No. _____

IN THE

Supreme Court of the United States

ARTHUR BROWN JR.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, MARCH 9, 2023 AT 6:00 P.M.

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-26,178-04

EX PARTE ARTHUR BROWN JR., Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 636535-C IN THE 351ST JUDICIAL DISTRICT COURT
HARRIS COUNTY

Per curiam.

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay Applicant's execution.[1]

In November 1993, Applicant was convicted of the offense of capital murder. *See* TEX. PENAL CODE ANN. § 19.03(a). The jury answered the special issues submitted

[1] Unless otherwise indicated, all references to Articles in this order refer to the Code of Criminal Procedure.

pursuant to Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. December 18, 1996) (not designated for publication). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Brown*, No. WR-26,178-02 (Tex. Crim. App. June 18, 2008).[2] And it denied relief on one claim and dismissed the remaining claims included in Applicant's first subsequent application for a writ of habeas corpus. *Ex parte Brown*, No. WR-26,178-03 (Tex. Crim. App. Oct. 18, 2017). Applicant's instant post-conviction application for writ of habeas corpus was filed in the trial court on March 1, 2023.

In his application, Applicant alleges that he is actually innocent (Claim 1); that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) (Claim 2); that he is intellectually disabled (Claim 3); and that his trial was impermissibly influenced by racial bias (Claim 4). We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised. Art. 11.071 § 5(c). We deny Applicant's motion to stay his execution.

IT IS SO ORDERED THIS THE 7th DAY OF MARCH, 2023.

Do Not Publish

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[2] *Ex parte Brown,* No. WR-26,178-01, was an application for writ of mandamus, which this Court denied leave to file on March 23, 1994.

WR-26,178-04
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/1/2023 1:21 PM
Accepted 3/1/2023 1:43 PM
DEANA WILLIAMSON
CLERK

No. _____

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE ARTHUR BROWN, JR,
Applicant.

MOTION FOR STAY OF EXECUTION PENDING DISPOSITION OF SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

This is a capital case.

Mr. Brown is scheduled to be executed March 9, 2023.

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Counsel for Arthur Brown, Jr.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Applicant Arthur Brown, Jr. respectfully requests that this Court stay his execution pending the disposition of his Subsequence Application for Writ of Habeas Corpus, presently filed in the 351st District Court of Harris County. Mr. Brown's execution is scheduled for March 9, 2023. In his Application, Mr. Brown raises significant, never before raised claims for relief, warranting authorization by this Court under Section 5 and additional factual development. In support of this request, Mr. Brown states as follows:

I. Mr. Brown's Stay Motion is Delayed Through No Fault of Mr. Brown

Mr. Brown's current counsel, the Office of Capital and Forensic Writs (OCFW) has only been appointed to this case since May 25, 2022. The OCFW has been diligent in its representation of Mr. Brown, however, his ability to do so has been impacted by delays by the Harris County District Attorney's Office (HCDAO). These delays were meaningful – the information that was eventually turned over forms in part the basis of Mr. Brown's Innocence and *Brady v. Maryland,* 373 U.S. 83 (1963), claims in the new application before this Court.

To be clear, the OCFW first requested to review the HCDAO's file on July 12, 2022, within weeks of their appointment to Mr. Brown's case. Two weeks later, on July 26, 2022, the HCDAO substantively responded to that request, notifying the OCFW that it did not have available times for file review until at least September

2022. Due to this limited availability, the OCFW was not able to review the State's file until October 6, 2022, nearly 3 months after they had initially requested to do so.

At the time of review, the HCDAO did not allow the OCFW to scan or make copies of any of the material, including the digital material. The HCDAO required that the OCFW receive a copy of any requested materials within the HCDAO's file through the HCDAO's reproduction only. Production of the State's file to the OCFW did not actually occur until January 11, 2023. Similarly, the OCFW requested production of Mr. Brown's co-defendants' files and did not receive those materials until January 19, 2023.

After reviewing those records and realizing that the medical records of the two surviving victims in Mr. Brown's case – the only eyewitnesses to this crime, where no forensic evidence tied Mr. Brown or his co-defendants to the scene at all – were missing, the OCFW then contacted the HCDAO again in early February 2023. Although clearly a *Brady* request, the HCDAO responded by saying: "Your request appears to comply with the requirements of the Public Information Act (PIA)" and said it would forward the request to General Litigation. Although the OCFW clearly and directly articulated again that this was a *Brady* request, the HCDAO did not meaningfully attempt to engage with this request or comply until very recently. In fact, Mr. Brown's counsel did not get production of the medical

records – which now form one of these bases for their Subsequent Application – until nearly 1 p.m. *yesterday*, February 28, 2023. Mr. Brown's counsel is obligated to fully and fairly litigate his case, especially in the context of an execution warrant, and the HCDAO's delay has contributed significantly to this delayed motion for a stay request.

II. Mr. Brown's Subsequent Application and Other Contemporaneous Filings Raise Serious Constitutional Concerns

A stay of execution is necessary in this case to resolve the serious constitutional concerns raised by his March 1, 2023 filings, both here and in the district court. Contemporaneously with the filing of this motion, Mr. Brown filed:

- **Subsequent Application for Writ of Habeas Corpus**, raising 4 claims for relief, including:
    - (1) **Innocence**, based on new evidence never before presented to this Court, including the videotaped interview of Anthony Farias, the son of the HCDAO's star surviving eyewitness Rachel Tovar, who implicates another person in the commission of these crimes. Not only does Mr. Farias implicate someone else, he implicates the exact alternative suspect that Mr. Brown's trial counsel attempted to present in his 1993 capital trial – Terrell Hill – and Mr. Brown's trial counsel, Patricia Saum Nasworthy and Thomas Moran, both confirm they have never before seen this information. In addition to this critical resurfaced statement, this claim is also based on additional information suppressed by the HCDAO until *yesterday*, including medical records for Rachel Tovar reflecting brain damage, as well as medical records for the only other surviving victim and eyewitness, Mr. Nicolas Cortez, who suffered serious head injuries affecting his cognitive abilities. This serious concern over eyewitness testimony is not just based on the

medical records – Ms. Tovar's own sons have corroborated her serious memory issues after the shooting, during the time of trial, and up to today, in information provided to the OCFW in 2023. These serious memory issues of Rachel Tovar were known to and not disclosed previously by the HCDAO. In addition to this suppressed information, Mr. Brown presents other supporting evidence of his innocence, including the new report of eyewitness expert Dr. Jennifer Dysart as well as information that corroborates Anthony Farias' statement that Terrell Hill and/or others were responsible for these crimes.

- (2) ***Brady*/Due Process**, based on the information suppressed by the HCDAO, including the suppression of the clearly exculpatory information in their possession in Anthony Farias' videotaped interview, as well as medical records of the only two surviving witnesses, both of whom provided critical testimony to the State, and the statements corroborating the serious memory loss – and knowledge thereof by the HCDAO – of Rachel Tovar. These issues have never been presented to this Court before.

- (3) **Intellectual Disability**, based on Mr. Brown's lifetime of significant intellectual and adaptive deficits. This included a childhood IQ score of 70, as well as years of placement in special education classes and designation as Educable Mentally Retarded (EMR). This issue has never before been litigated.

- (4) **Racial Bias**, which tainted Mr. Brown's conviction and death sentence. Mr. Brown has recently discovered that at least one juror who convicted and sentenced him to death did so largely on the basis of his race – calling him a "typical thug," and saying she could tell he had "done bad acts in the past" just by looking at him. These descriptions applied to young Black men like Mr. Brown are racist and irreparably affected the constitutionality of his capital trial and sentence.

- **Chapter 64 DNA Testing Motion**, wherein Mr. Brown seeks to prove his innocence through DNA testing. Though there is very little evidence that was

collected by the Houston Police Department in 1992, there exists still cloth strips and a knife that Mr. Brown alone allegedly handled, which could exculpate him should he be allowed to test it.

For the reasons above, Mr. Brown respectfully requests that this Court stay his March 9, 2023 execution, and allow for his Subsequent Application to be considered in the ordinary course and/or be authorized to the trial court for factual development.

IV. Conclusion & Prayer for Relief

Mr. Brown respectfully requests that this Court stay his execution and allow for the litigation of his significant constitutional claims.

Respectfully submitted,

DATED: March 1, 2023

/s/ Kelsey Peregoy
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Counsel for Arthur Brown, Jr.

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing pleading to:

Court of Criminal Appeals
P.O. Box 112308
Austin, Texas 78711
Filed electronically

Joshua Reiss, Harris County Assistant District Attorney
Office of the Harris County District Attorney
500 Jefferson Street, Suite 600
Houston, Texas 77002
Via e-mail

This certification is executed on March 1, 2023, at Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Kelsey Peregoy
Kelsey Peregoy

Automated Certificate of eService

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IN THE 351ST DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE ARTHUR BROWN Jr., APPLICANT	)	Writ No. _____ Trial Cause No. 0636535

*** EXECUTION SCHEDULED MARCH 9, 2023 ***

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Arthur Brown Jr. is an innocent and intellectually disabled man incarcerated on Texas's death row as a result of sloppy police work, prosecutorial suppression of exculpatory evidence, corrupted eyewitness identifications, false forensic testimony. His execution has been scheduled for March 9, 2023.

Mr. Brown's capital conviction stems from the June 20, 1992, robbery and shooting of six individuals present at 4631 Brownstone Lane in Houston, Texas. Mr. Brown was prosecuted along with Mr. Marion Dudley and Mr. Antonio Dunson. Rachel Tovar and her husband, Jose Guadalupe Tovar, lived and sold large quantities of cocaine and marijuana from the Brownstone Lane home, along with two of their sons, Frank and Anthony Farias.[1] Rachel Tovar and friend of the family Nicolas Cortez survived the shooting, whereas Jose Tovar, Frank Farias, daughter-in-law Jessica Quinones, and neighbor Audrey Brown died from their injuries.

The last time this Court reviewed Mr. Brown's case was in 2017, following the recommendation of relief by J. Mark Kent Ellis of the 351st District Court on a false testimony claim concerning ballistic evidence – the only forensic evidence tying Mr. Brown to the crime – where this Court found the false testimony, standing

[1] Anthony Farias' full name is Roy Anthony Farias, but he is known as and was referred to as "Anthony Farias" in prior case proceedings and herein.

alone, not sufficiently material to warrant relief. Today, however, there is much more evidence of Mr. Brown's innocence.

Mr. Brown and his co-defendants have maintained their innocence in the Brownstone Lane murders for more than 30 years. As detailed further below, substantial new evidence supports that Mr. Brown's conviction and death sentence were both wrongful and unconstitutionally obtained. For the first time, Mr. Brown presents to this Court long-suppressed information by the Harris County District Attorney's Office (HCDAO) pointing to Marcus Terrell Hill,[2] a Tuscaloosa drug dealer who was shot and killed trying to rob a crack house in Alabama while in possession of the alleged murder weapon in this case, as the party responsible for the murders for which Mr. Brown and his co-defendants were wrongly convicted. *See infra* Section (III)(A)&(B). Anthony Farias' videotaped interview also revealed substantial other impeachment and favorable information, further undermining the HCDAO's theory of the case. *Id*. Moreover, the HCDAO suppressed evidence that Rachel Tovar, the HCDAO's star witness, experienced severe and ongoing memory problems, in addition to brain damage, as a result of her injuries, undermining any confidence in her identification of Mr. Brown and his co-defendants. *Id*. Nicolas Cortez likewise had head trauma likely induced by seizures and his injuries, and

[2] Marcus Terrell Hill is known by his middle name, Terrell. This pleading uses "Terrell" and "Terrell Hill" to refer to Marcus Terrell Hill.

evidence of these severe medical issues were also suppressed from Mr. Brown. Finally, totally apart from the unreliability stemming from Rachel Tovar and Nicolas Cortez's trauma and brain damages, an eyewitness identification expert, Dr. Jennifer Dysart, has identified multiple factors that impaired the unreliability of the identifications in this case. *See infra* Section (III)(A)&(B).

There is little, if any, credible and unimpeached evidence that implicates Mr. Brown and his co-defendants. *See infra* Section (III)(A)&(B). Furthermore, Mr. Brown has since uncovered evidence of racial bias by one of his jurors, undermining the integrity of his capital conviction and death sentence. *See infra* Section (III)(D). But even if this Court is not persuaded by the mounting evidence of innocence and the racial bias from his trial, Mr. Brown's execution is also barred by his intellectual disability. *See infra* Section (III)(C). An expert, Dr. David Price, has diagnosed Mr. Brown as intellectually disabled based on a childhood IQ score of 70 and a plethora of evidence of adaptive functioning deficits. *Id*.

For the reasons that follow, Mr. Brown respectfully requests that this Court authorize the claims in this subsequent application and grant his simultaneously filed motion for a stay of his March 9, 2023 execution.

II. FACTUAL AND PROCEDURAL HISTORY[3]

A. The Houston Police Department's Rushed and Inadequate Homicide Investigation

On June 20, 1992, at approximately 10 p.m., Houston Police Department (HPD) officer Ruben Davis responded to a call for a shooting in progress at 4631 Brownstone Lane in Houston, Texas. 27 RR 120. Officer Davis arrived and the front door was open, with Rachel Tovar bleeding from her head, 27 RR 121, and another man – later identified as Nicolas "Nico" Cortez[4] – who was also bleeding in the living room of the home, *id*. at 124. He observed four other individuals were shot in the home. 27 RR 121-24. These individuals were later identified as Rachel Tovar's husband, Jose Guadalupe "Lupe" Tovar, her 17-year old son, Frank Farias, her 15-year old son Anthony Farias' pregnant wife, Jessica Quinones, and her neighbor, Audrey Brown. Officer Davis was friendly with Rachel Tovar, 27 RR 119, but also

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[3] References to the Reporter's Record of Mr. Brown's 1993 capital trial are denoted as "[Volume] RR [Page]." The clerk's file was compiled in a "Transcript" for the purposes of appeal, acting as Volume 1 of the Reporter's Record. For clarity and to match contemporary conventions, the "Clerk's Record" is used to describe this volume, and the abbreviation "CR [Page]" is used for citations in this pleading.

[4] Nicolas Cortez and Nicholas Cortez are used interchangeably in the transcripts to refer to the same person. Additionally, Nicolas Cortez was initially identified as Alexander Camarillo based on an identification card he had in his possession at the time he was taken to the hospital. Cortez testified that he got the ID card from his ex-girlfriend's brother, who had given it to him so he could work. 31 RR 59. However, as documented in a report by the Houston Police Department, Ms. Lisa Persons reported to HPD officer Carroll on June 22, 1992, just two days after the Brownstone murders, that the "real Alexander Camarillo works for her" and that "the real Alexander had his wallet stolen recently and feels that the person shot in Ben Taub is not who he says he is."

knew she was a known drug trafficker, *id*. at 175. When he first arrived, Rachel Tovar refused to speak with him. 27 RR 143, 175.

i. HPD's Failure to Document Interviewing Witnesses and Failure to Adequately Collect Evidence at the Scene

HPD's initial investigation was sloppy and, in substantial part, undocumented. Although police claim to have spoken with more than 30 neighbors of the Tovars and other bystanders at the scene, they did not get the names of most of the individuals with whom they spoke and did not document the information they received from those individuals. *See, e.g.*, 27 RR 103-104, 106; 27 RR 172.

Later, the Crime Scene Unit (CSU) of HPD arrived on the scene. 27 RR 207. While CSU videotaped and photographed the Brownstone Lane home, 27 RR 200, they seemed to do little else to process the scene. CSU officer Beverly Trumble, the first CSU officer on the scene, testified that she collected very little from the Brownstone Lane house, even though there was evidence of the crime in nearly every room of the house. Trumble testified that there was blood in the foyer and on the door jams, 27 RR 204, large pools of blood in the living room, *id*. at 213, blood on the couch in the living room, *id*. at 215, and blood and "brain matter" on the bed and pillow in one of the bedrooms, *id*. at 221-22. Trumble acknowledged that suspects sometimes left their own blood at crime scenes, 27 RR 250, and yet provided no explanation for why she did not attempt to collect evidence to determine that here.

Trumble collection of other evidence was similarly deficient. She testified that she collected no evidence from the bathroom, 27 RR 217, and no evidence from one of the bedrooms, *id*. at 226, both of which were places where victims were found. She testified she did not open drawers or search closets at the scene, blaming her failure to do so on the lack of consent or a warrant to search a crime scene where six individuals were shot, *see* 27 RR 265, an explanation that was later contradicted by other HPD officers.[5] Trumble also failed to search or collect much evidence from around the periphery of the Brownstone home where the crime occurred. Although a knife and piece of a sheet were found just outside the Brownstone home, 27 RR 210, Trumble acknowledged she did not search for or collect any other evidence in the driveway or around the home, *id*. at 210-11.

Trumble not only failed to adequately search for possible evidence, she failed to collect evidence in plain view at the scene. Trumble did not collect what appeared to be syringes and tubes for syringes, 27 RR 242,[6] nor did she collect a box of ammunition plainly visible at the scene, or even check to see if there were bullets inside the box. *Id*. at 243-44. Trumble retrieved no blood or hair samples from the house, nor did she collect any fingerprints. 27 RR 252-53. Several items visible in

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[5] Outside the presence of the jury, HPD Officer Frederick Carroll testified that HPD did obtain a consent to search authorization from Anthony Farias. 28 RR 65-67.

[6] Officer Trumble subsequently testifed that she assumed that the syringes were from the ambulance but admitted she had no way of actually knowing that. 27 RR 273, 284-85.

the crime scene video and photos she took could have been processed but were not. *See, e.g.*, State Exhibit (Ex.) 34, 37 (Cup, keys, lighter by chair); State Ex. 41 (ashtray with cigarette butt, foam cup); State Ex. 53, 60 (ID cards on bed by victim Jose Tovar). For example, there was a cup and a coke can visible, but she neither collected them nor processed them for fingerprints. 27 RR 244. Likewise, she did not retrieve a paper bag that had handwriting on it, *id*. at 245, and even more remarkably, did not collect or test what appeared to be cocaine left on a glass coffee table. 27 RR 246-47.[7] Although Trumble eventually collected a knife and bloody strips of sheets, 27 RR 210-11 (knife and sheet in driveway), *id*. at 227 (sheet strips collected from inside the house), she did not do so until the next day, *id*. at 259-60, and she failed to send them for forensic testing of any sort.[8]

ii. Confused and Undocumented Initial Interviews of Witnesses

While HPD officers reported to the scene began to process it, emergency services were called to the Tovars' Brownstone home. 27 RR 49; 27 RR 73. At about 11 p.m., they transported the individuals who had been shot to the hospital, 27 RR

[7] Trumble claimed at trial that she had no memory of the cocaine in the home and that, when confronted with a photo appearing to contain powder cocaine on a glass coffee table, that she thought it was possibly a glare in the photo. 27 RR 246-47. However, autopsies on the four deceased individuals were performed on June 21 and 22, 1992. Laboratory results during the autopsies of Audrey Brown, Jose Tovar, 17-year-old Frank Farias reflected that there was cocaine in their systems. 41 RR 1317 (Audrey Brown), 1334 (Jose Tovar), 1350 (Frank Farias).

[8] Simultaneously with the filing of this motion, Mr. Brown has sought DNA testing of these materials under Chapter 64 of the Texas Code of Criminal Procedure with the trial court.

62, including Rachel Tovar. Rachel Tovar testified that her son, Anthony Farias, had been to speak to her before the police arrived. 32 RR 62 ("Q: Do you recall how long you had been at the hospital before [Anthony] got there? A: No. Q: Were you already in a hospital room? A: No. Q: Had the police been to talk to you? A: When Anthony came to see me? Q: Right. A: No, they hadn't been there."). She also testified that she could not remember what she said to him or if she told him what happened. *Id*.

Shortly after being transported to the hospital and despite the fact that she had been shot in the head and was bleeding profusely – and by her own account, had been going in and out of consciousness at the scene, 31 RR 197, 200 – she was interviewed by HPD officers David C. Acres and H.T. Pham. 27 RR 81-82. Officer Acres testified that he spent about 30 minutes at the scene and then went directly to Ben Taub Hospital to interview Rachel Tovar. 27 RR 81-82. Acres went directly to Rachel Tovar, who was still in a holding area of the hospital laying on a bed. *Id*. at 82-83. Acres did not record his interview with Rachel Tovar but testified that despite her injuries she described three assailants. 27 RR 86-87. Acres testified she described two of her assailants as between 5'1" and 5'2" tall, both approximately 120 pounds and one with green eyes and one with brown eyes, and the third – assumed to be Mr. Brown –as between 5'6" to 5'7", 140 to 145 pounds,[9] medium brown complexion

[9] Rachel Tovar would later testify that she did not remember speaking to those officers, 32 RR 63-64, and that she did not "exactly remember what I gave them, but I know I did give some descriptions of them, but I can't recall what I really said," 32 RR 59. Asked if she remembered

with green eyes and wearing a dark shirt and blue jeans. *Id.*[10] Acres testified that Rachel Tovar also described a silver van being at her house earlier with Alabama license plates on it. 27 RR 84-85. Acres testified that Rachel Tovar was otherwise "very vague about what happened" and gave "very little" other information. 27 RR 93.

After that initial interview, Officer Frederick Carroll interviewed Rachel Tovar at the hospital. 27 RR 306. This interview was also unrecorded and took place at approximately 2 a.m. on Sunday, June 21, 1992. 28 RR 71-72. Officer Carroll testified that before interviewing her, he spoke to Officer Acres to get a general description of the suspects; he also stated that there was a general HPD broadcast concerning the description of the suspects. 28 RR 31-32. Officer Carroll asked Rachel Tovar if she knew the names Squirt and Red, and she told him that she did not know their real names. 28 RR 308-09.[11] After this interview, at about 3 or 4 a.m.

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giving the description of 5'6 to 5'7 inches tall, she said "I could have said that, but I really don't remember." *Id*. Asked about the weight, description of complexion, that he had green eyes – to each question she said "I don't remember." *Id*. She testified "[W]hether I said those things. I could have said them, but I don't remember." *Id*. Eventually, HCDAO attorney Brown said "Judge, I'm going to object as being repetitious. She already indicated that she doesn't remember." *Id*. at 59-60. Addressing the Court, Rachel Tovar said "[t]he time of talking to the police I was in the hospital. There is parts that I just don't remember, you know. I was in the hospital when they talked to me." *Id*. at 60.

[10] This description does not at all fit Mr. Brown, who is 6'2" tall, and has brown eyes. By contrast, as recorded in his autopsy, Terrell Hill was 5'9" tall.

[11] Trial counsel questioned Officer Carroll, whose interview took place before Rachel Tovar's only recorded interview, if he suggested those names to her. *See, e.g.,* 27 RR 306.

on June 21, 1992, Rachel Tovar's son Anthony Farias visited her in the hospital again. 32 RR 91.

At approximately 9:40 a.m. on June 21, 1992, less than 12 hours after the shooting, Rachel Tovar was interviewed again at the hospital by HPD officers. 35 RR 49. This is the only recorded interview of Rachel Tovar during her hospitalization after the crime. A copy of the audiotape became part of the record at trial. *See* 35 RR 95-96; Defense Exhibit 90. In that interview, conducted by HPD officers Webber and Novak, Rachel claimed that her husband brought three black males to her house, and she had no idea why they were there. Appendix (App.)[12] at 2. She said all she knew about them was that they were driving a van and that they were from Alabama because she saw their car license plate. App. at 3-4. She also told the officers that she did not know if her husband was dealing drugs, and only knew that he had used them before. App. at 5 ("Webber: Does your husband deal in drugs? Tovar: I know he uses it, but I don't know if he was ever dealing in them.").

Of the crime, she said that the men tied them up, but she didn't hear any of their conversation. App. at 3 ("Webber: Did you hear any conversation at all? Tovar: No, I didn't."). She said she heard an argument between her husband and someone in the other room, but could not hear anything they were saying. App. at 4. When

[12] Mr. Brown files an Appendix (App.) in support of this subsequent application for writ of habeas corpus.

asked if she knew the names of the assailants, she said no. App. at 6 ("Webber: Do you have any idea who their, what their names are? Tovar: Nuh huh."). Officer Webber then asked if the assailants had been to her house before, and she said "Uh huh. I've heard nicknames, but I don't know if it's them, you know." *Id*. When asked what nicknames she had heard, she said "I heard, I thought I heard them say one was Squirt and the other one was Red, but I'm not sure." *Id.* Rachel then said of "Red" that he once told her "yall gonna be dead and I'll be in New Orleans or be in Alabama. That's all I heard him say." App. at 6-7. Asked later if she knew anything else about them, she said no. App. at 12.

When asked if her son Anthony knew them, she first said "No, I don't think so," App. at 6, and then later said, "if he sees them, yes, he knows them," App. at 7. Rachel Tovar said Anthony would know them from answering the door at their house. App. at 11. She confirmed that she and the family knew "Jaz," who she described as "another friend of [my husband's]" from Alabama. App. at 11. After completing this interview, the police spoke with the doctor treating Rachel Tovar in the hospital, and they were told there was bullet fragments lodged in her head, but a decision had not been made about whether to remove it.

Police attempted to interview Nicolas Cortez at the hospital after the shootings on Brownstone Lane. He was conscious but unable to speak. Brown 27 RR 61. Nicolas Cortez testified that he only say two men in the house that committed the

Brownstone Murders. *Id*. at 101. Police also asked if he knew the men who shot him, and he indicated "no". Police asked at the hospital about Nicolas Cortez and were advise he might have brain damage.

iii. HPD's Reliance on Information From Other Alabama Drug Dealers

HPD officers returned to the scene at Brownstone the following morning on June 21, 1992, to interview additional witnesses, including Anthony Farias and his friend Rafael Gonzalez. 33 RR 269-70. These interviews at Brownstone were interrupted when drug dealers LaCedric "Ced" Jones and Raylon Johnson arrived at the residence. 35 RR 33-34, 42-43. They acted nervous and provided police with false identification, 35 RR 35-36, 44, and later claiming that they were there to buy drugs from the Tovars, *id*. at 43, 46. Shortly after noon on June 21, 1992, both LaCedric and Raylon were escorted to the homicide division at HPD to give statements. 27 RR 326-27.[13]

Raylon had previously bought from the Tovars with fellow drug dealer Jasper Finney. 28 RR 142, 144. Police called Jasper Finney on the phone and questioned him about who "Red" and "Squirt" could be; Jasper provided the name of Marion

[13] Despite the fact that they had arrived at an active homicide scene of known drug dealers and the impression that they were acting nervously, HPD apparently did not run criminal history searches on either Jones or Johnson at that time. Had they done so, they would have discovered that LaCedric Jones was contemporaneously charged with three counts of murder in Alabama. 28 RR 39-40.

Dudley as "Red" and the name of Arthur Brown as "Squirt." 27 RR 331. After pointed the police to Mr. Dudley and Mr. Brown, the police focus exclusively on Mr. Brown and his co-defendants as the alleged perpetrators.

iv. HPD's Aggressive Tactics Against Mr. Brown's Sisters

Immediately after other drug dealers implicated Mr. Brown and his co-defendants as the assailants, the police focused exclusively on them, without investigating any other suspects or perpetrators. Police noted even at the time of the crime that media were present at the crime scene.

Most significantly, police focused on Mr. Brown's sisters. Mr. Brown's sisters Grace Brown, Serisa Brown, and Carolyn Momoh lived in Houston together with Serisa's daughter and Carolyn's two children. 29 RR 26-27. His sisters Carolyn Momoh and Serisa Brown were interviewed in Tuscaloosa, Alabama by Tuscaloosa Police Department (TPD) officers on June 22, 1992, and those interviews were recorded. Of particular note, Carolyn Momoh's tape recorded interview says nothing inculpatory about the murder.

After they were interviewed by police in Tuscaloosa, Carolyn Momoh and Serisa Brown returned to Houston. On June 26, 1992, all three sisters were transported to Houston Police Department and interviewed by HPD officers, along with their friend Kirk Royster. *See, e.g.*, 29 RR 79-81. These interviews were not recorded. 29 RR 86. In her trial testimony, Serisa Brown said that HPD officer

Novak told her that her statements to TPD in Alabama were "fairy tale lies" and that she "needed to tell the truth or he was going to put [her] in jail and he would take [her] daughter away from [her]." 29 RR 83.[14] She testified he was rude and cursed at her, and that she believed he was going to do that. *Id*. at 83-84. Carolyn Momoh likewise testified that HPD officer Novak immediately told her that her statement to TPD was "the worst goddamn fairy tale he has ever heard in his life." 37 RR 28. Novak showed her a federal warrant and told her she could be arrested. 37 RR 29.

Novak also told Carolyn Momoh the only reason that she (Carolyn) wanted to go back to Tuscaloosa was to get laid, used the word "bitch," and told her that an orange jumpsuit was waiting for her. 37 RR 32-33. Novak "was always abusive" and wasn't "interested in the truth." 37 RR 92-93. Carolyn cried, 37 RR 45-46, and was told she had to stay at the Houston Police Department "until [she] got it right." 37 RR 47. The officers told her that they would call her abusive ex-husband and he would take her children,[15] because she was going to go to jail. 37 RR 48. Instead of recording the interviews, HPD officers typed up statements and had the witnesses sign them under the penalty of perjury.

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[14] Serisa Brown's daughter was nine years old at the time of Mr. Brown's trial. 29 RR 27.

[15] Carolyn Momoh's children were 5 years old and 4 months old at the time of the interview. 36 RR 39.

v. Arrest of Mr. Brown

Just short of six months after the Brownstone murders, Mr. Brown was arrested in Tuscaloosa, Alabama, while he was living at a friend's house on a federal warrant for Unlawful Flight to Avoid Process. TPD officer Everett testified that he found Mr. Brown under a bed in a bedroom, and when the police entered the apartment, he partially crawled out from under the bed. 33 RR 89-90. Everett testified that Mr. Brown said "Don't shoot, I'm unarmed," or something similar. 33 RR 99. When asked, Mr. Brown said his name was Arthur Brown, and did not resist arrest. 33 RR 92, 100. Mr. Brown told Everett at the time of his arrest that there was a gun in the other room. *Id*. Mr. Brown was indicted with capital murder in Harris County, Texas on November 11, 1992. CR at 7.

B. Mr. Brown Fought for Discovery and *Brady* Evidence

Following Mr. Brown's arrest, HCDAO attorneys Terry Wilson and Susan Baetz Brown were assigned to prosecute Mr. Brown's case. Attorney Patricia Saum[16] was appointed as Mr. Brown's lead counsel on November 16, 1992. CR at 9, with Thomas Moran appointed as co-counsel. They repeatedly fought for discovery and *Brady v. Maryland* material prior to and during Mr. Brown's capital trial. One focus of their efforts was to discover the true extent of the drug dealing of

[16] Patricia Saum's name is now Patricia Nasworthy. To avoid confusion, she is referred to as Patricia Saum herein, as that was her name at the time of trial and in the Reporter's Record.

