



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-81,480-02

EX PARTE WILLIAM OWENS, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 10F0132-005-B IN THE 5TH DISTRICT COURT
FROM BOWIE COUNTY**

ALCALA, J., delivered the opinion for the unanimous Court.

O P I N I O N

In this subsequent application for a writ of habeas corpus¹ challenging his conviction for aggravated sexual assault of a child, applicant William Owens asserts that the State withheld an exculpatory police report in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Applicant contends that this newly available police report indicates that the complainant, his daughter Julie who was four years old at the time she was

¹ See TEX. CODE CRIM. PROC. art. 11.07, § 4.

sexually abused, had alleged that another man, Billy Speights, sexually assaulted her.² We deny relief because applicant has failed to show that there is a reasonable likelihood that, if the report had been available at trial, a jury would not have convicted him.

In 2011, a jury convicted applicant of aggravated sexual assault of a child, and after learning about an extraneous sexual assault of another young child, it assessed a sentence of life imprisonment along with a fine of \$10,000. Applicant's conviction and sentence were affirmed on direct appeal. *Owens v. State*, 381 S.W.3d 696, 700 (Tex. App.—Texarkana 2012). In the instant subsequent habeas application, applicant presents newly available evidence, a police report concerning Julie's allegations of sexual abuse by Billy Speights. Applicant submits that in 2016, after the denial of his initial habeas application, he came into possession of this police report from the State's file on Speights.³ Applicant asserts that the police report contains exculpatory information implicating Speights in the assault of Julie and that, had the report been made available to him at trial, there is a reasonable likelihood of a different outcome. We remanded the application to the habeas court. The habeas court made factual findings regarding applicant's *Brady* claim indicating that the State erroneously represented that the Speights file did not contain any information concerning Julie and that

² Julie is the pseudonym used by the court of appeals. For continuity, we will continue to refer to the complainant as Julie. See TEX. R. APP. P. 9.10.

³ At the time of Julie's outcry in March 2008, Speights was being investigated for sexually assaulting Julie's brother, John. Speights was later convicted of sexually abusing John, who was approximately six years old at the time of the abuse. John is the pseudonym used in the police reports.

the report was not previously available to applicant. The habeas court, however, did not make conclusions of law.

The discovered police report from Speights's file details that after applicant's children began living with her, Nora Mitchell⁴ notified the police that the children were telling her about sexual abuse, and the children were then interviewed at the Children's Advocacy Center. During those interviews, the children claimed that they had been sexually assaulted by Speights. During her CAC interview, Julie was asked if someone had ever hurt her, and she replied "Uncle Billy." When asked what her Uncle Billy did, Julie pointed to her female sexual organ and said he touched her down there with his finger. Julie told several inconsistent scenarios about how the abuse transpired. The police report states that it is unclear when and where Speights touched Julie. The investigator who drafted the instant police report based on the interviews spoke with the investigator assigned to applicant's case to discuss the allegations Julie had made against Speights. Due to the lack of clarity in Julie's description of the events, no charges were brought against Speights for his conduct with Julie.

Applicant contends that this police report constitutes *Brady* material because it could have been used to impeach trial testimony by Julie, the CAC interviewer, and Nora Mitchell. Additionally, he asserts that this report would have led to the discovery of the CAC interview with Julie in which she mentioned only Speights when she was asked if anyone had hurt her.

⁴ Nora Mitchell took custody of both Julie and John a few months after the allegations of abuse against applicant arose.

We conclude that the police report constitutes newly discovered evidence that may be considered in applicant's subsequent habeas application, but that it is inadequate to establish a violation of his due process rights under *Brady*. Applicant has not shown the materiality of the police report and thus has failed to establish his *Brady* claim.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. To establish a claim under *Brady*, an applicant must demonstrate that (1) the State failed to disclose evidence; (2) the evidence withheld is favorable to him; (3) the evidence is admissible in court; and (4) the evidence is material to guilt or punishment. *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). Evidence is "material" to guilt or punishment if there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different. *Id.* The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. *Id.* at 666. When evaluating whether the materiality standard is satisfied, the strength of the exculpatory evidence is balanced against the evidence supporting conviction. *Id.* Thus, to establish the materiality of withheld evidence, an applicant must show that "in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure." *Id.* An applicant need not show that he more likely

than not would have been acquitted had the evidence been admitted. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (citing *Smith v. Cain*, 565 U.S. 73 (2012)). “He must show only that the new evidence is sufficient to undermine confidence in the verdict.” *Id.* “If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.” *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 113 (1976)).

