26-5256

IN THE SUPREME COURT

BRYAN LAMAR GRESHAM, APPELLANT-PETITIONER

v.

ERIC GUERRERO
TDCJ – INSTITUTIONAL DIVISION
APPELLEE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari

Submitted by;
Bryan Lamar Gresham, Pro Se, 4304 Hwy 202, Beeville, TX 78102

Questions to the Supreme Court

1. By not reviewing petitioner's newly discovered evidence before rejecting his "Actual Innocence" claim, did the lower courts err?

2. Because the Third Circuit and the Fifth Circuit have ruled differently, does exculpatory DNA evidence outweigh a positive identification?

3. Is exclusionary DNA evidence enough to establish a showing of innocence when it contradicts claims in the underlying complaint and no other inculpatory evidence exists?

4. If Trial Counsel develops a theory that is used as the basis for his defense strategy, does he have a duty to investigate each element of the theory prior to advising the defendant?

5. If, as part of the habeas process, a petitioner is granted an evidentiary hearing in state court and Trial Counsel testifies, is the petitioner entitled to a new factual predicate date, one that aligns with the date of Trial Counsel's testimony?

6. If it is released to the defense after a plea offer has been accepted by the defendant and finalized by the trial court, is exculpatory impeachment evidence, that was denied to the defense prior to plea negotiations, considered "newly discovered"?

7. After it is discovered the State possessed exculpatory impeachment evidence it previously denied was in its possession, is a defendant who entered into a plea agreement with the State entitled to relief?

8. After it is discovered the State withheld all--or a portion--of an investigative report related to the defendant's case, is a petitioner who entered into a plea agreement with the State entitled to relief?

9. Though it might later be deemed "immaterial," is a habeas petitioner claiming "Actual Innocence" able to introduce newly discovered evidence, to overcome a procedural bar, then rely on the "old" evidence to establish a showing of innocence?

10. Does Trial Counsel have a duty to investigate a named, known alternative suspect?

11. Is illegally obtained exculpatory impeachment evidence excluded from disclosure rules and protected by the Ruiz precedent?

12. If Brady applies only to evidence known to the State but not the defense, must a defendant be forced to test the vagaries of a trial, with a hamstrung defense, when the defense has knowledge the State is in possession of exculpatory impeachment evidence but the State denies it?

LIST OF PARTIES

BRYAN L. GRESHAM – APPELLANT, PETITIONER

ERIC GUERRERO – RESPONDENT

List of Prior Proceedings

May 4, 2018: Plea Bargain Hearing – Bexar County 175th District Court, Cause #2016CR11156 (judgement entered: May 4, 2018)

November 19, 2018: Initial State Habeas Application filed – Bexar County 175th District Court, Cause #2016CR11156-W1

April 9, 2019: Denial of Habeas Application (without written order) -Texas Court of Criminal Appeals, Cause #2016CR11156-W1

June 13, 2023: Second State Habeas Application filed- Bexar County 175th District Court, Cause #2016CR11156-W2

May 21, 2024: State Evidentiary Hearing- Bexar County 229th District Court, Cause #2016CR11156-W2 (Opinion entered: June 21, 2024)

October 9, 2024: Denial of Habeas Application (without written order)- Texas Court of Criminal Appeals, Cause #2016CR11156-W2

December 31, 2024: Initial petition for 2254 Federal Writ of Habeas Corpus filed- United States District Court for the Southern District of Texas, Corpus Christi Division

January 3, 2025: Petition transferred to the United States District Court for the Western District of Texas, San Antonio Division, Docket No. 25-SA-CA-0019-JKP

June 3, 2025: Judgement entered (Relief denied, one-year procedural bar)

July 3, 2025: Request for Certificate of Appealability filed- United States Court of Appeals for the Fifth Circuit, Docket No. 25-50539

December 26, 2025: Judgement entered (request denied)

January 7, 2026: Motion Requesting Time Extension to File a Motion for Reconsideration filed- United States Court of Appeals for the Fifth Circuit, Docket No. 25-50539 (request denied, unsure when judgement entered, order was not received)

January 21, 2026: Motion for Reconsideration filed- United States Court of Appeals for the Fifth Circuit, Docket No. 25-50539 (no action taken, notice given January 26, 2026)

March 23, 2026: Petition for a Writ of Certiorari filed- Supreme Court

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TABLE OF AUTHORITIES

Reference to the Opinions Below

The Fifth Circuit's decision, which denied a Certificate of Appealability, is not published but is available in the Appendix (See Court of Appeals Order and Motions). The District Court's decision is reported at U.S. Dist. LEXIS 104764 (See Appendix: District Court's Order). The state court's opinion, in *Ex Parte Gresham*, is not published but is available in the Appendix (See Trial Court's Opinion (Writ 2)).

Basis for Jurisdiction

On December 21, 2024, I filed my pro se petition in the United States District Court, Southern District of Texas, Corpus Christi Division, naming Barry Lumpkin as the respondent. On or around January 3, 2025, my petition was transferred to the Western District of Texas, San Antonio Division. Around that same time, Eric Guerrero replaced Mr. Lumpkin as the respondent. On March 12, 2025, Respondent submitted his response to my petition, requesting that it be denied with prejudice as untimely. On or around April 3, 2025, the Court received my reply. On June 3, 2025, the District Court denied my petition, with prejudice, as untimely, also denying me a "certificate of appealability." I followed with a timely request for a certificate of appealability. My request was denied on December 26, 2025. Now I submit to this Court my timely Petition for a Writ of Certiorari.

Before the Court is my Petition for a Writ of Certiorari, requesting a reversal of the final order issued in case 25-50539. On June 3, 2025, the final order was issued in the United States District Court, Western District of Texas, San Antonio Division, by my request for a Certificate of Appealability was denied the Fifth Circuit Court of Appeals, giving the Supreme Court jurisdiction, also making it the proper venue in which the appeal is to be reviewed.

Constitutional Provisions Addressed

Fourth Amendment- "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment- "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment- "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Eighth Amendment- "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Thirteenth Amendment- (Section 1) "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Fourteenth Amendment- (Section 1) "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifteenth Amendment- (Section 1) "The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Introduction

Before the Court is my Petition for a Writ of Certiorari, requesting a reversal of the final order issued in case 25-50539. On June 3, 2025, the final order was issued in the United States District Court, Western District of Texas, San Antonio Division, by my request for a Certificate of Appealability was denied the Fifth Circuit Court of Appeals, giving the Supreme Court jurisdiction, also making it the proper venue in which the appeal is to be reviewed.

The issues before the Court are the denial of my claims of "Actual Innocence," "Ineffective Assistance of Trial Counsel," the State's multiple violations of *Brady*, and "Involuntary Plea" based on the District Court's determination that the petition is untimely.

I argue I have made a showing of actual innocence, enough to satisfy the demanding *Schlup* standard, and that any procedural bar should be waived. I also argue, with regard to my *Brady* claim, the factual predicate could not have been previously discovered through the exercise of due diligence and that the facts are enough to establish, but for a constitutional error, no fact finder could find guilt beyond a reasonable doubt. I further argue that the state courts and the District Court made unreasonable findings of Trial Counsel's credibility and effectiveness, as they rely, solely, on testimony unsupported by the evidence in the record presented during the state habeas corpus proceedings.

With this appeal, I am requesting the Court to:

1) Affirm that I have made a substantial showing of the denial of a constitutional right

2) Grant me a "Writ of Certiorari"

3) Order that my petition for relief be considered on the merits

4) Order my release from custody, either on recognizance or surety, while the appeal is pending, in accordance with U.S.C.S. Federal Rule 23(b)(3)

5) Affirm that I have shown that I am entitled to relief

6) Order my unconditional release from custody

7) Enter a finding of prosecutorial misconduct

8) Enter a finding of malicious prosecution

9) Order that any plea agreement entered into, during the plea hearing involving the present case, be immediately rendered involuntary and, thus, void

10) Bar any future prosecution of this or considered matters

I. Statement of the Case

On March 29, 2026, I, Bryan Lamar Gresham (also "Petitioner"), was arrested in Houston, Texas. On April 5, 2016, I was transferred to the Bexar County Adult Detention Center. On April 14, 2016, I first learned the charges against me, during an interview with Detective Owens, of the San Antonio Police Department ("SAPD"). On July 2, 2016, I was released on bond. Later that same month, I retained, as counsel, Robert Barrera, ("Trial Counsel") an attorney with the Nicolas and Barrera Law Firm. Mr. Barrera was my attorney of record for each of the following cases: 2016CR11156 (Aggravated Sexual Assault), 2016CR11755 (Impersonation of a Public Servant), 2017CR8449 (DWI-3d), and 2018CR4391(Sexual Assault). On October 1, 2017, I was arrested in San Antonio, Texas, accused of violating the terms of the bond in case 2017CR8449, and I have been incarcerated since. In November 2017, during a meeting with Mr. Barrera, I let it be known that I have evidence of my innocence, in case 2018CR4391, telling him I recorded the encounter with the claimant, and I urged Mr. Barrera to retrieve my phone from the police, who had seized it without a warrant. In

March 2018, I attended a hearing on a motion to suppress, filed by Mr. Barrera, in case 2017CR8449, and asked about the phone. After the motion was denied, Mr. Barrera appealed on my behalf. Mr. Barrera told me he inquired with the San Antonio Police Department (SAPD), on multiple occasions, and he was repeatedly told the phone was not in their possession.

While the appeal was pending, on May 4, 2018, against my wishes, following the advice of Mr. Barrera, I entered into two plea agreements with the State, pleading "No Contest" to the charges in cases 2016CR11156 and 2017CR8449. Under the agreement for the present case (2016CR11156), the charge was reduced to aggravated assault with a deadly weapon, a second-degree felony with a punishment range of two to twenty years confinement, and I received a fourteen-year prison sentence. Cases 2016CR11755 and 2018CR4391 were taken into consideration, as part of that agreement. For case 2017CR8449, I received the maximum ten-year sentence. On August 30, 2018, Mr. Barrera filed a motion for the release of my phone. In October 2018, my mother, Gaye Gresham, was able to retrieve my phone from SAPD's property storage warehouse. After confirming the video of me engaged in a consensual encounter with one of the State's witnesses was still saved, I requested an "Application for a Writ of Habeas Corpus" from the law library at the Garza West unit of the Texas Department of Criminal Justice. The writ was filed on or around December 10, 2018. The writ was denied around April 19, 2019. After multiple requests for information, Mr. Barrera finally sent me his notes from his time serving as my attorney. I received the files in June 2020. Because his notes were sparse, through my mother, I initiated a Freedom of Information Act ("FOIA") request, for records pertaining to Laura Smith's (the alleged victim in case 2016CR11156) criminal history and the records associated with the case number (SAPD 16004763) on a report from the Bexar County Criminal Investigations Lab ("CIL"), released August 5, 2016, which informed SAPD of a DNA link between the present case and the one mentioned in the report. I received the files in late 2020. This is when I first learned of Tyrone Baker and his connection to the present case. With Mr. Barrera's declaration of being unaware of any evidence that exonerates me, I determined I had enough evidence for a showing of ineffective assistance of counsel. In September 2021, I retained Sarah Durham ("Writ Counsel") to help me file a second state habeas corpus application. Sometime in the summer of 2022, Writ Counsel submitted requests to Trial Counsel and the State, for all discoverable documents related to 2016CR11156. Writ Counsel received the requested files in the fall of 2022. In March 2023, the State informed Writ Counsel of documents that had not been previously disclosed, the "SIA Serial Rapes Update" from February 2016.

On June 12, 2023, Writ Counsel filed my second writ application. On June 20, 2023, the State filed its first "Notice of Retroactive Disclosures." In January 2024, the State informed Writ Counsel of additional documents that had not been previously disclosed, the initial "Strategic Intelligence Analysis" report from January 2016." On January 25, 2024, the State filed its second "Notice of Retroactive Disclosures." Writ Counsel submitted an amended writ application April 29, 2024. An evidentiary hearing was held May 21, 2024. On June 21, 2024, the state trial court submitted its "Findings of Fact and Conclusions of Law," recommending the denial of my writ application. On October 9, 2024, the Texas Court of Criminal Appeals denied my application. On December 21, 2024, I filed my pro se petition in the United States District Court, Southern District of Texas, Corpus Christi Division, naming Barry Lumpkin as the respondent. On or around January 3, 2025, my petition was transferred to the Western District of Texas, San Antonio Division. Around that same time, Eric Guerrero replaced Mr. Lumpkin as the respondent. On March 12, 2025, Respondent submitted his response to my petition, requesting that it be denied with prejudice as untimely. On or around April 3, 2025, the Court received my reply. On June 3, 2025, the District Court denied my petition, with prejudice, as untimely, also denying me a "certificate of appealability." I followed with a timely request for a certificate of appealability. My request was denied on December 26, 2025. Now I submit to this Court my timely Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit did not review the newly discovered evidence before denying my "Actual Innocence" claim, contradicting its own precedent, set in *Crawford v. Cain*, and violating precedent established by this Court in *House v. Bell* and *Schlup v. Delo.*

The Appeals Court analysis of a COA application necessitates "only a limited, threshold inquiry" (*Holberg v. Lumpkin, 2023 U.S. App. LEXIS 5928;* citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). Because the district court did not address the issue of the video footage, the next court to review the matter should "look through" to the last decision entered (*Wilson v. Sellars*, 584 U.S. 122, 125 (2018)). In this case, however, no court specifically addresses the matter of the cell phone footage; therefore, the reviewing court must rely on the state court's generalized determination that no evidence was "improperly withheld." The problem here, though, is the fact that the state habeas court offers no rationale for its conclusion. On the other hand, the record presented during the state habeas proceedings offers ample evidence that shows evidence, namely the cell phone video and the "SIA" report, was improperly withheld and resulted in my being prejudiced.

First, during the evidentiary hearing, the State concedes that the phone had been held by SAPD as "evidence" (See Appendix: Evidentiary Hearing Transcript p.51, lines 2-5). In its "Notice of Retroactive Disclosures," the State confirms the "SIA" report was not provided to Trial Counsel, by specifically naming Writ Counsel as the person to whom the document was delivered, also confirming the report was not submitted to me, by way of counsel, until more than five and a half years after the plea hearing (See Appendix: Notice of Retroactive Disclosures p.1). Therefore, the issue of suppression is not debatable and should not be questioned. Second, specifically regarding the cell phone video, the evaluation comes to the question of "materiality," meaning the footage in question must be either exculpatory or impeaching. On April 19, 2018, the State submitted its "Notice of Intent to Introduce Evidence of Extraneous Offenses," where it lists fifteen alleged instances of criminal misconduct on my part. Number 13 says: "On or about the 1st day of October 2017, the defendant did commit the offense of sexual assault against Samantha Schmid in Bexar County, Texas" (See Appendix: Notice of Intent p.157, #13). This statement is made even though I was never convicted of such actions. On the same day, the State submitted its "List of Witnesses," with Samantha Schmid listed as a witness (see Appendix: States List of Witnesses p.1).

Added to the State's acknowledgement that my phone was, in fact, in the State's possession and withheld from the defense, the State does not deny the SIA report was also withheld, and the Court is in no position to assert a denial on the State's behalf. Therefore, by disregarding the State's concession and, instead, accepting Trial Counsel's claim of having received the report, a claim proved false by the discovery log, the Court makes an egregious error.

From the outset of this ordeal, I have staunchly maintained my innocence. In his answer, Respondent offers *House v. Bell* as a case in which the petitioner presents elements of a showing of "actual innocence" that are efficient to establish the basis of a claim under the demanding *Schlup* standard (See Respondent's Answer with Brief in Support,11). In summary the elements presented, to show actual innocence, in that case are as follows:

-The State does not dispute new evidence has been introduced

-The petitioner is excluded as a DNA contributor

-Another individual is found to be a match to a sample of DNA from the scene

-There is a named, known alternative suspect

With those four elements, the Supreme Court determined that the petitioner had, indeed, met the burden for showing actual innocence and ruled that his petition could proceed, despite many of his claims being procedurally barred.

Here, the presented elements are similar. They are also acknowledged and undisputed by Mr. Guerrero. In fact, in defense against my claim of ineffective assistance of counsel, Respondent offers two elements, in his answer, that are exactly the same as two of the four elements presented in *House*. Respondent acknowledges, and does not dispute, the fact that another individual is found to be a match to a sample of DNA from the scene and the fact that there is a named, known alternative suspect (See Respondent's Answer 8,12). Furthermore, it cannot be disputed that I have been excluded as a DNA contributor and that the State does not deny new evidence (i.e. the SIA Report, "SIA Serial Rapes Update" report, and cell phone video) has been introduced.

