IN THE 337TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE	§	
	§	CAUSE NO. 1087328-B
ANTOIN DENEIL MARSHALL	§	

BRIEF IN SUPPORT OF SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

Randy Schaffer, P.C.
State Bar No. 17724500

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@schafferfirm.com

Attorney for Applicant
ANTOIN DENEIL MARSHAL

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CUSTODY

Applicant, Antoin Deneil Marshal, inmate number 2112539, is illegally restrained of his liberty in the Texas Department of Criminal Justice, Correctional Institutions Division, pursuant to a judgment of the 337th District Court of Harris County.

CHRONOLOGY OF THE PROCEEDINGS

Applicant pled not guilty to capital murder in cause number 1087328 in the 337th District Court of Harris County before Judge Don Stricklin. A jury convicted him, and the court assessed punishment at life without parole on December 14, 2006. Charles Brown and Michael Fosher represented applicant.

The Fourteenth Court of Appeals affirmed applicant's conviction in an unpublished opinion issued on February 28, 2008. The Court of Criminal Appeals (CCA) refused discretionary review in No. PD-1199-08 on January 14, 2009. Marshal v. State, No. 14-06-01133-CR, 2008 WL 516786 (Tex. App.—Houston [14th Dist.] Feb. 28, 2008, pet. ref'd) (not designated for publication). Windi Akins Pastorini represented applicant.

Applicant filed a state habeas corpus application on July 22, 2020. The trial court, after conducting a ten-day evidentiary hearing, recommended that relief be denied without consideration of the merits based on the doctrine of laches on December 23, 2020. The CCA denied relief on November 10, 2021, and denied

reconsideration on May 2, 2022. The United States Supreme Court denied certiorari on February 27, 2023. Ex parte Marshal, WR-92,202-01 (Tex. Crim. App. Nov. 10, 2021), cert. denied sub nom Marshal v. Texas, 143 S.Ct. 978 (2023). Undersigned counsel represented applicant.

Applicant filed a federal habeas corpus petition in cause number 4:24-cv-00123 in the United States District Court for the Southern District of Texas on January 11, 2024. He simultaneously moved to stay and abate the federal habeas proceeding to enable him to return to state court to file a subsequent application raising actual innocence. The district court entered an order staying the federal proceeding on January 18, 2024.

ISSUES PRESENTED

1. Whether applicant is actually innocent.
2. Whether newly available scientific evidence entitles applicant to a new trial.
3. Whether the prosecution's use of and failure to correct false and misleading testimony, failure to disclose favorable evidence, and knowing misrepresentation of a material fact in asking a question denied applicant due process of law and a fair trial.
4. Whether applicant was denied the effective assistance of counsel at the guilt-innocence stage.

5. Whether the cumulative prejudice from the prosecutorial misconduct and the deficient performance of counsel requires a new trial.

STATEMENT OF FACTS

A. The Indictment

The indictment alleged that, on or about October 26, 2005, applicant intentionally caused the death of Reuben DeLeon by shooting him with a firearm while in the course of committing and attempting to commit robbery or burglary of a building (C.R. 2).[1]

B. The State's Case

Four female Houston Police Department (HPD) officers and one HPD male officer were allowed to use an apartment at no charge at a complex near their substation in exchange for providing "security" when off-duty (2 R.R. 22-23).[2] Officers Reuben DeLeon and Starlyn Martinez—each of whom was married—had keys to the apartment and were involved in what Martinez described in her testimony

[1] The State abandoned the robbery allegation at the charge conference (5 R.R. 135).

[2] Although Officer Starlyn Martinez testified that the officers used the apartment to go to the bathroom and type reports, photos depicting the sparse furnishings—in particular, an air mattress on the bedroom floor — suggest that the apartment was used for trysts (2 R.R. 22-23, 76; 7 R.R. SX 2-19).

as an "inappropriate romantic relationship" (2 R.R. 26).[3]

Officer Martinez testified that she and Officer DeLeon met at the apartment about 10:35 p.m. on October 25, 2005, to change clothes to go to bars (2 R.R. 21, 24, 28-29). DeLeon left his shotgun in a closet (2 R.R. 29). They met other officers, had drinks, and left the last bar at closing time (2 R.R. 35-41).

Officer Martinez testified that they returned to the apartment to get their uniforms to go to their respective homes (2 R.R. 42-43). Someone knocked on the door about 2:30 a.m. (2 R.R. 45). Martinez looked through the peephole and saw a black male wearing a dark, "silky" jacket (2 R.R. 47). Officer DeLeon said that he would see what the man wanted (2 R.R. 48). When DeLeon opened the door, he was shot and killed (2 R.R. 48-54; 3 R.R. 114-15).[4]

Crime scene officers found the crystal from a man's watch in the stairwell across from the apartment and a do-rag (a head covering) in the grass between the apartment and the parking lot (3 R.R. 15-16).

HPD Homicide Investigator Todd Miller testified that an anonymous caller

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[3] The State attempted to excuse and minimize the affair by eliciting Officer Martinez's testimony that she was "drawn" to Officer DeLeon because he brought her flowers, wrote her notes, flirted with her, hugged her, and kissed her on the cheek and the forehead—unlike her husband, who was not affectionate (2 R.R. 26-28). Thus, the State set the tone at the outset for the materially false testimony to follow.

[4] Officer Martinez's husband, a paramedic, responded to the call (2 R.R. 59). He did not know about her relationship with Officer DeLeon, asked her what happened, and became upset when she told him (2 R.R. 59-60). They "got into it" and had to be separated (2 R.R. 60, 198-99).

informed CrimeStoppers that he saw "Brandon," whom he knew, run out of the apartment complex that night (4 R.R. 62-63). Further investigation led the police to develop Brandon Zachary as a suspect (4 R.R. 62).

Calvin Finnels Jr., a resident of the apartment complex, told Investigator Miller that he was talking on the phone on the balcony of his second-story apartment between 2:30 a.m. and 3:00 a.m. when he saw two black males enter the building across the parking lot (4 R.R. 104-07; 110). About two minutes later, he heard a gunshot and ducked as the men ran away (4 R.R. 111-12).

Zachary was arrested in Beaumont on October 31, 2005 (3 R.R. 169). Officer Martinez positively identified him in a lineup as the man she saw through the peephole and also identified the blue New York Yankees jacket that he was wearing (3 R.R. 164-66). Finnels identified Zachary in a photospread and a lineup (4 R.R. 66-68, 116-18).

Applicant also became a suspect (4 R.R. 77). He was arrested in Wichita Falls on November 2, 2005 (3 R.R. 180-81). Finnels identified him in a photospread, a lineup, and before the jury (4 R.R. 77-84, 112-14, 118-20). Thus, at the time applicant was charged with capital murder, the State's evidence consisted of an identification by Finnels from his second-story balcony in the dark at a distance.

Michael Buchanan, a career criminal who was awaiting trial in the Harris County Jail on a habitual offender burglary of a habitation charge and was on

mandatory supervision on a 40-year sentence for a previous burglary conviction,[5] testified that he wrote a letter to the Harris County District Attorney's Office (HCDAO) on February 6, 2006, offering to testify against applicant (2 R.R. 109-12, 115-19, 160). He met with assistant district attorneys Craig Goodhart and Marc Brown, who were prosecuting applicant (2 R.R. 119). After he agreed to testify, he pled guilty to burglary and was sentenced to two years in prison (2 R.R. 122). He denied that he received this plea bargain as a result of his cooperation (2 R.R. 120, 123).[6] Buchanan testified that applicant confessed in jail that he shot DeLeon, ran into a staircase, fell down, and when he reached the car, his do-rag and watch were missing (2 R.R. 146-47).

C. The Defense's Case

Applicant testified that he was in Beaumont at the time of the murder and did not shoot Officer DeLeon (5 R.R. 38, 48-49).[7] Applicant acknowledged that Zachary was a good friend and that he previously had left his Yankees jacket in

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[5] A person convicted of burglary of a habitation who has two prior final felony convictions faces a punishment range of 25 years to life in prison as a habitual offender under Section 12.42(d) of the Texas Penal Code if the second conviction was for an offense committed after the first conviction became final.

[6] Undoubtedly, it was just a coincidence that a habitual offender charged with burglary of a habitation—who was on mandatory supervision for burglary of a habitation and also had been convicted of sexual assault and possession of a controlled substance in a penal facility—was offered a plea bargain of two years after he wrote a letter offering to testify that another inmate confessed to the capital murder of a police officer.

[7] Beaumont is about 90 miles from Houston.

Zachary's car (5 R.R. 30, 33-35). Applicant denied that he owned a do-rag and that he had been to this apartment complex and lost his watch there (5 R.R. 34, 38-39). He also denied giving Buchanan information about the case (5 R.R. 82).[8] Finally, he denied telling Sergeant Mike Scott that Zachary was higher than him in a gang, that they were together that night, and that Zachary had done something stupid (5 R.R. 91-92).

D. The State's Case-In-Rebuttal

Sergeant Mike Scott testified that applicant said after he was arrested that Zachary was higher than him in a gang, that they were together that night, and that Zachary had done something stupid (5 R.R. 125-26, 131).