The outcome of this habeas application turns on the materiality of the excluded police report. At trial, the State presented evidence of Julie’s positive identification of applicant as her sexual abuser with her references to “her daddy” and “Bubba” as a person who had sexually abused her. Applicant defended himself with evidence that, at one point, Julie had recanted her allegations against him. Furthermore, applicant was permitted to impeach Julie’s identification with her claim that her abuser had white hair and that applicant did not have that hair color. However, applicant’s counsel argued to the trial court that he wanted to present his theory that Speights, who had blonde hair, was the abuser rather than applicant. The court declined that request by essentially determining that it appeared that Julie had been abused by applicant and Speights. As the State argues, the police report does not establish that only one person assaulted Julie. The information in the police report would have provided a stronger basis upon which to impeach Julie’s identification of applicant, but not to the extent that there is a reasonable likelihood this information would have affected the jury’s verdict or undermines our confidence in the verdict. In the police report and CAC

interview, Julie referred to the sexual abuse by Speights by referring to him as “Uncle Billy,” in contrast to her references to applicant as “daddy” and “Bubba.” Although it is true that Julie’s testimony at applicant’s trial vacillated at times and she acknowledged she had previously recanted her allegations against applicant, her testimony was found persuasive by the jury in spite of these issues. We cannot agree under these circumstances that the police report showing that Julie also alleged sexual abuse against Speights during approximately the same time period establishes a reasonable likelihood of a different outcome at trial had this information been disclosed to the defense.⁵ Although applicant’s discovery of this police report meets the procedural requirements for consideration of his subsequent habeas application and it would have been prudent for the State to tender it to the defense, the report is not material to applicant’s guilt. We, therefore, deny habeas relief.

Delivered: November 7, 2018

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⁵ For reasons we have already essentially explained above, we also reject applicant’s claim that his trial counsel was ineffective for failing to obtain this police report. *See Strickland v. Washington*, 466 U.S. 668 (1984). The record shows that, prior to trial, counsel requested access to Speights’s file but was improperly denied access by the State based on its misrepresentation that the file contained no information relevant to applicant’s case. Under these circumstances, counsel’s performance did not fall below an objective standard of reasonableness, given that he properly requested the information at issue and his inability to obtain the police report was not due to any deficiency on his part. Accordingly, we deny relief as to applicant’s ineffective-assistance claim.

Appendix B

. 5th District Court's Findings of Fact and Conclusions of Law

CAUSE NO. 10F0132-005-B

EX PARTE

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IN THE DISTRICT COURT
OF BOWIE COUNTY, TEXAS
5TH JUDICIAL DISTRICT

WILLIAM OWENS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this day, the Court considered Applicant's Second Application for Writ of Habeas Corpus and Supplemental Application for Writ of Habeas Corpus, filed pursuant to art. 11.07, Texas Code of Criminal Procedure. Having reviewed Applicant's Second Application and Supplemental Application, together with Memorandums in Support, the State's Original Answer to Applicant's Second Application for Writ of Habeas Corpus, Applicant's Response to the State's Answer, the Affidavit of trial counsel, the Affidavit of Kristian Young, the Assistant District Attorney who prosecuted Applicant's case, the Record and applicable law, the Court makes the following findings.

A. BACKGROUND

1. Following a jury trial in this matter, Applicant was found guilty of the offense of Aggravated Sexual Assault of a Child and was thereafter sentenced to a term of life in the Texas Department of Criminal Justice – Institutional Division and a fine of \$10,000.
2. The victim in the case was Applicant's daughter, who was referred to under the pseudonym, Julie Mae, and was four years old at the time of the offense.
3. Applicant appealed his conviction to the Sixth Court of Appeals, alleging five errors, one of which was that the State violated the holding of *Brady v. Maryland* by not providing exculpatory evidence. The Court found there was not a *Brady* violation and affirmed the trial court's judgment.

4. Applicant filed his Application for Writ of Habeas Corpus asserting various grounds.
5. This Court entered an Order Recommending Denial of Applicant's Application for Writ of Habeas Corpus.
6. The Court of Criminal Appeals denied the Writ without written order.
7. On or about August 29, 2016, Applicant filed his Second Application for Writ of Habeas Corpus.
8. By Order dated December 15, 2016, the Court of Criminal Appeals ordered the trial court to make findings of fact and conclusions of law in regard to Applicant's *Brady*, actual innocence and ineffective assistance of counsel claims.
9. By Order dated December 19, 2016, the trial court ordered the State to respond to Applicant's allegations.
10. The trial court entered an Order, which was served on December 28, 2016, ordering trial counsel to file an affidavit responding to Applicant's allegations.
11. Trial counsel filed an affidavit on January 12, 2017.
12. The State filed its Motion to Extend Time to File Answer on January 18, 2017, which the trial court granted.
13. The State filed its Original Answer to Applicant's Second Subsequent Application for Writ of Habeas Corpus on February 23, 2017.
14. On March 6, 2017, Applicant filed his Response to the State's Answer.
15. By Order dated March 23, 2017, the Court ordered Kristian Young, the attorney who represented the State at trial and on direct appeal, to file a response to the Application.
16. Young filed her Affidavit on April 7, 2017.

17. By Order dated April 12, 2017, the Court ordered the State to produce to the Court for *in camera* review, its file in the case of *the State of Texas v. Owens* and in the case of *the State of Texas v. Speights*, as well as the Children's Advocacy Center ("CAC") interviews in each. The State produced the files and the CAC video interviews, and the Court conducted an *in camera* review of same.

