NO. _____

IN THE SUPREME COURT OF THE UNITES STATES

MANUEL JAVIER PEREZ

vs.

THE STATE OF TEXAS

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

1. Pursuant to Supreme Court Rule 13.5, petitioner Manuel Javier Perez respectfully requests a 60-day extension of time, until August 11, 2025, within which to file a petition for writ of certiorari. The Texas Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus on March 12, 2025, in a written opinion. The opinion is attached. This Court has jurisdiction under 28 U.S.C. § 1257.

2. Absent an extension, a petition for writ of certiorari would be due on June 10, 2025. *See* U.S.S.Ct.R 13.1. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case. The requested extension is necessary because the issue to be presented in Petitioner's case is a complex and significant *Brady* claim involving suppressed DNA evidence

that went to the heart of Petitioner's defense theory that the complainant framed him. Moreover, undersigned counsel spent part of this 90-day period working on a "suggestion for reconsideration" of the Court of Criminal Appeals' opinion, which was filed on March 27, 2025, and denied on April 11, 2025. However, due to the Texas Rules of Appellate Procedure prohibiting habeas corpus litigants from filing a "motion for reconsideration," the law is unsettled regarding whether the filing of this "suggestion for reconsideration" counted as a motion for rehearing/reconsideration that would extend the deadline for filing a petition for writ of certiorari until 90 days after its denial. *See* Tex.R.App.Proc 79.2(d); *cf. Emerson v. Johnson,* 243 F.3d 931, 935 (5th Cir. 2001). After the denial of the "suggestion for reconsideration," undersigned counsel mailed all the relevant legal documents to Petitioner so that he could participate in the process of drafting a petition for writ of certiorari to this Court. Due to the slowness of the Texas prison mailing system, this package was not received by Petitioner until May 19, 2025. Moreover, undersigned counsel had a planned vacation from May 23-30, 2025.

3. In this case, the trial court determined that the prosecutors for the State of Texas committed a *Brady* violation when they failed to disclose that the DNA profile obtained from the complainant's neck swab consisted of at least three individuals, along with failing to disclose the epithelial cell fractions from the anal and thigh swabs. *See* Attachment 2, *Trial Court's Findings of Fact and Conclusions of Law*.

Petitioner maintains that the fact that there were at least three individuals' DNA on the complainant's neck swab supported the defense's theory that the complainant fabricated the allegations, as the third-party found on the neck swab showed that the complainant could have been given a hickey from someone other than Petitioner. Further, the fact that there were unreported epithelial cell fractions was prejudicial to the Petitioner's case because, as the State's DNA expert admitted in an email to the prosecutors, the discovery of the third-party DNA on the neck swab made these epithelial fractions important in terms of identifying a potential second female contributor: "Very rarely are the epithelial cell fractions of our differential (sperm containing) samples probative to a case, so we usually focus very little on these and rely more heavily on sperm fractions. However; given the scenario presented by this defense, we'd be looking for a second female so the epithelial cell fraction would then be important."

4. In recommending that habeas corpus relief be granted in Petitioner's case, the trial court stated: "This Court notes that the integrity of our judicial system requires compliance with basic evidentiary and procedural requirements that have been established by case law and by statute. The failure to follow the requirements of *Brady* with regard to the production of exculpatory materials, as was demonstrated in this case, is a fundamental error that demands relief be provided to [Petitioner]." *See* Attachment 2, at 39 (Finding #100). The trial court concluded:

> Both justice and the perception of justice are obstructed when exculpatory evidence is not produced in accordance with the requirements of law. As demonstrated here, the failure to comply detrimentally affected counsel's ability to properly prepare for trial, and then to adequately defend based upon the true facts of the case – facts that should have been made known to counsel before the commencement of trial.
>
> Attachment 2, at 39 (Finding #100)

5. However, the Texas Court of Criminal Appeals overruled the trial court in a three-page *per curiam* order that barely touched on the facts of Petitioner's case. The Court of Criminal Appeals held: "We disagree because, among other things, the exculpatory value of an unidentified third party's non-sperm DNA is insignificant compared with the inculpatory value of [Petitioner's] sperm DNA recovered from the victim's thigh and anus." *See Ex Parte Perez*, WR-84,267-02, slip op. at 2 (Tex.Crim.App. March 12, 2025) (*per curiam)* (attached as Attachment 1).

6. Petitioner intends to argue in a petition for writ of certiorari that the Texas Court of Criminal Appeals' ruling applies a higher burden for proving *Brady* materiality than authorized by United States Supreme Court case precedent, as the materiality prong of the *Brady* rule does not require a showing that a timely disclosure of the evidence would have resulted in a defendant's acquittal. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Court of Criminal Appeals ignored how the undisclosed DNA evidence would have affected the defense's presentation of the case to the jury, as the undisclosed evidence supported Petitioner's theory that

he had sexual relations with a different woman at a motel prior to the complainant's arrival to the same motel room, and then the complainant framed Petitioner by rubbing a used condom on herself.

7. Undersigned counsel's competing work obligations and planned vacation limit his ability to devote adequate time to Petitioner's petition for writ of certiorari between today and June 10, 2025. Undersigned counsel filed a brief in Texas' Fourteenth Court of Appeals on May 21, 2025, and he has another brief due with Texas' Sixth Court of Appeals on June 11, 2025. Additionally, counsel has a brief due with Texas' Seventh Court of Appeals on June 16, 2025, and the United States Court of Appeals for the Fifth Circuit set a deadline of July 2, 2025, for a motion for certificate of appealability in a federal habeas action.

8. Wherefore, Petition respectfully requests that an order be entered extending the time to file a petition for writ of certiorari to Monday, August 11, 2025.

Dated: May 30, 2025

Respectfully submitted,

/s/ Christopher M. Perri___
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ATTACHMENT 1

Texas Court of Criminal Appeals' Order Denying Relief

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,267-02

EX PARTE MANUEL JAVIER PEREZ, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. CR37715-B IN THE 385TH DISTRICT COURT
FROM MIDLAND COUNTY**

***Per curiam*.**

O R D E R

A jury found Applicant guilty of two counts of aggravated sexual assault of a child and one count of indecency with a child by contact. It assessed prison terms. The Eleventh Court of Appeals affirmed the convictions in an unpublished decision. *See Perez v. State*, No. 11-11-00247-CR (Tex. App.—Eastland del. Sep. 30, 2013). Applicant, through counsel, filed this subsequent application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant raises two grounds for relief based on prosecutorial misconduct involving Ralph Petty's dual employment as both an assistant district attorney and a law clerk for the trial court judge.

The claims are newly available to Applicant since the date this Court denied Applicant's initial habeas application. Applicant argues that Petty's dual role during the initial habeas corpus proceeding violated his due process rights. *See Ex parte Young*, No. WR-65,137-05 (Tex. Crim. App. del. Sep. 22, 2021) (not designated for publication). This Court has independently reviewed the claims Applicant raised in his initial habeas application. *See, e.g., Ex parte Benavides*, No. WR-81,593-01 (Tex. Crim. App. del. Sep. 21, 2022) (not designated for publication). They lack merit and do not demonstrate entitlement to habeas relief. Applicant also argues prosecutorial misconduct during his trial, claiming Petty assisted prosecutors with legal issues while simultaneously advising the trial court on those same matters. The trial court concluded that Applicant failed to meet his burden to prove that Petty actively participated as a prosecutor during the trial while also working for the judge. This Court agrees.

