No. 25-6793

IN THE

Supreme Court of the United States

ROMAN FLORES,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
the Texas Court of Criminal Appeals

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S APPENDIX 1

JUDGMENT ON PLEA BEFORE JURY
COURT/JURY ASSESSING PUNISHMENT

CAUSE NO. 773453

THE STATE OF TEXAS

VS. Roman Flores

(Name of Defendant)

AKA _____

IN THE 179th DISTRICT COURT

COUNTY CRIMINAL COURT
AT LAW NO. _____

OF HARRIS COUNTY, TEXAS

Date of Judgment: 1-31-2000 | Date Sentence Imposed: 1-31-2000 | Sentence to Begin: 01-30-1998 | Date of Offense: 01-01-1998

Attorney for State: C. Connors.

Attorney for Defendant: J. Guerinot ☐ Defendant Waived Counsel

Offense Convicted of: Capital Murder

☐ A MISDEMEANOR, CLASS: A | B | C ☒ A FELONY, DEGREE: SJ | 3rd | 2nd | 1st | CAPITAL

Jury Verdict: GUILTY Foreperson: Perry T. Mason

(Circle appropriate selection – N/A = not available or not applicable)

Plea to Enhancement Paragraph(s): 1st Paragraph: True | Not True | N/A; 2nd Paragraph: True | Not True | N/A

Charging Instrument: Complaint | Indictment | ~~Information~~

Findings on Enhancement(s): 1st Paragraph: True | Not True | N/A; 2nd Paragraph: True | Not True | N/A

Plea: ~~Guilty~~ | ~~Nolo Contendere~~ | Not Guilty

Affirmative Findings:

Deadly Weapon: Yes | No | N/A namely a firearm

Family Violence: Yes | No | N/A

Victim Selected by Bias/Prejudice: Yes | No | N/A

Victim Younger Than 17 years: Yes | No | N/A

Controlled Substance Used to Commit Crime: Yes | No | N/A

Punishment Imposed by COURT / JURY and Place of Confinement: Life

(Mark all that apply)

☒ Institutional Division, TDCJ

☐ State Jail Division, TDCJ

☐ Harris County Jail

☐ Sentence suspended, Defendant placed on community supervision for _____

☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

☐ Fine in the Amount of :$_____

☐ Fine Only

Time Credited: _____ days toward incarceration _____ days toward fine and costs _____ days toward incarceration, fine and costs

COURT COSTS: $ 236.25

(Mark appropriate selections below, if applicable)

☐ Name changed from _____.

☐ Judgment Addendum incorporated herein by reference.

☐ Driver's license is suspended for a period of _____ days/months/years.

☐ The Defendant is entitled to _____ days credit toward suspension of driver's license.

☐ It is ordered by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13 (h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

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This cause being called for trial in Harris County, Texas, unless otherwise referenced, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above; or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court, and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent and having pleaded as shown above to the charging instrument, both parties announced ready for trial and thereupon a jury, to-wit, the above named foreperson and eleven others for a felony offense indicated above or the above named foreperson and five others for a misdemeanor offense indicated above, was duly selected, impaneled, and sworn, the jury having heard the charging instrument read and the Defendant's plea thereto and having heard the evidence submitted and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into Court by the proper officer, the Defendant and the defendant's counsel, if any, being present, and returned into open court the verdict set forth above, which was received by the Court and is here now entered upon the minutes of the Court as shown above.

The Defendant having previously elected, in writing and at the time of his plea, to have punishment assessed as indicated above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the Court; they retired to consider such question and after having deliberated they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by the Court, in due form of law further evidence was heard by the Court relative to the question of punishment and the Court fixed punishment of the Defendant as shown above.

IT IS CONSIDERED, ORDERED, AND ADJUDGED by the Court, in the presence of the Defendant, that the said judgment be and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, and said Defendant as indicated above. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas, unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail for the period indicated above, and until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause, unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law; or as indicated above.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on 01-31-2000

X _____

JUDGE PRESIDING

M Wilkinson

Community Supervision
Expires on: _____

Notice of Appeal: 1-31-2000

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on 1/31/00 at 5:00 AM / PM
Sheriff, Harris County, Texas

By: _____ Deputy

Entered _____
Verified _____
LCBT _____
LCBD _____

SPECIAL INSTRUCTION OR NOTES: _____

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RESPONDENT'S APPENDIX 2

01-00-296-CR

REPORTER'S RECORD 00 APR 14

VOLUME 6 OF 7 VOLUMES

TRIAL COURT CAUSE NO. 773453

ROMAN FLORES, Appellant,	)	IN THE DISTRICT COURT
VS.	)	HARRIS COUNTY, TEXAS
THE STATE OF TEXAS, Appellee.	)	179TH JUDICIAL DISTRICT

****

TRIAL ON MERITS

****

On the 31st day of January, 2000, the following proceedings came on to heard in the above entitled and numbered cause before the Honorable J. Michael Wilkinson, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computer-aided transcription/stenograph machine.

ORIGINAL

A P P E A R A N C E S

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VOLUME 6

TRIAL ON MERITS

January 31, 2000

Very drunk. He tells you a story of what occurred at the back of a car and then moves to the driver's side. And that the shooting occurs from the driver's side. Some of the things you can't change in a case are the physical facts. Where do we see the little cones? Where do we see the markers? We see them on the passenger side of the car, not on the driver's side. That's the very first thing. The next thing that we know is that everybody starts running. And he says that there are shots. Now, what's important about that? What's important about everybody running and shots? You have to find, number one, that Freddie Motilla is the killer. I think that's obvious. That is as obvious to everybody as all of us sitting here today. The problem is when you look to see if somebody intended to kill somebody, what do you look at? You look at how close they are, what they do with the gun. Does he shoot him in the head? Does he shoot him in the heart? This man is shot, unfortunately -- and it's a tragedy -- shot in the arm. The problem is the bullet goes further. Now, there is no doubt that's an act clearly dangerous to human life, but that does not tell you that that man had the specific intent to kill. That's what they have to prove. They have to prove that beyond a reasonable doubt. Number one, that Freddie Motilla had the specific intent to kill, he had the specific intent to kill. If we believe Jose Osuna and Cesar Martinez and we

want to take Rosie Montalvo at her word, when he walked up, he would have pulled a gun on him and shot him right there. The problem is that didn't happen. Something else happened. There is yelling. There is screaming. There is a demand. There are people pulling on people. All of these things you have to sift through, all of them, not just rush to a conclusion and say, gosh, it's got to be this specific way. Look at everything. Look at the autopsy report. It tells you where the bullet entered, in the back part of the arm. The man's running away. Look at everything.

When we start talking about Cesar Martinez, let's also analyze him a little further. Here's a man that says I had two or three Long Island teas, potent drinks. When did you start drinking? At 10:30. I only had two or three, but I didn't drink anything else. Then, at another hearing, he said he started drinking at 7:30 and he drank continuously till the time he left the Far West Rodeo. I'd submit to you that he was wacked just like Jose Osuna was. Both of them were intoxicated. Both of them had been drinking for some six or seven hours. Think about where you'd be if you had drinking for six or seven hours. I probably would have been passed out in the corner. I would have been out cold. But these people kept right on drinking, went to do more drinking.

The real question becomes, if anything, what

has the State proved to you? I guess they could make a case for an aggravated robbery. If you believe Rosie Montalvo, that out of the clear blue she says this man, identifies him, then at some point she looks up, she hears gunshots, she's nervous, looking for her friends, and at some instance she sees him go over to Ronnie Fisk's body and put his hands on his pockets. I guess if you believe that beyond a reasonable doubt then you could convict this man of aggravated robbery. But I would submit to you that he is not guilty of capital murder. He is darn sure not guilty of having to be reasonably sure that Freddie Motilla--

MS. CONNORS: Objection, Your Honor. That's not the law, reasonably sure. That's a misstatement.

THE COURT: Sustained.

MS. CONNORS: Ask the jury be instructed to disregard.

THE COURT: Disregard it, ladies and gentlemen.

Rephrase your argument, sir.

MR. GUERINOT: Thank you, Judge.

Let me read it to you directly so you'll know. That he should have anticipated as a result of carrying out the conspiracy what happened. Where have they showed you a conspiracy? That's the very first thing. Ask yourself that. They are the people that have to prove it to

RESPONDENT'S APPENDIX 3

0773453 0101A

Case No. _____

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

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

NAME: Roman Flores

DATE OF BIRTH: August 12, 1975

PLACE OF CONFINEMENT: Jester III, Richmond, Texas

WARDEN: Jamarcus Goodall

TDCJ-CID NUMBER: 914216 **SID NUMBER:** 05107645

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

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

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

The 179th District Court of Harris County

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

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

Michael Wilkinson

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

Yes, by Mr. Jerry Guerinot (SBOT: 08571500)

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

January 31, 2000

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

Capital murder, life with the possibility of parole after 40 years

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

n/a

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

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

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

n/a

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

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

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

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

If you answered yes, when did your sentence discharge? n/a

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

☒ **yes** ☐ **no**

If you did appeal, answer the following questions:

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

(B) What was the case number? 01-00-00296-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name: Yes, James Mount

(D) What was the decision and the date of the decision? On November 30, 2000, the court of appeals affirmed the conviction.

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

☒ **yes** ☐ **no**

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

(A) What was the case number? No. 101-01

(B) What was the decision and the date of the decision? On April 18, 2001, the CCA affirmed the Appeals Court's decision.

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

☐ **yes** ☒ **no**

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? n/a
(B) What was the decision and the date of the decision? n/a

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

n/a

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

☐ **yes** ☒ **no**

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

n/a

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

☐ **yes** ☐ **no**

If you answered yes, answer the following questions:

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

n/a

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

n/a

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

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

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

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

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

GROUND ONE:

FLORES'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT APPLICANT'S TRIAL. STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

FACTS SUPPORTING GROUND ONE:

Mr. Flores's trial counsel rendered ineffective assistance, in violation of Mr. Flores's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, section 10 of the Texas Constitution, and Article 1.051 of the Texas Code of Criminal Procedure, by committing several errors that prejudiced the outcome of his trial. The ineffectiveness consists of: the failure to establish a relationship with Mr. Flores, the failure to conduct any investigation into the facts of the crime, the failure to investigate the witnesses he presented at trial, the failure to file any pretrial (discovery) motions, being ineffective during the voir dire process, the failure to impeach the state's witnesses with readily available impeachment material, the failure to consult with experts and present any expert testimony, the failure to use Freddie Motilla as a witness, the failure to call Mr. Alvarez, Mrs. Alvarez, and Jamie Dominguez as witnesses, the failure to present an alternative suspect defense and the failure to investigate the initial suspects, the failure to develop and communicate a trial strategy with Mr. Flores before and during trial, by introducing Defense Exhibit 1, by admitting Mr. Flores's guilt during closing argument against Mr. Flores's objection, by effectively acting as a prosecutor instead of an advocate for Mr. Flores.

Under Strickland, a petitioner first "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." Second, the petitioner must demonstrate prejudice by showing "reasonable probability but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonably probability is a probability sufficient to undermine confidence in the outcome."

Strickland v. Washington, 466 YS 688 (1984).

But for counsel's ineffectiveness, Mr. Flores would not have been convicted of capital murder. See attached memorandum of law (and exhibits).

GROUND TWO:

Mr. Flores's trial counsel violated Flores's Sixth Amendment right to choose the objective of his defense by admitting Mr. Flores's guilt against his objection. McCoy v. Louisiana, 138 S.Ct. 1500 (2018)

FACTS SUPPORTING GROUND TWO:

Mr. Flores has adamantly denied any involvement in the (attempted) robbery and subsequent killing of Mr. Fisk; pretrial, during his interrogation, during trial when Mr. Flores testified, and after trial when Mr. Flores wrote several requests for help to innocence projects.

At the start of trial, Mr. Flores pled 'not guilty.' At trial, Mr. Flores testified on his own behalf and stated that he had no involvement whatsoever in the robbery or murder of Mr. Fisk. (5.RR.96,97,99.)

Mr. Flores was charged with capital murder, felony murder, aggravated robbery, and robbery.

During closing argument, Mr. Guerinot conceded to the jury: "The real question becomes, what has the state proved to you? I guess they could make a case for an aggravated robbery. If you believe Rosie Montalvo. [] I guess if you believe that beyond a reasonable doubt then you could convict this man of aggravated robbery." (4.RR.13-15.) This goes directly against Flores's pretrial and trial statements. Robbery is the aggravating factor in this case which makes it capital murder.

Mr. Guerinot knew (or should have) that Motilla shot and killed the victim with a firearm Motilla brought to the Shell parking lot. Guerinot knew (or should have) that Flores and Motilla were charged with murder committed in the course of committing or attempting to commit a robbery.

Guerinot knew (or should have) that Mr. Flores was charged under the law of parties, where the case law is clear on the fact that one should have anticipated the death of an individual if one of the parties brings a gun to a robbery and uses it to kill. Guerinot knew (or should have) that this makes all parties equally guilty of the crime actually committed by one as set out in Tex. Cod. Crim. Pro., 7.02(b). Knowing all this, Guerinot effectively told the jury to convict Flores of capital murder. Moreover, conceding guilt to an element of the crime or a lesser included crime is still a McCoy violation. Rubio v. State, 596 S.W. 3d 410, 425 (Tex. App.-Dallas 2020), rev'd and remanded, 638 S.W. 3d 693 (Tex. Crim. App. 2022; Turner v. State, 570 S.W. 3d. 250, 275 (Tex. Crim. App. 2018).