E. The Closing Arguments

The prosecutors argued that applicant shot and killed Officer DeLeon during a burglary and, while fleeing, ran into the stairwell, broke his watch, and lost his do-rag (6 R.R. 9, 49-50); that Finnels identified applicant as one of the men who ran out of the building after the shot was fired (6 R.R. 16); and that applicant gave Buchanan

[8] Applicant lied about this to his detriment. Applicant testified at the initial habeas hearing that Buchanan portrayed himself as a jailhouse lawyer and offered to help with applicant's case; that applicant disclosed what his lawyer had told him about the evidence; and that applicant asked Buchanan whether DNA could be found on a do-rag or a watch in the hope that DNA testing could prove his innocence (11 S.H.R.R. 70-77). Buchanan reframed this information as a confession in what proved to be a successful attempt to turn a habitual offender burglary charge with a punishment range of 25 years to life and a plea bargain offer of 40 years into a two-year sentence. If applicant had testified truthfully, a competent defense lawyer could have explained to the jury how Buchanan was able to fabricate a confession from the information applicant had given him.

information that only the killer would know (6 R.R. 50).

Defense counsel argued that Officer Martinez saw and heard only one man, whom she identified as Zachary (6 R.R. 31); that the CrimeStoppers tip implicated Zachary (6 R.R. 34); that Finnels could not accurately identify anyone in the dark because he was talking on his phone and not paying attention (6 R.R. 24-25); and that Buchanan fabricated the confession and received a two-year sentence on a habitual offender burglary charge (6 R.R. 21-22).

F. The Verdict

The jury convicted applicant of capital murder, and the trial court sentenced him to life without parole.

THE INITIAL HABEAS CORPUS PROCEEDING

The trial court conducted a ten-day evidentiary hearing but did not make any findings of fact and conclusions of law on the merits of the constitutional claims. Instead, the court recommended that relief be denied based on the doctrine of laches because applicant waited 11 years after his conviction became final on appeal to file the application.[9] The CCA adopted the findings of fact and conclusions of law,

[9] The state habeas trial judge, Herb Ritchie, had a conflict of interest that he failed to disclose to the parties. Judge Ritchie, who did not run for reelection in 2020, informed the parties in September that the case had to be resolved expeditiously because he would retire on December 31. However, he did not disclose that he intended to seek appointments as a visiting judge in Harris County. Susan Brown, the Presiding Judge of this Judicial Region, appoints the visiting judges. Her husband, Marc Brown, was one of the trial prosecutors accused of misconduct at petitioner's trial. Judge Ritchie would be at the mercy of Judge Susan Brown to appoint him as a

denied relief without written order, and denied reconsideration.

The Supreme Court denied certiorari on whether the CCA's application of the equitable doctrine of laches to bar review of the merits of applicant's constitutional claims violated his right to due process of law and whether the State was estopped from relying on the doctrine of laches because its misconduct caused the delay in filing the application.

CONSIDERATION OF THE MERITS IN A SUBSEQUENT APPLICATION

Article 11.07, §4 of the Code of Criminal Procedure provides that the CCA may not consider the merits of or grant relief on a subsequent application unless it contains sufficient facts establishing that (1) the legal or factual basis of the claims was unavailable at the time the previous application was filed or that, (2) by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt.

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visiting judge. He had every reason to believe that she would never appoint him if he found that her husband—who has been a visiting judge since he lost his reelection bid to the Fourteenth Court of Appeals in 2018—had suppressed favorable evidence and presented false testimony at a capital murder trial. Judge Ritchie should have disclosed his conflict of interest to the parties and recused himself from presiding at applicant's habeas proceeding. Judge Ritchie died unexpectedly on December 1, 2022. Hensley, *Herb Ritchie, former Harris County criminal judge and UT Tower survivor,* dies, Dec. 4, 2022, https://www.houstonchronicle.com/news/houston-texas/article/herb-ritchie-judge-dies-houston-17626860.php. Only a higher power knows whether Judge Ritchie's death was related to what he did to applicant.

A. The Factual Basis For Applicant's Actual Innocence Claim Was Unavailable When He Filed The Initial Application.

The State presented testimony at trial that the result of the DNA analysis on the do-rag that the killer left at the scene of the murder was "negative" (3 R.R. 167). The jury was left with the false impression that no DNA was found on the do-rag.

Testimony at the initial habeas hearing established that, in December 2005, Identigene, a private DNA lab, developed a full male DNA profile from the do-rag that did not match applicant, Zachary, or Officer DeLeon (4 S.H.R.R. 80-82; 1 S.H.C.R. 316-20).

Applicant asked the State at the commencement of the initial habeas hearing whether there had been a CODIS search, but the State refused to give a definitive answer (4 S.H.R.R. 17-19). Applicant established that neither HPD nor the Harris County District Attorney's Office (HCDAO) had requested a CODIS search before or since the trial (4 S.H.R.R. 83, 90; 6 S.H.R.R. 7). Applicant repeatedly requested a CODIS search throughout the hearing, but the State refused, and the trial court would not order it (4 S.H.R.R. 17-24; 5 S.H.R.R. 10-21; 8 S.H.R.R. 6-20).[10]

Shortly before the November 2020 election for District Attorney, undersigned counsel notified a journalist of the State's refusal to request a CODIS search, and the journalist contacted the habeas prosecutor for comment. Once the media

[10] Although the police and the prosecution can request a CODIS search, a private citizen cannot do so.

contacted the HCDAO, the Conviction Integrity Unit (CIU) of the HCDAO got involved and quickly agreed to a CODIS search. However, the DNA profile was not uploaded into the CODIS database before the habeas hearing concluded. Five days after the profile was uploaded, there was a match to another black male (the Known Suspect). His DNA profile was not in the CODIS database at the time of applicant's trial in 2006, but it was uploaded in 2007 after he was arrested in Houston for robbery (1 S.H.C.R. 800-37, 842-43). Thus, there would have been a CODIS match in 2007 if HPD or the HCDAO had requested a CODIS search before applicant's trial instead of waiting until 2020.

Applicant filed his previous application in July 2020 without the benefit of the CODIS match to the Known Suspect because HPD and the HCDAO did not request a CODIS search. The CODIS match was not available to applicant or ascertainable through the exercise of reasonable diligence before he filed the initial application. As a result, the factual basis for the actual innocence claim was unavailable at that time. And, as applicant will demonstrate infra, by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt. Thus, he has met the requirements for a subsequent application under article 11.07, §4(a)(1) & (2) and (c). See Ex parte Santillan, No. WR-49,763-02, 2023 WL 2150874 (Tex. Crim. App. Feb. 22, 2023) (not designated for publication) (relief granted on actual

innocence claim raised in subsequent application where DNA testing on bloodstains on jersey worn by killer excluded the applicant and led to the real killer 24 years after the murder).

B. The Factual Basis For Applicant's Article 11.073 Claim Was Not Available When He Filed The Initial Application.

For the reasons set forth above, the factual basis for applicant's article 11.073 newly available scientific evidence claim could not reasonably have been formulated when he filed the initial application. Thus, this claim also is cognizable in a subsequent habeas proceeding. See Ex parte Clark, No. WR-13,739-06, 2023 WL 8613823 (Tex. Crim. App. Dec. 13, 2023) (not designated for publication).

C. The Prosecutorial Misconduct And Ineffective Assistance Of Counsel Claims, Which Were Not Considered On The Merits In The Initial Habeas Proceeding Because Of The Doctrine Of Laches, Are Cognizable In A Subsequent Habeas Proceeding Because Applicant Can Demonstrate By A Preponderance Of The Evidence That He Is Actually Innocent.

A subsequent habeas applicant who demonstrates by a preponderance of the evidence that he is actually innocent is entitled to merits consideration of otherwise procedurally defaulted habeas claims. Ex parte Brooks, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007). "It is not necessary for an applicant to prove his innocence, rather, all that is necessary is a prima facie showing of actual innocence ..." Id. One purpose of the section 4 exceptions is to remedy a "miscarriage of justice." Id. Thus, the prosecutorial misconduct and ineffective assistance of counsel claims must be

considered on the merits, if necessary, pursuant to article 11.07, §4(a)(2), notwithstanding the doctrine of laches.

D. The State Is Estopped From Relying On A Laches Defense Because The Misconduct Of The Trial Prosecutors And The Police Was Responsible For The Delay In Filing The Initial Application.

Testimony at the initial habeas hearing established that, in December 2005, Identigene, a private DNA lab, developed a full male DNA profile from the do-rag that did not match applicant, Zachary, or Officer DeLeon (4 S.H.R.R. 80-82; 1 S.H.C.R. 316-20). After the testimony concluded, HPD disclosed to undersigned counsel a "to-do" list made by an unidentified HPD officer that contained the notation, "Identify who owned the do-rag after sending the male profile to CODIS. Is this Gregory Cage?" (2 S.H.C.R. 3-4).[11]

Neither HPD nor the HCDAO requested that the full male DNA profile from the do-rag be uploaded into the CODIS database before applicant's trial.[12] If HPD or the HCDAO had requested a CODIS search before applicant's trial, there would have been a match in 2007, when the DNA profile of the Known Suspect was

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[11] Cage gave a written statement to HPD on October 27, 2005, that Dante Lindsey, who was wearing a black do-rag, told Cage that he was going to kill the police officer that worked security at the apartment complex because the officer had arrested and beat up his brother; a day or two later, Lindsey told Cage that he killed the officer, displayed a pistol, and had substantially changed his appearance (4 S.H.R.R. 69-71; 1 S.H.C.R. 197-99). The jury did not hear any testimony about Cage and Lindsey.

