CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

JUAN BALDERAS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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*****CAPITAL CASE*****

QUESTION PRESENTED

In 2014, Eduardo "Powder" Hernandez was killed. His friend, Juan Balderas, was convicted and sentenced to death for the murder, despite the fact that witnesses place Balderas far from the scene of the crime at the time of the murder.

Six years after Balderas's trial, the State belatedly disclosed extensive exculpatory and impeachment evidence going to the very heart of the State's case. The State's failure to have timely disclosed this critical evidence was a clear violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

Balderas successfully sought a stay of his federal habeas proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to file a subsequent habeas petition in state court to exhaust five new claims based, in part, on the previously undisclosed *Brady* evidence and on other evidence developed by federal habeas counsel regarding Balderas's competency to stand trial. In granting the stay, the district court held *inter alia* that Balderas's five new claims were "potentially meritorious."

Balderas then filed a subsequent application for writ of habeas corpus with the Texas Court of Criminal Appeals ("TCCA"), setting forth in detail the constitutional violations supported by evidence never-before-reviewed by any Court. The TCCA, however, summarily refused to review any of the five claims on the merits. It provided one sentence: "We have reviwed the subsequent application and find that Applicant has failed to make a prima facie showing that he satisfies the requirements of Article 11.071, § 5(a)."

Accordinlgy, the TCCA dimissed the petition "as an abuse of writ without considering the merits of the claims."

This petition therefore presents the following question:

Whether, in light of these circumstances, the Texas Court of Criminal Appeals' summary determination that Juan Balderas's subsequent petition failed to satisfy the requirements of Texas Code of Criminal Procedure Article 11.071 § 5(a) violated due process and whether it should be ordered to explain its ambiguous ruling.

PARTIES TO THE PROCEEDING

The Petitioner is Juan Balderas.

The Respondent is the State of Texas.

STATEMENT OF RELATED PROCEEDINGS

State Court

Texas v. Juan Balderas, Trial Cause No. 1412826, 179th District Court, Harris County, Texas (Mar. 14, 2014)

Balderas v. State, 517 S.W.3d 756 (Tex. Crim. App. 2016)

Ex parte Balderas, No. WR-84,066-01 (Tex. Crim. App. 18, 2019)

Federal Court

Balderas v. Texas, 137 S. Ct. 1207 (2017)

Balderas v. Lumpkin, No. 4:20-cv-4262 (S.D. Tex.)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Juan Balderas respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (TCCA).

OPINIONS BELOW

The TCCA's unpublished opinion, *Ex parte Balderas*, No. WR-84,066-03 (Tex. Crim. App. Oct. 25, 2023) is contained in the Appendix to the Petition. App. 1a.

STATEMENT OF JURISDICTION

The TCCA's opinion issued on October 25, 2023. On November 20, 2023, Balderas filed a *pro se* motion for reconsideration and rehearing on November 20, 2023. The TCCA denied the motion for reconsideration and rehearing by written notice on December 20, 2023. App. 3a. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Texas Code of Criminal Procedure Article 11.071 § 5(a):

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented

> previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

The following constitutional provisions of the Constitution of the United States are involved in this case:

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

> be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Summary

Balderas was a member of Houston-area street gang, La Tercera Crips ("LTC"). Balderas's role in LTC was to hold and transport LTC's guns, which were shared among the group. App. 36a.

In December 2004, Eduardo "Powder" Hernandez, a close friend who Balderas had introduced to LTC, was arrested in a stolen vehicle while in possession of a handgun later determined to match ballistic evidence in an unsolved murder of a woman. App. 37a. When interviewed by the Houston Police Department ("HPD"), Powder stated that he was borrowing the vehicle from another LTC member, Israel "Cookie" Diaz, and that Cookie had been bragging about murdering a woman. App. 37a.

As a result, Powder was labeled a "snitch" by Cookie and the local LTC leader, Victor "Gumby" Arevalo, and ostracized. App. 38a; *see* App. 36a, App. 38a. Balderas, however, remained friends with Powder. App. 38a.

Consistent with LTC's view that snitching is a most serious offense against a fellow gang member and punishable by death (App. 36a), Power faced growing threats. *See, e.g.*, App. 39a. On or about December 3, 2005, Cookie called a LTC meeting to discuss Powder's snitching and called for Powder to be killed. App. 39a. Balderas opposed, arguing there was no need because Powder had run away by that time to Mexico. App. 40a.

Nonetheless, unbeknownst to Balderas, Gumby and Cookie concocted a plan to have Gumby kill Powder. App. 40a. Angry that Balderas sided with Power and that Balderas had plans to leave LTC, Cookie and Gumby decided to frame Balderas. *Id.*; *see* App. 41a.

On December 6, 2005, a shooter entered the apartment of Powder's girlfriend, Wendy Bardales; shot Powder two times in the back of the head; and ran out. App. 43a.

At the time of the shooting, Balderas was at the home of a family friend, Oralia McCrary, with three of

her children—Anali Garcia, Octavio Cortes, and Illeana Cortes. App. 43a. They each independently recall that Balderas spent all afternoon and evening of December 6, 2005, with them at the family's apartment, including at the time when Powder was shot and killed. App. 44a.

1. The State Investigation

Witnesses reported that the shooter fired a silver or chrome gun, and wore khakis and a dark hooded sweatshirt. App. 43a. During the commotion, the shooter's hood momentarily fell. *Id*.

The night of the shooting, Wendy Bardales told HPD she "got a good look" at the shooter's face and had "never seen him before." She noted he had a "dark birth mark on his face" but could not "remember exactly where." App. 46a.

On December 7, 2005, HPD Sergeant Norman Thomas Ruland showed Bardales a photo array for the purpose of identifying the shoort. She reported that she recognized one of the people – Israel "Cookie" Diaz – but that she did not believe he was the shooter. At no point did she mention that from fall 2004 and summer 2005 she had been sexually involved with Cookie. App. 47a-48a. On December 12, 2005, officers received an anonymous tip identifying Balderas as the shooter. App. 48a. Bardales was then presented with a second photo array including a picture of Balderas – the only photo in the array depicting an individual wearing a black hoodie and bearing a dark birthmark on his cheek. Bardales idetnified him as "Apache," Balderas's nickname within LTC, and claimed "his face looked exactly like the shooter." App. 48a.

The next day, officers questioned Bardales about her statement that "the shooter and Balderas had the same face." She claimed that she focused on the face because the "shooter was wearing a hood." App. 49a. One of the officers asked her to look at the photos again, this time using her hands to cover the top portion of each photograph. Upon doing so, Bardales said she was sure that Balderas was the shooter. *Id*.

On December 16, 2005, HPD officers and a SWAT SWAT team served arrest warrants on LTC members, including Cookie and Balderas. App. 49a. Balderas was charged with capital murder in the death of his friend Powder. Cookie was charge with capital murder for an unrelated case. *Id*.

The officers observed Balderas walking in a parking lot carrying a green container of several guns and ammunition, which was given to him that morning by Gumby. App. 50a. One of the firearms in the container was later discovered to be the firearm used to kill Powder. *Id.*

2. Trial Counsel Fails for Eight Years to Conduct an Investigation

For the first five years of Balderas's arrest, trial counsel failed to conduct a single witness interview. Instead, trial counsel's focused on persuading Balderas to plead guilty. Balderas steadfastly maintained his innocence. On April 14, 2011, Balderas filed a *pro se* "motion to appoint new counsel [due to fact present counsel is ineffective." App. 53a. He stated only saw his trial counsel two times that year, spoke to a fact investigator once in the previous five years, and his defense team had not interviewed any of the witnesses that were present at the scene of the shooting. *Id*.

In July 2013, Balderas's trial was finally set for February 2014. Balderas's wife and mother requested to meet with trial counsel in December 2013. At that time, trial counsel stated that they did not have a guilt-phase theory of the case and did not intend to put on affirmative evidence of Balderas's innocence. App. 55a. By the time Balderas's trial counsel gave opening statements in his capital murder trial, they had interviewed only three witnesses with information potentially relevant to Balderas's eight-year-old claim of innocence.

3. Trial and Appeal

On the eve of Balderas's trial, Cookie secured a plea deal, the State agreed to reduce his capital murder charge to aggravated robbery in exchange for testimony against Balderas at trial. Cookie testified that Balderas took credit for Powder's murder on the night of the shooting across the street from the crime scene. App. 62a. Wendy Bardales also testified (in Spanish) regarding her eyewitness identification of Balderas.

Balderas's counsel called only one fact witness, another LTC member, who testified that Gumby confessed to killing Powder and showed him the gun that he used to "[take] care of Powder." App. 63a. Trial counsel presented no alibi defense. Indeed, Anali Garcia, who was with Mr. Balderas on the night of the shooting, attended Balderas's trial and was shocked that no such alibi defense was presented. App. 156a.

Balderas was convicted and sentenced to death, and the TCCA affirmed his conviction and sentence on direct review on November 2, 2016. *See Balderas v.*

State, 517 S.W.3d 756 (Tex. Crim. App. 2016).[1] This Court denied a writ of certiorari from Balderas's direct appeal on Febraury 27, 2017, thereby concluding direct review. *See Balderas v. Texas*, 137 S. Ct. 1207 (2017).

B. State Habeas Proceedings

1. OCFW is Appointed to Represent Balderas in Post-Conviction Habeas Proceedings

Pending his direct appeal, the trial court appointed the Office of Capital and Forensic Writs (OCFW) to represent Balderas in state post-conviction proceedings in the summer of 2015. At that time, OCFW attorneys faced excessive caseloads because of inadequate funding. To optimize resources, OCFW focused exclusively on investigating claims related only to trial counsel's failure to investigate and present alibi testimony at trial. OCFW did not investigate claims related to Balderas's competency, even though OCFW was aware of Balderas's long history of mental illness, behavior consistent with those diagnoses, and periods of refusal to take his prescribed medications.

2. The State's First Post-Trial Disclosures.

In August 2015, OCFW was allowed to review five of the eleven boxes in the State's file. The State withheld six boxes, claiming they were in the process of being scanned. Two months later OCFW still had not received the full file and filed a Motion for Disclosure

[1] Former Judge Elsa Alcala filed a dissenting opinion disagreeing with the majority opinion's determination that the pretrial identification by Wendy Bardales was not impermissibly suggestive and that her in-court identification that was made over eight years later was reliable. *Balderas v. State*, 517 S.W.3d 756, 804 (Tex. Crim. App. 2016).

of Exculpatory and Impeachment Evidence. On October, 21, 2015, the State finally gave OCFW what was purported to be the full file.

Reviewing the State's file, OCFW began to find exculpatory evidence that was not disclosed prior to trial, including handwritten notes of prosecutors' interviews with Cookie in 2007 and 2008, which contradicted each other and Cookie's testimony at trial.

When OCFW's investigator spoke with Cookie, he *recanted his trial testimony*. App. 72a. Cookie explained that the State approached him multiple times over the course of the eight years he was incarcerated while awaiting trial, asking him to provide information inculpating Balderas in Powder's shooting. Cookie said that he told prosecutors that "[Balderas] did not tell me he killed [Powder] . . . ." *Id.* Cookie told the OCFW investigator that on the eve of Balderas's trial, the State again approached him, and he again stated that Balderas had never confessed to him. *Id.* This time, Cookie said the prosecutors told him to change his story. *Id.* Cookie felt pressured to cooperate with the State because he had already been incarcerated for nearly a decade with no word on how or when his case would be resolved. App. 73a. As a result, Cookie accepted a plea deal on the first day of Balderas's trial and provided false testimony.

3. The State Belatedly Makes *Brady* Disclosures.

OCFW filed two further motions to compel the production of *Brady* evidence. App. 97a-98a. On May 1, 2018, the Court ordered the State to disclose certain evidence. App. 98a. On May 7, four days before an evidentiary hearing in Balderas's state habeas

proceedings, the State disclosed for the first time voluminous information about Cookie relevant to Balderas's claims. The information (which Balderas had sought since 2015) included the capital murder summary, 561 copies of prison calls by Cookie while incarcerated, and documents and records pertaining to communications between Cookie and prosecutors. App. 73a.

OCFW requested a continuance of the evidentiary hearing to review the disclosed material, but the court denied the request. App. 98a. This *Brady* evidence contained crucial information calling Cookie's credibility into question, including new evidence that Cookie told prosecutors he had gotten into physical altercations with Powder because Powder was attempting to leave LTC.

At the evidentiary hearing, Cookie disavowed his recantation and testified that Balderas had made the confession as he had testified at trial. He also testified that two other LTC members witnessed the alleged confession, but OCFW had obtained affidavits from both members in which they averred that they were not present at the scene of the shooting at that time. The court refused to allow the affidavits into evidence. App. 75a. The court denied Balderas relief on all claims.

4. Continuing *Brady* Disclosures.

On August 20, 2018, two months after the habeas court denied relief, the State made yet another first-time disclosure of exculpatory information, one which it self-styled as a *Brady* disclosure. App. 99a. The State disclosed prosecutors' interview notes of a witness stating that he believed Powder was killed by a rival gang, MS-13. App. 114a. OCFW moved to

remand, based in part on the State's ongoing *Brady* violations, but the TCCA denied Balderas's intial state habeas Application on December 18, 2019.

In June 2020, Balderas's federal habeas counsel sent a letter to the State requesting it produce any further *Brady*. Several months later – and over 6 years after Balderas's conviction – the State finally produced a trove of previously undisclosed exculpatory information. In November 2020, the State disclosed prosecutors' notes from the interviews of 14 witnesses. In December 2020, the State disclosed prosecutors' notes from the interviews of another 14 witnesses.

Review of the State's belated disclosures revealed a great quantity of previously undisclosed exculpatory and impeachment evidence, including:

a. Undisclosed evidence of Cookie's multiple, contradictory accounts of Balderas's alleged confession

Prosecutors notes from a 2007 interview revealed that Cookie discussed meeting with LTC members across the street from the crime scene on the night of the shooting, but made no mention of Balderas's presence or his alleged confession. App. 102a. In a different interview, notes reflect that Cookie stated that "[Balderas] *called* [him] the *day after* Powder was killed & said 'we took care of that.'" App. 103a. (emphasis added). Further, notes from a 2008 interview state that Balderas allegedly confessed to Cookie at another LTC member's house the night of the shooting, not across the street from the crime scene. *Id.*

b. Undisclosed evidence contradicting Cookie's testimony that he did not speak with prosecutors in 2007 or 2008 about this case

At trial, defense counsel asked Cookie about his interactions with State prosecutors in 2007 and 2008 App. 103a. Cookie testified that the subject matter of those conversations was "different things that were not even related to this." *Id*. The 2007 and 2008 interview notes revealed this was an outright lie, which the State failed to correct at trial.

c. Undisclosed evidence contradicting Cookie's testimony that he was killed because he socialized with members of other gangs

At trial, Cookie testified that Powder was killed because he engaged in the "ultimate betrayal" by associating with rival gangs (not "snitching"). App. 104a-105a. Notes from a January 2014 interview with Cookie, however, show that he told prosecutors punishment for getting caught with other gang members would be to "get checked (beat up)." App. 105a.

d. Undisclosed evidence that Cookie wanted Powder dead

At trial, Cookie testified that he "truly didn't care" what happened to Powder, even though he "snitched" on him. App. 105a. But, in the 2007 and 2008 interview notes, Cookie says "[t]he day [Powder] lost his flag, he lost his life . . . Every body wanted Powder dead." App. 160a.

e. Undisclosed evidence contradicting Cookie's testimony that he was unconcerned about Powder's potential testimony against him

At trial, Cookie testified that he was not concerned with Powder testifying against him because he had spoken to him and convinced him "it was pointless" to testify against him. App. 105a-160a. In reality, notes from a January 2014 interview, just a month before trial, reveal Cookie told prosecutors that he secretly met with Power while on bond and told him "if you tell on me, I'll tell on you," and threatened to implicate Powder in another murder. The notes of the January 2014 interview were not disclosed until December 2020.

f. Undisclosed evidence that Cookie had a violent history with Powder

In 2020, the State disclosed a 2005 interview in which Cookie stated he got into a fight with Powder prior to Powder "snitching" on him, and acknowledging that it was "okay" between them after that. App 106a.

g. Undisclosed evidence that Cookie desperately sought to trade testimony against Balderas for a deal

Cookie testified at trial that he "never asked [the prosecutors] for anything," (App. 106a), and made a deal with prosecutors "[j]ust last week." App. 107a. But prison phone calls revealed this testimony was false, and the State failed to correct it. In numerous calls to family members, Cookie made clear that he was desperately seeking a deal from prosecutors in exchange for colalborating.

h. Undisclosed evidence supporting the defense theory that Balderas was merely holding the LTC guns the day he was arrested

At trial, the defense maintained that Balderas was in possession of the murder weapon when arrested because he was given a green container holding the gun by the real killer – Gumby. The State withheld evidence that would have supported this theory.

According to 2007 interview notes, Cookie stated that when they were arrested, another member of LTC "was helping [Balderas] get rid of guns." App. 110a, 124a. Interview notes of an LTC member in 2013 confirmed that "everyone gave [Balderas] guns to hold." App. 124a.

i. Undisclosed evidence that police engaged in in unduly suggestive identification practices

At trial, the State presented evidence that Wendy Bardales identified Balderas in a photo array after she was asked to place her finger over the top portion of each picture. In November 2020, the State disclosed previously withheld evidence that officers investigating LTC may have been putting their own fingers on the person that they wanted the witness to choose and otherwise pressured witnesses to select suspects. For example, the State disclosed notes from a 2006 interview with Angelina Quinones in which she stated an officer showed her a photospread and then "guided her hand to the photo kind of like playing Where's Waldo." She said the officer was "not really asking if they could ID – telling them. Very clear – said only one on each spreadsheet." App. 112a. Interview notes with Quinones from 2010 confirm this; she stressed that "the cops already knew who they were after & were

pushing her to choose their suspects." *Id*. This evidence could have been used at trial to case doubt on Balderas's identification, which was the subject of a dissenting opinion in Balderas's direct appeal.

j. Undisclosed evidence relating to MS-13's potential involvement in the murder

The State withheld evidence that MS-13, a rival gang, may have been responsible for Powder's murder. During state habeas proceedings, the State disclosed that an LTC member stated "everybody was saying it was MS[-13]." In 2018 and 2020, the State disclosed additional notes from an interview with an LTC members and Powder's brother, each stating that MS killed Powder. App. 113a-114a.

The State never investigated the potential that MS-13 committed the crime or had any involvement in the shooting. The State never told defense counsel that it had any information pointing to MS-13.

k. Undisclosed evidence that the graffiti on the wall of the crime scene had nothing to do with Powder

At trial, the State presented testimony that members of LTC put graffiti on the wall of the apartment to let the killer know Powder's location on the day of the murder. App. 115a. However, the state withheld evidence from 2014 interview notes with Cookie, disclosed in 2020, that he told prosecutors that the tagging had nothing to do with Powder and was mere "*coincidence*." App. 116a (emphasis in original).

l. Undisclosed evidence that a correctional officer who testified for the State was terminated for conduct resulting in the death of an inmate and lying during the resulting investigation

During the punishment phase, the State relied on testimony from a former detention officer regarding a disciplinary citation he issued to Balderas in 2010.

The State withheld evidence that the officer was terminated following an investigation into the death of an inmate. The investigation found the officer "used force" against the inmate, left him "unmoving and unresponsive" on the floor of his cell, and made no effort to secure any medical assistance to attend to his injuries, resulting in the inmate's death. The investigation further found that the officer made false statements during the course of the investigation.

C. Federal Habeas Counsel's Investigation Regarding Balderas's Competency

Federal habeas counsel reviewed Balderas's medical records and determined that there was ample evidence that Balderas suffered from significant mental disease since well before the time of trial.

Dr. Bhushan Agharkar, MD, DFAPA, was retained to conduct a psychiatric evaluation of Balderas and found that Balderas exhibited, *inter alia*, compelling mood, trauma, and brain impairment systems that likely pre-dated his trial but were not adequately investigated and presented to the fact-finder in this case. He determined that Balderas suffered from Schizoaffective Disorder, Bipolar Type, and Post-Traumatic Stress Disorder. He determined that Balderas likely has frontal and parietal lobe brain damage or dysfunction. He concluded that Balderas's

psychotic and brain impairment systems would have negatively impacted his ability to rationally assist trail counsel and his understanding of the charges and proceedings. App 88a-89a.

Federal habeas counsel also retained Dr. Robert H. Ouaou, Ph.D. to assess Balderas's neurocognitive functioning. Based on his evaluation of Balderas's IQ was well below average (FSIQ=87; 19th percentile) and that he exhibited intellectual declines and a host of cognitive deficits that are found in patients with significant central nervous system damage. App 93a.

D. Federal Habeas Proceedings and Subsequent State Petition

On December 15, 2020, Balderas filed his federal petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. *Balderas v. Lumpkin*, No. 4:20-cv-04262 (S.D.Tex.), ECF No. 2. Balderas's petition presented new claims and evidence that had not been previously presented in Balderas's initial state habeas petition.

Balderas sought discovery to support five of the claims in his petition. *Id.*, ECF No. 16. The Court denied the motion on June 1, 2021, holding that "state court is the proper forum for the consideration of new constitutional claims" and that "[s]tate court is the proper forum for the development and resolution of factual issues in habeas cases." *Id.* at 4.

Balderas filed an amended habeas petition in April 2022. *Id.*, ECF No. 38. He simultaneously filed a motion to stay proceedings pending exhaustion of state court remedies under *Rhines v. Weber*, 544 U.S. 269 (2005). *Id.*, ECF No. 39.

Balderas sought to exhaust five claims based on:

- Claim I: the State's failure to disclose exculpatory and impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny;
- Claim II: ineffective assistance of trial counsel for failure to request a hearing on Balderas's competency to stand trial or, at minimum, a continuance to further investigate his mental illness;
- Claim III: violation of Balderas's due process rights because he was tried while incompetent to stand trial;
- Claim IV: violation of Balderas's Sixth Amendment autonomy right to present an alibi defense; and
- Claim V: violation of Baldersas's due process rights for failure to correct false testimony under *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *Giglio v. United States*, 405 U.S. 150 (1972).

The Court granted Balderas's *Rhines* motion on December 13, 2022. App. 175a. In doing so, the Court expressly found that Balderas showed good cause for the failure to exhaust, that the unexhausted claims are "potentially meritorious," and that he has not engaged in intentionally dilatory litigation tactics. App. 177a.

Balderas promptly filed his subsequent state habeas petition with the TCCA on February 24, 2023 raising the five unexhausted claims. On July 3, 2023, Balderas filed an amended subsequent petition to comply with the word count limitations in Texas Rule of Appellate Procedure (9.4)(i)(2)(A). App. 4a.

The TCCA denied Balderas's subsequent application by *per curiam* Order dated October 25, 2023. App. 1a. The only explanation for the TCCA's denial was as follows: "We have reviewed the subsequent application and find that Applicant has failed to make a prima facie showing that he satisfies the requirements of Article 11.071 § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claims." App. 2a.

REASONS FOR GRANTING THE PETITION

In a single sentence, the Texas Court of Criminal Appeals (TCCA) summarily dismissed Balderas's subsequent petition for habeas corpus for a purported failure to satisfy the requirements of Texas Code of Criminal Procedure 11.071 § 5(a). The TCCA's practice of summarily death row inmates' petitions without explanation cannot be reconciled with the most basic requirements of due process and cries out for an exercise of this Court's supervisory powers.

I. Certiorari is Warranted Because The Decision Below Violates This Court's Jurisprudence on Fifth and Sixth Amendment Law and Fails to Consider Newly Presented Evidence

The TCCA summarily denied review of Balderas's five claims on the unelaborated grounds that he had "failed to make a prima facie showing that he satisfies the requirements of Article 11.071 § 5(a)."

Article 11.071 § 5(a) provides three possible grounds to permit review of a subsequent petition on the merits:

> (1) the current claims and issues have not been and could not have been presented

> previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a).

As applied by Texas courts, under Section 5(a)(1), an applicant need only show that: (1) the factual or legal basis for his current claims were unavailable at the time he filed his previous application; and (2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007).

Alternatively, an applicant satisfies Section 5(a)(2) with a sufficient showing that he is *Guevara v. Stephens*, No. H-08-1604, 2016 WL 305220, at *2 (S.D. Tex. Jan. 26, 2016).

Review is also warranted under Section 5(a)(3), if an applicant clearly shows that, absent a constitutional violation, no special statutory punishment findings

would have been made in the State's favor. *Ex parte Blue,* 230 S.W.3d 151, 160–61 (Tex. Crim. App. 2007).

For each of the five claims in Balderas's subsequent petition, he invoked one or more of these three grounds under Article 11.071 § 5(a). The five claims were based on:

> (1) violations of due process rights concerning exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963);
>
> (2) violations of Sixth Amendment rights as to effective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668, (1984), *Trevino v. Thaler*, 569 U.S. 413, 428 (2013) and *Martinez v. Ryan*, 566 U.S. 1 (2012);
>
> (3) due process rights concerning competency at trial under *Cooper v. Oklahoma*, 517 U.S. 348 (1996);
>
> (4) due process rights concerning the knowing use of false testimony under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972); and
>
> (5) rights under the Sixth Amendment to competent counsel and automony to assert defenses under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).[2] App. 153-154a.

As explained below, Balderas both satisfied Section 5(a)'s requirements and demonstrated substantial violations of his Fifth and Sixth Amendment rights. The TCCA provided no reasons for its contrary conclusion that Balderas failed to make the necessary

---

[2] Claim I invoked § 5(a)(1), (2), and (3). Claims II and III invoked § 5(a)(3). Claim IV invoked § 5(a)(2) and (3). Claim V invoked § 5(a)(1).

showing for review. Doing so was "so clearly wrong" and "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

A. Claim I— *Brady* Violations

The Due Process Clause of the Fourteenth Amendment requires the State to disclose exculpatory and impeachment evidence to the defense that is material to either guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Brady*, 373 U.S. at 83. This extends to the "nondisclosure of evidence affecting credibility" of a witness where his or her "reliability … may well be determinative of guilt or innocence." *Giglio*, 405 U.S. at 154.

Where claims are brought for the nondisclosure of evdience, the materiality of the suppressed evidence is not considered item-by-item but based on the cumulative effect. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995).

From September through December 2020—six years after Balderas's trial—the State repeatedly disclosed evidence materially undercutting its main theories at trial. This satisfies the first requirement of Article 11.071, § 5(a)(1): that the evidence was previosuly unavailable. The second requirement of Section 5(a)(1) is satisfied where, as here, an applicant allege facts that, if proven, establish a federal constitutional violation sufficiently serious as to likely require relief from his conviction or sentence. *See Campbell*, 226 S.W.3d. 418 at 422. The numerous, specific *Brady* violations more than suffice. The withheld evidence casts doubt on the three pillars of the State's case against Balderas: (1) Cookie's testimony that Balderas

"confessed" to him; (2) Bardales's photospread identification; and (3) the discovery of the murder weapon in a container found with Balderas when he was arrested.

First, the withheld evidence undermines Cookie's testimony that Balderas confessed outside the scene of the crime wearing clothing similar to those identified by the witnesses. The importance of this testimony to the jury cannot be understated. While deliberating, the jury sent five notes requesting exhibits or read-back of testimony relevant to Cookie's account of the night in question. App. 121a. The State's withheld evidence revealed that Cookie gave several conflicting versions of Balderas's alleged confession and that another LTC gang member present that night stated that Balderas never "talk[ed] to [him] about killing [Powder]; and [he] thought MS killed [Powder]." App. 122a.

Second, the withheld evidence would have called into doubt Wendy Bardales's identification of Balderas in the final photo array presented to her. App. 119a. The jury sent multiple notes regarding Bardales's testimony, and may have been swayed by testimony regarding the HPD's use of suggestive techniques. App. 120a.

Third, the withheld evidence would have explained why Balderas was in possession of a box containing the murder weapon on the day of his arrest. The defense urged at trial that LTC held guns collectively, and it was Balderas's job to hold the guns. App. 124a. The defense further maintained that Gumby brought the box to Balderas on the day he was arrested. App. 109a. Again, the jury signaled its interest in this evidence, noting as a point or statement in dispute "when Cookie talked about how LTC shared guns or passed them

around." App. 124a. But, the State withheld evidence that corroborated the defense's explanation of Balderas's role and that "everyone gave [Balderas] guns to hold." App. 124a.

Alternatively, authorization was proper under Article 11.071, § 5(a)(2). Based on the previous record and the newly available evidence further impeaching the credibility of the State's star witness, Cookie, and calling into question the propriety of investigating officers' photographic lineup practices, Balderas presents evidence that it is more likely than not that no reasonable juror would find Balderas guilty beyond a reasonable doubt.

Finally, authorization is also proper under section 5(a)(3) where there is evidence that statutory special punishment findings would not have been made. Here, those findings were based on the jury's percetion of Balderas's future dangerousness and the balance between dangerousness and mitigation. App. 129a. But the numerous *Brady* violation plainly affect both assessments, , and it is clear that no rational juror would have sentenced Balderas to death in the absence of these various *Brady* violations, which allowed Cookie's false testimony to go unimpeached.

B. Claims IV and V—Ineffective Assistance of Trial Counsel for Failure to Raise Mental Competency and Related Due Process Violation

This Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). And where substantial evidence is presented as to the defendant's competency, a defendant is constitutionally entitled to

a hearing on their competence to stand trial. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

Where defense counsel has evidence raising a bona fide doubt as to defendant's competence, counsel has a duty to request a competency hearing. *Drope v. Missouri*, 420 U.S. 162 (1975).

Here, there was ample indicia of Balderas's mental illness and incompetence, such that his trial counsel should have raised the issue of his fitness to stand trial. For example, Balderas has a permanent skull depression as a result of childhood trauma and a history of mental health diagnoses and substance abuse issues. Federal habeas counsel hired two experts to evaluate Balderas – as trial counsel should have done – and they confirmed serious doubts as to Balderas's competency to stand trial.

Trial counsel's failure to request a hearing on Balderas's competency to stand trial or, at a minimum, a continuance to further investigate, undermined his due process rights and was constitutionally deficient performance falling below an objective standard of reasonableness. There is a reasonable probability that Balderas was incompetent at trial.

Authorization for the subsequent writ was proper under Article 11.071, § 5(a)(3) of the Texas Code of Criminal Procedure because no rational juror would have answered at least one of the statutory special punishment issues in the State's favor had additional evidence of Balderas's mental health and incompetence to stand trial been in the record.

In *Blue*, the TCCA reasoned that because a person who is intellectually disabled is constitutionally ineligible for the death penalty, "no rational juror would answer any of the special issues in the State's

favor, if only for the simple reason that the statutory special issues would not be submitted to the jurors in the first place." 230 S.W. at 161. The logic applies equally to Balderas. Balderas's incompetency, manifest through hallucinations, paranoia, delusions, ideas of reference, memory impairment, and tangential thought processes, is well-documented by pre-trial mental health records, the evaluations of Dr. Mendel and Dr. Brams, declarations by lay witnesses, jail records, and the recent evaluations by Dr. Agharkar and Dr. Ouaou. No rational juror would have sentenced Balderas to death in light of these circumstances.

This Court should grant certiorari to reverse the TCCA's refusal to consider this new evidence of Balderas's competency underpinning serious constitutional violations at trial

C. Claim VII—Violations of Sixth Amendment Autonomy Right to Present an Alibi Defense

The Sixth Amendment guarantees a defendant the right "to have the *Assistance* of Counsel for *his* defense." *McCoy v. Louisiana*, 584 U.S. 414, 417 (2018) (emphasis in original). Thus, "[w]ith individual liberty – and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id*. Accordingly, counsel violates a client's Sixth Amendment autonomy when counsel "usurp[s] control of an issue within [the defendant's] sole prerogative." *Id*. at 426-27. This includes the defendant's right to present an alibi defense. *Id*. at 425.

Balderas's counsel utterly failed to investigate and, against Balderas's wishes, chose not to present

Balderas's alibi defense – a defense which could have been readily supported by witness testimony. Accordingly, this Court should grant certiorari and find that Balderas was stripped of his Sixth Amendment guarantee of autonomy in his defense.

With respect to Claim VII, authorization was proper under Article 11.071, § 5(a)(2), of the Texas Code of Criminal Procedure because no reasonable juror, in light of the newly presented alibi evidence from four witnesses and other exculpatory evidence in the record, could find Mr. Balderas guilty beyond a reasonable doubt.

