# EXHIBIT B

**WRIT NO. WR-62,159-03**

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| **EX PARTE** | § | **IN THE 235th CRIMINAL** |
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| | § | **DISTRICT COURT** |
| | § | |
| **MICHAEL NEWBERRY** | § | **COOKE COUNTY, TEXAS** |

## FINDINGS AND CONCLUSIONS AND ORDER

Pending before the Court is applicant Michael Newberry's third postconviction application for writ of habeas corpus. After considering the application, including all exhibits; the amicus curiae brief, including all exhibits; the appellate record from the trial; the record from the hearing on Applicant's second application for writ of habeas corpus; the evidence presented at this Court's hearings on Applicant's third application; Applicant's first amended agreed proposed findings of fact and conclusions of law; and the law applicable to the grounds raised, the Court RECOMMENDS that Applicant's request for relief be GRANTED on the sole ground that the State withheld exculpatory evidence and that Applicant be granted a new trial.[1] *See* Tex. Code Crim. Proc. Ann. art. 11.07, § 3(d); *see, e.g.*, *Ex parte Mitchell*, 853 S.W.2d 1, 4–6 (Tex. Crim. App. 1993).

[1]The District Attorney of Cooke County, John Warren, has stated in open court that if relief were granted, the State would dismiss the capital-murder case against Applicant and that Applicant would not be further prosecuted.

## I. GENERAL FACTS

1. Applicant was convicted of the capital murder of Granville Hanks during the course of committing a robbery and was sentenced to life confinement. *See* Tex. Penal Code Ann. § 19.03(a)(2). The Second District Court of Appeals affirmed his conviction; a petition for discretionary review was not filed. *Newberry v. State*, No. 02-97-00486-CR (Tex. App.—Fort Worth May 7, 1998, no pet.) (not designated for publication).

2. In 2005, Applicant filed his first application for postconviction habeas corpus relief based on ineffective assistance of counsel, which the Court of Criminal Appeals denied without written order. *Ex parte Newberry*, No. WR-62,159-01 (Tex. Crim. App. Aug. 31, 2005) (not designated for publication). [Appl. Exs. 38] In the habeas hearing before the trial court, Applicant testified that before trial, his attorney John Morris[2] had not tried to obtain and had not received a plea-bargain offer from the State in his case. [Writ No. 96-088A RR 49]

3. On June 16, 2008, Applicant filed a second, pro se application for writ of habeas corpus, alleging that Morris had conveyed a plea-bargain offer from the State of 30 years' confinement and that Applicant had accepted that offer. [Appl. Ex. 40] Applicant further alleged that Morris "forgot to tell the D.A. I accepted the 30 year offer." [Writ No. 96-088B RR at 6, 11] He represented to the court that he had sent

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[2]John Morris is the current statutory County Court Judge of the Cooke County Court at Law.

letters accepting the offer, which he attached to his application. The trial court held a hearing and ultimately found that Applicant had "fabricated" evidence and recommended that relief be denied. [Writ No. 96-088B; 135 CR 77] The Court of Criminal Appeals dismissed his second application as an unauthorized subsequent writ. *Ex parte Newberry*, No. WR-62,159-02 (Tex. Crim. App. Aug. 13, 2008) (not designated for publication); *see* Tex. Code Crim. Proc. Ann. art. 11.07, § 4.

4. In late 2024, Applicant filed the instant third application for postconviction habeas corpus relief, raising three grounds: (1) Applicant's trial and appellate counsel, Morris, had an actual conflict of interest because he had previously represented Applicant's alleged accomplice, Lilton Deon Moore; (2) the prosecutor, Janelle Haverkamp,[3] withheld exculpatory evidence; and (3) the state, through the prosecutor, presented false testimony. Applicant further raises an alternative ground, requesting a new, out-of-time direct appeal based on his counsel's conflict. This Court held an evidentiary hearing on the application on February 4 and February 13, 2025.

## II. SUBSEQUENT-WRIT BAR

5. As discussed, the Court of Criminal Appeals denied Applicant's first writ application, which was based on ineffective assistance of counsel. The Court of

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[3] Janelle Haverkamp is the current District Judge of the 235th District Court of Texas. Because of her prior involvement in the case, Judge Haverkamp was recused from the instant writ, and the undersigned was assigned to hear and determine it by the Presiding Judge of the Eighth Administrative Judicial Region of Texas. *See* Tex. R. Civ. P. 18a(g)(7).

Criminal Appeals dismissed Applicant's second writ application, also raising ineffective assistance of counsel, as an unauthorized subsequent writ. Applicant now argues that his third writ application is not barred as a subsequent writ because the factual or legal bases for his claims were unavailable when the previous two applications were filed; thus, his current claims and issues could not have been presented previously. Tex. Code Crim. Proc. Ann. art. 11.07, § 4(a)(1). To hurdle the subsequent-writ bar, Applicant must allege "sufficient specific facts" to establish this exception. *See id.*

› 6. Applicant has articulated specific facts, that are agreed to by the state.[4] First, Applicant argues that there was newly discovered evidence in the form of affidavits signed by witnesses at Applicant's trial as well as his alleged accomplice, Moore, who did not testify. [Mem. in Supp. of Appl. at pp. 38–39] Applicant included these affidavits as exhibits to his application: Sidney Perry's August 29, 2022; Douglas Wilson's September 6, 2022 affidavit; Louie Ray Sheppard's August 25, 2022 affidavit; and Lilton Deon Moore's September 8, 2024 affidavit. [Appl. Exs. 2, 3, 4, 18] It is indisputable that these affidavits were prepared and signed over a decade after Applicant's second writ was filed. Applicant argues that upon receiving Moore's 2024 affidavit, his counsel

[4]At this Court's habeas hearing, the Cooke County District Attorney stated that he would waive any objection to writ based on the subsequent-writ bar or laches due to the "substantial nature of misconduct in this case." [2/4/2025 RR 19] He also stated in a letter that "to the extent the State can waive any alleged bar under 11.07 Sec. 4 for the relief requested in the entirety of the writ, the state has a legitimate interest in the integrity of the conviction and would waive any objection to this writ proceeding on its merits under the statute in the interests of justice." [Appl. Ex. 1 at 2]

filed an open records request with the Cooke County District Attorney's office on October 21, 2024, requesting "the prosecution file for Lilton Deon Moore." [Appl. Ex. 41]

7. Applicant argues that the facts as detailed in the new affidavits concerning the killing of Hanks were inconsistent with the witnesses' testimony at trial in that each witness stated that no one had talked about robbing Hanks and Moore and that Applicant had intended only to conduct a drug transaction. [Appl. Exs. 2, 3, 4]. Moore's affidavit was inconsistent with his original statement to the police and his grand jury testimony. [Appl. Exs. 8, 16, 18] In Moore's affidavit he states, "I have given several statements to the police and grand jury regarding the incident in which [Applicant] was charged with Capital Murder. I wish to recant all statements that I called this incident a robbery or said [Applicant] had anything to do with the drug transaction and murder. It was not a robbery. Nobody planned to rob anybody. It didn't turn into a robbery." Moore went on to say that he had intended to sell drugs to Hanks and while Applicant did get out of the car with him, Applicant did not go to Hanks's car with Moore but instead went to a friend's house nearby. [Appl. Ex. 18]

8. Applicant argues that this evidence was not available until September 2024, leading to his October 2024 open records request to obtain Moore's file from the District Attorney's Office. [Appl. Ex. 41] When this file was provided, Applicant's attorneys contend they gained access, for the first time, to the exculpatory grand-jury testimony of Moore. They claim that this was when they first learned that Moore had

told the grand jury that the shooting did not occur during the course or commission of a robbery. They maintain that is when they first learned that Haverkamp had failed to disclose exculpatory evidence per the trial court's order. [Mem. in Supp. of Appl. at 38–42] They also claim that they learned for the first time, through receipt of Detective Ronnie Williams's report, that Moore had told Williams that Morris had represented him in the same criminal matter. After a complete review of all evidence furnished by the Cooke County District Attorney's Office, Applicant's counsel filed the current writ based on information that they maintain they did not and could not have known when the previous writs were filed.

9. This Court finds that Applicant could not have presented his claims that the prosecutor failed to disclose the specific exculpatory evidence alleged and that there was an alleged conflict by Morris because they did not have the information to do so until after the Open Records Request. This Court finds that Applicant's claim that his conviction was based on false evidence could not have been presented in a previous writ because the claim was based on the affidavits that were received in 2022 and 2024.

10. Accordingly, there are sufficient specific facts to overcome the bar, allowing this Court to consider the merits of the application.

## III. BACKGROUND FACTS

### A. The Offense

11. In the night-time hours of May 28, 1996, Applicant, Moore, Louis Ray Sheppard (also known as "Neechie" or "Little Ray"), Douglas Wilson (also known as

"Cotton"), and Sidney Perry were driving together in Gainesville, Texas, when they encountered Hanks, whose car was stalled. Hanks asked the five young men to help him by pushing his car. At the same time, he asked if they had any crack cocaine he could buy. The teenagers refused to help him and kept driving. A short time later, Hanks was found in his car around the corner from where the group had initially seen him. He had coins in his hand and a single, fatal gunshot wound to his neck.

### B. THE INVESTIGATION

12. Williams investigated Hanks's murder. [Appl. Ex. 6] On May 30, 1996, Willie Hennesy came to the police department to tell Williams that he had heard "on the street" that Applicant, Moore, and "Cotton" were involved in the killing. [Appl. Ex. 6 at 3]. The next day, Hennesy returned to the police department to tell Williams he had "someone out in the hall" who wanted to talk to Williams. [Appl. Ex. 6 at 4] In his report Williams wrote: "[T]his was Lilton Deon Moore. Deon Moore was with Michael Newberry when he killed the guy." The report then stated in a separate paragraph: "Before I could talk to him about the homicide, Lilton Deon Moore wanted to talk to his attorney, John Morris."[5] Williams further wrote, "[A]fter Lilton Deon Moore talked to his attorney, I then took a tape-recorded statement from him." [Appl. Ex. 6 at 4]

13. Moore's first statement lasted nine minutes. [Appl. Ex. 8] He was not advised of his rights because Williams told him that he was not a suspect. [Appl. Ex. 8 at 2]

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[5]John Morris was a private attorney in Gainesville at the time this offense and trial occurred.

Hennesy was in the room during the statement at Moore's request. [Appl. Ex. 8 at 6-7] At that time, Moore stated that he had been in a group of young men who had driven by Hanks while he was in his car and that Hanks had asked for "crack" cocaine and a push because his car was stalled. [Ex. 8, pgs. 2-3]. In his statement, Moore claimed that he had told Hanks that he did not sell cocaine and would not help him. [Appl. Ex. 8 at 3] Moore said they then drove away. In the first mention of a gun, Moore stated that after this encounter, "I threw the gun back to [Applicant]. . . ." [Appl. Ex. 8 at 3]. Moore stated that Applicant was the only person in the car with a gun, even though Moore also admitted to having the gun in his hands and throwing it to Applicant. [Appl. Ex. 8 at 3]

14. Moore reported that Applicant then asked him if he wanted to "help [Applicant] rob, uh, go up there and take [Hanks's] money." [Appl. Ex. 8 at 3] Although Moore told Williams that he had informed Applicant he would not help, he conceded that he walked to Hanks's car with Applicant. [Appl. Ex. 8 at 3] When they arrived at the car, Moore quoted Applicant as saying "brace yourselves." [Appl. Ex. 8 at 3] Moore explained that meant Applicant was going to take Hanks's money. [Appl. Ex. 8 at 6]. Moore said he "took off running back to the car." [Appl. Ex. 8 at 3] He said he heard a "pow" and instead of going to the car, Moore kept running. [Appl. Ex. 8 at 3].

15. Moore told Williams that he had spoken to Applicant that night after the shooting and that Applicant had denied shooting Hanks. [Appl. Ex. 8 at 4] But Moore reported that the following day, Applicant was "bragging" about how he "earned his

stripes" in his gang. [Appl. Ex. 8 at 4-5] Moore explained that this statement meant that Applicant had committed a murder, which would result in Applicant being moved to a higher status in his gang. [Appl. Ex. 8 at 5] Moore further disclosed that Applicant had stated that he had shot Hanks because Hanks had hit him. [Appl. Ex. 8 at 7]

16. Three days later on June 3, 1996, Applicant was in custody and gave two statements to Williams.[6] The first interview lasted nine minutes. [Appl. Ex. 11] Applicant was advised that he was charged with capital murder and he was advised of his rights. [Appl. Ex. 11 at 2–4] Applicant said he understood his rights and had not been threatened or promised anything to give the statement. [Appl. Ex. 11 at 3]. Applicant gave his account of the events surrounding Hanks's murder. He explained that Moore had suggested that they should "jack" Hanks and that "everybody was like yeah okay okay okay." [Appl. Ex. 11 at 4] Applicant stated that Moore had the gun and tied a rag around his face when both he and Moore went to Hanks's car. [Appl. Ex. 11 at 5] He said that Moore had pointed the gun at Hanks's head and had told Hanks to give him money, to which Hanks replied "naw." [Appl. Ex. 11 at 5] Applicant said he backed away from the car and then he heard a shot. [Appl. Ex. 11 at 5]. He said Moore ran, but he walked, away from the scene. [Appl. Ex. 11 at 5] Applicant admitted that he had told people that he killed Hanks because other people had told him that Moore

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[6]Morris filed a Motion to Suppress Applicant's recorded statements. [CR]. After a hearing, the trial court denied this motion. [CR]

had said he would kill Applicant if Applicant told the truth. [Appl. Ex. 11 at 5]. Applicant stated that the facts he gave were true and correct. [Appl. Ex. 11 at 8]

17. Williams testified at trial that after this first statement was given, he remained in the room with Applicant and the two of them just talked. Williams admitted that he had told Applicant he did not believe his first statement and that Applicant just "held his head down and said, 'Yeah, I shot that man.'" Williams further conceded that he did not record any of the statements either of them made for the 37-minute gap. [7 RR 88]

18. Williams took a second statement from Applicant. [Appl. Ex. 12] Applicant was again advised of his rights and Applicant told Williams that he had not told the truth in his first statement. [Appl. Ex. 12 at 2–3] In another nine-minute statement, Applicant again stated that it had been Moore's idea to "jack" Hanks and again described how he and Moore had left the car they were riding in after Moore had wrapped the rag around his face. He again said that Moore had brought the gun. [Appl. Ex. 12 at 4] But Applicant said that once they got to Hanks's car, he had asked Moore for the gun, Moore had given Applicant the gun, and Moore had removed the rag from his face. [Appl. Ex. 12 at 4] Applicant explained that Moore had asked Hanks for money and Hanks had said he didn't have any. [Appl. Ex. 12 at 4] Applicant then stated, "After that I shot him." [Appl. Ex. 12 at 4] When asked how many times he shot, Applicant responded "for no reason once." [Appl. Ex. 12, pg. 4] Applicant claimed that he did not know why he shot Hanks, but later said, "My finger just hit the trigger." [Appl. Ex. 12 at 5-6] When asked if the gun was cocked, Applicant explained that it did not have

to be cocked and acknowledged that the gun was "double action." [Appl. Ex. 12 at 6]. Applicant claimed that he had not told the truth in his first statement because he was scared; when asked if he was telling the truth during his second statement, Applicant stated, "Yes and nothing but the truth." [Appl. Ex. 12 at 7]

19. Perry gave his statement to Williams on June 19, 1996. In this interview, Perry was advised that he was not charged with a crime and was told that the statement was being recorded. [Appl. Ex. 15 at 2] Perry told Williams that on the day that Hanks was murdered, he had been with Applicant, Moore, Sheppard, and Wilson. [Appl. Ex. 15 at 2–3] Perry claimed that he had been with the group before and after the shooting but not when the killing occurred. [Appl. Ex. 15 at 3–4] Perry discussed the events that occurred after the shooting but told Williams that neither Applicant nor Moore had said that they had shot Hanks. [Appl. Ex. 15 at 7]

20. On July 1, 1997, after speaking with Morris, Perry changed his statement, in writing, to admit that he was in the car with Applicant, Moore, Perry, Sheppard, and Wilson when Applicant and Moore got out of the car "to rob the victim." [Appl. Ex. 15 at 13] He further added that approximately five minutes after they got out of the car, Perry had heard a shot. [Appl. Ex. 15 at 13]

21. Williams's report and copies of the witness statements were sent to Haverkamp's office. When reviewing these, Haverkamp made notes based on what she read. Contained in her notes is a statement, "John Morris let him talk." [Appl. Ex. 60

at 1] On Moore's statement to Williams, Haverkamp wrote "Should D have been suspect?" [Appl. Ex. 7 at 7]

### C. GRAND-JURY PROCEEDING

22. On July 1, 1996, approximately one month after Moore had given his statement to Williams, Moore appeared before a grand jury to testify about the events that culminated in Hanks's murder. Moore was advised orally and in writing of his rights. [Appl. Ex. 16 at 4] During his testimony, Moore stated that he was represented by three attorneys including Keith Brown and two lawyers from Dallas, whose names he did not know. [Appl. Ex. 16 at 129] None of these attorneys appeared with Moore when he testified before the grand jury. After being advised of his rights, Haverkamp asked if Moore "wished to testify before the Grand Jury." He asked, "If I don't, would I go to jail?" Haverkamp responded that she could not answer that question. [Appl. Ex. 16 at 6]. Moore's testimony spanned 124 pages. He answered most of the questions asked by Haverkamp and by multiple members of the grand jury. He refused to answer questions about who had sold the gun that was used to kill Hanks and about other people he knew who sold drugs. [Appl. Ex. 16 at 19, 23]

23. During Moore's testimony, he gave both consistent and inconsistent answers. Haverkamp repeatedly asked him if there had been any discussion of robbing or "jacking" Hanks by Applicant, Moore, or anyone else in the car. Moore repeatedly

replied that they had not talked about robbing Hanks.[7] [Appl. Ex. 16 at 39–40, 75, 79, 82, 104] In his grand-jury testimony, Moore never said that the encounter with Hanks was intended to be a robbery.

24. Moore explained that the first time they had encountered Hanks that night, he would not sell Hanks drugs because he had not wanted to push Hanks's car. [Appl. Ex. 16 at 32]. But then he had decided to go back to "serve him" to make some money. [Appl. Ex. 16 at 27, 32-33]. Moore explained that "serve him" meant to sell drugs. [Appl. Ex. 16 at 27-28] He asserted that he had only wanted to sell drugs to Hanks and that he had believed that was also Applicant's intention. Moore explained that Applicant was new to selling drugs. [Appl. Ex. 16 at 97,101–102] Moore believed Applicant had only wanted to sell drugs because Applicant had stated he wanted "to make a lick from [Hanks]." [Appl. Ex. 16 at 38] Moore explained that "make a lick" means sell drugs, not commit a robbery. Moore repeatedly stated that he had not known that Applicant intended to commit a robbery until he heard Applicant say "brace yourself." [Appl. Ex. 16 at 79, 119] Moore clarified the phrase meant that the person who said it was about to commit a robbery and did not mean that the person was going to shoot someone. [Appl. Ex. 16 at 119, 121]

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[7]Applicant's counsel has unceasingly argued that Moore testified it had not been a robbery 46 times in his grand-jury testimony. This Court did not find that many references to the missing element of an intent to commit robbery; however, Moore was consistent in his grand-jury testimony that there had been no intent to rob Hanks.

25. Moore admitted to "playing" with the gun when the group had encountered Hanks the first time. [Appl. Ex. 16 at 26–27, 34–35] He had given the gun back to Applicant before they got out of the car because Moore did not carry a gun when he delivered drugs. [Appl. Ex. 16 at 38] Haverkamp directly asked if the gun in the car belonged to Moore, and he denied it. [Appl. Ex. 16 at 109] He did confirm that he was familiar with the gun from when another person, whom he refused to identify, owned it. [Appl. Ex. 16 at 109–110] When asked by a grand juror, Moore admitted he understood how that gun worked. [Appl. Ex. 16 at 125] Moore agreed that it was a double-action revolver. [Appl. Ex. 16 at 125] In one of his inconsistent statements, Moore stated that Applicant had taken the gun with him when he walked up to Hanks to sell drugs. [Appl. Ex. 16 at 37] One page later, he said that Applicant did not have the gun when they had tried to complete the drug transaction. [Appl. Ex. 16 at 38]

26. Moore conceded that Applicant and "Cotton" had talked about robbing "dope fiends" earlier in the day, but insisted that no one had talked about robbing Hanks after they came upon him that evening. [Appl. Ex. 16 at 75–76] However, Moore repeatedly referred to Hanks as a "dope fiend" in his grand-jury testimony. [Appl. Ex. 16 at 22, 25] Nevertheless, Moore persistently asserted that the first time he had known Applicant was going to rob Hanks was when Applicant had said "brace yourself." [Appl. Ex. 16 at 79, 119] Moore then explained that while he was running away, he had heard Applicant say "give me your money," and Moore had then heard a "pow." [Appl. Ex. 16 at 91]

27. During the course of his grand-jury testimony, Moore was asked numerous questions about crimes he had previously committed, going back to the age of 12. In answering these questions, he was inconsistent at times. Because the intent to commit robbery was a critical topic when discussing the events surrounding Hanks's murder, there were numerous questions concerning Moore's involvement in robberies before the night of this offense. When Moore was first asked about whether he had "actually robbed people before," he responded, "No. I've seen people rob people." [Appl. Ex. 16 at 41]. Later in his testimony, when asked how many people he had robbed, he stated, "Five or six. I wasn't too much into robbery." [Appl. Ex. 16 at 109] In response to a grand juror's question, Moore attempted to clear up his involvement in previous robberies by stating, "[Y]ou misunderstood what I said. I used to rob people when I was 12 and 13 years old all the time. I don't do no robberies no more." [Appl. Ex. 16 at 96] Moore also admitted to committing a drive-by shooting at the age of 15 in Oklahoma to earn his "second stripe" in the Five Deuce Hoover Crip gang. [Appl. Ex. 16 at 43, 49]. Moore also admitted that he had twice "been caught with a gun." [Appl. Ex. 16 at 109].

28. Haverkamp made notes in her file concerning some of the information Moore had divulged during his grand-jury testimony: his history of committing robberies, his past gun charges, and a drive-by shooting. [Appl. Ex. 7 at 1–3]

## D. PRETRIAL AND TRIAL

29. A pretrial hearing was held on January 2, 1997. [2 RR 1] The trial court ordered the State to provide witness statements to the defense after the witness testified at trial. [2 RR 11] Further, the defense had filed a motion for disclosure of favorable evidence, which the court granted: "Ms. Haverkamp, if you have anything that's exculpatory you know you've got to give that to them. And if there's anything that you have a question about, you need to submit it to the Court for an in-camera inspection." [2 RR 19]

30. Haverkamp's opening presented the State's version of the facts and how they "add[ed] up to the crime of capital murder." [6 RR 7] She told the jury about the first time that Applicant, Moore, and their friends had encountered Hanks; she then recounted that once they had driven away from Hanks, Applicant and Moore had arrived at a "plan" to rob or "jack" Hanks. They got the driver of their car to go to Hanks's location, where Applicant and Moore got out of the vehicle, with Moore possessing the gun. [6 RR 7] Haverkamp told the jury that Applicant's words were that Hanks "wouldn't come off the money," so Applicant took possession of the gun and shot Hanks. Haverkamp's opening made it clear that the intent to commit robbery was the aggravating element the State was relying on to make this murder add up to capital murder.

31. In her closing, she was even more explicit. She told the jury, "We have to prove that they were in the course of committing or attempting to commit a robbery.

The robbery is the whole reason why we're in the courtroom today." [8 RR 20]. She further argued that it was obvious that Applicant was the shooter because he knew "that this gun does not have to be cocked, and this gun can be shot double-action. And that's exactly the truth." [8 RR 41] In addition, she countered Morris's argument that there were no fingerprints on the gun with the argument that "this is not his first rodeo. . . . [H]e's got enough common sense to wipe fingerprints off the gun." [8 RR 40]

32. In his opening statement to the jury, Morris made his theory of the case clear for the jury: "So I think after you hear this evidence, you're going to see that this man is not the murderer, that the murderer is yet to be tried. And his name is Lilton Deon Moore." [6 RR 9] Morris returned to his theme in his closing argument by reminding the jury that once Moore had testified to the grand jury, he too was in jail for capital murder awaiting trial. [8 RR 27] "Deon Moore's the one who attempted to rob this man and who shot this man, not [Applicant]. There's no evidence that he solicited anything, that he encouraged or aided or helped – that he was a lookout – nothing like that. And if you base your verdict on that evidence, then you've got to find [Applicant] not guilty as a party to this offense. Because the real guilty party is Lilton Deon Moore, and he's in jail today." [8 RR 29–30]

33. Moore did not testify at Applicant's trial. Moore was awaiting trial for the same offense.[8] Neither the State nor the defense made any effort to call Moore as a witness.

34. Perry testified at Applicant's trial. [7 RR 111–23 ] While Perry did not give many details in his trial testimony, he did concede that when Moore and Applicant got out of the car, Moore had said "let's jack that dude." [7 RR 114] He also described how Moore had put a blue rag over his face. [7 RR 114]

35. On cross-examination, Perry acknowledged that he had visited Morris in his office on July 1, 1997. Morris asked Perry whether the two of them had listened to the tape-recorded statement that Perry had given to Williams on July 19, 1996; Perry agreed that he and Morris had listened to the tape. [7 RR 117–18] Perry also agreed that he had told Morris what changes needed to be made to the statement and that they had made those changes.[9] At trial, Morris then took a pause in the proceeding to "review the

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[8]Applicant makes the argument that the State hid behind the trial court's ruling that statements did not have to be turned over to defense counsel until after the witness testified and that Haverkamp intentionally withheld the exculpatory information in the grand-jury testimony by not calling Moore as a witness. [Mem. in Supp. of Appl. at 3, 24] Applicant then argues that after a witness asserts his Fifth Amendment privilege, his former testimony to the grand jury then becomes admissible under the former testimony exception to the hearsay rule. Tex. R. Evid. 804(b)(1); *See Jones v. State*, 843 S.W.2d 487, 492 (Tex. Crim. App. 1992). Moore never asserted his Fifth Amendment right.

[9]Those changes are reflected in writing on the transcript of the recorded statement included as an exhibit to Applicant's third writ application. [Appl. Ex. 15 at 13]

statement just a minute."[10] [7 RR 117] Perry also acknowledged that he had not changed his statement that Applicant "didn't know nothing." [7 RR 117].

36. Wilson also testified at Applicant's trial. During cross-examination, he acknowledged that he came to Morris's office on June 19, 1996, and talked about the case. [6 RR 114]. He was driven to that meeting by Applicant's father. [6 RR 117] From the questions on cross-examination, it was clear that Wilson had discussed the case with Morris. Wilson acknowledged that he had told Morris that Moore had threatened him if the story of Moore's involvement got out. [6 RR 116, 121] Wilson had told Morris and testified that Moore had said Applicant had shot Hanks; Applicant had not said that he had done so. [6 RR 116] Wilson also had told Morris and testified that after Moore had threatened him, a relative of Moore's had also threatened him. [6 RR 116–17]. Wilson testified that Applicant had claimed to have shot Hanks only when Moore was present. [6 RR 115]

37. Sheppard testified at trial. Haverkamp asked Sheppard early on whether it was true that he did not want to be there, and he answered that was correct. [6 RR 64–65] During the remainder of the direct examination, Sheppard made that clear. On cross-examination, Sheppard acknowledged that he went to Morris's office on June 19, 1997, with Wilson and Perry. [6 RR 78] During Morris's cross-examination, Sheppard

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[10]In Applicant's memorandum in support of the third application, counsel seems to take the position that all the State's witnesses' statements were not made available to the defense for cross-examination. [Mem. in Supp. of Appl. at 41 n.11] The testimony above shows otherwise.

claimed that it had been Moore's idea to rob Hanks and that Moore possessed the gun when he left the car. [6 RR 88] Sheppard related that before Moore got out of the car to go back to Hanks's car, Moore had removed his shirt and covered his face. [6 RR 80–81]. He testified that Applicant had never told him that he had shot Hanks.[11] [6 RR 82]

38. After both the State and defense rested on guilt or innocence, Morris requested the court to include a charge on the lesser-included offense of murder. He argued that "a jury could rationally find that the Defendant was a party to a murder that was not committed during the course of or in the attempt to commit a robbery." [8 RR 2]. The trial court denied the requested charge by overruling the objection. [8 RR 2].

39. The following occurred as the jury was being discharged by the court following the acceptance of their verdict:

> [Jury retiring to the jury room]
>
> THE DEFENDANT: You assholes was prejudiced, man. Send me back to jail, man. You all was prejudiced, man.
>
> THE COURT: Can you prepare a judgment and sentence, Ms. Haverkamp?
>
> MS. HAVERKAMP: Yes, sir. I'll be right back.
>
> (Ms. Haverkamp leaves the courtroom)

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[11]It is apparent that Morris had conducted pretrial, in-person interviews with each of the three witnesses who testified from personal knowledge of the events surrounding Hanks's death.

> THE DEFENDANT: Smoke that ol' Cotton, man. Bitch. The bitch assholes was prejudiced. A man can't get no fair trial in this court. Tell that Janelle bitch she's better be watching her ass tonight, 'cause she's dead.

[8 RR 5][12]

### E. ATTACHED AFFIDAVITS

40. In an affidavit given three months before Applicant filed his third application for writ of habeas corpus, Moore stated that most of his statements to the police and to the grand jury were untrue. [Appl. Ex. 18] His affidavit included the following statement: "I wish to recant all statements that I called this incident a robbery or said [Applicant] had anything to do with the drug transaction and murder. It was not a robbery. Nobody planned to rob anybody. It didn't turn into a robbery either." [Appl. Ex. 18] Moore also included in his affidavit that: "I also consulted with my attorney, John Morris before giving my original statement to the police." [Appl. Ex. 18] While Moore admitted in his affidavit that he had attempted to sell drugs to Hanks the night of the shooting, he stops short of explaining how Hanks was shot. Moore says that Hanks had refused to pay him for the drugs and that they "got into an argument." [Appl. Ex. 18] Yet he gives no explanation of the events that occurred thereafter and did not divulge who had shot Hanks. [Appl. Ex. 18] Moore's affidavit is completely devoid of any personal information such as whether he had a job or was unemployed

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[12]This testimony is worthy of note given Applicant's arguments regarding the possibility of undue influence by Moore and his family and Moore's violent propensities.

or was in or out of custody; thus, there is no way to discern the circumstances under which the affidavit was collected.

41. Perry's affidavit, which also is attached to the third application for writ of habeas corpus, was sworn to on August 29, 2022, over two years before the application was filed. [Appl. Ex. 2] He provided more details concerning the night of May 28, 1996. He stated, "We went riding around to the store and back to [Applicant]'s house to get a rape tape to listening to on our way to Denton, TX." [Appl. Ex. 2 at 1]. He further stated that Hanks "flagged us down to see if we could help him with his disabled vehicle .... We were trying to get on the highway and didn't want to help and plus we didn't sell .... Anyway, we really didn't know the man, I believe [Moore]'s the only man that knew of him."[13] [Appl. Ex. 2 at 1] Perry claimed that when he had stated that he did not believe Applicant "could do that," Williams tried to "convince me that Michael did [it] and said he confessed." [Appl. Ex. 2 at 3]. He further stated, "What I do know is that [Applicant] didn't commit a crime and murder anyone, nor was he a party to it." [Appl. Ex. 2 at 3] He maintained that "Capital murder has elements of robbery and there was nothing for Deon to rob that man of." [Appl. Ex. 2 at 3] As with Moore's affidavit, Perry's affidavit contains no personal information to supply the context under which this statement was taken.

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[13]The quoted statements are examples of identical language, including typos, included in Wilson's affidavit, which was sworn to eight days later—on September 6, 2022. [Appl. Ex. 3 at 1]

42. Wilson's affidavit was signed eight days after Perry signed his. [Appl. Ex. 3] Wilson's affidavit contained the identical, typo-laden language quoted in the discussion of Perry's affidavit above. [Appl. Ex. 3 at 1] In this affidavit, Wilson discussed what happened when Applicant got back in the car after the shooting and he stated that "[Applicant] definitely did say he did it." [Appl. Ex. 3 at 2] But later in the affidavit, Wilson stated that "[Applicant] never told me he did it." [Appl. Ex. 3 at 2] Wilson claimed that he had been threatened by Williams and was told to say that Applicant had shot Hanks; otherwise, Wilson could do "20 to a Life sentence": [Williams] said my basketball scholarship would be over, so he basically said I needed to roll with what was said, and he didn't believe me." [Appl. Ex. 3 at 3]. Wilson also averred that he had not wanted to testify but that Haverkamp had coerced him beforehand and had made him say things that were not true. [Appl. Ex. 3 at 4] Wilson acknowledged in his affidavit that he had met with Morris and had told him that Applicant had not committed an offense. [Appl. Ex. 3 at 4] Wilson's affidavit was missing the same contextual information as the statements discussed above.

43. Sheppard filed an affidavit that was attached to the third application for writ of habeas corpus. [Appl. Ex. 4] His affidavit was sworn to on August 25, 2022. [Appl. Ex. 4 at 3] His affidavit did not track the language repeated verbatim in the affidavits of Perry and Wilson; instead, he stated that while driving around, the group went to Applicant's house to get a "rap" tape, not a "rape" tape as the other affiants claimed. [Appl. Ex. 4 at 1] Sheppard's affidavit does not stray far from his testimony in trial. As

with all the other recent affidavits, Sheppard's affidavit failed to include any personal information.

## IV. APPLICABLE LAW

### A. General Habeas Corpus Law

44. To prevail on a post-conviction writ of habeas corpus, the Applicant bears the burden of proving by a preponderance of the evidence, the facts that would entitle him to relief. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 1996). In habeas corpus proceedings, virtually every fact finding involves a credibility determination. *Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996). In this type of proceeding, the judge determines the credibility of the witnesses and if those findings are supported by the record, they should be accepted by the Court of Criminal Appeals. *Id.* This is true even if those findings are based on affidavits rather than live testimony. *Ex parte Thompson*, 153 S.W.3d 416, 420 (Tex. Crim. App. 2005).

### B. Law Applicable to Alleged Failure to Disclose Exculpatory Evidence

45. The State has an affirmative duty to disclose favorable evidence under the Due Process Clause.[14] *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "The Due Process

[14] It is important to clarify that this trial was not governed by the 2014 Michael Morton Act, which ushered in a general right to criminal discovery and, thereby, greatly expanded the scope of discovery and a prosecutor's obligation to disclose. *See State v. Heath*, 696 S.W.3d at 677, 699 (Tex. Crim. App. 2024); *Watkins v. State*, 619 S.W.3d 265, 277–78, 288 (Tex. Crim. App. 2021). *See generally* Tex. Code Crim. Proc. Ann. art. 39.14. Before the enactment of the Michael Morton Act, criminal discovery was governed by

Clause of the Fourteenth Amendment is violated when a prosecutor fails to disclose evidence which is favorable to the accused that creates a probability sufficient to undermine the confidence in the outcome of the proceeding." *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992). In other words, it must be determined if the evidence was material. *Id.* Limiting applicant's defense strategies by withholding exculpatory evidence is an impermissible constraint on a defendant's trial preparation or presentation. *Id.* at 405. In determining materiality, we are to evaluate the undisclosed evidence in the context of the entire record. *Turpin v. State*, 606 S.W.2d 907, 916 (Tex. Crim. App. 1980). Under *Brady*, it is "irrelevant whether the evidence was suppressed inadvertently or in bad faith." *Ex parte Chaney*, 563 S.W.3d 239, 266 (Tex. Crim. App. 2018).

**C. LAW APPLICABLE TO DEFENSE COUNSEL'S ALLEGED CONFLICT OF INTEREST**

46. When it is asserted that the ineffective assistance of counsel derived from a conflict of interest, the proper standard is that articulated by the United States Supreme Court in *Cuyler v. Sullivan*. 446 U.S. 335 (1980). "In order to prevail the appellant need show only that trial counsel 'actively represented conflicting interests' and that counsel's performance at trial was 'adversely affected' by the conflict of interest." *Acosta v. State*, 233 S.W.3d 349, 353 (Tex. Crim. App. 2007). This test also applies to applications for

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a prosecutor's narrower duty to disclose as a matter of due process. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Heath*, 696 S.W.3d at 695, 699; *Watkins*, 619 S.W.3d at 277.

habeas corpus relief alleging a conflict of interest of counsel. *See Ex parte Morrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997).

### D. Law Applicable to False-Evidence Claim

47. "In order to be entitled to post-conviction habeas relief on the basis of false evidence, an applicant must show that (1) false evidence was presented at this trial and (2) the false evidence was material to the jury's verdict of guilt." *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015); *Ex parte Barnaby*, 475 S.W.3d 316, 323 (Tex. Crim. App. 2015); *see Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). An applicant must prove both prongs by a preponderance of the evidence. *Ex parte De La Cruz*, 466 S.W.3d at 866. The relevant question is whether the false testimony, taken as a whole, gave the jury a false impression. *Id.*

## V. APPLICATION OF LAW TO FACTS

### A. Ground One—Exculpatory-Evidence Claim

48. Applicant has listed fourteen items of material, exculpatory evidence that he claims were not provided in discovery by the prosecutor. [Mem. in Supp. of Appl. at 40-42]. Only two of these were effectively discussed as undisclosed in the hearings on Applicant's third writ: the initial statement by Moore to Williams and Moore's grand-jury testimony.

49. Morris testified at the hearing on Applicant's third writ about what discovery he did and did not receive from the State. Counsel for Applicant asked Morris if he had received Moore's original statement to the police or a copy of Moore's testimony to the

grand jury. Morris responded that he had neither of those statements because Haverkamp had not provided them to him. [2/4/25 RR 60–61] Morris was asked a series of questions concerning his lack of knowledge regarding the details of Moore's criminal history, the details of Moore's propensity to violence, and the fact that Moore had possessed the gun that night—all matters contained in Moore's grand-jury testimony. Morris repeatedly denied receiving any of this information from the State before trial.[15] [ 2/4/2025 RR 57–67]

50. Morris was shown a copy of his motion for disclosure of favorable evidence. [2/4/2025 RR 67] He was then asked if the "first thing that you asked for was the statements of any witnesses interviewed by the prosecution who identified an individual other than the defendant as having fired a gun or possessed a gun in this case." Morris acknowledged that he had filed that motion and that it had been granted by the court. [2/4/2025 RR 67] Morris also testified that he had not known that Moore had said both in his original statement to the police and in his grand-jury testimony that he had possessed the gun that killed Hanks or that Moore had known exactly how the gun

[15]At the first hearing of Applicant's writ, Applicant introduced exhibit 58 into evidence which included a "State's Compliance with Order for Discovery" document that contained a disclosure that the criminal history of Lilton Deon Moore was provided to Morris by Haverkamp. [2/4/2025, Ex. 58, pg. 5]

worked.[16] [2/4/2025 RR 64] Morris stated that if he had received this information, he would have changed his trial strategy. [2/4/2025 RR 68]

51. Morris was also questioned about whether he had ever received information that Moore had been "questioned intensely and stated over 46 times" that neither Moore nor Applicant intended a robbery of Hanks. [2/4/2025 RR 59] Morris responded that he had not received that information and that if he had known Morris had denied that he or Applicant had an intent to rob Hanks, he would have used it in trial. [2/4/2025 RR 59] Morris agreed that a lack of intent to commit a robbery was exculpatory evidence. This court finds that Morris's testimony is credible.

52. The testimony concerning how Haverkamp provided discovery to defense counsel showed that there were a variety of ways she provided documents. She credibly testified that she had provided written compliance documents on occasions and had given other documents to opposing counsel without any proof that had been done. [2/13/2025 RR 24, 38]

53. At the first writ hearing on Applicant's third writ, Morris was not asked questions about the State's failure to provide any other items of evidence contained in

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[16]Applicant's attorney conceded that four days before trial, Haverkamp had disclosed to Morris that Wilson and Sheppard had said that Moore had had a gun; but Applicant's attorney argued that Haverkamp had not provided Morris with their statements, and Morris agreed he had not received their statements. [2/4/2025 RR 66]

Applicant's list.[17] Applicant relies on a lack of discovery-compliance documents in the record to show that this material was not provided. To support this, Applicant's attorney called a witness to reinforce his assertion that discovery was not produced if there was no compliance document in the file. The witness was an attorney who had previously worked for Haverkamp as an assistant district attorney. He testified concerning her strict rule of providing documentation when discovery was produced. The witness testified that Haverkamp was "extremely meticulous" and "she would require us to make sure we documented everything." [2/13/2025 RR 9] When counsel told the witness that Haverkamp had claimed that at times she would simply hand defense counsel discovery documents without preparing a disclosure document, the witness simply stated: "That was not something I was allowed to do, no." [2/13/2025 RR 8]. While this Court finds this testimony credible, this Court does not consider the weight of the testimony of what he was allowed to do to adequately establish that each of the twelve items not discussed with Morris was not produced by Haverkamp, his superior. The record is unclear and inadequate to find that Haverkamp failed to provide the other documents contained in Applicant's list.

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[17]Morris was asked questions about exculpatory evidence that was provided by Haverkamp concerning a statement by Tara Engler. Engler reported that Moore had told her that "Deon Moore said my cousin [Applicant] is in jail serving my time." There was a discovery-compliance document related to this disclosure. [2/4/2025 RR 63, Ex. 58 at 7]

54. This court finds based on the entire record that the prosecutor knew of Moore's initial statement to Williams because she took notes and recorded her own impressions. She also knew of Moore's statements to the grand jury because she called him as a witness and did the majority of the questioning. Haverkamp knew Moore had claimed that there was no intent to commit a robbery, that all occupants of the car knew that, and capital murder required proof of that element. Haverkamp failed to disclose Moore's statement to Williams as well as his later grand-jury testimony, which was inconsistent with his original statement to Williams.

55. This information is favorable to the defense because it removes the aggravating element of an intent to commit robbery. It also shows that Moore's possession of the murder weapon and Moore's detailed history of crimes, including a drive-by shooting. Favorable evidence includes exculpatory evidence and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Moore's involvement in this offense was a pivotal point in dispute; and Sheppard, Perry and Wilson each testified about his role. Knowledge of Moore's intentions, possession of and experience with the type of gun used to kill Hanks, and propensities for violence could have provided Morris with relevant, strong cross-examination material. *See Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011) (holding favorable evidence under *Brady* includes impeachment evidence, which can be used to dispute, disparage, deny, or contradict other evidence.). Morris was denied the ability to impeach the State's witnesses by the failure of the prosecutor to provide the information in her possession.

56. Moreover, the testimony was material because Haverkamp's entire approach to this case was that Applicant intended to commit a robbery and shot Hanks. "The State may not suppress evidence incompatible with its own theory of the case or that supports the defense's case." *Chaney*, 563 S.W.3d at 266. It is material also because Applicant needed merely a scintilla of evidence showing he was guilty only of the lesser-included offense of murder to entitle him to the lesser charge, which was requested at trial. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994); *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

57. Considering this omission in the context of the entire record,[18] this Court finds that Applicant sustained his burden of proof and showed by a preponderance of the evidence that (1) the prosecutor failed to disclose evidence;[19] (2) the evidence is favorable to the Applicant; and (3) the evidence is material. This Court also finds that there is a reasonable likelihood that, had it been disclosed, the suppressed evidence could have affected the judgment of the jury. While not ignoring the other evidence in the case, this court finds that the undisclosed favorable evidence could reasonably have

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[18]The amicus curiae brief and Haverkamp's testimony suggest that to find the Applicant had been denied due process would be unfair because the Applicant confessed. [Amicus Br. 10-11; 2/4/2025 RR 12] This Court is including the confession in the context of this analysis. Morris challenged the confession in a motion to suppress. He further cross-examined Williams about the unrecorded 37-minute gap between the two statements.

[19] Because the good or bad faith of the parties is not relevant under *Brady*, this Court expressly does not find that the prosecutor's actions were in bad faith.

put the whole case in a different light so as to undermine confidence in the verdict. *See Chaney*, 563 S.W.3d at 274.[20]

### B. Ground Two—False-Testimony Claim

58. With respect to the first prong of the false-evidence inquiry, Applicant contends that the State's two "main witnesses"—Sheppard and Douglas—have admitted that their testimonies at trial were untruthful. [Mem. in Supp. of Appl. at 92] Applicant further contends that Williams gave false testimony when he answered defense counsel's question concerning whether Moore had said he was present at the car when Applicant committed the killing. Williams answered "Yes, sir." [6 RR 153]

59. Sheppard signed an affidavit on August 25, 2022, in which Applicant claims that Sheppard admitted he had lied at trial. Having reviewed that affidavit numerous times, this Court can find nothing in Sheppard's affidavit that indicates he fabricated testimony at trial. At trial, Sheppard testified that at one point after the group's first encounter with Hanks, he had heard "someone" say that they should go back and "jack" Hanks. He could not remember who said that. Sheppard did not testify that Applicant made that statement. Twenty-four years later in his affidavit, he did say that there was

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[20]Applicant argues that the other items of exculpatory evidence contained in their list were not disclosed by the prosecutor. This Court has reviewed them all and finds each to be tenuous at best. This Court concludes that Applicant's proof that the evidence was not disclosed is insufficient. Because the evidence discussed above is exculpatory and material and because Applicant would not be entitled to any greater relief, these remaining items are not discussed in any further detail.

no discussion of a robbery. Sheppard did not attribute this discrepancy to being a lie or fabricating evidence. He did say that Williams had mentioned the terms "jack" or "rob" when he was interviewed and admitted that the interview made him nervous. But he did not say he lied or fabricated evidence as a result of a suggestion by Williams. In his affidavit, Sheppard appears to honestly and credibly recite what he remembered from events that had occurred decades before.