Applicant raises one ground claiming that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose material evidence regarding third-party DNA profiles. Suppression by the prosecution of evidence favorable to an accused violates due process where evidence is material either to guilt or punishment, irrespective of the prosecution's good or bad faith.

Applicant alleges that suppressed evidence reveals that DNA from at least three contributors was present on the victim. He further argues that this evidence contradicted the prosecution's narrative and supported Applicant's defense that the victim fabricated the allegations against him. The trial court found that this evidence was favorable and material. We disagree because, among other things, the exculpatory value of an unidentified third party's non-sperm DNA is insignificant compared with the inculpatory value of Applicant's sperm DNA recovered from the victim's thigh

and anus. Relief is denied.

Delivered: March 12, 2025

Do not publish

ATTACHMENT 2

Trial Court's Findings of Fact and Conclusions of Law

FILED

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ALEX ARCHULETA
DISTRICT CLERK
MIDLAND COUNTY, TEXAS
BY Diana Price DEPUTY
DIANA PRICE

CAUSE NO. CR37715-B

EX PARTE	*	IN THE 385TH JUDICIAL
	*	DISTRICT COURT OF
MANUEL PEREZ	*	MIDLAND COUNTY, TEXAS

FINDINGS OF FACT and CONCLUSIONS OF LAW

General Facts

1. Applicant was indicted for three counts of aggravated sexual assault of a child and three counts of indecency with a child. CR 3–6. He pleaded not guilty.

2. At trial, the State was represented by Stephen A. Stallings, Michael C. McCarthy, and Omar Khawaja. 1 RR 2; 4 RR 189–92; CR 159–73. Applicant was represented by Stephen Spurgin. 1 RR 2; CR159–73. Judge Robin Darr presided over the trial. 1 RR 3; CR 159–73.

3. The Clerk's Record reveals that the State's pleadings were all filed by Stephen Stallings. CR 11, 7, 23–24, 30–37, 51–53, 55–64, 101–03, 110–11, 113–14, 118–21.

4. The trial began on May 23, 2011, and ended on May 27, 2011. 1 RR 4–9.

5. Ralph Petty did not represent the State during Applicant's trial. Petty did not make an appearance at the trial and did not file anything with the Clerk's Office before or during the trial for Applicant's case. 1 RR 2; 2 RR 2; 3 RR 2; 4 RR 2; 5 RR 2; 6 RR 2; 7 RR 2; 8 RR 2; 9 RR 2; 10 RR 2; CR 11, 7, 23–24, 30–37, 51–53, 55–64, 101–03, 110–11, 113–14, 118–21.

6. The jury found Applicant guilty of two counts of aggravated sexual assault of a child and one count of indecency with a child, then sentenced him to twenty-five-years and five-years of imprisonment, respectively. 7 RR 75–76; 8 RR 38–39.

7. On May 27, 2011, the trial court ordered the five-year sentence to run consecutive to the concurrent, twenty-five-year sentences. 9 RR 8; CR159–73 (Judgment).

8. The Eleventh Court of Appeals affirmed Applicant's conviction *in Perez v. State*, No. 11-11-00247-CR, slip op. at 11-12 (Tex. App. – Eastland Sept. 30, 2013, *pet. ref'd*) (mem. Op., not designated for publication). The Court of Criminal Appeals then denied Applicant's petition for discretionary review on March 19, 2014.

9. On June 8, 2015, Applicant filed an application for writ of habeas corpus in state court. This Court adopted the State's proposed findings and recommended that relief be denied on November 16, 2015. CR-W 356. The Court of Criminal Appeals adopted this Court's findings on January 20, 2016, and denied relief without written order. Applicant filed a "suggestion" for reconsideration, but this was denied on February 3, 2016.

10. Applicant next filed a federal petition pursuant to 28 U.S.C. Sec. 2254 on January 27, 0216. See *Manuel Javier Perez v. Lorie Davis*, 7:16-cv-00035 (W.D.Tex). The federal district court denied relief in a written opinion on August 24, 2017. In its

opinion, the Federal District Court concluded that "The jury found M.M.'s statements alone insufficient to find Petitioner guilty..." The court explained that "The jury found Petitioner guilty on the charges substantiated by the DNA evidence and not guilty on the charges not substantiated by DNA evidence. Accordingly, it is reasonable to assume that the jury relied primarily on the DNA evidence in finding Petitioner guilty of these charges."

Applicant's Grounds for Relief

11. In his first ground for relief, Applicant alleges that the State violated his due process rights to a fair habeas corpus writ proceeding and an impartial judge when it committed prosecutorial misconduct by assigning Applicant's initial writ application to ADA Ralph Petty, who also worked for the district court that was handling the findings and recommendation on Applicant's writ application.

12. In his second ground for relief, Applicant alleges that by virtue of Petty working for the District Attorney's Office at the time of Applicant's jury trial in 2011, he assisted the trial prosecutors on legal issues while also impermissibly advising the trial court on those same legal issues.

13. In his third ground for relief, Applicant alleges that the State committed a *Brady* violation when it failed to disclose material evidence that the DNA profile obtained from M.M.'s (the alleged victim's) neck swab consisted of at least three individuals,

along with failing to disclose the epithelial cell fractions from the anal and thigh swabs.

14. This Court finds that each of these three grounds for relief was unavailable to Applicant when he filed his previous application for writ of habeas corpus.

Habeas History

11. Applicant filed his first habeas application on June 8, 2015. SHCR-01 at 1–18; Tex. Code Crim. Proc. art. 11.07. He alleged that his trial counsel, Spurgin, was ineffective for:

a. Failing to cross-examine the witnesses regarding the DNA evidence from the victim's neck, particularly whether taking a shower would have any effect on the DNA mixture found;

b. Being unprepared for trial, specifically, he was not aware of Applicant's six prior convictions and Applicant's cocaine use, which was brought forth during Applicant's cross-examination;

c. Failing to obtain and review Detective Therwhanger's report prior to trial;

d. Failing to diligently pursue a subpoena against Daniel Arreola, an essential witness to the defense;

e. Failing to investigate and obtain cell phone records from complainant's phone calls to Applicant;

f. Failing to object to the trial court's use of Pritesh Maharaj as an interpreter who was not neutral because he was the son of the State's witness, was not a professional interpreter, and later testified for the State;

g. Failing to ask the victim, even outside the presence of the jury, what the stepfather had done to her as stated on her MySpace page;

h. Failing to hire an investigator to assist in refuting the victim's credibility, particularly regarding her MySpace page, her accusation against her stepfather, her anger against Applicant, and whether Room 208 at the Scottish Delight Motel was occupied by Roman Urquidi on the night of the offense; and

i. Admitting his own ineffectiveness on volume 6, page 16 of the reporter's record.