Article 11.071, Section 5(a)(2), was enacted in response to this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), and therefore "standards set forth for evaluating a gateway-actual-innocence claim announced by the Supreme Court should guide [the court's] consideration of such claims under Section 5(a)(2)." *Reed v. Thaler*, No. A-02-CV-142, 2012 WL 2254217, at *12 (W.D. Tex. June 15, 2012). Under *Schlup*, to satisfy the "actual innocence" standard set forth in *Murray v. Carrier*, 477 U.S. 478 (1986), "a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. 298 at 299–300. Under *Schlup*, a "credible claim of actual innocence serves to bring the petitioner within the 'narrow class of cases' implicating a fundamental miscarriage of justice." *Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007) (quoting Schlup, at 315).

Here, consistent with *Schlup*, trial counsel's repeated rebuffs to alibi witnesses in violation of Balderas's Sixth Amendment right to autonomy brings Balderas's actual innocence claim "within the 'narrow

class of cases' implicating a fundamental miscarriage of justice." *Id.*

Alternatively, authorization was proper under Article 11.071, § 5(a)(3) because no rational juror would have sentenced Baldearas to death had the alibi evidene and other exculpatory evidence been in the record.

D. Claim XXI—Due Process Violations Under *Napue* and *Giglio*

A conviction obtained through the use of false evidence, known to be false by the State, violates due process under the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150, 153 (1972).

Here, the State failed to correct Cookie's false testimony that he "never asked [the prosecutors] for anything." App. 159a. Prison phone calls produced by the State just four days before the evidentiary hearing in Balderas's 2018 state habeas proceeding demonstrated that Cookie had long sought a deal from prosecutors in exchange for testifying against Balderas. The State was required to correct this blatant false statement which would have, in conjunction with the tidal wave of impeachment evidence regarding Cookie withheld by the State, further undermined Cookie's testimony at trial.

"[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio*, 405 U.S. at 153. The Court should grant certiorari and require that the TCCA review the new evidence and merits of Balderas's claim under *Napue* and *Giglio*.

With respect to Claim XXI, authorization was proper under Article 11.071, § 5(a)(1) because the factual basis for this claim was unavailable at the time the Initial State Habeas Corpus application was filed. As discussed *supra*, Mr. Balderas filed his Initial Habeas Corpus application in January 2016, but the State did not disclose the audio files and the prosecutors' notes until May 2018. Thus, the factual basis for this claim was unavailable for over two years after Balderas filed his initial application, despite the exercise of reasonable diligence to obtain it.

Additionally, the specific facts alleged for Claim XXI, if established, would constitute a violation of Mr. Balderas's Due Process rights. (*See* Am. Pet. ¶¶ 1027–1030.) Specifically, a conviction obtained through the use of false evidence, known to be false by the State, violates due process under the Fourteenth Amendment. *See Napue*, 360 U.S., at 269 (internal citations omitted); *see also Giglio*, 405 U.S. at 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Thus, Balderas is entitled to a state court remedy for Claim XXI.

II. The Question Presented is an Exceptionally Important and Recurring One That Warrants This Court's Review

The TCCA routinely issues boilerplate opinions dismissing subsequent habeas petitions for purported failure to satisfy the requirements of Article 11.071 § 5(a). As a recent petition for certiorari pending before this Court explained, "Given the TCCA's practice of dismissing subsequent applications as 'abuse[s] of the

writ' without ever explaining why the statutory conditions have not been met, a comprehensive list of other cases in which it has denied relief on inadequate, purportedly procedural grounds is difficult to compile." *Medrano v. Texas*, No. 23-5597. Indeed, this Court has received numerous petitions for certiorari involving these boilerplate TCCA decisions.[3]

A state court cannot evade direct review by issuing an ambiguous or obscure decision. *Florida v. Powell*, 559 U.S. 50, 56 (2010) ("[I]t is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."). Indeed, this Court has held that an ambiguous ruling can threaten a criminal defendant's "liberty and due process interests." *Stutson v. United States*, 516 U.S. 193, 196, 116 S. Ct. 600, 603, 133 L. Ed. 2d 571 (1996). Allowing courts to issue ambiguous rulings as to important liberty rights can "risk effectively immunizing summary dispositions by courts of appeals from our review." *Id.* As a result, it is appropriate to require the court to "clarify its ambiguous ruling." *Id.*

The TCCA's practice of dismissing subsequent petitions pursuant to Article 11.071 § 5(a) without explanation threatens the constitutional guarantees of due process for any applicants to the TCCA.[4]

For Balderas, aggravating circumstances render the TCCA's failure to explain the basis for its opinion

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[3] *See, e.g.*, *Broadnax v. Texas*, No. 23-248; *Brown v. Texas*, No. 22-6964; *Valdez v. Texas*, No. 18-7637.

[4] This is especially so in light of the State's contention in many cases involving the TCCA's dismissals of subsequent petitions that the decision is itself an independent and adequate state ground barring this Court's review.

dismissing his subsequent petition squarely incongruent with the due process guarantees of the Fifth and Fourteenth Amendments.

First, Balderas has been sentenced to death. In a typical case, "[t]he very nature of [habeas proceedings] demands that [they] be administered with the initiative and flexibility essential to insure that miscarriages of justice within [their] reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Capital cases in particular underscore the need for heightened procedural safeguards because the sentence is final and irreversible. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (The "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Far from taking "painstaking care," the TCCA's boilerplate decision flouts the seriousness of the constitutional violations raised by Balderas in his subsequent petition.

Second, the new claims raised by Balderas are based, either in whole or in part, on new evidence discovered or developed after his initial state habeas petition had been made. By refusing to consider the merits of Balderas's claims, the TCCA effectively foreclosed review of this compelling new evidence in his federal habeas proceedings. *See Cullen v. Pinholster,* 563 U.S. 170 (2011)(holding that a federal court's review of a habeas petition under 28 U.S.C. § 2254 is generally limited to the record that was before the state court). The consequences of the TCCA's failure to thoroughly review Balderas's claims are exacerbated here where the State withheld exculpatory *Brady* evidence until after Balderas's initial state habeas proceedings were underway or concluded. The State's withholding of this evidence rendered a subsequent petition to the TCCA the *only* procedural mechanism by which the previously withheld evidence could still be considered. Therefore, it was critical that

the TCCA give appropriate weight to this newly discovered evidence. This Court's intervention is necessary to address and correct these serious constitutional violations and to ensure that prosecutors are not encouraged to withhold *Brady* evidence until state court proceedings are past the point of no return.

Third, Balderas's new claims were determined by the district court to be "potentially meritorious" when granting his *Rhines* motion to stay federal habeas proceedings to exhaust his new claims. Balderas recognizes that the TCCA likely routinely considers numerous frivolous applications for habeas relief for which it should not be required to pen lengthy opinions on dismissal. Here, however, the district court acted as a gatekeeper, permitting Balderas to raise new claims in state court upon a finding that they are "potentially meritorious." The TCCA's terse dismissal of Balderas's claims flouts the district court's ruling that the claims held merit and the deference the district court afforded the Texas courts to consider the claims in the first instance. Indeed, the *raison d'être* for the stay-and-abeyance procedure set out in *Rhines* is an acknowledgement that "the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims." *Rhines*, 544 U.S. at 273.

In light of the totality of the circumstances in this case, the TCCA's failure to explain the grounds for its decision violated Balderas's due process rights. Balderas is not requesting that the Court make a blanket determination that such decisions always violate petitioners' due process. Rather, this case presents this Court with an opportunity to set limits on the TCCA's practice of issuing boilerplate opinions when compelling circumstances exist for the TCCA to

provide adequate justification for its dismissals under Article § 11.071 § 5(a).

III. This Case is An Ideal Vehicle to Review The TCCA's Practice of Summarily Dismissing Subsequent Petitions Without Substantive Review

The question presented is one of susbtantial legal and practical importance to the federal criminal justice system. This case provides an optimal vehicle for the Court to resolve that question.

As reflected in Article 11.071 § 5(a), Texas law recognizes the importance of affording capital petitioners meaningful review of new claims in various circumstances. *Cf. Stutson v. United States*, 516 U.S. 193, 196 (1996) (recognizing that "judicial efficiency and finality" must give way to a "certain solicitude for [the] rights" of criminal defendants).

Nevertheless, the TCCA has ignored its mandate by summarily dimissing subsequent petitions, like Balderas's, without meaningful review. This practice denies criminal defendants the kind of reasoned opinions that are integral to judicial processes and that allow allow this Court to provide meaningfully review. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) ("The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes.").

As it stands petitioners are forced to present arguments to this Court regarding the merits of newly raised claims of violations of federal law unmoored from any substantive decision below. As a practical matter, petitions to this Court of boilerplate TCCA

decisions will undeniably appear less deserving of certiorari relative to other petitions where a court below expressly "decided an important question of federal law." Supreme Court Rule 10 (b), (c).

Here, Balderas filed a detailed petition with all of the necessary evidence presented, and the TCCA simply denied the petition without meaningfully reviewing the evidence. The TCCA's ruling is indisputably unclear; there is no mechanism by which Balderas or this Court could devine its basis. Nor is there any basis for concluding that it rests on any independent and adequate state ground. *See Florida*, 559 U.S. at 56. The case thus presents an ideal vehicle for rejecting the TCCA's practice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Pro Bono Counsel for Petitioner

Dated: March 19, 2024

APPENDIX

Appendix A

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,066-03

EX PARTE JUAN BALDERAS, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 1412826 IN THE 228TH JUDICIAL DISTRICT COURT HARRIS COUNTY

Per curiam.

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071, § 5.[1]

In February 2014, a jury convicted Applicant of capital murder for murdering Eduardo Hernandez in the course of committing or attempting to commit burglary. TEX. PENAL CODE 19.03(a)(2). The jury answered the special issues submitted pursuant to

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[1] Unless we specify otherwise, all references in this order to "Articles" refer to the Texas Code of Criminal Procedure.

Texas Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal, *Balderas v. State*, 517 S.W.3d 756 (Tex. Crim. App. 2016), and denied relief on his initial Article 11.071 application for a writ of habeas corpus, *Ex parte Balderas*, No. WR-84,066-01 (Tex. Crim. App. Dec. 18, 2019) (not designated for publication). We received this, Applicant's first (amended) subsequent application for a writ of habeas corpus, on July 10, 2023.

Applicant presents five allegations in his subsequent application. In Claim 1, Applicant alleges that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. In Claims 2 and 3, Applicant asserts that he was incompetent to stand trial (Claim 3) and that his trial counsel were ineffective because they failed to raise the issue of his competency at trial (Claim 2). In Claim 4, Applicant contends that his trial counsel violated his right to present an alibi defense. And in Claim 5, Applicant avers that the State violated his due process rights under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), because it failed to correct false testimony.

We have reviewed the subsequent application and find that Applicant has failed to make a prima facie showing that he satisfies the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 25th DAY OF OCTOBER, 2023.

Do Not Publish

Appendix B

[SEAL]

FILE COPY

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

12/20/2023
BALDERAS, JUAN
Tr. Ct. No. 1412826-B
WR-84,066-03

On this day, this Court has denied applicant's motion for reconsideration/rehearing.

Deana Williamson, Clerk

JUAN BALDERAS
POLUNSKY UNIT - TDC # 999590
3872 FM 350 S.
LIVINGSTON, TX 77351

Appendix C

7/3/2023 4:52 PM
Marilyn Burgess - District Clerk Harris County
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IN THE 228th JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS IN AUSTIN, TEXAS

THE STATE OF TEXAS

—v.—

JUAN BALDERAS

Cause No. 14128260101B-3

CCA No. WR-84,066-01

DEATH PENALTY

AMENDED SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO TEX. CODE CRIM. PROC. ART. 11.071 § 5

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** *Motion for Admission Pro Hac Vice forthcoming*

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STATEMENT OF THE CASE

Juan Balderas was convicted and sentenced to death in 2014 for the murder of Eduardo "Powder" Hernandez – a crime he did not commit. He was framed by two leaders of his Houston-area street gang (Israel "Cookie" Diaz and Victor "Gumby" Arevalo), who ordered and carried out the hit on Powder as both an act of revenge against Powder for informing law enforcement about a crime that Cookie committed and to otherwise silence Powder from testifying against Cookie. Despite the fact that Mr. Balderas was elsewhere with extended family at the time of Powder's murder, Cookie and Gumby's plan worked.

Mr. Balderas was ultimately convicted based on Cookie's testimony that Mr. Balderas alleged "confessed" to him, the testimony of an eyewitness who was coerced into providing a photo identification after several failed attempts and a game of "Where's Waldo", and the fact that Mr. Balderas was arrested carrying the murder weapon (which he was given by other gang members to help get rid of guns in his role as the gang's holder of guns). Mr. Balderas's conviction was not only factually wrong, but it was obtained through various constitutional violations, raised for the first time in this Subsequent Application.

In Claim I, Mr. Balderas will demonstrate that the State failed to disclose a tidal wave of exculpatory and impeachment evidence to defense counsel in violation of *Brady* and long-standing Texas precedent. *See Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2001). This suppressed evidence goes to the very heart of the State's case against Mr. Balderas, which rested on three pillars of evidence:

(1) a fellow gang member ("Cookie")'s testimony that Mr. Balderas "confessed" to him; (2) a photo identification; and, (3) a weapon found in a container with Mr. Balderas when he was arrested. The suppressed evidence includes Cookie's contradictory statements on the circumstances of Mr. Balderas's alleged "confession" (including a version where Mr. Balderas never confessed), evidence that another gang member supposedly present at the confession stated that Mr. Balderas never confessed, evidence that the officers were playing "Where's Waldo" with witnesses and putting their fingers to cover suspects' images, and evidence that explains Mr. Balderas's role as a gun holder for the gang.

In Claim II, Mr. Balderas will demonstrate that his trial counsel was ineffective by failing to request a hearing on his competency to stand trial or, at minimum, a continuance to further investigate his mental illness. This Subsequent Application details the substantial evidence that was readily available to trial counsel regarding Mr. Balderas's competency to stand trial, including Mr. Balderas's long history of mental illness diagnoses, history of behavior consistent with those diagnoses, and periods of refusing to take his prescribed medication. Additionally, recent psychiatric and neuropsychological reports rendered by Dr. Sam Agharkar and Dr. Robert Ouaou, respectively, concur that Mr. Balderas's cognitive deficits affecting judgment, reasoning, impulse control, problem solving, and rational decision making, were likely manifest at the time of the alleged offense and conclude, among other things, that Mr. Balderas's manic and psychotic symptoms as recounted in pre-trial jail medical records should have been followed-up on.

In Claim III, Mr. Balderas will demonstrate that his Due Process rights were violated because he was tried while incompetent to stand trial. There was ample indicia of Mr. Balderas's mental illness and brain impairment at the time of trial, yet trial counsel failed to investigate or raise this issue. Based on records that were available to trial counsel, Dr. Agharkar and Dr. Ouaou concur that Mr. Balderas's brain damage and manic and psychotic symptoms were present at the time of his trial in 2014 and were likely manifest at the time of the alleged offense. Further, Mr. Balderas lacked a sufficient ability to consult with trial counsel with a reasonable degree of rational understanding and lacked both a rational and factual understanding of the proceeding against him.

In Claim IV, Mr. Balderas will demonstrate that his trial counsel violated his Sixth Amendment autonomy right by refusing to present an alibi defense. At the end of January 2014, Mr. Balderas's wife provided trial counsel with names of five people who she believed may offer helpful testimony at the guilt/innocence phase of trial, including two potential alibi witnesses, Anali Garcia and Oralia McCrary, who were with Mr. Balderas on the night of the murder. On February 4, 2014, Ileana Cortes, the mother of Mr. Balderas's niece, also contacted trial counsel to inform them that Mr. Balderas had been with her and her family at their apartment all afternoon and evening on the day Powder was killed. On February 13, 2014, four days before trial, trial counsel spoke with Anali Garcia, who told him that Mr. Balderas had spent the afternoon and evening at her house on the day of the Powder's murder. Trial counsel, however, advised Ms. Garcia that they did not need her testimony.

In Claim V, Mr. Balderas will demonstrate that the State violated his Due Process rights by failing to correct false testimony from Israel "Cookie" Diaz, a leader of a Houston-area street gang who framed Mr. Balderas. At Mr. Balderas's trial, when defense counsel explored the circumstances of Cookie's deal with prosecutors to testify against Mr. Balderas, Cookie testified that he "never asked [the prosecutors] for anything." This testimony proved to be false in light of Cookie's prison phone calls from 2009 that were disclosed days before the May 2018 State Habeas Hearing, which reveal that Cookie did speak to prosecutors about Mr. Balderas's case in 2007 and 2008 in an effort to obtain a plea deal. It also revealed that the State knew this and knowingly failed to correct Cookie's false testimony. Further, the disclosed prosecutors' notes reveal numerous inconsistencies in Cookie's trial testimony that underscore the likelihood that false testimony was not corrected in violation of Mr. Balderas's Due Process rights.

All of this evidence was discovered or developed by Mr. Balderas's federal counsel subsequent to his initial state habeas petition. Based on this evidence, counsel moved for a *Rhines* stay to bring these unexhausted claims back to State court. To do so, Mr. Balderas had to demonstrate that they are supported by good cause, they are not plainly meritless, there is and can be no evidence of intentional dilatory litigation, and that they are authorized under Article 11.071 § 5, of the Texas Code of Civil Procedure. On December 14, 2022, U.S. District Judge Alfred Bennett (Southern District of Texas) agreed that Mr. Balderas satisfied these elements and stayed his federal petition pending the exhaustion of these claims in State court.

Mr. Balderas endured over eight years of confinement on death row for a murder he did not

commit. Mr. Balderas's trial, direct appeal, and state application were plagued by suppression and inadequacies by prior counsel. Mr. Balderas therefore requests that the Court authorize this application so that a court may assess the copious and compelling evidence of his innocence and vacate his conviction.

BACKGROUND

I. PROCEDURAL HISTORY

A. Trial Proceeding

On December 16, 2005, Mr. Balderas was arrested and incarcerated at a Harris County Sheriff's Office detention facility in Houston.

On April 12, 2006, a criminal grand jury in Harris County, Texas, returned a capital murder indictment against Mr. Balderas for causing the death of Eduardo "Powder" Hernandez in the course of committing or attempting to commit a burglary of a habitation. Mr. Balderas made an initial appearance on the indictment on July 13, 2006, with attorney Alvin Nunnery. (Docket, Texas Court of Criminal Appeals ("CCA Record"), Vol. I, 00048-00054, at 00048.)[1] Shortly thereafter, attorneys Jerome Godinich, Jr., and Robert R. Scott were appointed as

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1 1 References to "CCA Record" are the Clerk's Record, Direct Appeal to the Court of Criminal Appeals of Texas, Trial Cause No. 1412826, Volumes I to XII. References to "RR" are the Reporter's Record, Volumes 1 to 49, Trial Court Cause No. 1412826. References to "Habeas Writ Record" are the Writ Record in the Court of Criminal Appeals of Texas for Post-Conviction Applications for Writ of Habeas Corpus, Trial Court Writ No. 1412826-A, Volumes I to XXII. Undersigned counsel is prepared to provide these voluminous documents to the Court upon request and in conjunction with counsel for the Texas Attorney General's Office.

counsel. Attorney R. Scott Shearer was also appointed years later in January 2014 as a member of Mr. Balderas's legal defense team.

On January 13, 2014, almost eight years after his initial arrest, Mr. Balderas received a trial with the commencement of jury selection. Following jury selection's conclusion on February 7, 2014, Mr. Balderas was arraigned and pleaded not guilty on February 17, 2014.

Trial began before then-Judge Kristin Guiney in the 179th District Criminal Court on February 17, 2014. The State of Texas—represented by the Harris County District Attorney's Office—presented its case and rested three days later on February 20, 2014. The defense presented a case, and both sides rested and presented closing arguments on February 24, 2014. The jury deliberated and announced approximately 14 hours later on February 26, 2014, that it was still unable to reach a unanimous verdict. The court denied a defense motion for mistrial and instead issued an *Allen* charge instructing the jury to continue deliberations. The jury deliberated for several more hours and returned a verdict of guilty the next day on February 27, 2014.

The punishment phase of trial began on February 27, 2014, and the State rested its case on March 5, 2014. The defense for Mr. Balderas then presented a case, which concluded on March 12, 2014. Following the presentation of rebuttal witnesses, the case was submitted to the jury for punishment-phase deliberations on March 13, 2014.

For its punishment-phase deliberations, the jury was tasked with answering two special verdict questions. The first question (Special Issue One) asked the jury to answer:

> "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Juan Balderas also known as Apache, would commit criminal acts of violence that would constitute a continuing threat to society?"

(Jury Charge and Verdict, Mar. 14, 2014, CCA Record, Vol. XII, 03334-45, at 03342.)

In the event of a "Yes" to the first question, the jury was directed to answer the following question (Special Issue Two):

> "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Juan Balderas also known as Apache, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?"

(*Id*. at 03343.)

On March 14, 2014, the jury returned a verdict as to both questions—it answered "Yes" as to Special Issue One and "No" as to Special Issue Two. (*Id.* at 03342-43.)

The same day, on March 14, 2014, Judge Guiney sentenced Mr. Balderas to death. Mr. Shearer remained as counsel for Mr. Balderas for purposes of direct appeal. The then-named Office of Capital Writs—now known as the Office of Capital and Forensic Writs ("OCFW")— was appointed as state habeas corpus counsel for Mr. Balderas.

B. Direct Appeal

Mr. Shearer timely filed a notice of direct appeal on Mr. Balderas's behalf with the Texas Court of Criminal Appeals ("TCCA") on March 14, 2014. (Notice of Appeal, Mar. 14, 2014, CCA Record, Vol. XII, 03360.) The opening brief was due to be filed with the TCCA on January 20, 2015.

On January 23, 2015, the Clerk of the TCCA issued an official notice indicating that the opening brief had not been filed and directed the immediate filing of the brief (along with a motion for extension of time) in order to avoid the issuance of a show-cause order. Counsel for Mr. Balderas filed the opening brief three months later on April 27, 2015. The brief asserted nine grounds for relief: (1) insufficient evidence to prove guilt; (2) denial of speedy trial; (3) denial of Sixth Amendment right to confront accuser in the English language when the witness speaks, understands, and is fluent in English; (4) denial of Sixth Amendment right to cross-examine and impeach accuser concerning her ability to speak English; (5) abuse of trial court's discretion by allowing eyewitness Wendy Bardales to testify in Spanish; (6) violation of the *Gaskin* Rule by improperly denying Mr. Balderas the opportunity to impeach Wendy Bardales with her prior audio recorded statement to police; (7) deprivation of due process and an impartial jury by outside influence; (8) deprivation of due process of law when trial court failed to suppress Wendy Bardales's in-court and out-of-court identifications; and (9) abuse of discretion when the trial court failed to have testimony read back in response to two jury notes.

On June 24, 2015, the State filed its opposition brief. Counsel for Mr. Balderas did not file a reply brief.

On November 2, 2016, the TCCA issued its opinion, delivered by Judge Michael Keasler, affirming the trial court's judgment. *See Balderas v. State*, 517 S.W.3d 756 (Tex. Crim. App. 2016). Former Judge Elsa Alcala filed a dissenting opinion. *See id.* at 803-14. In her dissent, Judge Alcala disagreed with the majority opinion that the pretrial identification procedure was not impermissibly suggestive, and she also disagreed that the in-court identification that was made over eight years later was reliable. Judge Alcala stated that she would "sustain appellant's eighth issue, find the error harmful, reverse appellant's conviction and death sentence, and remand for a new trial." *Id*. at 804.

The United States Supreme Court denied a writ of certiorari from Mr. Balderas's direct appeal on February 27, 2017, thereby concluding direct review. *See Balderas v. Texas*, 137 S. Ct. 1207 (2017).

C. Initial State Habeas Corpus Proceeding

Mr. Balderas's initial state habeas corpus application commenced during the pendency of his direct appeal. Once an application challenging a judgment imposing death is filed, the Texas Code of Criminal Procedure directs the habeas court to determine, based on the application and the State's answer, "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist" and then "issue a written order of the determination." Tex. Code Crim. Proc. art. 11.071 § 8(a).

Section 9 of Article 11.071, entitled "Hearing," governs the proceeding when the habeas court "determines that controverted, previously unresolved factual issues material to the legality of [ ] confinement exist." Tex. Code Crim. Proc. art. 11.071 § 9(a). In that circumstance, the habeas court must designate by written order the issues of fact that are to be resolved and the manner by which the court will consider evidence to resolve those issues. *Id*. § 9(a). To resolve the issues, the court can hold a hearing appropriate to the case; the statute authorizes the court to receive evidence via affidavits, depositions, interrogatories, live witnesses, and personal recollection. *Id.*

After several extensions of the deadline were granted by TCCA, OCFW filed its Initial Application for Writ of Habeas Corpus on Mr. Balderas's behalf on January 15, 2016.

Several weeks later, on February 8, 2016, OCFW filed a motion seeking the recusal of Judge Guiney from the case on the basis that Judge Guiney was a material fact witness to one of Mr. Balderas's habeas claims related to her "actions extraneous to courtroom proceedings." Judge Olen Underwood was referred the motion for hearing, which he denied. Judge Underwood also denied a motion for reconsideration on May 5, 2016. On May 13, 2016, OCFW filed a application for writ of mandamus with the TCCA regarding the recusal issue and filed a related motion for a stay of Mr. Balderas's state habeas proceedings until resolution of the mandamus. On July 27, 2016, the TCAA denied Mr. Balderas's application for writ of mandamus without written order.

On August 5, 2016, Mr. Balderas filed a Motion to Designate Issues of Fact to be Resolved and Request for Evidentiary Hearing Under Article 11.071, § 9(A). (Motion for Order Designating Issues and Live Evidentiary Hearing; Proposed Order Designating Issues, Aug. 5, 2016, Habeas Writ Record, Vol. V, 01426-46.) Mr. Balderas presented evidence from his post-conviction investigation on controverted, previously unresolved factual issues, including:

- That the State's star witnesses, Israel "Cookie" Diaz, had recanted his trial testimony;
- Alibi evidence that the jury never heard;
- That the only witness to identify Mr. Balderas (Wendy Bardales) had been in an ongoing, intimate relationship with the State's star witness in the year leading up to the shooting;
- An affidavit from an eyewitness identification detailing numerous defects in Ms. Bardales's identification;
- That Mr. Balderas had been in the process of distancing himself from the gang for months prior to his arrest and that his attempt to do so angered other members of the gang, and the gang had a history of responding to perceived traitors by setting them up for crimes they did not commit;
- Affidavits from other gang members who identified a plan of the State's star witness to blame Mr. Balderas for the murder;
- Affidavits from several witnesses who believed the gang had set up Mr. Balderas

in response to Mr. Balderas attempting to leave the gang; and

- Evidence in addition to the trial testimony concerning Mr. Balderas's sexually abusive stepfather and absent father, Mr. Balderas's mother was also highly unstable and absent in Mr. Balderas's life.

The State filed its Motion to Designate Issues on September 7, 2016, (State's Motion to Designate Issues, Sept. 7, 2006, Habeas Writ Record, Vol. V, 01447-49), and Order for Filing Affidavits on September 7, 2016 (Order for Filing Affidavits, Sept. 7, 2006, Habeas Writ Record, Vol. V, 01460). In its filings, the State requested the habeas court to order the submission of trial counsel affidavits.

Judge Guiney issued an Order Designating Issues on September 16, 2016. (Court's Order Designating Issues, Sept. 16, 2016, Habeas Writ Record, Vol. V, 01450-51.) On that same date, Judge Guiney also entered an order directing Mr. Balderas's trial counsel to submit affidavits responding to the allegations in the claims submitted by OCFW on Mr. Balderas's behalf. (Order for Affidavits, Sept. 16, 2016, Habeas Writ Record, Vol. V, 01457-62.) Pursuant to that order, affidavits were due November 15, 2016, but trial counsel—Jerome Godinich and Alvin Nunnery—did not submit their affidavits until August 9, 2017, and August 11, 2017. (Notice regarding filing Affidavit of Jerome Godinich, Aug. 9, 2017, Habeas Writ Record, Vol. V, 01485; Notice regarding filing Affidavit of Alvin Nunnery, Aug. 11, 2017, Habeas Writ Record, Vol. V, 01493.)

On November 8, 2016, Judge Guiney stood for re-election to the 179th District Court and was defeated by current Judge Randy Roll, who then took over as

the presiding habeas bench officer for the matter. Less than five months later, on March 29, 2017, the TCCA issued a *per curiam* order directing "the trial court to resolve any remaining issues in the case within 180 days[.]"

Following a recusal of Judge Roll on December 15, 2017, for bias related to statements he made concerning his high opinion of Mr. Balderas's trial counsel (Verified Motion to Recuse Judge Randy Roll From Proceedings Connected to Juan Balderas's Initial Application for Writ of Habeas Corpus, Sept. 22, 2017, Habeas Writ Record, Vol. V, 01505-01524, at 01522.), Mr. Balderas's state habeas case was re-assigned to Judge Baylor Wortham on December 28, 2017. (Order of Assignment by the Presiding Judge, Dec. 28, 2017, Habeas Writ Record, Vol. VII, 01971.) Several days later, on January 2, 2018, OCFW filed a renewed motion for evidentiary hearing, which it had originally sought approximately 17 months earlier. (Opposition to State's Motion for Trial Court To Order the Submission of Proposed Findings of Fact and Renewed Motion for a Live Evidentiary Hearing, Jan. 2, 2018, Habeas Writ Record, Vol. VI, 01788-1822.) Judge Wortham held a status hearing on February 22, 2018, regarding the disputed issues for evidentiary resolution, and he directed both parties to submitted proposed orders.

On March 21, 2018, almost 20 months after OCFW first identified issues for resolution and a request for evidentiary hearing, Judge Wortham issued an order which essentially adopted verbatim the proposed order submitted by the State narrowing the issues. Indeed, Judge Wortham's order was even entitled "*State's Proposed* Supplemental Order Designating Issues To Be Resolved Via Evidentiary Hearing." (State's Proposed Supplemental Order Designating

Issues To Be Resolved Via Evidentiary Hearing, March 21, 2018, Habeas Writ Record), Vol. VII, 01857-58) (emphasis added). The order limited the scope of a "narrowly tailored evidentiary hearing" to only two of the issues that Mr. Balderas originally raised for hearing (namely, the State's alleged presentation of false testimony by key witness Israel "Cookie" Diaz and trial counsel's failure to present alibi testimony at trial). The evidentiary hearing was scheduled to begin on May 11, 2018.

On April 19, 2018, OCFW filed a Motion to Compel Disclosure of Exculpatory and Impeachment Evidence. (Motion to Compel Disclosure of Exculpatory and Impeachment Evidence, April 19, 2018, Habeas Writ Record, Vol. VII, 01956-69.) This included requests as to exculpatory and impeachment evidence as to Cookie and Alejandro Garcia. (*Id*. at 01962-67.)

Several days before the evidentiary hearing, the State abruptly disclosed information on May 7, 2018, that had *never* previously been disclosed—not prior to Mr. Balderas's trial, not during the direct appeal process, and not at any point prior during the state habeas proceeding. All of the information (such as jailhouse call audio and prosecution interview notes) related to Cookie—the State's key witness against Mr. Balderas.

The State's May 7, 2018, disclosure followed years of ignored motions that Mr. Balderas filed, *pro se*, seeking exculpatory and impeachment information. His first came on October 8, 2015, and again on August 18, 2017, and then on April 19, 2018, and then finally once more on May 1, 2018. It was only after Mr. Balderas's *fourth* motion for exculpatory and impeachment information that the State made

this new disclosure of information days later—over four years *after* his trial concluded.

On May 8, 2018, OCFW moved for a continuance of the evidentiary hearing in light of the late disclosure. Judge Wortham denied the motion. On May 11, 2018, Judge Wortham held the evidentiary hearing as originally planned.

On July 11, 2018, OCFW filed a motion to supplement the evidentiary record on the basis that OCFW had been limited in the evidence it sought to introduce during the May 11, 2018, hearing, as well as the late-disclosed information from the State just days before the hearing commenced. Judge Wortham denied the motion the same day.

On July 19, 2018, OCFW and the State each submitted proposed findings of fact and conclusions of law. Just one day later, on July 20, 2018, Judge Wortham issued his Findings of Fact and Conclusions of Law, and Order denying Mr. Balderas's state habeas application. (State Habeas Findings of Fact and Conclusions of Law ("FFCL"), July 20, 2018, Habeas Writ Record, Volume X, 02844-2937.) The court also ordered that all papers be transmitted to the TCCA.

On August 20, 2018, the State again disclosed information that had never previously been provided to trial, appellate, or state habeas counsel. Among the information were statements from a witness (Alejandro Garcia) indicating that Mr. Balderas was not Powder's killer. On November 30, 2018, OCFW filed a motion with the TCCA seeking to stay the proceedings and to remand the matter for a renewed evidentiary hearing in light of the State's late-disclosed information. The TCCA never ruled on OCFW's motion.