B. LEGAL STANDARDS

Subsequent Writ Standard

18. As stated above, Applicant has previously filed an application for writ of habeas corpus.
19. Section 4 of Article 11.07, Texas Code of Criminal Procedure, governs the filing of subsequent applications for writ of habeas corpus. Section 4(a) states that a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
- (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
 - (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.
20. The factual basis of a claim is unavailable under Subsection (a)(1) if it "was not ascertainable through due diligence on or before that date."
21. In the instant case, Applicant argues that the factual basis for his claim was unavailable at the time of the prior application because the State denied the existence of *Brady* material. Prior to trial, Applicant filed a *Brady* motion, seeking exculpatory evidence. At the pre-trial hearing, Applicant renewed his *Brady* motion, asserting that Billy Speights, another jail inmate, told him that Speights had also been accused of fondling or inappropriately

touching Owen's daughter and requesting Speights' police file. (See Reporter's Record, Vol. 2, Pages 154-157).¹ The prosecutor responded that it was not her case, but she had reviewed the case pending against Speights, and the alleged victim in the Speights case was a male victim, "not the child in this case." (See Reporter's Record, Vol. 2, Page 157). The trial court denied the motion. (See Reporter's Record, Vol. 2, Page 166). Applicant contends that after his appeal, he ended up in Billy Speights' prison section, and Speights presented him with the police report in his clerk's file that the State had denied the existence of.

22. The Court finds that the factual basis for his claim was not available at the time he filed his original Application for Writ of Habeas Corpus, and therefore, the current claim could not been presented in his original Application for Writ of Habeas Corpus.²

Brady v. Maryland

23. When challenging the State's failure to disclose exculpatory evidence on habeas, an applicant must show by a preponderance of the evidence: (1) "that the State failed to disclose evidence, regardless of the prosecution's good or bad faith;" (2) "that the withheld evidence is favorable to applicant;" and (3) "that the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of

¹ All references herein are to the Record in the case of *the State of Texas v. Owens*.

²Issues raised on direct appeal, cannot be raised in a writ of habeas corpus. In his direct appeal to the 6th Court of Appeals, Applicant asserted his *Brady* claim, arguing that the trial court erred in refusing to require the State to turn over a file on another criminal defendant, in an unrelated case, or in failing to conduct an in camera review of that file. Applicant's *Brady* claim was based on a statement purportedly made to him by another inmate while Owens was in jail pending trial. In affirming the trial court, the Court of Appeals stated, "there was no suggestion that anything in the Speights file contained exculpatory or material evidence regarding the charge pending against Owens." Although the Court of Appeals considered Applicant's *Brady* claim in connection with the allegations against Speights, Applicant was not yet in possession of Speights's file, and the Court did not know the content of the file, which does include statements by the victim in this case against Speights. Accordingly, the Court finds Applicant's prior appeal does not bar him from making this claim.

the trial would have been different.” *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002) (internal citations omitted).

24. An applicant cannot show constitutional “materiality” by alleging that a piece of undisclosed evidence “might have helped the defense.” *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002)(quoting *U.S. v. Agurs*, 427 U.S. 97, 109-10 (1976)).
25. An applicant must submit evidence supporting his or her claim. See *Ex parte Richardson*, 70 S.W.3d at 871.

Actual Innocence

26. A claim of actual innocence based on newly discovered evidence is cognizable on post-conviction writ of habeas corpus. *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 398 (Tex.Crim.App.1994, orig. proceeding).
27. For an applicant to establish that he or she is entitled to relief on a *Herrera*-type claim, the applicant must “prove by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.” *Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002). The Court in *Ex parte Franklin* held “that when an applicant asserts a *Herrera*-type claim based on newly discovered evidence, the evidence presented must constitute affirmative evidence of the applicant's innocence.” 72 S.W.3d 671, 678 (Tex.Crim.App.2002).
28. Moreover, the Court in *Ex parte Brown* stated as follows:

Not only must the habeas applicant make a truly persuasive showing of innocence, he must also prove that the evidence he relies upon is ‘newly discovered’ or ‘newly available.’ The term ‘newly discovered evidence’ refers to evidence that was not known to the applicant at the time of trial and could not be known to him even with the exercise of due diligence.

Ex parte Brown, 205 S.W.3d 538, 545 (Tex.Crim.App.2006).

Ineffective Assistance of Counsel Standard

29. To obtain habeas corpus relief for ineffective assistance of counsel under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), an applicant must show that counsel's performance "was deficient and that a probability exists, sufficient to undermine our confidence in the result, that the outcome would have been different but for counsel's deficient performance." *Ex Parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004).
30. Moreover, "applicant must overcome the 'strong presumption that counsel's conduct fell within the wide range of professional assistance.'" *Ex Parte Chandler*, 182 S.W.3d 350, 354 (Tex.Crim.App. 2005).
31. "[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

C. GROUND ONE: NEWLY DISCOVERED EVIDENCE SHOWS APPLICANT'S RIGHT TO DUE PROCESS AND DUE COURSE OF LAW UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION WERE VIOLATED WHEN THE STATE SUPPRESSED AND FAILED TO DISCLOSE EVIDENCE FAVORABLE TO THE ACCUSED.

In connection with this ground, Applicant contends that the State withheld exculpatory evidence in the form of a police report, wherein the victim in his case made the same allegations against Billy Speights. He contends that the State denied that the file in *the State of Texas v. Speights* contained exculpatory or material evidence regarding the charge pending against him. Applicant further contends that while in prison, Applicant was moved to the same section as Speights, and Speights told him that he had a copy of the police report in his (Speights) case

which contains exculpatory evidence that should have been turned over to Applicant. Specifically, Speights stated that the police report showed that the victim alleged Speights fondled her. In addition, the victim's brother, Applicant's son, also made allegations against Speights. Applicant contends that instead of pursuing a case against Speights, charges were filed against him. Applicant contends that this report, dated November 5, 2008, prior to Applicant's October 27, 2011 trial, is exculpatory because (1) it shows that there was only one assault, and the victim had given inconsistent statements as to who committed the assault; and (2) relates to the victim's motive and bias, therefore, requiring admittance under Texas Rule of Evidence 412(b), (2)(c) and (E) .