[12] The State did not request a CODIS search because a match to another person would establish that applicant was not wearing the do-rag, that Buchanan fabricated the confession, and that Finnels' made a mistaken identification.

uploaded into the CODIS database after he was arrested in Houston for robbery (1 S.H.C.R. 800-37, 842-43). If the HCDAO had notified applicant and his appellate counsel of this exculpatory evidence in 2007, applicant could have informed the Innocence Networks at two law schools in letters that he wrote requesting representation in 2007 and 2009 (5 S.H.R.R. 81-82; 11 S.H.R.R. 79-80; 1 S.H.C.R. 702, 705-06) that the DNA profile from the do-rag matched the Known Suspect. Although applicant's family could not afford to hire habeas counsel at that time, an Innocence Network unquestionably would have accepted his case *pro bono* and filed a habeas application after his conviction became final on appeal in 2009. Thus, the State's decision not to request a CODIS search was responsible for the 11-year delay in filing the initial application. As a result, the State's is estopped from relying on a laches defense because it has "unclean hands." See Foxwood Homeowner's Ass'n. v. Ricles, 673 S.W.2d 376, 379 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (a party with "unclean hands" is not entitled to equitable relief).[13]

[13] The State expressly waived a laches defense in agreeing to relief in Santillan.

GROUND ONE

APPLICANT IS ACTUALLY INNOCENT.

A. The Standard Of Review

The issue of actual innocence is cognizable in a post-conviction habeas corpus proceeding. Ex prate Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). The CCA has recognized two types of actual innocence claims. One is a substantive, free-standing claim in which the applicant asserts a "bare claim of innocence based solely on newly discovered evidence" under Herrera v. Collins, 506 U.S. 298 (1993). See Ex parte Franklin, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002).[14] The other is a "gateway" claim under Schlup v. Delo, 513 U.S. 298 (1995), in which the applicant's assertion of actual innocence "does not by itself provide a basis for relief, but is intertwined with constitutional error that renders [the] conviction constitutionally invalid." See Ex parte Brown, 205 S.W.3d 538, 544-45 (Tex. Crim. App. 2006).

The applicant must make "an exceedingly persuasive case" that he is actually innocent to prevail on a free-standing actual innocence claim under Herrera. Elizondo, 947 S.W.2d 206. He must "unquestionably establish" his innocence by

[14] "Newly discovered evidence" is evidence that was not known to the applicant at the time of trial and could not have been known with the exercise of diligence. Ex parte Calderon, 309 S.W.3d 64, 65 (Tex. Crim. App. 2010).

proving "by clear and convincing evidence that no reasonable juror would have convicted ... in light of the new evidence." Id. at 209. The reviewing court must assess the "probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole [and] ... must necessarily weigh such exculpatory evidence against the evidence of guilt of the accused at trial." Id. at 206.[15]

B. No Rational Juror That Considered The Evidence Now Available Would Convict Applicant.

The crux of the State's case was Buchanan's testimony that applicant confessed in jail that he shot Officer DeLeon, ran into a staircase, fell down, and when he reached the car, his do-rag and watch were missing (2 R.R. 146-47). Buchanan's testimony that applicant confessed was much more damaging than Finnels' testimony that he identified applicant from his second-story balcony in the dark at a distance. The prosecutors emphasized during their closing arguments that applicant shot and killed DeLeon during a burglary and, while fleeing, ran into the stairwell, broke his watch, and lost his do-rag; and, thereafter, that applicant gave Buchanan information that only the killer would know (6 R.R. 9, 49-50). However, the State not only failed to request a CODIS search but also deliberately created the false impression that no DNA was found on the do-rag.

[15] Conversely, when the applicant raises actual innocence as a "gateway" to seeking merits consideration of an otherwise procedurally barred claim, he must establish his innocence by only a preponderance of the evidence. Schlup, 513 U.S. at 327.

Prosecutor Marc Brown asked HPD Sergeant Brian Harris on direct examination whether the result of the DNA analysis on the do-rag was "positive or negative." Harris responded, "Negative" (3 R.R. 167). That testimony was patently false and misleading. However, defense counsel did not present any testimony about the DNA. As a result, the jury was left with the false impression that no DNA was found on the do-rag.

Testimony at the initial habeas hearing established that HPD received a lab report from Identigene in December 2005 that a full male DNA profile had been developed from the do-rag that did not match applicant, Zachary, or Officer DeLeon (4 S.H.R.R. 80-82; 1 S.H.C.R. 316-20). When Buchanan told Goodhart and Marc Brown in February 2006 that applicant said that he lost his do-rag as he fled, they should have known that he was lying based on the Identigene report. Nonetheless, Marc Brown argued to the jury that applicant lost his do-rag as he fled (6 R.R. 50).

Applicant asked the State at the commencement of the habeas hearing whether there had been a CODIS search, but the prosecutor refused to give a definitive answer (4 S.H.R.R. 17-19).

Marc Brown testified at the initial habeas hearing that the HCDAO did not request a CODIS search and that he intended to leave the jury with the impression

that the do-rag belonged to applicant (4 S.H.R.R. 83, 90).[16] Brown was able to create this false impression by failing to present testimony that another male's DNA was found on the do-rag. Defense counsel did not correct this false impression.

After the testimony at the habeas hearing concluded, HPD disclosed to undersigned counsel a "to do" list made by an unidentified HPD officer that contained the notation, "Identify who owned the do-rag after sending the male profile to CODIS ..." (2 S.H.C.R. 3-4).

Applicant repeatedly requested a CODIS search throughout the habeas hearing, but the State refused, and the trial court would not order it (4 S.H.R.R. 17-24; 5 S.H.R.R. 10-21; 8 S.H.R.R. 6-20). Undersigned counsel eventually persuaded the CIU to request a CODIS search. However, the DNA profile was not uploaded into the CODIS database before the habeas hearing concluded. Five days after the profile was uploaded, there was a match to the Known Suspect. His DNA profile was not in the CODIS database at the time of applicant's trial in 2006, but it was uploaded in 2007 after he was arrested in Houston for robbery (1 S.H.C.R. 800-37, 842-43). Thus, there would have been a CODIS match in 2007 if HPD or the HCDAO had requested a CODIS search before trial instead of waiting until 2020.[17]

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[16] After Marc Brown testified, the State confirmed that HPD did not request a CODIS search (6 S.H.R.R. 7).

[17] Applicant received the name of the Known Suspect after the closing arguments in the habeas proceeding. Shortly thereafter, applicant filed exhibits reflecting that the Known Suspect

No rational juror would have convicted applicant if the juror had known of the CODIS match to the Known Suspect. This new evidence establishes that applicant was not wearing the do-rag that the killer left at the scene, that Buchanan gave false testimony that applicant confessed that he committed the murder and lost his do-rag and watch as he fled, and that Finnels made a mistaken identification. This Court should find that clear and convincing evidence establishes that applicant is actually innocent and that a preponderance of the evidence establishes that he has satisfied the Schlup gateway requirement necessary to consider the merits of the prosecutorial misconduct and ineffective assistance of counsel claims, if necessary.[18]

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has an extensive history of assaultive offenses—including robbery, assault on a public servant, assault family violence, and retaliation (1 S.H.C.R. 800). He committed a robbery in Houston in July 2007, and his DNA was uploaded into the CODIS database in August 2007 (1 S.H.C.R. 801-03). He lived in an apartment complex near the scene of the murder in 2005 (1 S.H.C.R. 804-834). He and petitioner were close in height and weight at that time (1 S.H.C.R. 835-37). Their mugshots demonstrate that they could pass for brothers (1 S.H.C.R. 835-37). Petitioner has attached their mugshots, side-by-side, in an Appendix to this brief so the Court can observe the similarities in their appearance.

[18] Applicant will explain the delay in filing the subsequent application. When undersigned counsel received the name of the Known Suspect in December 2020, he asked District Attorney Kim Ogg to conduct an actual innocence investigation. Six months later, Ogg informed counsel that the Texas Rangers would conduct the investigation. However, instead of assigning the case to the HCDAO CIU, Ogg allowed the habeas prosecutor who was defending the conviction to retain control over the case. Neither he nor the Texas Rangers will share information with undersigned counsel—as is customary in a *bona fide* post-conviction innocence investigation. Ranger Grover Huff told counsel in July 2021 that he believed that the investigation would confirm applicant's guilt. Huff told counsel over a year later that the do-rag was sent to SERI, a private lab, and expressed his opinion that more advanced DNA testing would reveal the presence of applicant's DNA. SERI provided a report in May 2023 that the DNA results were "at least 187 quadrillion times more likely if they originated from [the Known Suspect] than from two unknown, unrelated contributors," which "provides very strong support for the inclusion of [the Known Suspect] to this mixture" (AX 64). Counsel was concerned that, if he filed a subsequent state application or a federal petition at that time, he might hamper the investigation. However, the

GROUND TWO

NEWLY AVAILABLE SCIENTIFIC EVIDENCE ENTITLES APPLICANT TO A NEW TRIAL.