In addition to the primary elements that are exactly like the elements presented in the case Respondent has identified as being the model, for petitioners attempting to assert claims of "actual innocence," to follow, I have highlighted multiple supplemental facts that are also indisputable and illustrate my innocence: 1) The State tried and failed to link me to the alleged scene, multiple scenes of other similarly alleged attacks, other suspects, and other persons of interest; 2) The State established a vast pool of alternative suspects; 3) The State created a suspect profile I do not fit; 4)The alleged victim misidentified me; 5) The only other witness, the alleged victim's friend, contradicted the complainant's account; 6) There is no evidence implicating me.

Following Respondent's guidance and using the standard established by the Supreme Court in its *House* decision, I have met the burden for a showing of actual innocence. Because the record shows the "SIA" report was not presented prior to my plea hearing, not made known to me until March 2023, and not fully disclosed until January 2024, it must be considered new evidence, regardless of whether the state court finds it was not improperly withheld, because the State's retroactive disclosure is evidence of the report's materiality, satisfying the first prong of *Schlup*. If, however, the Court chooses to dismiss the relevance of the initial "SIA" report and the "Serial Rapes Update," there can be no discounting the relevance of the video of me engaged in a consensual sexual encounter with one of the State's witnesses. Even if the State is protected against a *Brady* claim under *Ruiz,* because the video was not available to me prior to the plea agreement becoming final, the video must be considered "newly discovered."

2. Regarding whether or not exculpatory, exclusionary DNA evidence surmounts a witness's positive identification, a matter of import in the present case and one that is not uncommonly presented throughout the judicial system, the Fifth Circuit (*Gresham v. Guerrero*) has issued a decision that conflicts with decisions issued by the Third Circuit (*Andrews v. Scuilli* and *Wilson v. Russo*) and the Eighth Circuit (*Kuehl v. Burtis*).

"The DNA evidence also did not surmount other evidence pointing to Petitioner as the perpetrator, including the victim's positive photo identification, Petitioner's admissions and GPS coordinates placing him at the scene, and cell phone texts containing communications with the victim." (*Gresham v. Guerrero, 2025 U.S. Dist. LEXIS 104764, 15*)

"We also gave a scenario in which an officer knows about reliable, independent, exculpatory DNA evidence that contradicts a positive identification. In such a case, the positive identification would not be enough to outweigh such evidence." (*Andrews v. Scuilli, 853 F.3d 690, 702*)

"While we agree that positive identification by a victim witness, without more, would usually be sufficient to establish probable cause, this qualified precept cannot be rendered absolute. Independent exculpatory evidence or substantial evidence of the witness's own unreliability that is known by the arresting officers could outweigh the identification such that probable cause would not exist." (*Wilson v. Russo, 212 F.3d 781, 790*)

"... an otherwise credible victim identification would not provide probable cause if police contemporaneously possessed reliable DNA evidence which determined conclusively the accused could not have committed the crime." (at 790)

"An officer contemplating arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests probable cause exists." (quoting *Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999)*)

The District Court cites my admissions, which I made and have maintained since my interview with Detective Owens, prior to knowing what evidence SAPD actually possessed. I offered that the alleged victim and I had multiple conversations, exchanged several text messages, and sent each other pictures, as we made plans to meet. I also offered that, when I arrived at the hotel, I called and messaged the alleged victim, trying to get her room number, but she never responded. Those admissions, considering their consistency (compared to the alleged victim's shifting statements), are far from inculpatory and are completely supported by the evidence.

Taken together, the evidence shows the alleged victim's positive photo ID is undermined by her assertion that she remembers me from high school. The positive photo ID is further undermined by the alleged victim's description of the alleged attack, because she specifically states that her attacker left his semen at the scene, and I am excluded as a contributor of the DNA collected from the scene. Another drag on the photo ID is the fact that it came seven months after the alleged attack, though the record shows, and I have attested, that I sent pictures of myself to the alleged victim, as we were making plans to meet, the night of the alleged attack, and she never provided those pictures to police, or identified me as her attacker, during her initial interview (See Appendix: Incident Report pp. 52-56).

Still, because there exists no minimum standard to determine the validity of a "positive" identification, despite Ms. Smith not identifying me as her assailant when police responded; her glaring lack of detail in the description she gave of her attacker; the seven-month lapse between the alleged assault and the interview with detectives that includes her identifying my photo; her mistaken identification of me, after the fact; and the fact that she explicitly states that her attacker left his DNA sample, in the form of semen, at the scene, the Fifth Circuit ruled the DNA evidence to be inferior to the positive identification and denied my petition.

Where as, given their stances regarding witness credibility and independent exculpatory DNA evidence, had this case taken place within the jurisdiction of the Third Circuit or the Eighth Circuit, it highly unlikely I would have been arrested for, much less charged, with this crime. That is the significance of the implications that can be remedied by this Court.

3. Petitioner's state court of last resort, the Texas Court of Criminal Appeals ("TCCA"), has decided an important question of federal law, regarding whether illegally obtained exculpatory impeachment evidence is protected from disclosure requirements, under the Court's decision in *United States v. Ruiz*, a matter that should be settled by this Court.

My cell phone contains a video of me engaged in a consensual sexual encounter with one of the State's witnesses, Samantha Schmid (See Appendix: List of Witnesses, p.1). Ms. Schmid claimed the encounter was an assault. I maintain it was not. Without a warrant, the State seized, attempted to search, then withheld my phone. Despite multiple inquiries and discovery motions, submitted by Trial Counsel, the State did not turn over the phone, claiming it was not in their possession (See Appendix: Evidentiary Hearing Transcript, p.12, lines 5-6). Then, in August 2018, three months after my plea hearing, after Trial Counsel submitted a motion, specifically for the phone's release, the State acknowledged it was in their possession and had been since October 1, 2017, the day the video was recorded(See Appendix: Evidence Bag).

Because it can be reasonably assumed that the State intended to use Ms. Schmid's claim to lend credence to the claim made by the alleged victim in this case (See Appendix: Notice of Intent p3, #13), the footage on the phone would have been used to impeach Ms. Schmid's testimony. Therefore, the video is material and should have been disclosed to Trial Counsel, between April 19, 2018, when the State issued notice of its intent to present Ms. Schmid as a witness and May 3, 2018, the day before the date of the next scheduled trial setting for this case.

The Trial Court, in its opinion, contends, without elaboration, that, in accordance with *Ruiz*, the impeachment evidence contained on my phone was not improperly withheld (See Appendix: Trial Court's Opinion (Writ 2) p.6, #17). With that opinion, the Trial Court tacitly countenances the notion that a violation of the Fourth Amendment's protection against warrantless searches and seizures of private property does not undermine the State's ability to withhold illegally obtained property once said property is in the State's possession, even if a defendant knows the item(s) is/are being held by the State and requests the property be returned to its owner.

That is a question of federal law that cannot be determined at the state level; it must be decided by this Court.

4. The Fifth Circuit has sanctioned a stance, on "statutory" and "equitable" tolling, by the lower courts, that is an extreme departure from established precedent and federal law$ it calls for this Court to exercise its supervisory powers.

As outlined in the petition, the State withheld a report that offers a vast pool of alternative suspects and shows a failed attempt to link me to them or crimes similar to the one of which I am accused. Though I was initially arrested in March 2016 and the report was released in January 2016, the State did not disclose any part of the report until March 2023; additional pieces of the report were not disclosed until January 2024.

Furthermore, resisting my most earnest efforts, Trial Counsel did not provide details, pertaining to his knowledge relevant to this case or his actions taken in preparation for my defense, until May 21, 2024, during an evidentiary hearing. Therefore, the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence is May 21, 2024, and certainly no earlier than January 25, 2024.

A. LAW AND ARGUMENTS

1. I, Bryan Lamar Gresham, am actually innocent of the offense of which I am accused and to which I pled "No Contest."

By an overwhelming preponderance, the evidence shows I had no physical interaction with the alleged victim, Laura Smith. I am excluded as a contributor of any of the many DNA samples collected, and my fingerprints are not present anywhere at the scene. With there being only exculpatory forensic evidence, the State had no probable cause to arrest me. During the photo lineup, Ms. Smith misidentifies me. A sample of collected DNA matches a DNA sample taken from a separate scene of similarly alleged activity and implicates a specific individual.

a. Exculpatory DNA

On March 26, 2016, during her interview with SAPD detectives, the alleged victim in this case, Laura Smith, confirms her attacker left samples of his DNA at the scene of the incident (See Appendix: Prosecution Guide, p.60, para 1, line 15-16). In that same interview, conducted more than seven months after the alleged attack, Ms. Smith identifies me as her attacker, by way of a photo lineup.

Eighteen days prior to that interview, on March 8, the Bexar County Criminal Investigations Laboratory ("CIL") received eight pieces of evidence, taken from the scene of Ms. Smith's alleged encounter, to be processed and DNA analysis conducted. Three days prior to the interview, on March 23, CIL released its findings in a "Forensic DNA Report," which states "DNA consistent with an unknown male individual was identified" on the interior of a condom, listed as item "E20F" (See Appendix: CIL Report p.38).

On May 5, 2016, two years prior to the plea hearing at which I pled "No Contest," CIL released a supplement to its March 23 report (See Appendix: CIL Report pp.40-41). That report concludes, with unequivocal scientific certainty, I am excluded as a contributor of the identified DNA.

Though the absence of probable cause is unable to be corrected through hindsight, independently collected exculpatory evidence should outweigh a victim's positive photo identification, in the determination of probable cause, when nothing more is offered (*Thompson v. City of Williamsport*, 2023 U.S. LEXIS 206935, 147). Being that "beyond a reasonable doubt" places a much higher burden of proof on the State, *Thompson* is instructive here because, other than the victim's identification, nothing places me at the scene of the alleged incident.

b. No Probable Cause

As has been established by the record, DNA evidence contradicts Ms. Smith's account, specifically with regards to her identifying me as her attacker. Presciently, the Third Circuit opined this exact scenario, declaring "a scenario in which an officer knows about reliable, independent, exculpatory DNA evidence that contradicts a positive identification, in such a case, the positive identification would not be enough to outweigh such evidence" (*Andrews v. Scuillli*, 853 F.3d 690, 702 (2017)). In this case, however, the District Court states, "The DNA evidence also did not surmount ...the victim's positive photo identification...(*Gresham v. Guerrero*, 2025 U.S. Dist. LEXIS 104764, 15), Using the CIL reports, it can be inferred that police knew of the existence of the exculpatory DNA evidence, prior to their March 26 interview with Ms. Smith, and certainly before my arrest on March 29, 2016.

On March 23, 2016, CIL delivered to SAPD its initial report, in which it identifies DNA belonging to an "unknown male individual" (See Appendix: CIL Report p.38). The report also notes the detected sample had been entered into the FBI's Combined DNA Index System ("CODIS").

On May 5, 2016, CIL delivered to SAPD its supplemental report (See Appendix: CIL Report p. 40). Beyond excluding me as a contributor of the DNA identified in this case, the report states the collected DNA sample was tested against a DNA profile developed for me on March 14, 2013, meaning a sample of my DNA was available to the State, specifically SAPD and its detectives, for more than three years prior to the release of the initial CIL report. The fact that the March 2016 report identifies the DNA as having come from "an unknown male individual" proves I was excluded as a contributor prior to Ms. Smith's interview with Detective Owens.

Furthermore, assuming that, for any possible reason, police were unaware of the exculpatory DNA evidence at the time of my arrest in this case, 2016CR11156, the same benefit of doubt cannot be extended to my arrest in case 2016CR11755, a charge and indictment borne of the allegations in this case. The indictment in 2016CR11755, which is a case that was taken into consideration as part of the plea agreement, alleges that I impersonated a public servant (the underlying charge) and induced Ms. Smith to engage in sexual acts, under threat of arrest (See Appendix: Indictment p.149-151).

The indictment states the alleged events occurred on or about August 30, 2015, verifying it stems from the same allegations made by Ms. Smith in case 2016CR11156. The indictment was filed December 20, 2016, seven months after police learned DNA evidence contradicts Ms. Smith's account and lacking any other evidence of my involvement.

Following *Andrews*, it can be concluded that SAPD knowingly lacked probable cause to arrest me. Moreover, with the contradiction established, the veracity of the account given by Ms. Smith, during her March 26 interview with Detective Owens, must be called into question. Because she already offered varying versions of the alleged attack (see Appendix: Compare-police report p.53, p.58 to Prosecution Guide p.60), the exculpatory DNA evidence also begs for a challenge to her identifying me in the photo lineup.

c. Photo ID

There are six factors to be considered in evaluating the risk of misidentification in a photo lineup: 1) the opportunity for the witness to view the criminal; 2) the witness's degree of attention; 3) the accuracy of the description; 4) the witness's level of certainty; 5) the time elapsed between the crime and the identification; and 6) the corrupting influence of the suggestive identification itself (*United States v. Atkins*, 698 F.2d 711).

As I attested during the evidentiary hearing, May 21, 2024, testimony supported by the record, Ms. Smith and I exchanged several photos as we made plans to meet, allowing one to conclude that, if I was the perpetrator, she had ample opportunity to view me. With pictures of me in her possession, Ms. Smith also had ample opportunity to identify me as her attacker while police were at the scene (or at any later time). She never does, not before the March 26 interview. What she does do, however, is provide police with a vague description of a generic Black male (See Appendix: Police Report p.53, line 17-18).

Though Ms. Smith states she is "100%" certain of her selection, she also suggests she remembers me being a high school classmate of hers (See Appendix: Prosecution Guide, p.61). In actuality, Ms. Smith is seven years my senior. We attended high school during non-overlapping, four-year periods. Also, we went to different high schools. According to her statement, Ms. Smith attended Clark High School in San Antonio, TX. I, on the other hand, attended Smithson Valley High School in Spring Branch, TX, more than forty miles away. Additionally, I was not enrolled in any primary or secondary school in the city of San Antonio, or any other Bexar County municipality, after September 1997, when I was ten years old.

The photo lineup was conducted more than seven months after Ms. Smith's alleged encounter. Because there is no available video or audio recording, and no detailed record of how the lineup was administered, there is no way to ascertain what level of influence the detectives had over Ms. Smith's selection; though, it has already been established detectives knew the results of the DNA analysis prior to conducting the lineup.

When comparing the photo of me to those of the others said to have been presented, the suggestiveness is evident. The other photos are of men who appear to be much older than me, who have significantly darker complexions than mine, and leave me as the only one smiling.

Objectively considered, evaluating the six factors outlined in *Atkins*, the risk for misidentification by Ms. Smith is high. At best, Ms. Smith's identification must be considered questionable, or damningly unreliable, when compared to an average witness's identification. Ms. Smith's differing accounts of the encounter already call into question her integrity as a witness, and her statements suggest she has mistaken me for someone else.

d. Alternative Suspect

On August 5, 2016, CIL sent notice to SAPD(See Appendix: CIL Report, p44), specifically Detective Montes, the original detective assigned to case 2016CR11156, informing them of a DNA match to one of the items submitted on March 8. The match was discovered via CODIS. The letter states an unknown individual is the same contributor of the DNA identified in Laura Smith's case and a separate sexual assault that is said to have occurred January 6, 2016, assigned SAPD #16004763 (See Appendix 44).

On January 4, 2016, CIL received thirty-one items, gathered from Laura Smith's hotel room in August 2015, during SAPD's investigation of the present case, 2016CR11156 (SAPD #15187142)(See Appendix CIL Report p.35). Included in those items were two condoms, listed as "E9" and "E20F". On July 8, 2016, CIL received two items, gathered during SAPD's investigation of the alleged sexual assault of Robin Lance (SAPD 16004763)(See Appendix: CIL Report p.44). One of the items, a cutting of a fitted sheet from Ms. Lance's bedroom, is listed as "E1" (See Appendix: CIL Report p.44). According to the August 5 letter to Detective Montes, DNA from the fitted sheet ("E1") matches DNA from the condom interior ("E20F"), linking SAPD cases 15187142 and 16004763(See Appendix CIL Report p.42).

On March 27, 2017, Tyrone Baker was indicted for the sexual assault of Robin Lance, SAPD case 16004763(See Appendix: Tyrone Baker indictment, p.43). Though the charges were dismissed, due to the unavailability of a key witness, likely the victim, Tyrone Baker has not been eliminated as a suspect in that case. Therefore, he cannot be eliminated as a suspect in this case, especially because he has never been questioned in relation to this case, according to the State's records. This remains true in the face of DNA evidence, excluding me as a contributor, and Ms. Smith's questionable credibility.

