

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

EX PARTE

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NO. WR-56,666-03

DENNIS LEE ALLEN

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

EX PARTE

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NO. WR-82,467-01

STANLEY ORSON MOZEE

WRIT NO. W00-01305-FR(B)  
CAUSE NO. F00-01305-R

EX PARTE

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IN THE DISTRICT COURT  
265TH JUDICIAL DISTRICT  
DALLAS COUNTY, TEXAS

DENNIS LEE ALLEN

WRIT NO. W99-02631-R(A)  
CAUSE NO. F99-02631-R

EX PARTE

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IN THE DISTRICT COURT  
265TH JUDICIAL DISTRICT  
DALLAS COUNTY, TEXAS

STANLEY ORSON MOZEE

AGREED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON APPLICANTS' AMENDED WRITS OF HABEAS CORPUS

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## I.

### INTRODUCTION

Presently pending before this Court are amended Applications for a Writ of Habeas Corpus, which the Court of Criminal Appeals remanded to this Court for additional consideration and findings by orders dated September 14, 2016. Specifically, this Court now has pending before it Applicant Mozee's Second Amended Application for a Writ of Habeas Corpus dated November 18, 2015, and Applicant Allen's Third Amended Application for a Writ of Habeas Corpus dated December 28, 2016.

This Court (the Hon. Everett Young, sitting by assignment) was assigned to preside over these cases by assignment of the Presiding Judge of the First Administrative Judicial Region by order dated December 8, 2016. Since being assigned to these cases, the Court has spent considerable time reviewing the extensive pleadings, exhibits, and transcripts in this matter, both regarding Applicants' original trials and the post-conviction record developed by the parties before the various district judges who had previously presided over these applications. This record includes extensive testimony by the former trial prosecutor taken at a hearing held in the District Court in October 26-27, 2015, as well as numerous documents from the prosecutor's original trial file that were submitted as exhibits at that hearing. The court has also conferenced with counsel

for both parties to discuss the various legal claims and the state of the evidentiary record in light of the Court of Criminal Appeals' remand order and the proceedings held to date.

Having considered the entire record, and the applicable legal authorities pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court agrees with counsel for both Applicants and the State that the existing record provides substantial and compelling evidence that Applicant's due process rights were violated. Accordingly, this Court FINDS that habeas relief should be granted to both applicants under the Due Process Clause of the United States and Texas Constitutions.

The Court hereby makes the following Findings of Fact and Conclusions of Law with respect to Grounds Three, Four, Six and Nine<sup>1</sup> of Applicant Allen's Amended Writ and Grounds Three and Five of Applicant Mozee's Amended Writ.<sup>2</sup> Specifically, the Court FINDS that as to both Applicants, there exists compelling documentary and testimonial evidence that the trial prosecutor (1) knowingly

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<sup>1</sup> In Applicant Allen's Third Amended Application, he inadvertently listed two separate grounds as Ground Nine. The court's reference in these Findings to Allen's Ground Nine is to the Second Ground Nine which states, "The state suppressed exculpatory evidence that an eyewitness picked out a picture of someone other than Allen."

<sup>2</sup> Given the close interrelationship between the two cases – including the unified police investigation and prosecution that led to their convictions, the State's theory that the two men acted in concert to commit the robbery-murder, and the overlap between the witnesses and evidence used against each Applicant at his trial – the Court believes that these Findings are best understood when discussed jointly as to both Applicants, rather than in separate Findings.

presented and/or failed to correct false testimony at trial, (2) failed to disclose benefits, promises, agreements, and/or understandings between the State and least four informant witnesses who had pending criminal charges and/or convictions in Dallas County for which they sought and received the State's assistance, as well as correspondence and notes in the prosecutor's own file relating to those pretrial discussions and benefits, and (3) failed to disclose favorable eyewitness evidence.

Consistent with the original remand order by the Court of Criminal Appeals dated February 4, 2015, which instructed the District Court to provide the former trial prosecutor with an opportunity to respond to the *Brady* claims presented, this Court emphasizes that all of the issues and claims addressed in the instant Findings are ones which the former trial prosecutor, Rick Jackson, thoroughly addressed in his testimony in these writ proceedings. Jackson was given an opportunity well in advance of the hearing to review the Reporter's Records from both trials and the State's file (including his extensive personal notes). He testified at great length regarding his recollections (if any) of the trials, the relevant facts, his interpretations of the record, and what he stated would have been his standard practices at that time even if he did not presently recall certain aspects of what he actually did in these cases. Jackson was also questioned about what he understood to be his legal obligations as a prosecutor under the Due Process Clause. This Court FINDS that Jackson has had a full and fair opportunity to testify as to all of the issues addressed

in these Findings, and the Court has a complete record upon which it may resolve the due process claims as set forth below.

## II.

### PROCEDURAL HISTORY

Applicant Stanley Orson Mozee was convicted by a Dallas County jury of capital murder and sentenced to life imprisonment on August 2, 2000. Applicant Dennis Lee Allen was convicted by a Dallas County jury of capital murder and sentenced to life imprisonment one month later, on September 1, 2000. Both Applicants were alleged by the State to have acted in concert to commit the robbery-murder of the Rev. Jesse Borns, Jr., a Dallas shopkeeper who was found stabbed to death in his place of business on April 7, 1999. Both Applicants maintained their actual innocence of the crime at trial and continue to do so to this day.

On December 14, 2001, Mozee's conviction was affirmed by the Fifth District Court of Appeals in Cause No. 05-00-01260-CR. On July 11, 2002, Allen's conviction was affirmed by the Eighth District Court of Appeals in Cause No. 08-00-00442-CR.

Mozee has not filed a prior application for a writ of habeas corpus. Allen filed one prior application for a writ of habeas corpus, which was denied on November 12, 2003.

On September 11, 2014, both Applicants filed new Applications for Writs of Habeas Corpus, along with a Joint Memorandum of Law. The Applicants raised numerous grounds for relief in their original applications, including that new DNA testing on blood evidence from the crime scene established their actual innocence when viewed in light of the record as a whole (Ground One), and that by a preponderance of the evidence, the same advanced DNA testing established that they would not have been convicted at trial had the jury heard the evidence, pursuant to art. 11.073. See Joint Mem. of Law filed 9/11/15 at 64-84. The Applicants also raised numerous grounds for relief alleging multiple violations of the Due Process Clause, which the parties have continued to investigate and develop since the original Applications were filed over two years ago.

The Applications were originally heard by the Hon. Mark Stoltz of the 265<sup>th</sup> Judicial District Court in Dallas County. On October 28, 2014, after considering the entire record in both cases, Judge Stoltz entered Agreed Findings of Fact and Conclusions of Law. Judge Stoltz found that the documentary record as it then existed – consisting primarily of the Reporters' Record from both trials, as well as newly disclosed informant correspondence found in the trial prosecutor's original file – persuasively established that the State suppressed exculpatory evidence regarding two jailhouse informants, in violation of *Brady v. Maryland*, and that the State presented false informant testimony that went uncorrected by the prosecution.

On February 4, 2015, the Court of Criminal Appeals issued a remand order directing the trial court to provide the trial prosecutor the opportunity to respond to the Applicants' *Brady* claim. Judge Stoltz was no longer serving on the District Court at the time of the remand, his term having ended on December 31, 2014, and the case was assigned to the new Judge of the 265<sup>th</sup> Judicial District Court, the Hon. Jennifer Bennett. Following receipt of the remand order, Judge Bennett (who had previously served as a Dallas County Assistant District Attorney with the former trial prosecutor) recused herself *sua sponte*. Applicant's case was then reassigned to Judge Theresa Hawthorne of the 203<sup>rd</sup> Judicial District Court.

An evidentiary hearing was held before Judge Hawthorne on October 26 – 27, 2015, the focus of which was the testimony of the former lead trial prosecutor, Rick Jackson. At the conclusion of this portion of the hearing, the parties indicated to Judge Hawthorne that they had additional investigation they wished to conduct into certain *Brady* claims under consideration based on answers given by Jackson and materials he identified in his trial file. The parties informed the Court at that time that their further investigative findings may require presentation of additional testimony and/or documentary evidence at a later date. The Court agreed and thereafter adjourned, but did not conclude, the hearing, and asked the parties to confer regarding another date to continue the hearing should they wish to do so.

Two weeks later, on November 10, 2015, Judge Hawthorne issued “Findings of Fact” in both Applicants’ cases. The brief Findings were identical in substance as to each Applicant, and relied solely on the Court’s own recollection of the testimony at the hearing (as the Reporter’s Record from the writ hearing was not prepared until approximately 10 days later).

On December 11, 2015, counsel for the State provided counsel for both Applicants with a written *Brady* notice, informing Applicants of some additional exculpatory information the State had obtained through its ongoing investigation. In the State’s Notice, the Dallas County District Attorney’s Office informed Applicants that it had discovered additional exculpatory information relating to (1) undisclosed benefits given to three State informant witnesses who testified at Allen’s trial, and (2) an identification witness who was sworn, but not called to testify on the first day of Mozee’s trial, after the witness failed to make a positive identification in a pretrial photo lineup administered by State officials. The State subsequently provided Applicants with documentation relating to this new information and took the sworn deposition of the eyewitness, all of which was made part of the record for this Court as Exhibits 56, 57, 58 and 60.<sup>3</sup>

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<sup>3</sup> Although this evidence was discovered and made part of the record after the hearing on October 26-27, 2015, the trial prosecutor had already been questioned extensively during his testimony about his dealings with each witness to which the new evidence relates, and was given a full opportunity to set forth any recollections (if any) he had regarding his dealings with, and benefits provided to, each witness. The specific facts testified to and reflected in the record are noted *infra* in the Court’s Findings for each claim.

Both Applicants filed objections to Judge Hawthorne's Findings with the Court of Criminal Appeals. The State also filed its own objections to the Findings. All parties argued to the Court of Criminal Appeals that Judge Hawthorne's findings were not supported by the record and, indeed, did not even address all of the *Brady* and due process issues presented at the hearing and the pleadings. The Applicants and the State urged the Court of Criminal Appeals to reject Judge Hawthorne's findings and grant due process relief to both Applicants; in the alternative, the parties asked the Court of Criminal Appeals to remand the case for reconsideration and additional findings regarding the newly developed evidence.

