No. _____

In the Supreme Court of the United States

ELIJAH DWAYNE JOUBERT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-78,119-02

EX PARTE ELIJAH DWAYNE JOUBERT, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 944756-B IN THE 351ST DISTRICT COURT
HARRIS COUNTY

***Per curiam*.**

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]

Applicant was convicted in October 2004 of capital murder. The State introduced evidence at trial showing that Applicant, Dashan Glaspie, and Alfred Brown robbed a check-cashing business in Harris County on April 2, 2003. Employee Alfredia Jones and

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

police officer Charles Clark were shot and killed during the robbery. Applicant gave a statement to police in which he admitted participating in the robbery but denied shooting anyone. Pursuant to a plea deal with the State, Glaspie testified against Applicant at trial. Glaspie testified that Applicant shot Jones and Brown shot Clark.

The jury was authorized to find Applicant guilty either as a principal actor or as a party. After finding Applicant guilty of capital murder, the jury answered the special issues submitted under Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Joubert v. State,* 235 S.W.3d 729 (Tex. Crim. App. 2007). This Court denied relief on Applicant's initial post-conviction application for a writ of habeas corpus. *Ex parte Joubert*, No. WR-78,119-01 (Tex. Crim. App. September 25, 2013) (not designated for publication).

Applicant further challenged his conviction in Cause No. 4:13-cv-03002, styled *Elijah Dwayne Joubert v. William Stephens,* in the United States District Court for the Southern District of Texas, Houston Division. In October 2015, the federal district court entered an order staying its proceedings for Applicant to return to state court to present his claims. Applicant's instant post-conviction application for a writ of habeas corpus, *Ex parte Joubert*, No. WR-78,119-02, was received in this Court in June 2016.

Applicant presents nine allegations in his -02 writ application in which he challenges the validity of his conviction and resulting sentence. In October 2016, we

remanded this application for the trial court to consider Claims One and Two, in which Applicant alleged that the State: (1) presented Glaspie's false testimony about Brown's participation in the offense, and (2) suppressed landline telephone records and grand jury testimony which would have supported Brown's alibi and impeached Glaspie's credibility. *See Napue v. Illinois,* 360 U.S. 264 (1959); *Brady v. Maryland,* 373 U.S. 83 (1963). After holding a hearing in July 2017, the trial court recommended that relief be denied on Claims One and Two.

After we received the supplemental clerk's record containing the trial court's findings of fact and conclusions of law, the State asked this Court to "remand the instant proceedings back to the habeas court in light of recent developments." The "recent developments" included: the State's discovery of new evidence suggesting that the prosecutor who tried Brown's case knowingly failed to disclose landline telephone records to Brown's defense team prior to or during his trial; Brown's filing of a civil rights lawsuit against Harris County in federal court, which Harris County moved to dismiss under Federal Rule of Civil Procedure 12(b)(6); and the appointment of Special Prosecutor John Raley, who reviewed Brown's case and concluded in a March 2019 report that it "meets the legal definition of 'actual innocence.'"

In June 2019, we stayed the proceedings so the State could file its evidence of the recent developments with the district clerk. We also ordered the habeas judge to make findings of fact and conclusions of law regarding whether the filed evidence should be

considered and if it had any effect on Claims One and Two in Applicant's case. In December 2020, the trial court signed Applicant's proposed findings of fact and conclusions of law recommending that relief be granted on Claims One and Two.[2] We disagree.

In order for Applicant to prevail on his *Brady* claim, he must show that: (1) the State suppressed evidence; (2) the suppressed evidence was favorable to him; and (3) the suppressed evidence is material. *See Ex parte Lalonde,* 570 S.W.3d 716, 724 (Tex. Crim. App. 2019). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id., quoting United States v. Bagley,* 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

The State does not contest that it suppressed favorable evidence. However, the suppressed evidence, considered collectively and balanced against the evidence supporting Applicant's conviction, is not material. *See Ex parte Miles,* 359 S.W.3d 647, 666 (Tex. Crim. App. 2012); *Kyles v. Whitley,* 514 U.S. 419, 436 (1995). The State presented evidence that three people participated in the instant offense. Glaspie and Applicant both named Brown as the third participant, but the true identity of the third participant does not ultimately matter in light of Applicant's own statement to police.

[2] The trial court stated that it was withdrawing its 2017 findings and conclusions and replacing them with its 2020 findings and conclusions.

Applicant admitted that he actively participated in the offense and he knew Jones was "gonna die" if the police came to the scene. Therefore, the suppressed evidence supporting Brown's alibi does not undermine our confidence in the outcome of Applicant's trial.

With regard to Applicant's *Napue* claim, Applicant must show by a preponderance of the evidence that (1) false testimony was presented at his trial and (2) the false testimony was material to the jury's verdict. *See Ex parte De La Cruz,* 466 S.W.3d 855, 866 (Tex. Crim. App. 2015), *citing Ex parte Weinstein,* 421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014). We review *de novo* the ultimate legal conclusion of whether such testimony was "material." *See Weinstein,* 421 S.W.3d at 664.

The State now concedes that Glaspie falsely testified at Applicant's trial about Brown's participation in the instant offense. However, it is not reasonably likely that Glaspie's false testimony about Brown's participation in the offense affected the judgment of the jury in Applicant's trial. *See id.* at 665 (holding that false testimony is "material" only if there is a "reasonable likelihood" that it affected the judgment of the jury). Based upon our own review, we deny relief on Claims One and Two.

In Claims Three and Four, Applicant asserts that there is "newly discovered evidence" which shows that Glaspie is the one who shot and killed Jones. In Claims Five and Six, Applicant alleges that he received ineffective assistance of counsel with regard to the presentation of mitigating evidence at the punishment phase of his trial. In Claim

Seven, he contends that he received ineffective assistance of appellate counsel. In Claim Eight, he contends that the State presented false testimony of witness A.P. Merillat at the punishment phase of his trial. In Claim Nine, Applicant claims that trial counsel was ineffective for failing "to request a preliminary hearing of Merillat's testimony." With regard to these claims, we find that Applicant has failed to satisfy the requirements of Article 11.071, § 5. Accordingly, we dismiss Claims Three through Nine as an abuse of the writ without reviewing the merits of those claims.

IT IS SO ORDERED THIS THE 23RD DAY OF JUNE, 2021.

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351ST DISTRICT COURT
HARRIS COUNTY, TEXAS

EX PARTE ELIJAH DWAYNE JOUBERT,	)	
APPLICANT	)	**CAUSE NO. 944756-B**
	)	

APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant, Elijah Dewayne Joubert was convicted and sentenced to die for capital murder in the shooting death of Alfredia Jones in the course of the April 3, 2003, robbery of a Houston America Cash Express (ACE) store. Before the Court are two claims raised in Applicant's subsequent application and authorized by the CCA for consideration pursuant to Tex. Code Crim. Proc. art. 11.071, § 5.

Claim One asserts the prosecution violated Due Process when the State knowingly presented false testimony at Applicant's trial.

Claim Two asserts the State denied Applicant due process of law when it suppressed evidence favorable and material to Applicant's defense.

This Court previously recommended that the CCA deny Applicant's pending post-conviction claims. But, in 2019, the State moved the CCA to return the matter to this Court in light of new developments in the case of Applicant's co-defendant, Alfred DeWayne Brown, appending four documents illustrative of those events in support of the motion.

The CCA granted the State's motion, ordered this Court to "make written findings of fact and conclusions of law regarding whether the filed materials should be considered in Applicant's case and if so, whether the filed materials have any effect on Applicant's Claims One and Two." *Ex parte Joubert*, No. WR-78,119-02 Order at 5 (Tex. Crim. App. July 12, 2019).

As set out in more detail below, this Court reviewed the filed materials and determined

that they contain two types of evidence relevant to Applicant's claims. One document, the Raley Report, includes reproductions of documents that were available to the prosecution at the time of Applicant's trial including telephone records corroborating Mr. Brown's alibi, an email from the lead detective informing the prosecutor of the corroboration, and a subpoena application the prosecutor filed after receiving the corroboration. In addition, the District Attorney's press releases contain admissions by the State's representative that correspond with elements of Applicant's claims.

There are a number of factual and legal issues that are not contested by the parties which are relevant to Applicant's two claims before the Court. As to Claim One, the District Attorney admits that the documents reproduced in the Raley Report (a) constitute objective, contemporaneous evidence that directly contradicts the testimony of several prosecution witnesses who testified against Applicant, and (b) that the contradiction was known to the prosecution before it presented those witnesses' testimony. Because one of those witnesses, co-defendant Dashan Glaspie, also testified that he would forfeit his plea agreement with the State if his testimony was contradicted by any other evidence, and he retained his plea agreement, the State knowingly presented false testimony to Applicant's jury. Accordingly, the Constitution requires Applicant receive a new trial if there is any reasonable likelihood the jury relied upon the false testimony.

This Court was unable to make that determination in 2017 because the State had not yet disclosed the email and subpoena application which establish the prosecutor's knowledge that the testimony he presented was false. The State admits the email was suppressed until 2019. With the email and subpoena application, and subsequent developments in the case of Mr. Brown, this Court can make the necessary findings for Claim One. In *State v. Brown*, the State

made judicial admissions that Mr. Brown is actually innocent of involvement in the ACE robbery and murders. Those judicial admissions, and the District Attorney's evidentiary admissions summarized above, remove from contention the falsity and knowledge elements of Claim One. The materiality standard must be applied based on how the filed documents would have altered the State's case at trial, which is a matter of record. This Court finds there is more than a reasonable likelihood that Applicant's jury relied upon the prosecution's false testimony when reaching each of its two verdicts. Accordingly, this Court concludes the Constitution requires that he receive a new trial based on Claim One.

The newly disclosed evidence also alters the analysis of Applicant's Claim Two. The State previously admitted that the telephone records were favorable to Applicant because they impeached Mr. Glaspie's testimony, and that the records were suppressed. The Constitution requires reconsideration because materiality "turns on the cumulative effect of all … evidence suppressed by the government." *Kyles*, 514 U.S. at 421; *id.* at 436 ("materiality … of suppressed evidence considered collectively, not item by item"). Thus, the telephone records must be viewed together with the newly disclosed email and subpoena application. *Kyles*, 514 U.S. at 421, 436. Viewed together, and in light of the record as a whole, the newly disclosed "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict(s)." *Id.* at 435.

As the State has acknowledged in the *Brown* case, the prosecution deliberately set out to convict an innocent man: Alfred Brown. The testimony in Applicant's trial identifying Mr. Brown as the third participant in the robbery was part of that scheme. This Court cannot say that a trial that included numerous witnesses providing false testimony, that was intended to deceive the jury that a man with a corroborated alibi shot and killed a police officer after Applicant cold-

bloodedly shot Alfredia Jones, the clerk at ACE, while Mr. Glaspie merely watched, produced a capital verdict that is worthy of confidence.

Applicant "need not show that he more likely than not would have been acquitted had the new evidence been admitted." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (internal quotation marks and citation omitted). The Supreme Court has held that an applicant who shows the suppression of favorable evidence "can prevail even if … the undisclosed information may not have affected the jury's verdict." *Id.*, 136 S. Ct. at 1006 n.6. Accordingly, this Court concludes the Constitution requires that Applicant receive a new, fair trial.

In light of the newly disclosed evidence and the State's admissions, this Court withdraws its previous Findings of Fact and Conclusions of Law, *Ex parte Joubert*, No. 944756-B, Aug. 4, 2017, and replaces them with the following findings of fact and conclusions of law regarding Claim One and Claim Two of Mr. Joubert's subsequent Application, which the CCA has authorized and sent back for findings. *Ex parte Joubert*, No. WR-78, 119-02, 2016 WL 5820502 (Tex. Crim. App. Oct. 5, 2016).

I. PROCEDURAL HISTORY

1. Applicant, Elijah Joubert, along with co-defendants Dashan Glaspie and Alfred Brown, were charged with capital murder in relation to the shooting deaths of Alfredia Jones and Houston Police Officer Charles Clark during an April 3, 2003, robbery of an America Cash Express (ACE) store.

2. The prosecution alleged that Mr. Brown and Applicant entered the store to rob it; the robbery was foiled by Officer Charles Clark; Mr. Brown shot and killed Officer Clark and Applicant shot store clerk Alfredia Jones with a different weapon; and the third co-defendant Mr. Glaspie waited and watched from outside.

3. Applicant was convicted of capital murder in the death of Ms. Jones and sentenced to death on October 21, 2004. Mr. Brown was tried and convicted of the capital murder of Officer Clark on October 18, 2005. Mr. Glaspie, who entered into a plea agreement in exchange for his cooperation and testimony against both co-defendants, pled guilty to a reduced charge of aggravated robbery and was sentenced, after providing his testimony at both trials, to a term of 30 years' imprisonment.

4. Applicant's conviction and sentence were affirmed by the CCA on direct appeal. *Joubert v. State*, 235 S.W.3d 729 (Tex. Crim. App. 2007).[1]

5. In December 2006, Applicant filed his initial application for writ of habeas corpus, pursuant to Tex. Code Crim. Proc. art. 11.071. This Court held a hearing on Applicant's claim that his trial counsel were ineffective for failure to investigate and present available evidence to impeach Mr. Glaspie's credibility at trial. Applicant presented seven witnesses who testified to Mr. Glaspie's bad reputation for truthfulness. *Ex parte Elijah Joubert*, No. 944756-A, 2 RR 59-110. Trial counsel testified, and agreed that "the credibility of [Mr.] Glaspie was critical to Mr. Joubert's case during the guilt/innocence and punishment." *Id.* at 2 RR 25.

6. On the issues as presented there, this Court recommended on April 18, 2013, that relief be denied. *Ex parte Elijah Dwayne Joubert*, No. 944756-A. The CCA adopted this Court's findings and conclusions, and based upon those findings and conclusions, and its own review, the CCA denied relief. *Ex parte Joubert*, WR-78,119-01 (Tex. Crim. App. Sept. 25,

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[1] Applicant raised seven points of error on appeal, including that the evidence was insufficient to support his conviction for capital murder where the State failed to corroborate the testimony of accomplice witness Dashan Glaspie, and that the trial court erred in prohibiting the defense from arguing that Mr. Glaspie's plea bargain was a mitigating factor in assessing punishment. *Joubert v. Texas*, AP-75-050, Brief for Appellant (Claims 4 and 6).

2013).

7. Applicant then filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of Texas on September 24, 2014.

8. In the meantime, this Court entered Agreed Findings of Fact and Conclusions of Law in co-defendant Alfred Brown's case, jointly provided by the State and Mr. Brown, in which this Court found that the State had "inadvertently" failed to disclose phone records that supported Mr. Brown's alibi for the time of the offense, and recommended that Mr. Brown's habeas application be granted. *Ex parte Alfred Dewayne Brown*, No. 1035159-A (May 28, 2013).

9. Based on this Court's findings and conclusions and its own review, the CCA held in *Ex parte Brown* that the State withheld evidence that was favorable and material to Mr. Brown's case, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and vacated Mr. Brown's conviction and sentence, returning the case to this Court for a new trial or other proceedings consistent with the CCA's opinion. *Ex parte Alfred Dewayne* Brown, No. WR-68, 876-01 (Tex. Crim. App. Nov. 5, 2014).

10. On June 8, 2015, this Court granted the State's motion to dismiss the capital murder charges against Mr. Brown on grounds of insufficient evidence.

11. In light of these developments in Mr. Brown's case and at the request of Applicant, the United States District Court stayed and held in abeyance the proceedings on Applicant's federal habeas corpus petition to permit Applicant the opportunity to present unexhausted issues to the state courts. *Joubert v. Stephens*, 4:13-CV-03002 Order (S.D. Tex. Oct. 15, 2015).

12. On June 9, 2016, Applicant filed his subsequent application for writ of habeas

corpus pursuant to Tex. Code Crim. Proc. art. 11.071, § 5, raising nine claims that he contended could not have been raised previously due to the State's suppression of material evidence, and deficient representation by his original state post-conviction counsel. *Ex parte Elijah Dewayne Joubert,* No. 944756-B.

13. The CCA authorized Applicant to proceed on two claims, in which Applicant alleged that the State presented false testimony from co-defendant, Dashan Glaspie,[2] and withheld exculpatory evidence that would have undercut Mr. Glaspie's testimony that Applicant killed Alfredia Jones,[3] and remanded the case to this Court for consideration. *Ex parte Joubert,* WR-78,119-02, 2016 WL 5820502 (Tex. Crim. App. October 5, 2016).

14. This Court reviewed the evidence then available, which included the trial and post-conviction records for Alfred Brown, as well as Applicant's subsequent application with attached exhibits, and the parties submitted proposed findings of fact and conclusions of law.

