

Cause No. 3083-A

EX PARTE ALBERTO SIFUENTES,

Applicant.

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IN THE DISTRICT COURT OF

LAMB COUNTY, TEXAS

154th JUDICIAL DISTRICT

THE STATE OF TEXAS AND PETITIONER ALBERTO SIFUENTES'S AGREED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
IN THE OFFICE
OF THE DISTRICT CLERK

The State of Texas and Petitioner Alberto Sifuentes ("Sifuentes") file the Agreed

Proposed Findings of Fact and Conclusions of Law on the following claims:

APR 27 2006
AT 2:00 P M O'CLOCK

LAMB COUNTY DISTRICT CLERK

I.

AGREED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Claim Two: Trial counsel rendered ineffective assistance of counsel by failing to investigate and present testimony from alibi witness Pauline Robles.**

a. **Findings of Fact.**

1. At 2:08 a.m. on August 6, 1996, Evangelina Cruz called the Littlefield 911 Dispatcher and said that she had just been shot at the Jolly Roger convenience store, which was located on Hall Avenue in Littlefield. (Sifuentes, V. 6, pp. 22, 26) At trial, the state's theory was that Ms. Cruz had been shot during the course of a robbery of the convenience store just moments before her 911 call to police. Within minutes of Ms. Cruz's 911 call, Littlefield police officer Craig Thompson arrived at the Jolly Roger store and asked Ms. Cruz who had shot her. (Sifuentes, V. 6, pp. 28, 46-47) According to Officer Thompson, Ms. Cruz told him that "two Hispanic males, one with long hair and one with short hair, about 18-20 years of age" had shot her. Ms. Cruz said that one of the men was wearing "shades" and she remembered "a gold car." (*Id.* at pp. 46-47; SR-HAB 85)

2. It was the state's theory at trial that Sifuentes and Jesus Ramirez ("Ramirez"), and the woman who was with them that night, Mary Davila Wood, had stopped at the Jolly Roger store in Littlefield at 2:00 a.m. after they had left a bar, the Paradise Club, in Lubbock. While the state had no eyewitnesses to the robbery and shooting of Ms. Cruz, it was the state's theory that Brenda Ayala, a woman who claimed to have been at the store at 2:00 a.m. just moments before the murder, had seen Sifuentes and Ramirez in the store in Littlefield at 2:00 a.m. (Sifuentes, V. 6, pp. 12-14)

3. It was not disputed at trial that on the night of August 5, 2006, Sifuentes and Ramirez had gone to a bar in Lubbock called the Paradise Club. Both Sifuentes and Ramirez lived in

Muleshoe, Texas, approximately 67 miles from Lubbock. On the night of August 5th, Sifuentes and Ramirez left Muleshoe in Ramirez's car and drove on Highway 84 to Sudan to pick up a woman, Mary Davila Wood ("Wood"). After picking up Wood, the three drove on Highway 84 to Littlefield, where they stopped to see if Sifuentes's girlfriend wanted to go to the bar with them. (Sifuentes, V. 8, pp. 249-253) When she declined to go with them to the bar, the three left Littlefield and drove to the Paradise Club, which is located just off of Highway 84 in Lubbock on Clovis Road. (*Id.*)

4. It was the state's theory at trial that Sifuentes, Ramirez, and Wood left the Paradise Club in Lubbock before the bar closed at 2:00 a.m. Since the Paradise Club was approximately 35 miles from the Jolly Roger convenience store in Littlefield, the state had to show that Sifuentes and Ramirez left the bar with enough time to drive to Littlefield, some 35 miles away, and arrive at the store by 2:00 a.m.

5. It was not disputed at trial that Sifuentes, Ramirez and Wood were stopped by Amherst City Marshall, Harley Boleyn, at 2:55 a.m. – 47 minutes after Ms. Cruz called police to report that she had been shot - on Highway 84 heading northwest in the direction of Sudan and Muleshoe. (Sifuentes, V. 7, pp. 40; SR-HAB 70; Ramirez Defendant Trial Exhibit 1) When they were stopped at 2:55 a.m. on Highway 84, they were approximately 10 miles northwest of Littlefield. (*Id.*)

6. Based upon Ms. Cruz's description of her killers, law enforcement had issued an all points bulletin to police in the area describing the suspects as two Hispanic males, 18 to 20 years of age, one with short hair and one with long hair, one wearing shades and driving a gold car. (Sifuentes Defendant Trial Exhibit 9; Sifuentes, V. 6, pp. 49-50) Mr. Sifuentes and Ramirez were stopped by Officer Boleyn on Highway 84 because he thought they were driving a gold car. (SR-HAB 70)

7. After stopping Sifuentes, Ramirez and Wood, Officer Boleyn, with the assistance of Lamb County Deputy, Bobby Hankins, searched the car and both Sifuentes and Ramirez and found nothing to connect them with the robbery and murder at the Jolly Roger store. (SR-HAB 64; Sifuentes, V. 7, pp. 64-65, 70, 74-77, 79, 82, 85) They found no weapons, no bloody clothes, no-blood spatters, and no money within the car. (*Id.*) Officer Hankins reported that after finding nothing suspicious, the officers allowed them to leave. (Sifuentes, V. 7, pp. 82, 85; SR-HAB 64) After the officers released them, Sifuentes and Ramirez drove to Sudan on Highway 84 and dropped Mary Davila Wood off at her home, and then they drove on Highway 84 to their homes in Muleshoe. (Sifuentes, V. 8 p. 265)

8. When asked, Sifuentes and Ramirez told the police and their defense attorneys that they had gone to the Paradise Club in Lubbock on the night of the murder, had stayed at the club until it closed at 2:00 a.m., and were driving home to Muleshoe on Highway 84 when they were stopped by police at 2:55 a.m. (SR-HAB 52, ¶¶ 26-27; SR-HAB 1, ¶ 7; Habeas, V. 1, p. 42, p. 162; SR-HAB 70; SR-HAB 64) Both denied that they had robbed and shot Ms. Cruz and denied that they had stopped in Littlefield at the Jolly Roger store after leaving Lubbock. (*Id.*)

9. Well before their trials, Sifuentes and Ramirez informed their defense attorneys that there was a woman who had been at the Paradise Club on the night of the murder who could confirm that the men and Ms. Wood had not left the club in Lubbock until it closed at 2:00 a.m. This woman had previously dated Jesus Ramirez.