On September 14, 2016, the Court of Criminal Appeals issued orders holding the Applications in abeyance until the trial court resolves the outstanding factual issues and claims in Applicants' amended writ applications, and remanded the cases for additional consideration. The Court's remand orders also cited the United States Supreme Court's decision in *Weary v. Cain*, 577 U.S. \_\_\_, 136 S.Ct. 1002 (Mar. 7, 2016), which the parties had submitted as supplemental authority because of the instant cases' involvement of alleged suppression of exculpatory evidence related to informants, but was not decided until after Judge Hawthorne issued her findings.

On November 22, 2016, the State filed a Motion to Recuse Judge Hawthorne under Rule 18a of the Texas Rules of Civil Procedure.<sup>4</sup> Among the grounds for

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<sup>4</sup> On the same date, the Applicants both filed motions to recuse Judge Hawthorne as well.

recusal alleged was Judge Hawthorne's refusal to consider all of the evidence and her bias against the State. On December 1, 2016, Judge Hawthorne issued an order voluntarily recusing herself from both cases. On December 8, 2016, this Court was assigned to preside over both Applications.

On December 30, 2016, after reviewing the extensive record and the parties' pleadings before the District Court and the Court of Criminal Appeals, this Court held a joint conference with counsel for the parties, at which counsel and the Court discussed the record and the applicable law in detail. The Court and the parties AGREE that these writ applications can presently be resolved in favor of both Applicants on due process grounds, based on the extensive record developed to date. The Court offered the parties the opportunity to submit additional evidence and testimony regarding any pending claims, but counsel were all of the view that no further development of the record was necessary to resolve the primary due process claims. Both Applicants were freed on personal bonds and have fully complied with all terms and conditions of bond since Judge Stoltz's original findings were issued in October 2014.

### III.

#### JURISDICTION AND PROCEDURAL POSTURE

This Court has jurisdiction over both applications under Art 11.07. As a preliminary matter, the Court agrees with Judge Stoltz and FINDS that despite the

fact that this is Allen's second writ application, all of his claims are properly before this Court. Specifically, the Court FINDS that Allen could not have raised these claims in a prior writ application, because the evidence was suppressed by the State at trial and because the DNA testing was not previously available to him. The Court FINDS that the evidence supporting Applicants' due process claims became available or was thereafter able to be developed only as a result of the District Attorney's open file policy instituted in 2008. As such, the Court has jurisdiction to reach the merits of his claims pursuant to Article 11.07(4)(a) of the Texas Code of Criminal Procedure. With respect to Mozee, this is his first writ application, and this Court FINDS that he filed and then amended his application in a timely fashion as the new evidence upon which he relies was developed.

#### IV.

#### FINDINGS AS TO DUE PROCESS CLAIMS

This Court hereby recommends that relief be granted to Dennis Allen on Grounds Three, Four, Six and Nine<sup>5</sup> of his Application, and to Stanley Mozee on Grounds Three and Five of his Application.

The parties have agreed to defer consideration of the remaining claims, and factual matters addressed within those claims which are not otherwise resolved by

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<sup>5</sup> See Footnote 1, *supra*.

these Findings,<sup>6</sup> until the Court of Criminal Appeals rules on these Findings. If the Court of Criminal Appeals adopts these Findings and vacates the Applicants' convictions, the other Grounds for relief will be moot. With respect to Ground One of both Applications (Actual Innocence), both Applicants have conferred with their counsel and understand that if the Court of Criminal Appeals grants relief on their due process claims, their claims of actual innocence will be dismissed; *i.e.*, that if the Court of Criminal Appeals adopts this Court's findings, they will have waived the right to have their convictions vacated based on "actual innocence" under *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). *See Ex parte Reyes*, 474 S.W.3d 677 (Tex. Crim. App. 2015).

A. Legal Standard

"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Ex parte Adams*, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989). Furthermore, the prosecution has a duty to learn of, and disclose, the

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<sup>6</sup> Contained within several of the Applicants' due process claims are multiple factual allegations regarding suppression of exculpatory evidence and presentation of false testimony by the State. For example, the Applicants have argued that certain favorable police reports regarding eyewitnesses were not provided to their counsel and that other informant witnesses (other than the ones discussed in detail herein) were given undisclosed benefits in exchange for their testimony. This Court is limiting its present findings to the most clearly established and dispositive evidence developed within each Ground for relief. If the Court of Criminal Appeals does not adopt the Court's findings, however, this Court would thereafter consider, on remand, any factual allegations within each Ground that have not yet been addressed.

exculpatory evidence in the possession of all members of the prosecution team, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.*

Importantly, “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.” *Kyles*, 514 at 434. Instead, a defendant will be entitled to relief whenever the State’s failure to disclose *Brady* material “undermine[s] confidence in [his] conviction.” *Smith v. Cain*, 132 S.Ct. 627, 631 (2012) (internal citations omitted); *see also Thomas v. State*, 841 S.W.2d 399, 401-02 (Tex. Crim. App. 1992) (en banc) (emphasizing that applicant for *Brady* relief need not show that the suppressed evidence “creates . . . reasonable doubt” about his guilt, and reversing district court for applying that incorrect and unduly burdensome test). Furthermore, where defense counsel made a specific request for production of materials that were not disclosed, the inference that the violation was material is particularly strong. *See Bagley*, 473 U.S. at 682.

In *Ex parte Richardson*, the Court of Criminal Appeals determined that applicants must “satisfy a three-pronged test” in order to prevail on their post-

conviction claim that the State suppressed evidence. *Ex parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002) (citing *Ex parte Kimes*, 872 S.W.2d 700, 702-03 (Tex. Crim. App. 1993) (citing *Bagley*, 473 U.S. at 682)).

In the first prong, the applicant must show that the State failed to disclose evidence, regardless of the prosecution's good or bad faith. *Ex parte Richardson*, 70 S.W.3d at 870. For purposes of this analysis, the State includes the trial prosecutors, other members of the prosecutor's office, and the police. *Id.* (citing *Kyles*, 514 U.S. at 437). *See also Ex parte Adams*, 768 S.W.2d 281, 291-92 (Tex. Crim. App. 1989) (under *Brady*, the knowledge of the police is imputed to the prosecutor).

In the second prong, the applicant must show that the undisclosed evidence is "favorable" or exculpatory. *Ex parte Richardson*, 70 S.W.3d at 870. Favorable material subject to mandatory disclosure under *Brady* has long included evidence that may be used to impeach a State's witness, including "evidence affecting credibility." *See Giglio v. U.S.*, 405 U.S. 150, 153-54 (1972); *see also United States v. Bagley*, 473 U.S. 667, 675-76 (1985) (no distinction between impeachment evidence and other favorable evidence for *Brady* purposes). *See also Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006) (citing *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992)).

Finally, in the third prong, the applicant must show that the undisclosed evidence is material, meaning that it "could reasonably be taken to put the whole

case in such a different light as to undermine confidence in the verdict.” *Ex parte Richardson*, 70 S.W.3d at 870 (quoting *Kyles*, 514 U.S. at 435). See also *Ex parte Adams*, 768 S.W.2d at 290-91. The court must weigh materiality “in terms of suppressed evidence considered collectively, not item by item.” *Kyles*, 514 U.S. at 436.

The legal standards governing the presentation of false testimony are equally well established. Where the record demonstrates that a prosecutor presented evidence that he knew or should have known was false, the highest level of due process scrutiny is warranted, and the Court will apply an even more deferential standard of materiality review. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (“[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment”); *United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir. 2003) (“[T]he prosecution’s knowing use of false testimony entails a veritable hair trigger for setting aside the conviction[.]”) (internal citations omitted). In such cases, relief will be granted in any case where the “false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.” *Giglio*, 405 U.S. at 153-54 (quoting *Napue*, 360 U.S. at 269, 271).

Furthermore, “[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue*, 360

U.S. at 269. This “constitutional duty to correct known false evidence” is so well established that the Court of Criminal Appeals has applied it to cases in which the prosecutor may not have had actual knowledge of the testimony’s falsity, but should have recognized it as such. *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) (“it does not matter whether the prosecutor actually knows that the evidence [presented at trial] is false; it is enough that he or she should have recognized the misleading nature of the evidence”) (internal citations omitted).

**B. Findings of Fact and Conclusions of Law**

The Court makes the following findings of fact and conclusions of law with respect to both Applicants’ due process claims.

**1. False Testimony by State Witnesses**

This Court finds that the State presented false and/or misleading testimony, and violated its duty to correct such testimony when given, with respect to at least two witnesses (Ground Four of Allen’s Third Amended Writ, and Ground Five of Mozee’s Second Amended Writ). Judge Hawthorne did not address these claims in her findings dated November 10, 2015.

This Court finds that there exists compelling and un rebutted testimonial and documentary evidence supporting relief for both Applicants on this issue. Further, the parties and this Court agree (and former Assistant District Attorney (ADA) Jackson, in his testimony, did not deny) that each of the areas to which the false

testimony related were material to the outcome of the trials, as interpreted by the United States Supreme Court and the Texas Court of Criminal Appeals.

a. Lonel Hardeman (Allen trial)

At Applicant Allen's trial, the State violated *Brady* and *Napue* when the trial prosecutor solicited (on direct examination) and failed to correct (on cross-examination) numerous statements by a jailhouse informant, Lonel Hardeman, that he neither sought, wanted, nor expected any benefits or assistance from the State in exchange for his testimony against Allen. In fact, there were numerous letters in the trial prosecutor's own file, sent by Hardeman to the prosecutor and the lead detective, which revealed that exactly the opposite was true. Indeed, at the writ hearing, the trial prosecutor conceded that (1) he knew about Hardeman's pretrial letters, (2) Hardeman's testimony was contradicted by the letters, and (3) if he failed to correct Hardeman's false testimony – which the trial record makes clear he did not – then he violated well-established legal duties under the Due Process Clause.

Informant Hardeman claimed at trial that Allen made direct admissions to the murder to him while the two men were housed at the County Jail. In his testimony, Hardeman repeatedly swore to the jury that even though he was facing the possibility of decades in prison on robbery charges, he sought no help from the prosecutor for his testimony. Under questioning by prosecutor Jackson, Hardeman testified as follows:

Q: Mr. Hardeman, do you have any expectations - what are your expectations for testifying in this case?