15. On July 24, 2017, this Court heard argument. Applicant's counsel argued that the State was aware of the evidence that supported Mr. Brown's alibi and still presented false testimony at Applicant's trial. Writ Hr'g. Tr. at 8 (Jul. 24, 2017).

16. The State took the position that the materials had been withheld inadvertently and that Mr. Brown's case was dismissed not because Mr. Brown was "actually innocent," but

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[2] Claim for Relief Number One:

THE PROSECUTION PRESENTED A FALSE AND MISLEADING IMPRESSION OF ITS' KEY WITNESS DASHAN GLASPIE'S TRUTHFULNESS BY WITHHOLDING EVIDENCE AND BY FAILING TO CORRECT TESTIMONY WHICH UNDERMINED THE BOLSTERING EFFECT OF THE STATE'S ZERO TOLERANCE PLEA AGREEMENT.

[3] Claim for Relief Number Two:

THE PROSECUTION WITHHELD MATERIAL EVIDENCE WHICH IMPEACHED ITS KEY WITNESS, DASHAN GLASPIE'S TESTIMONY AND WHICH WOULD HAVE UNDERMINED THE BOLSTERING FORCE OF THE STATE'S ZERO TOLERANCE PLEA AGREEMENT.

because there was "now insufficient evidence to support [Mr.] Glaspie's testimony because the other witnesses who put Mr. Brown in and around the scene of the capital murder, their testimony has gone south on the State." *Id.* at 16.

17. Based upon the facts then available, this Court found that Applicant's application was "legally and factually premised on the successful writ of co-defendant Alfred Dewayne Brown; that the State agreed Brown was entitled to habeas corpus relief after he successfully demonstrated the State committed a *Brady* violation; that in Brown's case, the State **unintentionally** failed to disclose certain phone records that would have supported Brown's alibi." *Ex parte Elijah Dwayne Joubert*, No. 944756-B, Findings of Fact and Conclusions of Law at 15 (Aug. 4, 2017) (emphasis added).

18. This Court found that the State did not contest the failure to disclose and favorability prongs of Applicant's *Brady* claim. *Id.* Based upon evidence then available, this Court found that Applicant had failed to satisfy that prong and, consistent with the State's proposed findings and conclusions, recommended that relief be denied on the *Brady* claim. *Id.* This Court's findings and conclusions did not address the merits of Applicant's Claim One, the false evidence claim, which was also absent from the State's proposed findings and conclusions. *Id.*

19. The CCA received the supplemental record containing this Court's findings and conclusions on October 30, 2017, but before the case was set for submission, the State moved the CCA to return the case to this Court "so that it may consider whether additional and/or different findings of fact and conclusions of law are necessary in the wake of recent developments in the

case of the applicant's co-defendant Alfred Dewayne Brown."[4]

20. The "recent developments" described by the State were that the Office of the District Attorney had discovered new evidence "suggesting that former Harris County District Attorney Dan Rizzo was informed about the existence of the phone records well before trial, yet failed to disclose or provide them to defense counsel or the jury," prompting the District Attorney to notify the State Bar of Texas "so that it may investigate the former prosecutor's professional conduct while handling the Brown case" and to appoint attorney John Raley to review Mr. Brown's claim of actual innocence related to a civil suit filed by Mr. Brown. *Id.* at 2-3. Additionally, the defendants in Mr. Brown's civil suit had filed a Motion to Dismiss premised on an expert's opinion that the withheld evidence Dockery phone records could also be interpreted as inculpatory of Mr. Brown. *Id.* at 2-3.

21. Noting that the record previously relied upon by this Court indicated that the evidence had been withheld "inadvertently"; that "recent developments may or may not" affect this Court's findings of fact and conclusions of law and its ultimate recommendation; that this Court is the most appropriate venue for consideration of new evidence; and that judicial economy favored allowing this Court to determine the impact of the new information to avoid a third remand, the State asked the CCA to stay the proceedings and remand so this Court may consider the "recent developments" and determine whether they affect Applicant's claims for relief. *Id.* at 5.

22. The State offered three exhibits in support of the motion:

1) A news release dated March 2, 2018, titled "Statement from Harris County

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[4] *Ex parte Joubert,* WR-78,119-02, Motion for the Court of Criminal Appeals to Remand the Instant Proceedings Back to the Habeas Court in Light of Recent Developments, (Tex. Crim. App. Aug. 29, 2018).

District Attorney Kim Ogg Regarding Newly Discovered Evidence in Alfred Brown Case."

2) A press release dated May 2, 2018, tilted "DA Ogg announces review of Alfred Brown case."

3) "Defendant Harris County's Rule 12(b)(6) Motion to Dismiss Claims Related to Alleged *Brady* Violations," dated March 1, 2019.

23. In the meantime, the review of the Alfred Brown case announced by DA Ogg in May 2018 was completed. *Report of Special Prosecutor John Raley to District Attorney Kim Ogg Regarding Alfred Dewayne Brown*, March 1, 2019 ("Raley Report").

24. March 1, 2019, the State filed an Amended Motion to Dismiss Mr. Brown's case on grounds that "no credible evidence exists that inculpates Alfred Brown in the April 3, 2003 murder of Charles Clark as alleged in Cause No. 1035159," and the State's belief that Mr. Brown is "actually innocent of the capital murder for which he was convicted and sentenced to death on October 25, 2005 in Cause No. 1035159." *State v. Brown*, No. 1035159, State's Motion to Dismiss at 4 (Mar. 1, 2019). The State submitted the Raley Report as an exhibit in support of its Amended Motion to Dismiss in *Brown*. *Id.* at Ex. A.

25. That same week, the State renewed its request for the CCA to remand Applicant's case back to this Court, adding the Raley Report, which had since been released, to the list of exhibits attached to the motion.[5]

26. On May 3, 2019, in *State v. Brown*, this Court withdrew its June 2015 Order of Dismissal and, "[f]or the reasons stated in the State's Amended Motion to Dismiss," ordered that Mr. Brown's case be dismissed "due to Alfred Dewayne Brown's actual innocence." *State v.*

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[5] *Ex parte Joubert*, WR,78-119-02, State's Renewed Motion for the Court of Criminal Appeals to Remand the Instant Proceedings Back to the Habeas Court in Light of Recent Developments (March 8, 2019).

Brown, No. 1035159 Order (May. 3, 2019).

27. On July 12, 2019, the CCA issued an order (a) staying Applicant's proceedings in that court, (b) directing the State to file the four new documents in this Court, (c) directing this Court to review those documents, and (d) directing this Court to "make written findings of fact and conclusions of law regarding whether the filed materials should be considered in Applicant's case and if so, whether the filed materials have any effect on Applicant's Claims One and Two." *Ex parte Joubert*, WR-78,119-02 (Tex. Crim. App. Jun. 12, 2019) (not designated for publication).

28. The State provided this Court with the four documents listed in the CCA's Order. In due course, this Court notified the parties that it had reviewed the new materials and determined that admissible evidence had changed the Court's evaluation of Applicant's claims.

29. In lieu of briefing or a hearing, and in light of the materials provided and the developments described herein, this Court determined that the record is sufficient to resolve Applicant's two claims. On November 2, 2020, this Court directed the parties to confer and to submit new proposed findings of fact and conclusions of law reflecting their views on the new evidence.

30. The parties conferred and agree as to the key premises of Applicant's claims – that co-defendant Alfred Brown was not a participant, that the trial prosecutor had evidence that would have exonerated Mr. Brown at trial; that the trial prosecutor withheld that evidence from both Applicant and Mr. Brown until long after trial; and that the trial prosecutor knew prior to and at all times during the prosecution of all three defendants that evidence in the State's possession, which had not been disclosed to the defense, was exculpatory of Mr. Brown and contradicted the case against Applicant; and that the trial prosecutor nonetheless presented

evidence and argument contradictory to that evidence and now known to be false.

31. Upon due consideration of the evidence and the parties' submissions, this Court now withdraws its previous Findings of Fact and Conclusions of Law, and replaces them with these, recommending that relief be granted.

II. CASE AT TRIAL

32. The decedent, Alfredia Jones was killed in the course of an armed robbery at an America Cash Express (ACE) store on April 3, 2003. The forensic testimony reflected that Ms. Jones was killed by a single gunshot wound to the head. 28 RR 95. HPD Officer Charles Clark walked in on the robbery and was shot and killed by a different weapon. 28 RR 95.

33. The police recovered a .45 caliber projectile and .45 caliber shell casing from the interior of the ACE store. 28 RR 24-125, 145-147, 152-154. The police also recovered two .380 caliber shell casings from the scene, and a 9-millimeter shell casing. The 9mm was believed to have been fired from Officer Charles Clark's service weapon. 28 RR 124-125, 145-147, 152-154. There were no video recordings of the robbery and shooting at the ACE store.

34. Acting on information received during the investigation, HPD officers separately arrested Dashan Glaspie, Alfred Brown, and Applicant on April 4, 2003. 26 RR 193; 27 RR 193-195; 27 RR 105-106; 28 RR 29-32.

35. Mr. Glaspie was arrested the morning after the crime; Applicant and Mr. Brown were arrested later that same day. Mr. Glaspie initially denied involvement, but once investigators had given him the names of Mr. Brown and Applicant and told him repeatedly that three people were involved, he began to implicate Mr. Brown and Applicant. Petition Ex. 21, Statement of Dashan Glaspie, pp. 30-33 (April 4, 2003).

36. In a pretrial suppression hearing on September 30, 2004, the State presented

testimony that, in an unrecorded interrogation at HPD headquarters, Applicant consistently denied involvement in the robbery and murders for two and a half hours. The Detectives decided it would be helpful to play a portion of Mr. Glaspie's statement for Applicant. Upon hearing the recording, Applicant reportedly said "Mother Fucker is telling y'all everything. They're going to kill me." 25 RR 26. This oral response was unrecorded, though the first part was described in an officer's report. 25 RR 40. HPD Homicide Detectives then began to video their interview with Applicant.

37. The Court denied the defense motion to exclude the video-taped recording of the subsequent interview between Applicant and HPD interrogators, 25 RR 46, but granted the defense motion to exclude the two oral statements. 26 RR 4.

38. Mr. Glaspie entered his guilty plea prior to Applicant's trial,[6] but would not be sentenced until after he had testified at both Applicant's and Mr. Brown's capital murder trials. If Mr. Glaspie complied fully with the terms of the agreement, he would be sentenced to 30 years' incarceration. *Id.* at 6-7. According to the plea, it would be the State that ultimately determined whether Mr. Glaspie had fully complied with the terms of the plea agreement, including whether he was 100% truthful, and would receive the negotiated benefit. *Id.*

39. In his opening statements of Applicant's trial, Assistant District Attorney (ADA) Dan Rizzo told the jury the evidence would show that Mr. Brown, also known as "Doby," shot and killed Officer Clark. 26 RR 20-21.

40. ADA Rizzo also told the jury it would "hear that after a lot of work we believed [Mr. Glaspie] to be the non-shooter." 26 RR 28.

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[6] *State v. Glaspie*, No. 994450, Plea (Jul. 19, 2004).

41. ADA Rizzo said that Mr. Glaspie would testify, that he "got a 30-year deal for aggravated robbery" and "part of that deal is that he has to testify truthfully." 26 RR 28. ADA Rizzo told the jury, if Mr. Glaspie "lies about anything . . . about one little minor thing," or if his testimony "doesn't match the evidence and the truth in any way, the deal is that he can be prosecuted for capital murder." 26 RR 29. According to the State, Mr. Glaspie had "a big hammer over his head to testify truthfully." 26 RR 29.

42. ADA Rizzo told the jury that Mr. Glaspie would testify that Applicant told him "'Shon, this bitch played us.' He [Applicant] raised up his hand, his arm, like a gangster, and shot her once in the head and that she dropped and died in the middle of the lobby. That's what this Defendant did." 26 RR 22. ADA Rizzo promised that "[a]ll of the evidence is going to be matching up for you." 26 RR 24.

43. ADA Rizzo suggested that the jury could determine whether Mr. Glaspie was lying by looking at the other evidence presented and that all that evidence would corroborate Mr. Glaspie's testimony. 26 RR 29-30. He informed the jury that they would receive records of the electronic doors at ACE store to compare with Mr. Glaspie's testimony and determine whether he is telling the truth. 26 RR 30.

44. ADA Rizzo additionally described the cell phone location data that would be presented, telling the jury "what I would like you to do, also, is to compare that evidence with Mr. Glaspie's statements to see if it corroborates it. Because those are things that cannot lie." 26 RR at 30. And, lastly, he urged the jury to watch how Mr. Glaspie testified. *Id.*

45. ADA Rizzo told the jury in his opening that "in his statement" Mr. Joubert "makes himself guilty as a party to the capital murder." 26 RR 26. Thus, "there won't be any doubt, based on his statement alone, that he's guilty of capital murder as a party, as a non-

shooter. **But that's not the truth. That's not what happened. He is the killer, based on the evidence, of Mrs. Jones**." 26 RR 26-27 (emphasis added).

46. Sheikah Mohammed Afzal testified that shortly after 9:00 a.m. on April 3, 2003, two men entered the furniture store where he was working, walked around, then left in the direction of the adjacent to ACE store. 26 RR 240, 244-45, 250-51. He testified that he had attended a line-up and thought Mr. Glaspie and Mr. Brown were the two men he had seen, but was not "100 percent sure." 26 RR 246-47.

47. Shoukat Hussein, a co-worker of Mr. Afzal, testified that, on April 3, 2003, around 9:15-9:20 a.m. he observed two men enter the furniture store. He thought he recognized photographs of Mr. Glaspie and Mr. Brown provided by the prosecution as the two men. 26 RR 277-80. Mr. Hussein testified that Mr. Brown left the store, walked in the direction of ACE Cash Express, and returned to the store. 26 RR 282-83. Then, both Mr. Brown and Mr. Glaspie left the store and Mr. Hussein heard two shots a few minutes later. 26 RR 283-84. On cross-examination, Mr. Hussein acknowledged that he had not been able to identify anyone in a line-up shortly after the crime. 26 RR 286-87.

48. A wrecker driver, James Wheat, who had been speaking with Officer Clark and followed him to the store after overhearing the robbery-in-progress dispatch, testified that he observed three black males exit the store, get in a white car, and drive off. He could not identify the men. 26 RR 50-51, 56-57.

49. A courier, Randy Love, stopped in highway traffic while passing the check cashing store, observed Officer Clark crouching behind the door and heard two shots. Mr. Love observed a black male emerge from the store and stand, with his hand extended, over the officer. He did not make any identification. 26 RR 137-140, 158-159.

50. Alisha Hubbard, a resident in Applicant's apartment complex, testified that around 8:15 a.m. on April 3, 2003, she saw Mr. Glaspie, Mr. Brown, and Applicant together in the apartment complex. 26 RR 202-07. She testified that she observed Mr. Glaspie loading bullets into the clip of his pistol, insert the clip into the weapon, and then load another clip. 26 RR 219-23. She further testified that she heard Mr. Glaspie ask the other two men if they were "ready to go do it." 26 RR 207.[7] On cross-examination, she admitted that she initially identified an man known as "Duece," rather than Mr. Brown. 26 RR 214.

51. LaTonya Hubbard testified that between 7:00 and 8:00 a.m. on the date of the offense, while stopped at a gas station, she observed Applicant and Alfred Brown standing next to a white Grand Am, which belonged to Mr. Glaspie's girlfriend. 26 RR 177, 182-87.[8] She testified that she observed Mr. Glaspie exit the convenience store and approach the Grand Am. 26 RR 186. She said that Mr. Brown had been wearing a black or blue Bomber's jacket and a dark cap. 26 RR 190. She further testified that when she saw the breaking news regarding the shooting at ACE store, she drove to the crime scene because she "had a feeling I knew who it was." 26 RR 192. Ms. Hubbard said she then returned home, spoke with her sister and called 9-1-1 to tell the police that she thought Mr. Glaspie, Mr. Brown and the Applicant had committed the crime; a few weeks later she collected $10,000 from Crimestoppers. 26 RR 194-195. On cross-examination, she admitted that in her statement to police, she had identified "Duece" rather than Mr. Brown. She explained that she "made a mistake in the lineup .... It was hard to know who they were with clothing over their head and a big jacket on." 26 RR 195-198.

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[7] Alisha Hubbard gave numerous conflicting accounts of what she saw. Ultimately, the State determined and admitted that her statements were "extremely suspect ... untrustworthy, and unusable." Raley Rpt. at 130.

[8] LaTonya Hubbard has since withdrawn her identification of Mr. Brown.

52. George "Ju-Ju" Powell,[9] who frequented Applicant's apartment complex, testified that on April 3, 2003, he observed Mr. Glaspie and Applicant arguing in the parking lot, and Applicant walking off. 27 RR 12-13, 19-20. Mr. Powell told the jury that Mr. Glaspie gave him a .45 caliber pistol and asked him to hold it for him. 27 RR 15-17. Mr. Powell took the pistol to his friend's house and hid it. 27 RR 22.

