IN 409th DISTRICT COURT
OF EL PASO COUNTY, TEXAS

THE STATE OF TEXAS	§	
	§	
VS.	§	**CAUSE NO. 76187-41-1**
	§	
DANIEL VILLEGAS	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ON THIS THE 16TH DAY OF AUGUST, 2012, Comes the 409th District Court and after hearing and consideration of all evidence presented, all submissions, affidavits, the transcripts of the two prior trials, as well as all other evidence before this Court in this matter, submits to the Court of Criminal Appeals the following Findings of Fact And Conclusions of Law:

I. FINDINGS OF FACT

A. Findings of Fact Related to the Investigation of the Double Homicide of Armando Lazo and Robert England.

1. Shortly after midnight on April 10, 1993, Jesse Hernandez, Juan Medina, Armando Lazo, and Robert England were walking home from a party on Jamaica Street in El Paso, Texas. They reached the intersection of Transmountain Road and Electric Street, seventeen-year-old Lazo and eighteen-year-old England were struck and killed by gunfire originating from the passenger side of a vehicle on Electric Street. Hernandez and

Medina were not struck. (WH Pet. Ex. 43, 46; T1 12/7/94, 16, 121, 126).[1]

2. Robert England suffered a single gunshot wound to the head and died shortly thereafter. His body was discovered approximately 148 feet from six .22-caliber bullet casings that were later found grouped together on Electric Street. (T1, 12/7/94, 73-74, 97-98, 108-10, 186-88).

3. Armando Lazo was shot once in his abdomen and once in his thigh, with both bullets entering the front of his body. His body was found on the doorstep of the corner home belonging to George and Nancy Gorham, directly behind from where the shots originated. The Gorhams called 911 at 12:18 a.m. after hearing five or six consecutive gunshots and the sound of someone knocking at their front door. They did not report hearing a second round of shots fired after the initial five or six. Except for the cluster found on Electric Street, no shell casings were found near the Gorhams' door or anywhere else in the vicinity. (WH, 9/8/11, 114, 130-33; WH Pet. Ex. 32a-31, 61; T1, 12/7/94, 48).

4. Two weeks before the shooting, fifteen-year-old Rudy Flores, an LML gang member who was known as "Dust," had a confrontation with Robert England and Armando Lazo at a party, during which time he threatened to kill Lazo and waited outside to fight him. Rudy's older brother, twenty-year-old Javier Flores, who was known as "Dirt," also had confrontations with Armando Lazo and fought him at school. Rudy Flores had a car that was similar to the one described by the surviving victims. (WH, Pet. Ex. 30, 35, 43).

5. Just hours after the shooting, in an investigative interview conducted by Detective Arbogast of the El Paso Police Department, Juan Medina told the police the following:

    a. As the four boys were walking down Transmountain Road, a car approached them, stopped, backed up, moved forward, and stopped again. Believing that the car belonged to a friend of theirs named Hector Ochoa whom they had just seen at the party, the boys

[1] Citations to the record appear with an abbreviation for the proceeding, followed by the date of testimony and the corresponding page number. A citation to WH, 6/21/11, 40, for instance, refers this Court to page 40 of the portion of the Writ Hearing held on June 21, 2011. Similarly, T1 refers to Daniel Villegas' first trial in December 1994, T2 refers to Villegas' second trial in August 1995, and SH refers to the Pre-trial Motion to Suppress hearing held in December 1994. Citations to different documents in the record are separated by semicolons.

approached the vehicle; the car, however, continued this cat-and-mouse pattern until it eventually drove off. (T1, 12/7/94, 11, 14).

b. Shortly thereafter, as the four boys were walking on Electric Street, the same car approached, parked on the wrong side of the street, and turned off its lights. When the four boys again approached the car, shots were fired from the car's passenger side. Medina and Hernandez began running as the gunshots continued and were not struck. (T1, 12/7/94, 13-16).

c. Medina told Detective Arbogast that he could not identify the shooter or any other individuals in the car. (T1, 12/7/94, 15-16).

6. That same day, April 10, 1993, the other surviving victim, Jesse Hernandez, was interviewed at Police Headquarters by Detective Alfonso Marquez of the El Paso Police Department, who was leading the investigation. During this interview, Hernandez described facts about the events leading up to the shooting similar to the facts that Medina relayed, and also stated that he could not identify the shooters. Hernandez added that the car in question was red or maroon. (WH, 6/22/11, 20-22, 24-25, 31-32, 37, 52-53; WH 9/8/11, 24; WH Pet. Ex. 24).

7. On April 10th, 1993, later in the evening, gunshots were reported on Shenandoah Street in close proximity to the scene of the Electric Street shooting. Officer Bellows was the first responding officer to both of the shootings. Rudy Flores was present during the Shenandoah Street shooting. In addition, a .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. This weapon was never tested against the .22-caliber casings recovered from the Electric Street shooting earlier that day. The recovered weapon was destroyed by the El Paso Police Department five (5) years after it was taken into evidence. (WH, 9/8/11, 135-43; WH, Pet. Ex. 50).

8. On April 12, 1993, Jesse Hernandez was brought back to the police station by Detective Marquez for further questioning, where the following occurred:

a. Detective Marquez asked Hernandez to write out a description of the events leading up to and including the Electric Street shootings. While Hernandez was writing, Marquez took the statement, told

him to "just cut the bullshit," and threw the statement back at Hernandez. (WH, 6/22/11, 54).

b. Detective Marquez accused Hernandez of killing his friends and lied to him by telling Hernandez that Juan Medina had already implicated him. (WH, 6/22/11, 54).

c. Detective Marquez threatened Hernandez that if he didn't confess, he would go to jail and get the death penalty. (WH, 6/22/11, 55).

d. Hernandez did not confess to the crime. However, during the evidentiary portion of this writ hearing, Hernandez testified that he was close to confessing to the killing of his friends based on Detective Marquez's interrogation.

9. Shortly after the shooting, Tonya Vinson, Terri Vinson, Charles Blucher, and Terrance Farrar all contacted the police to alert them that they believed Rudy and/or Javier Flores were responsible for shooting Lazo and England. (WH, Pet. Ex. 43).

10. At 4:25 p.m. on April 14, 1993, Javier Flores gave a statement to the police indicating that he lived with Rudy Flores, and that when Javier arrived home at approximately 12:30 a.m. on the evening of the Electric Street shooting, Rudy was not home. (WH, Pet. Ex. 35).

11. Approximately one-and-a-half hours later on April 14, 1993, Detective Marquez took a statement from Rudy Flores, which included the following information:

a. Rudy Flores drove past the same party the victims were at on Jamaica Street at approximately 11:00 p.m. on the night of the murder.

b. At around midnight, Rudy Flores was in a car traveling east on Transmountain Road.

c. Between 12:15-12:20 a.m., Rudy Flores was in the same car near Transmountain and Electric Street (the location of the shooting).

d. Rudy Flores claimed he then went home. His home was located just one or two minutes away from the scene of the Electric Street shooting.

(WH, Pet. Ex. 34). This information placed Flores at the scene of the crime at the time of the shooting, which occurred shortly before the Gorhams called 911 at 12:18 a.m.

12. On April 15, 1993, based on a tip, Detective Marquez participated in the arrest, transport from New Mexico to El Paso, and subsequent questioning of fifteen-year-old Michael Johnston. The circumstances of this questioning were as follows:

    a. Detectives Marquez and Graves interrogated Michael Johnston for eight hours from 7:00 p.m. on April 15 until 3:00 a.m. on April 16, 1993.

    b. Johnston was handcuffed during the entire eight hours and was unaccompanied by his parents.

    c. Detective Marquez accused Johnston of shooting Lazo and England and lied to him that Johnston's friend had implicated him.

    d. Detective Marquez threatened Johnston with the electric chair if he did not confess, promising to pull the switch himself.

    e. Detective Marquez further threatened to take Johnston to jail where he would be molested and raped if he did not confess, but he promised to let Johnston off easy if he did confess.

    f. Johnston confessed to shooting Armando Lazo and Robert England.

    g. Johnston was never charged with this offense. Detective Marquez later admitted that Johnston's confession was false. (T1, 12/8/94, 312, 317; T1, 12/9/94, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

13. During the investigation, several other individuals confessed to or boasted of committing the Electric Street shooting but were not charged,

including Rick Martinez, Eddie Valles, and Jacob Jarequi. (T1, 12/8/94, 317; WH, 9/14/11, 29; WH, Pet. Ex. 43).

14. On April 21, 1993, the El Paso Police Department contacted Patricia Rangel, telling her they needed to speak to her seventeen-year-old son David Rangel regarding a telephone harassment complaint that had been filed against him and threatening her with obstruction of justice if she did not cooperate. (T1, 12/9/94, 696). David Rangel is Daniel Villegas' cousin. Rangel was subsequently picked up by investigating detectives and questioned at the police station by Detectives Marquez and Lozano. (T1, 12/8/94, 146; WH, 6/22/11, 113). The circumstances of this questioning were as follows:

    a. David Rangel was never questioned about a telephone harassment complaint. The sole topic discussed was the shooting on Electric Street.

    b. Detective Marquez accused Rangel of committing the murders and lied to him that others had already implicated him in the shooting.

    c. Detective Marquez threatened Rangel with life in prison if he did not confess and warned him that he was a "pretty white boy with green eyes" who could expect to be "fucked" in prison.

    d. During the questioning, David Rangel told the detectives that during a telephone call with his cousin Daniel Villegas and Marcos Gonzalez, Villegas admitted to shooting at the victims on Electric Street with a shotgun. Rangel told the detectives that Villegas and Gonzalez were laughing during the conversation and Rangel believed Villegas was joking.

    e. Rangel testified he wrote a statement documenting this phone call with Villegas and Gonzalez, wherein he noted that Villegas had admitting shooting at the victims with a sawed-off shotgun.

    f. Detective Marquez, after reading the statement, threw it in the garbage and told Rangel it was "not correct" that Villegas used a shotgun.

g. Rangel testified that Detective Marquez ordered him to sign another statement that purported to document the phone conversation but that did not mention the type of gun used. Marquez threatened that if Rangel did not sign the new statement, he would be charged with the crime and would not be released. Rangel signed the statement, explaining that he was willing to sign "pretty much what was in front of" him as he was "just [wanting] to get out of there." (WH, 6/22/11, 118-36).

15. David Rangel's signed statement documenting Villegas' purported involvement included several facts that are directly contradicted by other evidence in this case, including:

a. That Villegas was in a black car, whereas the surviving eyewitness victims variously described the car as red, maroon, or "goldish." (WH, Pet. Ex. 24, 26, 51).

b. That Villegas shot Lazo once, saw Lazo run to a nearby home, and then "chased him to the house and there shot him again," even though no shell casings were recovered near Lazo's body or anywhere else other than the location on Electric Street from which Hernandez and Medina said the shots originated. (WH, Pet. Ex. 26; WH, 9/8/11, 212-14).

c. That on the initial drive-by, Villegas ordered one of the victims to stop, at which point the victim stopped and "threw his gang sign" at Villegas. Surviving eyewitnesses Jesse Hernandez and Juan Medina did not describe any verbal exchange or hand gestures on the initial encounter. (WH, Pet. Ex. 26, T1, 12/5/94, 38-39).

d. That Villegas chased Lazo down and personally shot him again, which directly conflicts with Villegas' purported confession, in which he said someone else shot Lazo the second time. (WH, Pet. Ex. 26).

16. On April 21, 1993, fifteen-year-old Rodney Williams was questioned by El Paso Police. Detective Earl Arbogast was the first to question Williams; he concluded his questioning after determining Williams had nothing relevant to add to the investigation. (WH, 6/21/11, 26; WH, 6/23/11, 10-11).

17. Detective Graves then began questioning Williams. The circumstances of this questioning were as follows:

    a. Fifteen-year-old Williams was alone and without counsel during the five-to-six hour interrogation. He asked to see his mother but Detective Graves refused these requests.

    b. Detective Graves insisted that he knew Williams was involved and present when Villegas shot Lazo and England on Electric Street; Williams maintained that neither he nor Villegas were involved.

    c. Williams told Detective Graves that he and Villegas had been watching movies at the Village Green apartment complex on the night of the murders.

    d. Detective Graves threatened that, if Williams did not admit his involvement, he would be charged and go to jail. He told Williams that he would be raped so often and so brutally that his rectum would enlarge and he would not be able to "fart."

    e. Detective Graves promised Williams he could go home if he did give an inculpatory statement. Detective Graves also promised Williams that they wanted to prosecute Villegas, and they were not interested in going after Williams.

    f. Williams signed a typed statement prepared by officers, despite the fact that the information in the statement was untrue. (WH, 6/23/11, 13-30; T1, 12/8/94, 250-51).

