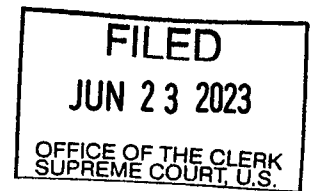


23-5772

No. 23-50158

ORIGINAL



In The
Supreme Court of the United States

CORNEL JACKIE DRUMMER,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
USDC No. 5:22-CV-875

PETITION FOR A WRIT OF CERTIORARI

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NON-CAPITAL CASE

QUESTION PRESENTED

DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN SUSTAINING THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS' HOLDING THAT PETITIONER'S 28 U.S.C. § 2254 PETITION SHOULD BE AND RENDERED DISMISSED WITH PREJUDICE AS UNTIMELY BARRED FROM FEDERAL HABEAS REVIEW BY THE ONE-YEAR STATUTE OF LIMITATIONS PERIOD EMBODIED IN 28 U.S.C. 2244 (d)(1). AND THAT THE PETITIONER IS NOT ENTITLED TO STATUTORY TOLLING UNDER 28U.S.C. § 2244(d)(2) ON HIS CLAIMS OF BEING DEPRIVED OF HIS RIGHTS TO A MEANINGFUL APPEAL WHERE THE RECORD DEMONSTRATES THAT NO CLERK'S RECORDS AND COURT REPORTER'S RECORDS WERE SENT TO THE COURT OF APPEALS FOR APPELLATE REVIEW FOR RESOLUTION OF THE APPEAL TO SUPPORT THE COURT'S DECISION AFFIRMING THE JUDGMENT OF THE TRIAL COURT ON PETITIONER'S CLAIMS REGARDING THE INSUFFICIENCY OF THE EVIDENCE

RELATED PROCEEDINGS

Direct:

The State of Texas v. Cornel Jackie Drummer, Trial Court No. 1991-CR-1948-A-Murder, 144th District Court, Bexar County, Texas, Judgment entered June 12, 1992.

Cornel Jackie Drummer v. The State of Texas, appealed to the Court of Appeals, Fourth Court of Appeals District at San Antonio, Texas. (04-92-00406-CR) Judgment of Opinion affirming judgment of trial court's conviction was issued on May 26, 1993.

Mandate issued on January 13, 1994.

First state habeas application:

Ex Parte Drummer, No.15,103-08 (Tex.Crim.App.); (ECF No.22-60 at 16). The Texas Court of Criminal Appeals denied without written order on December 20, 2000. (ECF No.22-60 at 2). 16

Ex Parte Drummer, No.15,103-11 (Tex.Crim.App.); (ECF No.22-67 at 2, 16) The Texas Court of Criminal Appeals denied the application without written order on June 2009.

Ex Parte Drummer, No.15,103-16 (Tex.Crim.App.); (ECF No.22-78 -80); The Texas Court of Criminal Appeals dismissed as successive pursuant to Tex.Code Crim.Proc. Art. 11.07, § 4(a)-(c). Judgment entered on or about

Ex Parte Drummer, No.15,103-20 (Tex.Crim.App.); (ECF No.22-91, 22-102). The Texas Court of Criminal Appeals dismissed as successive pursuant to Tex.Code Crim.Proc. Art. 11.07, § 4(a)-(c). Judgment entered on or about

Federal habeas application:

Drummer v. Lumpkin, No. 5:22-CV-875, U.S. District Court for the Western District of Texas, San Antonio Division. Judgment entered on February 14, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully request that the Court grant a writ of certiorari summarily reversing the judgment below and remanding or, alternatively, for plenary review.

OPINION BELOW

The opinion of the Court of Appeals is unpublished but can be made available at

The white card of the Texas Court of Criminal Appeals denying and dismissing applications for writ of habeas corpus is unpublished but can be made available through the District Clerk at the Texas Court of Criminal Appeals.

The State habeas court's Findings of Fact and Conclusions of Law is unpublished but can be made available through the files of the Bexar County District Clerk's Office.

JURISDICTION

The Order of the United States District Court for the Western District of Texas at San Antonio Division is attached and issued on February 14, 2023. On July 13, 2023, the Clerk of the United States Supreme Court returned to the Petitioner his initial filings in said court for the purpose of making corrections to meet the requirements of the Court. The time to file said Petition for Writ of Certiorari is September 13, 2023.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The full text of the Fifth and Fourteenth Amendment to the U.S. Constitution are reproduced at

INTRODUCTION

This is a case about the breakdown of the careful division of roles in our adversarial system. Local Law Enforcement and Forensic lab Technicians are not supposed to work together in an unbiased way in providing State prosecutors with known faulty evidence to help the State secure convictions.