Guerinot's tack at trial was therefore a blatant violation of Flores's Sixth Amendment right to choose the objective of his defense and warrants a new, and fair, trial.

See attached memorandum of law and exhibits.

GROUND THREE:

The state violated Flores's due process rights by unknowingly and/or knowingly introducing false or misleading testimony at trial. Ex Parte Chabot, 300 S.W. 768 (2009), Alcorta v. Texas, 355 US 28

FACTS SUPPORTING GROUND THREE:

Mr. Flores's conviction was obtained through the State's use of false and misleading testimony, in violation of his right to due process of law. U.S. Const. Am XIV: TX. CONST. art. I, §§ 1, 19; Ex parte Chabot, 300 S.W. 3d 768 (Tex. Crim. App. 2009). The State built its capital murder case on false testimony by several witnesses and supported it by misleading crime scene photos. Together, the prosecution created the false impression that Mr. Flores is guilty. Based on the State's presentation of false testimony, the prosecution's case was premised on a false impression that: (1) Mr. Flores talked to Montalvo in the car, (2) Mr. Flores directed Mr. Motilla to: "get that guy with the trunk," (3) Mr. Flores jumped in the victim's car trying to hotwire it, (4) Flores left the crime scene and returned for a second time, (5) Mr. Flores rolled over the victim's body, (6) Mr. Flores went through the victim's jeans' pockets, and (7) Mr. Flores left the crime scene together with Motilla. These acts individually and combined constituted the basis for the State to prove their robbery theory, Mr. Flores's involvement, and his anticipation of the murder - as required under the Law of Parties.Despite the testimony about these acts being false, they were critical to the State's case, as shown by seeing these facts reiterated in the opinion on appeal

confirming Mr. Flores' conviction. (Ex. 34, Flores v. Texas, 1st Ct. of App., 2000 (unpublished)).

Had the jury known all the facts in this case, however, they would have found that Flores did not commit any of these seven acts. Moreover, a robbery likely never even occurred; at minimum, there was no robbery in which Mr. Flores was involved. The false testimony was buttressed by by suggestive and misleading crime scene photos. The witnesses' false testimony gave the jury the false impression that a robbery had occurred and that Mr. Flores was one of two people responsible.

Evidence not presented at trial, such as declarations from Ms. Motilla, Mr. Michael Alvarez, Ms. Esther Alvarez, many expert declarations, and the State's discovery file, show that Mr. Flores is not guilty of capital murder, (aggravated) robbery, or any other of the charged crimes.

The State relied heavily on the false testimony to prove that Mr. Flores was guilty of capital murder under the law of parties. During the State's closing argument, all the elements of the false testimony it presented were listed as evidence to convince the jury to convict. The false testimony also materially contributed to the capital murder conviction under the Law of Parties.

Lastly, the false testimony was material to Flores's conviction because the Texas Court of Appeals for the First District listed all the false testimony to confirm Flores's conviction on appeal.

See attached memorandum of law and exhibits.

GROUND FOUR:

Flores's conviction violates the US Constitution because he is innocent of capital murder. Herrera v. Collins, 506 US 390 (1993); Ex Parte Elizondo, 947 S.W.2d 202, 205 (1996).

FACTS SUPPORTING GROUND FOUR:

Flores's conviction and sentence violate his First, Fifth, Sixth, and Fourteenth Amendment rights to due process, a fair trial, and a reliable determination of guilt and punishment because Motilla's confession, expert reports, new witness testimony, and documents from the discovery file of the Office of the District Attorney for Harris County clearly and convincingly show Flores is innocent of capital murder. Mr. Flores was not involved in any (attempted) robbery and could not have anticipated a death would occur. In light of all the evidence now available, no reasonable would have convicted Mr. Flores of capital murder. Ex parte Elizondo, 947 S.W.2D 202, 205 (Tex. Crim. App. 1996); see also Herrera v. Collins, 506 U.S. 390 (1993).

Several newly-available pieces of evidence show Mr. Flores is innocent of capital murder: (1) the statement of Mr. Motilla that Mr. Flores was not involved in the murder and that no robbery took place i.e. that Mr. Flores was not involved in any robbery; (2) the statement of Mr. Michael Alvarez, supported by a statement of Ms. Heuvelman, that he had the blue Polo cap which Mr. Flores wore on the night of the incident at his house and gave to Mr. Guerinot, therefore the cap in Fisk's car could not have been Mr. Flores's cap; (3) the expert report of Ms. Jennifer Dysart raising serious

concerns about the reliability of the State's witnesses' testimonies and identifications; (4) the expert declaration of Mr. Chris Randall stating that the wires hanging underneath the steering wheel in Fisk's car are not from someone trying to hotwire that car, and lastly; (5) evidence found in the DA's discovery file showing that Mr. Flores never rolled Mr. Fisk's body over, such as never-presented crime scene photos, police reports, and a paramedic's note.

Had this evidence been presented, the State would not have been able to prove Flores guilty beyond a reasonable doubt. Because the State's evidence was directed solely towards the theory that Flores was involved in an attempted robbery, and no evidence suggested that Flores shot Fisk, Mr. Flores could not be guilty of capital murder unless there was an actual attempted robbery Flores participated in that attempted robbery. The new evidence establishes that a robbery most likely never took place, and in the more unlikely scenario that it did, that Mr. Flores had no involvement in it. This evidence was not presented to the fact finder due to conduct of trial counsel [see Claim 1], or due to the fact that the material wasn't turned over to the defense. [See Claim 5]

See attached memorandum of law and exhibits.

GROUND FIVE :

The state violated Flores's due process rights by failing to disclose exculpatory and impeachment evidence to the defense. Brady v. Maryland, 373 US 83 (1963).

FACTS SUPPORTING GROUND:

The State Failed to Disclose Information Related to Alternative Suspects.

The State failed to disclose critical information regarding the initial suspects in this case: Issac Banda and Israel Banda. This included fingerprint cards, reports, and envelopes containing evidence that could have explained how the Banda brothers were identified as suspects. The suppression of this evidence was detrimental to Mr. Flores's defense and materially impacted his conviction.

Fingerprint evidence collected from multiple vehicles in this case was not disclosed to the defense. The fingerprint report, dated November 6, 1998, identifies four individuals as suspects in this case: Issac Banda, Israel Banda, Roman Flores, and Freddie Motilla. After a viewing of the physical evidence in this case, it became clear from the envelopes and fingerprint cards that the Banda brothers became suspects before Mr. Flores and Mr. Motilla became suspects. This information was not disclosed to the defense, yet is material and exculpatory for several reasons. (1) Mr. Issac Banda has prior charges, including charges for attempted murder, burglary of a vehicle, and unlawful carrying of a weapon. (2) Mr. Issac Banda's appearance matches suspect descriptions of two independent witnesses, (3) The Banda brothers, knowing they were suspects first, likely pointed

the police in the direction of Mr. Flores and Mr. Motilla, and (4) (4) It is possible that another person saw an opportunity amid the chaos and quickly searched the victim's clothing after he was shot.

The discovery file also lacks any offense or incident reports documenting the investigation that initially led law enforcement to identify the Banda brothers as primary suspects within the first two weeks following the shooting. Standard police training mandates that officers properly document and disclose investigative reports, yet such materials are conspicuously absent in this case.

Since no reports identifying the Banda brothers as suspects were included in the State's discovery, it appears that trial counsel lacked access to this critical information during trial.

The fact that the Banda brothers were initially identified as suspects yet omitted from the discovery materials constitutes a clear Brady violation, as this suppressed information was both favorable and material to Mr. Flores's defense.

See attached memorandum of law and exhibits.

WHEREFORE, I PRAY THAT THE COURT GRANT THE RELIEF TO WHICH APPLICANT MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

This application form *must be verified* in one of the following ways by either an applicant or a petitioner or it may be dismissed for noncompliance.

Applicants

In order to verify this application form, an applicant must sign one of the following:

(1) the "Unsworn Declaration" for inmates (page 16) if applicant is an inmate; or
(2) the "Unsworn Declaration" for non-inmates (page 17) if applicant is not an inmate; or
(3) the "Oath Before a Notary Public" before a notary public (page 18).

Petitioners

If a petitioner, including an attorney, presents an application form on behalf of an applicant, the petitioner may verify the application form for the applicant. In order to verify this application form, a petitioner must sign one of the following:

(1) the "Unsworn Declaration" for inmates (page 16) if petitioner is an inmate; or
(2) the "Unsworn Declaration" for non-inmates (page 17) if petitioner is not an inmate; or
(3) the "Oath Before a Notary Public" before a notary public (page 18).

In addition, *all petitioners*, including attorneys, presenting an application on behalf of an applicant must complete "Petitioner's Information" and sign "Petitioner's Statement" (page 19).

UNSWORN DECLARATION (INMATE)

My name is (First)_____ (Middle)_____(Last)_____, my date of birth is _____, and my inmate identifying number, if any, is _____.

I am presently incarcerated in (Corrections unit name)_____ in (City) _____, (County)_____, (State) _____, (Zip Code)_____. I declare under penalty of perjury that the contents of this application for a writ of habeas corpus and the facts stated in the application form are true and correct.

Executed on the _____ day of (Month)_____ (Year)_____.

Signature of Declarant: _____

UNSWORN DECLARATION (NON-INMATE)

My name is (First) _____ (Middle) _____ (Last)_____, my date of birth is _____, and my address is (Street)_____ _____, (City)_____ , (State)_____, (Zip Code)_____, and (Country)_____. I declare under penalty of perjury that the contents of this application for a writ of habeas corpus and the facts stated in the application form are true and correct.

Executed in _____County, State of _____, on the _____day of (Month)_____ (Year)_____.

Signature of Declarant: _____

OATH BEFORE A NOTARY PUBLIC

STATE OF TEXAS

COUNTY OF Gregg

Mesel Portier, being duly sworn, under oath says: "I am the applicant or petitioner in this action and know the contents of this application for a writ of habeas corpus and, according to my belief, the facts stated in the application form are true."

Signature of Declarant

SUBSCRIBED AND SWORN TO BEFORE ME THIS 19th DAY OF February, 2025.

MAYLET PASCUAL
Notary ID #134382103
My Commission Expires
May 30, 2027

Signature of Notary Public

PETITIONER'S INFORMATION

(Contact information for a petitioner presenting this application on behalf of the applicant)

Petitioner's printed name: Merel Pontier

State bar number, if applicable: 24121061

Address: PO Box 6271
Longview, TX 75608

Telephone: 737 615 2333

Fax: 512 969 6057

Email Address: pontier.merel@gmail.com

PETITIONER'S STATEMENT

"I am signing and presenting this application form on behalf of the applicant for the purpose of obtaining relief from the applicant's felony conviction. I have consulted with the applicant concerning this application and the applicant has given consent to the filing of this application form."

Signature of Petitioner

Signed on Feb. 19, 2025.

DECLARATION OF MEREL PONTIER

State of Texas

County of Gregg

I, Merel E. Pontier, hereby declare:

1. I am a member of the State Bar of Texas in good standing.
2. I am duly authorized attorney for applicant Roman Flores, having the authority to prepare and to verify Mr. Flores's application for writ of habeas corpus.
3. I am presenting this amended application with the applicant's knowing and voluntary consent.
4. I have prepared and read the foregoing application and I believe all of the allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury

Merel E. Pontier

SUBSCRIBED AND SWORN TO BEFORE ME ON 19th day of February, 2025

MAYLET PASCUAL
Notary ID #134382103
My Commission Expires
May 30, 2027

NOTARY

RESPONDENT'S APPENDIX 4

3/5/2025 10:06 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 98123875
By: Bryan Hudson
Filed: 3/5/2025 10:06 PM

NO. 0773453-A

EX PARTE	§	IN THE 179TH
	§	DISTRICT COURT OF
ROMAN FLORES, Applicant	§	HARRIS COUNTY, TEXAS

STATE'S RESPONSE
TO APPLICANT'S ORIGINAL AND AMENDED GROUNDS

The applicant seeks habeas relief from a January 31, 2000 conviction for capital murder. At trial, three eyewitnesses identified the applicant as the non-shooter who participated in the robbery and shooting death of the complainant. At trial and on habeas, the applicant does not claim he was not present at the scene; instead, the applicant claims he was near the shooter but attempted to stop the shooter. The applicant fails to demonstrate his conviction was improperly obtained and fails to prove he is entitled to habeas corpus relief.

The Applicant's Confinement

The applicant, Roman Adam Flores, is confined pursuant to the judgment and sentence of the 179th District Court in cause no. 773453, where a jury convicted him of capital murder. On January 31, 2000, the trial court assessed his punishment at confinement for life in the Texas Department of Criminal Justice—Institutional Division. On November 30, 2000, the First Court of Appeals affirmed the applicant's conviction and sentence. *Flores v. State*, No. 01-00-00296-CR, 2000 WL 1753148 (Tex. App.—

Houston [1st Dist.] Nov. 30, 2000, pet. ref'd) (mem. op., not designated for publication). Mandate issued on June 27, 2001.

