No. _____

In The
Supreme Court of the United States

JUAN EDWARD CASTILLO,
Petitioner,

vs.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

Mr. Castillo is scheduled to be executed on May 16, 2017 after 6:00 p.m.

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** Counsel of Record*
Member, Supreme Court Bar

Counsel for Petitioner

CAPITAL CASE

INDEX TO APPENDICES

APPENDIX 1

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,510-04

EX PARTE JUAN EDWARD CASTILLO, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. 2004CR1461A-W2 IN THE 186TH JUDICIAL DISTRICT COURT BEXAR COUNTY

***Per curiam*. ALCALA, J., concurred. YEARY, J., did not participate.**

O R D E R

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

In September 2005, a jury found applicant guilty of the 2003 capital murder of Tommy Garcia, Jr. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set

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

applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Castillo v. State*, 221 S.W.3d 689 (Tex. Crim. App. 2007).

In his initial application for a writ of habeas corpus, applicant alleged that: his trial counsel rendered ineffective assistance of counsel at voir dire, prior to trial, and at trial; his appellate counsel rendered ineffective assistance; and the trial court violated his right to self-representation and abused its discretion by allowing him to represent himself during the sentencing phase of trial. This Court adopted the trial court's findings of fact and conclusions of law, found that the claim regarding self-representation was procedurally barred, and otherwise denied relief on applicant's claims. *Ex parte Castillo*, No. WR-70,510-01 (Tex. Crim. App. Sept. 12, 2012)(not designated for publication).

On October 30, 2017, applicant filed the instant application in the trial court. This is applicant's first subsequent writ of habeas corpus application. In the application, applicant raises a single claim that his conviction and sentence are based on false testimony and, therefore, violate his right to due process.

In December 2009, this Court held in *Ex parte Chabot* that the knowing or unknowing use of false or perjured testimony violates due process. *Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Because applicant filed his initial habeas application in the trial court prior to this Court's decision in *Chabot*, this decision, which provides a new legal basis, was not available at the time applicant filed that application. Thus, we found that applicant had met the requirements of Article 11.071 § 5(a)(1), and we stayed his

execution and remanded his application to the trial court for resolution of the claim. *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017)(not designated for publication). The case has now been returned to this Court.

In *Ex parte Weinstein*, this Court clarified that, when an applicant asserts that his due process rights were violated by the State's use of material false testimony, this Court must first determine (1) whether the testimony was, in fact, false, and, if so, then (2) whether the testimony was material. 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). False testimony is material only if there is a "reasonable likelihood" that the testimony affected the judgment of the jury. *Id*. We review factual findings concerning whether a witness's testimony is perjurious or false under a deferential standard, but we review the ultimate legal conclusion of whether such testimony was "material" *de novo*. *Id*. at 664.

Gerardo Gutierrez testified at trial that he and applicant were held in the Bexar County Jail during the same period. During a conversation between them, applicant told Gutierrez that he and two friends had planned to rob a person, but it went awry and applicant shot the victim when he took off running. Applicant also told Gutierrez that the authorities would have a hard time convicting him because they did not have the weapon used. Gutierrez testified that, at the time of trial, he was working, he was not incarcerated, he did not have any charges pending against him, and he did not want anything from the prosecution.

However, in June 2013, Gutierrez executed a sworn declaration in which he stated

that his trial testimony regarding what applicant had told him about the crime had been untrue. He then specifically stated that "I made up this testimony to try to help myself."

Applicant now claims that this recantation shows that false testimony was admitted at his trial, which violates his due process rights. After reviewing the issue, the trial court issued findings of fact and conclusions of law and recommended that this Court deny applicant relief on his claim.

In its findings, the trial court discussed the facts of the case, this Court's holding on direct appeal, Gutierrez's 2013 affidavit recanting his trial testimony, and the actual trial testimony. These findings are generally supported by the record with two exceptions.[2] First, the record shows that the name of "Teresa Quintana" used on pages 4-6 of the findings should be "Teresa Quintero."[3] Second, the trial court states on page 6 of its findings that "Gerardo Gutierrez testified that in March 2003, he was an inmate in the same area of the Bexar County Jail as Applicant." Although this Court made the same imprecise statement in its direct appeal opinion, it is more accurate to say that Gutierrez testified that he was arrested and jailed in March 2003. And, sometime after December 2003, he met applicant, who was living in the same area of the jail. With these two corrections, we adopt the trial court's findings.

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[2] On post-conviction review of habeas corpus applications, the convicting court is the "original factfinder," but this Court is the ultimate factfinder. *Weinstein*, 421 S.W.3d at 664 (quoting *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)).

[3] We recognize that we made the same mistake in the opinion on direct appeal.

In its conclusions of law, the trial court noted at the outset that applicant's claim "rests on whether Gutierrez's 2013 affidavit can be considered credible." To support its determination, the trial court found that Gutierrez was not the sole source of any piece of information he provided to the jury during applicant's trial. Rather, his testimony was consistent with the testimony of Lucinda Gonzales and Bryan Anthony Brown regarding admissions they heard applicant make. Gutierrez's testimony was also consistent with the version of events set out by the two co-defendants who testified. In his 2013 affidavit, on the other hand, Gutierrez gave no explanation for how he could have independently manufactured a version of events consistent with that of multiple other witnesses while he was incarcerated in the Bexar County jail. Thus, the court concluded that Gutierrez's 2013 affidavit was not credible, and applicant had not met his burden to prove his claim.

We adopt the trial court's conclusions described above. However, we do not adopt the legal reasoning starting on line 2 of page 10 and continuing through line 3 of page 11. We also reject the speculation and legal reasoning beginning on line 11 of page 11 and continuing through line 3 of page 12. These conclusions mischaracterize applicant's claim as an actual innocence claim rather than a false testimony claim. Consequently, the trial court improperly required applicant to meet a greater burden than that which applies in this case.

When reviewing a false testimony claim, a court must determine (1) whether the testimony was, in fact, false. *Weinstein*, 421 S.W.3d at 665. If it was false, then the court

must determine (2) whether the testimony was material. *Id*. Because the trial court determined that applicant failed to prove that the testimony presented at trial was false, and because that determination is supported by the record, we need not address the materiality prong. Relief is denied.

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

Do not publish

APPENDIX 2

NO. 2004CR1461A-W2

EX PARTE	§	IN THE DISTRICT COURT
	§	186TH JUDICIAL DISTRICT
JUAN CASTILLO	§	BEXAR COUNTY, TEXAS

ORDER

Juan Castillo, hereafter referred to as Applicant, has filed an application for post-conviction writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure, collaterally attacking Applicant's conviction in cause number 2004CR1461A. TEX. CODE CRIM. PROC. art. § 11.071.

HISTORY OF THE CASE

Applicant was indicted for the capital murder of Tommy Garcia, hereafter referred to as the victim, in cause number 2004CR1461A. Applicant pleaded not guilty to the charge. A jury trial was held in the 186th Judicial District Court of Bexar County, Honorable Maria Teresa Herr presiding. On August 30, 2005, the jury found Applicant guilty of capital murder. Based on the jury's answers to the special issues in the punishment phase, a sentence of death was imposed.

On September 26, 2005, Applicant filed notice of appeal. On appeal, Applicant argued that (1) the evidence was insufficient to corroborate the accomplice-witness testimony as required by Article 38.14; (2) the evidence was factually insufficient to support a finding that Applicant robbed the victim or that he shot the victim; (3) the

death penalty is cruel and unusual punishment in violation of the Eighth Amendment; and (4) the trial court erred when it denied Applicant's pretrial motion objecting to the testimony of the two accomplice witnesses on the ground that their testimony would violate Rule 3.04 of the Texas State Bar Rules of Professional Conduct, and 18 U.S.C. §§ 201(b)(1)(A), 201(b)(3). On March 23, 2005, the Court of Criminal Appeals issued a unanimous opinion affirming Applicant's conviction and sentence. *Juan Castillo v. The State of Texas,* 221 S.W.3d 689 (Tex. Crim. App. 2007).

Applicant filed his original Article 11.071 habeas application on November 13, 2009. Applicant alleged that (1) he was rendered ineffective assistance of trial counsel; (2) his right to self-representation had been violated by the trial court; and (3) he was deprived effective assistance of appellate counsel on the motion for new trial and on appeal. On September 12, 2012, the Court of Criminal Appeals reviewed the record with respect to the allegations made by applicant and denied relief on the merits. *Ex parte Castillo*, No. WR-70,510-01, 2012 Tex. Crim. App. Unpub. LEXIS 901, at *2 (Crim. App. Sep. 12, 2012). Additionally, the Court found that Applicant's second allegation was procedurally barred.

This Subsequent Application for Post-Conviction Writ of Habeas Corpus was filed on October 30, 2017. On November 28, 2017, the Court of Criminal Appeals certified Applicant's subsequent writ application and remanded this application to the trial court for resolution.

ALLEGATIONS OF APPLICANT

In Applicant's sole ground for relief, Applicant alleges that his due process rights were violated when the State unknowingly presented the false testimony of Gerardo Gutierrez. In support of Applicant's claim, Applicant has filed an affidavit from Gutierrez, dated June 26, 2013.

FINDINGS OF FACT

Testimony at Trial

During the trial for this offense the jury heard from several witnesses, including Jessica Cantu, Frank Russell, Robert Jimenez, Debra Espinosa, Lucinda Gonzales, Bryan Anthony Brown, Francisco Gonzales, and Gerardo Gutierrez. Jessica Cantu testified that Applicant was wearing the victim's necklace, a gold medallion described as a "spinner" medallion with a thick gold chain, on the afternoon after the murder. (RR17 108-122; RR18 8-15). She spoke with Applicant and told him that the necklace looked familiar. The next time she saw Applicant he was no longer wearing the necklace. Cantu told the victim's mother that she had seen Applicant wearing the victim's necklace.

Frank Russell testified that he and Robert Jimenez were at Jimenez's house with the victim in the late night and early morning hours of December 2 and 3, 2003. (RR15 166-200). The victim received a phone call from Debra Espinosa and went to meet with her. The victim offered to give Russell a ride home on the way.

Robert Jimenez also testified that he and Frank Russell were at his house with the victim when the victim received the call from Espinosa. (RR16 36-57). Jimenez testified that ten or fifteen minutes after the victim and Russell left, he received a phone call from Espinosa who was crying hysterically and told him that someone had shot the victim. Jimenez drove to Russell's and the two of them went to Clamp Street where Espinosa said the shooting had occurred. When they arrived, they saw the victim's car with the doors open and the victim lying face-down in the street. He appeared dead. Both Jimenez and Russell told police what they knew about the victim's plans to meet Espinosa.