Local Law Enforcement and Forensic Lab Technicians are suppose to provide unbiased evidence to the prosecution.

The prosecution is suppose to decide whether that data supports bringing of criminal charges against an accused.

The defense is suppose to be able to probe into the reliability of the evidence to be used at trial.

The courts are suppose to be neutral arbiters of the arguments made by the parties.

In the instant case, the Petitioners was charged with and subsequently convicted of murder. Since this time it has been discovered that Criminal Homicide Detectives and Criminal Evidence Technicians for the San Antonio Police Department and Medical Technicians for the Bexar County Medical Examiner's Office, intentionally and knowingly acted in a combination conspiring to falsify government documents, tamper with physical evidence, and to commit aggravated perjury by making a false statement of material facts known to be false for the purpose of providing the Bexar County Criminal District Attorney's Office with the evidence and testimony it needed to convince the jury to find the Petitioner guilty. As a result of these infractions, SAPD and Bexar County Medical Examiner's Office's Criminal Evidence entities knowingly deprived the prosecution of the ability to fulfill their role in deciding whether the evidence supports a prosecution.

The defense in this case, never had a chance to present to the jury a defense with information it needed to accurately evaluate the reliability and persuasiveness of the Laboratory Forensic evidence used by the prosecution.¹

Immediately following the Petitioner's conviction, a Bexar County Medical Examiner's Office evidence fixing scandal was uncovered. Fred S. Zain, ex Serologist for the Bexar County Medical Examiner's Office was caught in his Laboratory tampering with findings from evidence of tests results the evidence did not show. Accordingly, this infraction led to a local Bexar County Criminal investigation into allegations of an evidence fixing scandal and review into thousand of other cases handled by that of Zain.

Unfortunately though, just as soon as the investigation into Zain's misconduct got on the way, a cover up immediately emerged.

Mr. Orlando L. Garcia, Justice., Fourth Court of Appeals, at San Antonio District, Texas, issued an ORDER declining for any outside assistance from the Dallas County Forensic Science Center into the investigation, however, it ORDERED the case assigned to that of Steven C. Hilbig, ex-Bexar County Criminal District Attorney and Dr. Vincent J.M. DiMaio. ex-Bexar County Chief Medical Examiner. At the conclusions of their investigation, it found only three cases where it looked like Zain's handling of evidence may have sent innocent men to prison. Jack Warren Davis of New Braunfels, Gilbert Alejandro of Uvalde, and Jesus Flores of Brownsville, Texas.

The Petitioner has filed complaints with all San Antonio City, Bexar County, State and Federal Texas Officials but still to this current date my complaints have been ignored. With this in mind, this Court should grant this petition and set this case for arguments.

STATEMENT OF THE CASE

On December 28, 1990, Willie Graggs hereinafter referred to as the Complainant was fatally shot and found laying face up in the front yard of 106-East Canton Street, San Antonio, Texas.

Cornell Jackie Drummer and Anthony Wayne Simmones , hereinafter referred to as the defendants were charged with murder.

According to witness, immediately after hearing 4 to 5 gunshots being fired close by, they saw two suspects run around the corner away from the crime scene and one man stumbling around in the front yard of 106 East Canton Street with a gun in his hand before falling to the ground.

John R. Huggins, a resident who lived across the street said immediately after the man had fallen in the yard, he ran over to see if he could be of any help to the man. Huggins said the man was still alive and saying he needed help and that he had been shot.

Benjamin Preacher, a resident who lived up stairs at the house where the shooting occurred said he too heard 4 to 5 gunshots being fired close by. Preacher said he leaned over to look out of his window and there he saw a man stumbling around in his front yard with a gun in his hand before falling to the ground.

Randy Jones, SAPD-Officer and one of the first to arrived at the crime scene, said he and his partner were in their patrol cars finishing up some paper work and sitting in the parking lot of an H.E.B. Shopping Mall-when suddeningly they heard what sounded like consecutive gunshots being fired close by. Jones said that alomst immediately the emergency tone in their patrol cars wnet off that shots were being fired in the 100 block off East Canton Street. Jones said that because he was sitting on the side of the parking lot closest to Canton Street, he exited the parking lot directly on Canton Street and arrived at the crime scene less than one minute.

Ullon his arrival he found the Complainant laying face up in the front yard of 106 East Canton Street with what appeared to be a single gunshot wound to the center of his chest. The Complainant had a smaller caliber handgun in his right hand and a pack of cigarettes and lighter in his left hand. More than \$1000,000 dollars were found in his front right pocket.