Summary of the Applicant's Trial

The following is the Court of Appeals' factual summary of the capital murder committed by the applicant and Fredrick "Freddie" Motilla:

> Ronnie Fisk, the complainant, and two friends, Jo[s]e Osuna and Cesar Martinez, were parked at a gas station. While returning from the restroom, Osuna saw appellant and Freddie Motilla approach Fisk, who was standing by the car's trunk. Appellant told Motilla to "get that guy right there by the trunk." Motilla pulled a gun from his jacket, told Fisk and Martinez to "get on the ground," and demanded the keys. Meanwhile, appellant jumped in the driver's side of Fisk's car and appeared to be looking for something.
>
> Osuna and Martinez ran away. Less than a minute later, they heard several gunshots, followed by Fisk's crying out in pain. When they looked back, they saw Fisk fall on his face. Martinez and Osuna ran back to the car just before appellant and Motilla, who had apparently stepped away for a moment, came back together from around the corner of the station's car wash. While Motilla again aimed the gun at them and demanded the keys, Martinez and Osuna saw appellant turn Fisk over, kick him, and search his pockets and neck area. Appellant and Motilla ran away together. Another eyewitness, Rosie Montalvo, testified she had seen appellant and another man screaming at someone; the other man with appellant shot Fisk; and appellant walked back to the victim, "tapped" him with his feet, and put his hand in Fisk's pockets.
>
> *Flores*, 2000 WL 1753148, at *1.

List of Trial Witnesses

- Robert Baldwin: firearms examiner (Vol. 4)
- Mark Conner: crime scene unit (Vol. 4)
- Scott Michael Dalmas: crime scene unit (Vol. 4)
- Roman Flores: the defendant/applicant (Vol. 5)
- Felipe Gonzales: defense witness (Vol. 5)
- Stewart H. Kennedy: homicide sergeant (Vol. 4)

- Cesar Martinez: eyewitness (Vol. 4)
- Rosie Montalvo: eyewitness (Vol. 4)
- Patricia Moore: pathologist (Vol. 4)
- Jose Osuna: eyewitness (Vol. 3)
- Bettie Joanne Pampbell[1]: the complainant's mother (Vol. 5)
- David Rodriguez: primary patrol unit (Vol. 4)
- Jimmy L. Schraub: latent print examiner (Vol. 4)
- Cynthia Segura: defense witness (Vol. 5)
- D.D. Shirley: homicide sergeant (Vol. 3, 5)
- Stacy Suro: crime scene unit (Vol. 3)

List of Additional Relevant Individuals

- Ronnie Fisk: the decedent-complainant
- Claire Connors: the trial prosecutor
- Gerard "Jerry" Guerinot: the applicant's trial attorney
- Wayne Hill: the applicant's prior defense attorney[2]
- Jamie Dominguez: the owner of the car in which Montalvo was seated
- Fredrick "Freddie" Motilla: the applicant's co-defendant who was found guilty of capital murder in cause number 776889; *see Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002)
- R.E. Wheelan: Motilla's trial attorney

The Applicant's Claims on Habeas

In his application for writ of habeas corpus, the applicant raises the following claims: ineffective assistance of counsel, *McCoy* violation, false evidence, actual innocence, and *Brady* violation. Am. Writ App. at 6-15; Am. App. Memo at 9-61 *(3-55)*; *see also* Writ App.

[1] According to TLO, Pampbell's name was actually spelled "Betty Joann Pampell"; but the State will use the trial record's spelling. *See* St. Writ Ex. A.

[2] Hill withdrew from the applicant's case due to "conflict" (St. Writ Ex. F), and then Guerinot was appointed (St. Writ Ex. G).

at 6-15; App. Memo at 9-52 *(3-46)*.[3] Many of the underlying factual allegations that the applicant presents as supporting evidence are shared amongst the grounds. Therefore, certain responses below will address the overarching factual allegation and specify within which grounds the applicant raised the factual allegation.

The Burden Rests on the Applicant

"Texas law has long required all post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief." *Ex parte Dennis*, 665 S.W.3d 569, 572 (Tex. Crim. App. 2022) (citing *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985)). The applicant bears the burden to prove allegations that entitle him to relief on habeas. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988). "Even sworn allegations are not alone sufficient proof." *Ex parte Evans*, 964 S.W.2d 643, 648 (Tex. Crim. App. 1998) (citing *Ex parte Empey*, 757 S.W.2d at 775). Conclusory allegations are insufficient to warrant habeas relief. *See id.*

Also, sufficiency claims are not cognizable on habeas. *Ex parte Easter*, 615 S.W.2d 719, 720 (Tex. Crim. App. 1981). This applicant complains that "[t]he State's evidence in this case was weak at best," and he was "merely a bystander trying to prevent Mr. Motilla from firing his gun." Am. App. Memo at 28, 51 *(22, 45)*. At trial, the jury heard: three

[3] The applicant filed his original application for writ of habeas corpus ("Writ App.") and supporting memorandum ("App. Memo") on June 4, 2024. The applicant filed his amended application ("Am. Writ App.") on February 19, 2025 and his amended memorandum ("Am. App. Memo") on February 20, 2025. Most citations in the State's answer will be to the amended filings; however, in certain circumstances the State also cites the original filings. When the State provides citations to the applicant's memoranda, the State refers to the electronic document page numbers, which appear on the left side of the filed document near "Certified Document Number" ("CDN") and then provides the applicant's pagination in italics.

eyewitnesses to the crime, including impeachment based on various minor inconsistencies; none of the fingerprints matched the applicant or the gunman; and the applicant's testimony that he was trying to stop the gunman but fled once the gunman pointed the weapon at him. As shown by its verdict convicting the applicant of capital murder, the jury did not believe the applicant and found that the State's evidence proved his guilt beyond a reasonable doubt.[4] Re-litigation of the applicant's trial defense—already considered and rejected by the jury—is not cognizable on habeas unless the applicant satisfactorily proves another ground for relief.

Laches Bars Habeas Relief

The equitable doctrine of laches applies in the instant application because there has been an unjustifiable 23-year delay from the issuance of the mandate in the primary case. Although the Court of Criminal Appeals does not require that claims for habeas relief be asserted within a specified period of time, the doctrine of laches can bar habeas relief when the State is harmed as a result of an unreasonable delay in pursuing a habeas claim. *Ex parte Carrio*, 992 S.W.2d 486, 487 (Tex. Crim. App. 1999) (overruled in part by *Ex parte Perez*, 398 S.W.3d 206, 213-215 (Tex. Crim. App. 2013)). Furthermore, in some instances, an applicant's delay in seeking relief can prejudice the credibility of his claim. *Ex parte Smith*, 444 S.W.3d 661, 665 (Tex. Crim. App. 2014) (quoting *Ex parte Young*, 479 S.W.2d 45, 46 (Tex. Crim. App. 1972)).

[4] The docket sheet shows the jury deliberated for less than three hours: 12:53pm to 1:30pm, and 2:30pm to 4:40pm, including a read-back of testimony. *See* St. Writ Ex. K.

"[A]ll forms of prejudice" may be considered by a court in deciding whether to hold an application barred by laches. *Ex parte Perez*, 398 S.W.3d at 208. A court may consider the totality of the circumstances in deciding whether to grant equitable relief and "anything that places the State in a less favorable position," including prejudice to the State's ability to retry a defendant. *Ex parte Saenz*, 491 S.W.3d 819, 825 (Tex. Crim. App. 2016); *Ex parte Perez*, 398 S.W.3d at 215. A court may consider, among all relevant circumstances, factors such as the length of the applicant's delay in filing the application, the reasons for the delay, the degree and type of prejudice resulting from the delay, and the State's and society's interest in the finality of a conviction. *Ex parte Perez*, 398 S.W.3d at 217-218. Courts must engage in a difficult and sensitive balancing process that takes into account the parties' overall conduct. *Id.* at 217. The longer an applicant delays filing his application, particularly when the delay is much more than five years after conclusion of direct appeals, the less evidence the State must put forth in order to demonstrate prejudice. *Id.* at 217-218.

When considering whether prejudice has been shown, a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial. *Id.* at 217. Courts may "more broadly consider the diminished memories of trial participants and the diminished availability of the State's evidence, both of which may often be said to occur beyond five years after a conviction becomes final." Id. at 216. If prejudice to the State is shown, a court must then "weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief." *Id.* at 217.

A court may reject the State's reliance on laches when the record shows that (1) an applicant's delay was not unreasonable because it was due to a justifiable excuse or excusable neglect; (2) the State would not be materially prejudiced as a result of the delay; or (3) the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he is actually innocent of the offense, or in some cases, that he is reasonably likely to prevail on the merits. *Id.* at 218.

This applicant was sentenced on January 31, 2000, and the mandate issued on July 27, 2001. The applicant allowed nearly 23 years to pass from the date of the mandate before filing his original application on June 4, 2024. To explain his delay, the applicant claims in his unsworn declaration that he does not have any money, and he reached out to various innocence projects over the years. App. Writ Ex. 4 at 8-10 (#51-#60). He attaches an email from the Innocence Network that states the applicant reached out in 2005 and 2006 (App. Writ Ex. 37); an email from the Innocence Project of Texas that states the applicant reached out in 2007 (App. Writ Ex. 38); and an email from the Texas Innocence Network that states the applicant reached out to the University of Houston Texas Innocence Network in 2017 (App. Writ Ex. 39).[5] Importantly, the applicant never claims he was not aware he could file an application for writ of habeas corpus; instead, he merely states that he could not find a lawyer willing to look into his case for free. App. Writ Ex.

[5] The applicant also attaches two exhibits that the Court should find are unpersuasive: a general close-out letter from the University of Texas School of Law Actual Innocence Clinic that is not dated and is not addressed to the applicant (App. Writ Ex. 40), and an unsworn declaration from Press, a lawyer who writes generally about innocence projects and presents hypotheticals, but appears to have never met the applicant and offers no facts specifically tied to the applicant's delay (App. Writ Ex. 11).

4 at 9 (#59). "Lack of funds, pro se status, and/or the lack of sophistication of the law would not, without more, excuse [an applicant's] twenty-two year delay." *Ex parte Caudill*, No. WR-86,762-02, 2019 WL 1461929, at *7 (Tex. Crim. App. Jan. 30, 2019).

The applicant's delay in pursuing habeas relief has prejudiced the State's ability to fully respond to the applicant's writ claims. Due to the passage of time, the applicant's trial attorney Guerinot cannot recall some portions of his representation of the applicant, including certain strategic decisions.[6] Guerinot Aff. at 1-2 (#2), 3 (#7), 4 (#9, #12). Guerinot no longer has access to his defense file and does not recall when the applicant's file was disposed. Guerinot Aff. at 1-2 (#2), 3 (#5). John Castillo, who investigated the applicant's case and spoke to multiple witnesses, is deceased. Guerinot Aff. at 3 (#5). Also, Wheelan, Motilla's attorney, is deceased. *See* St. Writ Ex. B. The applicant's delay impedes the State's ability to present this Court with the defense investigation and with Wheelan's input regarding Motilla's claim that he would have testified he acted alone.

Furthermore, the applicant's delay in pursuing habeas relief would likely prejudice the State's ability to retry the applicant. The impact of the trial testimony would likely not be the same as it would have been in 2000. The higher court permits a trial court to draw reasonable inferences about whether excessive delay has likely compromised the reliability of a retrial; and, in this case, it is reasonable for the Court to conclude that the three eyewitnesses' memories and abilities to describe the details of the applicant's actions would have diminished over the 25 years since the applicant's trial. Also, Pampbell, the

[6] In response to the applicant's claims, trial counsel Guerinot filed an affidavit. *See* Affidavit of Gerard Guerinot ("Guerinot Aff."), executed and filed December 5, 2024.

complainant's mother who testified for the State at the applicant's trial, is deceased. *See* St. Writ Ex. A. Any equitable considerations that militate in favor of granting habeas relief are far outweighed by the prejudice to the State, the State's and society's interest in the finality of a conviction, and the excessive length of the applicant's unjustified delay. Thus, the doctrine of laches should bar the applicant from challenging his conviction.

The State Did Not Violate *Brady*

In his fifth ground for relief, the applicant claims that the State violated his due process rights by failing to disclose exculpatory and impeachment evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Writ App. at 14-15; Am. Writ App. at 14-15. In his original fifth ground, the applicant complained about reports, statements, and photos. Writ App. at 14-15. In his amended fifth ground, the applicant claims fingerprint evidence and offense reports were not disclosed. Am. Writ App. at 14-15; Am. App. Memo at 54-61 *(48-55)*; App. Writ Ex. 43.