53. A series of four additional witnesses testified to the transfers of the gun between people in the apartment complex. 26 RR 226-237; 257-276; 27 RR 46-91.

54. HPD officers testified that there was no security video of the robbery/murder, and no fingerprint or gunshot residue linking Applicant to the crime. Ballistic testing on the recovered projectile believed to have killed Alfredia Jones matched a .45 caliber pistol linked to co-defendant Mr. Glaspie. 28 RR 165-169.

55. The State introduced the video-taped custodial interview of Applicant following his arrest, in which he placed Mr. Brown at the scene of the robbery and murders and placed himself in the car outside waiting. 28 RR 10; St. Ex. 2.

56. HPD Homicide Detective James Binford testified that Applicant agreed to give this statement after hearing a recording of Mr. Glaspie's statement. Applicant repeated details Mr. Glaspie had provided, including that Mr. Brown was involved in the crime. 27 RR 210-12.

57. In the recording, Applicant repeatedly insisted that he did not have a gun and did not shoot anyone. State's Original Answer, Exhibit 1, Audio Transcript of Elijah Joubert, at 2, 3, 13, 25, 33, passim. (hereinafter ("Joubert Tr."), *Ex parte Joubert*, No. 944756-B, 351st District Court (April 3, 2017).

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[9] No relation to undersigned Presiding Judge George Powell.

58. Homicide Detective Sgt. Wayman Oliver Allen, Jr., testified that, on April 4, 2003, he joined Det. Binford in the interview room with Applicant to play a portion of his earlier interview with Mr. Glaspie. 28 RR 9-10.

59. At the request of ADA Rizzo, Det. Allen performed a re-enactment of the demonstration Applicant had given him in the video-taped statement as to "how he says Ms. Jones was shot and killed" by Mr. Glaspie, and elicited an opinion that holding the gun as illustrated would have left stippling or soot at the wound. 28 RR 10-11. ADA Rizzo then replayed that portion of Applicant's interview again for the jury. 28 RR 12-13.

60. Officer Darrell Robertson testified that there was a four-inch tear in the vertical seam of Ms. Jones' dress under the right armpit. 28 RR 101.

61. Det. McDaniel testified regarding phone records that he had obtained and analyzed. Using location data, he mapped cell phone calls from Mr. Glaspie's and Applicant's phones around the time of the crime which he showed to the jury in a slideshow as he testified. State's Exhibits 222 and 223. Det. McDaniel explained that not every call was in the slideshow, that they "pulled out some that were more pertinent." 29 RR 203-204. The actual phone logs were entered as exhibit 223.

62. The only data for Applicant's cell phone placed it at his residence, the Villa Americana apartments, at 8:39 a.m. and still pinging off the same tower at 10:26 am. Exhibit 222. Applicant's cell phone data never placed him at the crime scene.

63. Det. McDaniel's slide show included maps and phone records of calls to and from Mr. Glaspie's phone up until 8:26 am, resuming at 10:14 a.m., before and after the crime. He testified that he spent two days with Mr. Glaspie going through the phone logs and getting information about each call. His slide show included maps showing the location of Mr.

Glaspie's phone at the time of each call. The exhibit depicted several calls that Mr. Glaspie alleged had been made to or from Mr. Brown using Mr. Glaspie's phone. 29 RR 231.

64. Relying on Mr. Glaspie's representation as to which calls had been made by Mr. Brown, Det. McDaniel told the jury that Mr. Brown's location could be determined by the location data of Mr. Glaspie's phone at the time of those calls. Thus, the cell phone "pings" of Mr. Glaspie's phone were used to place Mr. Brown near and en route to the scene before and after the crime. 29 RR 219-230.

65. The State's main witness against Applicant was co-defendant Dashan Glaspie.

66. Mr. Glaspie admitted that he had accepted a plea offer of 30 years on a reduced charge of aggravated robbery to testify against Applicant, contingent upon him testifying "truthfully," "about my role or any other role that's in this case and what happened," and if he lied "about anything," even "one tiny thing", even "a small thing", he would be prosecuted for capital murder and eligible for the death penalty. 29 RR 9, 11-12.

67. Mr. Glaspie testified that on April 2, 2003, he recruited both Applicant and Alfred Brown to participate in the robbery of a check cashing store. 29 RR 13-16. Mr. Glaspie said he had called Mr. Brown the next morning to check out the prospective target, and then the two men called Applicant shortly afterwards. 29 RR 18.

68. Mr. Glaspie testified that he had recruited both Applicant and Alfred Brown to participate in the robbery of a check cashing store, and admitted that the .45 caliber pistol used in the robbery was his gun and that he had borrowed the car used in the robbery from his girlfriend. 29 RR 13-16, 19-22, 112, 128.

69. Mr. Glaspie testified that he picked up Mr. Brown from his girlfriend's residence, and then the two drove to pick up Applicant. 29 RR 23-24. The three eventually made it to the

planned location, Leo's Kwik Cash, but abandoned the plan when the man opening the store observed them and displayed a gun. 29 RR 29-33. The three returned to the apartment complex where Applicant lived, and, at Mr. Brown's suggestion, formulated a plan to rob the ACE check cashing store. 29 RR 36-37. Mr. Brown directed them to the ACE store where they parked and waited for the store to open. 29 RR 38-41.

70. Mr. Glaspie testified that, while waiting in the car, Applicant grabbed Mr. Glaspie's pistol from under the seat, intending to use it during the robbery. 29 RR 40-41. Mr. Glaspie explained that the plan had been for Applicant to gain entry to the store by walking in the employee opening the store at gunpoint. Mr. Glaspie's role was supposed to be limited to acting as the get-away driver; he had not planned to enter the store. 29 RR 43.

71. Mr. Glaspie testified that he went to wait in a nearby furniture store. 29 RR 42, 46. Mr. Brown left to go to the ACE store, while Mr. Glaspie waited in the car, but then went to the ACE store to see why the robbery was taking so long. 29 RR 47-48. Mr. Glaspie entered the store and saw Applicant with a female clerk in the booth, while Mr. Brown was holding open the door to the booth. 29 RR 49, 51-52. Applicant was holding Mr. Glaspie's pistol to the clerk's head as she knelt at the store's safe. 29 RR 55.

72. Mr. Glaspie testified that he checked the bathroom area for surveillance cameras and when he returned, he saw a police officer in the lobby area. 29 RR 57-59. Mr. Glaspie said he saw Mr. Brown move into the lobby and heard "a few shots." 29 RR 60-61, 62.

73. According to Mr. Glaspie's testimony, Applicant grabbed Ms. Jones, moved into the lobby area, and told Mr. Glaspie that "this bitch played us, man," then shot her. 29 RR 63-65.

74. Mr. Glaspie and ADA Rizzo conducted a demonstration to show the jury how Ms. Jones was grabbed and shot. 29 RR 60-61.

75. Mr. Glaspie testified that he and Applicant exited the store and got in the waiting car where Mr. Brown was in the driver's seat and the three drove off. 29 RR 66-67. At some point during the drive, Applicant climbed into the front seat and left Mr. Glaspie's pistol with him in the back seat. 29 RR 67, 68. Mr. Glaspie stated that Mr. Brown's gun, a chrome semi-automatic, was also on the floor in the backseat. 29 RR 68.

76. When they returned to the apartment complex, Mr. Glaspie went to the apartment of Nikki Colar, and gave his .45 caliber pistol to "Ju-Ju" (George Powell) and asked him to hold it for him because there were police in the area. 29 RR 71-72. While inside Ms. Colar's apartment, Mr. Glaspie and Applicant changed their clothes. 29 RR 74.

77. Mr. Glaspie denied calling anyone on his cell phone while in Ms. Colar's apartment and specifically denied that he had admitted to anyone that he shot the woman at the ACE check cashing store. 29 RR 74, 165-66. Mr. Glaspie changed this testimony on cross-examination when confronted with cell phone records, and admitted that he had called someone, but denied that he admitted to shooting anyone. 29 RR 166.

78. Applicant presented a single witness, Lamarcus Collar, in his defense. Mr. Colar lived with his sister, Nicole Colar, in Applicant's apartment complex. Mr. Colar testified that he returned home early from school on April 3, between 10:00 and 10:30 a.m. 30 RR 39. Minutes later, Mr. Glaspie, Mr. Brown and Applicant arrived at the apartment, staying only 10 - 15 minutes. 30 RR 39-41. Mr. Colar said he overheard Mr. Glaspie on the telephone admitting that he had shot someone and saying, "Shit, bitch got out of line. She was taking too long, so I had to do what I had to do." 30 RR 46-47.

79. In his closing argument, ADA Lafon covered the physical evidence. He argued to the jury that the dress worn by Ms. Jones was particularly important because in Applicant's

"version of events he tells you that Shon Glaspie has Ms. Jones by the neck, that he's manipulating her around by the neck. And that he then places the gun to her head and pulls the trigger, even though we don't have any type of soot or stippling on her." But, Mr. Glaspie "says that it was [Applicant] who was manipulating Ms. Jones and how was he doing it, by her dress. The dress is ripped right here (indicating) underneath the right arm." 31 RR 10. That was "one example" of how to use physical evidence to determine "[w]ho's telling you the truth. Who's lying to you." *Id.*

80. ADA Lafon also addressed the jury charge. He explained to the jurors that in order to find Applicant guilty of capital murder, they were not required to all agree whether it was a robber/murder or a double murder. 31 RR 26. He argued that the defense had not met its burden as to felony murder because the physical evidence was inconsistent with an accidental shooting and had failed to meet its burden as to duress because Applicant could have walked away from the crime. 31 RR 29-36. "There was no one standing there forcing him at gunpoint to commit this offense." 31 RR 36.

81. Counsel for Applicant argued in closing that it was Mr. Glaspie who shot Alfredia Jones, that "the State of Texas does not want you all to focus on the real killer here. They have to justify the decision they made for that 30-year sentence." 31 RR 39.

82. The defense listed eight facts that demonstrated it was Mr. Glaspie who shot Ms. Jones. 31 RR 84-90. Counsel for Applicant argued that the State used Mr. Glapsie because he would put the murder of Ms. Jones on Applicant, describing it as a deal with the devil: "the Devil is a deceiver," "the Devil is a liar and the father of lies and is a murderer." 31 RR 83. Defense counsel concluded by asking the jury to convict Applicant of the lesser offense that Mr. Glaspie pled guilty to, aggravated robbery. 31 RR 94.

83. In closing, ADA Rizzo again vouched for Mr. Glaspie's credibility and repeatedly assured the jury that, consistent with the terms of the plea deal, Mr. Glaspie testified truthfully. *See* 31 RR 106 ("[Mr.] Glaspie told the truth when he testified. And he had good reason to."); 31 RR 116 ("[Mr.] Glaspie was telling the truth.").

84. ADA Rizzo argued that Mr. "Glaspie was telling the truth" because his testimony, "matches each and every small piece of evidence." 31 RR 116.

85. The State argued to the jury that Applicant's statement was false because his attempt to describe the killing of Ms. Jones did not fit with the physical evidence, while Mr. Glaspie had accurately described how she was shot. 31 RR 111-12.

86. ADA Rizzo emphasized the harsh terms of the plea agreement as proof of Mr. Glaspie's credibility:

> [Mr.] Glaspie is eligible for the death penalty in Texas. [Mr.] Glaspie testified that he knows that if he testifies falsely about one thing and it doesn't match the evidence and it doesn't match anything, if he testifies falsely about one thing, that all deals are off . . . Also, he testified that there's no substantial compliance. In other words, he can testify about 99 percent of - and comply with 99 percent of everything, but if one thing he doesn't comply with, he testifies falsely, then he can be prosecuted, again, for capital murder. That's a heavy hammer. That's a bigger hammer than most witnesses have over their head.

31 RR 118.

87. The jury was presented with three charges: capital murder, felony murder, and aggravated robbery. As to capital murder, the jury was presented with various theories under which it could find Applicant guilty of capital murder, including as a party to the offense. 2 CR 293-96.

88. During deliberations, the foreman of Applicant's jury sent the Judge a handwritten note reading: "We would like the transcripts of Shon's testimony." 2 CR 308.

89. The Court sent the jury instructions regarding how to make a request, along with a

form to submit. The jury returned the form, requesting ADA Rizzo's direct examination of Mr. Glaspie for purposes of clarifying "[h]ow Ms. Jones was being held (demonstration w/ Mr. Rizzo)." 2 CR 309.

90. The jury returned a general verdict of guilty on the charge of capital murder. 2 CR 307.

91. In the penalty phase, the State presented evidence regarding Applicant's prior contacts with law enforcement as a juvenile and adult. *See* RR vols. 33, 34.

92. Applicant presented family members, including Applicant's grandmother, who testified about the circumstances of his upbringing. 35 RR 105-24. Applicant also presented a social worker who testified about the formative phases of Applicant's life, and the effect on his subsequent development. 35 RR 129-214. Applicant's childhood was "very neglectful," marked by an absent parent and the absence of feelings of parental love due to Applicant's mother's drug addiction. 35 RR 153-54, 169. Applicant's mother also testified. 36 RR 4-31. She described her long history of drug use, and how she used marijuana while pregnant with Applicant to deal with her morning sickness. 36 RR 12. She testified that she had not been present for her children and left them unsupervised in the apartment. Applicant's sister also testified, describing the conditions in which she and Applicant grew up. 36 RR 32-70. She also described physical abuse by her mother on the children. 36 RR 55-58.

93. Applicant also presented testimony from Dr. Mark Cunningham, a clinical and forensic psychologist, to testify about the effects of Applicant's upbringing and family in relation to his subsequent development. 37 RR 7-30, *id.* at 33-182.

94. In rebuttal, the State called A.P. Merillat, an investigator for the Special Prosecution Unit, which prosecutes prison offenses in TDCJ. 39 RR 77-124. Mr. Merillat

suggested that TDCJ could not control Applicant's behavior, and related several anecdotes of prison misconduct. 39 RR 91-95, 100, 104, 108.

95. The jury answered the special issues submitted under Tex. Code Crim. Proc. art. 37.071, returning affirmative answers to issues one and two and a negative answer to the mitigation special issue. 2 CR 235, 236. The trial court accordingly sentenced Applicant to death on October 21, 2004.

96. Applicant's co-defendant, Alfred Brown, was tried separately after Applicant. Mr. Glaspie testified against Mr. Brown in a manner consistent with his testimony at Applicant's trial. *Ex parte Alfred Dewayne Brown*, No. 1035159-A, Agreed Proposed Findings of Fact and Conclusions of Law at 4 (May 22, 2013).

97. Mr. Brown maintained that he was not present at the scene and provided an alibi that he was in the apartment of his girlfriend, Erika Dockery; that two of Ms. Dockery's nephews were also home with him; that Ms. Dockery was at work and that he called her around 10:00 a.m. from her apartment, which made it physically impossible for him to participate in the ACE robbery and murders. *Id.*

98. On April 4, 2003, Ms. Dockery told police that Mr. Brown was home asleep when she escorted her children to catch the bus at 6:50 a.m. and when she left for work at 8:30 a.m. on the morning of April 3, 2003; that she later called home and was told that Mr. Brown was sick and upstairs sleeping; and, that Mr. Brown called her at work at approximately 10:00 a.m. and she talked to him for approximately fifteen minutes. *Id.* at 2.

99. At Mr. Brown's trial, however, Ms. Dockery was called by the prosecution and testified that Mr. Brown was not in her apartment when she returned at 7:25 a.m. *Id.* at 4-5. She testified further that Mr. Brown called her around 10:00 a.m. at the home of her employer and

told her that he was at "Shono's" home in the Villa Americana Apartments. *Id.* at 5. However, under cross examination by defense counsel, Ms. Dockery testified that her employer, Alma Berry, told her the caller ID said "its your house". *Id.*

100. The jury found Mr. Brown guilty of capital murder in the death of Officer Clark on October 18, 2005, and sentenced him to die on October 25, 2005.

101. Mr. Glaspie was sentenced, on November 3, 2005, to 30 years' imprisonment, as agreed, in exchange for his cooperation and testimony against Applicant and Mr. Brown.

102. The CCA affirmed Applicant's conviction and sentence on direct appeal. *Joubert v. Smith*, 235 S.W.3d 729 (Tex. Crim. App. 2007).

103. In his initial state post-conviction application, Applicant asserted that he had been denied effective assistance of counsel due to trial counsel's failure to investigate evidence that would impeachment the credibility of Mr. Glaspie. *Ex parte Joubert*, No. 944,756-A Application at 18-20 (Claim 6).