A: Nothing, just to bring a closure to Mr. Borns' death. That's it.

Q: Okay. Have I told you that we would talk about maybe doing something in your case after this was over?

A: No, sir.

He claimed that he had never even discussed the *possibility* of leniency in his own cases with Det. Berry or any other state agent; that he "would not be asking [ADA] Jackson for no help" even after he testified; and that even if someone had, on his behalf, managed to negotiate outright dismissal of his own charges in exchange for his testimony here, he "didn't want no part of" such an arrangement *and would turn it down if offered to him*, because he preferred, he claimed, to put his fate "in the Lord's hands."

This testimony is directly and entirely contradicted by the numerous pretrial letters sent by Hardeman to Jackson and others. These letters were received by Jackson well in advance of trial and preserved in his own trial file. In these letters, Hardeman lobbied, pleaded, and cajoled the State to dismiss his own pending robbery cases outright, in direct exchange for his anticipated testimony. He also wrote to Jackson that he had made clear to Dallas Police Department homicide Detective Rick Berry "from day one" of their discussions that his cooperation and testimony was conditioned on dismissal of his (Hardeman's) own charges. Hardeman also informed Jackson that Det. Berry had promised Hardeman that he would "help me like I helped him"; and later, when Hardeman's own case was

continued, he threatened to withdraw his cooperation if the Allen trial and Hardeman's own quid-pro-quo dismissals did not quickly follow.

At the writ hearing, former ADA Jackson did not dispute that he must have known about Hardeman's letters in his file at the time Hardeman testified.<sup>7</sup> He agreed that they directly contradicted what Hardeman said on the witness stand about not desiring, requesting, or expecting any benefit in exchange for his testimony -- indeed, he agreed that Hardeman was "lying" to the jury on this critical issue. He further agreed that as the lead trial prosecutor, he had a duty to correct this false testimony when given. Finally, Jackson agreed that if the trial record indicated that he did not correct this false testimony, it would be a due process violation.<sup>8</sup>

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<sup>7</sup> Indeed, he maintained that not only did he know about them, but he believes he showed them to Allen's defense counsel on the first day of trial. As discussed *infra*, the Court disagrees with Jackson's belief that the record supports he disclosed the letters, but it remains undisputed that Jackson knew about them and regardless of whether they were disclosed, he had a duty to correct any false or misleading testimony by informant Hardman to the contrary.

<sup>8</sup> Jackson testified as follows at the writ hearing:

Q. Here it says, "Okay" -- this is a question from you -- "Have I told you that we would talk about maybe doing something in your case after this was over?"

And he said, "No, sir." But, in fact, that is exactly what you had told him, isn't it?

A. Yes.

Q. You had told him you would do something, --

A. No.

Q. -- talk about something on his case, doing something on his case after this was over?

A. Potentially, yes.

Q. And he said, no, sir, you haven't, right?

A. For the second time, yes.

Q. So he's lying, isn't he?

In light of the undisputed record, and the trial prosecutor's concessions, the Court FINDS that the State violated its well-settled duty under *Napue*, *Duggan*, and related authorities, *supra*, at Allen's trial, by failing to correct Hardeman's false testimony. This Court further FINDS the false testimony was of such a nature that the materiality prong of *Napue* and its progeny is satisfied, since it is clear that the "false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 153-54. The case against Allen was built almost exclusively on uncorroborated informant testimony; there were no eyewitnesses to

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A. At that point, I don't know if he's lying for sure or not.

Q. What do you mean you don't know if he's lying for sure? You just told us that you had talked to him about doing something on his case --

A. Oh, that -- yes. I'm sorry. Yes.

Q. -- and he says, no, sir, you haven't.

A. That's correct.

Q. So he's lying?

A. At that time, I would think so, yeah.

Q. Okay. So when you heard him tell that lie, what did you -- well, let me back up. When you, as the prosecutor, heard this witness tell this lie, what was your legal and ethical obligation?

A. To correct it.

Q. Did you correct it?

A. It's in the transcript. I don't recall what happened. What's in there is what happened.

Q. Okay. Did -- so if you did not correct it, in this transcript, then did you fail in your legal and ethical obligations?

A. Yes.

Q. Okay. And so -- and I understand you haven't memorized the transcript, you don't know whether it's in here or not.

A. I do not.

Q. Okay. So if you didn't correct it, then you would agree that there has been a Giglio -- at the very least a Giglio violation, right? Because that requires you to correct that.

A. Okay.

Q. You agree?

A. Sure.

the crime itself, and no forensic evidence tied him or Mozee to the scene (indeed, they were excluded as the source of all interpretable DNA that was tested). The record reflects that Allen's trial counsel, Jim Oatman, thoroughly and vigorously cross-examined the informants, particularly Hardeman, regarding the very matters discussed by Hardeman in the letters to the State. If Oatman had been able to show the jury that even one of those informants was blatantly lying under oath about his true motives and expectations – as the prosecutor himself now admits that Hardeman did – there is at the very least a “reasonable likelihood” that the jury would have declined to convict. Accordingly, relief should be granted to Allen on this Ground.

**b. Eyewitness Testimony by Det. Rick Berry (Mozee trial)**

The State's theory at both trials was that Mozee and Allen acted in concert to commit the robbery-murder, and that Allen then attempted to use the victim's stolen credit cards at three locations. However, the credit cards were never recovered in Allen's possession, and the store clerks who allegedly made these identifications did not identify him at trial. (Indeed, the only eyewitness to the use of the credit cards whom the State did call to testify at either trial, Samson Tinsaye, actually told the jury that, when he saw him in court, he realized that Allen was not the person who attempted to use the credit cards).

At Mozee's trial, the State sought to prove this aspect of its case solely through the summary testimony of Det. Berry as to the alleged identifications, without actually calling the alleged eyewitnesses.<sup>9</sup> The post-conviction record now makes clear that at least one of the alleged identification witnesses -- Sang Yoon Kwon -- actually recanted his purported identification of Allen on the first day of Mozee's trial. Thus, Det. Berry's testimony to the contrary was false or, at best, highly misleading to Mozee's jury.

Mr. Kwon<sup>10</sup> was a clerk at one of the convenience stores at which a man attempted to use the victim's stolen credit card within hours of the murder. A pretrial police report, which was provided to defense counsel, states that he selected Allen's photograph. The police reports also indicate that two other individuals allegedly identified Allen from pretrial photo arrays -- one at each of the two other locations where the card was used. Under questioning from ADA Jackson, Det. Berry testified at Mozee's trial regarding these three alleged identifications. He told the jury under oath that he showed Allen's photograph to the clerks at each of these

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<sup>9</sup> Mozee's claim that his trial counsel was ineffective for failing to object to this hearsay testimony by the State is the subject of a separate claim in his application. Because the Court is recommending that relief be granted on other grounds, this claim will not be addressed at this time.

<sup>10</sup> Mr. Kwon's name is at times spelled "Kwoon" in the original police reports and transcripts. For the sake of clarity, he will be referred to as "Kwon" in these findings.

three locations, and at each one, the clerk "identified" Allen as the man who used the stolen cards.

This testimony was false, or at the very least, highly misleading. Whether or not Kwon had identified Allen in an initial photo array one year before trial, he did not do so when shown another array by State officials just before the start of the Mozee trial.<sup>11</sup> During these writ proceedings, current counsel for the State discovered a note in Jackson's file that indicated that Kwon was brought to court on the first day of Mozee's trial, and that Judge Dean "swore the witness in."

At the writ hearing, Jackson was asked about why Kwon was not called to testify at either trial, since police reports indicated that he had positively identified Allen in an earlier array. Jackson had no present recollection of the witness, what photographic arrays he may have viewed, or why he was not called to testify. He agreed, however, that if Kwon or any other eyewitness recanted an earlier photographic identification of either defendant, or failed to identify either man, that would be exculpatory evidence he would have to timely disclose. Kwon, however, does continue to have a very clear recollection of what transpired before he was released from his subpoena prior to the Mozee trial. As the recent deposition testimony of Kwon revealed, he was not called to testify after failing to select Allen

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<sup>11</sup> Mr. Mozee had two trials, several weeks apart. The first, beginning on beginning June 26, 2000, ended mid-way in a mistrial after it was discovered that one of the empaneled jurors knew the victim's widow. No transcript of that proceeding was prepared. It was before commencement of this first trial that Kwon was brought to the courthouse for the identification procedure.

or Mozee's photograph in a second photographic array shown to him on the first day of Mozee's trial. As he stated in his sworn deposition taken by the Dallas District Attorney's Office in 2015, he was brought to court and met with a man whom he believes was the trial prosecutor. He was then asked to look at two photographic arrays, and each time he selected an individual whom he believes, based on the prosecutor's reaction, was "the wrong person." He was then told he was no longer needed to testify and left the courthouse.

As noted *supra*, at the hearing Jackson also affirmed his ongoing duty to correct any testimony given by any of his witnesses, including police witnesses, that was false or misleading. Finally, he agreed that whether or not he personally administered a photo array to Kwon or any other witness is immaterial, because the prosecution has a duty to learn of, and disclose, the exculpatory evidence in the possession of all members of the prosecution team, including the police. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

As set forth in part (2) of these Findings, *infra*, the nondisclosure of this "non-ID" by Kwon as to both defendants forms the basis for a separate claim of suppression of exculpatory evidence. In Mozee's case, however, these events also form the basis for a false testimony claim because they are irreconcilable with the testimony of Det. Berry to the Mozee jury that all three store clerks "identified" Allen from photo arrays, when in fact Kwon did not. At the very least, the

testimony was highly misleading, because it gave the false and inaccurate impression that the initial photo arrays shown to the witnesses shortly after the murder were the only identification procedures administered to them. However, both Det. Berry and the prosecutor knew or should have known that was not the case, and that at least one of the store clerks ultimately did not identify Allen in an array just prior to Mozee's trial, and was not called as a witness for that reason. As noted above, Jackson was given a full opportunity to address these issues at the hearing and offered nothing to contradict the notes in his own file and Kwon's sworn deposition testimony. Thus, Mozee has clearly met his burden of showing that the State presented false and/or misleading testimony from Det. Berry at his trial.