18. The statement Rodney Williams signed contained the following details relating to the homicides on Electric Street:

    a. Williams, Villegas, and Marcos Gonzalez were at the Village Green Apartments during the late evening hours of April 9, 1993 when "Popeye" and "Snoopy" picked them up in a white, mid-sized car. Popeye then drove the five boys around the area.

b. Thereafter, Villegas and Gonzalez got out of the car and stole a case of Budweiser beer (i.e., "a beer run") from a Diamond Shamrock, which the five boys then drank together.

c. Sometime thereafter, with Popeye still driving the car, they approached a group of four boys walking on Transmountain Road. Popeye yelled "Que Barrio?", at which point two of the boys approached the car and started yelling in response. Popeye then drove off.

d. Fifteen minutes later, Popeye drove up to the same group of boys, handed Villegas a gun, and Villegas shot at the boys. One fell down right away, while the others ran away. Williams stated that he believed that another was shot in the back as he was running away. (WH, Pet. Ex. 29).

19. After signing the statement, Rodney Williams was arrested for capital murder, but charges against him were dropped after the prosecutor announced in open court that they had insufficient evidence to charge him. (WH, 6/23/11, 35, 38; T1, 12/8/94, 253-54).

20. Shortly after 10:00 p.m., on April 21, 1993, Detectives Marquez and Arbogast entered the Villegas home armed with an arrest warrant obtained approximately forty minutes earlier for Marcos Gonzalez. Gonzalez, an adult, was placed under arrest and read his rights. As the detectives were leaving, Daniel Villegas asked them why they were arresting Gonzalez. After learning the identity of Villegas, Detective Marquez placed him under warrantless arrest and read him the same rights. Villegas was sixteen years old at the time. (WH, 9/15/11, 28, 31; WH, Pet. Ex. 46; SH, 130, 227).

21. Villegas and Gonzalez were placed in different police cars. Both police cars then drove past the home of Fernando Lujan, who is known by the nickname "Droopy." The officers specifically pointed this house out to Villegas. (WH, 9/15/11, 29-30; SH, 12/1/94, 158).

22. While in the car, officers asked Villegas if he knew someone named "Snoopy," and Villegas said he did not. (WH, 9/15/11, 30).

23. Both of the police cars then drove to Northpark Mall. While Villegas and Gonzalez stayed in the police cars, the officers met and spoke to each other. (WH 9/15/11, 31; SH 12/1/94, 152, 223).

24. After this meeting, both Gonzalez and Villegas were driven directly to the El Paso Police Headquarters. During this drive, Villegas repeatedly informed Detective Marquez that he was a juvenile. Detective Marquez accused Villegas of lying about his age. About 10-15 minutes after arriving at Police Headquarters, Detective Marquez confirmed that Villegas was, in fact, just sixteen years old. At that point, Detective Marquez told Villegas he was a "lucky punk" and transported him to Juvenile Investigative Services, which is a "juvenile processing office" pursuant to Tex. Fam. Code §52.05(a). (WH, 9/15/11, 31, 33; SH, 12/1/94, 224-25).

25. Marcos Gonzalez, an eighteen-year-old, remained at Police Headquarters, where he was questioned by Detective Graves. The circumstances of this questioning were as follows:

    a. Gonzalez testified that Detective Graves threatened to beat him if he did not confess to the Electric Street shooting. Detective Graves also promised to put Gonzalez in county jail where he would be "screwed by fat, old men" unless he confessed.

    b. Detective Graves promised Gonzalez that he was only interested in going after Villegas for the killings.

    c. Gonzalez testified that when he refused to confess, Detective Graves slammed him against the wall repeatedly.

    d. At 1:15 a.m., Gonzalez signed a statement typed by law enforcement. (T1, 12/8/94, 433, 436, 446, 452, 489; SH, 12/30/94, 41; WH, Pet. Ex. 56).

26. Marcos Gonzalez's signed statement contained the following details relating to the homicides on Electric Street:

    a. Gonzalez and Williams were outside Williams' apartment on the evening of the shooting "kicking back." A beige, two-door car approached them. "Snoopy" was driving the car, "Popeye" was in

the front passenger seat, and Villegas was in the back. Gonzalez and Williams got in the back of the car.

b. They then stopped at a 7-Eleven, where Popeye went on a "beer run," stealing four twelve-packs of Budweiser.

c. The group drank approximately three of the twelve-packs while driving around. Eventually, they passed a group of four or five teenage boys walking on Transmountain Road.

d. Popeye and Villegas yelled "VNE Putos" at the boys, and the other group yelled something back. Snoopy then drove off toward his home, saying he wanted to go get his gun.

e. Snoopy pulled up outside his house and went in, returning a short time later with a small black automatic gun.

f. As they drove back toward Transmountain Road, Gonzalez asked to be let out of the car. Snoopy did so, but not before Popeye called him a "pussy" and Gonzalez hit him.

g. Gonzalez walked home and went to sleep. Later, Villegas told Gonzalez that he had shot and killed Armando Lazo. (WH, Pet. Ex. 56).

27. Detective Marquez arrived with Villegas at the Juvenile Investigative Services office at approximately 11:00 p.m. Villegas was placed in a room and handcuffed to a chair by Detective Marquez. (SH, 227; WH, 6/21/11, 42-43; WH, 9/15/11, 33-35; WH, Pet. Ex. 5).

28. Villegas signed a juvenile *Miranda* warning card in front of Detective Ortega after arriving at the office at 11:15 p.m. (WH, 6/21/11, 206-07; WH, Pet. Ex. 3, 4; T1, 12/8/94, 378).

29. Villegas was questioned by Detective Marquez while at Juvenile Investigative Services. Villegas testified at the evidentiary hearing to the following:

a. Villegas remained handcuffed to a chair while he was questioned for about an hour.

b. Detective Marquez repeatedly accused Villegas of committing the Electric Street shooting, telling him that Rodney Williams had implicated him.

c. Detective Marquez threatened Villegas that if he did not confess, he would be put in county jail to be "raped and fucked by a bunch of fat faggots."

d. Detective Marquez also threatened to "kick his ass" and to take him to the desert and beat him if he did not admit to the shooting.

e. When Villegas maintained his innocence, Detective Marquez slapped him. Villegas had never been interrogated before and was "terrified out of his mind." (WH, 9/15/11, 35-36; T1, 12/12/94, 813-18).

30. Villegas was next handcuffed and taken to the Juvenile Probation Department, where Officer Mario Aguilera documented his intake at 12:26 a.m. and wrote that Villegas had agreed to "give a confession." (WH, 6/21/11, 212; SH, 11/30/04, 20; WH, Pet. Ex. 6).

31. Officer Aguilera met privately with Villegas, at which point Villegas agreed to give a statement. (WH, 6/21/11, 224).

32. Villegas was next taken before Magistrate Carl Horkowitz, who was required to warn him of his rights prior to any interrogation.

33. Prior to this meeting, Villegas testified that Detective Marquez warned Villegas that if he did not agree to give a statement, he would beat him and put him in jail. Specifically, Detective Marquez threatened: "You are going to tell the judge that you are going to make a statement and if you don't you already know what I am going to do to you, motherfucker. I am going to take you to the desert and beat your ass." (WH, 6/21/11, 56-57; WH, 9/15/11, 39).

34. At 12:53 a.m., Villegas did tell Magistrate Horkowitz that he would give a statement. Villegas testified that he did so only because he was "mentally paralyzed" by Detective Marquez's continual threats. (WH 9/15/11, 38-39).

35. Villegas was then driven back to Juvenile Investigative Services, where he was handcuffed and questioned once again by Detective Marquez. Villegas also testified that after being told by Marquez that Williams had already implicated him, Villegas then told Detective Marquez the following while Detective Marquez typed into the statement:

    a. On the night of the murder, Villegas and Williams were at the Village Green Apartments, when they were approached by a group of black males with a gun.

    b. Williams alone left with the black males, telling Villegas that he was going to do "something crazy."

    c. Williams returned later and told Villegas that he had killed Lazo and England. (WH, 9/15/11, 40).

36. After Villegas finished this story, Villegas then testified that Detective Marquez took the paper from the typewriter, crumpled it up, and slapped Villegas. Detective Marquez then threatened Villegas that he would pull the switch on the electric chair himself if Villegas did not confess to being the shooter. (WH, 9/15/11, 40-41).

37. Villegas then testified Detective Marquez then waved Williams' statement at Villegas and told him that Williams had named "Snoopy" and Marcos Gonzalez as accomplices. Villegas told Detective Marquez that he did not know anyone named "Snoopy," although he did know someone nicknamed "Droopy." (WH, 9/15/11, 44).

38. Villegas testified Detective Marquez then left the room, but returned shortly thereafter to tell Villegas that Marcos Gonzalez had also implicated Villegas as the shooter. (WH, 9/15/11, 46).

39. Villegas agreed to sign a one-page statement prepared by Detective Marquez, which included the following details:

    a. Villegas, Marcos Gonzalez, Rodney Williams, Popeye and Droopy were together in Popeye's white, mid-size car on the evening of the shooting.

b. Popeye was driving, Droopy was in the front passenger seat, Villegas was in the back behind Droopy, Williams was seated next to Villegas in the back, and Gonzalez was next to Williams in the back behind Popeye.

c. They stopped for a "beer run" at Diamond Shamrock, where they stole two 24-pack cases of beer. Villegas served as a lookout during the "beer run."

d. After the boys drank one case of beer, Popeye drove them down Transmountain Road, where they saw four other boys, including Armando Lazo, walking along the side of the road.

e. Droopy yelled "Que Vario" out the window at the boys, and the four boys on the street hollered something back.

f. Villegas was then handed a small black gun.

g. Popeye drove back to the scene and stopped the car. Lazo approached and said "What's up? What's up?"

h. Villegas fired one shot in the air to scare the boys on the street, followed by more shots aimed directly at the group of four boys.

i. Someone in the car yelled that Lazo was getting away and we needed to "finish him off."

j. "Someone" then "finished [Lazo] off." Villegas did not name himself as the one who "finished him off." (WH, St. Ex. 1).

40. Detective Marquez finished typing the statement at 2:26 a.m. on April 22, 1993. Villegas was then taken back to Magistrate Horkowitz where after being given *Miranda* warnings again, he signed the confession at 2:40 a.m.. (WH, St. Ex. 1).

41. While Detective Marquez was interrogating Villegas at JIS, he would take breaks and speak with Detective Graves, who was simultaneously re-interrogating Marcos Gonzalez at Police Headquarters. During these conversations, Detective Graves learned that pertinent facts in Daniel Villegas' statement conflicted with Gonzalez's first signed statement.

Detective Graves' testimony during the evidentiary hearing was that he was in contact with Detective Marquez during this time period. (T1, 12/8/94, 494; T2, 8/24/95, 473).

42. Gonzalez ultimately signed a second statement. (WH, St. Ex. 56; T1, 12/8/94, 432-34).

43. Gonzalez's second statement was typed by Detective Graves and conflicted with his first statement in the following ways:

44. The following differences were in Gonzalez' statement:

First Statement	**Second Statement**
a . The driver of the car was "Snoopy"	The driver of the car was "Popeye"
b. The front passenger was "Popeye"	The front passenger was "Droopy"
c. Gonzalez was not present at the shooting	Gonzalez was at the shooting

(WH Pet. Ex. 56; WH St. Ex. 1; WH, 9/15/11, 44).

45. Gonzalez's second statement are consistent with the details in Villegas' signed statement. (WH, Pet. Ex. 56; WH, St. Ex. 1).

46. Gonzalez's second statement includes additional new details regarding what he witnessed during the shooting. Each of these details is consistent with Villegas' signed statement. (WH Pet. Ex. 56; WH St. Ex. 1).

47. Marcos Gonzalez was charged but never prosecuted for any crime related to the Electric Street shooting. (T1, 12/8/94, 473).

48. Daniel Villegas' signed confession contained details that are demonstrably false and factually impossible in the following ways:

a. The boy identified as "Popeye" was incarcerated at the time of the offense; he therefore was not driving the car involved in the shooting.

b. The boy identified as "Droopy" was under house arrest at the time of the shooting; he was therefore not in the passenger seat at the time of the murder, nor did he yell "Que Barrio" at the victims.

c. No beer was stolen at Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys. (WH, 9/8/11, 153-54, 195; WH, 9/15/11, 59).

49. Rodney Williams' signed statement contained the same demonstrably false and factually impossible details. (WH, Pet. Ex. 29).

50. Both of Marcos Gonzalez's statements contained the same demonstrably false and factually impossible. Additionally, no beer was stolen from the 7-Eleven at Hondo Pass and Railroad on the evening of the murders, as indicated in Gonzalez's second statement.

51. Daniel Villegas' signed confession also conflicts with other evidence in the case in the following ways:

a. The color of the vehicle used in the shooting:
   i. Villegas statement: white (WH, St. Ex. 1).
   ii. Other evidence:
      1. *Surviving victim Jesse Hernandez*: maroon or red (WH, Pet. Ex. 24).

      2. *Surviving victim Juan Medina*: goldish (WH, Pet. Ex. 51).

      3. *David Rangel's statement documenting Villegas' alleged confession*: black (WH, Pet. Ex. 26).