12. Applicant represented himself during part of the proceeding, then later was represented by habeas counsel, John Hurley. SHCR-01 at 17 (pro se application), 413 (Hurley's Motion for an Evidentiary Hearing, filed for Applicant), 414–15 (Hurley's objection to Urquidi's affidavit), 429–30 (Hurley's objection to the length of the State's answer).

13. Applicant included an affidavit from his daughter, Kristen Mendez, detailing text messages she exchanged with a person she believed to be Roman Urquidi. SHCR-01 at 54–55. Mendez averred that this person purporting to be Urquidi admitted to not staying in Room 208 at the Scottish Delight Motel on the night of the underlying offenses. Id. In photocopies of the text messages Mendez exchanged, she admits that she never met Urquidi and only conversed with him through text. SHCR-01 at 54, 62.

14. Mendez's affidavit contains multiple hearsay statements. Tex. R. Evid. 801, 802. Thus, the information from her affidavit is unreliable and fails to discredit the trial testimony and exhibits concerning which room Urquidi occupied on the night of the offenses.

15. Urquidi never testified at trial, but the Scottish Delight Motel managers, Laknath and Pritesh Maharaj, testified that, according to the Motel's business records from the night of the offenses, Applicant occupied Room 116, while Urquidi occupied Room 208. 4 RR 206–08; 6 RR 246; 10 RR 8 (State's Exhibit 1), 31–32 (State's Exhibit 9).

16. The victim also testified that she stayed with Applicant the night of the offenses in Room 116. 4 RR 242–44.

17. The testimony from Laknath Maharaj, Pritesh Maharaj, and the victim, along with the motel's business records, are more credible than the hearsay statements from Mendez's affidavit.

18. On July 6, 2015, Judge Darr designated all of Applicant's allegations as issues to be resolved, requiring further factual development. SHCR-01 at 175–79. Judge Darr then ordered responsive affidavits to be filed. Id. That same day, Judge Darr specifically requested an affidavit from trial counsel, Steve Spurgin. SHCR-01 at 411–12.

19. In response to this court order, Spurgin filed his affidavit on July 22, 2015, the same day he swore to it. SHCR-01 at 431–35. Spurgin's affidavit addressed each of Applicant's claims from his initial habeas proceeding. Id.

20. Spurgin admitted to not investigating Urquidi's room rental at the Scottish Delight Motel on the night of the offenses. SHCR-01 at 434–35. However, this was a strategic decision to avoid the risk of Urquidi confirming the accuracy of the motel's records. Id. Spurgin believed this confirmation would thereby prevent him from challenging the records in good faith, as well as limit his ability to cross the victim and the motel clerks on this issue. Id.

21. Spurgin's affidavit from the first habeas proceeding is credible and was written and attested to independently of Petty's dual work for the State and Judge Darr. SHCR-01 at 431–35.

22. Petty filed the State's answer to the allegations, along with affidavits by Roman Urquidi, Johnie Eads, and Teresa Cornelius. SHCR-01 at 66–149 (State's answer),

274–85 (affidavits). On October 16, 2015, Petty also filed the State's Suggested Order for the Court denying the initial application. SHCR-01 at 180–261.

23. On November 16, 2015, Judge Darr adopted the State's Suggested Order denying the initial application. SHCR-01 at 356–58.

24. On January 20, 2016, the CCA denied the initial application without written order on the findings of the trial court without a hearing. SHCR- 01 at action taken sheet.

Current Habeas Application

25. Applicant claims his due process rights for a fair and impartial judge were violated during his initial state habeas proceeding because of Petty's prosecutorial misconduct. Appl. 6.

26. Applicant attached several invoices Judge Darr issued to Petty to pay for the legal work he performed on habeas applications, including Applicant's initial habeas proceeding. Appl. Attach. 1. The invoices are dated November 24, 2014, to February 9, 2016. Id.

27. Applicant briefed one of his claims raised in his initial habeas application—that trial counsel failed to investigate Urquidi's room rental at the Scottish Delight Motel (included in 6(h) above). Appl. Memo. 25. He asserts this claim is of particular importance. Id.

28. Applicant failed to brief any of his other claims raised in his initial habeas application (listed in 10(a) through (i) above). Id.

29. Applicant further claims his due process rights for a fair trial and impartial judge were violated during his trial because of Petty's prosecutorial misconduct. Appl. 8.

30. Applicant attached affidavits from his sister, Julieta Gardner, and his mother, Rosa Perez. Appl. Attachs. 2, 3. Both Gardner and Perez claimed that when they saw Petty's photograph in 2021, they recalled seeing Petty at the trial escorting the victim down the hall, preventing them from speaking to the victim, and conversing with the prosecutors, Stallings and McCarthy. Appl. Attachs. 2, 3. Gardner and Perez further suggested that Judge Darr also possibly witnessed these events and proposed this may have affected the trial court's impartiality. Appl. Attachs. 2, 3. 7

31. Gardner and Perez offer no reliable and relevant information in their affidavits concerning Petty's alleged involvement with Applicant's trial.

32. Applicant also argues that Petty used a "distinctive font and type-face," when he filed documents. Appl. Memo, 24. Referring to documents filed during both the trial and habeas proceeding, Applicant indicates that Petty could have been involved in the trial by preparing documents for the State, which were filed by Stallings. Id.; CR 113; SHCR-01 at 118.

33. Applicant presents nothing credible to fully support his "distinctive font and type-face" argument. Nothing indicates that only Petty used, and that Judge Darr was aware that only Petty used, the supposedly distinctive font and typeface.

34. The State presented invoices signed by Judge Darr, paying Petty for "legal work," on five unrelated habeas cases during the pendency of Applicant's trial, dated between October 21, 2010, and March 18, 2011.

35. Applicant attached a report from George Schiro, a Forensic Scientist, who infers and concludes that: The defense attorney most likely had access only to the TDPSCL reports. There would have been no indications in the reports that the attorney would have needed to investigate further. Even with reasonable diligence, the attorney would not have discovered the information about the information provided to State's counsel from the State's DNA expert witness, Ms. Garcia. Specifically, the State did not produce new DNA opinions that she reached just nine and four days prior to her testimony. Based on a review of Ms. Garcia's testimony, this favorable evidence to Mr. Perez was never disclosed to the Defense. Appl. Attach. 7 (Schiro Forensic Report, Conclusion No. 11)

36. On March 15, 2021, Applicant received a letter from the Texas DNA Mixture Review Project, which stated that the Project investigated Combined Probability of

Inclusion (CPI), which "was not used in the prosecution and conviction in [Applicant's] case." Appl. Attach. 4).

37. Applicant asserts this letter and the news following Ralph Petty's misconduct working as both a prosecutor and a law clerk in Midland County caused him to seek a Public Information Act (PIA) with the Texas Department of Public Safety (DPS). Appl. 10; Appl. Memo. 26, 29; Ex parte Young, No. WR-65,137-05, 2021 WL 4302528 (Tex. Crim. App. Sept. 22, 2021).