Mozee has also met his burden of showing that there is a "reasonable likelihood" that the false testimony could have "affected the judgment of the jury," *Giglio*, and thus is material to the outcome. The case against Mozee was based largely on an alleged confession he signed after numerous police interviews, which Det. Berry testified he made voluntarily but which was not recorded. Mozee testified that the statement was a product of coercion and information provided to him by the police. No forensic evidence or eyewitnesses corroborated the alleged confession. However, Jackson directly relied on the purported eyewitness identification evidence regarding Allen's use of the victim's stolen cards in his final

argument to Mozee's jury, directly asserting that the identifications of Allen "verified" and corroborated the confession, as follows: "What is verified is his participation in a capital murder. He says it's he and Dennis Allen. Lo and behold, Dennis Allen is the one using the credit cards, selling the pager. He's been identified." (Emphasis supplied.) Det. Berry's false testimony at Mozee's trial regarding the alleged identifications of Allen by all three store clerks was the sole evidentiary foundation upon which Jackson made this argument. As such, due process was violated and relief should be granted on this Ground.

## 2. Failure to Disclose *Brady/Giglio* Material Regarding Informants

Separate and apart from the false testimony evidence, this Court also FINDS that both Applicants are entitled to habeas relief on the ground that the State failed to disclose exculpatory evidence that would have substantially impeached the credibility of at least four informant witnesses – three of whom testified at Allen's trial, and one of whom (Zane Smith) testified at both defendants' trials. Each of these witnesses had pending criminal charges or other problems (such as probation revocation, or a sentence he wished to see reduced) with which the State either assisted the witness before or after he testified in Applicants' cases, yet these benefits were not disclosed. In making these findings, the Court relies heavily on the undisputed documentary evidence in the State's trial file, including the prosecutor's notes, as well as Jackson's testimony at the writ hearing.

### Jackson's Testimony

Preliminarily, the Court will summarize Jackson's testimony at the writ hearing with respect to his recollections and discovery practices generally in these cases, since this testimony applies to all of Applicants' *Brady* claims in this section of the Findings.

Jackson was shown various letters authored by two informants (Zane Smith and Lonel Hardeman, discussed *infra* and identified individually at the hearing) that were in his trial file. He agreed that each of them were *Brady* material that he was required to disclose in a timely fashion to both Applicants' trial counsel. He also agreed that because these letters were in his trial file, he must have known about them, and that he had a duty to learn of any pretrial discussions with the informants referenced in the letters that any other State official may have had, at the time he elicited the relevant testimony. Jackson was also shown handwritten notations he made in his own trial file, memorializing the fact that Det. Berry had apparently provided pretrial assistance to two other informants (Charles Manning and Alvin Degraftenreed) with probation violations. He had no present recollection of any of those discussions or any assistance provided, but readily agreed that if Det. Berry or any other state official had assisted these informants in any way with a pending case, including a probation violation, prior to the informant testifying, that would be *Brady/Giglio* information he was required to timely disclose.

With respect to the letters by informants Smith and Hardeman, Jackson admitted that he had no recollection of whether he had or had not disclosed any of the letters to either defendant's counsel (except for one of the letters from Smith, requesting that Jackson fulfill a promise to "intercede on [Smith's] behalf," which he conceded he did not disclose to Mozee's counsel; *see infra*). Jackson acknowledged that he was given the opportunity to review his entire trial file prior to the hearing, which he said he examined for the specific purpose of finding some documentary proof that he had, in fact, turned these letters over to the defense.

Jackson's practice was to keep well-organized and meticulous documentation of his work on a case, including itemized lists and records of what was provided to defense counsel in discovery, and he was known to be extremely thorough in his documentation. Consistent with his general practice, the State's file reflects that Jackson did so in this case -- the notes and lists having been entered into evidence at the writ hearing. However, Jackson admitted that during his review of the State's trial file in preparation for the writ hearing, he found no specific mention of any of the informants' letters in any of the lists he made about the documents and evidence that he showed or provided to defense counsel.

Instead, he relied on a sole indication in the entire record that, he claimed, supported his belief that he must have given this correspondence to either defendant's counsel prior to trial. That notation consisted of a single entry in his

personal notes from the first day of Mr. Allen's trial, documenting that Jackson had "show[n]" Allen's counsel, Jim Oatman, the "knife and rest of physical evidence." (emphasis supplied). This entry, Jackson maintained, was proof in his mind that he had shown Oatman all of the documentary evidence to which the defense was entitled under *Brady* and *Giglio*.

At the writ hearing, Jackson was cross-examined at length about the well-understood difference between "physical evidence" and documentary evidence. He was also cross examined about the fact that he made a separate list of the specific *documents* he showed or gave to Oatman in the Allen case, which was part of the same two-page document on which he found the "physical evidence" notation. That list of documents turned over to Oatman notably did not include any of the informants' letters. Jackson further testified that he presumed that he made disclosures in the same fashion to Mozee's counsel -- although on this point, he did not have notes to back up his assumption. Indeed, Jackson conceded that because Allen's trial took place after Mozee was already convicted, even if this "physical evidence" notation in the Allen file could somehow be interpreted to relate to disclosure of the informant letters, by definition it would not apply to Mozee's case because any file note Jackson made for the Allen trial is irrelevant in discerning what was turned over to Mozee's counsel one month earlier.

Importantly, Jackson does not dispute that he was obligated to turn over any of the informant letters, nor does he deny that the letters were significant *Brady* material that the defense was entitled to receive, both under *Brady/Giglio* and under the detailed pretrial discovery orders entered by the trial judge in these cases.

For the reasons discussed below, this Court FINDS that the record does not support Jackson's claim that the "physical evidence" he showed to Oatman includes disclosure of the content of these informant letters. Nor does the record support his claim that he disclosed the informant letters to Mozee's counsel. Not only is Jackson's position contrary to the well-understood meaning of the term and to common sense, but it also fails to account for the remainder of the record, which makes clear to this Court that the defense did not use the substantial impeachment material in these letters because neither counsel had been provided with them.

a. Lonel Hardeman

This Court has already found (*supra*) that compelling evidence exists that Lonel Hardeman gave false testimony at Allen's trial, which Jackson admits he failed to correct. For reasons similar to those which warrant relief based on false testimony, this Court also finds that the State violated *Brady/Giglio* by failing to turn over multiple letters in its file from Hardeman and his girlfriend, Lisa Davis, which were sent to Jackson and to Det. Berry and found in the State's trial file. The Court also finds that the trial prosecutor actively assisted Hardeman with pending

criminal matters prior to trial and failed to disclose that critical impeachment evidence to the defense.

The letters in question were introduced at the writ hearing as Exhibits 12, 13 and 18, 19 and 20. All of them could have been used at trial to powerfully impeach Hardeman's claims that when he testified against Allen, he had not been promised any benefit whatsoever by the State in exchange for that testimony; that he had no expectation or understanding that the State would in any way assist him with those cases after he testified; and indeed, that he did not even ask for such assistance at any time. Hardeman claimed that he came forward and took the stand as a State's witness for the one and only purpose of bringing "closure" to the murder victim's family; as for the potential 25 to life sentence he faced in his own pending theft cases, he claimed he sought nothing from the State, and was simply "put[ting] it in the Lord's hands."

As noted above, Jackson did not deny at the writ hearing that these letters are textbook *Brady* material. The reason for Jackson's concession is clear. In his pretrial letters, and directly contrary to his trial testimony, Hardeman not only sought assistance with his pending felony theft cases, but at times demanded that the State promise him outright dismissal of those cases ("all charges against me to be dropped") in exchange for his testimony. He repeatedly asked for confirmation of the "agreement" he had with the State, which he said would need to cover "all of the

cases pending against me” at that time. He then threatened to withdraw his cooperation if Allen’s trial was not held soon, because he remained in jail pending his testimony against Allen, but “can’t keep waiting on another man [sic] trial that keeps on being reschedule [sic].” Moreover, the State’s file also included correspondence from Hardeman’s incarcerated girlfriend, Lisa Davis, detailing her own efforts to negotiate a deal for Hardeman to testify against Mozee and Allen “in exchange for lesser sentences for both of us.” (Further quotations from all of these letters are set forth in Allen’s Objections to Judge Hawthorne’s findings at pp.7-11 and in the parties’ Joint Mem. of Law at 40-46).

There are several reasons why the record does not support Jackson’s belief that the “physical evidence” notation in his file establishes that he must have turned these letters over to Allen’s counsel. First, the term “physical evidence” is well understood in criminal cases to mean tangible items like weapons, clothing, proceeds of a crime, and forensic samples – that is, original physical items that are recovered by police at a crime scene or at other points in the investigation, which cannot simply be photocopied and given to the defense. The fact that Jackson specifically referred to the “knife and rest of physical evidence” in his notes shows that he understood this category to mean what it always does at a criminal trial.

Second, if “physical evidence” covered documents in the prosecutor’s file, as Jackson now claims it does, there would have been no reason for Jackson to make a

separate list on that same date of the documents that he “turned over to Atty Jim Oatman,” as he did in that same set of two-page notes he prepared. The fact that he made a very detailed and precise list of documentary discovery provided to Oatman on that date – which included individually listed lab reports, autopsy reports, and criminal histories of his informant witnesses – is strong evidence that Jackson never showed or gave the defense the informant’s letters, or he would have included them on that list.

Third, Jackson made a separate list in his own notes of items he knew he needed to disclose, which he entitled “Exculpatory Evidence.” Even this list has no reference to the letters from Hardeman (or informant Smith – see *infra*, part 2), which Jackson does not dispute are, in fact, exculpatory evidence the defense was entitled to have under *Brady* and *Giglio*. Thus, if he had shown them to Oatman rather than suppressed them, they should have also appeared on this list.

Last, although Oatman’s trial file is unavailable<sup>12</sup>, the trial and post-conviction record convincingly establishes that Oatman (1) did not have the letters at the time he tried the Allen case, and (2) would have used them to impeach Hardeman if he had. During voir dire (*i.e.*, on the same date and just after the point when, according to Jackson, he showed Oatman the letters), Oatman told the jury

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<sup>12</sup> Oatman died in a car accident several years after trial. Counsel attempted to locate any file he may have retained for this case through his widow and his former law partners, but the file was not preserved.

that he had no documentary proof that any informant witnesses had received any benefits or had any deals or understandings with the State for future benefits, but asked the jurors whether they could still find that a jailhouse informant might have an unwritten deal or understanding with the State. There can be little doubt that Oatman would not have made this statement to the jury, and at trial would have proceeded to show the jury Hardeman's explicit written demands for dismissal of his own charges and references to "agreements" with the State, if he had any idea these letters existed. Moreover, Oatman vigorously and ably cross-examined Hardeman about what Oatman asserted were his lies about having no expectation of benefits or promises from the State. If he had Hardeman's own written words to impeach him, the Court is convinced Oatman certainly would have used them.