10. Alberto Sifuentes' attorneys acknowledged that they knew that there was an alibi witness, a woman named Pauline, who could testify that Sifuentes and Ramirez were at the Paradise Club in Lubbock until it closed at 2:00 a.m. (Habeas Exhibit 215; Habeas, V.1, pp. 161-163) At the habeas hearing, Sifuentes attorney Patrick Metze admitted that he knew of an alibi witness and testified that when he first met Sifuentes, Sifuentes told him that they "went to the club and stayed there until the club closed down." (Habeas, V.1, p. 162) Mr. Metze also identified attorney notes that reflected the name "Paulene" and testified that the notes were made by co-counsel, Mark Fesmire, during a meeting with Sifuentes prior to trial. (*Id.* at p. 163) Mr. Metze testified that the reference to "Paulene" was "the woman that they met in the bar that night." (*Id.*)

11. Mark Fesmire, Sifuentes's other trial attorney, acknowledged that Sifuentes maintained his innocence throughout the case, was adamant in stating that he did not know Ms. Cruz and had not been in the Jolly Roger, and that he (Mark Fesmire) was aware that Ramirez had spoken to a woman at the Paradise Club named Pauline. (SR-HAB 1; SR-HAB 215) Mr. Fesmire stated in his affidavit that "prior to trial, either thru a review of the record or thru discussion with Mr. Sifuentes, I was made aware that Mr. Ramirez had spoken to a woman at the Paradise Club. I recorded the name Paulene in handwritten notes that were in defense counsel's files." (SR-HAB 1)

12. The defense attorneys for Sifuentes and the attorneys representing Ramirez shared information about the cases as they were preparing for trial and shared a mitigation specialist, Vince Gonzales who was appointed by the trial court on both cases and worked with both defense teams to prepare mitigation evidence and to assist the attorneys with reviewing discovery from the state. (Habeas, V.1, pp. 25, 33, 158-159; V. 2, pp. 7-8, 10-11; SR-HAB 1, ¶ 8) Vince Gonzales, was also aware prior to the two trials that there was an alibi witness at the Paradise Club. (Habeas, V. 2, pp. 13-14)

13. Mr. Wischkaemper, one of Ramirez's defense attorneys, also testified at the habeas hearing that he knew that Ramirez had said that there was an alibi witness who could testify that he and Sifuentes were still at the Paradise Club in Lubbock at 2:00 a.m. (Habeas, V. 1, p. 41)

14. Mary Davila Wood, the woman who was with Sifuentes and Ramirez at the Paradise Club on the night of the murder, told police two times prior to trial that she remembered a woman at the club who knew Jesus Ramirez. (Ramirez Defendant Trial Exhibit 34; SR-HAB 74). On August 13, 1996, one week after the murder, Mary Wood gave a signed statement to the Texas Rangers in which she stated: "At the bar ... I saw a woman come over and hug Michael [Jesus] and talked with [Gilbert]." (Ramirez Defendant Trial Exhibit 34)

15. On July 24, 1997, Mary Wood told state investigator Greg Parrott and Texas Ranger Dusty McCord that: "Davilla informed us that there was a Hispanic female there who Manuel

[Jesus] claimed was his exgirlfriend. He introduced her, but she could not remember her name.” (SR-HAB 74)

16. Defense counsel for Sifuentes and Ramirez had copies of Ms. Wood’s statement (Ramirez Defendant Trial Exhibit 34) and Officer Parrott’s report (SR-HAB 74) prior to both trials. (Habeas V.1, pp. 42-43, pp. 164-166; SR-HAB 1, ¶¶ 9-10)

17. On May 4, 1998, five months before Sifuentes’s trial, Mary Davila Wood, when called by the state to testify in Jesus Ramirez’s trial, again described seeing a woman who knew and spoke with Ramirez at the Paradise Club on the night of the murder. (Ramirez, V. 8, p. 34). She testified “this girl. I mean, she didn’t join us, she was waiting up there where and talked to Manuel [Jesus] ... just visiting, you know, ‘Where you been, how you been,’ stuff.” (*Id.*)

18. Defense counsel for Sifuentes and counsel for Ramirez never investigated this alibi witness nor attempted to find the woman named Pauline that both Sifuentes and Ramirez had told them could testify that they had not left the club in Lubbock until 2:00 a.m. Counsel for Sifuentes, Patrick Metze, testified that no one on the defense team tried to locate the woman named Pauline from the Paradise Club and the Sifuentes attorneys never asked the trial court to appoint a licensed investigator to assist in Sifuentes’s defense. (Habeas, V. 1, pp. 166-168; V. 2, p. 4) The Sifuentes team, Mr. Metze, Mr. Fesmire and Vince Gonzales, went to the Paradise Club in Lubbock once during the daytime to see the club, but made no effort to locate and interview the alibi witness named Pauline. (SR-HAB 1, ¶ 11; Habeas V. 1, pp. 166-167; V. 2, pp. 14-17) Mr. Metze testified that he went to club because he “just wanted to see the lay of the land and check it out kind of.” (Habeas, V. 1, p. 167)

19. Vince Gonzales also testified at the habeas hearing that he never conducted any investigation into the woman the defendants had seen at the Paradise Club (nor was he asked to by defense attorneys), that he went to the bar one time during the day with the attorneys for Sifuentes, but that they did not go to the bar to look for any witnesses, and that he did not do anything to find any witnesses from the Paradise Club. (Habeas, V. 2, pp. 14-17)

20. Mr. Wischkaemper, counsel for Ramirez, testified that he never attempted to look for Pauline, he never instructed Vince Gonzales to look for Pauline, and the Ramirez attorneys never requested from the trial court that a licensed private investigator be appointed to assist in Ramirez’s defense. (Habeas V. 1, pp. 33-34, 43-44) Mr. Wischkaemper testified that to his knowledge no one on Ramirez’s defense team ever went to the Paradise Club. (*Id.* at p. 44) David Martinez, the other attorney for Ramirez, testified that he left “the investigation” in the case “up to co-counsel” [Mr. Wischkaemper]. (Habeas V. 5, p. 192) Mr. Martinez also testified that Mr. Wischkaemper and Vince Gonzales never discussed with him the witness named Pauline Robles and that he, nor anyone on the defense team, ever found Ms. Robles or interviewed her. (Habeas V. 5, pp. 194, 228)

21. The investigator hired to work on Sifuentes and Ramirez’s post-conviction appeals, Richard Reyna, located Pauline Robles at the Paradise Club in 2002. (SR-HAB 2) Mr. Reyna learned of Pauline’s existence when he began working on the post-conviction proceedings through discussions with Sifuentes and Ramirez and through a review of the trial records. (SR-