Under *Brady v. Maryland*, a prosecutor has an affirmative duty to turn over material, exculpatory evidence. *Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993) (citing *Brady*, 373 U.S. 83). A due process violation has occurred if: 1) the prosecutor failed to disclose evidence; 2) the evidence was favorable to the applicant; and 3) the evidence was material, such that there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different. *Id.* at 702-703. A prosecutor does not have a duty to turn over evidence that would be inadmissible at trial. *Id.* at 703. Also, the State does not have a duty to disclose evidence if the defendant was

actually aware of the exculpatory evidence or could have accessed it from other sources. *Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011). The applicant must present enough credible evidence to prove the first element—failure to disclose—by a preponderance of the evidence. *Ex parte Reed*, 670 S.W.3d 689, 763, 766 (Tex. Crim. App. 2023).

The applicant's *Brady* claims wholly fail, and his meritless allegations should negatively affect the credibility of the entire writ application. In his original claim, the applicant alleged that certain items were not disclosed when those items were actually used in trial. In his amended claim, filed "after undersigned counsel conducted a habeas investigation" (Am. App. Memo at 7 *(1)*), the applicant states "it is unclear whether the State turned over the evidence" and admits "[t]his portion of the brief assumes the relevant evidence was not produced to counsel prior to trial." Am. App. Memo at 53 *(47)*. The applicant concedes that he fails to meet his burden to prove the items were not disclosed.

Evidence Alleged in Original Ground that was Used at Trial. At trial, the jury heard that the prints did not match the applicant (Schraub: 4 R.R. at 10-11).[7] At trial, the jury heard evidence that the two cartridge casings found at the scene were fired from the same gun, but no firearm was recovered or compared (Baldwin: 4 R.R. at 23). At trial, Guerinot impeached testifying witnesses Osuna and Martinez with their written statements (*see infra* "Guerinot's Impeachment of the Eyewitnesses"). At trial, the State presented to the jury that the complainant's wallet was found on his body (5 R.R. at 152).

[7] Schraub's entries appear in the police report as supplements #10, #11, #14, and #17, and his comparison print report documenting that the applicant was eliminated is supplement #30.

Issac Banda Documentation Alleged in Amended Ground. In his amended complaint, the applicant alleges that "[t]he State failed to disclose critical information regarding the initial suspects in this case: Issac Banda and Israel Banda…includ[ing] fingerprint cards, reports, and envelopes…" Am. App. Memo at 53-54 *(47-48)*.[8] Banda is mentioned in police report supplements #16 and #30, which were in the State's file[9], and the applicant offers no evidence to refute Guerinot's assertion that he "had access to and reviewed the entire State's file." Guerinot Aff. at 2 (#5).[10] Also, the trial record shows that the trial prosecutor openly presented the prints evidence in court (Shirley: 3 R.R. at 39; Conner: 4 R.R. at 5-6; Schraub: 4 R.R. at 8-12; Dalmas 4 R.R. at 45, 47), and that the complained-of print card envelopes (App. Writ Ex. 43) were actually present inside the courtroom during the testimony (4 R.R. at 8-10).[11] There is no support for the applicant's claim that the State suppressed or failed to disclose information about Banda.

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[8] While the applicant briefly mentions Israel Banda, his claims only focus on Issac Banda. Therefore, the State responds about Issac Banda and refers to him as "Banda."

[9] The State's trial file included a copy of the police report through supplement #30. *See* App. Writ Ex. 46 (CDN 119072789 at 6-65); App. Writ Ex. 47 (CDN 119074417 at 5-6).

[10] Not only did Guerinot review the entire State's file prior to the applicant's trial, but he also reviewed the trial transcript of Motilla's jury trial, in which many of the same witnesses testified—Baldwin, Kennedy, Martinez, Moore, Osuna, Pampell, Rodriguez, Shirley, and Suro (1 F.M.-R.R. at 3-8). *See* 3 R.R. at 3-4 (Guerinot states that he reviewed Motilla's trial transcript).

[11] The State notes that the applicant's presentation of the prints trial evidence is misleading. *See* Am. App. Memo at 54-55 *(48-49)*. The applicant only notifies this Court about the trial testimony of the two officers who collected the prints (Conner and Dalmas), complains "Conner did not testify whether the prints matched Mr. Flores or if they were compared to any other set of prints," and states that "[d]uring closing argument, the State admitted that the fingerprints taken from Ms. Dominguez's car did not match Mr. Flores." Am. App. Memo at 54-55 *(48-49)*. The applicant omits that the State also presented Schraub's testimony, and he told the jury that he compared the prints and eliminated both the applicant and Motilla (4 R.R. at 10-11). The jury heard this evidence directly from the author of complained-of supplement #30; it was not merely "admitted" by the prosecutor in closing. This misrepresentation should negatively affect the credibility of the applicant's entire writ. Also, the applicant persists in claiming "the original production provided to Mr. Flores's current counsel did not include these suspects identities" referring to Banda (Am. App. Memo at 19 *(13)*), even though

The Court need not engage in a favorability or materiality analysis because the applicant has offered no evidence to support a finding of failure to disclose and Guerinot confirmed that he reviewed the entire State's file. *See Ex parte Reed*, 670 S.W.3d at 766–67 ("Because [the applicant] has failed to establish that this evidence was suppressed before or during his trial, it is unnecessary for us to conduct a materiality analysis"). Thus, the applicant's fifth ground is without merit and should be denied.

The Consistency of the Eyewitness Testimony

At the applicant's trial, eyewitness Montalvo testified about interacting with the applicant before the murder. Montalvo was seated behind the driver's seat in Dominguez's car (4 R.R. at 49-50, 52, 76). Dominguez was seated in the front passenger's seat (4 R.R. at 51). The applicant approached Dominguez's car on the "right side," the side opposite from where Montalvo was seated (4 R.R. at 52-53, 76, 84). Montalvo reached over and lowered the window, and the applicant stuck his head into the vehicle (4 R.R. at 53, 54, 77, 85). The applicant was about two or three feet away from Montalvo (4 R.R. at 54). The first thing Montalvo noticed about the applicant was the tattoo on his neck that said "Flores" (4 R.R. at 56-57, 74). The applicant asked Montalvo for her name and her number and, when Montalvo responded that she had a boyfriend, the applicant walked away, calling

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the applicant's counsel already had to supplement a prior filing about Banda after the State pointed out the false claims within that filing. *See Addition to Second Motion for Extension of Time*, filed on February 12, 2025 and in which the applicant's counsel concedes Banda and the prints comparison report were part of the PIA production; and *State's Motion to Deny Applicant's Extension Request and Proceed to Findings*.

her a "bitch" (4 R.R. at 53, 55). Three minutes later, Montalvo saw the applicant, together with a man who was 5'3" or 5'4," yelling at the complainant (4 R.R. at 57-58).

All three eyewitnesses testified to similar details about the applicant's participation in the capital murder. Both Osuna and Martinez testified that the applicant and the gunman approached together (Osuna: 3 R.R. at 60, 79; Martinez: 4 R.R. at 92, 111). All three testified that the other man, not the applicant, had the gun (Osuna: 3 R.R. at 61; Martinez: 4 R.R. at 92-93; Montalvo: 4 R.R. at 58). Both Osuna and Martinez testified that the gunman demanded the keys (Osuna: 3 R.R. at 61, 64; Martinez: 4 R.R. at 93, 98). Martinez testified that the applicant said "get the guy with the trunk" (4 R.R. at 92); but Osuna averred that the applicant said nothing (3 R.R. at 78). Montalvo repeatedly confirmed that both the applicant and the gunman were yelling at the complainant, but did not specify what (4 R.R. at 58, 59, 72, 73, 78, 79).

All three testified that they heard more than one gunshot (Osuna said two: 3 R.R. at 65; Martinez said two or three: 4 R.R. at 118; Montalvo said three: 4 R.R. at 60, 78). All three testified that the applicant returned to the scene a second time (Osuna: 3 R.R. at 66, 68, 81-83; Martinez: 4 R.R. at 97; Montalvo: 4 R.R. at 60). All three testified that the applicant searched the complainant's pockets (Osuna: 3 R.R. at 68; Martinez: 4 R.R. at 98-99, 114, 116; Montalvo: 4 R.R. at 60-61, 80). Montalvo also said the applicant tapped the complainant's leg with his leg (4 R.R. at 60, 80); while Martinez said the applicant turned over the complainant, kicked him in the head, and checked the complainant's neck area (4 R.R. at 98-99, 114, 116). Osuna and Martinez testified that the applicant and the gunman

left the scene together (Osuna said they were running: 3 R.R. at 69-70; Martinez said they left in a vehicle: 4 R.R. at 101).

Only Osuna testified that the applicant jumped into the driver's seat of the complainant's car and appeared to be searching for something (3 R.R. at 63). Osuna also testified that the gunman demanded Osuna's chain (3 R.R. at 66). In contrast to Martinez's statement, Osuna testified he did not see anyone roll the complainant's body (3 R.R. at 91).

Only Montalvo testified that she did not see the applicant actually take anything from the complainant (4 R.R. at 60-61, 80). Montalvo also believed the gunman had already fled when the applicant was searching the complainant's pockets (4 R.R. at 61, 80); therefore, Montalvo did not indicate that the applicant and the gunman left the scene together.

All three witnesses identified the applicant in the courtroom (Osuna: 3 R.R. at 64; Martinez: 4 R.R. at 92; Montalvo: 4 R.R. at 53), and the photospread was entered into evidence as State's Trial Exhibit 2 (3 R.R. at 70-72; 4 R.R. at 62-63, 105-106, 124-126).

Guerinot's Impeachment of the Eyewitnesses

Osuna

On cross examination of Osuna, Guerinot emphasized facts to discredit his memory. Osuna probably had more than five drinks (3 R.R. at 73-74). Osuna did not know the applicant or the gunman; instead, he saw them for the first time that night (3 R.R. at 95). Osuna only looked at the applicant and the gunman for 30 seconds when they first walked up; he had limited visibility through the popped trunk and blocked windows; and

he was not looking back at them when he ran away (3 R.R. at 79, 80, 86, 91-92). Osuna could not describe any clothing the applicant was wearing and instead only knew that he was wearing "a ballcap" (3 R.R. at 77-78).

In addition, after Osuna described the gunman's height as 5'2" or 5'3," Guerinot asked that Codefendant Motilla (who had been bench-warranted previously (St. Writ. Ex. I)) be presented to the jury for their observation (3 R.R. at 75). Upon Guerinot's questioning after Motilla entered the courtroom, Osuna conceded that Motilla was "not even close" to 5'2" or 5'3" (3 R.R. at 75). In his questions of Osuna thereafter, Guerinot repeatedly referred to Motilla as variations of "the man you described as 5'2" or 5'3", emphasizing an apparent inaccuracy in Osuna's memory of the events (3 R.R. at 77, 79, 80, 83-84).

Guerinot specifically impeached Osuna with his prior statement to the police and with his prior sworn testimony (3 R.R. at 81, 88). Osuna admitted that he did not tell the police that the applicant returned back to the scene, and instead told them that the gunman returned to the scene and "no one was with him" (3 R.R. at 82-83). Osuna admitted his trial testimony directly contradicted what he told the police; that it was a different story; and that he was "just trying to get it right" (3 R.R. at 89-90). Moreover, Osuna admitted that he had spoken with Martinez "some" about what happened that night and had spoken with the prosecutor twice (3 R.R. at 90-91).

On cross examination of Osuna, Guerinot also solicited testimony that contradicted some of Martinez's testimony. Osuna testified that the only person doing the talking was

the gunman (3 R.R. at 78), in contrast to Martinez's testimony (4 R.R. at 92). Also, Osuna did not see anyone turn the complainant's body (3 R.R. at 91), in contrast to Martinez's testimony (4 R.R. at 98).

Martinez

On cross examination of Martinez, Guerinot established facts to challenge Martinez's memory and his identification of the applicant. Martinez drank steadily for almost seven hours, including some strong drinks (4 R.R. at 108-109, 121). The applicant did not get close to Martinez (4 R.R. at 117). When the police showed Martinez a photospread, he tentatively identified the applicant and was unsure of his identification; while in court two years later, Martinez claimed he was positive of his identification of the applicant (4 R.R. at 107-108, 110, 111, 116). In contrast to the other eyewitnesses' descriptions, Martinez said the applicant was wearing a black hat turned backwards, along with a black leather jacket and white pants (4 R.R. at 116-117).

Guerinot specifically impeached Martinez with his prior statement to the police and with his prior sworn testimony (4 R.R. at 108, 117). Martinez admitted he told the police that he heard five or six gunshots; but, Martinez testified on direct that he only heard two or three gun shots (4 R.R. at 118). Martinez admitted that he told the police that the applicant and the gunman left the scene in a vehicle the first time they left the scene (4 R.R. at 121-122), leaving in question Martinez's testimony about the applicant returning to the scene a second time. Also, despite how he testified on direct, Martinez admitted he had not included in his prior statement to the police that the applicant kicked the complainant

in the head. (4 R.R. at 119). Further, Martinez admitted that he spoke with Osuna about the incident (4 R.R. at 119-120).