The trial court makes the following findings of fact in connection with ground 1:

32. Prior to trial, trial counsel filed a Motion for Evidence Favorable to the Defendant, moving the Court to order the prosecution to disclose to the defense all exculpatory or favorable evidence for the defendant in the prosecution's possession, specifically requesting "any evidence which would tend to show that the Defendant did not commit the alleged offense" and "any evidence which would indicate that a person other than the Defendant committed or is criminally responsible for the offense alleged." Based on the Affidavit of Alwin A. Smith, Applicant's trial counsel, the State did not respond to the *Brady* motion, and trial counsel's request to interview Speights was denied by the Public Defender's Office.
33. During the pre-trial hearing, trial counsel renewed his *Brady* motion, having become aware that Billy Speights met with Applicant in jail³ and told him he had also been

³ Based on Applicant's assertions, it appears Speights and Applicant were in jail together prior to Applicant's trial, at which time Speights notified Applicant of the allegations the victim had made against him, and that following Applicant's conviction, they were in the same prison unit, at which time Speights gave Applicant the Report in question.

accused of the same allegation by the Applicant's daughter, the victim in the case in question. (See Reporter's Record, Vol. 2, Pages 154-157).

34. Kristian Young was the Assistant District Attorney who prosecuted Applicant and handled his direct appeal. Ms. Young worked for the Bowie County District Attorney's office from May of 2001 through January 2004 and from January 2007 through July 2012. (See Affidavit of Kristian Young).
35. Based on Ms. Young's Affidavit, prior to trial, defense counsel inquired as to another case pending in the Bowie County District Attorney's office in which the victim of William Owens accused Billy Speights of the "same or similar crimes," and prior to Applicant's trial, she retrieved the file concerning Billy Speights located within the Bowie County District Attorney's office. *Id.* Ms. Young contends that nothing in the file located in the Bowie County District Attorney's office indicated there were any female victims in the case pending against Billy Speights at that time. *Id.* She states the only reports in the file contained within the Bowie County District Attorney's office regarding Billy Speights concerned a male victim who made allegations against Speights. *Id.*
36. Ms. Young did not take any further steps to determine if there were any alleged female victims in the *State of Texas v. Billy Speights* file that was present in the Bowie County District Attorney's office. *Id.* Ms. Young determined that because the alleged victim in Billy Speights case was male, the victim could not be the same as in Applicant's case. *Id.*
37. During Ms. Young's employment with the Bowie County District Attorney's office, she indicates the District attorney's office always had an "open file" policy. *Id.*
38. Defense counsel was previously employed as an Assistant District Attorney with the Bowie County District Attorney's office and she indicates defense counsel should been

aware of the open file policy. *Id.* Ms. Young does not recall whether defense counsel took the opportunity to review Billy Speights' file in the Bowie County District Attorney's office prior to Applicant's trial. *Id.* Ms. Young states that defense counsel was afforded the opportunity to review the file present in the Bowie County District Attorney's office on Billy Speights prior to Applicant's trial. *Id.*

39. Even if trial counsel had taken advantage of the State's "open file" policy and reviewed the file in the Owens case, he would not have discovered the Speights report or the allegations the victim made against Speights. Other than the Affidavit of Kristian Young, the Record does not reflect whether trial counsel would have had the opportunity to review the State's file in the Speights case pursuant to the State's "open file" policy.
40. At the pre-trial hearing, trial counsel contended Speights was Shannon's "live-in boyfriend" at the time the outcry was made. (See Reporter's Record, Vol. 2, Page 155).
41. Based on the Affidavit of Trial Counsel, Applicant told him that the victim's caretaker (Nora Mitchell) had contacted him and told him the victim had recanted the allegations against Applicant and stated that she "told the story against the Applicant at the insistence of her mother who was the girlfriend of Speights." Trial counsel spoke to Nora Mitchell to confirm this.
42. At the pre-trial hearing on the *Brady* motion, trial counsel asserted that on the CAC video in the present case, the name the victim gave was inaudible, but it was clear she did not identify William, the defendant. (See Reporter's Record, Vol. 2, Pages 155-156). The interviewer went back over this with her, and she identified "Bubba." Counsel contended

that, at that time, the victim identified “every significant male in her life as Bubba.”⁴ (See Reporter’s Record, Vol. 2, Page 156). Trial counsel stated that during the CAC interview, the victim also identified that Bubba, who she identified as her dad, had white hair⁵. *Id.* Trial counsel stated that Applicant does not have white hair, but his understanding was that Speights did have blond hair with bleached tips. *Id.*

43. At the pre-trial hearing, in response to the *Brady* motion, the State stated:

Judge, I looked into the case pending. I looked up who the victim was in Billy Speights’s case. It’s a male victim. I didn’t – it’s not in my court. I don’t know anything else about it. I mean, I – know it’s not the child in this case.

(See Reporter’s Record, Vol. 2, Page 157).