When taking into account the aforementioned facts, along with soon-to-be-presented evidence that was not revealed until after the plea agreement was signed and the conviction finalized, one can quickly conclude the "Carrier" standard, as it is applied in *Schlup v. Delo*, has been exceeded. Within the proceeding grounds, reviewers will come to understand how the actions (and inactions) of Trial Counsel and the State combined to undermine many of the various protections afforded those defending themselves against criminal prosecution.

A federal court can grant relief under section 2254(d)(2) if the state court makes a factual determination, using adequate procedure, but the resulting determination is unreasonable because it is not fairly supported in the evidence presented in the State court proceedings (*Brumfield v. Cain*, 576 U.S. 305, 307, 314-317 (2015)).

It is evident that Trial Court's finding that I have not met the burden of showing I am actually innocent (See Writ 2 Trial Court's Opinion 10, #30) is unreasonable because, even using the standard set forth in Ex Parte Brown (205, S.W. 3d. 538 (Tex. Crim. App. 2006)), which states "the applicant must show by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in the light of the new evidence," there is no evidence of guilt, especially none that supports a conviction.

In fact, the preponderance of the evidence (exculpatory DNA results; DNA link between this case and a separate, similar case with an alternative suspect; SIA report establishing a pattern of identical attacks and exempting me as being linked to similar crimes; Laura Smith's changing story, etc.) supports my claim of innocence. By applying *Ex Parte Brown*, Trial Court requires that I first prove a negative (evidence of guilt) then argue against it. That is, by definition, unreasonable.

2. Trial Counsel was insufficiently aware of material facts, pertaining to this case and considered cases, rendering their assistance ineffective.

When advising me to accept the plea agreement, Trial Counsel did not know that Tyrone Baker, a potential alternative suspect, had been indicted for sexual assault in SAPD case 16004763, a case linked to the present case (SAPD 15187142) by matching DNA samples(See Appendix: Tyrone Baker indictment, p.43; CIL Report, p.42.). Also, Trial Counsel was not privy to information contained in an SIA report from January, 2016, listing several persons of interest; multiple cases with a similar M.O.; and a suspect profile. Also Trial Counsel was not privy to the "SIA Serial Rapes Updates," (See Appendix: Discovery Log), released by SAPD in February 2016 and containing detailed instances of alleged attacks that are similar in nature to the account given by Laura Smith, the claimant in this case(See Appendix SIA Report, p.84). The report also offers a vast pool of alternative suspects. Furthermore, in addition to failing to investigate Tyrone Baker, Trial Counsel failed to investigate Laura Smith; he failed to investigate the underlying probable cause for my arrest; and he willfully disregarded exculpatory impeachment evidence(See Appendix: Evidentiary Hearing Transcript p.14, line 22).

In *Strickland v. Washington*, the Supreme Court held that "counsel has a duty to make reasonable investigations... Counsel's actions, are usually, quite properly, based on the informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information" (466 U.S. 668, 691).

Trial Counsel was aware of my lack of knowledge regarding Tyrone Baker, Ms. Smith's history, and the legalities of "probable cause." Therefore, it was incumbent upon him to shore up the deficiencies, by conducting, at least, a basic investigation to gather facts that support my consistent denial of involvement.

a. *Failure to Investigate Tyrone Baker*
(see Appendix: Tyrone Baker Indictment)

According to Trial Counsel's testimony, given May 21, 2024 (See Appendix: Evidentiary Hearing Transcript p.18,line 9-11), he acknowledges being told of Tyrone Baker's existence not long before the date of the plea hearing, which took place May 4, 2018, while also confirming that the first time he was presented with the files pertaining to Mr. Baker was that morning, in court (p 16, line 25; p.17, line 1-6). What Trial Counsel did not reveal, though it is evident from the record, is that, in addition to receiving the files pertaining to Mr. Baker, at the same time, he also received each of the files for the three considered cases (2016CR11755, 2018CR4391, and JN1820342) (See Appendix: Discovery Log), each containing numerous pages.

Assuming the files were received by 8:00AM, instead of the time stamped on the discovery log, Trial Counsel spent fewer than four hours reviewing the voluminous documents. Even if it were to be suggested and believed that Trial Counsel focused solely on the Tyrone Baker file, his testimony reveals an ignorance of, and an indifference to, Mr. Baker's having very recently been under indictment for sexual assault (See Appendix Evidentiary Hearing Transcript 17, line 17-22; p.18, line 6-8) and a complete unawareness of the connection between the two cases. Given the facts available to Trial Counsel, his lack of knowledge is only the result of his failure to review and investigate the information provided.

As discussed in *Agan v. Singletary*, though "it is true that counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial... counsel must still make an independent examination of the facts and circumstances and offer an informed opinion to the accused," when determining best courses of action (12 F.3d 1012; citing *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984)). In that case, one of the factors used to sustain the ineffectiveness of the assistance Mr. Agan received was the little time his attorney spent investigating, fewer than seven hours. Here, Trial Counsel spent fewer than four.

Lacking knowledge of the contours of Mr. Baker's indicted case's (SAPD 16004763) connection to this case, knowledge that could have been gathered by properly conducting a basic preliminary investigation, any assertion that the DNA samples, taken from separate scenes, matching each other is irrelevant has to be considered, at best, reckless, especially given Ms. Smith's claim that her attacker left samples of his semen at the scene. Trial Counsel has consistently maintained that the fact I had phone contact with Laura Smith, and GPS placing me in the vicinity, increased the likelihood that I would be found guilty at trial. Following this logic, had Trial Counsel investigated Tyrone Baker, it is very reasonable to assume he would have found that Mr. Baker also made phone contact with Laura Smith and GPS would have placed him in the vicinity, being that his semen was at the scene, confirming he had physical contact with Ms. Smith. Those facts, coupled with Mr. Baker's indictment, undoubtedly make him an equally viable, if not greater, candidate to be the suspect in this case.

To date, Mr. Baker has not been eliminated as a contributor of the DNA identified in SAPD case 16004763, meaning he also cannot be eliminated as a contributor of the DNA identified in this case, making him a potential suspect in both. That fact should have been discovered, presented, and argued by Trial Counsel.

b. Initial SIA Report

(See Appendix: SIA Report, pp.2-4)

Though it has been outlined in each brief, including the brief supporting my petition for a COA (pp. 9-10), and supported by the record, including the statements highlighted by the State and the courts, what has been consistently overlooked, by the state courts, by the District Court, and now by the Appellate Court, is the fact that Trial Counsel claims to have received and reviewed only the report titled "SAPD's SIA Serial Rapes Update," though the record shows differently. Beyond that, however, Trial Counsel makes no acknowledgment of the initial SIA report, issued "1/27/15" (though the dates in the report are from January 1, 2015 to January 13, 2016), even after being questioned during the evidentiary hearing. Trial Counsel's hearing testimony, his affidavit, the discovery log, and the "State's Notice of Retroactive Disclosure" all point to the fact that Trial Counsel was unaware of the initial SIA report, which is the report that specifically mentions my name, along with three other individuals, and San Antonio Police Department's initial assessment of the crimes detailed in the report (including the attack for which I stand accused).

The State's assessment concludes the attacks are part of a larger pattern, one involving gang members. The assessment is then further cemented in the Serial Rapes Update, in which the State establishes a suspect profile. The profile doubles down on the State's belief that those perpetrating the attacks were members of criminal enterprises.

The initial report also confirms the State believed DNA evidence would tie the named parties, including myself, to at least one of the attacks. Multiple reports, however, most notably the CIL report from May 5, 2016, and the CIL memo to SAPD, from August 5, 2016, describing the CODIS match, confirm that I am excluded as a DNA contributor in this case, specifically, and all other crimes, from across the country, in which a DNA sample has collected.

Taking Trial Counsel at his word, he would have been aware of the information contained in the Serial Rapes Update which, along with the suspect profile, details many of the attacks thought to be part of the larger pattern, including an attack that matches the M.O. of the attack for which I stand accused. But, the report does not mention me by name or reveal how significant SAPD believed DNA to be in furthering its cause in solving these cases.

Because he could not adequately analyze the full scope and context of SAPD's investigation, leading him to conclude, as he admits in his affidavit and hearing testimony, that the DNA reports excluding me as a DNA contributor were irrelevant, Trial Counsel's not being aware of both reports rendered his assistance ineffective.

Again, the initial SIA report was not provided to me until January 2024.

c. "SIA Serial Rapes Updates"

(See Appendix: SIA Reports pp.84-86)

In addition to failing to investigate a very plausible alternative suspect, due to the State's withholding of material evidence, Trial Counsel remained unaware of pertinent facts, facts that, had they been disclosed, likely would have affected Trial Counsel's beliefs, with regards to the circumstances in this case, and it is highly probable he would not have advised me to accept a plea agreement, given his knowledge of my vehement opposition to such a notion.

The evidence, a report entitled "SIA Serial Rapes Updates," among disclosing that SAPD had been investigating 81 hotel/motel sexual assaults and 162 robberies, then singling out six that involved the use of the same website used by Laura Smith's alleged attacker, details an incident very similar in nature to the account given by Ms. Smith and offers a vast pool of alternative suspects (See Appendix SIA Report pp.84-86)

Throughout Trial Counsel's affidavit (See Appendix: Trial Counsel's Affidavit pp.121-125) and hearing testimony, he conveys his belief that there are enough overlapping elements, between this case and considered cases 2018CR4391 and JN1820342, that, had the State been allowed to enter those cases under the 404(b) evidentiary rule, it might have been able to establish a patterned M.O. A cursory review of the reports, from 2018CR4391 (See Appendix: S.S. Report pp.143-148.4) and JN1820342 (See Appendix: R.S.report pp.127-142.5), will unveil that, when comparing the primary case to the considered cases, the accounts are more dissimilar than they are alike.

The two considered cases contain, primarily, tales of acquaintances spending considerable time together at public locations then returning to a private residence, where events lead to an alleged assault. This case is the tale of a prostitute as the victim of an ambush attack, by multiple assailants, involving police impersonation, taking place at a hotel, with the utilization of Backpage.com, culminating in a sexual assault and robbery.

Had Trial Counsel been given the opportunity to review the SIA report, he would have learned of the six incidents, singled out by SAPD, and been able to see that they occurred within twenty-five miles of Laura Smith's alleged assault; the perpetrators used Backpage.com, the website Ms. Smith acknowledges using to advertise her services; and the earliest incident occurred fewer than three months after Ms. Smith's, with the others occurring within three months of the first. Moreover, Trial Counsel would have seen that the report details a specific incident (SAPD 15262667) that reads as though it could serve as a synopsis of Ms. Smith's account(See Appendix SIA Report, p.85).

On the third page of the report, Trial Counsel could have found that SAPD had already developed a preliminary profile for the potential suspects, determining that members of rival gangs (not an MBA-holding veteran with his own business) were the most likely to be involved(See Appendix: SIA Report, p.86).. Surely, this knowledge, coupled with his awareness of the exculpatory DNA evidence, would have altered Trial Counsel's perception. Without it, he was advising me without being adequately informed of the facts, rendering his assistance ineffective *(Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S. Ct. 316, 322, 92 L.Ed 309, 319 (1948)).

d. The Video

"When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'" (*Lee v. United States,* 582 U.S. 357, 364; citing *Hill v. Lockhart*, 474 U.S. at 59, 106 S. Ct. 386, 88 L. Ed. 2d 203).

Throughout Trial Counsel's affidavit and evidentiary hearing testimony, he acknowledges that I continually maintained my innocence. He also acknowledges the importance I placed on the video, of Samantha Schmid and me, that had been saved on my cell phone. With that understanding, it is reasonable to believe that, had I had access to the cell phone video, already knowing I was excluded as a DNA contributor, I would have insisted on going to trial.

To show that I would have been better off going to trial, as the Court requires (at 365), I point to the record which offers evidence of Laura Smith's inconsistencies; exclusionary DNA; an alternative suspect; withheld reports showing the allegations made against me fit into a large pattern of similar crimes being committed by individuals fitting a suspect profile that excludes me; stark contrasts between the claims made in the primary case and the claims made in the considered cases; a withheld video of me engaged in a consensual sexual encounter with one of the State's witnesses; and inconsistencies in the accounts given by the claimant and a witness, in one of the considered cases.

On multiple occasions, beginning in November 2017, I inquired with Trial Counsel to the whereabouts of my cell phone (See Appendix: Evidentiary Hearing Transcript p.15, line 19-20), During each inquiry, I reminded him of the video stored on it, showing me engaged in a consensual sexual encounter with Samantha Schmid, the alleged victim in case 2018CR4391, one of the considered cases (See Appendix: Evidentiary Hearing Transcript p. 29 lines 7-9, 23-25).Ms. Schmid is also listed as a witness, for the State, in this case (See Appendix: List of Witnesses, p.1). Trial Counsel's affidavit and hearing testimony establish that he gave considerable consideration to the possibility of Ms. Schmid's allegations being admitted during a potential trial in this case, under the 404(b) rule of evidence, as part of the State's effort to establish a pattern (See Appendix: Evidentiary Hearing Transcript p. 31, lines 13-15, 20-22; Trial Counsel's Affidavit p. 122, para 1, lines 4-6).

In fact, on April 19, 2018, with the submission of "State's Notice of Intent to Introduce Evidence of Extraneous Offenses..." (See Appendix 155-158), the State transparently verified Trial Counsel's suspicion. In the notice, the State lists thirteen incidents, including several for which I have never been questioned (#12), arrested (#s 6 and 7), charged (#s 6, 7, 12), or those for which charges were quickly dismissed (#s 3, 4, 9), and one that is not a crime at all (#2). (Note; "#12" is the same case as JN1820342, which was taken into consideration as part of the plea agreement.)

The fact that the notice was submitted more than two weeks prior to the May 4 plea agreement means Trial Counsel was not only informed of the State's plan to include the very "404(b)" evidence he suspected might be used, but he also had ample opportunity to draft a motion requesting the release of my phone. This directly contradicts Trial Counsel's claim, in his affidavit, that "the issue of the cell phone would have been timely addressed" (See Appendix: Trial Counsel's Affidavit p.122, para 1, lines 10-12), a declaration that comes directly after Trial Counsel offers this hypothetical: "Had [2018CR4391] gone to trial, or been used as 404b evidence by the State... ."

Being that Trial Counsel harbored serious enough concern about the State's possible strategy, going as far as to admit the Samantha Schmid case "certainly" factored into his decision to advise me to take a plea (See Appendix: Trial Counsel's Affidavit p. 122, para 1), he had a duty to make a reasonable attempt to uncover evidence that would likely serve to sufficiently refute the claims made by Ms. Schmid. Undoubtedly, a video showing Ms. Schmid's account is laced with falsehoods meets that criterion. Therefore, having been made aware of the video's existence, and knowing the State received no warrant authorizing the seizure of my phone, it was incumbent upon Trial Counsel to procure the phone and review the footage.

Instead, referencing the record, Trial Counsel took no action and made no attempts to get my phone released, until August 2018, when he filed a motion for the release of my personal property, specifying my phone, three months after advising me to accept the plea offer (See Appendix: Motion for Release of Personal Property). Prior to this action, though there is no documentation to support Trial Counsel's claim that he spoke to the State about my phone, he attests the State told him that my phone was not in their possession. In defiance of that notion, fewer than two months after the motion was submitted, my phone was released to my mother, in an envelope labeling it as evidence, the video still stored on it (See Appendix: Evidence Bag).

Though Trial Counsel has known of the video's existence since November 2017, by his own admission, to date, he has not viewed the footage(See Appendix: Evidentiary Hearing Transcript p.14, line 22), choosing to remain willfully ignorant of exculpatory impeachment evidence. Trial Counsel's countenance of the State's assertion, during cross-examination at the May 2024 hearing, that he would not have been able to authenticate the video footage or that the captured encounter might not have been the same incident for which Ms. Schmid alleges misconduct, is disingenuous (p 30, line 2-10). The technology used to authenticate digital recordings has existed, and been widely available, since before the time of Ms. Schmid's allegation. Also, any cross-examination of Ms. Schmid could have served to get her to acknowledge she and I had only one sexual encounter. Here, again, Trial Counsel proves to have been derelict in his duty to provide effective assistance.