Lucinda Gonzales, the younger sister of Francisco Gonzales, testified that she was living in the same house with Gonzales and his girlfriend Teresa ("Bita") Quintana at the time of the murder. (RR16 169-197). Lucinda testified that on the night of the offense, Applicant called numerous times looking for Francisco, and eventually came over with his girlfriend, Debra Espinosa. Applicant and Francisco asked to borrow Lucinda's car. Applicant, Francisco, and Teresa left in Lucinda's car around 9:30 p.m. that evening. Espinosa left earlier in her own car. Teresa returned around 2:30 a.m., and she told Lucinda that Francisco had been arrested on a child-support warrant. The following day, Lucinda saw a news report about the victim's murder. A couple of days later, Francisco was charged with the victim's murder and arrested.

Later that day, Lucinda overheard a conversation between Teresa and Applicant. Lucinda testified that she heard Applicant say that he committed the murder, ran through an open field and discarded his mask, gloves, and the gun. Lucinda called the police and reported what she had heard. A few days later, Lucinda confronted Applicant and Applicant made a threatening gesture toward her.

Bryan Anthony Brown testified that he was living in the same house with his aunt Lucinda, his uncle Francisco Gonzales and Francisco's girlfriend Teresa, and others. (RR17 86-108). On the night of the offense, Applicant and his girlfriend came over. Applicant had a gun and a bullet-proof vest. Applicant, his girlfriend, Francisco, and Teresa all left in Lucinda's car. Brown found out the next day that Francisco had been arrested. A couple of days later, Brown heard Applicant say that that he had to get out of town, that he had shot someone a bunch of times, and that he had hidden the gun and vest in a field.

Francisco Gonzales testified as an accomplice witness for the State. Francisco testified that he, Applicant, Debra Espinosa and Teresa Quintana planned to rob the victim. (RR16 83–157). Pursuant to the plan, Espinosa called the victim and made arrangements for him to pick her up and drive to Clamp Street, a secluded area, for sex. As the victim and Espinosa were parked on Clamp Street, Applicant and Francisco came up behind the car, Applicant smashed one of the windows with the butt of his gun, opened the car doors and demanded that the victim hand over his money.

Appellant had a loaded gun, and Francisco had a gun as well, but it was "just for show" because it did not work. Francisco and Espinosa both testified that Applicant shot the victim numerous times as he attempted to run.

Debra Espinosa testified as an accomplice witness for the State. Espinosa also testified that she, Applicant, Francisco Gonzales, and Teresa Quintana planned to rob the victim. (RR17 28-86). Espinosa's testimony was consistent with Francisco Gonzales' testimony, and consistent with Applicant's admissions. Espinosa testified that Applicant told her to make sure that the victim's pants were down so he couldn't run. She testified that there was never any discussion of shooting anybody. Finally, she testified that she had known the victim for five years and never believed that he was going to be hurt.

Gerardo Gutierrez testified that in March 2003, he was an inmate in the same area of the Bexar County Jail as Applicant. (RR17 3-28). Gutierrez testified that he spoke to Applicant every day. Applicant told Gutierrez what he was charged with, described what happened, and what he did. Applicant told Gutierrez that he and two friends, Francisco and Bita, planned to rob a person, but "it turned out wrong" when the victim took off running and Applicant shot him numerous times. Applicant told Gutierrez that the female accomplice, Bita, was the one who had turned him in. He also said they would have a hard time convicting him because they did not have the weapon.

On August 30, 2005, the jury found Applicant guilty of the offense of Capital Murder. The punishment phase of the trial began immediately. On September 9, 2005, Applicant was sentenced to death.

The Sufficiency of the Evidence

On direct appeal, Applicant claimed that the evidence presented to the jury was insufficient to corroborate the accomplice-witness testimony as required by Article 38.14. *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. May 2, 2007). The Court of Criminal Appeals found that, even setting aside the accomplice witness testimony, the evidence was still sufficient to convict Applicant. *Id.* at 693. The Court considered the testimony that Applicant was seen wearing the victim's necklace shortly after the murder, that Applicant was seen with a gun and with the accomplices in the hours before the murder, that the victim made a plan just prior to his murder to meet one of the accomplices, that Applicant told a fellow inmate that he and accomplices had planned a robbery and that Applicant shot the victim multiple times when the victim attempted to run, and that Applicant was overheard admitting that he was responsible for shooting someone. *Id.* The Court considered all of this evidence sufficient to tend to connect Applicant to the murder and the robbery. *Id.* This finding from the Court of Criminal Appeals was not based on any sort of forensic evidence.

The Court of Criminal Appeals summarized the key non-accomplice testimony:

> The above non-accomplice testimony includes evidence that appellant was seen wearing the victim's necklace shortly after the murder, that appellant was seen with a gun and with the accomplices in the hours before the murder, that the victim made a plan just prior to his murder to meet one of the accomplices, that appellant told a fellow inmate that he and accomplices had planned a robbery, that appellant shot the victim multiple times when the victim attempted to run, that Lucinda overheard appellant admit to Teresa that he was responsible for shooting someone, and that Brown overheard a similar conversation between appellant and Teresa. This evidence is sufficient to "tend to connect" appellant with the murder and robbery.
>
> *Castillo*, 221 S.W.3d at 692-693.

Gutierrez's 2013 Affidavit

On October 30, 2017, Applicant filed this first subsequent application for writ of habeas corpus. In support of Applicant's ground for relief, Applicant provided an affidavit from Gerardo Gutierrez, dated June 26, 2013. This affidavit states the following:

> "I testified in this trial on August 25, 2005. At pages 9-10 of my testimony I described what Juan Castillo supposedly told me about the capital murder. Specifically at Lines 5-11 on page 10 of my testimony which is attached to this declaration. Juan Castillo never told me this information about this capital murder case. This testimony was untrue about Juan Castillo. I made up this testimony to try to help myself. This month, June 2013, is the first time ever that I decided to reveal this information."

The specific lines of testimony that the affidavit refers to state the following:

> "Basically, stated that it was him, a friend – two friends, Frank and Bita – Bita -- that actually planned to rob this person. And it turned out -- it turned out wrong. And the victim took off running, and that he shot at him a couple of times. And then when he was crawling, like screaming for help, he walked up closer to him and shot him two more times, close range."
>
> (RR17 10).

The content of this testimony was corroborated by multiple other witnesses at trial. Lucinda Gonzales reported to police that she heard similar admissions from Applicant as to how he ran through an open field and discarded the mask, gloves, and the gun. Bryan Anthony Brown also heard Applicant say that he had to get out of town and that he had shot someone a bunch of times, and that he had hidden the gun and vest in a field. Francisco Gonzales, in testifying as an accomplice witness, confirmed the substance of these admissions and testified that Applicant shot the victim numerous times as he attempted to run. Debra Espinosa testified to the same, consistent with Applicant's admissions and Francisco Gonzales' testimony. Each of these individuals testified in a way that was consistent with Gerardo Gutierrez's testimony at the time of trial.

CONCLUSIONS OF LAW

Applicant's claim rests on whether Gutierrez's 2013 affidavit can be considered credible. In collaterally attacking a conviction through habeas corpus, an applicant has the burden to allege and prove *facts* which, if true, entitled him to relief. *Ex parte*

Russell, 720 S.W.2d 477, 487 (Tex.Crim.App.1986); *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). A recantation alone is not enough to overturn a conviction if the record does not support the recantation. *See Ex parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014). Applicant must still unquestionably establish his innocence when the recantation is considered in light of the incriminating evidence in the record. *See Ex parte Navarijo*, 433 S.W.3d 558 (Tex. Crim. App. 2014). Reconciliation of conflicts and contradictions in the evidence is within the province of the jury, and such conflicts will not call for reversal if there is enough credible testimony to support the conviction. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982).

Applicant argues that his claim is substantively similar to the ground presented in *Chabot.* Unlike the witness in *Chabot*, Gutierrez was not an accomplice witness to this offense. *See Ex parte Chabot*, 300 S.W.3d at 769-770 (Tex. Crim. App. 2009). Gutierrez did not face the same motivations as the accomplice witness in *Chabot.* The record does not reflect that Gutierrez was offered anything in exchange for his testimony. While the witness in *Chabot* was conclusively linked to the offense via DNA evidence, Gutierrez had no connection to the commission of this offense. *Id. at* 772.. The testimony of the accomplice witness in *Chabot* provided the only direct evidence against the defendant, while Gutierrez was one of three individuals who heard admissions from Applicant to the offense. The testimony Gutierrez presented at trial

did not provide the jury with any information that had not been previously provided by other witnesses. This consistency in testimony distinguishes Applicant's case from *Chabot*.

The record in this case does not support Gutierrez's recantation. Gutierrez was not the sole source of any piece of information provided to the jury during Applicant's trial. Gutierrez's testimony as to Applicant's admissions is consistent with the admissions heard by Lucinda Gonzales and Bryan Anthony Brown. His testimony is also consistent with the versions of events provided by Francisco Gonzales and Debra Espinosa. Gutierrez's 2013 affidavit makes no explanation for how he, while incarcerated in the Bexar County Adult Detention Center, independently manufactured a version of events consistent with multiple other witnesses. However, the record provides some insight as to why Gutierrez may be motivated to provide a false recantation now. At the time of trial Gutierrez testified as to his reputation in the jail and how other inmates ridiculed him. (RR17 24). Gutierrez also testified that he knew that in putting himself "in this mix" that "this attack" would be coming upon him. Gutierrez's 2013 affidavit could be an attempt to protect himself from further attacks.

Under the circumstances there is no reason to find Gutierrez's 2013 affidavit to be credible. Gutierrez's recantation is not supported by the record, and Gutierrez's affidavit is not sufficient to support overturning Applicant's conviction. *See Ex parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014). Applicant has not met his burden

of unquestionably establishing his innocence when the affidavit from Gutierrez is considered in light of all the other testimony and evidence in record. *See Ex parte Navarijo*, 433 S.W.3d 558 (Tex. Crim. App. 2014). Applicant has not met his burden to prove his claim. This application for writ of habeas should be denied.