Jones said that "in fearing for the safety of himself and fellow Officers at the scene, he removed the weapon from the hands of the Complainant and placed it in his patrol car and locked the door." When the SAPD-Criminal Evidence Technician Mr. Reginal Speller arrived, he gave him the weapon as evidence collected at tje crime scene.

Jones said that on his way to the crime scene, he did not see any witnesses or suspects along the street.

Roger Hornor, SAPD-Officer said he and his partner were sitting in the parking lot of an H.E.B. Shopping Mall when they heard what sounded like consecutive gunshots being fired close by.

Hornor said that because he was on the opposite side of the parking lot and closest to East Houston Street which runs parallel to East Canton Street, he exited the parking lot on East Houston Street and turned left on Pelmetto Street that runs across East Canton Street and over to East Crockett Street in hopes of finding suspects. But when he could not locate any, he returned to the crime scene to see if he could be of any help.

Hornor said he saw that witnesses were coming from their houses and with that he began talking with some of them to see if anyone had seen anything.

Reginal Speller, SAPD-Criminal Evidence Technician said, he and his partner Richard Sanchez were called out to the 100 block of East Canton Street to conduct a follow up investigation into a possible homicide. Speller said he was met by Randy Jones, SAPD Officer and first to arrive at the crime scene. Speller said that Jones had given him a gun and had advised him that the gun was removed from the hands of the Complainant Willie D. Graggs.

Speller said that based upon his investigation of the gun he saw that it had been fired only 1 time and with 5 live round bullets remaining. Speller said that after completing his duties at the crime scene, he went back to the station to further evaluate the evidence. He then conducted a finger print examination

on the gun but could not obtain any finger prints. Speller said he then took the gun over to the SAPD-Evidence Property-Room to be placed in storage pending further investigation.

Richard Sanchez said he and his partner were called out to the 100 block of East Canton Street for a possible homicide.

Speller said that upon his arrival he only assisted his partner with the collection of evidence.

Alvin C. Brown, SAPD-Homicide Detective said he was not working on the morning of December 28, 1990, during the hours in which the Complainant was fatally shot. He returned to work on December 31, 1990, and was advised that he would be assigned to the case file assignment of # 90673179, possible homicide of the Complainant Willie D. Graggs.

Brown said that after conducting some follow up investigation, he was met by SAPD-Utility Detective Joery Smittick whom had advised him that a witness name James Little came in on December 29, 1990, to say that he was a witness to the fatal shooting death of the Complainant Willie D. Graggs. Brown he received from Smittick what appeared to be a sworn statement by the witness. Brown was also provided with contact information onto the whereabouts of the witness.

Brown said that he went to the witnesses job site and ask if he would be willing to come over to the station to provide details into his version of what he say he witnessed.

Brown said he met with the witness at the station where was

able to secure a second statement from the witness James Little.

Brown said that the witness told him that he saw the two suspects Cornell Jackie Drummer and another unknown actor chasing Graggs with guns and demanding money from him. Brown said that the witness told him that he saw the other person shoot the Complainant at close range and that he then saw the Petitioner (Drummer) take the murder weapon from his friend and place it into the right hand of the Complainant after trying to rob him of his money.

Brown said that he was further contacted by SAPD-Crime Stoppers and advised that a second witness Dennis Sullivan had called in to say that he too was a witness to the December 28, 1990, shooting death of Willie D. Graggs. Brown stated that Sullivan told him that he saw Drummer and the Complainant standing on the porch of 106 East Canton Street and that he saw Cornell Jackie Drummer shoot the Complainant at point blank range and then put the murder weapon into his hand.

Based upon Brown's investigation into the shooting death of the Complainant, Brown then applied for an arrest of the Petitioner Cornell Jackie Drummer and Anthony Wayne Simmons. In doing so, Brown included the name RICHARD STENGELS on his SAPD-SUPPLEMENTAL REPORT at page #9 and in his AFFIDAVIT FOR ARREST WARRANT at paragraph # 6 to be used as probable cause for the issuance of said warrant.

Subsequently, Cornell Jackie Drummer and Anthony Wayne Simmons were arrested and charged with the murder of Willie Graggs.

II. PROCEDURAL HISTORY

A. Petitioner's trial and first state habeas application

In June 12, 1992, petitioner was tried and found guilty by a jury of murder and sentenced to 99 years in the Texas Department of Corrections (now known as TDCJ-ID).