Rachel Tovar and her family, and the other was to learn as much as possible about alternative suspects in the case. The trial record reflects not only their significant efforts, but also the HCDAO's confused understanding of and remarkable resistance to any discovery and their *Brady* obligations.

First, less than three months after her appointment on February 10, 1993, attorney Saum filed a motion for discovery, CR at 40, as well as a motion specifically for *Brady*[17] evidence, CR at 14. That same day she filed an additional Motion to Compel the Preservation of Rough Notes, requesting specifically that the law enforcement officers (including the Houston Police Department) be required to preserve their investigative notes, memoranda, or other raw data, and noting that these materials could constitute *Brady* evidence. CR at 30.[18] Defense counsel also sought specifically to discover evidence of the Tovars' drug dealing under *Brady*. *See, e.g.,* CR at 106-07 (Defendant's Memorandum of Law in Support of Access to Law Enforcement Intelligence Records). The district court did not directly address these motions for several months.

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17 *Brady v. Maryland*, 373 U.S. 83 (1963).

18 The HCDAO agreed to the motion concerning law enforcement notes, writing on the order: "agreed state to contact HPD officers and have officers retain any notes still in their possession 3/26/93." CR at 33 (signed by "S Brown").

i. September 10, 1994 Discovery and *Brady* Hearing

On September 10, 1993, approximately 7 months after trial counsel's initial *Brady* requests and just 4 days before the start of jury selection, the district court held a hearing on the discovery, *Brady*, and rough notes motions, in addition to other motions filed by the defense. *See* 4 RR. When the trial court addressed the defense's discovery motion, the HCDAO represented that they "kept an open file for the defense," but noted that there were many items in the possession of the Houston Police Department or other law enforcement to which the HCDAO did not have access. 4 RR 80. The trial court gave the HCDAO specific instructions to turn over *Brady* evidence, including impeachment evidence:

> **The Court**: So clearly, on the record, since we're all here, the three prongs of Brady, number one, anything that you or Ms. Brown know, at this point in time, that would tend to exculpate Arthur Brown, Jr. of a capital murder?
>
> **Mr. Wilson**: We have nothing, Your Honor.
>
> **The Court**: Okay. The next part is anything that would tend to impeach on this issue. Any of your witnesses that you will be relying on for the purpose of obtaining a conviction of capital murder against Arthur Brown, Jr.?
>
> **Ms. Brown**: Your Honor, some of the witnesses, at least one that I know of that we intend to call, have criminal records. I will provide that to the defense in advance of their testifying, any felonies or crimes of moral turpitude for which they have been convicted.
>
> **The Court**: Okay. That's one angle of impeachment. Another one might be any psychological, psychiatric hassles that any of your witnesses maybe have had.

> **Ms. Brown**: I have no information of that, but I will discuss it with each witness before they take the stand.

4 RR 54-56.

During the September 10, 1993 hearing, the trial court granted both the discovery and the *Brady* motion, entering written orders on each. CR at 16 (Order granting *Brady* motion); CR at 60 (Order granting discovery motion).[19]

ii. October 1993 Discovery, *Brady* Filings and Hearings

Even after the September 1993 orders and motions hearing, the defense struggled to get meaningful access to discovery or *Brady* evidence. Despite the trial court's prior orders, and after nearly a month of jury voir dire, on October 13, 1992, the HCDAO closed its file to Mr. Brown's defense counsel. *See, e.g.*, CR at 170 (Saum Affidavit attached to Motion to Take Depositions noting: "on or about October 13, 1992, the State, acting through Susan Brown, closed its file to Defendant and refused to provide the Houston Police Department offense report to Defendant or his counsel, even though the State had asserted to this Court on September 10, 1993, that its file was open to Defendant's counsel."); 4 RR 3 (Moran: "since the State closed its file we ask the Court to set a date and time and place for discovery for things the Court already recorded in the discovery order").

[19] The trial court also addressed Saum's motion concerning preserving the notes of law enforcement, and the parties agreed that it had been agreed to several months prior. 4 RR 79-80.

On October 15, 1993, defense counsel filed a Motion for Contempt for Violation of this Court's Order of September 10, 1993, Requiring the State to Disclose Exculpatory Evidence, CR at 130, as well as a Motion to Take Depositions, CR 169. In their Motion for Contempt, defense counsel argued that it had already discovered that the HCDAO had withheld information that Rachel Tovar sought to intervene in a suit to claim ownership over drug-related cash the HCDAO was pursuing civil forfeiture. CR at 132. Defense counsel asserted again that they were requesting all *Brady* evidence, and specifically any evidence "indicating that Mrs. Tovar is engaged in the business or trade of selling illegal narcotics." CR at 133. The trial court granted this motion, subject to modifications. CR at 222.

The trial court addressed the issue of these motions and discovery issues before voir dire began on October 15, 1993. *See* 20 RR 3-7. Mr. Moran argued to the court: "Judge, we need to have exculpatory evidence[.]" 20 RR 5. The HCDAO's response to the Court was evasive and misconstrued its requirement to meaningfully disclose *Brady* materials to the defense. Rather than answering the defense and the Court's question about whether all *Brady* evidence had been disclosed, the HCDAO suggested that it need not disclose *Brady* before the trial began, and then denied that there was any *Brady* evidence at all:

> **Mr. Moran**: Judge, we need to have exculpatory evidence, if we're going to get and if the State has done that.
>
> **The Court**: Are you ready to answer that.

> **Ms. Brown**: We haven't started the trial. There maybe something that comes up that I would be require[d] by law to give them. I don't want to be precluded, if they want to say that I have given all [I've] given I can do that.
>
> **The Court**: All he's asking you is of Brady itself. Do you at that point know of anything that you have [to] tender that might be Brady, exculpatory.
>
> **Ms. Brown**: No[.]

20 RR 5. Because the case was in the midst of voir dire, the trial court then said it would take up defense counsel's motions implicating *Brady* later and "as soon as we can." 20 RR 6.

The following day on October 16, 1993, prior to the beginning of voir dire proceedings for the day, the trial court addressed the defense's *Brady* and discovery concerns. *See* 21 RR 13-59. At the outset, the trial court questioned the HCDAO: "Have you had that opportunity to thoroughly check through to see if something's been discovered? It was either exculpatory on guilt, impeaching of witnesses or mitigating on punishment." 21 RR 14. The HCDAO responded simply, "Yes. I have looked at my file. I have no Brady." *Id*. The trial court – in consideration of the defense motion noting that they had discovered the $5,000 intervention claim of drug money by Rachel Tovar – told the HCDAO: "If they've been able to discover something – hopefully we're not just sort of playing games for lack of a better term." *Id*. at 14-15.

In the October 16, 1993, hearing, defense counsel specifically requested for *Brady* evidence concerning any drug-dealing by Rachel Tovar and her family, and the other witnesses in the case. 21 RR 18-19. The trial court asked the HCDAO to agree that Rachel Tovar was a drug dealer, but HCDAO attorney Terry Wilson stated: "Some persons at that residence obviously had some police involvement in narcotics trafficking." *Id*. at 21. The trial court later cautioned the HCDAO: "Brady requires a little bit more digging in order to answer some of these very difficult questions and so you're directed pursuant to the many prongs of Brady to check with narcotics people whether it's HPD or HCSO to determine what knowledge, if any, they have about Ms. Tovar's [drug-dealing] activity since the tragedies that were involved here up through the trial." 21 RR 23. ADA Terry Wilson resisted, responding to the trial court's concerns by saying: "The law does not require me to debrief the world. While [the defense] can sit there and make allegations, it does not require me to check Alabama or Mississippi or New York or California or anyplace else because he thinks this person's a drug dealer." 21 RR 24. ADA Wilson continued: "I do not feel that Brady compels me to go out and mount a surveillance of [Rachel Tovar's] activities and try to determine, but I will check all logical places where information might be available on [her drug dealing]." *Id*. at 26.

Mr. Brown's counsel also detailed their issues with the HCDAO's discovery practices, noting that they did not have access to the HCDAO's file while ADA

Brown was on maternity leave, and limited access to materials while the HCDAO's investigator was still working and the file was incomplete. 21 RR 30-31. Saum read into the record the digital materials that she had been given access to, which included a copy of the video of the scene, the interview of the defendant, Mr. Brown, and transcripts of interviews of Jasper Finney (6/24/92), Yvonne Carol Darden (7/10/92), Carolyn Momoh (6/22/91), and co-defendant Antonio Dunson (7/8/92). *Id*. Saum noted at that time she had not even been given the written statements of witnesses. *Id*. at 32.

Additionally, during the October 16, 1993, hearing, the trial court inquired about its prior order granting discovery. 21 RR 35-57. The HCDAO again expressed resistance to giving the defense any witness statements or recordings. *See, e.g*., 21 RR 46 (Brown: "The law doesn't require that I give them a copy of a witness' statement. I've given them a copy of their defendant's statement and that's the only thing I'm required to do."); *id*. at 47 (Brown: "The problem is realistically I don't have to give that. 39.14 doesn't require me to give them that information until after the witness testifies."). Despite the fact that the HCDAO closing the file had in part caused the delay in discovery, the HCDAO also suggested that it was too late now for it to be necessary for the defense to listen to audiotaped interviews of witnesses. *See* 21 RR 47 (Brown: "Realistically I don't have any obligation to give that to them and I don't know when now – between now and trial time they're going to listen to

seven tapes."). Clearly, the HCDAO's position was that unless and until a witness testified, the defense was not entitled to their video or audio recorded statements – and the trial court and Mr. Brown's counsel were forced to rely on the HCDAO's representation that there was no *Brady* evidence in any of the tapes that were not being disclosed until witnesses testified.

Formally, the trial court ruled that – separate and apart from the HCDAO's *Brady* obligations – to the extent that the defense was entitled to listen to the tapes as a matter of discovery, those tapes would be disclosed during trial. The court noted: "I will put DA and defense to listen to tapes during trial, off hours." 21 RR 48*; see also* 24 RR 4-5 (reaffirming during Oct. 21, 1993 hearing); CR at 44 (order).

iii. Continued *Brady* Efforts

After the October 15 and 16, 1993, hearings on discovery and *Brady*, defense counsel continued to press for more information from the HCDAO and the HCDAO continued to resist disclosure. Defense counsel filed motions for depositions of witnesses, citing *Brady* concerns, CR at 170, 204. In a motion to depose DeAndrea Dunn, trial counsel even specifically noted that the defense wanted more information about a gun alleged to be a murder weapon in the Brownstone Lane killings that the defense had just learned that Dunn received from Tyrell [Terrell] Hill. CR at 208.

Defense counsel filed a subpoena duces tecum directed at the Houston Police Department for copies of offense reports, CR at 227, 246, and both HPD and the

HCDAO filed motions to quash the subpoena, CR at 242 (HPD), 249 (HCDAO).[20] Defense counsel so distrusted the HCDAO's production of *Brady* materials that they filed a motion requesting that the trial court "inspect the State's file for discoverable or exculpatory information and the seal the State's entire file for appellate review." CR at 252 (Motion for In Camera Inspection and to Seal Records for Appellate Review). Defense counsel noted, just as it had for weeks, how "[a]t every turn, the State has failed to comply fully with this Court's [*Brady* and discovery] orders." CR. at 254. In an October 29, 1993, motion for continuance, under the subheading "A Track Record of Discovery Abuse" and just days before the guilt phase of Mr. Brown's capital murder trial began, defense counsel wrote:

> Stated bluntly, the State's track record in complying with this Court's discovery orders is so bad that neither Defendant nor this Court can trust the State to comply voluntarily.

CR at 265. Defense counsel filed another motion for exculpatory evidence on November 2, 1993. CR at 276. Mr. Brown's guilt phase began the next day.

C. Mr. Brown's 1993 Capital Trial, Conviction & Death Sentence

Mr. Brown was the first of the three men tried for capital murder for the Brownstone homicides. The guilt phase of Mr. Brown's capital trial began on November 3, 1993, just days after the protracted discovery and *Brady* litigation

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[20] Ultimately the trial court denied the motion(s) to quash and ordered "Court to review for *Brady* in camera 10/29/93," CR at 247. *See also* CR at 251 (noting "denied" of the HCDAO's separate motion to quash the same subpoena duces tecum).

concluded. *See* 27 RR. From the very beginning of trial, defense counsel Saum focused on alternative suspects who could have been responsible for the Brownstone Lane murders, and particularly on the drug dealer Terrell Hill:

> I anticipate though that the evidence will show you that much to the – that the State – the law enforcement officers did not know at the time that they issued the arrest warrant [for Mr. Brown] that Terrell Hill had possession of both of the murder weapons and they were both found on him and both of them matched up to the two murder weapons that were used in this case. I believe the evidence will show you that Rachel Tovar and her family were part of the Alabama/Texas connection, if you will, that she was selling somewhere between two to three kilograms of cocaine per week to each of these individual drug dealers, and we're talking about Arthur Brown, Marion Dudley, Tony Dunson. Jasper Finney, he's here, he will testify, Terrell Hill, all of these people were coming down here and buying their dope at the Tovar's house. And somewhere along the line, a feud broke out and the feud broke out when Jasper Finney – Jasper Finney came to Houston and he bought some marijuana, somewhere between 15 and 30 pounds of marijuana from Rachel Tovar and when he got back to Tuscaloosa, somewhere around the first part of June of 1992, he got busted. And the reason he got busted is because Marion Dudley turned him in and set him up, and Jasper was not happy. Jasper Finney, at that point, when he got out of jail, he – they had a fight between all of the drug dealers. And what I anticipate that the evidence is going to show is that Jasper Finney came back to Houston, and while he was in Houston, right after that, he had the opportunity to plan how he could get the ultimate revenge against Marion Dudley and Arthur Brown . . . the evidence will show you that Terrell Hill was in Houston on June 20th of 1992, and again, that Terrell Hill is the person who had both of the weapons. I anticipate the evidence will show you, there will be testimony that Terrell Hill admitted to doing the killings. And I anticipate that when all the dust settles that you will know more than the Houston Police Department knew, more than the investigators knew because some of this has only been discovered within the last two weeks, and that you will hesitate to act, you will not find Mr. Brown guilty, in fact, you will find him not guilty.

27 RR 42-45.

Thus, from that point on, there could be no question as to what the defense theory was from that point; the HCDAO clearly on notice. Moreover, throughout Mr. Brown's capital trial, defense counsel fought to show that other drug dealers in Tuscaloosa – again, specifically LaCedric Jones and Terrell Hill – were likely responsible for the Brownstone murders. *See, e.g.,* 27 RR 32-33, 41-45; 28 RR 224-70; 39 RR 95-100. In particular, trial counsel highlighted that Alabama police had recovered the Charter Arms .38 Special, which the State alleged was used in the Brownstone Lane murders, from the investigation into the shooting death of Terrell Hill. 33 RR 222, 259-61.

Separate and apart from the firearms evidence, and discussed in turn below, the evidence against Mr. Brown and his co-defendants was limited and received considerable challenge at trial. Surviving victims Rachel Tovar and Nico Cortez testified for the State, as did Rachel Tovar's brother, Daniel Leija, who had been at the Brownstone Lane address earlier in the evening. *See infra* Section (II)(C)(i). Additionally, Mr. Brown's sisters, Grace Brown, Serisa Brown, and Carolyn Momoh testified for the State, *see infra* Section (II)(C)(ii), and there was evidence presented of flight by Mr. Brown, *see supra* Section (II)(A)(v).

i. Testimony of Eyewitnesses

At trial, the HCDAO presented the testimony of a few eyewitnesses: surviving victims Rachel Tovar and Nicolas Cortez, Rachel Tovar's brother Daniel Leija, who had been at the home earlier in the evening, and Jose Candelario Hernandez,[21] who was outside the Tovar home in a vehicle at the time of the shooting.

Surviving witness Rachel Tovar, who was shot in the head during the crime, gave varying accounts and conflicting details of the night of the crime to the police in the hours and days following the crime that caused her severe trauma. At Mr. Brown's trial, Rachel Tovar testified that she does not remember giving descriptions to the police officers or even speaking to either set of officers at the hospital after the crime occurred. 32 RR 59-61, 83-84. Rachel Tovar also testified that "some" of the facts she told the police that night and the next morning are true, but other facts she told them were "[n]ot true, very incorrect." *Id.* at 87. She identifies Mr. Brown in open court as "Squirt" and as who helped perpetrate this crime. Id. at 132-33. Rachel Tovar also testified she didn't know anyone named "Dud" but did know LaCedric and Jazz. 31 RR 133. She testified she did not know Terrell Hill. Id. at 133-34.

[21] He is referred to by his middle name, Candelario Hernandez, for the purposes of this pleading.

Rachel Tovar testified that at the time of the crime, she and her husband Jose Tovar were selling Mr. Brown and Mr. Dudley marijuana and cocaine – two and a half or three kilos at a time – and that they had sold to them 6-7 times previously. 31 RR 136-37. The Tovars had met Red through a man named Reuben in their neighborhood, who her sons all knew. *Id*. at 236-37. She then testified that about a month prior to the killings, she had gotten in a disagreement with Red about the pricing of their cocaine. *Id*. at 137-38. She testified that Red and Squirt and another black male had first come over to Brownstone Lane at around 2 or 3 p.m. (and then also says "noontime") to buy cocaine, but she didn't have the drugs at the time. *Id.* at 143-44, 173. Jose Tovar told them to come back later and they would have the drugs then. *Id*. at 174-75. She then testified that they left and came back "right before it got dark" for a second time. *Id*. at 176. Jose Tovar had the men sample cocaine, but said he wasn't going to sell that cocaine to them and told them again to leave and come back in about 45 minutes. *Id*. 176-77. The crime allegedly happened the third time the men returned. *Id*. at 178.

Rachel Tovar testified that during the crime, when she came into her house after having been visiting with her neighbor next door and drinking a beer, there was a "young guy" who she had never seen before "standing there with a gun already." 31 RR 178, 183-184. She identified this person as "Anthony."[22] *Id*. at 182. The gun

[22] Presumably this was meant to refer to Mr. Brown's co-defendant, Antonio Dunson.

that Rachel Tovar testified that he had was a silver .38 revolver, and either him or Squirt told her to go to the back – she didn't remember which. *Id*. In great contrast to her prior statements, Rachel Tovar testified she and her family members were all placed in the same bedroom, and the suspect she identifies as "Red" (Marion Dudley) yelled at them, saying: "you stupid Mexicans, I never did like you, it's your fault they killed one of my – they killed my little brother," while the person she identified as Anthony (Antonio Dunson) repeated "yeah, they killed our little brother." 31 RR 185.[23]

Rachel Tovar said that then Squirt obtained a kitchen knife from her kitchen, pulled a sheet out of a basket that was in her room, and used the knife to cut up the sheet. 31 RR 169-170, 187. While Squirt was cutting up the sheet, Red was holding a gun to her husband's head. *Id.* Rachel Tovar testified that after cutting up the bed sheet into strips, Squirt tied up Frank Farias, then Audrey Brown, then her with the bed sheet strips. *Id.* at 193. She said she was left tied up in a room in the house when she heard the doorbell ring and Jessica answer the door. *Id.* at 195-196. Rachel Tovar heard Nicolas Cortez come inside the house, then Jessica came in the room she was in with Squirt, who now had the silver .38 pistol, and forced Jessica Quinones to gag

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[23] Notably, Marion Dudley did not have a little brother, nor was he related to Antonio Dunson such that they shared a little brother. Likewise, Mr. Brown was not related to Mr. Dudley or Mr. Dunson, and did not share a little brother with either.

her (Rachel Tovar). *Id.* at 196. Rachel Tovar testified that the next thing that she remembers happening was being left in the room again, hearing a struggle and two gun shots, and then being shot herself. *Id.* at 197. Rachel Tovar testified that she does not know which man shot her. *Id.* Out of the people who were at her house the night of the crime, only Rachel Tovar and Nicolas Cortez survived. *Id.* at 217. Rachel Tovar testified that she was taken to Ben Taub hospital where she stayed for a week. 31 RR 202-03. During the time she was in the hospital, she testified police brought her three photo spreads, and first she said they told her to "pick someone" and then at the HCDAO's suggestion, she said that they told her "if you knew anybody." *Id*. at 223-24. Rachel Tovar identified Mr. Brown from the first photo spread and Mr. Dudley from a separate photo spread. *Id*. at 223-26.

On cross examination, Rachel Tovar said her husband Jose Tovar was a drug dealer, but she was not. 31 RR 231-32. She said she never sold drugs before except to Mr. Brown and his co-defendants. *Id*. at 233.

Nicolas Cortez[24] testified at Mr. Brown's trial that on the night of the crime, Cortez arrived at the Tovar household on Brownstone Lane at about 10:00 p.m. 31 RR 14-15. Cortez said he had been on his way to a party in the area with other friends in a car when he stopped by Brownstone Lane to visit with Jose Tovar. 31 RR 15-

[24] Mr. Cortez was a friend of the family, who had previously lived with them at Brownstone Lane for about 1 year. 31 RR 14.

16. Cortez's friends stayed in the car and waited for Cortez. *Id*. When Cortez knocked on the door, Frank Farias yelled through the closed door for Cortez to "go away." *Id*. at 16. Despite being told to leave, Nicolas Cortez stayed at the door, and the door opened. *Id*. at 17. He testified he recalled that when the door opened, he saw Jessica Quinones behind the door with "[a] person with a gun." *Id*. When asked what the person looked like, Cortez testified "it was dark," and the man "with a gun, had it on [Jessica] and he got me inside." *Id*. When asked if he had a chance to see the person with the gun in the light at any time, Cortez testified, "A little bit, yes." *Id*. at 17-18. Cortez then identified Mr. Brown in-court and for the first time as the person he saw with the gun in the dark the night of the crime. *Id*. at 18-19.[25] Cortez's subsequent testimony in Mr. Brown's co-defendant's trials was remarkably less certain.[26]

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[25] Within 24 hours of the crime, police presented Nicolas Cortez with a photo spread containing Mr. Brown's photo, and yet Cortez did not identify Mr. Brown as one of the perpetrators of this crime. The next time Cortez was asked whether Mr. Brown was one of the men who committed this crime was at Mr. Brown's trial, and Cortez identified Mr. Brown in court, even though the HCDAO had provided defense counsel no notice that Cortez had informed the HCDAO that morning that now he could identify Mr. Brown. *Compare* 31 RR 18-19 *with* 31 RR 25-26 (Saum: "[T]his witness has just made an in-court identification of my client, when I was told the offense report indicates that he was never able to identify him from a photospread and that the State told me prior to him testifying earlier in this trial that he could not identify Mr. Brown.") *and* 31 RR 35 (Court: "[W]hen is it that the State learned that Mr. Cortez was able – was going to be able to make an in-court identification? Ms. Brown: This morning, Judge.").

[26] For example, Cortez testified twice after Mr. Brown's trial that he could not identify Mr. Brown as having been at Brownstone Lane the night of the crime. *See* Dudley 24 RR 439 (referring to the suspect he had identified as Mr. Brown at Mr. Brown's trial, Cortez testifying only that the suspect had a black gun, was "of the Black race," and "taller than I am," without any other descriptions or identifications); *and* Dunson 5 RR 169-170 (Cortez re-examining the photospread

Nicolas Cortez's testimony conflicts, at least in part, with testimony provided by Rachel Tovar. Cortez testified that after the man with "a gun" had him come inside the house, the man with "a gun" directed him to the back bedroom. 31 RR 47. When Cortez got to the back bedroom, a different man with a chrome gun wearing one black glove was in the room with Jose Tovar. *Id*. The man that Cortez identified as Mr. Brown was separate and apart from the man in the back room with the chrome gun. *See id*. at 49 (Q: "Now, who tied you up, the man that's here in court or the man with the chrome gun?" A: "The two of them."). The suspect that Cortez alleged was Mr. Brown, however, was not the man who shot Cortez that night: "the other one, the shorter one with the chrome gun" shot Jose Tovar and then shot Cortez. *Id*. at 50, 53.

Daniel Leija, Rachel Tovar's brother, testified that he arrived at Brownstone Lane on June 20, 1992, around 6:30 or 7:30 p.m., when it was not yet dark outside. 30 RR 165-67. He testified he had been drinking beer since about 6 p.m. and that he brought beer with him to Brownstone Lane, where he drank 6 beers total. *Id*. at 207, 209. Leija identified Mr. Brown in court as a person he saw standing in the hallway of Brownstone Lane talking to Jose Tovar, but he did not know what they were talking about. *Id*. at 175-76, 179. He said that they were speaking English, and that

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that includes Mr. Brown and again failing to recognize anyone from the spread as one of the perpetrators.).

this was the only time that Leija ever heard Jose Tovar speak English. *Id*. at 215. Leija testified that when he left it was barely getting dark, and defense counsel introduced a copy of a Houston Chronicle noting that the sunset that day at 8:25 p.m. *Id*. at 231-24. Leija testified that when he saw Mr. Brown, Mr. Brown was wearing "a yellow muscle shirt." and shorts.[27] *Id*. at 216-27. Leija also testified that he was shown a photo spread by police, and that he first selected a person in spot number 2 (a filler), and then after looking at it for 30 minutes before selecting Mr. Brown. 30 RR 238.

Candelario Hernandez testified that he hadn't previously spoken with police or the district attorneys, but that someone showed up at his house the day before his testimony and asked for him by name. 32 RR 185-86. Hernandez then testified the following day, and said that on June 20, 1992, he was on his way to a party with Nico Cortez and another unidentified friend in a car that Nico Cortez was driving. 32 RR 159-60. When they arrived at Brownstone Lane, Hernandez and the unidentified friend stayed in the car and Cortez went to the door and knocked. *Id*. at 160. Hernandez testified that he saw the door open and Cortez go inside, and then next thing he heard was shots. *Id*. at 162. Hernandez testified that he did not know

[27] This description greatly contrasts with Rachel Tovar's initial description in the hospital of what Mr. Brown was allegedly wearing during the shooting. *Compare* 27 RR 86-87 (HPD officer Acres testimony that the man identified by Rachel Tovar as Mr. Brown was "wearing a dark shirt, blue jeans" during the crime).

how many shots occurred, but said that he saw two men leave the house and get in a van, but he did not know what color the van was because it was dark outside. *Id*. at 163, 165. Then Hernandez testified then two black men came out of the house looked around, and then he heard more shots. *Id*. at 165. He testified it was too dark to see what color their clothing were, but the men were almost the same size[28] but he wasn't sure how tall. *Id*. at 181. He testified through a translator that the men had a sweatshirt "like this one" on because it was cold, and Saum requested for the record to reflect that Hernandez was wearing "a windbreaker." *Id*. at 181-82.[29] He said he did not see them with weapons and did not see them carrying anything out of the house. *Id*. at 183. Hernandez testified he saw a woman come out of the house who appeared wounded, she fell down, and then an ambulance arrived soon after. 32 RR 165-66. Hernandez saw Cortez loaded on a stretcher, put in the ambulance, and then he left because he was afraid. *Id*. at 166-67.

ii. Testimony of Mr. Brown's Sisters

With regard to his sisters, Serisa Brown testified consistently with her HPD statement after HCDAO attorneys Wilson and Brown gave her immunity both for

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[28] Importantly, this would be inconsistent with Mr. Brown and Mr. Dudley. Mr. Brown is approximately 6'3" tall, and Mr. Dudley was much shorter, approximately 5'6" or 5'7" tall.

[29] There is some confusion around this point – after defense counsel clarifies that for the record, HCDAO attorney Wilson indicates that to him it seemed that Hernandez was referring to his shirt and not his windbreaker jacket. Defense counsel inquires further, and Hernandez then testified that he meant a thin sweatshirt. 32 RR 182-83.

any drug transport related crimes and immunity from prosecution for perjury for statements she made in Alabama. 29 RR 25. She testified that her brother Mr. Brown and his friends, Marion Dudley, Antonio Dunson, and Maleik Travis, arrived in Houston in the early morning hours of June 20, 1992. 29 RR 28. They had been driving a tan minivan. 29 RR 33-34. She testified she was out most of the day, and when she returned at about 12:30 a.m. on the morning of June 21, 1992, Mr. Brown and his friends were home in the house and she saw Mr. Dudley counting money. 29 RR 39-40. Shortly after that, she spoke to Mr. Brown, and he asked her if she wanted to go home to Alabama earlier than she had been planning to go (she had planned to go over the Fourth of July). 29 RR 41-42. They spoke about her driving back to Alabama the next morning, but once Serisa told him she had an appointment the following Monday, she said he dropped the conversation about it. 29 RR 42-44. Later, Serisa spoke with Carolyn Momoh about going back to Alabama early, and they agreed to; Mr. Brown and his friends agreed to pay them one thousand dollars for driving the van back to Alabama. 29 RR 44-48. She testified that she was supposed to "bring drugs back on the van" and specifically powder cocaine. 29 RR 48-49.

Serisa Brown testified that they left at noon on Sunday, June 21, 1992, and drove straight and into the night to Tuscaloosa, and that it was a 12-hour trip. 29 RR 53-54. She also testified that they checked into a motel in Tuscaloosa, 29 RR 55, and

sometime that morning on June 22, 1992, she spoke to Mr. Brown on the phone from the motel. 29 RR 63. She said she had heard about the killings in Houston and that she asked Mr. Brown if there was anything she needed to be concerned about, and Mr. Brown told her no. 29 RR 66-67. The next morning, police arrived at the motel they were staying at, told her they were searching for persons, searched their motel room, and then left without searching the van. 29 RR 67-69. About an hour later, they took the van to an apartment complex and gave it to Mr. Brown and his friends. 29 RR 115-16. At the time that they exchanged the van, Serisa Brown said she asked Mr. Brown again if he had anything to do with the killings in Houston, and Mr. Brown said no, and she testified she believed him then and now. 29 RR 116-17.

On cross examination, however, Serisa Brown testified later that HCDAO attorneys Brown and Wilson threatened, cursed at, and treated her rudely. *Id*. at 88. When she asked for an attorney, they told her she had no right to one. *Id*. at 87. She admitted that Mr. Brown came to Houston came to Houston before, and it was not unusual for him to drive a car there with others and then fly back to Houston. 29 RR 91-92. Serisa testified it was not unusual to see Mr. Brown or his friends with a large amount of cash, and that evening was not unusual. 29 RR 95-96. Serisa Brown also testified that she didn't notice anything unusual about Mr. Brown or his friends when they were in Houston, and all of their conversations were normal. 29 RR 92-93. She said Mr. Brown was nice and that he played with his nieces and nephew. 29 RR 93-

95. Serisa Brown testified she drove the van back to Alabama and did not see any blood in the van or in her sister's house, and saw no bloody clothing anywhere. 29 RR 111-12. She never saw Mr. Brown or his friends in possession of a weapon. 29 RR 110.