Trial Court's findings contradict Trial Counsel's stance that the cases taken into consideration were not used as leverage (See Appendix: Trial Court's Opinion Writ 2 p.9, #26a). In fact, Trial Court explicitly states: "Applicant obtained the benefit of his plea bargain... By entering into the plea bargain, Applicant received a non sexual-related conviction... He also received dismissals on three other felony charges (#36)." Those "other felony charges" are those that were taken into consideration (2016CR11755, 2018CR4391, JN1820342), each of which I have maintained my innocence against. When questioned about the use of the cases as "leverage," Trial Counsel was replying to a question about case 2018CR4391, specifically (See Appendix: Evidentiary Hearing Transcript, p.15, line 6-7, 9-14). The record shows that the video disputing the allegations in that case was withheld by the State, prior to and during the plea hearing. By inhibiting my ability to craft a defense against case 2018CR4391, another case in which I have always maintained my innocence, the State used it as leverage, by threatening to take me to trial without sufficient defense, to coerce me into accepting a plea agreement in this case, one in which there is only evidence of my innocence.

e. Failure to Challenge Probable Cause

Trial Counsel was hired to represent me in July 2016. By the end of that month, he was in possession of several documents that were part of the State's file for case 2016CR11156, including the supplemental report, from CIL, dated May 5, 2016. Therefore, he knew I was excluded as a possible contributor of the identified DNA. In December 2016, Trial Counsel agreed to represent me in case 2016CR11755, one of the cases taken into consideration as part of the plea agreement and borne from Ms. Smith's allegations in this case.

As discussed in *Andrews*, the exculpatory DNA evidence must outweigh Ms. Smith's positive photo ID, given her version of events are not corroborated by any of the remaining evidence; in fact, she is contradicted by the only other witness who also happens to be Ms. Smith's friend. Because Trial Counsel was aware of the exculpatory DNA evidence and had sufficient reason to believe the police were also aware of such evidence, prior to my being arrested and charged in case 2016CR11755, he failed to provide a minimum level of reasonable assistance, by not challenging the indictment and its underlying probable cause.

Being that cases 2016CR11156 and 2016CR11755 are connected(See Appendix Indictment pp.93-94, 119), a fact shown in the Trial Court's granting of the State's motion to try them together (See Appendix: Pre-Trial Motion p.149-151), discrediting the photo ID for one discredits the ID for both. Without the ID, the State's lack of evidence against me becomes more so. The State would have been left only with conflicting witness accounts and my call log, for which there is an established, noncriminal explanation. Had Trial Counsel taken the most basic steps of a reasonable attorney, it is highly likely the outcome of this case would have been different, that is, resolved in my favor.

f. Failure to Investigate the Claimant

A review of Trial Counsel's notes underscores his lack of preparation for this case and undermines confidence in his assistance. Based on his testimony, it is easy to infer Trial Counsel harbored doubts about my innocence. Throughout the two years prior to my acceptance of a plea agreement, Trial Counsel's most posed question to me was "Why would she say it was you?" referring to Laura Smith's choosing me as her attacker. Each time he asked, I had to be honest and tell him I did not have the answer to that question.

Following the guidance in *Strickland*, because he deemed an answer to that question as being crucial to any possible defense strategy, Trial Counsel had a duty to investigate (*Strickland v. Washington*, 668 U.S., 691 L.Ed 19). After our many conversations left him lacking for answers, like a reasonable attorney, his focus should have shifted to the alleged victim, Laura Smith, with the same question in mind; "Why?" That change in focus and simple question would have yielded results.

There are several indications that Ms. Smith's story is not only flawed but tainted. A basic search reveals the claimant, Laura Smith, was under criminal indictment for felony drug possession, stemming from an arrest in February 2015. The records also show her claim of sexual assault occurred only two weeks prior to the date of her trial setting. Ostensibly, due to the allegations she levied, against no one in particular at the time, the trial date was reset. On September 16, 2015, the felony drug charges against Ms. Smith were dropped, but the case was not dismissed in the judicial record. Ms. Smith was scheduled to meet with the detectives investigating her assault, on September 17. She never attended the meeting, nor did she call to reschedule.

For almost six months, according to the record, there is no activity in either of Ms. Smith's cases, not the one in which she is the alleged victim nor the one where she is the alleged perpetrator, until Detective Montes, of the SAPD, applies for and is granted a warrant for my cell phone records, sometime in early March 2016. On March 11, SAPD receives a search warrant for my DNA, which has been in the State's system and CODIS since March 2013. The State does not make contact with Laura Smith again until March 26, 2016. On that date, during an interview with Detective Owens, Ms. Smith makes significant changes to her story (See Appendix: Prosecution Guide pp. 59-61, 68). On March 29, 2016, I am arrested and charged with assaulting Ms. Smith. On April 2, 2016, Ms. Smith's felony drug case is officially dismissed and closed in the judicial record.

Here, I point to the SIA report (See Appendix: SIA Report p.84), specifically SAPD case 15258785, focusing on the description of the incident as well as its date and location. Also important to note is the State's acknowledgement, in the initial SIA Report, provided to Writ Counsel in January 2024, that SAPD had been attempting to link me to any one of the scenes or other known suspected persons, but they were unable to do so. The initial SIA report was published in January 2016. The updates were published in February 2016.

Though he never saw the report, Trial Counsel testified that he was aware of the nature of what was being investigated (See Appendix: Evidentiary Hearing Transcript p.35 line 18-22; p. 36, line 3-7, 9-12). Had Trial Counsel vetted Ms. Smith and her claims, it is more than probable that, given his considerable experience (See Transcript 24-25), he would have been able to deduce, with a high degree of accuracy, Ms. Smith's motivation for choosing me as her attacker. For him not to have made the slightest attempt to make the connection (between Ms. Smith's drug case, SAPD's trying to connect me to crimes similar to the alleged attack against Ms. Smith, and Ms. Smith's changing story) stands in stark contrast to the efforts any reasonable attorney, practicing any level of law, would have put forth.

To prevail in a claim of ineffective assistance, the petitioner must satisfy both prongs set forth in *Strickland*. First, the petitioner must show counsel was deficient, meaning counsel did not perform their duties to a level of reasonableness established in the legal profession. Second, the petitioner must show that there is reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different.

Given Trial Counsel's not knowing about Tyrone Baker's prior indictment for sexual assault and the DNA evidence linking that case (SAPD 16004763) to this case (SAPD 15187142); Trial Counsel's not being aware of the details contained within the initial "SIA Report", "SIA Serial Rapes Updates", and how they relate to his concerns about M.O.; Trial Counsel's willingness to disregard the existence of exculpatory impeachment evidence; Trial Counsel's failure to challenge probable cause; Trial Counsel's failure to investigate Laura Smith; and trial counsel's failure to investigate the veracity of the claim considered in the development of his "M.O." theory and subsequent defense strategy, it is clear his performance did not meet any standard of reasonableness, thereby making his performance deficient.

It is reasonable to suggest that there is a high probability that, had any one of the aforementioned matters been addressed, the outcome in this case would have been much different because I would not have accepted a plea agreement, if I had been afforded the knowledge Trial Counsel failed to retrieve. Instead, I would have maintained my stance and insisted on going to trial, where no reasonable juror could have found me guilty beyond a reasonable doubt.

Trial Court's finding that Trial Counsel's "advice was within the range of competence demanded of attorney's in criminal cases" (#35) is unreasonable, given the aforementioned facts. "In a federal habeas challenge to a state criminal judgement, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. subsection 2254(d)." (*Strickland v. Washington*, 466 U.S. 668, 698 (1984))

g. *Failure to Investigate Considered Claims*
(See Appendix: R.S. Police Report)
(See Appendix: S.S. Police Report)

The primary underlying factor, in Trial Counsel's strategy of advising me to accept a plea offer, appears to have been his overwhelming concern about the State's ability to establish a pattern between the claims made by Laura Smith and the claims made by Rubiana Salais and Samantha Scmid, the claimants in considered cases JN1820342 and 2018CR4391, respectively. Trial Counsel called the M.O. "strikingly similar" (See Appendix: Evidentiary Hearing Transcript-p.31, line 13) and stated that allegations of me posing as a police officer was "a common flow throughout the theme of almost every case that was presented to me" (p.29, lines 22-25). In his affidavit, Trial Counsel states "...the totality of the evidence in the primary case and the pending cases, all supported a similar if not identical 'M.O.'..." (See Appendix: Trial Counsel's Affidavit-p.4, para.2, lines 7-8). The record begs to differ.

In her complaint, Rubiana Salais ("R.S.") says I introduced myself as a "promoter" (See Appendix: R.S. Police Report- p.131, para.1, line 1). Samantha Schmid ("S.S.") offers no information as to what my profession may be (See Appendix: S.S. Police Report- pp.143-148). Further undermining Trial Counsel's premise, the primary case--2016CR11156--details a simultaneous armed sexual assault and an armed robbery. A simple scan of the reports from the considered cases reveals neither an armed robbery nor an armed sexual assault is even hinted at having occurred.

In Ms. Salais's case, according to the accounts given by Ms. Salais and her witness, Fiona Calvillo, though they differ on major details, neither mentions a sexual assault--or even an attempted sexual assault--or a robbery. For Ms. Schmid, there is no mention of a gun or a robbery--or even an attempted robbery. Neither mentions the use of the website "Backpage.com," and neither woman is claiming to be--or has a history of being--an escort. Neither alleged incident is said to have occurred at a hotel/motel. Neither mentions multiple assailants. Other than the fact that the complainants are female, there is no overlap between the primary case and the considered cases referenced by Trial Counsel. If, however, he was determined to discover any kind of overlap between the primary case and the considered cases, by digging deeper and comparing the reports, Trial Counsel would have found both, the primary case and considered case JN1820342, rife with glaring inconsistencies.

In his affidavit, Trial Counsel concedes Laura Smith's story is "replete with misstatements and conflicts" (See Appendix: Trial Counsel's Affidavit- p.3, para.2, line 2). With such an acknowledgment, a reasonable layperson would question the validity of any pattern the State might attempt to establish. A trial attorney has a duty to challenge the validity. Therefore, it was incumbent upon Trial Counsel to investigate any claims he believed the State intended to use to establish a pattern. In its "Notice of Intent to Introduce Evidence of Extraneous Offenses" ("Notice of Intent"), filed April 19, 2018, the State informs Trial Counsel of its plan to use Rubiana Salais's claims against me (See Appendix: Notice of Intent- p.157, #12).

Whether he believes me or not, Trial Counsel acknowledges that I have steadfastly maintained my innocence (See Appendix: Trial Counsel's Affidavit- p.2, line 7). He also acknowledges Laura Smith's story is flawed. He is also aware that there exists a video of the encounter between Samantha Schmid and me, a video I told him rebuts her claims. Therefore, by the time Trial Counsel received notice of the State's intent to use Rubiana Salais to buttress its case, Trial Counsel had reason to doubt the State's ability to effectively establish a pattern. In the reports for Ms. Salais's claim, more inconsistencies surface, primarily in the accounts given by Ms. Salais and her friend, Fiona Calvillo.

Both women state, and I agree, that I met them, for the first time, at Cantina, a sports bar. We all agree that the three of us left Cantina, and they willingly accompanied me to a different bar. We all also agree that they willingly went to my apartment. From here, the ladies' stories differ, each offering significantly contradictory details. Both women say Rubiana and I went to my bedroom and that we were in there for awhile. However, in Rubiana's telling, she and I were in the bathroom. Rubiana says she was trying to get out the bathroom and get back to Fiona, who Rubiana says started "knocking on the door, after about twenty minutes" (See Appendix: R.S. Police Report- p.131, line 13).

On the other hand, in Fiona's telling, she says she got upset because "Ruby" and I went inside my bedroom and were gone for a long time. Then, Fiona says, "I finally got up and walked out" (See Appendix: R.S. Police Report- p.141, lines 11-12). Contradicting Rubiana's account, Fiona makes no mention of knocking on any door or any attempt to retrieve Rubiana while they were in my apartment. In fact, Fiona says she went to the parking garage and waited by my car. According to Fiona, she called Ruby multiple times, and, when Ruby finally answered, she told Fiona "not to worry" (lines 13-14).

Rubiana told police that she eventually got out of my apartment and made it to the parking garage, where she found Fiona. Rubiana says she and Fiona were speaking when I entered the garage and got on my phone (p.131, lines 20-22). However, in Fiona's version of events, Rubiana and I entered the garage together, and we stood by my car, talking (p.141, lines 16-17). Only when describing the alleged attack, as it was told to her by Rubiana, does Fiona's version of events match Rubiana's. Curiously, unlike the rest, those details match, perfectly.

Furthermore, beyond the inconsistencies in the stories told by Rubiana and Fiona, had Trial Counsel taken a moment to review the statements, he would have discovered, quite easily, that they were fabricated. Both women claimed that, not only did I drive them in my car, I shared several rounds of drinks with them, first at the bar then at my apartment (See Appendix: R.S. Police Report- p.131, lines 4 and 7; p.139, lines 16-17 and 19-20). That would have been impossible for me to do.

At the time of the alleged incident, I was under court order to have an ignition interlock device installed on my car, as a result of my DWI arrest, case 2017CR8449, a case for which Trial Counsel is my attorney of record (See Appendix: R.S. Police Reports- p.142.1). The interlock device prevents an individual from being able to start the vehicle when the device's breathalyzer detects alcohol, which, according to the statements given by Ms. Salais and Ms. Calvillo, it most certainly would have.

With all of Trial Counsel's professed concern about patterns, by not investigating the claims made by Ms. Salais and Ms. Calvillo, including Ms. Calvillo's conviction that my car is silver (p.139, line 12), when it is, in fact, black (pp.142.2-142.5), Trial Counsel missed the pattern of inconsistencies, a pattern that case shares with the primary case. To the extent there is a pattern to be established, as it pertains to the claims against me, the similarities lie with the considered cases, and those similarities do little more than paint me as an individual, with an amiable personality, who enjoys the nightlife (p.131, lines 7-8; p.139, line 15)(See also Appendix: S.S. Police Reports- p.148.1, para.4, lines 5-7).

With minimal investigation, Trial Counsel would have discovered the claims in Ms. Schmid's case require one to suspend their common sense and disregard glaring omissions. Aside from acknowledging the group's familiarity with me (See Appendix: S.S. Police Report- p.148.1, para.4, lines 15-17), the statements given confirm they were comfortable having me in their space, unaccompanied (p.148.2, para.1, lines 18-19). Then, the story gets wonky.

Ms. Schmid's friends told police that they left her alone, with me, for "a brief moment." Then, when they returned, we were both gone (p.148.2, para.2, lines 1-2). By Ms. Schmid's account, instead of accepting she left of her own volition, she wants it believed that, in that brief moment, I managed to carry her out of the apartment then, from there, to my apartment, which, she doesn't mention, would require a trek down two corridors then up two floors (p.148.2, para.3, lines 1-2). Never mind such a feat would require one to be prescient enough to know when someone might return and also so precise in his timing that he's able to execute his movements in a "brief moment," to avoid detection, it would require an ability to lift and carry a grown woman with a swiftness my medical records show I do not possess (See Appendix: VA Records).

Withal, the most telling part of Ms. Schmid's account is what was unsaid. According to the arrest affidavit, police believed Ms. Schmid's recall of the events to be sufficient enough to establish her veracity. She recites specific questions she claims I asked, questions that more so bring wonder to my level of capacity (See Appendix: S.S. Police Reports- p.148.2, para.3, line 4). She acknowledges that she still recognized me, despite her claimed level of intoxication (lines 5-6). And, she recalls a specific threat that I supposedly made, regarding calling the police (lines 7-8). With that level of supposed recall, the question then becomes: Why did Ms. Schmid never mention the fact that I recorded the very part of the encounter that prompted her outcry, the part she claims was not consensual?

By not asking that question himself, after being made aware of the video's existence, in addition to not investigating the inconsistencies and improbabilities contained in each claim, Trial Counsel willfully lacked knowledge of pertinent details, details that would have served to undermine, not only the State's ability to establish a pattern, the very credibility of the claimants, themselves.

3. Despite multiple requests and reset trial commencement dates, the State did fail to turn over material exculpatory evidence, violating its duties under *Brady*.

a. SIA Report

In February 2016, SAPD released its "SIA Serial Rapes Updates" report, in which it analyzes 81 hotel/motel sexual assaults and 162 robberies that occurred in 2015 and early 2016, a time period that includes the date of the alleged attack on Laura Smith. In addition to the coinciding time frame, the materiality of the report is highlighted by the appearance of a series of incidents, shown by the State to be part of a possible pattern, including an instance with details that overlap with those in Ms. Smith's account (See Appendix: Prosecution Guide p. 84), and by the State's providing a preliminary profile for a pool of potential suspects.