38. Through Hurley, Applicant filed his PIA request with DPS. Appl. Memo. 29. On October 18, 2021, Applicant received a packet and letter from DPS in response to his PIA request. Appl. Memo. 26, 29; Appl. Attach. 5. In the packet were e-mail exchanges between the trial prosecutors and the testifying DNA expert from DPS, Angela Garcia.

39. Applicant attached the e-mail exchange between the trial prosecutors and DNA expert Garcia. Appl. Attach. 5. In an e-mail dated May 20, 2011, Garcia explained to Stallings and McCarthy that the neck swab contained a possible third-party contributor, but the peaks were "insufficient for comparison purposes." Appl. Attach. 5. For the anal and thigh swabs, Garcia found epithelial cell fractions foreign to the victim that were "insufficient for comparison." Id. She stated that normally the DNA analysis would focus very little on the epithelial cell fractions, but "given the scenario

presented by this defense, we'd be looking for a second female so the epithelial cell fraction would then be important." Id.

40. This Court finds that the emails contained within this PIA response were not made available or produced to Applicant at the time of trial or when he filed his first writ application, and Applicant had no reason to suspect that the prosecutors were hiding or had not produced possibly exculpatory evidence to him at trial or at the time he filed that application in 2015, as the State had represented that its open-file policy included all available discovery in the case.

41. Additionally, Applicant had filed a comprehensive motion for discovery prior to trial, and this motion included a request for exculpatory or *Brady* evidence. The Supreme Court has held that a prosecutor's non-disclosure of information and an open-file policy are best characterized as "conduct attributable to the State that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Strickler v. Greene*, 527 U.S. 264, 283-84 (1999) ("If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable.").

42. Applicant was entitled to rely on the State's representation that it had turned over all the discoverable evidence, especially *Brady* materials, without being required to further query the State. *See Ex parte Lernke*, 13 S.W.3d 791, 794-95 (Tex.Crim.App.2000), *overruled on other grounds by Ex parte Argent*, 393 S.W.3d 781 (Tex.Crim.App.2013); *see also Ex parte Miles*, 359 S.W.3d 657, 664 (Tex.Crim.App.2012) (determining that evidence of two previously undisclosed police reports was "unavailable" when the habeas applicant filed his first application, despite the fact that the applicant was later able to obtain these reports through Freedom of Information Act (FOIA) requests).

42. The emails between DPS and the prosecution revealed two important facts that were never disclosed to Applicant's attorneys prior to trial: (1) the DNA profile obtained from M.M.'s neck swab consisted of a mixture of at least three individuals, and (2) the epithelial cell fractions from the anal and thigh swabs were not reported to the defense. At trial, Garcia did not testify that the DNA profile from the neck swab consisted of a mixture of at least three individuals; instead, she testified that the DNA profile was consistent with Applicant and M.M.'s DNA profiles without mentioning a potential third party. 5 RR 210-12, 221. Moreover, Garcia did not testify about her discovery of epithelial cell fractions from the anal and thigh swabs.

43. On direct appeal, the Eleventh Court of Appeals determined that the trial court

erred in prohibiting the defense from presenting evidence to prove M.M.'s motive for fabricating the sexual assault allegation:

> "Appellant claimed that M.M. made up false sexual assault allegations against him. The trial court excluded all evidence that related to the possibility that M.M. fabricated the allegations because she was angry at Appellant for threatening to tell the police that [her stepfather] Daniel sexually abused her and for telling her that she could not live with him. This evidence was relevant to show M.M.'s potential motive to testify against Appellant. Therefore, the trial court abused its discretion by excluding it. Had the jury heard the excluded evidence and believed it, the jury could have concluded that a possible motive arose for M.M. to make up sexual assault allegations against Appellant. Without the excluded evidence, Appellant could not offer the jury a reasonable explanation as to why M.M. would have made up the allegations. Based on this fact, we conclude that the excluded evidence was vital to Appellant's defense and that the trial court's erroneous evidentiary ruling denied Appellant his right to present a meaningful defense."

Perez v. State, No. 11-11-00247-CR, slip op. at 11 (Tex.App.-Eastland Sept. 30, 2013, *pet. ref'd*) (mem. op., not designated for publication)

44. Ultimately, the Court of Appeals determined that the trial court's error was harmless because of the strength of "the strong scientific and physical evidence that corroborated M.M.'s testimony that Appellant sexually assaulted her." *Id.*, at 15. This Court finds that the Court of Appeals' conclusion no longer holds water in light of the undisclosed and suppressed DNA evidence of a third-party contributor.

45. This Court finds that the undisclosed evidence was favorable to the defense. By failing to disclose that the DNA profile obtained from M.M.'s neck swab was a

mixture containing at least three individuals, the State allowed its expert, Angela Garcia, to misleadingly testify that the DNA profile from the neck swab matched only Applicant and M.M. 5 RR 210-12, 221. The fact that there were at least three individuals' DNA on the neck swab supported the defense's theory that M.M. fabricated the allegations, as the third-party found on the neck swab could have been the person who gave M.M. the hickey. Further, the fact that there were unreported epithelial cell fractions was prejudicial to the defense's case because, as Garcia admitted in her email to the prosecutors, the discovery of the third-party DNA on the neck swab made these epithelial fractions important in terms of identifying a potential second female contributor:

> "Very rarely are the epithelial cell fractions of our differential (sperm containing) samples probative to a case, so we usually focus very little on these and rely more heavily on sperm fractions. However; ***given the scenario presented by this defense, we'd be looking for a second female so the epithelial cell fraction would then be important.***" (emphasis added).

46. In addition to this Court finding that the evidence was favorable to the defense, ***the fact that Ms. Garcia described in her communication with the prosecutor prior to the trial the undisclosed DNA evidence as "important" to the defense*** (emphasis added) is proof that the evidence was material. In fact, this email is a "smoking gun" proving *Brady* materiality. Further, although prosecutorial intent is not a focus of the *Brady* analysis, this Court finds that the State and its expert intentionally

failed to produce this evidence, with full awareness of how such a nondisclosure would harm the defense in its preparation for trial and trial presentation.

47. This Court finds that without the third-party DNA results, the defense was left to argue that M.M. planted the DNA on herself from a used condom. This defense theory, including its efforts to raise reasonable doubt, was less compelling without the undisclosed evidence of third-party DNA. Had the third-person DNA been disclosed, Trial Counsel would have retained a DNA expert, like George Schiro, whose expert report was presented in this application, to analyze the case. They might have then obtained DNA samples from Rachel Torres (Applicant's intimate partner on the evening of the alleged sexual assault, according to Applicant's testimony) to determine whether those samples matched the third-party sample on the neck swab or either of the epithelial cell fractions on the anal and thigh swabs.

48. Alternatively, if the DNA on the neck swab matched someone with whom M.M had been intimate (such as a boyfriend), then this evidence also would have been favorable to Applicant's case. For example, Applicant could have called his stepdaughter, Samantha Jurado, to testify that she had listened to a phone conversation between her sisters M.M. and Priscilla, in which M.M. told Priscilla that her boyfriend (not Applicant) had given her the hickey on her neck. CR-A 176-77; 182-83. This evidence would have been admissible over a hearsay objection, because

M.M.'s statement about the hickey constitutes a "Statement Against Interest," as it exposes her to criminal liability for lying to the police about the source of that hickey. *See* TEX. R. EVID. 803(24).