On December 18, 2019, the TCCA issued a *per curiam* order adopting Judge Wortham's findings of fact and conclusions of law and denying relief to Mr. Balderas.

D. Federal Petition for Writ of Habeas Corpus

Mr. Balderas timely filed his federal Petition for Writ of Habeas Corpus on December 15, 2020, and an amended petition on April 18, 2022.

On April 18, 2022, Mr. Balderas filed a Motion to Stay Proceedings Pending Exhaustion of State Court Remedies ("*Rhines* Stay"), requesting that the proceedings be stayed and the Amended Petition held in abeyance pending Mr. Balderas's exhaustion of state court remedies.

On December 14, 2022, the District Court for the Southern District of Texas Houston Division granted Mr. Balderas's *Rhines* Stay, permitting Mr. Balderas to seek exhaustion of state court remedies regarding the claims set forth in this Subsequent Application. (*Balderas v. Bobby Lumpkin*, Case No. 4:20-CV4262 (S.D. Tex., Houston Div.), Order, Dkt. No. 57)

II. STATEMENT OF FACTS

A. The La Tercera Crips ("LTC") Street Gang

La Tercera Crips ("LTC") is a street gang based in southwest Houston with a neighborhood subgroup in the Alief neighborhood ("LTC Alief"). Relevant LTC members or associates included, among others:

a. Victor "Gumby" Arevalo (co-conspirator who framed Mr. Balderas);

b. Israel "Cookie" Diaz (co-conspirator who framed Mr. Balderas);

c. Willie Arevalo;

d. Eduardo "Powder" Hernandez (the victim);

e. Jose "Pepe" Perez;

f. Jose "Debo" Luviano;

g. Alejandro "Twin" Garcia;

h. Pedro "Twin" Garcia;

i. Walter "Kool-Aid" Benitez;

j. Efrain "Hairless" Lopez;

k. Pedro "Trey" Acuna; and

l. Juan "Apache" Balderas (the Applicant in this matter).[2]

Gumby was the leader of LTC Alief in 2004 and 2005. (28 RR 142:25- 143:16; Affidavit of Jose Perez ("Jose Perez Aff."), Nov. 11, 2015, Habeas Writ Record, Vol. II, 00647-56, ¶ 9; Affidavit of Yancy Escobar ("Yancy Escobar Aff."), Oct. 24, 2015, Habeas Writ Record, Vol. II, 00558-63, ¶ 5; Affidavit of Daniella Chavez ("Daniella Chavez Aff."), Nov. 2, 2015, Habeas Writ Record, Vol. II, 00522-24, ¶ 3.) He "called the shots." (28 RR 155:18-20.) LTC Alief had regular meetings at various members homes, including those belonging to Gumby and Twin. (28 RR 147:21-149:9, 153:24-154:25.) It was well known that there were two sides of LTC—one was concerned with the "business branch" of the group, while another was concerned with the image, respect, or "dirtier" and violent side of the group. (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 10.)

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[2] A more exhaustive list of key figures in this matter is included in Appendix A ("List of Key Figures").

Cookie was close friends with Gumby and served as his "right hand man." (26 RR 149:2-9; Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 5; Affidavit of Walter Benitez ("Walter Benitez Aff."), Oct. 26, 2015, Habeas Writ Record, Vol. II, 00513-20, ¶ 11; Daniella Chavez Aff., Habeas Writ Record, Vol. II, 00522-24, ¶ 3.) He was described as a "crazy, angry" individual—someone who you "don't know what he would do next." (26 RR 158:10-12.) He was described as "very, very aggressive" by others. (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 11; Yancy Escobar Aff., Habeas Writ Record, Vol. II, 00558-63, ¶ 6.) Cookie was close with Gumby because both were on the more violent side of the gang. (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 10.)

Mr. Balderas's role was to "hold onto and transport [LTC's] guns," which were shared among the group. (*Id*. ¶ 9.) That included "hold[ing] on to guns other guys had used to shoot at someone." (*Id.)* Mr. Balderas was more on the "business" side of the group. (*Id.* ¶ 10.) Generally, he did not agree with "bringing on heat to" LTC. (*Id.)*

Powder was a younger member of LTC, brought to the group by Mr. Balderas, and the two were close friends. (*Id*. ¶ 16.)

Loyalty to LTC Alief was an important pillar of LTC Alief's code. Any activity seen as disloyal to the gang was strictly prohibited. And "snitching" on another member was seen as a serious offense that was punishable by death in the gang. (26 RR 160:9-13; 26 RR 182:8-13; 28 RR 161:5-9.)

B. Victor "Gumby" Arevalo and Israel "Cookie" Diaz Conspire to Kill Powder

On December 3, 2004, Powder was arrested by the Houston Police Department ("HPD") in a stolen vehicle while in possession of a 9-millimeter handgun. In the vehicle, officers also later found a 9-millimeter shell casing that matched to ballistics evidence in the murder of a victim named Ines Maldonado. (HPD Offense Report, Incident No. 179083204 I, Habeas Writ Record, Vol III, 00942-64, at 00950.)

In an interview with investigators on January 9, 2005, Powder said that he had obtained the vehicle from Israel "Cookie" Diaz. (*Id* at 00950.) Powder further told investigators that Cookie had admitted to killing "this Cholo on Corporate [Drive in Houston] recently," and that Cookie was "bragging to the OG's that he had killed the Cholo on Corporate [Drive]." (*Id.* at 00951.) When asked what type of gun Cookie had, Powder told investigators that he had seen Cookie with a ".45 caliber" "chrome" gun that has an "animal on the grip." (*Id.* at 00952.) Powder further told investigators that "'Cookie' keeps the guns in a green box under his bed in his house." (*Id.* at 00951.) Investigators asked Powder if he knew where Cookie's guns might be given that police did not find any firearms when Cookie was arrested. Powder claimed that Cookie "might have given the guns to some guy named Jonathan because Jonathan is the one who supplies him with the guns." (*Id.* at 2.066.) Powder added that Cookie "probably heard when he ([Powder]), got arrested, and he might have thought he would snitch him out about the stolen truck." (*Id.*)

At the time of the interview, Powder had already been released, but Cookie was still being held in the

Harris County Jail until he later made bond in April 2005. Shortly after on February 1, 2005, investigators interviewed Cookie. (*Id.* at 2.074.) Investigators informed Cookie that "the vehicle in the case where he is charged with aggravated robbery, had a spent shell casing that matched up to [the] murder investigation" of Ms. Maldonado. (*Id*. at 2.075.) Importantly, investigators also "advised [Cookie] that they had been told that he had been bragging about killing the 'Cholo' on Corporate" and asked him "how come his own gang member friends are telling them that he (Cookie), has been bragging about committing this murder[.]" (*Id*. at 2.076.) Cookie claimed he did not know and that "maybe they are just trying to pin this on him cause he is locked up." (*Id*.) Cookie also told investigators that he used to have a shotgun, but he sold it about six months prior to the interview. He also told investigators that he didn't have any handguns except for "the one that [Powder] was arrested with[.]" (*Id*.) The police report of the interview notes that "investigators could tell that [Cookie] was not being totally truthful" and "showed signs of deception while being interviewed[.]" (*Id*. at 2.077.)

Following the stolen vehicle incident, Powder was considered a "snitch" by Cookie and many other members of the LTC. (26 RR 160:9-13.) Gumby restricted anyone from talking to Powder. (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 17.) Mr. Balderas, however, continued to remain friends with Powder. (*Id.)* Gumby and Cookie were "really pissed" at Mr. Balderas for not following orders. (*Id.)*

Powder was expected to testify against Cookie in the case related to the stolen vehicle, and he had received a subpoena compelling him to do so. (HPD Offense Report, Incident No. 184361705, Habeas,

Writ Record, Vol. III, 00806-57, at 00823.) Powder told his sister Miriam Hernandez "that he was afraid of [Cookie] and that [Cookie] had told him that he had committed some murders on Corporate [Drive] earlier this year." (*Id.* at 00813.) Powder further told his sister that Cookie told him, "I know you are the one that told them what happened," and that if "you testify against me in court I will kill you and your family." (*Id.* at 00845.) Powder told her that Cookie "had a gun and pointed it at him when he told him that." (*Id.*)

On or about December 3, 2005, Cookie called an LTC meeting to discuss Powder's snitching. (28 RR 161:12-17.) The meeting included approximately 12 to 15 LTC Alief members including, among others, Gumby, Cookie, Alejandro "Twin" Garcia, Walter "Kool Aid" Benitez, Efrain "Hairless" Lopez, Tomas "Taz" Correón, Jr., Jose "Little Taz" Diaz, and Mr. Balderas. (28 RR 161:18-162:20; Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 18; Walter Benitez Aff., Habeas Writ Record, Vol. II, 00513-20, ¶ 17.) Cookie argued that Powder should be killed for snitching on him. (28 RR 169:3-13; Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 18.) He suggested that Powder should also be killed because he had slept with Cookie's girlfriend and other people's girlfriends in the gang. (Walter Benitez Aff., Habeas Writ Record, Vol. II, 00513-20, ¶ 17.) Many in the group were not persuaded by Cookie because of LTC's rule that, "if someone snitches on you, it is your responsibility to deal with it." (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 22.) Cookie, however, did not want to deal with Powder's snitching himself because he was out on bond for the very same arrest Powder snitched on him for, and

"did not want to get in more trouble." (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 23.)

Mr. Balderas opposed Cookie's position and argued that there was no need to kill Powder because Powder ran away from home and would not testify against Cookie. (28 RR 171:18-172:23.) Mr. Balderas "did not want Powder touched." (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 18.)

At the meeting, the only two who "appeared to be pissed off were Cookie and Gumby." (Walter Benitez Aff., Habeas Writ Record, Vol. II, 00513-20, ¶ 17.) Cookie was also upset with Mr. Balderas for "putting his name on the line for Powder and sticking up for Powder over him." (*Id.*) After the meeting, Gumby sent many younger members of the gang away, leaving around eight people remaining— including Cookie, Walter "Kool Aid" Benitez, and Mr. Balderas. Gumby gave the "green light to take Powder out, while Mr. Balderas continued to say it should not be done. In the alternative, Mr. Balderas said that LTC could "give Powder an ass whooping instead." (Walter Benitez Aff., Habeas Writ Record, Vol. II, 00513-20, ¶ 19.) This angered Cookie more, and he asked: "Why choose Powder over my opinion?" (*Id.*)

At some point after the meeting, Cookie and Gumby worked together on a plan to murder Powder. Gumby had recently "jumped bail," and many falsely believed he was in Mexico avoiding the police. Because Gumby was believed to be out of the country, the plan called for Gumby to kill Powder on Cookie's behalf. (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 24.)

As a result of the perceived slights and disloyalty, Cookie and Gumby decided that Mr. Balderas should be framed for Powder's murder. (Jose Perez Aff.,

Habeas Writ Record, Vol. II, 00647-56, ¶ 25; Walter Benitez Aff, Habeas Writ Record, Vol. II, 00513-20, ¶ 22.) Cookie was furious with Mr. Balderas for taking Powder's side and opposing Cookie at the meeting. He was also angry with Mr. Balderas because he had allegedly "messed around with Judy, Gumby's girlfriend and the mother of his child." (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 25.) And it all reached the boiling point when Cookie and Gumby learned that Mr. Balderas was attempting to leave LTC because he "wanted a better life." (Walter Benitez Aff., Habeas Writ Record, Vol. II, 00513-20, ¶ 16.)

This was not the first time LTC would frame one of its members. LTC had a history of responding to perceived traitors by setting them up for crimes they did not commit. Indeed, it was "common for people in the gang to point fingers just to keep their hands clean." (*Id*. ¶ 23.) For example, not long before Mr. Balderas's arrest, the LTC responded to a falling out with a former member—Jose "Debo" Luviano—by blaming him for a murder under investigation at the Loma Vista apartment complex in Houston on September 12, 2005 ("the Loma Vista Shooting"). (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 14). Officers later discovered that Debo was incarcerated at the time of the Loma Vista Shooting.

C. The Murder of Eduardo "Powder" Hernandez

On December 6, 2005, Powder was with his girlfriend, Karen Bardales, at an apartment located on Corporate Drive. The apartment—a known MS-13 hangout location—belonged to Karen's friends Durjan "Rata" Decorado and Juan Estrada. Powder spent the day with Karen, her sister Wendy Bardales (another

associate of MS-13 and the Southwest Cholos street gang), Edgar Ferrufino (an MS-13 member and Wendy's boyfriend), Rata, and "Javier" (Edgar Ferrufino's cousin).

At the time, it was known that Wendy Bardales also had a year-long intimate relationship with Cookie. She had also known Mr. Balderas for at least six months at that point and, in fact, had recently gotten into an altercation with Mr. Balderas when she attempted to get a tattoo from Mr. Balderas at his home. After Mr. Balderas kicked her out for being associated with MS-13, she screamed that she would have him killed. (Affidavit of Celeste Munoz ("Celeste Munoz Aff."), Oct. 23, 2015, Habeas Writ Record, Vol. II, 00643-45, ¶ 8; 29 RR 7:25-10:23)

In the afternoon of December 6, 2005, LTC member Jose "Chango" Vazquez visited the apartment to speak with Powder. Chango told Powder to leave the MS- 13 apartment because LTC would be angry if it found out he was associating with the rival street gang. Powder chose to stay. As Chango left, Karen uttered "Fuck LTC"—Chango responded by pulling up his shirt to reveal a gun. After Chango left, the group at the apartment departed to get dinner at various places. (24 RR 234:12- 14, 237:20-240:11, 241:10-18)

Karen, Wendy, Powder, Rata, and Ferrufino came back to the apartment at around 9:30 or 10:00 p.m. on December 6, 2005. (25 RR 23:6-8, 23:23-24:17.) As they returned, they saw fresh gang graffiti on the wall outside of the apartment that said "LTC CK" (translated to "LTC Crip Killer") or "LTC BK" (translated to "LTC Blood Killer"). (24 RR 50:18-52:22.) The group entered the apartment and stayed in the living room right inside the door. Wendy and

Ferrufino were sitting on a couch near a television and Karen and Powder were lying near the door.

At some point after they returned to the apartment, the group heard gunshots coming from outside the door. (24 RR 54:11-55:2, 241:22-242:4.) A shooter wearing khakis and a dark hooded sweatshirt covering his face then entered the apartment firing a silver or chrome gun inside the apartment. (*Id.* at 253:13-25, 264:21-265:5; HPD Offense Report, Habeas Writ Record, Volume III, 00806-57, at 00821.) During the ensuing commotion, the shooter's hood momentarily fell. The shooter looked around and pointed his gun at Ferrufino, who was by the television on the opposite side of the room. The shooter turned back toward the door where Powder was laying on the ground with Karen. The shooter walked over to Powder and shot him two times in the back of the head and ran out. (24 RR 246:7-9, 252:20-253:7, 256:3-9.) Powder died on the scene.

D. Mr. Balderas's Whereabouts at the Time of Powder's Murder

On the evening of December 6, 2005, Mr. Balderas was at the home of Oralia McCrary—located at the Bayou Apartments on Corporate Drive, within walking distance of Mr. Balderas's apartment and Rata's MS-13 apartment—with three of her children, Anali Garcia, Octavio Cortes, and Ileana Cortes. (Affidavit of Anali Garcia ("Anali Garcia Aff."), Oct. 27, 2015, Habeas Writ Record, Vol. II, 565-568, ¶¶ 2-5; Affidavit of Octavio Cortes ("Octavio Cortes Aff."), Oct. 26, 2015, Habeas Writ Record, Vol. II, 526-529, ¶¶ 3-5; Ex. A, Declaration of Ileana Cortes ("Ileana Cortes Decl."), Mar. 23, 2021, ¶¶ 9-10)

In or around 2002, Mr. Balderas's brother, Jesus, began dating Ileana. In the spring of 2005, Ileana

gave birth to the couple's daughter, and Mr. Balderas's niece. Mr. Balderas was a proud uncle and began to visit McCrary's home on a regular basis. Mr. Balderas also worked with McCrary cleaning homes and with Ileana grooming dogs. Mr. Balderas became close with the family. (Ex. A, Ileana Cortes Decl., ¶¶ 4-5.)

Anali, Ileana, and Octavio all independently recall that Mr. Balderas spent all afternoon and evening of December 6, 2005, with them at their family's apartment, *including at the time when Powder as shot and killed*. They each remember the afternoon and evening of December 6, 2005, specifically because their mother received news of a nearby shooting and she would not let anyone leave the apartment, including Mr. Balderas. As a result, Mr. Balderas spent the night at their apartment. (Ex. A, Ileana Cortes Decl., ¶ 9.)

One or two days after the shooting, Anali, Ileana, and Octavio were devastated to find out that the shooting victim that night was Powder. (Octavio Cortes Aff., Habeas Writ Record, Vol. II, 526-529 ¶¶ 8-9; Garcia Aff. ¶¶ 10-11; Ex. A, Ileana Cortes Decl. ¶ 9) They were each shocked again when they found out thereafter that Mr. Balderas had been accused of Powder's murder, as they knew that Mr. Balderas had been with them in their apartment the entire night of the shooting. (Octavio Cortes Aff., Habeas Writ Record, Vol. II, 526-529, ¶¶ 8-9; Anali Garcia Aff., Habeas Writ Record, Vol. II, 565-568, ¶¶ 10-11; Ex. A, Ileana Cortes Decl., ¶ 9.)

E. The State Investigation

On the night of the murder, HPD took statements from witnesses Karen Bardales, Wendy Bardales,

Edgar Ferrufino, Durjan "Rata" Decorado, Francisco Hernandez, and Juan Estrada.

a. Rata "did not see the shooter at all." (HPD Offense Report, Incident No. 184361705, Habeas Writ Record, Vol. III, 00806-57, at 00816.)

b. Estrada was in a different apartment and said that he was "upstairs watching television with a friend" when he heard "gunshots outside." He "ran out onto the balcony and saw a male with a gun in his hands." He "could not see his face." He said the person was 5'6 to 5'7 in height, weighed about 130 to 140 pounds, and was wearing a "black and gray hooded jacket." (*Id.* at 00817.)

c. Karen Bardales told the police that, with the exception of Javier, they had all "run with gangs." She said she was "Southwest Cholos," and that Feruffino and Wendy were with MS-13. She said that they spent the day in Rata's apartment, and that Powder's "homeboy" came to the apartment to talk with Powder in the afternoon. Three MS-13 gang members also came to the apartment. Powder told her that the "homeboy" told him that LTC was upset with Powder for hanging out with Karen because she was with the Southwest Cholos and hung out with MS-13, and that Powder had not been hanging out with LTC as much. (*Id*. at 00817-19.) Karen also told Houston Police that, after the group left the apartment that evening, they came back at around 10:00 p.m. to see fresh LTC "tagging" on the outside of Rata's apartment. After they entered the apartment, Karen "heard about six gunshots from outside the door" a few minutes later. Someone then pushed her to the floor, and she heard "shooting everywhere." When the shooting stopped for a moment, she saw Powder laying near her and

observed "someone who was wearing dark blue pants with dark colored 'FUBU' or 'Timberland' shoes, walk over to [Powder] and sho[o]t him two times in the back of the head." (*Id.* at 00819.)

d. Wendy Bardales told officers that she went to Rata's apartment at 7:00 p.m. She said that she was sitting on the floor with Ferrufino near the sofa, and that Karen was lying on the floor near the door with Powder. She said "there was a gunshot outside the apartment and the shot came through the front door of the apartment." She said the "door then opened and a skinny Hispanic guy dressed in a black hooded sweatshirt type jacket had a gun" and that "the hood cover[ed] his face and head." He was carrying a "large black automatic kind" of gun. She said he was "looking around the apartment as if he was looking for someone" and then "shot one time at [Ferrufino] and [Ferrufino] hid behind the T.V." She said that after the gunman shot at Ferrufino, the "hood to his jacket came off and exposed his face." The shooter then "shot [Powder] 2 or 3 times in the head." She then said the shooter shot at her until his gun was empty and "missed her every time." The shooter then ran away. She told the police she "got a good look at his face," but she had "never seen him before." She said he was "Hispanic and about 16-17 years old," and 5'5" to 5'7" in height. She recalled he had a "dark birth mark on his face," but she could not "remember exactly where." She said he was "very skinny and clean shaven" with a short "fade type haircut" with black hair. She said he was wearing a "black sweat shirt hooded jacket and khaki pants." (*Id.* at 00819-20.)

e. Ferrufino confessed to Houston Police that he associated with MS-13. Ferrufino recounted that Powder's friend had come to speak with him during

that day. Ferrufino told police that before the friend left, Karen had yelled "fuck L.T.C." and that the friend pulled a gun and said, "who said that shit." After Karen said she did, the "guy laughed and put the gun down." Ferrufino said his MS- 13 friends present in the apartment "were pissed." (HPD Offense Report, Incident No. 184361705, Habeas Writ Record, Vol. III, 00806-57, at 00820-21.) Ferrufino said the shooter walked up to Powder and "shot him in the back of the head" and "ran out." Ferrufino said he "never saw the guy who did the shooting before." He said it was "not the same guy that had been at the apartment earlier." (*Id.* at 00820- 21.) He also said the shooter was about 18 or 19 years' old, 5'8" in height, and weighed about 140 to 155 pounds. He said the shooter "wore a black hoodie with the hood up and khaki pants." Ferrufino said the "hood fell down during the shooting," and that Wendy told him that "his eyes looked Chinese and he was also dark skinned." But Ferrufino said "I did not see him that clearly myself." Ferrufino said the gunman carried a "chrome" pistol. (*Id.*)

On December 7, 2005, HPD Sergeant Norman Thomas Ruland drove to Wendy Bardales's residence and presented her with a photograph array for the purpose of identifying the gunman. The array did not include Mr. Balderas's photograph. (*Id.* at 00823-24.) Wendy did not identify anyone as the shooter, but she said that she recognized one of the people shown—Israel "Cookie" Diaz—as a friend of Powder. She did not believe he was the shooter. At this time, Wendy changed her earlier description of the shooter from not knowing where the dark mark was located to claiming it was on the shooter's cheek. (*Id.* at 00824.)

Moreover, at no point did Wendy tell Sgt. Ruland that she had a year-long sexual history with Cookie

between fall 2004 and early summary 2005. (Yancy Escobar Aff., Habeas Writ Record, Volume II, 00558-63, ¶ 7.)

On December 12, 2005, officers received an anonymous tip delivered to the Mayor's Anti-Gang Office that identified Mr. Balderas as the shooter. (HPD Offense Report, Incident No. 184361705, Habeas Writ Record, Vol. III, 00806-57, at 00824.) As a result, Sgt. Ruland arranged for a second photograph array that this time include Mr. Balderas's picture. (*Id*.) Sgt. Ruland visited Wendy at her residence again and presented the second array to her. This time, Wendy pointed to Mr. Balderas's photograph—the only one of which in the array depicted an individual wearing a black hoodie and with a dark birthmark on his cheek—and said "she knew him" as "Apache." She said "he looked like the shooter." Sgt. Ruland asked what she meant, and she said that "his face looked exactly like the shooter." Sgt. Ruland asked if "Apache" was the shooter and Wendy "responded by saying that his face looked exactly like the shooter's face." Wendy said she had not seen "Apache" for approximately six months. Sgt. Ruland asked Wendy to clarify what she meant. She said that "Apache" and the "shooter had the same exact face" and was "positive" that the face was the same and that "Apache" could be the shooter. (*Id.* at 00824-25.)

At no point during the interview on December 12, 2005, however, did Wendy tell the officers that she and Mr. Balderas had gotten into an altercation prior to Mr. Balderas's arrest in which she threatened to have Mr. Balderas killed. (Celeste Munoz Aff., Oct. 23, 2015, Habeas Writ Record, Vol. II, 00643-45, ¶ 8.)

On December 13, 2005, Sgts. Ruland and Brian Harris went back to Wendy a third time to clarify her earlier statements. She said again that "the shooter and Balderas had the same face." She said the "shooter was wearing a hood and that is why she focused on the face." She "insisted that is why she kept talking about the face." She then said she had known "Apache" for six months. One of the officers then "asked her to view each of the photos again with the hair covered" by using her hands to cover the top portion of each photograph. Upon doing so, Wendy Bardales then said she was sure that Mr. Balderas was the shooter. (HPD Offense Report, Incident No. 184361705, Habeas Writ Record, Vol. III, 00806-57, at 00826.)

F. The Arrest of Mr. Balderas, Cookie, and Other LTC Members

On December 16, 2005, HPD Officers Eric Termulen and Rick Moreno met with a SWAT team of approximately 24 other officers to serve arrest warrants on various LTC Alief members for ten murders and other crimes—the arrests included Victor "Gumby" Arevalo, Israel "Cookie" Diaz, Jose R. "Debo" Luviano, Jose Vasquez, Jose C. Hernandez, Silder Armando Regalado, Pedro Acuna, Willie Arevalo, Alejandro Garcia, and Mr. Balderas. (26 RR 83:13-84:13; HPD Offense Report, Incident No. 184361705, Habeas Writ Record, Vol. III, 00806-57; Harris County District Clerk Record, Luviano, Habeas Writ Record, Vol. III, 00873-80; Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 26; Houston Police Dep't News Release, Dec. 21, 2005, Habeas Writ Record, Vol. III, 00859-60.) As for Cookie, he was arrested that day for capital murder. (26 RR 164:18-20.)

The officers observed Mr. Balderas walking in a parking lot of an apartment complex carrying a green container and a black bag.(26 RR 86:1-14, 93:13-15.) It was the same green plastic container that Gumby had brought to Mr. Balderas earlier that morning. (28 RR 183:25-184:2.) When Mr. Balderas saw the officers, he dropped the green container and black bag, ran, and was arrested. (26 RR 94:2-5, 96:23-25, 98:5-17, 113:16-24.) When Mr. Balderas dropped the green plastic container, a number of guns and ammunition fell from it—including what was later discovered to be the firearm used to kill Powder. (26 RR 113:2-7.)

While in custody, Mr. Balderas gave a statement to officers that, "prior to Powder's murder[,] he had received a letter from 'Trey' telling him to kill 'Powder.'" He told the officers that he "did not act on the letter" and that he was "afraid that they were after him for not carrying out the order." (HPD Offense Report, Incident No. 184361705, Habeas Writ Record, Vol. III, 00806-57, at 00830.) Mr. Balderas told the officers that the day before, December 15, 2005, he was "carjacked by some LTC members that took his Honda." (*Id.)* He said that "LTC members had framed him." (*Id.*)

G. While in Jail, Cookie Attempts to Convince Others to Blame Mr. Balderas

While Cookie and Mr. Balderas were in jail, Cookie told Yancy Escobar (Mr. Balderas's wife) that "[Mr. Balderas] should take the blame for all of the murders because [Mr. Balderas] did not have a family, unlike Cookie and some of the others." (Yancy Escobar Aff., Habeas Writ Record, Vol. II, 00558-63, ¶ 8; Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 27.)

Cookie also contacted Alejandro Garcia and "convinced him to go along with his putting everything on Juan." (Jose Perez Aff., Habeas Writ Record, Vol. II, 00647-56, ¶ 28.) Indeed, Garcia indicated that "the plan he was told to follow was to pin every lick on [Mr. Balderas] —they were going to set [Mr. Balderas] up." (*Id.* ¶ 29.)

H. Mr. Balderas Languishes in Jail for Eight Years Before Going to Trial

Following his arrest on December 16, 2005, Mr. Balderas was incarcerated in the Harris County Jail – Mr. Balderas has remained incarcerated ever since.

Over the course of the next eight years, Mr. Balderas's case was reset for trial more than *fifty* times. (Resets, CCA Record, Vol. I, at 00005-6, 00011-00016, 00023,000 27-28, 00048-54, 00060, 00074, 00076, 00078, 00080; 22 RR 5:22-6:15.) Indeed, the State has conceded that Mr. Balderas's trial was not brought in a speedy fashion. (22 RR 5:25-18 ("Judge, the State's in agreement that the eight-year delay in Mr. Balderas's going to trial is sufficient to trigger the inquiry made by the Court under Barker.")

I. Trial Counsel Fails to Conduct an Investigation For Eight Years

1. Trial counsel pushes a plea deal instead of conducting an investigation.

From April 2006 to April 2011, trial counsel's investigation was limited to reviewing discovery, as trial counsel's files do not reflect a single guilt/innocence witness interview in that entire time period. Three fact investigators and five mitigation specialists were hired at different times to work on Mr. Balderas's investigation in the eight years

leading up to trial, but virtually no work was done to find evidence regarding guilt/innocence.

In the initial several years of Mr. Balderas's pre-trial incarceration, trial counsel's efforts were centrally focused on persuading Mr. Balderas to plead guilty. (Email from Godinich, June 14, 2010, Habeas Writ Record, Vol. III, 00700; Email from Mary Poirier, Sept. 1, 2010, Habeas Writ Record, Vol III, 00702-03; Emails from Spence Graham, June 14, 2010 and Oct. 21, 2020, Habeas Writ Record, Vol III, 00710-13; Email from J. Godinich, Nov. 7, 2010, Habeas Writ Record, Vol III, 00715; Email from Carroll Pickett, June 18, 2012, Habeas Writ Record, Vol III, 00724-26; Email from Adriana Helenek, Sept. 23, 2012, Habeas Writ Record, Vol III, 00730; Email from Godinich, Nov. 21, 2013, Habeas Writ Record, Vol III, 00747; Email from Godinich, Dec. 3, 2013, Habeas Writ Record, Vol III, 00749; Email from Terry Pelz, Dec. 30, 2013, Habeas Writ Record, Vol III, 00751.) For example, in a September 2010 email to trial counsel, Ms. Poirier acknowledged that Mr. Balderas was still unwilling to accept a deal, and she suggested that the team at least conduct something resembling an investigation to earn Mr. Balderas's trust in the plea negotiation process:

> John [Castillo] could be useful in the area of looking like we are just going ahead with trial by finding witnesses and talking to Juan about them. If Juan sees more work as in direction of what he expects to prepare for trial he will gain trust and we can possibly make him see outside the box for a plea.

(Email from Mary Poirier, Sept. 1, 2010, Habeas Writ Record, Vol III, 00702-03.) Ms. Poirier even went on to point out that, regardless of the trust issue, trial

counsel should consider conducting a guilt/innocence investigation for the purpose of preparing for trial for its own sake:

> Should we be thinking about the investigation if we go to trial too? I know the pressure is about the possible offer that could come any day but I think we should also be thinking about the possibility of trial, roles and time lines [sic]. (WE can be doing this simultaneously with the work towards a plea.)

(*Id.*)

Despite Ms. Poirier's urging, counsel continued to ignore the guilt/innocence phase investigation while attempting to convince Mr. Balderas to take a deal. (Email from Godinich, Nov. 7, 2010, Habeas Writ Record, Vol. III, 00715.) In November 2010, trial counsel Godinich acknowledged that Mr. Balderas was "angry" over the topic of plea negotiations and that Mr. Balderas maintained that "[h]e did not kill anyone and the female witnesses [against Mr. Balderas] are ex-girlfriends of the gang ring leader who set the whole thing up." (*Id.*) Later in the same email, Mr. Godinich suggested that "[Mr. Balderas] is manipulating his mother into believing he is not guilty." (*Id.*)

On April 14, 2011, a full five years after Mr. Balderas had been initially charged with the shooting, he filed a *pro se* "motion to appoint new counsel [due] to fact present counsel is ineffective." (*Pro Se* Motion to Appoint New Counsel, Apr. 14, 2011, CCA Record, Vol. I, 00057-58.) In that motion, Mr. Balderas stated that he had only seen Mr. Godinich two times in the calendar year, that he had "not seen Alvin E. Nunnery in years," and he had

only met and spoken to the fact investigator one time in the previous five years. (*Id.)* Additionally, Mr. Balderas stated that the defense team had so far failed to interview any of the witnesses that were present at the scene on the day of the shooting. (*Id.*)

On April 28, 2011, the State announced its intention to seek the death penalty against Mr. Balderas. (Notice of the State's Intention to Seek the Death Penalty, Apr. 28, 2011, CCA Record, Vol. II, 00504; 22 RR 32:1-6.) That same month counsel took their first step towards a guilt/innocence investigation by retaining ballistics expert Richard Ernest. (Email from Jerome Godinich, Apr. 19, 2011, Habeas Writ Record, Vol. III, 00717.) In June 2012, Mr. Ernest provided a report and invoice to trial counsel, effectively ending his involvement with the defense team. (Email from Richard Ernest, June 11, 2012, Habeas Writ Record, Vol. III, 00722.)