On multiple occasions throughout his affidavit (See Appendix: Trial Counsel's Affidavit, pp. 121-125) and hearing testimony (See Appendix: Evidentiary Hearing Transcript pp.19-38), Trial Counsel expresses concern that, within two of the considered cases (2018CR4391 and JN1820342) separate elements from this case appear and those appearances might have allowed the State to establish a pattern (See Appendix: Evidentiary Hearing Transcript, p.31, line 13-15), though neither of the considered cases contains all, or multiple, of the primary elements of this case: 1) the use of Backpage.com; 2) a hotel/motel setting; 3) multiple assailants; 4) sexual assault; and 5) robbery (including theft of a laptop).

If Trial Counsel believed deeply enough that the potential elemental overlaps, between the two considered cases (See Appendix: Compare-R.S. report pp. 129-132, 139-141 to S.S. report pp.145-146) Prosecution Guide pp.59-62) and this case (See Appendix: Prosecution Guide, pp. 59-62) were enough to surmount the exculpatory DNA evidence (See Appendix; Trial Counsel's Affidavit, p.123), it is reasonable to conclude that, had Trial Counsel been presented with six separate cases, all occurring within about four months of the alleged attack on Ms. Smith, each containing at least partial overlaps of the primary elements, including one that contains three out of five primary elements (SAPD #15258785) and another that contains all five primary elements (SAPD #15262667)(See Appendix: SIA Report, p.84), and none having any link to me, Trial Counsel would have had no choice but to consider alternative suspects in this case, likely the pool of potential suspects offered by the State, allaying his concerns, regarding the State's possible strategy, and disabusing any notion he entertained that led him to advise me to accept a plea agreement.

In *Brady v. Maryland*, the Supreme Court held that "the suppression of evidence favorable to an accused person 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" (377 U.S. 83, 87 (1963)). To constitute a violation under *Brady*, three elements must be met: 1) the evidence must be favorable to the accused, either because it is exculpatory or impeaching; 2) that evidence must have been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued (*Strickler v. Greene*, 527 U.S. 263).

Here, the record shows the SIA report and the SIA Updates are favorable to me, in that they are exculpatory, because they highlight a spate of incidents similar, if not identical, to the incident in this case; offered a vast pool of alternative suspects; and attempt to but establish no connection to me. The record, in this instance the discovery log (See Appendix: Discovery Log), which the State points to during the May 2024 evidentiary hearing, to confirm its disclosures, while cross-examining Trial Counsel (See Appendix Evidentiary Hearing Transcript, p. 32, line 18-25; pg. 33, line 4-9), shows the State did not disclose, to Trial Counsel or myself, the SIA report or the SIA Updates. Due to the State's suppression of both reports, I was prejudiced because the lack of disclosure resulted in Trial Counsel's being unaware of material facts, precluding his ability and duty to provide informed advice *(Wofford v. Wainwright*, 748 F.2d 1505 (citing *Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973) at 217)).

b. Cell Phone Video

On April 19, 2018, the State submitted its list of witnesses for this case, 2016CR11156. Included on that list is Samantha Schmid, the claimant in case 2018CR4391 (See Appendix: S.S report, pp. 143-148). On October 1, 2017, Ms. Schmid accused me of sexually assaulting her. Wary, because of prior accusations, I recorded the encounter, using my cell phone, to show both parties were consenting and neither was under duress. The same day Ms. Schmid levied her accusations, I was arrested and charged with the assault.

At the time of my arrest, one of the officers removed my phone from my car and slipped it into his breast pocket. While I was confined to the Bexar County Jail, my property was released to my mother. My phone was not included among my property items. On multiple occasions, I pressed Trial Counsel to retrieve my phone from SAPD. After each entreaty, during a subsequent conversation Trial Counsel would tell me that the State was claiming not to be in possession of my phone. He reiterated the same claim, during testimony at the May 2024 evidentiary hearing (See Appendix: Evidentiary Hearing Transcript, p.12, line 1-6).

On August 31, 2018, Trial Counsel submitted a motion for the release of my personal property. In the motion, Trial Counsel lists my phone, identified by make, model, and serial number, as the sole item sought. In October 2018, my mom retrieved my phone from SAPD's storage warehouse. The phone was in an envelope, marked with the phone's description and date of intake, October 1, 2017, confirming it had been in the State's possession, contradicting what was repeatedly told to Trial Counsel. The envelope was also labeled "evidence," with a handwritten note stating there had been at least one unsuccessful attempt to access the phone's contents, by bypassing the passcode.

The Fourth Amendment affirms the right to be secure against illegal searches and seizures of private property. Ordinarily, a defendant bears the burden of proving, by a preponderance of the evidence, that a challenged search or seizure was unconstitutional (*United States v. Waldrop*, 404 F.3d 365 (citing *United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001))). However, where a police officer acts without a warrant, the government bears the burden of proving the search was valid (citing *United States v. Castro*, 166 U.S. F.3d 728, 733 n.7 (5th Cir. 1999)). Being that the phone did not immediately appear to be incriminating and the officers had no legal right to access it, the "plain view" doctrine does not apply, thus making the seizure and attempted search of my phone illegal without a valid warrant, which the State never applied for, much less received.

In *Allas v. Rumson*, the difference between misfeasance and malfeasance is explained. Misfeasance is "the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner." Malfeasance is "doing an act which is positively unlawful and wrong" (115 N.J.L. 593 at 596). In *United States v. Bagley*, the Supreme Court held "impeachment evidence... as well as exculpatory evidence falls within the *Brady* rule" (473 U.S. 667, 676 L.Ed. 2 (1985)). In the present case, when the police confiscated, then attempted to search, my phone, they committed an act of misfeasance. However, that misfeasance became malfeasance when, after multiple inquiries from Trial Counsel, police continually denied being in possession of my phone.

Under *Strickler*, the State commits a *Brady* violation when it suppresses material, exculpatory or impeachment evidence, whether that suppression happens willfully or inadvertently. The video on my phone, capturing the consensual encounter between Ms. Schmid and me, constitutes impeachment evidence because it could have been presented to refute any testimony Ms. Schmid might have given alleging I assaulted her, impugning her credibility as a witness. By withholding that evidence, the State grossly prejudiced my ability to develop a defense.

Contrary to Trial Court's findings, *United States v. Ruiz* does not apply here. In that case, it is suggested that the State is at least minimally aware of the impeachment value of its evidence and that said evidence had been legally obtained (536 U.S. 622). Here, the record shows the State attempted but did not succeed in unlocking my phone; therefore, it was unaware of the phone's contents, including the video, until a copy of the video was provided by Writ Counsel in June 2023. Furthermore, the State was in illegal possession of the phone, undermining any claim that might be made under *Ruiz*.

Trial Court's finding that I have not met the burden of showing *Brady* violations were committed (See Appendix: Trial Court's Opinion (Writ 2) p.10, #34) is unreasonable, given that I have outlined the items' materiality; proven they were withheld by the State; and that I have been prejudiced, by remaining convicted of and incarcerated for a crime all non-circumstantial evidence shows I did not commit.

"If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt" (*Wearry v. Cain,* 577 U.S. 385, 393; quoting *United States v. Agurs,* 427 U.S. 97, 113, 96 S. Ct. 2392, 49 L. Ed. 242 (1976)). Trial Counsel, having already expressed doubts regarding Laura Smith's story, would have benefitted from the disclosure of the "SIA" report and the "SIA Serial Rapes Update." With the detailed description of similarly alleged attacks, the suspect profile, other named persons of interest, and the timing of their release, Trial Counsel would have been able to address his pressing concerns, regarding the State's ability to establish a pattern and connect me to it.

4. Despite reasonable diligence, I did not have factual awareness of the circumstances surrounding my case, rendering my plea involuntary

Prior to pleading, I was unaware an alternative suspect, Tyrone Baker, had been identified and linked to this case, by being the sole indicted individual in a case of similar nature (SAPD 16004763) that shares a matching DNA profile, developed from samples taken from the separate crime scenes(See Appendix CIL Report, pp.42, 44)(See also Appendix Tyrone Baker Indictment). In addition to a specific individual being identified as an alternative suspect, I was unaware of the SIA report and the SIA Updates released by SAPD in January 2016 and February 2016, respectively, detailing crimes that share primary elements, of the allegation made against me, and offering a vast pool of alternative suspects, plus a failed attempt by the State to establish a link between me and multiple named suspects and persons of interest or any one of the crime scenes. I was unaware of these facts because, as the record shows and Trial Counsel attests, he, too, was unaware of these material facts.

In *McCarthy v. United States*, the Supreme Court held "if a defendant's plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all elements of a criminal charge, it cannot truly be voluntary unless the defendant possesses an understanding of the law in relation to the facts" *(394 U.S. 451, 466, 81 S. Ct. 1166, 22 L.Ed 2d 418 (1969)*). Here, it has been established that, due to violations of *Brady*; malfeasance by the State; ineffective assistance from inadequately informed Trial Counsel; and various violations of constitutional protections, my plea was neither voluntary nor knowing.

Trial Court's finding against there existing a reasonable probability that, had the withheld evidence been disclosed, the outcome of the trial would have been different (See Appendix Trial Court's Opinion (Writ 2) p.10 #36) is unreasonable, given the materiality of the withheld items and their exculpatory nature. This truth also undermines, and renders unreasonable, Trial Court's finding that the information was not improperly withheld, or that its being withheld did not render my plea involuntary (#33).

Also, given that I have maintained my innocence, Trial Court's use of *Ex Parte Barnaby*(See Appendix: Trial Court's Opinion (Writ 2) p.36) is misapplied. In that case, the defendant pled guilty to several separate charges, subsequently challenging only one (475, S.W. 3d 316 (Tex. Crim. App. 2015)). It is unreasonable and unfair for Trial Court to conflate cases being taken into consideration, as part of a plea agreement, with any admission of guilt on my behalf. In fact, given my continued stance of innocence and the examples cited in the brief for the subsequent writ, Trial Court should have concluded that I would have continued asserting my innocence and proceeded to trial, in each instance, had it not been for Trial Counsel's deficiencies and the State's misconduct. Furthermore,

it is unreasonable and offensive to suggest that any innocent person receives any benefit from entering into any plea agreement, especially one that saddles that individual with a criminal conviction, and most especially one that requires they spend even a single day in confinement.

In *Blank v. Vannoy*, the Fifth Circuit held " any evidence that undermines Petitioner's confession is exculpatory, especially DNA evidence that excludes the Petitioner as a possible match," determining the exculpatory evidence outweighs the confession (2021 U.S. Dist. LEXIS 173438, 15).

In that case, as is true here, no forensic evidence connected the petitioner to the crime of conviction. Being that exculpatory evidence, especially DNA evidence, outweighs a defendant's confession, it must also outweigh any stipulation made in a plea agreement, especially if it supports the petitioner's assertion that the plea was made involuntarily.

B. Undisputed Facts

1. Exculpatory DNA

On March 11, 2016, Detective Montes applied for and received a warrant to obtain a buccal swab from me. On April 6, 2016, Detective Owens received the contents of the testing kit from Officer Darren Taylor of the Houston Police Department, who conducted the test while I was confined in the Harris County Jail, sometime between March 29, 2016, and April 5, 2016 (See Appendix: Prosecution Guide p. 61).

That same day, Detective Owens submitted the buccal swab to the Bexar County Criminal Investigations Laboratory ("CIL"). Prior to Detective Owens's submission, CIL received eight items, taken from the scene of Laura Smith's alleged assault, for DNA analysis (See Appendix: CIL Report 38-39). The items were received on March 8, 2016. By March 23, 2016, CIL released its "Forensic DNA Report," which states the tested samples are consistent with belonging to an "unknown male individual." On May 5, 2016, CIL released a supplemental report, confirming, with unequivocal scientific certainty, that I am excluded as a contributor of the DNA samples identified in its March 23 report.

2. Photo ID

On March 26, 2016, Detective Owens conducted an interview with the alleged victim, Laura Smith. At some point during the interview, a photo lineup was conducted. Though it is unclear from the record, as there is no available video or audio recording, it appears Ms. Smith was shown seven photos, one by one, eventually selecting the one with my picture, identifying me as her attacker.

Although Ms. Smith received several photos of me, from me, via texts and Snapchat, as we made plans to meet the night of her alleged attack, she did not provide the pictures to the officers who responded to her 9-1-1 call; instead, she gave a vague description of a generic Black male (See Appendix: Incident Report, p 53, line 17-18). The report does not indicate the level of lighting available to Ms. Smith, during the alleged incident, so it is unclear how good of an opportunity she had to actually view her assailant.

Though Ms. Smith states she is "100%" certain of her identification, the same day, during a call with Detective Owens, she suggests she remembers us being high school classmates (See Appendix: Prosecution Guide p.51, paras.2,4). In fact, we attended different schools, separated by forty miles, during non-overlapping, four-year periods. The lineup was conducted more than seven months after the alleged attack. Because there is no video of the interview, there is no way to ascertain what level of influence the detectives' presence exerted on Ms. Smith's selection.

3. Alternative Suspect

On August 5, 2016, CIL sent notice to San Antonio Police Department ("SAPD"), specifically Detective Montes, informing them of a DNA match to one of the items submitted on March 8, discovered using the FBI's Combined DNA Index System ("CODIS"). The message states an unknown individual is the same contributor of the DNA taken from the Laura Smith case and a separate sexual assault that is said to have occurred January 6, 2016 (SAPD 16004763) (See Appendix: CIL Report p.42).

On January 4, 2016, CIL received thirty-one items, gathered from Laura Smith's hotel room in August 2015, during SAPD's in *McCarthy v. United States* investigation of the present case, 2016CR11156 (SAPD 15187142). Included in those items were two condoms, listed as "E9" and "E20F". On July 8, 2016, CIL received two items, gathered during SAPD's investigation of the alleged sexual assault of Robin Lance (SAPD 16004763). One of the items, a cutting of a fitted sheet from Ms. Lance's bedroom, is listed as " E1" (See Appendix :CIL Report p. 44).

DNA from the fitted sheet ("E1") matches DNA from the condom interior ("E20F"), linking cases 15187142 and 16004763. On March 27, 2017, Tyrone Baker was indicted for the sexual assault of Robin Lance, SAPD case 16004763. Though Tyrone Baker is not eliminated as a suspect in Robin Lance's case, he has never been questioned in relation to the current case, according to the State's records. Through testimony, Trial Counsel confirms he was unaware of Tyrone Baker's having had very recently been under indictment in the Robin Lance case (See Appendix: Evidentiary Hearing Transcript p 16, line 25; p.17, line 1-6 ,17-22; p.18, line 9-11).

4. "SIA Serial Rapes Update"

In February 2016, SAPD issued a "Strategic Intelligence and Analysis" report, entitled "SIA Serial Rapes Updates" (See Appendix: SIA Report pp. 84-86). The initial report analyzes 81 hotel/motel sexual assaults and 162 robberies, occurring in 2015 and early 2016. Two cases were added to the Department's analysis in this report. The first, SAPD 15262667, describes a similar offense to the one I am accused of:

> 3 males (1 identified as BM, the other two not specified in RMS) wrapped cloth around the victim's head and tied her hands together; vaginally, orally, and anally raped; stole laptop and cell; vic reports one of the suspects wore a black and silver letterman style jacket.(See Appendix SIA Report p.84

The report states most of the assaults and robberies took place on Saturday/Sunday and Sunday/Monday during late evening and early morning hours. That is true of Ms. Smith's allegations. She says the attack occurred between 0300 and 0500 on August 30, 2015, which was a Sunday.

On the third page, entitled "Serial Rapists Utilizing Backpage.com, 11/8/15 to 1/25/2016," the six assaults listed occur near in time (within about four months) and in proximity (within a 25-mile radius) to Ms. Smith's alleged encounter. Using the maps from the initial "SIA" report and the update, it is clear that the aforementioned assault described in the "Updates" happened in very close proximity to Laura Smith's assault, fewer than 10 miles away, and not long after Laura Smith's assault, less than 3 months later. The report also states that rival gang members were possible suspects of the serial assaults and robberies. None of this information, being the report in its entirety or in partial, was provided to Trial Counsel and did not fully come to light until January 2024, nearly eight years after it was published.

5. Cell Phone Video

On October 1, 2017, I was arrested and charged with the sexual assault of Samantha Schmid. Wary, because of prior accusations, I recorded the encounter, using my cell phone, to show both parties are consenting and neither is under duress. At the time of my arrest, one of the officers removed my phone from my car and slipped it into his breast pocket.