49. This Court finds that even without evidence that the third-party DNA matched either M.M.'s boyfriend or Rachel Torres, the fact that there was a third-party's DNA would have raised some doubt about Applicant's guilt - especially in light of the ramifications of the evidence of potential third-party contributors.

50. This Court finds that the State's failure to disclose the third-party DNA evidence affected trial strategy and preparation, as the case would have been presented to the jury in a different light, had this evidence had been disclosed to the defense. Moreover, this Court finds that the disclosure would have affected pretrial preparation. Instead of accepting the DPS DNA reports at face value, Applicant would have instead chosen to hire his own DNA expert, like George Schiro, to further investigate the DNA evidence. For instance, as stated in Schiro's report, Applicant's epithelial DNA could have innocently transferred from bed sheets, a towel, or a toilet to M.M.'s skin. Likewise, a third party's DNA could have transferred to M.M. in this manner, as suggested by the undisclosed emails. Additionally, such further investigation, with the aid of a DNA expert, would have brought to light the anomaly of the presence of semen on the anal and thigh swabs, but not the vaginal swab - when

vaginal penetration had been alleged. Trial Counsel would have then hired reasonable experts, like Schiro and Victoria Morton, to testify in a manner that supported the defense's theory that M.M. planted the semen on her body from an external source (*i.e.*, used condom).

51. This Court finds that the report of Applicant's DNA expert, George Schiro is relevant and credible.

52. According to Schiro, the failure to disclose evidence of a third-party's DNA affected the presentation of the case to the jury. A reasonable defense attorney would have sought expert assistance if the third-party evidence had been disclosed, and such expert assistance would have been material to Applicant's defense. After reviewing the evidence and testimony, Schiro concluded that the failure to disclose this favorable DNA evidence regarding a third-party affected the outcome of Applicant's trial, and this Court finds the following statement by Schiro to be credible and compelling:

> "The State appeals court stated, "The physical evidence and DNA evidence corroborated M.M.'s testimony." [footnote omitted]. It further stated, "in light of the strong scientific and physical evidence that corroborated M.M.'s testimony that Appellant sexually assaulted her, we cannot conclude that the jury would have been influenced by the excluded testimony." [footnote omitted].
>
> The Federal appeals court stated, "The jury found M.M.'s testimony credible and supported by the other evidence, and found Petitioner's testimony not credible and not supported by the other evidence." [footnote omitted]. It further stated, "The jury found Petitioner

> guilty on the charges substantiated by the DNA evidence and not guilty on the charges not substantiated by DNA evidence. Accordingly, it is reasonable to assume that the jury relied primarily on the DNA evidence in finding Petitioner guilty of these charges." [footnote omitted].
>
> Finally, the Federal appeals court stated, " the jury found M.M.'s statements alone insufficient to find Petitioner guilty on the other charges." [footnote omitted]. Both appeals courts stressed the importance of the DNA findings in this case and how it supported M.M.'s claims. That is why the undisclosed DNA results for the epithelial fractions of the anal swab and thigh swab along with the three person mixture on the neck swab are material to this case. This DNA evidence could have called into question and, perhaps, contradicted M.M.'s testimony. There is a reasonable probability that had the evidence been disclosed it would have aligned with Mr. Perez's defense, and the results of the trial would have been different."

See Applicant's Memorandum of Law, Attachment 7, *Report of George Schiro, Jr.*, at 7.

53. In addition, this Court finds that a DNA defense expert's analysis would have prompted reasonable counsel to question the validity of the SANE nurse's (Nurse Brookings) examination and report. The anomaly of there being no DNA attributed to Applicant from the vaginal swabs (yet his DNA being detected on the accuser's anal and thigh swabs), despite an allegation of vaginal penetration, implies potential and clear problems with Nurse Brookings' testimony. According to Applicant's SANE expert, Victoria Morton, if semen had leaked from M.M.'s vagina to her anus, semen should still be detectable on vaginal swabs; thus, the absence of DNA on the vaginal swabs makes the defense's evidence-planting theory more probable. *See* Applicant's

Memorandum of Law, Attachment 8, *Affidavit of Victoria Morton*, at 1-2. This Court finds Morton's statement to be credible and relevant.

54. Further, Morton determined that Nurse Brookings' testimony was misleading when she stated that SANE nurses do not "try to collect" semen from inside the "vaginal area." *Id.*, at 2. Moreover, Morton found that Brookings provided misleading testimony about the injury to M.M.'s vaginal cavity, as this could have been self-inflicted instead of being caused by sexual intercourse. *Id.*, at 2-3. Importantly, Morton also disputes Brookings' testimony that "the patient had been sexually assaulted." *Id.*, at 3. According to Morton, "her expert testimony should have addressed the consistency between the patient's history and exam findings, rather than drawing conclusions about how injuries were caused or whether a sexual assault occurred." *Id.* Lastly, Morton describes at least five instances in which Nurse Brookings' use of medical terms was inaccurate and confusing to the jury. *Id.*, at 3-4. This Court finds the following conclusion of Morton to be credible:

> "A reasonably professional defense attorney would have sought consultation from a SANE expert prior to trial to review the documentation of the medical-forensic exam, photographs, results of evidence analysis and medical records. Without an expert, an attorney may not know the complexities of the comprehensive examination process, detailed ano-genital anatomical sites, methods of collections, and factors affecting physical evidence and injury.
>
> If present a trial, he or she would have been able to observe Ms. Brookings' testimony and provide questions to [Applicant's] attorney during the trial

> to elicit testimony from Ms. Brookings favorable to [Applicant], for instance alternate explanations for abrasions to the fossa navicularis."

Id., at 5

55. This Court finds that the State's DNA expert's (Angela Garcia's) testimony, absent the undisclosed evidence of the third-party DNA connecting Applicant to the alleged offense, was vital to the State's case. In closing arguments, the State emphasized the presence of Applicant's and M.M.'s DNA on her neck, and such an argument would have held less weight if the prosecution had disclosed the fact that there was at least one other person's DNA profile in that mixture, as opposed to misrepresenting that the mixture contained only Applicant's and M.M.'s DNA. *See* 7 RR 15, 22-23, 57-59. In fact, the State pointed to the DNA on the neck swab as being determinative because Applicant explained the presence of his semen on the anal and thigh swabs by virtue of M.M.'s access to his used condom, while there was not a similar explanation for the presence of his epithelial cells on her neck. 7 RR 22-23, 58-59. Defense counsel could not adequately rebut said arguments absent knowledge of the nondisclosed *Brady* evidence.

56. For instance, the prosecutor argued in the State's first closing argument:

> And you heard the test results, ladies and gentlemen. That gentleman's DNA is on [M.M.]'s thigh via semen. That gentleman's DNA is on [M.M.]'s anus via semen. And that gentleman's DNA is on her neck via an unknown substance.
> I want you to keep in mind this when you are listening to [Defense

Counsel]. The DNA sample from her neck was not semen. It wasn't. Ladies and gentlemen of the jury, I would heartily suggest to you that the DNA evidence in this case isn't just proof beyond a reasonable doubt. It's proof beyond all doubt. DNA doesn't lie.