Grace Brown testified that she, too, had signed a statement written by HPD, and that she had spoken to the HCDAO about it the morning of her testimony. 29 RR 129. She testified that Mr. Brown had visited Houston before and brought his friends, and that sometimes they would stay overnight at her house. 29 RR 131-32. Grace testified that when she got home from work on June 20, 1992, in the morning, Mr. Brown and his friends were already at her house and mostly asleep. 29 RR 136-40. Grace testified that Mr. Brown and his friends flew back from Houston to Alabama, and that her sisters drove their van back to Tuscaloosa. 29 RR 145-48. She testified that she saw on the news that night that there were murders that happened in Houston, and that there was a "van at the scene [with] Alabama plates on it." 29 RR 150-51.

Carolyn Momoh, through her attorney George Parnham, resisted testifying in Mr. Brown's trial. Hearings about whether or not the trial court was going to permit her to take the 5th Amendment because of the significant differences between her tape-recorded statement in Tuscaloosa and her sworn written statement in Houston taken by HPD. 29 RR (November 5, 1993); 30 RR (November 8, 1993); 34 RR

(November 12, 1993); 35 RR (November 13, 1993). She was held in contempt by the trial court for refusing to be sworn or testify, 30 RR 95-97, and was jailed andn/or on bond at different points between these days. *See, e.g.,* 36 RR 20 (noting that she had been in custody and her attorney Parnham represented that she was going to remain in custody until she purged herself of the contempt of court by testifying). Parnham asked repeatedly if the HCDAO would grant Carolyn Momoh immunity for the inconsistencies between statements, particularly because her HPD statement was untrue, so she could tell the truth, and the HCDAO refused repeatedly. *See, e.g*., 29 RR 191; 36 RR 22. HCDAO attorney Wilson, after attempting to question Carolyn Momoh again, tells her that she can be jailed up to 6 months and fined $500. 35 RR 5-6.

When she finally does testify, the HCDAO attorneys give Carolyn a copy of her HPD written statement and ask her to refer to it continuously throughout her testimony. Carolyn Momoh testified that Mr. Brown and his friends Mr. Dudley and Mr. Dunson left the sisters' Houston home on the evening of June 20, 1992. 36 RR 131-32. She and her friend and children went to a movie, and then came home in the early morning hours on June 21, 1992. 36 RR 131-32, 134. Carolyn Momoh testified that Mr. Brown asked her to drive the van he and his friends had arrived in back to Alabama, and she asked him if the van was "hot," meaning that there was any trouble around the van. 36 RR 135-36. She said Mr. Brown assured her no, there was nothing

wrong with the van. 36 RR 136. After that, she spoke to her sister Serisa Brown and they agreed they would drive the van to Alabama together. 36 RR 136. In her direct testimony, she agreed that Mr. Brown was acting "strange" that night. 36 RR 141. She testified that Mr. Brown told her the next day on June 21, 1992, in the morning before Mr. Brown went to the airport, on the front lawn of their shared house that "he said to [her] I shot six Mexicans." 36 RR 146. Carolyn Momoh also testified that Mr. Brown told her he "had to get away" because was "tired of the killings." 36 RR 148. Unlike her sister Serisa Brown's testimony, she said she did not search the van and did not know she was transporting drugs. 36 RR 151.

However, immediately on cross examination, Carolyn Momoh disavowed her entire direct examination testimony. Like her sister Serisa Brown, Carolyn testified she was threatened by the HCDAO. 37 RR 51-52, 71. Carolyn Momoh testified that HCDAO attorney Terry Wilson threatened her with criminal contempt and six months of jail if she didn't testify, and that she understood that to mean that she had to testify in accordance with her June 26, 1992 written HPD statement (and not her TPD recorded statement). 37 RR 51-52, 71-72. Carolyn Momoh agreed that she was being forced to testify and that she was coerced to do so, and that she had been jailed for contempt. 37 RR 23-24. She told the jury that her June 26, 1992 written statement to HPD – the same statement that the HCDAO made her refer to repeatedly during

her direct testimony and jailed her for suggesting she would testify differently from – was inaccurate. 37 RR 24.

Importantly, Carolyn Momoh testified on cross examination when asked if it was accurate that "Arthur Brown actually said anything to you about having shot anyone," and Carolyn Momoh said "that's inaccurate." 37 RR 73. When asked if Mr. Brown had told her that he was "tired of all the killings," she said "He didn't make that statement to me." 37 RR 73. Carolyn Momoh testified that she signed that statement because that is what the police wanted her to say. *Id*.

On redirect, HCDAO attorney Terry Wilson asked Carolyn Momoh: "In the time that you gave the statement on June 26, 1992 to the police, you're telling this jury that you lied to the police department about your brother admitting it because of the coercive tactics of Sergeant Novak, is that correct?" 37 RR 82. Carolyn Momoh said yes, and that Mr. Brown never said that. 37 RR 82-83. Wilson asked Carolyn Momoh: "[D]id you ever hear the words from Arthur, your brother, this defendant, that he shot six Mexicans or I killed six Mexicans?" and Carolyn Momoh testified unequivocally: "I never heard it." 37 RR 86. When Wilson asked Carolyn Momoh if she "made it up" that Mr. Brown said that statement, she said yes. *Id*. When confronted again about having testified on direct to those inculpatory

statements, Carolyn Momoh responded to HCDAO attorney Wilson: "Mr. Wilson, I was told I had to testify to that statement." 37 RR 89.[30]

iii. The Defense Focused on Alternative Suspect Terrell Hill

Trial counsel's alternative suspect theory was powerful, in part because there was little direct or even circumstantial evidence of Mr. Brown and his co-defendants' guilt. The primary evidence against Mr. Brown included the dubious testimony of eyewitnesses, the statements of his sisters, Carolyn Momoh, Grace Brown, and Serisa Brown, and an attempt by the HCDAO to connect guns found in Tuscaloosa – not on Mr. Brown or his co-defendants' persons – to them and the crime. *See infra* Section (III)(A)(ii). The eyewitness testimony in Mr. Brown's trial included the testimony of Rachel Tovar and Nicolas Cortez, both of whom were shot in the head, and that of Daniel Leija, who testified that he saw Mr. Brown and his co-defendants earlier in the day of the shooting. But these individuals' testimony faced considerable challenge at trial due to both to the prior inconsistent statements of each of the witnesses and the suggestive procedures employed by the police – leaving the alternate suspect theory of Terrell Hill still powerful.

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[30] Making good on their threats, the HCDAO prosecuted Carolyn Momoh for perjury after her testimony. *See State v. Carolyn Momoh*, Cause No. 068065001010; *State v. Carolyn Momoh*, Cause No. 068065301010; *State v. Carolyn Momoh*, Cause No. 067944201010. Carolyn Momoh remains a felon to this day as a result of her testimony in this case.

Trial counsel's closing statement focused on a number of sources of doubt, but three are particularly relevant here: (1) alternative suspect Terrell Hill; (2) Rachel Tovar's impeached credibility; and (3) the mystery of why Anthony Farias did not testify. Trial counsel argued:

> And it's interesting that the State must think I have done a pretty good job of prosecuting Marcus Terrell Hill . . . Because he had both the guns and that's something that can't be explained away. How he has both of the murder weapons in this case.

39 RR 95. Trial counsel also noted that the alibi for Terrell Hill cobbled together by the HCDAO was extraordinarily weak. 39 RR 95 ("They bring in all these witnesses, attempt to establish an alibi for Marcus Terrell Hill and I would hazard to guess that we believe we'd be laughed out of the courtroom if we put on that kind of alibi[.]"); *id*. at 97 ("But there's absolutely nothing that they brought you to show you that Marcus Terrell Hill didn't stay here [in Houston]."). With respect to Rachel Tovar, trial counsel argued:

> It was a little amazing to me to have them bring Rachel Tovar in here and attempt to portray her as something other than a dope dealer. We didn't 'have any problems saying we are a dope dealer, therefore that's what we did. And that's all we did. . . . . and why [Rachel Tovar] doesn't want to come in here and just admit it, I don't know.

39 RR 79-80.

Trial counsel also questioned why all of the Houston Police Department's sworn statements were not tape or video recorded except for one – the one videotape that the HCDAO did not disclose to trial counsel, that of Anthony Farias. Although

trial counsel was not entitled to (and did not receive) the videotape under the discovery order entered by the trial court – because Anthony Farias was not called by the State to testify – they used the existence of the tape to cast doubt on the other work by HPD:

> And it's interesting that not one witness who came in here who testified who had given a sworn statement to the Houston Police Department, not one of those sworn statements was tape recorded. And yet we know they got the ability. They took a two-hour video tape of Anthony Farias. What did Anthony Farias have that was so important that they videotaped it and why isn't he here to testify?

39 RR 92-93.[31]

Mr. Brown was sentenced to death on November 22, 1993. 40 RR 150-55. This Court affirmed Mr. Brown's conviction and sentence on December 18, 1996. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. Dec. 18, 1996) (not designated for publication). The United States Supreme Court denied certiorari on October 20, 1997. *Brown v. Texas*, 522 U.S. 940 (1997).

D. Mr. Brown's Prior Postconviction Efforts Casting Serious Doubt on the Integrity of Mr. Brown's Conviction and Sentence

Mr. Brown filed his initial application for a writ of habeas corpus on March 26, 1998, through his then-counsel Alex Calhoun. Inexplicably, the HCDAO did not file an answer until nearly four years later on April 24, 2002. This application raised

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[31] Trial counsel noted that police reports indicated that there existed a videotape of Anthony Farias and used that fact to cast doubt throughout the trial. *See, e.g.*, 35 RR 32 (Cross of Officer Garcia: "Q: Did you videotape any other witnesses? A: No, I think that was the only one.").

several undeveloped grounds for relief and was denied by the 351st District Court on August 31, 2007, without an evidentiary hearing. This Court agreed with the district court's finding and denied relief on this application on June 18, 2008. *Ex parte Brown*, No. WR-26,178-02 (Tex. Crim. App. June 18, 2008).

On January 1, 2009, Mr. Brown sought relief in federal district court through his original state habeas counsel, Alex Calhoun, joined by attorney Paul Mansur. Mr. Brown's federal habeas petition was denied on February 28, 2011. *Memorandum and Order* (ECF 31), *Brown v. Thaler*, No. H-09-74, 2011 WL 798391 (S.D. Tex. Feb. 28, 2011). The Fifth Circuit denied Mr. Brown's request for a Certificate of Appealability (COA) on June 12, 2012. *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012).

On October 29, 2014, Mr. Brown filed his first successive application for Article 11.071 relief. *See* Subsequent Application for Writ of Habeas Corpus, Filed in Accordance with Article 11.071, Section 5, Texas Code of Criminal Procedure, *Ex parte Brown*, WR-26,178-03 (Tex. Crim. App. Oct. 29, 2014). In this application, Mr. Brown raised claims that (1) the state's firearms expert at trial, C.E. Anderson, provided false or misleading testimony about the bullets recovered from the autopsies "matching" two guns that the HCDAO attributed to Mr. Brown and his co-defendants, (2) that surviving victim and state's eyewitness Nicolas Cortez provided false testimony in his identification of Mr. Brown, (3) that the HCDAO withheld a

report from the Tuscaloosa Police Department (TPD) describing potential alternative perpetrators in a blue van "bragging" about committing murders in Houston within days of the Brownstone murders in 1992, and (4) a claim of ineffective assistance of counsel at the penalty phase of Mr. Brown's trial.

This Court authorized and remanded Mr. Brown's first claim centered on the false testimony of the State's firearm expert, C.E. Anderson, to the 351st District Court. *See* Order, *Ex parte Brown*, WR-26,178-03 (Tex. Crim. App. Oct. 28, 2015). During an evidentiary hearing on October 11, 2016, Mr. Brown presented evidence from two firearms examiners, Edard Love, Jr. and Donna Eudaley, reflecting that the two weapons allegedly connected to Mr. Brown and his co-defendants, the .357 Smith & Wesson and the .38 Charter Arms, were excluded or inconclusive upon re-testing the ballistic evidence. On December 19, 2016, J. Mark Kent Ellis adopted Mr. Brown's Findings of Fact and Conclusions of Law (FOFCL) and recommended that relief be granted on his false testimony claim. Order, *Ex parte Brown*, No. 636,535-B (351st Dist. Ct. – Harris County, Dec. 19, 2016).

This Court rejected the district court's recommendation of relief in a per curiam order on October 18, 2017. *See Ex parte Brown*, WR-26,178-03 (Tex. Crim. App. Oct. 18, 2017) (unpublished). Although this Court assumed the falsity of the ballistics evidence presented in Mr. Brown's trial, it denied relief citing Mr. Brown's legal liability under the law of parties, and remaining evidence against him – the

eyewitness identification of Rachel Tovar and Mr. Brown's sister alleged statement to police. *Id*. at 4 ("But even if we assume the falsity of Anderson's testimony about his ballistics testing results . . .). Justice Alcala dissented, making the following observation:

> "Anderson testified that he could 'say absolutely' that EB1 and EB3 were fired from the Smith & Wesson and that EB2, EB5, EB6 and EB8 were fired from the Charter Arms. At the habeas hearing, evidence was presented and the habeas court determined that no evidence supports these conclusions made by Anderson."

See id. (Alcala, J., dissenting) (published). On October 15, 2018, the United States Supreme Court denied certiorari. *Brown v. Texas*, No. 17-7929 (Oct. 15, 2018).

E. Mr. Brown's Current Representation

In 2022, the HCDAO sought Mr. Brown's execution. Subsequently on May 13, 2022, Mr. Brown's then-counsel, Paul Mansur notified the 351st District Court that he could no longer represent Mr. Brown given that the State was seeking an execution warrant. On May 25, 2022, the 351st District Court appointed the Office of Capital and Forensic Writs (OCFW) as counsel for Mr. Brown. On August 17, 2022, the district court signed an order for Mr. Brown's execution, setting his execution on March 9, 2023. This timely successive application for a writ of habeas corpus follows.

III. Claims for Relief

A. CLAIM ONE: Mr. Brown is Innocent and His Conviction and Death Sentence are Unconstitutional Under the Eighth and Fourteenth Amendments

Mr. Brown's conviction and death sentence relied on scant and unreliable evidence. The most damning pieces of evidence against Mr. Brown faced considerable challenge at trial, and since then, more information has been developed that undermines Mr. Brown and his codefendants' guilt.

While merits relief on an innocence claim requires proof of clear and convincing evidence, *infra* Section (III)(A)(i), authorization of this claim under Article 11.071 Section 5 requires substantially less. Section 5(a)(2) requires proof by a preponderance of evidence, Article 11.071, Section 5(a)(1) requires only sufficient facts be pleaded to support that the factual or legal bases wasn't previously available, and *infra* Section(III)(A)(iii). As argued below, Mr. Brown can demonstrate his innocence by clear and convincing evidence, or alternatively, can demonstrate that his claim relies on factual bases not previously pleaded, or in the alternative, can establish by a preponderance that his claim should be authorized for further factual development of the merits of his innocence.

i. Executing an Innocent Person Violates the Eighth and Fourteenth Amendments

This Court has held that "[i]ncarceration of an innocent person offends federal due process, therefore a bare innocence claim raises a constitutional challenge to the

conviction." *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002). Such a claim is cognizable in habeas proceedings in Texas. *Id*. (citing *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996)). Under *Elizondo* and progeny, an incarcerated person "must prove by clear and convincing evidence that no reasonable juror would have convicted the applicant in light of the new evidence." *Id*. (citing *Elizondo*, 947 S.W.2d at 209). This standard requires the convicting court to "weigh[] the evidence of the applicant's guilt against the new evidence of innocence." *Id*. (citing *Elizondo*, 947 S.W.2d at 207).

ii. Mr. Brown is Innocent

Meeting the *Elizondo* standard requires the production of new evidence followed by a reweighing of all the relevant evidence. Several pieces of evidence that support Mr. Brown's innocence have been pleaded here for the first time. This new evidence includes the videotaped statement of Anthony Farias, *see infra* Section (III)(A)(ii)(a), the suppressed information about Rachel Tovar's serious memory issues following the shooting, *infra* Section (III)(A)(ii)(b), the new report of Dr. Jennifer Dysart, an expert in eyewitness identification, whose work significantly undermines the already dubious eyewitness identifications in this case, *see infra* Section (III)(A)(ii)(c), as well as the supporting declarations of individuals in Alabama with knowledge implicating individuals other than Mr. Brown and his co-defendants in these crimes, *see infra* Section (III)(A)(ii)(d). This new information,

coupled with the weakness of the trial evidence, the completely discredited firearms analysis, *infra* Section (III)(A)(iii)(a), and the repeatedly disavowed statement of Mr. Brown's sister Carolyn Momoh., *infra* Section (III)(A)(iii)(b) – presents a compelling case for Mr. Brown's innocence that this Court should allow him to develop further.

a. Anthony Farias' Statement Connects Trial Counsel's Alternative Suspect Terrell Hill to the Tovar Family & the Brownstone Murders and Impeaches Rachel Tovar

The videotaped statement of Anthony Farias, which the HCDAO suppressed from his trial counsel in violation of Mr. Brown's *Brady* rights, *see infra* Section (III)(B) (*Brady* claim), provides new and significant exculpatory evidence. This video identifies trial counsel's alternative suspect – Terrell Hill – as "Red," rather than Marion Dudley as one of the assailants.[32] This identification is exculpatory to Mr. Brown because Mr. Brown has no connection to Terrell Hill and it has been undisputed that he was with Marion Dudley both before and after the crime. It further provides impeachment information regarding Rachel Tovar's ability to process and recall information, and more generally casts doubt upon the HCDAO's

[32] Mr. Brown notes that Marion Dudley has already been executed for this crime that he had long maintained his innocence of. Mr. Brown notes that he requested a copy of Marion Dudley's file from the HCDAO in addition to Mr. Brown's file, and it was produced in Mr. Brown's file but not Mr. Dudley's file. It is possible that Marion Dudley was executed without access to this videotaped statement.

theory of the case, and even provides other potential alternative suspects who may have been involved with Terrell Hill in the Brownstone Lane murders.

Notably, when Rachel Tovar was first interviewed at the hospital immediately after the shooting, she gave a description of three black men none of whom were similar in appearance to Mr. Brown. Then, in two subsequent videos she said her assailants were "Red" and "Squirt" and that she did not know their real names. *But see* Section (III)(A)(ii)(b) (new evidence of Rachel Tovar's serious memory issues).[33] Indeed, in her only *recorded* interview, she said that she did not know the men that shot her, but that she thought she heard the nicknames "Red" and "Squirt," App. at 6, but it is unclear wherefrom (if she heard it from the police or during the crime). In her recorded interview, she also states that [her son] Anthony would know them and suggests he might know them better than she would, App. at 8, 11.

Anthony Farias spoke with the OCFW and said he remembers being with his mother at the hospital while police are present and speaks to her. App. at 247. Then, only a few hours after Rachel Tovar told HPD officers that Anthony would know who "Red" and "Squirt" are, the police formally interviewed him. HPD officer Felix Garcia interviewed Anthony on June 21, 1992, less than 24 hours after the

[33] There is no indication that trial counsel were informed of Rachel Tovar's serious memory issues. They did, however, suspect that the officers may have suggested the names Red and Squirt to Rachel Tovar through questioning by the time she got to the third interview. *See, e.g.,* 27 RR 306 (trial counsel questioning Officer Carroll, who interviewed Rachel Tovar before the recorded interview, if he suggested those names to her).

Brownstone Lane murders. App. at 16. According to Garcia's report, the interview lasted from 1:30 until 3:30 p.m. In the videotaped statement, Officer Garcia asks Anthony if he knows Jazz (Jasper Finney), as well as individuals named "Red" and "Squirt." Immediately upon talking about them, Anthony says "Red, his name is Terrell. . . . I remember his name is Terrell." App. at 25.

Throughout his interview, Anthony repeats again and again that "Red" is Terrell. *See, e.g.,* App. at 26; 89 ("Investigator Garcia: Do you know Red's real name? Any part of it? Mr. Farias: Terrell. Investigator Garcia: Terrell. Mr. Farias: I know for a fact it's Terrell."). Anthony also noted details about Red that would be inaccurate descriptions of Mr. Dudley. For example, he said that Red "stays in Florida," App. at 44, but there is no such evidence that Mr. Dudley had ever been to Florida. He also reported that Red had "long scars" on his finger, which was never proven or even alleged to be an accurate description of Mr. Dudley. App. at 89.

Anthony's statement was exculpatory not only because it identified Terrell as one of the perpetrators, but it also contained information that did not describe Mr. Brown. Anthony said that Red/Terrell and Squirt were brothers, App. at 26, when Mr. Brown and Mr. Dudley – whom the HCDAO claimed was "Red" – were not related at all, by blood or marriage. Anthony also recounts that "Red and Squirt stopped working together" in drug dealing and "went their own ways." App. at 26, and expressed extreme confusion at the idea that Red/Terrell and Squirt would be

together; for example, when Anthony found out Red/Terrell and Squirt were supposedly together at Brownstone Lane, he explained:

> That's why I tripped out, man. That's why – see, because him and Squirt ain't supposed to be working together. They're brothers, but they had left each other. And then all sudden the time they come, my mom should have snapped, hey, look at these two motherfuckers working are together now. What's the deal?

App. at 117; *see also* App. at 118 (Anthony: "Why they're working together? They're not supposed to be working together. What's the deal?"). This description does not characterize Mr. Brown and Mr. Dudley, who had no such falling out, and were together, by all accounts, all day before and after the homicides. Moreover, while Anthony gave a fairly general description of who Squirt was, he noted several physical characteristics that do not match Mr. Brown. For example, Anthony noted that the Squirt of whom he was speaking "always had on a jacket" and agreed it was "like a windbreaker," affirming "he always had a different color windbreaker." App. at 92. Anthony also said that this Squirt was "[a]bout 7', 7'1" tall and that he "had a flattop" haircut. App. at 119. None of these descriptions are accurate characterizations of Mr. Brown.

Additionally, although the HCDAO's theory of the case was that Mr. Brown and his co-defendants committed a robbery of the Tovars, Anthony Farias' statement clearly supports alternative theories – including theories that directly supported trial counsel's theory of what transpired, *i.e.*, Terrell Hill, Jasper (Jazz) Finney, Raylon

Johnson, and/or LaCedric Jones were responsible for the Brownstone Lane murders rather than Mr. Brown and his co-defendants. Specifically, when Anthony was asked about LaCedric and Raylon coming to Brownstone Lane on June 21, 1992, the morning after the homicides, he told Officer Garcia: "I think they were trying to set me up. . . . I thought since they got their people, they knew I was going to try to get them back . . . they told mom to meet me. You know, I was supposed to meet Jazz at noon, and they were going to try to set me up." App. at 31. When asked by Officer Garcia if he thought that they were going to kill him, he agreed that he did. *Id.* Anthony was clear and persistent about his belief that other drug dealers in Alabama were involved, saying "I think [Raylon and LaCedric are] involved, too, and I think Jazz is involved, and I think they all worked together." App. at 34.

At other points, Anthony seemed to suggest that Rachel initially told him that Red/Terrell could have done the murder alone, without Squirt:

> Investigator Garcia: Did you mom say who was carrying the pistols? Did she see them?
> Mr. Farias: All she told me was Red did it.
> Investigator Garcia: Red did it. What –what did she mean by that, Red did it.
> Mr. Farias: She kept on telling me, Red did it. Red did it.
> Investigator Garcia: Red did it. Red set us up. Red shot us.
> Mr. Farias: Red shot us. Red fucked us over.

App. at 136.

> Investigator Garcia: Ok. What do you think she meant by, Red did it.
> Mr. Farias: She meant Red shot them.
> Investigator Garcia: Okay. We need to find out for sure.

Mr. Farias: She just kept on telling me, Red did it. Red did it.

App. at 138.

Anthony also referred to other drug dealers that could have had motivation to harm his family, potentially in conjunction with Terrell/Red. For example, he referred extensively to the fact that his family was in a feud their former friend, Reuben, whom he said had introduced Red to Rachel Tovar. *See, e.g.*, App. at 107 (noting his family "tried to kill [Reuben] a couple of times"); App. at 99 (Anthony noting "I could have shot him but I didn't go that far"); *see also* 31 RR 236-37 (Rachel Tovar's testimony that the Tovars had met Red through a man named Reuben in their neighborhood, who her sons all knew). Anthony also states in his videotaped statement that Cedric and Red/Terrell bought drugs from another Houston area drug dealer before they started to buy from the Tovars – namely, Mr. Mata. App. at 44.[34]

Anthony Farias' videotaped statement also impeached Rachel Tovar's credibility. Throughout his interview, Anthony emphasized that it was his mother Rachel, not his stepfather Jose, who was meeting with and selling directly to drug

[34] The transcript mistakenly transcribed the name given as "Mr. Mike," but in the audio, you can clearly hear Mr. Farias say "Mr. Mata." Moreover, Mr. Mata is a real person – in 2023, Anthony Farias told the OCFW about a years long drug war between the Mata family and the Tovars, stemming from Mr. Mata being upset that the Tovars started selling drugs in his territory while he was incarcerated. Anthony Farias also remembered that Mr. Mata used to sell to people from Alabama, which could have included Terrell Hill or any of the alternative suspects that had motivations to pin this homicide on Mr. Brown and his co-defendants.

dealers in part because she was bilingual. *See, e.g.*, App. at 37-38 (Noting that Rachel was first introduced to Red and only then did Rachel and Red start working with Jose); App. at 105 (Noting introduction to Rachel only); App. at 97 (noting "mom knew Reuben and Reuben knew he can get it from my mom"); *see also* App. at 99 (noting Rachel was "getting to close" to Reuben selling drugs). Even Officer Garcia assumed Rachel had a primary role in the drug dealing, and Anthony seemed to agree. *See, e.g.,* App. at 44-45 (Garcia: "Do you know who they got their dope from before your mom? . . . Anthony: "That's who else he would get it from besides my mom."). Anthony even described an instance where Red had "tried to go to my mom one time with – with the people she was getting it from," ascribing to her a central role in the drug dealing. App. at 45.

Anthony Farias' long-withheld statement is significant new evidence that both implicates Terrell Hill in the Brownstone Lane murders and impeaches Rachel Tovar's version of events and her credibility. It also discredits the HCDAO's weak theory of the case that Mr. Brown and his co-defendants robbed their own suppliers, the Tovars, from whom they were making significant money from dealing drugs, and implicates others who might have more significant motive to harm the Tovar family, including Reuben and a separate drug dealer in Houston, Mr. Mata. Because it discredits the State's theory, impeaches its primary witness, and implicates another individual, Terrell, in the homicide, it supports Mr. Brown's innocence.

b. The State's Key Eyewitness, Rachel Tovar, Had Significant and Suppressed Issues with Her Memory at the Time She Allegedly Implicated Mr. Brown and His Co-Defendants and When She Testified

At trial, the HCDAO's case rested heavily on the testimony Rachel Tovar. In closing argument, the HCDAO focused on her identification of Mr. Brown, and her alleged prior knowledge of him. 39 RR 116 ("And what you need to remember is Rachel Tovar knows Arthur Brown. She knows Marion Dudley but she doesn't know Antonio Dunson."). The State used this identification to discount the alternative suspects the defense presented. *See, e.g.*, 39 RR 117 ("Arthur Brown, she tells you, not somebody she never seen before. Not Marcus [Terrell] Hill, not anybody else but Arthur Brown. . ."); 39 RR 119 ("[S]he told them . . . it's Squirt and Red. It's not Joe and Fred and Marcus and whoever else Raylon and Le Cedric [sic]. It's Squirt and Red[.]").

But the effects of Rachel Tovar's head injuries were significant and had they been known to counsel, would have enabled counsel to effectively challenge the HCDAO's narrative that Rachel Tovar was able to identify Marion Dudley and Arthur Brown *as the perpetrators of the homicides* as opposed to as men she had seen earlier in the day. Her recall of the murders was so damaged that she was wildly wrong about some facts, uncertain about others – and counsel might argue – therefore extremely susceptible to suggestion. Rachel Tovar's own sons acknowledge Rachel's impairments. Her son Anthony Farias told the OCFW:

> Mr. Farias told me that he went to visit his mother at the hospital as soon as he could. He told me that he was so scared. When he arrived, Mr. Farias said that his mother was confused and out of it. She told him, "Anthony is dead!" She didn't recognize that he was standing in front of her. Mr. Farias told me that his mother kept saying "Everyone is dead."
>
> Mr. Farias stated that when he visited his mother in the hospital, he asked her what happened, but she told him she had blacked out during the shooting and could not remember anything. Mr. Farias told me that his mother did not remember what had happened or who had shot her.

App. at 247.

Rachel's eldest son, Amador Farias gave a similar report of his mother's condition: "As soon as I heard about [the shooting], I rushed back to Houston. I went to see my mother at the hospital. She was hurt badly. She was out of it and she couldn't even see me. She kept asking where is Frank? Where is Frank? There were police around at the hospital." App. at 179.

This information from Rachel Tovar's sons is corroborated by the statement Rachel Tovar made at 9:40 a.m. on Sunday, June 21st, at which point she told police that she did not know who committed the murders and had previously only heard nicknames (and it is unclear where or when she heard them). *Cf.* App. at 2 (Rachel: "I don't know who they were."); *id.* at 6 (noting she has heard the nicknames Red and Squirt before). The confusion she expressed in this interview may well have been exacerbated by police interviews that suggested names to her in this very

vulnerable state – which would explain why she would initially say she recognized no one and then later express certainty that it was Mr. Dudley and Mr. Brown.

Nor were these impairments temporary. Anthony Farias reported to the OCFW that Rachel Tovar's memory issues did not resolve when she left the hospital:

> Mr. Farias told me that his mother was not the same after the shooting. Mrs. Tovar forgot things, including items in her household that she had owned for many years. Mr. Farias also said that his mother had trouble recognizing and remembering her own grandchildren.