44. Counsel for the State then stated that the child has never told her of the allegations against Speights. (See Reporter’s Record, Vol. 2, Page 158)

45. Trial counsel asserted that in the victim’s CAC interview in the present case she made an allegation that Applicant molested her brother.⁶ (See Reporter’s Record, Vol. 2, Pages 156-157).

46. Trial counsel asserted that Speights was indicted and was pending trial for sexually molesting Applicant’s brother. *Id.*

47. Counsel for the State asserted that there was no mention of Speights in the CAC interview in this case. (See Reporter’s Record, Vol. 2, Page 159).

⁴ At trial, the victim testified that she called William Owens “Daddy,” and she sometimes referred to him as “Bubba Owens.” (See Reporter’s Record, Vol. 3, Page 172). She also testified she called her brother “Bubba,” but no one else. (See Reporter’s Record, Vol. 3, Page 179).

⁵ During the trial, outside of the presence of the jury, the forensic interviewer testified that the victim told her he had white hair. (See Reporter’s Record, Vol. 3, Page 120) When asked if defendant had white hair, the forensic interviewer stated, no. (See Reporter’s Record, Vol. 3, Pages 120-121).

⁶ Outside of the presence of the jury, the forensic interviewer testified that during the forensic interview, the victim told her that defendant had also touched her brother. (See Reporter’s Record, Vol. 3, Pages 121-122).

48. Trial counsel stated there is a CAC interview of victim's brother in the present case, wherein he denies that his father did anything to him, but he had not been provided that. (See Reporter's Record, Vol. 2, Page 160).
49. Counsel for the State stated that trial counsel had never requested the victim's brother's CAC interview with regard to Owens. (See Reporter's Record, Vol. 2, Page 160).
50. Trial counsel asserted that the victim had recanted with regard to the allegations that Applicant molested her. (See Reporter's Record, Vol. 2, Pages 154-155).
51. The State argued that the victim would be able to explain why she had recanted. (See Reporter's Record, Vol. 2, Page 161).
52. During the trial, the victim testified that she had recanted her story, after going to live with Nora Mitchell, her caretaker, because she felt safe and didn't want her dad's family to be mad at her, and she was scared her daddy might go to jail. (See Reporter's Record, Vol. 3, Pages 174-175).
53. During the pre-trial hearing on the *Brady* motion, the trial court stated that the issue is whether the evidence of the outcry against Speights contradicts or rebuts the outcry against Applicant. (See Reporter's Record, Vol. 2, Pages 161-162). The trial court stated that if the victim is alleging there was one assault and one time made the allegation against Applicant and another time made the allegation against Speights, then it is admissible. *Id.* If the victim alleged there were two assaults, and that she was assaulted by Applicant and by Speights, it is not admissible. *Id.*
54. In ruling on the *Brady* motion, the trial court stated:
- Okay. Well, as it's being related to me, what I'm hearing is that there's an allegation by the child of a sexual assault against Mr. Speights, but we're not seeing the same thing that they reference in the Casterson case where there's only one abuser and the question is which one of the two did it.

What I'm hearing is, there's an allegation made against Mr. Owens, there's an allegation made against Mr. Speights, and the allegations are very, very, very similar about what was done. But that's not the same thing as saying there's only been one assault.

So that being the case, under the Casterson case, it would not be admissible. If it's not admissible, then it's not exculpatory, so there so there would not be any Brady for the State to even produce even assuming that such existed.

(See Reporter's Record, Vol. 2, Page 164).

55. After trial counsel stated that without being able to see the police file, "we don't know if we're talking about two similar incidents or the same incident," the Court stated:

Unless the defense proves to me the existence of something which is clearly exculpatory, then my role is simply to look at the State and the State says, we don't have anything, and we move on. If there's a sentence – if there's a finding of guilt and a sentence, then at later times on a post-conviction relief, there would be opportunity to make any kind of discovery into it.

But at this stage, that's the role of the Court on the issue of Brady. And I'm not hearing anything that tells me that there's only been one assault and that it contradicts or rebuts the allegations against this defendant. So in the absence of that, then it wouldn't be – wouldn't be exculpatory, wouldn't be Brady.

So with respect to the first allegation of the complaining victim's outcry against Mr. Speights, I'm going to overrule the defendant's motion.

(See Reporter's Record, Vol. 2, Pages 164-166).

56. Outside of the presence of the jury, Missy Davison (Stout), the outcry witness, who was the forensic investigator, stated that she did recall the victim stating during the forensic examination, that Nana (victim's grandmother) had touched and humped her brother and that Nana had humped Bubba, her daddy. (See Reporter's Record, Vol. 3, Page 122). When asked if she believed "Nanna had humped on Bubba," Davison responded that it is not her job to form opinions. *Id.*

57. At trial, the victim testified that when she was visiting her daddy, he touched her “tutu,” which was her “private area,” with his fingers. (See Reporter’s Record, Vol. 3, Page 173). She testified his fingers went inside her “tutu,” and he moved them around inside her “tutu.” (See Reporter’s Record, Vol. 3, Pages 173-174).
58. At trial, the victim testified that when she spoke to the forensic interviewer, she told her she was on the bed without any clothes on when the alleged act happened, but had told her grandmother (Nana) it happened in the bathtub. (See Reporter’s Record, Vol. 3, Pages 182-183). She acknowledged she had told “Nana” that her brother knocked on the door, and her dad got on to him. (See Reporter’s Record, Vol. 3, Page 184). She then testified that the story she told “Nana” was not true. (See Reporter’s Record, Vol. 3, Page 185). The following exchange occurred between the victim and trial counsel:

Q. And the truth is, is that this didn’t happen, did it?

A. (No response.)

Q. It’s okay, Sweetheart.

A. No, sir.

Q. You told Miss Nora that you told that story because your moma and Nana told you you had to tell that story, didn’t you?