      4. *Gonzalez's first statement:* beige (WH, Pet. Ex. 56).

b. Where the demonstrably false beer run occurred:
   i. Villegas statement: Diamond Shamrock at Dyer near the Village Two Apartments (WH, St. Ex. 1).

   ii. Other evidence: Marcos Gonzalez's first statement says the beer run occurred at 7-Eleven at Hondo Pass and Railroad. (WH, Pet. Ex. 56).

c. First interaction with the four victims:

i. Villegas statement: Upon seeing the victims, Droopy yelled from the car, "Que Vario." (WH, St. Ex. 1).

ii. Other evidence:

1. *Surviving victim Jesse Hernandez*: Someone from the car yelled "Que Putos." (WH, Pet. Ex. 24).

2. *Surviving victim Juan Medina*: Someone from the car yelled "come here." (WH, Pet. Ex. 51).

3. *Rodney Williams' statement*: Popeye, not Droopy, yelled "Que Barrio." (WH, Pet. Ex. 29).

4. *Marcos Gonzalez's second statement*: Villegas, not Droopy or Popeye, yelled "VNE Putos." (WH, Pet. Ex. 56).

d. The shooting of Armando Lazo

i. Villegas statement: After the initial gunshots from the car, the perpetrators chased after Lazo, "finishing him off" while he was running away toward the home of the Gorhams. (WH, St. Ex. 1).

ii. Other evidence:

1. No additional shell casings were recovered beyond the six found together on Electric Street.

2. Neither the Gorhams, Hernandez, nor Medina reported seeing or hearing a new set of gunshots after the initial five or six shots.

3. Lazo had no entrance wounds to the back, suggesting he was not shot again, or "finished off," while running away. (WH, 9/8/11, 130-33, 205-06, 212-15; WH, Pet. Ex. 61; T2, 8/24/95, 167-68).

52. Daniel Villegas recanted his confession to Monica Sotelo, a juvenile probation officer, as soon as he was away from Detective Marquez. Villegas told Probation Officer Sotelo that "he didn't do it," and that he

only confessed because "the cops were harassing him." "Tired and want[ing] to go back to sleep, [he] told them what they wanted to hear." (WH, Pet. Ex. 42).

53. Neither the vehicle nor the gun used in the crime was ever located as part of the police investigation into the Electric Street shooting. (WH, 9/8/11, 202; WH, St. Ex. 1; WH, Pet. Ex. 26, 29, 56).

54. In the days following the shooting and prior to the statements of Villegas, Gonzalez, Williams, and Rangel, the local media reported on the shooting, including articles that were published in the El Paso Times on April 11, April 13, and April 18, 1993. See Gordon Dickson, *2 Teens Gunned Down Leaving Party*, El Paso Times, April 11, 1993, at 1A; Joe Olvera, *Beaumont Reviews EMS Call*, El Paso Times, April 13, 1993, at 1A; Gordon Dickson, *Help Police Find Suspects Who Shot and Killed Teens*, El Paso Times, April 18, 1993 at 7B (collectively, the "El Paso Times articles").

55. Daniel Villegas had seen these newspaper articles and discussed them with his friends, including David Rangel and Marcos Gonzalez. (T1, 12/7/94, 153-55; T1, 12/8/94, 423).

56. At some point during the investigation, an exculpatory tape recording was made in which a witness divulged the identity of a killer that was not Daniel Villegas, as well as the location of the .22-caliber gun used in the murders. This tape went missing before trial and has never been found. Detective Marquez was aware of, and listened to, the tape. (WH, 9/9/11, 24-27; WH, Pet. Ex. 92; T2, 8/24/95, 9-11, 499-502).

B. Findings of Fact Related to Daniel Villegas' First Trial.

57. Villegas' first trial for capital murder began on December 5, 1994, 592 days after his arrest on April 21, 1993. The State was represented by prosecutors Jamie Esparza and John Williams. Villegas was represented by retained counsel Jaime Olivas. (T1, 12/5/94, 1-2).

58. Each side gave opening statements. Olivas' opening statement highlighted the flaws in the State's evidence, namely that the details in the signed statements contradicted other evidence in the case or were demonstrably false; that the detectives who obtained the statements had a

pattern of using intimidation and illegal interrogation tactics, and had done so against Villegas; and that Villegas was particularly vulnerable to these tactics because he was mentally slow. Olivas also suggested that Rudy Flores had a motive to commit the crime and that his car matched the description given by one of the surviving victims. (T1, 12/5/94, 1-12).

59. The State presented the testimony of the surviving victims – Jesse Hernandez and Juan Medina – and of the Gorhams to explain the circumstances of the shooting. None of them were able to identify the assailants or anyone in the car. (T1, 12/7/94, 3-51).

60. The State presented the testimony of several responding officers, crime technicians, forensic officers, and the medical examiner. Through direct and cross-examination, none of these witnesses were able to connect Daniel Villegas, Rodney Williams, Marcos Gonzalez, Popeye," "Snoopy," or "Droopy." (T1, 12/7/94, 51-119, 130-43, 183-198).

61. The State presented the testimony of David Rangel and asked that he be treated as an adverse witness because it "knew he was going to deny" his previous statement to police. Rangel did not deny his previous statement. Specifically, Rangel testified that Villegas did claim responsibility for committing the shooting on Electric Street with a sawed-off shotgun during a telephone conversation with Rangel; Rangel, however, knew Villegas was kidding. (T1, 12/7/94, 144, 145-82).

    a. On cross-examination, Olivas elicited from Rangel that Villegas often "talked shit" and pretended to have committed crimes in which he actually had no involvement. Olivas also elicited from Rangel that he knew that Villegas had read the El Paso Times articles. (T1, 12/7/94, 178-79, 180).

62. The State called Rodney Williams even though he informed state representatives at least a week prior to trial that his statement to police was coerced and untrue. Williams testified regarding the circumstances of his questioning. Williams further testified that his statement, in which he had implicated himself and Villegas in the Electric Street shootings, was entirely false. Williams also provided an alibi for himself and Villegas, testifying that the two of them, as well as Marcos Gonzalez, were with "Linette" and Williams' brother from 10:15 p.m. to 12:30 a.m.

on the evening of the shooting. They were babysitting two girls and watching the movie "White Men Can't Jump." (T1, 12/8/94, 205-73).

a. On cross-examination, Olivas elicited from Williams that all of the details in his signed statement to police were fed to him by his interrogators. Olivas also elicited the details of the threats. Williams also testified that neither he, Gonzalez, nor Villegas owned a red, maroon, or goldish car. (T1, 12/8/1994, 244-60, 246).

63. The State called Marcos Gonzalez. Gonzalez corroborated the alibi as testified to by Rodney Williams, including the name of the movie they watched. He further testified on direct examination that the statement he signed at the police station was not true, and he only signed the two statements because they were "beaten out" of him. (T1, 12/8/94, 399-478, 436, 440).

a. On cross-examination, Olivas elicited testimony regarding the detailed threats made to Gonzalez during his interrogation. Olivas also elicited that Gonzalez did not even know the meaning of certain words in the statements he signed and that the details in Gonzalez's signed. Olivas further elicited from Gonzalez the details in his confession that were demonstrably false. (T2, 12/8/94, 445-61).

64. The State also called Detective Marquez, Detective Graves, the juvenile officers involved in the interrogations, and the magistrate judge. Through Detective Marquez, the State introduced into evidence Villegas' signed statement, which Marquez and the juvenile officer denied was obtained through any threats, promises, or other illegal interrogation tactics. Detective Marquez also denied ever stopping at Northpark Mall prior to taking Villegas to Juvenile Investigative Services. He also denied the allegations made by David Rangel during his testimony. Detective Graves, who took Gonzalez's two statements and Williams' statement, also denied using any illegal or coercive interrogation tactics. (T1, 12/8/94, 274-396, 481-539).

a. On cross-examination, Olivas pointed to many other alternative suspects in this case, including others who confessed to the offense and the Flores brothers. Olivas also highlighted the demonstrably false details in the statements of Villegas, Gonzalez, and Williams.

Indeed, Detective Marquez admitted on cross-examination that Popeye could not have been involved in this crime. Olivas also elicited that allegations of perjury had been made against Detective Marquez, and that Detective Graves had been the subject of an internal affairs investigation. (T1, 12/8/94, 324-25, 448; T1, 12/9/94, 501-02, 676-80).

65. In short, as the State itself remarked in closing argument, the State's entire case against Daniel Villegas revolved around the four alleged out-of-court statements given by David Rangel, Marcos Gonzalez, Rodney Williams, and Daniel Villegas, each of which had been disavowed prior to trial. (T1, 12/12/94, 52, 58-62).

66. During the defense case, Olivas put on eighteen witnesses to support (1) an alibi defense; (2) that the signed statements were made as a result of police intimidation and illegal and coercive interrogation tactics used on the particularly vulnerable Villegas and Williams; and (3) that the signed statements were entirely unreliable because they included demonstrably false details and conflicted with other evidence.

67. Priciliano Villegas, Lesley Williams, Veronica Ramirez, Sally Williams, Linette Moore, and Daniel Villegas himself were all called to testify in support of Villegas' alibi, which was initially established by Gonzalez and Williams on direct examination (T1, 12/8/1994, 243, 452-460; T1, 12/9/1994, 657, 713-20; T1, 12/12/94, 774-77, 789-90, 802, 806-10; WH, Pet. Ex. 59).

68. A series of witnesses established that Detective Marquez has exhibited a pattern of using illegal interrogation tactics, including in this case, and committing perjury, including:

    a. Michael Gibson and Bruce Weathers, both practicing attorneys in El Paso, testified that Detective Marquez has a reputation for untruthfulness. Gibson, a former First Assistant Chief Felony Prosecutor and Director of the Organized Crime Unit in El Paso, actually twice presented a perjury indictment to the grand jury against Marquez. (T1, 12/9/1994, 550-80; T1, 12/12/1994, 786).

    b. Michael Johnston, as well as his mother Barbara Hoover, testified that Detective Marquez used illegal interrogation tactics leading to

Johnston's own false confession to the Electric Street murders. (T1, 12/ 9/1994, 587, 589).

c. Detective Marquez himself was recalled and testified that he had been the subject of a number of Internal Affairs investigations. He also testified that there have been roughly thirty citizen complaints against him. (T1, 12/9/94, 678-80).

d. Daniel Villegas testified to the threats made to him by Detective Marquez during the interrogation, and the other surrounding circumstances of his interrogation. (T1, 12/12/94, 813-23).

69. Patricia Rangel, the mother of David Rangel, testified that David did not go voluntarily to the police station but instead went because police falsely told him that they wanted to question him about a telephone harassment complaint. This testimony was consistent with David's testimony and contradicted Detective Graves' testimony. (T1, 12/9/94, 696-97; WH, Pet. Ex. 38).

70. Several witnesses were called to demonstrate that Daniel Villegas had a particular vulnerability to falsely confessing under coercive police interrogation and had at times pretended that he had done things, including criminal acts, that he did not really do, including:

a. Priciliano Villegas, Daniel Villegas' adopted father, testified that Villegas has a learning disability, reads poorly, and dropped out of school in seventh grade. He described Villegas as impressionable, easy to trick, someone who thought more like a child than an adult, and tells people what they want to hear. He also testified that Daniel Villegas was "hyper" and prone to boasting. (T1, 12/9/94, 647-49, 651-52, 655).

b. Patricia Rangel, who is the aunt of Villegas and had known him his whole life, testified that he was prone to boasting and exaggeration. (T1, 12/9/94, 701, 704-06).

c. Dr. Angel Marcelo Rodriguez-Chevres, a forensic psychiatrist who conducted a court-ordered psychiatric evaluation of Villegas, testified that Villegas likely had a learning disability, attention deficit disorder, emotional problems, and possible mild mental

retardation, all of which could make him impulsive and a poor decision-maker. Dr. Rodriguez-Chevres also testified that there is a "strong possibility" that these traits could make Villegas easily influenced by a police interrogation. (T1, 12/12/94, 742-50; WH, Pet. Ex. 72).

71. Sally Williams, Rodney Williams' mother, testified that her son was easily scared and manipulated by people, and that he would say anything to the police if they demanded it. (T1, 12/12/94, 792-93).

72. Olivas elicited testimony to prove that several details in Villegas' signed statement were demonstrably false or inconsistent with the crime scene, including:

    a. Paula Masters testified that she is the owner of the local Diamond Shamrock, and after reviewing her store's records, she found that no beer had been stolen from her store at the date and time in question. She also testfied that her employees are required to report whenever merchandise has been stolen, and none did so that evening. (T1, 12/12/1994, 771).

    b. Lesley Roy Williams, the brother of Rodney Williams, testified that neither Villegas, Gonzalez, nor Williams had a maroon, red, or goldish car. (T1, 12/9/94, 722-23). This was also established during the cross-examination of David Rangel. (T1, 12/7/94, 179).

73. Olivas gave a lengthy closing argument, spanning thirty-four pages of transcript, arguing that Villegas was not guilty based on (1) the alibi, (2) the evidence supporting that the interrogators used illegal tactics and intimidation to secure the statements, and (3) that the statements were unreliable because of the lack of corroborating evidence and the contradictory and demonstrably false details. (T1, 12/12/94, 15-50).