1. Because this was seemingly "stranger-on-stranger" offense with two potential eyewitnesses allegedly standing in the same spot but did not see each other and were not present at the crime scene when police arrived less than one minute, both witnesses immediately implicated the petitioner and another man as the suspects" and placing the murder weapon into the hands of the Complainant-prosecutors "relied heavily" on forensic ballistic evidence during the trial and guilt phase of petitioner's trial. Fully half of the State's case in chief was devoted to presenting the testimony of forensic lab and expert witnesses.

Prosecutors told the jury "that the forensic evidence served as pieces of a puzzle that taken together, showed [petitioner] committed murder." The State also "told the jury that it would present evidence proving that Cornel Jackie Drummer caused the death of the Complainant by shooting him and then placing the murder into his hand.

The State then presented the trial testimony of only one of the two witnesses it had intended to call, James Little, a convicted felony and inmate told the court that on the night of and early morning of December 28, 1990, he saw the Complainant

being chased by Petitioner and another man both of whom were carrying guns and demanding money. Little told the jury that he then saw the other person shoot Graggs at point blank range and that the Petitioner took the murder weapon from him and placed it into the right hand of the Complainant Willie Graggs. Little told the jury that he then saw Cornell Jackie Drummer kneeling down on one knee and going through the pocket of the Complainant but when lights at a nearby house were turned on, the two suspects ran away from the crime scene.

Dr. Vincent J.M. DiMaio, ex-Bexar County Chief Medical Examiner told the jury that he was not the original person to conduct the autopsy on the body of the Complainant but that his Deputy Chief Medical Examiner Mrs. Suzanna E. Dana, is.

DiMaio testified that by her findings and conclusions into the death of the Complainant, she found that he had been shot one time in the center of his chest by a small caliber hand gun.

DiMaio said that in her findings, she concluded that the path of the bullet was from front to back, left to right, almost horizontal. There was no evidence of close range firing to the entry wound defect.

Examination of the clothing reveals a 1/4th inch defect to the left back of the shirt which was worn across the front right side of the body. DiMaio told the jury that his office did not conduct a close range firing test examination on the clothing of Graggs and that all findings were visible.

DiMaio also told the jury that he did not perform the Gun-shot Residue Analysis Report on the hands of the Complainant,

but that his Gunshot Residue Analyst Mr. J. L. Castereno was responsible for conducting that examination. DiMaio testified that Castereno concluded by his findings that the Complainant's right hand had a smaller amount of gunpowder residue and that his left hand had a large amount of gunpowder residue.

DiMaio told the jury that because of the amount found to the Complainant's left hand, it could mean that he fired a gun or held his left hand out toward a gun being fired at him. DiMaio told the jury that the amount found to the Complainant's right hand, that portion found did not mean anything because the number of the substance was too low and that anyone could get that amount just by coming in contact with the substance.

Richard F. Stengels, Toolmark and Firearms Analyst for the Bexar County Medical Examiner's Office told the jury that he is one of two Firearms Experts at the lab. Stengels told the jury that it is their jobs to test fire any guns and weapons brought in to the lab by any outside agency that wants for them to test-fire a gun to see if a certain bullet was fired by that gun.

Stengels told the jury that prior to December 28, 1990, an agent for the Bexar County Medical Examiner's Office went over to the San Antonio Police Department's Evidence Property-room and picked up a large amount of guns-including SX.NO.#1 the alleged murder recovered at the crime scene and found in the hands of the Complainant. Stengels told the jury that "on December 28, 1990, after meeting with Deputy Chief Medical Examiner Suzanna E. Dana

and receiving a bullet slug from her she removed from the body of the Complainant, he testfired the submitted revolver and compared it's firing land marks to that of SX.NO.# 29. Stengels told the jury that he is 100% sure that the bullet from Graggs body was fired by the same gun found in his possession at SX.NO#1 and no other gun.

During the trial testimony of Stengels, the State introduced SX.No.#17-a manella envelope containing 4 live, 2 empty shells and 1 bullet slug. Stengels told the jury that his office used one of the 5 live round bullets as a test bullet and that the other missing bullet was at the lab where it was testfired.

Reginal Speller, SAPD-Criminal Evidence Technician told the jury that he did not see if anyone hand went over to the San Antonio Police Department's Evidence Property-Room to remove the evidence weapon for further investigation.

In accordance to establishing the chain of custody on the gun and the bullets removed from the gun, the State did not present the SAPD-Evidence Property-Room K-Tages Receipt form and Release form to confirm whether the gun had been submitted to an outside agency for further investigation.