104. The State responded by arguing that Mr. Glaspie's testimony had been corroborated by Applicant's statement and specifically by phone records collected by Det. McDaniel:

> Indeed, as shown by a review of the record, Glaspie's testimony was corroborated by the testimony of Breck McDaniel, Houston Police Department, homicide division, who testified that Glaspie's account was consistent with cell phone records location data (XXIX R.R. at 246-251). Also, Darrell Robertson, Houston Police Department, homicide division, testified that the complainant's dress was torn under her arm, consistent with Glaspie's testimony that the applicant grabbed the complainant by her dress (XXVIII R.R. at 100-01)(XXIX R.R. at 60, 63). Furthermore, Glaspie and Colar both testified that the applicant and Colar's sister were very close, and the State elicited cross-examination testimony from Colar that he made the statement regarding Glaspie because he was afraid his sister would have been arrested if he had not said something (XXIX R.R. at 25)(XXX R.R. at 41).

State's Original Answer to initial application at 25.

105. The State concluded that: "The applicant fails to show how different impeachment of Dashan Glaspie, whose testimony was supported by the evidence and the applicant's own admissions, would have resulted in a different outcome in the applicant's trial." *Id.* at 25.

106. As noted above, this Court recommended that relief be denied, and the CCA accepted that recommendation. *Ex parte Joubert*, No. WR-78,119-01 (Tex. Crim. App. Sept. 25, 2013).

III. WITHHELD EVIDENCE AND 2017 AUTHORIZATION

107. During Mr. Brown's post-conviction proceedings in this Court, the State disclosed, for the first time, grand jury testimony and phone records which tended to refute Mr. Glaspie's testimony implicating Mr. Brown in the offense.

A. LANDLINE PHONE RECORDS

108. As part of the State's post-conviction proceedings in Mr. Brown's case, the State asked the HPD officer who conducted the original phone investigation to search for any documents relating to the case. The officer located a box of materials at his residence related to the phone records investigation.

109. The newly discovered materials included phone records for the landline in Ms. Dockery's apartment on April 3, 2003, along with an Application submitted by the State to obtain the landline records from the telephone company, which was signed by this Court on April 24, 2003.

110. The records reflect that a call was placed from the landline at Ms. Dockery's apartment to the home of her employer, Alma Berry, at 10:08 a.m. on April 3, 2003, the day of the robbery.

111. This evidence corroborates Ms. Dockery's statement to the police and her initial testimony before the Grand Jury that Mr. Brown called her around 10:00 a.m. and that Ms. Berry, who answered the phone, recognized Ms. Dockery's number on Caller ID and told Ms. Dockery, "Ericka, it's your house" before handing the phone to Ms. Dockery.

112. This evidence supports Mr. Brown's alibi that he was at Ms. Dockery's residence the morning of the offense, and therefore was not present or involved in the robbery and murders.

113. As the State has conceded, the phone records were never produced to Applicant or Mr. Brown's counsel or used by the State at either trial.

B. Grand Jury Testimony

114. On April 21, 2003, Ericka Dockery testified before a Harris County Grand Jury. ADA Rizzo, who prosecuted both Applicant and Mr. Brown, was present during Ms. Dockery's testimony.

115. Ms. Dockery testified that Mr. Brown was asleep on her couch when she left home at 8:30 a.m. on April 3, 2003; at approximately 10:00 a.m., she received a call from Mr. Brown at her place of employment where she cared for an elderly woman, Alma Berry; Berry looked at the Caller ID on her phone and said, "Ericka, it's your house" when Mr. Brown called; Ms. Dockery left work at 1:00 p.m., and returned home where she saw Mr. Brown; and Mr. Brown told her that he did not feel well.

116. The transcript reflects that the grand jurors, led by an active duty police officer, along with ADA Rizzo, accused Ms. Dockery of lying and threatened that if she was perjuring herself, her children would be taken away. Despite the aggressive tactics, Ms. Dockery stuck to her story. Grand Jury Testimony of Erika Dockery, pp. 1-119 (April 21, 2003).

117. After leaving the Grand Jury room, Ms. Dockery spoke with ADA Rizzo in the hallway and returned to the Grand Jury to "correct" her statement, saying she had not returned to the apartment after leaving at 6:50 a.m. *Id.* at 120-22.

118. Tonika Hutchins, Dashan Glaspie's girlfriend, testified before the Grand Jury on April 28, 2003. Ms. Hutchins testified that Mr. Glaspie had told her that George "Ju Ju" Powell, rather than "Doby" (Alfred Brown) had been a participant in the ACE robbery. Mr. Glaspie told her he too was present at the scene, but never entered the store, only Applicant and "Ju Ju." Ms. Hutchins also testified that she overheard Mr. Glaspie call Mr. Brown around 6:00 a.m. on the morning of the offense and instructed someone over the phone to wake Mr. Brown up, but was rebuffed by the other party. Ms. Hutchins was also aggressively interrogated by the grand jurors who told her they knew she was lying, that she took drugs, and that her family was ashamed of her for "hanging out with a hoodlum who probably killed someone" [referring to Mr. Glaspie].

119. Both Mr. Brown and Applicant challenged their convictions on grounds of *Brady v. Maryland*, 373 U.S. 83 (1963).

120. The State conceded the *Brady* violation as to Mr. Brown, maintaining that the favorable and material evidence had been inadvertently withheld. Mr. Brown's conviction and sentence were overturned and he was released on the *Brady* claim, but still faced potential retrial. After re-evaluating their case, the State determined that Mr. Brown could not be retried and moved to dismiss the case due to insufficient evidence. This Court granted the motion.

121. As to Applicant, the State conceded only that favorable evidence had been withheld, but challenged the materiality of the *Brady* evidence.

122. A key and persuasive aspect of the State's argument opposing relief for Applicant was that Mr. Brown' s case was only "dismissed for insufficient evidence" and that he could be

retried because he was not "actually innocent." Writ Hr'g. Tr. at 16. The Court agreed with the State's position that "as you're assessing the credibility of this claim with regard to Mr. Glaspie, it's important to keep that in mind." *Id.*

123. Subsequently, in 2017, this Court concluded that, despite the State withholding favorable evidence and the lack of sufficient evidence to re-try Mr. Brown, the verdict against Applicant had resulted from a process that was not perfect, but fair enough. Undersigned still had confidence in the reliability of the jury's verdict.

124. That is no longer true.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING WHETHER THE FILED MATERIALS SHOULD BE CONSIDERED IN APPLICANT'S CASE

125. This Court finds that certain relevant and admissible portions of the material identified above should be considered in Applicant's case. The relevant and admissible portions of the material do have an effect on Applicant's Claims One and Two and have changed this Court's recommendation. This Court makes findings of fact and conclusions of law as regarding each of these four documents as follows:

A. Statement from Harris County District Attorney Kim Ogg Regarding Newly Discovered Evidence in Alfred Brown Case, March 2, 2018.

126. The document purports to represent the views of the District Attorney. Because the document was created long after the trial, it cannot be suppressed evidence under *Brady*. For the same reason, it is neither direct nor contemporaneous evidence that trial testimony was false, or the prosecutor's knowledge that testimony was false.

127. The document contains out-of-court statements which, if offered for the truth of the matters asserted in those statements, would constitute hearsay. Tex. R. Evid. 801(d).

128. However, the following statements contained within the news release are not hearsay under Tex. R. Evid. 801(e):

a. District Attorney Ogg's statement that an "email between former Harris County prosecutor Dan Rizzo and former Houston Police Department Officer Breck McDaniel" was "previously undisclosed";

b. District Attorney Ogg's statement that the email constitutes "new evidence";

c. District Attorney Ogg's statement that the email "suggests … that well before Brown's trial, Rizzo was informed about the existence of the records, yet failed to disclose or provide them to the defense counsel or the jury";

d. District Attorney Ogg's statement that telephone records that were suppressed at the time of Mr. Brown's trial (which the state has conceded were also suppressed at the time of Applicant's trial) "corroborate [Mr. Brown's] alibi defense";

e. District Attorney Ogg's statement that she referred former ADA Rizzo to the State Bar because she "bec[a]me[] aware" that he "'committed a violation of the applicable rules of professional conduct.'"

129. Together, these statements expressly assert or strongly imply, see Tex. R. Evid. 801(c)(1) and (2), the following:

a. the email from Det. McDaniel to ADA Rizzo was suppressed at the time of the trials of Brown and Applicant's trial;

b. the email was previously unavailable to Applicant despite the exercise of due diligence;

c. ADA Rizzo intentionally suppressed the telephone records corroborating Mr. Brown's alibi;

d. ADA Rizzo was "informed" and therefore was aware of the telephone records and their ability to corroborate Mr. Brown's alibi "well before" Applicant's trial, as well as Mr. Brown's.

130. The foregoing expressly asserted or strongly implied statements satisfy each of the criteria for admissibility as a party admission.

131. Applicant offers the statements against the State. Tex. R. Evid. 801(e).

132. The statements were made by the District Attorney in her capacity as the representative of the State of Texas, Tex. R. Evid. 801(e)(A), either in the news release itself, or

when the State urged the CCA to have this Court consider the statements.

133. The District Attorney manifested that the State of Texas adopted or believed the statements to be true, *see* Tex. R. Evid. 801(e)(2)(B), by acting on them in three ways: (1) by referring ADA Rizzo to the State Bar; (2) by moving to dismiss Mr. Brown's case based on the Raley Report, which the State of Texas submitted as an exhibit in support of its Amended Motion to Dismiss in *Brown*; and (3) by calling the statements "important" in the motion urging the CCA to direct this Court to consider the news release.

134. As the elected District Attorney for Harris County, Texas, District Attorney Ogg was authorized by the State of Texas to make a statement on the subject of ADA Rizzo's knowledge and actions. Tex. R. Evid. 801(e)(2)(C).

135. District Attorney Ogg was acting in her capacity as the State of Texas's agent when she made the statements, as evidenced by (1) the official seal of her office appearing on the news release, and (2) the State urging the CCA to consider the news release in conjunction with this case. Tex. R. Evid. 801(e)(2)(D).

B. Press Release Titled "DA Ogg announces review of Alfred Brown case".

136. The document contains out of court statements which, if offered for the truth of the matters asserted in those statements, would constitute hearsay. Tex. R. Evid. 801(d).

137. Applicant offers one statement as evidence that the State admits Mr. Glaspie's testimony about Mr. Brown's involvement in the robbery cannot be corroborated. That is the District Attorney's statement that the "prior District Attorney dismissed Brown's capital murder charge due to an inability to corroborate a co-defendant's testimony."

138. Applying the analysis set out above, this Court finds that statement is admissible as a party admission. As noted above, that admission directly contradicts the State's argument to

Applicant's jury which was that Mr. Glaspie's testimony was corroborated by several witnesses who also identified Mr. Brown, and by the physical evidence.

C. "Defendant Harris County's Rule 12(b)(6) Motion to Dismiss Claims Related to Alleged *Brady* Violations", filed May 8, 2018, in *Brown v. City of Houston et al.*, Cause No. 4:17-cv-001749 (S.D. Tex.).

139. No party to this case filed, responded to, or adopted any portion of the Motion to Dismiss. Harris County filed the motion, and is not a party to this case. The State of Texas is not a party to the civil case *Brown*. The United States District Court for the Southern District of Texas rejected Harris County's argument that the State of Texas is the real party in interest in the civil suit. *Brown*, Order, Dkt. No. 56 at 10 (S.D. Tex. Mar. 15, 2018); *see also Brown*, Order, Dkt. No. 117 at 4 n.3 (S.D. Tex. Dec. 20, 2019). The current District Attorney, who represents the State in this litigation, was dismissed from the civil case after the U.S. District Court found the claims against her were entirely redundant of the claims against Harris County, which is the real party in interest in that case. *Brown*, No. 4:17-cv-1749, Order, Dkt. No. 117 (S.D. Tex. Dec. 20, 2019).

140. The Motion to Dismiss contains legal arguments that reflect the opinions of the lawyers representing Harris County in a civil suit. Those opinions are not admissible evidence in this court. Tex. R. Evid. 702.

141. The document contains out of court statements which, if offered for the truth of the matters asserted in those statements, would constitute hearsay. Tex. R. Evid. 801(d).

142. The document does not fall within any exception to the hearsay rule.

143. Indeed, the Motion to Dismiss is critical of the District Attorney because she "accepted th[e] misrepresentation" that "a phone record proved [Mr. Brown] was at his girlfriend's apartment after the double murder of Alfredia Jones and Houston Police Office

Charles Clerk." Mot. Dismiss at 1. Therefore, the statements made by the county's representatives cannot be admissions by a party to this case.

144. The State of Texas has not demonstrated a belief in the truth or implications of the report by Ben Levitan attached as Exhibit 2 to the county's Motion to Dismiss. On the contrary, the State of Texas, through District Attorney Ogg, manifested a belief in Mr. Raley's rejection of those arguments when it submitted as an exhibit in the criminal case *State v. Brown* the Raley Report, which contains a refutation of the argument made by the county based on Levitan.

145. The State is barred by judicial estoppel from relying upon the county's motion and the arguments contained therein. Judicial estoppel applies to the State when it takes a position in one round of litigation, then tries to take an inconsistent position in a different round of the same or related litigation. *Schmidt v. State*, 278 S.W.3d 353, 358 (Tex. Crim. App. 2009) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749-751 (2001)).

146. The State has previously and repeatedly acknowledged and accepted the link between the *Brown* criminal case, including the post-conviction action in that case, and Applicant's case. Judicial estoppel "protect[s] the integrity of the judicial process … by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-750 (internal quotation marks and citations omitted).

147. The elements of judicial estoppel are (1) "a party's later position must be clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-751 (internal

quotation marks and citations omitted).

148. Any attempt by the State to rely upon the Harris County Motion to Dismiss or the argument and evidence contained in it would satisfy all three criteria.

149. The state conceded in this case and in *Brown* that the telephone records corroborated Mr. Brown's alibi and therefore could be used to impeach Mr. Glaspie. Harris County's motion argues that understanding of the telephone records is a "misrepresentation" that Brown used to "bluff[] his way out of prison." Therefore, the two positions are entirely inconsistent.

150. The State submitted agreed upon findings of fact to this Court, which it signed, and the CCA later adopted in *Brown*. Still later, the State filed an Amended Motion to Dismiss in Mr. Brown's case in which the State asserted "that no credible evidence exists that inculpates Alfred Brown in the April 3, 2003 murder of Charles Clark." This Court granted the State's Amended Motion to Dismiss in Brown. Therefore, the State succeeded in persuading this Court that the refutation of the theory advanced in Harris County's motion, not the motion itself, is correct while the Harris County Motion to Dismiss argues that this Court and the CCA were misled in the earlier litigation in this case and in *Brown*.

151. The State would gain an unfair advantage from this Court relying on the Harris County Motion to Dismiss in that the motion is based on the opinion of Ben Levitan who has not been qualified to offer an opinion in this matter, and who has not been subject to cross-examination by Applicant.

152. For each of the foregoing reasons, this Court concludes that the Harris County Motion to Dismiss should not be considered in this matter. It would undermine the integrity of these proceedings if the State were permitted to argue that its own position in *Brown* should be

rejected merely because it is inconsistent with the result the State seeks in Applicant's case.

D. Report of Special Prosecutor John Raley to District Attorney Kim Ogg Regarding Alfred Dewayne Brown ("Raley Report")

153. The District Attorney appointed attorney John Raley to perform tasks that are related to this case, but distinct from the issues presented in Applicant's Claims One and Two. Mr. Raley was appointed to do three things: (1) "to investigate the role, if any" that Mr. Brown played in the murders of Ms. Jones and Officer Clark; (2) to "perform an independent analysis of Mr. Brown's claim of 'actual innocence' regarding the crime for which he was convicted"; (3) to "present findings and recommendations based on the available evidence." Raley Rpt. at 1.

154. The Raley Report was written and released in 2019. Therefore, the report itself is not *Brady* material, and is not contemporaneous or direct evidence that Applicant's jury heard false testimony, or that the prosecutor knew the testimony was false. However, the report contains statements that are relevant to the elements of Applicant's *Brady* and *Mooney/Napue* claims. Those specific statements are set out in the findings related to those claims.

155. Mr. Raley worked with a team that conducted an investigation that included review of the transcripts of Applicant's trial, and interviews with witnesses who testified in the trial, and law enforcement officers involved in the investigation of the case. *Id.*

156. The Raley Report is hearsay, and, in many places, contains hearsay within hearsay. However, as this Court found with regard to the news release, the report contains statements that are admissible under Tex. R. Evid. 801(e) when offered by Applicant against the State.

157. Mr. Raley was duly appointed a special prosecutor by the District Attorney who later submitted his report as support for the State's Amended Motion to Dismiss in Brown. Therefore, Mr. Raley was authorized to make a statement on the subject-matter contained in the

report, as required by Tex. R. Evid. 801(e)(2)(C) and (D). When the District Attorney submitted the Report in support of the State's Amended Motion to Dismiss, she effectively made the statements as a representative of the State of Texas, as required by Tex. R. Evid. 801(e)(2)(A).