Article 11.073 of the Code of Criminal Procedure authorizes the CCA to grant habeas relief based on relevant scientific evidence that was not available at the time of the trial through the exercise of reasonable diligence if that evidence would have been admissible at trial and the court finds by a preponderance of the evidence that, if the evidence had been presented, the applicant would not have been convicted. This issue can be raised in a subsequent application under subsection(c) if the evidence was not ascertainable through the exercise of reasonable diligence by the applicant on or before the date he filed the initial application.

The Known Suspect's DNA profile was not available at the time of applicant's trial in 2006 because it was not uploaded to the CODIS database until 2007. A CODIS match would be admissible at trial. A jury probably would acquit applicant based on the CODIS match to another black male. Thus, applicant is entitled to a new trial under article 11.073 on the basis of newly available scientific evidence. See Ex parte Clark, No. WR-13,739-06, 2023 WL 8613823 (Tex. Crim. App. Dec. 13, 2023) (not designated for publication) (relief granted on article 11.073 claim

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HCDAO and the Texas Rangers have refused to communicate with him since then. He wrote a letter to Ogg in December 2023 asking about the status of the innocence investigation. When she did not respond, he prepared and filed the federal petition and the motion to stay and abate pending the outcome of a subsequent state habeas proceeding. He prepared and filed the subsequent application after the federal district court granted a stay.

raised in a subsequent application where a DNA expert testified at trial that the applicant was the sole contributor to the DNA profile obtained from the killer's do-rag, but DNA testing conducted nine years later identified the DNA profile of an alternative suspect).[19]

GROUND THREE

THE PROSECUTION'S USE OF AND FAILURE TO CORRECT FALSE AND MISLEADING TESTIMONY, FAILURE TO DISCLOSE FAVORABLE EVIDENCE, AND KNOWING MISREPRESENTATION OF A MATERIAL FACT IN ASKING A QUESTION DENIED APPLICANT DUE PROCESS OF LAW AND A FAIR TRIAL.

A. The Standards Of Review

1. Suppression Of Favorable Evidence

The prosecution's failure to disclose evidence favorable to the accused violates the Due Process Clause of the United States Constitution when the evidence is material either to guilt or to punishment, regardless of the good or bad faith of the prosecution. U.S. CONST. amends. V and XIV; Kyles v. Whitley, 514 U.S. 419, 432 (1995); Brady v. Maryland, 373 U.S. 83, 87 (1963). The prosecutor has a duty to disclose favorable evidence, even if it was not requested or was requested only in a general way, if the evidence would be "of sufficient significance to result in the

[19] In Clark, the HCDAO agreed to the trial court finding by a preponderance of the evidence that, if the new DNA evidence had been presented at trial, Clark would not have been convicted even though his DNA profile was found on the do-rag worn by the killer. Thus far, the HCDAO has opposed relief for applicant, even though his DNA profile was not found on the do-rag worn by the killer, but the Known Suspect's DNA profile was.

denial of the defendant's right to a fair trial." United States v. Agurs, 427 U.S. 97, 108 (1976). Impeachment evidence must be disclosed under Brady. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). All information known to the law enforcement agencies involved in the case is imputed to the prosecution. Ex parte Adams, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989).

Regardless of any defense request, favorable evidence is material, and constitutional error results from its suppression by the prosecution, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). A showing of materiality does not require the defendant to prove by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in an acquittal or a lesser sentence. The question is not whether he more likely than not would have received a different verdict, but whether he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Kyles, 514 U.S. at 434.

2. False And Misleading Testimony And Knowing Misrepresentation Of A Material Fact In Asking A Question

The prosecutor's use of false or misleading testimony violates the Due Process Clause of the United States Constitution. U.S. CONST. amends. V and XIV; Giglio v. United States, 405 U.S. 150, 154 (1972) (conviction reversed because prosecutor used false testimony that key witness would not receive leniency for testimony);

Adams, 768 S.W.2d at 288-89 (habeas relief granted because prosecutor used false testimony that witness identified defendant in a lineup).

The defendant must show that the testimony was false or misleading and was material. However, he need not show that the prosecutor knew that the testimony was false or misleading to obtain relief. Ex parte Chabot, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (habeas relief granted because accomplice witness testified falsely, without prosecutor's knowledge, that he did not sexually assault or harm victim, that he acted under duress, and that he was in another room when she was sexually assaulted and murdered); Estrada v. State, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010) (death sentence reversed because prosecution expert testified falsely that inmates sentenced to life without parole for capital murder could obtain less restrictive prison classification after ten years, which conflicted with testimony of defense expert).

A showing of materiality does not require the defendant to prove that impeachment of the false testimony would have resulted in an acquittal or a conviction for a lesser offense. A conviction must be reversed if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Napue v. Illinois, 360 U.S. 264, 271-72 (1959); United States v. Agurs, 427 U.S. 97, 103 (1976). That materiality standard is equivalent to the harmless-error standard set forth in Chapman v. California, 386 U.S. 18 (1967). Thus, reversal

is required unless the State proves beyond a reasonable doubt that the false testimony did not contribute to the conviction. See United States v. Bagley, 473 U.S. 667, 679-80 & n.9 (1985).

The same principles apply when the prosecutor knowingly misrepresents a material fact while questioning a witness. Cf. Dakin v. State, 632 S.W.2d 864, 866-67 (Tex. App.—Dallas 1982, pet. ref'd) (conviction reversed because the prosecutor attempted to present harmful facts, unsupported by the evidence, in the form of questions).

B. The Suppressed Evidence, False Testimony, And Knowing Misrepresentation Of A Material Fact In Asking A Question.

1. The State presented false and misleading testimony regarding the substance of the CrimeStoppers tip and the identity of the tipster.

Investigator Miller testified at trial that an anonymous caller contacted CrimeStoppers and said that he saw "Brandon," whom he knew, run out of the apartment complex (4 R.R. 62-63). The State deliberately deceived the jury by failing to elicit from Miller that the tipster gave his name; reported that Brandon was alone, and no one else was in the area; went to the HPD Homicide Division to give a statement; and received a substantial reward.[20] If this testimony had been presented, it would have undermined Finnels' testimony that he saw two men run

[20] Miller, who worked for HPD for 33 years and was assigned to the Homicide Division for 24 years, "voluntarily retired" years ago and is not eligible for rehire (9 R.R. 99-100; 1 S.H.C.R. 606-08).

away together.

Applicant presented testimony at the initial habeas hearing that Fredrick Albert contacted CrimeStoppers; gave his name; signed a document waiving anonymity; and said that he saw "Brandon" run out of the apartment complex, and no one else was in the area (4 S.H.R.R. 42-45; 1 S.H.C.R. 616-18). CrimeStoppers provided this information to HPD and sent Albert to the Homicide Division for an interview (4 S.H.R.R. 45, 49; 1 S.H.C.R. 616-18). Albert gave a statement to HPD and said that he would be willing to testify at trial (4 S.H.R.R. 49; 1 S.H.C.R. 609). HPD routinely forwards witness statements to the HCDAO (9 S.H.R.R. 122). However, the State claimed at the hearing that HPD and the HCDAO cannot find Albert's statement (4 S.H.R.R. 10-13; 6 S.H.R.R. 7-8, 12, 17-19).[21]

Sergeant Harris sent a letter to CrimeStoppers on December 8, 2005, that "Fred" had been interviewed and would be a *vital part* of the trial; recommended that "Fred" receive a $7,000 reward; and invited CrimeStoppers to contact Investigator Miller or him if there were any questions (4 S.H.R.R. 45-47; 1 S.H.C.R. 609).[22] CrimeStoppers paid Albert $8,000 for his information in December 2005 (4 S.H.R.R. 50). Neither Miller nor any other HPD officer prepared a supplemental

[21] The only logical conclusion is that HPD, if not both agencies, destroyed Albert's statement so it would not be available to the defense.

[22] Harris was placed on deferred adjudication probation for solicitation of prostitution in the 435th District Court of Montgomery County in 2023 (AX 64).

offense report naming Albert (9 S.H.R.R. 128-29, 132). HPD omitted Albert's name from all documents sent to the HCDAO that were disclosed to defense counsel, and Miller made the false statement in his report that the tipster was "anonymous" (7 S.H.R.R. 97; 1 S.H.C.R. 597). Miller omitted from his report and trial testimony that Albert told CrimeStoppers that, when Brandon ran out of the apartment complex, no one else was in the area (4 S.H.R.R. 62-63; 1 S.H.C.R. 597).

Thus, the State suppressed Albert's name, his statement to CrimeStoppers that Brandon was alone when he ran out of the complex, and his statement to HPD. The State also presented Investigator Miller's false testimony that the tipster was anonymous and his misleading testimony regarding the substance of the tip. This egregious misconduct demonstrates that HPD and the HCDAO will do whatever it takes to deceive the defense and the jury to avenge the murder of a police officer.

2. The State presented false and misleading testimony that the result of the DNA testing on the do-rag worn by the killer was "negative."

Marc Brown asked Sergeant Harris on direct examination whether the result of the DNA analysis on the do-rag was "positive or negative." Harris responded, "Negative" (3 R.R. 167). *That testimony was patently false and misleading.* Neither Brown nor defense counsel presented additional testimony about the DNA. The jury was left with the false impression that *no DNA* was found on the do-rag.