HAB 2, ¶ 11). Knowing the name and location of the bar – the Paradise Club in Lubbock – and the woman’s first name – Pauline – Mr. Reyna was able to locate and interview Ms. Robles in 2002 concerning her recollection of the night she saw Ramirez and Sifuentes. Mr. Reyna located Pauline Robles using basic investigatory practices – going to the Paradise Club in the evening to talk to patrons and staff and talking to people who knew of a woman named Pauline who frequented the Paradise Club. (*Id.* at ¶ 12). After several visits to the Paradise Club at night, Mr. Reyna located Ms. Robles at the club, the same bar where Sifuentes and Ramirez had said that they had seen her six years earlier. (*Id.*)

22. Pauline Robles testified at the habeas hearing that she remembered seeing Jesus Ramirez with another man, who had long hair, and a woman, who was drunk, at the Paradise Club in Lubbock. (Habeas V.1, pp. 127-128) While she did not remember in 2005 (the time of her testimony at the habeas hearing) the exact date she saw Ramirez at the bar, she said that she saw Ramirez, the other man and the woman at the club a few days before she heard about the murder at the Jolly Roger convenience store on television. (Habeas V.1, p. 136-137) Ms. Robles testified that this was the only time that she had ever seen Ramirez in the Paradise Club. (*Id.* at p. 126) Ms. Robles testified that she was never contacted or interviewed by anyone – police or defense counsel – about seeing Ramirez that night until Mr. Reyna contacted her in 2002. (Habeas V. 1, pp. 139-140)

23. Ms. Robles testified that she had previously dated Ramirez while she was living in Lubbock and Ramirez was “living next to the dairy, where he was working at,” and had dated him about ten years prior to seeing him at the Paradise Club. (Habeas V.1, pp. 123-124) When asked about the night in question, Ms. Robles testified that she remembered seeing Ramirez at the Paradise Club with another man with long hair and a woman who appeared drunk. (*Id.* at 127-128) It was undisputed that at the time of the murder, Sifuentes had long hair, and Ms. Wood acknowledged to police, prosecutors and defense counsel that she had been drinking heavily during the night that she went to the Paradise Club. (SR-HAB 74; Ramirez, V. 8, pp. 42, 53).

24. Ms. Robles testified that she used to work at the Paradise Club as a bartender for eight years and considers herself a regular at the club. She is familiar with the operation of the club and the times that it opens and closes. (Habeas, V. 1, p. 125, 133-134, 136)

25. Ms. Robles testified that she had never seen Ramirez at the club before that night and had never gone to the club with Ramirez while the two were dating. (*Id.* at p. 126) On the night that she saw Ramirez, Ms. Robles testified that she was at the club with her boyfriend, Alfredo Martinez. (*Id.*) She testified that she saw Ramirez in the club when “my boyfriend, he went to the bathroom, Jessie approached me to say hi to me. So he surprised me when I saw him in the bar.” (*Id.* at 127) She further testified that Mr. Ramirez was with a man and a woman and that the woman was drunk, especially “when they turned on the lights, you know, when it’s happy hour and you have your last call, I noticed that she had one too many,” and that the man “had long hair, longer than mine.” (*Id.* at p. 128) Ms. Robles testified that she was sitting “three tables away” from the three during the night. (*Id.* at p. 131)

26. Ms. Robles testified at the hearing that a band was playing that night in the back of the bar where the bands usually play, that she was sitting that night three tables away from where Ramirez was sitting with the other man and woman, and that she could see Ramirez and he could see her during the night. (Habeas, V.1, pp. 130-132) Ms. Robles testified that there were many people in the club that night – there were people at the bar, people sitting at the tables, and people playing pool where the pool tables were set up. (*Id.* at 133)

27. Ms. Robles testified that the Paradise Club routinely had bands play during the weekend and the weekdays. That night a band was playing. (*Id.* at 133). Ms. Robles testified that the band always stops playing at the club at 1:30 a.m. (*Id.*) Ms. Robles testified that since she started going to the club and during the time she worked at the club for eight years, last call for drinks always occurs at 1:30 a.m. At this time - 1:30 a.m. - the lights come on at the club and people can finish their drinks, but must leave the club at 2:00 a.m. when it closes. (*Id.* at 134-136)

28. Ms. Robles testified at the habeas hearing that Jesus Ramirez and the man and woman he was with left the Paradise Club at 2:00 a.m. when the bar closed. (Habeas V.1, pp. 133-136) She further testified as to how she knew the time they left. She testified that when the band that night stopped playing at 1:30 a.m. and the lights came on in the bar for last call, the three of them were still in the club (*Id.* at p. 133-135) She stated that after last call at 1:30 a.m., she saw Ramirez and the other man and woman as they “finished their last drink” and also saw them play songs on the jukebox in the bar. (*Id.* at 134) She stated that the bar closed at 2:00 am “everyday” and that she and Ramirez and the other man and woman “got up at the same time,” left the bar, and walked out together – at 2:00 a.m. when it closed. (*Id.* at 135-136)

29. Ms. Robles testified that she learned that a murder had occurred at the Jolly Roger store in Littlefield from the television about “three days” after she saw Ramirez in the Paradise Club. (Habeas, V.1, p. 137) She did not know that Ramirez had been arrested for the murder. (*Id.*) She first learned that he had been arrested for the murder when Richard Reyna, the post-conviction investigator, first contacted her in 2002. (*Id.* at pp. 137, 139)

30. Ms. Robles testified that the night she saw Ramirez with another man and woman at the Paradise Club was the last time that she had seen or spoken to Ramirez. (*Id.* at p. 152) She testified that she was never contacted by the police or by anyone who said that they were attorneys for Jesus Ramirez or Alberto Sifuentes. (*Id.* at p. 140). She also never heard that anyone was looking for her or trying to contact her. (Habeas, V.1, p. 147)

31. State witness, Mary Davila Wood, testified at the habeas hearing that on the night of the murder she went to the Paradise Club with Ramirez and Sifuentes and she saw a woman at the club who “came up to Jesse and said ‘hi’” and that she told the police about seeing the woman there with Jesus Ramirez. (Habeas, V. 3, p. 146) Ms. Wood testified that she asked Jesus Ramirez who the woman was, and he told her “oh, I use to be – I used to go out with her.” (*Id.*) Ms. Wood testified that she had only been to the Paradise Club with Jesus Ramirez and Alberto Sifuentes one time - on the night of the murder. (Habeas, V. 3, pp. 145-146)

32. Ms. Wood also testified that on that night the bar was full of people, that a band was playing and after the band stopped playing they stayed to put money in the jukebox. (*Id.* at pp.

147-148). She testified that she and Ramirez and Sifuentes stayed at the bar after the band stopped playing, after the lights came on for “last call for alcohol,” and after they had finished their last drinks. (*Id.* at pp. 148, 151).

33. Defense counsel for Mr. Sifuentes never investigated or located Ms. Robles and did not present any testimony about her at the trial. Defense counsel presented no witnesses to the jury in Sifuentes’s case to establish that he and Ramirez left the Paradise Club in Lubbock at 2:00 a.m. when it closed, and thus, could not have shot and killed Angie Cruz in Littlefield, some 35 miles away, shortly after 2:00 a.m.

34. Mr. Metze acknowledged that defense counsel for Sifuentes did not investigate the case well, that it was a mistake not to investigate Pauline Robles, and that “we were ineffective in not finding the alibi witness.” (Habeas, V. 1, p. 168, 188, V. 2, p. 6) Mr. Fesmire testified in his affidavit that had the defense team located and interviewed Pauline, they would have called her to testify before the jury. (SR-HAB 1, ¶ 12) Because the evidence against Sifuentes was “circumstantial,” Mr. Fesmire testified that Ms. Robles’ testimony, which would have placed Sifuentes and Ramirez at the Paradise Club in Lubbock when the murder occurred, “would have provided the jury with critical evidence of which they were never informed.” (*Id.*)

b. Conclusions of Law.

1. The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). To establish a violation of his Sixth Amendment right to counsel, petitioner must establish that (1) counsel’s performance was deficient and (2) this deficiency prejudiced his defense. *Id.* at 687. Counsel is deficient when their representation “fell below an objective standard of reasonableness.” *Id.* at 688. Under the prejudice prong of *Strickland*, petitioner must establish a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) (adopting *Strickland*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

2. The duty to investigate is fundamental to counsel’s role as an advocate. *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-2466 (2005) (citing 1 ABA Standards for Criminal Justice 4-4.1); *Butler v. State*, 716 S.W.2d 48, 54-55 (Tex. Crim. App. 1986); *Johnson v. State*, 172 S.W.3d 6, 13 (Tex. App.-Austin 2005). Counsel must conduct a reasonable amount of pretrial investigation and “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994); *see also Butler*, 716 S.W.2d at 54-55 (finding failure to investigate alibi and eyewitnesses ineffective assistance of counsel); *Wiggins v. Smith*, 123 S. Ct. 2527, 2535, 2537 (2003) (finding counsel ineffective for failing to conduct a thorough investigation of the defendant’s background for mitigating evidence); *Rompilla*, 125 S. Ct. at 2458-2459 (finding counsel ineffective for failing to investigate and review court files on client’s prior charges in order to develop mitigating evidence); *Soffar v. Dretke*, 368 F.3d 441, 478 (5th Cir. 2004) (finding trial counsel ineffective for failing to conduct an adequate pre-trial investigation into known eyewitnesses and into ballistic evidence); *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir.

2005) (finding trial counsel ineffective for failing to conduct a reasonable pre-trial investigation into forensic evidence); *Miller v. Dretke*, 420 F.3d 356, 361-362 (5th Cir. 2005) (finding trial counsel ineffective for failing to adequately investigate and present evidence of defendant's known medical and psychological problems)

3. Accordingly, counsel has been found to be constitutionally ineffective for failing to investigate and interview potential alibi witnesses to ascertain whether their testimony would aid the defense. *Butler v. State*, 716 S.W.2d 48, 54-55 (Tex. Crim. App. 1986) (finding failure to investigate alibi and eyewitnesses ineffective assistance of counsel); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (finding failure to investigate and interview alibi witnesses ineffective assistance of counsel); *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1358-59 (4th Cir. 1992) (finding failure to investigate and present alibi witness constituted ineffective assistance of counsel); *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1992) (holding failure to interview alibi witnesses was deficient performance under *Strickland*); *Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998) (finding failure to investigate an alibi claim or to present an alibi witness was ineffective assistance of counsel); *Washington v. State*, 219 F.3d 620, 634 (7th Cir. 2000) (finding counsel's failure to contact or produce possible alibi witnesses rendered performance constitutionally deficient).

4. "In assessing the reasonableness of an attorney's investigation, ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 1235 S. Ct. at 2538. Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. A failure, though, to investigate and interview a known, potentially helpful witness cannot be excused as a strategic decision because without investigation, the attorney has no basis with which to assess the witness's testimony or usefulness to the defense. *Soffar*, 368 F.3d at 475-76; *see also Rompilla*, 125 S. Ct. at 2465-2466, 2468; *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental health problems."); *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003) (finding a decision not to investigate "cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose.").

5. The Court concludes that Sifuentes has demonstrated that trial counsel's performance was deficient in failing to conduct any investigation into a known alibi witness. There is credible testimony and evidence that trial counsel knew well before Sifuentes's trial that there was a witness, a woman named Pauline that used to date Ramirez, who had been at the Paradise Club on the night of the murder and who could provide testimony that Ramirez and Sifuentes left the club in Lubbock when it closed at 2:00 a.m. Trial counsel for Sifuentes acknowledged knowing about this alibi witness.

6. The Court concludes that trial counsel did not investigate, attempt to locate, or interview this potential alibi witness. Trial counsel acknowledged that they did not conduct any investigation into this witness nor did they attempt to locate and interview her. Trial counsel also acknowledged that they did not secure a private investigator trained to discover and

investigate witnesses and evidence that would aid the defense. The Court concludes that the failure by trial counsel to conduct an investigation into this key avenue of evidence was unreasonable, fell below the professional norm, and constituted deficient performance.

7. The Court concludes that the failure to investigate, interview and present the testimony of Pauline Robles could not have been a strategic decision nor a trial tactic because defense counsel failed to conduct a sufficient investigation to enable counsel to be able to make an informed and reasonable decision regarding this evidence.

8. The Court concludes that Sifuentes was prejudiced by counsel's failure to investigate, interview and present the testimony of Pauline Robles at trial. Ms. Robles' testimony would have been important to Sifuentes's defense. Her testimony, if presented to the jury, would have provided evidence that she was with Sifuentes and Ramirez at the Paradise Club in Lubbock at 2:00 a.m. just minutes before the murder, and thus, they could not have shot and killed Ms. Cruz in Littlefield, some 35 miles away. Defense counsel presented no witnesses to the jury to establish that Sifuentes and Ramirez left the Paradise Club in Lubbock at 2:00 a.m. Further, this is not a case where there is direct evidence of Sifuentes's guilt. The evidence relied upon by the state was circumstantial in nature and not so extensive as to render defense counsel's error in failing to present Ms. Robles's testimony harmless. Given the weak circumstantial evidence supporting Sifuentes's conviction, the Court concludes that had this evidence been presented at trial, there is a reasonable probability it could have created reasonable doubt in the minds of the jurors and resulted in a different verdict.

9. In evaluating Sifuentes's claim for ineffective assistance of counsel, the Court must consider the collective errors of counsel on the fairness of Sifuentes's trial. *Strickland v. Washington*, 466 U.S. 66, 695-96 (1984); *Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999). The Court concludes that the collective effect of the errors committed by trial counsel were such that counsel failed to provide Sifuentes effective assistance of counsel.

10. The Court concludes that Sifuentes was deprived of the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. The Court recommends that state habeas relief on this claim should be granted.

2. **Claim Four: Trial counsel rendered ineffective assistance of counsel by failing to investigate and present evidence implicating Armando and Jerry Gonzales, two other possible suspects in the murder.**

a. **Findings of Fact.**

1. The investigation by law enforcement focused on Alberto Sifuentes and Jesus Ramirez on the day of the murder when Brenda Ayala identified Sifuentes as one of the men she had seen in the Jolly Roger store from a photograph shown by police. (Habeas V. 5, p. 36) Based upon that identification, the police concentrated their investigation on Sifuentes and Ramirez and arrested them for the murder of Ms. Cruz seven days later. (Habeas V. 5, p. 36, p. 47) After Ms. Ayala's identification, there was little investigation done into any other potential suspects. (Habeas, V. 5, p. 47; SR-HAB 205, ¶¶ 340-345)

2. As discussed in the findings above, Littlefield police officer Craig Thompson was the first officer to arrive at the Jolly Roger store after Ms. Cruz called 911 at 2:08 a.m. to report that she had been shot. (SR-HAB 85; Sifuentes, V. 6, pp. 28, 46-47) When he arrived at the store and found Ms. Cruz, Officer Thompson questioned her about who had shot her. (SR-HAB 85) In his report of that conversation, Officer Thompson stated:

This officer noted that victim was in extreme pain but coherent.... While attempting to comfort victim I asked her who had shot her and she stated "Two Hispanic males one with long hair and the other with short hair about 18 to 20 years old." Victim stated that one of the suspects wore shades. This officer then asked if they were glasses and she stated no, they are shades. This officer then asked victim if she remembered what they were wearing and she could not. I then asked if she saw a car and she stated that there was a gold car.

(SR-HAB 85)

3. Officer Thompson testified at the habeas hearing that when he spoke to Ms. Cruz she was coherent and he could understand what she was saying. (Habeas V. 5, p. 108). He testified that he put quotations marks in his report around "two Hispanic males one with long hair and the other with short hair about 18 to 20 years old" because "that's exactly what she said." (*Id.* at p. 109) Officer Thompson also testified that Ms. Cruz was referring to both suspects when she stated that they were 18 to 20 years old. (*Id.* at p. 119)

4. Officer Thompson testified that based upon the description he received from Ms. Cruz, the police issued that night an all points bulletin for the suspects. (*Id.* at p. 111; Sifuentes Defendant Trial Exhibit 9) The APB stated:

Suspects are described as 2 Hispanic males 18 to 20 years of age. One subject has short hair, the other has long shoulder length hair. One subject was wearing shades. Suspects were driving a gold car unknown make, model or tag.

(Sifuentes Defendant Trial Exhibit 9)

5. At the time of Ms. Cruz's murder, Jesus Ramirez was 48 years old and Alberto Sifuentes was 23 years old.

6. In processing the crime scene, the police recovered tennis shoe prints from the top of the countertop by the cash register at the Jolly Roger store and determined that the prints were made by Nike Cortez tennis shoes. (SR-HAB 56; SR-HAB 52, ¶ 18; SR-HAB 163) Police investigators assumed that the tennis shoe prints found on the countertop by the cash register had been made by the murderer when standing on the counter or by jumping onto and over the counter to get to the cash register in the store. (Habeas V.5, pp. 40-41) No witness testified that they saw either Sifuentes or Ramirez wearing tennis shoes on the night of the murder.

7. Police also recovered a gold-colored “Mariana” charm or medallion from the ground in front of the open cash register at the Jolly Roger, near where Ms. Cruz was shot. (SR-HAB 56; SR-HAB 153) The state could not establish any connection between the Mariana charm and Sifuentes and Ramirez. (Ramirez, V. 9, p. 155) Witnesses who were questioned by the state about the “Mariana” charm stated that they had never seen Sifuentes or Ramirez wearing such a necklace or charm. (*Id.*)

8. On the day after the murder, August 7, 1996, Ted Holder, the police chief from Levelland, Texas (a town approximately 25 miles from Littlefield) contacted Texas Ranger Warren Yeager to report two possible suspects in the Jolly Roger murder. (SR-HAB 53). Officer Holder identified two Hispanic men, Armando Gonzales and Jerry Gonzales, who were brothers from Levelland, as possible suspects. (*Id.*)

9. The two men reported as possible suspects by Officer Holder matched the description given by Ms. Cruz to police of her assailants. Both men were Hispanic. One was 18 years old at the time of the murder; the other was 19 years old. (SR-HAB 5; SR-HAB 178; SR-HAB 179) At the time of the murder, Officer Holder reported that they drove a 1985 gold colored Chrysler 4-door car. (SR-HAB 53) One of the men had short hair, and the other had long hair. (SR-HAB 178; SR-HAB 179)

10. Other than checking the fingerprints of the two brothers with the prints recovered from inside of the Jolly Roger store and finding no match, the police did nothing else to investigate whether the brothers were involved in the robbery and murder. (SR-HAB 56; SR-HAB 53) Ranger Yeager testified in Ramirez’s trial that he never followed up on the lead from Chief Holder. (Ramirez, V. 5, p. 171) Investigator Greg Parrott and the lead Texas Ranger on the investigation, Sal Abreo, testified that they never investigated or talked to Chief Holder about the Gonzales brothers. (Ramirez, V. 10, pp. 42, 98; Habeas, V. 3, pp. 107-108) No fingerprints nor any other physical evidence connected Sifuentes or Ramirez to the scene of the crime.

11. The police did not conduct any investigation into the whereabouts of Jerry and Armando Gonzales on the night of the murder. Neither man was interviewed by police. Police never investigated or interviewed any friends or other people who knew the Gonzales brothers. The police never investigated if the men had a pair of tennis shoes that were consistent with the prints on the counter, if they had a gun, if they had any evidence – such as clothing – that would have trace forensic evidence such as blood or gunpowder residue, or if the gold car they drove had any evidence connecting them to the murder. (Ramirez, V. 5, p. 171; Ramirez, V. 10, pp. 42, 98; Habeas, V. 3, pp. 107-108; Habeas, V. 5, pp. 172-173; SR-HAB 205, ¶¶ 157-159)

12. Defense counsel for Sifuentes and Ramirez testified that they knew that police early in the investigation had identified Jerry and Armando Gonzales as possible suspects and that police had done little to investigate these men. (Habeas, V. 1, p. 47; SR-HAB 53) Defense counsel also knew that these two men matched the description given by Ms. Cruz of her assailants. (SR-HAB 53; Habeas, V. 1, p. 49) Mr. Metze, counsel for Sifuentes, testified at the habeas hearing that he remembered knowing prior to trial about Chief Holder’s report to Ranger Yeager of two possible suspects – Armando and Jerry Gonzales – that matched the description given by Ms. Cruz. (Habeas, V. 1, pp. 170-172; SR-HAB 1, ¶¶ 15-17)

13. Vince Gonzales testified at the habeas hearing that he was not a licensed private investigator, that he did not conduct a fact investigation into the murder at the Jolly Roger store, and that he was never asked by the Sifuentes attorneys nor did he conduct any investigation into Armando and Jerry Gonzales. (Habeas, V. 2, pp. 12, 22)

14. Mr. Wischkamper, counsel for Ramirez, testified at the habeas hearing that he also remembered knowing about Chief Holder's report to Ranger Yeager of two possible suspects – Armando and Jerry Gonzales. (Habeas, V. 1, pp. 47-48)

15. Defense counsel for Sifuentes and Ramirez never investigated potential suspects Armando and Jerry Gonzales, nor presented any evidence in the trials that would have implicated these two men in the murder of Ms. Cruz. Sifuentes's attorney, Patrick Metze, testified in the habeas proceeding that they did "nada" or nothing to investigate Jerry and Armando Gonzales. (Habeas, V. 1, pp. 172-173; V. 2, pp. 5-6) Mr. Metze also testified that the attorneys for Sifuentes never asked the trial court to appoint a licensed private investigator to conduct an independent investigation of the case and to assist with Sifuentes's defense. (*Id.* at p. 174)

16. Vince Gonzales testified at the habeas hearing that he was never asked by Mr. Sifuentes's defense attorneys to conduct an independent investigation into the facts of the state's case. (Habeas, V. 2, pp. 12-13). Mr. Gonzales also testified that he was never asked to nor did he conduct any investigation into Jerry and Armando Gonzales. (*Id.* at p. 23)

17. Mr. Wischkamper testified at the habeas hearing that he made one telephone call to Chief Ted Holder about the Gonzales brothers close to the time that Ramirez's trial started in April of 1998, over a year and half after the murder and after Ramirez's arrest (Habeas, V. 1, 51), but did nothing else to investigate these suspects. (*Id.* at pp. 49-51) Mr. Wischkamper testified that no one on the defense team investigated the Gonzales brothers' whereabouts on the night of the murder, no one obtained photographs of either Jerry or Armando Gonzales, no one attempted to interview people who knew them or might have seen them on the night of the murder, and no one asked Vince Gonzales to investigate these two men to see whether they could find any connection to the murder of Ms. Cruz. (*Id.* at p. 50).

18. The investigator hired to work on Sifuentes and Ramirez's habeas appeals, Richard Reyna, began investigating Armando and Jerry Gonzales in 2002. Using Texas Ranger Warren Yeager's police report identifying the two men as potential subjects as a starting point, Mr. Reyna's investigation confirmed that the two men were both Hispanic males; one had short hair and one had long hair in 1996; one was 18 and the other was 19 at the time of the murder; and they were known to drive a gold car at the time. (SR-HAB 2, ¶ 14) Using standard investigatory practices, such as researching and reviewing records, interviewing people who knew the two men, and investigating the men's background and past conduct, Mr. Reyna located four witnesses – Lora Casas, Mary Ann Casas Enriquez, Diana Perez, and Tina Martinez - who provided testimony at the habeas hearing that implicated these two men in the murder of Ms. Cruz. (SR-HAB 2, ¶ 15) None of these witnesses had been located or interviewed by defense counsel for Ramirez and Sifuentes or by police.

19. Two sisters, Lora Casas and Mary Ann Casas Enriquez, testified at the habeas hearing that they had seen and talked to Jerry and Armando Gonzales in Littlefield on the night of the murder. Mary Ann Casas testified that she had dated Jerry Gonzales for two or three months, and on the night of the Jolly Roger murder, Jerry and Armando Gonzales came to her sister, Lora Casas's, apartment in Littlefield. (Habeas, V. 2, pp. 77, 79, 89) Mary Ann testified that on the night of the murder she and her cousin, Tina Martinez, were at her sister's apartment in Littlefield (*Id.* at p. 78) She testified that she saw Jerry and Armando drive up to her sister's apartment sometime after midnight. (*Id.* at pp. 78-79).

20. Mary Ann testified that when she saw Jerry and Armando Gonzales at her sister's apartment they were both wearing jeans, t-shirts and tennis shoes. (*Id.* at p. 95) Mary Ann testified that "Jerry had long hair and it was past his shoulders, and Armando's was short." (*Id.* at p. 80) Mary Ann also testified that she could see that Jerry and Armando were driving a "long four door, like a gold brown colored car." (*Id.* at p. 79) Mary Ann also testified in a written affidavit submitted in the habeas proceeding that she had seen Armando Gonzales wearing sunglasses on the back of his head that she described as "Mad Dogs or Locs." (Habeas, V. 5, p. 139; SR-HAB 31) Mary Ann testified at the habeas hearing that the two men were drinking and they appeared to be "pretty buzzed" that night. (*Id.* at p. 83)

21. Mary Ann Casas testified that her family, some of her friends, and Jerry Gonzales at times called her Mariana, which is the Spanish name for Mary Ann. (*Id.* at pp. 80, 99)

22. Mary Ann Casas testified that when Jerry and Armando Gonzales stopped at her sister's apartment, they told Mary Ann that they needed money to get gas because they did not have enough gas to get back to their home in Levelland. (*Id.* at pp. 80-81) Mary Ann testified that she told them that they did not have any money, and the two men got angry at her sister, Lora. (*Id.* at pp. 81-82) She testified that Lora got angry at Jerry and Armando and "told them to get the 'h' out of there." (*Id.* at p. 82)

23. Mary Ann testified that when she was talking to Jerry Gonzales while he was in the car, she saw him reach under the seat in the car on the passenger side and pull out a gun from under the seat. (*Id.* at p. 90) She testified Jerry "pulled it out, but he – just put it back in and that kind of made me nervous when I saw the gun." (*Id.*)

24. Mary Ann Casas testified that when she and Lora refused to give them any money for gas, the Gonzales brothers became angry and left the apartment in their car. (*Id.* at pp. 82-83) Mary Ann testified that her cousin, Tina Martinez, and Jerry and Armando Gonzales had left the apartments shortly after one another. She testified that Armando and Jerry Gonzales left the apartment shortly before Tina Martinez, her cousin, left to go buy drugs. (*Id.* at pp. 84-85, 100) Mary Ann testified that her cousin was gone about 10 to 15 minutes before she returned to the apartment and told Mary Ann that she had passed the Jolly Roger store on her way back to Lora's apartment and had seen cops at the Jolly Roger store. (*Id.* at p. 85)

25. Lora Casas testified at the habeas hearing about her encounter with Jerry and Armando Gonzales on the night of the murder. Lora Casas testified that after 1:00 a.m. Jerry and Armando Gonzales stopped by her apartment in Littlefield looking for money. She testified that her

apartment was “less than a minute” down the road from the Jolly Roger convenience store on Hall Street (which is also called Highway 385). (Habeas, V. 2, pp. 42-43; SR-HAB 162) Her apartment was at the XIT Apartments on the corner of 13 Street and Hall Avenue in Littlefield. (*Id.*) Lora testified that on the night of the murder, she, her sister, Mary Ann Casas, and her cousin, Tina Martinez, were “chilling and hanging out” at her apartment. She testified that two guys drove up to her apartment in a gold car and Mary Ann told her that it was “Jerry and Armando from Levelland.” (*Id.* at p. 44) Lora testified that Mary Ann used to date Jerry Gonzales. (*Id.* at pp. 44-45)

26. Lora Casas testified that Jerry and Armando Gonzales “were asking for gas money because they needed to get back home to Levelland.” (*Id.* at pp. 45, 50) She testified that when she told them that she didn’t have any money, Jerry and Armando got “very rude,” “pissed off,” and kept “demanding” that they give them money for gas to get home to Levelland. (*Id.* at pp. 45-47, 51) Lora testified that both men were “pretty buzzed” and that she could smell marijuana and beer and could see that their eyes were bloodshot. (*Id.* at pp. 45-46). Lora testified that Jerry and Armando told her that they were coming from partying in Dimmitt and needed gas money to get back to Levelland. (*Id.* at pp. 45, 50)

27. Lora Casas testified that the two men were driving a gold car that night and that they were wearing blue jeans and t-shirts. (*Id.* at pp. 47-48) She testified that Jerry had longer hair, and Armando had shorter hair. (*Id.* at p. 47)

28. Lora Casas testified that “Jerry was doing most of the talking” and “Mando” was the one getting angry at her for not giving them money. (*Id.* at p. 46) She testified that Armando Gonzales was “trying to intimidate me. He was trying to act like he had – like he was packing or something.” (*Id.* at p. 47) She testified that Armando was “constantly” demanding money, and when she refused to give it to him, she saw he and Jerry drive away in the gold car. (*Id.* at p. 49) She testified that “they left pissed off.” (*Id.* at p. 49, 51)

29. Lora Casas testified that she knew that the Gonzales brothers had stopped by her apartment looking for money sometime after 1:00 a.m. because that night she was watching a television show, “Midnight Love,” and it ended after 1:00 a.m. (*Id.* at p. 48) She testified that the show had finished and they had turned off the television and turned on the radio by the time that the Gonzales brothers arrived at her apartment. (*Id.*) She also testified that the next day, she learned that a woman had been killed at the Jolly Roger convenience store. (*Id.* at p. 49) She testified that when she learned of the murder, she thought that “it was them two guys that came to my house ... because it was around that time and – and they wanted gas money, you know, and they were trying to get to Levelland and it’s on the way out.” (*Id.* at p. 50) Lora testified that she did not “call the cops,” because she heard “they had got two other guys and I figured that the cops had did their job.” (*Id.*)

30. Lora Casas also testified at the habeas hearing that she has known her sister to go by the name Mariana, and that she and her mother would also call Mary Ann – Mariana. (*Id.* at pp. 53-54)

31. Tina Martinez (Lora and Mary Ann Casas's cousin) and Diana Perez (Lora Casas's former sister-in-law) also testified at the habeas hearing. Ms. Martinez testified that on the night of the Jolly Roger murder, she was at Lora Casas's apartment. (Habeas, V. 2, p. 70) She testified that at some point that night, she left the apartment to buy drugs, and on her way back to the apartment she passed the Jolly Roger store and "saw cop cars, I saw crime sign ribbons, I knew something big had happened, nothing like that happens in Littlefield." (Habeas, V. 2, pp. 70-71, 74) Ms. Martinez testified that when she got back to the apartment, she told Mary Ann Casas what she had seen at the Jolly Roger store. (*Id.* at p. 71). Diana Perez testified that on the day after the murder at the Jolly Roger store, she and Lora Casas drove by the Jolly Roger store and noticed crime scene tape around the store. (*Id.* at pp. 63, 67). Ms. Perez testified that when they saw the store, Lora Casas told her a woman had been killed there the night before, that she thought it was the two guys that had stopped by her house the night before asking for gas money, and that she thought one of them probably had a gun when they stopped at her apartment. (*Id.* at pp. 67-68)

32. Defense counsel for Sifuentes never investigated Jerry and Armando Gonzales, never investigated, located or interviewed Lora Casas and Mary Ann Casas, and never presented any testimony from these witnesses at trial. (Habeas, V. 1, pp. 50-51) Defense counsel for Sifuentes also never examined any police investigators at trial, including Ranger Yeager or Chief Holder, concerning the identification by police of Jerry and Armando Gonzales as potential suspects.

33. Mr. Metze testified at the habeas hearing that had he known of Lora Casas and Mary Ann Casas, he would have presented their testimony to the jury in Sifuentes's case and it "would have changed our entire defense." (Habeas, V. 1, p. 152) Mr. Metze also acknowledged that the Sifuentes attorneys were "ineffective" for not investigating this lead. (Habeas, V. 1, p. 188)

b. Conclusions of Law.

1. The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). To establish a violation of his Sixth Amendment right to counsel, petitioner must establish that (1) counsel's performance was deficient and (2) this deficiency prejudiced his defense. *Id.* at 687. Counsel is deficient when their representation "fell below an objective standard of reasonableness." *Id.* at 688. Under the prejudice prong of *Strickland*, petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) (adopting *Strickland*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

2. The duty to investigate is fundamental to counsel's role as an advocate. *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-2466 (2005) (citing 1 ABA Standards for Criminal Justice 4-4.1); *Butler v. State*, 716 S.W.2d 48, 54-55 (Tex. Crim. App. 1986); *Johnson v. State*, 172 S.W.3d 6, 13 (Tex. App.-Austin 2005). Counsel must conduct a reasonable amount of pretrial investigation and "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994); *see also Butler*, 716 S.W.2d at 54-55 (finding failure to investigate

alibi and eyewitnesses ineffective assistance of counsel); *Wiggins v. Smith*, 123 S. Ct. 2527, 2535, 2537 (2003) (finding counsel ineffective for failing to conduct a thorough investigation of the defendant's background for mitigating evidence); *Rompilla*, 125 S. Ct. at 2458-2459 (finding counsel ineffective for failing to investigate and review court files on client's prior charges in order to develop mitigating evidence); *Soffar v. Dretke*, 368 F.3d 441, 478 (5th Cir. 2004) (finding trial counsel ineffective for failing to conduct an adequate pre-trial investigation into known eyewitnesses and into ballistic evidence); *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005) (finding trial counsel ineffective for failing to conduct a reasonable pre-trial investigation into forensic evidence); *Tenny v. Dretke*, 416 F.3d 404, 408, 409 (5th Cir. 2005) (finding counsel ineffective for failing to investigate and call witnesses to support the claim of self-defense); *Miller v. Dretke*, 420 F.3d 356, 361-362 (5th Cir. 2005) (finding trial counsel ineffective for failing to adequately investigate and present evidence of defendant's known medical and psychological problems).

4. "In assessing the reasonableness of an attorney's investigation, ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 123 S. Ct. at 2538. Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. A failure, though, to investigate evidence or witnesses cannot be excused as a strategic decision because without adequate investigation, the attorney has no basis with which to make a strategic call. *Soffar*, 368 F.3d at 475-77; *Rompilla*, 125 S. Ct. at 2465-2466, 2468; *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental health problems."); *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003) (finding a decision not to investigate "cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose.").

5. The Court concludes that Sifuentes has demonstrated that trial counsel's performance was deficient in failing to conduct any investigation into two men that had been identified by police early in the investigation as potential suspects. There is credible testimony and evidence that trial counsel knew well before Sifuentes's trial that the police had identified two men as potential suspects in the murder, that these men matched the description given by Ms. Cruz to police of her assailants, and that police had done little to investigate these men.

6. The Court concludes that trial counsel did not investigate these potential suspects to determine if there was evidence that could implicate these two men in the murder of Ms. Cruz. Trial counsel acknowledged that they did not conduct any investigation into the Gonzales brothers' whereabouts on the night of the murder, no one obtained photographs of either man, no one attempted to interview people who knew them or might have seen them on the night of the murder, defense counsel did not request the appointment of a private investigator trained to conduct this type of fact investigation, and defense counsel presented no evidence about them at trial.

7. The Court concludes that had counsel conducted an investigation into these two men and their whereabouts on the night of the murder, they could have discovered and secured the

testimony of witnesses – Mary Ann Casas Enriquez and Lora Casas - who saw the men in Littlefield on the night of the murder just minutes from the Jolly Roger store, matching the description given by Ms. Cruz, with a gun, and with a motive to rob a convenience store - that they needed money for gas to get home. The Court concludes that the failure by trial counsel to conduct any investigation into this key avenue of evidence was unreasonable, fell below the professional norm, and constituted deficient performance.

8. The Court concludes that the failure to investigate these known suspects, discover and present the testimony of Ms. Enriquez and Ms. Casas could not have been a strategic decision nor a trial tactic because defense counsel failed to conduct a sufficient investigation to enable counsel to be able to make an informed and reasonable decision regarding this evidence.

9. The Court concludes that Sifuentes was prejudiced by counsel's failure to conduct any investigation into these two known suspects, to discover witnesses who implicated these men, and to present their testimony at trial. Ms. Casas and Ms. Enriquez's testimony, along with Tina Martinez and Diana Perez, would have provided evidence that implicated two other men in the murder of Ms. Cruz. These men had been identified by police as potential suspects in the days following the murder. These men matched the description of the assailants given by Ms. Cruz to police more than Ramirez and Sifuentes did. Casas and Enriquez's testimony would have placed these men just minutes from the Jolly Roger store shortly before the murder, driving a gold car, one with long hair and one with short hair, one wearing shades, and one 18 years old and the other 19 years old. These witnesses would have provided testimony that the men were demanding money because they needed gas, that they were intoxicated and angry, that they left before the murder without getting any money, and that one of men showed Enriquez a gun. With the testimony of these witnesses, defense counsel could have also linked these men to two pieces of physical evidence found at the scene of the murder – tennis shoe prints on the countertop and a Mariana charm found on the floor by the cash register. These witnesses described seeing the men wearing tennis shoes on the night of the murder, and Mary Ann Enriquez dated and was called Mariana by one of the suspects.

10. Given the weak circumstantial evidence supporting Sifuentes's conviction, the Court concludes that had this evidence been presented at trial, there is a reasonable probability it could have created reasonable doubt in the minds of the jurors and resulted in a different verdict.

11. In evaluating Sifuentes's claim for ineffective assistance of counsel, the Court must consider the collective errors of counsel on the fairness of Sifuentes's trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999). The Court concludes that when the collective effect of the errors by defense counsel are considered – the failure to present a witness who would testify that Sifuentes and Ramirez were in Lubbock at the time of the murder and the failure to present evidence implicating two other men – one's confidence in the outcome of this case is severely undermined.

12. The Court concludes that Sifuentes was deprived of the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. The Court recommends that state habeas relief on this claim should be granted.

**II.
RELIEF REQUESTED**

Sifuentes's claims addressed above warrant state habeas relief. The State of Texas and Petitioner Sifuentes respectfully request that the Court adopt these findings of fact and conclusions of law and recommend that the Texas Court of Criminal Appeals grant Sifuentes's First Petition for Writ of Habeas Corpus.

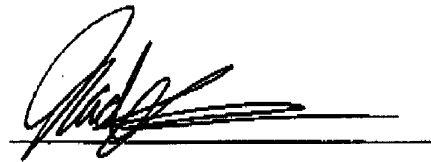
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all counsel of record by Federal Express on this 27th day of April 2006.

And hand delivery

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