A. Yes, sir.

Q. You didn’t want to tell that story anymore, did you?

A. No, sir.

Q. Because that story wasn’t true, was it?

A. No, sir.

On Redirect, the following exchange occurred between the victim and the attorney for the State:

Q. Now, Morgan, when you say that that's the story they wanted you to tell—well, first of all, let's go back to clarify what Mr. Smith said.

Actually, you told Miss Missy—and I know, Honey, he was asking you questions fast, and it's easy—...

Q. You didn't tell Miss Missy that you didn't have your clothes on, did you?

A. No, sir—no, no, ma'am.

Q. You told her that you had your panties and your shirt on?

A. Yes, ma'am.

Q. And that he put his hand inside your panties?

A. Yes.

Q. Okay. And when—after your daddy touched you, you were scared, weren't you?

A. Yes, sir-- ma'am.

Q. When you say that that's the story they wanted you to tell, they wanted you to tell that it happened in the bathtub?

A. Yes, ma'am.

Q. And that's why you—you didn't – I mean, you wanted to tell that. Now, what you told Miss Missy what happened on the bed at your daddy's house, that's when he touched your tutu?

A. Yes, ma'am.

On re-cross, the following exchange occurred between the victim and trial counsel:

Q. Morgan Sweetie, when you talked to Miss Missy, when you first started talking about this with her, you told her that you had your panties on and your top on, didn't you?

A. Yes, sir.

Q. And later in the interview, though, you told her that you didn't have any clothes on, didn't you?

A. Yes, sir.

Q. Okay. And, Honey, are you just saying yes, sir, because you think I want you to?

A. No, sir.

Q. Or are you telling us the truth?

A. Yes, sir.

Q. You're telling us the truth?

A. Yes, sir.

Q. Okay. Nana and your mama wanted you to tell this story about your daddy, didn't they?

A. Yes, sir.

Q. Because they were afraid your daddy was going to get custody of you and your brother?

A. Yes, sir.

The following exchange occurred on redirect by the State:

Q. And Morgan, again, to clarify, when you talked to Miss Missy, you said you had your panties on, your shirt on, right?

A. Yes, ma'am.

Q. Okay. Is—and then you said that your daddy did not have his clothes on?

A. No, ma'am.

Q. No, you didn't say that, or, no, he didn't?

A. Yes.

Q. You did say that?

A. Yes, ma'am.

Q. Okay. And did you see anything come out of your daddy's tutu?

A. No, ma'am.

Q. And when—when we're talking about the story that they wanted you to tell, they wanted you to tell the story about him touching you in the bathtub.

A. Yes, ma'am.

On further re-cross, the following occurred:

Q. I'm sorry, Sweetheart. I'm going to ask this one more time. They also wanted you to tell this story that you told to Miss Missy, didn't they?

A. Yes, ma'am (sic).

On further redirect, the following exchange occurred:

Q. Morgan, I know we've been back and forth and back and forth, and you promise to tell this jury the truth today?

A. Yes, ma'am.

Q. Did your daddy touch you on your tutu?

A. Yes, ma'am.

Q. Did he touch you inside your tutu?

A. Yes, ma'am.

Q. Did it hurt?

A. Yes, ma'am.

(See Reporter's Record, Vol. 3, Page 185-189).

59. Kathy Lach, the SANE nurse who examined the victim, testified that when taking a history from the victim, the victim stated that he put his fingers in her tutu and touched her private with his fingers, and touched her butt with his fingers. (See Reporter's Record, Vol. 3, Page 165). She testified she wrote that the patient labels anatomical picture stating that the victim calls the breast area her private, her vagina area her tutu, and her buttocks her butt. *Id.* She testified that the victim stated he touched me inside my

underwear on my tutu, and he touched her privates under her shirt. (See Reporter's Record, Vol. 3, Pages 165-166).

60. Based on Ms. Young's Affidavit, in meeting with the victim in this case, she made it clear Applicant sexually assaulted her. (See, Affidavit of Kristian Young).
61. The Bowie County Sheriff's Department Supplement Report dated November 5, 2008, taken in connection with allegations made by the victim's brother against Billy Speights, which is the report at issue, indicates the victim herein and her brother were interviewed on August 25, 2008 at the CAC center by Missy Stout, the forensic interviewer in connection with allegations made against Billy Speights (as well as those made against Applicant). (See, Exhibit A to the Memorandum in Support of Habeas Corpus filed by Applicant, William Owens). The detective watched the interview via television from a remote room. *Id.*
62. The Report reflects that when the victim, referenced as Jane, was asked if someone had ever hurt her, she said "Uncle Billy," and when asked what Uncle Billy did, the victim pointed to her vagina and said he touched her down there with his finger. *Id.* She stated they were at the trailer park in her bedroom. *Id.* She stated she was awake in her bed and was wearing a shirt and pants. *Id.* She stated Uncle Billy came in her bedroom and went under the blanket and got her. *Id.* She stated he touched her with his finger by pulling her pants to the side and touching her private, which she demonstrated. *Id.* She stated she yelled, and Uncle Billy hid in the closet. *Id.* Her grandmother came in and told Billy to get out and quit messing with her grandchildren. *Id.* Later in the interview, she stated she was in her bedroom when Uncle Billy came in her bedroom when Uncle Billy touched her tutu, and he opened the window and pulled her out of bed and took her to his truck by

the dumpster. *Id.* In the Report, the investigator stated “it is unclear when and where Speights touched Jane. She talks about several locations this happened.” *Id.*