Testimony at the habeas hearing established that HPD received a lab report from Identigene in December 2005 that a full male DNA profile had been developed

from the do-rag that did not match applicant, Zachary, or Officer DeLeon (4 S.H.R.R. 80-82; 1 S.H.C.R. 316-20). When Buchanan told Goodhart and Marc Brown in February 2006 that applicant said that he lost his do-rag as he fled, they should have known that he was lying based on the Identigene report. Nonetheless, Brown argued to the jury that applicant lost his do-rag as he fled (6 R.R. 50).

Marc Brown testified at the habeas hearing that he intended to leave the jury with the impression that the do-rag belonged to applicant (4 S.H.R.R. 90). Brown was able to create this false impression by failing to present testimony that another male's DNA was found on the do-rag. Defense counsel did not correct this false impression.

After the testimony at the habeas hearing concluded, HPD disclosed to undersigned counsel a "to do" list made by an unidentified HPD officer that contained the notation, "Identify who owned the do-rag after sending the male profile to CODIS ..." (2 S.H.C.R. 3-4). However, neither HPD nor the HCDAO requested a CODIS search (4 S.H.R.R. 17-18, 83; 6 S.H.R.R. 7).

Applicant repeatedly requested a CODIS search throughout the habeas hearing, but the State refused, and the trial court would not order it (4 S.H.R.R. 17-24; 5 S.H.R.R. 10-21; 8 S.H.R.R. 6-20). Undersigned counsel eventually persuaded the CIU to request a CODIS search. However, the DNA profile was not uploaded into the CODIS database before the habeas hearing concluded. Five days after the

profile was uploaded, there was a match to the Known Suspect. His DNA profile was not in the CODIS database at the time of applicant's trial in 2006, but it was uploaded in 2007 after he was arrested in Houston for robbery (1 S.H.C.R. 800-837, 842-43). There would have been a CODIS match in 2007 if HPD or the HCDAO had requested a CODIS search before applicant's trial instead of waiting until 2020.

Thus, the State elicited Sergeant Harris' false and misleading testimony that the do-rag was "negative" for DNA when, in fact, it contained a full male DNA profile that, once it was uploaded into the CODIS database 15 years later, matched the Known Suspect.

3. The State failed to disclose to the defense that it reduced the plea bargain offer on Michael Buchanan's habitual offender charge from 40 years to two years after he agreed to testify against applicant and presented his false testimony that his plea bargain was unrelated to his cooperation.

Buchanan testified at trial that he was facing 25 years to life in prison as a habitual offender and had been in jail about nine months when he wrote the letter offering to testify against applicant (2 R.R. 115-19). Buchanan asked the prosecutors to speak to his lawyer because he did not have good representation (2 R.R. 119-20). After the lawyers spoke, Buchanan agreed to testify, pled guilty and was sentenced to two years in prison (2 R.R. 115-16, 121-22). Goodhart elicited that the prosecutors did not promise Buchanan a benefit in exchange for his testimony (2 R.R. 123). Thereafter, Goodhart argued to the jury, "Did Buchanan get

a deal? We didn't cut him a deal" (6 R.R. 14).

Applicant testified at the initial habeas hearing that he and defense counsel discussed the information contained in the State's file before trial (7 S.H.R.R. 41-42). Buchanan (then age 40) befriended applicant (then age 18) in the jail and said that he was an experienced jailhouse lawyer who could help with applicant's case (11 S.H.R.R. 58-59). Applicant did not realize that Buchanan wanted information about his case in order to contact the State and offer to testify that applicant confessed to the murder in an effort to obtain leniency on his own pending habitual offender charge (11 S.H.R.R. 61). Applicant told Buchanan what his lawyer had told him about the evidence (11 H.R.R. 60, 70-74).[23] Applicant asked Buchanan whether DNA could be obtained from a broken watch crystal and a do-rag because he wanted to know whether DNA testing could establish his innocence by showing that another person was wearing these items (11 S.H.R.R. 74-75).

Applicant also presented testimony at the initial habeas hearing that, when Buchanan wrote the letter to the HCDAO and met with Goodhart and Marc Brown, the State's plea bargain offer was 40 years in prison (6 S.H.R.R. 58; 1 S.H.C.R. 133, 568-94). The State did not disclose to the defense, and defense counsel did not discover, that the offer was 40 years before Buchanan agreed to testify (8 S.H.R.R.

[23] Applicant acknowledged at the habeas hearing that he testified falsely at trial that he did not give Buchanan information about the case (11 S.H.R.R. 76).

39-44). The State reduced the charge of burglary "with intent to commit sexual assault" to burglary "with intent to commit assault"; waived the habitual offender enhancement; and, two months before Buchanan testified against applicant, Buchanan pled guilty and was sentenced to two years in prison (4 S.H.R.R. 129-30 133-35, 139-40; 1 S.H.C.R. 134). Goodhart lied during his closing argument in denying that Buchanan got a deal as a result of his cooperation.

Thus, the State failed to disclose that Buchanan received a benefit in exchange for his cooperation and presented his false testimony that he did not receive a benefit.

4. The State failed to disclose to the defense that it dismissed Calvin Finnels' misdemeanor theft charge the day before applicant's trial started.

Finnels was charged with misdemeanor theft on February 2, 2006 (6 S.H.R.R. 108; 1 S.H.C.R. 173-75). He was not arrested, did not post bond, and the charge was dismissed because of "insufficient evidence" on December 7, 2006—the day before applicant's trial started (1 R.R. 1; 6 S.H.R.R. 108-10; 1 S.H.C.R. 173-75). The State failed to disclose that Finnels had a theft charge that was dismissed the day before applicant's trial started (8 S.H.R.R. 81).

5. Prosecutor Craig Goodhart misrepresented a material fact in asking applicant why his cellphone records show that he was in Houston on the day of the murder when Goodhart knew that the records did not show that.

Defense counsel asserted in his opening statement that he would show that applicant's cellphone was in Beaumont on the day of the murder (2 R.R. 17). Neither

the State nor the defense offered applicant's cellphone records, although they were in the State's file (7 S.H.R.R. 106-09).

Applicant testified on direct examination that he was in Beaumont at the time of the murder and did not shoot Officer DeLeon (5 R.R. 38, 48-49). Goodhart asked on cross-examination, "Now, you said you hadn't been to Houston. Do you have any idea why your cellphone records show you were in Houston the day of the killing?" (5 R.R. 72). Applicant responded, "My phone was guaranteed not to show no Houston calls." Defense counsel did not offer the cellphone records or call the officer who analyzed them to corroborate applicant's testimony. Marc Brown argued to the jury that defense counsel did not keep his promise to offer applicant's cellphone records, but the State kept its promises (6 R.R. 46).

Applicant presented testimony at the initial habeas hearing that his cellphone records show that he was in Beaumont, rather than in Houston, on the day of the murder (4 S.H.R.R. 107-09; 7 S.H.R.R. 107-08; 8 S.H.R.R. 27; 1 S.H.C.R. 176-95). The State could not produce any records showing that applicant's cellphone was in Houston on the day of the murder (4 S.H.R.R. 15-16). To the contrary, the offense report contained a timeline tracking the locations of applicant's cellphone on the day of the murder which reflects that the cellphone "hits I-10 Walden Road Tower at

12:10 a.m." (4 S.H.R.R. 107; 1 S.H.C.R. 176).[24] The murder occurred about 2:30 a.m. in Houston (2 R.R. 45). The next call hit the same tower at 9:35 a.m. (1 S.H.C.R. 176). After the testimony at the habeas hearing concluded, HPD disclosed to undersigned counsel a report (that was not in the State's file) that contained an officer's notation, "Not even phone places suspect near murder scene" (2 S.H.C.R. 3-4).

Goodhart and Marc Brown testified at the initial habeas hearing that a prosecutor can properly misrepresent in a question to the defendant that the State has evidence that it does not have in an attempt to bluff him into confessing and, thereafter, not correct the misrepresentation (4 S.H.R.R. 111-15; 10 S.H.R.R. 97-104).[25] Goodhart deliberately misled the jury by misrepresenting in a question that applicant's cellphone records show that he was in Houston on the day of the murder. After applicant testified that this was not possible, Goodhart doubled down by failing to correct that misrepresentation. Marc Brown continued this charade by suggesting during his closing argument that, because defense counsel did not offer applicant's cellphone records, the phone was in Houston on the day of the murder even though Brown knew that was false (4 S.H.R.R. 107-08). Goodhart's misrepresentation that

[24] Walden Road Tower is in Beaumont (1 S.H.C.R. 177-78).

[25] It was a sad day for the judiciary when Marc Brown—formerly an appellate court judge and presently a visiting district judge—testified that it is acceptable for a prosecutor to lie while cross-examining the defendant and thereby mislead the jury.

the State had incriminating evidence that it did not have, which he thereafter failed to correct, undermined applicant's testimony that he was in Beaumont at the time of the murder and denied him a fair trial.[26]

C. The Suppressed Evidence, False And Misleading Testimony, And Knowing Misrepresentation Of A Material Fact In Asking A Question, Considered Collectively, Were Material.