60. The most critical thing that did not change from Sheppard's testimony at trial to his affidavit was his expressed opinion at trial that "[Applicant] did not do anything." [6 RR 81]. Sheppard maintained that same position in his affidavit when he stated: "Michael didn't have anything to do with it." [Appl. Ex. 4 at 2]. Due process is violated if the State uses material, false evidence to secure a conviction. *Giglio v. United States*, 405 U.S. 150, 155 (1972). "To evaluate falseness, we examine whether the testimony taken as a whole gave the jury a false impression. *Weinstein*, 421 S.W.3d at 666. Sheppard was not the only witness who testified that Moore and others in the car had talked about robbing or "jacking" Hanks. In Applicant's own statements he admits that he and Moore had intended to rob Hanks. [Appl. Ex. 11 at 4, Ex. 12 at 4] Furthermore, Perry, Applicant's own witness, stated that before Moore and Applicant got out of the car, someone had said they were going to "jack that dude." [7 RR 114]

61. "[D]efinitive or highly persuasive evidence introduced in a post-conviction habeas proceeding may show by a preponderance of the evidence that testimony used to obtain a conviction was false." *De La Cruz*, 466 S.W.3d at 867. This Court finds that

Sheppard's testimony at trial and his statements in his affidavit are predominantly consistent and finds both to be credible. Sheppard's testimony and affidavit are not incompatible, and this Court finds there is no definitive or even persuasive evidence that shows that his testimony at trial was false. Applicant's false-evidence claim as it relates to Sheppard fails because the evidence was not proven to be false.

62. Applicant also argues that Wilson's affidavit proves that his trial testimony was false. Wilson's affidavit contains the identical language that is contained in Perry's affidavit, including grammar issues and what one might fairly assume is a typo when he said that night they went to Applicant's house to get "a rape tape to listening to on our way to Denton, TX." [Appl. Ex. 3 at 1] Wilson does assert in his affidavit that when he gave his statement to Williams, Williams threatened him. [Appl. Ex. 3 at 3] He also alleges that Haverkamp coerced him before trial and that "everyone could tell that it was coerced." [Appl. Ex. 3 at 4]. Interestingly, however, in his discussion of the facts surrounding Hanks's murder in his affidavit, Wilson first says that Applicant "definitely did say he did it." [Appl. Ex. 3 at 2] Eight sentences later, in the same affidavit, Wilson states, "[Applicant] has told me that he didn't do it." [Appl. Ex. 3 at 4] Wilson further states that he would go see [Applicant] in the Cooke County jail but then "he caught a case and [Applicant] didn't see much of me afterwards." [Appl. Ex. 3 at 4]

63. Wilson's affidavit does not contain any personal information to better judge his status and the context in which the affidavit was given. It is clear though, that he must have had access to Perry's affidavit, which was notarized on August 29, 2022—

eight days before Wilson swore to his affidavit. [Appl. Ex. 3 at 2]. This court finds Wilson's affidavit to be unreliable and not credible.

64. In a due-process claim based on false evidence, the Applicant must prove first and foremost that the evidence was actually false. *Ukwuachu v. State*, 613 S.W.3d 149, 150 (Tex. Crim. App. 2020). The evidence of falsity must be "definitive or highly persuasive." *Id.* at 157. Having found Wilson's affidavit to lack reliability and credibility, this Court finds that Applicant failed to prove his false-testimony claim as it relates to Wilson.

65. Applicant also argues that Williams presented false testimony when he answered defense counsel's leading question about whether Moore stated he was present at the car when Applicant shot Hanks. [Mem. in Supp. of Appl. at 100–08] .The State did not elicit this false testimony. Williams answered a leading question propounded by defense counsel: "Did [Moore] say he was present at the car with [Applicant] when [Applicant] committed the killing?" Williams answered, "Yes, sir." [6 RR 153] Defense counsel went on to question Williams about why he had not arrested Moore after Moore told him he was present when the shooting occurred. A review of Moore's pretrial statement reveals that Moore had not said he was present when Hanks was killed. [Appl. Ex. 8].

66. While it is true, as argued by Applicant, that Williams was asked other questions by defense counsel concerning other information Williams may have had

concerning whether Moore was at the car at the time of the shooting, the question concerning what Moore told him is the only statement that has been proven false.

67. Applicant argues in his memorandum that the false testimony of the State's three main witnesses together affected the judgment of the jury. This Court has found that Applicant failed to prove false testimony of two of the three witnesses. A review of Moore's statement does reveal that Williams's "yes, sir" answer to defense counsel's leading question amounted to false testimony. Moore had not said he had been at the car when Applicant shot Hanks. [Appl. Ex. 8]

68. The State did not elicit false testimony for the purpose of obtaining a conviction. The question that elicited the untrue answer was asked by the defense when he was exploring why Moore had not been arrested until after his grand-jury testimony. While that alone is not dispositive of any issue, it does place the statement in context. Although one part of Williams's testimony was false, the record does not support the legal conclusion that this one answer was material to the jury's verdict. The jury was not deciding if Moore was guilty but instead if Applicant was guilty. This one statement had no probative value to prove or disprove Applicant's intent to commit a robbery.

69. Given the direct evidence of Applicant's guilt, including statements by Wilson, Perry, and Sheppard that a robbery was intended and that Applicant had admitted to them that he had killed Hanks along with Applicant's own confession, this one statement could not be determined to be the "tipping point" that unfairly convinced the jury of Applicant's guilt. *Weinstein*, 421 S.W.3d at 669. Applicant has failed

to show that Williams's false testimony was "material" such there is "a reasonable likelihood" that this false testimony affected the jury's verdict. *Ex parte Chavez*, 371 S.W.3d 200, 210 (Tex. Crim. App. 2012); *see Ex parte Ghahremani*, 332 S.W.3d 470, 481–83 (Tex. Crim. App. 2011).

### C. Grounds Three and Four—Conflict- of-Interest Claims

70. In ground three, Applicant argues that he is entitled to habeas corpus relief because his trial counsel had an actual conflict of interest resulting from his alleged prior representation of Moore. Applicant contends that because Morris had represented Moore and Applicant, this left Applicant "without a constitutionally effective advocate." [Mem. in Supp. of Appl. at 111] Applicant contends that credible evidence establishes that Morris, Applicant's trial counsel, had represented Moore concerning the same criminal charges, before Applicant's or Moore's arrest. Applicant relies on three pieces of evidence to support his claim:

1. Williams's report reflects that Moore had appeared at the police station on May 31, 1996, with Willie Hennesy and that Hennesy had told Williams that Moore was out in the hall. [Appl. Ex. 6 a 4] Williams's report then details that Hennesy had told him that "Deon Moore was with Michael Newberry when he killed the guy." Further, the report recites that "before [Williams] could talk to [Moore] about the homicide, Lilton Deon Moore wanted to talk to his attorney, John Morris." Finally, Williams's notes reflect that "after Lilton Deon Moore talked to his attorney, [he] then then took a tape-recorded statement from [Moore]." [Appl. Ex. 6 at 4]

2. Haverkamp reviewed Williams's report and Moore's statement and made a notation that "John Morris let him talk." [Appl. Ex. 7 at 14]

3. Moore signed an affidavit swearing that he had talked to Morris, his attorney, before he made his initial statement. [Appl. Ex. 18]

71. At this Court's hearings on Applicant's third writ, Applicant presented no evidence to explain what Williams intended to convey in his report or who actually spoke the words included in his report. In this Court's first hearing, Applicant's counsel called Haverkamp as a witness and questioned her about her notes. Haverkamp agreed that the note "John Morris let him talk" could have been her handwriting and then later explained that she had been making notes of what Williams's report had said. [2/4/2025 RR 21, 26] Haverkamp later testified , "I'm not saying John Morris is [Moore's] attorney. I'm saying that's what the statement said." [2/4/2025 RR 26].