App. at 247. If Rachel Tovar could not recognize her own grandchildren, it seems highly unlikely that she would recognize an acquaintance. Moreover, Anthony Farias recalled not only his mother's continued memory issues, but that the prosecutors knew about those memory issues and needed to have a significant number of meetings with her to prepare her to testify because of those issues. Anthony told the OCFW:

> Mr. Farias told me that his mother was not the same after the shooting. Mrs. Tovar forgot things, including items in her household that she had owned for many years. Mr. Farias also said that his mother had trouble recognizing and remembering her own grandchildren.
>
> [The OCFW] learned from Mr. Farias that his mother had ongoing health problems as a result of the shooting. Mr. Farias told me that his mother's physicians informed him that Mrs. Tovar had suffered brain damage and memory loss. Mr. Farias stated that his mother began experiencing seizures after the shooting, and he had to take her to many doctors.
>
> Mr. Farias said that members of the Harris County District Attorney's Office knew about his mother's memory problems. Mr. Farias told [the OCFW] that employees of the District Attorney's Office visited his

> mother over and over, both while she was in the hospital and after she had returned home. Mr. Farias said he lived with his mother after the murders, and he was in her presence daily.

App. at 247.

Not only did the HCDAO know about the memory issues that Rachel Tovar was having, but they also received her medical records from Ben Taub Hospital on or about October 3, 1993,[35] before Mr. Brown's guilt phase of his capital trial began. These records reflect that Rachel Tovar was admitted on June 20, 1992, with a gunshot wound, and a CT scan completed revealed that her gunshot wound pierced her scalp, causing an underlying skull fracture in the back of her head and leaving brain damage underneath to her occipital lobe. App. 494. The occipital lobe is responsible for visual perception, which is related to an individual's ability to judge faces. The fact that Rachel Tovar has damage to this area is of great concern for her ability to serve as an accurate or reliable eyewitness. Moreover, her sons in 2023 indicated she had trouble seeing them when they were at the hospital visiting her immediately after the shooting, and that information is very corroborative of the brain damage her medical records indicate.

Likewise, it is important to note that the temporal lobe is right next to the occipital lobe in the brain, and damage to one is likely to affect the other. And

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[35] This is the date of the business records affidavit attached to the medical records for both Nicolas Cortez as well as Rachel Tovar.

importantly in this case, damage to the temporal lobe causes seizures. This, too, corroborates her son Anthony's report that she has had recurrent seizures since the shooting.

Admission nots for Rachel Tovar also indicate that she was confused on her admission – for example, she reported to nurses that she was separated from her husband, had 5 grown children, lived in an apartment paid by her husband who only comes by occasionally to give money to her and allowances to her children. App. at 499. At the time of the crime, however, she had two young daughters, Anthony Farias was only 15, and Frank Farias was only 17. Additionally, she lived in a house, not an apartment. This appears to be the exact kind of confusion her sons described about her at the time they visited her in the hospital after the shooting.

The CT scan that revealed the brain damage also noted that large metallic foreign bodies were still in her head, and a radiology report confirmed that they were multiple bullet fragments. App. 495. She was discharged on June 26, 1992, with instructions to follow up in the neurosurgery clinic, though these records were not included.

Moreover, her records reflect that secondarily she was being cared for acute emotional and psychological trauma, another fact not disclosed to the defense, despite the HCDAO's assurances they would do exactly that. App. at 497; *see also* 4 RR 54-56 ("The Court: Okay. That's one angle of impeachment. Another one

might be any psychological, psychiatric hassles that any of your witnesses maybe have had. Ms. Brown: I have no information of that, but I will discuss it with each witness before they take the stand.").

These materials were not given to trial counsel under the existing discovery order[36] and were disclosed to the OCFW for the first time on February 28, 2023, after the OCFW had sought these records repeatedly for several weeks. Importantly, these records corroborate both of her sons' accounts that Rachel Tovar had memory problems for years, seizures, and that she could not tell who they were when they visited her, because her records reflect that she had brain damage to the part of her brain involved in controlling her eyesight. These undisclosed medical records reflecting serious trauma that supports exactly the kind of effects that her son, Anthony Farias, corroborates, significantly undermine her eyewitness account and the three interviews police conducted of her in the less 12 hours from the time she became brain damaged.

Thus, this previously suppressed information from Rachel Tovar's son's undermines Rachel Tovar's identification and testimony in Mr. Brown's case,

[36] The discovery order entered by the trial court noted that for defense counsel's request for "[m]edical records or reports of any victim or witness which may be used as evidence to show the physical condition of the complainant(s) at or about the time of the alleged offense" that they would only be given "autopsy reports" (handwritten). CR at 51.

supports Mr. Brown's innocence, and establishes the complicity of the HCDAO in misleading the jury.

c. The State's Second Eyewitness Nicolas Cortez Had a Head Injury That Likely Affected His Cognitive Functioning and the State Suppressed His Medical Records

Not only did the HCDAO suppress serious and concerning issues about the memory and brain damage of their eyewitness Rachel Tovar, *see supra* Section (III)(A)(ii)(b), but the HCDAO likewise suppressed evidence that their second surviving witness eyewitness, Nicolas Cortez, also had head injuries that likely affected his cognitive functioning.

Like with Rachel Tovar's records, the HCDAO received Cortez's medical records from Ben Taub Hospital on or about October 3, 1993. These records reflect that Cortez was admitted on June 20, 1992, with a gunshot wound to his head. On admission providers noted that his pupils were dilated 2mm and reactive on the left, and 3-4mm and reactive on the right. App. at 152. On June 21, 1992, Cortez was opening his eyes and was not able to follow commands. App. at 148. Cortez was also having generalized seizures. He was intubated for at least 4 days, until June 24, 1992, and potentially was having trouble getting oxygen to his brain, as the same medical providers noted he had a faint pulse and was cold and clammy to the touch, and other similar symptoms throughout. A CT scan of his head and spine was completed. App. at 146. These reveal that Mr. Cortez had bullet fragments, the

largest of which fractured his C2 vertebra and his "formen transversarium in which runs the vertebral artery." *Id*. This this artery was damaged. However, after consultations with specialists, the Ben Taub doctors decided not to repair the artery, because a scan revealed that the other vertebral artery was small and the act of repairing the damaged artery could have caused stroke and further damage. So instead, they decided to monitor Mr. Cortez's symptoms for several more days and discharge him with a follow up appointment. He was discharged on July 1, 1992, with instructions to follow up with a neurosurgery clinic in two weeks' time, but records from that continued care were not included. *Id*. at 153.

To be clear, Nicolas Cortez's injuries were severe, and his presentation, particularly at admission with pupils dilated to different sizes, suggested cognitive issues or trauma. Coupled with his ongoing presentation of lacking oxygen, likely to his brain, there is considerable cause for concern about his head injury and his ability to remember the events that induced that trauma.

Again, as with Rachel Tovar's records, these materials were not given to trial counsel under the existing discovery order and were disclosed to the OCFW for the first time on February 28, 2023 after multiple attempts to get them from the HCDAO. These undisclosed medical records are shocking. Cortez's head injury and injuries significantly undermine his eyewitness account and testimony.

d. New Eyewitness Expert Evidence Supports that the Eyewitness Testimony In this Case Was Unreliable

Three individuals identified Mr. Brown, two of whom were surviving victims of the shooting at Brownstone Lane (Rachel Tovar and Nico Cortez), and one who had been at the house earlier in the day (Daniel Leija). The State's closing argument heavily stressed the identifications of the two surviving victims, Rachel Tovar and Nico Cortez. *See* 39 RR 117 ("Then what does [Rachel Tovar] see? Arthur Brown, she tells you, not somebody she never seen before."); 39 RR 122 ("Nicholas Cortez tells you that when he arrived at the house he was met at the door by Arthur Brown . . . Nicholas Cortez has no reason in this world to come in here and lie to you."). After recounting all three identifications, Ms. Brown concluded her portion of the closing argument by saying, "The only people who have ever been identified in this shooting are Arthur Brown, Marion Dudley, and Antonio Dunson." 39 RR 1.

Even setting aside Rachel Tovar's memory issues, *see supra* Section (III)(A)(ii)(b), other new evidence establishes the limited value of those identifications. Eyewitness identification expert Dr. Jennifer Dysart's opinion demonstrates the unreliability of the identifications of all three witnesses. App. at 187.[37] Dr. Dysart was particularly concerned with the suggestiveness of the photo

[37] The OCFW received copies of Rachel Tovar and Nicolas Cortez's medical records after Dr. Dysart had completed her expert report. Although Dr. Dysart's report does not make reference to these records, they certainly further undermine the reliability of both witnesses' memory, eyewitness reports and identifications.

arrays and the bias it caused, which ultimately undermined the in-court identifications of Mr. Brown:

> In summary, with respect to the photo array used in this case, there was a strong bias created toward the selection of Mr. Brown, regardless of whether or not he was one of the perpetrators. ***After viewing him in an unnecessarily suggestive procedure, the results of any subsequent procedure (e.g., in-court identification) are relatively meaningless*;** the bias from the first suggestive procedure renders any follow-up procedure's outcome irrelevant for the purposes of determining witness accuracy.

App. at 209 (emphasis added).

The fact that these in-court identifications were undermined is significant because one of the eyewitnesses could not select Mr. Brown from the photo array at all (Nico Cortez). Her overall conclusion is instructive:

> 84. In this case, with respect to all three testifying witnesses who selected Mr. Brown, Rachel Tovar, Nicholas Cortez, and Daniel Leija, many estimator and system variables shown to decrease eyewitness reliability were present, together resulting in conditions that tend to result in unreliable identification decisions.

App. at 189.

It is important to note on the outset that while Nicolas Cortez and Daniel Leija did make identifications of Mr. Brown at trial, their identifications were deeply compromised. As Dr. Dysart noted, Ms. Tovar was the key eyewitness:

> 14. Ms. Tovar was the only witness who testified at trial that positively selected Mr. Brown from the suggestive photo array, and she did so after previously providing a description of the perpetrator that does not match Mr. Brown's physical characteristics. Of the two other witnesses who testified at trial, one [Daniel Leija] tentatively selected Mr.

> Brown's photo after first selecting another lineup member, and the other [Nicolas Cortez] did not select him at all from the photo array.

App. at 189.

Dr. Dysart details at length the multitude of issues with each of the identifications, finding:

> 17. It is my opinion that there were a sufficient number of estimator and system variables present that make it unlikely that the selection of Mr. Brown by Rachel Tovar was reliable. Her selection likely was affected by several estimator variables including having a limited opportunity to see the perpetrators at the time of the crime (and the effects of exposure time, poor lighting, and weapon focus), change blindness and prior familiarity, the effect of stress/arousal, and cross-racial identification. The reliability of Ms. Tovar's selection of Mr. Brown also was likely compromised by system variables such as post-event contamination, description accuracy, photo array bias, pre-identification warnings/instructions, non-blind lineup administration, repeated identification procedures, unconscious transference, and commitment effects.
>
> 18. It is my opinion that there were a sufficient number of estimator and system variables present that make it unlikely that the selection of Mr. Brown by Nicholas Cortez was reliable. Specifically, the estimator variables that likely affected Mr. Cortez's selection included his limited opportunity to see the perpetrators (including exposure time, poor lighting, and weapon focus), the effects of stress/arousal, and cross-racial identification. Mr. Cortez's selection was also undermined by the presence of system variables such as post-event contamination, description accuracy, photo array bias, non-blind lineup administration, repeated identification procedures, unconscious transference, and commitment effects.
>
> 19. It is my opinion that Daniel Leija's selection of Mr. Brown was likely unreliable, even in comparison to the other witnesses in this case. Mr. Leija's selection likely was unreliable due to the presence of estimator and system variables including his limited opportunity to see the perpetrators (including exposure time and poor lighting) and cross-

> racial identification. The system variables present that undermined Mr. Leija's selection included post-event contamination, description accuracy, photo array bias, pre-identification warnings/instructions, non-blind lineup administration, repeated identification procedures, unconscious transference, and commitment effects, lack of witness confidence, and post-identification feedback.

App. at 190.

That Rachel Tovar was the only witness to positively identify Mr. Brown from the photo array shortly after the crime is significant, because "the likelihood of error is increased by the discrepancies between the first reports given by the witnesses, which are generally the most reliable, and their later selections of Mr. Brown." App. at 190. Daniel Leija testified that he didn't recognize anyone when he first was given the photospreads, and that for 30 minutes – a very long time – he "sat there and looked with the officers that was sitting next to [him]" until he felt like he recognized someone. 30 RR 183.[38]

e. New Information from Witnesses Supports Mr. Brown's Innocence

The discovery of the Anthony Farias videotaped statement dovetails with other information developed regarding Terrell Hill – who was killed in Tuscaloosa trying to rob a crack house. Trial counsel's theory that Terrell Hill was involved in

[38] Even the trial court noted at the time of Mr. Leija's testimony that he was "concerned that [Mr. Leija's] testifying from the State's side as to his identification of Mr. Brown" and granted a motion in limine to suppress the identification. 30 RR 196. The in-court identification of Mr. Brown, however, happened before the issue of the photo spreads were addressed by the court. Ultimately the jury hears about the photo spread because defense counsel used it on cross-examination.

this homicide, coupled with Anthony Farias' beliefs that multiple people in Alabama were involved, were expanded on with witnesses with knowledge.

Details from the Anthony Farias videotaped statement are consistent with Terrell as the perpetrator – and not Mr. Brown or Mr. Dudley. In his videotaped statement, Anthony says that he believed that Red robbed his family because he "always bragged about himself" and he "want[ed] money and the power." App. at 115. This description melds well with others' knowledge of Terrell. For example, Terrell Hill was known for robbing people, and particularly other drug dealers. *See, e.g.*, App. at 169 ("[Terrell] watched all those gangster movies like New Jack City and Scarface, and he wanted to be like them. He robbed other drug dealers, even his friends."); App. at 162 ("There are laws in the streets, there are certain things that people know that you just can't do. Everyone else knew that there were things you just didn't do. But Terrell robbed people, especially other people selling drugs."); App. at 155 ("Terrell Hill was known for stealing from people. One time, Terrell ran off with some of my money."). Terrell was also known to be violent. App. at 161 ("Terrell was a troublemaker and was real violent. Terrell was doing drivebys, I remember him driving by me and my friends on the streets and shooting at us. He came to the club we hunt out at and started fights."). A physical characteristic of Red described by Anthony – that Red had "some long scars on his fingers, App. at 89 –

that was corroborated with a description of Terrell. App. at 155 ("Terrell Hill had a scar on his left hand, including on one of his fingers, from a motorcycle accident.").[39]

Similarly, while Mr. Dudley and Mr. Brown never had a falling out as Anthony described, Terrell did have a massive falling out with someone close to him that he used to sell drugs with. App. at 170 ("Terrell and Joe [Winters] had a falling out."). Others were also able to confirm that Terrell and multiple people he was close with were in Houston on the weekend of the Brownstone Lane murders. App. at 170 ("I learned that there were 8 or 10 guys from Tuscaloosa down in Houston that weekend [of the murders]. LaCedric Jones and a guy named Raylon, and Terrell and Jerry White were all in Houston that weekend. I heard [Terrell] was involved[.]").

Terrell also had close friends who were tall and wore windbreakers, just like Anthony Farias reported in his videotaped statement. App. at 166 ("I remember that there was a tall guy who hung out with [Terrell] from Oak Street. He wore windbreakers and tearaway pants. It was noticeable, because guys who are tall like that can't buy clothes at the regular store."). Terrell and Mr. Brown, however, were never friends or associates of each other. App. at 158 ([Mr. Brown] didn't hang out with or deal with Terrell.").

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[39] Similar examples of violence were pointed out about some of the other potentially implicated drug dealers, such as Cedrric Jones. *See, e.g.,* App. at 155 ("Ced was a violent guy. Ced stabbed me one time."); App. at 159 ("Ced was a rowdy guy. Ced was known to pull a gun on somebody in a minute without a real reason."); App. at 164 ("[Ced] started doing cocaine. Ced became paranoid, unpredictable, and violent. . . . I wouldn't get into the car with him. I couldn't trust him to not to try to hurt me.").

Individuals remembered that "Squirt" was also a common nickname in Tuscaloosa, not particularly limited to Mr. Brown. App. at 161 ("There are a few other guys who go by that nickname [Squirt]. If I hear someone tell a story about a Squirt, I would need more information to make sure I know who they are talking about."); App. at 158 ("Squirt is a common nickname in Tuscaloosa. Off the top of my head, I can think of a few other people who went by Squirt. One I can think of it an order man Squirt, probably 55 or 56 years old now. There are also some younger kids who go by the nickname 'Squirt'"); App. at 170 ("I knew other Squirts in Tuscaloosa").

Individuals denied that "Red" was Marion Dudley at all. For example, one said "[Mr. Brown] was friends with Marion Dudley, who goes by 'Dud.' I have never known Dud to go by the nickname 'Red.'" App. at 158; App. at 164 ("I only ever called Dudley 'Dud.' I don't remember Dud having any other nicknames.").

Many individuals who have little to no connection to Mr. Brown have long doubted that Mr. Brown or his co-defendants were involved. App. at 167 ("I never thought [Mr. Brown and his co-defendant's arrests] made any sense, because Dud [Mr. Dudley] was making so much money off his connections down there. It didn't make any sense for him to kill them. Dud wasn't someone who would do that unprovoked and he wasn't someone who just robbed people for no reason like Terrell or some other guys."); App. at 158 ("I don't believe that Dud, [Mr. Brown] and Tony

had anything to do with the Brownstone murders in Houston. Most people in Tuscaloosa don't believe that. Everyone in Tuscaloosa says that LaCedric Jones and Terrell Hill committed the Brownstone murders. I also heard that Jasper Finny, who goes by "Jazz," was in on it.").

iii. Weighed Against Scant Evidence of Guilt, Mr. Brown Proves His Innocence by Clear and Convincing Evidence

Mr. Brown's new evidence, outlined above, bolsters the alternative suspect theory he presented at trial, impeaches Rachel Tovar both specifically with respect to her eyewitness identification and generally with respect to her credibility, impeaches Nicolas Cortez with respect to his eyewitness identification, and also undermines the already-shaky eyewitness identifications by Mr. Cortez and Mr. Leija. With those materials discredited, very little evidence of guilt remains, and no unimpeached evidence of guilt. Little forensic testing was done in this case (due to police failure to collect and process it), and the only forensic evidence that was presented – firearm analysis – was demonstrated to be false in prior post-conviction proceedings. Finally, the only other remaining evidence of guilt – Mr. Brown's sister's claim that he made inculpatory statements – has been repeatedly disavowed by her under the penalty of perjury. Each of these are discussed in turn below.

a. No Forensic Evidence Ties Mr. Brown to the Crime

Mr. Brown and his co-defendants were alleged to have committed a bloody murder in the evening on Saturday, June 20, 1992. But no forensic evidence at trial

corroborated their participation and in fact, some testimony contraindicated their participation. Most notably, the van that the men were allegedly driving at the time of the crime did not contain any blood. *See, e.g.*, 29 RR 111-12 (Serisa Brown's testimony there was no blood in the van, Grace Brown's Houston home that Carolyn and Serisa shared, and that she never saw bloody clothing). There was also no blood or bloody clothing in the home the three alleged co-defendants shared. *See* 29 RR 223-24 (Grace Brown's testimony that she did not find any blood in her Houston home or bathroom); 33 RR 156-57, 160 (HPD Officer Leonard Dawson's testimony he did not recover any bloody clothes and did not see anything with blood on it in Grace Brown's Houston home). No fingerprints, hair samples, or biological evidence was tested from the scene. *See supra* Section (II).

The only piece of forensic evidence that purportedly tied Mr. Brown and his codefendants to this crime was the firearms evidence presented through state expert C.E. Anderson. But Anderson's testimony was thoroughly discredited in Mr. Brown's 2014 postconviction application, which resulted in a recommendation for relief from the trial court. *See Ex parte Brown*, WR-26,178-03, *2 (Tex. Crim. App. Oct. 18, 2017) (Alcala, J., dissenting) (published) ("Anderson testified that he could 'say absolutely' that EB1 and EB3 were fired from the Smith & Wesson and that EB2, EB5, EB6 and EB8 were fired from the Charter Arms. At the habeas hearing, evidence was presented and the habeas court determined that no evidence supports

these conclusions made by Anderson."). This Court, though it rejected the recommended of relief, did so on materiality grounds, and did not question the falsity of the testimony.

b. Alleged Statements by Mr. Brown's Sisters Were False

Beyond the discredited ballistics, *see supra* Section (III)(A)(iii)(a), and the now-discredited eyewitness testimony, *supra* Section (III)(A)(ii)(b) & (III)(A)(ii)(c), the State presented very limited additional evidence of guilt. The only other possibly inculpatory evidence linking Mr. Brown to the homicides (as opposed to just drug dealing) came from Mr. Brown's sister, Carolyn Momoh. Carolyn Momoh was originally interviewed by the Tuscaloosa Police Department, and at that time did not report any inculpatory statements by Mr. Brown. However, after she was interviewed by the Houston Police Department for nearly 6 hours, 37 RR 25-26, made to "cry[] hysterically," 37 RR 45, 47, and threatened with having her children taken away from her, 37 RR 48, she signed a statement stating that Mr. Brown told her he was tired of the killings and that he had shot six Mexicans.

But on cross-examination, Ms. Momoh immediately recanted. When asked if Mr. Brown said anything to her about having shot anyone, she said Mr. Brown had not. 37 RR 73. When asked if Mr. Brown made a statement about being tired of all the killings, Ms. Momoh said "He didn't make that statement to me." 37 RR 73. She later reaffirmed that these statements were false to postconviction investigator Lisa

Milstein. App. at 471-72. Likewise, Serisa Brown's statements to police were false. She, too, described being threatened by HPD, until she "finally acquiesced and agreed to a statement prepared by the police giving the facts that they wanted." App. at 468; *see also id*. at 468 (Grace Brown reported that "[HPD] also threatened the sisters that they would be prosecuted if their statements did not match. During the interrogation, the police told her details from her sister Serisa's statement that they wanted her to corroborate . . . Serisa also told [Grace Brown] that she signed her statement in order to get the police to leave her alone."). All three sisters' – and particularly Carolyn Momoh's – statements has been discredited multiple times, and has very little weight in favor of guilt.

c. Mr. Brown's Innocence Claim Meets the Clear and Convincing Standard

Mr. Brown's postconviction proceedings have discredited the only forensic evidence against him (firearms testimony), all three eyewitnesses who identified him (Rachel Tovar's memory issues, unreliable eyewitness identification, and motivation(s) to lie; Nicolas Cortez's undisclosed brain damage and unreliable eyewitness identification; Daniel Leija's unreliable eyewitness identification), as well as any inculpatory statements by his three sisters.

This leaves very little indication of guilt left in Mr. Brown's case – put simply, the only thing left is that he and his friends were seen driving in a van with Alabama license plates that could be identified by individuals around the house, and Mr.

Brown and his co-defendants allegedly attempted to evade prosecution. But Mr. Brown and his co-defendants were young, black men in the early 1990s, who had been buying large quantities of drugs from the very house where a horrific shooting occurred; their desire not to be wrongly prosecuted for that does not a capital murder conviction and death sentence make. Mr. Brown meets his burden by clear and convincing evidence.

iv. Mr. Brown's Claim of Innocence Should be Authorized Under Article 11.071 Section 5(a)(1) or 5(a)(2)

Mr. Brown's innocence claim meets both the article 11.071 Section 5(a)(1) standard and the Section 5(a)(2) standard. Article 11.071, section 5 provides that a subsequent application for a writ of habeas corpus may be considered where "the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application," Tex. Code Crim. Proc. art. 11.071 §(5)(a)(1).

In this case, several critical pieces of new evidence supporting Mr. Brown's innocence previously were unavailable to him: the statements by Rachel Tovar's sons describing her memory impairments, Nicolas Cortez's medical records, much of the research supporting Dr. Dysart's eyewitness identification report. Further, the OCFW first learned of Anthony Farias' videotaped statement when the HCDAO produced a copy of its file in January 2023, and additional investigation information developed as a result of information from Anthony Farias' videotaped statement was obtained diligently could not have been previously raised. Because these factual

bases did not exist at the time of his last pleading in 2014, Mr. Brown could not raise this claim previously and meets the requirements of Article 11.071 Section 5(a)(1).

Alternatively, a successive claim is authorized where "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt," Tex. Code Crim. Proc. art. 11.071 §(5)(a)(2); *see*, *e.g., Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008). To meet this threshold showing, Mr. Brown is not required to prove his claim by clear and convincing evidence, but only a preponderance of the evidence. He has done so: Every piece of evidence inculpating Mr. Brown as a participant in the Brownstone Lane homicides has been discredited.

B. CLAIM TWO: Mr. Brown's Conviction and Death Sentence Were Obtained in Violation of *Brady v. Maryland* and Progeny[40]

Mr. Brown's defense theory at trial clearly depended on connecting Terrell Hill and other Tuscaloosa drug dealers to the Brownstone Lane murders, discrediting both Nicolas Cortez's eyewitness identification and Rachel Tovar's eyewitness identification, in addition to establishing Rachel Tovar as a drug dealer. The HCDAO was aware before trial that defense counsel's alternative suspect theory centered on Terrell Hill, by virtue of the sworn affidavit of trial counsel Patricia Saum supporting her motion for depositions, *see* CR at 208, and an awareness that

[40] Mr. Brown incorporates the facts and arguments from Section (II)(A) (Innocence Claim).

would have been cemented at the start of Mr. Brown's trial by its starring role in the defense's opening statement. 27 RR 44-45 ("[T]he evidence will show you that Terrell Hill was in Houston on June 20, 1992, and again, that Terrell Hill is the person who had both of the [murder] weapons. I anticipate the evidence will show you, there will be testimony that Terrell Hill admitted to doing the killings.").

Nonetheless, the HCDAO withheld from trial counsel information about Rachel Tovar's serious memory issues, Rachel Tovar and Nicolas Cortez's brain damage evident in their medical records, and the fact that Rachel Tovar's son, Anthony Farias, identified "Red" – one of the supposed assailants – not as Marion Dudley, but as "Terrell," in a videotaped statement that also contained additional information impeaching Rachel Tovar and exculpating Mr. Brown and his co-defendants. *See infra* Section (III)(B)(iii).

i. The HCDAO Violated *Brady* and Progeny

Under *Brady v. Maryland*, the State has a duty to disclose exculpatory and impeachment evidence to defense counsel. 373 U.S. 83, 87 (1963). "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. An individual prosecutor, moreover, is obligated "to learn of any favorable evidence known to the others acting on the government's behalf." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This duty

applies, moreover, even when the accused fails to specifically request such evidence. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

A due process violation occurs where (1) the evidence at issue is favorable to the defense; (2) the State or persons acting on behalf of the State failed to disclose this evidence to the defense; and (3) the evidence was "material" to guilt or punishment. *See, e.g.*, *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008); *Ex parte Reed*, S.W.3d 698, 726 (Tex. Crim. App. 2008). Under these prevailing standards, as established below, the HCDAO violated *Brady*.

a. The Undisclosed Evidence was Favorable

The first prong of *Brady* requires that the evidence that was suppressed be favorable – generally, exculpatory, impeaching, or mitigating. The medical records of the only two surviving witnesses, Nicolas Cortez and Rachel Tovar, information about Rachel Tovar's severe and continued memory problems, and the videotaped statement of Anthony Farias are favorable within the meaning of *Brady*. Favorable evidence includes both exculpatory and impeachment evidence. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

First, the information about Nicolas Cortez's head trauma due to seizures and other serious issues, as well as Rachel Tovar's brain damage, all of which was contained in their medical records sitting in the HCDAO's file, was valuable

impeachment evidence. This is because this information would have given an additional basis for trial counsel to challenge their eyewitness identifications, and a potentially significant one, particularly considering the differences between their identifications and stories about what happened that night.

Second, the information that Rachel Tovar was "confused" and "out of it" and that she had severe memory problems before and after trial impeached the reliability of both her eyewitness identification and other statements she made to the police regarding the murders. App. at 247; *see also* App. at 179. This case is similar to *Strickler*, in which an eyewitness testified with certainty about events she witnessed and her impressions of them, only for defense counsel to discover after trial notes from an interviewing detective and letters written by the eyewitness, reflecting that she had no such memory. *Strickler*, 527 U.S. at 273-75.[41]

Third, the videotaped statement of Anthony Farias supported Mr. Brown's theory that Terrell Hill was involved in or committed the murders at Brownstone Lane, and also impeached Rachel Tovar's testimony about the family's drug dealing and her role in it. Anthony Farias' videotaped statement identifies "Red" – the main supposed assailant – as "Terrell." App. at 25 ("Red, his name is Terrell. . . . I remember his name is Terrell."); *id*. at 26 ("Red is Terrell"); *id*. at 89 ("Investigator

[41] *Strickler* acknowledged the value of this *Brady* material, ultimately denied the claim in Strickler's case for failing to meet materiality. Here, Mr. Brown has a much stronger claim of materiality.

Garcia: Do you know Red's real name? Any part of it? Mr. Farias: Terrell. Investigator Garcia: Terrell. Mr. Farias: I know for a fact it's Terrell."). That Terrell had been identified as a known alternative suspect was both exculpatory to Mr. Brown and his co-defendants and impeaching as to Rachel Tovar's identification. *See supra* Section (III)(A). More generally, it also provided several alternate suspects previously unknown, because Anthony discussed rival drug dealer Mr. Mata – whom he now says had a years long drug war with the Tovars – as well as Reuben, a friend and drug dealing associate who had a serious falling out with the Tovars around that time according to Anthony Farias's videotaped statement. This is exculpatory information that could have lead to the discovery of additional exculpatory information by trial counsel if it had not been suppressed.

b. Favorable Evidence was Suppressed

The second prong of a *Brady* claim requires that evidence be previously unknown to the defense due to it being withheld or suppressed by the state. *See, e.g., Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011) ("The scenarios to which *Brady* applies 'involve[ ] the discovery, after trial of information which had been known to the prosecution but unknown to the defense.' *Agurs*, 427 U.S. at 103, 96 S.Ct. 2392.").

Rachel Tovar's persistent memory issues were suppressed by the HCDAO until the OCFW learned about it in late February 2023. Anthony Farias told the OCFW the prosecution knew of his mother's impairments:

> Mr. Farias said that members of the Harris County District Attorney's Office knew about his mother's memory problems. Mr. Farias told me that employees of the District Attorney's Office visited his mother over and over, both while she was in the hospital and after she had returned home. Mr. Farias said that he lived with his mother after the murders, and he was in her presence daily.

App. at 247. This information was suppressed, and trial counsel cannot be faulted for failing to request notes or memorandums of those interviews. *Cf. Strickler*, 527 U.S. at 285 ("Although it is true that petitioner's lawyers—both at trial and in post-trial proceedings—must have known that [the eyewitness] had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that [the eyewitness] sent to the detective, existed and had been suppressed.").