In the summer of 2012, trial counsel was still focused on trying to convince Mr. Balderas to take a plea deal. By this time, Mr. Balderas had become outwardly "hostile" to the idea. (Email from Carroll Pickett, June 18, 2012, Habeas Writ Record, Vol. III, 00724-26.) Counsel also reached out to Ms. Escobar for help in convincing Mr. Balderas to accept a plea deal. In an attempt to secure her help, counsel promised to "continue to investigate any potential leads that might help [Mr. Balderas] in the guilt innocence [sic] phase of the trial." (Email from Adriana Helenek, Sept. 23, 2012, Habeas Writ Record, Vol. III, 00730.)

2. Trial counsel realizes that it must proceed to trial.

In July 2013, after dozens of re-set dates, Mr. Balderas was finally provided a trial date in February 2014. (Case Reset Form, July 29, 2013, CCA Record, Vol. I, 00080.) Rather than devote their remaining time and energy to the guilt/innocence investigation that they had repeatedly put off to that point, counsel instead doubled down on their efforts to convince Mr. Balderas to plead guilty. By November 2013, counsel had retained the help of classification and prison experts Beth and Terry Pelz to speak with Mr. Balderas about life in prison. (Email from Godinich, Nov. 21, 2013, Habeas Writ Record, Vol. III, 00747; Email from Godinich, Dec. 3, 2013, Habeas Writ Record, Vol. III, 00749; Email from Terry Pelz, Dec. 30, 2013, Habeas Writ Record, Vol III, 00751.)

Escobar and Mr. Balderas's mother requested to meet with counsel in December 2013, as trial was nearing, to discuss the state of the case. At the meeting, counsel stated they still did not have a guilt-phase theory of the case and did not intend to put on affirmative evidence of Mr. Balderas's innocence. Counsel explained that they only planned to cross examine State witnesses and object to State evidence. (Yancy Escobar Aff., Habeas Writ Record, Vol. II, 00558-63, ¶ 9; Affidavit of Maria Victoria Reyes Mirafuentes ("Vicky Mirafuentes Aff."), Oct. 25, 2015, Habeas Writ Record, Vol. II, 00589-613, ¶ 41.) By the end of the month, the defense team finally came to terms with the fact that "[Mr. Balderas] ha[d] pretty well dug in his heels to go to trial." (Email from Terry Pelz, Dec. 30, 2013, Habeas Writ Record, Vol III, 00751.)

Jury selection began on January 13, 2014. (4 RR.) The next day, counsel brought attorney R. Scott Shearer onto the defense team as an appellate expert. (Motion for Appointment of Appellate Counsel, Jan. 14, 2014, CCA Record, Vol. VIII, 02073.) On his very first day with the team, Mr. Shearer noted that there were problems with Wendy Bardales's identification of Mr. Balderas, and he suggested counsel retain the services of an eyewitness identification expert. Counsel then retained Dr. Roy Malpass and provided him with materials regarding the Wendy Bardales identification on January 17, 2014. (Affidavit of Roy S. Malpass, Ph.D. ("Dr. Roy Malpass Aff."), Nov. 2, 2015, Habeas Writ Record, Vol. II, 00403-474, ¶ 8.)

On January 17, 2014, counsel also requested for the *first time* that the State provide background information about certain anonymous tips implicating Mr. Balderas in the shooting, which were originally made to the Mayor's Anti-Gang Task Force over eight years earlier in December 2005. (Email from Traci Bennett, Jan. 17, 2014, Habeas Writ Record, Vol. III, 00757-58.) The State responded that the tips were anonymous, and there is no record of further follow-up by counsel. (*Id.*)

At the end of January 2014, a defense team email indicated that Escobar provided Ms. Poa (Mr. Godinich's assistant) with first names of five people who she believed may have been able to offer helpful testimony at the guilt/innocence phase of trial:

- "Billy" – A member of the LTC who could name the true leader of the gang and explain Mr. Balderas's role/rank within the LTC;

- "Oralia [McCrary]" – A potential alibi witness for Mr. Balderas on the night of the shooting;
- "Anale [Garcia]" – Oralia's daughter;
- "Walter [Benitez]" – Another member of the LTC; and
- "Daniela [Chaves]" – A woman who associated with the LTC and could name the true leaders of the gang.

(Email from Godinich, Jan. 31, 2014, Habeas Writ Record, Vol. III, 00770-71.) Escobar also provided the full name and contact information for Celeste Munoz, a mutual friend of Mr. Balderas, Wendy Bardales, and Powder. Ms. Poa stated in a January 31, 2014, email that this was the first time the defense team had heard of this information and that she would schedule a meeting with Munoz but was waiting on contact information for the other five witnesses. (*Id.)* At that point, trial was scheduled to start in 17 days.

On February 4, 2014, Ileana Cortes—one of the alibi witnesses for Mr. Balderas—contacted trial counsel to inform them that Mr. Balderas had been with her and her family at their apartment all afternoon and evening on the day Powder was killed. (Email from Godinich, February 4, 2014, Habeas Writ Record, Vol. III, 00773-74; Ex. A, Ileana Cortes Decl., ¶ 12.) In a memorandum about the meeting, counsel indicated that Ileana did not know any specific facts about the Powder shooting and that she had difficulty remembering whether it was the exact night of the Powder shooting that Mr. Balderas was at her apartment. (*Id.*) However, rather than attempt to corroborate or further explore whether Mr. Balderas was indeed with Ileana on the night of the shooting,

counsel bluntly told Ileana her testimony was useless and sent her away. (Jesus Balderas Aff., Habeas Writ Record, Vol. II, 00476- 83, ¶¶ 21, 22); Ex. A, Ileana Cortes Decl., ¶ 12)

The same day, counsel documented receiving a trove of information from Escobar relevant to the guilt/innocence phase of Mr. Balderas's case. Among other things, counsel noted that Escobar informed them that: she was friends with the leaders of LTC Alief and knew their roles and ranks within the gang; "Victor A." was the leader of LTC Alief; Cookie held a higher rank than Mr. Balderas; multiple members of LTC Alief began plotting against Mr. Balderas after [Gumby's] girlfriend cheated on him with Mr. Balderas; Cookie and Wendy Bardales were in an ongoing, intimate relationship; [Gumby] left Mr. Balderas with many of the guns Mr. Balderas was arrested with, suggesting that someone other than Mr. Balderas may have used the gun tied to the Powder shooting; Cookie was coordinating with co-defendants in jail to set up Mr. Balderas; and Cookie told Escobar that Mr. Balderas needed to take the blame "for everything" because he did not have a family like the other co-defendants. Escobar told counsel she was previously afraid to testify to this information because Mr. Balderas had been threatened by other members of LTC Alief, but now felt like she needed to come forward. She also suggested that counsel speak with [Gumby's] brother William or [Gumby's] girlfriend Judy to corroborate this information. (Email from Godinich, Feb. 4, 2014, Habeas Writ Record, Vol. III, 00773-74; Yancy Escobar Aff., Habeas Writ Record, Vol. II, 00558-63, ¶ 8.)

That same week, Ms. Poa scheduled an appointment with Munoz at counsel's law office for

"eight o'clock" on Saturday, February 8, 2014, eight days after receiving Munoz's contact information and nine days before the scheduled start of trial. However, Munoz did not show at 8:00 a.m. and instead called Ms. Poa at 8:00 p.m. that night to inform her that she was waiting outside counsel's office. Ms. Poa informed Munoz that she had missed the scheduled meeting and would need to reschedule for later in the week. (Email from Godinich to Team, Feb. 13, 2014, Habeas Writ Record, Vol. III, 00776.) On February 12, Ms. Poa finally interviewed Munoz at counsel's office. No other members of the defense team were present. During the interview, Munoz explained that she had witnessed Mr. Balderas get into an altercation with Wendy Bardales sometime in 2005 and that Wendy told Mr. Balderas she would have him killed as a result.[3] Munoz also told Ms. Poa that Wendy Bardales was known to be sleeping with Mr. Balderas, Cookie, and Powder at one point or another.

Not surprisingly, Ms. Poa—a legal secretary with no experience investigating homicide cases—also had difficulty scheduling "Billy" for a meeting at counsel's office. She left him a voicemail, but he never responded. Because Jesus Balderas and Escobar were unable to produce phone numbers for Oralia McCrary, Benitez, and Daniella Chaves, Ms. Poa could not call them to set up times for them to come to counsel's office for an interview either. (Email from

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[3] At trial, the Court informed the defense that this evidence could not be presented without opening the door to extraneous offenses. As a result, counsel did not present any testimony from Munoz at the guilt/innocence phase of trial. (29 RR 14:7-17.)

Godinich to Team, Feb. 13, 2014, Habeas Writ Record, Vol. III, 00776.)

At no point in this time period was there mention of a qualified investigator attempting to locate any of these witnesses, nor was there any mention of attempting to conduct the interviews at the witnesses' homes or somewhere convenient for them. Counsel's approach to this investigation was deaf to the cultural, socio-economic, and legal circumstances in this case and made it unlikely for witnesses to reliably communicate and schedule interviews in a business-like and reliable manner.

As of February 13, 2014, four days before trial, counsel had only spoken with two people from Escobar's list: Munoz and Anali Garcia (sister of Ileana Cortes). Even then, the conversation with Anali was brief and over the phone, and counsel quickly determined that they did not need her as a "character witness"—either oblivious or indifferent to her critical importance as a potential alibi witness. (*Id*.) As Anali recalls, she was informed that counsel had set what can only be described as an arbitrary deadline for potential witnesses to come forward. (Anali Garcia Aff., Habeas Writ Record, Vol. II, ¶ 12.) Anali called counsel before that deadline to inform them that Mr. Balderas had spent the afternoon and evening at her house on the day of Powder's murder and that he therefore could not have been the shooter. Counsel again advised Anali that they already had enough "character" witnesses and did not need her testimony. (*Id*.) Anali attempted to clarify that she was not calling as a character witness, but counsel did not let her explain. Ultimately, Anali took counsel's word that they did not need her testimony, stating: "I thought that he would know better than me." (*Id*.) Anali was shocked when she attended Mr.

Balderas's trial and found that counsel did not offer an alibi defense. (*Id*. ¶ 13.)

On February 15, 2014, two days before trial, counsel first became aware of the LTC meeting held in early December 2005 to discuss whether to kill Powder— a foundational fact for the State's guilt case. (Email from Dr. Matthew Brams to Godinich, Feb. 15, 2014, Habeas Writ Record, Vol. III, 00780.) Given that Benitez, the defense's most important witness at the guilt/innocence phase, testified about the LTC meeting at trial, it is clear that counsel had not yet interviewed him as of February 15, 2014. This is further supported by the fact that counsel pronounced in opening arguments on February 17, 2014, that Cookie was the "likely shooter" while later presenting evidence from Benitez that Gumby had confessed to being the killer. (24 RR 27:12-24; 28 RR 224:4-18; 30 RR 59:23-60:8.) As such, counsel gave opening statements in Mr. Balderas's capital murder trial having interviewed only three witnesses with information potentially relevant to Mr. Balderas's eight-year- old claim of innocence.

J. The Trial of Mr. Balderas

1. The State's case.

The trial guilt/innocence phase of the trial began on February 18, 2014. During the guilt/innocence phase of Mr. Balderas's trial, the State's theory was that Mr. Balderas killed Powder in retaliation for Powder snitching on Cookie. Cookie was facing capital murder charges in a different case at the time and was incarcerated alongside Mr. Balderas from December 2005. (26 RR 121:16-122:10.)

On the eve of Mr. Balderas's trial, Cookie secured a plea deal with the State, wherein the State agreed to reduce his capital murder charge to aggravated robbery in exchange for his testimony against Mr. Balderas at trial. (*Id.* at 122:17-124:12.) As a result, Cookie became one of the State's primary witnesses against Mr. Balderas. Cookie ultimately testified that Mr. Balderas had taken credit for Powder's murder the following day across the street from the crime scene. (*Id.* at 159:23-160:18.)

Mr. Balderas's defense counsel cross-examined Cookie on his cooperation with police, what he would receive in exchange, the "snitching" incident with Powder, the "throwing" of gang signs, and the pre-murder meeting, but counsel never asked Cookie about Mr. Balderas's alleged confession. (*Id.* at 166:15-179:23, 182:8-184:7, 185:1-189:1, 190:20-191:12.)

The State also called each of the witnesses who were at Rata's apartment on the night of the murder: Edgar Ferrufino, Karen Bardales Wendy Bardales. Each testified to their relationship with Powder and their recollections of the events of the shooting. Wendy further provided testimony (in Spanish) regarding her eyewitness identification of Mr. Balderas. The State also called Sgt. Thomas Ruland, the lead investigator of Powder's homicide and the officer who presented the photo arrays to Wendy Bardales.

The State called various other witnesses including the police officers involved in Mr. Balderas's arrest and a police firearms examiner.

2. The Defense case.

The Defense called Walter Benitez. Benitez was a member of the LTC gang in 2005 and was "cliqued in" on the same day with Powder. (28 RR 140:23-141:4 & 152:2-9.) Benitez testified that Gumby had confessed to killing Powder himself and showed Benitez the gun he used to "[take] care of Powder." (*Id.* at 224:4-226:3.) The defense also attempted to present the testimony of an expert witness related to Wendy Bardales's photographic identification of Mr. Balderas. The court conducted a hearing outside the jury's presence and heard from the expert—Dr. Roy Malpass, a professor emeritus and a former director of the criminal justice program at the University of Texas at El Paso and an expert on eyewitness identification. (25 RR 122:20-123:13; *Id.* at 127:8-14.)

Dr. Malpass reviewed materials related to Wendy's identification and testified about its reliability problems. (*Id.* at 134:8-22; *Id.* at 137:16-21.) He testified that there was a substantial likelihood that a misidentification had been made. (*Id.* at 150:24-151:2.)

3. The jury's deliberations, request for readback of Cookie's testimony, deadlock, Allen charge and verdict.

Following closing arguments, the jurors were sequestered for two nights during the guilt/innocence phase deliberations.

On the first night, after hearing extensive testimony regarding the gang violence and danger of certain southwest Houston neighborhoods, the jury was sent to stay at a motel located in the same neighborhood as the murder. Many jurors realized

they were being forced to spend the night near the crime scene. (Affidavit of John Armstrong ("Juror Armstrong Aff."), Sept. 25, 2015, Habeas Writ Record, Vol. III, 00668-73, ¶¶ 5-6; Affidavit of Alison Birney ("Juror Birney Aff."), Sept. 26, 2015, Habeas Writ Record, Vol. III, 00675-78, ¶ 4; Affidavit of Ronald Browning-McCauley ("Juror Browning-McCauley Aff."), Sept. 26, 2015, Habeas Writ Record, Vol. III, 00680-81, ¶ 5; Affidavit of Christopher Norwood ("Juror Norwood Aff."), Sept. 25, 2015, Habeas Writ Record, Vol. III, 00683-86, ¶ 4; Affidavit of Michael Orosz ("Juror Orosz Aff."), Sept. 25, 2015, Habeas Writ Record, Vol. III, 00688-93, ¶ 5; Affidavit of Chad Sullivan ("Juror Sullivan Aff."), Sept. 26, 2015, Habeas Writ Record, Vol. III, 00695-98, ¶¶ 3, 5.)

During deliberations, the jury sent five notes requesting exhibits or read-back of testimony relevant to Cookie's account of the night in question:

- "Can we have the aerial photo of 7700 Corporate—showing complex across the street?" (Jury Note, Feb. 25, 2014, CCA Record, Vol. XII, 03289.)
- "Would like to hear [Cookie's] testimony about receiving phone call to go to crime scene and who was across the street from the crime scene right after Powder was killed." (Jury Note, Feb. 25, 2014, CCA Record, Vol. XII, 03291.)
- "After incident, [Cookie's] testimony about what [Mr. Balderas] was wearing." (Jury Note, Feb. 26, 2014, CCA Record, Vol. XII, 03298.)
- "[Cookie's] testimony where he said [Mr. Balderas] was changing or switching

magazines during the gathering across the street right after the incident." (Jury Note, Feb. 26, 2014, CCA Record, Vol. XII, 03302.)

- "In [Cookie's] testimony, did he describe the weapon [Mr. Balderas] had at the meeting across the street right after the incident of Powder's death?" (Jury Note, Feb. 26, 2014, CCA Record, Vol. XII, 03307.)

The jury deliberated for more than two days and even informed the trial court that it reached an impasse at one point. On the afternoon of the second day of guilt/innocence deliberations, after about 14 hours of deliberation, the jury sent out a note: "We are deadlocked. We agreed that we are not to 'strong arm' each other to change votes and have exhausted our questions over testimony and evidence. Now what?" (Jury Note, Feb. 26, 2014, CCA Record, Vol. XII, 03312.) In response, the trial court issued an *Allen* charge, instructing the jury to continue deliberations. (31 RR 24:7-13.) The next day, the jury reached a verdict of guilty. Despite this, at least one juror has expressed that she is still not completely convinced of Mr. Balderas's guilt. (Juror Birney Aff., Habeas Writ Record, Vol. III, 00675-78, ¶ 8.)

K. The Punishment Phase

1. The State's case.

The State presented evidence during the punishment phase that attempted to tie Mr. Balderas to four extraneous offenses committed by the LTC between September and December 2005. (33 RR 6:13-

8:5.) Multiple members of the LTC were present during each of these offenses.

The State also presented testimony from LTC member Alejandro Garcia that Mr. Balderas was involved in the Loma Vista and Beltway Shootings. (34 RR 154- 60, 204-46; 35 RR 10-32.) Garcia testified in exchange for a charge reduction in a case of capital murder to aggravated robbery charge, which carried a five-year probated sentence instead of life imprisonment. (34 RR 154-60.) The State also presented evidence that Mr. Balderas was involved in two separate altercations with a correctional officer and was cited for contraband while awaiting trial in the Harris County Jail. (42 RR 247-275.)

2. The Defense case.

Mr. Balderas's defense only touched briefly on the childhood sexual abuse Mr. Balderas suffered from his stepfather, and his mother's early abandonment. (38 RR 125-183; 39 RR 37-108.) Mr. Balderas's mother testified that she sent her son to live with her family in Mexico for approximately one year when he was eight or nine years old. (38 RR 41, 56-59.) His biological father testified about the discord with Mr. Balderas's mother during Mr. Balderas's early childhood. (38 RR 89-91.) Two relatives from Mexico attempted to testify via Skype to offer mitigation evidence relating to Mr. Balderas's life history, but their testimony was cut short due to repeated technical difficulties. (39 RR 7-24, 35, 109-12; 40 RR 172-75, 193-95.)

Socioeconomic and cultural factors were also briefly raised. Amy Nguyen, an expert in geographic information systems, discussed the socio-economics of Southwest Houston. (40 RR 125-170.) And Dr. John

Rodriguez, a sociologist and gang expert, testified to the various factors in Mr. Balderas's life that made him more likely to join a street gang in his youth. (40 RR 195-258. Dr. Matthew Mendel addressed sexual abuse (38 RR 125-183; 39 RR 36-108), and Dr. Jolie Brams testified to the trauma that Mr. Balderas suffered in his youth and how it likely impaired his development. (41 RR 251-71; 42 RR 6-95.)

Dr. Brams testified that Mr. Balderas's brain had not fully developed at the time of his arrest when he was nineteen years old, but that it had matured in his years of pre-trial incarceration. (42 RR 87-90.) Accordingly, Mr. Balderas was likely to be a compliant inmate within the Texas Department of Criminal Justice. (39 RR 139-59; 40 RR 9-63.) Terry Pelz, an expert in prison environment and prison gangs, echoed the opinion that Mr. Balderas would likely acclimate well to life in TDCJ. (41 RR 210-250.)

3. The jury deliberation and verdict.

The jury deliberated for a day and a half before returning with a verdict of death. (44 RR 11:6-11.) The jurors answered "Yes" to Special Issue One concerning future dangerousness, and "No" to Special Issue Two concerning the existence of mitigating factors that would have made a life sentence an appropriate punishment. (44 RR 9:5-9.)

L. State Appellate Proceedings

The court appointed R. Scott Shearer to continue representing Mr. Balderas on direct appeal. (Order on Notice of Appeal, March 14, 2014, CCA Record, Vol. XII, 03360-61.) Mr. Shearer moved for a mistrial and a new trial on April 14, 2014, arguing that the verdict was reached as a result of outside influence and Mr.

Balderas's right to an impartial jury, due process, and a fair trial had been violated. (Motion for New Trial, April 14, 2014, CCA Record, Vol. XII, 03365-3387.) The motion for a mistrial /new trial was denied without hearing on April 21, 2014. (Order – Determination, April 21, 2014, CCA Record, Vol. XII, 03409.)

On April 27, 2015, Mr. Shearer filed an opening brief on appeal in the CCA. On direct appeal, Mr. Balderas argued that: (1) the evidence was insufficient to support the verdict; (2) he was deprived of his Sixth Amendment right to a speedy trial; (3) he was deprived of his Sixth Amendment right to confront Wendy Bardales in English; (4) even if he did not have a Sixth Amendment right to confront Wendy Bardales in English, he was deprived of the right to cross-examine and impeach her concerning her ability to speak English; (5) the trial court abused its discretion by allowing Wendy Bardales to testify in Spanish; (6) the trial court violated the *Gaskin v. State* rule by preventing Mr. Balderas from impeaching Wendy Bardales with the prior audiotaped statement she gave to police; (7) he was deprived of due process and an impartial jury by an outside influence acting upon the jury during their deliberations; (8) he was deprived of due process when the trial court failed to suppress both the in-court and out-of-court identifications; and (9) the trial court abused its discretion by failing to have testimony read back in response to two jury notes. (Brief for Appellant, Texas Court of Criminal Appeals, *Juan Balderas v. The State of Texas*, No. AP-77,036, Apr. 27, 2015.) The State filed a brief in response on June 24, 2015.

On October 7, 2015, both parties presented oral arguments before the CCA. On November 2, 2016,

the CCA denied Mr. Balderas's direct appeal and affirmed the judgment and sentence of death. The CCA held that: (1) the evidence was sufficient to prove that Mr. Balderas was guilty of capital murder; (2) Mr. Balderas was not deprived of a speedy trial; (3) the assistance of an interpreter did not deprive Mr. Balderas of his Sixth Amendment right to confront Wendy Bardales; (4) the trial court did not violate the Sixth Amendment by excluding the audio recording; (5) the trial court did not abuse its discretion by allowing Wendy Bardales to testify in Spanish; (6) there was no violation of the *Gaskin* Rule; (7) the trial court did not abuse its discretion by overruling Mr. Balderas's motion for a mistrial due to outside influence allegedly acting upon the jury during their deliberations; (8) the trial court did not err by admitting Wendy Bardales's in-court and out-of-court identifications; (9) the trial court did not abuse its discretion by failing to have testimony read back in response to two jury notes. (*Id*.)

M. State Habeas Proceedings

1. OCFW is appointed to represent Mr. Balderas in post- conviction habeas proceedings.

While his direct state appeal was pending, the trial court appointed OCFW to represent Mr. Balderas in post-conviction habeas proceedings. Mr. Derek VerHagen ("VerHagen") and Ms. Erin M. Eckhoff ("Eckhoff") were the two staff attorneys at OCFW assigned to Mr. Balderas's case. (Ex. B, Declaration of Erin M. Eckhoff In Support of Juan Balderas's Petition for Writ of Habeas Corpus (First Amended) Under 28 U.S.C. § 2254 of a Person in State Custody ("Eckhoff Decl."), April 17, 2022; Ex. C, Declaration of

Derek VerHagen In Support of Juan Balderas's Petition for Writ of Habeas Corpus (First Amended) Under 28 U.S.C. § 2254 of a Person in State Custody ("VerHagen Decl."), April 17, 2022)

During the time OCFW handled Mr. Balderas's case, OCFW lacked adequate resources and funding, causing excessive caseloads for each of the OCFW attorneys and high turnover. (Ex. B, Eckhoff Decl., ¶ 5) According to Eckhoff and VerHagen, it was extremely difficult for attorneys and investigators to dedicate sufficient time and resources to each of their cases. (Ex. B, Eckhoff Decl., ¶ 6; Ex. C, VerHagen Decl., ¶ 7) Due to their caseloads, it was not until the summer of 2015 that Eckhoff and VerHagen were able to review and investigate Mr. Balderas's case in depth. (Ex. B, Eckhoff Decl., ¶ 8; Ex. B, VerHagen Decl., ¶ 3) By that time, the complexity and size of Mr. Balderas's case was overwhelming. (Ex. C, VerHagen Decl., ¶ 9)

In order to best optimize OCFW's limited time and resources, OCFW took a triage approach to managing Mr. Balderas's case. (Ex. B, Eckhoff Decl., ¶ 14) Accordingly, OCFW focused on investigating and developing claims related to trial counsel's failure to investigate and present alibi testimony at trial. (Ex. B, Eckhoff Decl., ¶¶ 14, 18) Due to a lack of resources, OCFW did not investigate claims related to Mr. Balderas's competency, even though Eckhoff and VerHagen were aware of Mr. Balderas's long history of mental illnesses, history of behavior consistent with those diagnoses, and periods of refusing to take his prescribed medications. (Ex. B, Eckhoff Decl., ¶¶ 15-17; Ex. C, VerHagen Decl., ¶¶ 10-12) Nor did OCFW investigate or consider an additional claim that trial counsel violated Mr. Balderas's Sixth

Amendment right to present an alibi defense. (Ex. B, Eckhoff Decl., ¶ 19; Ex. C, VerHagen Decl., ¶ 14)

Thus limited by time and resources, OCFW began its narrowly targeted investigation into Mr. Balderas's case in the summer of 2015.

2. First post-trial disclosures.

On August 13, 2015, OCFW visited the DA's office to review the State's file. Counsel was given only five of eleven boxes of the State's files. The State withheld six boxes, stating that they were in the process of being scanned.

On October 8, 2015, after OCFW had yet to receive the full file, OCFW filed a Motion for Disclosure of Exculpatory and Impeachment Evidence. (Motion for Disclosure of Exculpatory and Impeachment Evidence, Oct. 8, 2015.) On October 21, 2015, the State finally provided to OCFW what was purported to be the full file. In reviewing the newly disclosed file, OCFW found evidence reflecting differing accounts related to Powder's murder. Two of the accounts came from handwritten investigative notes from 2007 and 2008 between the State and Cookie that contradicted Cookie's trial testimony—none of which were disclosed prior to trial.

In the 2007 notes, there was a "meeting 9-10 mos before Powder was killed." (2007 and 2008 Israel "Cookie" Diaz Interview Notes, Habeas Writ Record, Vol. III, 00782-804, at 00788.) At trial Cookie said the meeting was three or four days before Powder's murder. (26 RR 160:2-3; 26 RR 184:5-7.) The notes also state that "[Mr. Balderas] called [Cookie] the day *after* Powder [was] killed & said 'we took care of that.'" (*See* 2007 and 2008 Israel "Cookie" Diaz

Interview Notes, Habeas Writ Record, Vol. III, 00782-804, at 00788 (emphasis added).)

In the 2008 notes, in which the prosecutor was again present, the notes provided a different rendition of the alleged confession. According to the notes, Cookie told the State that LTC members and associates later gathered in Alejandro Garcia's backyard and "talked about Powder's murder" on the night of the shooting. He told the State, as reflected in the notes, that it was at the backyard gathering that "Apache [Mr. Balderas] said he took care of it." (*Id.* at 00795.)

None of the alternative confession versions were disclosed to Mr. Balderas's legal team prior to the trial. As a result, defense counsel was unable to confront Cookie with these conflicting accounts and demonstrate the inconsistencies to the jury.

During OCFW's investigation, its investigator spoke with Cookie, who recanted his trial testimony. (Affidavit of Adrian De La Rosa, Jan. 13, 2016, Habeas Writ Record, Vol. II, 00531-00535.) Cookie explained that the State approached him multiple times over the course of his eight-year incarceration awaiting trial on a separate capital murder charge asking him to provide information inculpating Mr. Balderas in Powder's shooting. Cookie said that he told prosecutors that "Juan did not tell me he killed [Powder], but that it was the word on the street . . . Juan never told me he did it." (*Id.* at 00533 ¶ 8.) Cookie further told the OCFW investigator that, on the eve of Mr. Balderas's trial, the State again approached Cookie, who indicated that he again told them that Mr. Balderas had never confessed. This time, Cookie said that prosecutors told him to change that story. (*Id.*, ¶¶ 8, 10.) Cookie told investigators

that he felt pressured to cooperate with the State because he had already been incarcerated for nearly a decade with no word on how or when his case would be resolved. (*Id.*, ¶ 8.) As a result, Cookie accepted a plea deal on the first day of Mr. Balderas's trial and testified falsely that he had seen Mr. Balderas near the scene on the night of the shooting and that Mr. Balderas had confessed.

3. The State issues Brady disclosures four days before the hearing.

On May 7, 2018, four days before the evidentiary hearing was to begin in May 2018, the State disclosed for the first time voluminous information about Cookie relevant to Mr. Balderas's claims and which Mr. Balderas had requested since 2015. The disclosure included:

a. The capital murder summary;

b. 561 audio copies of jail calls made by Cookie while incarcerated in Harris County jail (approximately 16 CD-ROMs); and

c. Documents and audio recordings pertaining to communications and contact between Cookie and the Harris County District Attorney's Office (including Cookie's State File, Traci Bennett's Pretrial Interview Notes with Cookie, and Cookie's 2006-2010 Harris County Jail Disciplinary Record).

(Letters from Harris County District Attorney's Office, May 4, 2018; Post- Conviction Writ Evidentiary Hearing Tr. ("EH"), Vol. 2, at 9:14-11:3, 56:17-62:12, 76:16-78:11.)

OCFW requested a continuance to review the disclosed material given that the evidentiary hearing was scheduled for just four days later. The request was denied.

The *Brady* information that the State disclosed contained crucial information calling Cookie's credibility into serious question. The material contained new evidence that Cookie told prosecutors prior to the murder in connection with an alleged car theft that he and Powder had gotten into physical altercations because Powder was attempting to pull away from the gang. (Audio recording of Israel Diaz interview by Officers H. Chavez and A. Carrillo at the Harris County Jail relating to Case No. 179083204I, Feb. 1, 2005, produced by Harris County District Attorney's office on Oct. 22, 2020 as Disc 5.)

4. The Texas State habeas hearing.

On May 11, 2018, the court held the evidentiary hearing on OCFW's habeas motion. During the hearing, the court restricted the ability of Mr. Balderas to present evidence to support the already truncated claims at issue. As to the first issue (originally designated by Judge Guiney), the state habeas court only permitted Mr. Balderas to put on the testimony of Cookie. And for the second issue, the court limited the evidentiary presentation to two specific witnesses—Anali Garcia and Octavio Cortes—related to the alibi evidence that trial counsel failed to present to the jury. (Signed Order Designating Issues for Hearing, Mar. 21, 2018, Habeas Writ Record Volume VII, 01948-49.)

When defense counsel put Cookie on the stand, he recanted the recantation he previously made to OCFW. He testified that Mr. Balderas had actually

made a confession as he had originally testified. Cookie further claimed that Efrain Lopez and Jose Hernandez and all the other LTC gang members were present for that confession.

Contrary to Cookie's evidentiary hearing testimony, however, both Lopez and Hernandez provided affidavits to OCFW during its investigation that they were not, in fact, present at the scene shortly after the shooting. The court refused to allow these affidavits into evidence at the hearing because they allegedly went beyond one of the "limited purpose[s] of the [evidentiary] hearing," which was to determine if Cookie had recanted his trial testimony. (4 EH 294:3-295:21.) The habeas court acknowledged that the affidavits impeached Cookie trial testimony, but still refused them even for that purpose. (*Id.* at 291:10-92:22, 294:3-95:21.)

The habeas court also denied the affidavit of University of Virginia Law Professor Brandon L. Garrett on the inherent risks of informant testimony. The court ruled that it was impermissible comment on the credibility of a witness. In fact, Professor Garrett's testimony was not directed at Cookie specifically, but was intended to assist the fact-finder in understanding the unique risks of informant testimony in a case where it is so critical to the conviction. (5 EH 4-26.)

The habeas court also denied admission of the proffered affidavits of six jurors, including one alternate, supporting Mr. Balderas's claims of juror misconduct and extraneous influences. The court found that the affidavit of alternate juror Browning-McCauley was irrelevant because she did not participate in deliberations. (FFCL, Habeas Writ Record, Volume X, 02844–02937, at 02885 ¶¶ 178.)

The court found that the affidavits of jurors Armstrong, Birney, Norwood, Orosz and Sullivan were all "not dispositive on the merits" of Mr. Balderas's habeas claims. (*Id*., at 02886 ¶ 179, 02888 ¶ 193, 02911 ¶ 273, 02917 ¶ 303.) The court also found that these affidavits were not admissible—the court had no explanation as to some and ruled as to others that they would constitute impermissible commentary on the deliberation process. (*Id*. at 02924 ¶ 21, 02928-29 ¶ 36, 02931 ¶ 47, 02933 ¶ 58.)