While I was confined in the Bexar County Jail, my property was released to my mother. My cell phone was not included. On multiple occasions, I pressed Trial Counsel to retrieve my phone from SAPD. Each time, he told me he had been rebuffed by SAPD, repeatedly told the phone was not in their possession. (See Appendix: Evidentiary Hearing Transcript, p. 12, line 1-6; p.15, line 17-22.)

On August 31, 2018, Trial Counsel submitted a motion for the release of my personal property, identifying my phone as the sole item sought (see Appendix: Motion for Release of Personal Property, p.95, para 3). In October 2018, my mom retrieved my phone from SAPD's property storage warehouse. The phone was in an envelope, marked as evidence, with writing indicating the State attempted to access the phone but could not bypass the passcode (see Appendix: Evidence Bag). Not only is there no record of a warrant (or even a warrant application) authorizing the seizure of my phone, but there is also no warrant authorizing a search of my phone. The video is still stored on the phone.

Respondent is free to deny any and all claims presented in the petition. To dispute the facts presented, however, Respondent must offer evidence that counters the evidence in the record that was presented during the state habeas corpus proceedings (U.S.C.S. Federal Rules of Civil Procedure Rule 56(c)). Respondent has not done so; therefore, the facts presented remain undisputed.

C. Claims Seeking Judgement

1. "Actual Innocence"

From the outset of this ordeal, I have staunchly maintained my innocence. In his answer, Respondent offers *House v. Bell* as a case in which the petitioner presents elements of a showing of "actual innocence" that are efficient to establish the basis of a claim under the demanding *Schlup* standard (See Respondent's Answer with Brief in Support,11). In summary the elements presented, to show actual innocence, in that case are as follows:

-The State does not dispute new evidence has been introduced

-The petitioner is excluded as a DNA contributor

-Another individual is found to be a match to a sample of DNA from the scene

-There is a named, known alternative suspect

With those four elements, the Supreme Court determined that the petitioner had, indeed, met the burden for showing actual innocence and ruled that his petition could proceed, despite many of his claims being procedurally barred.

Here, the presented elements are similar. They are also acknowledged and undisputed by Mr. Guerrero. In fact, in defense against my claim of ineffective assistance of counsel, Respondent offers two elements, in his answer, that are exactly the same as two of the four elements presented in *House*. Respondent acknowledges, and does not dispute, the fact that another individual is found to be a match to a sample of DNA from the scene and the fact that there is a named, known alternative suspect (See Respondent's Answer 8,12). Furthermore, it cannot be disputed that I have been excluded as a DNA contributor and that the State does not deny new evidence (i.e. the SIA Report, "SIA Serial Rapes Update" report, and cell phone video) has been introduced.

In addition to the primary elements that are exactly like the elements presented in the case Respondent has identified as being the model, for petitioners attempting to assert claims of "actual innocence," to follow, I have highlighted multiple supplemental facts that are also indisputable and illustrate my innocence: 1) The State tried and failed to link me to the alleged scene, multiple scenes of other similarly alleged attacks, other suspects, and other persons of interest; 2) The State established a vast pool of alternative suspects; 3) The State created a suspect profile I do not fit; 4)The alleged victim misidentified me; 5) The only other witness, the alleged victim's friend, contradicted the complainant's account; 6) There is no evidence implicating me.

Following Respondent's guidance and using the standard established by the Supreme Court in its *House* decision, I have met the burden for a showing of actual innocence. Because the record shows the "SIA" report was not presented prior to my plea hearing, not made known to me until March 2023, and not fully disclosed until January 2024, it must be considered new evidence, regardless of whether the state court finds it was not improperly withheld, because the State's retroactive disclosure is evidence of the report's materiality, satisfying the first prong of *Schlup*. If, however, the Court chooses to dismiss the relevance of the initial "SIA" report and the "Serial Rapes Update," there can be no discounting the relevance of the video of me engaged in a consensual sexual encounter with one of the State's witnesses. Even if the State is protected against a *Brady* claim under *Ruiz,* because the video was not available to me prior to the plea agreement becoming final, the video must be considered "newly discovered."

Because Respondent urges us to use *House* as a model, it is only prudent that we, not only garner insight from the Supreme Court's determination that the presented elements satisfy *Schlup's* demanding standard, allowing for its use as a "gateway" to pursue otherwise procedurally barred claims, we should also take into account the case's outcome. Ultimately, despite the presence of possibly incriminating circumstantial evidence, when all the evidence was evaluated, in totality, the district court determined that *House* was, in fact, entitled to relief (*House v. Bell*, 2007 U.S. Dist LEXIS 94176).

Considering I have presented the same primary elements as the petitioner in *House*; I have made myriad supplemental presentments, highlighting that the State's efforts only further uncovered evidence of my innocence; and there is not one solid piece of evidence, outside of the stipulations in an involuntary plea, that even hints at a possibility of my being guilty, it is more likely than not that no reasonable juror would find me guilty. Thus, *Schlup*'s second prong is satisfied.

2. *Brady* Violations

Put plainly, the State withheld material evidence. The State does not deny it withheld material evidence. Respondent is not in a position to assert a denial on the State's behalf. Trial Court erred in finding that the evidence was not improperly withheld, because the record reflects differently.

a. *"SIA Report"*
(See Appendix: SIA Report)

This report establishes two very clear facts: 1) SAPD considered me, as either a suspect or person of interest, in at least one sexual assault/robbery (e.g. the present case) they believed to be part of a pattern of attacks containing similar, if not identical, elements; and 2) Although they tried, the State could not, and cannot, establish a link between me and either any one of the dozens of the alleged crime scenes (including the one in this case), any of the other suspects, or any of the other persons of interest, despite receiving my phone records and obtaining my DNA sample.

Therefore, the report is exculpatory and, thus, material, meaning it should have been disclosed to Trial Counsel when he became the attorney of record in July 2016, being that the report itself was already five months old. However, instead, the State withheld the report, in part, for over seven years, and, in full, for almost eight years, through multiple requests for discovery, numerous trial settings and declarations of "Ready," the arrest and indictment of a man whose DNA is a match to a sample collected from the scene in this case, a plea hearing, and the initial state habeas corpus proceedings, in which I first asserted the State had violated *Brady*, only to have the State issue a blanket denial. The State knew, a full month and a half before they arrested then charged me, that they possessed a report that supports my proclamations of innocence, and the State withheld it.

Because this is a fact not denied by the State, and instead acknowledged by its disclosure five years after my conviction became final, and a fact Respondent cannot dispute, without offering evidence to the contrary, which does not exist, I ask the Court to enter a summary judgement, finding the State did, in fact, violate *Brady*. I further request that the Court acknowledge that the violation entitles me to a new factual predicate date, which would begin the day the full report was received, in line with U.S.C. subsection 2254(d)(1)(D). Further still, I beseech the Court to find the State's violation of *Brady* is also a violation of the Fourteenth Amendment's " Due Process" and "Equal Protection" clauses, therefore making cognizable my claim of "Actual Innocence." Finally, I implore the Court to find that I am entitled to relief and grant my petition, ordering my immediate and unconditional release.

b. *Cell Phone Video*

My cell phone contains a video of me engaged in a consensual sexual encounter with one of the State's witnesses, Samantha Schmid (See Appendix: List of Witnesses, p.1). Ms. Schmid claimed the encounter was an assault. I maintain it was not. Without a warrant, the State seized, attempted to search, then withheld my phone. Despite multiple inquiries and discovery motions, submitted by Trial Counsel, the State did not turn over the phone, claiming it was not in their possession (See Appendix: Evidentiary Hearing Transcript, p.12, line5-6). Then, in August 2018, three months after my plea hearing, after Trial Counsel submitted a motion, specifically for the phone's release, the State acknowledged it was in their possession and had been since October 1, 2017, the day the video was recorded(See Appendix: Evidence Bag).

Because it can be reasonably assumed that the State intended to use Ms. Schmid's claim to lend credence to the claim made by the alleged victim in this case (See Appendix: Notice of Intent p3, #13), the footage on the phone would have been used to impeach Ms. Schmid's testimony. Therefore, the video is material and should have been disclosed to Trial Counsel, between April 19, 2018, when the State issued notice of its intent to present Ms. Schmid as a witness and May 3, 2018, the day before the date of the next scheduled trial setting for this case.

Again, the State withheld the phone. The State does not deny that it withheld the phone. Respondent is not in a position to assert a denial on the State's behalf. Trial Court erred in finding that the evidence was not improperly withheld, because the record reflects differently.

With that, I ask the Court to note the State's pattern of withholding evidence that undermines its case by being favorable to me. I ask the Court to understand that the video was not available to me at the time of my plea hearing, despite my due diligence, and should also be considered new, with regard to any *Schlup* determination. I further ask that, when considering the video along with the other exculpatory evidence (i.e. the "SIA" report, also SIA Updates, exclusionary DNA results, alternative suspect, claimant's misidentification, etc.), weighing it against the absence of any inculpatory evidence, the Court find I have met the burden of showing "Actual Innocence," as established by the *Schlup* standard **and** the more stringent *Herrera* standard.

3. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance, the petitioner must satisfy both prongs set forth in *Strickland.* First, the petitioner must show counsel was deficient, meaning counsel did not perform their duties to a level of reasonableness established in the legal profession. Second, the petitioner must show that there is reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different (*Strickland v. Washington*, 466 U.S. 668 (1984)).

When advising me to accept the State's plea agreement, Trial Counsel was unaware that Tyrone Baker, a potential alternative suspect, had been indicted for sexual assault in a separate case that is linked to this case by matching DNA samples (See Appendix: Evidentiary Hearing Transcript p.18. line 9-11). Also, Trial Counsel was not privy to the information contained within SAPD's "SIA Report or Serial Rapes Update")(See Appendix: Evidentiary Hearing Transcript, p.36 line 3-7), an ignorance that adversely effected his ability to provide appropriately informed assistance. Furthermore, in addition to failing to investigate Tyrone Baker and other possible alternative suspects, Trial Counsel willfully disregarded the existence of exculpatory impeachment evidence (See Appendix: Evidentiary Hearing Transcript p.14,line 22) all of which rendered Trial Counsel's performance deficient. Had any one of these issues been addressed, I would have been able to form a viable defense and not entered into a plea agreement.

4. Involuntary Plea

Despite my dogged diligence, prior to pleading I was unaware an alternative suspect had been identified and linked to this case by being the sole indicted individual in a case of a similar nature that shares a matching DNA profile, developed from samples taken from the separate crime scenes. I was also unaware of the "SIA Report", issued January, 2015, and the "SIA Serial Rapes Update" report, produced by the State in February 2016, detailing crimes that share primary elements of the allegations made against me and offering a vast pool of alternative suspects, plus a failed attempt by the State to establish a link between me and multiple named suspects, other persons of interest, or any of the other assaults.

In *McCarthy v. United States*, the Supreme Court held that "If a defendant's plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all elements of a criminal charge, it cannot truly be voluntary unless the defendant possesses an understanding of the law in relation to the facts" (394 U.S. 457, 466 81 S. Ct. 1166, 22 L.Ed 2d 418 (1969)).

D. One-Year Statute of Limitations

This petition falls within the parameters of "Actual Innocence" and is therefore exempted from the statute of limitations, as prescribed in *McQuiggin v. Perkins*, where the Supreme Court resolved the issue of the use of "actual innocence" in habeas filings (*McQuiggin v. Perkins*, 569 U.S. 383). In accordance with the House decision, I have made a showing of innocence, enough to satisfy the *Schlup* standard

Also, pursuant to U.S.C. 28 subsection 2244(d)(D), the predicate facts, were unveiled only as the result of a subsequent writ filing, which led to an evidentiary hearing, revealing multiple pieces of material facts that had been long withheld, despite my dogged diligence and best attempts, since March 2016, to obtain all discoverable files and exculpatory evidence.

As outlined in the petition, the State withheld a report that offers a vast pool of alternative suspects and shows a failed attempt to link me to them or crimes similar to the one of which I am accused. Though I was initially arrested in March 2016 and the report was released in January 2016, the State did not disclose any part of the report until March 2023; additional pieces of the report were not disclosed until January 2024.

Furthermore, resisting my most earnest efforts, Trial Counsel did not provide details, pertaining to his knowledge relevant to this case or his actions taken in preparation for my defense, until May 21, 2024, during an evidentiary hearing. Therefore, the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence is May 21, 2024, and certainly no earlier than January 25, 2024.

E. Presumption of Correctness

A federal court can grant relief under section 2254(d)(2) if the state court makes a factual determination, using adequate procedure, but the resulting determination is unreasonable because it is not fairly supported in the evidence presented in the State court proceedings (*Brumfield v. Cain*, 576 U.S. 305, 307, 314-317 (2015)). Among the recurring circumstances in which federal courts have concluded that (i) the record did not fairly support state factual determinations and (ii) that a federal hearing accordingly was required include: 1) The record evidence contradicting the state court findings of fact is too strong to justify relying on those findings without conducting a federal hearing (*Giles v. Schotten*, 1999 U.S. App LEXIS 16902, 12), and 2) The evidence supporting petitioner's claim is compelling (*Magwood v. Smith*, 791 F.2d 1438, 1448, 1450 (11th Cir. 1986)).

Furthermore, under *Townsend v. Sain*, to deny a federal hearing a prior state court hearing must have been "full and fair" (372 U.S. 313). Federal courts have held that a state court hearing was not "full and fair" if the state trier of fact relied on events observed in the courtroom as the basis for its findings, but the party's claim is based on events occurring outside the courtroom (*Friedman v. United States*, 588 F.2d 1010, 1016 (5th Cir. 1979)). In this instance, as evidenced by the State court's findings, (See Appendix: 4 Trial Court's Opinion(Writ 2), pp. 7-10) to support its findings, Trial Court references only the testimony given during the evidentiary hearing and Trial Counsel's affidavit, neither of which can be considered as being relevant to the bases of the claims that occurred outside the courtroom. The factual claim "Trial Counsel was ineffective for failure to apprise Applicant of the vital facts surrounding his case that were vital to an innocence defense" occurred outside the presence of the trier of fact; therefore, any finding of fact must be supported by the evidence presented to the Court. This includes any finding of fact pertaining to a party's credibility. The same holds true for my claim of "Actual Innocence," violations of *Brady* \and "Involuntary Plea."

The evidence, nearly all of which having been collected and produced by the State, presented to the state courts flatly contradicts the findings of Trial Court, undermining its conclusions and those of the Texas Court of Criminal Appeals, which has the final say in state criminal proceedings. Referring, once again, to Trial Court's opinion, here I will present each of Trial Court's findings and provide evidence from the record that was presented, or established precedent that directly contradicts said findings:

#20- Finding that Trial Counsel is "credible and truthful" regarding his affidavit:

Using Trial Counsel's affidavit, (See Appendix: Trial Counsel's Affidavit pp. 121-125), explicitly mentioned by Trial Court, it can quickly be concluded that Trial Counsel does not meet his own standard for credibility. When addressing the matter of my cell phone, Trial Counsel states "Had [2018CR4391] gone to trial, or been used as 404b evidence by the State, the issue of the cell phone would have been timely addressed" (See Appendix: Trial Counsel's Affidavit p.2, para 1, lines 8-10). In fact, on April 19, 2018, the State submitted the "State's Notice of Intent to Introduce Evidence of Extraneous Offenses," in which it includes the claimant and claims associated with case 2018CR4391(See Appendix: Notice of Intent p.3, #13). Though the filing was made two weeks prior to the plea hearing, Trial Counsel did not file a motion for the release of my phone from police custody until August 31, 2018, almost four months after advising me to accept the State's plea offer (See Appendix: Motion for Release of Personal Property).

#26- Finding Trial Counsel's testimony, regarding disclosure of an alternative suspect, "truthful and credible":

Never once, not in his affidavit (See Appendix: Trial Counsel's Affidavit pp. 122-123) or during his hearing testimony (See Appendix: Evidentiary Hearing Transcript pp.16-18), does Trial Counsel mention anything about Tyrone Baker, the alternative suspect, being more than an individual who was a "CODIS hit. " In fact, instead of leaning into the possibility and offering Mr. Baker as an alternative suspect, Trial Counsel argues against the strategy. Moreover, because Trial Counsel had not yet looked into Tyrone Baker's history, Trial

Counsel did not possess the requisite knowledge to present Mr. Baker to me as an alternative suspect (See Appendix: Evidentiary Hearing Transcript p.16, line 13 to p.18, line 24).