63. The Report states, “Jane told several scenarios of what happened. She said he came through the window, she said hid in the closet, he tip toed through the house, she said he was under the bed and he peeked up and he did it and then let her go back to sleep.” *Id.*

64. The Report states that the interviewer got the anatomical dolls out, and the victim picked the one that looked like Uncle Billy, who she described as “being white, a grown up, a boy and his hair is cut off. She picked out the boy doll that had on a blue shirt.” *Id.*

65. During the CAC interview in connection with the allegations against Speights, when the victim was asked to show what Uncle Billy had done to her, the victim took the girl doll and pulled her pants down and told the interviewer that Uncle Billy put his finger in her private “on the inside” and “it went all the way to her butt.” *Id.* The victim lifted the girl doll’s shirt up and said “he even touched me there,” pointing to the breasts of the girl doll. *Id.* The interviewer asked what he did there, and she moved her finger in a circular motion on top of the breasts. *Id.*

66. During the interview, the victim stated Uncle Billy’s finger went inside her butt, but did not know what it felt like. *Id.*

67. During the CAC interview in connection with the allegations against Speights, when the interviewer brought out the anatomical dolls, Jane started to move in her chair, sitting on one leg and rubbing her vagina on her leg. *Id.* The victim opened the shirt of the boy doll and pulled down the pants, touching the tutu (penis). *Id.* She said Uncle Billy went to the bathroom, and when asked if she had ever seen Uncle Billy’s tutu, she said no. *Id.*

68. The Report stated that the victim said it happened when she was five years old at her grandma's house, but it was unclear whether she meant Elizabeth or Nora, since she calls both Grandma⁷. *Id.* She stated that Uncle Billy said "don't scream, don't scream," but she screamed and her grandmother came in. *Id.*
69. The Report states that Investigator Gisela Altamirano was currently working on a case of Aggravated Sexual Assault against William Owens, alleging he molested his biological daughter, referred to in the Speights Report as Jane. *Id.*
70. The Report states the investigator went to a residence and spoke to Speights, who had "short blond/orange hair." *Id.*
71. The detective in the Speights case called Nora Mitchell to ask about some of the information the victim spoke of in her video interview. *Id.* In the video interview she stated that Billy Speights came in through a gate, and Nora Mitchell stated there was not a gate at her house. *Id.* The victim said Speights pulled her out of her bedroom window. *Id.* Nora Mitchell said she always kept the window locked and did not feel like that happened. *Id.* The victim said she yelled when Speights was in her room touching her, and her grandma came in and told Speights to get away from her grandchildren. *Id.* Nora Mitchell said she did not remember that happening. *Id.* Nora Mitchell stated she believed the victim was getting things mixed up with her biological father, William Owens. *Id.*
72. Although the investigator asked Nora Mitchell about the gate at her house, the bedroom window at her house and whether she ever walked in on Speights and the victim and told him to leave her grandchildren alone, the Report reflects that the victim was living with her grandmother, Elizabeth Mitchell, not Nora Mitchell, when the alleged offense by

⁷ However, earlier in the Report, it reflects that the victim was living with Elizabeth, not Nora, when the alleged offense occurred. (See Exhibit A to the Memorandum in Support of Habeas Corpus filed by Applicant, William Owens).

Speights occurred. *Id.* The Report also indicates Speights was living with Elizabeth at that time. *Id.* There is no information in the Record as to whether there was a gate at Elizabeth Mitchell's house, whether there was a bedroom window at Elizabeth Mitchell's house or whether Elizabeth Mitchell ever walked in on Speights and the victim, at which time she told him to leave her grandchildren alone.

73. The Report states that the patient history in the SANE exam performed on the victim in the Owens case "is similar to my case with Speights." *Id.*

74. The investigator in the Speights case spoke to the detective in the Owens case, and she said she thought there was a gate at Owens' residence. *Id.* She also stated that the victim used her finger in a circular motion describing some of the allegations. *Id.*

75. The Report in the Speights case states:

Due to the video of Jane Smith being unclear on exactly what happened and the fact that Jane may be getting things mixed up with what happened with her father, I request my case #B08-02516 be closed.

Id.

76. The investigator requested the case against Speights with regard to the victim's allegations be closed in the "unfounded status." *Id.* The detective told Nora Mitchell he would not be getting a warrant on Speights for Jane, but would be getting a warrant on Speights for Jane's brother. *Id.* Ms. Mitchell agreed and stated that "the city was supposed to arrest William Owens on the case that involved Jane." *Id.*

D. GROUND TWO: APPLICANT PRESENTS A CLAIM OF ACTUAL INNOCENSE. BY A PRFEPONDERANCE OF THE EVIDENCE, BUT FOR THE CONSTITUTIONAL BRADY VIOLATION DESCRIBED IN GROUND ONE NO RATIONAL JURY COULD HAVE FOUND APPLICANT GUILTY BEYOND A REASONABLE DOUBT.