Further, if Jackson knew that Oatman had seen the letters, he would not have elicited false testimony from Hardeman disclaiming any hope or expectation of benefit, because he would have known that Oatman would immediately impeach that testimony. Jackson testified at the writ hearing that Oatman was a very good defense lawyer. The fact that Jackson elicited this false testimony from Hardeman indicates to this Court that he knew Oatman was not armed with any of the documents that would have destroyed Hardeman's credibility on cross-examination.

Moreover, when asked about the issue of benefits to informants at the writ hearing, Jackson testified that he "never" directly intervened in a pending case after

the informant witness testified if he was not the prosecutor handling that witness's own cases. Instead, he said that the most he would ever do was talk to the prosecutor handling the informant's cases, and let them know of the informant's cooperation in the event the other prosecutor wished – in his or her sole discretion – to do something to benefit the informant. He admitted he had no present recollection of whether he had ever assisted Hardeman or spoken to anyone on his behalf, but insisted he would not have deviated from his standard practices.

In its *Brady* notice provided to Applicants' counsel in December 2015, and in transcripts disclosed prior to issuance of the formal *Brady* notice, the Dallas District Attorney's Office revealed it had obtained transcripts of plea proceedings held in Hardeman's own robbery cases (*i.e.*, the cases that were pending at the time Hardeman testified against Allen). The transcript of the November 6, 2000 plea reveals that Jackson did personally intervene on Hardeman's behalf in prosecutions being handled by another colleague. After Jackson intervened, Hardeman was offered, and accepted, a guilty plea of just three years prison time on each of the two felony robbery charges he faced, and two years state jail time on each of the enhanced misdemeanors. This constituted a dramatic reduction from the mandatory 25-to- life on each robbery count he would have faced as a prior felony offender had he gone to trial and been convicted. This record, viewed as a whole, provides strong evidence from which a jury could conclude that the post-testimony assistance by

Jackson constituted his delivery on the promises and understandings that Jackson had reached with Hardeman before he testified, as referenced in Hardeman's letters. *See, Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989) (an understanding for leniency constitutes an agreement between state and witness; formal agreement is not necessary); *e.g., LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 735 (5th Cir. 2011) (quoting *Napue*, 360 U.S. at 270) (emphasis added) ("the Supreme Court has never limited a Brady violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal," as "the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness 'might have believed that [the state] was in a position to implement . . . any promise of consideration'"). Even if Jackson did not give Hardeman everything he wanted or believed he had been promised (*i.e.*, his numerous felony charges were not all dismissed), the benefits he received were nonetheless considerable given the multiple enhanced sentences he was otherwise facing. Thus, the Court FINDS that Allen has established that Jackson violated *Brady* and its progeny by failing to disclose this exculpatory evidence.

b. Zane Smith

This Court also FINDS that the trial prosecutor violated *Brady* with respect to jailhouse informant Zane Smith, who claimed at both trials that Mozee made a

detailed admission to him to having participated in the robbery-murder along with Allen.

On this issue, the Court finds that there exists substantial evidence that Jackson failed to timely disclose two letters written to State officials by Smith from the jail, which Jackson concedes constituted *Brady* material and were also covered by the court's pretrial discovery orders. Relatedly, the Court finds that he failed to disclose an agreement he had made with Smith to assist him in obtaining a sentence reduction after he testified. This agreement was expressly referenced in Smith's second letter, and is further evidenced by the fact that Jackson proceeded to go to extraordinary and improper lengths to carry out the State's end of the bargain and give Smith the maximum possible sentence reduction after he twice testified for the State in these cases. Further, as with Hardeman, the present record establishes that Jackson in fact engaged in actions with respect to this informant that he testified at the hearing he would "never" take (before being confronted with the record), further undermining confidence in the outcome of both trials.

Finally, with respect to Mozee, who was tried first, the Court finds that there exists substantial evidence that Jackson withheld Smith's name and the substance of his allegations from Mozee's counsel until the morning of Mozee's trial. Indeed, he affirmatively misled Mozee's counsel about the actual date on which Smith had first contacted the State about this case. This belated and inaccurate disclosure was in

violation of *Brady* as well as the trial court's express order – issued seven months earlier -- to identify the names and criminal records of all trial witnesses, and provide Mozee's counsel with any prior written statements by those witnesses. Jackson's actions served to prejudice Mozee's counsel from being able to effectively cross-examine Smith about the relationship between a highly favorable plea he entered into with the State less than three weeks before he testified (but shortly after he first contacted the State about this case) and his willingness to testify as a witness against Mozee.

With respect to the Smith letters, and Smith's pretrial agreements and discussions with the State, the Court hereby makes the following findings:

Smith wrote two letters to State officials regarding his allegations and testimony in the Mozee case, both of which were found in Jackson's trial file during post-conviction review. The first letter was written on June 28, 2000, while Smith was at the jail awaiting trial on his own felony theft cases. He addressed it to the district clerk, set forth some (but not all) of the inculpatory information he claimed to have against Mozee, and made clear that he was "willing to testify." On July 11, 2000, just two weeks after sending this letter – and three weeks before he testified for the State at Mozee's trial, or Allen's subsequent trial – Smith received a highly favorable plea and sentence for a third-degree theft charge with a deal that resulted

in just 365 days state jail time, instead of the possible exposure of 20 years' prison time due to his lengthy prior criminal record.

The second letter was written by Smith to Jackson on August 2, 2000 – the day after Smith testified at Mr. Mozee's trial, and the same day Mr. Mozee was convicted. It was in the second letter that Smith referenced explicit, pre-testimony discussions he had with the prosecutor about assistance regarding his own conviction and sentence. Specifically, Smith sought confirmation that the prosecutor would, in fact, deliver on what Smith believed had been promised to him before he testified: "what I'd like to know is: Will you still be able to intercede on my behalf as you said[?]") (emphasis supplied). Jackson acknowledged at the writ hearing that he must have received Smith's August 2, 2000 letter well within the thirty-day time period in which Mozee would be entitled to move for a new trial, and before the commencement of Allen's trial on August 28, 2000.

The letters, particularly Smith's second letter, could have been used by both Applicants' counsel to substantially impeach Smith's testimony that he had not discussed, and did not expect, any future assistance from Jackson in the theft case in which he had just been sentenced on July 11, 2000. At Mozee's trial, Smith claimed that (1) he had no contact with Jackson about Mozee's case until after he was "already sentenced" on his theft case in July, and (2) he had no deal, agreement, or understanding with Jackson about his sentence, and that he was only "hoping"

that Jackson "may" agree to assist him "at some point down the road" as a result of his testimony. At Mozee's trial, Jackson stated, and asked Smith to affirm, that "you told me [this information] knowing that your sentence was already over and that I may or may not help you out in the future?" (emphasis supplied). Similarly, at Allen's trial, Smith repeatedly denied on both direct and cross-examination that his testimony had anything to do with his own plea and sentence in his theft case, testifying that "I talked to [the prosecution in Mozee and Allen] after I had already got my own case resolved." In both trials, Jackson successfully created the misimpression to the jury that because Smith's case was already "resolved," or "over," there was nothing the State could or would do for him, and at most the State might be able to assist him if at some unspecified point "in the future" he got into trouble again.

Applicants also presented evidence at the writ hearing of three additional actions by Jackson regarding Smith. Each of these actions undermine Jackson's testimony that he played no role in the favorable plea that Smith received prior to trial, that he had "no deal" with Smith for a subsequent sentence reduction, and that he and Smith "never" even discussed the possibility of "potentially" getting him a sentence reduction before he testified. While Jackson had no recollection of his actual dealings with Smith, his testimony was based on what he maintained were his consistent practices in every case he handled.

First, Applicants offered into evidence a disclosure log handwritten by Mozee's trial counsel Matt Fry dated July 31, 2000 (the first day of Mozee's trial) and saved to Fry's trial file. The note reads, in part, "Prior to voir dire Rick Jackson tells me that in the last few days he has been contacted by Zane Arlester Smith BD 4/19/65" (emphasis supplied), and proceeds to summarize the substance of Smith's proffered testimony as relayed by Jackson just before trial. Certainly, if Jackson had shown Fry the first Smith letter dated June 28, 2000, at voir dire (as Jackson testified he believed he did), Fry would have realized that Smith had actually contacted the State offering to testify a full month – not a "few days" – before Jackson made this disclosure.

Second, the parties admitted into evidence an original printout of a Dallas County criminal history check for Smith, which was located in Jackson's handwritten "Smith, Zane" trial file, and which was dated July 7, 2000. Jackson conceded that this document meant that either he or someone acting at his direction ran a copy of this history while preparing for the Mozee trial, and that this search must have been performed on or before the date it was printed. July 7 was four days before Smith entered into his favorable theft plea and sentence. The State's file does not contain any notes showing when Jackson actually met with Smith to discuss his testimony. But Jackson admitted that he must have been at least "aware of the letter" that Smith sent to the clerk offering to testify against Mozee at the time

of Smith's plea, and that he also knew about Smith's offer to testify several weeks before Mozee's trial began. Thus, these documents directly contradict what he told Mozee's counsel at trial: that he was only contacted by Smith "a few days" before trial, which would have been his explanation for making this untimely disclosure.