On July 11, 2018, OCFW filed a motion to supplement the record and to expand the evidentiary hearing. (Motion to Supplement the Record and to Expand the Evidentiary Hearing, July 11, 2018, Habeas Writ Record, Vol. VII, 02268-86.) Counsel for Mr. Balderas also asked for the opportunity to move affidavits and additional documents into evidence. (*Id*.) The habeas court denied these requests via email the same day. (Email from Judge Baylor Worthman, July 11, 2018, Habeas Writ Record, Vol. X, 02948).

Shortly thereafter, on July 20, 2018, Judge Wortham issued his Findings of Fact and Conclusions of Law denying relief on all claims. (*Id*. at 02844-2938). The court's order denying relief closely tracked the State's proposed findings and conclusions.

5. Post-Texas State hearing Brady disclosures.

On August 20, 2018, two months after the habeas court denied relief, the State made yet another first-time disclosure. The State filed another Disclosure Pursuant to Texas Code of Criminal Procedure Article 29.14(h), (k) (the "August 2018 *Brady*

Disclosure"). In it, the State disclosed exculpatory information:

- "On December 10, 2013, prosecutors Traci Bennet, Caroline Dozier, and Mary McFaden met with witness Alejandro Garcia and Garcia's counsel Bob Loper. At this meeting, Garcia stated that at school, Eduardo 'Powder' Hernandez's brother told Garcia that MS had killed [Powder]."
- "On December 19, 2013, prosecutors Traci Bennett, Caroline Dozier, and Mary McFaden met with witness Alejandro Garcia and Garcia's counsel Bob Loper. At this meeting, Garcia stated: he did not suspect that the applicant killed Eduardo "Powder" Hernandez; the applicant did not talk to Garcia about killing [Powder]; and Garcia thought MS killed [Powder]."

(State's Disclosure Pursuant to Tex. Code Crim. Proc. art. 39.14(h), (k), Aug. 20, 2018, Habeas Writ Record, Vol. X, 02960-61.)

On November 30, 2018, Mr. Balderas—through OCFW—filed a motion for remand, arguing, among others that the State's repeated Brady violations deprived Mr. Balderas of his due process rights. The Motion for Remand was never decided. And on December 18, 2019, the TCCA denied Mr. Balderas's State Habeas Application.

On April 27, 2020, Mr. Balderas filed a motion with the TCCA seeking reconsideration of its denial of his State Habeas Application. On June 18, 2020, the TCCA denied Balderas's motion without written order.

On June 29, 2020, undersigned counsel sent a letter to the Harris County District Attorney's Office notifying the office that DLA Piper LLP (US) serves as federal habeas counsel for Mr. Balderas ("Federal Habeas Counsel"). Federal Habeas Counsel requested that the State produce any further *Brady* information within thirty days—including six specific requests for documents and communications concerning meetings with Alejandro Garcia, investigations arising from information provided by Alejandro Garcia, documents sufficient to identify the identity of Powder's brother as described by Alejandro Garcia, interviews with Powder's brother, investigations into Alejandro Garcia's statement that MS-13 killed Powder, and documents regarding the investigation of Powder's murder that had not been previously disclosed.

On July 1, 2020, Federal Habeas Counsel issued a Texas Public Information Act request ("Public Records Request") for all public records concerning Mr. Balderas, including those requested in the June 29, 2020 letter. On July 10, 2020, Brian L. Rose—General Litigation Division Chief, Harris County District Attorney's Office—responded to the letter requesting a call to discuss the June 29, 2020, letter. Federal Habeas Counsel spoke with Mr. Rose on July 14, 2020, and agreed to withdraw the Public Records Request without prejudice and that the Harris County District Attorney's Office would work informally with Federal Habeas Counsel to provide the information requested.

To move forward on informal discovery, Federal Habeas Counsel and the Harris County District Attorney's Office agreed to move forward in two steps: (1) the Harris County District Attorney's Office would provide a list of documents it believed were previously provided to Mr. Balderas's counsel; and

(2) it would then provide further responsive documents that were not previously produced.

On July 22, 2020, Federal Habeas Counsel sent a letter to State of Texas Assistant Attorney General Tomee Heining seeking the office's agreement to waive any statute of limitations defenses or agree that equitable tolling for a reasonable period would apply to Mr. Balderas's claims. Federal Habeas Counsel's request was due to the extraordinary difficulties of conducting an appropriate federal habeas review in light of COVID-19 (including counsel's inability to meet with Mr. Balderas, to gather records, and to otherwise complete investigation of new and previously unknown facts). On July 28, 2020, Assistant Attorney General Heining responded that "unfortunately we cannot agree to waive any procedural defense or make an open-ended agreement for equitable tolling." However, she agreed that, because of the unusual circumstances, her office "would not oppose the filing of a skeletal petition within the one-year time limit, identifying all the claims you intend to raise in federal court, and allowing for amendment of that petition with full briefing within a reasonable period of time" and that the Attorney General "will not assert a limitations defense against any later-filed amendment that relates back to those timely-filed claims."

On July 31, 2020, Federal Habeas Counsel received a list from the Harris County District Attorney's Office of documents it represented had been previously produced to Mr. Balderas's previous counsel. After reviewing files it had received, Federal Habeas Counsel advised the Harris County District Attorney's Office that it was missing a number of files, mostly related to audio interviews or jail calls.

On September 10, 2020, the State provided the requested files.

On August 20, 2020, Federal Habeas Counsel had a telephone conference with Mr. Rose concerning the documents it had requested that were not included in previous disclosures, including potential files that have not been previously produced in this matter at all, such as prosecutor or law enforcement notes with witnesses or documents concerning investigations into other potential suspects. Mr. Rose stated that he understood the remaining files may be work product, but that the State would review those files for further *Brady* material and also likely produce any notes between prosecutors or law enforcement and any witness, regardless of the substance. In particular, Federal Habeas Counsel requested that the State produce the actual notes underlying the State's August 20, 2018, disclosure describing two meetings between prosecutors and Alejandro Garcia (and his counsel Bob Loper) in December 2013. Federal Habeas Counsel also requested, and the State agreed to search for, any documents concerning investigations into leads on other suspects. In particular, Federal Habeas Counsel asked the State to search for any documents concerning investigation into the statements by Garcia at the December 2013 meeting that Powder's brother had told Garcia that "MS had killed [Powder]" and that Garcia believed the same. Mr. Rose agreed that the State wanted to "aggressively push out anything that could be *Brady*" and that he would produce the "statement" portion of any witness interviews with a work-product redaction for any notes that would constitute the prosecutor's thoughts.

On October 28, 2020, the State provided notes from prosecutors Mary McFaden and Traci Bennett taken

during a series of interviews with Alejandro Garcia from December 2013. The State advised that the Bennett notes had been previously produced to State Habeas Counsel during the State Habeas Application. The State advised that ADA Dozier had been unavailable to review her notes and as such would produce those notes later.

On October 29, 2020, Federal Habeas Counsel noted that it had also asked for any notes between prosecutors or law enforcement and any witness, regardless of substance, and also any documents concerning investigations into leads on other suspects, including but not limited to, MS-13. Federal Habeas Counsel requested whether the State intended to produce interviews with any other witnesses that have not been produced and whether the State investigated other potential suspects.

On November 2, 2020, as to the investigation of other suspects, the State responded that "any and all documentation of the investigations into the charged homicide has been previously produced . . . no documentation of an investigation has been withheld." The State further advised that "as to Brady material and specifically prosecutor notes of witness interviews, that review process continues and will heat up now."

On November 11, 2020, the State disclosed prosecutor Caroline Dozier's notes from her meeting with Alejandro Garcia in December 2013.

On October 23, 2020, Federal Habeas Counsel issued a Texas Public Information Act request for personnel files on the HPD officers involved in Powder's murder investigation, including Investigator Art J. Palos, Sgt. Thomas Ruland, Sgt. Brian Harris, Sgt. Will Gonzales, and Investigator Thomas R.

Cunningham. On November 6, 2020, the City of Houston's Human Resources Department advised that it had 818 pages of responsive documents and would require a payment of $189.80 to provide the files. On November 11, 2020, Federal Habeas Counsel overnighted the check for the full amount. As of the filing of this Application, Federal Habeas Counsel has not received the files.

On November 25, 2020, the State disclosed: (1) handwritten notes with Angelina Quinones from July 15, 2010 (Ex. D, the "2010 Quinones Notes"); (2) handwritten notes with Angelina Quinones from January 24, 2006 (Ex. E, the "2006 Quinones Notes"); (3) handwritten and typewritten summary of notes with Guadalupe Sepulveda from August 8, 2014 (Ex. F, the "2014 Sepulveda Notes"); (4) handwritten notes with Yeni Rivas from August 4, 2014 (Ex. G, the "2014 Rivas Notes,"); (5) typewritten summary of notes with Courtney Altimore from December 31, 2013 (Ex. H, the ("2013 Alitmore Notes"); (6) handwritten notes with Kilyn (unclear spelling) Velasquez from January 3, 2014 (Ex. I, the "2014 Kilyn Velasquez Notes"); (7) typewritten summary with Myriam Flores from September 26, 2014 (Ex. J, the "2014 Flores Notes"); (8) typewritten summary with Brenda Velasquez from October 1, 2014 (Ex. K, the "2014 Brenda Velasquez Notes"); (9) handwritten notes with "Cueva" from December 19, 2005 (Ex. L, the "2005 Cueva Notes"); (10) handwritten notes with Roxanne Resendez from October 26, 2014 (Ex. M, the "2014 Resendez Notes"); (11) typewritten summary of notes from Karen and Wendy Bardales from January 20, 2014 (Ex. N, the "2014 Bardales Notes"); (12) typewritten summary of notes from Edgar Ferrufino dated February 10, 2014 (Ex. O, the "2014 Ferrufino Notes"); and (13) handwritten notes with Wendy and

Karen Bardales from January 2014 (Ex. P, the "2014 Handwritten Bardales Notes").

On December 1, 2020, the State also disclosed prosecutor notes with: (1) handwritten notes with Cookie from January 27, 2014 (Ex. Q, the "2014 Cookie Notes"); (2) Karen and Wendy Balderas from February 11, 2014 (Ex. R, the "2014 Bardales Prosecutor Notes"); (3) handwritten notes with Tommy Ruland from February 14, 2014 (Ex. S, the "2014 Ruland Notes"); (4) handwritten notes with Steve Guerra from January 23, 2014 (Ex. T, the "2014 Guerra Notes"); (5) handwritten notes with Rick Moreno from January 23, 2014 (Ex. U, the "2014 Moreno Notes"); (6) handwritten notes with Karen Balderas from January 20, 2014 (Ex. V, the "2014 Karen Bardales Notes"); (7) handwritten notes with Officer Grant from January 23, 2014 (Ex. W, the "2014 Grant Notes"); (8) handwritten notes with Victor Gonzalez from January 10, 2014 (Ex. X, the "2014 Gonzalez Notes"); (9) handwritten notes with Myriam Flores from December 3, 2005 (Ex. Y, the "2005 Flores Notes"); (10) handwritten notes with Karen and Wendy Bardales undated (Ex. Z, the "Undated Bardales Notes"); (11) an email from Traci Bennett to herself summarizing an interview with Miriam Hernandez from September 21, 2013 (Ex. AA, the "2013 Bennett Email"); (12) handwritten notes with Edgar Ferrufino from February 10, 2014 (Ex. BB, the "2014 Ferrufino Notes"); (13) handwritten notes with Luis Garcia undated (Ex. CC, the "Undated Garcia Notes"); and (14) typewritten summary of notes with Jose Espinoza from August 21, 2014 (Ex. DD, the "2014 Espinoza Notes").

N. Undersigned Counsel's Investigation of Mr. Balderas's Mental Health

157. A review of Mr. Balderas's medical records reveals that Mr. Balderas has suffered from mental disease since well before the time of trial:

- Mr. Balderas entered the juvenile justice system in February 2001 (13 years before he was convicted) and was diagnosed with Adjustment Disorder. (Harris County Sheriff's Office Records ("HCSO Records"), Feb. 15, 2001, TDS-000001-001140, at TDS-000759-761.)
- In May 2001, Mr. Balderas was examined by the Mental Health and Mental Retardation Authority of Harris County ("MHMRA"). Mr. Balderas was diagnosed with oppositional defiant disorder and the MHMRA noted that he exaggerated certain facts and was in partial remission from an inhalant-related disorder.
- In May 2002, Mr. Balderas was charged with assault, placed in CJPO Boot Camp, and referred for a psychological evaluation. He was

evaluated by Matthew Shelton, Staff Psychologist, and Dr. Quintana, Supervising Clinical Psychologist. Mr. Shelton gave Mr. Balderas a GAF score of 42, which signified serious symptoms including suicidal ideation, severe obsessions, and serious impairment in social, occupational, and/or school functioning. Mr. Balderas's score of 42 is considered one level away from a diagnosis of impaired reality or psychosis. (MHMRA Records, May 13, 2002, TDS-001197-001281, at TDS-001210-1216.)

- Mr. Balderas was diagnosed with adolescent onset Conduct Disorder, Oppositional Defiant Disorder, and Development/Personality Disorders by Mr. Shelton in May 2002. The records indicate that conduct disorder manifests when a child is antisocial and prone to disregarding basic social standards and rules. Oppositional Defiant Disorder is a childhood mental health disorder that includes frequent and persistent anger, irritability, arguing, et cetera as a result of genetic and environmental factors. (MHMRA Records, May 13, 2002, TDS-001197-001281, at TDS-001201-1202 and TDS-001210-1216).
- The records indicate that Mr. Balderas was medicated for Major Depressive Disorder. Specifically, Mr. Balderas was taking Lexapro and Seroquel in 2010. (HCSO Records, TDS-000001-001140, at TDS- 000833 and TDS-000867.)

- In December 2013, a Personality Assessment Inventory Analysis Report states that Mr. Balderas is experiencing a moderate to severe level of psychiatric distress and impairment in one or more areas. The distress appears to be manifested in mood disturbance, anxiety, somatization, character pathology, paranoia, and psychotic symptoms. The report states that Mr. Balderas also had some degree of personality dysfunction characterized by moodiness and interpersonal sensitivity, and some degree of personality dysfunction. Finally, the report states that Mr. Balderas has a moderate to severe amount of suicidal ideation and a considerable level of suspiciousness and hostility along with significant levels of anxiety.

158. Undersigned counsel retained Dr. Bhushan Agharkar, MD, DFAPA ("Dr. Agharkar"), to conduct a psychiatric evaluation of Mr. Balderas. In addition to Dr. Agharkar's private practice treating a wide range of conditions, Dr. Agharkar has extensive experience performing independent medical examinations and medical record reviews for criminal and civil cases nationwide. Dr. Agharkar performed a psychiatric evaluation of Mr. Balderas on May 27 and July 29, 2021 to assess the existence and extent of Mr. Balderas's psychiatric difficulties. (Ex. EE, Report of Bhushan Agharkar, MD ("Agharkar Report"), Jan. 12, 2022.) Based on Dr. Agharkar's evaluation of Mr. Balderas, with reference to his review of Mr. Balderas's juvenile records, school records, Harris County mental health record, Texas Department of Corrections mental health records, family history

documents, trial transcripts, and the psychological reports of Jolie S. Brams, PhD., and Matthew Mendel, PhD, and the neuropsychological report by Dr. Robert H. Ouaou, PhD (Ex. FF, Report of Robert H. Ouaou, PhD ("Ouaou Report"), Jan. 15, 2022), Dr. Agharkar formed the following opinions and observations:

- Mr. Balderas exhibits compelling mood, trauma, and brain impairment symptoms that likely pre-date his trial but were not adequately investigated and presented to the fact-finder in his capital case.
- Mr. Balderas currently suffers from Schizoaffective Disorder, Bipolar Type, and Post-Traumatic Stress Disorder (PTSD). There is also evidence he suffers from Organic brain impairment.
- Mr. Balderas's Schizoaffective Disorder, Bipolar Type, is indicated by Mr. Balderas's history of depressive episodes, endorsement of hallucinations, paranoid and grandiose delusions, and disorganized and tangential thought processes. During Dr. Agharkar's interviews, Mr. Balderas was pressured in his speech and preoccupied with discussing UFO's, the existence of aliens, and visual hallucinations he has experienced. Mr. Balderas believes the "prosecutors and gang members" set him up to be incarcerated so the government can experiment on him and learn more about his connections to aliens and their spaceships. Mr. Balderas reported to the Harris County Juvenile Probation Department that opposing gang

members from Killough were after him as early as August 2001. (Harris County Records, p. 762).

- Mr. Balderas likely has frontal and parietal lobe brain damage/dysfunction, based on his poor performance on neurological screenings performed during Dr. Agharkar's examinations. Mr. Balderas's thought processes were tangential, he had difficulty switching from one topic or task to another, his insight and judgment were poor, and he had difficulty recalling a short story after fifteen minutes.
- Mr. Balderas's mood difficulties are compounded by his exposure to significant environmental trauma in childhood as well as physical and sexual abuse.
- Mr. Balderas exhibited a host of cognitive defects that are found in patients with significant central nervous system damage. Mr. Balderas demonstrated learning and memory deficits, as well as significant impairments on many measures of executive functioning strongly associated with damage and/or diminished development of the frontal lobe region of the brain and general neurological disease.
- According to Dr. Agharkar's interview of Mrs. Yancy Balderas conducted via Zoom on October 22 and 29, 2021, it is believed Mr. Balderas's mother drank while pregnant with Mr. Balderas. Mr. Balderas's mother reportedly dropped him on his head when he was a newborn infant. Mr. Balderas's stepfather would

hold his face down under water to drown him when he was about 8 years old in Mexico.

- Mr. Balderas has told Mrs. Yancy Balderas he hears voices and believes he is descended form an Egyptian prince. Since his incarceration in his late teens, he has often talked about witchcraft, ancient civilizations, an aliens. Mr. Balderas believed the State was spying on Mrs. Yancy Balderas though a mirror in her house and asked her to remove it. Mr. Balderas admitted to Mrs. Yancy Balderas that he heard voices, several years before his trial.
- The records available indicate a complex interplay of trauma, potential brain damage, a mood disorder, and a psychotic condition, all which require extensive work-up to determine the extent of Mr. Balderas's brain impairment.
- Mr. Balderas's manic and psychotic symptoms as recounted in his pre- trial jail medical records would have raised doubts as to Mr. Balderas's competency to stand trial and required additional follow-up.
- The psychological experts retained by trial counsel, Dr. Jolie Brams and Dr. Matthew Mendel, were both the wrong types of experts to integrate the abundance of mental health data in this case, misattributed symptoms of major mental illness as trauma rather than a confluence of psychiatric, neurologic and traumatic

factors. As such, their reports are unreliable and incomplete.

- Dr. Jolie S. Brams conducted a psychological consultation in September 2012 at the direction of Mr. Godinich, for mitigation purposes. (Brams & Associates Psychological Consultation Report, TDS-002452-72). Dr. Brams's report focuses mostly on sexual abuse rather than mental health and incorporates a report from Dr. Matthew Mendel, an expert in treatment of male sexual abuse victims. *Id*. Dr. Brams's report indicated that the sexual abuse Mr. Balderas suffered occurred at a critical and formative stage of his life, and that Mr. Balderas did not receive the type of mental health intervention he needed throughout his youth. *Id*.
- Dr. Brams also discussed the significance of Mr. Balderas's experiences with childhood neglect, parental abandonment, and physical abuse as additional sources of trauma, and hypothesized that Mr. Balderas's abuse of inhalants may have caused brain impairment. However, she did not recommend neurological or neuropsychological screening or testing, nor did she evaluate Mr. Balderas for other mood disorders or psychotic symptoms after she diagnosed him with Post- traumatic Stress Disorder. Further, Dr. Brams does not appear to have relied on any of the critical information concerning Mr. Balderas's diagnoses while at the Harris County jail. As such, the

accuracy and reliability of Dr. Brams's report is in question and is incomplete.

- Dr. Mendel was not provided with critical information about Mr.
- Balderas's psychiatric history and treatment, including treatment with antipsychotic and antidepressant medication. His examination of Mr. Balderas is therefore incomplete and unreliable.
- Based on the full neuropsychological battery performed by Dr. Ouaou on October 15, 2021 (discussed *infra*), Mr. Balderas demonstrates learning and memory deficits in addition to significant impairments on many measures of executive functioning strongly associated with damages to the frontal lobes of the brain. Damage to these areas would negatively impact Mr. Balderas's ability to rationally weigh and deliberate, inhibit his impulses, regulate his mood and emotions, memory functioning, and freedom from perseveration. Frontal lobe dysfunction is also implicated in symptoms of paranoia and psychotic disorders.
- Based on the nature of brain damage/ dysfunction revealed by neuropsychological testing, and that there have been no head injuries since the time of trial, it is likely Mr. Balderas's brain impairments were present at the time of his trial.
- At the time of trial, Mr. Balderas's psychotic and brain impairment symptoms

would have negatively impacted his ability to rationally assist trial counsel and his understanding of the charges and proceedings.

Undersigned counsel also retained Dr. Robert H. Ouaou, PhD ("Dr. Ouaou"), to assess Mr. Balderas's neurocognitive functioning secondary to a history of neurodevelopmental, neurological, and psychiatric disease and/or damage. Dr. Ouaou performed a full battery of neuropsychological tests on Mr. Balderas on October 15, 2021. (Ex. FF, Ouaou Report, Jan. 15, 2022., Ex. GG, Ouaou Report, Dec. 5, 2022) Based on Dr. Ouaou's evaluation of Mr. Balderas, with reference to his review of Mr. Balderas's Medical Records, Mental Health Records, Academic Records, Jail and Prison Records, Juvenile and Extraneous Offense Records, Psychological Report by Jolie S. Brams, PhD, Declaration of Bhushan S. Agharkar, MD, DFAPA, and Declarations of Lay Witnesses, Dr. Ouaou formed the following opinions and observations:

- Mr. Balderas has a history of severe childhood physical and sexual abuse, head injuries, inhalant abuse, and possible in utero alcohol exposure.
- Mr. Balderas suffered innumerable blows to the head from physical abuse, accidents, and youth boxing, many of which occurred during the developmental period and resulted in a loss of consciousness. Evidently, Mr. Balderas was dropped as an infant by his uncle and sustained a permanent skull depression.
- Mr. Balderas abused inhalants daily for one year beginning at age 14. Such inhalants included carbonator cleaners,

known to cause changes to the central nervous.

- Mr. Balderas has been diagnosed with PTSD, major depression, and psychosis.
- Mr. Balderas's IQ was below average (FSIQ = 87; 19th percentile). An estimate of premorbid IQ showed his IQ should be in the average range (105; 63rd percentile). This represents a significant decline form the expected baseline.
- Mr. Balderas exhibited intellectual declines and a host of cognitive deficits that are found in patients with significant central nervous system damage.
- Mr. Balderas demonstrated learning and memory deficits and significant impairments on many measures of executive functioning strongly associated with damage to and/or diminished development of the frontal lobe region of the brain as well as general neurological disease.
- Mr. Balderas likely suffered from severe etiologies of central nervous system damage that were present at the time of the alleged offense and trial. Behavioral and cognitive consequences of Mr. Balderas's history of abuse and trauma, head injuries, and other risk factors on a developing brain contributed to his behavior at the time of his offense and trial. The mental diseases suffered by Mr. Balderas were present well before and at the time of trial.

- Mr. Balderas exhibits evidence of residual cognitive deficits that are consistent with damage to the frontal-limbic areas of the brain, affecting judgment, reasoning, impulse control, problem solving, and rational decision making.
- Despite the prior psychological examiner's reports that Mr. Balderas suffered profound developmental damage at critical points in this life and had significant risk factors that cause brain damage, there was a failure to refer him to experts to further evaluate the impact of brain damage on Mr. Balderas's ability to competently participate in the trial proceedings.

LEGAL STANDARD

This Court's initial inquiry into a subsequent application under Article 11.071 is limited to whether the applicant meets the threshold showing required by § (5)(a). Mr. Balderas presents grounds for satisfying §§5(a)(1), (2), and (3).

In order for consideration of the merits to take place under § 5(a)(1), he need only show that: (1) the factual or legal basis for his current claims were unavailable at the time he file his previous application; and (2) the specific facts alleged, if established, would constitute a constitutional violation that would likely required relief from either the conviction or sentence. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007).

Under § 5(a)(2), to receive review of the merits, "an applicant must make a threshold, prima facie showing of innocence by a preponderance of the

evidence." *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008).

According to § 5(a)(3), a court may consider the merits of or grant relief based on the subsequent application if the application "contains sufficient facts establishing that . . . by clear and convincing evidence, but for the violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072." The § 5(a)(3) standard requires merely "a threshold showing of evidence that would be at least sufficient to support an ultimate conclusion, by clear and convincing evidence." *Ex parte Blue,* 230 S.W.3d 151, 163 (Tex. Crim. App. 2007).

CLAIMS FOR RELIEF

I. CLAIM I: THE STATE VIOLATED MR. BALDERAS'S DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND* AND ITS PROGENY

A. The State Has a Duty to Disclose Exculpatory and Impeachment Evidence to Defense Counsel

Under *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny, the State has a duty to disclose exculpatory and impeachment evidence to defense counsel. *See also Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011).

To protect a criminal defendant's right to a fair trial, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to disclose exculpatory and

impeachment evidence to the defense that is material to either guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Brady*, 373 U.S. at 83.

Under *Brady,* "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87.

Favorable evidence includes both exculpatory and impeachment evidence. *See, e.g., United States v. Bagley,* 473 U.S. 667, 676 (1985); *see also Giglio v. United States,* 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady* rule].").

To prevail on a *Brady* claim, an applicant must show (1) that the evidence at issue is favorable to the defense in that it is either exculpatory or impeaching; (2) the State or persons acting on behalf of the State failed to disclose this evidence to the defense; and (3) prejudice. *See, e.g., Strickler,* 527 U.S. at 281-82.]

When evaluating a *Brady* claim, materiality of the suppressed evidence is not considered on an item-by-item basis, but on the cumulative effect of the suppressed evidence. *Crawford v. Cain*, 248 F. App'x 500, 505 (5th Cir. 2007) ("[W]e must consider the materiality of the evidence *cumulatively*, in light of the record as a whole.") (emphasis in original).

B. History of *Brady* Requests and Disclosures

Prior to trial, on August 15, 2007, Judge J. Michael Wilkinson ordered the state to produce "all exculpatory evidence pursuant to *Brady v. Maryland*

and related cases." (Discovery Order, CCA Record, Vol. I, 00008-10, at 00008.)

On January 17, 2014, still apparently not having received *Brady* evidence, trial counsel made a motion for the production of exculpatory and mitigating evidence, including "any evidence, documentary or otherwise, which might undermine or tend to undermine the credibility of any state witness," "all exculpatory evidence which the prosecuting attorneys and their agents may have in their files," and "any evidence of any kind which is in any way mitigating. (Motion for the Production of Exculpatory and Mitigating Evidence, CCA Record, Vol. II, 00492-93.)

On or about August 13, 2015, State Habeas Counsel visited the State's office in-person to review the State's file. Counsel was given five out of eleven boxes of files, but were told that six were unavailable because they were in the process of being scanned. (Initial Application for Writ of Habeas Corpus, Jan. 15, 2016, Habeas Writ Record, Vol. I, 00002-3960.)

On October 8, 2015, State Habeas Counsel filed a Motion for Disclosure of Exculpatory and Impeachment Evidence. (Motion for Disclosure of Exculpatory and Impeachment Evidence, Oct. 8, 2015.)

On or about October 21, 2015, the State disclosed several boxes of information to State Habeas Counsel, that included the 23 pages of 2007 and 2008 Israel "Cookie" Diaz Notes (the "October 2015 Disclosure"). (Initial Application for Writ of Habeas Corpus, Habeas Writ Record, Vol. I, 00002-3960, at 00069.) On April 19, 2018, State Habeas Counsel filed a second Motion to Compel Disclosure of Exculpatory and Impeachment Evidence. (Motion to Compel Disclosure of Exculpatory and Impeachment Evidence,

Apr. 19, 2018, Habeas Writ Record, Vol. VII, 01956-69.)

On May 1, 2018, State Habeas Counsel filed a third Motion to Compel Disclosure of Exculpatory and Impeachment Evidence. (Renewed Motion to Compel Disclosure of Exculpatory and Impeachment Evidence, May 1, 2018, Habeas Writ Record, Vol. VII, 02066-85.)

On May 1, 2018, the State Habeas Court ordered the State to disclose: (1) the capital murder summary; (2) audio copies of Jail calls made by Cookie while incarcerated in the Harris County Jail, comprising approximately 16 CDs; (3) documents pertaining to communications and contact between Cookie and the Harris County District Attorney's Office, including Cookie's State File, Cause No. 1009713, Traci Bennett's Pretrial Interview Notes with Cookie, Cookie's 2006-2010 Harris County Jail Disciplinary Record; and (4) NCIC/TCIC for Cookie, as of May 3, 2018; (5) disclosure document dated May 7, 2018 pertaining to the procedural profile of Cookie's charge in cause no. 1050628. (Motion to Continue Evidentiary Hearing, May 8, 2018, Habeas Writ Record, Vol. VIII, 02251-58, at 02252.)

On May 7, 2018, state habeas counsel received the documents ordered by the State Habeas Court. (*Id.*).

On May 8, 2018, State Habeas Counsel requested a continuance to review the May 2018 Disclosures, citing the late disclosure and inability to open the Cookie jail audio files. The State opposed. The Court denied the continuance request. (*Id.*; Motion in Opposition to Delay of Evidentiary Hearing, May 8, 2018, Habeas Writ Record, Vol. VIII, 02259-64.)

On August 20, 2018, the State filed a self-styled *Brady* disclosure from a December 19, 2013 interview with Alejandro "Twin" Garcia (the "August 2018 Disclosures"). (State's Disclosure Pursuant to Tex. Code Crim. Proc. art. 39.14(h), (k), Aug. 20, 2018, Habeas Writ Record, 02960-61.) Twin told the State that, contrary to its star witnesses' testimony that Mr. Balderas had "confessed" to him, that Mr. Balderas never made any such confession:

> On December 19, 2013, prosecutors Traci Bennett, Caroline Dozier, and Mary McFaden met with witness Alejandro Garcia and Garcia's counsel Bob Loper. At this meeting, Garcia stated: he did not suspect that the applicant killed Eduardo "Powder" (*Id.*) Hernandez; the applicant did not talk to Garcia about killing Hernandez; and Garcia thought MS killed Hernandez.

(*Id.*)

On October 28, 2020, the State disclosed Prosecutor Mary McFaden's and Traci Bennett's underlying handwritten notes from the December 19, 2013 interview with Twin (Ex. HH, the "2013 McFaden Garcia Notes") (Ex. II, the "2013 Bennett Garcia Notes").[4]

On November 11, 2020, the State disclosed Prosecutor Caroline Dozier's underlying handwritten notes from the December 19, 2013 interview with Twin that state: "[Mr. Balderas] did not talk about killing Powder." (Ex. JJ, the "2013 Dozier Garcia Notes"). (Ex. JJ, 2013 Dozier Garcia Notes, at 8.)

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[4] The State has represented that it disclosed the 2013 Bennett Garcia Notes to State Habeas counsel sometime during the State Writ Proceedings but it is unclear when this occurred.

On November 25, 2020, the State disclosed: (1) handwritten notes with Angelina Quinones from July 15, 2010 (Ex. D, 2010 Quinones Notes); (2) handwritten notes with Angelina Quinones from January 24, 2006 (Ex. E, 2006 Quinones Notes); (3) handwritten and typewritten summary of notes with Guadalupe Sepulveda from August 8, 2014 (Ex. F, 2014 Sepulveda Notes); (4) handwritten notes with Yeni Rivas from August 4, 2014 (Ex. G, 2014 Rivas Notes); (5) typewritten summary of notes with Courtney Altimore from December 31, 2013 (Ex. H, 2013 Alitmore Notes; (6) handwritten notes with Kilyn (unclear spelling) Velasquez from January 3, 2014 (Ex. I, 2014 Kilyn Velasquez Notes); (7) typewritten summary with Myriam Flores from September 26, 2014 (Ex. J, 2014 Flores Notes); (8) typewritten summary with Brenda Velasquez from October 1, 2014 (Ex. K, 2014 Brenda Velasquez Notes); (9) handwritten notes with "Cueva" from December 19, 2005 (Ex. L, 2005 Cueva Notes); (10) handwritten notes with Roxanne Resendez from October 26, 2014 (Ex. M, 2014 Resendez Notes; (11) typewritten summary of notes from Karen and Wendy Bardales from January 20, 2014 (Ex. N, 2014 Bardales Notes); (12) typewritten summary of notes from Edgar Ferrufino dated February 10, 2014 (Ex. O, 2014 Ferrufino Notes); and (13) handwritten notes with Wendy and Karen Bardales from January 2014 (Ex. P, 2014 Handwritten Bardales Notes).