In connection with this ground, after discussing his above-referenced *Brady* violation claim, Applicant contends that given that the victim recanted her allegations against Applicant before trial and during trial⁸, it is more likely than not that no rational jury could have convicted him if they would have seen evidence that the victim accused Speights of committing the crime instead of Applicant. Applicant asserts he is innocent and did not commit the crime alleged. He states the sexual assault did occur, but he did not commit it. The Court makes the following findings:

77. The victim recanted the allegations against Applicant prior to trial. (See Reporter's Record, Vol. 3, Pages 174-175).
78. The victim later took back her recantation, and at trial, she testified as to her reasons for recanting. (See Reporter's Record, Vol. 3, Pages 174-175).
79. At trial, the victim testified that Applicant had committed the acts alleged. (See Reporter's Record, Vol. 3, Pages 173-174 and 189).
80. The victim did not recant the allegations against Applicant at trial. At most, her testimony was inconsistent.

⁸ With regard to Applicant's contention that the victim "recanted" her allegations against Applicant during trial, referencing the Court of Appeals' Opinion, the Court assumes Applicant is referring to the testimony set forth above wherein the victim's testimony was unclear as to whether she was testifying the assault did not take place or it took place, but not in the bathroom. On direct appeal, the Sixth Court of Appeals stated, "at most, this is a conflict in the victim's testimony," but "her final testimony was clearly that abuse did in fact occur." The Court of Appeals did not find this to be a recantation.

81. There is no evidence in the Record that the victim has recanted after the trial; therefore, there is no new evidence of a recantation to provide the basis for an actual innocence claim.

82. Even if a *Brady* violation occurred as alleged by Applicant, the police report in the Speights case, the purportedly exculpatory evidence in question, would not unquestionably establish Applicant's innocence, as is required to succeed on a *Herrera* actual innocence claim.

E. GROUND THREE:IN THE EVENT THE STATE CLAIMS SOMEHOW TRIAL COUNSEL SHOULD HAVE HAD ACCESS TO THIS ASSERTED BRADY MATERIAL PREVIOUSLY DESCRIBED, THEN HE ASSERTS A CLAIM HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

For his third ground, Applicant asserts that in the event the State does not accept responsibility for its actions, trial counsel was ineffective for failing to get exculpatory evidence the State claimed did not exist. The Court makes the following findings:

83. Prior to trial, trial counsel filed a Motion for Evidence Favorable to the Defendant, moving the Court to order the prosecution to disclose to the defense all exculpatory or favorable evidence for the defendant in the prosecution's possession, specifically requesting "any evidence which would tend to show that the Defendant did not commit the alleged offense" and "any evidence which would indicate that a person other than the Defendant committed or is criminally responsible for the offense alleged."

84. During the pre-trial hearing, trial counsel renewed his *Brady* motion, having become aware that Billy Speights met with Applicant in jail and told him he had also been accused of the same allegation by the Applicant's daughter, the victim in the case in question. (See Reporter's Record, Vol. 2, Pages 154-157) The Court denied the motion. (See Reporter's Record, Vol. 2, Page 166).


85. During the prosecutor, Ms. Young's, employment with the Bowie County District Attorney's office, it always had an "open file" policy. (See Affidavit of Kristian Young).
86. Defense counsel was previously employed as an Assistant District Attorney with the Bowie County District Attorney's office and was aware of the open file policy. *Id.* Ms. Young does not recall whether defense counsel took the opportunity to review Billy Speights' file in the Bowie County District Attorney's office prior to Applicant's trial. *Id.* Defense counsel was afforded the opportunity to review the file present in the Bowie County District Attorney's office on Billy Speights prior to Applicant's trial. *Id.*
87. Even if trial counsel had taken advantage of the State's "open file" policy and reviewed the file in the Owens case, he would not have discovered the Speights report or the allegations the victim made against Speights. Other than the Affidavit of Kristian Young, the Record does not reflect whether trial counsel would have had the opportunity to review the State's file in the Speights case pursuant to the State's "open file" policy.
88. If the Report is exculpatory, *see* paragraphs 32-76 above, the State had the duty to produce the report to defense counsel pursuant to Defense counsel's discovery requests.

F. GROUND FOUR: APPLICANT ASSERTS A CLAIM OF ACTUAL INNOCENCE. BY A PREPONDERANCE OF THE EVIDENCE, BUT FOR THE CONSTITUTIONAL VIOLATION OF INNEFFECTIVE ASSISTANCE OF COUNSEL, NO RATIONAL JURY COULD HAVE FOUND APPLICANT GUILTY BEYOND A REASONABLE DOUBT.

With regard to Applicant's fourth ground, the Court incorporates by reference the findings in Sections "D" and "E" hereinabove.

The District Clerk shall transmit to the Court of Criminal Appeals the following: a certified copy of these Findings of Fact and Conclusions of Law; and any documents not previously forwarded for review by that Court as provided by law.

Signed this the 10th day of May 2017.


11:53 pm, May 10, 2017
Unique Digital Signature Identifier:
336886055752626750-1494439019117

Bill Miller, Judge Presiding
5th District Court