72. Williams's report is vague and ambiguous concerning who told him that Moore wanted to talk to his attorney, i.e., Morris. The way it is written, it could be either Hennesy or Moore. The report does not in any way describe any effort by Williams to verify that the information conveyed was true. The further statement—"after [Moore] talked to his attorney, [Williams] then took a tape-recorded statement from [Moore]"—only reports what Williams did and does not explain who told him that the conversation had taken place, if it did. There is no evidence in Williams's report to confirm that Moore actually spoke to anyone before his statement. This Court finds that Haverkamp's explanation of how her notes came to be written was credible and further finds credible her assertion that she was not reporting her belief that Morris was, in fact,

Moore's attorney. This Court finds her account that she was simply taking notes of what was contained in Williams's report to be credible.

73. John Morris testified at the first hearing on Applicant's third writ of habeas corpus. Morris also provided an affidavit that Applicant's counsel had marked and admitted as an exhibit in the hearing. [2/4/2025 RR 42-43] In the affidavit, Morris states, "I can unequivocally state that at no time did I ever represent Lilton Deon Moore regarding the charge." [2/4/2025 RR Ex. 61] At the hearing, Morris testified that he had never represented Moore and stated, "I never talked to the man." [2/4/2025 RR 45]. When asked if he had received a phone call from Moore on May 31, 1996, Morris candidly answered, "I just don't remember." Acknowledging that it had been "28-plus years," counsel for Applicant then replied "that's fair." When confronted with the assertion that he had allowed Moore to talk to Williams, Morris responded, "I would never have told a client **or anybody else that called me,** I'm a suspect in a murder case, should I talk to the police? Oh yeah, you should go talk to the police. That's absurd." [Emphasis added.] [2/4/2025 RR 52] Morris also testified that after a thorough search when he had testified at the hearing on Applicant's first writ application and again before this Court's hearing held on the current application, he found no file indicating he had ever represented Moore. [2/4/2025 RR 54–56] The Court finds Morris's statements that he never represented Moore to be credible.[21]

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[21]Applicant takes the position that this Court should find Morris's testimony concerning his representation of Moore to not be credible but then is asking the court

74. When Moore testified before the grand jury on July 1, 1996, he told the grand jury that he was represented by three lawyers including Keith Brown and two other lawyers from Dallas whose names he did not know. [Appl. Ex. 16 at 129] The record does not reflect that any of those alleged attorneys were present or that any had ever made an appearance on his behalf. The exhibits to the third application show that Moore was represented by attorney Phil Adams no later than sixteen days after his grand-jury testimony when he was furnished discovery by Haverkamp. [Appl. Ex. 7 at 10]

75. Finally, Applicant relies upon the affidavit of Moore signed on September 28, 2024. [Appl. Ex. 18]. Moore has given three accounts of the events of May 28, 1996: his statement to Williams on May 31, 1996 [Appl. Ex. 8], his testimony before the grand jury on July 1, 1996 [Appl. Ex. 16], and his latest affidavit [Appl. Ex. 18]. His account of events changes each time he is asked to address how Hanks was killed and why.

76. His affidavit is submitted with absolutely no context—there is no information concerning whether he was in custody or out of custody, whether he had any pending charges, whether he was employed or unemployed, or where he lived. He simply says he wants to "recant" all statements, whenever made, that implicated Applicant in any crime. [Appl. Ex. 18, pg. 1] While the affidavit was sworn to before a

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to find the remainder of his testimony concerning what discovery he did and did not receive and how that was material to his defensive strategy to be credible. Although a court may make selective credibility determinations, there is no basis to do so regarding Morris's testimony.

notary public, it is evident on its face that the affidavit does not tell the "whole truth" because while he admits to arguing with Hanks on the night of his death, Moore completely fails to disclose that Hanks was killed or who shot him. These were events that he had discussed in detail in previous accounts of his story.

77. This Court finds each of Moore's accounts as to what happened in the shooting of Hanks to be untrustworthy and not credible. Each statement conflicts, and it is apparent that Moore is communicating whatever scenario serves him best at that time.

78. In this same untrustworthy affidavit, Moore includes the statement that he "consulted with [his] attorney John Morris before giving my original statement to the police." This statement is contrary to Morris's testimony and is the opposite of advice Morris said he would ever give to anyone. The Court has found Morris's testimony of to be credible. Given Moore's previous testimony before the grand jury about the three attorneys who purportedly represented him and given the documented representation just days later by Phil Adams, the Court has no confidence whatsoever in Moore's account and unsupported assertion that Morris ever represented him. The Court finds all of Moore's statement to be irreconcilably inconsistent, self-serving, unreliable and not credible.

79. After a careful review of the record of the original trial, this court finds that Morris zealously represented Applicant by arguing that Moore actually committed the offense of capital murder that resulted in Hanks's death. Morris could not have been

actively representing Moore's interests by arguing that Moore committed capital murder.

80. "In order for a defendant to demonstrate a violation of his right to reasonably effective assistance of counsel based on a conflict of interest, he must show (1) that defense counsel was actively representing conflicting interests, and (2) that the conflict had an adverse effect on specific instances of counsel's performance." *Morrow*, 952 S.W.2d at 538; *Cuyler*, 446 U.S. at 350. Based on the record, Applicant failed to meet his burden of establishing an actual conflict of interest pursuant to either prong of the *Cuyler v. Sullivan* test.

81. In Ground Four, Applicant relies on the same evidence to support his request for relief through a "new appeal" based on the actual conflict of interest of Morris who was his appellate counsel. [Mem. in Supp. of Appl. at 137] This Court maintains that Applicant failed entirely to prove by credible evidence that Morris had an actual conflict of interest under *Cuyler v. Sullivan*. Applicant's allegation against Morris is grounded in his position that Morris's representation on appeal was inadequate "because there were *plausible* arguments available that Morris failed to pursue because of his conflicting interests." [Mem. in Supp. of Appl. at 143] This Court has found that Applicant failed to meet his burden of establishing an actual conflict of interest and therefore has failed to prove that he is entitled to a new appeal. "We decline to speculate about a strategy an attorney might have pursued, but for the existence of a potential conflict of interest,

in the absence of some showing that the potential conflict became an actual conflict." *Routier v. State*, 112 S.W.3d 554, 585 (Tex. Crim. App. 2003).

## III. SUMMARY AND ORDER

82. Based on these findings and conclusions, the Court RECOMMENDS that Applicant's request for relief be GRANTED on the sole ground that the State withheld exculpatory evidence and that Applicant be granted a new trial for the charged offense of capital murder.

The Court ORDERS the court clerk to transmit to the Court of Criminal Appeals, under one cover, all documents required by Texas Code of Criminal Procedure article 11.07, § 3(d). The clerk is further ordered to send a copy of these Findings and Conclusions and Order to Applicant, Michael Newberry, by and through his attorney of record Mark Lassiter, mark@lomtl.com, 3300 Oak Lawn Ave. Suite 700, Dallas, Texas, 75219, and to Cooke County District Attorney John Warren.

SIGNED April 10, 2025.

LEE GABRIEL
JUSTICE (SENIOR, RET.)
235TH DISTRICT COURT
SITTING BY ASSIGNMENT