Montalvo

On cross examination of Montalvo, Guerinot showcased the differences in her recollection from Osuna's and Martinez's. Montalvo could not describe the applicant's clothing and instead only knew he was wearing a white cap (4 R.R. at 74), which contrasted with Martinez's testimony about the hat's color. Montalvo believed the complainant was alone at the time of the shooting and at the time the applicant searched the complainant's pockets (4 R.R. at 73, 81), indicating she did not see Osuna or Martinez nearby. Guerinot also emphasized that Montalvo did not immediately report what she saw to the police. Montalvo admitted she did not call the police to report the shooting at all; instead, she waited for the police to approach her (4 R.R. at 81-82).

Guerinot's Effective Representation

In his first and second grounds for relief, the applicant claims Guerinot was ineffective because Guerinot: 1) failed to establish a relationship with the applicant; 2) failed to file any pretrial motions; 3) failed to communicate his trial strategy; 4) conducted an insufficient *voir dire*; 5) acted as a prosecutor instead of an advocate for the applicant; 6) failed to use Codefendant Motilla as a witness; 7) introduced Defense Exhibit 1 at trial; 8) failed to investigate and present an alternative suspect defense; 9) admitted the applicant guilt's during closing argument against the applicant's objection, in violation of *McCoy*; 10) failed to conduct an investigation into the facts of the crime; 11) failed to

investigate the defense witnesses; 12) failed to call Michael Alvarez, Esther Alvarez, and Jamie Dominguez as witnesses; 13) failed to impeach the State's witnesses with readily available impeachment material; and 14) failed to consult with experts and present expert testimony. Am. Writ App. at 6-9; Am. App. Memo at 10-23 *(4-17)*.[12]

The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The *Strickland* Court set forth a two-part standard, which has been adopted by Texas. *See Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). First, the applicant must prove by a preponderance of the evidence that counsel's representation fell below an objective standard of reasonableness. *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (citing *Strickland*, 466 U.S. at 688). Second, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

[12] The applicant also attaches and refers to an unsworn declaration from Smith, a lawyer who shares about his own practice and evaluates Guerinot's performance. *See* App. Writ Ex. 1. The Court should consider *Strickland* and its progeny when assessing whether the applicant has proven that Guerinot was ineffective, not another lawyer's irrelevant, unpersuasive conclusions. An attorney is not ineffective simply because another attorney may have employed a different strategy. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981) (overruled on other grounds, *Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988); *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979) "This Court will not second-guess through hindsight the strategy of counsel at trial nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness).

In reviewing trial counsel's conduct, there is a strong presumption that the attorney's actions were reasonable and based on sound trial strategy. *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). "[I]ndeed, strategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012). "Counsel's conscious decision not to pursue a defense or to call a witness is not insulated from review, but, unless a defendant overcomes the presumption that counsel's actions were based in sound trial strategy, counsel will generally not be found ineffective." *Id.* "[I]t is not enough to show that trial counsel's errors had some conceivable effect on the outcome of the proceeding." *Id.* "Rather, the applicant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* "A reasonable probability is one sufficient to undermine confidence in the outcome." *Id.* "Both prongs of the Strickland test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight." *Id.* at 633-634.

As a preliminary matter, Guerinot filed a credible post-conviction affidavit[13] explaining that, due to the passage of time, he no longer has his defense file or an independent memory of all parts of his representation of the applicant. Guerinot Aff. at

[13] The Court should find that Guerinot's affidavit is credible and supported by the trial record. The Court should further determine that Guerinot's casual, unplanned statements to habeas counsel about the applicant's case—when he had not reviewed the file and was unaware he was being recorded—are not relevant to this habeas proceeding. *See* App. Writ Ex. 3 (alleged transcript of Merel Pontier's secretly-recorded conversation with Guerinot).

1-2, 4 (#2, #12). However, he recalls certain parts of the representation. Guerinot Aff. at 1-2 (#2). Guerinot spoke with the applicant about every aspect of the case; explained the law of parties; explained the process of a jury trial; and explained the trial prosecutor's unique ability to cross-examine witnesses. Guerinot Aff. at 2, 3 (#3, #4, #8). The applicant wanted a trial and wanted to testify. Guerinot Aff. at 2, 3 (#4, #6, #8). The trial record offers some insight into Guerinot's trial strategy and showcases the applicant's chosen defense.

The Court should find the applicant's unsworn declaration to be not credible (App. Writ Ex. 4) because he fails to provide sufficient reliable support for his allegations therein and he makes inconsistent statements. For example, in his sworn trial testimony, the applicant claims: that night, he drove himself alone in Paul's car (5 R.R. at 90, 92, 122); the applicant approached Motilla when he saw Motilla waving the gun (5 R.R. at 130-131); Motilla pointed the gun at the applicant (5 R.R. at 96, 133); and the applicant ran away when Motilla pointed the gun and started shooting (5 R.R. at 98, 136-137). In contrast, in his unsworn post-conviction declaration, the applicant claims: that night, Paul drove the applicant (#21); the applicant approached Motilla after he heard shouting (#24); the applicant never mentions Motilla pointed the gun at him; and the applicant walked away after Motilla jerked away from him (#26). App. Writ Ex. 4. The applicant's post-conviction claims about Guerinot's allegedly-deficient representation are unpersuasive.

Claims that Fail on Their Face

The applicant claims Guerinot was ineffective for five reasons that require little analysis before determining the applicant fails to meet his burden to establish harm. The applicant claims Guerinot failed to establish a relationship with the applicant; failed to file any pretrial motions; failed to communicate his trial strategy; conducted an insufficient *voir dire*; and acted as a prosecutor instead of an advocate for the applicant. Am. Writ App. at 6; Am. App. Memo at 10-11, 13-15, 19, 22-23 *(4-5, 7-9, 13, 16-17)*. The record demonstrates there was no deficiency—the clerk's record shows pretrial motions were filed by the applicant's other lawyer[14]; the trial record shows Guerinot's *voir dire*; and the trial record shows that Guerinot and the applicant were aligned in presenting the same defense to the jury. Moreover, in all these claims, the applicant fails to prove the second prong of *Strickland*—that these alleged deficiencies harmed the applicant.[15] Even assuming Guerinot had been deficient, the applicant has not proven there is a reasonable probability that the result of the proceedings would have been different if Guerinot had a stronger relationship with the applicant, had filed additional pretrial motions, or had asked different questions during jury selection.

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[14] The applicant fails to notify the Court that the applicant's prior attorney Hill filed numerous pretrial motions (St. Writ Ex. E), and the trial court entered a discovery order (St. Writ Ex. J).

[15] At most the applicant proposes a hypothetical harm regarding his relationship with Guerinot, claiming Guerinot had to spend time with the applicant "to ensure Mr. Flores could get the best deal possible" (Am. App. Memo at 11 *(5)*); however, this "harm" is unproven and irrelevant because the applicant demonstrated in his trial testimony and throughout his writ application that he would not have pleaded guilty. *See also* Guerinot Aff. at 2 (#4) (the applicant wanted a trial).

Claims that Fail After Consideration of the Record

Motilla. With regard to the applicant's claim that Guerinot was ineffective for failing to call Codefendant Motilla as a witness at trial (Am. Writ App. at 6; Am. App. Memo at 18-19 *(12-13)*), Guerinot and the State are prejudiced due to the passage of time, are unable to respond to this allegation with Guerinot's independent memory of his trial strategy (Guerinot Aff. at 3 (#7)), and are unable to obtain a response from Motilla's defense attorney Wheelan who is now deceased. However, the trial record indicates that Guerinot presented Motilla to the jury as a tool to impeach the testimony of eyewitness Osuna (*see supra* "Guerinot's Impeachment of the Eyewitnesses: Osuna" (¶ 2)). Guerinot used Codefendant Motilla to impact the jury for a specific purpose—to cast doubt on Osuna's memory—while also avoiding the risk of calling Motilla to testify. *See* Guerinot Aff. at 3 (#7) ("a codefendant can be a risky witness to call at trial…especially in a law of parties case"); *see* App. Writ Ex. 46—CDN 119072789 at 59-60 (supplement #24 documenting Motilla's unpredictability when Motilla originally claimed he "didn't do anything," then admitted he shot the complainant during a robbery, said he was with the applicant after the robbery[16], started crying, switched again to a cocky attitude, and laughed); *compare* App. Writ Ex. 14 at 1-2 (#6-#7) (Motilla claiming in an unsworn declaration that he shot the complainant and the applicant tried to stop him) *with* St. Writ Ex. R at 11, 90, 98 (in 2003, Motilla denying he was the perpetrator and claiming he asked his attorney to investigate

[16] On March 5, 2025, the applicant offered a USB into evidence—through the court reporter—as an additional exhibit to his writ application. The USB (labeled App. Ex. 5) contains a variety of files, including Motilla's audio statement and habeas counsel's transcription of the audio statement. This exhibit should not be confused with previously filed App. Writ Ex. 5.

the actual perpetrator of this crime). The Court should find Motilla's unsworn declaration (App. Writ Ex. 14) to be unpersuasive in this habeas litigation. Further, the applicant fails to prove Guerinot was ineffective for failing to call Motilla to testify.

Defense Exhibit 1. With regard to the applicant's claim that Guerinot was ineffective for introducing Defense Exhibit 1 at trial (Am. Writ App. at 6; Am. App. Memo at 21 *(15)*), Guerinot and the State are prejudiced due to the passage of time and are unable to respond to this allegation with Guerinot's independent memory of his trial strategy. *See* Guerinot Aff. at 1-2, 4 (#2, #12). However, the trial record comports with Guerinot's statements about his standard practice and procedure—that he "would have made [his] client aware of the photo and context" (Guerinot Aff. at 4 (#12))—as shown by the fact that Guerinot offers the photo, Defense Exhibit 1, into evidence while the applicant is testifying (5 R.R. at 91-92). The applicant's brother Michael Alvarez and sister-in-law Esther Alvarez acknowledge that Esther gave Guerinot the photo. App. Writ Ex. 7 at (#9); App. Writ Ex. 8 (#18). The trial record and Guerinot's affidavit demonstrate that the applicant was aware of the plan to introduce the photo into evidence. The applicant fails to prove Guerinot was ineffective for introducing Defense Exhibit 1 at trial, particularly because the applicant's family provided the photo and the applicant was aware of the plan to introduce it as evidence. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (when determining the validity of a claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight).

Banda. With regard to the applicant's claim that Guerinot was ineffective for failing to investigate and present alternative suspect Banda (Am. Writ App. at 6; Am. App. Memo at 19-21 *(13-15)*), Guerinot and the State are prejudiced due to the passage of time and are unable to respond to this allegation with Guerinot's independent memory of his strategic decisions. Also, the applicant fails to overcome the strong presumption that Guerinot's actions were reasonable and based on sound trial strategy after reviewing the entire State's file, including the police report. *See* Guerinot Aff. at 2 (#5).[17] Furthermore, the applicant fails to prove from whom Guerinot could have elicited testimony about Banda. The trial record indicates that neither Segura nor the applicant would have accused Banda of robbing the complainant, as both had an opportunity to do so when they testified that Banda[18] was present at the scene (5 R.R. at 34, 99, 123). Also, even if Banda was a suspect before the applicant, the applicant fails to prove that the trial court would have permitted such testimony as relevant.[19] If the trial court *had* permitted such testimony, the State would have presented evidence to the jury that, like the applicant, Banda was eliminated as a match to the prints located as the scene; but, *unlike the applicant*, Banda was *not* identified

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[17] The applicant has offered no evidence to support a finding that Guerinot did not receive the supplements that mention Banda, and the applicant has also offered no evidence to prove that Guerinot would not have noticed if an entire supplement was missing from the police report, particularly significant supplements discussing the composition of the photospread (#16) and documenting that his client was eliminated as a match to the prints (#30). *See supra* "The State Did Not Violate *Brady*: Issac Banda Documentation Alleged in Amended Ground."

[18] Banda's first name—Issac—is spelled "Isaac" in the trial transcript.

[19] The applicant claims that Issac Banda was developed as a suspect before the applicant, but fails to explain how this is relevant. The applicant acknowledges that "Motilla only became a suspect after Mr. Flores became a suspect" and "Motilla's fingerprints were not analyzed until November 5, 1998" (Am. App. Memo at 57 *(51)*); yet, the applicant repeats throughout his application that Motilla is guilty of the complainant's murder. That Motilla became a suspect after Banda and the applicant became suspects does not make him any less guilty.

in a photospread containing his photo that was shown to the three eyewitnesses.[20] *See* App. Writ Ex. 46—CDN 119072789 at 43-44 (supplement #16). The applicant fails to prove there is a reasonable probability that the result of the proceeding would have been different if Guerinot had presented evidence that, at one time, there was another suspect eliminated as the perpetrator after an evidence-based investigation.

McCoy. With regard to the applicant's claim that Guerinot admitted the applicant guilt's during closing argument against the applicant's objection (Am. Writ App. at 6-9; Am. App. Memo at 21-22, 26-28 *(15-16, 20-22)*), the trial record demonstrates this did not happen.