The 2010 Quinones Notes stated: "When I asked her about picking the three Δ's out in photospreads, she said that the cops already knew who they were after & were pushing her to choose their suspects. When I asked her if they put their finger on the person she needed to choose she didn't answer my question & just said that, 'Well, when you have one

white guy, a black guy & a Hispanic guy, you know who they are after.' I'm not sure what she meant, b/c the photospreads contain photos of nothing but Hispanic males." (Ex. D, 2010 Quinones Notes, at 1.)

On December 1, 2020, the State also disclosed prosecutor notes with: (1) handwritten notes with Cookie from January 27, 2014 (Ex. Q, 2014 Cookie Notes); (2) Karen and Wendy Balderas from February 11, 2014 (Ex. R, 014 Bardales Prosecutor Notes); (3) handwritten notes with Tommy Ruland from February 14, 2014 (Ex. S, 2014 Ruland Notes); (4) handwritten notes with Steve Guerra from January 23, 2014 (Ex. T, 2014 Guerra Notes); (5) handwritten notes with Rick Moreno from January 23, 2014 (Ex. U, 2014 Moreno Notes); (6) handwritten notes with Karen Balderas from January 20, 2014 (Ex. V, 2014 Karen Bardales Notes); (7) handwritten notes with Officer Grant from January 23, 2014 (Ex. W, 2014 Grant Notes); (8) handwritten notes with Victor Gonzalez from January 10, 2014 (Ex. X, 2014 Gonzalez Notes); (9) handwritten notes with Myriam Flores from December 3, 2005 (Ex. Y, 2005 Flores Notes); (10) handwritten notes with Karen and Wendy Bardales undated (Ex. Z, Undated Bardales Notes); (11) an email from Traci Bennett to herself summarizing an interview with Miriam Hernandez from September 21, 2013 (Ex. AA, 2013 Bennett Email); (12) handwritten notes with Edgar Ferrufino from February 10, 2014 (Ex. BB, 2014 Ferrufino Notes); (13) handwritten notes with Luis Garcia undated (Ex. CC, Undated Garcia Notes); and (14) typewritten summary of notes with Jose Espinoza from August 21, 2014 (Ex. DD, 2014 Espinoza Notes).

C. The State Withheld Impeachment Evidence as to its Star Witness, Israel "Cookie" Diaz

1. The undisclosed evidence that Cookie gave multiple versions of the alleged confession providing multiple contradictions that trial counsel was unable to confront Cookie with.

At trial, Cookie testified that he went to the crime scene the night of the murder and stood across the street with fellow LTC gang members, including Twin. Cookie testified that Mr. Balderas came up to him wearing a dark blue or black sweatshirt and khakis, hugged and kissed him, and joyfully told he "got him" while exchanging the magazine in a chrome gun. (26 RR 157.)

The Version Where There is No Confession. Also, within the October 2015 Disclosure, in the 2007 Notes, Cookie said that he met with LTC members on the night of the murder but does not mention Mr. Balderas being there or that he confessed. Instead, Cookie said: "[w]ent to the twins house while everyone else went to the funeral. Went to twins house to smoke weed – night of killing – everyone talked about it. Including the OGs. Muerto was there & talked a lot. Muerto said [ ] that's it – don't talk about it. Not a big deal to [Cookie]. Don't brag about these things b/c if you are a talker then you will be a snitch." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, at 00789-90.) Moreover, there is no mention that Balderas was wearing a blue or black sweatshirt or khakis, no mention of hugs or kisses or joy, or that Balderas was holding a chrome gun and exchanging the magazine.

The Version Where the Confession Was the Day After on the Phone. Within the October 2015 Disclosure, in the 2007 Notes, Cookie stated "[Mr. Balderas] *called [him]* the *day after* Powder killed & said 'we took care of that.'" (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, 00788 (emphasis added).) Moreover, there is no mention that Balderas was wearing a blue or black sweatshirt or khakis, no mention of hugs or kisses or joy, or that Balderas was holding a chrome gun and exchanging the magazine.

The Version Where the Confession Was the Night of the Murder at the Twins House—Not at the Murder Scene Exchanging Magazines and Without Hugs and Kisses. In the October 2015 Disclosure, in the 2008 Notes, Cookie states he "[m]et at Twins house later – talked about Powder's murder. [Mr. Balderas] said he took care of it." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, at 00794-95.) There is no mention that Mr. Balderas was wearing a blue or black sweatshirt or khakis, and no mention of hugs, kisses, joy, or that Balderas was holding a chrome gun and exchanging the magazine.

2. The undisclosed evidence that Cookie's testimony that he never spoke with prosecutors in 2007 or 2008 as to this case was a lie.

At trial, defense counsel asked Cookie about his interactions with the State prosecutors in 2007 and 2008. (26 RR 165-67.)

When asked what the subject matter of the conversation was, Cookie said "different things that were even not related to this." (*Id.* at 167:10-13.)

The 2007 and 2008 Notes would have shown this was a lie. Indeed, the notes show that Cookie spoke with prosecutors extensively on all "things" "related to" to the murder of Powder. (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804.)

3. The undisclosed evidence that Cookie told prosecutors that the LTC meeting on Powder occurred nine to ten months before the murder (not three to four Days before).

At trial, Cookie testified that the LTC meeting before Powder's murder was three or four days prior to the killing.

But within the October 2015 Disclosure, in the 2007 Notes, Cookie said the meeting about murdering Powder was "9-10 mos before Powder was killed." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, at 0788.)

The difference is critical. Powder was killed in December 2005. Nine months before that is April 2005 (counting April). And April 2005 is when Cookie was bonded out of jail on the crime that Powder "snitched" on him about. Accordingly, it would make sense that Cookie would call a meeting on Powder's betrayal of him as soon as he could.

4. The undisclosed evidence that Cookie told prosecutors that Powder's alleged transgression against the gang for hanging out with other gangs was punishable by a beating (not death).

At trial, Cookie testified on direct that "hang[ing] out with other gang members from our gang . . . a

rival gang, that's just unacceptable. That's the ultimate betrayal." (26 RR 146:23-147:2.) He testified that it was Powder's hanging out with other gang members that caused his death. (*Id.* at 149:7-153:1.)

On cross-examination, Cookie doubled-down on his testimony that Powder's hanging out with other gangs—and not his "snitching" on Cookie—was the reason for his murder. (26 RR 182:8-16.)

In withheld notes between prosecutors and Cookie on January 27, 2014, disclosed in December 2020, Cookie told prosecutors that "[i]f caught w/ other gang member get checked (beat up)." And if someone kept doing it, that would be "more serious." (Ex. Q, 2014 Cookie Notes, at 7.). He does not say that it was the "ultimate betrayal." (*See id.*)

5. The undisclosed evidence that Cookie wanted Powder dead.

During trial, Cookie testified that he "truly didn't care" what happened to Powder, even though he "snitched" on him. (26 RR 152-53.)

But within the October 2015 Disclosure in the 2007 and 2008 Notes, Cookie says "[t]he day he (Powder) lost his flag, he lost his life. . . Every body wanted Powder dead." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782- 804, at 00790.)

6. The undisclosed evidence as to Cookie's explanation of his discussion with Powder on the "snitching."

Also, at trial, Cookie testified that he was not concerned with Cookie testifying against him because he "lectured [Powder] and spoke to [Powder] and guided [Powder]" and convinced Powder "it was

pointless for" Powder to testify against him. (26 RR 180:17-25.)

But that is not what he told prosecutors just a month earlier.

In the January 27, 2014 notes, disclosed in December 2020, Cookie told prosecutors that he "met [Powder] when on bond (met in secret) told [Powder] if you tell on me, I'll tell on you," regarding the "Ice Cream Man . . . [Powder] took part in the Ice Cream Man murder." (Ex. Q, 2014 Cookie Notes, at 2-3.)

7. The undisclosed evidence that Cookie had a violent history with Powder.

Further, within the September 2020 Disclosure, the State disclosed an interview of Cookie with Harris County Officers on February 1, 2005, where Cookie stated that he had gotten into a fight with Powder prior to Powder "snitching" on him. Cookie told interviewers that it was never "okay" with him and Powder after that.

8. The undisclosed evidence that Cookie was desperate for a plea deal and had approached prosecutors repeatedly to help himself.

During the trial, defense counsel explored with Cookie the circumstances of his deal with prosecutors to testify against Mr. Balderas. (26 RR 166-76.)

Cookie testified that he "never asked [the prosecutors] for anything." (26 RR 168:15).

164. Defense counsel asked Cookie: "How did this deal come about then? Did the prosecution come to you through your attorney and say this what we got

to offer, or did you go to them and say this is what I will take if you need me to participate?" Cookie responded: "Actually they came to me and interviewed me one more time and they didn't tell me what it was." (26 RR 174:12-20.)

Cookie testified that he had just made a deal with prosecutors "[j]ust last week" before trial. (26 RR 174:9-11.)

But withheld evidence of Cookie's prison phone calls show this testimony was false, and the State failed to correct it. *See* U.S. Const. amend. XIV; *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *Blankenship v. Estelle*, 545 F.2d 510, 514-15 (5th Cir. 1977); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497-98 (5th Cir. 1993).

Instead, it was Cookie who had been desperately seeking a deal from prosecutors to save himself and had believed a deal had been made years prior to Mr. Balderas's trial.

In a call sometime eight years after his arrest, Cookie spoke with his father about how frustrated he was that it had been eight years that he was in prison awaiting trial. He asked his father whether his attorneys could get his trial date pushed forward. Cookie's father said that he spoke with Cookie's attorney who told him that he could attempt to push forward trial but the State would "give him court for the same charge." Cookie's father explained, that "they are like that because the agreement is the same. Your son will testify against him. For that reason, they won't make the same trial for your son. If your son was sent to trial, they would do it for the same charge, and they would charge him for life. They would leave him there for life." Cookie's father told him to wait and "hop[e] that things get resolved"

have "faith in God." Cookie said he lost his faith and his father told him it was "because you became desperate." Cookie lamented that he was in prison for 8 years and that he "wrote to the judge," he "wrote to the prosecutor," and that he was going to write to the "State Bar of Texas" so that they could "go to the prosecutors" and "pressure them" to get his trial scheduled. Cookie told his father that the prosecutors were "not so informed regarding the four visits that I had from the other prosecutors" where he "spoke with them for periods of two to three hours." Cookie told his father he had been trying to be patient, but "this is torturing my mind."

In another call with his mother and father, Cookie's father tells him to write a letter reminding prosecutors that "a deal had been made previously, and that you hope that they will continue to honor it, and you will continue in your position of collaborating and helping out." His father said, "if they had promised to continue with the deal, the agreement – to continue with the agreement, they even went there to visit you, and they went to speak together with your solicitor."

In another call with his brother-in-law, Cookie describes how prosecutors told him after they "get done with [Mr. Balderas], they are going ahead to make a deal or something." Cookie states the prosecutors are not going to take him to trial. Similarly, in another call with his uncle, Cookie affirms he has received a promise from prosecutors of an offer of a deal.

In two separate calls with his father and uncle, respectively, Cookie states he will not testify at Mr. Balderas's trial until he is offered a deal.

There are over 560 prison calls containing over a hundred hours of calls that were withheld until days before the May 2018 State Habeas Hearing.[5] State habeas counsel requested a continuance to review this material, citing trouble accessing these files, but the State Habeas Court refused.

Had this information not been withheld, it would have been used to impeach Cookie at trial and at the State Habeas Hearing.

D. The State Withheld Evidence Supporting the Defense Theory that Mr. Balderas Was Merely Holding the LTC Guns the Day He Was Arrested

When Mr. Balderas was approached on the day he was arrested, he was found carrying six firearms in a green plastic container, one of which the State claimed was the murder weapon. (28 RR 40.)

Testimony at trial indicated, however, that the LTC held guns collectively and it was Mr. Balderas's job to hold the guns. (30 RR 8:1-7, 29:12-13.)

Further testimony showed that Gumby had the green box that contained the murder weapon on the day Mr. Balderas was arrested and brought it to Mr. Balderas that very morning. (28 RR 177:3-179:3, 214:3-16.)

Mr. Balderas's theory at trial, therefore, was that Mr. Balderas was in possession of the gun because he was given the green container with the murder weapon that day by the real killer—Gumby.

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[5] The State should have turned these materials over without request, but to the extent these calls were available to trial counsel, their failure to request them prior to trial constitutes ineffective assistance.

Importantly, there was no testimony that Mr. Balderas's fingerprints were found on the murder weapon.[6] (30 RR 29:15-18.)

The State withheld evidence, however, that would have supported this exculpatory theory.

In the October 2015 Disclosure, the 2007 Notes include Cookie stating that, when Mr. Balderas and Silder were arrested, "[Silder] was helping Apache get rid of guns." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, at 00787.)

In the May 2018 Disclosure, the State disclosed notes from Prosecutor Bennett's interview with Twin in December 2013 in which he told prosecutors that "everyone gave [Balderas] guns to hold." (Ex. II, 2013 Bennett Garcia Notes, at 6.) Further, withheld notes with Cookie, disclosed in December 2020, would have

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[6] With regard to evidence of fingerprint *exclusions*, Houston Police Department has a history of not issuing reports on eliminations. *See The State of Texas v. Ronald Hamilton, Jr.*, Cause No. 0901049-B, ¶ 168 (180th Dist. Ct., Harris County, Tex., Oct. 30, 2002) (recounting in the Court's Findings of Fact in consideration of applicant's initial writ for Habeas Corpus that it was the practice of the Houston Police Department's crime lab to create supplemental offense reports when identifications were made, but not to make supplemental reports if exclusions were made). The trial court in *Hamilton* recommended relief, which the Court of Criminal Appeal rejected without disturbing or rejecting the trial court's findings of fact. *Ex Parte Ronald James Hamilton, Jr.*, No. WR-78,114-02 (Tex. Crim. App. Nov. 11, 2020) (Order) (not designated for publication). According to the trial court, Houston Police Department's policy of not documenting fingerprint exclusions led to the suppression of potential evidence that a defendant was excluded from leaving a print at a scene or on an item of evidentiary value. *See The State of Texas v. Ronald Hamilton, Jr.*, Cause No. 0901049-B, ¶ 97 (180th Dist. Ct., Harris County, Tex., Oct. 30, 2002).

supported the theory of collective gun use and impeached Cookie's trial testimony. At trial, when asked whether "passing guns back and forth," was a "common practice" in LTC, Cookie responded, "at first, when we were younger until they eventually find out about the – the gun shows that they have in different parts. And then everybody purchased their own." (26 RR 190: 14-19.)

But the undisclosed notes with Cookie show him saying "group would fight over guns." (Ex. Q, 2014 Cookie Notes, at 4.)

After Cookie answered that LTC no longer had a practice of sharing guns, trial counsel moved on. But had it possessed the January 27, 2014 notes, it would have been able to confront Cookie with this apparent contradiction.

This evidence would have supported the important defense theory that Mr. Balderas was merely in possession of the green box that day, despite the murderer being someone else, including Gumby or Cookie.

E. The State Withheld Impeachment Evidence That Police Were Playing "Where's Waldo" With Photo Lineups, Pressuring Witnesses to Identify Suspects on Photo Lineups, and Putting their Fingers on Photos of Suspects

At trial, the State presented evidence concerning Wendy Bardales's identification of Mr. Balderas. The testimony showed that the officers asked Wendy Bardales to place her finger over the top portion of each picture because the shooter was wearing a hood.

However, previously withheld evidence has shown that the officers investigating LTC at the time may

have been putting their own finger on the person that the witness needed to choose. (Ex. D, 2010 Quinones Notes, at 1.)

In November 2020, the State disclosed notes from an interview with Angelina Quinones dated July 15, 2010, stating: "When I asked her about picking the Δ's out in photospreads, she said that the cops already knew who they were after & were pushing her to choose their suspects. When I asked her if they put their finger on the person she needed to choose she didn't answer my question & just said that, 'Well, when you have one white guy, a black guy & a Hispanic guy, you know who they are after.' I'm not sure what she meant, b/c the photospreads contain photos of nothing but Hispanic males." (Ex. D, 2010 Quinones Notes, at 1.)

Also in November 2020, the State disclosed notes from an interview with Ms. Quinones dated January 24, 2006, stating that an officer showed her a photospread and then "guided her hand to the photo (kind of like playing Where's Waldo." She said the officer was "not really asking if they could ID – telling them. Very clear – said only one on each spreadsheet." (Ex. E, 2006 Quinones Notes, at 3-4.)[7]

These notes would have provided strong impeachment evidence as to the identification of Mr. Balderas by Wendy Bardales. Counsel could have used these notes to call into question the

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[7] While the State previously issued a *Brady* disclosure on September 18, 2013 as to Ms. Quinones 2006 statements, it did not include the underlying notes containing the "Where's Waldo" allegation or the specific allegations that the officer was "telling" her which photograph to pick. Nor did the September 2013 Brady Disclosure identify the 2010 interview or the underlying notes.

identification by showing that perhaps the officers had *themselves* put their finger on Mr. Balderas. Indeed, these notes are contemporaneous to the same investigation of Mr. Balderas in the Powder murder and have an officer pointing to Mr. Balderas and pressuring Ms. Quinones to identify him. The defense could have argued the same happened here, and could have explored this with the officers at trial, but did not.

Worse it deprived Trial Counsel of an opportunity to investigate this allegation as to Mr. Balderas's case. These notes identify a potential practice of the investigating officers playing "Where's Waldo" with witnesses and putting their finger on pictures and pressuring witnesses to make identifications.

Wendy Bardales' identification testimony was at the forefront of the State's evidence. The State spent a significant amount of time in their closing argument arguing that Mr. Balderas was the killer because of Wendy Bardales's identification. This evidence would have significantly undermined that argument.

F. The State Withheld Exculpatory Evidence As to MS-13's Potential Involvement in the Murder

During the State Habeas Writ the State disclosed audio interviews with Efrain "Hairless" Lopez where he stated, in two separate interviews on December 16, 2005, that "everybody was saying it was MS[-13]."

Also during the State Habeas Writ, the State also provided an audio interview with Cookie who stated during his original interview on December 16, 2005, that he had heard "a lot of people is saying cause he went out with a girl that was MS."

Within the August 2018 Disclosure, the State disclosed that Alejandro "Twin" Garcia had stated in December 2013 that he believed "MS killed [Powder]." (August 2018 Disclosure, Habeas Writ Record, Vol. 10, 02960-61.)

In November 2020, the State disclosed notes with Twin that stated: "Powder's brother came crying the next day & said they killed his brother. . . . Said MS killed him." (Ex. JJ, 2013 Dozier Garcia Notes, at 1.)

The State never investigated the potential that MS-13 committed the crime or had any involvement.[8] It never even told defense counsel that it had information pointing to MS-13.

While most of the evidence pointed to either Gumby or Cookie being involved in the murderer, the failure to disclose this alternative suspect, and the failure of the State to investigate, deprived trial counsel of a bedrock defense tactic of discrediting the police investigation to raise reasonable doubt. *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir.1985) ("the evidence withheld by the prosecutor in today's case carried within it the potential both for the destruction of Alexander's identification of Lindsey and the discrediting, in some degree, of the police methods employed in assembling the case against him"); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th

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[8] On August 21, 2020, the undersigned federal habeas counsel requested that the Harris County DA's office produce "documents concerning investigations into leads on other suspects," and in particular related to the leads provided regarding MS-13. (Email Chain Between DLA and Brian Rose, Oct. 29 to Nov. 2, 2020.). The Harris County DA stated it produced all investigation files. (*Id.*) As none of the underlying files show any such investigation into MS-13, it appears that no such investigation was undertaken.

Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation."); *Orena v. United State*s, 956 F. Supp. 1071, 1100 (E.D.N.Y.1997) (as "the O.J. Simpson case and many others demonstrate, destroying the bona fides of the police is a tactic that has never lost its place in the criminal defense reasonable doubt armamentarium.").

G. The State Withheld Exculpatory Evidence that the Tagging on the Wall of the Crime Scene Had Nothing to Do with Powder

At trial, the State presented testimony that Powder had met an LTC member earlier in the day at the apartment, who then left and allegedly called members of LTC to tell them where Powder was, and then other members of LTC had put graffiti the wall of the apartment to let the killer know where Powder. (*See* 24 RR 50:18- 51:3; 25 RR 28:10-19; 26 RR 253:10-254:12; 46 RR 98, State's Exhibit 41.)

In particular, the State elicited testimony from Karen Bardales that this graffiti had appeared only after she and Powder had left the apartment and then came back later that day. (24 RR 50:18-51:3.) She testified that when she and Powder returned and they noticed this, Powder "put his head down and we just walked back to the apartment." (*Id.* at 51:1-3.) Karen testified that, after Powder saw it, "he knew something was going to happen." (*Id.* at 53:4-9.)

The State also elicited testimony from Edgar Ferrufino on whether this tagging had "special significance" to him and he responded, "well, I mean, taking into consideration what happened, you know what I mean?" (25 RR 28:10-19.)

The State's implication, accordingly, was that LTC had tagged the apartment to let the killer know where to find Powder. Indeed, it drove that home in its closing statement where it argued that there was "one problem" for the gang after "decid[ing] his fate," which was that "the gang didn't know where [Powder] was" because he "had run away from home." The State argued, "how did they find him . . . the guy in the red HEB shirt [Jose Vazquez]." (30 RR 53:9-24.)

The State withheld evidence, however, that expressly rebutted this theory from its star witness, Cookie. In notes with Cookie on January 27, 2014, disclosed in December 2020, Cookie told prosecutors that "tagging had ∅ to do w/ Powder – saying LTC territory coincidence." (2014 Cookie Notes, at 6.) The notes further show Cookie telling prosecutors, "insane amount of guns. Always fighting over who was going to hold them." (*Id.* at 11.)

Trial counsel had no access to this information and therefore no opportunity to bring this fact in front of the jury, which would have been especially powerful coming from the State's star witness Cookie.

H. The State Withheld Impeachment Evidence that the Officer Who Testified About Mr. Balderas's Alleged Infraction of Having Extra Medication Was Terminated for Conduct Resulting in the Death of an Inmate

At the punishment phase of trial, the State presented testimony from former Harris County detention officer Christopher Pool. (*See* 42 RR 247-55.)

Mr. Pool's testimony centered on a disciplinary citation that he issued to Mr. Balderas on May 29, 2010, while Mr. Pool was still employed as a detention officer. (*Id*. at 253.) Mr. Pool testified that during a routine monthly cell search, he located medication—specifically, Seroquel and Klonopin, which Mr. Balderas had been prescribed to treat his diagnosed mental health conditions—in Mr. Balderas's cell, along with a pen and two razors. (*Id*. at 249-53). Mr. Pool testified that he determined that the extra medication should be written up as a "major offense" ("misuse of medicine") rather than as a minor offense for possession of contraband because he felt the "higher offense" designation was "more appropriate" under the circumstances. (*Id*. at 253.)

Notably absent from the State's examination of Mr. Pool was any inquiry into the circumstances under which he left his Harris County employment. (42 RR 247- 53.). On cross-examination, Mr. Pool revealed that he had been terminated from the Harris County Sheriff's Office for "deception" and "failure to render aid" to an injured inmate, who subsequently died as a result of his injuries. (*Id*. at 254-55). Mr. Pool did not offer any further testimony regarding the circumstances of his termination.

As part of its post-conviction investigation, the Office of Forensic and Capital Writs obtained copies of Mr. Pool's Termination Letter and associated Separation of Licensee Form. (Pool Termination Letter, Aug. 21, 2012, Habeas Writ Record, Vol. III, 00918-928; Pool Separation of Licensee Form, Aug. 24. 2012, Habeas Writ Record, Vol. III, 00930.) These documents reveal that Mr. Pool was terminated as a consequence of an investigation into the death of a mentally ill, 72-year-old inmate. The investigation revealed that Mr. Pool "used force" against this

inmate (punching him in the face), left him "unmoving and unresponsive" and "face down" on the floor of his cell, and made no effort to secure any medical assistance to attend to his injuries. The inmate died six days later as a result of these injuries.

The investigation report found that Mr. Pool was "untruthful" and made false statements, including flatly contradictory claims in sworn statements over the course of the investigation. The report concluded that Mr. Pool failed to "tell the truth throughout the course of [the] investigation." In addition to his failure to render aid, it was this "untruthfulness" that formed the basis for his "dishonorable discharge." (Pool Termination Letter, Aug. 21, 2012, Habeas Writ Record, Vol. III, 00918-928; Pool Separation of Licensee Form, Aug. 24. 2012, Habeas Writ Record, Vol. III, 00930.) Sheriff Adrian Garcia described Mr. Pool's actions as "a gross neglect of duty" that "discredits you, the Sheriff's Office, and its employees." (Pool Termination Letter, Aug. 21, 2012, Habeas Writ Record, Vol. III, 00918-928.)

Mr. Pool's termination for "untruthfulness" and making false statements plainly qualifies as impeachment evidence, yet there is no indication in the record that the State disclosed this information to the defense. On cross-examination, defense counsel elicited testimony that Mr. Pool had been terminated from his employment, but without this material context, was unable to establish the details of Mr. Pool's termination.

I. The Withheld Evidence Prejudiced Mr. Balderas and There is a Reasonable Probability That the Result of the Trial Would Have Been Different Had the Evidence Been Disclosed

As demonstrated above, the State repeatedly withheld evidence that infected the entire trial and all of its major witnesses. The cumulative effect of all such evidence withheld raises a reasonable probability that its disclosure would have produced a different result. *See Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

The withheld evidence casts doubt on all three pieces of evidence that the State relied upon to convict Mr. Balderas: (1) Wendy Bardales's photospread identification; (2) Cookie's testimony that Balderas "confessed" to him; and, (3) that the gun was in the green container found with Balderas when he was arrested.

First, the withheld evidence would have called into doubt the first pillar of the State's evidence: Wendy Bardales's identification. (30 RR 33-50.)

The State argued "Wendy Bardales. She saw the defendant do it. She's the only one who can come in here and testify as to the identity of the shooter." (30 RR 36:3-8.) Indeed, the State went on, "Wendy was the only one who did actually tell the police what she saw." (*Id.* at 36:24-25.) And, of course, the State took considerable pains to try and explain away the many contradictions and the issues with her photo identification, including the multiple attempts of officers to have her identify with certainty anyone. (*Id.* at 39:12-43:3.) The State concluded "she was positive when she made her identification eight years ago." (*Id.* at 47:16-17.)

The jury sent multiple notes regarding Wendy Bardales's testimony and the photospread identification:

a. The jury specifically requested Wendy's statements and testimony and asked to see "both photo arrays that were shown to Wendy and admitted into evidence." (Jury Notes, CCA Record, Vol. XII, at 03286, 03292.)

b. The jury also requested to "hear when the defense asked Officer Rulen if he would question Wendy's credibility if she knew [Mr. Balderas] prior to the incident." (*Id.* at 3295.)

c. "Point or statement in dispute: [Officer Ruland's] belief that he had a positive identification on December 12 and his communication or lack of communication with the district attorney's office." (Jury Note, CCA Record, Vol. XII at 003305.)

d. "Point or statement in dispute: How did Officer Cunningham ask about and record the statement 'I have never seen him before' according to his testimony." (*Id.* at 03314.)

If her testimony was tainted by an officer putting his own finger on the photograph, however, then, as the State acknowledged, there was not another witness who identified Mr. Balderas as the shooter.

Second, the withheld evidence would have called into doubt the second pillar of the State's evidence: the Cookie testimony that Mr. Balderas confessed outside the scene of the crime wearing clothing similar to those identified by the witnesses. In its closing argument, the State argued: "[H]ow else do

you know that Juan Balderas is the killer? Israel ["Cookie"] Diaz. He told you. Juan Balderas told [Cookie] that he got him, that he killed Powder." (30 RR 48:11-14.)

Indeed, during deliberations, the jury sent five notes requesting exhibits or read-back of testimony relevant to Cookie's account of the night in question:

- "Point or statement in dispute: Would like to hear [Cookie's] testimony about receiving phone call to go to crime scene and who was across the street from the crime scene right after Powder was killed. (Jury Note, CCA Record, Vol. XII, at 3291.)
- "Point or statement in dispute: After incident, Cookie's testimony about what [Mr. Balderas] was wearing." (*Id.* at 3298.)
- "Point or statement in dispute: Cookie's testimony where he said [Mr. Balderas] was changing or switching magazines during the gathering across the street right after the incident." (*Id.* at 3302.)
- "Point or statement in dispute: In Cookie's testimony, did he describe the weapon apache had at the meeting across the street right after the incident of Powder's death?" (*Id.* at 03307.)

The details of the confession, including its location and time, were thus of critical importance to the jury. That the 2007 and 2008 Notes state that the confession happened somewhere and sometime else undermines Cookie's testimony on this critical piece of evidence, which included Cookie stating that Mr. Balderas hugged and kissed him and was joyful about the murder while switching magazines in a chrome

gun (a gun resembling the murder weapon). There is none of that in the 2007 and 2008 Notes and its absence could have been used to call into question Cookie's testimony.

Moreover, that the alleged confession happened elsewhere at a different time or even through a phone call undermines Cookie's testimony that Balderas was wearing a dark sweatshirt and khakis after the murder. That is critical because Cookie's testimony about Mr. Balderas wearing those articles of clothing corroborated testimony from the shooting witnesses (Edgar Ferrufino and Karen and Wendy Bardales) who testified the shooter was wearing khakis and a dark sweatshirt. Indeed, the jury had asked "Point or statement in dispute: According to her testimony, what did Karen [Bardales] describe about the physical description of the shooter or any description of his clothing." (Jury Note, CCA Record, Vol. VII, at 03315.)

Cookie's testimony of a confession is also undermined by Twin's statement. Cookie testified that Garcia was with him during the alleged confession outside the murder. (26 RR 155-159.) But Garcia told Prosecutors that Balderas never "talk[ed] to [to him] about killing [Powder]; and [he] thought MS killed [Powder]." (August 2018 Disclosure.)

Further, the August 2018 Disclosure provided a potential lead into an alternative theory—that MS-13 may have been involved in the murder. Because trial counsel was never presented with this evidence, they had no opportunity to look into any potential leads or formulate a theory. *See Carrillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1226 (9th Cir. 2015) (it is the "prerogative of the defendant and his counsel—and not of the prosecution—to exercise judgment in

determining whether the defendant should make use of it"); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 306 (3d Cir. 2016) ("There is no requirement that leads be fruitful to trigger disclosure under *Brady*, and it cannot be that if the Commonwealth fails to pursue a lead, or deems it fruitless, that it is absolved of its responsibility to turn over to defense counsel *Brady* material.").

Further, the August 2018 Disclosures deprived trial counsel of pointing to the State's failure to pursue an alternative lead that MS-13 might have committed the murder. *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir.1985); *Bowen*, 799 F.2d at 613 ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation."); *Orena v. United State*s, 956 F. Supp. 1071, 1100 (E.D.N.Y.1997) (as "the O.J. Simpson case and many others demonstrate, destroying the bona fides of the police is a tactic that has never lost its place in the criminal defense reasonable doubt armamentarium.").

Third, the withheld evidence would have called into doubt the third pillar of the State's evidence: that Mr. Balderas was in possession of the murder weapon when it fell out of a green box he was carrying.

The State argued, "how else do you know that Juan Balderas killed [Powder]? He was caught with the gun that killed [Powder]." (30 RR 56:14-16.) The State returned to the point again to drive it home: "The defendant was caught with the murder weapon. And that's how you know that Juan Balderas is the killer." (*Id.* at 58:1-3.) In reality, Mr. Balderas was caught carrying a green container that had the

murder weapon inside it, and none of his fingerprints were found on the gun.

Indeed, the theory at trial, supported by testimonial evidence, was that LTC held guns collectively and it was Mr. Balderas's job to hold the guns. (26 RR 190; 30 RR 8:1-7, 29:12-13.) And, further, that Gumby held this green box on the day Balderas was arrested and brought it to Balderas that very morning. (28 RR 177:3- 179:3, 214:3-16.)

Mr. Balderas's theory at trial, therefore, was that Mr. Balderas was in possession of the gun because he was given the green container with the murder weapon that day by the real killer—Gumby.

The jury signaled the importance of this point:

a. "Point or statement in dispute: Can we have the pictures of the green tote with the guns." (Jury Note, CCA Record, Vol. XII, at 03301.)

b. "Point or statement in dispute: When Cookie talked about how LTC shared guns or passed them around." (*Id.* at 03319.)