158. By submitting the Raley Report in support of its determination that Mr. Brown is actually innocent, the State "manifested that it adopted or believed to be true" the statements Applicant now relies upon. Tex. R. Evid. 801(e)(2)(B).

159. The Raley Report contains scanned copies of documents that are relevant to Applicant's claims. This Court finds the State has conceded the authenticity, completeness, and identities of those documents by submitting the Raley Report for review in this case, and as Exhibit 1 to the Amended Motion to Dismiss in *State v. Brown*. See Tex. R. Evid. 901(b)(7). The following documents are included in the Raley Report and relevant to Claims One and/or Two in Applicant's case:

a. Detective Breck McDaniel's email to ADA Dan Rizzo dated April 22, 2003, and time-stamped 4:33 p.m. Raley Rpt. at 8;

b. Unsigned Application for Release of Telephone Records and Proposed Order which were attached to McDaniel's email. Raley Rpt. at 9-11;

c. Application for Release of Telephone Records signed by ADA Rizzo on April 24, 2003, and the Order for their release signed the same day. Raley Rpt. at 13-15.

160. The Raley Report contains a verbatim transcription of Det. McDaniel's May 2, 2003, Supplemental Offense Report. Raley Rpt. at 16-17. This Court finds this transcript is authentic and the Supplemental Offense Report is relevant.

161. The Raley Report contains a verbatim transcription of Deputy U.S. Marshal Richard Hunter's sworn statement to the Special Prosecutor. Raley Rpt. at 20. This Court finds the transcription authentic and Deputy Marshal Hunter's statement relevant as set out herein.

162. The Raley Report contains an opinion section regarding Applicant's role in the

robbery and shooting of Officer Clark. Raley Rpt. at 54-57. The author of the report admits he is not qualified to render an opinion on the topic, *id.* at 54, his opinion is speculative, *id.* at 54 and 57, and his opinion exceeds the scope of his assignment. Applicant does not offer those statements as evidence. Therefore, the analysis and opinions contained therein are hearsay, and are non-admissible opinions. Tex. R. Evid. 702.

163. In addition, the opinions of Special Prosecutor Raley were formed long after the trial, and therefore are irrelevant to Claims One and Two: later-formed opinions based on post-trial investigation cannot have been suppressed at the time of trial, nor conclusively show that the prosecutor knew testimony was false at the time of trial.

164. Finally, because a reviewing court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury," *Chiarella v. United States*, 445 U.S. 222, 236 (1980), Special Prosecutor Raley's speculation is not properly before this Court.

E. Other Recent Developments

165. In addition to the four documents submitted by the State in this case, the State's filings and this Court's findings in *State v. Brown* should be considered. While pleadings do not constitute proof, facts alleged in those pleadings may constitute judicial admissions. *Collin County District Attorney's Office v. Fourrier*, 453 S.W.3d 536, 541 (Tex. App.—Dallas 2014). "A judicial admission takes the matter out of the domain of proof; it is not evidence, but serves as a substitute for evidence." *Id.*; *see also Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983) ("Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. Any fact admitted is conclusively established in the case without the introduction of the pleadings or presentation of other evidence.")

166. Further, as discussed above in relation to judicial estoppel, this Court must be

concerned with the integrity of its process. "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). There is a long history of "[j]udicial disapproval of the state's use of inconsistent and irreconcilable theories in separate trials for the same crimes." *In re Sakarias*, 106 P.3d 931, 942-944 (Cal. 2005) (surveying case law). "Because it undermines the reliability of the convictions or sentences, the prosecutions [*sic*.] use of inconsistent and irreconcilable theories has also been criticized as inconsistent with the principles of public prosecution and the integrity of the criminal trial system." *Id.* at 944. In order to safeguard the integrity of its habeas process, this Court considers whether judicial admissions by the State in *Brown* are inconsistent with the theories advanced by the State in the present matter.

167. In *Brown*, the State admitted that the Dockery phone records were exculpatory of Mr. Brown to the extent that they and other evidence showed Mr. Brown to be "actually innocent" of involvement in the ACE robbery. In reliance on those judicial admissions, this Court amended its order to reflect dismissal on grounds of actual innocence rather than merely insufficient evidence.

168. The State has taken the position that "[i]n his capacity as the original factfinder, Judge Powell is best suited to review their possible effect on the applicant's claims for relief. *Simpson*, 136 S.W. 3d at 668-69. In addition, the habeas court's consideration of these recent developments promotes judicial economy as they are arguably fodder for a subsequent writ of habeas corpus. Tex. Crim. Proc. Code art 11.071 Sec. 5(a)." State's Renewed Motion at 3.

169. Thus, in the interest of judicial economy and judicial integrity, this Court takes judicial notice of additional "recent developments" subsequent to the four exhibits submitted by

the State:

170. State's Amended Motion to Dismiss, *State v. Alfred Dewayne Brown*, Cause No. 1035159, 351st District Court Harris County (March 1, 2019).

171. Order granting the Amended Motion to Dismiss, *State v. Alfred Dewayne Brown*, Cause No. 1035159, 351st District Court Harris County (May 3, 2019).

172. Further, the Court takes judicial notice, per Tex. R. Evid. Rule 201, of the trial and initial and successor post-conviction records in this case, including the exhibits to Applicants successor petition, which includes the entire Clerk's File for Mr. Brown's writ proceedings.

173. This Court takes judicial notice of the updated trial and post-conviction records in *State of Texas v. Alfred Dewayne Brown*, 270 S.W.3d 564 (Tex. Cr. App., 2008), and, *Ex parte Alfred Dewayne Brown,* WR-68,876-01 (Tex. Cr. App. Nov. 5, 2014).

174. The Court takes judicial notice of the plea and sentencing in *State of Texas v. Dashan Glaspie,* No, 994450 (351st District Court of Harris County, Texas, November 3, 2005).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE MERITS OF CLAIM ONE: *NAPUE* FALSE EVIDENCE CLAIM

175. In Claim One of his subsequent application, Applicant alleges that the State presented false testimony at trial, in violation of the Fourteenth Amendment's Due Process Clause.

176. At the time this Court signed and transmitted findings of fact and conclusions of law in 2017, two things were unclear. The first was whether the testimony implicating Mr. Brown was actually false or merely impeaching of prosecution witnesses who identified him as a participant. The second was whether the prosecution knew the testimony was false. Accordingly, the finding and conclusions signed in 2017 did not address the legal standard for

the applicant's false-testimony claim or make findings regarding whether the testimony was false, whether the falsity was known to the prosecution at the time, or whether it was material under the applicable standard.

177. Three things have changed since then. First, new evidence has been presented showing the prosecution knew before trial that objective evidence corroborated Mr. Brown's alibi, and that the prosecution intentionally suppressed that evidence. Second, the State has made admissions regarding Mr. Brown's innocence. The Court has before it both public admissions in documents the State and Applicant have asked this Court to consider, and judicial admissions made before this Court and the CCA in this case, and before this Court and the CCA in *Brown*. Third, based on the same information, evidence and admissions, this Court has made findings and decisions in *Brown* that were predicated on Mr. Brown's innocence. It would undermine public confidence in the integrity of the criminal justice system if this Court were to allow the State to advance a theory in this case that contradicts the judicial admissions and findings made in *Brown*, or if this Court made contradictory findings on its own. However, that concern does not exist because neither the falsity of the testimony nor the prosecution's knowledge of its falsity is disputed on the present record.

A. Legal Standards

178. Claim One, the false-testimony claim, is governed by differing state and federal legal standards. Under federal law, *Mooney v. Holohan*, 294 U.S. 103 (1935) and its progeny "make clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney*, 294 U.S. at 112). Applicant is entitled to relief if he can establish his conviction was obtained by the knowing use of false testimony and "there is any

reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v Agurs*, 427 U.S. 97, 103 & nn. 8-9 (1976).

179. Texas state law similarly establishes that Applicant is entitled to a new trial, or new sentencing proceeding, where the prosecution knowingly relied upon false testimony, *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011) (citing *Estrada v. State*, 313 S.W.3d 274, 287–88 (Tex. Crim. App. 2010), if "there is a 'reasonable likelihood' that the false testimony affected the outcome." *Ghahremani*, 332 S.W.3d at 478 (citing *Agurs*, 427 U.S. at 103).

180. The Court of Criminal Appeals has explained that "the evidence is material (and harmful) unless it can be determined beyond a reasonable doubt that the testimony made no contribution to the defendant's conviction or punishment." *Ex parte Lalonde*, 570 S.W.3d 716, 722 (Tex. Crim. App. 2019) (internal citation omitted).[10]

181. Pursuant to state law, if the applicant is unable to demonstrate that the prosecution knowingly relied upon false testimony, he can still establish a due process violation; however the burden shifts and "the 'applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment.'" *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (quoting *Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996)).

B. False Testimony

182. While it is not in dispute that the State presented false testimony at Applicant's trial, and the State's judicial admission that Mr. Brown is actually innocent precludes the State

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[10] The Court applies this standard in this case because it is undisputed that Applicant could not have raised this claim in any earlier proceeding. *Gharemani*, 332 S.W.3d. at 482-83.

from taking a contradictory position here, the record and evidence before the Court support such a finding by this Court.

183. "Falsity is a factual inquiry" which "turns on whether the jury was left with a misleading or false impression after considering the evidence in its entirety." *Ex parte Chaney*, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018).

184. Since this Court's review of Applicant's claims in 2017, the State amended its Motion to Dismiss Mr. Brown's case to state that: "no credible evidence exists that inculpates Alfred Brown in the April 3, 2003 murder of Charles Clark" and Mr. Brown is "actually innocent of the capital murder for which he was convicted." State's Amended Motion to Dismiss at 4, *State v. Brown*, No. 1035159 (Mar. 1, 2019). This Court granted that Motion and dismissed Mr. Brown's case, "[f]or the reasons stated in the State's Amended Motion to Dismiss" and "due to Alfred Brown's actual innocence." *State v. Brown*, No. 1035159, Order (May 3, 2019).

185. This not only means that false evidence was presented at Mr. Brown's trial, it also means that any evidence presented by the State at Applicant's trial which either suggested to the jury that Mr. Brown participated in the offense, or directly implicated him, was false. "[T]here is no requirement that the offending testimony be criminally perjurious." *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

186. Much of the evidence now proven false as to Mr. Brown was also presented against Applicant.

187. Applicant and the State agree and this Court finds that any prosecution argument or evidence presented at Applicant's trial that placed Alfred Dwayne Brown, AKA "Doby" or "Dobie" at the scene of the April 3, 2003, robbery of the ACE check cashing was false.

188. The Court finds that the State presented false testimony and evidence regarding:

(1) Alfred's Brown's participation in the offense; and (2) the veracity/credibility of its key witness, co-defendant Dashon Glaspie.

189. The Court finds that previously withheld evidence, including Ms. Dockery's landline phone records, and the grand jury testimony, demonstrates that Mr. Brown was not present and did not participate in the offense.

190. In light of the now-established fact that Mr. Brown was not present, and the parties agree that all evidence placing Mr. Brown at the scene was false, this Court makes the following findings of fact regarding the evidence and argument presented at Applicant's trial:

a) This Court finds that the opening statement of the prosecution in which he described the robbery and shooting contained false statements. 26 RR 9-31.

b) This Court finds that LaTonya Hubbard's testimony placing Mr. Brown at the gas station with Mr. Glaspie and Applicant on the morning of the offense was false.[11]

c) This Court finds that the trial testimony of Alisha Hubbard that placed Mr. Brown with Mr. Glaspie and Applicant on the morning of the offense was false.

d) This Court finds that Shoukat Hussein's testimony that placed Mr. Brown in the furniture store on the morning of April 3, 2003, was false.

e) This Court finds, to the extent Sheikah Mohammed Afzal's testimony identified Mr. Brown as one of the men in his store on the morning of April 3, 2003, the testimony was false.

f) This Court finds that Mr. Glaspie's testimony regarding Mr. Brown's participation and involvement in the offense as well as his testimony regarding his own veracity, was false and misleading.

g) The Court finds that Applicant's recorded statement concerning Mr. Brown's participation and involvement in the offense was false. When addressing it at trial, the prosecutor told the jury that Applicant's statement was "not the truth," and that what Applicant said was "not what happened." 26 RR 26.

h) This Court finds that Lamarcus Colar's testimony regarding Mr. Brown's presence

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[11] In its 2017 filings in this case, the State acknowledged that she had since withdrawn her identification of Mr. Brown. State's Proposed Findings of Fact and Conclusions of Law at 3, n. 2 (July 10, 2017).

with Mr. Glaspie on the day of the crime was false and was unreliable.[12]

i) This Court finds that Mr. Glaspie lied to Det. McDaniel as to at least the calls on his phone log that were attributed to Mr. Brown between 8:45 a.m. and 10:54 a.m. on the day of the crime and, consequently, that at least some of Det. McDaniel's slide show and testimony regarding those calls was false. St. Ex. 222, 42 RR 14-41.

j) This Court finds that Det. McDaniel's testimony and exhibits gave the jury a false impression that the cell phone records linked the three defendants and placed Applicant at the scene of the crime.

191. A second category of false testimony presented by the State was that related to co-defendant Dashon Glaspie's plea deal which required 100% truthfulness.

192. The State's presentation of its key witness, Mr. Glaspie, left the jury with the impression that Mr. Glaspie was testifying 100% truthfully. This impression was false and misleading.

193. As detailed above, Mr. Glaspie testified falsely as to Mr. Brown's participation and involvement in the robbery and murders.

194. In its opening statement, the State told the jury that its main witness, Applicant's co-defendant Mr. Glaspie, was to receive a plea bargain to a lesser charge and a sentence of 30 years' incarceration. The State returned to the plea deal during the Mr. Glaspie's testimony and again during its closing argument.

195. The State's repeated references to and reliance upon Mr. Glaspie's plea deal essentially guaranteed the jury that Mr. Glaspie was 100% truthful.

196. When the State called Mr. Glaspie to testify, he told the jury that he had received a plea deal to testify and explained that in order to get the deal, he had to "[t]estify about this

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[12] In its 2017 filings in this case, the State acknowledged that he had since withdrawn his identification of Mr. Brown. State's Proposed Findings of Fact and Conclusions of Law at 6, n. 3 (July 10, 2017).

case truthfully," and "tell the truth about my role or any other role that's in this case and what happened." 29 RR 9, 11. He told the jury that, according to the deal, if he lied "about anything" he would be prosecuted for capital murder. 29 RR 11.

197. In light of the record, this Court makes the following findings of fact regarding the evidence and argument presented at Applicant's trial regarding Mr. Glaspie's veracity:

a. This Court finds that ADA Rizzo's statements at trial vouching for the truth of Mr. Glaspie's testimony were false. "[Mr.] Glaspie told the truth when he testified." 31 RR 106; "[Mr.] Glaspie was telling the truth." 31 RR 116; and "I'll tell you the reason that [Mr.] Glaspie was telling the truth . . ." 31 RR 116.

b. The State's presentation of its key witness, Mr. Glaspie, left the jury with the false impression that Mr. Glaspie was testifying 100% truthfully.

c. The Court finds that the jury was left with a false impression that the State's plea deal with Mr. Glaspie was premised on the State knowing the truth.

d. Further, the Court finds that the jury was left with the false impression that the State vouched for Mr. Glaspie's truthfulness.

198. Accordingly, this Court finds and concludes that Applicant has proved by a preponderance of the evidence that the evidence presented regarding Mr. Brown's involvement and Mr. Glaspie's account and motivation to tell the truth was false.

C. KNOWING

199. While it is not in dispute that the State knew that testimony and evidence it was presenting to the jury was false, and the admissions discussed above preclude the State from disputing the prosecutor's knowledge, the record and evidence before the Court support such a finding by this Court.

200. The record and admissible evidence before this Court show by a preponderance of the evidence that, at the time of Applicant's trial, ADA Rizzo was aware that (a) the evidence linking Mr. Brown to the robbery and homicides was false, and (b) Mr. Glaspie's testimony about his plea deal requiring complete consistency with the evidence was false.

201. In responding to a discovery request in a civil suit brought by Mr. Brown in 2017, the State, through District Attorney Ogg, located email correspondence between members of the prosecution team that had been conducted through the DA's domain. This included an email on April 22, 2003 (the day after Erika Dockery's testimony before the Grand Jury) from HPD Detective Breck McDaniel to ADA Dan Rizzo. No one else was copied on the email.