Similarly, Rachel Tovar and Nicolas Cortez's medical records were suppressed by the HCDAO until February 28, 2023, despite the OCFW asking for these materials repeatedly. These medical records were subpoenaed by the HCDAO for trial, received on October 3, 1993 – a month before the guilt phase of Mr. Brown's trial – and never disclosed. To put this into context, these medical records, which reflected the severe injuries and brain damage of the only two eyewitnesses to the crime – who would later provide dubious eyewitness and in-court

identifications of Mr. Brown – were in the possession of the HCDAO when they represented to the trial court:

October 15, 1993:

> **The Court**: All [trial counsel's] asking you is of *Brady* itself. Do you at that point [sic] know of anything that you have tender [sic] that might be *Brady*, exculpatory.
> . . .
>
> **Ms. Brown**: I will [review the files] just to make sure if there was any *Brady* that they have it.

20 RR 5–6.

October 16, 1993:

> **Ms. Brown**: I have looked at my file. I have no *Brady*. I will continue to provide any *Brady* I have.

21 RR 14.

October 21, 1993:

> **Ms. Brown**: Judge, if it's *Brady*, I'll certainly provide it for them. . . . If there's anything *Brady*, I'll certainly provide it to them.

24 RR 20.

October 29, 1993:

> **Ms. Brown**: I have complied with all the orders in the Motion for Discovery.

25 RR at 8.

> **Ms. Brown**: I have complied with all the discovery.

Id. at 9–10.

And yet, the HCDAO withheld information directly relevant to two separate eyewitnesses' memory and brain damage from trial counsel, which is classic impeachment evidence.

Likewise, the HCDAO withheld Anthony Farias' June 21, 1992 videotaped statement from Mr. Brown's trial counsel, and the OCFW did not learn of the videotaped statement until 2023. At trial the HCDAO fought to keep – and succeeded in keeping – from disclosing any audio or videotaped statements of witnesses until they testified. *See* Section (II)(C) (describing trial counsel's efforts to get *Brady* and discovery materials); CR at 44 (noting that witness statements generally were to be disclosed, as handwritten on the order, "after direct"); *id*. (noting for "[a]ll sound recordings or videotapes containing the voices of witnesses or prospective witnesses" that "DA & Def. to listen to tapes during trial off-hours."). Consequently, the HCDAO was able to completely withhold the Anthony Farias videotape by electing not to call him to testify at Mr. Brown's trial. But these kinds of (forced) discovery arrangements – where prosecutors flout their duties under *Brady* – cannot defeat a *Brady* claim. *See, e.g., Strickler*, 527 U.S. at 286 ("Even pursuant to the broader discovery provisions afforded at trial, petitioner would not have had access to these materials under Virginia law, except as modified by *Brady*."). Here trial counsel took the extraordinary step of trying – but failing – to obtain an in-camera review of the HCDAO's entire file for *Brady* material.

Trial counsel was left to rely on the HCDAO's repeated representations that there was "no Brady" being withheld in their file. *See, e.g.*, 21 RR 14 (Court: "Have you had that opportunity to thoroughly check through to see if something's been discovered? It was either exculpatory on guilt, impeaching of witnesses or mitigating on punishment." HCDAO: "Yes. I have looked at my file. I have no Brady."). Trial counsel, having had no choice but to rely upon the prosecution's representations, cannot be faulted for doing so. *Banks v. Dretke*, 540 U.S. 668, 695 (2004) (finding that "when the prosecution represents that all such [Brady] material has been disclosed" it is reasonable for defense counsel to rely on the prosecution's representation); *see also Strickler*, 527 U.S. at 284 ("If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable.").

Although trial counsel knew about the *existence* of the videotape from the police reports, they cannot be faulted for not previously seeking the tape at the time of trial. Trial counsel was forced by the trial court – who refused their numerous *Brady* motions – to rely on the HCDAO's representation that it was not withholding *Brady* material. Moreover, the information trial counsel did have from police reports

was misleading about the true contents of the withheld video statement. Most notably, the Houston Police Department repeatedly omitted or misrepresented Anthony Farias' statements to police, and specifically his statements about who "Red" (Terrell) and "Squirt" were to him. Indeed, in one of the supplemental reports, Sgt. Webber wrote: "It should be noted that Anthony acknowledged knowing a black male named 'Red' and a black male named 'Squirt' but stated that *he does not know their true name*[.]" This affirmatively misrepresented Anthony's knowledge and statement from the exact same day as captured in his videotaped statement, where he affirmed not once or twice, but several times that he was sure that the true name of "Red" was "Terrell."

The only source for information about Anthony Farias' statement that defense counsel would have had access to in the HCDAO's file unless and until Anthony Farias testified was the note of the HPD officer who actually conducted the interview, Felix Garcia. Garcia noted that statement existed, but did not describe any of Anthony Farias' statements or the identification of Terrell as Red — the critical new and exculpatory information from the videotaped statement. Because defense counsel was allowed little more than access to the HPD offense report – which misrepresented Anthony's knowledge and statements – they had no indication that Anthony's statement might contain *Brady* material. And although defense counsel fought for access to videotaped statements of witnesses specifically prior to trial, *see*

CR 44 (order), the HCDAO was able to unconstitutionally suppress Anthony's statement because they did not call him to testify at Mr. Brown's trial. *Cf. Banks*, 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process[.]") (internal citation omitted). Because of the affirmative misrepresentations of HPD through their reports and the HCDAO in their hearings, to request this information would have been little more than speculation insufficient to defeat a *Brady* claim. *See Strickler*, 527 U.S. at 286 ("Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support.").

Moreover, the 2023 affidavits of Mr. Brown's trial counsel, Patricia Saum Nasworthy and Tom Moran, confirm that they never knew about the contents of Anthony Farias' statement. App. at 175 (Saum Nasworthy: "Anthony Farias did not testify at Mr. Brown's capital trial. The HCDAO never disclosed a videotaped statement of an interview of Anthony Farias to me. I was unaware of the contents of any such interview of Anthony Farias prior to 2023."); 183-84 (same).

c. The Undisclosed Evidence is Material

The third prong of *Brady* requires that suppressed evidence be material. Evidence is "material" within the meaning of *Brady* when there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012). A defendant need not show that "more likely than not" he would have been acquitted had the suppressed evidence been admitted. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (citing *Smith*, 565 U.S. at 73–77). He must only show that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith*, 565 U.S. at 75 (quoting *Kyles*, 514 U.S. at 434). In other words, a defendant can prevail "even if . . . the undisclosed information may not have affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6.

Viewed in the context of what was presented at trial, the materiality of this new information is extraordinarily important. The evidence of Mr. Brown's guilt at trial was thin and much of it has been largely discredited in his prior postconviction proceedings. *See supra* Section (III)(A) (innocence claim). Consequently, evidence that severely undermined both surviving victims as well as information from a Tovar family member connecting Terrell Hill to the homicides, as both of Mr. Brown's trial counsel recognized, could have played a decisive role in the case. Patricia Saum Nasworthy explained:

> Had I known that Anthony Farias identified "Red" as someone other than Marion Dudley, Mr. Brown, or Mr. Dunson, and had identified "Squirt" as Red's brother, I would have used that information at trial. Even more so, Anthony Farias connecting Terrell to the Brownstone Lane murders would have significantly bolstered my trial theory that Terrell Hill and/or other drug dealers like LaCedric Jones and Jasper Finney were responsible for these murders. Connecting Terrell Hill to the capital crime was one of my highest priorities and this information, particularly coming from Rachel Tovar's surviving son, would have been critical to my defense investigation and presentation.

App. at 176 (Saum).

Similarly, Mr. Brown's second chair counsel Mr. Moran wrote:

> I am confident that Ms. Nasworthy and I would have immediately latched on to any information that supported that Terrell Hill was connected to the Brownstone Lane murders and/or was inconsistent with Mr. Brown and his co-defendants. Any such information would have been vital to our defense case because it would have made our alternative suspect theory – and our theory that Terrell Hill was involved in and responsible for these murders – stronger before the jury. This information would have been particularly useful coming from Anthony Farias, Rachel Tovar's own son.

App. at 184 (Moran).

It is not just the exculpatory value of the videotaped statement that constitutes valuable *Brady* material, but the impeachment material as well.

New evidence also supports the materiality of this suppressed evidence. *See* Section (III)(A)(ii) (outlining the importance of the new evidence in Mr. Brown's innocence claim).

iii. This Claim Should be Authorized Under Article 11.071 Section 5(a)(1) or Section 5(a)(2)

Mr. Brown's *Brady* claim should be authorized either under Section 5(a)(1) or, in the alternative, under Section 5(a)(2) of Article 11.071.

a. Mr. Brown Meets the Requirements of Section 5(a)(1)

Article 11.071 Section 5(a)(1) provides that claims raised in a subsequent application cannot be considered unless "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because *the factual or legal basis for the claim was unavailable* on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071(5)(a)(1) (emphasis added). The statute also provides that "[f]or purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." Tex. Code Crim. Proc. art. 11.071(5)(e).

Mr. Brown's *Brady* claim should be authorized under this subsection. There is no question that Mr. Brown's trial counsel diligently pursued *Brady* evidence. Trial counsel filed at least 5 motions that requested *Brady* information specifically or implicated those rights and argued for *Brady* information at multiple pretrial hearings. Rachel Tovar and Nicolas Cortez's medical records were suppressed until February 28, 2023, just a day before the filing of this subsequent application. The

HCDAO continued to suppress information known to them about Rachel Tovar's sincere memory problems as recounted to her by Anthony Farias and Amador Farias' statements about their mother's impairments and memory and were likewise only recently discovered.

The OCFW first learned of Anthony Farias' videotaped statement when the HCDAO produced a copy of its file in January 2023. This late discovery, however, was not due to any lack of diligence by the OCFW. The OCFW first requested to review the HCDAO's file on July 12, 2022. Two weeks later, on July 26, 2022, the HCDAO substantively responded to that request, notifying the OCFW that it did not have available times for file review until at least September 2022. Due to this limited availability, the OCFW was not able to review the State's file until October 6, 2022, nearly 3 months after they had initially requested to do so. The OCFW was then allowed to review the paper within the file that was not being withheld by the HCDAO but was not allowed to scan or make copies of any of the material, including the digital material. The HCDAO required that the OCFW receive a copy of any requested materials within the state's file through the HCDAO's reproduction only. More delay on the part of the HCDAO occurred.

Production of the State's file to the OCFW did not actually occur until January 11, 2023. Similarly, the OCFW requested production of Mr. Brown's co-defendants' files and did not receive those materials until January 19, 2023. Additionally, in the

affidavit attached, Mr. Brown's trial attorneys confirm that they were diligent about pursuing *Brady* information, and that the Anthony Farias videotaped statement, which was exculpatory to Mr. Brown and confirmed their trial theory that Terrell Hill was the true assailant, was never disclosed to them. App. at 176 (Saum); 184 (Moran).

b. Mr. Brown Meets the Requirements of Section 5(a)(2)

In addition to subsection 5(a)(1) above, Article 11.071 section 5 also provides for authorization of successive claims where "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. art. 11.071(5)(a)(2). In this case, the evidence of the medical records of the state's only two eyewitnesses evidencing brain damage, the accounts from Rachel Tovar's own sons of her memory issues, and the videotaped statement of Anthony Farias statement exculpating Mr. Brown and impeaching Rachel Tovar – at least by a preponderance of the evidence – demonstrate that Mr. Brown is innocent of the capital crimes he is accused of. *See supra* Section (III)(A). In the alternative to Section 5(a)(1), this Court should find Mr. Brown meets the requirements of Section 5 (a)(2).

C. CLAIM THREE: Mr. Brown is Intellectually Disabled and His Death Sentence is Unconstitutional Under the Eighth Amendment

Mr. Brown is a person with an intellectual disability. Throughout his childhood, Mr. Brown was placed in special education classes, regarded as "slow" by friends and family, and largely illiterate until he was 18 years of age. There is significant evidence of Mr. Brown's intellectual disability in his school records as well as newly developed materials that justifies further factual development by the lower courts.

i. The Legal Standard for Intellectual Disability

In 2002, the United States Supreme Court first held that execution of the intellectually disabled violates the Eighth Amendment in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Court explained:

> Those [intellectually disabled] persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants.

Atkins, 536 U.S. at 306-07.[42]

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[42] After *Atkins*, mental health professionals and the legal community began to use the terms "intellectual disability" rather than "mental retardation." *See Hall*, 572 U.S. at 704 (acknowledging this name change). Although the latest iteration of the Diagnostic and Statistical Manual, 5th Edition, Text Revision, uses the term "Intellectual Developmental Disorder," this is interchangeable with Intellectual Disability (ID). This pleading uses the term Intellectual Disability or ID to avoid confusion.

The Court emphasized that *Atkins* announced "a *categorical rule* making such [intellectually disabled] offenders ineligible for the death penalty." *Id*. at 320 (emphasis added).

When the *Atkins* Court ruled that evolving standards of decency prevented the execution of the intellectually disabled it expressly noted: "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). This prescription, however, was not intended to be without limits; in defining intellectual disability for the categorical bar on execution, *Atkins* referred to "clinical definitions" of intellectual disability, *see id.* at 317 n. 22, and cited to the American Association on Mental Retardation (AAMR)[43] and the American Psychological Association's (APA) Diagnostic and Statistical Manual (4th ed. 2000) (DSM-4), as authorities on defining intellectual disability, *see id*. at 308 n. 3.

Since *Atkins*, the Supreme Court has twice rejected state- or court-created standards for the determination of intellectual disability that were contrary to or in conflict with clinical definitions guided by medical authorities like the AAIDD and

[43] The AAMR has since changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). Thus, references to the AAIDD used in this pleading refer to the present iteration of the AAMR.

the DSM. *See Hall v. Florida*, 572 U.S. 701, 719 (2014) ("*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus.") (internal citation omitted).

In 2014 in *Hall v. Florida*, the Court rejected Florida's use of a hard IQ cutoff score of 70 to determine intellectual disability. *Hall*, 572 U.S. at 724. *Hall* rejected the approach of taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and by relying on an IQ score as dispositive without recognizing that the score itself has a margin of error or standard error of measurement (SEM). *Id.* at 702. *Hall* holds that all three prongs of an intellectual disability assessment—an intelligence test result, adaptive deficits, and evidence of pre-age 18 onset—should be considered, consistent with the standards of the medical community. *Id.*

Of particular relevance in Texas, the Supreme Court reaffirmed that the diagnosis of intellectual disability must be guided by the medical and clinical community in its 2017 decision in *Moore*. Moore, a death-sentenced man on Texas's death row, asserted his ineligibility for execution due to intellectual disability in state

postconviction proceedings. *Moore*, 137 S. Ct. at 1045-46. After a state postconviction court granted him relief on the basis of his intellectual disability, pursuant to its finding that Moore fit the criteria for intellectual disability as defined by the AAIDD clinical manual (11th ed. 2010) and the DSM (5th ed. 2013) (DSM-5), this Court reversed that decision, holding that the lower court had used the wrong standards in determining whether Moore was intellectually disabled, because the factors it articulated in *Ex parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004), were binding on the determination. *Id*. at 1046. The *Briseno* Court had adopted the 1992 definition of intellectual disability previously promulgated by the AAIDD, which included the requirement that an individual's "adaptive deficits be 'related' to intellectual-functioning deficits." *Id*. at 1046 (citations omitted). However, to be sufficiently "related," and thus determined to have adaptive deficits consistent with being intellectually disabled, *Briseno* articulated "seven evidentiary factors" (*Briseno* factors) that were judicially created, and not otherwise found in medical or clinical authority. *Id*. The Supreme Court in *Moore* rejected the *Briseno* factors and reaffirmed that the Eighth Amendment required that courts be guided by the medical community's "current manuals [which] offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id*. at 1053. Thus, *Moore* emphasized guidance from the medical community on the presence and interpretation of adaptive deficits. *See, e.g., Moore*, 137 S. Ct. at 1052

n. 9 (noting skepticism of the *Briseno* factors, because they "placed undue emphasis on adaptive strengths, and regarded risk factors for intellectual disability as evidence of the absence of intellectual disability.") (internal citations omitted).

In reaffirming that intellectual disability determinations should be guided by the medical community and not only states or courts, *Moore* noted: "'[i]f the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.'" *Moore*, 137 S. Ct. at 1053 (quoting *Hall*, 572 U.S. at 720-21).

This Court therefore must be guided in the assessment of Mr. Brown's intellectual disability by medical and clinical authority. The most recent and current opinions of the medical community are found in the Fifth Edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition, Text Revision* (2022) (DSM-5-TR) and the Twelfth Edition of the American Association on *Intellectual and Developmental Disabilities' Intellectual Disability: Definition, Classification, and Systems of Supports* (2021) (AAIDD-12). The prevailing medical standard for diagnosing intellectual disability requires: 1) deficits in intellectual functioning; 2) deficits in adaptive functioning, and 3) onset during the developmental period. DSM-5-TR at 37; *see also* AAIDD-12 at 15-17.

ii. Mr. Brown Meets the Criteria for Intellectual Disability

a. The Diagnostic Standard for Intellectual Disability

The current version of the DSM, the DSM-5-TR, provides:

> Intellectual developmental disorder (intellectual disability) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualize, standardized intelligence testing.
> B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
> C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5-TR at 37.

The AAIDD provides a similar definition:

> ID is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.
>
> AAIDD-12 at 13.

In an IDD diagnosis, assessments of intellectual functioning occur in concert with those of adaptive function. For example, the AAIDD recognizes "equal weight" should be "given to adaptive behavior and intellectual functioning in the diagnosis

of ID." AAIDD-12 at 20. The DSM-5-TR expands on this point, adding that "the various levels of severity [of an IDD diagnosis] are defined on the basis of adaptive functioning, not IQ scores, because it is adaptive functioning that determines the level of support required." DSM-5-TR at 38.

Notably, the AAIDD-12 defines the developmental period as up to age 22, whereas the DSM-5-TR does not. Otherwise, these definitions are largely consistent. Here, however, those differences have no significance.

ii. Mr. Brown has Significantly Subaverage Intellectual Functioning

a. Clinical Considerations in the Interpretation of IQ Scores

The first prong of the intellectual disability diagnosis requires significantly subaverage intellectual functioning. *See* DSM-5-TR at 37; AAIDD-12 at 13; *see also Hall*, 572 U.S. at 710. Determination of whether intellectual disability exists requires significantly subaverage intelligence *approximately* two standard deviations below the mean, and this prong of the diagnosis is typically – but not exclusively – met through the use of standardized intelligence instruments (IQ tests). The medical community recognizes, however, that while the first prong can be demonstrated through the use of such IQ tests, the determination of whether this prong is met does not include an IQ cutoff score.

While the AAIDD and DSM acknowledge that IQ testing is a significant consideration in whether the deficits in intellectual functioning prong exists, such testing must be considered in conjunction with factors that have been observed to affect the interpretation of IQ scores. IQ test scores, for example, must be considered in conjunction with the Standard Error of Measurement (SEM). The DSM-5-TR instructs:

> Individuals with intellectual developmental disorder have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

DSM-5-TR at 38. *Hall* also recognized the importance of considering the SEM present in testing instruments, consistent with this guidance from the medical community. *See Hall*, 572 U.S. at 713 ("The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."). Thus, the Supreme Court has held that an IQ score of 75 is "squarely in the range of potential intellectual disability." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015).

b. Mr. Brown has Significantly Subaverage IQ and Was Diagnosed As "Mentally Retarded" As a Child

Relevant to the determination of his intellectual functioning, Mr. Brown has had several IQ measurements beginning in his childhood, as evidenced by his school

records. These childhood scores evidence that Mr. Brown was low functioning, and his earliest – and most reliable – IQ scores reflect that Mr. Brown's IQ was in the ID range—and, in fact, he was diagnosed as "mentally retarded" as child.

As Dr. David Price, an expert in clinical and forensic psychology and neuropsychology notes, school records reflect a "troubled matriculation for Mr. Brown." App. at 354. Mr. Brown was diagnosed as "mentally retarded" (but educable), placed in special education, and had intellectual deficits documented in standardized testing.

In the third grade, when Mr. Brown was 8 years old, his intelligence was assessed. Mr. Brown was then given the Weschler's Intelligence Scale for Children – Revised (WISC-R), in addition to the Wide Range Achievement Test (WRAT). On the WISC-R, Mr. Brown had a full-scale score of 70, and was placed by the testing psychologist in the "Educable Mentally Retarded" (EMR) range. As Dr. Price notes, accounting for the Standard Error of Measurement (SEM), this places Mr. Brown's full scale IQ score between 65 and 75, and within the second percentile of intelligence without any adjustments. App. at 354.

Further, during the same examination when he was in the 3rd grade, Mr. Brown took the WRAT achievement test. Of his performance, the testing psychologist wrote that those "scores confirm[ed] academic retardation." *Id.*; App. 312.

Although through Mr. Brown's later school years – and likely due to the practice effect[44] – Mr. Brown's IQ testing scores were higher, his achievement testing and actual academic performance remained very low and consistent with an intellectual disability. For example, regarding Mr. Brown's performance on a WRAT given to him when he was older, a school psychologist noted that he scored in the 1%tile for Reading Recognition, 0.8% in Spelling, and only at the 14%tile in Arithmetic, and remarked: "These standard scores, mathematically analogous to IQ scores, immediately suggest academic achievement far below that expected from Arthur's present WISC-R I.Q." App. at 302. And as Dr. Price similarly notes, these WRAT scores achieved by Mr. Brown at 11 years old are consistent with an intellectual disability. App. at 354.

It bears mentioning that Mr. Brown was determined to be "Educable Mentally Retarded" and suffering from "academic retardation" as a child by the Tuscaloosa school system, diagnoses that were corroborated by his failure to graduate, placement in special education, and flunking of the 9th grade.

iii. Mr. Brown Has Significant Adaptive Deficits

A diagnosis of intellectual disability requires evidence of concurrent deficits in adaptive behavior. Adaptive deficits "refer to how well a person meets community

[44] The practice effect is defined as "learning from repeated testing," and the DSM-5-TR instructs practitioners specifically to consider this effect in the interpretation of IQ scores. DSM-5-TR at 38.

standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5-Tr at 42; *see also* AAIDD-12 at 29 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.").

The adaptive deficits prong of an intellectual disability diagnosis "is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately across multiple environments, such as home, school, work, and community." DSM-5-TR at 42; *see also* AAIDD-12 at 31. Importantly, this prong of intellectual disability is met by clinical judgment of deficits, and is not negated by strengths. *See, e.g.,* AAIDD-12 (noting that "[w]ithin an individual, limitations often coexist with strengths.").

Although Mr. Brown need only exhibit deficits in one adaptive deficits domain, he has evidence of deficits in all three of these domains. *See, e.g.,* App. at 355 (concluding that Mr. Brown manifested "significant issues in all three domains of adaptive functioning (conceptual, social, and practical)).

a. Mr. Brown Has Deficits in Conceptual Skills

The conceptual domain includes skills such as academic skills, problem solving, thinking abstractly, difficulty communicating thoughts or ideas. AAIDD-12

at 30. For individuals with mild intellectual disability, "abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (i.e., reading, money management), are impaired." DSM-5-TR at 39. As Dr. Price opines, Mr. Brown has significant deficits in the conceptual domain, centered around thinking skills, self-direction and planning, functional academics, and communication. App. at 356-57.

Generally, Mr. Brown's intellectual limitations were known to his friends and family. Individuals that knew Mr. Brown over the course of his life have described him consistently as "slow" App. 429; App. at 413 ("slower than other kids his age," App. at 418, or "slow at things," App. at 426. Childhood neighbor and friend Lester Jackson noted that "a lot about [Mr. Brown] [] makes me think [Mr. Brown] had problems thinking," App. at 418, and that he was "slow learning," *id*. at 419. Mr. Brown's teachers also observed that Mr. Brown was limited. For example, one of his special education teachers recalled: "I remember Arthur. He was slow. He could do things, and he got along with other students when he had to, but he definitely had issues." App. at 409. He was observed to have a limited vocabulary, App. at 414, and nearly illiterate until the age of 19 when he was patiently taught to read by the mother of his children. *Id.* at 399 (observing that Mr. Brown "didn't learn as easily as other people.").

Mr. Brown's teacher's memory of him is well-supported by Mr. Brown's school records. Impairment in "academic skills involving reading writing, arithmetic, time, or money" are indications of mild intellectual disability. DSM-5-TR at 39. Consistent with such a diagnosis, Mr. Brown struggled in school and was placed in special education by the time he was in the 3rd grade, and then in the Educable Mentally Retarded (EMR) classes in the 4th and 5th grade. Mr. Brown had to repeat the 9th grade, even though he was still classified as "Educable Mentally Retarded" and taking nearly all special education classes. In a Mastery Management Individual Student Status Report given to Mr. Brown on December 3, 1984, when he was 14 years old, he received an overall score of 59%, and could not master basic skills such as: math skills (fractions, decimals, graphs and area), use of clocks, use of calendars, as well as phone numbers and zip codes.

After repeating the 9th grade, Mr. Brown began to be labelled "Learning Disabled" rather than EMR. Mr. Brown's struggles only worsened: he began failing school even more significantly, getting F grades in the 10th grade. Eventually, Mr. Brown formally withdrew from school on February 5, 1988, when he was in the 10th grade (though he was 17.5 years old). Mr. Brown's issues in school were a source of embarrassment for him, as several of his friends and family members noted. App. at 413 ("Not everyone knew [Mr. Brown] was in special education. It's not something he wanted people to know."); App. at 403 ("When [Mr. Brown] found

out that he would probably have to repeat the 9th grade, he was very upset. He felt like he failed. He would hit himself in the forehead and call himself stupid.").

As Dr. Price notes, Mr. Brown also "has had pronounced issues with communication over the course of his life." App. at 357. From a very early age, many individuals knew that Mr. Brown struggled to express or communicate his thoughts or to understand others. Family friend and babysitter, Anita Simpson, recalled that Mr. Brown "did not start talking until he was 3 or 4 years old" and that even when he did begin to speak, "his speech was not clear." App. at 429.

Mr. Brown struggled even more significantly to understand others. Mr. Brown "had a significantly limited ability to express himself." App. 357. Mr. Brown "had trouble keeping up with conversations," App. at 423, and had "a very hard time following the thread of a conversation" and "often misunderstood what people meant." *Id.* at 432. Those in Mr. Brown's community were careful how they worded things to him, or he wouldn't understand. App. at 403. As Lester Jackson recalled, "you couldn't say big words around him because he wouldn't know what they would mean, and he would always be asking what it meant." App. 419.

As a result of his difficulty understanding what others sought to communicate to him, Mr. Brown often became frustrated and people tried to simplify things to protect his feelings. As Nettie Mae Williams recalls, Mr. Brown "was the kind of person where you couldn't say too much or he'd get offended or upset." App. 432.

Mr. Brown "wasn't paranoid, he just wasn't able to correctly interpret what people were saying and he was sensitive." *Id.*

As noted by an expert and multiple lay witnesses, Mr. Brown has significant adaptive deficits in skills within the conceptual domain. On that basis alone, he meets the second prong for a diagnosis of intellectual disability. But Mr. Brown has deficits within other domains as well.

b. Mr. Brown Has Deficits in Social Skills

Adults with mild intellectual disability are "immature in social interactions," and may have "difficultly in accurately perceiving peers' social cues." DSM-5-TR at 39. Such individuals may also have "difficulties regulating emotion and behavior in age-appropriate fashion" and have "limited understanding of risk in social situations," which means they are "at risk of being manipulated by others (gullibility)." *Id*. Mr. Brown has "significant deficits in the social domain" App. 358.

Mr. Brown manifested significantly impaired interpersonal skills and poor social judgment. Individuals who knew Mr. Brown in his childhood said that Mr. Brown "didn't have any friends" and "didn't know how to make friends," and that he played with children much younger than him "instead of kids his own age" because "he could relate to them." App. at 426. As a young child, Mr. Brown was "awkward with other children" and "got along with [the family's] hunting dogs

better than he did with other children" because the dogs "didn't ask much of him." App. at 429.

His thinking in social situations was always overly concrete. As Nettie Mae Williams recalls, Mr. Brown "couldn't handle teasing like other kids because he couldn't understand" when someone was joking and "took everything you said at face value and thought it was serious." App. at 433.

Mr. Brown also had a strong desire to please others. Anita Simpson recalled that "[i]f you were nice to [Mr. Brown], though, he would follow you around . . . . That's how [Mr. Brown] was for as long as I knew him – wanting to follow around and please whoever was nice to him." App. at 429.

Mr. Brown has consistently struggled with social skills throughout his life, being victimized by others, described as naïve, gullible, easily taken advantage of, having childlike interests, and has in several examples given by others, incapable of meeting age-appropriate expectations in social situations. Mr. Brown has significant deficits in skills in the social domain, and this prong of intellectual disability is therefore met in this case on that basis. But Mr. Brown also has deficits in the third domain as well.

c. Mr. Brown Has Deficits in Practical Skills

Adults with mild intellectual disabilities "may function age-appropriately in personal care," but "need some support with complex daily living tasks in

comparison to peers." DSM-5-TR at 39. These adults typically need help with "grocery shopping, transportation, home and child-care organization, nutritious food preparation, and banking and money management." *Id*. Additionally, these "[i]ndividuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently." *Id*.

Mr. Brown has significant deficits in his practical skills and these deficits stem from his childhood. As a child, Mr. Brown got "special treatment" compared with his siblings, in part because he "was not able to do things that other kids were able to do." App. at 429. His mother physically carried him around until he was "4 or 5 years old." *Id*. It was well-known that [Mr. Brown] needed help: "Everybody in the family did things for [Mr. Brown] so he wouldn't have to do them himself. [Mr. Brown] had a harder time doing things so he needed the help." *Id*.

Even after Mr. Brown left his parental home, his practical skill issues continued. His longtime girlfriend and the mother of his two children, Onetha Gay Bolden, noted that Mr. Brown could not act as a parent to their children:

> AJ played with the children and could put them down to sleep. But as far as most parenting goes, AJ wasn't good at it. He was loving and playful, but he couldn't do things that needed to be done. I would not let AJ measure formula for the babies, for example. He could not understand the proper ratios for that, so I always had to do it.

App. at 398.

It wasn't just parenting tasks that Mr. Brown could not do, he also was not trusted to use things like blenders or sharp knives. App. at 400; *cf. id.* ("I tried to keep AJ from using knives in the kitchen because I was worried he would accidentally cut himself.").