74. The evidence and arguments concluded on December 12, 1994. The jury hung and the trial court declared a mistrial on December 14, 1994.

C. Findings of Fact Related to Daniel Villegas' Second Trial.

75. Villegas' second trial for capital murder began on August 21, 1995. The State was again represented by prosecutor Jaime Esparza, the same man who prosecuted the first trial. Villegas, who at this time was now declared indigent, requested that his first trial counsel Jaime Olivas be appointed to represent him – to which Olivas agreed – but that motion was denied. Instead, Villegas was represented by John Gates, who was appointed a mere sixty-seven days[2] prior to the start of trial. (WH, Pet. Ex. 1, 32, 71).

76. The State presented an opening statement. During this opening, the State detailed the content of the out-of-court statements of Marcos Gonzalez and Rodney Williams implicating Villegas and remarked that the "evidence will show that in all three statements given by Williams, Gonzalez and the defendant, they admit to being there and they point the finger at the defendant . . . and based on all that evidence, the State of Texas is going to ask you to convict the defendant." (T2, 8/24/95, 145).

77. Gates reserved his opening statement until after the State presented its evidence. (T2, 8/21/95, 141, 145).

78. The State's evidence mirrored what it presented at the first trial.

    a. The surviving victims – Jessie Hernandez and Juan Medina – testified similarly to the first trial, and could not identify their assailants or anyone in the car. (T2, 8/21/95, 172-99; T2, 8/22/95, 206-37).

    b. Responding officers and forensic technicians testified and again none were able to specifically connect Daniel Villegas, Rodney Williams, or Marcos Gonzalez to this crime. (T2, 8/21/95, 147-64; T2, 8/22/95, 237-85, 289-306).

    c. Unlike the first trial, the parties stipulated to the autopsy report, and the medical examiner was not called to testify. The stipulation, however, erroneously stated that Lazo was shot three times, when

[3] Attorney Gates' second affidavit states that he was appointed on June 15, 1995, received the transcripts from the first trial on June 23, 1995, and picked the jury on August 21, 1995. The affidavit goes on to state that he was appointed sixty-six days, and had the transcripts sixty days, before trial commenced. Assuming the dates are correct, however, Gates was actually appointed sixty-seven days, and received the transcripts fifty-nine days, before the beginning of trial.

he was really shot twice. Further, the stipulation failed to include the location of the entrance wounds, both of which were in the front of his body. (T2, 8/23/95, 576-79; WH, Pet. Ex. 32a-30-32).

79. As in the first trial, the State's case hinged on the same four alleged out-of-court statements, all of which were again disavowed at the second trial as they were at the first.

    a. David Rangel testified consistently with what he said at the first trial. Gates did not elicit that Rangel knew that Villegas had read the El Paso Times articles nor did he elicit the specific threats made to Rangel by Detective Marquez. (T2, 8/22/95, 307-46).

    b. Rodney Williams and Marcos Gonzalez also testified consistent with their testimony at the first trial asserting that their signed statements implicating Villegas were not true. The State, however, questioned them about their signed statements in detail. Gates failed to object to the State eliciting testimony regarding the substance of Williams or Gonzalez's signed statements, even though that testimony implicated Villegas as the shooter. (T2, 8/22/95, 347-406; T2, 8/23/95, 408-43).

        i. Gates only briefly cross-examined Williams and Gonzalez. He failed to elicit any testimony regarding most of the detailed threats or promises made to them by their interrogators. Gates also did not elicit testimony to the effect that they did not own a red, maroon, or goldish car. Gates also failed to explore on cross-examination Villegas' alibi, as testified to by Williams and Gonzalez on direct. (T2, 8/22/95, 349-53, 377-79, 381-82; T2, 8/23/95, 423-24, 432-41).

    c. The State again called Detective Marquez, Detective Graves, the juvenile officers involved in the interrogations, and the magistrate judge, who introduced Daniel Villegas' written statement. These officers generally testified consistently with what they said at the first trial. Detective Marquez added that he could get a confession at any point if "he really wanted to." (T2, 8/23/95, 450-510, 515-75; T2, 8/23/95, 504).

i. Gates failed to cross-examine Detectives Marquez or Graves on any of the citizen complaints, internal affairs investigations, claims of perjury, or other false confessions and claims of illegal interrogation tactics alleged against them. Attorney Gates only minimally cross-examined the law enforcement witnesses regarding the demonstrably false details in Villegas' statement.

80. Following the State's case-in-chief, Gates waived the opening statement he had previously reserved for this time. (T2, 8/24/95, 582).

81. Gates called only one witness, Everett Turner, who testified that he was a master sharpshooter, and that he went out to the scene of the Electric Street shooting in an attempt to recreate the shooting as described in Villegas' signed statement. In doing so, Turner failed to hit his target in ten attempts, and Turner believed it would be "virtually impossible" for an individual to intentionally hit his target four out of five times, like that described in Villegas' confession, under those conditions. (T2, 8/24/95, 582-602).

a. Gates failed to present any of the alibi witnesses from the first trial.

b. Gates failed to present any of the witnesses from the first trial that testified to Detectives Marquez and Graves' pattern of improper police behavior, perjury, and illegal interrogation tactics..

c. Gates failed to present any testimony regarding Daniel Villegas' limited intelligence and particular vulnerability to false confession.

d. Gates failed to present the testimony of Paula Masters to demonstrate that a "beer run" did not occur at Diamond Shamrock, contradicting Villegas' signed statement.

82. Gates failed to request a limiting instruction ordering the jury to consider Williams' and Gonzalez's out-of-court statements only for impeachment purposes, not as substantive evidence for the truth of the matter asserted. (T2, 8/22/95, 347-376, 404).

83. Gates' closing argument spanned twenty pages of transcript. During the argument, Attorney Gates specifically suggested that the jury could

consider Gonzalez's and Williams' out-of-court signed statements as substantive evidence. Attorney Gates also spent much of his argument suggesting that Villegas did not intend to kill, but he only committed a reckless act by shooting off the weapon toward the victims. (T2, 8/24/95, 609-629; T2, 8/24/95, 611, 618-19, 625, 628).

84. The State's rebuttal closing argument specifically asked the jury to consider the out-of-court statements of Gonzalez and Williams as substantive evidence, arguments to which Attorney Gates never objected:

> And who does [Marcos Gonzalez] finger? The defendant. Who did Rodney Williams finger? The defendant. Now, what consistency. (T2, 8/24/95, 641).
>
> Who does [Rodney] finger? The defendant... This is direct evidence from the boys who were there. (T2, 8/24/95, 642).
>
> [T]his case revolves around three things, doesn't it? Marcos Gonzalez, Rodney Williams and the defendant. ... Why, if they were bragging, why would they be so accurate? Why would they tell us that this happened as they came down Transmountain and they turned on Electric? Why would they tell you that they had seen those people before? That they had fronted them? Unless it was the truth. (T2, 8/24/95, 649).
>
> Guess what? Not only do [Williams, Gonzalez, and Villegas]'s confessions – not only are their statements consistent, not only is their alibi consistent, but I got the three of them together on April 10th, 1993. (T2, 8/24/95, 651).

85. The State's closing argument also specifically pointed to the lack of evidence presented by the defense, evidence that was presented at the first trial:

> *They got the same alibi. We were babysitting. We were over there up above the apartments babysitting. . . Where is the mother who needed babysitting? (T2, 8/24/95, 637).*
>
> *Our case was here to be tested and all we got was Everett Turner. (T2, 8/24/95, 643).*

There isn't any evidence that he lacks the intelligence to make this confession. None. Absolutely none, so don't go back there and say, well, he's just not smart enough. That's why he took the fall. Think about it. (T2, 8/24/95, 647).

Did you hear any evidence that he wasn't smart enough to make this statement? None. None. No one came in here and told you he was academically slow. No one came in here and told you he was mentally retarded. No one told you his IQ. No one told you that the words in that confession were too big or too large and he couldn't understand them. No one told you that. You can't argue it back there because that's not evidence. You would be guessing. (T2, 8/24/95, 648.)

86. The evidence and argument concluded on August 24, 1995, with a jury finding Villegas guilty of capital murder. Villegas was sentenced to life in prison. (T2, 8/24/95, 653).

D. PROCEDURAL HISTORY

87. On September 8th 1995, Villegas filed notice of appeal.

88. On appeal, Villegas challenged: (1) the procedure for his transfer from juvenile court to the district court and (2) the trial court's denial of his motion to suppress his confession.

89. On July 10th 1997, the Eighth Court of Appeals overruled all of Villegas' appellate issues and affirmed the judgment of the trial court.

90. On appeal, Villegas was represented by attorney Carol Cornwall.

91. Villegas' conviction became final on September 17th 1997, when the Eighth Court of Appeals issued its mandate.

92. Over twelve years after mandate issued, on December 23rd 2009, Villegas filed his application for writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure.

93. Villegas was represented on his writ by attorney Charles L. Roberts.

94. Villegas' writ application alleged a single ground for relief (with multiple sub-grounds) that he received ineffective assistance of counsel in his second trial.

95. On January 25th, 2010, the 41st District Court signed an order designating the issue (ODI) to be resolved as whether applicant was denied effective assistance of counsel in his retrial as alleged in Villegas' writ application at the time the ODI was signed.

96. The 41st District Court's ODI directed attorney John Gates to submit an affidavit to the Court regarding his representation of Villegas.

97. On February 19th 2010, attorney John Gates filed his affidavit.

98. On February 25th 2010, the 41st District Court recused itself from further participation in the writ proceedings due to a conflict of interest.

99. On March 1st 2010, Villegas' writ application was transferred to the 409th District Court by Judge Stephen Ables, presiding judge, Sixth Administrative Judicial Region.

100. The State filed its answer to Villegas' writ application on December 15th 2010.

101. An evidentiary hearing was set for April 25th 2011.

102. On April 20th 2011, five days before the scheduled evidentiary hearing, Villegas filed a new application for writ of habeas corpus asserting two grounds for relief: (1) a claim of ineffective assistance of counsel by his second trial counsel, and (2) a claim of "actual innocence" based on new evidence.

103. The new writ application alleged only that attorney John Gates rendered ineffective assistance due to: (1) failure to investigate and discover that Villegas' confession was illegally obtained, (2) failure to interview and call known defense witnesses, (3) failure to consult with first trial attorney Jaime Olivas, (4) failure to object to inadmissible testimony, (5) failure to request a limiting instruction, (6) failure to request expert witnesses, (7) failure to adequately consult with Villegas, and (8) cumulative error.

104. Villegas' new actual innocence claim alleged that newly discovered evidence showed that: (1) Villegas' confession was coerced, (2) another person "may have been involved," and (3) Villegas' confession contained impossibilities of fact.

105. On April 21st 2011, the State filed its written objection to consideration of Villegas' new writ allegations.

106. The State objected to consideration of Villegas' new writ allegations on the grounds that the State was not accorded its statutory 15-day response time set forth in article 11.07 of the Texas Code of Criminal Procedure.

107. Villegas' "actual innocence" claim was not designated by the 41st District Court as issues involving "controverted, previously unresolved facts that were material to the legality of the applicant's confinement."

108. The State filed its answer to Villegas' new writ application on May 5th 2011.

109. On May 25th 2011, this Court promulgated an Order Designating Issues.

110. This Court found that the issues of fact to be resolved concerned whether: (1) applicant was denied effective assistance of counsel, to wit: by failure to investigate and discover that applicant's confession was illegally obtained, failure to investigate by interviewing witnesses and consulting with first trial defense counsel Jaime Olivas, failure to call known defense witnesses, failure to object to inadmissible testimony, failure to request a limiting instruction, failure to request expert witnesses, failure to consult with applicant, and cumulative error; and (2) applicant is actually innocent based on new evidence, to wit: that applicant was coerced by Detective Marquez into confessing to a double murder he did not commit, recently obtained police reports suggest another individual may have been responsible for the murders, and recently obtained photographs and affidavits demonstrate that the version of applicant's confession contained impossibilities of fact.

111. Evidentiary hearings were held on June 21-24 2011, before being continued until September 6 2011.

112. On September 7 2011, the State again filed written objections to this Court's litigating new and additional grounds for relief not properly pled in Villegas' writ application.

113. Additional evidentiary hearings were conducted on September 6-9 2011, and September 14-15, 2011.

114. The parties were given until October 18 2011, to submit any final affidavits to be considered by the Court, with any counter affidavits to be submitted by October 31 2011.

115. On October 18 2011, Villegas submitted various materials, to include a polygraph results and an affidavit from a juror from Villegas' second trial.

116. On October 18 2011, the State submitted, in their entirety, nine recordings of alleged phone calls made by Villegas while incarcerated in the El Paso County jail.

117. On October 31 2011, the State submitted one additional recording of jail-recorded phone calls by Villegas, an affidavit from inmate Onnie Kirk relating an alleged admission by Villegas that he committed the murders of England and Lazo, and transcripts of portions of the jail-recorded telephone calls.