7 RR 22-23

57. Later, in the State's second closing argument, the prosecution emphasized the DNA on M.M.'s neck again:

> "What did she tell you? "He gave me a hickey."
> And miraculously, where is the Defendant's DNA? Right there. Right there on the left side of her neck where he gave her a hickey. Amazing."
>
> "The Defense - you know, it's interesting. I think the Defense knows they can't run from this. And so [Defense Counsel] says: "I don't know how the DNA got there."
> Well, it just didn't magically leap from somewhere, ladies and gentlemen.
>
> ***We know the source of it. We know the source of it. We know who put it there on those three spots on this poor little girl. The Defendant. He can't get away from that, no matter how much he would like to. Just simple, cold, hard facts.***" (emphasis added).

7 RR 58-59

58. Applicant's statement—that he (and his counsel) could not have discovered this *Brady* claim until after his initial habeas proceeding had concluded—is credible.

59. Applicant demonstrates the State did not provide to the Applicant DPS reports that included data and information indicating a contributor to the DNA found on the victim's neck, thigh, and anal swab that could not be attributed to the victim or

Applicant. The evidence includes the unproduced communications between Stallings, McCarthy and Garcia shortly before the trial.

60. a. DPS expert Garcia did **not** testify that there was DNA on the victim's neck swab which could not be attributed to either the victim or the Applicant. (emphasis added). Instead, her testimony was,

Q. "And you stated you can say with scientific sample - - scientific certainty that the unknown sample from the anal and thigh swabs came from the Defendant, correct?

A. That is correct, yes.

Q: But you cannot - - can you say the same thing for the neck swab?

A. No, I cannot. And the reason being is that on the anal swab and the thigh swab, we are talking about a single source DNA profile. That means DNA from one person.

On the DNA profile from the neck, there is DNA from more than one person. The victim and the suspect appear to be present on that swab from the neck

And so because we are talking about a mixture, I cannot call either one of them the source." 5 RR 212

b. It is not likely that this statement, during the heat of the trial, would have been understood by defense counsel – at that moment – to be of significance. The witness certainly did **not** say that there was DNA on the victim's neck swab which could not be attributed to either the victim or the Applicant. Nor did she say ***"given the scenario presented by this defense, we'd be looking for a second female, so the epithelial cell fraction would then be important,"*** the very words she used in explaining to the prosecutor shortly before the trial the importance of that evidence.

61. Applicant has shown that the DNA evidence, which was suppressed and not produced by the State, improved the probability of Applicant's previously rejected defense theory—that the victim took Applicant's used condom to place his DNA on her body so that it would be detected on her thigh and anal swabs obtained during her SANE examination.

62. Applicant also has demonstrated how the allegedly suppressed DNA evidence could explain how his touch or saliva DNA was located on the victim's neck swab, which contained the DNA from both the victim and Applicant in almost equal parts. 5 RR 240–41.

CONCLUSIONS OF LAW

General Writ Law and Subsequent Applications

63. Applicant bears the burden of proof in this habeas proceeding; he must prove his "factual allegations by a preponderance of the evidence." *Ex parte Brown*, 158 S.W.3d 449, 461 (Tex. Crim. App. 2005). "In a postconviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief." *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

64. Relief may be denied if the applicant states only conclusions, and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). "Sworn

pleadings provide an inadequate basis upon which to grant relief in habeas actions." *Ex parte Garcia*, 353 S.W.3d 785, 789 (Tex. Crim. App. 2011) (11.072 proceeding).

65. Applicant relies on only the first exception. A subsequent bar is inapplicable if the "current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.07 §4(a)(1).

66. If Applicant fails to establish his exception, the application is procedurally barred and must be dismissed as subsequent. *See Ex parte Santana*, 227 S.W.3d 700, 702–04 (Tex. Crim. App. 2007). Applicant established the exception as to all three issues before this Court.

67. The CCA, in *Ex parte Young*, No. WR-65,137-05, 2021 WL 4302528 (Tex. Crim. App. Sept. 22, 2021), discussed Petty's working as a law clerk for Midland County judge, John Hyde, while also active as an Assistant District Attorney for Midland County. In certain matters, Petty's dual involvement could result in the reconsideration of an applicant's habeas claims, a new trial, or both, as the CCA found in Young's case. *Id.*

68. The CCA may reconsider a prior state habeas application on its own motion when that prior application proceeding violated due process. *Ex parte Benavides*, No. WR-81,593-01, 2022 WL 4360857 (Tex. Crim. App. Sept. 21, 2022). In that case as in this one, the applicant was denied a fair consideration of his claims due to Petty's working on the matter both as a prosecutor and a law clerk. *Id.* at *1. However, upon reconsideration and a review of the record, the Court further found that the applicant was still not entitled to habeas relief. *Id.* This Court reaches that same conclusion on this issue.

Reconsideration of Applicant's Prior Habeas Claims

69. Because it appears that Ralph Petty's alleged dual employment for the State and the District Courts potentially tainted Applicant's habeas proceeding, his prior habeas claims may be reconsidered. *Ex parte Benavides*, 2022 WL 4360857.

70. Applicant waived all but one of his prior claims pertaining to inadequacy of counsel, for failing to adequately brief the issues. *See Ex parte Pena*, No. WR-84,073-01, 2017 WL 8639778, at *2 n.3 (Tex. Crim. App. Nov. 15, 2017) (not designated for publication) (finding Fourth Amendment claim inadequately briefed where argument was "limited to a single sentence citing a non-binding Fifth Circuit case"); *Ex parte Granger*, 850 S.W.2d 513, 514 n.6 (Tex. Crim. App. 1993) (holding that where appellant proffered "no argument or authority as to the protection provided by the[]

state [constitutional and statutory] provisions or how that protection differs meaningfully from that provided by the [federal constitution], we consider his claims based on these state provisions inadequately briefed and not properly presented for our consideration"); *Wood v. State*, 18 S.W.3d 642, 651 (Tex. Crim. App. 2000) (inadequate briefing forfeits issue); *cf. Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. Crim. App. 1995) ("Appellant cites no authority in support of his proposition, nor does he provide any argument beyond his conclusory assertion. From appellant's brief, we cannot discern his specific arguments, and we will not brief appellant's case for him.").

71. Applicant's one adequately briefed claim alleged that Spurgin failed to investigate Urquidi's stay at the Scottish Delight Motel. Appl. Memo. 15–17.

72. Regardless of his waiving the remaining claims, Spurgin's affidavit adequately addresses each allegation.

Ineffective Assistance of Counsel

73. The two-prong test enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984), applies to ineffective assistance of counsel claims in non-capital cases. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective counsel, Applicant must show the representation fell below an objective standard of reasonableness, and there is a reasonable probability the

results of the proceedings would have been different in the absence of counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

74. Applicant bears the burden of establishing that he was deprived of effective assistance of counsel by a preponderance of the evidence. *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010); *Jackson v. State*, 877 S.W.2d 768, 711 (Tex. Crim. App. 1994); *see Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). A "vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Bone*, 77 S.W.3d at 836.