ORDERS

The District Clerk of Bexar County, Texas, is hereby ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a. The Court of Criminal Appeals
Austin, Texas 78711

b. Nicholas "Nico" LaHood
Criminal District Attorney
Conviction Integrity Unit
Cadena - Reeves Justice Center
Bexar County, Texas 78205

c. Timothy P. Gumkowski
Texas Bar No. 24104 788
Texas Defender Service
510 S. Congress Ave.
Austin , Texas 78704
tgumkowski@texasdefender.org
Office Telephone: (512) 320-8300
Facsimile: (512) 477-2153

SIGNED, ORDERED and DECREED on Dec. 1, 2017.

Maria Teresa "Tessa" Herr
Judge Presiding
By Assignment

APPENDIX 3

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,510-04

EX PARTE JUAN EDWARD CASTILLO, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. 2004CR1461A-W2 IN THE 186TH JUDICIAL DISTRICT COURT BEXAR COUNTY

***Per curiam*. YEARY, J., not participating.**

O R D E R

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay applicant's execution.[1]

In September 2005, a jury found applicant guilty of the 2003 capital murder of Tommy Garcia, Jr. The jury answered the special issues submitted pursuant to Texas

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

Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Castillo v. State*, 221 S.W.3d 689 (Tex. Crim. App. 2007).

Applicant raised four allegations in his initial application for a writ of habeas corpus, including allegations that: his trial counsel rendered ineffective assistance of counsel at voir dire, prior to trial, and at trial; his appellate counsel rendered ineffective assistance; and the trial court violated his right to self-representation and committed an abuse of discretion by allowing him to represent himself during the sentencing phase of trial. This Court adopted the trial court's findings of fact and conclusions of law, found that the claim regarding self-representation was procedurally barred, and otherwise denied relief on applicant's claims. *Ex parte Castillo*, No. WR-70,510-01 (Tex. Crim. App. Sept. 12, 2012)(not designated for publication).

On October 30, 2017, applicant filed the instant application in the trial court. This is applicant's first subsequent writ of habeas corpus application, and he raises a single claim in this application. Specifically, applicant claims that his conviction and sentence are based on false testimony and, therefore, violate his right to due process.

In December 2009, this Court held in *Ex parte Chabot* that the knowing or unknowing use of false or perjured testimony violates due process. *Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Because applicant filed his initial (and only other) habeas application in the trial court prior to this Court's decision in *Chabot*, this decision

provides a new legal basis which was not available at the time applicant filed his last habeas application. Thus, we find that he has met the requirements of Article 11.071 § 5(a)(1), and his application is remanded to the trial court for resolution. Applicant's motion to stay his execution is granted.

IT IS SO ORDERED THIS THE 28th DAY OF NOVEMBER, 2017.

Do not publish

APPENDIX 4

NO. 2004CR1461A-W2

EX PARTE	§	IN THE DISTRICT COURT
	§	186TH JUDICIAL DISTRICT
JUAN CASTILLO	§	BEXAR COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RESPONSE TO APPLICANT'S SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES NICHOLAS "NICO" LAHOOD, Criminal District Attorney of Bexar County, Texas by and through the undersigned Assistant Criminal District Attorney, and files the attached Proposed Findings of Fact and Conclusions of Law.

Applicant is scheduled to be executed on December 14, 2017. On October 30, 2017, Applicant filed a Motion to Withdraw or Stay the Execution Date, and a Subsequent Application for Post-Conviction Writ of Habeas Corpus. On November 28, 2017, the Court of Criminal Appeals stayed the execution pending this application, and ordered that this Court resolve the issues presented therein. The State would ask that the Court enter an ORDER that Applicant's subsequent application for writ of habeas corpus be DENIED.

Respectfully submitted,
NICHOLAS "NICO" LAHOOD
Criminal District Attorney
Bexar County, Texas

_/s/ *Matthew B. Howard*_____
MATTHEW B. HOWARD
Assistant Criminal District Attorney
Bexar County, Texas
101 W. Nueva
San Antonio, Texas 78205
SBN: 24085860
(210) 335-2736
(210) 335-2436-FAX
Attorneys for the State

CERTIFICATE OF SERVICE

I, Matthew B. Howard, Assistant Criminal District Attorney, Bexar County, Texas, certify that a true and correct copy of the foregoing response will be served via electronic service to Timothy P. Gumkowski, Texas Bar No. 24104788, tgumkowski@texasdefender.org, on this the 30th day of November, 2017.

_/s/ *Matthew B. Howard*_____
MATTHEW B. HOWARD

NO. 2004CR1461A-W2

EX PARTE	§	IN THE DISTRICT COURT
	§	186TH JUDICIAL DISTRICT
JUAN CASTILLO	§	BEXAR COUNTY, TEXAS

ORDER

Juan Castillo, hereafter referred to as Applicant, has filed an application for post-conviction writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure, collaterally attacking Applicant's conviction in cause number 2004CR1461A. TEX. CODE CRIM. PROC. art. § 11.071.

HISTORY OF THE CASE

Applicant was indicted for the capital murder of Tommy Garcia, hereafter referred to as the victim, in cause number 2004CR1461A. Applicant pleaded not guilty to the charge. A jury trial was held in the 186th Judicial District Court of Bexar County, Honorable Maria Teresa Herr presiding. On August 30, 2005, the jury found Applicant guilty of capital murder. Based on the jury's answers to the special issues in the punishment phase, a sentence of death was imposed.

On September 26, 2005, Applicant filed notice of appeal. On appeal, Applicant argued that (1) the evidence was insufficient to corroborate the accomplice-witness testimony as required by Article 38.14; (2) the evidence was factually insufficient to support a finding that Applicant robbed the victim or that he shot the victim; (3) the

death penalty is cruel and unusual punishment in violation of the Eighth Amendment; and (4) the trial court erred when it denied Applicant's pretrial motion objecting to the testimony of the two accomplice witnesses on the ground that their testimony would violate Rule 3.04 of the Texas State Bar Rules of Professional Conduct, and 18 U.S.C. §§ 201(b)(1)(A), 201(b)(3). On March 23, 2005, the Court of Criminal Appeals issued a unanimous opinion affirming Applicant's conviction and sentence. *Juan Castillo v. The State of Texas,* 221 S.W.3d 689 (Tex. Crim. App. 2007).

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ALLEGATIONS OF APPLICANT

In Applicant's sole ground for relief, Applicant alleges that his due process rights were violated when the State unknowingly presented the false testimony of Gerardo Gutierrez. In support of Applicant's claim, Applicant has filed an affidavit from Gutierrez, dated June 26, 2013.

FINDINGS OF FACT

Testimony at Trial

During the trial for this offense the jury heard from several witnesses, including Jessica Cantu, Frank Russell, Robert Jimenez, Debra Espinosa, Lucinda Gonzales, Bryan Anthony Brown, Francisco Gonzales, and Gerardo Gutierrez. Jessica Cantu testified that Applicant was wearing the victim's necklace, a gold medallion described as a "spinner" medallion with a thick gold chain, on the afternoon after the murder. (RR17 108-122; RR18 8-15). She spoke with Applicant and told him that the necklace looked familiar. The next time she saw Applicant he was no longer wearing the necklace. Cantu told the victim's mother that she had seen Applicant wearing the victim's necklace.

Frank Russell testified that he and Robert Jimenez were at Jimenez's house with the victim in the late night and early morning hours of December 2 and 3, 2003. (RR15 166-200). The victim received a phone call from Debra Espinosa and went to meet with her. The victim offered to give Russell a ride home on the way.

Robert Jimenez also testified that he and Frank Russell were at his house with the victim when the victim received the call from Espinosa. (RR16 36-57). Jimenez testified that ten or fifteen minutes after the victim and Russell left, he received a phone call from Espinosa who was crying hysterically and told him that someone had shot the victim. Jimenez drove to Russell's and the two of them went to Clamp Street where Espinosa said the shooting had occurred. When they arrived, they saw the victim's car with the doors open and the victim lying face-down in the street. He appeared dead. Both Jimenez and Russell told police what they knew about the victim's plans to meet Espinosa.

Lucinda Gonzales, the younger sister of Francisco Gonzales, testified that she was living in the same house with Gonzales and his girlfriend Teresa ("Bita") Quintana at the time of the murder. (RR16 169-197). Lucinda testified that on the night of the offense, Applicant called numerous times looking for Francisco, and eventually came over with his girlfriend, Debra Espinosa. Applicant and Francisco asked to borrow Lucinda's car. Applicant, Francisco, and Teresa left in Lucinda's car around 9:30 p.m. that evening. Espinosa left earlier in her own car. Teresa returned around 2:30 a.m., and she told Lucinda that Francisco had been arrested on a child-support warrant. The following day, Lucinda saw a news report about the victim's murder. A couple of days later, Francisco was charged with the victim's murder and arrested.

Later that day, Lucinda overheard a conversation between Teresa and Applicant. Lucinda testified that she heard Applicant say that he committed the murder, ran through an open field and discarded his mask, gloves, and the gun. Lucinda called the police and reported what she had heard. A few days later, Lucinda confronted Applicant and Applicant made a threatening gesture toward her.

Bryan Anthony Brown testified that he was living in the same house with his aunt Lucinda, his uncle Francisco Gonzales and Francisco's girlfriend Teresa, and others. (RR17 86-108). On the night of the offense, Applicant and his girlfriend came over. Applicant had a gun and a bullet-proof vest. Applicant, his girlfriend, Francisco, and Teresa all left in Lucinda's car. Brown found out the next day that Francisco had been arrested. A couple of days later, Brown heard Applicant say that that he had to get out of town, that he had shot someone a bunch of times, and that he had hidden the gun and vest in a field.

Francisco Gonzales testified as an accomplice witness for the State. Francisco testified that he, Applicant, Debra Espinosa and Teresa Quintana planned to rob the victim. (RR16 83–157). Pursuant to the plan, Espinosa called the victim and made arrangements for him to pick her up and drive to Clamp Street, a secluded area, for sex. As the victim and Espinosa were parked on Clamp Street, Applicant and Francisco came up behind the car, Applicant smashed one of the windows with the butt of his gun, opened the car doors and demanded that the victim hand over his

money. Appellant had a loaded gun, and Francisco had a gun as well, but it was "just for show" because it did not work. Francisco and Espinosa both testified that Applicant shot the victim numerous times as he attempted to run.

Debra Espinosa testified as an accomplice witness for the State. Espinosa also testified that she, Applicant, Francisco Gonzales, and Teresa Quintana planned to rob the victim. (RR17 28-86). Espinosa's testimony was consistent with Francisco Gonzales' testimony, and consistent with Applicant's admissions. Espinosa testified that Applicant told her to make sure that the victim's pants were down so he couldn't run. She testified that there was never any discussion of shooting anybody. Finally, she testified that she had known the victim for five years and never believed that he was going to be hurt.