Third, after both trials were over, Jackson went to extraordinary and perhaps unprecedented lengths to deliver on his apparent promise to "intercede on [Smith's] behalf" and reduce his sentence. Jackson claimed at the writ hearing that he not only "never" made specific promises to informants about actions the State might take to benefit them, but emphasized to all of them before they testified that there might be circumstances in which "there wasn't anything I could do for them" due to the posture of the informant's case. He also testified that he never personally intervened in an informant's case, but would at most "go to the prosecutor on Smith's case and tell him he helped [the State] out, but it's up to them whether they're going to do anything for him." Yet Jackson did just the opposite here. By the time Jackson was done with Applicants' trials (Allen's concluded on September 1, 2000), more than 30 days had passed since the entry of Smith's July 11, 2000 plea and sentence. Despite being outside the time frame for a proper motion for new trial as provided by law, later that month he personally moved to reopen Smith's case and convinced the late Hon. Karen Greene to grant an out-of-time Motion for a New Trial that he now admits she had no jurisdiction to grant. Moreover, Jackson's

actions had the effect of securing the maximum possible sentence reduction the State could provide to Smith – a recalculation of his 365 day state jail sentence to 244 days in the County Jail, which he had already served. Smith had initially faced up to 20 years in prison if convicted, and his file jacket reflects that the State's initial offer (before he offered to be an informant) was five years' prison-time. After he testified for Jackson at Applicants' trials, however, he was freed directly from the county jail after just nine months' incarceration, without serving a day of state jail time, as he had told Applicants' juries was his final disposition.

With this history in mind, this Court finds that Jackson failed to disclose Smith's second letter, and the underlying agreement with the State it references ("will you still intercede on my behalf as you said?"), to both defense counsel. As with the Hardeman letters, the only issue that Jackson disputes, even in part, that is relevant to this *Brady* claim is whether he turned over both of Smith's letters, and whether he did so in a timely fashion.

With respect to Mozee, this Court finds that Jackson explicitly conceded at the hearing that (1) he did not turn over the second, most critical letter to Mozee's counsel – since he claims he would have made all the required disclosures at voir dire, but received this letter either on the last day of Mozee's trial or shortly after trial ended, and (2) when reminded of his continuing obligation to turn over *Brady* material within the time period allowed for Mozee to file a motion for a new trial,

Jackson agreed that this letter was *Brady* and that he violated his duty to make a timely post-trial disclosure to Mozee's counsel here.

Further, with respect to Mozee, this Court finds compelling record evidence that Jackson also did not turn over Smith's first letter (containing his initial offer to testify), and violated due process by misrepresenting to Mozee's counsel the time when Smith first contacted the State. While this letter did not include any explicit discussion of any benefits he sought or expected to receive, it is important to the integrity of Mozee's trial because it was dated several weeks before trial, and pre-dates Smith's own favorable plea and sentence. It also directly contradicts what Jackson told Mozee's counsel about having been contacted by Smith only "in the last few days" and makes clear that Fry did not see this letter at voir dire as Jackson now assumes that he did. Not only is it an obvious violation of due process to make a knowing false statement to defense counsel about a State's witness, but Jackson's conduct also violates his obligation to make *Brady* disclosures in a timely fashion that gives the defense sufficient opportunity to investigate and use the information provided.<sup>13</sup> See, e.g. *Little v. State*, 991 S.W.2d 864 (Tex. Crim. App. 1999); see also *Ex Parte Temple*, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016) (not designated for publication).

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<sup>13</sup> Of importance also is that Jackson was also under an obligation to make timely *Brady* disclosures pursuant to a pretrial discovery order.

With respect to Allen, the record also does not support Jackson's claim that he timely disclosed the letters. At the writ hearing, Jackson was able to cite only his "show Oatman knife and rest of physical evidence" note to support his belief that he turned Smith's letters over. This Court finds that explanation unpersuasive and unsupported by the record for the same reasons as with informant Hardman's letters. Furthermore, in Allen's trial, it emerged in the middle of Oatman's cross-examination of Smith that he had sent a "kite" to the district clerk on June 30, 2000, offering to testify against Mozee. Oatman then requested a copy of that letter, which Jackson provided on the record. Notably, at no point did Jackson indicate that he had already shown that letter to either Applicants' counsel at voir dire as he now claims. Moreover, at no point did Jackson mention in the course of turning over Smith's first letter that he had a second letter from Smith, written after he took the stand against Mozee and before he appeared at Allen's trial. Jackson's failure to produce both letters during that exchange supports an inference that he was actively concealing the second letter, with its explicit reference to the benefits Smith believed he had been promised. Additionally, this Court finds that the record strongly supports the conclusion that Oatman would have used the second letter in his cross-examination of Smith if he knew of its existence prior to or during trial.

Finally, with respect to both Applicants, this Court finds that the record as a whole impeaches the testimony by Smith (at trial) and Jackson himself (at the writ

hearing) that he and Smith had “no deal,” or even an implicit understanding, regarding a potential sentence reduction in exchange for his testimony. The second Smith letter (“will you still intercede on my behalf as you said?”) is evidence at least that Smith understood there to be such an agreement, and the fact that Jackson actively concealed the letter from both counsel is notable. Moreover, this Court places great weight on the fact that Jackson was apparently so obligated to Smith that he secured an arguably invalid sentence reduction after these trials were over, which allowed Smith to immediately walk free. Had there been “no deal” or even discussion of such a possibility prior to trial, Jackson would have simply told Smith that there was nothing the State could do for him. Further, whether or not he made Smith a specific promise is immaterial, as long as Smith had reason to believe, as a result of their discussions, that Jackson was likely to assist him. *See, e.g. Duggan, supra*, 778 S.W.2d 465 (Tex. Crim. App. 1989); *LaCaze, supra*, 645 F.3d at 735 (5th Cir. 2011).

In light of all the undisclosed impeachment material regarding Smith, and the evidence on record that Jackson deliberately misled Mozee’s counsel about his pre-testimony contacts with Smith, this Court can no longer have confidence in the outcome of either Applicant’s trial and finds that relief should be granted.

c. Charles Manning and Alvin Degraftenreed

This Court also finds compelling and un rebutted record evidence that the State withheld *Brady* information regarding informants Charles Manning and Alvin Degraftenreed. Both of these witnesses testified only at the Allen trial, and the findings concerning these witnesses apply only to the Allen trial.

Manning testified that he knew Mozee and Allen, and claimed that the two defendants frequently “hung out” together around the time the victim was killed. Manning acknowledged that during the relevant time period, he was sporadically homeless and addicted to drugs, and that the victim had hired him for odd jobs around his store. At the time he testified, Manning told the jury that he was not in custody and had found a job with a local TV news station. No mention was made of any State assistance he received in any criminal matters, past or present. Indeed, the State relied heavily on Manning’s alleged personal transformation and his lack of any “reason to lie” for the State when Jackson’s co-counsel Eric Mountin vouched for his credibility in summation:

Remember Charles Manning? Remember the gentleman, the homeless gentleman who talked about getting his life back together? Remember how he told you what he remembered from the streets, the people he knew, the people who ran in that neighborhood? Remember one of the things that he talked about was the fact that Dennis Allen and Stanley Mozee ran together all the time. They were with each other all the time.

Now, why would Charles Manning lie about that? And what do I mean lie about that? Well, Dennis Allen told you that he didn’t

even know Stanley Mozee, didn't hang with Stanley Mozee, didn't smoke crack cocaine with Stanley Mozee, had nothing to do with Stanley Mozee. And yet Charles Manning pointed out to you folks, that that was somebody that spent a lot of time together. Why would Charles Manning lie? He is probably the most credible witness of any witness in this case. Because he is the one witness that no matter what Mr. Oatman may try to paint on those other witnesses about deals that they may have made or he alleges of thinks occurred or suggests occurred, there's no deal with Charles Manning. There's no reason for Charles Manning to lie.

However, the post-conviction record establishes that Manning was in fact in legal jeopardy during the entire year he cooperated with the State's investigation, including when he testified. The parties' investigation during the instant writ proceeding revealed that Det. Berry had personally intervened to keep Manning out of jail during that time. Manning was on probation for aggravated theft at the time Rev. Borns was killed in April 1999, and in August 1999, he was charged with violating his probation. Yet his probation was not revoked as a result of the violation, despite the State's motion to revoke his probation being passed on several times in the ensuing months. Ultimately, after Det. Berry intervened on his behalf, in January 2000 he was allowed to remain free on a personal bond pending resolution of the motion. The State's records indicate that Manning's cooperation with the State in these cases was cited as a reason why he should be allowed to remain on bond pending Applicants' trials, rather than be revoked. Further, the revocation motion was still pending at the time Manning testified.

Although not necessary for *Brady* relief (see *Kyles, supra*), the record is clear that Jackson was fully aware of this history. In Jackson's own internal, pre-trial notes, he documented the following: "Berry helped out Manning and Degraftenreed with their probation violations."

At the writ hearing, Jackson claimed to have no present recollection of Det. Berry's actions on Manning's behalf, nor did he recall whether he told the defense about it. He expressed confidence that Det. Berry "never told [me]" about any assistance provided to Manning in connection with this case. However, he eventually conceded that he would not have made his file notation about Berry "help[ing] Manning and Degraftenreed with their probation violations" if someone had not told him about that assistance, even if he did not presently recall it. He also conceded that any undisclosed actions Det. Berry had taken to assist a witness with a pending probation violation would be a violation of *Brady*. And finally, he agreed that he had no recollection, nor any documentary or record evidence, to support a finding that he had actually disclosed this information to the defense. To the contrary: the record makes clear that Jackson stood mute while his co-counsel argued that Manning had "no reason to lie" to benefit the State, and the defense – being unaware of the considerable assistance Manning had received – did not object or offer anything to the contrary.

Like Zane Smith, Manning was promptly rewarded for his assistance. The State finally withdrew its long-pending motion to revoke his probation on September 20, 2000, less than three weeks after Allen was convicted at the trial where Manning testified.

A nearly identical pattern of undisclosed, pre-testimony assistance has been established with respect to witness Alvin Degraftenreed. Degraftenreed identified Allen at trial as the taller companion of a "short" man he claimed to have seen arguing with the homicide victim on the night of the murder. Jackson asked if Degraftenreed had any "prior felony criminal record," and the witness answered affirmatively. Jackson then took pains to establish for the jury that the witness's troubles with the law and his need for State assistance were long past:

Q: [D]o you have any prior felony criminal record?

A: Yes.

Q: Okay. What was that?

A: Arson.

Q: Okay. How long ago?

A: Oh, ten years—probably ten years.

Q: Okay. Did you get probation or penitentiary time?

A: I got probation

Q: Did you live it out or did you get revoked and sent to the pen?

A: I lived it out.

Q: Do you have any other prior felony convictions.

A: No.

Q: Do you have any other theft convictions?