202. Attached to the email, Det. McDaniel sent ADA Rizzo a draft of an application and proposed court order for a subpoena *duces tecum* to get records of calls from Ericka Dockery's home phone. Det. McDaniel explained that the records had already been provided and described what they contained:

> I was hoping that it would clearly refute Erica's [sic.] claim that she received a call at work (residence on Hartwick street) from Doby at about 10:00 a.m. or so from her apartment, thereby putting him at the apartment as an alibi as the nephew claims. But, it looks like the call detail records from the apartment shows that the home phone dialed Erica's place of employment on Hartwick Street at about 8:30 a.m. and again at 10:08 a.m. Erica claimed that the caller identification at the Hartwick house showed the apartment.

203. In the email, Det. McDaniel flagged a citation in the attached documents (the subpoena application and proposed order) and asked ADA Rizzo to confirm that it was correct. Two days later, ADA Rizzo filed an application and form of order that was identical to the draft sent by Det. McDaniel except that the citation flagged in the email had been corrected on both the application for the phone records and the proposed order. *Ex parte Alfred Dewayne Brown*, No. 1035159-A, Agreed Proposed Findings of Fact and Conclusions of Law, Exhibit 4 (May 22, 2013).

204. The State, through Harris County District Attorney Kim Ogg, has acknowledged the email suggests "that well before Brown's trial, Rizzo was informed about the existence of the records, yet failed to disclose them to the defense counsel or the jury." *Statement from Harris*

County District Attorney Kim Ogg Regarding Newly Discovered Evidence in Alfred Brown Case, News Release March 2, 2019.[13]

205. On May 2, 2003, Det. McDaniel filed a Supplemental Offense Report which stated, in part, that his further involvement in the case "involved the thorough analysis" of phone records including "some land lines" and that Det. McDaniel had "notified ADA Rizzo of the availability of these records and the vast amount of data that they reveal." HPD Homicide Division Offense Report Case # 45215203-P, p. 2.139, reproduced in the Raley Rpt. at 16-17.

206. The email itself, its location on a server held by the District Attorney, Det. McDaniel's contemporaneous statement in his Supplemental Report, ADA Rizzo's filing of the application and proposed order, and the District Attorney's 2019 press release show by a preponderance of the evidence that ADA Rizzo (a) received the email from Det. McDaniel, (b) read the email, (c) understood that the phone records corroborated Mr. Brown's alibi and contradicted the accounts of Applicant and Mr. Glaspie, and (d) acted on the information when preparing for trial.

207. This Court finds by a preponderance of the evidence, that ADA Rizzo knowingly presented false testimony at Applicant's trial that the testimony of co-defendant Dashon Glaspie was 100% truthful.

208. Additionally, Applicant and the State agree, and this Court finds by a preponderance of the evidence, that ADA Rizzo knowingly presented false testimony at Applicant's trial that Mr. Brown participated in the robbery of the ACE check cashing store.

209. The jury was assured by the State that Mr. Glaspie's testimony "matche[d] each

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[13] This document was filed as Exhibit 1 with the State's motion to the CCA to remand the case to this Court and was one of the documents in the materials this Court was ordered to review.

and every small piece of evidence." 31 RR 116. However, at the time, the State was in possession of credible evidence which showed that Mr. Glaspie's testimony was false.

210. The Court finds that at the time the State elicited testimony regarding the zero-tolerance approach to Mr. Glaspie's testimony, the prosecutor was aware of the evidence which contradicted Mr. Glaspie's testimony.

211. Accordingly, this Court finds and concludes that Applicant has proved by a preponderance of the evidence that the State knowingly presented false testimony at Applicant's trial and failed to correct it thereafter. The State's knowing use of false testimony and evidence was "deliberate deception," which is incompatible with "rudimentary demands of justice." *Giglio*, 405 U.S. at 153 (internal quotation marks and citation omitted).

D. Materiality

212. Where there was knowing use of false testimony, it is material when "there is a reasonable likelihood" that the false evidence affected the judgment of the jury." *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014); *Ghahremani*, 332 S.W.3d at 478 (citing *Agurs* 427 U.S. at 103); *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

213. "The 'reasonable likelihood' standard is equivalent to the standard for constitutional error, which 'requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Ghahremani*, 332 S.W.3d at 478 & n.21 (citing *Bagley*, 473 U.S. at 680 n.9); *see also Ex parte Castellano*, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993) (en banc) ("The Supreme Court has announced the standard of materiality for perjured testimony is the harmless error standard."); *Ramirez v. State*, 96 S.W.3d 386, 396 (Tex. Ct. App.--Austin 2002) (*Napue* standard "is essentially the harmless error standard for constitutional error embodied in the Texas Rules of

Appellate Procedure 44.2(a).") (internal quotation marks and citation omitted).

214. Thus, if Applicant establishes that the State knowingly presented false testimony, the burden is on the State to prove beyond a reasonable doubt that the false testimony had no effect on either the verdict of guilt, or the death sentence. *Chapman v. California*, 386 U.S. 18, 24 (1967). This is "justified … on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.'" *Bagley*, 473 U.S. at 680 (quoting *Agurs*, 427 U.S. at 104).

215. However, if the applicant is unable to demonstrate that the prosecution knowingly relied upon false testimony, Applicant may still prevail under state law if he can "prove by a preponderance of the evidence that the error contributed to his conviction or punishment.'" *Chabot*, 300 S.W.3d at 771 (quoting *Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996)).

216. Because the presentation of the false evidence in Applicant's case was knowing, and the evidence in support of his claim was not available at the time of his direct appeal, under Texas law, Applicant is entitled to relief unless it can be determined beyond a reasonable doubt that the testimony made no contribution to the defendant's conviction or punishment." *Ex parte Lalonde*, 570 S.W.3d 716, 722 (Tex. Crim. App. 2019) (internal citation omitted).

217. Because it is uncontested that the prosecution knowingly presented false evidence at Applicant's trial, the overarching question before this Court under both state and federal law is whether there is any likelihood that the false testimony affected the judgment of the jury.

218. However, this Court finds that there is a reasonable likelihood that the false testimony affected the outcome of Applicant's trial under both state and federal standards.

219. In determining whether there is a reasonable likelihood that the false testimony

affected the verdict, the Court considers the verdict rendered in response to the case presented by the State. *Napue v. Illinois*, 360 U.S. at 272.

220. The Court finds that the State's theory of the case, as presented to the jury and supported by Mr. Glaspie's testimony, was that Applicant shot and killed Ms. Jones in the course of robbing the ACE check cashing store, rendering Applicant a principal in the capital murder.

221. The Court also finds that the State's theory was that Mr. Brown shot and killed Officer Clark and that Mr. Glaspie was a non-shooter.

222. Although the State suggested that Applicant could be convicted under a theory of party liability, the clear focus of the State's case, from opening statements, through testimony, and throughout closing arguments, was that Applicant shot Ms. Jones, Mr. Brown shot Officer Clark, and Mr. Glaspie was not a shooter at all.

223. The State unequivocally presented Applicant as the individual who shot Ms. Jones. The only testimony that supported this theory was that of Mr. Glaspie.

224. While the State has argued that Mr. Glaspie was impeached at trial, the State also falsely corroborated his account with testimony from other witnesses. Unlike Mr. Glaspie, who was vulnerable to impeachment because he had an incentive to curry favor with prosecutors, witnesses who identified Mr. Brown as a participant were presented as disinterested eye witnesses. Those witnesses include Shoukat Hussein and Sheikah Mohammed Afzal. In addition, police officers tainted Applicant's custodial statement by encouraging him to talk by showing him Mr. Glaspie's statement implicating Mr. Brown. Even if Mr. Glaspie was impeached at trial, it is at least reasonably likely that jurors credited his account of Mr. Joubert's role based on the other witnesses' (false) corroboration of Mr. Glaspie's account of Mr. Brown's

role.[14]

225. Moreover, this Court is concerned about the inconsistent positions the State has taken regarding Mr. Glaspie at different stages of this case. During Applicant's direct appeal, the State contended

> that the most powerful evidence in the State's case was Dashan Glaspie's testimony. Glaspie described how Appellant was involved in the planning of the robberies, willingly participated in them, and personally shot Alfredia Jones in the head. Glaspie also candidly admitted that he had personally set the events leading to the murders of Alfredia Jones and Officer Charles Clark in motion the day before when he suggested the three rob a check cashing business. Glaspie admitted he actively participated in the ensuing crimes.

State's Appellate Brief at 10, *Joubert v. Texas*, 2006 WL 2643719 (Aug. 8, 2006).

226. Allowing the State to take contradictory positions at different phases of the same case undermines public confidence in the integrity of the judicial process. Although it is not dispositive of this Court's findings or conclusions, the Court finds that the doctrine of judicial estoppel bars the State from asserting in this proceeding that Mr. Glaspie's testimony was deemed unreliable at trial when the State argued immediately after the trial that the same testimony was "the most powerful evidence in the State's case."

227. The Court concludes that it is at least reasonably likely that the jury convicted Applicant as a principal—a theory built on Mr. Glaspie's testimony—just as the State argued they should, and the State has not even attempted to prove beyond a reasonable doubt that it did not.[15]

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[14] The erroneous testimony of the "corroborating" witnesses, the false evidence regarding the cell phone records, and the fact that Applicant's own statement has now been proven to contradict both the physical evidence and the truth about Mr. Brown's involvement further cause this Court to harbor reasonable doubt about concluding that the falsehoods made no contribution to Applicant's conviction.

[15] The Court also notes that the jury was instructed under theories of party liability that relied on

228. As to punishment, the Court finds the prosecution presented the jury with a choice between believing Mr. Glaspie's account of Mr. Joubert shooting Alfredia Jones, and Mr. Joubert's statement that Mr. Glaspie shot her. If the jury disbelieved Mr. Joubert, as the prosecution argued they should, they also would have discredited his statements of remorse.

229. Several studies of how jurors decide whether to vote for life or death show that remorse, or the lack of it, and doubts about the defendant's culpability are important factors with lack of remorse and increased culpability influencing votes for death. *See* Eisenberg, Theodore; Garvey, Stephen P.; and Wells, Martin T., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998)(Juror perception of defendant's remorse influences sentencing decisions); Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998)(almost all of the cases where a defendant with a denial defense receives a life sentence are multiple defendant cases in which jurors expressed lingering doubt about the level of participation). *See also Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding prejudice under reasonable probability standard based in part on excluded statements of remorse).

230. Applicant's statement contained assertions of remorse and coercion by Mr. Glaspie. Either or both of these claims, if credited could have influenced the jury's verdict on liability—whether they convicted Applicant as a principal or party—and the jury's answers to

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the jury finding Mr. Brown killed Officer Clark. The newly-revealed false evidence exonerating Mr. Brown undermines at least two ways the jury was authorized to convict: the murder of Ms. Jones and Officer Clark during the commission of a robbery under a "traditional" parties theory and the murder of Ms. Jones and Officer Clark during the commission of a robbery under a "conspiracy" parties theory. Given that the jury returned a general verdict, this Court cannot conclude beyond a reasonable doubt that the false evidence did not affect the verdict. *See e.g. Riley v. Mc.Daniel.* 786 F.3d 719, 726-27 (9th Cir. 2015).

the second and third special issues.

231. Upon consideration of all the evidence and admissions, the Court concludes that it is at least reasonably likely that jurors were influenced by Mr. Glaspie's false testimony when answering the second and third special issues, and therefore, Applicant has shown the knowing presentation of false testimony was material to the death verdict.

232. In closing, ADA Lafon told the jury that they did not all have to agree regarding whether Applicant shot Ms. Jones or was the non-shooter co-conspirator. 31 RR 22.

> But there's no requirement that all 12 of you agree on which one. All that you have to agree is whether or not he's guilty of capital murder. So let me give you by illustration. Let's say six of you believe he's guilty of capital murder because of the robbery/murder of Ms. Jones but you may have some questions about the double homicide. The other six of you say, "No. double homicide." No. No. He's guilty of the It doesn't matter that you agree on that. It only matters that you agree it's capital murder. Okay? No, you don't have to be specific in your verdict.

31 RR 26.

233. As ADA Lafon argued to the jury in closing, Mr. Joubert's mere presence at the robbery was not sufficient to establish his culpability for a death sentence. *See Tison v. Arizona*, 481 U.S. 137 (1987). For the jury to answer the second special issue in the affirmative, the State had to prove beyond a reasonable doubt that Applicant "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2).

234. The prosecution's concession that the jury could convict on either of several theories—some supported by Mr. Glaspie, others by Applicant's custodial statement—is important. Even under the demanding reasonable probability standard applicable to *Brady* claims, a conviction or death sentence may be set aside even if the evidence that remains

untouched by the suppression is enough to convict the defendant. *Kyles*, 514 U.S. at 434-435 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.").

235. The Supreme Court has explained that the reasonable probability standard of materiality applicable to *Brady* claims is more demanding than the harmless-error standard applicable to post-conviction claims of trial error. *Kyles*, 514 U.S. at 435 ("a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different … necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict") (internal quotation marks and citations omitted). And the "substantial and injurious effect" standard is more demanding than *Chapman* harmless-error standard that the CCA and Supreme Court have applied to *Mooney* claims like the one before this Court. *Id.* at 435-436. Therefore, if it is at least reasonably likely that the jury was influenced by Mr. Glaspie's and others' false testimony, Applicant is entitled to relief even if the jury could have convicted Applicant or sentenced him to death as a party based on Applicant's custodial statement.

236. This Court concludes it is at least reasonably likely that Mr. Glaspie's false testimony about either the role of Mr. Brown or Mr. Glaspie's compliance with his plea agreement contributed to the jury's verdict on guilt/innocence and its answers to the second or third special issues.

237. The Court next assumes the prosecution did not knowingly present false testimony and considers whether Applicant has carried his burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Chabot*, 300 S.W.3d at 771. The Court finds that Applicant has carried his burden as to both liability and punishment.

238. Specifically, for the reasons stated above, the Court finds it is more likely than not that the jury credited Mr. Glaspie's account—despite impeachment on cross-examination—and convicted Mr. Joubert as a principal, not a party, and that Mr. Glaspie's account contributed to the jurors' answers to the second and third special issues.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE MERITS OF CLAIM TWO: THE *BRADY* CLAIM

239. In Claim Two, Applicant alleges that the State withheld favorable, material evidence in violation of the Fourteenth Amendment's Due Process Clause. The Court incorporates by this specific reference the findings made above regarding the newly disclosed materials and Claim One.

240. As explained above, since 2017, when this Court originally transmitted findings and conclusion regarding Applicant's claims to the CCA, circumstances have changed, and issues have been clarified.

241. The suppression of favorable and material evidence violates the Due Process Clause of the Fourteenth Amendment.[16]

242. There are three elements to a *Brady* claim: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'"[17] The applicant has the burden of establishing each element of a *Brady*

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[16] *See Brady v. Maryland*, 373 U.S. 83 (1963); *Banks v. Dretke*, 540 U.S. 668, 691 (2004) ("*Brady* ... held that '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.'") (quoting *Brady*, 373 U.S. at 87).

[17] *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (en banc) ("(1) the state suppressed evidence; (2) the suppressed evidence is favorable to defendant; and (3) the

claim. *Harm*, 183 S.W.3d at 406.

243. Whether the suppressed evidence is favorable to the accused and whether it is material are both based on what effective defense counsel could have done with the evidence.[18]

244. Two of the three elements of Applicant's *Brady* claim are not in dispute. *See* State's Proposed Findings of Fact and Conclusions of Law, at 18 (July 10, 2017) ("[T]he State does not contest the failure to disclose and favorability prongs of *Brady*; the State contests the materiality prong.").

A. WITHHELD EVIDENCE

245. The suppressed evidence at issue includes not only the record of calls to/from Ms. Dockery's landline and the grand jury testimony of Ms. Dockery and Ms. Hubbard, but also now the evidence that the prosecution knew Mr. Brown's alibi could be corroborated and deliberately deceived the jury about that as well as Mr. Glaspie's motivation to testify truthfully.

246. Although not essential to this Court's findings of fact and conclusions of law, in the interest of judicial economy this Court considers whether the suppression of the email from Det. McDaniel to ADA Rizzo violated *Brady v. Maryland*. The State has conceded that it was not disclosed to Applicant's counsel.

247. Based on the State's concessions, and the evidence presented in Applicant's post-conviction proceedings, this Court finds that the Grand Jury testimony, landline phone records and the April 4, 2003 email from Det. McDaniel to ADA Rizzo were not disclosed to the defense

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suppressed evidence is material.").

[18] *See Kyles v. Whitley*, 514 U.S. 419, 441 (1995) (holding "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (*Brady* "evidence is 'evidence favorable to an accused,' ... so that, if disclosed and used effectively, it may make the difference between conviction and acquittal") (quoting *Brady*, 373 U.S. at 87).

team, either at trial, on appeal, or in initial state post-conviction proceedings.