118. On October 31 2011, the evidentiary portion of the writ hearing closed.

119. On November 10 2011, the State filed its Supplemental Answer to Applicant's Application for Writ of Habeas Corpus.

120. In its supplemental answer, the State reiterated its previous objections to this Court's consideration of any claims not properly pled in Villegas' writ application.

121. Closing arguments were held on November 10 2011, and this Court took the writ under advisement.

E. Findings of Fact Related to the Evidentiary Hearing on Daniel Villegas' Writ of Habeas Corpus.

122. Villegas was represented by Joe Spencer, Joshua Spencer, and Luis Gutierrez at this hearing. The State was represented by Jim Callan, and Doug Fletcher and John Briggs

123. John Gates, who was appointed to represent Villegas sixty-seven days prior to the start of the trial, used the five volumes of transcripts from Villegas' first trial as the primary source of his preparation. He did not receive these transcripts until eight days after being appointed, or fifty-nine days before trial. John Williams, one of the attorneys who prosecuted Villegas at his first trial, testified that he could not have been prepared to prosecute the case in such a short time, and he did not believe any defense counsel could be effective in this case with such a short preparation time. (WH, Pet. Ex. 1 ,32a; WH, 9/6/11, 66-67).

124. Gates requested investigator Sam Streep be appointed a mere six days before trial. Investigator Streep was tasked only with locating witnesses and serving subpoenas; he did not do any factual investigation. Based on conversations Streep had with Gates shortly before the trial, Streep did not believe that Gates understood the facts of the case or that he was adequately prepared for trial. (WH, 9/6/11, 12-14; WH, Pet. Ex. 32a-4).

125. Neither Gates nor any agent or investigator working on behalf of him ever contacted, interviewed, subpoenaed or called to testify any of the following witnesses on behalf of Villegas, all of whom would have cast doubt on the credibility of Detectives Marquez and/or Graves, and would have supported the argument that Villegas' confession was coerced and false:

a. Detective Earl Arbogast, who would have testified that, contrary to Detective Marquez's testimony at both trials and the evidentiary hearing, the police did stop at Northpark Mall prior to taking Villegas to Juvenile Investigative Services. Detective Arbogast would have also testified that Detective Marquez did not have Villegas sign a *Miranda* warning card at home, contrary to the Detective Marquez's testimony. (WH, 6/21/11, 25, 27; WH, 9/8/11, 161-65).

b. Detective Ortega, who did testify for the State at the second trial. Had Gates been prepared, he would have been able to cross-examine Ortega on the discrepancy in his report regarding the time of the *Miranda* waiver, demonstrating that it was signed at 11:15 p.m, while Daniel was already in custody at Juvenile Investigative Services. This conflicted with the testimony of Detective Marquez and demonstrated that Marquez was not credible when he stated that he arrested Villegas shortly after 11:00 p.m., where he allegedly had him sign a warning card at home. (WH, 6/21/11, 159, 196, 206-07; WH, 9/8/11, 161-65).

c. Jesse Hernandez, one of the surviving victims who also testified at trial for the State. Had Attorney Gates prepared or interviewed Hernandez, he would have learned that Detective Marquez used intimidation, threats, and lies when questioning him two days after the murder, accusing Hernandez himself of killing his friend in the manner. (WH, 6/22/11, 54-55).

d. Michael Johnston and his mother Barbara Hoover, who would have testified regarding Detective Marquez's coercive interrogation of Johnston, which actually led to his false confession in this case. (T1, 12/8/94, 312, 317; T1, 12/9/94, 587-89, 596, 598-99; WH, 9/8/11, 41; WH, 9/9/11, 4-7; WH, Pet. Ex. 49).

e. Patricia Cates (formerly Rangel), the mother of David Rangel, who would have testified consistent with her testimony at the first trial. (T1, 12/9/94, 696-97; WH, 6/22/11, 87-88, 93, 99).

f. Detective Arturo Ruiz and Lieutenant Paul Saucedo, both of whom would have testified that contrary to Detective Marquez's testimony, Detective Marquez never asked or ordered either of them to find or listen to a tape containing exculpatory evidence, and thus that they never listened to such a tape. (WH, 6/22/11, 6, 10-11; WH, 9/14/11, 44-45).

g. A police interrogation expert, such as Dr. Richard Leo, who testified at the evidentiary hearing. Such an expert could have educated the jury about the police interrogation process, how the process – especially as alleged in this case – can lead to false

confessions, and how a jury should analyze Villegas' confession to determine its reliability. (WH, 9/9/11, 129-31).

125. Gates, nor any agent or investigator working on behalf of him, ever contacted, interviewed, subpoenaed or called to testify the following witnesses on behalf of Villegas who could have supported the argument that Villegas was particularly vulnerable to police pressure and false confession:

h. Jesus Lechuga, who was the bond officer for Villegas prior to trial and the individual to whom Villegas reported for 12-18 months. Lechuga would have testified that Villegas was a very poor reader with very poor comprehension; indeed, Villegas did not understand that a "home" was the same thing as a "house." (WH, 6/22/11, 167, 169-71).

i. Alberto Renteria, who was a detention officer at the Juvenile Probation Department in 1993 when Villegas was in custody. Renteria would have testified that Villegas was a "very slow thinker" and had a very difficult time understanding Renteria's instructions. (WH, 6/22/11, 122).

126. Gates nor any agent or investigator working on behalf of him ever contacted, interviewed, subpoenaed or called to testify any of the following witnesses on behalf of Villegas, and could have supported the guilt of Rudy Flores and Javier Flores:

j. Terrance Farrar, who would have testified to witnessing a confrontation between Rudy Flores and Armando Lazo two weeks prior to the shooting, during which Flores threatened to kill Lazo. This testimony would have provided a motive for Rudy Flores. Farrar would have further testified to Rudy "stabbing at" Farrar and Javier Flores shooting at him on previous occasions. (WH, 6/23/11, 93-98, 100-01; WH, Pet. Ex. 30).

k. Rocio Gutierrez, who was Armando Lazo's girlfriend prior to his death, who would have testified that Javier Flores and Armando

"had problems" and that both Flores brothers had a reputation for violence. (WH, 6/23/11, 134, 136-37, 141-42).

127. Gates signed an affidavit admitting that he "overlooked" or "did not utilize" substantial amounts of "vital, material, and relevant" evidence. He also admitted that he erred in entering the stipulation to the autopsy report, as it would have been important to highlight that Lazo was not shot in the back, contradicting the suggestion in Villegas' signed statement that he was shot while running away. (WH Pet. Ex. 4, 32a).

128. Gates further admitted that he "missed several key issues" and that Villegas' capital case required "much more preparation" than he did or had time to do. He admitted that had he not made these errors and omissions, "there would have been no plausible reason not to utilize this evidence for Mr. Villegas' second trial." His "trial strategy would have been different and more effective," and he believed "the outcome may have been different." (WH, Pet. Ex. 32a).

129. The evidentiary hearing also produced evidence pointing to the innocence of Daniel Villegas and the guilt of Rudy and Javier Flores through the testimony of the following witnesses:

a. Jamarcqueis Graves was at the Mount Franklin Apartments with several other people shortly after the Electric Street shootings. While there, Graves overheard a conversation between Javier and Rudy Flores with Ben Watson, Phil Tucker, and Johnny Tucker. During this conversation, the Flores brothers referred to "Danny Boy" being "locked up because he went down for something that they had did." Graves also witnessed one of the Flores brothers give Phil a .22-caliber gun and tell him to dispose of it. Graves did not come forward with this information sooner because he was unavailable: he was either incarcerated or living out-of-town in the years between the shootings and the writ hearing. He also generally went on with his life, not knowing that Villegas received a life sentence for the crime. Graves came forward recently, at the urging of his current girlfriend, when he saw the case on the news and billboards around town and told his girlfriend that he knew who

the true killers were. (WH, 9/6/11, 21-22, 26, 40-41, 47-48, 52-53).

b. Connie Martinez Serrano, who knew the Flores family, accompanied a woman named Gloria to the Flores house right after the shooting on Electric Street, as Gloria was intending to pick up a gun. While at the house, Sally Flores, the sister of Rudy and Javier, went to her closet and retrieved a .22-caliber gun, but Gloria would not take the gun after she found out it had been used before. Serrano also revealed that Rudy Flores' best friend, who goes by the nickname Half-Pint, told her that Rudy admitted to shooting the boys on Electric Street. Serrano called Crime Stoppers several times during the investigation to tell them that Rudy Flores was responsible for the crime, but she was rebuffed and told they had the correct killer in custody. (WH, 9/6/11, 89, 91-94, 97; WH, Pet. Ex. 34).

130. The affidavit of Tony Kosturakis, a private investigator retained by Villegas, was also admitted into evidence. This statement confirmed the prior existence of an exculpatory tape. The statement also established that Investigator Kosturakis, at one point, spoke to a witness who confirmed the existence of a hidden .22-caliber gun at the Flores home. (WH, Pet. Ex. 92).

131. Rudy Flores was twice called to testify at the evidentiary hearing, both times invoking his Fifth Amendment right not to incriminate himself. The second time, this Court ordered him to answer the questions, finding that he had waived his privilege by previously signing an affidavit relating to this matter. Flores refused and was found in direct contempt of court. (WH, 9/14/11, 55-57; 9/15/11, 5-8, 12; WH, St. Ex. 6).

132. This Court also finds that the testimony of Detective Marquez at the evidentiary hearing was not credible. This Court reaches this conclusion based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others. This Court also reaches this conclusion based on other evidence presented in this case, such as:

a. Documents demonstrating that Villegas was likely interrogated long before he was legally allowed to be or when Detective Marquez testified he began questioning him, and

b. Testimony from other law enforcement officers inconsistent with Detective Marquez's testimony

i. Denying that he stopped at Northpark Mall or going to Police Headquarters,

ii. That he ordered other detectives to retrieve what may have been a tape exculpatory to Villegas, and

iii. That he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez.

c. Testimony from Detective Marquez during the evidentiary hearing that on a previous occasion, he wore a "smock" commonly worn by medical personnel, during the interrogation of a criminal suspect. He further testified that the smock was not used for deception purposes. This Court finds no conceivable way that the wearing of a smock commonly worn by medical personnel, was not intended to deceive this suspect into believing that he was talking to medical personnel and not law enforcement.

In short, this Court gives the testimony of Detective Marquez at the evidentiary hearing little to no weight.

133. This Court finds that the audio tapes submitted by the State of Texas and the Applicant in this case have no relevance to these findings of fact and conclusions of law.

II. CONCLUSIONS OF LAW

A. THE ACTUAL INNOCENCE CLAIM OF DANIEL VILLEGAS

The Court in this case has reviewed the findings of fact and makes the following conclusions of law concerning the Applicant claim of actual innocence. The Court has reviewed the two (2) trial transcripts held in the 41st District Court, the multitude of evidence presented by the Applicant and the State of Texas in the form of documentation, live testimony, as well as submissions to this Court. The basis of this case is pursuant to the Wirt of Habeas Corpus filed by the Applicant on December 23rd, 2009, as well as the Amended Writ filed on April 20th, 2011. This Court has also received the answer(s) and submissions in contest of these writs from the State of Texas that have been duly considered.

This Court is addressing the claim of actual innocence in accordance with the State and Federal law as it exists at the time of the filing of the Writ of Habeas Corpus. Applicant Villegas has asserted that he is entitled to the writ of habeas corpus because he is actually innocent of the crimes for which he was convicted. Such a claim is cognizable in habeas proceedings, including non-capital cases. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). An applicant may raise a claim of actual innocence under either *Herrera v. Collins*, 506 U.S. 390 (1993), or *Schlup v. Delo*, 513

U.S. 298 (1995). *Ex parte Spencer*, 337 S.W.3d 869, 877 (Tex. Crim. App. 2011). This Court is addressing this claim as a claim of actual innocence under the holding of *Schlup v. Delo*, 513 U.S. 298 (1995). In a *Schlup*-type claim, innocence is tied to a showing of constitutional error at trial: "An applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Spencer*, 337 S.W.3d at 878.

A *Schlup* claim, in contrast to *Herrera*, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, a *Schlup* Applicant's conviction may not be entitled to the same degree of respect as one, such as *Herrera's*, that is the product of an error-free trial. Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner such as in *Schlup* presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner may pass through the gateway and argue the merits of his underlying claims. Consequently, the Applicant's evidence of innocence need carry less of a burden. In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well-founded),

the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" even if his conviction was the product of a fair trial. For *Schlup*, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial. See *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex.Crim.App. 1996).

In *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the petitioner raised a claim of actual innocence in an effort to bring himself within the "narrow class of cases" implicating fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ. The Court took pains to distinguish between *Schlup's* claim and the claim presented by the petitioner in *Herrera*. *Schlup's* claim of innocence did not alone provide a basis for relief, but was tied to a showing of constitutional error at trial. *Herrera's* claim of actual innocence had nothing to do with the proceedings leading to his conviction; he simply claimed that execution of an innocent man would violate the Eighth Amendment. The Court expounded upon the differences between the two situations, emphasizing the greater burden that must be borne in order to prevail in a naked claim of actual innocence using clear and convincing evidence.