The State withheld evidence, however, that would have supported Mr. Balderas's theory. In the 2007 Cookie Notes, he told police that: "[Silder] was helping Apache get rid of guns." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, at 00787.)

The State also withheld evidence from Prosecutor Bennett's interview with Twin in December 2013 in which he told prosecutors that "everyone gave [Balderas] guns to hold." (2013 Bennett Garcia Notes, at 6.)

Accordingly, the State withheld significant evidence calling into doubt all three pillars of its evidence, and there is a reasonable possibility that had it been disclosed, the outcome may have been different. Indeed, the jury was originally deadlocked until it received an *Allen* charge. (Jury Note, CCA Record, Vol. XII, at 03312 ("We are deadlocked. We agreed that we are not to 'strong arm' each other to change cotes and have exhausted our questions over testimony and evidence.").)

The State also withheld evidence calling into doubt the truthfulness of Christopher Pool's testimony, which was presented during the punishment phase. It is highly likely that the jury considered Mr. Pool's false testimony that he had been "cleared" of deception and untruthfulness in evaluating his credibility as a witness, and thus in assessing the weight to give his testimony regarding Mr. Balderas's misconduct. Had the State corrected Mr. Pool's testimony, the jury would have seen a pattern of deception and dishonesty likely to significantly impact its perceptions of Mr. Pool's credibility.

The State presented Mr. Pool's testimony and the related disciplinary citation as evidence in support of its argument on the first special issue, which asks whether there is probability that a defendant will commit future criminal acts of violence that would pose a continuing threat to society. *See* Tex. Code Crim. Proc. art. 37.701 § 2(b)(1), (e)(1). Unless the jury finds that this probability exists beyond a reasonable doubt, it is not permitted to impose the death penalty.

As a State employee charged with maintaining safety and order in the prison, Mr. Pool's testimony on this issue likely carried considerable weight with

jurors unaware of his pattern of dishonesty and deception.

Mr. Pool's impact on the proceedings was significant. State witness Sergeant David Davis repeatedly referred to Mr. Pool's "misuse of medicine" citation in discussing Mr. Balderas's disciplinary history. Because the State failed to correct Mr. Pool's false testimony, the jury lacked the necessary context to evaluate the veracity of Mr. Pool's testimony regarding that incident or the degree to which Mr. Pool's conclusions regarding that incident should be trusted.

Accordingly, Mr. Balderas's conviction and death sentence must be reversed.

J. Claim I Is Reviewable Under Article 11.071 §§ 5(a)(1), (2) and (3)

Claim I is authorized under Article 11.071, § 5(a)(1) of the Texas Code of Criminal Procedure because the materials were disclosed nearly ten months after the prior state writ was denied. While Mr. Balderas raised a Brady claim in his Initial Application for Writ of Habeas Corpus based on available to him at the time, this new Claim I is also based on exculpatory materials that was not previously disclosed. Claim I incorporates both the evidence previously available and the newly disclosed evidence because *Brady* claims are analyzed based on the cumulative effect of the suppressed evidence. *Crawford v. Cain*, 248 F. App'x 500 (5th Cir. 2007).

The Initial Application for Writ of Habeas Corpus was filed on January 15, 2016. The TCCA issued a *per curiam* order denying relief on December 18, 2019. Mr. Balderas, however, had been seeking these materials as early as 2007. (*See* Am. Pet. ¶¶ 239–

246.) Prior to trial, on August 15, 2007, Judge J. Michael Wilkinson ordered the state to produce all exculpatory evidence pursuant to *Brady v. Maryland* and related cases." (Am. Pet. ¶ 239.) On January 17, 2014, still apparently not having received *Brady* evidence, trial counsel made a motion for the production of exculpatory and mitigating evidence. (Motion for the Production of Exculpatory and Mitigating Evidence, CCA Record, Vol. II, 00492-93.) State Habeas Counsel filed three successive Motions for Disclosure of Exculpatory and Impeachment Evidence. (Motion for Disclosure of Exculpatory and Impeachment Evidence, Oct. 8, 2015; Motion to Compel Disclosure of Exculpatory and Impeachment Evidence, Apr. 19, 2018; Renewed Motion to Compel Disclosure of Exculpatory and Impeachment Evidence, May 1, 2018.)

Despite reasonable diligence and repeated attempts by Trial and State Habeas Counsel to receive all impeachment and exculpatory evidence, it wasn't until September, October, November, and December 2020 that the disclosures at issue in Claim I were actually produced.

As such, the facts underlying Claim I were unavailable, despite the exercise of reasonable diligence, and could not have been presented previously in Mr. Balderas's initial application.

Moreover, critical and voluminous evidence was disclosed to OCFW only four days prior to the evidentiary hearing on Mr. Balderas's Initial Application for Writ of Habeas Corpus including his *Brady* claim. OCFW requested a continuance to review the disclosed materials given that the evidentiary hearing was scheduled for just four days later. The request was denied. This evidence also

support authorization of Claim I under Article 11.071, § 5(a)(1) of the Texas Code of Criminal Procedure because they were not reasonably available to Mr. Balderas at the time of his Initial Application. In any event, these materials are properly considered as incorporated into Claim I because *Brady* claims are analyzed cumulatively. *Crawford v. Cain*, 248 F. App'x 500 (5th Cir. 2007).

Further, to overcome the second hurdle in Section 5(a)(1), the Applicant must allege sufficient specific facts that, if proven, establish a federal constitutional violation sufficiently serious as to likely require relief from his conviction or sentence. *See Campbell*, 226 S.W.3d. 418 at 422.

Here, with respect to Claim I, Mr. Balderas alleges that the State failed to disclose a tidal wave of exculpatory and impeachment evidence to defense counsel in violation of *Brady* and its progeny. *See supra*. The specific facts alleged in support of Claim I—which include contradictory testimony from Cookie on the circumstances of the "confession," evidence that another member supposedly present at the confession stated that Mr. Balderas never confessed, and evidence that the officers were playing "Where's Waldo" with witnesses and putting their fingers over suspects—establish a violation of Mr. Balderas's right to a fair trial.

Alternatively, authorization is proper under Article 11.071, § 5(a)(2) for Claim I.

The Section 5(a)(2) requirement is interpreted as a showing that the applicant is "actually innocent of the crime of conviction." *Guevara v. Stephens*, No. H-08- CV-1604, 2016 WL 305220, at *2 (S.D. Tex. Jan. 26, 2016). Based on the previous record and the newly available evidence further impeaching the

credibility of the State's star witness, Cookie, and calling into question to propriety of investigating officers' photographic lineup practices, Mr. Balderas presents evidence that it is more likely than not that no reasonable juror would find Mr. Balderas guilty beyond a reasonable doubt.

Finally, authorization is proper under section 5(a)(3) if the applicant shows by clear and convincing evidence a constitutional violation but for which no rational juror would have answered at least one of the statutory special punishment issues in the State's favor. *Ex parte Blue*, 230 S.W.3d 151, 160–61 (Tex. Crim. App. 2007). Both Mr. Balderas's future dangerousness and the balance between dangerousness and mitigation are altered by the perjured testimony, and no rational juror would have sentenced Mr. Balderas to death in the absence of that testimony.

II. CLAIM II: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO RAISE THE ISSUE OF MR. BALDERAS'S MENTAL COMPETENCY

A. Trial Counsel's failure to object to Mr. Balderas's competency deprived Mr. Balderas of his due process right to a competency hearing and harmed Mr. Balderas because it is reasonably probable that Mr. Balderas was incompetent at the time of trial.

Due process prohibits prosecution of a defendant who is not competent to stand trial. *Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990).

Competency to stand trial is measured by the two-part *Dusky* standard. A defendant is only competent

to stand trial if: (1) "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "he has a rational as well as factual understanding of the proceedings against him." *Dusky v. U.S.*, 362 U.S. 402, 402 (1960).

"Where substantial evidence is presented raising an issue as to the defendant's competency, a defendant is constitutionally entitled to a hearing on their competence to stand trial." *Green v. Davis*, 479 F. Supp. 3d 442, 507 (S.D. Tex. 2020) (*appeal filed*, *Green v. Lumpkin*, (5th Cir.2020) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)).

"[W]here counsel notes evidence raising a bona fide doubt as to a defendant's competence, counsel has a duty to request a competency hearing." *Green,* 479 F. Supp. 3d at 507 (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975)). "Trial counsel provides deficient performance if he fails to investigate a defendant's medical history when he has reason to believe that the defendant suffers from mental health problems." *Roberts v. Dretke*, 381 F.3d 491, 498 (5th Cir. 2004) (citing *Bouchillon*, 907 F.2d at 597).

To show prejudice, a defendant "need only demonstrate a 'reasonable probability' that he was incompetent, 'sufficient to undermine confidence in the outcome.'" *Bouchillon*, 907 F.2d at 595 (quoting *Strickland*, 466 U.S. at 694). "This is a lower burden of proof than the preponderance standard." *Bouchillon*, 907 F.2d at 595.

B. Considering the ample indicia of Mr. Balderas's mental illness and brain impairment, objectively reasonable counsel should have formed a doubt about Mr. Balderas's competence.

Evidence which raises a bona fide doubt as to a defendant's competence is not fixed in any rigid set of factors. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." *Drope*, 410 U.S. at 180. The *Drope* court further noted that there are "no fixed or immutable signs which invariably indicate the need for further inquiry;" instead, "the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.*

Substantial evidence, readily available to trial counsel, would have raised the issue as to Mr. Balderas's competency. Specifically:

- Mr. Balderas has a family history of mental illness. (See Jesus Balderas Aff., Habeas Writ Record, Vol. II, 00476-483, at 00477 ¶ 6; Vicky Mirafuentes Aff., Habeas Writ Record, Vol. II, 00589-613, at 00608 ¶ 27; German Enriquez Aff., Habeas Writ Record, Vol. II, 00537-00556, at 00548-00549 ¶¶ 2, 4-6.)
- Mr. Balderas has a permanent skull depression, the result of reported child-hood trauma. (See Ex. EE, Agharkar

Report, Jan. 17, 2022, at 4; Ex. FF, Ouaou Report, Jan. 15, 2022, at 2.)

- Mr. Balderas was diagnosed with adjustment disorder with disturbance in conduct, in February 2001. (Harris County Sheriff's Office Records ("HCSO Records"), Feb. 15, 2001, TDS-000001-001140, at TDS- 000759-761.)
- In May 2002 he was diagnosed with Axis I: Oppositional defiant d/co and was placed at Riverside Hospital for inpatient substance abused treatment. (*See* Mental Health and Mental Retardation Authority of Harris County Records ("MHMRA Records"), May 13, 2002, TDS- 001197-001281, at TDS-001201 and TDS-001210-1216.)
- In February 2008 Mr. Balderas was diagnosed with mood D/O NOS R/O (Rule out) schizoaffective d/o NDS with depressed mood. He was Axis II: antisocial traits and GAF-38. (HCSO Records, TDS-000001- 001140, at TDS-000746-749.)
- In May 2009, Mr. Balderas was diagnosed with bipolar D/O NOS (not otherwise specified) with psychosis, generalized anxiety disorder, and polysubstance dependence. (HCSO Records, TDS-000001-001140, at TDS-000824-825.)
- In October 2009, Mr. Balderas reported having A/V hallucinations and that he could "feel an evil presence." (HCSO Records, TDS-000001- 001140, at TDS-000829.) He also said he was "having

nightmares," and "Satan is taunting him." (*Id*.)

- Mr. Balderas took several different types of medications for his depression, including Lexapro, Seroquel, Zoloft, Paxil, Klonopin, and Celexa, with varying success and with some side effects. (HCSO Records, TDS-000001-001140, at TDS-000833 and TDS-000867.) At certain points he refused to take his medications routinely. (*Id*. at TDS- 000868.)
- In April 2012, Mr. Balderas was diagnosed with MDD with psychotic features and continued on a variety of antidepressants throughout 2013. (HCSO Records, April 18, 2012, TDS-000237.) In July 2013, Mr. Balderas reported suicidal ideation/ thoughts, and admitted that he kept his meds in order to complete a suicide attempt. (HCSO Records, at TDS-000174.) At the time he was reporting moderate symptoms of visual hallucinations and mentioned that he has a history of seeing the shadows and hallucinations since he was a child. (Id. at TDS-000185.)

In sum, before Mr. Balderas's judgment and sentence of death was rendered on March 14, 2014, trial counsel had access to Mr. Balderas's long history of mental illness diagnoses, history of behavior consistent with those diagnoses, and periods of refusing to take his prescribed medication.

Undersigned counsel hired Dr. Bhushan Agharkar, a psychiatrist with extensive experience treating a wide range of conditions, to evaluate Mr. Balderas. Dr. Agharkar performed two psychiatric evaluations

of Mr. Balderas, on May 27, 2021 and July, 29 2021. (See Ex EE, Agharkar Report, Jan. 12, 2022.) Based on his evaluation, Dr. Agharkar recommended a full neuropsychological battery be performed to elucidate the existence and extent of organic brain damage. Undersigned counsel hired Dr. Robert H. Ouaou, PhD, who conducted such testing of Mr. Balderas on October 15, 2021. (See Ex. FF, Ouaou Report, Jan. 15, 2022.)

Based on Dr. Agharkar's evaluation of Mr. Balderas, with reference to his review of Mr. Balderas's juvenile records, school records, Harris County mental health record, Texas Department of Corrections mental health records, family history documents, trial transcripts, and the psychological reports of Jolie S. Brams, PhD., and Matthew Mendel, PhD, and the neuropsychological report by Dr. Robert H. Ouaou, PhD, Dr. Agharkar formed the following opinions and observations:

- Mr. Balderas has a long history of significant and pervasive mental health difficulties. He was diagnosed with Bipolar Disorder and Major Depression with Psychotic Features while incarcerated in the Harris County jail.

Mr. Balderas currently suffers from Schizoaffective Disorder, Bipolar Type, and Post-Traumatic Stress Disorder (PTSD). There is also evidence he suffers from Organic brain impairment.

- Mr. Balderas's Schizoaffective Disorder, Bipolar Type, is indicated by Mr. Balderas's history of depressive episodes, endorsement of hallucinations, paranoid and grandiose delusions, and disorganized and tangential thought processes. During Dr. Agharkar's interviews, Mr. Balderas was pressured in his speech and preoccupied with discussing UFO's, the existence of aliens, and visual hallucinations he has experienced. Mr. Balderas believes the "prosecutors and gang members" set him up to be incarcerated so the government can experiment on him and learn more about his connections to aliens and their spaceships.
- Mr. Balderas likely has frontal and parietal lobe brain damage/dysfunction, based on his poor performance on neurological screenings performed during Dr. Agharkar's examinations. Mr. Balderas's thought processes were tangential, he had difficulty switching from one topic or task to another, his insight and judgment were poor, and he had difficulty recalling a short story after fifteen minutes.
- Mr. Balderas's mood difficulties are compounded by his exposure to significant environmental trauma in childhood as well as physical and sexual abuse.

- Mr. Balderas exhibited a host of cognitive defects that are found in patients with significant central nervous system damage. Mr. Balderas has demonstrated learning and memory deficits. Mr. Balderas demonstrated significant impairments on many measures of executive functioning strongly associated with damage and/or diminished development of the frontal lobe region of the brain as well as general neurological disease.
- According to Dr. Agharkar's interview of Mrs. Yancy Balderas conducted via Zoom on October 22 and 29, 2021, it is believed Mr. Balderas's mother drank while pregnant with Mr. Balderas. Mr. Balderas's mother reportedly dropped him on his head when he was a newborn infant. Mr. Balderas's stepfather would hold his face down under water to drown him when he was about 8 years old in Mexico.
- During Dr. Agharkar's interview with Mrs. Yancy Balderas, Mr. Balderas has told he hears voices and believes he is descended form an Egyptian prince. Since his incarceration in his late teens, he often talks about witchcraft, ancient civilizations, an aliens. Mr. Balderas believed the State was spying on Mrs. Yancy Balderas though a mirror in her house and asked her to remove it. Mr. Balderas admitted to Mrs. Yancy Balderas that he heard voiced, several years before his trial.
- Mr. Balderas was diagnosed with Psychotic Disorder, Not Otherwise Specified, and

treated with antidepressants and anti-psychotic medication while on death row in the Texas DOC. The records available indicate a complex interplay of trauma, potential brain damage, a mood disorder, and a psychotic condition, all which require extensive work-up to determine the extent of Mr. Balderas's brain impairment.

- Dr. Brams's report focused on Mr. Balderas's horrific experience of prolonged sexual abuse and the resulting trauma. Dr. Brams also discussed the significance of Mr. Balderas's experiences with childhood neglect, parental abandonment, and physical abuse as additional sources of trauma, and hypothesized that Mr. Balderas's abuse of inhalants may have caused brain impairment. However, she did not recommend neurological or neuropsychological screening or testing, nor did she evaluate Mr. Balderas for other mood disorders or psychotic symptoms after she diagnosed him with Post-traumatic Stress Disorder. Further, Dr. Brams does not appear to have relied on any of the critical information concerning Mr. Balderas's diagnoses while at the Harris County jail. As such, the accuracy and reliability of Dr. Brams's report is in question and is incomplete.
- Dr. Mendel also diagnosed Mr. Balderas with Post-traumatic Stress Disorder and failed to evaluate Mr. Balderas for other mood disorders or for psychosis. Due to failures of Trial Counsel, Dr. Mendel was

not provided with critical information about Mr. Balderas's psychiatric history and treatment, including treatment with antipsychotic and antidepressant medication. His examination of Mr. Balderas is therefore incomplete and unreliable.

- Based on the full neuropsychological battery performed by Dr. Ouaou on October 15, 2021, Mr. Balderas demonstrates learning and memory deficits in addition to significant impairments on many measures of executive functioning strongly associated with damages to the frontal lobes of the brain. Damage to these areas would negatively impact Mr. Balderas's ability to rationally weigh and deliberate, inhibit his impulses, regulate his mood and emotions, memory functioning, and freedom from preservation. Frontal lobe dysfunction is also implicated in symptoms of paranoia and psychotic disorders.
- Based on the nature of brain damage/ dysfunction revealed by neuropsychological testing, and that there have been no head injuries since the time of trial, it is likely Mr. Balderas's brain impairments were present at the time of his trial.

Dr. Agharkar stated in his report that there were compelling mood, trauma, and brain impairment symptoms that were not adequately investigated and presented in his capital case. Mr. Balderas's manic and psychotic symptoms as recounted in his pre-trail jail medical records should have been followed-up on.

Furthermore, Mr. Balderas's childhood trauma was not fully addressed in this case even though early childhood trauma has a tremendous impact on brain development and functioning. Furthermore, Mr. Balderas's clear mental disease and defect, detailed in Dr. Ouaou's neuropsychological report, was unknown at the time of trial because inadequate experts were hired and no brain testing was performed. (Ex. EE, Agharkar Report. at 7-8.)

The results of Dr. Ouaou's subsequent neuropsychological evaluation of Mr. Balderas, conducted on October 15, 2021, are consistent with Dr. Agharkar's psychiatric evaluation. (See Ex. FF, Ouaou Report, Jan. 15, 2022.) Based on Dr. Ouaou's evaluation of Mr. Balderas, with reference to his review of Mr. Balderas's Medical Records, Mental Health Records, Academic Records, Jail and Prison Records, Juvenile and Extraneous Offense Records, Psychological Report by Jolie S. Brams, PhD, Declaration of Bhushan S. Agharkar, MD, DFAPA, and Declarations of Lay Witnesses, Dr. Ouaou formed the following opinions and observations:

- Mr. Balderas has a history of severe childhood physical and sexual abuse, head injuries, inhalant abuse, and possible in utero alcohol exposure.
- Mr. Balderas suffered innumerable blows to the head from physical abuse, accidents, and youth boxing, many of which occurred during the developmental period and resulted in a loss of consciousness. Evidently, Mr. Balderas was dropped as an infant by his uncle and sustained a permanent skull depression.

- Mr. Balderas abused inhalants daily for one year beginning at age 14.
- Such inhalants included carbonator cleaners, known to cause changes to the central nervous.
- Mr. Balderas has been diagnosed with PTSD, major depression, and psychosis.
- Mr. Balderas's IQ was below average (FSIQ = 87; 19th percentile). An estimate of premorbid IQ showed his IQ should be in the average range (105; 63rd percentile). This represents a significant decline form the expected baseline.

Mr. Balderas exhibited intellectual declines and a host of cognitive deficits that are found in patients with significant central nervous system damage.

- Mr. Balderas demonstrated learning and memory deficits and significant impairments on many measures of executive functioning strongly associated with damage to and/or diminished development of the frontal lobe region of the brain as well as general neurological disease.
- The mental diseases suffered by Mr. Balderas were present well before and at the time of trial.
- Despite the prior psychological examiners' reports that Mr. Balderas suffered profound developmental damage at critical points in his life and had significant risk factors that caused brain damage, there was a failure to refer him to experts to further evaluate the impact of brain damage on Mr. Balderas's ability to competently participate in the trial proceedings.

Dr. Ouaou opines that Mr. Balderas's cognitive deficits were not only likely present at the time of the alleged offense and trial, but were likely greater in severity at that time. Mr. Balderas likely suffered from severe etiologies of central nervous system damage that were present at the time of trial. Behavioral and cognitive consequences of Mr. Balderas's history of abuse and trauma, head injuries, and other risk factors on a developing brain contributed to his behavior at the time of trial. According to Dr. Ouaou, the ramifications of Mr.

Balderas's cognitive deficits likely hampered his competency at the time of trial and an understanding of his neuropsychological functioning would have been vital to determine whether he was able to have a rational understanding of the proceedings, adequately process information presented to him during trial, and accurately relate information to counsel. (Ex. FF, Ouaou Report, Jan. 15, 2022, at 10.)

The recent psychiatric and neuropsychological reports rendered by Dr. Agharkar and Dr. Ouaou, respectively, concur that Mr. Balderas's cognitive deficits affecting judgment, reasoning, impulse control, problem solving, and rational decision making, were likely manifest at the time of trial. (See Ex. FF, Ouaou Report, Jan. 15, 2022, at 10; Ex. EE, Agharkar Report, Jan. 17, 2022, at 9.) Trial counsel evidently formed some doubt as to Mr. Balderas's mental health, since Dr. Brams was retained to investigate Mr. Balderas's childhood physical and sexual abuse, and Dr. Mendel was retained to conduct psychological testing regarding the devastating trauma Mr. Balderas suffered. *See Green v. Davis*, 479 F. Supp. 3d 442, 509 (S.D. Tex. 2020) appeal filed by *Green v. Lumpkin*, 5th Cir., September 16, 2020 (holding that where trial counsel in fact formed a bona fide doubt about defendant's incompetence, trial counsel's subsequent failure to request a hearing on defendant's competence to stand trial, and a continuance to further investigate defendant's mental illness, undermined defendant's due process rights to a competency hearing at a critical juncture and was constitutionally deficient performance falling below an objective standard of reasonableness).

Regardless of whether trial counsel in fact formed a bona fide doubt as to Mr. Balderas's incompetency,

the standard is whether objectively reasonable counsel, in light of the evidence available to it, would have. *See Green v. Davis*, 479 F. Supp. 3d 442, 509 (S.D. Tex. 2020). Here, Dr. Agharkar and Dr. Ouaou agree that Mr. Balderas's manic and psychotic symptoms as recounted in this pre-trial jail medical records should have been followed-up on and that brain testing should have been performed due to Mr. Balderas's clear mental disease and defect. (See Ex. EE, Agharkar Report, Jan. 17, 2022, at 8; Ex. FF, Ouaou Report, Jan. 15, 2022, at 1.) Trial counsel's failure to request a hearing on Mr. Balderas's competence to stand trial, or a continuance to further investigate his mental illness, undermined his due process rights and was constitutionally deficient performance falling below an objective standard of reasonableness.

C. Mr. Balderas was harmed because there is a reasonable probability that he was incompetent at trial.

Mr. Balderas's complete mental health history is recounted in Claim II, *supra*. Mr. Balderas presents ample evidence that he was incompetent at trial in 2014, sufficient to meet the *Dusky* standard for incompetence by a preponderance of the evidence, which is more than the 'reasonable probability' standard he is required to show here. *Bouchillon,* 907 F.2d at 595 (5th Cir. 1990) ("[The 'reasonable probability' standard] is a lower burden of proof than the preponderance standard."). As a foundational matter, Mr. Balderas suffers from mental illness and brain damage/dysfunction. To determine whether Mr. Balderas had a mental illness at the time of trial in 2014 the Court may rely on retrospective mental health expert evaluations and other contemporaneous evidence of symptoms consistent with the

retrospective diagnoses. *See Green v. Davis*, 479 F. Supp. 3d 442, 481-85 (S.D. Tex. 2020) (holding that Applicant suffered from Schizophrenia at the time of trial in 2000, relying on a retrospective mental health evaluation and diagnosis conducted in 2014, transcripts from the state pre-trial and trial proceedings, and records of Applicant's grossly disorganized behavior in pre-trial detention and in court). According to the recent psychiatric evaluation by Dr. Agharkar, Mr. Balderas suffers from Schizoaffective Disorder, Bipolar Type, and PTSD. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 7.) Further, Mr. Balderas likely has frontal and parietal lobe brain damage/dysfunction. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 9; Ex. FF, Ouaou Report, Jan. 15, 2022, at 9.) Dr. Agharkar and Dr. Ouaou concur that the brain damage/dysfunction revealed by neuropsychological testing, and the fact that there have been no head injuries since the time of trial, indicate that Mr. Balderas's brain impairments were present at the time of his trial. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 9; Ex. FF, Ouaou Report, Jan. 15, 2022, at 10.) Further, Mr. Balderas's manic and psychotic symptoms are recounted in his pre-trial jail record. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 7.)

Per the first *Dusky* prong, Mr. Balderas's mental illness and brain impairment symptoms affected his ability to consult trial counsel with a reasonable degree of rational understanding. Mr. Balderas is given to hallucinations, paranoid and grandiose delusions, and disorganized and tangential thought processes. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 8.) Mrs. Yancy Balderas recalls that, as a teenager, Mr. Balderas confided that he could talk to angels. (*Id.* at 5.) During his evaluation by Dr. Agharkar, Mr.

Balderas was preoccupied with discussing UFO's, the existence of aliens, and visual hallucinations he has experienced. (*Id*. at 3.) Mr. Balderas endorsed ideas of reference and believed that when the light in the room flickered, something significant was discussed that required further "research." (*Id.* at 3.) Mr. Balderas recounted to Dr. Agharkar that, while in juvenile, he saw symbols of aliens and that they talked to him about levitating. (*Id.* at 3.) Further, Mr. Balderas has expressed both to Dr. Agharkar and Mrs. Yancy Balderas that he believes the "prosecutors and gang members" set him up to be incarcerated so the government can experiment on him and learn more about his connections to aliens and their spaceships. (*Id.* at 3.) Mr. Balderas suspected the State was spying on Mrs. Yancy Balderas though a mirror in their house. (*Id.* at 5.) "Courts have found defendants incompetent when they suffer from conspiratorial delusions, particularly where the delusion integrates police, counsel, and the court." *Green v. Davis*, 479 F. Supp. 3d 442, 489 (S.D. Tex. 2020) (citing, e.g., *United States v. Ghane*, 490 F.3d 1036, 1040 (8th Cir. 2007); *United States v. Boigegrain*, 155 F.3d 1181, 1189 (10th Cir. 1998); *United States v. Hiebert*, 30 F.3d 1005, 1007 (8th Cir. 1994)). Mr. Balderas's ability to communicate effectively is also impaired by his brain impairment. Dr. Agharkar opines that damage to the frontal lobes of the brain, indicated in Mr. Balderas's neuro-psychological examination, would negatively impact his ability to rationally weigh and deliberate, inhibit his impulses, regulate his mood and emotions, memory functioning, and freedom from perseveration. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 10.) These impairments, according to Dr. Agharkar and Dr. Ouaou, pre-date Mr. Balderas's trial and would

have impacted Mr. Balderas at the time of trial. (*Id.* at 9-10; Ex. FF, Ouaou Report, Jan. 15, 2022, at 9-10.)

Second, Mr. Balderas's brain impairment diminished his capacity for a rational as well as factual understanding of the proceedings against him. According to Dr. Ouaou, Mr. Balderas IQ is well below average (FSIQ = 87; 19th percentile) and Mr. Balderas exhibits a host of cognitive defects associated with patients with significant central nervous system damage. (Ex. FF, Ouaou Report, Jan. 15, 2022, at 8.) Mr. Balderas exhibits learning and memory deficits in addition to significant impairments on many measures of executive functioning. (Ex. FF, Ouaou Report, Jan. 15, 2022, at 8.) As reiterated by Dr. Agharkar, Mr. Balderas's memory and his ability to rationally weigh and deliberate are affected by these impairments. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 10.) Furthermore, even if Mr. Balderas has the capacity to factually understand the charges against him, his understanding is not rational because Mr. Balderas suffers from the conspiratorial delusion that the prosecution set him up to be incarcerated in order to study him and probe his knowledge of aliens and their spaceships. *See Green,* 479 F. Supp. 3d at 489 (citing, e.g., *Ghane,* 490 F.3d at 1040 (8th Cir. 2007) (holding that despite defendant's factual understanding of the charges against him, his understanding was not rational because he believed the charges were part of a wide ranging government conspiracy)).

In sum, the host of symptoms stemming from Mr. Balderas's mental illness and brain impairment, present at the time of trial, significantly impaired his ability to consult trial counsel with a reasonable degree of rational understanding and stood as an

obstacle to his rational and factual understanding of the proceedings against him. Mr. Balderas thus demonstrates that there is a reasonable probability that he was incompetent under the *Dusky* standard and was therefore prejudiced by trial counsel's ineffective assistance in failing to either further investigate Mr. Balderas's mental illness or request a competency hearing. *See Bouchillon*, 907 F.2d at 595.

III. CLAIM III: MR. BALDERAS'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HE WAS TRIED WHILE INCOMPETENT

A. The Criminal Trial of an Incompetent Defendant Violates Due Process

The Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (internal quotation marks and citation omitted); *Wheat v. Thigpen*, 793 F.2d 621, 629 (5th Cir. 1986). The Supreme Court explained, "[c]ompetenc[y] to stand trial is rudimentary, for upon it depends that main part of those rights deemed essential to a fair trial," such as "the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Cooper*, 517 U.S. at 354 (citation omitted).

Competency to stand trial is measured by the two-part *Dusky* standard, wherein an inmate is only competent to stand trial if: (1) "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "he has a rational as well as factual understanding of the proceedings against him." *Dusky,* 362 U.S. at 402.

"The proper inquiry for an incompetency claim is the Applicant's mental state *at or near the time of trial*." *Goynes v. Dretke*, 139 F. App'x 616, 619 (5th Cir. 2005) (emphasis in original). Mr. Balderas bears the burden of proving his incompetency to stand trial by a preponderance of the evidence. *Green v. Davis*, 479 F. Supp. 442, 481 (S.D. Tex. 2020), *appeal filed*, *Green v. Lumpkin*, (5th Cir. 2020) (internal citation omitted). "[I]f the evidence of incompetency is more convincing than the evidence otherwise, the court must find in [Mr. Balderas's] favor." *Aldridge v. Thaler*, No. H-05-608, 2010 WL 1050335, at *27 (S.D. Tex. Mar. 17, 2010); *see Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976) ("[P]roof by a preponderance . . . is all that is required . . . To place a greater burden on the Applicant might bring up due process considerations.").

B. Mr. Balderas was Incompetent to Stand Trial During Both the Guilt and Innocence Phases

1. Mr. Balderas's psychotic and brain impairment symptoms were manifest at the time of his trial.

The Fifth Circuit has recognized that to meaningfully apply the *Dusky* standard, courts "must often [first] ascertain the nature of Applicant's allegedly incapacitating illness" before determining "whether such condition rendered the accused incompetent under the [*Dusky*] formulation." *Bruce,* 536 F.2d at 1059 (5th Cir. 1976). As discussed in Claim IV, *supra*, Mr. Balderas suffers from Schizoaffective Disorder, Bipolar Type, and PTSD. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 7.) Further, Mr. Balderas likely has frontal and parietal

lobe brain damage/dysfunction. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 9; Ex. FF, Ouaou Report, Jan. 15, 2022, at 9-10.) Dr. Agharkar and Dr. Ouaou concur that the brain damage/dysfunction and manic and psychotic symptoms were manifest at the time of trial in 2014. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 2; Ex. FF, Ouaou Report, Jan. 15, 2022, at 1.)

2. Mr. Balderas lacked sufficient ability to consult with trial counsel with a reasonable degree of rational understanding.