B. FAVORABILITY

248. The State has conceded that the suppressed evidence was favorable to Applicant.

249. Favorable evidence is evidence which is exculpatory, mitigating or impeaching toward any aspect of the State's case. *Smith v. Cain*, 565 U.S. 73, 75 (2012); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

250. The Court finds that suppressed evidence was favorable in that it would have been powerful support for Applicant's counsel to attack the State's theory of the case and the witnesses and evidence it presented to support such a theory.

251. Similarly, the suppressed evidence would have been mitigating as the State's case presented Applicant as a shooter and specifically, as the shooter of Ms. Jones.

252. As discussed below, however, the suppressed evidence went beyond mere impeachment evidence that would have tarnished the State's witnesses.

C. MATERIALITY OF THE SUPPRESSED FAVORABLE EVIDENCE

253. This is the only element of Applicant's *Brady* claim the parties dispute.

254. The Court finds that the withheld evidence was material to both phases of Applicant's capital murder trial.

255. Evidence is material/prejudicial if it "is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016).

256. Materiality/prejudice "turns on the cumulative effect of all … evidence suppressed by the government." *Kyles*, 514 U.S. at 421; *id.* at 436 ("materiality … of suppressed evidence considered collectively, not item by item").

257. The standard is satisfied when the cumulative effect of the suppressed evidence

"raises a reasonable probability that its disclosure would have produced a different result." *Kyles*, 514 U.S. at 421-22.

> As we stressed in *Kyles:* '[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' 514 U.S., at 434, 115 S.Ct. 1555.

Strickler v. Greene, 527 U.S. 263, 289–90, 119 S. Ct. 1936, 1952, 144 L. Ed. 2d 286 (1999).

258. Applicant can show a *Brady* violation by demonstrating that the favorable suppressed evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict. *Kyles*, 514 U.S. at 435.

259. In order to satisfy the materiality standard, the applicant "need not show that he more likely than not would have been acquitted had the new evidence been admitted." *Wearry*, 136 S. Ct. at 1006 (internal quotation marks and citation omitted). Conversely, the applicant "can prevail even if ... the undisclosed information may not have affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6.

260. Finally, "materiality ... is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35.

261. The foregoing standards apply to both the guilt/innocence phase of trial, and the punishment phase. *Brady*, 373 U.S. at 87. In *Brady* itself the "sole claim of prejudice [went] to the punishment imposed," *id.* at 88, which was death.

1) CULPABILITY PHASE

262. The withheld evidence reaches beyond simply impeachment evidence against Mr. Glaspie. The withheld evidence would have put the entire case in a different light. *Kyles*, 514 U.S. at 435. *See Wearry*, 136 S. Ct. at 1006-07; *Smith v. Cain*, 565 U.S. at 76.

263. The State's case against Applicant was based upon the version of events testified to by Mr. Glaspie, which portrayed Applicant as the shooter of Ms. Jones, Alfred Brown as the shooter of Officer Clark, and Mr. Glaspie as a non-shooter. This was the State's theory as presented to the jury.

264. The importance of Mr. Glaspie's testimony to the State can be seen in ADA Rizzo's reliance upon it in his closing argument,[19] and that ADA Rizzo repeatedly vouched for him to assure the jury his testimony was 100% true.

265. The withheld information directly contradicts Mr. Glaspie's testimony. *See Wearry*, 136 S. Ct. at 1006-07; *Smith v. Cain*, 565 U.S. 73, 76 (2012).

266. The withheld evidence also demonstrates that the prosecutor who presented Mr. Glaspie's testimony to the jury, and who vouched for Mr. Glaspie's truthfulness, knew of the evidence which contradicted and undermined the very testimony he was eliciting. In that sense, the withheld evidence permeated the trial.

267. The withheld evidence also cast doubts on the reliability of all other witnesses who placed Applicant with Mr. Glaspie and Mr. Brown before and after the offense.

268. When "withheld evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material." *East v. Johnson*, 123 F.3d 235, 239 (1997), citing *Wilson v Whitley*, 28 F.3d 433, 439 (5th Cir.1994), *cert denied*, 513 U.S. 1091 (1995).

269. The Harris County District Attorney and this Court have since concluded that "no

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[19] *East v. Johnson*, 123 F.3d 235 at 239 (5th Cir. 1997)(death sentence vacated where withheld evidence impeaching a key witness was found to be material because the prosecutor's closing argument placed more reliance on that witness' testimony than any other evidence of future dangerousness).

reasonable jury" could have determined that Mr. Brown was present at the offense. The parties agree, and this Court finds, that had Applicant's jury been made aware of the withheld evidence, they would have concluded that Mr. Brown was not present and, therefore, the testimony of Mr. Glaspie and all other evidence placing Mr. Brown at the scene was not true.

270. The new evidence not only demonstrates that Mr. Glaspie's version of events was false, it also undermines the reliability of all those witnesses who testified that Mr. Brown was with Mr. Glaspie and Applicant before and after the crime.

271. The fact that Mr. Brown was not present would have raised serious doubt about the testimony of uninvolved lay witnesses who were necessary to the State's operating premise that the three defendants were all seen together before and after the crime. Without that evidence, Det. McDaniel's testimony regarding the cell phone location data would not corroborate Mr. Glaspie's statement. Standing alone, the cell phone records only show that Applicant was at home before and after the crime.

272. Other witnesses would have been shown to have either been mistaken or lied about critical evidence in the case. The withheld evidence would not merely have raised questions about the veracity of these witnesses' statements, it would have demonstrated that at least some of their testimony was undisputedly false. This likely would have caused the jurors to be hesitant to rely upon the witnesses' judgment, memory, and honesty as to other facts.

273. If provided the withheld evidence prior to trial, it is probable that effective counsel would have put on a different case. The defense strategy was to concede that Applicant was present at the scene, but argue that he was the non-shooter. The goal was to get an aggravated robbery conviction. At the time, it appeared there was little choice, with several witnesses claiming to have seen Applicant with Mr. Brown and Mr. Glaspie before and after the

crime. Had they known that all of those witnesses were either lying or mistaken as to Mr. Brown, the landscape would have appeared very different to the defense.

274. The grand jury testimony illustrating the pressure put on two witnesses, together with the fact that a total of five witnesses testified falsely regarding at least Mr. Brown's presence, would have allowed the defense to build a case that Applicant's custodial statement was not reliable.

275. Applicant's custodial statement was significantly different from Mr. Glaspie's version of events. Where the two statements were similar was a narrative that included Mr. Brown, which came two and a half hours into Applicant's interrogation and only after law enforcement officers played the recording of Mr. Glaspie's custodial statement, implicating Mr. Brown, to him.

276. The Court finds that, had the withheld evidence been disclosed, the State's case would also have been drastically different. Without Mr. Glaspie, the State would not have been able to keep the promises it made to the jury in its opening statement.

277. The withheld evidence would have prevented the State from claiming that Mr. Glaspie had a zero tolerance plea or that he would face the death penalty if his testimony was less than 100% true. The prosecution would have had to admit that much of his testimony was false.

278. The Court looks at the effect of constitutional violation on the trial that occurred. That case was built upon the theory that Mr. Brown was present and shot Officer Clark. According to Mr. Glaspie, Mr. Brown selected the ACE store as a target, directed him there, brought the second gun, was a participant at every step along the way, and drove the getaway vehicle. Disclosure of the withheld material would have undermined the case the State offered at

trial. Without the ability to show Mr. Brown as the shooter of Officer Clark, or even being present at the scene, the State would have had to advance an entirely different theory.

279. At trial, the primary issue before the jury was the credibility of Mr. Glaspie and determining who shot Ms. Jones. "Who was the shooter is a paramount question." 31 RR 63 (Mr. Godinich's closing argument).

280. This Court further finds that, if this evidence had been known before trial, the jury would have had to entertain materially different issues. Given the distorted factual scenario presented at trial, this Court does not have confidence in the verdict.

281. The suppressed evidence undermining Mr. Glaspie's credibility relative to Applicant's "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." As the Supreme Court has observed, "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others." *Kyles*, 514 U.S. at 445.

282. Even if the jury, fully aware of all the withheld evidence, "*could* have voted to convict [Applicant]," the Court has "no confidence that it *would* have done so." *Wearry*, 136 S. Ct. at 1007 (citing *Smith v. Cain*, 565 U.S. at 76 (emphasis in original).

283. The prosecution's concession that the jury could convict on either of several theories—some supported by Mr. Glaspie, others by Applicant's custodial statement—is important. Even under the reasonable probability standard applicable to Applicant's *Brady* claim, a conviction or death sentence may be set aside even if the evidence that remains untouched by the suppression is enough to convict the defendant. *Kyles*, 514 U.S. at 434-435 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."); *Wearry*, 136 S. Ct.

1006; *id.* at n.6.

284. All applicant must show is that the new evidence is sufficient to "undermine confidence" in the verdict. *Wearry*, 136 S. Ct. at 1006.

285. The Court finds that the newly revealed evidence suffices to undermine confidence in Applicant's conviction. Thus, this Court recommends that relief be granted to Applicant on this claim and that his conviction be reversed.

2) PUNISHMENT PHASE

286. This Court finds that the suppressed evidence was also material to the punishment phase of Applicant's trial because the Court cannot have confidence that each member of the jury would have answered the special issues in such a way that required a death sentence, had they known that the State falsely attributed culpability for Ms. Jones' death to Applicant.

287. Mr. Glaspie was the only witness who could have established that Applicant shot Alfredia Jones. In the absence of Mr. Glaspie's testimony, the State would necessarily have lacked sufficient evidence to established who caused Ms. Jones' death.

288. Although he denied shooting anyone, in his video-taped statement, Applicant expressed remorse for the victims. ADA Rizzo urged the jury to disregard Applicant's account and credit Mr. Glaspie's account of intentionally and remorselessly shooting Ms. Jones.

289. Had the jury been presented with the suppressed evidence, there is a reasonable probability that at least one juror would have disbelieved Mr. Glaspie's account of Applicant shooting Ms. Jones and as a result, returned a different answer to one or more of the special issues.

290. Had the jury not disregarded Applicant's statement, for Mr. Glaspie's testimony, as urged by the prosecutor, there is a reasonable probability that at least one juror would have

found Applicant's expression of remorse sufficient to answer the special issues in a way that would not have resulted in a death sentence. *See* Eisenberg, Theodore; Garvey, Stephen P.; and Wells, Martin T., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998)(Juror perception of defendant's remorse influences sentencing decisions). *See also Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding prejudice under reasonable probability standard based in part on excluded statements of remorse).

291. Had the jury learned the content of the Grand Jury testimony of Ericka Dockery and Tonika Hutchins, as well as the landline phone records and Det. McDaniel's email, at least one juror would have concluded that the State's zero-tolerance guarantee of Mr. Glaspie's truthfulness was not only false but deliberately deceptive.

292. This Court finds that it is reasonably probable that this would have led to a rejection of Mr. Glaspie's testimony as to Applicant's role and participation in the offense, and a different punishment verdict.

293. The Court finds that Mr. Glaspie's testimony as to Applicant's participation and role in the offense was critical to the punishment phase of the trial because Applicant's role would have been a significant consideration to each juror in his or her individual evaluation of Applicant's moral culpability.[20]

294. The Court finds that the question of Applicant's participation and role in the

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[20] *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (sentencing function is one which involves jurors assessing a defendant's moral culpability); *Lowenfield v. Phelps*, 484 U.S. 231, 254-255 (1988) ("The capital sentencing jury is asked to make a moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the juror'' discretion, theirs is largely a subjective judgment."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("the rule in *Lockett* recognizes that 'justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'").

offense, such as shooter or non-shooter, is a matter which the jurors would have considered in assessing Applicant's punishment. This finding is supported by the State's focus on presenting Applicant as the shooter of Ms. Jones, despite its concession that an anti-parties instruction would have also have permitted a death sentence.

295. The disparity in the punishments the State sought for Applicant and Mr. Glaspie was justified on the grounds that Applicant was portrayed as a shooter and Mr. Glaspie as a non-shooter.

296. The Court finds that Applicant's death sentence relied upon Mr. Glaspie's testimony, including his allegation that Applicant shot Ms. Jones.

297. Had a single juror had a basis to disbelieve Mr. Glaspie's assignment of Applicant as the shooter of Ms. Jones, then there is a reasonable probability that the juror's assessment of the punishment special issues, including the mitigation issue, would have been different. *See Ghahremani*, 332 S.W.3d at 478. There is a reasonable probability that at least one juror would have found Applicant's statement regarding reduced culpability sufficient to answer the special issues in a way that would not have resulted in a death sentence. *See* Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998)(almost all of the cases where a defendant with a denial defense receives a life sentence are multiple defendant cases in which jurors expressed lingering doubt about the level of participation).

298. The Court concludes, under these circumstances, it is reasonably probable that at least one juror would have returned a different punishment verdict. *United States v. Bagley*, 473 U.S. 667 (1985); *Ex Parte Ghahremani*, 332 S.W.3d 470,478 (Tex. Crim. App. 2011).

VII. RECOMMENDATIONS AND CONCLUSION

299. The Court concludes that Applicant has demonstrated by a preponderance of the evidence that he is entitled to habeas corpus relief based on the State's presentation of false evidence. *Napue*, 360 U.S. at 272 (judgment reversed when "evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of the petitioner may have an effect on the outcome of the trial.").

300. The Court concludes that Applicant has demonstrated by a preponderance of the evidence that he is entitled to habeas corpus relief based on the State's failure to disclose favorable, material evidence, as a reasonable probability exists that the result of the proceedings would have been different. *Banks*, 540 U.S. at 691.

301. This Court recommends that relief be granted as to the guilt phase of Applicant's trial and that Applicant's conviction be vacated, and the case remanded for a new trial on the issue of liability.

302. This Court recommends that relief be granted as to the punishment phase of Applicant's trial and that Applicant's death sentence be vacated, and the case remanded for a new trial as to punishment.

Signed this ___ day of December, 2020.

Signed:
12/18/2020

George Powell, Judge Presiding
351st District Court of Harris County, Texas

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-78,119-02

EX PARTE ELIJAH DWAYNE JOUBERT

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. 944756-B IN THE 351ST DISTRICT COURT HARRIS COUNTY

***Per curiam*.**

O R D E R

In October 2004, Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted under Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Joubert v. State,* 235 S.W.3d 729 (Tex. Crim. App. 2007). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Joubert*, No. WR-78,119-01 (Tex. Crim.

App. September 25, 2013). Applicant's instant post-conviction application for writ of habeas corpus, *Ex parte Joubert*, No. WR-78,119-02, was received in this Court on June 23, 2016.

The record reflects that Applicant challenged his conviction in Cause No. 4:13-cv-03002, styled *Elijah Dwayne Joubert v. William Stephens,* in the United States District Court for the Southern District of Texas, Houston Division. On October 15, 2015, the federal district court entered an order staying its proceedings for Applicant to return to state court to present his claims.

Applicant presents nine allegations in the instant application. We have reviewed the application and find that Claims One and Two satisfy the requirements of Texas Code of Criminal Procedure Article 11.071, § 5(a). Accordingly, we find that the requirements for consideration of a subsequent application have been met and the cause is remanded to the trial court for consideration of Claims One and Two.

IT IS SO ORDERED THIS THE 5TH DAY OF OCTOBER, 2016.

Do Not Publish

Conclusion

[11] We vacate the judgment of the Court of Appeals and remand the case to that Court for further proceedings consistent with this opinion.

KELLER, P.J., and KEASLER, J., concurred in the judgment.

Elijah Dwayne JOUBERT, Appellant

v.

The STATE of Texas.

No. AP–75050.

Court of Criminal Appeals of Texas.

Oct. 3, 2007.

Background: Defendant was convicted in the 351st Judicial District Court, Harris County, Mark Kent Ellis, J., of capital murder and was sentenced to death. Defendant appealed.

Holdings: The Court of Criminal Appeals held that:

(1) non-accomplice evidence was sufficient to corroborate accomplice-witness testimony,

(2) special punishment issues are not required to be alleged in the indictment in a capital case;

(3) venireperson was not challengeable for cause on the ground that she did not consider a particular type of evidence to be mitigating; and

(4) co-defendant's plea-bargained sentence was not a mitigating factor to be considered by jury.

Affirmed.

1. Criminal Law ⚿511.1(3)

Accomplice testimony corroborating evidence need not be sufficient, standing alone, to prove beyond a reasonable doubt that a defendant committed the offense. Vernon's Ann.Texas C.C.P. art. 38.14.

2. Criminal Law ⚿511.2

All that is required under accomplice testimony statute is that there is some non-accomplice evidence tending to connect the defendant to the offense. Vernon's Ann.Texas C.C.P. art. 38.14.