Gerardo Gutierrez testified that in March 2003, he was an inmate in the same area of the Bexar County Jail as Applicant. (RR17 3-28). Gutierrez testified that he spoke to Applicant every day. Applicant told Gutierrez what he was charged with, described what happened, and what he did. Applicant told Gutierrez that he and two friends, Francisco and Bita, planned to rob a person, but "it turned out wrong" when the victim took off running and Applicant shot him numerous times. Applicant told Gutierrez that the female accomplice, Bita, was the one who had turned him in. He also said they would have a hard time convicting him because they did not have the weapon.

On August 30, 2005, the jury found Applicant guilty of the offense of Capital Murder. The punishment phase of the trial began immediately. On September 9, 2005, Applicant was sentenced to death.

The Sufficiency of the Evidence

On direct appeal, Applicant claimed that the evidence presented to the jury was insufficient to corroborate the accomplice-witness testimony as required by Article 38.14. *Castillo v. State*, 221 S.W.3d 689, 691 (Tex. Crim. App. May 2, 2007). The Court of Criminal Appeals found that, even setting aside the accomplice witness testimony, the evidence was still sufficient to convict Applicant. *Id*. at 693. The Court considered the testimony that Applicant was seen wearing the victim's necklace shortly after the murder, that Applicant was seen with a gun and with the accomplices in the hours before the murder, that the victim made a plan just prior to his murder to meet one of the accomplices, that Applicant told a fellow inmate that he and accomplices had planned a robbery and that Applicant shot the victim multiple times when the victim attempted to run, and that Applicant was overheard admitting that he was responsible for shooting someone. *Id*. The Court considered all of this evidence sufficient to tend to connect Applicant to the murder and the robbery. *Id*. This finding from the Court of Criminal Appeals was not based on any sort of forensic evidence.

The Court of Criminal Appeals summarized the key non-accomplice testimony:

> The above non-accomplice testimony includes evidence that appellant was seen wearing the victim's necklace

> shortly after the murder, that appellant was seen with a gun and with the accomplices in the hours before the murder, that the victim made a plan just prior to his murder to meet one of the accomplices, that appellant told a fellow inmate that he and accomplices had planned a robbery, that appellant shot the victim multiple times when the victim attempted to run, that Lucinda overheard appellant admit to Teresa that he was responsible for shooting someone, and that Brown overheard a similar conversation between appellant and Teresa. This evidence is sufficient to "tend to connect" appellant with the murder and robbery.
>
> *Castillo*, 221 S.W.3d at 692-693.

Gutierrez's 2013 Affidavit

On October 30, 2017, Applicant filed this first subsequent application for writ of habeas corpus. In support of Applicant's ground for relief, Applicant provided an affidavit from Gerardo Gutierrez, dated June 26, 2013. This affidavit states the following:

> "I testified in this trial on August 25, 2005. At pages 9-10 of my testimony I described what Juan Castillo supposedly told me about the capital murder. Specifically at Lines 5-11 on page 10 of my testimony which is attached to this declaration. Juan Castillo never told me this information about this capital murder case. This testimony was untrue about Juan Castillo. I made up this testimony to try to help myself. This month, June 2013, is the first time ever that I decided to reveal this information."

The specific lines of testimony that the affidavit refers to state the following:

> "Basically, stated that it was him, a friend – two friends, Frank and Bita – Bita -- that actually planned to rob this person. And it turned out -- it turned out wrong. And the victim took off running, and that he shot at him a couple of

> times. And then when he was crawling, like screaming for help, he walked up closer to him and shot him two more times, close range."
>
> (RR17 10).

The content of this testimony was corroborated by multiple other witnesses at trial. Lucinda Gonzales reported to police that she heard similar admissions from Applicant as to how he ran through an open field and discarded the mask, gloves, and the gun. Bryan Anthony Brown also heard Applicant say that he had to get out of town and that he had shot someone a bunch of times, and that he had hidden the gun and vest in a field. Francisco Gonzales, in testifying as an accomplice witness, confirmed the substance of these admissions and testified that Applicant shot the victim numerous times as he attempted to run. Debra Espinosa testified to the same, consistent with Applicant's admissions and Francisco Gonzales' testimony. Each of these individuals testified in a way that was consistent with Gerardo Gutierrez's testimony at the time of trial.

CONCLUSIONS OF LAW

Applicant's claim rests on whether Gutierrez's 2013 affidavit can be considered credible. In collaterally attacking a conviction through habeas corpus, an applicant has the burden to allege and prove *facts* which, if true, entitled him to relief. *Ex parte Russell,* 720 S.W.2d 477, 487 (Tex.Crim.App.1986); *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). A recantation alone is not enough to

overturn a conviction if the record does not support the recantation. *See Ex parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014). Applicant must still unquestionably establish his innocence when the recantation is considered in light of the incriminating evidence in the record. *See Ex parte Navarijo*, 433 S.W.3d 558 (Tex. Crim. App. 2014). Reconciliation of conflicts and contradictions in the evidence is within the province of the jury, and such conflicts will not call for reversal if there is enough credible testimony to support the conviction. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982).

Applicant argues that his claim is substantively similar to the ground presented in *Chabot.* Unlike the witness in *Chabot*, Gutierrez was not an accomplice witness to this offense. *See Ex parte Chabot*, 300 S.W.3d at 769-770 (Tex. Crim. App. 2009). Gutierrez did not face the same motivations as the accomplice witness in *Chabot.* The record does not reflect that Gutierrez was offered anything in exchange for his testimony. While the witness in *Chabot* was conclusively linked to the offense via DNA evidence, Gutierrez had no connection to the commission of this offense. *Id. at* 772.. The testimony of the accomplice witness in *Chabot* provided the only direct evidence against the defendant, while Gutierrez was one of three individuals who heard admissions from Applicant to the offense. The testimony Gutierrez presented at trial did not provide the jury with any information that had not been previously provided by other witnesses. This consistency in testimony distinguishes Applicant's

case from *Chabot*.

The record in this case does not support Gutierrez's recantation. Gutierrez was not the sole source of any piece of information provided to the jury during Applicant's trial. Gutierrez's testimony as to Applicant's admissions is consistent with the admissions heard by Lucinda Gonzales and Bryan Anthony Brown. His testimony is also consistent with the versions of events provided by Francisco Gonzales and Debra Espinosa. Gutierrez's 2013 affidavit makes no explanation for how he, while incarcerated in the Bexar County Adult Detention Center, independently manufactured a version of events consistent with multiple other witnesses. However, the record provides some insight as to why Gutierrez may be motivated to provide a false recantation now. At the time of trial Gutierrez testified as to his reputation in the jail and how other inmates ridiculed him. (RR17 24). Gutierrez also testified that he knew that in putting himself "in this mix" that "this attack" would be coming upon him. Gutierrez's 2013 affidavit could be an attempt to protect himself from further attacks.

Under the circumstances there is no reason to find Gutierrez's 2013 affidavit to be credible. Gutierrez's recantation is not supported by the record, and Gutierrez's affidavit is not sufficient to support overturning Applicant's conviction. *See Ex parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014). Applicant has not met his burden of unquestionably establishing his innocence when the affidavit from Gutierrez is

considered in light of all the other testimony and evidence in record. *See Ex parte Navarijo*, 433 S.W.3d 558 (Tex. Crim. App. 2014). Applicant has not met his burden to prove his claim. This application for writ of habeas should be denied.

O R D E R S

The District Clerk of Bexar County, Texas, is hereby ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a. The Court of Criminal Appeals
Austin, Texas 78711

b. Nicholas "Nico" LaHood
Criminal District Attorney
Conviction Integrity Unit
Cadena - Reeves Justice Center
Bexar County, Texas 78205

c. Timothy P. Gumkowski
Texas Bar No. 24104 788
Texas Defender Service
510 S. Congress Ave.
Austin , Texas 78704
tgumkowski@texasdefender.org
Office Telephone: (512) 320-8300
Facsimile: (512) 477-2153

SIGNED, ORDERED and DECREED on _____.

_____
JUDGE JEFFERSON MOORE
186th District Court
Bexar County, Texas

APPENDIX 5

NO. 2004-CR-1461A-W2

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
	§	
VS.	§	186th JUDICIAL DISTRICT
	§	
	§	
JUAN EDWARD CASTILLO	§	BEXAR COUNTY, TEXAS

ORDER OF VOLUNTARY RECUSAL

Now comes Jefferson Moore, Judge of the 186th Judicial District Court, Bexar County, Texas, and files this Order of Voluntary Recusal in the above styled and referenced cause. Judge Moore hereby voluntarily recuses himself from presiding over this case to avoid the appearance of bias, because he previously represented the recanting witness, Gerardo Gutierrez, who will be subject to a credibility determination in this matter.

Judge Moore hereby requests Judge Sid L. Harle, Presiding Judge of the Fourth Administrative Judicial Region, to assign another District Court Judge to preside over this cause.

SIGNED on NOVEMBER 30, 2017.

JUDGE JEFFERSON MOORE
186th JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS

APPENDIX 6

NO. 2004-CR-1461A-W2

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
	§	
VS.	§	186th JUDICIAL DISTRICT
	§	
	§	
JUAN EDWARD CASTILLO	§	BEXAR COUNTY, TEXAS

ORDER OF APPOINTMENT

Now comes, Judge Sid L. Harle, Presiding Judge of the Fourth Administrative Judicial Region, and files this Order in the above styled and referenced cause and finds as follows:

I.

Judge Jefferson Moore has filed an Order of Voluntary Recusal in this case.

II.

Wherefore, premises considered, Judge Sid L. Harle hereby assigns Judge Maria Teresa Herr, who has no conflict of interest, to preside over this case.

SIGNED, ORDERED and DECREED on November 20, 2017.