The jury found the petitioner guilty as charged in Count 1 of the indictment on June 12, 1992. This verdict however, was changed on July 8, 1992, outside of the presence of the court by a sworn affidavit of one juror member HARRY LOUIE-stating that petitioner was found guilty as a party to murder.

The jury then assessed his punishment at 99 years in the Texas Department of Corrections (now known as TDCJ-ID).

DIRECT APPEAL

The Petitioner filed his direct appeal arguing among other things (1) Insufficiency of the evidence and (2) violation of Discovery Order.

On May 26, 1993, the Justice's of the Court of Appeals allegedly issued an unpublished opinion affirming the judgment of the trial court's conviction.

Because the Petitioner's Court Appointed appellate counsel had not notified the petitioner of the decision of the opinion of the Court of Appeals, the petitioner made an inquiry of the Clerk of the Court of Appeals the status of his appeal. On January 1994, the Petitioner received a response from the Clerk that the appeal had been affirmed and that an opinion affirming the same had been issued upon appellate counsel. Immediately thereafter, on January 13, 1994, the Court then issued a MANDATE FINALIZING THE JUDGMENT of the trial court's conviction.

INITIAL APPLICATION 11.07-Writ of Habeas Corpus

On March 1, 1999, Petitioner filed his initial application 11.07-writ of habeas corpus challenging his direct appeal matters only-ineffective assistance of counsel for failure to notify him of the decision of the opinion of the affirmance of the judgment of the trial court's conviction. The Petitioner sought to seek an Out of Time Petition for Discretionary Review to the Texas Court

of Criminal Appeals.

Based upon the record, the trial Court made Finding of Facts and Conclusions of Law recommending relief be granted. The Petitioner then sought an extension of time to file and perfect the petition. And, in so doing, he made a request for access to and the availability of Statement of Facts and Transcripts. The request was denied and the time to file Pro-Se Petition for Discretionary Review was extended til October 8, 1994.

Because the Petitioner could not obtain access to the records to perfect said Petition, he did not meet the filing deadline. (#15,103-08)

SECOND SUBSEQUENT APPLICATION 11.07-Writ of Habeas Corpus

On April 2007, after a discovery that no Clerk's Records and Court Reporter's Records were sent to the Court of Appeals, for review and resolution of the appeal to support the decision of the Justice's of the Court of Appeals opinion affirming the judgment of the trial court's conviction, the petitioner file his second application 11.07-writ of habeas corpus seeking a new trial based on lost or destroyed records and exhibits under a claim of ineffective assistance of counsel, abuse of discretion of trial court Judge and failure of the Justice's of the Court of Appeals to ensure that a complete record be sent to the appellate court for review on a claim of insufficiency of the evidence to determine whether error occurred in the trial court and before the jury that convicted him.

The State's Attorney responded to the application and concluded that because the issue raised could have been raised in Petitioner's initial application and that where he had already asserted his claims of ineffective assistance of counsel, his subsequent application should be denied as a successive writ pursuant to Tex.Code Crim.Proc.Art.11.07-§ 4(a)(1)(2)

The Trial Court made Findings of Facts and Conclusions of Law agreeing with the State's response. And, it recommended to the Texas Court of Criminal Appeals to deny the application as a successive writ.

The Texas Court of Criminal Appeal denied the application as a successive writ without a written order. (15,103-11).

**THIRD SUBSEQUENT APPLICATION 11.07-Writ of Habeas Corpus
NEWLY DISCOVERED EVIDENCE**

After an independent investigation, it was discovered that the weapon SX.NO.#1 used by the State of Texas as the murder weapon through the trial testimony of Richard F. Stengels, was had not been removed from the SAPD-Evidence Property-Room on December 28, 1990 to be testfired or compared to any bullet slug recovered at the autopsy from the body of the Complainant Willie D. Graggs.

A Computer File Investigation revealed that the evidence weapon had been placed into the Property-Room on December 28, 1990, with 5 live and 1 spent round bullet. And, that on June 9, 1992, the evidence weapon had been removed from the property-room to be used for court purposes with the same 5 live and 1 spent round bullet. The weapon was never returned back in to the property-room after being used for court.

perty_room after being used for court.

The Computer Files of the San Antonio Police Department's Evidence Property-Room is indicating that on June 9, 1992, Mr. Reginal Speller, SAPD-Criminal Evidence Technician knowingly tampered and fabricated the ballistic evidence when he fired 1 of the 5 live round bullet through SX.No.#1 on the date of trial and allowed for Mr.Richard F. Stengels and Dr.Vincent J.M. DiMaio to use the fabricated bullet slug to the jury as being the original bullet slug recovered at the autopsy and from the body of the Complainant Willie D. Graggs.