Mr. Brown has displayed significant practical domain deficits as a result of his intellectual limitations, which have pervaded his entire life, and thus, on that basis alone and in combination with his deficits in the other domains described above, he meets the second prong for a diagnosis of intellectual disability.

iv. Mr. Brown's ID Onset Before 22 Years of Age

The third prong of an intellectual disability diagnosis requires the "[o]nset of intellectual and adaptive deficits during the developmental period," DSM-5-TR at 37, which is now defined as prior to the age of 22 years old, *see* AAIDD-12 at 33. This prong refers only to "recognition that intellectual and adaptive deficits are present during childhood or adolescence." DSM-5-TR at 42.

Importantly, Mr. Brown is not required to prove that he was *diagnosed* with intellectual disability before the age of 22 years old, just that *evidence* of such manifested prior to the age of 22. *Cf. Brumfield,* 135 S. Ct. at 2283 ("If Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child."). Mr. Brown also need not prove the exact

origin of his disability, be it in utero, due to progressive damage such as malnutrition, or due to acquired disease or injury (such as traumatic brain injury) to meet this prong of the diagnosis.

Mr. Brown's intellectual and adaptive deficits existed before he was 22 years old. Indeed, Mr. Brown was arrested when he was approximately 22 years and two months old, meaning that all but two months of his time out of incarceration for this offense was in the developmental period.

v. Mr. Brown Has Numerous Risk Factors for ID

Evidence of risk factors is not required for the diagnosis of intellectual disability either by medical communities or courts. But the medical community considers "risk factors" as "cause to explore the prospect of intellectual disability further." *Moore*, 137 S. Ct. at 1051. Thus, risk factors are persuasive evidence that an intellectual disability may exist or develop. *See Moore*, 137 S. Ct. at 1051 ("At least one or more of the risk factors described in the [DSM] will be found in every case of intellectual disability.") (internal brackets and quotation marks omitted) (quoting AAIDD-11, p. 60). Among the pre-, peri-and post-natal risk factors associated with intellectual disability are: fetal alcohol exposure, traumatic brain injury, social factors such as extreme poverty, and behavioral factors such as abuse. *See, e.g.,* DSM-V-TR at 44; AAIDD-11 Manual at 60; AAIDD-12 at 93 (embracing "a multiple-perspectives approach to risk factors associated with the biomedical,

psychoeducational, sociocultural, and justice perspectives on ID"). Mr. Brown had multiple risk factors for intellectual disability before and after age 22.

Prenatal Risk Factors: Significant Fetal Alcohol Exposure. Prior to Mr. Brown's birth, a number of risk factors for intellectual disability existed. Mr. Brown's mother, Joe Mae Brown, recalled that she "drank every weekend" and "[s]ometimes [she] drank during the week" while pregnant with Mr. Brown. App. at 437. Joe Mae said she "drank at least 1 pint of either whiskey or Brandy" every Friday, Saturday and Sunday while she was pregnant, and noted that multiple members of her family saw her do this. *Id*. She drank so much that she nearly miscarried Mr. Brown when she was 4-5 months pregnant with him and was put on bed rest for the remainder of her pregnancy. *Id*.

Dr. Natalie Novick Brown, a psychologist and renowned expert in Fetal Alcohol Spectrum Disorder (FASD) and an appointed faculty member at the University of Washington, School of Medicine, Department of Psychiatry and Behavioral Sciences, reviewed the evidence of Joe Mae Brown's alcohol intake during her pregnancy with Mr. Brown. Dr. Novick Brown observed that Ms. Brown's admitted alcohol intake of one pint of "boot leg" alcohol three nights a week was the equivalent of 10 shots of liquor—and indicated a "*massive* amount of binge drinking throughout pregnancy that is almost certainly going to produce FASD." App. at 480; App. at 361.

Traumatic Brain Injury. As a child, Mr. Brown suffered multiple traumatic brain injuries as a child, which are etiologically relevant to his intellectual disability diagnosis.

As a toddler, Mr. Brown's siblings were playing with him, swinging him from his arms and legs. One of his siblings let go, and Mr. Brown hit his forehead hard on the concrete. The injury resulted in a knot on his forehead and a fever; Mr. Brown's caregivers, however, did not bring him to the hospital for treatment.

As a grade schooler, Mr. Brown suffered a Moderate to Severe Traumatic Brain Injury. While playing football, Mr. Brown was hit in the head and became unresponsive. He was brought to the hospital by his football coach. While at the hospital, Mr. Brown was observed to be not responsive to pain and did not open his eyes. His pupils were dilated and sluggish. Based on his review of the hospital records, Dr. Price concludes that "there is no question that Mr. Brown had at the very least a Moderate TBI, but more likely had a Severe TBI, from that accident." App. 363. Dr. Price further opines that, due to Mr. Brown's history of head injuries, he likely developed a Neurocognitive Disorder with residual symptoms, comorbid with Intellectual Disability Disorder. *Id.*

Poverty. Mr. Brown experienced extreme poverty as a child. Mr. Brown's father made money by hunting and selling rabbits. If he killed enough rabbits and was able to sell them, there would be money to buy clothes. App. 447. Arthur and

Johnny Brown would accompany their father on these hunting trips as a child, killing rabbits to sell and make money to have school clothes.

Prior to abandoning his family, Mr. Brown's father made money as a mechanic at the local foundry and hauling logs, "but wasn't trying to provide." App. 434. They lived in the country, in an area called Cow's Creek, but "lived poorly." *Id.* As Mr. Brown's maternal aunt, Nettie Mae Williams, recalls,

> The house they lived in had no indoor plumbing. You had to fetch spring water from a well down a hill that sometimes had snakes on it. There also wasn't really good heating or insulation in the house. They had one fireplace in the front of the house but that's it. Often in the winter it would be so cold you wouldn't want to get out of bed at all.
>
> App. 434.

After Mr. Brown's father abandoned his family, Arthur Brown and his mother and siblings lost their home, because they could no longer afford it with what Arthur's mother was earning. They then moved into the Robinson Garden housing projects in the segregated west Tuscaloosa. App. 447. Many times, Mr. Brown's home contained roaches and rats. App. at 416.

Abuse and Domestic Violence. Mr. Brown witnessed and experienced physical abuse and domestic violence throughout his childhood.

As Mr. Brown's cousin, Jimmie Nell Spencer, recalls, Joe Mae Brown suffered tremendous abuse throughout Mr. Brown's childhood. The abuse was both verbal and physical. Mr. Spencer recalls one incident where Mr. Brown's father

choked his mother to such an extent that Mr. Spencer jumped in and pushed Mr. Brown's father off. When he was not choking Mr. Brown's mother, Mr. Brown's father was insulting her, calling her an "alcoholic", "dummy" and "stupid bitch." Mr. Spencer lived in a different apartment from Mr. Brown, separated by railroad tracks from the Brown household. But despite the distance, he "would hear loud fighting and profanity, and have to come over to check that everything was okay." App. at 441.

As Mr. Brown's older brother, Johnny Brown recalls, their mother and father fought physically and verbally all of the time—"there was no avoiding it." App. 446. Sometimes the problems related to Mr. Brown's father's infidelity—Mr. Brown has 36 siblings from his father. *Id.* As Johnny Brown recalls:

> I remember mom would get drunk with her sisters, and they would agitate her about dad being out and screwing other women. This kind of thing happened so often, and I know Arthur saw or heard this firsthand in our small apartment.
>
> Very often, Dad would return at night to see mom drunk, and he would yell at her for being drunk and worthless and she would yell at him for being out and cheating on her. think dad's behavior caused mom to drink as much as she did. Mom would take out the butcher knife and threaten dad with it, but she would never actually use it. She'd do this especially when she was agitated by her sisters, who didn't like dad, and he hated them back. Dad would then pin mom down with his hands and take the knife from her. This would happen many, many times, repeatedly, really as far as I can remember, before dad left. Dad would beat my mom too. We saw him slap and hit her all the time. At least a few times each year, especially in the last two or three years before he left, Arthur and I would see her with real bad bruises or a swollen face. Dad was a big guy, about 6'4", 230-240 pounds.

App. at 446-47. And sometimes, Mr. Brown's father would terrorize the family with a shotgun. As Johnny Brown recalls:

> Several times, Dad would take the buckshot and fire it in the air to freak mom out when she would return home from drinking. This happened probably when I was ten or eleven years old, so Arthur was about six or seven. Arthur saw this happen. It probably happened two or three times each year. I remember one time Arthur stood right behind dad when he would fire the shotgun to threaten mom.

App. at 446. And Mr. Brown's mother recalls that two or three weeks before her husband left her for good, he hit her in the face with his fist in the face so hard that her entire face became swollen and she had to seek medical attention. App. at 438.

Mr. Brown also suffered abuse at the hands of his parents. As Johnny Brown recalls, "dad and mom both beat and whipped us. Dad would get Arthur with a leather belt without holding back many times, maybe once a month or so." App. at 446. Arthur's aunt recalls that his father "was an abusive person" and "use to hang his children upside down by their feet and beat them." App. at 434.

Mr. Brown's suffering of abuse, abandonment, and trauma constitute risk factors for intellectual disability. *See Moore*, 137 S. Ct at 1051 (acknowledging that "childhood abuse and suffering" is a risk factor for intellectual disability). Although risk factors alone cannot establish an intellectual disability, the existence of these factors make it more likely that Mr. Brown has intellectual disability and should be

considered with this Court's determination of whether further factual development is warranted.

vi. Mr. Brown Has Been Diagnosed as Intellectually Disabled

At age 8, Mr. Brown was first diagnosed as "Educable Mentally Retarded" or intellectually disabled by the Tuscaloosa School system following intelligence testing that assessed his IQ within the range of 65-75. App. at 354. Mr. Brown provides additional, contemporary expert opinion to support his intellectual disability from Dr. David R. Price.

Dr. Price is a licensed psychologist in Southern Carolina, with extensive experience training and experience in forensic psychological and neuropsychological issues. He obtained his Doctorate in Clinical Psychology in 1982, and has 40 years of experience in psychology. During his career, he has held academic positions, including as the Administrative Director of the Forensic Psychiatry Research Foundation within the Department of Psychiatry and Behavioral Sciences at the Medial University of South Carolina. He has been recognized as an expert in clinical psychology, forensic psychology and neuropsychology in state and federal courts across the country, including Texas.

In reaching his opinions here, Dr. Price reviewed: school records from the Tuscaloosa City School System, including evaluations by R. Weisberg and Elizabeth Weissinger, EdS, and Mr. Brown's standardized testing by the school system;

medical records from prior to his incarceration in Texas, including his hospitalization at Druid City Hospital for a Traumatic Brain Injury; reviewed medical and other records from Texas Department of Criminal Justice; and affidavits/declarations from Joe Mae Brown, Jimmie Nell Spencer, Johnny Brown, James Hurst, Maliek Travis, Donald Hurst, Gwendolyn Hurst, Onetha Gay Bolden, Tara Rose Campbell, Thelma Church, Gwendolyn Crocker, Adriane Dunson, Lester Jackson, Wanda King, Anita Simpson, Nettie Mae Williams, psychologist Natalie Novick Brown, Ph.D., and mitigation specialist Ms. Lisa Milstein.

Applying the diagnostic framework for intellectual disability provided for in the DSM-5-TR and the AAIDD-12, Dr. Price found that Mr. Brown has suffered from deficits in intellectual functioning, confirmed by both clinical assessment and individualized, standardized testing. In addition, Dr. Price found that Mr. Brown has had significant issues in the conceptual, social, and practical domains of adaptive functioning, when deficits in just one would suffice to support an intellectual diagnosis, and that Mr. Brown's intellectual disabilities manifested during his developmental period. Based on these findings, it is Dr. Price's considered, expert opinion that Mr. Brown is intellectually disabled and qualifies for a diagnosis of intellectual disability disorder. Dr. Price also concluded that a diagnosis of intellectual disability disorder is etiologically supported by potential comorbid

diagnosis of Fetal Alcohol Syndrome and/or Neurocognitive Disorder (Traumatic Brain Injury). *See* App. at 360.

Because Mr. Brown suffers from Intellectual Disability Disorder, he cannot be executed consistent with the Eighth Amendment to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. at 304.

vii. This Claim Should be Authorized Under Article 11.071, Section 5(a)(1) or Section 5(a)(3)

Under Section 5 of Article 11.071, this Court may consider the merits of a subsequent application for writ of habeas corpus only if the application contains sufficient facts showing that one of three exceptions is met. Tex. Code Crim. Proc. art. 11.071 § 5(a). Mr. Brown's *Atkins* claim should be authorized under the first exception, Section 5(a)(1), because the Supreme Court's decision in *Moore v. Texas* created a previously unavailable legal basis for the claim.

a. Mr. Brown Meets Section 5(a)(1)'s Requirements Because the Legal Basis Was Previously Unavailable

Section 5(a)(1) provides that a court may consider the merits of a subsequent application when:

> the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

A legal basis "is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date." *Id.* at § 5(d). The CCA has explained that the § 5(a)(1) exception is triggered when there is a subsequent, directly applicable Supreme Court decision that contradicts the CCA's law at the time of the previous application. *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007) (authorizing a claim under § 5(a)(1) when a "subsequent writ is based on binding and directly relevant United States Supreme Court precedent decided after applicant had exhausted [his] claim at trial and on direct appeal and after applicant had filed his first state habeas application"); *see also Ex parte Hood*, 304 S.W.3d 397, 405 n.40−41 (Tex. Crim. App. 2010) ("*Hood II*") (collecting sources largely relying on *Martinez*).

The Supreme Court's decisions in *Atkins* and *Moore v. Texas*, 137 S. Ct. 1039 (2017), triggers the § 5(a)(1) exception.[45] *Atkins* was decided in 2002, approximately 4 years after Mr. Brown filed his initial state habeas application on March 29, 1998. Although Mr. Brown filed a subsequent application on October 29, 2014, this was

[45] These cases are unpublished. Thus, while the CCA has held that *Moore v. Texas* represents a new legal basis under Article 11.071 section 5(a)(1) on numerous occasions and authorized similar *Atkins* claims under section 5(a)(3) on at least one occasion, Mr. Brown is unable to cite these cases as precedent because the Court has not published them. *See* Tex. R. App. P. 47.7(a).

approximately 3 years prior to the Supreme Court's decision in *Moore*. In *Moore*, the Court found that Texas's framework for assessing intellectual disability was not properly informed by the current medical diagnostic framework and did not reflect appropriate neuropsychiatric expertise. *Moore*, 137 S. Ct. at 1048, 1050.

Importantly, the Court of Criminal Appeals has repeatedly held that *Moore v. Texas*, 137 S. Ct. 1039 (2017) represents a new legal basis under Texas Code of Criminal Procedure Article 11.071 section 5(a). *See, e.g.*, *Ex parte Davis*, WR-40,339-09, 2020 WL 1557291, at *3 (Tex. Crim. App. Apr. 1, 2020) (not designated for publication); *Ex parte Butler*, WR-41,121-03, 2019 WL 4464270 at *2 (Tex. Crim. App. Sept. 18, 2019) (not designated for publication); *Ex parte Gutierrez*, WR-70,152-03, 2019 WL 4318678, at *1 (Tex. Crim. App. Sept. 11, 2019) (not designated for publication); *Ex parte Milam*, WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019) (not designated for publication); *Ex parte Guevara*, WR-63,926-03, 2018 WL 2717041, at *1 (Tex. Crim. App. June 6, 2018) (not designated for publication). This Court should find similarly for Mr. Brown.

b. In the Alternative, This Court Should Authorize Mr. Brown's *Atkins* Claim Under Article 11.071, § 5(a)(3)

In the alternative, Mr. Brown's *Atkins* claim should be authorized under the third exception, § 5(a)(3), because Mr. Brown demonstrated "that there is evidence that could reasonably show, to a level of confidence by clear and convincing

evidence, that no rational finder of fact would fail to find he is [intellectually disabled].” *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007).

Mr. Brown has childhood full-scale IQ scores placing him in the range for mild intellectual disability, and a lifetime of being regarded as “slow” by friends, family members, and teachers. He has struggled to grasp basic concepts like reading, writing, and math, as well as the functional application of those skills in adulthood. Socially, he struggled to make friends, was regarded as “odd,” and was easily led around by others. Mr. Brown has been unable to function on a practical level, beginning with his inability to feed himself properly at an appropriate developmental level in childhood and carrying through to his inability to parent or do other tasks typical of adulthood. The onset of Mr. Brown’s deficits in both intellectual and adaptive functioning is evidence prior to the age of 22 and continued throughout his entire life. With this support, no reasonable factfinder would fail to find Mr. Brown is intellectually disabled.

On at least one other occasion, this Court has found that an *Atkins* claim in subsequent application should be authorized under Article 11.071 §5(a)(3). *See Ex parte Mays*, No. WR-75,105-02 (Tex. Crim. App. May 7, 2020) (unpublished). As such, this Court should authorize his *Atkins* claim under § 5(a)(3).

D. CLAIM FOUR: Mr. Brown's Conviction and Death Sentence was Impermissibly Influenced by Racial Bias

In all criminal cases, the "defendant has the right to an impartial jury that can view him without racial animus." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Mr. Brown was denied that right when one of the jurors at his trial used a racial stereotype to conclude that he was guilty before a single piece of evidence had been presented. Accordingly, his conviction and death sentence are "tainted with constitutional infirmity," and must be vacated. *Thomas v. Lumpkin*, 995 F.3d 432, 444 (5th Cir. 2021).

i. Juror S.W. Concluded that Mr. Brown Was Guilty Based on a Racial Stereotype

In a signed declaration discussing her jury service at Mr. Brown's trial, Juror S.W. revealed her reliance on a racial stereotype when deciding that Mr. Brown was guilty and should receive a death sentence. *See* App. at 491, ¶ 7 ("I knew when I saw him that he had committee bad acts in the past."). She stated that she "could tell the defendant was guilty because he looked like a typical thug." *Id.* She elaborated that she "knew when [she] saw him that he had committed bad acts in the past." *Id.* Based on her perception of Mr. Brown as "a typical thug," she concluded that he "was obviously a danger to society," describing her belief that she "could just tell Mr. Brown would kill again." *Id.* ¶ 12. Having already reached a conclusion as to Mr. Brown's guilt, she perceived the trial as "dragg[ing] on and on even after [she] knew

he was guilty." *Id.* ¶ 13. She recalled messaging with other jurors about "how boring it was and that it was taking too long." *Id.* After all, she noted, the jurors "all had jobs to get back to, too." *Id.*

The word "thug" is a "racial code word." *Thelwell v. City of New York*, No. 1:13-CV01260, 2015 WL 4545881, at *11 (S.D.N.Y. July 28, 2015); *see also Gaston v. Bd. of Educ. of. Chi.*, No. 1:17-CV-01025, 2019 WL 398688, at *6 (N.D. Ill. Jan. 31, 2019) (noting that "'thug' . . . of course is a racially-charged word"); *Brand v. Comcast Corp.*, 302 F.R.D. 201, 218 (describing "thug" as one of "several other terms that are racist either in and of themselves or in context"). Although the term is "facially non-discriminatory," it nevertheless "invoke[s] racist concepts that are already planted in the public consciousness." *Lloyd v. Holder*, No. 11 Civ. 3154(AT), 2013 WL 6667531 (S.D.N.Y. Dec. 17, 2013); *see also Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (describing "thug" as "a term that could be race-neutral or racially charged, depending on the context"); *cf. Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) ("Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign."). It is "used when speaking of Black men (and virtually *only* when referring to Black men)." Bryan Adamson, *Thugs, Crooks, and Rebellious Negroes: Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 Harv. J. Racial & Ethnic Just. 189, 232 (2016)

(emphasis in original). "To many, it has come to be regarded as a racial slur, the new code for a word long fallen out of public favor — [the N word]." *Id.*; *see also Jackson v. ABC Nissan, Inc.*, No. CV-03-0563-PHX-SMM, 2006 WL 2256908, at *4 (D. Ariz. Aug. 4, 2006) (including "thug" in a list of racial slurs).

ii. Juror S.W.'s Bias Denied Mr. Brown His Right to be Tried by an Impartial Jury

The right to "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Accordingly, trial by jury is protected by three distinct provisions of the federal Constitution. *See* U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury"); *Duncan*, 391 U.S. at 149 (holding that the right is guaranteed against the states by the Fourteenth Amendment). Likewise, "[t]he constitutions adopted by the original states" and "the constitution of every State entering the Union thereafter . . . protected the right to jury trial in criminal cases." *Duncan*, 391 U.S. at 153. Texas' constitution is no exception. *See* Tex. Const. art. I, § 10 ("In all criminal prosecutions the accused shall have a . . . trial by an impartial jury.").

At its core, "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). As a result, both the state and federal constitutions require not just the form

of a jury, but the substance of an impartial one. *See* Tex. Const. art. I, § 10 ("In all criminal prosecutions the accused shall have a . . . trial by an impartial jury"); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury"). In addition, "[p]rinciples of due process also guarantee a defendant an impartial jury." *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it.").

An "impartial jury is critical in determining guilt and punishment." *Virgil v. Dretke*, 446 F.3d 598, 605 (5th Cir. 2006). Thus, "[i]f a defendant is denied the right to an impartial decisionmaker . . . any subsequent conviction is tainted with constitutional infirmity." *Thomas*, 995 F.3d at 444. Even a single biased juror renders a conviction constitutionally invalid. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966) ("In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.").

Although denial of the right to an impartial jury renders a conviction invalid "regardless of the nature of the bias," *Thomas*, 995 F.3d at 444, "racial discrimination in the jury system pose[s] a particular threat . . . to the integrity of the jury trial." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Accordingly, "a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*,

505 U.S. at 58. When functioning properly, the jury "is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 309 (1880)). However, when jury verdicts are influenced by race, they "challenge[] the American belief that the jury [i]s a bulwark of liberty," and "damage[] both the fact and perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Peña-Rodriguez*, 137 S. Ct. at 867 (quotations omitted). Because "[s]ome toxins can be deadly in small doses," even the slightest consideration of race renders a verdict unreliable. *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

Although the Supreme Court has required several prophylactic steps "[i]n an effort to ensure that individuals who sit on juries are free of racial bias," those measures "may prove insufficient." *Peña-Rodriguez*, 137 S. Ct. at 868. Thus, the Constitution requires "that racial bias in the justice system must be addressed — including, in some instances, after the verdict has been entered." *Id.* at 869.

Other courts have reversed verdicts when a juror's statements indicate that they relied on racial stereotypes to reach the verdict. *See id.* at 862 (holding that the Sixth Amendment required consideration of a juror affidavit alleging that one juror concluded the defendant was guilty because of the juror's "belief that Mexican men are physically controlling of women"); *Harden v. Hillman*, 993 F.3d 465, 484

(6th Cir. 2021) (holding that *Peña-Rodriguez* required the trial court to consider a juror affidavit because "the jury's wholly unsupported belief that [the plaintiff] and his romantic partner were hard drug users demonstrate[d] overt racial bias"); *Bennett v. Stirling*, 170 F. Supp. 3d 851, 870–71 (D.S.C. 2016) (holding that the state court unreasonably concluded that a juror was not racially biased where the juror used a racial slur to refer to the defendant and "showed that his racial bias influenced his thoughts on" the defendant); *Young v. Gipson*, 163 F. Supp. 3d 647, 732–34 (N.D. Cal. 2015). In *Young v. Gipson*, a juror signed a post-conviction declaration asserting that he could "look at someone and know whether they were good or bad," and that he "knew this guy" — that is, the defendant — "was bad." *Young*, 163 F. Supp. 3dat 733. The juror also claimed that, though "[the defendant]'s lawyers dressed him up well," he "could still tell he was a thug." *Id.* The court found that the juror's "statements exhibit[ed] an alarming level of racism and prejudgment, which seriously undermine [the juror]'s impartiality as a juror." *Id.* Thus, the court concluded that the defendant had "established 'actual bias, which stems from a preset disposition not to decide an issue impartially,'" and granted habeas relief. *Id.* at 734 (quoting *Fields v. Brown*, 503 F.3d 755, 766 (9th Cir. 2007)).

Like the juror in *Young*, S.W. claimed the ability to tell whether Mr. Brown was good or bad just by looking at him. She even claimed to know that he "had committed bad acts in the past" — again just by looking at him. App. 490-91, ¶ 7.

And like the juror in *Young*, she claimed she could tell that Mr. Brown was "a typical thug." *Id.* ¶¶ 7, 12. Moreover, she explicitly acknowledged reaching a conclusion as to guilt based solely on her preconceived stereotype, noting that she "could tell that the defendant was guilty *because* he looked like a typical thug." *Id.* ¶ 7 (emphasis added). She was so confident in this conclusion that she felt the trial was a mere formality that "dragged on and on even after [she] knew he was guilty." *Id.* ¶ 13.

After formalizing her preconceptions into a guilty verdict, she carried them forward into the penalty phase, where she was asked to determine "whether there [wa]s a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Cf. also* Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). When considering the appropriate punishment, she was almost certainly influenced by her initial perception that she "could just tell" that this "typical thug . . . would kill again." App. at 491, ¶ 12; *cf. Buck*, 137 S. Ct. at 776–77 (finding a reasonable probability that the outcome of the future dangerousness inquiry would have been different if the jury had not heard evidence that Black defendants were more likely to commit future acts of violence); *see also Turner v. Murray*, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.")

S.W.'s statements "seriously undermine [her] impartiality as a juror," *Young*, 163 F. Supp. 3d at 733, and denied Mr. Brown his "right to an impartial jury that can view him without racial animus." *McCollum*, 505 U.S. at 58.

iii. The Court Should Authorize This Claim Under Art. 11.071, Section 5(a)(1)

A court may consider the merits of a subsequent habeas application if the application alleges sufficient facts to establish that one of three exceptions is met. Tex. Code Crim Proc. art. 11.071, § 5(a). The first exception applies when the legal basis for the claim was previously unavailable. *Id.* § 5(a)(1). The legal basis for Mr. Brown's claim that his conviction was based at least in part on a racial stereotype was not available for his previous applications for a writ of habeas corpus because, before *Peña-Rodriguez*, Texas courts could not consider a juror's subsequent declaration indicating racial bias. *See Young v. Davis*, 860 F.3d 318, 333 (5th Cir. 2017) ("The Supreme Court has since opened . . . this door thought closed — a retreat from the traditional rule, adopted into the Federal Rules of Evidence, precluding juror testimony from being used to impeach a jury's verdict."). *Compare* Tex. R. Evid. 606(b) (forbidding juror affidavits from being used to impeach a verdict) *with Peña-Rodriguez*, 137 S. Ct. at 862 (holding in 2017 that the Sixth Amendment requires a racial bias exception to the no-impeachment rule). Accordingly, this Court should authorize this Claim under the Section 5(a)(1).

The legal basis for a claim "was previously unavailable if it 'was not recognized by or could not have been reasonably formulated from a final decision of' a relevant court 'on or before' the date the previous application was filed." *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (quoting Tex. Code Crim. Proc. art. 11.071 § 5(d)). A legal basis was previously available if it is "founded on 'familiar legal principles'" or is the "logical extension" of previous case law. *Id.* at 844. By contrast, a legal basis was previously unavailable where subsequent controlling decisions allow defendants to "more easily establish" the claim. *See Ex parte Chavez*, 371 S.W.3d 200, 207 (Tex. Crim. App. 2012) (holding that a subsequent application "present[ed] a new, previously unavailable legal basis" where a subsequent case made the claim easier to establish).

Here, the legal basis for Mr. Brown's claim was not available when he filed his previous applications. Because Mr. Brown's last writ application was filed in 2014 and the Supreme Court's decision in *Peña-Rodriguez* was not issued until 2017, he would not have been able to use S.W.'s declaration to impeach the verdict. In fact, "[b]y the beginning of [the twentieth] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. 107, 117 (1987).

Further, the Supreme Court twice squarely rejected claims that the Constitution required an exception to the no-impeachment rule. *See Tanner*, 483 U.S. at 127 (holding that the Constitution does not require an exception for evidence of juror intoxication); *Warger v. Shauers*, 574 U.S. 40, 50 (2014) (same for juror bias). Not only did no case before *Peña-Rodriguez* "establish[] that proof of a juror's racial animus created a Sixth Amendment exception to the no-impeachment rule," but "[i]f anything, clearly-established precedent held just the opposite." *Tharpe v. Warden*, 898 F.3d 1342, 1345 (11th Cir. 2018); *see also Warger*, 574 U.S. at 50 (holding that the argument that the Constitution required an exception was "foreclosed by" *Tanner*).

In light of its repeated affirmation of the common law rule, the Court's decision in *Peña-Rodriguez* represented "a monumental shift in the law." *Richardson v. Kornegay*, 3 F.4th 687, 703 (4th Cir. 2021); *see also Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting) (describing the Court's holding as "a startling development"). When the Supreme Court held that the no-impeachment rule must "give way" when "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," *Peña-Rodriguez*, 137 S. Ct. at 869, the Court opened for the first time the possibility of juror bias claims that the no-impeachment rule had previously "rendered . . .virtually impossible to prove," *State v. Hoffman*, 326 So.3d 232, 238 (La. 2021).

Peña-Rodriguez provides a previously unavailable legal basis for this claim because it is binding and directly relevant case law that was decided after Mr. Brown filed his last state habeas application, and that directly contradicts the previous law precluding such a claim. Accordingly, the Court should authorize the claim under Section 5(a)(1). *Cf. id.* (holding that a racial bias claim brought after *Peña-Rodriguez* was "new or different" from a racial bias claim brought before *Peña-Rodriguez*, and thus could be raised in a successive application).

iv. This Court Should Grant Relief

Upon first seeing Mr. Brown, Juror S.W. used a racial stereotype to conclude that he had committed bad acts in the past, that he was guilty of the murder for which he was on trial, and that he would kill again in the future. While "fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense," *Peña-Rodriguez*, 137 S. Ct. at 861, certain circumstances "effectively repudiate[] the presumption that the jury has done so," *Bruton v. United States*, 391 U.S. 123, 128 (1968). It is difficult to imagine a more effective repudiation than a juror's express acknowledgment that she based her decision not on the evidence, but on invidious racial stereotypes. Accordingly, this Court should vacate Mr. Brown's conviction and death sentence.

IV. Conclusion

The OCFW respectfully requests that this Court authorize the above claims for further factual development by the lower court and grant his simultaneously filed stay of execution to allow for such development.

Respectfully submitted,

DATED: March 1, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2023, I have caused a true and correct copy of the foregoing Subsequent Application for Writ of Habeas Corpus to be served by email on counsel for the State, Joshua Reiss, Harris County District Attorney's Office, at reiss_josh@dao.hctx.net.