A defendant reserves the autonomy to decide that the objective of his defense is to assert his innocence. *Ex parte Barbee*, 616 S.W.3d 836, 842 (Tex. Crim. App. 2021) (citing *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018)). A lawyer might violate a defendant's right under *McCoy* when he overrides the defendant's expressly-asserted goal to maintain his innocence and, instead, concedes to the jury the defendant's guilt. *Ex parte Barbee*, 616 S.W.3d at 843 (citing *McCoy*, 138 S. Ct. at 1509). A *McCoy* violation is structural error, requiring automatic reversal of the conviction. *Turner v. State*, 570 S.W.3d 250, 275 (Tex. Crim. App. 2018). Ineffective-assistance-of-counsel jurisprudence does not apply because what is at issue is the defendant's autonomy, not counsel's competence. *Turner*, 570 S.W.3d at 275.

[20] The applicant's accusation that "there is a strong likelihood that [Banda], if anyone, was involved in searching Mr. Fisk's pockets, not the applicant" is reckless, unsupported, and unjust. *See* Am. App. Memo at 59 *(53)* (#4); App. Writ Ex. 49, 50, 51.

A "defendant cannot simply remain silent before and during trial and raise a *McCoy* complaint for the first time after trial," and instead should "make[s] a *McCoy* complaint with sufficient clarity when he presents express statements of his will to maintain innocence. *Turner*, 570 S.W.3d at 276; *see also Turner*, 570 S.W.3d at 273-274 (explaining that, in the McCoy murder trial, McCoy's lawyer conceded McCoy caused the victims' deaths in his opening statement, inciting McCoy to make an outburst in protest; persisted by stating the evidence was "unambiguous" and McCoy "committed three murders"; and after McCoy testified he was innocent, his lawyer argued that McCoy was guilty of a lesser, second-degree murder based on his mental state); *Ex parte Barbee*, 616 S.W.3d at 843 (noting, when referring to multiple cases similar to McCoy's, that "the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel's preferred course").

The applicant complains about the following portion of Guerinot's closing argument during the applicant's trial:

> "The real question becomes, if anything, what has the State proved to you? I guess they could make a case for an aggravated robbery. If you believe Rosie Montalvo, that out of the clear blue she says this man, identifies him, then at some point she looks up, she hears gunshots, she's nervous, looking for her friends, and at some instance she sees him go over to Ronnie Fisk's body and put his hands on his pockets. I guess if you believe that beyond a reasonable doubt then you could convict this man of aggravated robbery."
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> 6 R.R. at 11-12.

The applicant fails to prove that Guerinot admitted or conceded the applicant's guilt when he posed a hypothetical: "I guess they could make a case for an aggravated robbery

if you believe Rosie Montalvo…if you believe that beyond a reasonable doubt." Guerinot did not even concede that a robbery occurred. And, unlike the applicant's example (Am. App. Memo at 27 *(21)*: "It's clear that he aided, abetted, and assisted another supposed user in order to get some dope, if you believe the testimony of the officer"[21]), Guerinot stated generally "I guess they could make a case for *an* aggravated robbery." Guerinot did not concede the State could make a case *the applicant* committed an aggravated robbery. Guerinot's closing argument aligns with the applicant's position that a robbery did not occur and that the applicant did not interact with Montalvo.

Guerinot's closing argument includes attacks on Montalvo: "[W]e got a girl that sees something that may or may not have happened within a span of two minutes, thirty seconds, if we're listening to her. She looks up when the screaming starts. Sit there for a minute and think about that. Gunshots are almost immediately following that" (6 R.R. at 15-16).

Guerinot's closing argument also encourages the jury to believe the applicant's testimony over the eyewitnesses': "You come back and tell us what, if anything, Roman Flores is guilty of. Roman Flores waived his right not to incriminate himself and not to tell you a story. He waived a right that's very valuable… [H]e got up and told you what happened out there. Why is it he is going to steal a car when he's got a car? How do you think he got from Eldorado to the Far West Rodeo? Couldn't have walked; it's too far.

[21] *Brown v. State*, 866 S.W.2d 675, 680 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

Ask yourself, why would somebody with a car steal a car? … Why would he steal a car?" (6 R.R. at 14-15).

Guerinot's closing argument includes repeated emphasis on the State's burden of proof: "They have the burden of proving everything to you" (6 R.R. at 9); "They have to prove that beyond a reasonable doubt" (6 R.R. at 10); "They are the people that have to prove it to you" (6 R.R. at 12-13); "They have to prove everything" (6 R.R. at 15); and "Don't leave your common sense at the door. And say to them, State, prove your case" (6 R.R. at 16).

The applicant refers to a case that was ultimately overturned by the Court of Criminal Appeals because the applicant's constitutional rights were violated and trial counsel was ineffective. *Ex parte Brown*, No. WR-25,632-03, 2022 WL 2154167, at *1 (Tex. Crim. App. June 15, 2022) (not designated for publication). However, Guerinot did not commit the level of acts like the trial attorney in the *Brown* case, which was a 1992 trial for delivery of less than 28 grams of cocaine. Based on the two court opinions, it appears the trial attorney: 1) failed to secure the attendance of defense witness Williams; 2) failed to request a continuance based on Williams' absence; 3) failed to offer a transcript of Williams' testimony from Brown's first trial; and 4) abandoned the defensive evidence and conceded Brown's guilt during his closing argument. *See Ex parte Brown*, 2022 WL 2154167, at *1; *Brown v. State*, 866 S.W.2d 675, 676 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). The trial attorney argued in closing:

> Ask yourself: Did this person aid, encourage, help, and assist this other dope user to get ahold of some dope? And does that make the dope user a pusher

> because the one dope user takes another supposed dope user to a known admitted pusher? ... [I]t's against the law to help somebody buy dope even if this person is a dope user just like you. ... It's clear that he aided, abetted, and assisted another supposed user in order to get some dope, if you believe the testimony of the officer. ... It's no more than one dope head trying to get some dope from another dope head for pointing out to the dope head who the pusher is. ... They filed the wrong charge here, if you believe the officer. There's no doubt that that person, the officer who was masquerading as a dope head, was assisted in his quest to buy some dope by this man. It is undisputed, if you believe the officer, that this man asked him for a piece of the dope he bought for directing him to the pusher. It's undisputed. Does that make this man a pusher? ... Does it make more sense that he was masquerading as a doper, or does it make more sense that he was helping the pusher? It is obvious by the officer's testimony and by the testimony of the pusher that his man got nothing from the pusher but he was trying to get something from the officer, the user. They filed the wrong charge. And the evidence should raise a reasonable doubt as to whether or not he assisted the pusher in the delivery when, in fact, he assisted the buyer into making the buy.
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> Brown, 866 S.W.2d at 680-681.

There is no evidence of Brown's trial attorney attacking the police officer's credibility—like Guerinot did with Montalvo—and presumably Brown's trial attorney's argument was exacerbated by his failure to present defense witnesses.

The *McCoy* case and its progeny make clear that the trial counsel's actions throughout the trial are relevant and the Court should consider the entire closing argument. In the applicant's trial, Guerinot impeached the three eyewitnesses, emphasized that the recovered prints did not match the applicant, presented two defense witnesses in support of the applicant's testimony, and reiterated witness inconsistencies during his closing argument. The applicant fails to prove that Guerinot committed a *McCoy* violation or

conceded the applicant's guilt; therefore, the applicant's second ground for relief is without merit and should be denied.

The Applicant's Claims about Witnesses

The State will address the applicant's five remaining ineffective assistance of counsel claims—all of which are related to witnesses—along with the applicant's false evidence and actual innocence grounds, by grouping them based on factual allegations that serve as the purported justification for multiple grounds.

Ground One: Five Remaining IAC Allegations

In his first ground, the applicant alleges that Guerinot was ineffective for failing to conduct an investigation into the facts of the crime.[22] Am. Writ App. at 6. The applicant specifically raises Michael Alvarez's post-conviction declarations regarding the applicant's hat (App. Writ Ex. 7) and Esther Alvarez's post-conviction declarations regarding Montalvo's identification of the applicant (App. Writ Ex. 8). Am. App. Memo at 12 *(6)*. The applicant also raises trial witness Cynthia Segura's post-conviction declarations regarding additional details about the night of the murder (App. Writ Ex. 9). Am. App. Memo at 12 *(6)*.

[22] The State notes that, due to the applicant's delay, Guerinot does not have access to his defense file or Castillo's investigator file, which would have included the investigation completed by the prior defense investigator hired by Hill. *See* St. Writ Ex. C and D (Hill's investigator); *see also* St. Writ Ex. N and O (Guerinot and Castillo invoices); App. Writ Ex. 6 (Castillo invoice).

The applicant also alleges that Guerinot was ineffective for failing to call Michael Alvarez and Esther Alvarez as witnesses.[23] Am. Writ App at 6.[24]

The applicant also alleges that Guerinot was ineffective for failing to investigate the defense witnesses. Am. Writ App. at 6. The applicant specifically complains about trial witness Cynthia Segura's post-conviction declaration (App. Writ Ex. 9) in which she adds additional details about the night of the murder.[25] Am. App. Memo at 12-13 *(6-7)*.[26]

The applicant also alleges that Guerinot was ineffective for failing to impeach the State's witnesses with readily available impeachment material. Am. Writ App. at 6. The applicant specifically complains about the three eyewitnesses—Osuna, Martinez, and Montalvo. Am. App. Memo at 15-17 *(9-11)*. The applicant alleges that Guerinot should have used impeachment evidence regarding: the applicant rolling the complainant's body (App. Writ Ex. 24); Montalvo's identification of the applicant (App. Writ Ex. 18); the

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[23] The applicant also complains that Guerinot did not call Jamie Dominguez to testify (Am. Writ App. at 6), but the applicant does not offer a post-conviction statement from Dominguez or otherwise prove Dominguez would have been available and willing to testify in the applicant's trial. Therefore, the applicant fails to meet his burden and the Court need not consider this claim further. *See also infra*, "Montalvo's Identification of the Applicant" (addressing Dominguez's police interview).

[24] The applicant does not mention this claim in his memorandum. Presumably the allegations about Michael and Esther Alvarez are the same as those in the prior claim.

[25] The applicant also complains about Guerinot's investigation of trial witness Felipe Gonzales (Am. App. Memo at 12-13 *(6-7)*), but the applicant does not offer a post-conviction statement from Gonzales or otherwise offer evidence to establish what Guerinot would have discovered with additional investigation. Therefore, the applicant fails to meet his burden and the Court need not consider this claim further.

[26] The applicant mentions the applicant's trial testimony and the applicant's alleged IQ noted in Hayes' report; however, the applicant and Hayes do not claim the applicant was incompetent. Am. App. Memo at 13 *(7)*. The applicant's trial testimony demonstrates he was not incompetent. Further, Guerinot avers the applicant never exhibited any lack of understanding about the proceedings; he wanted a trial; and he wanted to testify. *See* Guerinot Aff. at 3 (#6). The applicant's brief comment about his alleged IQ is irrelevant to this habeas litigation.

applicant returning to the crime scene a second time (App. Writ Ex. 21); Osuna and Martinez returning to the crime scene a second time (App. Writ Ex. 22); the applicant stating "get that guy with the trunk" (App. Writ Ex. 20); the applicant searching the complainant's pockets (App. Writ Ex. 29); and the attempted hotwiring of the complainant's vehicle (App. Writ Ex. 13). Am. App. Memo at 15-17 *(9-11)*.

The applicant also alleges that Guerinot was ineffective for failing to consult with experts and present expert testimony. Am. Writ App. at 6. The applicant directs the Court to Randall's report regarding the attempted hotwiring of the complainant's vehicle (App. Writ Ex. 13).[27] Am. App. Memo at 17-18 *(11-12)*.

As established in the sections above and below, the applicant fails to prove that Guerinot was ineffective; therefore, the applicant's first ground for relief is without merit and should be denied.

Ground Three: False Evidence

In his third ground for relief, the applicant claims the State violated his due process rights by introducing false or misleading testimony at trial. Am. Writ App. at 10-11. The applicant specifically alleges that the following evidence was false: Montalvo's identification of the applicant; the applicant stating "get that guy with the trunk"; the applicant's

[27] The applicant also directs the Court to: Dysart's report regarding eyewitness identification (App. Writ Ex. 2), which offers no specific insight that Guerinot did not raise during his cross-examination of the eyewitnesses; Hayes' report regarding background information reported by the applicant and other arguably mitigating evidence, which would not have been relevant or admissible in the guilt phase of the applicant's capital murder trial (App. Writ Ex. 10); and Moses' report offering his thoughts on the contents of the State's file, which has no relevance or persuasive value in this habeas litigation (App. Writ Ex. 12).

attempted hotwiring the complainant's vehicle; the applicant returning to the crime scene a second time; the applicant rolling the complainant's body; the applicant searching the complainant's pockets; and the applicant leaving the scene together with Motilla. Am. App. Memo at 28, 31-45 *(22, 25-39)*.

Although the State will address the factual allegations of each claim below, the Court should note that the applicant does not meet his burden for any false evidence claim. When considering a habeas claim alleging the use of material false testimony, the Court must determine (1) whether the testimony was, in fact, false, and, if so, (2) whether the testimony was material. *Ex parte Barnaby*, 475 S.W.3d 316, 323 (Tex. Crim. App. 2015); *Ex Parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). False testimony is material only if there is a "reasonable likelihood" that it affected the judgment of the jury. *Weinstein*, 421 S.W.3d at 665. In this case, the Court need not engage in a materiality analysis because the applicant fails to prove that any of the evidence presented at trial was false. *Barnaby*, 475 S.W.3d at 323 ("To prove a false-evidence habeas corpus claim, a claimant must first show that the evidence in his or her case was false"). Instead of establishing falsity, the applicant establishes that some of the facts are merely disputed. The applicant disagreeing with the eyewitnesses' testimony does not meet the threshold of falsity.