Mr. Balderas may be found incompetent where he suffered from paranoid delusions which impeded his ability to effectively consult with counsel. *See, e.g., Green,* 479 F. Supp. 442 at 489 ("Green suffered from a paranoid delusion that the evidence in his case had been tampered with and that police were violently abusing him in jail. These delusions . . . impeded his ability to communicate with counsel and understand the proceedings in his case[.]"). Mr. Balderas is given to hallucinations, paranoid and grandiose delusions, and disorganized and tangential thought processes. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 8.) Mr. Balderas's specifically suffers from conspiratorial delusions that the State is spying on his wife, Mrs. Yancy Balderas, and that he was set up by the prosecution to be incarcerated so that his knowledge of aliens and spaceships could be probed. (*Id.* at 5.) Such conspiratorial delusions support a finding of incompetence, especially where the delusion integrates police, counsel, and the court. *See Green*, 479 F. Supp. 3d 422, 489 (citing, e.g,.*Ghane,* 490 F.3d at 1040 (8th Cir. 2007) (holding that despite defendant's factual understanding of the charges against him, his understanding was not rational

because he believed the charges were part of a wide ranging government conspiracy); *Boigegrain*, 155 F.3d at 1189 (10th Cir. 1998) (holding that defendant was incompetent where defendant was delusional and suffered from paranoid ideation causing him to believe his lawyer, the prosecutor and judge were participating in a conspiracy to incarcerate him for reasons unrelated to the charge against him); *Hiebert,* 30 F.3d at 1007 (8th Cir. 1994) (holding that defendant was incompetent because he believed the judge and the attorneys were part of a conspiracy against him)). Mr. Balderas's of delusions, hallucinations, paranoia, and tangential thought processes undermined his ability to consult with trial counsel with a reasonable degree of rational understanding.

3. Mr. Balderas lacked a rational as well as factual understanding of the proceeding against him.

Turning to the second Dusky prong, Mr. Balderas lacked a rational understanding of the proceedings, as evidenced by his conspiratorial delusions implicating the prosecution and the State. *See Green,* 479 F. Supp. 3d at 489 (citing, *e.g., U.S. v. Ghane*, 490 F.3d 1036, 1040 (8th Cir. 2007)). Even if Mr. Balderas evidenced a factual grasp of the charges set against him, this alone would be insufficient to conclude Mr. Balderas had a rational understanding of the proceedings, according. *Id.* Moreover, the brain impairments observed by Dr. Ouaou and the psychotic behavior observed by Dr. Agharkar, posed significant obstacles to Mr. Balderas's factual understanding of the proceedings. According to Dr. Ouaou, Mr. Balderas IQ is well below average (FSIQ = 87; 19th percentile) and Mr. Balderas exhibits a host

of cognitive defects associated with patients with significant central nervous system damage. (Ex. FF, Ouaou Report, Jan. 15, 2022, at 8-10.) Mr. Balderas exhibits significant impairments on many measures of executive functioning, which are those neuro-psychological processes that allow an individual to plan, initiate, program, sequence, and maintain goal-directed behavior. (*Id.*, at 8.) Dr. Ouaou also observed that Mr. Balderas suffers significant memory impairments, scoring in the 3rd percentile for the Logical Memory subtest of the WMS-IV, related to the acquisition of new information. (*Id.* at 7.) Dr. Agharkar observed that Mr. Balderas could not accurately recall a short story after fifteen minutes. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 7.) As reiterated by Dr. Agharkar, Mr. Balderas's memory and his ability to rationally weigh and deliberate are affected by these impairments. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 10.) Dr. Agharkar and Dr. Ouaou concur that these neuropsychological impairments, associated with damage to the frontal lobes of the brain, were likely present at the time of his trial. (Ex. EE, Agharkar Report, Jan. 17, 2022, at 2; Ex. FF, Ouaou Report, Jan. 15, 2022, at 1.)

Mr. Balderas need only demonstrate his incompetence by a preponderance of the evidence. "[I]f the evidence of incompetency is more convincing than the evidence otherwise, the court must find in [Mr. Balderas's] favor." *Aldridge*, 2010 WL 1050335, at *27. Mr. Balderas's incompetency, manifest through hallucinations, paranoia, delusions, ideas of reference, memory impairment, and tangential thought processes, is well-documented by pre-trial mental health records, the evaluations of Dr. Mendel and Dr. Brams, declarations by lay witnesses, jail records, and the recent evaluations by Dr. Agharkar

and Dr. Ouaou. Mr. Balderas's symptoms significantly undermined his ability to consult trial counsel with a reasonable degree of rational understanding, and impaired his factual and rational grasp of the proceedings against him. Mr. Balderas's was therefore tried while actually incompetent in violation of his due process rights.

C. Mr. Balderas's Competency-Related Claims, Claims II and III, are Reviewable under Article 11.071, § 5(a)(3)

With respect to Claims II and III, authorization is proper under Article 11.071, § 5(a)(3) of the Texas Code of Criminal Procedure because no rational juror would have answered at least one of the statutory special punishment issues in the State's favor had additional evidence of Mr. Balderas's mental health and incompetence to stand trial been in the record.

In *Ex parte Blue*, 230 S.W.3d 151, 160–61 (Tex. Crim. App. 2007), the TCCA reasoned that because a person who is intellectually disabled is constitutionally ineligible for the death penalty, "no rational juror would answer any of the special issues in the State's favor, if only for the simple reason that the statutory special issues would not be submitted to the jurors in the first place." *Blue*, 230 S.W.3d at 161. The TCCA's logic in *Blue* applies to Mr. Balderas's competency to stand trial here. No rational juror would have answered at least one of the statutory special punishment issues in the State's favor because, had Mr. Balderas been deemed incompetent to stand trial based on additional evidence in the record, the trial would have never occurred in the first place.

In any event, both Mr. Balderas's future dangerousness and the balance between dangerousness

and mitigation are altered by the evidence of Mr. Balderas's long history of mental illness diagnoses and history of behavior, as described *supra*. Mr. Balderas's incompetency, manifest through hallucinations, paranoia, delusions, ideas of reference, memory impairment, and tangential thought processes, is well- documented by pre-trial mental health records, the evaluations of Dr. Mendel and Dr. Brams, declarations by lay witnesses, jail records, and the recent evaluations by Dr. Agharkar and Dr. Ouaou. No rational juror would have sentenced Mr. Balderas to death in light of these circumstances.

IV. CLAIM IV: TRIAL COUNSEL VIOLATED MR. BALDERAS'S SIXTH AMENDMENT AUTONOMY RIGHT TO PRESENT AN ALIBI DEFENSE

A. The Sixth Amendment Right to Autonomy in the Objectives of the Defense

The Sixth Amendment guarantees a defendant the right to defendant the right "to have the *Assistance* of Counsel for *his* defence." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505, 200 L. Ed. 2d 821 (2018) (emphasis in original). Thus, "[w]ith individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id*. The "right to defend is personal," and a defendant's choice in exercising that right "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 1507.

Accordingly, the Sixth Amendment includes a right to "autonomy" to "decide that the objective of the defense is to assert innocence." *Id.* at 1508.

When a "client's autonomy, not counsel's competence, is in issue," a court does not apply "ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510–11.

The violation of a "protected autonomy right" is "complete when the court allow[s] counsel to usurp control of an issue within [the defendant's] prerogative." *Id. at 1511*

Violation of a "defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *Id.*

Where a "structural" error exists, the appropriate remedy is a new trial. *Id.*

B. Trial Counsel Violated Mr. Balderas's Right to Autonomy By Refusing to Present an Alibi Defense

The decision to present an alibi defense is within the sole prerogative of a defendant and a defense counsel that refuses to present an alibi defense violates a defendant's Sixth Amendment autonomy right. *See McCoy*, 138 S. Ct. at 1510 (counsel admitted guilt and also refused to present alibi defense). It is a structural error affecting "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* at 1511.

At the end of January 2014, Mr. Balderas's wife provided counsel with first names of five people who she believed may have been able to offer helpful testimony at the guilt/innocence phase of trial, including two potential alibi witnesses, Anali Garcia and Oralia McCrary, who were with Mr. Balderas on the night of the murder.

On February 4, 2014, Ileana Cortes, the mother of Mr. Balderas's niece (his brother's daughter), contacted counsel to inform them that Mr. Balderas had been with her and her family at their apartment all afternoon and evening on the day Powder was killed. In a memorandum memorializing the meeting, counsel indicated that Ileana did not know any specific facts about the Powder shooting and that she had difficulty remembering whether it was the exact night of the Powder shooting that Mr. Balderas was at her apartment. (E-mail from Jerome Godinich, February 4, 2014, Habeas Writ Record, Vol. III, 00773-74.)

Rather than attempt to corroborate or further explore whether Mr. Balderas was indeed with Ileana on the night of the shooting, counsel bluntly told Ileana her testimony was useless and sent her away. (Affidavit of Jesus Balderas ("Balderas Aff."), October 25, 2015, Habeas Writ Record, Vol. II, 00476-832, ¶ 21; Ex. A, Ileana Cortes Decl., ¶ 12)

On February 13, 2014, four days before trial, counsel spoke with Anali Garcia. However, the conversation with Anali was brief and over the phone, and counsel quickly determined that they did not need her as a "character witness," either oblivious or indifferent to her critical importance as a potential alibi witness. (*Id.*) As Anali recalls, however, she was informed that counsel had set what can only be described as an arbitrary deadline for potential witnesses to come forward. Anali called counsel before that deadline to inform them that Mr. Balderas had spent the afternoon and evening at her house on the day of the Powder shooting and that he therefore could not have been the shooter. Counsel again advised Anali that they already had enough "character" witnesses and did not need her testimony.

Anali attempted to clarify that she was not calling as a character witness, but counsel did not let her explain. Ultimately, Anali took counsel's word that they did not need her testimony, stating, "I thought that he would know better than me." Anali was shocked when she attended Mr. Balderas's trial and found that counsel did not offer an alibi defense. (Anali Garcia Aff., Habeas Writ Record, Vol. II, 565-568, ¶¶12- 13.)

C. Claim IV is Reviewable under Article 11.071, § 5(a)(2) and (3)

Authorization is proper under Article 11.071, § 5(a)(2), of the Texas Code of Criminal Procedure because no reasonable juror, in light of the newly presented alibi evidence from four witnesses and other exculpatory evidence in the record, could find Mr. Balderas guilty beyond a reasonable doubt.

Article 11.071, Section 5(a)(2), was enacted in response to the Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), and therefore "standards set forth for evaluating a gateway-actual-innocence claim announced by the Supreme Court should guide [the court's] consideration of such claims under Section 5(a)(2)." *Reed v. Thaler*, No. A-02-CV-142, 2012 WL 2254217, at *12 (W.D. Tex. June 15, 2012). Under *Schlup*, to satisfy the "actual innocence" standard set forth in *Murray v. Carrier*, 477 U.S. 478 (1986), "a[n] Applicant must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt."[9] *Schlup*, 513 U.S. 298 at 299–

[9] Circuit courts are divided on what constitutes "new evidence" for purposes of *Schlup*. "New evidence" may either mean "newly discovered" (i.e., not discovered until after conviction) or "newly presented" (i.e., evidence available at the time of trial but not

300. Under *Schlup*, "A credible claim of actual innocence serves to bring the Applicant within the 'narrow class of cases' implicating a fundamental miscarriage of justice." *Ex parte Brooks*, 219 S.W.3d 396, 400 (quoting *Schlup*, at 315).

Here, consistent with *Schlup*, trial counsel's repeated rebuffs to alibi witnesses in violation of Mr. Balderas's Sixth Amendment right to autonomy brings Mr. Balderas's actual innocence claim "within the 'narrow class of cases' implicating a fundamental miscarriage of justice." *Ex parte Brooks*, 219 S.W.3d 396 at 400 (Tex. Crim. App. 2007) (quoting *Schlup*, at 315).

Alternatively, authorization is proper under Article 11.071, § 5(a)(3) because no rational juror would have answered at least one of the statutory special

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presented). Neither the Fifth Circuit nor the Court of Criminal Appeals of Texas has stated its preference for either rule. *See Ex parte Reed,* 271 S.W.3d 698 at 734 (Tex. Crim. App. 2008) ("We will leave it for another day to decide exactly what new evidence, not presented at trial, may be considered in the purview of Section 5(a)(2)' threshold showing of innocence."). Justice Stevens's majority opinion in *Schlup* conspicuously uses the word "presented" rather than the word "discovered," indicating that the "newly presented" rule is appropriate. *See Schlup* at 324 (the Applicant "must support his allegations of constitutional error with reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial."). Whether applying the "newly presented" or "newly discovered" evidence rule, the reviewing court must make its determination in light of "'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *Ex parte Reed*, 271 S.W.3d at 733–34 (quoting *House v. Bell,* 547 U.S. 518, 537 (2006) (quoting *Schlup*, 513 U.S. at 327–28)).

punishment issues in the State's favor had all of the alibi evidence and the other exculpatory evidence been in the record. Both Mr. Balderas's future dangerousness and the balance between dangerousness and mitigation are altered by the alibi evidence, and no rational juror would have convicted Mr. Balderas to death in light of that testimony.

V. CLAIM V: THE STATE VIOLATED MR. BALDERAS'S DUE PROCESS RIGHTS BY FAILING TO CORRECT FALSE TESTIMONY UNDER *NAPUE* AND *GIGLIO*

A. The Knowing Use of False Testimony to Obtain a Conviction Violates Due Process

A conviction obtained through the use of false evidence, known to be false by the State, violates due process under the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (internal citations omitted); *see also Giglio v. United States,* 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

To obtain relief under *Napue* and *Giglio*, a Applicant must show that (1) the testimony was actually false; (2) the State knew that it was false; and (3) the testimony was material. *Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014). "[D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements." *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002). The testimony is material "if there is any reasonable

likelihood that the false testimony could have affected the judgement of the jury." *United States v. Agurs,* 427 U.S. 97, 103 (1976).

Here, the State failed to correct Cookie's false testimony under *Napue* and *Giglio*. At trial, Cookie testified that he "never asked [the prosecutors] for anything." (26 RR 168:15). But this is proven false based on Cookie prison phone calls from several years before Mr. Balderas's trial that were disclosed days before the May 2018 State Habeas proceeding, in which Cookie discussed with his mother, father, uncle, and brother-in-law his communications with prosecutors about obtaining a plea deal. This evidence also establishes that the State knew Cookie's testimony was false and failed to correct it. Had the prosecutors' notes not been withheld, it could have been used to impeach Cookie at trial and at the State Habeas Hearing. At minimum, the State should have corrected Cookie's false testimony when elicited. Thus, there is a reasonable likelihood that Cookie's uncorrected false testimony affected the judgement of the jury.

The recently disclosed prosecutors' notes also reveal numerous inconsistencies in Cookie's testimony that further underscore the likelihood that false testimony was not corrected in violation of Mr. Balderas's Due Process rights. For example, Cookie testified that Mr. Balderas confessed to killing Powder; specifically, that Mr. Balderas gave him a "hug and a kiss on the cheek," and then "took credit for the whole thing" by saying that he "got him." (26 RR 159:13- 160:18.) However, the prosecutors' notes, which were obtained only after trial, reveal that Cookie discussed details surrounding the shooting but did not mention seeing Mr. Balderas at the crime scene and did not indicate that Mr. Balderas

confessed to him. Additionally, Cookie testified that the LTC meeting before Powder's murder was three or four days prior to the killing, but the disclosures revealed that Cookie said the meeting about murdering Powder was "9-10 mos before Powder was killed." (2007 and 2008 Israel "Cookie" Interview Notes, Habeas Writ Record, Vol. III, 00782-804, at 00788.) Cookie also testified that "hang[ing] out with other gang members from. . . a rival gang, that's just unacceptable. That's the ultimate betrayal[]" and that it was Powder's hanging out with other gang members that caused his death. (26 RR 146:23-147:2; 149:7-153:1.) The December 2020 disclosures, however, indicate that Cookie told prosecutors that "[i]f caught w/ other gang member get checked (beat up)" and if someone kept doing it, that would be "more serious." (2014 Cookie Notes, at 9.) He does not say that it was the "ultimate betrayal." Cookie further testified that he "truly didn't care" what happened to Powder, even though he "snitched" on him, but the disclosures revealed that Cookie said "the day he (Powder) lost his flag, he lost his life. . . Every body wanted Powder dead." (2007 and 2008 Cookie Notes, Habeas Writ Record, Vol. III, 00782-804, at 00790.) In sum, in addition to the demonstrably false testimony by Cookie that he "never asked [the prosecutors] for anything[,]" several other recently revealed prosecutors' notes underscore Cookie's unreliability on a number of other points. Nevertheless, the State failed to correct or address these known falsehoods and inconsistencies in violation of Mr. Balderas's due process rights.

B. Claim V is Reviewable Under Article 11.071, § 5(a)(3)

Authorization is proper under Article 11.071, § 5(a)(1) because the factual basis for this claim was

unavailable at the time the Initial State Habeas Corpus application was filed. As discussed *supra*, Mr. Balderas filed his Initial Habeas Corpus application in January 2016, but the State did not disclose the audio files and the prosecutors' notes until May 2018. Thus, the factual basis for this claim was unavailable for over two years since Mr. Balderas filed his initial application, despite the exercise of reasonable diligence to obtain it.[10]

Additionally, the specific facts alleged for Claim V, if established, would constitute a violation of Mr. Balderas's Due Process rights. (*See* Am. Pet. ¶¶ 1027–1030.) Specifically, a conviction obtained through the use of false evidence, known to be false by the State, violates due process under the Fourteenth Amendment. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (internal citations omitted); *see also Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

PRAYER FOR RELIEF

WHEREFORE, in consideration of the claims enumerated herein, Applicant Juan Balderas prays that this Court:

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[10] Even if the State disclosed this evidence during the pendency of Mr. Balderas's Initial State Habeas Corpus application in 2016, state law would have prohibited Mr. Balderas from amending his application to include a claim based on the newly disclosed evidence. *See* Tex. Code Crim. Proc. art. 11.071 § 5(f).

A. Find that the requirements of Section 5 of Article 11.071 have been satisfied;

B. Issue an order remanding the case to the convicting court for an evidentiary hearing for the purposes of examining the merits of these claims; and

C. Grant any other relief that law or justice may require.

Dated: July 3, 2023

Respectfully submitted,

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** Motion for Admission Pro Hac Vice forthcoming*

CERTIFICATE OF COMPLIANCE

I, the undersigned, declare and certify that this brief complies with the 37,500 word-limit set forth in Texas Rule of Appellate Procedure 9.4 (i)(2)(A) as this brief contains 36,163 words, excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, state, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix. *See* Texas Rule of Appellate Procedure 9.4 (i)(1). The undersigned utilized Microsoft® Word to produce this brief and to calculate the word count. The undersigned adjusted Microsoft® Word's Word Count tool to include all text, including headings, footnotes, and quotations.

This certification is executed on July 3, 2023, in Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Ashley Allen Carr
Ashley Allen Carr

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served courtesy copies of the foregoing has been served on the following attorneys by electronic service and Federal Express:

1. Ali Nasser
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This certification is executed on July 3, 2023, in Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Ashley Allen Carr
Ashley Allen Carr

APPENDIX A – LIST OF KEY FIGURES

Person	Role
Balderas, Juan	The Applicant. Nicknamed "Apache." Currently confined on death row for the 2014 murder of Eduardo "Powder" Hernandez.
La Tercera Crips ("LTC") and Other Street Gangs	
Acuna, Pedro	LTC member, nicknamed "Trey," who was shot by Jose "Debo" Luviano on March 4, 2004.
Arevalo, Victor	LTC in 2004 and 2005. Nicknamed "Gumby." Brother of Willie Arevalo.
Arevalo, Willie	LTC Member. Brother of Victor "Gumby" Arevalo.
Benitez, Walter	Former LTC member. Nicknamed "Kool-Aid."
Diaz, Israel	LTC member, nicknamed "Cookie," who was "snitched" on by the victim, Eduardo "Powder" Hernandez, for stealing a vehicle at gunpoint and subsequently arrested in December 2004 for aggravated robbery. Cookie also faced a capital murder charge, which was later dropped to an aggravated robbery charge in exchange for his testimony against Juan Balderas at trial.
Ferrufino, Edgar	MS-13 member and boyfriend of Wendy Bardales who was in the apartment on Corporate Drive at the time of the shooting on December 6, 2005.

Garcia, Alejandro	LTC member, nicknamed "Twin," whose backyard was used for LTC meetings. Twin brother of Pedro "Twin" Garcia. Garcia testified against Juan Balderas in exchange for a deal reducing a capital murder charge to an aggravated robbery charge.
Garcia, Pedro	LTC member, nicknamed "Twin," whose backyard was used for LTC meetings. Twin brother of Alejandro "Twin" Garcia.
Hernandez, Eduardo	LTC member, nicknamed "Powder," who was killed on December 6, 2005 and is the victim in this case.
Lopez, Efrain	LTC member, nicknamed "Hairless."
Luviano, Jose	Former LTC member, nicknamed "Debo," who LTC falsely blamed for a murder at the Loma Vista Shooting.
Perez, Jose	LTC member, nicknamed "Pepe," with knowledge of LTC's operations and conspiracies who was never asked to testify at Mr. Balderas's trial.
Silder, Rigalado	LTC member who, on December 16, 2005, was arrested with Mr. Balderas.
Vazquez, Jose	LTC member, nicknamed "Chango," who visited the Corporate Drive apartment on December 6, 2005 before the shooting.
Key Individuals	

Bardales, Karen	Witness present at the crime scene at Corporate Drive on December 6, 2005. Girlfriend of the victim, Eduardo "Powder" Hernandez, and sister of Wendy Bardales.
Bardales, Wendy	Witness present at the crime scene at Corporate Drive on December 6, 2005. Identified Juan Balderas as the shooter after being asked on three different occasions with two different photo arrays. Sister of Karen Bardales.
Chavez, Daniela	Friend of Juan Balderas and girlfriend of Willie Arevalo.
Cortes, Ileana	Was with Juan Balderas at her family's apartment on Corporate Drive the night of December 6, 2005, during Powder's shooting. Sister of Anali Garcia and Octavio Cortes.
Cortes, Octavio	Was with Juan Balderas at her family's apartment on Corporate Drive the night of December 6, 2005, during Powder's shooting. Brother of Anali Garcia and Ileana Cortes.
Decorado, Durjan	Nicknamed "Rata." Lived in the apartment on Corporate Drive and was a witness present at the crime scene on December 6, 2005.
Garcia, Anali	Was with Juan Balderas at her family's apartment on Corporate Drive the night of December 6, 2005, during Powder's shooting. Sister of Octavio Cortes and Ileana Cortes.

Hernandez, Miriam	Sister of Eduardo "Powder" Hernandez.
Quinones, Angelina	Identified Juan Balderas, Efrain Lopez, and Israel Diaz as individuals allegedly involved in an extraneous offense.
Juan Balderas's Family	
Balderas, Sr., Juan	Juan Balderas's father.
Escobar (Balderas), Yancy	Juan Balderas's wife.
Reyes, Marina	Juan Balderas's aunt.
Reyes, Paloma	Juan Balderas's cousin.
Reyes, Maria Victoria	Juan Balderas's mother.
Attorneys, Judges, and Law Enforcement	
Bennett, Traci	Assistant District Attorney in the Harris County District Attorney's Office who presented the State's case at the guilt/innocence phase of Juan Balderas's trial beginning on February 18, 2014.
Cruser, Jeff	Sergeant in the homicide division of the Houston Police Department who responded to crime scene at Corporate Drive on December 6, 2005.

Cunningham, Thomas	Investigator in the homicide division of the Houston Police Department in December 2005. Took Wendy Bardales's statement on the night of the shooting.
Davis, David	Sergeant in the Harris County Sheriff's Office.
Dozier, Caroline	Assistant District Attorney in the Harris County District Attorney's Office who presented the State's case at the guilt/innocence phase of Juan Balderas's trial beginning on February 18, 2014.
Graham, Spence	Former Assistant District Attorney in the Harris County District Attorney's Office who was assigned Juan Balderas's case in 2009. In 2012, Spence Graham was replaced by another prosecutor, Paula Hartman.
Grant, S.L.	Officer in the Houston Police Department who was dispatched to the scene of the shooting at Corporate Drive on December 6, 2005.
Godinich, Jr., Jerome	Defense counsel who represented Juan Balderas at trial.
Guiney, The Hon. Kristin	Former Judge in the 179th District Criminal Court who initially presided over Juan Balderas's trial when it commenced on February 17, 2014. After losing reelection, Judge Randy Roll was assigned to Juan Balderas's trial.

Hartman, Paula	Assistant District Attorney in the Harris County District Attorney's Office who was assigned Juan Balderas's case in 2012 after Spence Graham. In 2013, Paula Hartman was replaced by another prosecutor, Traci Bennett.
Nunnery, Alvin	Defense counsel who represented Juan Balderas at trial.
McFaden, Mary	Assistant District Attorney in the Harris County District Attorney's Office who met with witness Alejandro Garcia on December 19, 2013.
Moreno, Rick	Officer in the homicide division of the Houston Police Department who was involved in Juan Balderas's arrest on December 16, 2005.
Poa, Gloria	Legal secretary who worked for Jerome Godinich, Juan Balderas's trial counsel.
Ponder, Clint	Sergeant in the gang unit of the Houston Police Department who testified at Juan Balderas's trial regarding the LTC hierarchy.
Pool, Christopher	Correctional officer in Harris County who testified during the punishment phase of Juan Balderas's trial.
Roll, The Hon. Randy	Judge in the 179th District Criminal Court who presided over Juan Balderas's case after Judge Guiney lost reelection. He was recused from the case for bias, and the matter was assigned to Judge Baylor Wortham.

Ruland, Norman Thomas	Sergeant in the homicide division of the Houston Police Department who interviewed Wendy Bardales and presented her with two different photo arrays on two different occasions.
Scott, Robert R.	Appointed as one of Juan Balderas's defense counsel after a grand jury returned the indictment against Juan Balderas.
Shearer, R. Scott	Appointed as one of Juan Balderas's defense counsel after a grand jury returned the indictment against Juan Balderas. Also appointed as Juan Balderas's counsel for direct appeal.
St. Martin, Stephen	One of at least two prosecutors assigned to Juan Balderas's case between 2005 and 2009.
Termulen, Eric	Officer in the Houston Police Department who worked on the SWAT team in 2005 and arrested Juan Balderas on December 16, 2005.
Wortham, The Hon. Baylor	Judge assigned to Juan Balderas's case on December 28, 2017, after Judge Roll's recusal.
Weston, Mitch	Lieutenant in the Harris County Fire Marshal's Office who responded to the Bunker Hill Shooting scene on December 17, 2005.
Other Relevant Individuals	
Altimore, Courtney	Eyewitness to the Bunker Hill Shooting on December 15, 2005. On November 25, 2020.

Brams, Dr. Jolie	Psychologist who testified about the trauma Juan Balderas suffered in his youth during the punishment phase of Juan Balderas's trial.
Brams, Dr. Matthew	Psychiatrist who testified about juvenile brain development during the punishment phase of Juan Balderas's trial.
Estrada, Juan	Lived in the apartment on Corporate Drive.
Esquivel, Monica	Mother of Israel "Cookie" Diaz's girlfriend who reported to law enforcement that Diaz told her Jose "Debo" Luviano had been involved in the Loma Vita Shooting on December 20, 2005.
Flores, Myriam	Girlfriend of Eric Romero and who was present in the vehicle when Romero was shot and killed in the Beltway Shooting on December 3, 2005.
Gallegos, Judy	Mother of Victor "Gumby" Arevalo's child who dated Arevalo for approximately 5 years.
Garcia, Jose	Victim of the Bunker Hill Shooting on December 15, 2005.
Garcia, Luis	Victim of the non-fatal Woodfair Drive Shooting on November 14, 2005.

Malpass, Roy	Professor emeritus and former director of the criminal justice program at the University of Texas at El Paso. He is an expert on eyewitness identification who was retained in this case on January 17, 2014, to review materials related to Wendy Bardales's eyewitness identification of Juan Balderas.
Mendel, Dr. Matthew	Psychologist with expertise in working with male victims of sexual abuse who conducted psychological testing on Juan Balderas and testified regarding the trauma that Juan Balderas suffered in his youth.
Munoz, Celeste	Mutual friend of Juan Balderas, Wendy Bardales, and Eduardo "Powder" Hernandez.
Nguyen, Amy	Expert on geographic information systems who testified during the punishment phase of Juan Balderas's trial.
Pelz, Terry	Expert on prison environments and prison gangs who testified during the punishment phase of Juan Balderas's trial.
Pickett, Rev. Carroll	A former death row chaplain who spoke with Juan Balderas in the summer of 2012.
Rescendez, Roxanne	On November 25, 2020, the State disclosed previously undisclosed prosecutor notes with Roxanne Rescendez dated October 26, 2014.

Rodriguez, John	Sociologist and gang expert with a Ph.D. in juvenile justice who testified during the punishment phase of Juan Balderas's trial.
Romero, Eric	Victim in the drive-by Beltway Shooting on December 3, 2005.
Sepulveda, Guadalupe	Victim (non-fatal) in the Loma Vista Shooting on September 12, 2005.
Waters, Millard F. "Fil"	Detective in the Houston Police Department who showed Angelina Quinones a photo array in attempt to procure identifications of the individuals involved in the murder of Jose Garcia on December 15, 2005.
Weissfisch, George	One of the prosecutors assigned to Juan Balderas's case between 2005 and 2009.
Zamora, Daniel	Victim in the Loma Vista Shooting on September 12, 2005.

Appendix D

[STAMP]

United States District Court
Southern District of Texas
ENTERED
December 14, 2022
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:20-CV-4262

JUAN BALDERAS,

Balderas,

VS.

BOBBY LUMPKIN,

Respondent.

ORDER

Texas death-row inmate Juan Balderas stood trial in February 2014 for the murder of Eduardo Hernandez. *See Balderas v. State,* 517 S.W.3d 756, 763-65 (Tex. Crim. App. 2016) (describing the factual basis for the conviction). A jury found Balderas guilty of capital murder and he received a death sentence. Balderas unsuccessfully availed himself of state appellate and post-conviction remedies.

Balderas filed a federal petition for a writ of habeas corpus on December 15, 2020. (Docket Entry No. 2). On April 18, 2022, Balderas filed an amended petition raising twelve grounds for relief. (Docket Entry No. 38). That same day, Balderas filed a motion to stay these proceedings to allow the exhaustion of state court remedies. (Docket Entry No. 39). As described in his motion, Balderas asks for a stay so that he can litigate the following claims in state court:

- Claim I – The State Violated Mr. Balderas's Due Process Rights Under *Brady v. Maryland* and its Progeny;
- Claim IV – Ineffective Assistance of Trial Counsel for Failure to Raise the Issue of Mr. Balderas's Mental Competency;
- Claim V – Mr. Balderas's Due Process Rights Were Violated Because He Was Tried While Incompetent;
- Claim VII – Trial Counsel Violated Mr. Balderas's Sixth Amendment Autonomy Right to Present an Alibi Defense; and
- Claim XXI – The State Violated Mr. Balderas's Due Process Rights by Failing to Correct False Testimony Under *Napue* and *Giglio.*

(Docket Entry No. 39 at 3). Balderas concedes that his has not exhausted these claims. Respondent Bobby Lumpkin opposes any stay of these proceedings. (Docket Entry No. 47).

"[F]ederal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims."

Rhines v. Weber, 544 U.S. 269, 273 (2005); *see also* 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"). Under *Rhines,* "a district court has discretion to stay a mixed petition . . . to allow a habeas petitioner to present his unexhausted claims to the state court in the first instance, then return to federal court for review of his perfected petition." *Day v. McDonough,* 547 U.S. 198, 210 n.10 (2006). Stay and abeyance should be granted when a petitioner shows good cause for the failure to exhaust, that the unexhausted claims are potentially meritorious, and that he has not engaged in intentionally dilatory litigation tactics. *See Rhines,* 544 U.S. at 278.

Having reviewed the parties' briefing, the record, and the law, the Court concludes that Balderas has met the *Rhines* requirements. A stay of this case is warranted to allow the exhaustion of state court remedies. Accordingly, the Court **GRANTS** Balderas' motion for a stay. (Docket Entry No. 39).

Balderas will file his successive state habeas application in an expeditious manner. Balderas' successive application will set forth all unexhausted claims that he wishes to litigate when he returns to federal court, including all factual theories and legal arguments supporting the same. After he submits his successive state habeas application, Balderas will file an advisory every ninety (90) days updating this Court on the status of his state habeas litigation. Balderas will move to reopen these proceedings within thirty days after the resolution of his state proceedings.

This case is **STAYED** and **ADMINISTRATIVELY CLOSED**.

The Clerk will provide copies of this Order to the parties.

SIGNED on DEC 13 2022 at Houston, Texas.

/s/ Alfred H. Bennett
ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE