APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-38,198-04

EX PARTE JULIUS JEROME MURPHY

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. 97-F-462-102 IN THE 102ND JUDICIAL DISTRICT COURT
BOWIE COUNTY**

***Per curiam*. ALCALA, J., filed a dissenting opinion in which WALKER, J., joins.**

O R D E R

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

In August 1998, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set applicant's punishment at death.

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[1] Unless otherwise indicated, all references to Articles refer to the Code of Criminal Procedure.

This Court affirmed applicant's conviction and sentence on direct appeal. *Murphy v. State*, No. AP-73,194 (Tex. Crim. App. May 24, 2000)(not designated for publication). This Court denied relief on applicant's initial post-conviction application for a writ of habeas corpus. *Ex parte Murphy*, No. WR-38,198-02 (Tex. Crim. App. Apr. 10, 2002) (not designated for publication).[2]

On January 17, 2006, applicant filed in the trial court a subsequent application for a writ of habeas corpus. In the subsequent application, applicant asserted that he was intellectually disabled and, therefore, exempt from execution. We remanded the issue to the trial court, and that court determined that applicant should be denied relief. We agreed. *Ex parte Murphy*, No. WR-38,198-03 (Tex. Crim. App. Nov. 19, 2014)(not designated for publication).

On September 24, 2015, applicant filed a second subsequent application in the trial court. In this application, applicant asserted that (1) the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); (2) the State unknowingly presented false testimony through one of these witnesses in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); and

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[2] On July 15, 1998, applicant filed with this Court an application for a writ of prohibition requesting this Court to prohibit the trial court from ordering him to submit to a psychiatric exam. The Court denied him leave to file that application on July 16, 1998. *See Ex parte Murphy*, No. WR-38,198-01 (no written order issued).

(3) evolving standards of decency dictate that the death penalty is no longer constitutional.

In October 2015, this Court stayed applicant's execution. *Ex parte Murphy*, No. WR-38,198-04 (Tex. Crim. App. Oct. 12, 2015)(not designated for publication). And in June 2016, we held that applicant's first and second claims satisfied the requirements of Article 11.071 § 5, and remanded them to the trial court for resolution. *Ex parte Murphy*, No. WR-38,198-04 (Tex. Crim. App. June 15, 2016)(not designated for publication). We did not dispose of the third allegation at that time in order to address all allegations together in a concise fashion.

After holding a live hearing, and considering the arguments by applicant and the State, the trial court entered findings of fact and conclusions of law recommending that applicant's first and second claims be denied.

We have reviewed the record and the trial court's findings of fact and conclusions of law. Based upon our own review, we deny relief on applicant's first two claims regarding *Brady* violations and alleged false testimony.

Applicant's third allegation regarding the constitutionality of the death penalty is dismissed.

IT IS SO ORDERED THIS THE 7th DAY OF NOVEMBER, 2018.

Do Not Publish

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-38,198-04

EX PARTE JULIUS JEROME MURPHY
Applicant

ON APPLICATION FOR POST-CONVICTION
WRIT OF HABEAS CORPUS
CAUSE NO. 97-F-462-102
IN THE 102ND JUDICIAL DISTRICT COURT
BOWIE COUNTY

ALCALA, J., filed a dissenting opinion in which WALKER, J., joined.

DISSENTING OPINION

In this application for post-conviction habeas relief filed by Julius Jerome Murphy, applicant, the habeas court never heard any live testimony from the two witnesses who are pertinent for the resolution of applicant's false-evidence claim. I, therefore, would remand this case to the habeas court for it to properly analyze applicant's claim based on a complete review of all the pertinent evidence, rather than, as this Court's majority does, deny applicant's claim based on the existing record that includes only written affidavits from those witnesses. Furthermore, because the parties and trial court had

agreed that applicant's death sentence for capital murder should be reformed to a life sentence for murder and applicant had been relocated from death row into the general prison population, I conclude that this Court should address the merits of applicant's "Motion to Remand" this case, in which he challenges this Court's decision to disallow that reformation. Specifically, applicant alleges that it would violate the Eighth Amendment to re-impose his death sentence after the district attorney and the trial judge agreed to reform his sentence to life imprisonment. Because I conclude that applicant has presented a colorable argument that it would violate his constitutional rights to carry out his death sentence under these circumstances in which the State formerly agreed to reform his sentence to life imprisonment, I would consider that issue on its merits. I, therefore, respectfully dissent from this Court's denial of relief as to applicant's false-evidence claim and its denial of his motion to remand.

I. Background

In 1998, applicant was convicted of capital murder and sentenced to death for the 1997 shooting of Jason Erie. The shooting took place during a robbery of the victim in a parking lot. Prior to the shooting, applicant had spent the evening drinking and partying with a group of friends. The friends eventually decided to go out to eat at a restaurant and left in two cars. At one point, the two cars pulled over at a gas station, and the driver of one of the cars, Chris Solomon, told the group he had noticed a man who was having car trouble and that he wanted to go "jack him." The driver of the other

car, Javarrow Young, told Solomon that he was not interested because he had his child in his car. The group then split up. Young and several passengers drove to the restaurant. Applicant, along with his girlfriend Christina Davis and a woman named Maria Woods, rode in Solomon's car to the parking lot where the victim was working on his car. The group assisted the victim with jump starting his car. According to the trial testimony, Woods then took a gun out of the car's glove box and handed it to applicant. Applicant got out of the car, went to the passenger side of the victim's car, and told the victim to give him all his money. When the victim refused and got out of his car and came towards applicant, applicant shot him one time in the head. Applicant took the victim's wallet and the group left the scene.

After waiting at the restaurant for 15 to 30 minutes, Young and his companions left to look for Solomon's car, returning to the parking lot where the robbery had occurred, at which point they saw the victim lying on the ground. When police arrived around that time, Young gave them a false name, denying that he knew anything about the shooting. But a few days later, Young spoke to the police again and told them that his friends had committed the robbery. At trial, Young testified that police threatened to take his baby away from him and the baby's mother if he did not cooperate with the police.

Davis was eventually interviewed by police, and she later testified at trial. Initially, Davis told officers that Solomon shot the victim. Davis later gave a second statement in which she indicated that it was applicant who had shot the victim.

Applicant confessed to the crime in a written statement. Afterwards, when being booked into jail, applicant stated, "I bet y'all never had anybody stand up and say straight out that he killed" someone.

At trial, no physical evidence was presented linking applicant to this offense. The primary evidence against applicant was testimony from Davis and Young, along with his own written confession.

Following his trial, this Court affirmed applicant's conviction and sentence on direct appeal. *Murphy v. State*, No. AP-73,194 (May 24, 2000) (not designated for publication). In 2002, this Court denied relief on the initial post-conviction habeas application. *See* WR-38,198-02. And in 2014, this Court denied relief on the first subsequent application. *See* WR-38,198-03. This is applicant's second subsequent habeas application.

In his instant pleadings that were filed in 2015, applicant raised three grounds: (1) the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses, Davis and Young, as required by *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the State unknowingly presented false testimony through the testimony of Davis and Young in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); and (3) evolving standards of decency dictate that the death penalty is no longer constitutional. With respect to his first two claims, applicant relied on new affidavits from Davis and Young. Both witnesses' affidavits appear to indicate that, contrary to their testimony at trial, applicant was not the shooter but that Solomon had in fact shot the victim. Both witnesses indicated in their affidavits that they

gave false testimony as a result of threats of prosecution by the State.

This Court determined that the first and second claims met the requirements for consideration in a subsequent writ application, and in 2016, we remanded those issues to the trial court for resolution on their merits. *Ex parte Murphy*, No. WR-38,198-04 (Tex. Crim. App. June 15, 2016).

Approximately one year later, in June 2017, this Court received a supplemental record from the trial court. The supplemental record contained documents indicating that, in May 2017, during the course of the litigation on remand, the parties had sought to enter into an agreement to reform applicant's conviction for capital murder to regular first-degree murder, and to reform his sentence from death to life imprisonment. After the parties reached this agreement, the State filed a "Motion to Dismiss the Indictment," in which the State asked the judge to dismiss the capital murder charge with prejudice, purportedly relying on the terms in Code of Criminal Procedure Article 32.02.[1] The trial court granted the State's motion and issued an order accepting the parties' agreement. The trial court also recommended dismissing the instant writ application as moot in light of the parties' agreement. In response to this development, this

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[1] *See* TEX. CODE CRIM. PROC. art. 32.02 ("The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.").

Court issued an order rejecting the parties' agreement and the trial court's dismissal of the indictment on the basis that, because only this Court has the ultimate power to determine whether habeas relief may be granted in this context, the trial court lacked jurisdiction to reform the death sentence until this Court had ruled on the merits of the habeas application and determined that a new trial was warranted.

In accordance with this Court's instructions to resolve the merits of applicant's habeas claims, the trial court subsequently held a hearing. At the hearing, neither Young nor Davis appeared, despite having been summoned to testify. According to the record, at the time of the hearing, Young was incarcerated in Huntsville on a felony assault charge. Applicant asserts that, based on instructions received from the clerk and constable, a subpoena for Young's appearance was served on TDCJ. However, because no bench warrant was issued for Young to appear, TDCJ did not transport him to the hearing. Davis did not appear because attempts to serve her in multiple locations failed.

Several witnesses, including applicant's trial counsel and the prosecutors, did testify. Applicant's trial counsel testified that the State did not inform him that Davis may face charges. Counsel said he met with Davis prior to trial and she did not mention any threats of prosecution or deals with the prosecution in exchange for her testimony. Counsel also testified that he was unaware of any deals with Young. The defense team was aware that Young had been threatened with having his child taken away and focused on that fact during cross-examination at

trial. Two prosecutors who had worked on the case also testified and indicated that the State did not disclose any threats or promises of leniency for Davis or Young because no such threats or promises were made.

Based on the evidence that had been introduced, the habeas court made findings of fact and conclusions of law recommending that all relief be denied. With respect to applicant's *Brady* claim, the habeas court found credible the prosecutors' testimony indicating that no threats of prosecution or deals were made for Davis and Young. With respect to applicant's false-evidence claim, the habeas court determined that the affidavits from Davis and Young were not credible, and, in any event, their new assertions were not material to a finding of guilt in light of applicant's confession to this offense.

In his current pleadings before this Court styled as a "Motion to Remand," applicant challenges the habeas court's refusal to require live testimony from the recanting witnesses to ascertain their credibility. The relevant witnesses, Davis and Young, did not appear to give testimony despite applicant's efforts to secure their testimony at the habeas hearing. Applicant complains that the trial court did not permit live testimony by Young, who did not appear because he was incarcerated in Walker County at the time of the hearing. Young was not transported to the hearing in Bowie County, nor was his live testimony permitted through live electronic communication. Davis could not be located and failed to appear for the hearing. Applicant has requested further opportunity to obtain their

presence for live testimony at a habeas hearing before the habeas court.

II. This Case Should Be Remanded For a New Hearing with Testimony from Absent Witnesses

I would not adopt the habeas court's findings of fact and conclusions of law rejecting applicant's false-evidence claim at this juncture because the two most pertinent witnesses on that matter have yet to provide live testimony subject to cross-examination and full consideration by the habeas court. I conclude that a live hearing is needed to fully evaluate the credibility of Davis's and Young's assertions that applicant was not the shooter and, therefore, I would remand this case to the habeas court for live testimony. Although applicant's confession was admitted at his trial, the strength of that evidence must be weighed against the recanted testimony by Davis and Young to determine whether it would still support a finding of guilt and imposition of the death penalty under the reevaluated circumstances.

The importance of live testimony from these recanting witnesses in this case is a consequence of the evidence adduced at applicant's trial. At trial, the State's case primarily consisted of applicant's confession and these witnesses' testimony. As applicant contended at trial and reemphasizes in his instant application, no physical evidence shows that applicant shot the victim. Perhaps it could be argued, as the habeas court suggested, that applicant's false-evidence claim necessarily should fail in light of his written confession which renders these witnesses' recantations immaterial. However, I reject the notion that applicant's confession makes

the instant litigation meaningless. Although applicant confessed to shooting the victim, applicant's habeas counsel points out that applicant's statement should be viewed with significant skepticism. As applicant's trial counsel noted, "For many reasons, especially not very thoughtful ones and very well thought-out reasons, people are willing to take the blame for something they didn't do." The Supreme Court has recognized that the possibility of a false confession increases with intellectual disability, taking note of this fact as a rationale for exempting the intellectually disabled from capital punishment. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002). Given his prior habeas claims suggesting that he is intellectually disabled and that, at a minimum, he has below average intelligence and was intoxicated by alcohol and marijuana at the time of the offense, applicant's confession could potentially be an instance of falsely taking responsibility for another's actions. Thus, the importance of live testimony from the now-recanting witnesses who previously buttressed that confession cannot be overstated. Considering the lack of physical evidence and plausible reasons to possibly doubt the veracity of applicant's confession, due process and the right to a fair trial necessitate an opportunity to personally evaluate the recantations of these witnesses the State relied upon to support the veracity of applicant's confession. Moreover, while recognizing that applicant could possibly have been convicted of capital murder under a party-liability theory even if he was not the actual gunman, a jury might have reasonably concluded that someone who was not the actual gunman poses a lesser danger to society and would have concluded that a death sentence was

inappropriate. Accordingly, I would remand this application to the habeas court for it to receive live testimony from Davis and Young.

III. Court Should Consider Constitutional Implications of Permitting Applicant's Execution Following Agreed Reduction of Sentence

In his motion to remand, applicant asserts that the reinstatement of his death sentence months after that sentence was lifted pursuant to the trial court's order accepting the parties' agreement to reduce his sentence to life imprisonment violates the Eighth Amendment. Applicant asserts that, at the time the agreement was entered into, both parties "believed in good faith that this plea agreement was valid." Applicant continues, "The victim's family agreed to this plea deal, the trial court accepted Murphy's plea, and dismissed the original indictment in June 2017. For months, Murphy's death sentence was lifted and he believed in good faith that he would not be executed . . . . To re-impose Murphy's death sentence now would subject Murphy to extreme psychological harm in violation of" the Eighth Amendment. Applicant contends that the Eighth Amendment may be violated by a punishment that imposes extreme psychological suffering. *See Beal v. Foster*, 803 F.3d 356, 357-58 (7th Cir. 2015) (the "alleged pain sufficient to constitute cruel punishment may be physical or psychological"). He asserts that forcing him to suffer the psychological trauma of having his death sentence imposed again, following the parties' collective good-faith belief that the State had the ability to dismiss and re-plead him to life imprisonment under these circumstances, is

precisely the sort of "unnecessary and wanton infliction of pain" that the Eighth Amendment proscribes. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976). He further contends that re-imposing a death sentence following an agreed reduction of his sentence to life imprisonment renders his punishment arbitrary and capricious. *See id.* at 188. He asserts that the Eighth and Fourteenth Amendments prohibit a state from inflicting "a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.*

At the outset, I continue to believe that, because only this Court may grant habeas relief, the trial court did not have the jurisdiction or authority to alone set aside applicant's death sentence and to permit applicant to be re-sentenced to life in prison for murder. But that does not resolve the instant pleadings that now contend that, having been re-sentenced to life in prison via an agreement with the State that that was the appropriate punishment for this offense, applicant's death sentence must not be re-imposed because doing so would violate his rights under the federal Constitution. That is a difficult and complicated question that is one of first impression in this Court. I would file and set that issue for further evaluation of whether the imposition of applicant's death sentence under these circumstances would constitute a cruel and arbitrary punishment in violation of the Eighth Amendment.

IV. Legislation May Be Appropriate to Address this Type of Inequity

This case is not unique in the sense that years after the sentence was imposed, it is recognized that the

death sentence was inappropriate for the case. This Court has seen multiple instances in which, in the past, a person was sentenced to death but, due to the passage of time and changes in the law or understanding of the facts, the present state representatives believe the death sentence is unjust. This problem sometimes can be remedied through traditional habeas review when this Court determines that there is a meritorious constitutional claim that entitles the defendant to relief. But sometimes, as here, given this Court's majority order denying relief, the habeas review process is inadequate to reach a just result in the eyes of the defense, the state prosecutors, and the victim's family. A rare grant of clemency by the Texas Governor may attempt to correct the inadequacy of the habeas review process. But I conclude that there should be other avenues that would permit habeas relief from a death or other type of unjust sentence when the defense, prosecutors, and trial judge all agree that relief is appropriate and in the interests of justice.

Here, as evidenced by its agreement to permit a life sentence for applicant, the State no longer believes that the death penalty remains an appropriate punishment for this offense. And yet, as this Court has indicated, there currently exists no procedural mechanism or statute that would allow the parties to agree to reform a pending death sentence to any other punishment. Believing his death sentence to be finally invalidated through an agreement of the parties, applicant was moved off death row into the general prison population to serve a sentence of life imprisonment. But now, as a result of an absence of

any statutory mechanism that would permit that agreement, applicant has been returned to death row to again await imposition of his death sentence. Given the rarity of grants of clemency, the current situation presents the real possibility that applicant would be executed even though the State no longer wishes to pursue that punishment against him.[2] Aside from the potential constitutional concerns noted above, this situation runs counter to the public interest when, after a lengthy incarceration on death row, the State and the victim's family indicate that they no longer wish to pursue the yet-to-be-carried-out execution of the defendant.

To remedy this situation, the Legislature could consider enacting legislation that would permit a defendant and the State, with the consent of the victim's family, to enter into an agreed reformation of a capital murder judgment to reflect some punishment less than death. As the Supreme Court has stated, "the penalty of death is different in kind from any other punishment imposed under our

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[2] With respect to executive clemency, I note here that clemency has been granted in Texas only in the very rare case. In August 2013, the Capital Punishment Assessment team noted that, as of that time, Texas had executed 503 inmates in the modern death penalty era and had commuted the sentences for only two inmates facing imminent execution. *See* Capital Punishment Assessment Highlights, Clemency, Chapter 9, available at http://www.txcourts.gov/media/415483/ABATXCapitalPunishmentAssessmentHighlights.pdf. In the period since that report was issued, I am aware of only one additional inmate who has been granted clemency. Given the rarity of grants of clemency, the hypothetical availability of this remedy should not weigh against the policy considerations that favor the enactment of legislation in this area.

system of criminal justice." *Gregg*, 428 U.S. at 188. It is "unique in its severity and irrevocability." *Id.* at 187. I conclude that, when there are serious questions about the facts supporting a conviction for capital murder or the appropriateness of a death sentence, and when the State, the defense, and the trial court agree that reformation of a death sentence to a lesser sentence is the appropriate and just resolution of the case, there should be a mechanism under the law, aside from clemency, that permits such a reformation.

V. Conclusion

I would remand applicant's false-evidence claim for a new hearing in the habeas court, and I would consider the merits of the arguments presented in his motion to remand asserting that executing him under these particular circumstances would violate the federal Constitution. I, therefore, respectfully dissent.

Filed: November 7, 2018

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APPENDIX C

Jill Harrington
District Clerk
Bowie County, Texas Teresa Tipps, Deputy
Cause No. 97F0462-102
Filed 03/08/2018

Cause No. 97F0462-102

Ex parte	*	IN THE DISTRICT COURT
JULIUS MURPHY,	*	102ND JUDICIAL DISTRICT
Applicant	*	BOWIE COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court of Criminal Appeals' Orders of June 15, 2016 and September 20, 2017 remanded the above styled and numbered cause for findings of fact and conclusions of law to this trial court. Pursuant to those orders, the court is to make factual findings regarding whether the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) and also whether the State unknowingly presented false testimony through one of these witnesses in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App.

2009). Therefore, having considered Applicant Julius Murphy's Second Subsequent Application for Post-Conviction Writ of Habeas Corpus, together with attached exhibits; the State's Original Answer to Applicant's Second Subsequent Application for Writ of Habeas Corpus; the Affidavit of Craig Henry; the testimony and evidence presented at the live evidentiary hearing on this matter; and the official court records for Applicant's capital murder trial and this post-conviction proceeding, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Procedural History

1. On September 20, 1997, Applicant, Julius Murphy, was indicted by the grand jury for the Capital Murder of Jason Erie. (C.R. Vol. 1, p. 2). Applicant was represented at trial by counsel, Craig Henry and Bill Schubert. Applicant was convicted in cause number 97F0462-102 of Capital Murder in the 102nd Judicial District Court of Bowie County, Texas, and the trial court assessed applicant's punishment at death by lethal injection pursuant to the jury's responses to the special issues on August 13, 1998. *State v. Murphy*, Cause No. 97F0462-102.

2. On May 24, 2000, the Texas Court of Criminal Appeals affirmed the Applicant's conviction and sentence. *Murphy v. State*, No. 73,194 (Tex. Crim. App. May 24, 2000)(not designated for publication).

3. On April 10, 2002, the Texas Court of Criminal Appeals denied applicant's initial application for writ of habeas corpus pursuant to Article 11.071. *Ex parte Murphy*, No. WR-38,198-02

(Tex. Crim. App. April 10, 2002)(not designated for publication).

4. On February 7, 2003, Applicant filed a federal petition for writ of habeas corpus in the United States District Court for the Eastern District of Texas. The federal district court denied Applicant relief in 2004.

5. Applicant appealed to the United States Court of Appeals for the Fifth Circuit. On July 11, 2005, the Fifth Circuit affirmed the district court's denial of relief. *Murphy v. Dretke*, 416 F.3d 427 (5th Cir. 2005).

6. Applicant filed a petition for a writ of certiorari in the United States Supreme Court, and it was denied on January 9, 2006. *Murphy v. Dretke*, No. 05-6940 (Jan. 9, 2006).

7. On January 17, 2006, applicant filed a subsequent application for a writ of habeas corpus in the trial court, based on the United States Supreme Court's holding in *Atkins v. Virginia*, 536 U.S 304, 307 (2006), arguing that he was mentally retarded and, as such, cannot be executed. The Texas Court of Criminal Appeals denied relief on November 19, 2014. *Ex parte Murphy*, No. WR-38,198-03 (Tex. Crim. App. Nov. 19, 2014) (not designated for publication).

8. On September 24, 2015, Applicant filed a second subsequent application for writ of habeas corpus in the trial court. In this application, applicant has asserted that (1) the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses as required by *Brady v. Maryland*,

373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); (2) the State unknowingly presented false testimony through one of these witnesses in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex.Crim.App.2009); and (3) evolving standards of decency dictate that the death penalty is no longer constitutional. In support of his Application, Applicant submitted the sworn Affidavits of Christina Davis and Javarrow Young, two of the State's lay witnesses at trial. Applicant also submitted the sworn Affidavits of Kimberly Huggins, Elena Byrd and Jennifer Hopson Hancock, who were not present at the scene of the murder and did not testify at trial.

9. On October 12, 2015, the Court of Criminal Appeals stayed Applicant's execution.

10. On June 15, 2016, the Court of Criminal Appeals, after reviewing applicant's subsequent application, determined that his first and second claims satisfy the requirements of Article 11.071 § 5 and remanded those claims to the trial court for resolution.

11. On October 20, 2017, the trial court held an evidentiary hearing, at which time Applicant and the State presented testimony concerning the issues. Applicant was represented by Cate Stetson, Desmond Hogan, Elizabeth Lockwood, and Katherine Ali, and the State, as Respondent, was represented by Jerry D. Rochelle and Lauren N. Sutton Richards.

II. Testimony at Trial

12. On the afternoon of September 18, 1997, Julius Murphy, Chris Soloman, Philip Schute,

Javarrow Young, Elena DeRosia, Maria Woods, Christina Davis and others gathered at Applicant's house to drink alcohol, smoke weed, and play dominoes. (R.R. Vol. 18, p. 32-34). Applicant, Chris, Phillip, and Javarrow were all drinking beer and Chris, Applicant and Phillip were smoking marijuana. (R.R. Vol. 18, p. 35). There was a .25 automatic pistol that was passed around between Chris, Phillip, Applicant and Marie while they were at Applicant's house. (R.R. Vol. 18, p. 51-52).

13. The group eventually left Applicant's house and went to New Boston to another individual's house and drank more alcohol. (R.R. Vol. 18, p. 36-37). They stayed in New Boston for around forty-five minutes (R.R. Vol. 18, p. 121). The group then left New Boston and drove back to Texarkana. (R.R. Vol. 18, p. 38). Around 11:00 or 12:00 p.m., they decided to go to Waffle House to eat, driving up Summerhill Road. (R.R. Vol. 18, p. 40).

14. Javarrow Young, Elena DeRosia, Javarrow's child, and Phillip Schute were in one vehicle, and Applicant, Chris Soloman, Maria Woods, and Christina Davis were in another vehicle. (R.R. Vol. 18, p. 41-42, 44). The two cars pulled over at a gas station, and Chris made statements he saw a man who was having car trouble and that they were going to go and "jack him" (R.R. Vol. 18, p. 42). Javarrow told them to go ahead, that he was going about his own business because he had his child in the car. (R.R. Vol. 18, p. 44-45). At this point the two cars split up, with Javarrow's car going across the Interstate because they did not want to be involved (R.R. Vol. 18, p. 45). They drove off, and Javarrow never saw anybody shoot anybody, never saw them

talking with the victim, Mr. Erie, and never drove by the scene three or four times. (R.R. Vol. 18, p. 69). They did not stay there to scope out and make sure everything happened okay. (R.R. Vol. 18, p. 69-70).

15. Chris drove the car back to where the victim was working on his car, and Chris got out and helped the victim jump his car. (R.R. Vol. 18, p. 126). Chris got back into his own vehicle, and the victim came and gave him five dollars for his help. (R.R. Vol. 18, p. 126-127). Marie got the gun out of the glove compartment of the car and handed it to Applicant. (R.R. Vol. 18, p. 128). Applicant got out of the car with the gun. (R.R. Vol. 18, p. 129).

16. Applicant and Chris's car did not come back and meet up with Javarrow at the Waffle House after approximately 15-30 minutes, so Javarrow drove back across the interstate and saw the victim lying on the ground. (R.R. Vol. 18, p.45-46). They stopped the car, Javarrow got out, saw that the victim was bleeding, then when an ambulance drove by, they got back in the car and chased it down to come back and help render aide. (R.R. Vol. 18, p. 46-47). EMT Kevin Adcock was driving the ambulance at Summerhill and College Drive when he was flagged down by Javarrow and the others. (R.R. Vol. 18, p. 105). When they arrived on the scene, the victim was bleeding from a bullet wound to the head and was unresponsive. (R.R. Vol. 18, p. 106). The victim was loaded in the ambulance and taken to the hospital. (R.R. Vol. 18, p. 107).

17. The police responded to the scene, and Javarrow spoke to the police. (R.R. Vol. 18, p. 48). He gave the police a false name because he was on probation at the time. (R.R. Vol. 18, p. 48).

Javarrow did not tell the police at this time he knew anything about Chris and Applicant robbing the victim. (R.R. Vol. 18, p. 49).

18. A few days later, Javarrow gave another statement to police where he told officers he knew what happened, but that he was afraid. (R.R. Vol. 18, p. 49-50). In the written statement, he gave a time line of events that was backwards in some places and not typewritten in the right order. (R.R. Vol. 18, p. 50). The type written statement of Javarrow Young was introduced into evidence as Defendant's Exhibit 2 (R.R. Vol. 18, p. 82).

19. Javarrow and Elena both gave statements to police officers at the same time, but they were put in different rooms. (R.R. Vol. 18, p. 73-74). During the statement, according to Javarrow, the officers threatened to take Javarrow's baby away from him and Elena. (R.R. Vol. 18, p. 74-75). It was discussed that if they were involved in the murder and they went to the penitentiary, what would happen to the child. (R.R. Vol. 19, p. 26-27). Javarrow did not get along with officers during the time he was giving his statement. (R.R. Vol. 19, p. 9).

20. Javarrow Young testified on behalf of the prosecution at Applicant's trial. (R.R. Vol. 18, 29-103).

21. Christina Davis was interviewed by police, and she initially told them that Chris shot the victim in order to protect Julius and because she was mad at Chris for being the reason it all got started. (R.R. Vol. 18, p. 134). In a subsequent statement, Ms. Davis told officers that it was actually Applicant that had done the shooting. (R.R. Vol. 18, p. 135).

22. At the time of his trial testimony, Javarrow Young was in custody for a probation violation warrant due to missing reporting, dirty uranalysis, failure to pay restitution, and failure to report to the school board. (R.R. Vol. 18, p. 53-54). At the time of his testimony, Mr. Young did not know the outcome of his probation revocation. (R.R. Vol. 18, p. 55).

23. Prior to trial, Christina Davis gave defense attorney Bill Schubert an interview at his office. (R.R. Vol. 18, p. 167). Mr. Schubert kept Ms. Davis waiting for her appointment because he was running late from an eye doctor's appointment.[1] (R.R. Vol. 18, p. 168-169).

24. Ms. Davis testified on behalf of the prosecution, and she was not charged with any crime in relation to the murder of Jason Erie. (R.R. Vol. 18, p. 112-170).

25. Applicant was provided with his legal rights, waived them voluntarily, and gave the following confession, in part:

> My name is Julius Murphy. Thursday night I was riding with Chris, Marie and Christina. It was about 1:00 at night. We seen this guy on the side of Summerhill Road. He waved us down and wanted us to give him a boost. We went over there and stayed five or ten minutes, giving him a boost. We sat in the car. He opened the hood of both cars. He connected the cables to both of the cars. His car cranked up after five or ten minutes. He

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[1] During his re-cross examination of Christina Davis at trial, Mr. Schubert asked, "and I was late from my eye doctor's appointment, wasn't I?" (R.R. Vol. 18, p. 169).

> came around and gave Chris five dollars. Then he went to his car. I got out of the car and went up to the passenger side of his car. I asked him to give me all his money. He didn't. He got out of the car and came around there where I was, and I shot him. He fell to the ground. I walked around the car to where he was. His wallet was laying on the ground beside him. I picked it up and got into the car and left. (R.R. Vol. 19, p. 16-23).

26. Applicant was more than cooperative and more than willing to tell officers what had happened. (R.R. Vol. 19, p. 31).

27. After the interview, when officers were preparing to take Applicant to be booked into the jail, Applicant made the following statement, "I bet y'all never had anybody stand up and say straight out that he killed a motherfucker." (R.R. Vol. 19, p. 104-106).

III. Applicant's Present Allegations

28. Applicant contends that the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses, Javarrow Young and Christina Davis, as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

29. Applicant asserts that the State unknowingly presented false testimony through Javarrow Young in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

IV. Evidentiary Hearing

30. At the October 20, 2017 live evidentiary hearing, Applicant called the following witnesses:

William Schubert and Jennifer Hancock. The State, as Respondent, called the following witnesses: Alwin Smith, Kristie Wright, and Lance Hall.

31. Applicant had desired to call Javarrow Young to testify at the evidentiary hearing to the facts contained in his sworn affidavit, but Mr. Young was at the time incarcerated. While the Applicant asserted Mr. Young was served with a subpoena at TDCJ, his live appearance was not secured by process of a bench warrant. (Hearing R. p. 8-9).

32. Applicant had desired to call Christina Davis to testify at the evidentiary hearing to the facts contained in her sworn affidavit, but she was never served with a subpoena. (Hearing R. p. 8,10).

33. The Court allowed Applicant to submit the Affidavits of Javarrow Young and Christina Davis in support of his position.

34. Because Javarrow Young and Christina Davis were not present at the hearing, the State did not have an opportunity to cross-examine them as to the testimony in their affidavits.

V. Summary of Witnesses' Testimony at Evidentiary Hearing

WILLIAM SCHUBERT

35. William Schubert testified he was one of Mr. Murphy's trial counsel in 1998, along with Craig Henry.[2] Mr. Murphy's case was Mr. Schubert's first death penalty case. (Hearing R. p. 14-15, 17).

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[2] Mr. Henry did not testify at the hearing. In his Affidavit filed in response to the Order of the Court, Mr. Henry stated that he forwarded his complete file in this case to Applicant's habeas corpus counsel, and therefore, cannot respond to the

36. During his representation of Mr. Murphy, Mr. Schubert requested the State, directly or indirectly, to disclose evidence of threats of charges or promises of leniency made to the witnesses in the case in written motions five separate times. (Hearing R. p. 21-30); (Hearing R. Ex. 1 (Mot. for Prod. of Evid. Favorable to the Accused, *State v. Murphy*, No. 97F0462-102 (Tex. Dist. Feb. 17, 1998)); Ex. 2 (Pretrial Mot. for Disc. and Inspection, *State v. Murphy*, No. 97F0462-102 (Tex. Dist. Feb. 17, 1998)); Ex. 3 (Def.'s Pretrial Mot. for Disclosure of Detailed Exculpatory Evid., *State v. Murphy*, No. 97F0462-102 (Tex. Dist. Feb. 17, 1998)); Ex. 4 (Mot. for Prod. of Information Concerning State's Witnesses, *State v. Murphy*, No. 97F0462-102 (Tex. Dist. Feb. 17, 1998)); Ex. 5 (Mot. to Require the State to Reveal any Agreement Entered Into Between the State and any Prosecution Witness that Could Conceivably Influence Their Testimony, *State v. Murphy*, No. 97F0462-102 (Tex. Dist. Feb. 17, 1998))).

37. Mr. Schubert specifically remembers a discussion with the prosecutors for the State in the case, Kristie Wright and Al Smith, where he asked Ms. Wright and Mr. Smith why they didn't file charges against certain people and one person in particular — Christina Davis, as she was the only person in the car who wasn't charged. (Hearing R. p. 30-32). Mr. Schubert was not insinuating the State was hiding something, but was more interested why one female in the car was charged and

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issues and has no independent recollection of the facts surrounding the issues.

Ms. Davis was not. (Hearing R. p. 32). He found it odd that the State did not charge Ms. Davis, despite charging all other occupants of the car in connection with the crime. (Hearing R. p. 32).

38. The State told Mr. Schubert they had disclosed everything and that they didn't have deals. They told him that they did not have a deal with Christina Davis because she was never charged, and she was not charged because there wasn't a case against her. (Hearing R. p. 33, 35-36).

39. Mr. Schubert said he was warned about Al Smith because he came with a reputation for not playing above board. But Mr. Schubert elaborated saying he could not profess it was true, it was just something he had been told. (Hearing R. p. 34). Specifically, he testified Mr. Smith's reputation for truthfulness was not good. (Hearing R. p. 34).

40. Mr. Schubert recounted the interview meeting with Christina Davis. Ms. Davis had requested Al Smith be present for the interview. Mr. Schubert testified that Mr. Smith arrived at Mr. Schubert's office prior to the meeting and Christina did not show up. Mr. Smith eventually left the office, and then Christina showed up soon afterwards and requested to carry on the interview in Mr. Smith's absence. (Hearing R. p. 37-38). Mr. Schubert does not recall any discussions with Christina during the interview about threats made by the prosecutors. If she had made such statements, they would have likely resonated with Mr. Schubert. (Hearing R. p. 52). Ms. Davis was nervous about being charged in connection with the murder. (Hearing R. p. 39).

41. To Mr. Schubert's knowledge, there was never a deal or threat of criminal charges or promises of

leniency made to Christina Davis. (Hearing R. p. 41-42). The prosecutors never disclosed any deals, threats of criminal charges or any kind of a promise of leniency made to Javarrow Young. (Hearing R. p. 42).

42. Mr. Schubert had a good overall working relationship with the Bowie County District Attorney's office. (Hearing R. p. 47).

43. To say the defense was provided a copy of the district attorney's entire file in the case would be consistent with the way it was done back then. (Hearing. R. p. 47-48).

44. The defense team became aware that during Javarrow Young's police interview the officers discussed his child being taken from him, and they used that information during Javarrow Young's cross-examination to test his credibility. (Hearing R. p. 55-56).

45. If the State did not disclose threats of prosecution or promises of leniency, Mr. Schubert would probably not have asked witnesses about such threats or promises at trial. (Hearing R. p. 20-21).

JENNIFER HOPSON HANCOCK[3]

46. Ms. Hancock is a truck driver from Livingston, Texas who has never met Applicant. (Hearing R. p. 67).

47. Ms. Hancock met Javarrow Young around 2011 through her uncle. (Hearing R. p. 69).

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[3] The Court sustained the State's hearsay objection to the testimony of Ms. Hancock and struck the hearsay statements from the Record. However, the Court will address Ms. Hancock's hearing testimony herein.

48. Ms. Hancock read an article about the murder and questioned Mr. Young about it. He did not want to discuss the murder. (Hearing R. p. 69-71).

49. Ms. Hancock asked Mr. Young again in 2015 about the murder, and he said he still did not want to discuss it. He eventually told her that he testified at Julius Murphy's trial and that he lied. He told Ms. Hancock that Mr. Murphy was not the one who did it, and at the time, prosecutors had threatened him. (Hearing R. p. 71-73).

AL SMITH

50. Al Smith testified he worked for the Bowie County District Attorney's Office in 1997 and was assigned the prosecution of the capital murder cases of Julius Murphy and Chris Solomon. (Hearing R. p. 80-81).

51. In Applicant's case, the State did not disclose threats or promises made to witnesses because there were not threats or promises of leniency made to witnesses. (Hearing R. p. 82-83). Specifically as it relates to the witnesses Javarrow Young and Christina Davis, the prosecutors did not threaten them with prosecution if they did not testify on behalf of the state. (Hearing R. p. 84).

52. Javarrow Young had no criminal liability, so there would have been no criminal charges to threaten him with. (Hearing R. p. 86).

53. It was Mr. Smith's practice that if a deal was cut with a witness for a lesser charge in exchange for testimony, he would absolutely disclose that to the defense. (Hearing R. p. 86).

54. As it relates to Christina Davis, she was a very eager witness who called the prosecutors

regularly. She wanted to know when the case was going to trial and when she was going to testify. (Hearing R. p. 87).

55. Prior to the trial, Ms. Davis was to be interviewed by Mr. Schubert, and Ms. Davis requested for Mr. Smith to go with her and be present for the meeting. The day of the meeting, Mr. Smith was informed that Mr. Schubert had a doctor's appointment and would need to reschedule. Attempts to contact Ms. Davis to inform her of the change were unsuccessful. Ms. Davis went to Mr. Schubert's office and was told he would be late. She was asked to wait so they could go ahead and do the interview. Ms. Davis later called the prosecutors upset because she went to Mr. Schubert's office and felt she had been sold out, left out to dry, and set up to be ambushed by Mr. Schubert. (Hearing R. p. 87-88).

56. Pretrial meetings with Ms. Davis included Mr. Smith, Ms. Wright and Roy Barker, but the elected District Attorney, Bobby Lockhart, did not sit in on witness interviews. (Hearing R. p. 89). Mr. Lockhart did not threaten Ms. Davis in this case. (Hearing R. p. 90).

57. Ms. Davis was not charged with an offense because she didn't do anything to make her culpable or criminally liable for anything that happened. She actually attempted to keep Julius from getting out of the car. (Hearing R. p. 90).

58. At no point did Mr. Smith or Ms. Wright threaten Javarrow Young that if he did not testify for the state he would face criminal charges or make promises to him in exchange for his testimony. (Hearing R. p. 90-91).

59. At no point was Christina Davis threatened with criminal charges if she did not testify, and no promises were made to her in exchange for her testimony. (Hearing R. p. 91). There would not have been any reason for Mr. Smith to offer leniency, promise leniency, suggest or imply leniency to Christina because she didn't do anything. (Hearing R. p. 93). Christina Davis was told repeatedly that she was not going to be charged with a crime. (Hearing R. p. 96).

60. Of the four occupants of co-defendant Chris Solomon's car at the scene of the crime, Ms. Davis was the only person who was never charged in connection with the murder. (Hearing R. 94).

61. Mr. Smith has probably had over 200 jury trials, and he does not recall every conversation he had with every witness. (Hearing R. p. 92-93).

62. A case Mr. Smith prosecuted in 1993 was overturned on appeal on the basis that the defense counsel was not provided copies of photographs as ordered by the court and for failure to provide pretrial access to certain witnesses. (Hearing R. p. 97-98).

63. Another case Mr. Smith prosecuted resulted in a death sentence, but the death sentence was later vacated on the basis there was false testimony given by a witness, unbeknownst to the state. (Hearing R. p. 101-103).

64. Mr. Smith has never been disciplined nor suspended by the State Bar. (Hearing R. p. 97).

KRISTIE WRIGHT

65. Kristie Wright was employed as a prosecutor for the Bowie County District Attorney's office in

1997 and was one of the prosecutors assigned on Applicant's case. (Hearing R. p. 105).

66. If Ms. Wright met with a witness and offered him leniency in some way, in her practice, she would make defense counsel aware of it. (Hearing R. p. 105-106).

67. Ms. Wright did not have a felony docket. If the District Attorney or someone else wanted her to make a deal, she would, but she never made a deal with a defendant. (Hearing R. p. 106).

68. Ms. Wright talked with Christina Davis on the phone often. Ms. Davis was in contact with the prosecutors a lot. (Hearing R. p. 107). Ms. Davis was anxious to get it over with and always wanted to be kept up on the case. She was not a reluctant witness. (Hearing R. p. 107-108). Ms. Wright did not make any threats to Christina Davis that she would be charged if she did not testify. (Hearing R. p. 109).

69. Ms. Wright recalls Javarrow Young as being pretty cooperative. Ms. Wright is unaware of any promises made to Mr. Young in exchange for his testimony. Ms. Wright never made any promises or threats to Mr. Young. (Hearing R. p. 108-109).

70. The elected District Attorney, Bobby Lockhart, did not sit in on pretrial meetings with witnesses, and it would not be feasible for him to have made threats or promises to any of the witnesses. (Hearing R. p. 109).

71. Ms. Wright was not present during the police officers' interviews with witnesses in the case and does not have personal knowledge of statements

made by the police during the witness interviews. (Hearing R. p. 116).

LANCE HALL

72. Mr. Lance Hall is a licensed peace officer and is currently employed as an investigator for the Bowie County District Attorney's Office. (Hearing R. p. 121).

73. Mr. Hall ran a criminal history check on Javarrow Young and learned that he was incarcerated at the Wynne Unit in Huntsville Texas at the time of the hearing. He is serving a three year sentence on a felony assault charge out of Harris County, Texas. (Hearing R. p. 121-122).

74. Mr. Hall's review of Javarrow's criminal history revealed he has an extensive criminal history, with his first felony conviction in 1997 for burglary of a building. That conviction was followed by a 2004 felony conviction for unauthorized use of a vehicle and forgery. (Hearing R. p. 127-128).

75. Javarrow Young has a 2005 felony conviction for facilitating escape. Mr. Hall was a lieutenant at the sheriff's office at that time and was on call. Mr. Young was in the Bi-State and put a man by the name of Austin Davis in the trash to be carried out. He covered him with trash, rolled him outside and permitted him to escape. (Hearing R. p. 128).

76. In 2009, Javarrow Young was convicted of the felony offense of theft with prior convictions out of Harris County, Texas. (Hearing R. p. 129).

77. In 2010, Javarrow Young was convicted of the felony offense of theft with two prior theft convictions out of Bowie County, Texas. (Hearing R. p. 128-129).

78. In 2012, Javarrow Young was convicted of the felony offense of assault-bodily injury-family violence, as well as two convictions for violation of protective orders, all from Harris County, Texas. (Hearing R. p. 129-130).

79. In 2016, Javarrow Young was convicted of the felony offense of assault-bodily injury-family violence. (Hearing R. p. 130).

80. On September 30, 2014, Javarrow Young was convicted of the misdemeanor offense of failure to ID in Harris County, Texas. (Hearing R. p. 132).

81. In 2010, Javarrow Young was convicted of the misdemeanor offense of failure to ID in Harris County, Texas. (Hearing R. p. 133).

82. In 2012, Javarrow Young was convicted of the misdemeanor offense of reporting a false alarm in Bowie County, Texas. (Hearing R. p. 133-134).

83. On December 28, 2009, Javarrow Young was convicted of the misdemeanor offense of theft in Harris County, Texas. (Hearing R. p. 134).

84. In November 2009, Javarrow Young was convicted of the misdemeanor offense of prostitution in Harris County, Texas. (Hearing R. p. 134).

85. The Court finds that Lance Hall had no personal knowledge of the crime for which Applicant was convicted or of the circumstances of the witnesses' testimony at trial.

VI. Consideration of Applicant's Allegations and the Evidence.

JAVARROW YOUNG IS NOT CREDIBLE

86. The Court find that Javarrow Young is not credible for the following reasons:

a. Mr. Young's extensive criminal history includes multiple felony and misdemeanor convictions for crimes of moral turpitude.

b. As described above, at trial, Mr. Young's testimony was that he did not see the shooting because they had driven away from the area and across the interstate. His testimony at trial that he did not see the actual shooting is consistent with his written statement to the police, introduced at trial into evidence as Defendant's Exhibit 2 (R.R. Vol. 18, p. 82).

c. Mr. Young's affidavit almost twenty years later that Julius Murphy was not the shooter is undermined by the fact that Julius Murphy confessed to shooting the victim. (R.R. Vol. 19, p. 16-23, 104-106).

d. In his Affidavit attached as an exhibit to Applicant's Application for Writ of Habeas Corpus, Mr. Young does not state that he saw Chris Solomon shoot the victim and does not otherwise identify the basis for his statement that he "never told them that Chris pulled the trigger." Further, his Affidavit does not directly state that Chris pulled the trigger. While he states he did not tell the jury the whole truth, he does not elaborate on that statement.

87. Applicant provided an affidavit from Jennifer Hopson Hancock wherein she states:

> At that time, I brought the subject of the murder up again when I overheard my uncle joking with Mr. Young about being a murderer. They were on the balcony at my apartment and, when I overheard this

> comment, I asked Mr. Young about it. At first, Mr. Young indicated that he did not want to talk about it. But my uncle Ray encouraged Mr. Young to tell me what had happened and he did. Mr. Young told me that he had robbed and killed somebody. He further said that, back in 1997 and 1998, what he told police and testified to relating to Julius Murphy and the crime was not 'the whole truth.' He went on to tell me that Julius Murphy took the rap for the murder, but Mr. Murphy was not the one who did it. He explained that he had made a deal and did whatever he had to do to keep himself out of trouble, including lying during his testimony at Mr. Murphy's trial to hide his own role in the murder and keep himself out of prison. He said he lied on Mr. Murphy and Mr. Murphy took the rap because he (Javarrow) had a family and a kid and Mr. Murphy did not.

These hearsay statements from Mr. Young contradict his own affidavit where he implied that Chris Solomon was the shooter. The statements Ms. Hancock allegedly heard Mr. Young make, although not completely clear, infer that Mr. Young may have been the shooter. No mention is made that Chris Solomon was the shooter. These inconsistencies again call into question the veracity of Mr. Young's affidavit.

88. At the evidentiary hearing, the Applicant called Ms. Hancock to testify to the contents of her affidavit. The State objected to her testimony on the grounds of hearsay. After her testimony concluded, the trial court sustained the objections to her

testimony; however, the general substance of her testimony is contained in the affidavit submitted with Applicant's subsequent application.

89. Applicant also provided an affidavit from Elena Byrd, who was in the car with Javarrow Young on the night in question. Her affidavit is entirely silent as to where they were located at the time of the shooting. If the inference of Mr. Young's affidavit is that the car he was in was located in a position making it possible for him to see that Chris Solomon committed the murder, it would be logical that Ms. Byrd, who was in the same car, would also have seen the murder, and would have stated that, as well as the identity of the shooter, in her affidavit. Her affidavit indicates she is unaware of whether Mr. Young received any promises of leniency or threats of prosecution from the district attorney's office.

90. Mr. Young was not present at the evidentiary hearing to testify; and therefore, the State was not provided an opportunity to cross-examine him.

91. Based on the above findings, see supra Findings 84-88, the Court finds that Javarrow Young is not credible and neither is his affidavit.

92. Applicant has failed to prove that Mr. Smith or Ms. Wright made any threats of prosecution or promises of leniency to Mr. Young or that Young gave false testimony at trial.

CHRISTINA DAVIS IS NOT CREDIBLE

93. The Court find that Christina Davis is not credible for the following reasons:

a. Ms. Davis provided an affidavit—attached to Applicant's subsequent state habeas

application—wherein she stated "I later talked to the District Attorneys, Bobby Lockhart, Al Smith, and Kristie Wright, who told me that if I did not testify they would charge me with conspiracy to commit murder." This statement is undermined by the testimony given by both Mr. Smith and Ms. Wright at the live evidentiary hearing that Bobby Lockhart, the elected district attorney, never participated in meetings with witnesses. In addition, Mr. Smith and Ms. Wright were unequivocal that no threats were made to Ms. Davis and that she was a very willing and eager witness.

b. Ms. Davis's affidavit also states, "The District Attorneys also told me I was not allowed to talk to Julius's attorneys because it could interfere with the case." This statement is undermined by testimony given by Mr. Schubert and Mr. Smith at the live evidentiary hearing, testifying Ms. Davis had a meeting set up to give an interview to Mr. Murphy's attorneys and that it was her own request to have one of the prosecutors present at the meeting. That request did not come to fruition, but Ms. Davis did give an interview to defense counsel.

c. Ms. Davis's affidavit states, "After I testified, the District Attorney's told me for the first time that I would not be charged with any crime." This statement is undermined by testimony given by Mr. Schubert and Mr. Smith at the live evidentiary hearing. Mr. Schubert stated he knew Ms. Davis was not being charged, and he found it odd. He recalled a conversation with prosecutors at a pre-trial hearing where they discussed Ms. Davis

not being charged. Mr. Smith stated that prior to the trial he repeatedly told Ms. Davis she was not going to be charged because she did not do anything to be criminally liable.

94. Ms. Davis was not present to testify at the evidentiary hearing, and therefore, the State did not have an opportunity to cross-examine her.

95. Based on the above findings, the Court finds that Christina Davis is not credible, and neither is her affidavit.

96. Applicant has failed to prove that Mr. Smith or Ms. Wright made any threats of prosecution or promises of leniency to Ms. Davis or that Ms. Davis gave false testimony at trial.

APPLICANT'S ALLEGATIONS ARE GENERALLY NOT CREDIBLE

97. The Court, having taken judicial notice of the trial transcript, finds that neither Applicant nor his trial attorneys raised any issue or presented any evidence at trial that Javarrow Young was an eyewitness to the shooting or alternatively the actual shooter.

98. The Court finds that neither Applicant nor his appellate attorney raised any issue on direct appeal alleging that Javarrow Young was an eyewitness to the shooting or alternatively the actual shooter.

99. The Court finds that neither Applicant nor his state habeas attorney raised any issue or presented any evidence during his initial state habeas application that Javarrow Young was an eyewitness to the shooting or alternatively the actual shooter.

100. The Court find that neither Applicant nor his federal habeas attorneys raised any issue or presented any evidence during his federal habeas application that Javarrow Young was an eyewitness to the shooting or alternatively the actual shooter.

101. If it is to be believed that Javarrow Young either saw Chris Solomon commit the murder or that Mr. Young played a role in the murder, Applicant would have been aware of same, yet allegations of this nature were not raised at anytime before September 24, 2015.

102. There is no sworn testimony by Applicant denying that he was the shooter.

AL SMITH IS CREDIBLE

103. The Court finds that Al Smith credibly denied any threats of prosecution or promises of leniency made to either Javarrow Young or Christina Davis. The Court finds Smith credible for several reasons:

a. Mr. Smith's recollection of events surrounding the "interview" of Ms. Davis by Mr. Schubert is more in line with testimony at trial, than that of Mr. Schubert. At trial, Mr. Schubert acknowledged, through Ms. Davis, that she was kept waiting because he was running late due to a doctor's appointment. Mr. Smith recalls being informed Mr. Schubert had a doctor's appointment and needed to reschedule the interview, but Mr. Smith was unable to reach Ms. Davis to advise her of the change. This is in contrast to Mr. Schubert's recollection of events, where he testified at the evidentiary hearing that he and Mr. Smith were waiting together, and Ms. Davis was running late.

b. No explanation has been provided about why Mr. Smith would need to threaten or promise leniency to Mr. Young or Ms. Davis. Mr. Murphy gave a full confession to the murder. Neither Mr. Young, nor Ms. Davis had any criminal liability according to Mr. Smith, so there was nothing he could use to strike a deal if the State wanted to.

c. The only evidence offered to contradict Mr. Smith's testimony with regard to not offering a deal or making a promise of leniency with regard to Javarrow Jones are the Affidavit of Javarrow Jones and the hearsay statements of Mr. Jones offered through Jennifer Hopson Hancock, and the Court has found Mr. Jones not to be credible.

d. The only evidence offered to contradict Mr. Smith's testimony with regard to not offering a deal or making a promise of leniency with regard to Christina Davis is the Affidavit of Christina Davis, and the Court has found Ms. Davis not to be credible.