Clear and convincing evidence is an "intermediate" standard of proof which "falls between the ordinary civil 'preponderance of the evidence' standard and our usual 'beyond a reasonable doubt' standard in criminal cases." *Elizondo*, 947 S.W.2d at 212. It is defined "'as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *Id.* (quoting *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

This Court finds that the Applicant in this case has satisfies the standard for actual innocence under the *Schlup* and *Ex Parte Elizondo* analyses under the law. This Court finds that the underlying verdict from the 41st District Court cannot withstand the legal review afforded by the law, being that this Court believes that a reasonable juror, based on the new evidence presented, would not find the Applicant guilty of the crime of capital murder. Applicant's counsel contacted Benjamin D. Hodge III, the presiding juror from Applicant's second trial to listen to the evidentiary hearing. After attending the hearing and listening to the evidence, Mr. Hodge provided the Applicant with an affidavit on September 20th, 2011 stating he would not have voted to convict again. See *(W.H. Pet. Ex 95.)*

The core of this case revolved around the confessions presented by the State of Texas at trial. Moreover, the focus on the confessions must involve the actions and the methods employed by the El Paso Police Department, particularly Detective Al Marquez.

Through the testimony presented, significant and credible evidence was presented that Detective Marquez, as well as other members of the El Paso Police, used at best "questionable" methods in obtaining the confessions used at trial. The Applicant, Rodney Williams, and Marco Gonzalez were subjected to, by this Court's analysis and observations, illegal and coercive methods that bring doubt and concern to the legality of the admissibility of the confessions. Although the State of Texas asserts that these confessions have been litigated and subjected to several legal reviews by the Trial and Appellate Courts, this Court must still question the confessions based upon the testimony of Detective Marquez himself at the evidentiary hearing. Based on the evidentiary hearing testimony, the inconsistencies in the statements, as well as voluntariness of the statements, this Court has no other alternative than find that the confessions in this case to be completely unreliable and require this Court to recommend a new trial.

This Court finds that the testimony of Detective Marquez at the evidentiary hearing was not credible. This Court reaches this conclusion

based on the corroborating evidence presented that supports the claim that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics both in this investigation and others. This Court also reaches this conclusion based on other evidence presented in this case. Documents demonstrating that Villegas was likely interrogated long before he was legally allowed to be or when Detective Marquez testified he began questioning him. Additionally, testimony from other law enforcement officers inconsistent with Detective Marquez's testimony such as denying that he stopped at Northpark Mall or going to Police Headquarters. Testimony that Detective Marquez ordered other detectives to retrieve what may have been a tape exculpatory to Villegas calls his credibility into question. Also, Detective Marquez's testimony that he never communicated with Detective Graves while they were in the midst of the interrogations of Villegas and Gonzalez contradicted the testimony of the other officers involved. However, the most disturbing testimony received by the Court was concerning another case where Detective Marquez donned a "smock" while questioning a defendant, with an admission by Detective Marquez, that "the tactic was not done with the intent to deceive." This Court cannot help but come to the conclusion, especially considering the age of the Defendant and other accused juveniles in this case, that these statements

were both factually incorrect as well as illegally obtained by Detective Marquez. This coincides with the testimony that Daniel Villegas immediately recanted his confession to Monica Sotelo, a juvenile probation officer, as soon as he was away from Detective Marquez. Villegas told Probation Officer Sotelo that "he didn't do it," and that he only confessed because "the cops were harassing him." "Tired and want[ing] to go back to sleep, [he] told them what they wanted to hear."

Detective Scott Graves interrogation of both Rodney Williams and Marco Gonzalez also reveal the same inconsistent information as the Applicant's statement. Gonzalez in fact made two (2) statements which were testified to in the writ hearing. The first statement containing inconsistencies was then amended by a second statement which coincided with the Applicant's statement. Combined with the inconsistent testimony that the officers did not speak to each other, is of importance to this Court.

This Court further finds that the same statements used by the State in obtaining the convictions contain factual impossibilities which calls the conviction into doubt. The Court heard evidence that the Applicant's signed confession contained details that are demonstrably false and factually impossible in several ways. The person identified as "Popeye" was incarcerated at the time of the offense. As such, he was not driving the car

involved in the shooting. The person identified as "Droopy" was under house arrest at the time of the shooting and was under electronic surveillance via an ankle bracelet. He was therefore not in the passenger seat at the time of the murder, nor did he yell "Que Barrio" at the victims. No beer was stolen at Diamond Shamrock on the evening of the shooting; therefore, there was no "beer run" committed by the group of boys, which was contained in Applicant's statement.

The physical evidence in this case, especially at the scene of the shooting on Electric Street, presented a critical problem for the State of Texas. The problem exists where the State's contention at trial was that Applicant's confession described the manner and positions of the shooters on Electric Street. Specifically, the statement describes that the suspects shot at Armando Lazo by chasing him to a door directly behind them where Lazo began ringing a doorbell for assistance. However, the physical evidence at the scene, both in the trial transcripts as well as the evidentiary hearing, reveal no shots to Lazo's back. In addition, there was no evidence presented that any bullet casings where Lazo allegedly was shot were discovered. This is of great importance to this case as physical evidence is usually the cornerstone of the State's prosecution. In this case, however, the defense not only overlooked this evidence which this Court views as critical, it

disregarded the strongest area of physical evidence to the Applicant's innocence.

The testimony and circumstances of the night of the shooting also causes concern for the Court in viewing the underlying conviction. Two weeks before the shooting, fifteen-year-old Rudy Flores, an LML gang member who was known as "Dust," had a confrontation with Robert England and Armando Lazo at a party, during which time he threatened to kill Lazo and waited outside to fight him. Rudy's older brother, twenty-year-old Javier Flores, who was known as "Dirt," also had confrontations with Armando Lazo and fought him at school. Rudy Flores had a car that was similar to the one described by the surviving victims. Later on in the evening, gunshots were reported on Shenandoah Street in close proximity to the scene of the Electric Street shooting. Officer Bellows was the first responding officer to both of the shootings. Rudy Flores was present during the Shenandoah Street shooting. In addition, a .22-caliber weapon was recovered by police in connection with the Shenandoah Street shooting. These shootings took place within ¼ mile of each other and the testimony revealed that no investigation by the El Paso Police Department to see if these matters were possibly connected.

Other information not utilized would have further pointed to the Flores brothers as viable third-party suspects. Rudy Flores was admittedly present at a shooting involving a .22-caliber weapon later that same day, just blocks away on Shenandoah Street. At the same time, Rudy Flores admitted to the police that he was at the intersection of Transmountain Road and Electric Street, at the exact time the Electric Street shooting occurred. He also attempted to give himself an alibi by saying that he was at home at 12:30 a.m., just minutes after the shooting, but his brother Javier indicated to the police that Rudy was not home at that time. Had this information about the Flores' brothers' opportunity and ability, in addition to their motive, to carry out this crime been investigated by Gates and been presented to the jury, it would have cast further suspicion over them as viable alternative suspects. Rudy Flores' recent invocation of his Fifth Amendment privilege at the writ hearing even after this Court ruled that he had waived that right and held him in contempt, only reinforces this position.

The new evidence provided by Villegas consists primarily of the testimony of Jamarcqueis Graves and Connie Martinez Serrano. The evidence presented by Graves meets the requirement that evidence supporting an innocence claim must be "newly discovered." Graves was entirely unknown to Villegas and his attorney at the time of trial. This lack

of knowledge was not due to lack of diligence; in fact, Graves was only discovered after he voluntarily came forward at the urging of his girlfriend after seeing news reports and billboards covering Villegas' pending writ hearing. He did not come forward earlier because he had been incarcerated and later moved out-of-state for a time.

Ms. Serrano was similarly unavailable. Although she did contact the police shortly after the Electric Street shootings, she was unmentioned in any police reports as having information related to the Flores family, and therefore Villegas could not be expected to discover this evidence. This evidence is material such that it would probably bring about a different result at another trial and, moreover, it constitutes affirmative proof of Villegas' innocence. According to Graves, the Flores brothers did not merely take responsibility for the shootings; rather, they specifically articulated that Villegas was innocent and "locked up because he went down for something that they had did." The importance of Graves' testimony could not be clearer. The Flores brothers could have been responsible for the shooting.

Graves' testimony also states that he witnessed one of the Flores brothers give someone a .22-caliber gun to dispose. This testimony is corroborated by that of Connie Martinez Serrano, who states that she was

with a woman named Gloria at the Flores house very shortly after the Electric Street shooting. During this visit, Sally Flores, the sister of Javier and Rudy, tried to give Gloria a .22-caliber gun, but Gloria refused when she learned it had been used. This testimony demonstrates that the Flores family was attempting to dispose of a .22-caliber gun, lending credibility to Graves' testimony that the Flores brothers later ordered their friend Phil to dispose of the gun. This testimony is further corroborated by Tony Kosturakis, a private investigator retained by Villegas, who said that he spoke to a witness who gave similar information about a hidden .22-caliber gun at the Flores home.

Finally, Javier Flores' own statement to police during the investigation contradicts his brother Rudy's statement claiming that he was home on April 10, 1993 at 12:30 a.m., near the time of the shooting. Javier maintains that he arrived home at 12:30 a.m., and Rudy was not there. (WH, Pet. Ex. 34, Pet. Ex. 35.) This contradiction suggests that Rudy may have been attempting to create a false alibi for himself.

At Villegas' second trial, no evidence was presented that Rudy Flores could have committed the crime for which the Applicant was convicted. Therefore, Jamarcquies Graves' testimony is independently competent and is not cumulative, corroborative, collateral, or impeaching. *Van Byrd v. State*, 605 S.W.2d 265, 267 (Tex. Crim. App. 1980).

In *Schlup*, "the petitioner raised a claim of actual innocence in an effort to bring himself within 'the narrow class of cases' implicating a fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise the claim in an earlier writ." *Elizondo*, 947 S.W.2d at 208 (citing *Schlup*, 513 U.S. at 298). Successful *Schlup* claimants are the "extraordinary" cases. *Brooks*, 219 S.W.3d at 400. The Court of Criminal Appeals recognizes that Texas law "allows review of the merits in the exceptional circumstances of a constitutional violation resulting in the conviction of one who is actually innocent of the offense." *Id.* at 401. To grant *Schlup* relief, an applicant must meet the threshold requirement of showing that a constitutional violation led to a miscarriage of justice due to the incarceration of someone who is actually innocent. *Id.*; *see also Ex parte Thompson*, 179 S.W.3d 549, 557 n.19 (Tex. Crim. App. 2005).

As opposed to *Herrera*, a *Schlup* claimant, on the other hand, need only show that he is "probably" actually innocent, meaning "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Elizondo,* 947 S.W.2d at 209; *see also Schlup*, 513 U.S. at 326–27. The lower standard is justified because the conviction "may not be entitled to the same degree of respect of one, such as *Herrera's,* that is the product of an error-free trial." *Schlup*, 513 U.S. at 316. To obtain relief on a

Schlup claim, the claimant must therefore show that the constitutional error at trial probably resulted in the conviction of one who was actually innocent. *Spencer*, 337 S.W.3d at 878.

In this case, this Court finds that the evidence that has been presented by the Applicant, in a cumulative manner, meets the clear and convincing evidentiary standard to determine that the jury in this case could have reasonably found the Applicant innocent in this case. The Court is of the opinion that the new evidence standard has been met under *Schlup*, and now proceeds to examine if constitutional error, if any, can be demonstrated to meet the *Schlup* standard set forth, *infra*.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

This Court has examined the claim of ineffective assistance of counsel in this matter with great attention and detail. This Court has reviewed the law applicable in this case with the evidence and submissions in this case. With the above in mind, it is with clear and convincing evidence that this Court finds that Applicant did not receive effective assistance from John Gates in his trial in the 41st District Court. This Court finds the performance by counsel in this case to fall to such a level that, in and of itself, counsel's performance was deficient to such a level that a fair trial was denied to the Applicant in multiple areas. As such, the performance of

counsel in this case arises to the level of constitutional violation which satisfies the analysis and legal standard not only in the *Schulp* holding, but to the holding in *Strickland v. Washington* as well.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. Const. amend. VI; Tex. Const. Art. I, § 10. The right to counsel necessarily includes the right to reasonably effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id.* First, appellant must demonstrate counsel's performance was deficient and not reasonably effective. *Id.* at 688–92. Second, appellant must demonstrate the deficient performance prejudiced the defense. *Id.* at 693. Essentially, appellant must show his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; Valencia v. State, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and the Court must indulge the strong presumption counsel was effective. Jackson v. State, 877 S.W.2d 768, *771 (Tex. Crim. App. 1994). The Court*

must presume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. Id. Moreover, it is appellant's burden to rebut this presumption by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 119 (1997). A breakdown in the adversarial process implicating the Sixth Amendment is not limited to counsel's performance as a whole; specific errors and omissions may be the focus of a claim of ineffective assistance as well. *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). The failure to object to evidence has been held to be ineffective assistance of counsel. See *Ramirez v. State*, 65 S.W.3d 156 (Tex. App. — Amarillo 2001, pet. ref'd), *Prudhomme v. State*, 28 S.W.3d 114 (Tex. App. — Texarkana 2000), and *Matter of K.J.O.*, 27 S.W.3d 340 (Tex. App. — Dallas 2000, pet. ref'd).