/s/ Kelsey Peregoy
Kelsey Peregoy

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this Subsequent Application for Writ of Habeas Corpus was computer generated and is less than 37,500 words in length, per amended Tex. R. App. Proc. 9.4(i)(2)(A) announced in Misc. Docket No. 22-004.

/s/ Kelsey Peregoy
Kelsey Peregoy

WR-26,178-04

EX PARTE	§	COURT OF CRIMINAL APPEALS
	§	
ARTHUR BROWN, JR. Applicant	§	STATE OF TEXAS

MOTION TO DISMISS THE APPLICANT'S SUBSEQUENT HABEAS APPLICATION AS AN ABUSE OF THE WRIT

THE STATE OF TEXAS files this *Motion to Dismiss the Applicant's Subsequent Habeas Application as an Abuse of the Writ*. The applicant raises four claims for relief. *First*, that he is actually innocent. This claim is grounded largely in the content of a videotaped interview with Anthony Farias ("Farias"), the son of victim Rachel Tovar ("Tovar"). *Application* at 50-78. *Second*, an interrelated *Brady* claim involving the Farias interview as well as records and information pertaining to Tovar's neurology. *Application* at 79-94. *Third*, the applicant is intellectually disabled and cannot be sentenced to death under *Atkins* and its progeny. *Application* at 95-123. *Fourth*, racial bias infected the jury deliberations. *Application* at 125-35.

The State will demonstrate that the applicant's actual innocence, *Brady*, and racial bias claims are procedurally barred, and that none of the four claims allege facts that, if

true, would entitle relief. Indeed, much of the evidence the applicant supplies to support his claims for relief further inculpates him.

THE APPLICANT'S ACTUAL INNOCENCE, *BRADY*, AND RACIAL BIAS CLAIMS ARE PROCEDURALLY BARRED

The applicant's actual innocence, *Brady*, and racial claims cannot satisfy the requirements of TEX. CRIM. PROC. CODE art. 11.071, § 5:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date. TEX. CRIM. PROC. CODE art. 11.071, § 5(d).

For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date. TEX. CRIM. PROC. CODE art. 11.071, § 5(e).

THE APPLICANT DID NOT EXERCISE REASONABLE DILIGENCE FOR HIS ACTUAL INNOCENCE AND BRADY CLAIMS

The applicant's actual innocence and *Brady* claims are grounded in four pieces of allegedly "new" evidence: (1) the videotaped statement of Farias; (2) suppressed information about Tovar's memory; (3) a report on eyewitness identification by Dr. Jennifer Dysert; and (4) the declarations of individuals who implicate others in the mass murder. However, all were previously ascertainable through the exercise of reasonable diligence in both of the applicant's prior writs.

Of particular importance is the reality that neither of the applicant's prior two habeas counsel, Alexander Calhoun and Paul Mansur, provide affidavits that they were unaware of the availability of any of the allegedly "new" evidence. In fact, both Calhoun and Mansur conducted Public Information Act (PIA) reviews of the State's files and had access to the videotaped interview of Farias that is at the core of the applicant's actual innocence and *Brady* claims. *Motion to Dismiss Ex. 1, Aff. Of Meagan Scott.* Indeed, Mansur told the *Houston Chronicle* that he reviewed the State's files and does not disclaim the videotape's presence. Nicole Hensley, *Texas Inmate Seeks Stay of Execution*, Houston Chronicle, March 4, 2023 https://www.houstonchronicle.com/news/houston-

texas/crime/article/arthur-brown-execution-evidence-17818844.php. Current counsel, the Office of Capital and Forensic Writs (OCFW), tacitly acknowledge this reality. *Application* at 78 ("The OCFW first learned about the video in 2023"). As will be shown, both Calhoun and Mansur had valid reasons not to base a claim on the content of the videotape. *Infra.*

Like the videotape, there is nothing "new" about the other pieces of evidence upon which the applicant relies for his actual innocence and *Brady* claims. Regarding Tovar's memory, the applicant relies on an affidavit from one of Tovar's sons and a hearsay affidavit from an OCFW investigator regarding a discussion he had with Farias. *Application Ex.* at 179, 245-46. Neither son indicates that they were not contacted by the applicant's prior legal team and/or unavailable to be located with reasonable diligence. *Id.* The applicant also avers that trial counsel were not given access to Tovar's medical records. *Application* at 64. However, neither of the applicant's trial counsel indicate as such in their affidavits. *Application Ex.* at 172-77, 181-85.

Reasonable diligence also would have developed the expert report of Dr. Jennifer Dysart. Review of Dr. Dysart's CV reveals that she has been providing psychological analyses of eyewitness identification for more than two decades. *Id.* at 221-44. Indeed, review of Dr. Dysart's report, coupled with the absence of an art. 11.073 claim, underscores that there are no new scientific developments upon which her conclusions are based. *Id.* at 187-219.

Finally, the unsworn declarations from Charles Hinton, Lakeisha Shepherd, Cedric Barnes, Derrick Barnes, and Demetrius Hatten share commonalities that highlight why the applicant cannot pass the subsequent writ procedural bar. All knew the applicant at the time of the mass murder. All continue to live in the applicant's hometown of Tuscaloosa, Alabama, so they could easily be located. And none indicate that they were ever unavailable and/or never spoke to a member of the applicant's prior legal team before signing their unsworn declarations. *Application Ex.* at 155-70.

In sum, all of the evidence supporting the applicant's actual innocence and *Brady* claims was easily ascertainable when he filed his two prior habeas applications. Accordingly, the claims should be dismissed as an abuse of the writ. *Ex parte Storey*, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019).

THE APPLICANT'S RACIAL BIAS CLAIM COULD HAVE BEEN REASONABLY FORMULATED IN A PRIOR WRIT APPLICATION FROM EXISTING LAW

The applicant contends that his conviction was influenced by racial bias and that the United States Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017) satisfies the § 5 new law exception. Not so.

In *Pena –Rodriguez*, the Supreme Court noted that "the Constitution's guarantee against state-sponsored racial discrimination in the jury system" is one that the Court had enforced "[t]ime and again," in decisions dating back to 1880. *Id.* at 222. The Court specifically recognized its previous efforts "to ensure that individuals who sit on

juries are free of racial bias." *Id.* at 223 (citing *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973); *Rosales-Lopez v. United States*, 451 U.S. 182, 189–90 (1981) (plurality op.). The Court also observed that even under common law, it had "noted the possibility of an exception to the [no-impeachment] rule in the 'gravest and most important cases.'" *Id.* at 219 (citing *United States v. Reid*, 53 U.S. 361, 366 (1851); *McDonald v. Pless*, 238 U.S.264, 269 (1915)). Further, the Court noted, several federal courts—governed by the comparable Federal Rule of Evidence 606(b)—had previously either held or suggested that a constitutional exception exists for evidence of racial bias. *Id.* at 218–19 (citing *United States v. Villar*, 586 F.3d 76, 87–88 (1st Cir. 2009); *United States v. Henley*, 238 F.3d 1111, 1119–21 (9th Cir. 2001); *Shillcut v. Gagnon*, 827 F.2d 1155, 1158–60 (7th Cir. 1987)).

Thus, the applicant could have reasonably formulated his juror-bias claim from jurisprudence of both the Supreme Court and multiple federal appellate courts. A criminal defendant's right to be tried by a jury free from racial bias is simply not new law. That the Supreme Court did not formally recognize an exception to the no-impeachment rule until *Peña-Rodriguez* does not excuse the applicant's failure to timely advance his claim. The unlikelihood that his claim would have succeeded does not excuse his failure to raise it. Indeed, the applicant does not allege he satisfies the § 5 new factual basis exception; a tacit admission that the affidavit from juror S.W. could have been obtained with reasonable diligence. Accordingly, the applicant's claim should

be dismissed as an abuse of the writ. *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021).

THE APPLICANT FAILS TO ALLEGE SUFFICIENT FACTS THAT WOULD ENTITLE RELIEF

Assuming that the applicant can satisfy either or both or the § 5 legal or factual unavailability exceptions, he must also clear an additional hurdle. His application must allege facts that, if true, would entitle relief. *Id.* at 845. None of the applicant's claims satisfy this additional requirement.

THE APPLICANT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT HIS ATKINS CLAIM

Pertinent Law

In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), the Supreme Court held the execution of intellectually disabled persons to be unconstitutional. In *Hall v. Florida*, 572 U.S. 701, 712 (2014), the Supreme Court clarified that courts cannot disregard "established medical practice" in examining an *Atkins* claim; that while there is a distinction between a medical and legal conclusion regarding an intellectual disability claim, a court's determination must be "informed by the medical community's diagnostic framework."

In *Moore v. Texas*, 137 S.Ct. 1039, 1049-55 (2016), the Supreme Court held that the latest editions of the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the American Association on Intellectual

and Developmental Disabilities *Definition Manual* constitute "current medical standards" that supply "the best available description of how mental disorders are expressed and can be recognized by a trained clinician."

In *Petetan v. State*, 622 S.W.3d 321, 332-33 (Tex. Crim. App. 2021), this Court explained that while the APA and AAIDD clinical manuals are quite similar, a legal determination of Intellectual Developmental Disorder (IDD) should hew closer to the APA's DSM since its clinical purpose is more in keeping with the rationale underpinning *Atkins*.

Intellectual Developmental Disorder

IDD is characterized by significant deficits in (1) intellectual and (2) adaptive functioning (3) during the developmental time period. An individual must satisfy each of the three criterion in order to be classified as IDD. DSM-5-TR at 37. Of importance to the instant writ is the DSM-5-TR requirement that "the diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of intellectual functions, standardized neuropsychological tests, and standardized tests of adaptive functioning. *Id.* at 38.

As will be shown, the applicant does not provide *prima facie* evidence to support a legal conclusion that he has IDD.

School Records Demonstrate a Learning Disability, Not IDD

The applicant's intellectual functioning evidence is found in school records introduced at trial. *Application* at 99-104; *Def. Tr. Ex.* 132-33.[1] The records are extensive and reflect that the applicant is an individual with below average to average intelligence and a learning disability, not IDD.

The applicant's intellectual functioning was repeatedly tested and documented from third through ninth grade. Of particular importance are the results of his WISC-R IQ tests. The WISC-R tests were administered in three year intervals (third, sixth, and ninth grade) so the practice effect is not at issue. Dale G. Watson, *Intelligence Testing*, in The Death Penalty and Intellectual Disability, 113, 123 (Edward A. Polloway Ed. 2015).

[1] Def. Tr. Ex. 132 and 133 are attached as Ex. 3 and Ex. 4. The Bates record refers to the clerk's page reference on the exhibit.

Date Administered	Verbal IQ	Performance IQ	Full Scale IQ
November 1978[2]	70	75	70
December 1981[3]	84	95	88
October 1985[4]	81	96	87

The sixth and ninth grade scores are virtually identical, while the third grade score is an outlier. The school psychologist's report for the third grade test administration indicates the applicant lacked motivation: "Inter and intra test variability probably reflect cultural differences and motivational shifts." *Motion to Dismiss Ex. 4*, November 1978 Psychological Report, Bates 2149-50. By contrast, there is no such suggestion of lack of motivation for his other test administrations. Viewed cumulatively, and in association with the reports of school psychologists who administered the tests, the WISC-R scores do not reflect "*significant* deficits" in intellectual functioning.

The identification of the applicant's learning disability is thoroughly documented in his grades and reports of school psychologists. Based in good measure on his 1978 WISC-R score, the applicant was placed in special education classes in third grade, and

[2] Def. Tr. Ex. 133, Psychological Report, Bates 2149-50; 3rd Grade.
[3] Def. Tr. Ex. 133, Psychological Report, Bates 2142-45; 6th Grade.
[4] Def. Tr. Ex. 133, WISC-R Record Form, Bates 2119; 9th Grade.

was designated as "educable mentally retarded." *Id.* at Bates 2149-50. With the extra assistance the applicant's grades steadily improved and by the end of 5th grade the applicant was a solid B student. *Motion to Dismiss Ex. 2*, Report Card, Bates 2097.

In 6th grade the applicant's exceptionality was changed from "educable mentally retarded" to "learning disabled." The school psychologist's report is insightful and underscores why the applicant does not demonstrate a prima facie case that he is IDD. The report indicates:

- "Pencil control below average for age. Handwriting especially poor. (Reversals and rotations)."[5]
- "These [WISC-R] scores fall near the border between Low Average and Average ranges of intellectual functioning. . . These scores are judged to be a reasonably accurate estimate of Arthur's present level of functioning. On most subtests he did show inconsistency, succeeding on a number of relatively difficult items after failing easier ones. *Potential may be somewhat higher than present level of functioning.*"
- "Arthur tended to show very low self-confidence and either gave up or became disorganized when he felt he was failing. However, with success and positive feedback he gained in ability to attend, persist, and concentrate. His expectations of himself seem to be paramount importance in his level of functioning."
- "The 11 point discrepancy between verbal and performance sections of the WISC-R is consistent with Learning Disability functioning."
- "It is recommended that he be transferred from EMR to LD class on a resource basis. . . *It will be important to help Arthur understand the concept of learning disability*, so that he can develop a more accurate self-concept, i.e., *a person of normal intelligence with a special problem in specific areas of functioning.*"

[5] This suggests something akin to dyslexia.

Motion to Dismiss Ex. 4, 6th Grade Psychological Report, Bates 2142-45 (emphasis added).

The applicant continued to perform well in special education classes that took his learning disability into account. He was promoted every year in middle school and in eighth grade was a B student in core academic subjects. *Motion to Dismiss Ex. 3*, Bates 2098. Also in eighth grade, at age 13, his national percentage on the Short Form Test of Academic Achievement is 24th percentile with a 91 index and 4th stanine.

In ninth grade the applicant is again assessed with a WISC-R and receives an 87 FSIQ. He is also administered a battery of additional tests: Wepman Auditory Discrimination Test, Wide Range Achievement Test-Revised (WRAT-R), Bender Visual-Motor Gestalt Test; Mykleburst and Boshes Behavior Scale and personal observation of the school psychologist. The results indicate a reading problem consistent with a learning disability. Of note, the applicant did well in auditory matters and his ability to discern phonics was solid. On the Wepman Auditory Discrimination Test the applicant demonstrated "good auditory discrimination ability." It is again determined that the applicant is to "receive specially designed instruction in classes for students identified as having Specific Learning Disabilities." *Motion to Dismiss Ex. 4*, October 1985 Psychological Report, Bates 2109-12.

The applicant's school records indicate that he starts the first semester of ninth grade well. He earned an overall B average, including a B in reading and a C in English.

Motion to Dismiss Ex. 3, *Report Card*, Bates 2095. Additionally, his homeroom teacher evaluated the applicant in twenty-four areas of behavioral characteristics, auditory comprehension, spoken language, orientation, and behavior. The applicant's scores average in all areas and above average in "social acceptance" and "completion of assignments". In areas pertaining to adaptive behavior he is found to be cooperative, pays attention, has an ability to organize, can cope with new situations, accepts responsibility, is tactful, and displays appropriate levels of social acceptance. *Motion to Dismiss Ex. 4*, *Mykleburst and Boshes Score Sheet*, Bates 2127.

However, the applicant stops attending school in the second semester of ninth grade, and only intermittently attends school for two more years until he drops out. A December 1985 note from the school nurse states: "This student is an habitual truant – only been in school a few days since the beginning of the year. He hasn't been there in the last few months." *Id.*, *School Nurse Note*, Bates 2171. A counselor's notes in a 1986 Review of Educational Program indicates that the applicant "will not attend school" and "With his record of attendance, no one could pass." The truancy records are important because they indicate that the applicant's lack of motivation, rather than significant deficits in intellectual functioning, was the cause of his repeating ninth grade.

The Applicant Does Not Satisfy the Requirements of the DSM-5-TR

The applicant advances his *Atkins* claim through the report of psychologist Dr. David Price, PhD who diagnoses the applicant as IDD. *Application Ex.* at 356-96.

However, Dr. Price's diagnosis violates the requirements of the DSM-5-TR and undercuts the applicant's *prima facie* claim.

Dr. Price acknowledges that the DSM-5-TR is the current authoritative work for diagnosing mental disorders, including IDD. *Id.* at 353. According to the DSM-5-TR Dr. Price's diagnosis needed to be based on: (1) a clinical assessment of intellectual functions; (2) standardized testing of intellectual functions; (3) standardized neuropsychological tests, and (4) standardized tests of adaptive functioning. DSM-5-TR at 38.

Dr. Price's report makes clear that he did not follow the requirements of the "current authoritative work." Since he never interviewed the applicant, there was no clinical assessment. Additionally, the applicant offers no standardized neuropsychological tests for Dr. Price to review. Finally, there are also no standardized tests of adaptive functioning administered to individuals who knew the applicant during the developmental period. Instead, Dr. Price relies on ten retrospective, non-notarized "declarations" of the applicant's family and friends, whom he did not interview, all of which were signed after an execution date had been set. *Application Ex.* at 397-432. Dr. Price does not acknowledge the potential for malingering by proxy from this diagnostic approach. Chafetz MD, Biondolillo A. *Validity issues in Atkins death cases.* Clin Neuropsychol. 2012;26(8):1358-76. doi: 10.1080/13854046.2012.730674. Epub 2012 Oct 4. PMID: 23035759. Dr. Price also ignores the contemporary assessment of the applicant's ninth grade teacher reflecting that the applicant was cooperative, pays

attention, has an ability to organize, can cope with new situations, accepts responsibility, is tactful, and displays appropriate levels of social acceptance. *Application Ex.* at 356-96.

Atkins jurisprudence does not tolerate deviations from current medical standards as expressed in the DSM-5-TR. *Moore*, 137 S.Ct. at 1049-55. Because Dr. Price did so the applicant cannot demonstrate a *prima facie* diagnosis of IDD. These deviations, coupled with the realities of the applicant's school records, necessitate that the instant claim should be dismissed as an abuse of the writ. *Storey*, 584 S.W.3d at 439.

THE APPLICANT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT HIS RACIAL BIAS CLAIM

The applicant avers that juror S.W. relied on racial bias to convict and he is entitled to relief under *Pena-Rodriguez*. The claim depends on S.W.'s affidavit, signed twenty-eight years post-conviction, in which she describes the applicant as a "thug." *App. Ex.* at 490-92. The applicant fails to make a *prima facie* case of racial bias for three reasons.

First, S.W.'s race is unstated. The Court cannot assume this important fact. See *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

Second, the facts of the applicant's writ are quite different than *Pena-Rodriguez*. In that case a juror believed the defendant was guilty because he was Hispanic. He also doubted the credibility of an alibi witness because he believed, based on his racial animus, that the individual was an illegal alien. *Pena-Rodriguez*, 580 U.S. at 862. The

Supreme Court determined that "where a juror makes a clear statement that he or she relied on racial stereotypes on animus to convict a criminal defendant" a court can consider an affidavit from a juror regarding deliberations. However, the Supreme Court cautioned,

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id.

Assuming *arguendo* that S.W. is not the same race as the applicant, there is no showing that S.W. made a statement during deliberations regarding the applicant being a "thug." Additionally, it is clear that S.W. made the decision to convict and sentence based on consideration of the evidence. S.W. believes that, "The female victim who was shot and survived to testify, Rachel Tovar, was very convincing. Rachel . . . was a really good witness." *Application Ex.* at 490.

Third, the content, timing, and context of S.W.'s statement do not support a *prima facie* case of racial animus. On its face, the term "thug" is race neutral and means "a vicious criminal or ruffian." *Random House Webster's College Dictionary* (2d ed.1997). Decades after trial, S.W.'s affidavit reflects a concern about crime in her

community. *Application Ex.* at 490 ("We are too light on crime now."). In that context, reference to a mass murderer who executed four people, including a pregnant teenager, as a "thug" does not state a *prima facie* case under *Pena-Rodriguez*.

Accordingly, the applicant's claim that juror S.W. relied on racial bias to convict should be dismissed as an abuse of the writ. *Storey*, 584 S.W.3d at 439.

THE APPLICANT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT HIS BRADY CLAIM

The applicant contends that the State committed a *Brady* violation for failure to disclose: (1) medical records of Tovar and Nicolas Cortez; (2) information about Tovar's memory; (3) the videotaped statement of Farias. *Application* at 79-80. These claims do not withstand factual scrutiny and the law.

Pertinent Law

The Supreme Court in *Brady v. Maryland* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. 1194. To establish a claim under *Brady,* a habeas applicant must demonstrate that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; [and] (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Hampton v. State,* 86 S.W.3d 603, 612 (Tex.Crim.App.2002).

Additionally, the evidence central to the *Brady* claim be admissible in court. *Ex parte Kimes,* 872 S.W.2d 700, 703 (Tex.Crim.App.1993).

The Medical Records Are Not *Brady* Evidence

Having been shot in the head, it was common sense that Tovar and Cortez would be taken to the hospital and that medical records would be produced. Indeed, the jury heard testimony on this rather obvious point (XXXI S.F. 59; 215). *Brady* does not apply to evidence known to the defense. *Hayes v. State*, 85 S.W.3d 809, 814-15 (Tex. Crim. App. 2002); *Jones v. State*, 234 S.W.3d 151, 158 (Tex. App.-San Antonio 2007). Of note, trial counsel Saum and Moran do not indicate in their affidavits that they were unaware of Tovar's and Cortez's medical records. *Application Ex.* at 172-77, 181-85.

Additionally, the records do not advance the applicant's cause as they are neither favorable nor material. Cortez's discharge note reflects, "neurologically, the patient is normal." *Application Ex.* at 152-53. Tovar's discharge summary reflects, "She is neurologically intact, appropriate behavior, and feels like she is back to her usual self." *Motion to Dismiss Ex. 2*, *Rachel Tovar Discharge Summary*.

The Allegation about Rachel Tovar's Memory Is Vague

The applicant alleges that Tovar suffered from persistent memory issues from her injury and that this information was suppressed by the State. The evidence advanced in support of this claim is a hearsay affidavit of OCFW investigator Dagny Paul who attests to his February 2023 discussion with Farias. According to Paul,

Farias indicated that members of the Harris County District Attorney's Office knew about Tovar's memory problems. *Application Ex.* at 247. Paul does not quote Farias directly on this point; he paraphrases the alleged content of the discussion.

That the applicant fails to supply an affidavit from Farias should put this Court on notice that the allegation is suspect. Paul's affidavit is simply too vague and speculative to constitute *prima facie* evidence of a *Brady* violation. There is no indication of who was allegedly told, what they were allegedly told, or when they were allegedly told. Additionally, Tovar was thoroughly impeached about her memory of the mass murder, including testimony about some inconsistencies in her statements, and that she was on medication and disabled from her head trauma (XXXI S.F. 23-157). Simply put, there is no probative value to the State's speculative knowledge about Tovar's alleged memory loss. *Harm v. State*, 183 S.W.3d 403, 408-09 (Tex. Crim. App. 2006).

Farias' Statement Was Vague and Not Material

The applicant overstates the value of Farias' statement that he knew "Red" as "Terrell." *Application* at 82-91; *Application Ex.* at 25-26. At trial, the defense developed an alternative perpetrator defense that the mass murderer was Terrell Hill, not the applicant. In support of the instant application trial counsel Saum and Moran indicate that they would have used Farias' statement to advance their alternate perpetrator strategy, but do not provide specifics as to what they would

have done differently. *Application Ex.* at 172-77, 181-85. Their vagueness underscores the weakness of the applicant's *Brady* claim.

The applicant, Saum, and Moran do not make a *prima facie* case as to how Farias' statement would have been admissible. *Kimes*, 872 S.W.2d at 703. If used to cross-examine Tovar it would have constituted improper impeachment and hearsay. TRE 613, 802. The statement could have been admissible if the defense called Farias as a witness. However, his testimony would have added little value.

Importantly, the transcript of the interview reflects that Farias believes "Red" is actually named "Terrell" and then immediately says, "*I think. I'm not too sure*, but . . ." Application *Ex.* at 26 (emphasis added). Later, Farias indicates that Tovar had previously sold narcotics to "Squirt". *Application Ex.* at 133. This is of note because, while cumulative of evidence that Tovar sold narcotics (XXXI S.F. at 143), it buttresses Tovar's ability to later identify the applicant as the perpetrator. Farias was also not present when the mass murder was committed, so anything he learned was hearsay. *Application Ex.* at 18. In short, the strength of the identification and content of the interview are not as robust as the applicant depicts.

Finally, Farias' statement that he believed "Red" to be named "Terrell" needs to be viewed in the context of evidence presented by the State in rebuttal. Witnesses La Tonya Yvette Hill and Ola Denise Ruthledge testified that Terrell Hill was in Tuscaloosa, Alabama on the evening of the mass murder (XXXVIII S.F. at 114, 139).

In sum, the applicant fails to show Farias' statement satisfies the required elements of *Brady*. *Harm*, 183 S.W.3d at 408-09; *Ex parte Reed*, 271 S.W. 3d 698, 727-33 (Tex. Crim. App. 2008); see *Ex parte Carty*, 543 S.W.3d 149, 175-77 (Tex. Crim. App. 2018) (Richardson, Hervey, Walker JJ. concurring) (withheld audiotaped statements not material).

Accordingly, the applicant fails to make a *prima facie* showing that the State committed a *Brady* violation regarding any of the three pieces of evidence, and his claim should be dismissed as an abuse of the writ. *Storey*, 584 S.W.3d at 439.

THE APPLICANT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT HIS ACTUAL INNOCENCE CLAIM

The applicant advances that he is actually innocent. He supports his claim with his *Brady* evidence coupled with a report on eyewitness identification by Dr. Jennifer Dysert, and the declarations of individuals who implicate others in the mass murder. *Application* at 51-79. Simply put, the applicant's "new" evidence is of little value, and pales in comparison to the weight of inculpatory evidence.

Pertinent Law

To obtain review of the merits of his procedurally barred claim, the applicant must support his allegations of constitutional error with reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. The applicant bears the burden of establishing that, in light of the new evidence, it is more likely than not that no

reasonable juror would have rendered a guilty verdict "beyond a reasonable doubt." To determine whether an applicant has satisfied the burden the court makes a holistic evaluation of all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial. The court must then decide how reasonable jurors, who were properly instructed, would react to the overall, newly supplemented record. *Ex parte Reed*, 271 S.W.3d at 733-34 (cleaned up).

The "New" Evidence Is Of Little Value,
While the Evidence Supporting the Conviction Is Substantial

In addition to the weak evidence advanced in his *Brady* claim (*supra*), the applicant adds a layer of hearsay and opinion. Affidavits from Charles Hinton, Lakisha Shepherd, Cedric Barnes, Derrick Barnes, and Demetrius Hatten describe Terrell Hill's reputation for violence, and rumors in the Tuscaloosa community that Hill was involved in the mass murder. *Application Ex.* at 155-170. However, they provide no personal knowledge or facts that exculpate the applicant. Additionally, the opinion of Dr. Jennifer Dysert regarding the weakness of Tovar's and Cortez's identification of the applicant is offset by evidence he presents elsewhere in the instant writ. Specifically, Farias' statement that Tovar had previously sold narcotics to "Squirt." That is, that Tovar was familiar with "Squirt's" appearance so she would be able to identify him.

By contrast, the cumulative weight of the evidence supporting the applicant's conviction is substantial:

- The applicant confessed to Momoh that he had "shot six Mexicans" and confided to her that he had to go away, and was tired of the killings (XXXVI S.F. at 146-48).

- The applicant hurriedly fled the jurisdiction in the immediate aftermath of the capital murders, ultimately being driven to the Louisville where a gun was wiped and disposed of (XXXII S.F. 231-36).

- The applicant gave his sisters $1,000 to drive his van across state lines carrying narcotics shortly after the mass murder (XXXVII S.F. 104-05).

- Cortez and Tovar identified the applicant as being present in the Tovar home when the mass murder was committed (XXXI S.F. at 18-24, 132-33).

- Momoh noticed that her personal Charter Arms .38 was missing after the applicant arrived in her home on the day of the mass murder (XXXVII S.F.at 101-02).

- Money was stolen from the Tovar residence, and Serisa Brown witnessed the applicant, Dudley, Dunson, and Taylor sitting around talking while Dudley counted stacks of money hours after the mass murder (XXIX S.F. at 41).

- Alleged alternative perpetrator Terrell Hill was alibied as being in Tuscaloosa the evening of the mass murder (XXXVIII S.F. at 114, 139).
- The applicant's friends refer to him as "Squirt," the same name by which he was known to Tovar. *Application Ex.* at 155.

Accordingly, the applicant cannot demonstrate that no reasonable juror would have rendered a guilty verdict beyond a reasonable doubt. *Reed*, 271 S.W.3d at 746-51.

PRAYER

THE STATE OF TEXAS asks that the Court of Criminal Appeals dismiss the applicant's successive habeas application as an abuse of the writ. *Storey*, 584 S.W.3d at 439; *Reed*, 271 S.W.3d at 746-51.

SIGNED this 5th of March, 2023.

Respectfully submitted,

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SERVICE

Service has been accomplished by serving a copy of this instrument on counsel for the applicant: Benjamin.wolff@ocfw.texas.gov; kelsey.peregoy@ocfw.texas.gov.

HE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE ARTHUR BROWN Jr., APPLICANT	)	Writ No. WR-26,178-04 Trial Cause No. 0636535

*** EXECUTION SCHEDULED MARCH 9, 2023 ***

REPLY TO STATE'S MOTION TO DISMISS MR. BROWN'S SUBSEQUENT APPLICATION

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I. Introduction

Mr. Brown's Subsequent Application for Writ of Habeas Corpus made pursuant to Article 11.071, Section 5 [hereinafter Subsequent Application], raised serious constitutional claims and new evidence that this Court has never before reviewed. The "Motion to Dismiss" filed by the Harris County District Attorney's Office (HCDAO) [hereinafter, HCDAO's MTD] is unauthorized by statute,[1] relies on a demonstrably false affidavit and should not be considered by this Court. But more importantly, the HCDAO's MTD actually highlights the need for additional proceedings in this case.

To be clear, the HCDAO wants this Court to execute Mr. Brown despite his substantial innocence, *Brady*,[2] and racially biased jury claims primarily because the HCDAO contends that prior postconviction counsel would or could have had access to these materials in the HCDAO's file or by other means. But HCDAO's MTD does not in fact demonstrate that; rather, it relies on a demonstrably false affidavit concerning one item of *Brady* evidence and with respect to another, ignores the fact that the HCDAO attempted to conceal that *Brady* evidence until the day before Mr.