As established in the sections below, the applicant fails to prove that the State introduced false or misleading testimony at trial; therefore, the applicant's third ground for relief is without merit and should be denied.

Ground Four: Actual Innocence

In his fourth ground for relief, the applicant claims he is actually innocent pursuant to *Ex parte Elizondo*, 947 S.W.2d 202 (1996). Am. Writ App. at 12-13. The applicant specifically alleges that the following evidence is new: Motilla's post-conviction statement that the applicant did not search the complainant's pockets (App. Writ Ex. 14)[28]; Michael Alvarez's post-conviction statement about the applicant's hat (App. Writ Ex. 7); Randall's report regarding the attempted hotwiring of the complainant's vehicle (App. Writ Ex. 13); the medical examiner investigator's report about the rolling of the complainant's body (App. Writ Ex. 24).[29] Am. App. Memo at 50-53 *(44-47)*.

Although the State will address the factual allegations of each claim below, the Court should note that the applicant does not meet his burden for any actual innocence claim. It is well-settled that claims of actual innocence are cognizable in habeas. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). Actual innocence claims are categorized as *Schlup* claims or *Herrera* claims. *Id.* at 209; *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002). A *Schlup* claim depends critically on the validity of an applicant's *Strickland* and *Brady* claims and requires only that the applicant show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Ex parte Franklin*, 72 S.W.3d 671, 676 (Tex. Crim. App. 2002). Contrastingly, in order to obtain relief in a *Herrera* claim, an applicant must prove by clear and convincing evidence that no

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[28] As stated above, the Court should not find Motilla's unsworn declaration to be persuasive. *See supra* "Claims that Fail After Consideration of the Record: Motilla."

[29] The applicant also cites Dysart's report regarding eyewitness identification (App. Writ Ex. 2), which is not newly-available information or persuasive. *See supra*, FN #27.

reasonable juror would have convicted him in light of the new evidence. *Ex parte Tuley*, 109 S.W.3d at 390.

A *Herrera* claim, or bare innocence claim, involves a substantive claim in which the applicant asserts his bare claim of innocence based solely on newly discovered evidence. *Id.* The applicant must show that the new evidence unquestionably establishes his innocence. *Id.* To determine whether a habeas applicant has reached this level of proof, the convicting court must weigh the evidence of the applicant's guilt against the new evidence of innocence. *Id.* "The burden placed upon the applicant to prevail in a freestanding-actual-innocence claim is a 'Herculean task.'" *Ex Parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014).

Not only must the habeas applicant make a truly persuasive showing of innocence, he must also prove that the evidence he relies upon is "newly discovered" or "newly available." *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). The term "newly discovered evidence" refers to evidence that was not known to the applicant at the time of trial and could not be known to him even with the exercise of due diligence. *Id.* He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions. *Id.* Further, newly discovered evidence that merely "muddies the waters" and only casts doubt on the conviction is insufficient to prevail in a free-standing actual innocence claim because that evidence does not affirmatively establish an applicant's factual innocence by clear and convincing evidence. *Ex Parte Harleston*, 431 S.W.3d at 89.

The Court need not analyze whether the applicant has proven by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence because the applicant fails to prove that any of his evidence is "new." The applicant citing an exhibit that was entered into evidence at his trial along with unsworn declarations from witnesses who could have been interviewed at the time of his trial does not meet the threshold of "newly discovered" or "newly available." *See Ex parte Brown*, 205 S.W.3d at 545.

As established in the sections below, the applicant fails to prove that he is actually innocent; therefore, the applicant's fourth ground for relief is without merit and should be denied.

The Applicant Inside the Complainant's Car and the Hotwiring Allegation

The applicant raises Randall's post-conviction declaration as evidence in his first, third, and fourth grounds. Am. App. Memo at 17, 17-18, 28, 36-37, 50, 52 *(11, 11-12, 22, 30-31, 44, 46)*. Randall claims he has worked in the car industry for about 12 years. App. Writ Ex. 13 at 1 (#1). In his unsworn declaration, Randall opines that "[i]t is highly unlikely that someone tried to hot wire the blue Oldsmobile Cutlass using the wire shown in State's Exhibit 10." App. Writ Ex. 13 at 2 (#8). Randall states that he "cannot see whether this wire is connected to anything," but "[t]he wire in State's Exhibit 10" "seems like two wires were taped together" "to install aftermarket speakers." App. Writ Ex. 13 at 2 (#6).

In order to assess the impact of Randall's testimony or testimony similar to Randall's, the Court must consider the evidence presented in trial. As stated above, only Osuna testified that the applicant jumped into the driver's seat of the complainant's car and appeared to be searching for something (3 R.R. at 63).[30] Importantly, Osuna did not mention the wires or hotwiring. The only other testimony regarding the applicant entering the complainant's vehicle is during the prosecutor's cross-examination of the applicant when she asked, "if you had gotten in that car and were trying to find those car keys or play with the wires, your hat could have fallen off, couldn't it?" 5 R.R. at 117. The applicant responded, "I didn't get in the car." *Id.*; *see also* 5 R.R. at 99 (the applicant denying on direct examination that he got into the complainant's car).

The applicant fails to prove that Guerinot was ineffective for failing to call a witness like Randall regarding the wires in the complainant's car because there was no testimony for Randall to refute.[31] Likewise, the applicant fails to prove that the State presented false evidence because there was no testimony that the applicant hotwired the complainant's

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[30] Twice in his memorandum, the applicant complains that Osuna testified that the applicant was "looking for something like the keys or something to start the car," but—because of Guerinot's effective objection to the witness' speculation—the jury was instructed to disregard that testimony (3 R.R. at 63). *See* Am. App. Memo at 17, 36 *(11, 30)*. Therefore, Osuna's only relevant testimony that was properly in front of the jury was that the applicant appeared to be searching for something (3 R.R. at 63).

[31] The applicant likely did not allege in his application that Guerinot was ineffective for failing to object to the hotwiring comment in the prosecutor's closing argument because he would be unable to prove that the trial judge would have erred in overruling the objection, as the prosecutor's one mention of hotwiring was a reasonable deduction from the trial evidence. *See* 6 R.R. at 23 (the prosecutor arguing in closing that the applicant was "looking for the keys, trying to hot wire that car, trying to get those keys").

vehicle. Finally, the applicant fails to prove that Randall's declaration is "new" evidence because it could have been obtained at the time of the applicant's trial.

The Applicant's Hat

The applicant raises Michael Alvarez's post-conviction declaration as evidence in his first and fourth grounds. Am. App. Memo at 12, 50, 51 *(6, 44, 45)*.[32] Michael states he is the applicant's older brother. App. Writ Ex. 7 at 1 (#1). In his unsworn declaration, Michael claims he "gave Guerinot the hat that Roman was wearing that night"; therefore, "Roman's hat could not have been the one found in the car." App. Writ Ex. 7 at 2 (#10); *but see* Guerinot Aff. at 4 (#10) (averring that the applicant's brother did not give him the applicant's hat).

In order to assess the impact of Michael's testimony, the Court must consider the evidence presented in trial. As stated above, the three eyewitnesses gave different descriptions of the applicant's hat: Osuna only knew the applicant was wearing "a ballcap" and provided no color description (3 R.R. at 77-78); Martinez said the applicant was wearing a black hat turned backwards (4 R.R. at 116-117); and Montalvo said the applicant was wearing a white cap (4 R.R. at 74). The applicant told the jury that he was wearing a blue hat with a Polo symbol, and said the hat shown in the complainant's car is not a Polo hat (5 R.R. at 116). *See also* 5 R.R. at 91, 99, 117 (claiming he was wearing the hat shown in Defense Exhibit 1 and he never got into the complainant's car).

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[32] The applicant also presents the Court with an unsworn declaration from Heuvelman, a lawyer who claims to have spoken with the complainant's brother and states that he showed her a photo of the complainant wearing "a blue hat." *See* App. Writ Ex. 35. This statement is unpersuasive and irrelevant to this habeas litigation.

The applicant fails to prove that Guerinot was ineffective for failing to call Michael Alvarez to testify about the applicant's hat. Michael fails to present credible proof in his unsworn declaration that he was available and willing to testify in the applicant's trial. Further, the applicant fails to prove, had Michael been available and testified, that there is a reasonable probability the result of the proceeding would have been different based on the evidence that was already presented to the jury. Finally, the applicant fails to prove that Michael's declaration is "new" evidence because it could have been obtained at the time of the applicant's trial.

The Applicant Stating "Get that Guy with the Trunk"

The applicant contests Martinez's testimony that the applicant said "get that guy with the trunk" in his first and third grounds for relief, specifically referring to Martinez's statement to the police (App. Writ Ex. 20). Am. App. Memo at 16, 28, 35 *(10, 22, 29)*. In his statement to the police, Martinez said, "As they were approaching us I heard the one with the gun say "get that guy with the trunk."" App. Writ Ex. 20 at 1. In his testimony, Martinez said that the applicant said "get that guy right there with the trunk" (4 R.R. at 92) and the gunman said "get on the fucking ground!" (4 R.R. at 93). Guerinot did not specifically impeach Martinez about this inconsistency.

In order to assess the impact of the potential additional impeachment, the Court must consider the evidence presented in trial. As stated above, Guerinot impeached Martinez's testimony with his statement to the police regarding how many gunshots he heard; from which direction the shooting occurred; that Martinez never told the police that

the applicant kicked the complainant; and the details of the applicant leaving the scene (4 R.R. at 117-120, 122). Guerinot also impeached Martinez with his prior testimony; emphasized that Martinez only provided a tentative identification of the applicant; and got Martinez to concede that he had spoken with Osuna about the incident an unknown number of times (4 R.R. at 107-108, 119-121). Further, Guerinot had already obtained testimony from Osuna that the applicant did not say anything (3 R.R. at 78).

Due to the passage of time, Guerinot cannot recall certain specific strategic decisions; however, the record reflects that Guerinot read Motilla's trial record prior to the applicant's trial and Martinez testified in Motilla's trial—as he did the applicant's trial—that the applicant said "get that guy right there with the trunk" (4 F.M.-R.R. at 47-48).

The applicant fails to prove Guerinot was ineffective for failing to impeach Martinez's testimony regarding the applicant saying "get that guy right there with the trunk." Guerinot would have known that Martinez already testified in Motilla's trial to this same statement, and it is not objectively unreasonable for Guerinot to choose to impeach Martinez in multiple other ways. The applicant also fails to prove, had the jury heard additional impeachment, that there is a reasonable probability the result of the proceeding would have been different. Finally, the applicant also fails to prove that Martinez's testimony was false; mere inconsistency is insufficient.

The Applicant Rolling the Complainant's Body

The applicant claims in his first, third, and fourth grounds that the autopsy report and the medical examiner investigator's report prove that the applicant did not roll the complainant's body. Am. App. Memo at 15, 28, 40-41 *(9, 22, 34-35)*. The investigator's report appears to state that the body "was originally lying on stomach but was rolled over by paramedic." App. Writ Ex. 24 at 2. Dr. Moore's autopsy report, entered into evidence at trial as State's Exhibit 32, states the body "was found lying on his stomach." App. Writ Ex. 23 at 2.

In order to assess the impact of these notes, the Court must consider the evidence presented in trial. As stated above, Martinez testified that the applicant turned over the complainant and kicked him in the head (4 R.R. at 98-99, 114, 116); while Montalvo testified the applicant tapped the complainant's leg with his leg (4 R.R. at 60, 80) and Osuna testified he did not see anyone turn the complainant's body (3 R.R. at 91). Shirley initially testified that, based on the blood pooling, it appeared the body was turned over "by someone" after the complainant was shot (3 R.R. at 27), and, on cross examination, Shirley agreed that the blood location was consistent with somebody falling and, still alive, rolling onto their back (3 R.R. at 42). Dr. Moore initially testified that it was "most likely the body has been moved" (4 R.R. at 39), and, on cross examination, Dr. Moore agreed that a person can roll over or turn over onto their back when they are dying (4 R.R. at 40).

The applicant fails to prove that Guerinot was ineffective for failing to present to the jury the investigator's report that contains a note about the paramedic moving the

complainant's body. Through Guerinot's cross examination, he presented to the jury an explanation for the complainant's body moving that did not involve the applicant. Even if Guerinot had specifically claimed that the paramedic rolled the complainant's body when evaluating the complainant's medical needs, the applicant fails to prove that movement precludes the applicant from previously rolling the complainant's body. Further, the applicant fails to prove, had the jury heard about the paramedic rolling the body, that there is a reasonable probability the result of the proceeding would have been different based on the evidence that was already presented to the jury. Finally, the applicant fails to prove that Martinez's testimony was false and that the investigator report—in the State's file before the applicant's trial—is "new" evidence.