The Petitioner argued ACTUAL INNOCENCE, Prosecutorial Misconduct by withholding brady material "SAPD-Evidence Property Receipt and Release form", Aggravated Perjury, Use of Fabricated Ballistic Evidence, and Ineffective Assistance of Trial Counsel who failed to conduct an independent investigation.

The State's Attorney responded to the application and recommended relief be denied as successive pursuant to Tex.Code Crim.Proc.Art. 11.07-writ of habeas corpus.

The Trial Court Judge made Findings of Facts and Conclusions of Law agreeing with the State's Attorney.

The Texas Court of Criminal Appeals dismissed as successive pursuant to Tex.Code Crim.Proc.Art.11.07-§4(a)(1)(B).

**FOURTH SUBSEQUENT APPLICATION 11.07-Writ of Habeas Corpus
NEWLY DISCOVERED EVIDENCE**

On or about April 2019, the Petitioner sought the assistance from a San Antonio Express News Reporter to request and obtain

records from the San Antonio Police Department and the Bexar County Medical Examiner's Office.

Accordingly, it was discovered that the SAPD-Criminal Investigative Files (90673179) were not available through the files of the SAPD-because the records had been sent to the Office of the Texas Attorney General with permission to withhold from public review.

After the Reporter and her attorney obtained the records from the Office of the Texas Attorney General, they were made available to me for inspection. Accordingly it was discovered that:

(1)SAPD-Hmicide Detective Alvin C. Brown had falsified his SUPPLEMENTAL REPORT AND HIS AFFIDAVIT FOR ARREST WARRANT when he included the name RICHARD STENGELS into his report for April 1, 1991-indecating that Stengels had reported to him that he testfired SX.NO.# 1 and that he (Stengels) matched the bullet slug from the body of Graggs to the gun found in his hand,

(2) the original ballistic report used during the trial proceedings did not have a bullet slug to the INSIDE CONTAINER to confirm that a bullet slug recovered at the autopsy and compare to the of SX.NO.31 was placed into the INSIDE CONTAINER as requaired by mandatory protocol,

(3) On October 12, 1994, two years after the petitioner's trial and conviction, San Antonio City's Assistant Attorney Mr.Chuck Wier had sent the Homicide Detective Mr.Alvin C. Brown a MEMO to meet with him at his office concerning the Willie Graggs case. Brown responded to the MEMO and met with Mr.Wier. Mr. Wier then provided the Himicide Detective with his SAPD-Criminal Investigative Files regarding the Willie Graggs case and advised him that to ballistic report did not have a bullet slug to the INSIDE CONTAINER to confirm that a bullet slug recovered at the autopsy had been placed into the INSIDE CONTAINER to confirm that it had been compared to a gun at SX.NO.# 1 found at the crime scene and from the hands of the Colllainant Willie Graggs. Mr.Wier then allowed for Brown to use a Black/dark permanant marker element to place a DOT to the INSIDE CONTAINER portion of the document and to copy the document off on to an SAPD-Copier Mechine so

that something would be seen resembling a bullet slug. Brown was also allowed to use the Black/dark permanent marker element and to scratch through the word AFTER on his SUPPLEMENTAL REPORT and to write in the word BEFORE-just above it.

(4) Mr. Chuck Wier then did the unthinkable, he removed the entire SAPD-Files from the Open Records Division of the San Antonio Police Department from public access and review and sent the petitioner the altered document to use in challenging the legalities of his confinement.

Based upon these facts, the petitioner filed his Fourth Application 11.07-writ of habeas corpus based upon newly discovered evidence.

The State's Attorney responded and concluded that the newly discovered evidence and information is not newly discovered and that petitioner's Fourth writ application should be dismissed as a successive writ pursuant to Tex.Code Crim.Proc. Art. 11.07-§ 4 (a)(2)(B)

The trial court judge made Findings of Facts and Conclusions of Law agreeing with the State's Attorney.

The Texas Court of Criminal Appeals dismissed the Fourth Subsequent application as successive. (15.103-20).