In *Ex parte Lane*, 303 S.W.3d 702 (Tex. Crim. App. 2009), the defendant was denied effective assistance of counsel when trial counsel failed to request pretrial notice of the State's experts and to object to the

"expert" testimony of a DEA agent at the penalty phase about the dangers and societal costs of methamphetamine use. The officer was not qualified to express the opinions contained in his testimony. Harm was shown where the prosecutor used the testimony to argue for a life sentence, and the jury imposed one. Remanded for new punishment hearing.

In Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991) the defendant was entitled to a new trial where he received ineffective assistance of counsel. Trial counsel failed to object to the indictment, which alleged in one of its counts that aggravated assault was a predicate offense of felony murder, and also failed to object to the charge, which authorized a conviction on this theory. Because the jury returned a general verdict, it was impossible to tell if it relied on this theory to convict and therefore harm was shown. Trial counsel also failed to object when the prosecutor asked the jury to consider the victim's state of mind, rather than the defendant's, when evaluating self-defense. This misstatement of the law was contrary to the jury charge. Absent these errors, there is a reasonable probability that the jury would not have convicted the defendant.

In Ex parte Zepeda, 819 S.W.2d 874 (Tex. Crim. App. 1991) the defendant received ineffective assistance of counsel where trial counsel failed to object to the omission of an accomplice instruction from the jury

charge. Two prosecution witnesses who were charged with involuntary manslaughter in the same incident as the subject of the trial were accomplice witnesses as a matter of law. They gave the only direct evidence that the defendant committed the murder. Therefore, there was a reasonable probability of acquittal if the instruction had been given.

In Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991) the defendant received ineffective assistance of counsel when his lawyer failed to object to the use of a 1961 capital murder conviction to enhance punishment. The conviction was void because a jury trial was waived, but the lawyer was unaware of this. Under the "reasonably effective assistance" standard applicable to punishment hearings, this was ineffective assistance. Harm was shown because this was the defendant's only prior conviction, use of the evidence kept the defendant from testifying at trial, and the enhancement count raised the minimum from five to fifteen years, which may have influenced the defendant's seventy-five year sentence.

In *Callaway v. State,* 594 S.W.2d 440 (Tex. Crim. App. 1980) almost total failure to object to highly prejudicial argument and testimony at competency hearing and failure to timely subpoena psychiatric witness denied effective assistance. *See also Cude v. State*, 588 S.W.2d 895 (Tex. Crim. App. 1979) (Denied effective assistance).

In Johnson v. State, 172 S.W.3d 6 (Tex. App.-Austin 2005, the defendant was denied effective assistance of counsel, and a new trial was required, where counsel failed to object to the state's failure to disclose audiotaped statements made by the defendant at the time of the arrest, and, when a portion of the tape was played at trial, failed to offer the exculpatory final portion of the tape. Because the tape was critical to the case, harm was shown and reversal is required.

Under the *Strickland* standard, trial counsel is deficient if his or her conduct is objectively "unreasonable under prevailing professional norms." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89). The adequacy of an attorney's services is to be judged by examining the "totality of the representation." *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981). To establish deficient performance, an applicant must overcome the "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992) (citing *Strickland*, 466 U.S. at 689). This Court must "keep in mind that it must be highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). Despite this presumption,

however, such deference is appropriate only when an attorney has demonstrated reasoned, strategic decision-making. *See, e.g., Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) ("Review of the first prong contemplates deference to *strategic* decision making") (emphasis added); *see also Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding ineffective assistance where counsel's errors were the result of "inattention, not reasoned strategic judgment").

In the case before the Court, multiple and significant errors exist in the trial are of such a deficiency that the Court cannot view the actions of counsel as any form of strategy that any competent lawyer would pursue in a capital murder case. In addition, even with the Court viewing Mr. Gates actions as deferential towards competency, the deficiency of the actions taken in Applicant's trial overcome the standards set in *Strickland* to a level that meets the requirements of the *Schlup* Court and mandate this Court to recommend a new trial. The Court finds that Counsel failed to object to the introduction of the confessions which resulted in ineffective assistance of counsel. Given that Marcos Gonzalez and Rodney Williams denounced their out-of-court handwritten statements and provided exculpatory testimony for Daniel Villegas at his first trial, both the State and Gates were on notice that their in-court testimony would be favorable to Villegas at the second trial.

With this backdrop, this Court must first evaluate whether Gates had a proper legal basis for objecting to the State's introduction of Gonzalez and Williams' hearsay statements under the law at the time of trial in August 1995. *Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) (citing *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) ("counsel's performance will be measured against the state of the law in effect during the time of trial").

Nothing in the record indicates that Attorney Gates had legitimate strategic reasons for failing to object to the State's calling of Gonzalez and Williams, or, at the minimum, request a limiting instruction and object to the State's substantive use of their testimony during closing. In his initial affidavit, Gates merely states that "I only recall making a tactical decision not to attempt to exclude the testimony, but the specific reasoning and mental impressions I cannot remember." (Gates First Aff. at 2). This unsupported assertion is not dispositive. *See Brown*, 304 F.3d at 688 (warning against the acceptance of "post hoc, self-serving" claims from attorneys who make "blanket and general statements" in the context of ineffectiveness proceedings).

This Court further finds that Counsel was ineffective in failing to suppress or challenge the State of Texas in suppressing Applicant's

confession. To obtain relief on the grounds of ineffective assistance of counsel for failing to make a motion to suppress evidence, the defendant "is required to prove that the motion would have been granted." *LaFleur v. State*, 79 S.W.3d 129, 137 (Tex. App. 2002) (citing *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998)). At the time of sixteen-year-old Daniel Villegas' arrest and subsequent confession in this matter, Tex. Fam. Code §52.02(a) provided:

> (a) A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under 52.025 of this code, shall do one of the following:
>
> (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;
>
> (2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;
>
> (3) bring the child to a detention facility designated by the juvenile court;
>
> (4) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or
>
> (5) dispose of the case under Section 52.03 of this code.

Act of May 26, 1991, 72d Leg., R.S., ch. 495, § 1, Tex. Gen. Laws 1738. *See also Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999) (explaining the 1991 amendment was in effect at the time of this case).

The purpose of section 52.02(a) is to reduce an officer's impact on a child in custody. *Le*, 993 S.W.2d at 655. Texas reviewing courts have consistently held that any statement from a minor obtained in violation of these provisions of the Family Code will result in the suppression of the statement. For example, in *Le*, the law enforcement officer first took the minor murder-suspect to a juvenile processing center in compliance with section 52.025, but then took him to an unauthorized police station to obtain a statement prior to taking one of the five actions contemplated by section 52.02(a). *Id.* The officer's error therein was not obtaining a statement at an unauthorized locale, but rather doing so prior to first complying with 52.02(a) "without unnecessary delay." *Id.* The error resulted in an illegally obtained confession that should not have been admitted against the minor. *Id.* at 654-56. *See also Comer v. State*, 776 S.W.2d 191, 196 (Tex. Crim. App. 1989) (detaining the minor suspect for the three hours it took to obtain his confession violated 52.02(a). To compound matters further, the conduct of the El Paso Police Department, particularly Detective Al Marquez, who conducted themselves in a manner where even a questionably competent

attorney would challenge their action both before the trial court as well as the jury results in ineffective assistance. The failure of counsel to question any of the witnesses in a suppression, or in trial, allows the inconsistencies of the statements, mentioned *infra*, to stay buried and caused a result that a reasonable juror, now knowing these facts, would change their verdict in the Court's opinion.

Daniel Villegas was arrested at his home at approximately 10:00 p.m. on April 21, 1993. Detective Marquez testified at the first trial that he had his juvenile *Miranda* warnings with him at the time of arrest, read them to Villegas at his home, and knew of his obligation to take Villegas directly to Juvenile Investigative Services, an accepted "juvenile processing office" pursuant to section 52.02(a). Based on the testimony of Detective Arbogast and others at the writ hearing, however, it is now clear Detective Marquez did not take Villegas immediately to Juvenile Investigative Services. Rather, law enforcement officers drove Villegas past the home of Fernando Lujan ("Droopy"), and questioned him as to whether he knew someone named "Snoopy." They then drove to Northpark Mall, where the officers convened for some time. Following that meeting, the officers took Villegas to police headquarters, which was also not a "juvenile processing office," an office designated by the juvenile court, or a juvenile detention facility. *See* Tex.

Fam. Code § 52.02(a)(2), (3); §52.025. Only after Villegas was at Police Headquarters did law enforcement finally take him to Juvenile Investigative Services, or a proper "juvenile processing office." To this end, law enforcement violated Daniel Villegas' rights under the Family Code by failing to comply with section 52.05 "without unncecessary delay." *See Le*, 993 S.W.2d at 655. In short, Detective Marquez should have taken Villegas to Juvenile Investigative Services as he originally testified at the first trial he did, testimony that new evidence demonstrates conclusively is false.

Attorney Gates' first affidavit proposes no strategic reason for failing to seek the suppression of Villegas' confession; given that Villegas's confession was the lynchpin of the State's case, there could be no such sound strategy for failing to do so. *See Mitchell*, 762 S.W.2d at 920. *See also* E. Cleary, McCormick on Evidence 316 (2d ed. 1972) (explaining that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained"). And, indeed, Gates' second affidavit makes clear that his decision was not strategic but rather was based on information that "eluded" him. Attorney Gates admitted that he would have "heavily litigated" the issue of the violation of the Family Code had he (1) interviewed Detective Abrogast and discovered that the officers did not

immediately go to Juvenile Investigative Services, (2) discovered that Villegas' *Miranda* warning card was not signed until 11:15 p.m., (3) utilized the Juvenile Probation Department time logs showing that Villegas did not arrive until 12:26 a.m., or (4) "pick up on the fact" that Detective Ortega's police report states that Villegas had already given a verbal statement prior to meeting with the magistrate or that officers had already requested permission by 12:26 p.m. to take Villegas to Popeye and Droopy's homes. (WH Pet. Ex. 32a). It is clear to this Court that Gates did not make a strategic decision; his conduct, rather, is best explained by the fact that he lacked a firm grasp of the facts of the case.

Despite available evidence from the first trial demonstrating that Detective Marquez had a pattern and practice of using illegal and coercive interrogation tactics to obtain other false confessions during this investigation and others, Gates almost entirely failed to introduce this evidence to the jury. Gates failed to (1) call Michael Johnston or his mother to testify that Johnston falsely confessed to the Electric Street murders during a coercive interrogation by Detective Marquez, (2) interview Jesse Hernandez to learn that Detective Marquez employed coercive tactics against him, (3) call attorneys Michael Gibson or Bruce Weathers to testify concerning their familiarity with Detective Marquez, his prior acts of

dishonesty, and his prior use of illegal interrogation tactics, and (4) cross-examine or introduce evidence of the many citizen complaints and internal affair investigations related to Detective Marquez. Once again, given the short time between the first and second trials, the evidence and witnesses supporting Detective Marquez's prior conduct were available at the second trial.

Gates, moreover, failed to elicit any significant details from David Rangel, Marcos Gonzalez, or Rodney Williams regarding the coercive circumstances of their interrogations. This failure is particularly noteworthy given that the State has taken the position that Gates strategically chose not to seek to exclude the testimony of Gonzalez and Williams. Gates' failure to highlight the coercive atmosphere under which Gonzalez and Williams' statements were taken undermines the State's argument because this powerful evidence is the most compelling reason for allowing them to testify about their out-of-court statements without objection.

Gates also failed to introduce testimony and arguments through Detective Arbogast and Officer Aguilera demonstrating that Marquez's testimony about immediately taking Villegas to Juvenile Investigative Services, never stopping at Northpark Mall, and reading Villegas his *Miranda* rights at his home at 11:15 p.m. was inconsistent with these

officers' testimony. He further failed to present readily available evidence and argument of Villegas' particular vulnerability to interrogation pressure, including his limited intellectual capacity, his youth, and his tendency to tell people what they want to hear. Compounding these errors was his failure to present evidence of Villegas' immediate recantation to Monica Sotelo and the explanation for his false confession.

As mentioned in the Courts analysis of actual innocence, there were no shortage of highly probative impossibilities in Villegas' confession. Most notably, Villegas (1) named a co-conspirator ("Popeye," the driver of the car) who was incarcerated at the time of the offense; (2) named another co-conspirator ("Droopy") who was confirmed by his probation officer and his monitoring device to be in his home on house arrest at the time; (3) described a "beer run" that never happened; (4) appeared to describe a car and an initial interaction unlike that seen or described by the surviving eyewitnesses; and (5) suggested that there were two series of gunfire, in contrast with the autopsy report, the Gorhams' recollection, and the testimony of Hernandez and Medina.