#30- Finding that "Applicant has not met the burden of showing that he is actually innocent":

Here, Trial Court cites state case *Ex Parte Brown* which invokes the "clear and convincing" standard to demonstrate actual innocence. That standard presumes there is evidence of guilt, enough to support a conviction, and states that evidence must be overcome. In this case, however, there is absolutely zero evidence of guilt, and even less to support a conviction. Therefore, any single piece of exculpatory evidence is enough to satisfy the *Brown* burden, a burden the Trial Court has actually misapplied. Being that this is not a death penalty case and it has been established (and undisputed) that the State withheld material evidence, the "more likely than not" standard, established by *Schlup v. Delo,* is the proper precedent. That is, if the Court wants to be "fair."

#31- Finding that "Applicant's claim that he would have insisted on going to trial..." is not credible

The record quickly contradicts such a finding. One need only read the letters I sent to Judge Catherine Torres-Stahl, the trial judge, and Judge Laura Parker, who presided over the plea hearing (See Writ 1 pp.23-24, 26-29). In fact, in her opinion responding to my initial writ, Judge Catherine Torres-Stahl acknowledges receiving her letter (See Writ 1, p. 31, #1). In both letters, I clearly state that, had I had access to the withheld evidence (at the time I was referring only to the cell phone video), I certainly would not have accepted a plea deal and continued my insistence on going to trial. The fact that I consistently showed up for every court date, for over two years, might have been a clue as well.

#32- Finding that there does not exist "A reasonable probability that had the ["SIA Serial Rapes Update" report and the cell phone video showing Applicant engaged in a consensual sexual encounter with a witness for the State] been disclosed, the outcome of the trial would have been different":

Throughout his affidavit and hearing testimony, Trial Counsel plainly states his concern over the State's ability to establish a pattern and connect me to it. Indeed, the SIA report establishes a pattern among more than half a dozen sexual assaults, including the assault of which I am accused. However, what it fails to do is link me to any of them but not for a lack of trying. That, plus a video showing me engaged in a consensual sexual encounter with a witness for the State who accused me of assaulting her during that encounter, no reasonable finder of fact can objectively conclude their inclusion would not have changed the outcome. Keep in mind, I was ready to go to trial with only the video. Adding a report that finds I am not linked to a spate of similar attacks the State believes to be part of a pattern and offers a vast pool of alternative suspects, I would have done more than push for trial, I would have pushed for a dismissal of the charges.

#33 and #34- Finding that "Applicant has not met his burden to show that a *Brady* violation rendered his plea involuntary" and "Applicant's claim that his plea was involuntary and/or that information had been improperly withheld from him" is not credible:

The State does not dispute that my cell phone, which contained video of me and one of its witnesses engaged in a consensual sexual encounter, was in its possession without a warrant and not disclosed to Trial Counsel (See Appendix: Evidentiary Hearing Transcript p.60, lines 11-13, 16-21). Additionally, the State does not dispute that the SIA report was not disclosed to Trial Counsel (See Appendix: Evidentiary Hearing Transcript, p.35, lines 18-22, p.36, lines 3-6). By providing the report as part of its "retroactive discovery," nearly six years after my conviction became final, the State implicitly acknowledged the report's materiality. The report is exculpatory. The video is impeachment evidence. The seizure of one's personal property, by the State, without a warrant violates the Fourth Amendment, making the withholding of my phone illegal and therefore improper. Withholding material evidence is a violation of *Brady*, thus making it a violation of the Fourteenth Amendment's "Equal Protection" and "Due Process" clauses, and therefore improper. By me not having knowledge of key pieces of evidence, my plea was not "knowing" and therefore not voluntary.

#35- Finding that "[Trial Counsel's] advice was within the range of competence demanded of attorneys in criminal cases" and "Applicant has not met his burden to show that counsel was ineffective":

Deducing from his affidavit and hearing testimony, despite receiving a report from the State that established a DNA link between my case and a separate sexual assault and Tyrone Baker being identified as the sole suspect in that assault, Trial Counsel conducted no investigation into Mr. Baker, not even after he was indicted, arrested, and jailed for the linked sexual assault (See Appendix: Evidentiary Hearing Transcript p.17, line 17-22; p.18, line 9-11). Trial Counsel was unaware of the details contained within the "SIA Serial Rapes Update" report and how they related to his concerns about M.O. Trial Counsel has remained willfully ignorant of impeachment evidence, that being the cell phone video (See Appendix: Evidentiary Hearing Transcript p. 14, line 22). Again, when it comes to getting the video released, Trial Counsel did not even meet the standards he deemed reasonable (See Appendix: Trial Counsel's Affidavit, p. 122, para 1, lines 8-10). "In a federal habeas challenge to a state criminal judgement, a state court conclusion that counsel rendered effective assistance is not a finding binding on the federal court to the extent stated by 28 U.S.C. subsection 2254(d)" (*Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

#36- Finding that "Applicant obtained the benefit of his plea bargain

Here, Trial Court misapplies *Ex Parte Barnaby*. In that state case, the defendant pled guilty to several separate charges, subsequently challenging only one. I, on the other hand, pled to two separate charges (Aggravated Assault w/a Deadly Weapon and DWI-3d), and I have challenged both. It is unreasonable and unfair for Trial Court to conflate cases being taken into consideration, as part of a plea agreement, with any admission of guilt on my behalf. In fact, given my continued stance of innocence and the examples cited in my subsequent writ, it would have been more reasonable for Trial Court to conclude that I would have continued asserting my innocence and proceeded to trial, in each instance, had it not been for Trial Counsel's deficiencies and the State's misconduct. Furthermore, it is unreasonable and offensive to suggest that any innocent person receives any benefit from entering into any plea agreement, especially one that saddles that individual with a criminal conviction, and most especially one that requires that individual spend even a single day in confinement.

F. Synopsis of Issues

1. Due Diligence

Quickly, allow me to address the District Court's determination that I have not shown due diligence. In addition to the discovery motions filed prior to the plea hearing, the record shows I continued my quest for documents and material, namely exculpatory and impeachment, evidence. The record also shows that, after the denial of my first request for habeas relief in the state courts, I was able to overcome the state's procedural bar against subsequent applications (Tex. Crim. Code Proc. Art. 1107 section 4), by showing new evidence, not previously disclosed by the State, had been discovered. Unlike in its first response, in the state's required response to my second writ, the State does not deny my claims regarding SAPD's Strategic Intelligence Analysis ("SIA"] report, SAPD's "SIA Serial Rapes Update," or the cell phone video.

By being unrelenting, I convinced Trial Counsel to file a motion for the release of my phone, which I believed still had a video of me engaged in a consensual sexual encounter with one of the State's witnesses. Trial Counsel finally acquiesced and filed a request on August 30, 2018 (See Appendix: Pre-Trial Motion, P.95). After the request was granted, I enlisted my mother to pick up the phone, from SAPD's property warehouse, since I was p. unable to do so. After verifying the video is still stored on the phone and giving Trial Counsel sufficient time to respond to a letter I sent requesting his notes, a response that never came, I submitted my initial state habeas corpus application, stating "Actual Innocence" and the State's Brady violation as my grounds. For its part, the State denied my allegations.

After the application was denied, in April 2019, in an attempt to strengthen my standing arguments, I sent another letter to Trial Counsel. Again, that letter went unanswered. In March 2020, I sent Trial Counsel a third letter, still requesting his notes (See Appendix: Letter to Trial Counsel, p.117). Finally, in June 2020, I received a response (See Appendix: Letter from Trial Counsel, p. 118).

After realizing that, mostly, all of the notes he sent me focused on my DWI case, I used the information I'd gathered through my own FOIA discovery request to look up the criminal history of Laura Smith, the alleged victim in this case. I also requested information on the case number mentioned in the August 5, 2016, CIL report. This is how I first learned of Tyrone Baker, his connection to the present case, and the other sexual assault case to which he is linked.

After receiving and reviewing the documents in late 2020, I began researching possible remedies, though access to the unit's law library was severely restricted, due to the COVID-19 pandemic. Once satisfied I had grounds for claims of actual innocence, violations of *Brady* by the State, and ineffective assistance of counsel (which would be the new claim necessary for me to file a subsequent application), I hired an attorney to assist me with the second writ application. I have maintained regular contact with Writ Counsel,from the time she was hired in September 2021 to the present day. As far as my ability to obtain the "SIA" report, I cannot, and should not be expected to, pursue a document I do not know exists. My determination to retrieve my phone and gather documents from Trial Counsel constitutes a showing of due diligence, enough to satisfy the requirement established by 28 U.S.C. subsection 2244(b)(2)(B). *(Will v. Lumpkin,* 2023 U.S. Dist. LEXIS 52455; discussing the State's withholding of ad hoc documents) ("Aside from [Petitioner's] general diligence seeking material, a reasonable person would have no specific reason to suspect that the challenged documents existed, much less that they had been withheld.")

"Trial Counsel need not assume the prosecution may be withholding information in order to exercise diligence. The Supreme Court has stated that its 'decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed,' and Trial Counsel should be able to reasonably rely on a prosecutor's open-file policy." (*Will v. Lumpkin,* 2024 U.S. Dist. LEXIS 61959)

In *Will v. Lumpkin*, a case in which the petitioner presents a *Brady* claim based on the State's withholding of ad hoc documents, documents that had been withheld for eight years and documents that had been withheld for nearly two decades, the Fifth Circuit found petitioner's claim satisfies the due diligence requirement established by 28 U.S.C. subsection 2244(b)(2)(B) "by making a prima facie showing that his *Brady* claim was not previously presented, that the evidence could not have been discovered through due diligence, and that his claim has merit." The Fifth Circuit then determined that "it is reasonably likely that, after hearing the new evidence alongside the old evidence, every reasonable juror would have some level of doubt. We express no view on whether [Petitioner] should ultimately prevail on the merits or whether he is actually innocent. We hold only that [Petitioner] has made a prima facie showing that his *Brady* claim deserves fuller consideration. He may be right. He may be wrong. But he should be heard." (2023 U.S. Dist. LEXIS 52455 at 18)

2. *Brady* Violations

"A court considering a *Brady* claim must look at the suppressed evidence "collectively, not item by item" *(Will v. Lumpkin,* 2024 U.S. Dist. LEXIS 61959; quoting *Kyles v. Whitley,* 514 U.S. 419, 436 (1995)).

In the order denying my petition, the District Court makes no mention of the cell phone video, focusing solely on the "SIA" report, though the video, of me engaged in a consensual sexual encounter with one of the State's witnesses, was also suppressed and specifically addresses case 2018CR4391, which Trial Counsel specifically mentions in his affidavit and hearing testimony, confirming the case factored into his decision to advise me to accept the State's plea offer. (See Appendix: Evidentiary Hearing Transcript, p.14 lines 6-9; p.31, lines 20-22) (See also Appendix: Trial Counsel's Affidavit, p.1, para.3, lines 1-2; para 1, lines 1-4)

By not looking at and considering the footage, the District Court failed to evaluate the suppressed evidence collectively, as required. (see *Crawford v. Cain*, 248F App'x 500, 504 (5th Cir. 2007)) ("[T]though the court may have to go over each piece of evidence item by item, it must ultimately evaluate the cumulative effect of the evidence for purposes of materiality.") Neither the state courts nor the District Court made a cumulative evaluation. Trial Court did not evaluate—or make a determination on—the withheld video, nor did it evaluate—or make a determination on-the video nor parts of the record that refute Trial Counsel's testimony (i.e. discovery log, "State's Notice of Retroactive Disclosure, "State's List of Witnesses, and "State's Notice of Intent to Introduce Evidence of Extraneous Offenses") (See Appendix: Trial Court's Opinion (Writ 2), pp. 1-11)(see also Appendix: District Court's Order-pp.1-7).

The Appeals Court analysis of a COA application necessitates "only a limited, threshold inquiry" (*Holberg v. Lumpkin, 2023 U.S. App. LEXIS 5928;* citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). Because the district court did not address the issue of the video footage, the next court to review the matter should "look through" to the last decision entered (*Wilson v. Sellars*, 584 U.S. 122, 125 (2018)). In this case, however, no court specifically addresses the matter of the cell phone footage; therefore, the reviewing court must rely on the state court's generalized determination that no evidence was "improperly withheld." The problem here, though, is the fact that the state habeas court offers no rationale for its conclusion. On the other hand, the record presented during the state habeas proceedings offers ample evidence that shows evidence, namely the cell phone video and the "SIA" report, was improperly withheld and resulted in my being prejudiced.

First, during the evidentiary hearing, the State concedes that the phone had been held by SAPD as "evidence" (See Appendix: Evidentiary Hearing Transcript p.51, lines 2-5). In its "Notice of Retroactive Disclosures," the State confirms the "SIA" report was not provided to Trial Counsel, by specifically naming Writ Counsel as the person to whom the document was delivered, also confirming the report was not submitted to me, by way of counsel, until more than five and a half years after the plea hearing (See Appendix: Notice of Retroactive Disclosures p.1). Therefore, the issue of suppression is not debatable and should not be questioned. Second, specifically regarding the cell phone video, the evaluation comes to the question of "materiality," meaning the footage in question must be either exculpatory or impeaching. On April 19, 2018, the State submitted its "Notice of Intent to Introduce Evidence of Extraneous Offenses," where it lists fifteen alleged instances of criminal misconduct on my part. Number 13 says: "On or about the 1st day of October 2017, the defendant did commit the offense of sexual assault against Samantha Schmid in Bexar County, Texas" (See Appendix: Notice of Intent p.157, #13). This statement is made even though I was never convicted of such actions. On the same day, the State submitted its "List of Witnesses," with Samantha Schmid listed as a witness (see Appendix: States List of Witnesses p.1).

Added to the State's acknowledgement that my phone was, in fact, in the State's possession and withheld from the defense, the State does not deny the SIA report was also withheld, and the Court is in no position to assert a denial on the State's behalf. Therefore, by disregarding the State's concession and, instead, accepting Trial Counsel's claim of having received the report, a claim proved false by the discovery log, the Court makes an egregious error.

Furthermore, beyond the District Court's reliance on Trial Counsel's contradicted testimony, the reasoning given for the denial of my assertion that I am, in fact, entitled to a new "factual predicate" date appears to conflate disparate facts and muddy clear evidence. Regardless how "perplexing" my argument may seem, the facts in the record are impossible to misconstrue:

- Though it provided Writ Counsel with the partial report in March 2023, the State filed its first "Notice of Retroactive Disclosures" on June 20, 2023, one week after the filing of my second writ application, with the "SIA" report being the only document listed. Moreover, the notice specifically states that the document is being submitted to me through Writ Counsel. There is no mention of Trial Counsel.

- On January 25, 2024, the State filed a second "Notice of Retroactive Disclosures," with "SAPD SIA Report from 1/27/15" as the sole document listed. Again, the State specifically mentions Writ Counsel as being the

Though the Court split in its decision, both the opinion and the dissent are instructive. The opinion holds that, despite the forensic evidence contradicting the defendant's self-defense claim, the State's failure to disclose the fact that one of its witnesses had been a paid informant is a clear violation of *Brady* because that information could have been used to impeach the witness's testimony. With that understanding, the opinion follows the precedent established by the Supreme Court and concludes impeachment evidence is protected under *Brady*.

From the dissent, it can be inferred that, had Ms. Kirkpatrick's testimony against Holberg been the sole testimony given to counter the defendant's self-defense claim (or had the evidence against Holberg been weaker), the notion of a *Brady* violation would have merit. As the dissent maintains, however, because there is ample evidence to the contrary, Kirkpatrick's testimony was thus immaterial and, therefore, not covered under *Brady* (at 509).

In this case, however, there is no additional evidence, forensic or otherwise, to support a guilty verdict. Here, the State clearly sought to corroborate the allegations made by Laura Smith with those made by Samantha Schmid. By withholding video evidence that shows the encounter between Ms. Schmid and I was consensual, the State absolutely committed a *Brady* violation. Trial Counsel repeatedly states, in his affidavit and hearing testimony, that his primary concern was the State's ability to establish a pattern, and he felt, without evidence to the contrary, Ms. Schmid's testimony would do just that. The video on my phone directly counters the claims made by Ms. Schmid, making it material and, therefore, covered under *Brady*. The State's withholding of the video not only violated *Brady*, denying my protections under the Fourteenth Amendment, the violation resulted in Trial Counsel's being uniformed of material evidence, meaning his assistance fell below the objective standard of "reasonableness" set forth in *Strickland v. Washington*, leading to my being prejudiced.