A: No.

Q: Have you asked me or have I said that I would intercede in your behalf on any reason or any subject?

A: No.

(Emphasis supplied).

This was highly misleading, at best. Like Manning, Degraftenreed in fact was on probation and faced a pending motion to revoke that probation while the murder investigation into these cases was ongoing. Moreover, Jackson was aware of that motion, as well as the fact that "Det. Berry helped . . . . Degraftenreed" remain at liberty, as memorialized in his pretrial notes in the Mozee/Allen file. In fact, the present record shows that the State withdrew its motion to revoke Degraftenreed's probation on December 9, 1999 – between when Degraftenreed first spoke with Det. Berry about the Borns homicide in May 1999, and when he testified at Allen's trial in September 2000. Thus, Degraftenreed received pre-testimony assistance from the State on a pending matter, despite telling the jury that he had "lived out" his probation. He also gave the jury the false or, at best, highly misleading impression that he and the trial prosecutor had never discussed the possibility that the State would "intercede on [Degraftenreed's] behalf for any reason on any subject," when in fact Det. Berry had done exactly that.

Jackson conceded that he has no present recollection of disclosing the information regarding this assistance that he memorialized in his file notes. He also conceded that he knows of no documentary or other evidence that he disclosed this evidence. Because, as Jackson conceded at the hearing, that assistance with a

pending probation violation would be a textbook *Brady* violation if assistance not disclosed, Allen's *Brady* claim is clearly meritorious.

d. John Paul Robinson

John Paul Robinson also testified at Allen's trial that Allen made incriminating admissions to him. At trial, Robinson testified as follows:

Q Now, when Detective Berry came to see you, did he have any idea what you were talking about, who you were?

A No.

Q Okay. Did you ask Detective Berry for something?

A No.

Q Okay. Did you ask him if he could help you out in your case?

A No.

Q Okay. Did he offer to help you out in your case?

A No.

Q Okay. Have I -- I mean you and I have talked about this on one prior occasion; is that right?

A Yes.

Q All right. And have I told you that I was going to do anything for you in your case?

A No.

Robinson provided a deposition during the current post-conviction investigation and signed a written statement declaring that he was told that if he testified against Allen the State would help him with his case. The record shows that Robinson was facing a sentence of 5 years to life, yet after he testified against Allen, he received five years' probation. At the writ hearing, Jackson testified that he had no present recollection of his dealings with Robinson prior to or after Allen's trial, but maintained that he would have followed what he maintained were his usual

practices with informants when dealing with Robinson.

The record supports a conclusion that Robinson was told by the State that his testimony would be beneficial to him and that this fact was withheld from the defense and falsely denied to the jury. In addition to Robinson's admission that he was told that his testimony would be of assistance to him, the way Robinson's case was handled by Jackson is consistent with that of the other jailhouse informants. Robinson met with the prosecutor and police officer and was led to believe they would assist him with his case in exchange for his testimony. At trial, Jackson elicited testimony from Robinson where he claimed that neither the police detective nor prosecutor told him they would do anything for him on his case and then, after his testimony, Jackson followed through on his unspecified, undisclosed, but understood agreement and got Robinson a probation sentence. The fact that this same pattern is present with multiple informants supports the credibility of Robinson's current statement that he had been told that the state would help him if he testified.<sup>14</sup>

#### Materiality of the *Brady* Violations with Respect to Informants

Jackson did not dispute the materiality of the exculpatory evidence discussed above, and the parties agree that it is material, whether considered individually or collectively. This Court concurs, and hereby FINDS that the State's failure to

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<sup>14</sup> At the writ hearing, Jackson testified that he "would have gone down and said they cooperated" to the prosecutor handling Robinson's case.

disclose its communications with and/or benefits provided to the four informants listed above were material to Applicants' convictions, as explained previously, and warrant relief.

"[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. Instead, an Applicant is entitled to relief if the State's failure to disclose *Brady* material "undermine[s] confidence in [his] conviction." *Smith v. Cain*, 132 S.Ct. 627, 631 (2012) (internal citations omitted). In making that determination, the "suppressed evidence [must be] considered collectively, not item by item." *Kyles*, 514 U.S. at 437 (1995); *see also id.* at 421 (noting "the established rule that the state's obligation under [*Brady*] to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government").

The U.S. Supreme Court's most recent *Brady* decision, *Wearry v. Cain*, 136 S.Ct. 1002 (2015) (per curiam), is instructive. In *Wearry*, the Court summarily reversed a decision by the Louisiana Supreme Court denying *Brady* relief based on nondisclosure of evidence impeaching the State's informant witnesses. The Court held that the state court had committed clear error in its materiality analysis, violating "settled constitutional principles" by (1) failing to consider the cumulative impact of the violations, and (2) holding *Wearry* to an unduly demanding materiality

test. The Court emphasized that where (as here) the State's trial case rested so heavily on the "dubious" claims of informant witnesses, evidence impeaching the informants' credibility – even if it does not preclude the possibility of a guilty verdict – undermines confidence in the conviction, and requires relief. *See id.* at 1006-08.

Here, the State's *Brady* violations with respect to at least four informants clearly meet this standard. The State's case against both defendants rested almost entirely on the uncorroborated claims of a series of criminal informants and, relatedly, the credibility of Det. Rick Berry. The State had no forensic evidence linking either Applicant to the crime; none of the proceeds from the crime were ever recovered in their possession; and there were no eyewitnesses to the murder. Instead, the State maintained at trial that these informants' testimony "corroborated" Mozee's alleged confession, and that the jury should find them credible because they were promised no benefits in exchange for their testimony, had nothing to gain from their cooperation, and had no reason to inculcate the Applicants except a desire to bring justice to the victim's family. The array of undisclosed *Brady* material paints a very different picture: informants who demanded, expected, and received considerable personal benefits with serious criminal charges as a result of their

testimony.<sup>15</sup> Even Jackson did not deny that this is classic impeachment material subject to mandatory disclosure under *Brady*. Because this Court finds compelling evidence that it was not disclosed, confidence in both verdicts is clearly undermined and relief should be granted.

### 3. Suppression of Exculpatory Evidence Related to Eyewitnesses

Finally, this Court FINDS that substantial documentary and testimonial evidence supports the conclusion that the State failed to disclose material, exculpatory evidence related to at least four eyewitnesses who were interviewed and shown photo arrays during the police investigation because they saw one or more suspects using or selling the victim's stolen property. None of these witnesses were called to testify. Nonetheless, the suppression of the exculpatory statements made by these witnesses is significant and material under *Brady* and its progeny. Judge Hawthorne did not address any of this evidence in her Findings from November 2015.

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<sup>15</sup> Such a conclusion is also supported by the evidentiary principle known as the "Doctrine of Chances." See, e.g., *De La Paz v. State*, 279 S.W. 3d 336 (Tex. Crim. App. 2009) ) (explaining that "the 'doctrine of chances' tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance," and holding that evidence of extrinsic acts bearing an unusual common pattern is admissible against defendant); see also *id.* at 348 ("As Auric Goldfinger, the infamous James Bond villain, said, "Once is happenstance. Twice is coincidence. The third time it's enemy action.'").

a. Sang Yoon Kwon

The facts that form the basis of this *Brady* violation were discussed in detail in part IV(B)(1)(b) of these Findings, *supra*, with respect to Mozee's false testimony claim. In summary, the present record shows that this witness – a store clerk who saw a suspect use the victim's stolen credit cards – may have initially identified Allen in a photo array, but did not identify either defendant in a new array shown to him on the first day of Mozee's trial. Jackson's own notes show that the trial judge "swore the witness in" but he was excused without being called to testify. There is no evidence on record that this exculpatory evidence was disclosed, and Jackson has no recollection of his dealings with this witness nor of disclosing the results of any identification procedures. Both defense counsel had every reason to use this information if they were aware of it. As such, this Court finds that based on Kwon's deposition testimony, Jackson's hearing testimony, and Jackson's reports and notes in his trial file, that Kwon's "no-ID" was not disclosed to either Applicant.

b. Kyoung Jang

Jackson's trial file contained undisclosed impeachment information regarding the alleged identification of Allen by store clerk Kyoung Jang. According to Det. Berry, Ms. Jang was one of the clerks who identified Allen as the man who had tried to use the victim's stolen credit card in a photo array in July 1999. Yet Jackson did not call Jang to testify at either trial the following year.

Jackson's trial file also contained an undisclosed document that appears to explain why Jang was not called as a witness: an interview of Jang by a different detective that was conducted eight weeks before Det. Berry secured this allegedly positive identification from her. In that report, Ms. Jang candidly stated that she "could not recognized [sic] anyone in relation to the attempt [sic] use of the complainant's credit card, as she had not gotten a close look at the individual trying to use it." (emphasis supplied).

At the writ hearing, Jackson was shown this report, and agreed that this report was clearly exculpatory evidence that he was obligated to disclose to defense counsel. Yet it was never mentioned at either trial, nor is the report in Mozee's trial counsel's file. Jackson had no recollection of providing this report to either defendant. He also could not explain why, if he did provide it, the disclosure of this report was not mentioned in any of his detailed notes ("I tried to make [the notes] thorough but I'm not always perfect about it"). Thus, this Court finds that the most logical conclusion from the entire record is that the exculpatory, initial report regarding Jang was not disclosed.

c. Roderick May

Roderick May (also referred to in certain portions of the record as "Mays") was another non-testifying eyewitness. Yet neither May's initial interview report, or any report of the photo arrays he was shown, were provided to the defendants. May's name appears in the record for the first time in the middle of Allen's trial, when Det. Berry stated on cross-examination that "Roderick Mays" was one of the witnesses who reported seeing two black men trying to sell pagers near the vicinity of the Rev. Borns' store on the night of the murder.

Det. Berry then admitted he had shown May a photo lineup, but claimed he did not have the report, nor did he know where to find May:

Q: Let's st[art] with Mays. Did you show him a photographic lineup?

A: Yes, I did.

Q: Where is he today?

A: I have no idea.

Q: Have you looked for him?

A: Today?

Q: Well, could you find the report that says you showed it to Roderick Mays?

A: I don't have that report.

Q: You don't have it?

A: No, I don't.