The cumulative effect of the suppressed evidence, the false and misleading testimony, and knowing misrepresentation of a material fact in asking a question should undermine the Court's confidence in the conviction. The jury did not know that Albert (who was falsely described in the testimony and offense report as an "anonymous caller") informed CrimeStoppers that he saw Brandon run out of the apartment complex alone, with no one else in the area; that the State conferred benefits on Buchanan and Finnels as a result of their cooperation; that applicant's cellphone records show that his phone was in Beaumont, rather than in Houston, on the day of the murder; and that another black male's DNA was on the do-rag (which shows that Buchanan gave false testimony that applicant confessed that he committed the murder and lost his do-rag and watch as he fled and that Finnels made

[26] Goodhart's wife, Paula, previously was a county criminal court at law judge in Harris County and presently is the judge of County Criminal Court at Law Number 2. Judge Ritchie had good reason not to rule on the merits of applicant's claims, as Marc Brown is a fellow judge and both he and Goodhart are married to judges. Judge Ritchie, by protecting the trial prosecutors, assured that Judge Susan Brown would not blacklist him from serving as a visiting judge after he retired. As it happened, she frequently appointed him to serve as a visiting judge from the time he retired until shortly before he died (AX 65).

a mistaken identification). There is a reasonable probability that, but for this egregious prosecutorial misconduct, the jury would have acquitted applicant or at least deadlocked. Applicant is entitled to a new trial.

GROUND FOUR

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE STAGE.

A. The Standard Of Review

The defendant has a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; Strickland v. Washington, 466 U.S. 668 (1984). Counsel must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759, 771 (1970).

In Strickland, the Supreme Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient under prevailing professional norms. Strickland, 466 U.S. at 687-88. The defendant also must show that counsel's deficient performance prejudiced the defense by depriving him of a fair trial with a reliable result. Id. at 687.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Strickland, 466 U.S. at 690. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of

professionally competent assistance. Id. Ultimately, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Strickland requires a cumulative prejudice analysis. White v. Thaler, 610 F.3d 890, 912 (5th Cir. 2010); cf. Kyles v. Whitley, 514 U.S. 419, 434, 436-37 (1995) (court assessing Brady claim must engage in "cumulative" analysis of "materiality," which is identical to Strickland "prejudice"). A reasonable probability is *less* than a preponderance of the evidence. United States v. Dominguez Benitez, 542 U.S. 74, 82 n.9 (2004) ("The reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different.").

The defendant need not show a reasonable probability that, but for counsel's errors, he would have been acquitted. A reasonable probability of any different outcome—including a deadlocked jury—is sufficient. Cf. Turner v. United States, 582 U.S. 313, 331 (2017) (Kagan, J., dissenting) (stating that both the majority and the dissent "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—i.e., an acquittal or hung jury rather than a

conviction."); see also Cabberiza v. Moore, 217 F.3d 1329, 1334 (11th Cir. 2000) (stating that the "record in this case is devoid of evidence that 'show[s] there is a reasonable probability' that an acquittal *or hung jury* would have resulted had petitioner's counsel" not performed deficiently) (emphasis added); Cravens v. State, 50 S.W.3d 290, 298 (Mo. App. 2001) ("We are persuaded there exists a reasonable probability that the outcome may have been changed, i.e., acquittal, *hung jury*, or conviction of the lesser offense.") (emphasis added).

B. Deficient Performance

1. Counsel failed to discover and present testimony regarding the complete CrimeStoppers tip and the name of the tipster.

Investigator Miller testified at trial that an anonymous caller contacted CrimeStoppers and said that he saw "Brandon," whom he knew, run out of the apartment complex (4 R.R. 62-63). The State deliberately deceived the jury by failing to elicit from Miller that the tipster gave his name; reported that Brandon was alone, and no one else was in the area; went to the HPD Homicide Division to give a statement; and received a substantial reward. Defense counsel should have presented this testimony to undermine Finnels' testimony that he saw two men run away together.

Applicant presented testimony at the initial habeas hearing that Albert contacted CrimeStoppers, gave his name, signed a document waiving anonymity, and said that he saw "Brandon" run out of the apartment complex, and no one else

was in the area (4 S.H.R.R. 42-45; 1 S.H.C.R. 616-18). CrimeStoppers provided this information to HPD and sent Albert to the Homicide Division for an interview (4 S.H.R.R. 45, 49; 1 S.H.C.R. 616-18). Albert gave a statement to HPD and said that he would be willing to testify at trial (4 S.H.R.R. 49; 1 S.H.C.R. 609). HPD routinely forwards witness statements to the HCDAO (9 S.H.R.R. 122). However, the State claimed at the hearing that HPD and the HCDAO cannot find Albert's statement (4 S.H.R.R. 10-13; 6 S.H.R.R. 7-8, 12, 17-19).

Sergeant Harris sent a letter to CrimeStoppers on December 8, 2005, that "Fred" had been interviewed and would be a *vital part* of the trial; recommended that "Fred" receive a $7,000 reward; and invited CrimeStoppers to contact Investigator Miller or him if there were any questions (4 S.H.R.R. 45-47; 1 H.C.R. 609). CrimeStoppers paid Albert $8,000 for his information in December of 2005 (4 S.H.R.R. 50). Neither Miller nor any other HPD officer prepared a supplemental offense report naming Albert (9 S.H.R.R. 128-29, 132). HPD omitted Albert's name from all documents sent to the HCDAO that were disclosed to defense counsel, and Miller made the false statement in his report that the tipster was "anonymous" (7 S.H.R.R. 97; 1 S.H.C.R. 597). Miller omitted from his report and trial testimony that Albert told CrimeStoppers that, when Brandon ran out of the apartment complex, no one else was in the area (4 S.H.R.R. 62-63; 1 S.H.C.R. 597).

Defense counsel testified at the initial habeas hearing that he did not know

that the tipster gave his name; signed a waiver of anonymity; reported that Brandon was alone, and no one else was in the area; and received $8,000 for his information (7 S.H.R.R 87-89, 93). If counsel had known this, he would have impeached Investigator Miller and attempted to call Albert to testify (7 S.H.R.R. 89, 93). Counsel acknowledged that he did not consider filing a motion requesting that the State disclose the recipient of the reward but that he should have done so (7 S.H.R.R. 94-95). Counsel believed that HPD omitted the tipster's name from the offense report to keep the defense from learning his identity and calling him to testify—especially in a case involving the murder of a police officer—because counsel had seen this happen other cases (7 S.H.R.R. 98-99).

Defense counsel could have discovered this evidence before trial—as undersigned counsel did during the habeas investigation—if he had been diligent. Thus, he performed deficiently by failing to discover and present testimony regarding the complete CrimeStoppers tip and the name of the tipster to enable him to impeach Investigator Miller and, if necessary, call Albert to testify.

2. Counsel failed to present testimony that a full male DNA profile was developed from the do-rag worn by the killer that did not match applicant, Brandon Zachary, or Officer Reuben DeLeon and failed to request a CODIS search.

Marc Brown asked Sergeant Harris on direct examination whether the result of the DNA analysis on the do-rag was "positive or negative." Harris responded, "Negative" (3 R.R. 167). That testimony was patently false and misleading.

Defense counsel did not present any testimony about the DNA. The jury was left with the false impression that no DNA was found on the do-rag.

Testimony at the habeas hearing established that HPD received the Identigene report in December 2005 that a full male DNA profile had been developed from the do-rag that did not match applicant, Zachary, or Officer DeLeon (4 S.H.R.R. 80-82; 1 S.H.C.R. 316-20). When Buchanan told Goodhart and Marc Brown in February 2006 that applicant said that he lost his do-rag as he fled, they should have known that he was lying based on the Identigene report. Nonetheless, Brown argued to the jury that applicant lost his do-rag as he fled (6 R.R. 50).

Marc Brown testified at the habeas hearing that he intended to leave the jury with the impression that the do-rag belonged to applicant (4 S.H.R.R. 90). Brown was able to create this false impression by failing to present testimony that another male's DNA was found on the do-rag. Defense counsel did not correct this false impression.

After the testimony at the habeas hearing concluded, HPD disclosed to undersigned counsel a "to do" list made by an unidentified HPD officer that contained the notation, "Identify who owned the do-rag after sending the male profile to CODIS ..." (2 H.C.R. 3-4). However, neither HPD nor the HCDAO requested a CODIS search (4 S.H.R.R. 17-18, 83; 6 S.R.R. 7).

Applicant repeatedly requested a CODIS search throughout the habeas

hearing, but the State refused, and the trial court would not order it (4 S.H.R.R. 17-24; 5 S.H.R.R. 10-21; 8 S.H.R.R. 6-20). Undersigned counsel eventually persuaded the CIU to request a CODIS search. However, the DNA profile was not uploaded into the CODIS database before the habeas hearing concluded. Five days after the profile was uploaded, there was a match to the Known Suspect. His DNA profile was not in the CODIS database at the time of applicant's trial in 2006, but it was uploaded in 2007 after he was arrested in Houston for robbery (1 H.C.R. 800-37, 842-43). There would have been a CODIS match in 2007 if HPD or the HCDAO had requested a CODIS search before applicant's trial instead of waiting until 2020.