This petition follows:

REASONS TO GRANT THE PETITION

Summary reversal Is Warranted Because The United States District Court For the Western District of Texas Decision Is Patently Wrong

"So basic" to this Court's "jurisprudence is the right to a fair trial that it has been called "the most fundamental of all freedoms." Neb. Press Ass'n v. Stuart, 427 U.S. 539, 586 (1976) (Brennan, J., concurring in judgment) (quoting Estes v. Texas, 381 U.S. 532, 540 (1965)). For that reason, this Court takes special

care to ensure that the requirements of federal due process are faithfully applied, including in state courts. "This Court, of course, has jurisdiction over the final judgments of state postconviction courts," and exercises that jurisdiction in appropriate circumstances" to consider whether false inculpatory evidence or exculpatory evidence improperly withheld under Brady is material. *Wearry v. Cain*, 577 U.S. 385, 395-96 (2016) (per curiam); see *Smith v. Cain*, 565 U.S. 73, 75-76 (2012) (reversing state habeas court finding on immateriality because withheld evidence was "plainly material").

To be sure, whether evidence is material is a "fact-intensive" issue. *Wearry*, 577 U.S. at 392, 394-95. But this Court has not shield a way from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Id.* at 395 (collecting cases). In *Wearry*, for example, this Court summarily reversed a state court's determination that the evidence the State withheld, which cast doubt on State's witnesses, was immaterial in the petitioner's capital case. *Id.* at 394-95. That was because "any juror," according to the Court, "might have thought differently" about the credibility of the State's witnesses had they heard the withheld evidence. *Id.* at 393-94 (emphasis added). "Even if the jury-armed with all of this new evidence-could have voted to convict" anyway, this Court summarily reversed because it had "no confidence that [the jury] would have done so." *Id.* at 394 (quoting marks omitted).

The same is true here, and the same result should follow.

In spite of being denied without written order on his first two State writ applications regarding matters of direct appeal-ineffective assistance of counsel who failed to notify the petitioner of the decision of the opinion of the Court of Appeals affirmance of the judgment of the trial court (WR.No.#15,103-08) and his failure to ensure that a record of the Clerk's Records and Court Reporter's Records be sent to the Court of Appeals for review and resolution of the appeal to determine whether error occurred in the trial court before the jury that convicted-on a claim regarding the insufficiency of the evidence standard, the Court of Appeals, the Texas Court of Criminal Appeals did not doubt the Petitioner's claims that he was deprived of his rights to a meaningful appellate review. Instead, the lower court found that it had no jurisdiction to consider the Petitioner's claims.

As demonstrated by the facts presented, the State of Texas knowingly used known fabricated ballistic evidence, falsified government documents, and aggravated perjury during the trial proceedings to aid the Bexar County Criminal District Attorney's Office with the evidence and testimony it needed to secure a verdict of guilty. More importantly, the State of Texas knowingly withheld from the jury the SAPD-Evidence Property-Room Receipt and Release forms regarding the chain of custody on the gun (SX. No.#1) used by the State as the murder weapon.

In conjunction with this, the Petitioner demonstrated that on the date of trial SAPD-Criminal Evidence Technician Mr. Reginal Speller, knowingly tampered with and fabricated the ballistic evidence when he fired 1 of the 5 live round bullets through SX.NO.#1 and allowed that evidence to be used by Richard F. Stengels, Toolmark and Firearms Expert for the Bexar County Medical Examiner's Office as being the original bullet slug recovered at the autopsy from the body of the Complainant Willie D. Graggs on December 28, 1990.

And, that on October 12, 1994, the San Antonio City's Assistant Attorney conspired with the SAPD-Homicide Detective 2 years after the conviction was secured, when he allowed for the Homicide Detective to come back and altered the SAPD-Criminal Investigative Files to cover up his previous trial court proceedings.

In respects to these facts, the record is clear that the gun at SX.No.#1 was irrelevant and should not have been used to the jury as the murder weapon.

This Court has previously recognized that some evidence is particularly prejudicial when it should not have been admitted.

"A confession," for example, "is like no other evidence alone in reaching its decision." Arizona v. Fulminante, 499 U.S. 279, 296 (1991). So too, "Ballistic evidence and testing can provide powerful new evidence unlike anything known before." Dist. Attorney's Off. for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 62 (2009). It is important that such powerful evidence "be presented

in a fair and reliable manner." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010)(per curiam).

Out of due respect for the prosecutorial function, this Court should address the State's position.

"Prosecutors have a special 'duty to seek justice, not merely to convict.'" *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (citation omitted). And prosecutors must seek justice even when that duty requires contesting a conviction to protect a defendant's constitutional rights. The State court has failed to do just that. The local Court of Appeals and the Texas Court of Criminal Appeals asserts that it lacks subject matter jurisdiction to consider Petitioner claims of being deprived of a meaningful appellate review based on lost and destroyed records and exhibits. And, the United State District Court for the Western District of Texas concludes that the Petitioner has failed to meet his 1 year statute of limitation to bring such issues and therefore, is not entitled to equitable tolling of the 1 year statute of limitation period to seek Federal Court review.