"When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court order may be taken), if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" (*Slack v. McDaniel*, 529 U.S. 473 (2000)).

<u>3. Ineffective Assistance of Trial Counsel</u>

The District Court's order relies, heavily, on Trial Counsel's affidavit, taking pains to disregard the evidence that elucidate the affidavit's incredibility. Because such deference is afforded to Trial Counsel, I offer the following points to show that neither Trial Counsel's affidavit nor his hearing testimony were truthful and are, therefore, not credible:

- Regarding the "SIA" report, in his affidavit, Trial Counsel states: "As a specific document, I do not recall the actual document he identified as 'SIA Serial Rapes Updates.' If it was contained in the discovery file, however, I would have discussed it with him. The record shows that it was disclosed" (See Appendix: Trial Counsel's Affidavit p. 124). In fact, the record shows the opposite. In the discovery log, which Trial Counsel signed, there is no mention of the "SIA" report (See Appendix: Discovery Log pp. 96-104). The report is not included in any of the documents Trial Counsel provided to either myself or Writ Counsel. Trial Counsel's claim is blatantly untrue.

- In his evidentiary hearing testimony, responding to Writ Counsel's question about the "SIA" report being disclosed, Trial Counsel states, "My recollection... it was in the evidence that was presented to me in the discovery" (See Appendix Evidentiary Hearing Transcript p.19, lines 15-18). Again, Trial Counsel's memory is proven faulty by the discovery log. Furthermore, when asked if he discussed the report with me, Trial Counsel responds, "... yes" (See Appendix: Evidentiary Hearing Transcript p.19, line 19-20). This is another blatant untruth. Trial Counsel claims to have discussed with me a report the records show he never received.

- As more proof of Trial Counsel's dishonesty, in both of the "State's Notice of Retroactive Disclosures," in which only the "SIA" report is listed, the State explicitly states the documents were provided to me through Writ Counsel. Nowhere is Trial Counsel mentioned (See Appendix: Notice of Retroactive Disclosures p.1).

- Regarding the other piece of withheld evidence, that being my cell phone and, more specifically, the video stored on it, in his affidavit, Trial Counsel writes: "Had [2018CR4391] gone to trial or been used as 404b evidence by the State, the issue of the cell phone would have been timely addressed" (See Appendix: Trial Counsels Affidavit p. 122, para 1). In fact, on April 19, 2018, the State submitted the "State's Notice of Intent to Introduce Evidence of Extraneous Offenses," in which it includes the claimant and the claims associated with 2018CR4391 (See Appendix: Notice of Intent p.157, #13). Though the notice was filed two weeks prior to the plea hearing, which was originally a trial setting, Trial Counsel did not file a motion for the release of my phone until August 31, 2018 (See Appendix: Motion for Release of Personal Property p. 95), nearly four months after advising to accept the State's plea offer. Trial Counsel claims he would have taken an action he literally did not take when the opportunity was before him. This time, Trial Counsel has proven himself untruthful.

- As to the matter of the alternative suspect, Tyrone Baker, Trial Counsel's affidavit and hearing testimony make clear that, if at all, Mr. Baker was presented to me as nothing more than one of the complainant's "numerous dates" (See Appendix: Trial Council's Affidavit p. 123) or as "one of the other persons who had access to this woman" (See Appendix Evidentiary Hearing Transcript p.18, line 6-8). In fact, despite the "CODIS hit," insofar as Trial Counsel means that do be a DNA match, Trial Counsel admits he only learned of Tyrone Baker shortly before the plea hearing and did not actually receive a file pertaining to Tyrone Baker until Trial Counsel was in conference with me, the morning of the hearing (See Appendix Trial Counsel's Affidavit p.122, para 2)(See also Appendix Evidentiary Hearing Transcript p.18, line 9-11). With regard to the very case that produced the DNA match (See Appendix CIL Report pp. 42,44)(See also Appendix Tyrone Baker Indictment p.43), Trial Counsel also admits he did not tell me that Tyrone Baker had been indicted in a separate sexual assault case (See Appendix Evidentiary Hearing Transcript p.17, line 17-22) (Writ Counsel asks "OK. And did you tell him that or did you know that Tyrone Baker had been indicted on a sexual assault previously?" Trial Counsel responds "I don't remember that conversation specifically related to whether or not Baker had been indicted previously."). More to the point of my "Ineffective Assistance" claim, as it relates to Tyrone Baker, the report about the CODIS finding was released August 5, 2016 (See Appendix: CIL Report p.42). Tyrone Baker was indicted, in the connected case, March 27, 2017 (See Appendix: Tyrone Baker Indictment, p.43). Still, Trial Counsel only learned of Mr. Baker around the time of the plea hearing, which, as he acknowledges, was initially a trial setting, in preparation for jury selection (See Appendix: Trial Counsel's Affidavit p.122, para 2). Therefore, out of the nearly 9,600 hours, between the date Tyrone Baker was indicted and the date of the plea hearing, Trial Counsel spent fewer than four hours, all on the morning of the hearing, reviewing any information pertaining to Tyrone Baker. Here, there is no untruth to be uncovered; instead, what is made clear is that any discussion Trial Counsel claims to have had with me, regarding Tyrone Baker, could not have been properly or adequately informed.

"To determine whether Petitioner was prejudiced, the court must consider the totality of the evidence before the fact-finder." (*Williamson v. Guerrero,* 2025 U.S. Dist. LEXIS 109301; citing *Mejia v. Davis,* 906 F.3d 307, 315 (5th Cir. 2018*)*; quoting *Strickland v. Washington*, 466 U.S. 668, 696)

4. Actual Innocence

Under Schlup, evidence need not be so strong as to show innocence. It need only be enough to "establish sufficient doubt about [Petitioner's] guilt..." (*Schlup v. Delo*, 513 U.S. 298, 316). In *Schlup*, the Supreme Court found just three pieces of evidence particularly relevant and enough to establish sufficient doubt. None of the evidence (two affidavits from inmates and one from a prison lieutenant) is scientific, and the bulk comes from sources the justice system generally deems inherently unreliable and incredible, the inmates (at 317). "Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the default" (quoting *Murray v. Carrier*, 477 U.S. 478, 496).

In the District Court's order, it states that I "judicially confessed" to the charges. The transcript from the plea hearing proves that I did not (See Appendix: Plea Bargain Hearing Transcript p. 6, line 2-5). In fact, I have maintained my innocence since the day I was arrested and charged. Also, I have steadfastly maintained that my plea of "no contest" was involuntary. When asked by the judge about my plea, I agreed that, after discussing the matter with Trial Counsel, I believed it to be in my best interests, at the time, due to the circumstances (lines 13-17). With the revelation of the "SIA" report, the release of the video showing me engaged in a consensual sexual encounter with one of the State's witnesses, and the information about Tyrone Baker, those circumstances have drastically changed. Additionally, in denying my claim of "Actual Innocence," for some reason, which is not clarified in the order, the District Court asserts a claim I never made, stating the DNA match of Tyrone Baker does not constitute "new reliable evidence." Then, the Court proceeds to ignore what was presented as new evidence: the "SIA" report and the cell phone video, mentioning the former only in the context that my assertions regarding it are purely "conclusory" and "without any evidentiary support." Additionally, the Court concludes that my points about the alleged victim misidentifying me, the SIA report establishing a vast pool of alternative suspects, and the alleged victim's friend contradicting the alleged victim's account "do little, if anything, to establish Petitioner's innocence of the crime, much less constitute the strong evidence necessary under Schlup's demanding standard."

Taken individually, it's true, the three points highlighted by the District Court do not constitute "strong evidence." It must be noted, however, that *Schlup* demands the evidence, new and old, be viewed in totality. Here, the Court isolates three, out of six, supplementary elements I presented, to support my innocence claim, and the Court completely ignores the precedent set by the Supreme Court in *House v. Bell,* as it pertains to the four primary elements supporting my claim of innocence: 1) The State does not deny new evidence has been presented; 2) I am excluded as a DNA contributor; 3) Another individual is found to be a match to the DNA collected from the scene; and 4) There is a named, known alternative suspect. These four elements are the exact same as those presented in *House*, and the Supreme Court maintained that they are enough to satisfy *Schlup's* demanding standard (*House v. Bell,* 547 U.S. 518 L.Ed 1A (2006)).

Also, as it relates to the exclusionary DNA, it must not be forgotten, and cannot be overstated, that the alleged victim specifically states that her attacker left his semen at the scene (See Appendix: Prosecution Guide p 60). Furthermore, if the District Court is going to bestow credence upon the alleged victim's photo identification, the Court must acknowledge and accept the alleged victim's statement that she recognized me as being a high school classmate of hers (See Appendix Prosecution Guide p.61). The fact is the alleged victim and I attended different high schools, in different cities, during different, non-overlapping periods.

To further undercut the District Court's stance, that the supplemental elements (what the Court calls "conclusory assertions") are not supported by the record, in the alleged victim's initial statement, taken the morning of the alleged attack, she says the assailants left in a WHITE Mitsubishi Galant and a BLACK four-door SEDAN, either a Chevy Cavalier or a Volkswagen Jetta (See Appendix: Incident Report p.53). In contrast, her friend, Rene Trevino, the other witness, told the investigating detective that the assailants fled in a small blue or black TRUCK before going to a gas station and getting into a small SILVER four-door vehicle, either a Mitsubishi Lancer, Toyota Corolla, or a small Acura (See Appendix: Prosecution Guide p. 60).

Then, addressing the Court's allegation that my assertion, that the "SIA" report establishes a vast pool of alternative suspect, is "unsupported" and "conclusory," under the portion of the report dubbed "What we know or is suspected as of now," the first bullet point maintains the crimes covered in the report (which include the alleged attack in this case) are tied to "Gang members but not necessarily gang activity" (See Appendix: SIA Report p.3).

Added to those four primary elements and three supplemental elements, I presented three other supplemental elements, which the Court chose to not address: 1) The State tried and failed to link me to any of the crime scenes (including the one in this case), tried and failed to link me to any other suspects, tried and failed to link me to any other persons of interest (See Appendix: SIA Report p. 3); 2) The State created a suspect profile I do not fit (See Appendix: SIA Update p. 85); and 3) There is no evidence implicating me.

Though it is suggested there is evidence implicating me, the examples given are specious, at best. First, the Court cites the alleged victim's positive photo identification. Again, if one is going to bestow credence upon the photo ID, one must also lend credence to the statement pertaining to the notion of me having attended the same school, at the same time, as the alleged victim and one, most certainly, must honor the alleged victim's description of the attack, a description that includes the specific mention of the attacker leaving his semen at the scene. Taken together with her other statements, all made on the same day, the alleged victim's positive photo ID is undermined by the fact that we attended different high schools, at different times, and the fact that I am excluded as a DNA contributor. Second, the Court cites the calls and text messages between me and the alleged victim, as well as GPS data that puts my phone near the hotel where she was staying. If calls and text messages implicate me, that means every person who called or texted the alleged victim is implicated, offering a vast pool of alternative suspects. The GPS data puts my cell phone in the vicinity of the hotel; it does not put me in the alleged victim's room. Therefore, the calls, texts, and GPS data implicate me to the same extent as the same data from the phones of the men who actually entered the alleged victim's room implicates them. The evidence is not inculpatory; it's circumstantial.

Finally, the Court cites my admissions, which I made and have maintained since my interview with Detective Owens, prior to knowing what evidence SAPD actually possessed. I offered that the alleged victim and I had multiple conversations, exchanged several text messages, and sent each other pictures, as we made plans to meet. I also offered that, when I arrived at the hotel, I called and messaged the alleged victim, trying to get her room number, but she never responded. Those admissions, considering their consistency (compared to the alleged victim's shifting statements), are far from inculpatory and are completely supported by the evidence.

Exempting Trial Counsel's affidavit and the testimony given during the evidentiary hearing, the evidence is as follows: "Old"= 1) The alleged victim's positive photo ID; 2) The alleged victim's description of the vehicles in which the assailants fled; 3) The alleged victim's description of the alleged attack; 4) The calls, texts, and GPS data from my phone; 5) Rene Trevino's description of the vehicles in which the assailants fled; 6) The CIL report from May 5, 2016; 7) The notice, from CIL to SAPD, sent August 5, 2016; 8) Tyrone Baker being identified as the DNA contributor of the sample collected from the scene in this case and a separate sexual assault, by way of his indictment. "New"= 1) SAPD's "SIA" report; and 2) The video on my cell phone showing me engaged in a consensual sexual encounter with one of the State's witnesses.

Taken together, the evidence shows the alleged victim's positive photo ID is undermined by her assertion that she remembers me from high school. The positive photo ID is further undermined by the alleged victim's description of the alleged attack, because she specifically states that her attacker left his semen at the scene, and I am excluded as a contributor of the DNA collected from the scene. Another drag on the photo ID is the fact that it came seven months after the alleged attack, though the record shows, and I have attested, that I sent pictures of myself to the alleged victim, as we were making plans to meet, the night of the alleged attack, and she never provided those pictures to police, or identified me as her attacker, during her initial interview (See Appendix: Incident Report pp. 52-56).

In addition to the alleged victim's positive photo ID being undermined by her own statements and the DNA evidence, her description of the assailants' vehicles is contradicted by the description given by her friend, Rene Trevino, though they both agree that he was at the hotel, during the time of the alleged attack, and saw the assailants flee. Continuing the assessment of the evidence, the alleged victim stated, of the three men involved, only one of her attackers was Black. The CIL report confirms Tyrone Baker, who is Black, was in the alleged victim's room and that he was involved in a separate alleged sexual assault that occurred just a few months later, near the scene in this case.

Apart from Tyrone Baker, in SAPD's "SIA" report, along with me, there are three other named persons of interest (See Appendix: SIA Report, p.3). The SIA report illustrates SAPD's desire to link me to any of the other persons of interest; they are unable to do so. In fact, one of the named men, Stephen Wansley, wrote a letter to Writ Counsel confirming he and I do not know each other and have never met (See Appendix: Wansley letter p 5). In addition to the named persons of interest, the SIA report states gang members are known, or suspected, to be involved, establishing a vast pool of alternative suspects. The report also creates a suspect profile I do not fit, identifying specific gang "sets" believed to be involved in the crimes. I have never been involved in, or suspected of, gang activity. The report also includes a statement of SAPD's desire to link me to any one of the crime scenes, including the one in this case, through the use of DNA. To the contrary, the

CIL report confirms, through CODIS, that I am not linked to any violent crime, in the history of criminality, anywhere in the country.

Therefore, taken together, the evidence is strong enough to conclude that it is more likely than not that no reasonable juror would find me guilty beyond a reasonable doubt.

III. Conclusion

To conclude, it is my hope that, with this information in hand, the Court follows the path set by The Fifth Circuit's previous opinions, namely those in *Will v. Lumpkin* and *Holberg v. Guerrero*, 130 F. 4th, 493 deciding that the state courts and the District Court erred in their assessments, especially as they relate my claims of the State's *Brady* violations and Trial Counsel's ineffective assistance. With respect to my "Actual Innocence" claim, I hope the Court follows the precedent it set in *House v. Bell*, as my presentments mirror, exactly, those of the petitioner in that case.

After the Court finds that the state courts and the District Court did, in fact, commit errors in their assessments, I ask that the Court reverse the order of the District Court. I further ask that the Court consider my petition on the merits, or order the District Court to do so. Finally, I implore the Court to order my release on recognizance or surety, pending the outcome of my appeal and consideration of my petition on the merits.

With this appeal, I am requesting the Court to:

1) Affirm that I have made a substantial showing of the denial of a constitutional right

2) Grant my Petition for a Writ of Certiorari

3) Affirm that I have shown that I am entitled to relief

4) Affirm my claim of actual innocence

5) Affirm my claim that the State did violate Brady

6) Affirm my claim of ineffective assistance of trial counsel

7) Affirm my claim of involuntary plea

8) Order that my petition for relief be considered on the merits

9) Order my release from custody, either on recognizance or surety, while the appeal is pending, in accordance with U.S.C.S. Federal Rule 23(b)(3)

10) Order my unconditional release from custody

11) Enter a finding of prosecutorial misconduct

12) Enter a finding of malicious prosecution

13) Order that any plea agreement entered into, during the plea hearing involving the present case, be immediately rendered involuntary and, thus, void

14) Bar any future prosecution of this or considered matters

With that, I thank the Court for its time and attention.

Respectfully Submitted,

Bryan L. Gresham

Bryan L. Gresham