75. "The proper standard of review for claims of ineffective assistance of counsel is whether, considering the totality of the representation, counsel's performance was ineffective." *Ex parte LaHood*, 401 S.W.3d 45, 49 (Tex. Crim. App. 2013).

76. Applicant must establish that his counsel's representation fell below an objective standard of reasonableness. *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim. App. 2007).

77. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record and "'the record must affirmatively demonstrate' the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591,592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

78. A reviewing court "must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he made all significant decisions in the exercise of reasonable professional judgment." *State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008) (citing *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992)).

79. Similarly, a review of "counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *see Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986) ("To establish a claim of ineffective assistance of counsel, a habeas petitioner must 'overcome [a] strong presumption of attorney competence.'" (citation omitted)).

80. "[The] court will not second guess through hindsight the strategy of counsel at trial nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness." *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979.)

81. A claim for ineffective assistance based on trial counsel's failure to investigate the facts fails absent a showing of what the investigation would have revealed that reasonably could have changed the result of the case. *Cooks v. State*, 240 S.W.3d 906, 912 (Tex. Crim. App. 2007).

82. Reviewing the reasonableness of trial counsel's investigative decisions must consider all surrounding circumstances and use a heavy dose of deference. *Ex parte Martinez*, 195 S.W.3d 713, 721 (Tex. Crim. App. 2006). "When assessing the reasonableness of an attorney's investigation, a reviewing court must consider the quantum of evidence already known to counsel and whether the known evidence would lead a reasonable attorney to investigate further." *Id.*

83. Spurgin strategically decided not to seek Urquidi as a witness regarding his room location at the Scottish Delight Motel. Spurgin made this decision so that he may freely challenge the State's evidence and witnesses to cause doubt in the jury's mind.

84. Applicant failed to show that any further investigation would have revealed information that reasonably could have changed the result of his case. *See Cooks*, 240 S.W.3d at 912.

85. Spurgin's decision not to further investigate Urquidi was not ineffective. *Blott*, 588 S.W.2d at 592.

86. As an alternative to Applicant's waiving his remaining ineffective-counsel claims, those are meritless, as well:

a. Spurgin's cross-examination of the witnesses at the time of the trial fell within the realm of reasonable representation. Any hindsight criticism of

his trial performance will not satisfy *Strickland*. *Blott*, 588 S.W.2d at 592; *Ex parte Ellis*, 233 S.W.3d at 330.

b. Spurgin directly refuted Applicant's allegation that he was unprepared for trial. SHCR-01 at 431–32. Applicant failed to inform Spurgin of his prior misdemeanor convictions. SHCR-01 at 432. Spurgin informed Applicant not to volunteer information about his cocaine use, but Applicant failed to do so. *Id*. Once Applicant admitted this to the jury, Spurgin hoped his transparency would bolster his credibility. *Id*. Based on the totality of these circumstances, particularly Applicant's lack of cooperation, Spurgin's performance is not deficient. *Ex parte LaHood*, 401 S.W.3d at 49; *Ex parte Martinez*, 195 S.W.3d at 721.

c. Spurgin reviewed the DVD interview of Applicant by Detective Therwhanger. SHCR-01 at 432. While Spurgin did not receive Therwhanger's report until the trial, he was able to review it before his cross-examination. *Id*. Not having much time to review reports is very common in Spurgin's experience. *Id*. Spurgin was not deficient here. *Blott*, 588 S.W.2d at 592; *Ex parte Ellis*, 233 S.W.3d at 330.

d. Spurgin diligently pursued a subpoena against an essential witness, Daniel Arreola, who successfully evaded service. SHCR-01 at 433.

Spurgin's actions were again, well within the realm of reasonable assistance of counsel. *Ex parte Ellis*, 233 S.W.3d at 330.

e. Obtaining cell phone records from third parties, in Spurgin's experience, can be time consuming. SHCR-01 at 433. Applicant has not shown what fruits an investigation into the victim's cell phone records would have yielded; therefore, the claim fails. *Id.*; *Cooks*, 240 S.W.3d at 912; *Ex parte Ellis*, 233 S.W.3d at 330.

f. Applicant fails to show an objection to the trial court's use of Pritesh Maharaj as an interpreter would have been successful. SHCR-01 at 434. Moreover, Pritesh testified for the State's rebuttal, *after* his father testified. *Id.* Applicant has not shown a deficiency. *Blott*, 588 S.W.2d at 592; *Ex parte Ellis*, 233 S.W.3d at 330.

g. The trial court granted the State's motion in limine, preventing Spurgin from asking the victim about her MySpace comments. SHCR-01 at 434. The record did include testimony by victim on voir dire concerning her MySpace page. 5 RR 264–70. Spurgin then made a further bill of exception concerning this issue. 8 RR 6–12. Applicant fails to show Spurgin's performance fell outside of reasonable representation. *Blott*, 588 S.W.2d at 592; *Ex parte Ellis*, 233 S.W.3d at 330.

h. Spurgin believed he had sufficient knowledge of the case and was ready for trial. SHCR-01 at 434. He believed his knowledge of the case included all potential exculpatory evidence, though it did not. Nevertheless, he did have a licensed investigator available should the need arise. *Id.*; *Blott*, 588 S.W.2d at 592; *Ex parte Ellis*, 233 S.W.3d at 330.

i. Spurgin's admission of ineffectiveness at the trial was a tactic to have his continuance granted, but it did not work. SHCR-01 at 435; *Ex parte Ellis*, 233 S.W.3d at 330. Spurgin's strategy cannot be criticized merely through hindsight. *Blott*, 588 S.W.2d at 592.

87. Applicant fails to show Spurgin performed deficiently and that Appellant was prejudiced by any alleged deficiency. Therefore, his claims that Spurgin was ineffective fails. *Strickland*, 466 U.S. at 688, 694.

Prosecutorial Misconduct and Partial Judge at Trial

88. *Ex parte Young*, No. WR-65,137-05, 2021 WL 4302528 (Tex. Crim. App. Sept. 22, 2021), and *Ex parte Lewis*, No. WR-94,237-01, 2024 WL 2034584 (Tex. Crim. App. May 8, 2024) are currently the leading CCA cases establishing the requirements for determining whether Petty tainted a criminal trial through his dual employment. The CCA requires at least two elements to meet before granting a new trial in *Ex parte*

Young: 1) Petty worked for the judge while the trial was held; and 2) Petty was actively involved as a prosecutor in the trial. *Id.* at *5 ("Judicial and prosecutorial misconduct—an undisclosed employment relationship between the trial judge and the prosecutor appearing before him—tainted Applicant's entire proceeding *from the outset*.") (emphasis added); *Ex parte Lewis*, 2024 WL 2034584 (Petty worked was a prosecutor for Lewis's trial while also clerking for the presiding judge on other matters). If Petty's tainting dates to the trial, then the Applicant has been "deprived of his due process rights to a fair trial and an impartial judge." *Ex parte Young*, 2021 WL 4302528, at *1.