JUDGE SID L. HARLE
PRESIDING JUDGE
FOURTH ADMINISTRATIVE JUDICAL REGION
BEXAR COUNTY, TEXAS

APPENDIX 7

Case # 2004CR1461A

Envelope Information

Envelope Id
21247730

Submitted Date
12/12/2017 4:24 PM CST

Submitted User Name
tgumkowski@texasdefender.org

Case Information

Location
Bexar County - District Clerk - Criminal

Category
Criminal - Felony

Case Type
Writ - Habeas Corpus

Case #
2004CR1461A

Party Information

Filings

Filing Code	Client Ref #	Filing Description
Free Text -5100		mtn to Vacate

Filing Details

Filing Type
EFileAndServe

Filing Code

Free Text -5100

Filing Description
mtn to Vacate

Filing Status
Accepted

Accepted Date
12/12/2017 4:39 PM CST

Accept Comments
1039329

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2017 12 12 (CASTILLO) Motion to Vacate Order.pdf *147.13 kB*	2017 12 12 (CASTILLO) Motion to Vacate Order.pdf	Does not contain sensitive data	Original File, Court Copy

eService Details

Status	Name	Firm	Served
Sent	Timothy Gumkowski	Federal Public Defender Western …	☑
Sent	Matthew Howard	Bexar County Criminal District Atto…	☑

Service Contacts +

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IN THE 186TH JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS

EX PARTE JUAN CASTILLO, APPLICANT	§ § § § § §	CAUSE NO. 2004CR1461A-W2

MOTION TO VACATE THE COURT'S DECEMBER 1, 2017, ORDER AND TO STRIKE *STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RESPONSE TO APPLICANT'S SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS*, AND REQUEST FOR PROCESS IN ACCORDANCE WITH STATUTORY PROCEDURES

Applicant Juan Edward Castillo requests that this Court vacate its December 1, 2017, order recommending denial of Mr. Castillo's application for a writ of habeas corpus and directing the clerk to forward the record to the Texas Court of Criminal Appeals (TCCA). The order was entered without affording Mr. Castillo any opportunity to respond to the State's filing requesting the relief and therefore violates due process. The order was also entered in contravention of the mandatory statutory procedures set forth in TEX. CODE CRIM. PROC. art. 11.071, and adjudicates facts against him without affording him an opportunity to

present evidence. Mr. Castillo additionally requests that the Court strike from the record the document filed by the State on November 30, 2017, captioned *State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus*, as it also fails to comport with the statutory procedures set forth in art. 11.071. Pursuant to art. 11.071, Mr. Castillo is entitled to specific procedural rights, which he intends to exercise. Deviations from the statutorily prescribed procedural rights violate due process.

I. BACKGROUND

On October 30, 2017, Mr. Castillo filed a subsequent application for a writ of habeas corpus pursuant to the provisions of TEXAS CODE OF CRIM. PRO. art 11.071 § 5, and a motion to stay his execution. The application contained a claim that the prosecution unknowingly relied on false testimony at the merits phase of Mr. Castillo's capital trial. Specifically, the application alleged that State's witness Gerardo Gutierrez's testimony that Mr. Castillo admitted culpability to him was false. An evidentiary proffer in the form of an affidavit by Gutierrez was attached to the application. While the application was pending before the TCCA, the State filed a document that purported to be its "response" to

Mr. Castillo's application. Mr. Castillo then filed, with the TCCA, a reply to the State's document which noted that such a "response," at that time, was not contemplated by art. 11.071 § 5.

On November 28, 2017, the TCCA authorized consideration on the merits of the single claim in the application and stayed Mr. Castillo's execution. *See* Order, *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017). The TCCA remanded Mr. Castillo's application to the trial court "for resolution." *Id*.

On November 30, 2017, the State filed a document titled *State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus*. The document requests the Court to "enter an ORDER that Applicant's subsequent application for a writ of habeas corpus be DENIED." The document also contains a proposed order. The proposed order recites findings of fact and conclusions of law. The findings speculate that Gutierrez was motivated to falsely recant his trial testimony due to fear from other prisoners as a consequence of his having testified against Mr. Castillo and that his affidavit "could be an attempt to protect himself

from further attacks."[1] Proposed Order at 11. The proposed order finds that "there is no reason to find Gutierrez's 2013 affidavit to be credible," and concludes that "Applicant has not met his burden to prove his claim."[2] *Id.* at 11-12. The proposed order directs the district clerk to prepare and forward a copy of the record to the TCCA.

Also on November 30, 2017, Judge Moore entered an order of voluntary recusal on the ground that he previously represented a witness in the case. That same day, the Presiding Judge of the Fourth Administrative Judicial Region appointed Maria Teresa Herr to preside over the habeas proceeding. The very next day, on December 1, 2017, Judge Herr signed the State's proposed order without any substantive alteration.[3] Undersigned counsel did not receive service of the order (via United States Mail) until December 8, 2017, and this motion follows.

II. THE COURT SHOULD VACATE ITS DECEMBER 1, 2017, ORDER BECAUSE IT VIOLATES FUNDAMENTAL DUE PROCESS

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[1] There are neither allegations nor evidentiary proffers of any attacks against Gutierrez.

[2] The "claim" referenced in the proposed order appears to be a claim for actual innocence, a claim that was not raised in Mr. Castillo's application, and is entirely irrelevant to this application.

[3] The Court's order changed the signature line to reflect Judge Herr's assignment, rather than Judge Jefferson Moore, as was reflected in the State's proposed orders.

The Court's December 1, 2017, order violates fundamental due process for three reasons. First, the order grants the State the totality of relief it requested by written motion just one day earlier. In doing so, the Court afforded no opportunity to be heard on the matter to Mr. Castillo. Second, the order fails to comply with the mandated statutory procedure for adjudicating habeas corpus applications outlined in art. 11.071. Third, the order adjudicated facts against Mr. Castillo without affording him any opportunity to be heard on them or to present evidence.

A. The Court's Failure to Afford Mr. Castillo Any Opportunity to Be Heard on the State's Motion Before Granting It Violated Due Process and Due Course of Law

The Fourteenth Amendment of the United States Constitution protects against deprivation of life, liberty, or property by the State "without due process of law." U.S. CONST. amend. XIV, § 1. The Texas Constitution states that no citizen of the state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the "due course of the law of the land." TEX. CONST. art. I, § 19. In the area of procedural due process, the protections afforded under the Texas Constitution are coextensive with those in the

federal constitution. *Ray v. Tex. State Bd. of Pub. Accountancy*, 4 S.W.3d 429, 433 (Tex.App.—Austin 1999, no pet.).

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shiven*, 407 U.S. 67, 80 (1976) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Here, the State filed a motion requesting a certain form of relief from the Court. Specifically, it requested that the Court adopt certain factual and legal conclusions; that it recommend that Mr. Castillo's habeas application be denied; and that it direct the district clerk to forward the record to the TCCA. Fundamental due process entitled Mr. Castillo an opportunity to be heard on the State's request before the Court acted; however, the Court signed the proposed orders submitted by the State the very next day after they were filed. By failing to afford Mr. Castillo an opportunity to be heard before granting the State the relief it

sought, the Court deprived Mr. Castillo of the fundamental requirement of due process, an opportunity to be heard. *See Campbell v. Stucki*, 220 S.W.3d 562, 570 (Tex.App.—Tyler 2007, no pet.) (fundamental due process violated when trial court deprived respondent of any opportunity to respond to movant's motion).

B. The Court's Failure to Comply with the Mandated Statutory Procedure for Adjudicating Habeas Corpus Applications Outlined in Art. 11.071 Violated Due Process

Article 11.071 clearly sets forth the appropriate process governing the adjudication of habeas corpus applications in death penalty cases, such as Mr. Castillo's. This statutory process is designed to satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause. Mr. Castillo has liberty and life interests at stake in the proceeding. Accordingly, deviation from the statutory procedure designed to adjudicate these interests deprives Mr. Castillo of due process.

As an initial matter, once the trial court receives notice that the requirements of § 5(a) for consideration of a subsequent application have been met, the first action the court should take is the appointment of counsel. TEX. CODE CRIM. PRO. art. 11.071 § 6(b-1). The statute then

instructs that "the state shall file an *answer* to the application." *Id.* §7(a) (emphasis added). The trial court is then directed to determine, based on the application and the State's answer, "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist." *Id.* § 8(a). The court "shall issue a written order of the determination." *Id.*

Section 8 of article 11.071, entitled "Findings of Fact Without Evidentiary Hearing," governs the trial court proceeding when the court determines that no controverted, previously unresolved factual issues material to the legality of confinement exist. In that circumstance, the statute directs the parties to file proposed findings of fact and conclusions of law for the court's consideration within thirty days of that determination. *Id.* § 8(b). The trial court must then make appropriate written findings of fact and conclusions of law. *Id.* § 8(c). Because there are no material facts in dispute, evidence is neither required nor received, and the trial court's findings and recommendations are based on the pleadings, as with a summary judgment.

Section 9 of article 11.071, entitled "Hearing," governs the proceeding when the trial court determines that controverted, previously

unresolved factual issues material to the legality of confinement exist. In that circumstance, the court's order must designate the issues of fact that are to be resolved and the manner by which those issues will be resolved. *Id.* § 9(a). To resolve the issues, the statute authorizes the court to require affidavits, depositions, and interrogatories and to hold evidentiary hearings. *Id.* The Texas Rules of Evidence apply at the hearing. *Id.* § 10. A transcript of the hearing must be prepared, and the court must order the parties to file proposed findings of fact and conclusions of law for it to consider no later than thirty days after the transcript of the hearing is filed. *Id.* § 9(d)–(e). The court must then make written findings of fact that are necessary to resolve the controverted facts and make conclusions of law based on those fact-findings. *Id.* § 9(e).

Here, the Court's order contravenes the statutory procedures set forth above. As an initial matter, art. 11.071 § 6 entitles Mr. Castillo to appointed counsel following the TCCA's order authorizing his subsequent application. The Court has not even appointed counsel for Mr. Castillo yet, and undersigned counsel—whom the statute gives an unqualified priority for appointment—has not had any opportunity even to move for

appointment.[4] Accordingly, Mr. Castillo has been deprived of his right to appointed counsel in the proceeding.

Aside from appointment of counsel, the initial action to be taken by the trial court is expressly detailed in § 8. This section instructs that, after the State files an answer, the trial court "shall" determine whether "controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist" and "*shall issue a written order of the determination*." *Id.* at § 8(a) (emphasis added). First, the State has yet to file an answer. The document it filed purports to be a "response" to Mr. Castillo's application, but it does not respond to anything, nor does it deny the allegations in the application. Second, the Court did not issue a written order of its determination regarding the existence of controverted, unresolved factual issues, as required by the statute. Entering findings of fact and conclusions of law before these mandatory steps violates due process.[5]

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[4] Contemporaneously with this motion, Mr. Castillo is filing a motion for appointment of counsel pursuant to § 6.