The Applicant Searching the Complainant's Pockets

The applicant contests Osuna's testimony that the applicant searched the complainant's pockets in his first, third, and fourth grounds, specifically referring to Osuna's statement to the police (App. Writ Ex. 21). Am. App. Memo at 16, 28, 41-43 *(10, 22, 35-37)*. In his statement to the police, Osuna never states that he saw the applicant search the complainant's pockets. *See* App. Writ Ex. 21. In his testimony, Osuna said that the applicant searched the complainant's pockets (3 R.R. at 68). While Guerinot did not explicitly impeach Osuna about this inconsistency, he emphasized to the jury that Osuna did not tell the police that the applicant returned back to the scene, which is when the applicant completed this search (3 R.R. at 82-83).

In order to assess the impact of the potential additional impeachment, the Court must consider the evidence presented in trial. As stated above, all three eyewitnesses testified that the applicant searched the complainant's pockets (Osuna: 3 R.R. at 68; Martinez: 4 R.R. at 98-99, 114, 116; Montalvo: 4 R.R. at 60-61, 80), and Montalvo testified she did not see the applicant actually take anything from the complainant (4 R.R. at 60-61, 80). On cross examination, Osuna admitted that he did not tell the police that the applicant returned back to the scene (3 R.R. at 82-83) and on re-cross, Osuna confirmed his testimony was a "different story" and "directly controverts" what he told the police (3 R.R. at 89-90). Shirley initially testified that the complainant's pockets were turned inside out (3 R.R. at 27) and—over Guerinot's objection—that indicated to Shirley that "someone had gone through his pockets" (3 R.R. at 29). On cross examination, Shirley admitted he did not turn over the complainant's body to look at the back pockets and conceded that it is possible the complainant "had his hand in his pocket and when he was shot pulled it out" (3 R.R. at 37). Shirley later testified that the complainant had no money on him but still had his wallet (5 R.R. at 152).[33]

The applicant fails to prove Guerinot was ineffective for failing to impeach Osuna's testimony in a more specific manner. Guerinot's performance was not objectively unreasonable, and the applicant fails to prove, had the jury heard additional impeachment,

[33] The applicant also complains that the police report shows that the complainant had a bracelet, stud, and ring on him, in addition to his wallet. *See* App. Writ Ex. 29. The applicant fails to prove, had the jury heard this additional information, that there is a reasonable probability the result of the proceeding would have been different. Attempted robbery is sufficient for capital murder, and the jury already heard Montalvo's testimony that she did not see the applicant actually take anything.

that there is a reasonable probability the result of the proceeding would have been different. Finally, the applicant fails to prove that Osuna's testimony was false and that his statement to the police—in the State's file before the applicant's trial—is "new" evidence

Returning to the Scene a Second Time

The applicant raises in his first and third grounds for relief two different claims with regard to returning to the scene a second time—about the *applicant* returning a second time, and about *Osuna and Martinez* returning a second time. Am. App. Memo at 16, 28, 37-39 *(10, 22, 31-33)*.[34] The applicant conflates the claims.

As stated above, Guerinot impeached Osuna with his police statement, resulting in Osuna admitting that he did not tell the police that the applicant returned to the scene a second time. The applicant claims "Guerinot should have impeached Mr. Martinez with Mr. Osuna's police statement" (App. Writ Ex. 21). Am. App. Memo at 16 *(10)*; *see also* Am. App. Memo at 38 *(32)*. The applicant fails to prove that would have been admissible under the Rules of Evidence. *See* Rule of Evidence 613. Guerinot could not have presented Osuna's prior written statement through Martinez's testimony. A witness cannot be directly impeached by the writing of another witness. If the applicant is referring to Guerinot presenting to the jury Osuna's prior written statement through Osuna's testimony, he did.

[34] The applicant claims that Osuna's statement to the police (App. Writ Ex. 21) and Martinez's statement to the police (App. Writ Ex. 20) "were not used in trial." Am. App. Memo at 38 *(32)*. The applicant's claim is patently false.

The applicant claims "Guerinot should have impeached Mr. Osuna with a police report about an anonymous source 'Gabriel' who told police that Mr. Jose Osuna and Mr. Cesar Martinez were lying about returning to the crime scene a second time" (App. Writ Ex. 22).[35] Am. App. Memo at 16 *(10)*; *see also* Am. App. Memo at 39 *(33)*. Again, the applicant fails to prove that would have been admissible under the Rules of Evidence. *See* Rule of Evidence 613. Guerinot could not have presented the police report through Osuna's testimony. If the applicant is referring to Guerinot presenting to the jury Guadalup Garcia's statements about what "Gabriel" told Garcia, the applicant fails to prove Garcia was available and willing to testify and the applicant fails to prove Garcia's testimony about Gabriel's statements would have been admissible under the Rules of Evidence. *See* Rule of Evidence 802.

The applicant fails to prove Guerinot was ineffective for failing to attempt to impeach trial witnesses with inadmissible evidence. The applicant further fails to prove the testimony about Osuna and Martinez returning to the scene a second time, and the testimony about the applicant returning to the scene a second time, was false.

The Applicant Leaving the Scene with Motilla

The applicant challenges Osuna's and Martinez's testimony about the applicant leaving the scene together with Motilla in his third ground for relief, specifically referring to Osuna's statement to the police (App. Writ Ex. 21). Am. App. Memo at 28, 43-45 *(22,*

[35] Police report supplement #13 referring to Guadalup Garcia's account of what "Gabriel" told him is also located in App. Writ Ex. 46 (CDN 119072789 at 37-38).

37-39).[36] Osuna and Martinez testified that the applicant and the gunman left the scene together; Osuna said they were running (3 R.R. at 69-70) and Martinez said they left in a vehicle (4 R.R. at 101). Montalvo testified that the gunman fled the scene before the applicant was searching the complainant's pockets (4 R.R. at 61, 80). As shown above, the applicant fails to prove Osuna's and Martinez's testimony was false based on Osuna's prior inconsistent statement to the police and fails to prove the jury was left with a false impression, especially in light of Montalvo's testimony and Guerinot's repeated impeachment of both Osuna and Martinez.

Montalvo's Identification of the Applicant

The applicant contests Montalvo's identification of the applicant in his first and third grounds for relief, specifically referring to Jamie Dominguez's statement to the police (App. Writ Ex. 18) and Esther Alvarez's post-conviction declaration (App. Writ Ex. 8). Am. App. Memo at 12-13, 15, 28, 31-35 *(6-7, 9, 22, 25-29).*[37]

In order to assess the impact of Dominguez's and Esther's potential testimony, the Court must consider the evidence presented in trial. As stated above, the three eyewitnesses identified the applicant as the man who searched the complainant's pockets after the gunman shot the complainant (Osuna: 3 R.R. at 64, 68; Martinez: 4 R.R. at 92,

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[36] The applicant also refers this Court to statements of two witnesses reporting different crimes and admits neither witness identified the applicant or Motilla as the perpetrator (App. Writ Ex. 30, 31); thus, these references are wholly irrelevant. *See* Am. App. Memo at 44-45 *(38-39).*

[37] The applicant states "Montalvo apparently did not give a statement at the time of the crime" (Am. App. Memo at 33 *(27)*), but she did. Montalvo's statement appears in police report supplement #21 (App. Writ Ex. 46—CDN 119072789 at 53) and her identification of the applicant is in supplement #16 (App. Writ Ex. 46—CDN 119072789 at 44).

98-99; Montalvo: 4 R.R. at 53, 60-61, 80). However, Montalvo is the only witness who testified about her interaction with the applicant in Dominguez's car, and this is the only identification the applicant appears to be contesting with Esther's and Dominguez's statements. Montalvo testified that the first thing she noticed about the applicant was the tattoo on his neck that said "Flores" (4 R.R. at 56-57, 74). *See* St. Writ Ex. M. As shown above, Guerinot impeached Montalvo's testimony. *See supra*, "The Consistency of the Eyewitness Testimony" *and* "Guerinot's Impeachment of the Eyewitnesses: Montalvo." The jury also heard that the prints found on Dominguez's car did not match the applicant (4 R.R. at 10-11). Further, the applicant testified "I've never seen that lady in my life," referring to Montalvo (5 R.R. at 94, 112, 149).

In her unsworn declaration, Esther Alvarez states that Paul Garcia admitted to her that "he was actually the one who went up to Rosie's car to ask her for her phone number, not Roman." App. Writ Ex. 8 at 4-5 (#26).[38] Esther does not specify exactly when Paul made this admission, other than at a time after the applicant testified and after Esther "knew the case was over and Roman would be convicted." *See* App. Writ Ex. 8 at 4 (#22, #25). Esther also does not assert that she told Guerinot what Paul allegedly told her. Assuming the trial evidence was not yet closed, the applicant fails to prove Guerinot was ineffective for failing to call Esther to testify about something Guerinot was not ever told. Further, even if Guerinot had called Esther to testify, the applicant fails to prove Esther's

[38] The applicant did not present this Court with a declaration from Paul Garcia.

testimony about Paul's statements would have been admissible under the Rules of Evidence. *See* Rule of Evidence 802.

The applicant does not provide a post-conviction statement from Dominguez and instead relies on Dominguez's statement to the police. As stated previously, the applicant fails to prove Dominguez would have been available and willing to testify in the applicant's trial.[39] *See supra*, FN #23. Therefore, the applicant fails to meet his burden to prove that Guerinot was ineffective for failing to call Dominguez as a witness.

Even if Guerinot had called Dominguez as a witness, the applicant fails to prove her testimony would have been beneficial to the applicant because much of her testimony would have directly refuted the applicant's testimony—that he attempted to stop Motilla and did not rob the complainant. While presumably Dominguez would have testified that the man who spoke with Montalvo "had many neck tattoos," she also would have testified that "the guy that came to the car was not the one that shot the guy, but he was with him." *See* App. Writ Ex. 18 at 4. Dominguez would have told the jury that "they, he kicked him and he started looking through his pockets, started looking through the guy's pockets. I don't know if found [sic] anything but cause were were [sic] like already starting to take off and he ran…" App. Writ Ex. 18 at 5; *see also* App. Writ Ex. 18 at 7 ("that guy had gone in his pocket and he took off running"). Also, according to police report supplement #16, Dominguez positively identified the applicant in the photospread. App. Writ Ex. 46 (CDN 119072789 at 43). The applicant fails to prove, had Dominguez been available and

[39] The trial prosecutor subpoenaed Jamie Dominguez to the applicant's trial, but the record is silent as to whether she appeared. *See* St. Writ Ex. H.

testified—including offering additional support that the applicant robbed the complainant—that there is a reasonable probability the result of the proceeding would have been different. Finally, the applicant also fails to prove Montalvo's identification of the applicant was false.

Defense Trial Witness Cynthia Segura's Post-Conviction Claims

The applicant raises the additional details trial witness Segura provides in her post-conviction declaration (App. Writ Ex. 9) in his first ground for relief. Am. App. Memo at 12, 12-13 *(6, 6-7)*. Due to the passage of time, Guerinot cannot recall certain specific strategic decisions and has no recollection of the defense trial witnesses. Guerinot Aff. at 4 (#9). Segura's testimony confirms Guerinot's statements about his standard practice and procedure—that Castillo would have conducted an initial interview and then Guerinot would have met with the witness prior to trial. In the applicant's trial, Segura testified that she heard about the applicant's trial from Esther Alvarez (5 R.R. at 42, 44), met with Castillo about 10 days prior to the trial, and met with Guerinot the day before her testimony (5 R.R. at 45-46). Segura testified about what the applicant was wearing, including a dark colored baseball cap with Polo symbol of a horse (5 R.R. at 20). Segura testified that, when Motilla approached the guys, the applicant tried to say something, put his hands on Motilla, argued (5 R.R. at 23-24). Then Motilla stepped away; there were gunshots; and the applicant fled (5 R.R. at 24). Segura claimed that the applicant never approached the complainant (5 R.R. at 25). On cross examination, the prosecutor emphasized that Segura never reported the murder to the police (5 R.R. at 50-41). Segura also admitted, in contrast

to the applicant's testimony, that Motilla never pointed the gun at the applicant (5 R.R. at 56).

The applicant fails to prove Guerinot was ineffective for failing to obtain additional details from Segura. Further, the applicant fails to prove, had Segura testified to additional details, that there is a reasonable probability the result of the proceeding would have been different.

Conclusion

The applicant fails to show that his conviction and sentence were improperly obtained. Accordingly, the Court should enter findings establishing that the grounds for relief are without merit and recommend to the Court of Criminal Appeals that the requested habeas corpus relief be denied.

SIGNED March 5, 2025.

Respectfully submitted,

/s/ Kristin Assaad

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Certificate of Service

I certify that, on March 5, 2025, I directed the electronic filing service provider efile.txcourts.gov to electronically serve a copy of the *State's Response to Applicant's Original and Amended Grounds* on the applicant's habeas attorney, Merel Pontier, P.O. Box 201493, Austin, TX 78720, at mpontier@clintonyoungfoundation.com.

Certificate of Compliance

I certify that the number of words in *State's Response to Applicant's Original and Amended Grounds* is 14,897, including footnotes, according to the Microsoft Word word count.

/s/ *Kristin Assaad*

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