3. Criminal Law ⚿511.1(7)

There is no requirement under accomplice testimony statute that non-accomplice testimony in murder prosecution corroborate the accused's connection to a specific element which raises the offense from murder to capital murder. Vernon's Ann.Texas C.C.P. art. 38.14.

4. Criminal Law ⚿511.2

Under accomplice testimony statute, there need be only some non-accomplice evidence tending to connect the defendant to the crime, not to every element of the crime. Vernon's Ann.Texas C.C.P. art. 38.14.

5. Criminal Law ⚿511.2

Non-accomplice evidence was sufficient to corroborate accomplice-witness testimony in capital murder prosecution; even though defendant denied being the person who shot victims during the robbery, videotaped statement in which defendant admitted participating in the robbery tended to connect defendant to the offense. Vernon's Ann.Texas C.C.P. art. 38.14.

6. Sentencing and Punishment ⚿1744

Special punishment issues are not required to be alleged in the indictment in a capital case.

7. Jury ⚿108

A venireperson is not challengeable for cause in a capital case on the ground that she does not consider a particular type of evidence to be mitigating.

8. Jury ⚿131(8)

A party is not entitled to question a venireperson in a capital case as to whether the venireperson could consider particular types of evidence to be mitigating.

9. Sentencing and Punishment ⚿1655

Co-defendant's thirty-year, plea-bargained sentence was not a mitigating factor to be considered by jury in assessing punishment for defendant in capital murder prosecution.

10. Sentencing and Punishment ⚿1655

A co-defendant's conviction and punishment have no bearing on a defendant's own personal moral culpability, and thus evidence of a co-defendant's conviction and punishment is not included among the mitigating circumstances which a capital defendant has a right to present.

Henry L. Burkholder III, Houston, for appellant.

Kevin Keating, Asst. D.A., Houston, Matthew Paul, State's Attorney, Austin, for state.

PER CURIAM.

The appellant was convicted in October 2004 of capital murder.[1] Based on the jury's answers to the special issues set forth in Code of Criminal Procedure Article 37.071, sections 2(b) and 2(e), the trial judge sentenced the appellant to death.[2] Direct appeal to this Court is required.[3] After reviewing the appellant's seven points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death.

On April 2, 2003, Dashan Glaspie recruited his longtime friend, the appellant, and another friend, Alfred Brown, to help him commit robbery at a check-cashing business. Glaspie was to act as a lookout while the appellant and Brown went inside. They drove to the business the next morning. The owner pulled up as the appellant and Brown were approaching. When the owner saw them, he pulled out a handgun. The appellant and Brown returned to the car, and the three decided to abandon the robbery because the owner had displayed a weapon.

They decided to rob a different business and drove to a second check cashing location. When Alfredia Jones arrived to open the store, the appellant approached her at gunpoint and walked her into the store. Shortly thereafter Glaspie and Brown entered the store. The appellant allowed Jones to make a phone call to another store to inform them that she was "opening Center 24." This was actually a distress code alerting them to the robbery. The appellant held a gun to Jones's head and told her to open the safe, while Glaspie began checking the store for surveillance equipment, and Brown went through Jones's purse. Police Officer Charles Clark arrived at the scene and entered the store. The appellant accused Jones of tipping off the police, and he shot her. The evidence suggested that Brown shot Offi-

1. PENAL CODE § 19.03(a).

2. Art. 37.071 § 2(g). Unless otherwise indicated, all references to Articles refer to the Code of Criminal Procedure.

3. Art. 37.071 § 2(h).

cer Clark. Jones and Clark both died as a result of the gunshot wounds. Pursuant to a thirty-year plea bargain, Glaspie testified for the State at the appellant's trial.

In point of error four, the appellant claims Glaspie's testimony, as accomplice-witness testimony, was not sufficiently corroborated to support the appellant's conviction as a principal. In his fifth point of error, he contends Glaspie's testimony was insufficiently corroborated to support his conviction under a parties theory.[4]

[1–4] Article 38.14 provides that a conviction cannot stand on accomplice testimony unless there is other evidence tending to connect the defendant to the offense. The corroborating evidence under 38.14 need not be sufficient, standing alone, to prove beyond a reasonable doubt that a defendant committed the offense.[5] All that is required is that there is *some* non-accomplice evidence *tending to connect* the defendant to the offense. Further, there is no requirement that the non-accomplice testimony corroborate the accused's connection to the specific element which raises the offense from murder to capital murder.[6] There need be only some non-accomplice evidence tending to connect the defendant to the crime, not to every element of the crime.[7]

[5] Houston Police Officer James Binford testified that he interviewed the appellant, who confessed in detail about his involvement in the instant offense. The interview with Binford and another officer was videotaped. The videotaped statement was played for the jury and admitted into evidence. In the video, the appellant admitted to participating in the instant offense, but he denied shooting either victim. The videotaped statement was sufficient to "tend to connect" him to the offense.[8] The appellant's liability as a principal or under a parties theory is of no relevance under an Article 38.14 analysis. The question is whether some evidence "tends to connect" him to the crime; the connection need not establish the exact nature of his involvement (as a principal or party). The appellant's admission that he participated in the crime, although he denied being a shooter, is enough to tend to connect him to the offense. Points of error four and five are overruled.

[6] In point of error one, the appellant claims the trial court erred in overruling his motion to dismiss the indictment for its alleged failure to include the special punishment issues,[9] in violation of his right to

4. The indictment alleged the appellant committed capital murder in either of two ways: (1) by causing the death of Jones during the course of committing a robbery of Jones; or (2) by causing the deaths of Jones and Clark during the same criminal transaction. The jury was authorized to convict the appellant under either paragraph, either as a principal or under the law of parties.

5. *Vasquez v. State,* 67 S.W.3d 229, 236 (Tex. Crim.App.2002).

6. *Vasquez v. State,* 56 S.W.3d 46, 48 (Tex. Crim.App.2001).

7. *Id.*

8. *See Jackson v. State,* 516 S.W.2d 167, 171 (Tex.Crim.App.1974) (stating that defendant's admission or confession is, under most circumstances, sufficient to corroborate accomplice testimony).

9. Pursuant to Article 37.071, upon a finding of capital murder, these questions must be submitted to the jury if the State seeks the death penalty:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party

due process of law under the Fourteenth Amendment. The appellant contends that under *Apprendi v. New Jersey,*[10] he was entitled to have the grand jury pass on the special punishment issues before authorizing the State to proceed on a capital murder prosecution.

Since the Supreme Court decided *Apprendi* and its progeny, state courts have struggled with whether sentencing factors, including the special punishment issues, should be considered full-blown elements of an offense, requiring inclusion in an indictment.[11] Most courts, including this one, have held that the *Apprendi* sentencing factors are not elements of offenses for purposes other than the Sixth Amendment jury-trial guarantee.[12] We have specifically rejected the argument that *Apprendi* requires the State to allege the special issues in the indictment.[13] Point of error one is overruled.

We have not examined whether a defendant has a right to a grand jury indictment on the special punishment issues under the state constitution. The appellant alleges exactly this in his second point of error. The appellant claims the trial court erred in overruling his motion to dismiss the indictment for its alleged failure to include the special punishment issues, in violation of his state constitutional right to indictment by grand jury. He contends the grand jury should be required to pass on the special issues before the State is authorized to seek the death penalty. The appellant misquotes *King v. State* [14] to support his position, as follows:

> At common law all offenses above the grade of misdemeanor must be prosecuted by indictment, for which it was the policy of the common law that no man should be put to death *until the necessity therefor should first be determined by a grand jury.*[15]

The appellant emphasizes that this is not a notice issue; rather, his argument is based on the historic role of the grand jury to serve as a check on prosecutorial power.

The actual language from *King* does not support the appellant's argument. In *King*, while discussing the historical basis for indictments at English common law, the Court quoted from Corpus Juris Secundum ("C.J.S."), where it is noted that:

> At common law all offenses above the grade of misdemeanor must be prosecuted by indictment, for it was the policy of the common law that *no man should be*

under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of ''yes'' or ''no'' on each issue submitted under Subsection (b) of this Article.

10. 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

11. Kevin R. Reitz, *Symposium: Sentencing: What's at Stake for States? Panel Two: Considerations at Sentencing—What Factors are Relevant and Who Should Decide? The New Sentencing Conundrum: Policy and Constitutional Law at Cross–Purposes,* 105 COLUM. L.REV. 1082, 1093, note 42 (2005).

12. *Id.,* at note 42.

13. *See Renteria v. State,* 206 S.W.3d 689, 709 (Tex.Crim.App.2006) (citing *Russeau v. State,* 171 S.W.3d 871, 886 (Tex.Crim.App.2005), *cert. denied,* —— U.S. ——, 126 S.Ct. 2982, 165 L.Ed.2d 989, 990 (2006), (*Apprendi* and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) have no applicability to Article 37.071); *Rayford v. State,* 125 S.W.3d 521, 533 (Tex.Crim.App.2003)).

14. 473 S.W.2d 43, 45 (Tex.Crim.App.1971).

15. *Id.* (alteration in original).

> *put on his trial for felony,* for which the punishment was death, *until the necessity therefor should first be determined by a grand jury on oath.*[16]

The appellant has reshaped the meaning of the reference that indictments were required for all felony cases. The point being made by the Court about the common law was that indictments have historically served as protection against arbitrary accusations by the government in serious criminal cases.[17] This court has repeatedly recognized prosecutorial discretion to seek the death penalty, and the C.J.S. excerpt in *King* does nothing to change this interpretation of state law.[18]

Further, there is nothing in the language of the state constitution itself that requires the grand jury to pass on special punishment issues. Article I, section 10, pertaining to the rights of an accused in criminal cases, provides in part that the accused "shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof" and that "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury."

Article V, Section 12(b) defines an indictment:

> An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense. The practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment of an indictment or information to a court invests the court with jurisdiction of the cause.

Although indictments serve, in part, to "provide the accused an impartial body which can act as a screen between the rights of the accused and the prosecuting power of the State," [19] this has never been interpreted to mean that the grand jury screening function provided in the Texas Constitution pertains to capital sentencing issues.

In *Studer v. State,*[20] this Court concluded that, after constitutional amendments adopted in 1985, the "requisites of an indictment stem from statutory law alone now." Articles 21.02 and 21.03 set forth the specific requisites for an indictment, and the Court has held that these provisions do not require the State to plead the punishment special issues in a capital case.[21] Point of error two is overruled.

In his third point of error, the appellant claims the trial court erred in failing to grant his challenge for cause against venireperson Patricia Bloom Wohlgemuth. The appellant contends Wohlgemuth was challengeable for cause because she would not consider any mitigating evidence during punishment. The appellant relies on an exchange between defense counsel and Wohlgemuth in which Wohlgemuth stated

16. *Id.* (emphasis added).

17. *Id.*

18. *Cf. Russeau,* 171 S.W.3d, at 887 (State's discretion to seek death penalty is not unconstitutional, citing *Hankins v. State,* 132 S.W.3d 380, 387 (Tex.Crim.App.2004), and *Ladd v. State,* 3 S.W.3d 547, 574 (Tex.Crim.App.1999)).

19. *Teal v. State,* 230 S.W.3d 172, 175 (Tex.Crim.App.2007).

20. 799 S.W.2d 263, 272 (Tex.Crim.App.1990).

21. *Rosales v. State,* 748 S.W.2d 451, 458 (Tex.Crim.App.1987); *Sharp v. State,* 707 S.W.2d 611, 624 (Tex.Crim.App.1986).

that she would not consider several specific types of evidence named by defense counsel to be mitigating, including: a difficult childhood, being orphaned at a young age, drug problems, or poor schooling.

[7, 8] A venireperson is not challengeable for cause on the ground that she does not consider a particular type of evidence to be mitigating.[22] Indeed, a party is not entitled to question a venireperson as to whether the venireperson could consider particular types of evidence to be mitigating.[23] Wohlgemuth stated clearly in other portions of her voir dire that she was open to considering mitigating evidence and would give the mitigation issue full and careful consideration. The trial court did not abuse its discretion in denying the appellant's challenge for cause against Wohlgemuth. Point of error three is overruled.

[9] In point of error six, the appellant claims the trial court erred in granting the State's motion to prohibit him from arguing that co-defendant Glaspie's thirty-year, plea-bargained sentence was a mitigating factor in assessing his punishment. Evidence was presented that Glaspie would receive a thirty-year sentence if he testified truthfully in the appellant's trial. Before summation at the close of the punishment phase, the court ruled that the appellant would not be allowed to argue that Glaspie's sentence was a mitigating circumstance in his case. The appellant relies on *Parker v. Dugger*.[24]

[10] A co-defendant's conviction and punishment have no bearing on a defendant's own personal moral culpability:

> [E]vidence of a co-defendant's conviction and punishment is not included among the mitigating circumstances which a defendant has a right to present. In *Evans v. State*, 656 S.W.2d 65, 67 (Tex. Crim.App.1983), we stated:
>
> > "We do not see how the conviction and punishment of a co-defendant could mitigate appellant's culpability in the crime. Each defendant should be judged by his own conduct and participation and by his own circumstances." [25]

The appellant's reliance on *Parker* is misplaced. In *Parker*, the United States Supreme Court recognized that evidence of the co-defendants' sentences was part of the mitigating evidence admitted at Parker's trial. But this evidence was admissible under Florida law.[26] The Supreme Court in *Parker* recognized that this evidence was presented as mitigating evidence under Florida law; it did not address whether exclusion of such evidence would be a violation of federal law or otherwise address any rationale for inclusion of such evidence under federal law.[27]

22. *Standefer v. State*, 59 S.W.3d 177, 181–82 (Tex.Crim.App.2001); *Rosales v. State*, 4 S.W.3d 228, 233 (Tex.Crim.App.1999); *Raby v. State*, 970 S.W.2d 1, 3 (Tex.Crim.App.1998).

23. *Rosales*, 4 S.W.3d, at 233.

24. 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

25. *Morris v. State*, 940 S.W.2d 610, 613 (Tex. Crim.App.1996).

26. *See Bolender v. Singletary*, 16 F.3d 1547, 1566 n. 27 (11th Cir.1994) (noting that under Florida law, disparate treatment of co-defendants can constitute non-statutory mitigating circumstance where defendants are equally culpable).

27. *See Morris*, 940 S.W.2d at 613 (observing that the Court in *Parker* did not address whether evidence of disparate sentencing is mitigating evidence which must be considered under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)); *see also State v. Ward*, 338 N.C. 64, 449 S.E.2d 709, 737 (1994)("It did not address ... or otherwise suggest that the exclusion of such evi-

This Court has rejected the argument that *Parker* compels consideration of punishments received by co-defendants, concluding that such punishments "relate[ ] neither to appellant's character, nor to his record, nor to the circumstances of the offense." [28] Point of error six is overruled.

In his seventh point of error, the appellant claims the trial court erred by instructing the jury that it could answer special issue two, "Yes," if they found that the appellant had merely anticipated that a death would occur during the underlying robbery, in violation of his right against cruel and unusual punishment. He contends the issue permitted a finding in favor of the death penalty without a finding that he intended that a killing occur. He relies on *Enmund v. Florida*,[29] and *Tison v. Arizona*.[30] This argument has been rejected in other cases,[31] and we are not persuaded to overrule that precedent. Point of error seven is overruled.

The judgment of the trial court is affirmed.

Ex Parte Jesse Richard CORDOVA, Applicant.

No. AP–75771.

Court of Criminal Appeals of Texas.

Oct. 3, 2007.

Background: Petition for habeas corpus was forwarded from the 372nd Criminal District Court, Tarrant County.

Holdings: The Court of Criminal Appeals held that:

(1) new pending charges did not deprive parolee of right to a preliminary hearing, within a reasonable time, but

(2) 41-day deadline to for final revocation hearing did not apply because parolee had been indicted for a new offense.

Relief granted in part.

1. Pardon and Parole ⚿87

New pending charges did not deprive parolee of his right to a preliminary hearing, within a reasonable time, to determine whether probable cause or reasonable grounds existed to show that he violated conditions of his parole. V.T.C.A., Government Code § 508.2811.

2. Pardon and Parole ⚿84

Forty-one day statutory deadline for parole panel to dispose of charges against a releasee arrested for violating condition of release did not apply to parolee who was arrested on parole revocation warrant and who had been indicted for a new offense, as would require final parole revocation hearing before the deadline. V.T.C.A., Government Code § 508.282(a)(1)(A).

Dale Heisch, Fort Worth, TX, for Applicant.

Matthew Paul, State's Attorney, Austin, TX, for the State.

dence was improper as a matter of federal law.").

28. *Morris,* 940 S.W.2d, at 613.

29. 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

30. 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

31. *Ladd,* 3 S.W.3d, at 573; *Cantu v. State,* 939 S.W.2d 627, 644–45 (Tex.Crim.App.1997).