Concessions of error from law enforcement are rare. They should be acknowledged and addressed when they occur. By completely ignoring the State's concession of error, the United States District Court for the Western District of Texas disregarded the role of the rights afforded to a defendant on direct appeal and the role of prosecutorial discretion in our criminal justice system.

II. Summary Reversal Is Warranted Because
The Stakes Could Not Be Higher, The
Underlying Issues Are Important, And
The State's Views Deserve To Be Addressed.

This is an extraordinary case in which the court below was not only wrong, but the United States District Court Judge failed to recognize the seriousness of the claims raised regarding being deprived of a meaningful appellate review on a claim of the insufficiency of the evidence to support the verdict of guilty where no Clerk's Records and Court Reporter's Records were not sent to the Court of Appeals for resolution of the appeal to determine whether error occurred in the trial court and before the jury that convicted him.

As demonstrated, the fabricated ballistic evidence, the falsified government documents "ballistic report" and aggravated perjury evidence is extremely prejudicial when it is false or unreliable, and the Texas Court of Criminal Appeals fail to even acknowledge the State's concession of error. "[S]ummary disposition is appropriate to correct clearly erroneous decisions of lower courts," especially "error[s] of great magnitude." See Stephen M. Shapiro et al., Supreme Court Practice 5-44-5-45 (11th ed. 2019).

This is a murder case, conviction, and sentence of 99 years. The stakes could not be higher. The Court regularly intervenes at this stage to ensure that federal constitutional rights are respected in practice as well as theory. See, e.g., *Andrus v.*

Texas, 140 S.Ct. 1875, 1878 (2020) (per curiam) (summarily vacating state habeas).

state habeas case when lower court failed to properly apply legal standard for ineffective assistance of counsel in capital case); Wearry, 577 U.S. at 394-95 (summarily reversing state habeas finding that withheld evidence was not material in capital case); see also Montgomery v. Louisiana, 577 U.S. 190, 213 (2016)(reversing state habeas judgment that failed to retroactively apply rule that juvenile cannot be sentenced to life without parole absent consideration of special circumstances); Z. Payvand Ahdout, Direct Collateral Review, 121 Colum.L.Rev. 159, 180-83 (2021)(citing numerous direct collateral review cases from recent terms).

Because this case deals with matters of direct appeal and whether the United State District Court should toll the 1 year Statute of limitation where the Petitioner was deprived of his right right to a meaningful appellate review but fails to do so in light of jurisdiction matters to the Texas Court of Appeals and the Texas Court of Criminal Appeals at Austin. this Court has always held that as a matter of right everyone has a right to direct appeal and a meaningful review based on a complete record to determine error occurred in the trial court before the jury that convicted him.

This case is a perfect example of this Court's decision in the Jackson v. Virginia, Supra standard, ().

Without the Clerk's Records and Court Reporter's for review the petitioner asserts that the decision of the opinion of the

Court of Appeals affirmance of the judgment of the trial court's conviction is highly questionable and should be returned back to the lower court for a hearing to determine the nature of the complaint being raised.

This Court should consider the newly discovered evidence obtained related to this case that was not sent to the Court of Appeals for review as they are identical to the originals used at trial but were altered two years after the conviction.

With this in mind, Petitioner asserts that the record is demonstrating that he is here on nothing but a judicial false impression of justice....and that this case has not ever had any ...judicial review on the merits.

It is important that such powerful influence upon our Texas Criminal Justice system affects the confidence and integrity of it's core value. More importantly, that such powerful evidence "be presented in a fair and reliable manner." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010)(per curiam).

Out of due respect for the prosecutorial function, this Court should address the State's position.

"Prosecutors have a special 'duty to seek justice, not merely to convict.'" *Connick v. Thompson*, 563 U.S. 51, 65-66(2011) (citation omitted). And prosecutors must seek justice even when that duty requires contesting a conviction to protect a defendant's constitutional rights. The State attempted to do just that. The CCA, though, rejected petitioner's claim without addressing the serious nature of petitioner's complaint by denying without a

written order.

Concessions of error from law enforcement are rare. They should be acknowledged and addressed when they occur. By completely ignoring the State's concession of error, the CCA and the United States District Court as well as the Fifth Circuit has disregarded the role of prosecutorial discretion in our criminal justice system.

CONCLUSION


For the foregoing reasons, this Court should summarily reverse the judgment below and remand or, alternatively, grant the petition and set the case for argument.

Respectfully submitted

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