KRISTIE WRIGHT IS CREDIBLE

104. The Court finds that Kristie Wright credibly denied making any threats of prosecution or promises of leniency to both Javarrow Young and Christina Davis. The Court finds Ms. Wright credible for several reasons:

a. Ms. Wright would make defense counsel aware in cases where she had met with witnesses and decided to offer them a deal for leniency in some way. Ms. Wright never was in the position to offer a witness a deal in exchange for their testimony, and she never made a deal with any defendant.

b. Ms. Wright talked with Christina Davis on the phone often. Ms. Davis was in contact with the prosecutors a lot. Ms. Davis was anxious to get it over with and always wanted to be kept up on the case. She was not a reluctant witness.

c. Ms. Wright recalls Javarrow Young as being pretty cooperative. Ms. Wright is unaware of any promises made to Javarrow in exchange for his testimony.

d. No explanation has been provided about why Ms. Wright would need to threaten or promise leniency to Mr. Young or Ms. Davis. Mr. Murphy gave a full confession to the murder.

105. The Court further finds persuasive Mr. Schubert's live testimony that he does not recall any statements by Christina Davis during the interview about threats or promises of leniency made by the prosecutors. As competent trial counsel, the Court finds Mr. Schubert's testimony — that he would have inquired into whether any deals or threats were made — is significant, because he does not recall Christina Davis suggesting that such threats or deals were made. Moreover, given Mr. Schubert's concerns at the time related his perception of Mr. Smith's reputation and his resulting heightened vigilance, his testimony — that he received no indication from Ms. Davis of threats or deals — further supports the testimony of Al Smith and Kristie Wright that no such threats or deals were made.

CONCLUSIONS OF LAW

I. Law Governing Applicant's Claims

1. Applicant's suppression-of-evidence claim is governed by *Brady v. Maryland*, 373 U.S.83 (1963). *See Ex parte Miles*, 359 S.W.3d 647, 664-65 (Tex. Crim. App. 2012). An applicant must prove that the State failed to disclose evidence, such evidence is favorable and the evidence is material, meaning there is a reasonable probability that the outcome of trial would have been different had it been disclosed. *Id.* at 665. The suppressed evidence must also be admissible in court. *Id*.

2. Applicant's unknowing presentation of false evidence claim is governed by *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). The Due Process Clause of the Fourteenth Amendment can be violated when the State uses material false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex.Crim.App. 2014), *citing Ex parte Chabot*, 300 S.W.3d 768, 770-71 (Tex.Crim.App. 2009); *see also Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex.Crim.App. 2012). A due-process violation may arise not only through false testimony specifically elicited by the State, but also by the State's failure to correct testimony it knows to be false. *See Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). In reviewing a claim alleging the use of materially false testimony, the reviewing court must determine: (1) whether the testimony was, in fact, false, and, if so, (2) whether the testimony was material. *See Ex parte Weinstein*, 421 S.W.3d at 665. Determining whether testimony is false is distinct

from the materiality inquiry. *See id.* The first prong in a false-testimony claim is whether the testimony was, in fact, false. *See id.* The proper question in a false-testimony claim is whether the particular testimony, taken as a whole, gave the jury a false impression. *See Ex parte Weinstein*, 421 S.W.3d at 666; *Ex parte Chavez*, 371 S.W.3d at 208. The second prong in a false-testimony claim is materiality. *See Ex parte Weinstein*, 421 S.W.3d at 665. Only the use of material false testimony amounts to a due-process violation. *See id.* And false testimony is material only if there is a reasonable likelihood that it affected the judgment of the jury. *See id.*; *see also Ex parte Chavez*, 371 S.W.3d at 208. The defendant must prove both prongs of his false-testimony claim by a preponderance of the evidence. *See Ex parte Weinstein*, 421 S.W.3d at 665; *Ex parte Napper*, 322 S.W.3d 202, 242-44 (Tex. Crim. App. 2010).

3. Applicant bears the burden of proving, by a preponderance of the evidence, facts that would entitle him to relief. *See ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).

II. Legal Conclusions

4. Applicant has failed to show by a preponderance of the evidence that the State made any undisclosed threats or promises of leniency to Javarrow Young or Christina Davis. Thus, Applicant cannot show that the State suppressed evidence in violation of *Brady v. Maryland*.

5. Applicant has failed to show by a preponderance of the evidence that the witness Javarrow Young gave any false testimony at trial. Therefore, he has failed to show that the State

knowingly or unknowingly presented false testimony or failed to correct evidence it knew to be false.

6. Applicant has failed to show by a preponderance of the evidence that the witness Christina Davis gave false testimony at trial. Therefore, he has failed to show that the State knowingly or unknowingly presented false testimony or failed to correct evidence it knew to be false.

7. Assuming solely for purposes of the supplemental application for writ of habeas corpus that Applicant proved Javarrow Young gave false testimony at trial, Applicant's written confession to shooting the victim Jason Erie, as well as statements to Detective Ronnie Sharp confessing to the murder, as well as testimony from other witnesses indicating Applicant was the triggerman, demonstrate that while Javarrow Young now infers that he would have testified at trial that Chris Solomon was the shooter, at the time of the offense, Applicant took responsibility and confessed to being the shooter. Thus, assuming Javarrow Young's position is that Chris Solomon was the shooter, Applicant cannot show a reasonable probability of a different result or material falsity given that Applicant confessed to the murder and all other witnesses indicate Applicant was the triggerman.

RECOMMENDATION THAT APPLICATION FOR WRIT BE DENIED

For the forgoing reasons, the court recommends that Applicant's subsequent application for writ of habeas corpus be DENIED. The Court Orders that these Findings of Fact and Conclusions of Law be

forwarded to the Court of Criminal Appeals, together with any other pleadings not already forwarded.

Signed: March 8, 2018.

/s/ Bill Miller
Bill Miller, Judge Sitting by Assignment
5th Judicial District, Bowie County

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-38,198-04

EX PARTE JULIUS JEROME MURPHY, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
IN CAUSE NO. 97-F-462-102
IN THE 102ND JUDICIAL DISTRICT COURT
BOWIE COUNTY

***Per curiam*. ALCALA, J., filed a concurring and dissenting opinion.**

O R D E R

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

In August 1998, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set applicant's punishment at death.

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[1] Unless otherwise indicated all references to Articles refer to the Code of Criminal Procedure.

This Court affirmed applicant's conviction and sentence on direct appeal. *Murphy v. State*, No. AP-73,194 (Tex. Crim. App. May 24, 2000)(not designated for publication). This Court denied relief on applicant's initial post-conviction application for a writ of habeas corpus. *Ex parte Murphy*, No. WR-38,198-02 (Tex. Crim. App. Apr. 10, 2002) (not designated for publication).[2]

On January 17, 2006, applicant filed in the trial court a subsequent application for a writ of habeas corpus. In the subsequent application, applicant asserted that he was intellectually disabled and, therefore, exempt from execution. We remanded the issue to the trial court, and that court determined that applicant should be denied relief. We agreed. *Ex parte Murphy*, No. WR-38,198-03 (Tex. Crim. App. Nov. 19, 2014) (not designated for publication).

On September 24, 2015, applicant filed a second subsequent application in the trial court. In this application, applicant asserts that (1) the district attorney's office failed to disclose threats of prosecution and promises of leniency to the State's two main witnesses as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); (2) the State unknowingly presented false testimony through one of these witnesses in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); and

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[2] On July 15, 1998, applicant filed with this Court an application for a writ of prohibition requesting this Court to prohibit the trial court from ordering him to submit to a psychiatric exam. The Court denied him leave to file that application on July 16, 1998. *See Ex parte Murphy*, No. WR-38,198-01 (no written order issued).

(3) evolving standards of decency dictate that the death penalty is no longer constitutional.

On October 12, 2015, this Court stayed applicant's execution until further order of this Court. After reviewing applicant's subsequent application, we find that his first and second claims satisfy the requirements of Article 11.071 § 5. Accordingly, we remand those claims to the trial court for resolution.

IT IS SO ORDERED THIS THE 15th DAY OF JUNE, 2016.

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