89. Here, the record does not support Applicant's assertions that Petty was dually employed and that it deprived Applicant of his due process right to an impartial judge. Petty did not file anything for the State before or during the trial. Petty did not make any appearance for the State before or during the trial.

90. Applicant fails to establish that prosecutorial misconduct occurred and deprived him of his due process right to an impartial judge. He fails to show that Petty represented the State during his trial while Petty worked for Judge Darr as a law clerk. *Ex parte Maldonado*, 688 S.W.2d at 116; *Ex parte Young*, 2021 WL 4302528.

Applicant's Claims Against the Reporting and Testimony of the State's DPS and SANE Experts Are Not Procedurally Barred.

91. Applicant's assertions that DPS expert, Angela Garcia, did not follow the proper reporting procedures or came to the wrong conclusions, based on the criticisms provided by Dr. George Schiro and SANE Nurse Paula Brookings. are not procedurally barred because he could not have raised these claims in his prior application. *Ex parte Santana*, 227 S.W.3d at 702–04 (a subsequent application must meet one of the two listed exceptions to avoid a procedural bar); Tex. Code Crim. Proc. art. 11.07 §4.

***Applicant's Brady* Claim Has Merit**

92. Applicant bears the burden to demonstrate, by a preponderance of the evidence, that his *Brady* claim entitles him to relief. *Ex parte Lalonde*, 570 S.W.3d 716, 724–25 (Tex. Crim. App. 2019).

93. The prosecutorial suppression of evidence favorable to the accused is a violation of a defendant's right to due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963). Such a violation requires reversal of a defendant's conviction if three prongs are met: (1) the evidence was suppressed by the State, either willfully or inadvertently, (2) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching, and (3) the evidence was material, such that prejudice resulted from its The prosecutorial suppression of

evidence favorable to the accused is a violation of a defendant's right to due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963). Such a violation requires reversal of a defendant's conviction if three prongs are met: (1) the evidence was suppressed by the State, either willfully or inadvertently, (2) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching, and (3) the evidence was material, such that prejudice resulted from its suppression. See *United States v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004).

94. Although the constitutional duty to disclose favorable evidence is triggered by the potential impact of this undisclosed evidence, the materiality prong of the *Brady* rule does not require a showing that the disclosure of this evidence would have resulted in the defendant's acquittal. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Notably, the materiality determination is not a "sufficiency of the evidence" test, as the defendant does not have to show that "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). Instead, the defendant must "show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. 93.

95. A court's materiality inquiry is "a fact-intensive examination done on a careful, case-by-case basis." *Banks v. Thaler*, 583 F.3d 295, 322 (5th Cir. 2009). In assessing

whether the withheld evidence casts the case in this "different light," consideration of its impact on trial strategy and preparation becomes appropriate and, in fact, is critical. See *Graves v. Dretke*, 442 F.3d 334, 344 (5th Cir. 2006), cert. denied, 549 U.S. 943 (2006); see also *Spence* v. *Johnson*, 80 F.3d 989, 998 (5th Cir. 1996) (in reviewing the materiality of *Brady* evidence, a court should examine how the withheld evidence could have affected trial preparation); see also *Sellers v. Estelle*, 651 F.2d 1074 n.6 (5 th Cir. 1981), cert. denied, 455 U.S. 927 (1982). Likewise, the Sixth Circuit has found that withheld evidence met the *Brady* materiality prong based on its potential impact on trial strategy. See *Schledwitz v. United States*, 169 F.3d 1003, 1016 (6th Cir. 1999). Moreover, the Third and Seventh Circuits have held that *Brady* evidence is material if it would have affected the jury's assessment of witnesses' credibility. See *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 294-95 (3rd Cir. 2016); see also *Sims v. Hyatte*, 914 F.3d 1078, 187-88 (7th Cir. 2019).

96. This Court concludes that there is a reasonable probability that any juror who found M.M. more credible in light of the trial DNA evidence would have thought differently had the juror learned about the undisclosed third-party-contributor DNA evidence. *Wearry v. Cain*, 577 U.S. 385, 395 (2016).

97. ***The materiality of the suppressed third-party-contributor DNA evidence is further demonstrated by the simultaneous acquittal by the jury for the counts not***

supported by DNA evidence. *Floyd v. Vannoy*, 894 F.3d 143, 167 (5 th Cir. 2018) (en banc). (emphasis added). After considering M.M.'s testimony about the acquitted counts and the defense evidence that Applicant's wife was present in the house and unaware of the alleged abuse occurring, the jury found Applicant not guilty of these counts. The Court concludes, because the jury determined that M.M.'s testimony alone was insufficient to find Applicant guilty, there is a reasonable probability that if the third-party-contributor DNA evidence had been disclosed, the result of the proceedings would have been different due to the presence of a reasonable doubt.

98. Further, the undisclosed third-party-contributor DNA evidence's status as objective scientific evidence corroborating the defense theory (as outlined in the above Findings of Fact), along with its tendency to enhance Applicant's and Rachel Torres' credibility in the eyes of the jury, leads this Court to conclude that the undisclosed evidence was material under *Brady*. That favorable evidence puts the whole case – from the discovery phase through the actual trial - in such a different light as to undermine this Court's confidence in the verdict.

99. Because the *Brady* evidence was suppressed by the State, was favorable to Applicant, and was material to Applicant's guilt-innocence, the State committed a due-process *Brady* violation by failing to disclose this evidence.

100. This Court notes that the integrity of our judicial system requires compliance with basic evidentiary and procedural requirements that have been established by case law and by statute. The failure to follow the requirements of *Brady* with regard to the production of exculpatory materials, as was demonstrated in this case, is a fundamental error that demands relief be provided to the Applicant.

101. Both justice and the perception of justice are obstructed when exculpatory evidence is not produced in accordance with the requirements of law. As demonstrated here, the failure to comply detrimentally affected counsel's ability to properly prepare for trial, and then to adequately defend based upon the true facts of the case – facts that should have been made known to counsel before the commencement of the trial.

Recommendation

102. This Court recommends to the Honorable Court of Criminal Appeals that this Court's findings of fact and conclusions of law be accepted as the findings of fact and conclusions of law in this case, and that the Court of Criminal Appeals grant Applicant relief in the form of a new trial on guilt-innocence.

Issued and Signed this 13th day of June 2024.

James M. Rush

Judge Presiding (by Assignment)

CAUSE NO. CR37715-B

EX PARTE	*	IN THE 385TH JUDICIAL
	*	DISTRICT COURT OF
MANUEL PEREZ	*	MIDLAND COUNTY, TEXAS

Order

The Clerk of the Court is hereby Ordered to immediately transfer a true and correct copy of the record in this matter (including the Reporter's Record and Clerk's Record from Applicant's original trial/appeal), along with the Court's Findings of Fact, Conclusions of Law, Recommendation, and Order to the Clerk of the Court of Criminal Appeals.

It is further Ordered that the Clerk serve the attorneys for Applicant and the State of Texas with copies of the Court's Findings of Fact, Conclusions of Law, Recommendation and Order.

Issued and Signed this 15th day of June, 2024.

James M Rush

Judge Presiding (by Assignment)