Defense counsel testified at the initial habeas hearing that he did not request a CODIS search because he was "ecstatic" that applicant "had nothing to do with that rag" (7 S.H.R.R. 66). However, he failed to present testimony to that effect to the jury and failed to argue that the DNA testing not only excluded applicant but also implicated an unidentified black male (7 S.H.R.R. 75-79).

Thus, defense counsel performed deficiently by failing to present testimony that the do-rag contained a full male DNA profile that did not match applicant, Zachary, or Officer DeLeon. If counsel had presented this testimony, he would have impeached Sergeant Harris' testimony that the do-rag was "negative" for DNA; demonstrated that Buchanan gave false testimony that applicant confessed that he committed the murder and lost his do-rag and watch as he fled; and that Finnels

made a mistaken identification.

3. Counsel failed to discover and present testimony that the State reduced the plea bargain offer on Michael Buchanan's habitual offender charge from 40 years to two years after he agreed to testify against applicant.

Buchanan testified at trial that he was facing 25 years to life in prison as a habitual offender and had been in jail about nine months when he wrote the letter offering to testify against applicant (2 R.R. 115-19). Buchanan asked the prosecutors to speak to his lawyer because he did not have good representation (2 R.R. 119-20). After the lawyers spoke, Buchanan agreed to testify, pled guilty, and was sentenced to two years in prison (2 R.R. 115-16, 121-22). Goodhart elicited that the prosecutors did not promise Buchanan a benefit in exchange for his testimony (2 R.R. 123). Thereafter, Goodhart argued to the jury, "Did Buchanan get a deal? We didn't cut him a deal" (6 R.R. 14).

Applicant testified at the initial habeas hearing that he and defense counsel discussed the information contained in the State's file before trial (7 S.H.R.R. 41-42). Buchanan (then age 40) befriended applicant (then age 18) in the jail and said that he was an experienced jailhouse lawyer who could help with applicant's case (11 S.H.R.R. 58-60). Applicant did not realize that Buchanan wanted information about his case in order to contact the State and offer to testify that applicant confessed to the murder in an effort to obtain leniency on his own pending habitual offender charge (11 S.H.R.R. 61). Applicant told Buchanan what his lawyer told

him about the evidence (11 S.H.R.R. 60, 70-74).[27] Applicant asked Buchanan whether DNA could be obtained from a broken watch crystal and a do-rag because he wanted to know whether DNA testing could establish his innocence by showing that another person was wearing these items (11 S.H.R.R. 74-75).

Applicant also presented testimony at the initial habeas hearing that, when Buchanan wrote the letter to the HCDAO and met with Goodhart and Brown, the State's plea bargain offer was 40 years in prison (6 S.H.R.R. 58; 1 S.H.C.R. 133, 568-94). The State did not disclose to the defense, and defense counsel did not discover, that the offer was 40 years before Buchanan agreed to testify (8 S.H.R.R. 39-44). The State reduced the charge of burglary "with intent to commit sexual assault" to burglary "with intent to commit assault"; waived the habitual offender enhancement; and, two months before Buchanan testified against applicant, he pled guilty and was sentenced to two years in prison (4 S.H.R.R. 129-30 133-35, 139-40; 1 S.H.C.R. 134). Goodhart lied during his closing argument in denying that Buchanan got a deal as a result of his cooperation.

Defense counsel testified at the initial habeas hearing that he did not subpoena the State's file on Buchanan's burglary case (which contained a notation on the cover that the initial plea bargain offer was 40 years in prison); that he should have done

[27] Applicant acknowledged at the habeas hearing that he testified falsely at trial that he did not give Buchanan information about the case (11 S.H.R.R. 76).

so; that he would have presented testimony about the 40-year-offer; and that he would have argued that Buchanan lied in denying that he had a deal (8 S.H.R.R. 39-45).[28]

Thus, defense counsel performed deficiently by failing to discover and present testimony that the State reduced the plea bargain offer on Buchanan's habitual offender charge from 40 years to two years after he agreed to testify against applicant.

4. Counsel failed to discover and present testimony that the State dismissed Calvin Finnels' misdemeanor theft charge the day before applicant's trial started.

Finnels was charged with misdemeanor theft on February 2, 2006 (6 S.H.R.R. 108; 1 S.H.C.R. 173-75). He was not arrested, did not post bond, and the charge was dismissed because of "insufficient evidence" on December 7, 2006—the day before applicant's trial started (1 R.R. 1; 6 S.H.R.R. 108-10; 1 S.H.C.R. 173-75).

Defense counsel testified at the initial habeas hearing that the State failed to disclose, and he did not discover, that Finnels had an open warrant on a theft charge that was dismissed the day before applicant's trial started (8 S.H.R.R. 72, 81). If he had known this, he would have elicited it to show Finnels' bias (8 S.H.R.R. 80-81).

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[28] Defense counsel testified at the initial habeas hearing that he knew at the time of trial how an experienced jail inmate will pump a young inmate for information about his case under the guise that he knows more than the inmate's lawyer and wants to help; and, after obtaining information, will manufacture a false confession to obtain a deal (8 S.H.R.R. 45-46). Counsel acknowledged that Buchanan testified about matters that counsel had disclosed to applicant after counsel read the State's file (8 S.H.R.R. 47-48).

Thus, counsel performed deficiently by failing to discover and present testimony regarding the existence and timing of the dismissed charge.

5. Counsel failed to discover and present evidence that would have cast doubt on Calvin Finnels' ability to identify a black male on the ground from his second-story balcony in the dark at a distance.

Finnels testified at trial that he was talking on the phone on the second-story balcony of his apartment between 2:30 a.m. and 3:00 a.m. when he saw two black men enter the building across the parking lot, heard a gunshot, and ducked as they ran away (4 R.R. 104-07, 110-12). He positively identified Zachary and applicant in photospreads and lineups and also identified applicant before the jury (4 R.R. 66-68, 77-84, 112-14, 116-20).

The State presented testimony at the initial habeas hearing that Investigator Miller and Sergeant Harris sent a crime scene officer to the apartment complex after dark on November 28, 2005, to take photos from the balcony of Finnels' apartment to show the view and the lighting conditions (12 S.H.R.R. 76-87, 100). The State did not offer any of those photos at trial (12 S.H.R.R. 99-100; 1 S.H.C.R. 162-70). Clearly, the State would have offered the photos if the prosecutors had believed that they supported that Finnels could make a reliable identification of a black male on the ground from his balcony in the dark at that distance.

Applicant presented at the initial habeas hearing a private investigator's testimony that it is unlikely that a person on that balcony could identify a black male

on the ground in the dark at that distance and a videorecording that the investigator made depicting the view from that balcony of a black male on the ground at night (5 S.H.R.R. 52-53, 56-57, 61-62).

Defense counsel testified at the initial habeas hearing that he went to the apartment complex during daylight and concluded that Finnels could not have made a reliable identification from his balcony (8 S.H.R.R. 64-65, 68, 87-88; 9 S.H.R.R. 69-70). Counsel never saw the photos that an HPD officer took at night (8 S.H.R.R. 67). Counsel did not present testimony, a videorecording, or photos depicting the view from Finnels' balcony at night.

Thus, counsel performed deficiently by failing to go to the apartment complex at night, make a videorecording, take photos, and offer those photos or the HPD photos to cast doubt on Finnels' ability to identify two black men (who were strangers to him) from his second-story balcony in the dark at that distance (8 S.H.R.R. 68-69; 1 S.H.C.R. 162-72).

6. Counsel failed to present evidence that applicant's cellphone records do not show that he was in Houston on the day of the murder.

Defense counsel asserted in his opening statement that he would show that applicant's cellphone was in Beaumont on the day of the murder (2 R.R. 17). Neither the State nor the defense offered applicant's cellphone records, although they were in the State's file (7 S.H.R.R. 106-09).

Applicant testified on direct examination that he was in Beaumont at the time of the murder and did not shoot Officer DeLeon (5 R.R. 38, 48-49). Goodhart asked on cross-examination, "Now, you said you hadn't been to Houston. Do you have any idea why your cellphone records show you were in Houston the day of the killing?" (5 R.R. 72). Applicant responded, "My phone was guaranteed not to show no Houston calls." Defense counsel did not offer the cellphone records or call the officer who analyzed them to corroborate applicant's testimony. Marc Brown argued to the jury that defense counsel did not keep his promise to offer applicant's cellphone records, but the State had kept its promises (6 R.R. 46).

Applicant presented testimony at the initial habeas hearing that his cellphone records show that he was in Beaumont, rather than in Houston, on the day of the murder (4 S.H.R.R. 107-09; 7 S.H.R.R. 107-08; 8 S.H.R.R. 27; 1 S.H.C.R. 176-95). The State could not produce any records showing that applicant's cellphone was in Houston on the day of the murder (4 S.H.R.R. 15-16). To the contrary, the offense report contained a timeline tracking the locations of applicant's cellphone on the day of the murder which reflects that the cellphone "hits I-10 Walden Road Tower at 12:10 a.m." (4 S.H.R.R. 107; 1 S.H.C.R. 176).[29] The murder occurred about 2:30 a.m. in Houston (2 R.R. 45). The next call hit the same tower at 9:35 a.m. (1 S.H.C.R. 176). After the testimony at the habeas hearing concluded, HPD disclosed

[29] Walden Road Tower is in Beaumont (1 S.H.C.R. 177-78).

to undersigned counsel a report (that was not in the State's file) that contained an officer's notation, "Not even phone places suspect near murder scene" (2 S.H.C.R. 3-4).