The evidence presented below, however, established that (1) a copy of the initial interview report with May was in Jackson's trial file, revealing that he had given detailed descriptions of two black males attempting to sell pagers near the scene that night, and (2) Jackson made a pretrial preparation note that inquired, "Did May ever see a lineup of defendants or anyone else? Anybody know who those two

B/M's were?" In additional notes, Jackson then answered his own question about the results of May's photo lineup: "didn't pick anyone." (emphasis supplied).<sup>16</sup>

At the hearing, Jackson agreed that if May had been shown photo arrays of these defendants and asked whether either of them was one of the black males he saw attempting to sell pagers, "and didn't pick them out," that would be exculpatory evidence. He would have been obligated to reveal that information to the defense, but he has no recollection or record of doing so. And it is clear from the questions that Allen's counsel asked Det. Berry that he was wholly unaware of this information.

Thus, the record regarding Roderick May shows that Jackson was personally aware of exculpatory evidence (that May had seen two suspects attempting to sell the victim's property, but "didn't pick anyone" from an array) that he failed to disclose. The record further indicates that – as with Zane Smith and Lonel Hardeman – Jackson breached his duty to correct the record when a witness (here, Det. Berry) gave false or misleading testimony regarding that undisclosed exculpatory evidence.

d. Insun Chon

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<sup>16</sup> It is of note, particularly in light of Det. Berry's testimony at trial that May was shown a photo lineup, that Jackson testified at the hearing that one of his investigators in the DA's Office had the first name "May," and said, "I don't know if that's her or somebody – if it's Roderick Mayes." But of course, there would have been no reason for Jackson's own investigator to be viewing photo lineups of suspects in this case to see if she herself could "pick anyone." And the reference in Jackson's notes to a witness who had already described "two B/Ms" in connection with this case corresponds directly to the information in Berry's report on witness Roderick May.

In addition to Ms. Jang and Mr. Kwon, *supra*, two additional witnesses viewed two men attempting to use the victim's stolen credit card: Inson Chon and Sun Jung.<sup>17</sup>

Mr. Chon (the store manager) was the one who viewed the primary suspect most clearly and gave a detailed description to Det. Berry. Jackson proceeded to make a note to himself to "subpoena Chon and . . . put [him] on standby." However, elsewhere in his file, as part of his pretrial preparation, Jackson wrote himself another note asking whether Chon had "ID['d] Defendant Allen" – and then answered his own question, "NO." The fact that Chon had apparently not identified Allen – the person whom the State alleged had tried to use the Rev. Borns' credit cards at multiple locations – was never presented to either defendant's jury. Nor did Jackson correct the highly misleading testimony given by Det. Berry at Mozee's trial that all three store clerks who Det. Berry interviewed during his investigation into the stolen credit cards had "identified" Allen.

#### Materiality of the Brady Violations Regarding Eyewitnesses

As with the suppression of exculpatory evidence regarding informants, *supra*, this Court finds that confidence in the outcome of Mozee's and Allen's trials is undermined by the suppression of the eyewitness evidence. The fact that numerous witnesses who saw the suspect(s) in the hours immediately following the murder

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<sup>17</sup> Sun Jung identified another suspect – Darryl Adkins – when she viewed the array, although this fact was brought out at Mr. Allen's trial.

either did not identify the Applicants or (in Jang's case) expressed doubt about their ability to make an identification before allegedly identifying one of them on a later date is textbook exculpatory evidence. See, e.g., *Smith v. Cain*, *supra* (reversing murder conviction on *Brady* grounds after State failed to disclose notes regarding initial statement by single eyewitness who purportedly identified the defendant, revealing that witness initially stated he did not see the suspect clearly enough to identify anyone). Further, especially in Mozee's case (where Det. Berry gave false testimony about the "three" eyewitnesses who allegedly identified Allen – none of whom testified), the suppressed evidence "could have been used to cap an attack on the integrity of the investigation and on the reliability of [the lead detective]," *Kyles*, 514 U.S. at 449. In a case where Det. Berry was the only person who witnessed Mozee's alleged "confession," and in which the State relied so heavily on dubious testimony by informants Berry interviewed, evidence revealing that (1) witnesses who allegedly identified Allen from Berry's photo arrays either recanted their identifications or admitted they had no opportunity to view the suspect, and/or (2) eyewitnesses who saw the suspect did not identify either Applicant, would have substantially furthered the defense case at both trials. And when the suppressed eyewitness evidence is considered alongside the suppressed informant evidence, see *Wearry*, confidence in the outcome of these trials is further undermined and relief should be granted.

V.

PREVIOUS FINDINGS

The court is cognizant of the fact that two district judges have previously made factual findings on this case. This Court finds that the original findings by Judge Stoltz regarding nondisclosure of the informant letters and false testimony by informants are supported by the record, and are further strengthened by new information (the testimony of Jackson and additional testimony and documentary evidence developed by the parties) that Judge Stoltz did not have before him in 2014. As to the findings by Judge Teresa Hawthorne, this Court makes the following findings:

For reasons that are unclear in the record, Judge Hawthorne did not allow the parties to present all of the evidence available in connection with these writ applications. Rather than hear and consider all of the evidence, Judge Hawthorne prematurely issued brief and non-specific fact findings in these cases. She issued identical findings as to both Applicants even though the factual bases for the Applicants' claims and Jackson's defense to those allegations differ in certain key respects. The current court has now considered all of the evidence available and finds that a consideration of all of the evidence compels a conclusion that both Applicants' due process rights were violated.

Judge Hawthorne's findings also failed to address the evidence before the court at the time she issued her findings. As set out in the objections to Judge Hawthorne's findings by Applicants, as well as the State, there was a substantial amount of evidence before the court showing that the trial prosecutor both withheld exculpatory evidence and presented false testimony to the jury. Judge Hawthorne's findings did not address, and did not consider this evidence.

Moreover, Judge Hawthorne's findings failed to address all of the issues raised and proven by the Applicants. For instance, there is no question that false evidence was presented at trial, yet Judge Hawthorne's findings completely overlooked or ignored this argument. Judge Hawthorne's failure to address this aspect of the writs is of particular concern because Jackson effectively conceded at the writ hearing that he failed to correct testimony at trial that he knew was false.

This Court also notes that the conclusion that the trial prosecutor failed to turn over the exculpatory evidence to defense counsel is proven by the objective record. Any claim that Jackson turned over this evidence to the defense is demonstrably untrue. Judge Hawthorne's cursory finding that the trial prosecutor's testimony at the writ hearing is credible is clearly contradicted by the evidence before the court. This evidence contradicting this finding includes that evidence before Judge Hawthorne, as well as the additional evidence that is now before the court, which Judge Hawthorne did not consider.

The record also shows that Jackson never claimed to have a specific recollection that he turned over the exculpatory evidence. Thus any claim that his testimony is credible is not anchored to the facts before the court. In other words, it is unclear on what issue Judge Hawthorne found Jackson to be credible since he never claimed any memory of turning over the exculpatory evidence, but only that he believed he would have done so. Moreover, the only basis for Judge Hawthorne to find that Jackson turned over the exculpatory jailhouse letters to defense counsel was Jackson's note indicating he turned over the physical evidence to defense counsel. Whether Jackson's file note establishes that he in fact turned over some or all of the *Brady* material to the defense is not an issue that can be resolved by evaluating Jackson's personal credibility; it requires an objective analysis of the record as a whole. As discussed elsewhere in these findings, Judge Hawthorne's conclusion that this shows that Jackson turned over the jailhouse letters is contrary to the record, as well as the usual and customary meaning of the term physical evidence. In fact, Jackson's notes, when considered in connection with all of the evidence now before the court, including the evidence not considered by Judge Hawthorne, shows the opposite of what Judge Hawthorne found.

Having considered the entire record now before the court, this Court agrees with the findings of the original trial judge on these writ applications, Judge Mark

Stoltz. Judge Stoltz's findings that the jailhouse letters were not turned over to defense counsel is fully supported by the record.

## VI.

### CONCLUSION

The Court Concludes that both Applicants have established all of the prerequisites that entitle them to relief under art. 11.07.

The Court has weighed the evidence presented in this Application for Writ of Habeas Corpus and engaged in necessary credibility determinations.

The Court Concludes that the evidence presented is newly discovered evidence.

The Court Concludes that Applicants are entitled to habeas corpus relief from their convictions and sentences under art. 11.07.

The Court's Findings of Fact and Conclusions of Law are limited to the allegations contained in Grounds Three, Four, Six and Nine of Allen's Third Amended Application for Writ of Habeas Corpus and Grounds Three and Five of Mozee's Second Amended Application. The Court, at this time, makes no findings on Applicants' other Grounds. Should the Court of Criminal Appeals adopt this Court's recommendation and grant relief on the specified grounds, the remaining claims will be dismissed as moot.

### ORDERS OF THE COURT

In implementing the Court's Findings of Fact and Conclusions of Law, the Clerk will:

Prepare a transcript of the papers in this cause and transmit the Court's Findings of Fact, Conclusions of Law, and Order, including Judgment, Sentence, Indictment, reporters record from the trial and writ hearing, all exhibits and docket sheets, and all filings in these cases to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure.

Send a copy of these Findings of Fact and Conclusions of Law, and the Court's Order to Applicants and their Counsel by depositing the same in the United States mail.


Signed and entered this 2<sup>nd</sup> day of March, 2017.



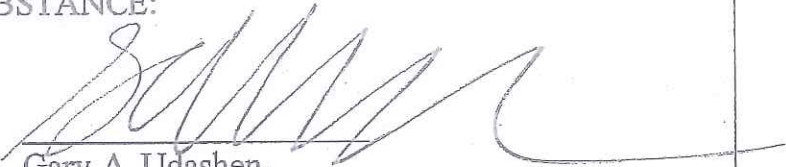
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**HON. EVERETT YOUNG**  
Senior Judge of the 297th District Court  
Sitting By Assignment to the 265th District  
Court of Dallas County, Texas

AGREED AS TO BOTH FORM AND SUBSTANCE:



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Dallas County District  
Attorney's Office



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**ATTORNEY FOR THE STATE**



Bruce Anton  
Sorrels, Udashen & Anton

Appearing on behalf of the  
Innocence Project of Texas

**ATTORNEYS FOR MR. ALLEN**



Nina Morrison  
Innocence Project, Inc.  
(Appearing *pro hac vice*)



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