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[1] Texas Code of Criminal Procedure Article 11.071 Section 5 does not provide or contemplate that the State will file an answer or "Motion to Dismiss" to a subsequent application at all. At most, the State may file an answer in the district court after this Court authorizes the claims.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Brown's filing deadline. This disregard of the facts should give this Court serious pause in accepting any of the HCDAO's representations at face value. *See infra* Section (II)(A)(i). Moreover, the HCDAO does not dispute that Mr. Brown's *Atkins*[3] claim meets Section 5, *infra* Section (II)(A)(iii), and its arguments that Mr. Brown's racial bias claim does not meet Section 5 are sophomoric, *infra* Section (II)(A)(iv).

With respect to the merits of Mr. Brown's claims, the HCDAO's MTD conflates Mr. Brown's pleading burden and his merits burden. *See infra* Section (B). As demonstrated below, Mr. Brown has pleaded substantial facts – and sworn affidavits and expert reports – which, if true, would entitle him to relief. Thus, Mr. Brown's contemporaneous stay motion should be granted, and his claims should be authorized for further factual development.

II. Argument

A. The HCDAO's Article 11.071 Section 5 Arguments are Fraudulent and Incorrect

i. The HCDAO Continues to Conceal *Brady* Information to This Day, Casting Serious Doubt on Any Assurance of What Was Available to Any Prior Postconviction Counsel

The thrust of the HCDAO's MTD is that prior postconviction counsel Alex Calhoun and Paul Mansur had access to the HCDAO's file in 2009 and 2014, and then the HCDAO makes the critical *assumption* that for both file reviews, the

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002).

videotaped interview of Anthony Farias was inside the HCDAO's file, and thus available to both Calhoun and Mansur. Notably, the HCDAO has nothing to demonstrate the truth of that assumption. Indeed, the affidavit supposedly supporting this proposition, that of General Litigation attorney Meagan Scott, is fraudulent. For example, although Ms. Scott claims to have "personal knowledge" of the facts in her affidavit, she could not have had personal knowledge of the alleged "fact" that "[t]he VHS tape labeled 'Interview with Anthony Roy Farias Incident # 66563392' would have been available for Mr. Calhoun to review or request for duplication as part of that request" in 2008/2009, HCDAO's MTD Exhibit 1 at 1. In 2008, when Mr. Calhoun's request was made, and in 2009, when his request was "completed" – whatever that means – Ms. Scott had not even graduated from law school. *See* Ms. Meagan Therese Scott, State Bar of Texas, https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=335520 (reflecting that Ms. Scott graduated law school in May 2013, and was barred in Texas on November 1, 2013). In fact, on information and belief, at the time of Mr. Calhoun's request, Ms. Scott had not even graduated from college. Thus, as an undergraduate student, she would not have been working for the HCDAO and could not have had "personal knowledge" of the availability of the tape as a lawyer within the General Litigation Division. Her fraudulent, demonstrably false arrogation of

personal knowledge as to the events surrounding Mr. Calhoun's request in a document sworn under penalty of perjury calls into question her honesty and credibility as to other aspects of her story.[4]

Moreover, Ms. Scott's assertion of personal knowledge of Mr. Mansur's review, while not demonstrably false in the same way, lacks recitation of any relevant facts that would support her personal knowledge of his review, such as whether she was working in the General Litigation Division at the HCDAO as a first-year lawyer in 2014 when Mr. Mansur completed a file review, how she had any personal knowledge of the contents of the HCDAO's file at the time he reviewed it, whether or not any digital information was made available to him, how it was duplicated, when or whether it was sent or received.[5] Her affidavit provides no reason to believe that the HCDAO knew what was in their file at any given time or what they in fact disclosed to whom. There is no better example of this than the fact

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[4] *See, e.g., Liberty Mut. Ins. Co. v. Thompson*, 171 F.2d 723, 726 (5th Cir. 1948) (applying the maxim *falsus in uno falsus in omnibus*, and noting that it is the prerogative of a fact finder to reject the entirety of a witness' testimony if it believes the witness testified falsely as to any material fact).

[5] The HCDAO's citation to a quote in a newspaper by Mansur was disingenuously presented to this Court. Although the HCDAO claims that the quote shows that Mansur "does not disclaim the videotape's presence," HCDAO's MTD at 3, the quote actually reads: "Paul Mansur, who represented Brown Jr. from 2009 until withdrawing last year, said prosecutors gave him access to the case files but he did not recall seeing the medical files or anything pertaining to the interview with Tovar's son." This second-hand, unsworn quotation does not reveal what question Mansur was responding to, what he actually said, nor does it support the HCDAO's contention that he does not "disclaim" that the videotaped statement or medical records were in the file. At most, Mansur allegedly remarked that he did not remember ever seeing them, giving more support to Mr. Brown's position than to that of the HCDAO.

that while the videotaped statement of Anthony Farias was produced in Mr. Brown's HCDAO file to the OCFW in 2023, the HCDAO's file for Marion Dudley, *reproduced just days later*, did not contain the same statement. *See* Subsequent Application at 52 n. 32 (noting it was possible, or even likely, that Mr. Dudley was executed without ever being given access to this critical videotaped statement).

Moreover, the HCDAO's current behavior and file review policies cast further doubt on whether the HCDAO's representations about what it gave prior counsel, and the timing of such disclosures, are accurate. The HCDAO's current file review policies forces postconviction counsel to access the HCDAO's files through the General Litigation Department, and the only permitted vehicle for access is the Texas Public Information Act (PIA). This means that anything unavailable under the PIA, such as medical records (even those of the client himself) are routinely not disclosed. It also means that attorneys in the General Litigation department, who have no familiarity with the case or potentially criminal cases more generally,[6] do review and production; no *knowledgeable* attorney reviews materials for *Brady* information and/or compliance with the Michael Morton Act codified in Article 39.14(h) and (k), which obligates the HCDAO to produce *Brady* information

[6] Moreover, the fact that an attorney with the HCDAO General Litigation Division would swear to the truth of a demonstrably false affidavit when the division exists, at least in part, to provide legal guidance to other attorneys and prevent things like this from happening, calls into question the competence and reliability of its management of file review requests.

discovered after trial. This cumbersome and inadequate system of file review is not new at the HCDAO and makes it extraordinarily unlikely that trial or postconviction counsel were granted anything approaching open file access.

More importantly, the HCDAO does not dispute that the videotaped statement of Anthony Farias discussing "Red" and "Squirt," and repeatedly stating that "Red" referred to Terrell Hill (rather than Mr. Brown or any of his codefendants), was not disclosed at the time of trial. Nor does it actually dispute that the medical records of Rachel Tovar and Nicolas Cortez were never turned over at the time of trial, or that the HCDAO's knowledge of Rachel Tovar's serious memory issues were disclosed to trial counsel. Instead, the HCDAO disingenuously suggests that because trial counsel's affidavit and declaration did not reference the medical records that Mr. Brown had not met his burden; however, because both of these statements were signed *before* the HCDAO had finally disclosed the medical records on February 28, 2023, approximately 24 hours before Mr. Brown filed his pleadings in this case, the statements could not have referenced the medical records. The HCDAO's gamesmanship in disclosing critical medical records 24 hours before a filing deadline – records the OCFW had specifically been requesting for weeks – should not be rewarded[7]; an omission in a supporting affidavit/declaration signed before

[7] The circumstances of the HCDAO's eleventh hour disclosure cast further doubt on the competence and adequacy of the HCDAO file review practices and the certainty with which the HCDAO can purport to aver the contents, much less the historical availability, of its files. The

those records were known to exist cannot be construed as concession. Now that she has learned of the information the HCDAO delayed providing, lead trial counsel Patricia Nasworthy (formerly Saum), has submitted a second declaration, wherein she specifically denies that she was given the medical records in question and avers how critical those records would have been. *See* Supplemental Appendix (Supp. App.) at 1-3.

If the HCDAO's general practice of treating all file review requests as PIA requests and their weak supporting documentation are not enough to cast doubt on the HCDAO's Section 5(a)(1) arguments, the OCFW's own experience with the HCDAO should preclude reliance on its representation regarding the file reviews that would have been conducted in Mr. Brown's case in 2009 and 2014. As the OCFW articulated in his Subsequent Application, it first requested Mr. Brown's file in July 2022, could not review it due to the HCDAO's restrictions until October 2022, and then had to wait an additional 3 months – until mid-January 2023 – before the HCDAO reproduced *any* part of the file for counsel, including the digital materials. This hardly amounts to open file access, and even then, the HCDAO continued to withhold some critical materials, including the medical records of Rachel Tovar and Nicolas Cortez, for which the OCFW had to fight and to which it

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HCDAO initially indicated that it searched its files and could not locate the medical records of Ms. Tovar and Mr. Cortez, records that it obtained in connection with its prosecution of Mr. Brown. The HCDAO later reported that it found the records in a box connected with a co-defendant.

got access only one day before the filing deadline. Because this Court can have no confidence in the HCDAO's representations as to what exculpatory materials prior postconviction counsel would have had access, forever barring Mr. Brown from demonstrating in his innocence and *Brady* claims based on those fraudulent representations would be a travesty and miscarriage of justice.

ii. Mr. Brown's Innocence and *Brady* Claims Meet Article 11.071 Section 5(a)(1) or 5(a)(2), or Alternatively, Any Remaining Concerns Should Be Resolved in a Hearing

Mr. Brown's Subsequent Application pleaded that his innocence and *Brady* claims met both Texas Code of Criminal Procedure Article 11.071 Section 5(a)(1) and (a)(2). The HCDAO's MTD does not engage with Mr. Brown's arguments at all under Section 5(a)(2) for these claims – which would make their Section 5(a)(1) arguments irrelevant – focusing only on Section 5(a)(1).

Mr. Brown's innocence and *Brady* claims meet Section 5(a)(1). Mr. Brown has attached multiple affidavit/declarations from trial counsel detailing how these materials were never before disclosed, and neither Mr. Calhoun nor Mr. Mansur, his prior postconviction counsel, remember ever seeing the videotaped statement of Anthony Farias when they reviewed the HCDAO's file.

Section 5(a)(1) does require that Mr. Brown's claims "have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because

the factual or legal basis for the claim was unavailable" on the date(s) of any prior applications, but it does not require that Mr. Brown do establish supporting facts beyond a reasonable doubt or by any other pleading standard. The HCDAO's MTD at most demonstrates that Mr. Calhoun and/or Mr. Mansur had *some* access to *some portion* of the HCDAO's file, but nothing the HCDAO has pleaded or attached reflects specific knowledge that: 1) the videotaped statement was in the file; 2) that statement was not withheld; and 3) that counsel was allowed to view it at the time of the file review or that it was reproduced for them before they filed their initial and first subsequent applications.

Because the HCDAO's MTD does not address Mr. Brown's Section 5(a)(2) claims, with respect to those claims, Mr. Brown relies on the arguments made in his Subsequent Application.

If it has any remaining questions, this Court can remand the innocence and *Brady* claims to the trial court for further fact-finding on whether Mr. Brown meets Section 5(a)(1), as it has done in numerous other cases. *See, e.g.*, *Ex parte Davis*, No. WR-40,339-09, 2020 WL 1557291, at *2 (Tex. Crim. App. Apr. 1, 2020) (remanding for further fact-finding on whether applicant met Section 5 on an Atkins claim and directing the Court to make recommendations on the merits of any such claim); *Ex parte Sales*, No. WR-78,131-02, 2018 WL 852323, at *3 (Tex. Crim. App. Feb. 14, 2018) (remanding for fact-finding and credibility determinations on

Section 5); *Ex parte Storey*, No. WR-75,828-02, 2017 WL 1316348, at *1 (Tex. Crim. App. Apr. 7, 2017) (remanding where applicant arguably met Section 5 but where "the record is not sufficient to determine with assurance whether applicant could have previously discovered the evidence complained of in the claims."); *Ex parte Hood*, No. WR-41,168-11, 2008 WL 4946276, at *1-2 (Tex. Crim. App. Nov. 19, 2008) (granting a stay of execution and remanding for further fact-finding on whether applicant met Section 5). At most, the HCDAO's MTD creates a factual dispute over what was in its file, when it was made available, what part of the file was made available, and whether any or all of the materials were reproduced and received by prior postconviction counsel before they filed prior applications. Should this Court remain uncertain that Mr. Brown has met his burden under Section 5(a)(1) and/or his burden under Section 5(a)(2), in the alternative, this Court can and should remand this case for further fact-finding on Section 5.

iii. The HCDAO Concedes Mr. Brown's *Atkins* Claim Meets Article 11.071 Section 5

Nowhere in its MTD does the HCDAO dispute that Mr. Brown's *Atkins*' claim meets the requirements of Section 5. The HCDAO has thus conceded that Mr. Brown's *Atkins*' claim meets Section 5's requirements, and disputes only the merits of Mr. Brown's claim. Mr. Brown has supported his claim with a wide array of evidence of intellectual disability. This includes evidence that Mr. Brown *was diagnosed* as intellectually disabled as a child, had his IQ assessed at 70 by a full-

scale measure, people in his family and community observed his adaptive deficits, he suffered head trauma, and he likely suffers from fetal alcohol spectrum disorder due to his mother's heavy binge drinking while pregnant with him. Mr. Brown further supported his ID claim with an expert evaluation. To the extent that the HCDAO disagrees with the methodology of this expert, that is a question to be explored in a hearing. To counsel's knowledge, this Court has never before refused to permit the evidentiary development of a new *Atkins* claim, whether before or after *Moore v. Texas*,[8] where the claim was supported by a childhood IQ score of 70, a childhood diagnosis of intellectual disability, adaptive deficits, etiological explanations/support and an expert opinion. It should not do so here. At most, the HCDAO has conceded that there is a factual dispute on the merits, which is best resolved through factual development in the district court. *See infra* Section (II)(B)(ii).

iv. Mr. Brown's Racial Bias in the Jury Claim Meets Section 5

The HCDAO does not dispute that Mr. Brown's prior applications were both filed before the United States Supreme Court ruled in *Pena-Rodriguez,* ruled that the Sixth Amendment requires that rules against juror impeachment must give way

[8] *See Moore v. Texas*, 137 S.Ct. 1039 (2017) (*Moore I*) (striking down Texas's court-created *Briseño* factors for the assessment of IDD claims as contravening medical standards for the diagnosis of IDD and creating an unacceptable risk of executing IDD individuals in violation of the Eighth Amendment); *Moore v. Texas*, 139 S.Ct. 666 (2019) (*Moore II*) (reaffirming the same).

where a juror demonstrates that "he or she relied on racial stereotypes or animus to convict a criminal defendant." 580 U.S. 206, 225 (2017).

Although the HCDAO attempts to cobble together federal case law – none from the 5th Circuit and none from this Court – to argue that "[Mr. Brown] could have reasonably formulated his juror-bias claim from jurisprudence of both the Supreme Court and multiple federal appellate courts," this argument is disingenuous. MTD at 6. The HCDAO acknowledges that before *Pena-Rodriguez*, Mr. Brown's claim would have failed. *See* HCDAO's MTD at 6 ("The unlikelihood that his claim would have succeeded does not excuse his failure to raise it."). The Texas Rules of Evidence would have barred Mr. Brown's claim before *Pena-Rodriguez*, as Rule 606(b) prohibited juror testimony on "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Tex. R. Evid. 606(b)(1); *cf. Colyer v. State*, 428 S.W.3d 117, 124-25 (Tex. Crim. App. 2014) (acknowledging that Rule 606(b) "outside influence" does not include a anything that came from the juror themselves or their personal knowledge/experience). Had Mr. Brown raised this claim before, irrespective of whether non-binding appellate courts had held differently about Federal Rule of Evidence 606, it would have failed in Texas.

But more critically, this Court has previously indicated that *Pena-Rodriguez* was a new legal basis. *See Ex parte Robertson*, 603 S.W.3d 427, 428 (Tex. Crim. App. 2020) (this Court issued a stay of execution and ultimately granted a suggestion for the reconsideration of the previous disposition of a racial bias and *Batson* claim,[9] citing *Pena-Rodriguez* as new legal authority). Particularly in light of its prior treatment of *Pena-Rodriguez*, this Court should not be persuaded by the HCDAO's Kafkaesque argument, whereby all capital defendants are obligated to raise claims that fail in state and most all federal courts (or claims based on law not yet in existence) or else be forever barred from raising them in the future. Indeed, accepting such an argument would render the "new law" exception contained in Section 5(a)(1) meaningless, because it would always be possible to make an argument contrary to existing law. This claim meets Section 5(a)(1) and should be considered on its merits.

B. Mr. Brown's Has Pleaded Facts Which If True Demonstrate Entitlement to Relief, and the HCDAO's Arguments Otherwise are Incorrect and Misstate the Burden at the Pleading Stage

The difference between the *pleading* burden of Article 11.071 that Mr. Brown's Subsequent Application needs to meet to pass through Section 5 and to be entitled to further evidentiary development, and the *merits* burden that Mr. Brown would need to meet *after* evidentiary development to be entitled to relief is critical.

[9] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Although the HCDAO pays lip service to this difference in their MTD, its arguments clearly conflate these burdens. Once Mr. Brown has met (or arguably met, as further factual development can be ordered on Section 5 where needed) the procedural hurdle of Section 5, he need only demonstrate that he has pleaded facts which, if true, could entitle him to relief. As set forth below, he has done so.

i. Mr. Brown's Innocence and *Brady* Claims Meet the Pleading Burden

The HCDAO does not dispute that the videotaped statement of Anthony Farias as well as the medical records of both Rachel Tovar and Nicolas Cortez were never turned over to Mr. Brown's trial counsel. Instead, the HCDAO argues only that Anthony Farias' videotaped statement, Rachel Tovar's medical records and the corroborating statements of her two sons, as well as Nicolas Cortez's medical records, do not entitle Mr. Brown to relief under *Brady*. The HCDAO likewise argues that these materials – in addition to the new materials of statements from witnesses in Alabama corroborating Terrell Hill as a viable alternate suspect, and eyewitness identification expert Dr. Jennifer Dysart's report casting further doubt on the critical eyewitness identifications (even assuming they were not brain damaged or cognitively affected at the time they made them) – are not sufficient to merit relief on his innocence claim. These arguments are wrong.

First, with respect to Mr. Brown's *Brady* claim, Mr. Brown need only have pleaded sufficient facts, which, if true, demonstrate information was favorable,

suppressed, and material. He has pleaded several pieces of evidence that the HCDAO does not dispute were unavailable to Mr. Brown's trial counsel and does not dispute were known to the prosecution, including the Anthony Farias videotaped statement implicating someone else in these murders, the medical records of the only two surviving eyewitnesses,[10] and the HCDAO's knowledge of Rachel Tovar's serious memory issues separate and apart from the medical issues before she testified. Notably, the MTD does not dispute that the HCDAO knew of Rachel Tovar's serious memory issues and did not disclose them to defense counsel. There is no reasonable dispute these materials were suppressed.

With respect to whether these materials were favorable and material, they must be considered cumulatively. *Kyles v. Whitley*, 514 U.S. 419 (1995) ("[T]the state's obligation . . .to disclose evidence favorable to the defense, turns on the *cumulative effect of all such evidence suppressed* by the government. . .") (emphasis added). The Anthony Farias videotaped statement plainly refers to the perpetrator "Red" as being Terrell, which given the defense theory at trial that Terrell

[10] The HCDAO suggests that because trial counsel knew that Rachel Tovar and Nicolas Cortez had been in the hospital, the medical records would have been "known" to trial counsel and therefore cannot be deemed suppressed. But such a conclusion ignores two critical facts: First, that trial counsel had no access to these records; and Second, that the HCDAO assured the trial court that it would find out and disclose from each witness issues about their mental health, which certainly would include information like that contained in the records. *See* 4 RR 54-56 ("The Court: Okay. That's one angle of impeachment. Another one might be any psychological, psychiatric hassles that any of your witnesses maybe have had. Ms. Brown: I have no information of that, but I will discuss it with each witness before they take the stand.").

Hill and his associates had committed these murders, rather than Mr. Brown and his codefendants, undoubtedly is exculpatory.

The HCDAO's MTD emphasizes the one point at which Anthony says, with respect to Terrell's identity, "I think, I'm not too sure," MTD at 20, Mr. Brown's Appendix (App.) at 27, but ignores all the unqualified references that Anthony makes. *See, e.g.*, App. at 25 ("Red, his name is Terrell"); id. at 75 ("I know for a fact it's Terrell"). It also fails to acknowledge that there is no place in the videotaped statement where Anthony gives any name for Red other than Terrell. Thus, Anthony's statement plainly provides evidence implicating an alternative suspect, one that trial counsel was seeking to demonstrate was the true perpetrator. Trial counsel Saum and Moran both have sworn it would have been critical to their defense presentation. Whatever specious arguments the HCDAO now musters about the strength of Anthony Farias' identification should have been presented to the jury, and do nothing to negate either the favorable nature of this information or its materiality.

Likewise, the medical records of Nicolas Cortez and Rachel Tovar were both favorable and material. Those records include a CT scan of Ms. Tovar's head made within 24 hours of the crime, a scan which showed she had a skull fracture in the left occipital area and a brain contusion on her occipital lobe, the part of the brain responsible for a variety of visual-related abilities. Indeed, the damaged area of the

brain was right next to her temporal lobe – damage which is likely responsible for her history of seizures that her son Anthony Farias described to the OCFW.[11] This was significant impeachment material closely related to her identification of the perpetrators of the murders, given that she saw the photospreads and made identifications *after* damage relevant both to perception of new visual information and processing of earlier acquired information. Trial counsel should have been able to question her doctors about her injuries and further investigate further the effects of her brain damage.

Mr. Cortez's intake medical records revealed a serious head injury that very likely had cognitive affects. For some time, he would have suffered oxygen deficiency to his brain: Upon intake, Mr. Cortez's skin was cold to the touch, he had a very faint pedal pulse, his pupils were dilated 2mm and reactive on the left, and 3-4mm and reactive on the right, and he suffered generalized seizures; nurses repeatedly noted that he had an ineffective breathing pattern and ineffective airway clearance; and he was on oxygen for at least four days while he was in the hospital. Because deprivation of oxygen to the brain for a sustained period can have devastating consequences for recall and cognitive processing, this, like the

[11] Notably, Anthony Farias described issues with Rachel Tovar's vision as well as her history of seizures before the medical records were ever disclosed to the OCFW; and they corroborate the damage revealed within them. Amador Farias, her elder son, also described similar issues and signed a sworn declaration to that effect, also before the OCFW ever saw the medical records in this case.

information contained in Rachel Tovar's records, was unquestionably favorable impeachment material. Trial counsel should have been able to question his doctors and/or their own experts on the effect of this brain damage on his memories of the night of the shooting and on his susceptibility to suggestion during identification procedures.

The HCDAO attempts to sweep these serious sources of impeachment under the rug by cherry-picking parts of the discharge records that state that Rachel Tovar was neurologically intact and "feels like she is back to her usual self," and that Nicolas Cortez was "normal" upon discharge. MTD at 18. But this ignores the serious trauma the records otherwise reflect, that they were asked to make identifications at a time when they were far from "normal," and that both were referred to follow up care for their injuries. Given the centrality of their identifications to the case against Mr. Brown – centrality reflected in the prosecution's focus on those identifications in their closing arguments – the favorable impeachment material contained in the suppressed records was itself material.

But these records do not stand alone. When they are considered with other indications of Mr. Brown's innocence, including the corroborating statements of individuals in Alabama who described Terrell Hill as violent, dangerous, and having a history of robbing drug dealers, and the multiple sources of unreliability that

undermined the eyewitness identifications, as described in Dr. Jennifer Dysart's report, and the information obtained from Rachel Tovar's sons concerning her continued impairments, what is left of the prosecution's case is very, very little. Put simply, there is no significant unimpeached evidence pointing to Mr. Brown's guilt.

The HCDAO seizes upon a handful of facts from trial that it claims establishes that the evidence against Mr. Brown is "substantial," but fails to consider how each purported "fact" was impeached. MTD at 23. It focuses on the statement of Carolyn Momoh that Mr. Brown allegedly said he had "shot six Mexicans," but ignores that she immediately disavowed those statements on cross, and did so repeatedly; indeed her recantation was so adamant and insistent that the HCDAO later charged her with perjury. *See* Subsequent Application at 41-44; *see also* 37 RR 73 (when asked if it was accurate that "Arthur Brown actually said anything to you about having shot anyone," and Carolyn Momoh said "that's inaccurate."); 37 RR 86 (HCDAO attorney Wilson asked Carolyn Momoh: "[D]id you ever hear the words from Arthur, your brother, this defendant, that he shot six Mexicans or I killed six Mexicans?" and Carolyn Momoh testified unequivocally: "I never heard it."). The HCDAO focuses on Cortez and Rachel Tovar's identifications of Mr. Brown and his codefendants, but ignores their medical records and Rachel Tovar's persisting memory issues – issues that Anthony Farias reported were known to the HCDAO. Likewise, the HCDAO cites the purported alibi the HCDAO attempted to present

for Terrell Hill, while ignoring that it was so flimsy that Mr. Brown's trial counsel made fun of it in closing argument: "They bring in all these witnesses, attempt to establish an alibi for Marcus Terrell Hill and I would hazard to guess that we believe we'd be laughed out of the courtroom if we put on that kind of alibi[.]" 39 RR 95; *see also* 39 RR 97 ("But there's absolutely nothing that they brought you to show you that Marcus Terrell Hill didn't stay here [in Houston].").

Equally telling is that the HCDAO fails to address the similarity between the way Terrell Hill died – shot while engaged in a drug-related robbery – and the crime at stake here, and fails to address the multiple declarants from Tuscaloosa who describe Hill's violent nature. The HCDAO does cite one piece of evidence that was not impeached, Mr. Brown's flight, but fails to note that flight alone is not sufficient evidence of guilt, particularly when the one who flees knows he is being pursued, as Mr. Brown did.

Finally, it is revealing that the HCDAO does not mention the only forensic evidence that it offered at trial, ballistic evidence that would have helped convince the jury of Mr. Brown's guilt – but has since been established to be false. Thus, there is no significant piece of evidence against Mr. Brown that hasn't been impeached. In light of this scant evidence, Mr. Brown demonstrates both that this new information is material to his *Brady* claim, as well as that when weighed against his

new information, Mr. Brown can demonstrate his innocence by clear and convincing evidence.

ii. Mr. Brown's *Atkins* Claim Meets the Pleading Burden

The HCDAO spends the majority of its MTD attempting to dispute the merits of Mr. Brown's *Atkins* claim. HCDAO's MTD at 7-15 (out of 24 total pages). However, Mr. Brown's pleading and evidence more than meets the pleading requirement on all three criteria for diagnosing intellectual disability.

Although the HCDAO spills much ink, it does not dispute that Mr. Brown's *first* full-scale IQ test on the WISC-R was a score of 70, a score obtained when he was in the 3rd grade, and one that clearly satisfies prong one, significant limitations in intellectual functioning. Although Mr. Brown achieved higher scores on subsequent administrations, it is not uncommon for intellectually disabled (ID) people to have a range of IQ scores, particularly when those scores likely were inflated by both practice effects and outdated norms, as is the case here. Moreover, the HCDAO fails to address the achievement test scores that do corroborate the score of 70, as Dr. Price's report explains.

The HCDAO's response also attempts to wave away the fact that Mr. Brown's school records contain a determination that he is mentally retarded, pointing to later descriptions of Mr. Brown as learning disabled as a reason to disregard the mental retardation determination. MTD at 10-11. However, as Mr. Brown has pleaded and

is widely known, it is not uncommon for persons with intellectual disability to be identified as learning disabled; sometimes this occurs because parents have fought labeling their child as retarded, sometimes because the school system fears a suit alleging discrimination (especially with respect to Black students), and sometimes simply to spare the child shame and embarrassment.

Thus, no fact or combination of facts the HCDAO cites with respect to the first prong demonstrates that Mr. Brown is precluded from meeting that prong, as Dr. Price has concluded he does. The HCDAO's attempts to discredit Dr. Price's report with respect to the second prong, significant deficits in adaptive functioning, are equally unpersuasive. The HCDAO focuses on the fact that his friends, family, and teachers signed declarations after his execution date was set rather than on their content, but (1) fails to note that this was the first opportunity for any of these declarants to make these statements, given that Mr. Brown's intellectual disability has never previously been investigated; (2) fails to confess that the entire concept of "malingering by proxy," is one lacking in scientific support; (3) fails to observe that at least his teacher can hardly be presumed to be lying on Mr. Brown's behalf, and (4) fails to acknowledge that these observations generally comport with school achievement test records made long before any criminal charges were brought against Mr. Brown.

Moreover, setting aside the completely unwarranted attack on the credibility of the declarants, it is plain that the declarations contain specific and compelling descriptions of Mr. Brown's substantial limitations, descriptions that the HCDAO does not contest would, if accurate, establish prong two. The only evidence the HCDAO proffers that might count as any kind of rebuttal of the existence of significant adaptive functioning deficits is some of Mr. Brown's grades. However, those grades were earned in classes for academically challenged students, and not all of Mr. Brown's grades, even in those classes, were adequate. Moreover, those grades do not speak at all to the other kinds of deficits – practical and social – to which the declarations attest**.**

In any event, everything the HCDAO offers on the question of the strength of Mr. Brown's ID claim are matters for evidentiary development and should be addressed to a factfinder. The HCDAO does not dispute that this claim meets Section 5, *supra* Section (II)(A)(iii), and Mr. Brown has supported this claim with the report of an expert, a childhood IQ score of 70 and placement in classes for the Educable Mentally Retarded (EMR), as well as signed and sworn statements of individuals who knew him in the developmental period. He has demonstrated facts that, if true, entitle him to relief of his death sentence.

iii. Mr. Brown's Racial Bias Claim Meets the Pleading Burden

Mr. Brown has demonstrated that one of his jurors convicted him because she believed he was a "typical thug," and that she could tell he had "done bad acts in the past" just by looking at him. Because one juror held racist beliefs that were directly tied to their verdict in this case, Mr. Brown has met his pleading burden. Though the HCDAO calls the term "thug" "race neutral," federal courts and law review journals disagree. *See* Subsequent Application at 124-127. Mr. Brown has pleaded that one of his jurors held racist beliefs, supported that pleading with a signed sworn statement from that juror that employs racist terminology and asserts that seeing Mr. Brown persuaded her of his guilt. Mr. Brown should be allowed factual development on this claim.

III. Conclusion

The OCFW respectfully requests that this Court authorize the above claims for further factual development by the lower court and grant his simultaneously filed stay of execution to allow for such development.

Respectfully submitted,

DATED: March 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2023, I have caused a true and correct copy of the foregoing to be served electronically on counsel for the State, Joshua Reiss, Harris County District Attorney's Office, at reiss_josh@dao.hctx.net.

/s/ Kelsey Peregoy
Kelsey Peregoy