Defense counsel testified at the initial habeas hearing that he forgot to offer applicant's cellphone records during his case because he was upset and angry that the prosecutors had failed to disclose a letter that applicant wrote from the jail that Goodhart used to impeach applicant (7 S.H.R.R. 111-15; 8 S.H.R.R. 23). However, counsel acknowledged that he could have cross-examined an officer about the location of applicant's cellphone before he became upset and angry (8 S.H.R.R. 23-24).

Thus, counsel performed deficiently by failing to object that Goodhart's question assumed a fact not in evidence (the location of applicant's cellphone) and by failing to present evidence that applicant's cellphone was not in Houston on the day of the murder (8 S.H.R.R. 27-29, 31-34). If counsel had presented this evidence, Goodhart could not have misled the jury by asking applicant why records show that his cellphone was in Houston on the day of the murder.

7. Counsel informed the jury in his opening statement that co-defendant Brandon Zachary had implicated applicant to the police.

Defense counsel asserted in his opening statement that Zachary had implicated applicant to the police but would testify and exonerate him (2 R.R. 17-18). After the State rested, Zachary's lawyer refused to allow Zachary to testify (4

R.R. 152-53). The prosecutors argued to the jury that defense counsel promised that Zachary would exonerate applicant, but Zachary did not testify, so counsel did not keep his promises to the jury, but the prosecutors kept their promises (6 R.R. 13-14, 46).

Defense counsel testified at the initial habeas hearing that Zachary's lawyer, Laine Lindsey, informed him before applicant's trial that Lindsey would not allow Zachary to testify (8 S.H.R.R. 113-16). Counsel acknowledged that he could have said in his opening statement that he anticipated that Zachary would testify and exonerate applicant without mentioning that Zachary had implicated applicant to the police (8 S.H.R.R. 117-19).

Thus, counsel performed deficiently by informing the jury during his opening statement that Zachary had implicated applicant to the police. Furthermore, even if Lindsey had allowed Zachary to testify, it would have been unsound strategy for counsel to call Zachary because the State could have impeached him with his prior statement implicating applicant.

8. Counsel presented applicant's testimony that he previously had been arrested for possession of marijuana and trespass, which opened the door to the State eliciting that he was arrested on that occasion with Brandon Zachary.

Applicant testified on direct examination that he previously had been arrested for possession of marijuana and trespass (5 R.R. 100). Goodhart elicited without objection on cross-examination that applicant was arrested with Zachary on that

occasion (5 R.R. 104). Marc Brown argued to the jury that it was a "phenomenal coincidence" that applicant and Zachary previously had been arrested together (6 R.R. 52).

Defense counsel testified at the initial habeas hearing that he knew that applicant and Zachary previously had been arrested together for possession of marijuana and trespass and that evidence of the defendant's prior arrests is not admissible for impeachment (8 S.H.R.R. 120-21). He asserted that he presented this testimony to show applicant's "background" (8 S.H.R.R. 121).

A prosecutor cannot properly impeach a defendant with non-moral turpitude misdemeanor convictions for possession of marijuana and trespass—much less arrests—under Texas Rule of Evidence 609(a)(1). Nor can a prosecutor properly elicit the details of any admissible prior convictions. Mays v. State, 726 S.W.2d 937, 953 (Tex. Crim. App. 1986).

Thus, defense counsel performed deficiently by eliciting applicant's inadmissible prior arrests. This testimony not only undermined applicant's credibility but also opened the door to Goodhart eliciting that applicant was arrested with Zachary on that occasion. See Robertson v. State, 187 S.W.3d 475, 484-85 (Tex. Crim. App. 2006) (conviction reversed because counsel elicited defendant's inadmissible convictions). Eliciting such testimony "can only be evidence of ineffectiveness of counsel," as there is "no logical reason why defense counsel

would want to impeach the credibility of his most important witness ...." Greene v. State, 928 S.W.2d 119, 123 (Tex. App.—San Antonio 1996, no pet.).

C. Counsel's Deficient Performance Resulted In Prejudice.

The State's case consisted of Finnels' identification of applicant from his second-story balcony in the dark at a distance and Buchanan's testimony that applicant confessed to him in jail. By any measure, the State had a weak case. The prosecutors had good reason to believe that the admissible evidence would not persuade a jury beyond a reasonable doubt that applicant was guilty. They overcame those weaknesses by presenting inadmissible, prejudicial testimony without objection. Defense counsel compounded the harm by failing to elicit substantial exculpatory evidence.

Counsel did not object when Goodhart misrepresented that applicant's cellphone records show that he was in Houston on the day of the murder and, thereafter, counsel failed to present testimony or records to show that the cellphone was not in Houston on the day of the murder. Counsel informed the jury that Zachary had implicated applicant to the police. Counsel presented testimony that applicant previously had been arrested for possession of marijuana and trespass, which opened the door to Goodhart eliciting that applicant was arrested on that occasion with Zachary.

Counsel did not discover and present critical exculpatory evidence. Counsel

did not present testimony that, after Buchanan agreed to testify against applicant, the State reduced his burglary of a habitation with intent to commit sexual assault charge to burglary of a habitation with intent to commit assault, waived the habitual offender enhancement, and reduced the plea bargain offer from 40 years to two years. Counsel also did not present testimony that the State dismissed Finnels' misdemeanor theft charge the day before applicant's trial started.

Counsel did not present testimony, a videorecording, or photos to cast doubt on Finnels' ability to identify a black male on the ground from the second-story balcony of his apartment in the dark at a distance. Counsel did not present testimony that the do-rag contained a full male DNA profile that did not match applicant, Zachary, or Officer DeLeon. Counsel did not discover and present testimony that Albert called CrimeStoppers and reported that, when Brandon ran out of the apartment complex, no one else was in the area.

If the jury had not heard the inadmissible testimony and had heard the exculpatory evidence that counsel failed to present, there is a reasonable probability that it would have acquitted applicant or at least deadlocked. If the court had overruled objections to any of the inadmissible testimony, there is a reasonable probability that an appellate court would have reversed any conviction. No court could have confidence in this conviction. Applicant is entitled to a new trial.

GROUND FIVE

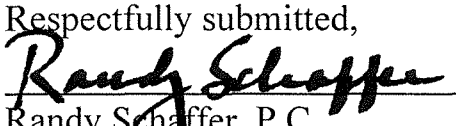
THE CUMULATIVE PREJUDICE RESULTING FROM THE PROSECUTORIAL MISCONDUCT AND TRIAL COUNSEL'S DEFICIENT PERFORMANCE REQUIRES A NEW TRIAL.

If the court concludes that the prosecutorial misconduct was not material and that trial counsel's deficient performance did not result in prejudice, the court should consider their cumulative effect and grant a new trial. See Derden v. McNeel, 978 F.2d 1453, 1456, n. 5 (5th Cir. 1992) (en banc). A reviewing court must determine whether the errors, considered collectively, "more likely than not caused a suspect verdict." Derden, 978 F.2d at 1458; see also, Kyles v. Whitley, 5 F.3d 806, 831 (5th Cir. 1993) (King, J., dissenting) ("I believe that the only appropriate way to analyze Kyles' case is to consider his ineffectiveness and Brady claims in conjunction. After all, the 'materiality' prong of his Brady claim in a significant way directly relates to the 'prejudice' prong of his ineffectiveness claim, and vice versa."), rev'd, 514 U.S. 419 (1995).

CONCLUSION

Applicant requests that the court conduct a hearing, make findings of fact and conclusions of law, and recommend a new trial.

Respectfully submitted,



Randy Schaffer, P.C.
State Bar No. 17724500

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@schafferfirm.com

Attorney for Applicant
ANTOIN DENEIL MARSHAL

CERTIFICATE OF COMPLIANCE

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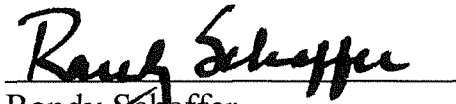
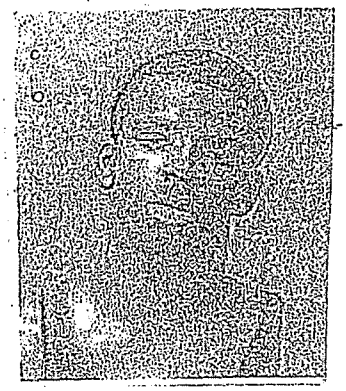


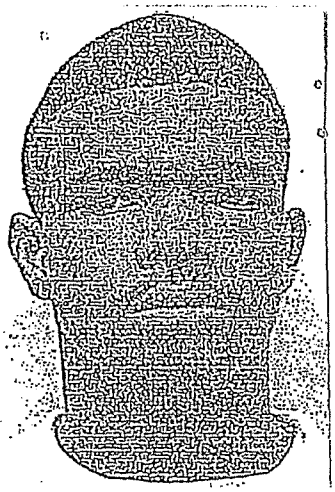
Randy Schaffer

APPENDIX

mugshots of applicant and the known suspect



The Real Killer



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