Where Villegas' first trial counsel carefully presented evidence, argument, and cross-examination pointing out these inconsistencies, Attorney Gates remained mostly silent on these matters. Gates himself now

acknowledges that he "overlooked" or "did not utilize" a substantial amount of "vital, material, and relevant" evidence. He did not call Paula Masters to refute that a "beer run" occurred, and only briefly mentioned during closing that the driver ("Popeye") and passenger ("Droopy") could not have been involved in the crime. Instead, Gates' closing spent more time acknowledging the likely *guilt* of his client by arguing that his gunshots were merely reckless acts, not intentional. Gates also now admits he erroneously stipulated to the autopsy report that overstated the number of bullet wounds and failed to mention that Armando Lazo was not shot in the back, contradicting the suggestion in Villegas' statement that Lazo was shot as he was running away.

Furthermore, all of the correct details that Villegas actually got right in his signed statement were widely publicized in the local media. Unlike Villegas' first trial counsel, however, Gates never elicited from David Rangel or anyone else that Villegas had read the El Paso Times articles and was familiar with the reported details of the shooting. In short, it appears that Villegas was unable to accurately describe anything about the shootings that had not been reported and read by him in the newspaper – but Gates never made this point. In a case where so many of these arguments to challenge the

confession were readily available, defense counsel's failure to pursue them was constitutionally deficient.

The Court further recognizes one area of failure where Gates was particulary deficient. In the trial before the 41st District Court, Gates did bring a Motion for Continuance after less than 59 days of preparation for trial. On trial day, Counsel moved for continuance based on his Motion to Transfer Venue, filed that same day before the Court. The Court immediately overruled Counsel's Motion To Transfer Venue and Counsel withdrew his Motion for Continuance. This Court fails to see any conceivable strategy or plan which would possibly justify Counsel's action to base his Continuance on a summary Motion that was denied by the Court.

One of the most glaring issues this Court has viewed in the case at bar is the amount of time that counsel had between the time of appointment to trial. In the Court's calculation, the amount in time in question was fifty nine (59) days. Even if this Court assumed, *arguendo*, that Counsel had voluminous and specialized experience in the area of capital murder, it is beyond any logic or strategy that a competent attorney could fathom being ready for trial in this amount of time. With capital murder being one of the highest crimes the Texas Penal Code can charge a citizen with, the logistics of investigation, reviewing trial transcripts, interviewing witnesses, securing

experts, as well as trial preparation cannot be accomplished, in this Court's humble opinion, in 59 days. In fact, Gates affidavit specifically stated that his entire preparation for this capital murder trial consisted on reading the trial transcript, Further, Gates also stated that he received these transcripts until a week after his appointment and the transcripts he received were incomplete.

In addition, Gates requested investigator Sam Streep be appointed a mere six days before trial. Investigator Streep was tasked only with locating witnesses and serving subpoenas; he did not do any factual investigation. Based on conversations Streep had with Gates shortly before the trial, Streep did not believe that Gates understood the facts of the case or that he was adequately prepared for trial. This was Streep's testimony in the evidentiary writ hearing. Notably, Gates himself now admits he made significant mistakes in Villegas' trial, an opinion shared by Investigator Streep, whom Gates requested a mere six days before the start of trial. In his most recent affidavit, Gates acknowledges that "he missed several key issues" and that the case required "much more preparation" than he gave it. He acknowledged that he had "no plausible reason" for not utilizing exculpating evidence at the second trial and believes that his "trial strategy would have

been different," "more effective," and might have resulted in a "different" outcome for Villegas had he not overlooked this evidence.

This Court also heard testimony from John Williams, who was one of the attorneys for the State of Texas in Applicant's first trial. Mr. Williams, who himself is now an attorney in private practice, testified at the writ hearing that there was no conceivable way that a State's prosecutor could have been ready to prosecute this case in 59 days. This is especially important to this Court as the State of Texas, with its considerable resources and manpower, could not accomplish what the State of Texas claims Mr. Gates could do in the same amount of time. Mr. Williams also testified that he could not have been prepared, if he had been the prosecutor in the second case, in 59 days even though he had intimate knowledge from having prosecuted the first trial. He also testified that even now, as a defense attorney, it is impossible to imagine being adequately prepared for a capital murder trial under any circumstances in 59 days.

Defense counsel has a duty to investigate and explore all avenues of defense. *Wiggins*, 539 U.S. at 521; *Kimmelman*, 477 U.S. at 384; *Ex Parte Wellborn*, 785 S.W.2d at 393; *Freeman v. State*, 167 S.W.3d 114, 119 (Tex. App. 2005); *Briggs*, 187 S.W.3d at 467. The failure to use available impeachment of a key government witness may constitute deficient

performance. *Fahimi-Monzari v. State*, 2010 Tex. App. LEXIS 3902, at *23 (Tex. App – Dallas 5th Dist.); *Beltran v. Cockrell*, 294 F.3d 730, 734 (5th Cir. 2002). Other information Attorney Gates had available but did not utilize would have further pointed to the Flores brothers as viable third-party suspects. Rudy Flores was admittedly present at a shooting involving a .22-caliber weapon later that same day, just blocks away on Shenandoah Street. At the same time, Rudy Flores admitted to the police that he was at the intersection of Transmountain Road and Electric Street (the scene of the Electric Street shooting) at the exact time the Electric Street shooting occurred. He also attempted to give himself an alibi by saying that he was at home at 12:30 a.m. (just minutes after the shooting), but his brother Javier indicated to the police that Rudy was not home at that time.

Had this information about the Flores' brothers' opportunity and ability, in addition to their motive, to carry out this crime been investigated by Gates and been presented to the jury, it would have cast a further cloud over them as viable alternative suspects. Rudy Flores' recent invocation of his Fifth Amendment privilege even after this Court ruled that he had waived that right and held him in contempt, only reinforces this position. *See generally Coffey v. State*, 744 S.W.2d 235 (Tex. App. – Houston [1st] 1987), aff'd, 796 S.W.2d 175 (Tex. Crim. App. 1990) (explaining that there is no

error in calling to the stand a witness who invokes an *invalid* Fifth Amendment privilege).

Gates excuses his decision not to investigate or call these witnesses because after speaking with jurors in *other* cases, he had developed a belief that "alibi witnesses were generally ill-considered by juries, their testimony viewed skeptically and, in may [sic] instances, served only to anger them." (Gates First Aff. at 2-3.) Whatever post-trial investigation he may have done in other unrelated cases, however, cannot excuse his pre-trial failure to investigate in this case. The law is clear that an attorney's decisions must be based on "an independent investigation of the *facts and circumstances in the case*" – in other words, he must make a case-specific determination regarding whether a particular client should forgo or pursue testimony from a particular alibi witness based on the particular facts and context of that particular case. *See Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (emphasis added); *see also Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986) ("It is fundamental that an attorney must acquaint himself not only with the law but also the facts of a case before he can render reasonably effective assistance of counsel") (internal citations omitted).

This obligation to make case-specific judgments cannot be satisfied when an attorney simply assumes that certain types of testimony – including

potentially significant alibi testimony – could never be valuable. In a *Schlup*-type claim, innocence is tied to a showing of constitutional error at trial: "An applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent." *Spencer*, 337 S.W.3d at 878. Accordingly, the *Schlup*-type claim here depends on the validity of Villegas' constitutional claim of ineffective assistance of counsel. For the reasons stated herein, this Court finds that the substantive ineffective assistance of counsel claim raised by Applicant Villegas is valid and would therefore also recommend relief under *Schlup*.

Finally, other evidence "newly available" to Villegas – that was unavailable, in part, because of the ineffective assistance of his second trial counsel – further demonstrates that a rational trier of fact would acquit Villegas. *See Spencer,* 337 S.W.3d at 878 (considering evidence that is both "newly discovered" and "newly available"). This evidence includes the uncalled alibi witnesses, evidence challenging the voluntariness and reliability of Villegas' confession, and all of the other evidence of Flores' possible guilt outlined above. When considering this evidence with the other newly discovered evidence described, this Court is convinced that justice requires that Villegas' writ be granted.

However, the one of the most disturbing factors in trial counsel's performance was where, in closing argument, Gates argued the Applicant's actions were based on recklessness and not intentional. In this Court's opinion, by this very argument, the proverbial nail was hammered into the Applicant's case to ensure that a conviction was inevitable. This statement in closing argument, by defense counsel and not the State of Texas, along with the controverted and unreliable evidence, all but guaranteed a conviction in this case.

Strickland's prejudice analysis requires this Court to weigh the cumulative impact of all defense counsel's deficiencies. *See Strickland*, 466 U.S. at 695. In this case, Attorney Gates' multiple failures were all mutually reinforcing. His failure to challenge the circumstances of Villegas' questioning and the reliability of the confession left the jury with the impression that the signed statement was credible on its face; his failure to prevent the State from calling Gonzalez or Williams – or from subsequently using their testimony substantively – left the jury with the impression that Villegas' confession was corroborated, especially where he inadequately elicited the circumstances of their statements; and his failure to call alibi witnesses left the jury with the impression that Villegas had no extrinsic evidence with which he could prove his confession false. Taken together,

this perfect storm of errors created prejudice against Villegas and altered the outcome of the trial.

Ramirez v. State 873 S.W.2d 757, 762-63 (Tex. App. 1994), exemplifies the value of examining the counsel's performance in its totality. In *Ramirez*, trial counsel failed to object to the State's use of inadmissible prior convictions. Those convictions were hardly the primary evidence of the defendant's guilt; in fact, there were multiple eyewitnesses to the crime who identified the defendant on the stand. However, defense counsel significantly impeached those eyewitnesses during cross-examination. As a result of this eyewitness impeachment, the *Ramirez* court held that, at the end of trial, the defendant's credibility was the only remaining consideration on which the jury could have based its verdict. Accordingly, trial counsel's failure to object to the State's use of inadmissible prior convictions that certainly undermined the defendant's credibility created sufficient prejudice to satisfy the *Strickland* requirement. *See id.*

Gates' failures go far beyond those in *Ramirez*. Not only did he fail to object to the State's use of inadmissible prior statements, but Gates also failed to impeach the State's witness (as counsel in *Ramirez* had done) or challenge the State's primary evidence – Villegas' confession – on its face. Unquestionably, the aggregate effect of these errors prejudiced Villegas'

trial to an even greater degree than the single error deemed prejudicial in *Ramirez*.

These acknowledgements by Gates all ring true given the disturbingly short amount of time – a mere two months – he had to prepare for this complex capital murder trial. Indeed, Gates' unfamiliarity with the basic facts of the case is apparent in the second trial transcript when he erroneously stipulated that Armando Lazo was shot three times (and once in the back), even though it is undisputed that Lazo was shot just twice in the front.

The extent to which the State exploited Gates' litany of errors and omissions during its closing argument at trial underscores the significant, cumulative prejudicial effect of these errors. The State repeatedly pointed to the hearsay statements of Gonzalez and Williams, the lack of evidence about Villegas' particular vulnerability to confession, and the unsupported alibi defense as reasons to convict Villegas. These arguments would not have been available but for Attorney Gates' ineffectiveness. *See Butler*, 716 S.W.2d at 51 (highlighting the State's closing argument pointing to the lack of corroboration for an alibi as a reason for concluding counsel's ineffectiveness in failing to present further evidence of the alibi was prejudicial).

In short, any review of Gates' representation in its totality compels the conclusion that his errors cumulatively prejudiced this trial, in addition to the conflicting evidence addressed in the actual innocence, as well as the newly discovered evidence, and that Applicant Villegas is therefore entitled to the Writ of Habeas Corpus.

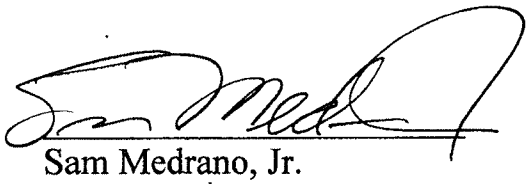
III. CONCLUSION

Whether due to a lack of diligence or the impossibility that any defense counsel could adequately prepare for a capital case of this complexity in just two months, Applicant Villegas received constitutionally deficient assistance that prejudiced his trial. Moreover, this Court believes that the new evidence presented at the writ hearing adequately meets the standard to demonstrate Villegas' actual innocence.

Based on the facts and law presented at the writ hearing and in related filings, this Court concludes that Applicant is illegally confined and restrained in his liberty in violation of the Texas Constitution. This Court hereby strongly recommends that the Texas Court of Criminal Appeals grant his Application for a writ of habeas corpus.

In addition to all of the facts adduced at this hearing, this Court's recommendation of reversal is based on the numerous and inexcusable mistakes and omissions committed by the State of Texas, as well as defense counsel, that have harmed Villegas over the last nineteen years, including, but not limited to, impossible evidence, coerced and unreliable confessions, and a multitude of errors and omissions by defense counsel.

Based on all of the above Findings of Fact and Conclusions of Law, this Court strongly recommends that the Texas Court of Criminal Appeals remand this case for a new trial.



Sam Medrano, Jr.
Judge, 409th District Court

August 16, 2012
Date