[5] Even if the Court were to determine that controverted, previously unresolved factual material to Mr. Castillo's confinement did not exist, the statute sets forth additional procedural rules that the Court must follow. According to the statute, if the Court were to determine that factual issues do not exist, the Court must: (1) state as much in a written order, and (2) set a date, that is not later than the 30th day after the date the order is issued, for the parties to file proposed findings of fact and

C. The Court's Adjudication of Facts Against Mr. Castillo Without Affording Him Any Opportunity to Be Heard on Them or to Present Evidence in Support of His Allegations Violated Due Process

The availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Moreover, "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Id.* Resolutions of disputed factual questions made by a judicial body must be based on evidence that is admitted at a hearing. *Morgan v. United States*, 298 U.S. 468, 480–81 (1936). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard" (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

A hearing in the criminal post-conviction context may be less formal than a criminal trial. *Ford*, 477 U.S. at 427 (Powell, J., concurring). It need not even require live testimony. But a "hearing" at least requires that there be a formal process for admitting, objecting to, and challenging

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conclusions of law for the court to consider." *Id.* at § 8(b). Mr. Castillo was never provided a date by which to file proposed findings of fact and conclusions of law, and therefore was deprived of any opportunity to file them.

the substance of evidence offered by a party. *See Goldberg*, 397 U.S. at 267 ("The hearing must be 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong*, 380 U.S. at 552). As well, it requires that the parties are given notice that a hearing is occurring, notice as to which disputes the hearing is intended to resolve, and an opportunity to confront adverse witnesses or evidence offered against a party. *See id*. at 258 ("rudimentary due process" requires "an effective opportunity" to present one's case, including "by confronting adverse witnesses").

Article 11.071 is written so as to comply with fundamental due process and, when properly followed, ensures that a hearing (of some form) occurs when material facts are in dispute. As discussed, *supra*, § 9 of article 11.071 is entitled "Hearing" and governs the proceeding when the trial court determines that controverted, previously unresolved factual issues material to the legality of confinement exist. Notwithstanding the form the hearing takes, the Texas Rules of Evidence apply, and therefore the statute requires that the parties be given an opportunity to formally move to admit (and object to the admittance of) evidence as to the factual disputes that have been determined and announced by the trial court. These provisions reflect the legislature's

intent to afford process congruent with judicial proceedings in any other context. *See United States v. Hayman*, 342 U.S. 205, 220 (1952) (Interpreting the word "hearing" in analogous federal statute providing for collateral challenges to federal criminal judgments (28 U.S.C. § 2255) to have "'obvious reference to the tradition of judicial proceedings'") (quoting *Morgan*, 298 U.S. at 480). Moreover, as the applicant has the burden of proof in a habeas corpus proceeding, factual allegations which are not flatly contradicted by or implausible in comparison to the record cannot be resolved against him before affording him an opportunity to prove them with evidence. *See, e.g.,* 28 U.S.C. § 2255(b) (providing, in analogous federal statute providing for collateral challenges to federal criminal judgments, that a court must grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (a motion to vacate under § 2255 may not be denied without a hearing unless the court can conclude from the trial record and motion that "under no circumstances" could the petitioner establish facts warranting relief). *Cf. Machibroda v. United States*, 368 U.S. 487, 495-496 (1962) (a hearing on a motion to vacate under § 2255 may be denied

only where the factual allegations are "vague, conclusory, or palpably incredible" when compared with the record). If a trial court's findings and recommendation depend upon facts contrary to the allegations contained in an application, then the trial court necessarily adjudicated controverted facts that were material.

By signing the State's proposed order, the Court adjudicated Mr. Castillo's claim. By dismissing the credibility of and rejecting the Gutierrez affidavit that was attached as a proffer to the application, the order adjudicated facts against Mr. Castillo. The Court's adjudication of these facts occurred without a hearing (in any form) and therefore was entirely arbitrary and deprived him of due process.

Besides having adjudicated facts in the absence of any hearing or evidence, the Court also did so without affording Mr. Castillo any notice. The Court entered its order without determining or notifying the parties whether controverted, material fact issues existed and even before the State filed its answer, in violation of the statute. The Court additionally failed to designate which (if any) controverted, material fact issues existed and to provide notice thereof to the parties before adjudicating facts against him as required by the statute. It additionally failed to

designate the manner by which the court would hear evidence to resolve any designated controverted, material fact issues and to provide notice to the parties thereof as required by the statute. Accordingly, the Court has adjudicated facts without affording Mr. Castillo either notice *or* an opportunity to be heard, in clear violation of the governing statute and due process of law.

The Court's unreliable findings flow directly from its deviations from mandatory statutory procedures for adjudicating habeas corpus applications in Texas. Had the Court afforded Mr. Castillo an opportunity to be heard, as required by the statute, he could have presented evidence addressing the alleged deficiencies the Court identified in the claim. Mr. Castillo's underlying due process claim may or may not ultimately entitle him to relief from his death sentence. Regardless, he is at least entitled to a fair opportunity to prove he was deprived of this important constitutional right during his capital trial and to an adjudication which complies with the mandated statutory procedure for resolving habeas corpus applications.

III. THE COURT SHOULD STRIKE THE STATE'S NOVEMBER 30, 2017, DOCUMENT BECAUSE IT DOES NOT COMPORT WITH THE STATUTORY PROCEDURE AND DIRECT THE STATE TO FILE AN ANSWER

Finally, the Court should strike the *State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus*. The document fails to comply with the statutory procedure required for proper adjudication of Mr. Castillo's claim. As noted above, the State has not filed an Answer to Mr. Castillo's application. Section 7(a) requires it to do so. *See* Art. 11.071 § 7(a).

By filing proposed findings of fact and conclusions of law and requesting that the Court sign an order denying Mr. Castillo's application, prior to any written order from the trial court, the State has merely attempted to bypass the procedural processes in place to assure reliable adjudication of Mr. Castillo's claim. In doing so, the State invited the trial court to proceed in such a manner that would violate Mr. Castillo's right to due process.

CONCLUSION

For the foregoing reasons, the Court should vacate its December 1, 2017, order, strike the State's filing from the record, direct the State to file an Answer, and adhere to the appropriate statutory process set forth in art. 11.071.

Respectfully submitted,

/s/ Timothy P. Gumkowski

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tgumkowski@texasdefender.org

Counsel for Juan Castillo

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2017, I filed the foregoing Motion through the e-fileTexas.gov system, which included service upon Matthew B. Howard, Assistant Criminal District Attorney, Bexar County, Texas, Matthew.Howard@bexar.org.

/s/ Timothy P. Gumkowski

Timothy P. Gumkowski

APPENDIX 8

Case # 2004CR1461A

Envelope Information

Envelope Id
21246600

Submitted Date
12/12/2017 4:11 PM CST

Submitted User Name
tgumkowski@texasdefender.org

Case Information

Location
Bexar County - District Clerk - Criminal

Category
Criminal - Felony

Case Type
Writ - Habeas Corpus

Case #
2004CR1461A

Party Information

Filings

Filing Code	Client Ref #	Filing Description
Free Text -5100		mtn Appointment of Counsel

Filing Details

Filing Type
EFileAndServe

Filing Code

Free Text -5100

Filing Description
mtn Appointment of Counsel

Filing Status
Accepted

Accepted Date
12/12/2017 4:36 PM CST

Accept Comments
1039329

Stamped Documents

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Lead Document

File Name	Description	Security	Download
2017.12.12 (CASTILLO) Motion to Appoint.pdf *71.58 kB*	2017.12.12 (CASTILLO) Motion to Appoint.pdf	Does not contain sensitive data	Original File / Court Copy

eService Details

Status	Name	Firm	Served
Sent	Timothy Gumkowski	Federal Public Defender Western …	☑
Sent	Matthew Howard	Bexar County Criminal District Atto…	☑

Service Contacts +

Fees +

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Version: 2017.1.4.6559

IN THE 186TH JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS

EX PARTE JUAN CASTILLO, APPLICANT	§ § § § § §	CAUSE NO. 2004CR1461A-W2

MOTION FOR APPOINTMENT OF COUNSEL

Undersigned counsel, Timothy P. Gumkowski, requests that the Court appoint him to represent applicant, Juan Edward Castillo, in the instant proceeding and that the order be entered *nunc pro tunc* to November 28, 2017. Mr. Castillo has been found to be indigent in every criminal and collateral proceeding related to his capital judgment.

On October 30, 2017, undersigned counsel filed a subsequent state habeas corpus application pursuant to TEX. CODE CRIM. PROC. art. 11.071, on Mr. Castillo's behalf. On November 28, 2017, the Texas Court of Criminal Appeals (TCCA) authorized consideration on the merits of the single claim in the application. *See* Order, *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017).

Article 11.071 § 6(b-1) provides that if the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met, the convicting court "shall appoint, in order of priority" (1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment; (2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or (3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions. Undersigned counsel represented Mr. Castillo in the proceedings under Section 5, and thus is required to be appointed. Mr. Castillo requests that the appointment be made *nunc pro tunc* to November 28, 2017, the date the TCCA authorized the claim in Mr. Castillo's subsequent habeas application to be heard.

CONCLUSION

For the foregoing reasons, the Court should appoint attorney Timothy P. Gumkowski to represent Mr. Castillo in the instant proceeding.

Respectfully submitted,

/s/ Timothy P. Gumkowski

Timothy P. Gumkowski
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Counsel for Juan E. Castillo

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2017, I filed the foregoing Motion through the e-fileTexas.gov system, which included service upon Matthew B. Howard, Assistant Criminal District Attorney, Bexar County, Texas, Matthew.Howard@bexar.org.

/s/ Timothy P.Gumkowski

Timothy P. Gumkowski

IN THE 186TH JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS

EX PARTE JUAN CASTILLO, APPLICANT	§	CAUSE NO. 2004CR1461A-W2

ORDER APPOINTING COUNSEL

The Court orders pursuant to TEXAS CODE OF CRIMINAL PROCEDURE article 11.071 § 6(b-1) that Timothy P. Gumkowski of the Texas Defender Service, 510 S. Congress Ave., Austin, Texas, 78704, (512) 320-8300, tgumkowski@texasdefender.org is appointed to represent applicant Juan Edward Castillo in *Ex parte Castillo*, No. 2004CR1461A-W2. The appointment is entered *nunc pro tunc* to November 28, 2017.

Signed this _____ day of _____, 20_____.

_____
MARIA TERESA HERR
Judge Presiding By Assignment
Bexar County, Texas

APPENDIX 9

IN THE 186TH JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS

EX PARTE JUAN CASTILLO, APPLICANT	§	CAUSE NO. 2004CR1461A-W2

MOTION TO DIRECT THE DISTRICT CLERK TO SUPPLEMENT THE RECORD WITH APPLICANT'S RECENT FILINGS

Applicant, Juan Edward Castillo, requests that the Court direct the district clerk to supplement the record to include recent filings, including Mr. Castillo's *Motion to Vacate the Court's December 1, 2017, Order and to Strike* State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus, *and Request for Process in Accordance with Statutory Procedures* and his *Motion for Appointment of Counsel*, both filed with the Court on December 12, 2017; as well as with the present motion. It is further re-

quested that once supplemented to the record, the documents be forwarded to the Texas Court of Criminal Appeals (TCCA), to ensure that that court has a complete record.

On October 30, 2017, undersigned counsel filed a subsequent state habeas corpus application pursuant to TEX. CODE CRIM. PROC. art. 11.071, on Mr. Castillo's behalf. On November 28, 2017, the TCCA authorized consideration on the merits of the single claim in the application. *See* Order, *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017). Two days later, the State filed a document captioned *State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus*. Included in the filing was a proposed order, setting forth findings of fact and conclusions of law, and recommending that Mr. Castillo's application be denied. The following day, December 1, 2017, this Court signed an identical order to the State's proposed order and directed the clerk to forward the order to the TCCA. On December 4, 2017, the district clerk forwarded various documents to the TCCA. It is counsel's understanding that the documents included: (1) State's Proposed Findings of Fact and Conclusions of Law; (2) Order of Voluntary Recusal; (3) Order of Appointment; and (4) the

Court's December 1, 2017, Order. Undersigned counsel received a copy of the December 1, 2017, order via United States mail on December 8, 2017.

On December 12, 2017, Mr. Castillo filed two motions with this Court. The motions included a *Motion to Vacate* and a *Motion for Appointment of Counsel*. Mr. Castillo now asks the Court to direct the district clerk to supplement the record with these two motions, as well as with the present motion, and to forward all motions to the TCCA, to ensure that that court has a complete record.

On December 18, 2017, Mr. Castillo filed a motion with the TCCA, objecting to this Court's December 1, 2017 order.

CONCLUSION

For the foregoing reasons, the Court should direct the district clerk to supplement the record to include, not only this motion, but the two motions filed by Mr. Castillo on December 12, 2017, and to forward all motions to the TCCA.

Respectfully submitted,

/s/ Timothy P. Gumkowski

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Counsel for Juan E. Castillo

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2017, I filed the foregoing Motion through the e-fileTexas.gov system, which included service upon Matthew B. Howard, Assistant Criminal District Attorney, Bexar County, Texas, Matthew.Howard@bexar.org.

/s/ Timothy P.Gumkowski

Timothy P. Gumkowski

APPENDIX 10

WR-70,510-04
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/18/2017 1:07 PM
Accepted 12/19/2017 3:25 PM
DEANA WILLIAMSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE JUAN CASTILLO,	§	
	§	CAUSE NO. WR-70,510-04
APPLICANT	§	
	§	
	§	

OBJECTIONS TO TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MOTION TO REMAND THE APPLICATION BACK TO THE TRIAL COURT WITH INSTRUCTIONS TO FOLLOW THE STATUTORY PROCEDURE FOR ADJUDICATING HABEAS CORPUS APPLICATIONS

Applicant Juan Edward Castillo requests that this Court reject the trial court's factual findings and legal conclusions, in their entirety, as set forth in the trial court's December 1, 2017, order recommending denial of Mr. Castillo's application for a writ of habeas corpus. The order was entered without affording Mr. Castillo any opportunity to respond to the State's filing requesting the relief and therefore violates due process. The order was also entered in contravention of the mandatory statutory procedures set forth in TEX. CODE CRIM. PROC. art. 11.071, and adjudicates facts against him without affording him an opportunity to present evidence. Pursuant to art. 11.071, Mr. Castillo is entitled to

specific procedural rights, which he intends to exercise. Deviations from the statutorily prescribed procedural rights violate due process.[1]

I. BACKGROUND

On October 30, 2017, Mr. Castillo filed in the district court a subsequent application for a writ of habeas corpus pursuant to the provisions of TEXAS CODE OF CRIM. PRO. art. 11.071 and, in this Court, a motion to stay his execution. The application contained a claim that the prosecution unknowingly relied on false testimony at the merits phase of Mr. Castillo's capital trial. Specifically, the application alleged that State's witness Gerardo Gutierrez's testimony that Mr. Castillo admitted culpability to him was false. An evidentiary proffer in the form of an affidavit by Gutierrez was attached to the application. While the application was pending before this Court, the State filed a document that purported to be its "response" to Mr. Castillo's application. Mr. Castillo then filed, with the TCCA, a reply to the State's document which

[1] The action taken by the trial court is inexplicable, shocking, and of great concern. The trial court's blatant disregard for Mr. Castillo's fundamental due process rights and its decision to spurn the procedures established by the legislature places the integrity of the judicial system in question. Fortunately, our system is designed such that errors of this magnitude by a lower court can be corrected by a higher court.

noted that such a "response," at that time, was not contemplated by art. 11.071 § 5.

On November 28, 2017, this Court authorized consideration on the merits of the single claim in the application and stayed Mr. Castillo's execution. *See* Order, *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017). The Court remanded Mr. Castillo's application to the trial court "for resolution." *Id.*

On November 30, 2017, the State filed, in the trial court, a document titled *State's Proposed Findings of Fact and Conclusions of Law and Response to Applicant's Subsequent Application for Writ of Habeas Corpus*. The document requested the trial court to "enter an ORDER that Applicant's subsequent application for a writ of habeas corpus be DENIED." The document also contained a proposed order. The proposed order recited findings of fact and conclusions of law. The findings speculated that Gutierrez was motivated to falsely recant his trial testimony due to fear from other prisoners as a consequence of his having testified against Mr. Castillo and that his affidavit "could be an

attempt to protect himself from further attacks."[2] Proposed Order at 11. The proposed order found that "there is no reason to find Gutierrez's 2013 affidavit to be credible," and concluded that "Applicant has not met his burden to prove his claim."[3] *Id*. at 11-12. The proposed order directed the district clerk to prepare and forward a copy of the record to the TCCA.

Also on November 30, 2017, District Court Judge Jefferson Moore entered an order of voluntary recusal on the ground that he previously represented a witness in the case. *See* Order of Voluntary Recusal (Nov. 30, 2017). That same day, the Presiding Judge of the Fourth Administrative Judicial Region appointed Maria Teresa Herr to preside over the habeas proceeding. *See* Order of Appointment (Nov. 30, 2017). The very next day, on December 1, 2017, Judge Herr signed the State's proposed order without any substantive alteration.[4] Undersigned counsel

---

[2] There are neither allegations nor evidentiary proffers of any attacks against Gutierrez.

[3] The "claim" referenced in the proposed order appears to be a claim of actual innocence, a claim that was not raised in Mr. Castillo's application, and is entirely irrelevant to this application.

[4] The Court's order changed the signature line to reflect Judge Herr's assignment, rather than Judge Jefferson Moore, as was reflected in the State's proposed orders.

did not receive service of the order (via United States Mail) until December 8, 2017.

On December 4, 2017, the district clerk forwarded various documents to this Court.[5] On December 12, 2017, Mr. Castillo filed a motion in the trial court requesting that the court vacate its December 1, 2017, order; direct the State to file a proper answer; and to adhere to the procedures established by the Legislature and set forth in art. 11.071. Counsel also filed, in the trial court, a Motion for Appointment of Counsel, pursuant to art. 11.071 § 6.[6]

II. THE COURT SHOULD REJECT THE FACTUAL FINDINGS AND LEGAL CONCLUSIONS, IN THEIR ENTIRETY, CONTAINED IN THE TRIAL COURT'S DECEMBER 1, 2017, ORDER BECAUSE THE ORDER VIOLATES FUNDAMENTAL DUE PROCESS

The trial court's December 1, 2017, order violated fundamental due process in three distinct ways. First, the order granted the State the totality of relief it requested by written motion just one day earlier. In

[5] It is counsel's understanding that those documents included: (1) the State's Proposed Findings of Fact and Conclusions of Law; (2) Order of Voluntary Recusal; (3) Order of Appointment; and (4) the trial court's December 1, 2017 order.

[6] On December 18, 2017, Mr. Castillo filed a motion in the district court requesting that court direct the district clerk to supplement the record with all recent filings and to have the documents forwarded to this Court.

doing so, the trial court afforded no opportunity to be heard on the matter to Mr. Castillo. Second, the order failed to comply with the mandated statutory procedure for adjudicating habeas corpus applications outlined in art. 11.071. Third, the order adjudicated facts against Mr. Castillo without affording him any opportunity to be heard on them or to present evidence.

A. The Trial Court's Failure to Afford Mr. Castillo Any Opportunity to Be Heard on the State's Motion Before Granting It Violated Due Process and Due Course of Law

The Fourteenth Amendment of the United States Constitution protects against deprivation of life, liberty, or property by the State "without due process of law." U.S. CONST. amend. XIV, § 1. The Texas Constitution states that no citizen of the state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the "due course of the law of the land." TEX. CONST. art. I, § 19. In the area of procedural due process, the protections afforded under the Texas Constitution are coextensive with those in the federal constitution. *Ray v. Tex. State Bd. of Pub. Accountancy*, 4 S.W.3d 429, 433 (Tex.App.—Austin 1999, no pet.).

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shiven*, 407 U.S. 67, 80 (1976) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Here, the State filed a motion requesting a certain form of relief from the trial court. Specifically, it requested that the court adopt certain factual and legal conclusions; that it recommend that Mr. Castillo's habeas application be denied; and that it direct the district clerk to forward the record to the TCCA. Fundamental due process entitled Mr. Castillo an opportunity to be heard on the State's request before the trial court acted; however, the court signed the proposed orders submitted by the State the very next day after they were filed. By failing to afford Mr. Castillo an opportunity to be heard before granting the State the relief it sought, the trial court deprived Mr. Castillo of the fundamental requirement of due process, an opportunity to be heard. *See Campbell v.*

Stucki, 220 S.W.3d 562, 570 (Tex.App.—Tyler 2007, no pet.) (fundamental due process violated when trial court deprived respondent of any opportunity to respond to movant's motion).

B. The Trial Court's Failure to Comply with the Mandated Statutory Procedure for Adjudicating Habeas Corpus Applications Outlined in Art. 11.071 Violated Due Process

Article 11.071 clearly sets forth the appropriate process governing the adjudication of habeas corpus applications in death penalty cases, such as Mr. Castillo's. This statutory process is designed to satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause. Mr. Castillo has liberty and life interests at stake in the proceeding. Accordingly, deviation from the statutory procedure designed to adjudicate these interests deprives Mr. Castillo of due process.

As an initial matter, once the trial court receives notice that the requirements of § 5(a) for consideration of a subsequent application have been met, the first action the court should take is the appointment of counsel. TEX. CODE CRIM. PRO. art. 11.071 § 6(b-1). The statute then instructs that "the state shall file an *answer* to the application." *Id.* §7(a) (emphasis added). The trial court is then directed to determine, based on

the application and the State's answer, "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist." *Id.* § 8(a). The court "shall issue a written order of the determination." *Id.*

Section 8 of article 11.071, entitled "Findings of Fact Without Evidentiary Hearing," governs the trial court proceeding when the court determines that no controverted, previously unresolved factual issues material to the legality of confinement exist. In that circumstance, the statute directs the parties to file proposed findings of fact and conclusions of law for the court's consideration within thirty days of that determination. *Id.* § 8(b). The trial court must then make "appropriate" written findings of fact and conclusions of law. *Id.* § 8(c). Because there are no material facts in dispute, evidence is neither required nor received, and the trial court's findings and recommendations are based on the pleadings, as with a summary judgment.

Section 9 of article 11.071, entitled "Hearing," governs the proceeding when the trial court determines that controverted, previously unresolved factual issues material to the legality of confinement exist. In that circumstance, the court's order must designate the issues of fact that

are to be resolved and the manner by which those issues will be resolved. *Id*. § 9(a). To resolve the issues, the statute authorizes the court to require affidavits, depositions, and interrogatories and to hold evidentiary hearings. *Id*. The Texas Rules of Evidence apply at the hearing. *Id*. § 10. A transcript of the hearing must be prepared, and the court must order the parties to file proposed findings of fact and conclusions of law for it to consider no later than thirty days after the transcript of the hearing is filed. *Id*. § 9(d)–(e). The court must then make written findings of fact that are necessary to resolve the controverted facts and make conclusions of law based on those fact-findings. *Id*. § 9(e).

Here, the trial court's order contravenes the statutory procedures set forth above. As an initial matter, art. 11.071 § 6 entitles Mr. Castillo to appointed counsel following this Court's order authorizing his subsequent application. The trial court has not even appointed counsel for Mr. Castillo yet, and undersigned counsel—whom the statute gives an unqualified priority for appointment—has not had any opportunity

even to move for the appointment.[7] Accordingly, Mr. Castillo has been deprived of his right to appointed counsel in the proceeding.

Aside from appointment of counsel, the initial action to be taken by the trial court is expressly detailed in § 8. This section instructs that, after the State files an answer, the trial court "shall" determine whether "controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist" and "*shall issue a written order of the determination*." *Id.* at § 8(a) (emphasis added). First, the State has yet to file an answer. The document it filed purports to be a "response" to Mr. Castillo's application, but it does not respond to anything, nor does it deny the allegations in the application. Second, the trial court did not issue a written order of its determination regarding the existence of controverted, unresolved factual issues, as required by the statute. Entering findings of fact and conclusions of law before these mandatory steps violates due process.[8]

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[7] Contemporaneously with Mr. Castillo's motion to vacate the court's order filed in the trial court on December 12, 2017, undersigned counsel filed a motion for appointment of counsel pursuant to § 6.

[8] Even if the trial court were to determine that controverted, previously unresolved factual material to Mr. Castillo's confinement did not exist, the statute sets forth additional procedural rules that the court must follow. According to the statute, if the trial court were to determine that factual issues do not exist, the court must: (1) state as much in a written order, and (2) set a date, that is not later than

C. The Trial Court's Adjudication of Facts Against Mr. Castillo Without Affording Him Any Opportunity to Be Heard on Them or to Present Evidence in Support of His Allegations Violated Due Process

The availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Moreover, "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Id.* Resolutions of disputed factual questions made by a judicial body must be based on evidence that is admitted at a hearing. *Morgan v. United States*, 298 U.S. 468, 480–81 (1936). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard" (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

A hearing in the criminal post-conviction context may be less formal than a criminal trial. *Ford*, 477 U.S. at 427 (Powell, J., concurring). It need not even require live testimony. But a "hearing" at least requires that there be a formal process for admitting, objecting to, and challenging

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the 30th day after the date the order is issued, for the parties to file proposed findings of fact and conclusions of law for the court to consider." *Id.* at § 8(b). Mr. Castillo was never provided a date by which to file proposed findings of fact and conclusions of law, and therefore was deprived of any opportunity to file them.

the substance of evidence offered by a party. *See Goldberg*, 397 U.S. at 267 ("The hearing must be 'at a meaningful time and in a meaningful manner'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). As well, it requires that the parties are given notice that a hearing is occurring, notice as to which disputes the hearing is intended to resolve, and an opportunity to confront adverse witnesses or evidence offered against a party. *See id.* at 258 ("rudimentary due process" requires "an effective opportunity" to present one's case, including "by confronting adverse witnesses").

Article 11.071 is written so as to comply with fundamental due process and, when properly followed, ensures that a hearing (of some form) occurs when material facts are in dispute. As discussed, *supra*, § 9 of article 11.071 is entitled "Hearing" and governs the proceeding when the trial court determines that controverted, previously unresolved factual issues material to the legality of confinement exist. Notwithstanding the form the hearing takes, the Texas Rules of Evidence apply to it, and therefore the statute requires that the parties be given an opportunity to formally move to admit (and object to the admittance of) evidence as to the factual disputes that have been determined and

announced by the trial court. These provisions reflect the legislature's intent to afford process congruent with judicial proceedings in any other context. *See United States v. Hayman*, 342 U.S. 205, 220 (1952) (interpreting the word "hearing" in analogous federal statute providing for collateral challenges to federal criminal judgments (28 U.S.C. § 2255) to have "'obvious reference to the tradition of judicial proceedings'") (quoting *Morgan*, 298 U.S. at 480). Moreover, as the applicant has the burden of proof in a habeas corpus proceeding, factual allegations which are not flatly contradicted by or implausible in comparison to the record cannot be resolved against him before affording him an opportunity to prove them with evidence. *See, e.g.,* 28 U.S.C. § 2255(b) (providing, in analogous federal statute providing for collateral challenges to federal criminal judgments, that a court must grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (a motion to vacate under § 2255 may not be denied without a hearing unless the court can conclude from the trial record and motion that "under no circumstances" could the petitioner establish facts warranting relief). *Cf. Machibroda v. United States*, 368 U.S. 487, 495-

496 (1962) (a hearing on a motion to vacate under § 2255 may be denied only where the factual allegations are "vague, conclusory, or palpably incredible" when compared with the record). If a trial court's findings and recommendation depend upon facts contrary to the allegations contained in an application, then the trial court necessarily adjudicated controverted facts that were material.

By signing the State's proposed order, the trial court adjudicated Mr. Castillo's claim. By dismissing the credibility of and rejecting the Gutierrez affidavit that was attached as a proffer to the application, the order adjudicated facts against Mr. Castillo. The trial court's adjudication of these facts occurred without a hearing (in any form) and therefore was entirely arbitrary and deprived him of due process.

Besides having adjudicated facts in the absence of any hearing or evidence, the trial court also did so without affording Mr. Castillo any notice. The court entered its order without determining or notifying the parties whether controverted, material fact issues existed and even before the State filed its answer, in violation of the statute. The court additionally failed to designate which (if any) controverted, material fact issues existed and to provide notice thereof to the parties before

adjudicating facts against him as required by the statute. It additionally failed to designate the manner by which the court would hear evidence to resolve any designated controverted, material fact issues and to provide notice to the parties thereof as required by the statute. Accordingly, the trial court has adjudicated facts without affording Mr. Castillo either notice *or* an opportunity to be heard, in clear violation of the governing statute and due process of law.

The trial court's unreliable findings flow directly from its deviations from mandatory statutory procedures for adjudicating habeas corpus applications in Texas. Had the court afforded Mr. Castillo an opportunity to be heard, as required by the statute, he could have presented evidence addressing the alleged deficiencies the court identified in the claim. Mr. Castillo's underlying due process claim may or may not ultimately entitle him to relief from his capital judgment. Regardless, he is at least entitled to a fair opportunity to prove he was deprived of this important constitutional right during his capital trial and to an adjudication which comports with the mandated statutory procedure for disposing of habeas corpus applications. Accordingly, the Court should reject the trial court's purported findings of fact and conclusions of law in their entirety.

III. THIS COURT SHOULD REMAND THE APPLICATION BACK TO THE TRIAL COURT WITH INSTRUCTIONS TO FOLLOW THE STATUTORY PROCEDURE FOR ADJUDICATING HABEAS CORPUS APPLICATIONS

This Court should remand Mr. Castillo's application back to the trial court with instructions to follow the statutory procedure set forth in art. 11.071. This Court's November 28, 2017, order remanded the application "to the trial court for resolution." *See* Order, *Ex parte Castillo* No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017) at 3. Certainly, this Court did not envision nor anticipate the trial court's "resolution" to involve a complete disregard for the statutorily mandated procedures for resolving Mr. Castillo's application. Moreover, this Court could not have intended for the trial court's "resolution" to come at the expense of Mr. Castillo's most fundamental due process rights. Accordingly, this Court should remand the application to the trial court for *proper* resolution, and with the explicit direction to adhere to the procedures detailed in art. 11.071.

CONCLUSION

For the foregoing reasons, the Court should reject the trial court's purported factual findings and legal conclusions, in their entirety, and remand Mr. Castillo's application to the trial court with instructions to

follow the statutory procedure for adjudicating habeas corpus applications.

Respectfully submitted,

/s/ Timothy P. Gumkowski
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2017, I filed the foregoing Motion through the e-fileTexas.gov system, which included service upon Matthew B. Howard, Assistant Criminal District Attorney, Bexar County, Texas, Matthew.Howard@bexar.org.

/s/ Timothy P. Gumkowski

Timothy P. Gumkowski