IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AND

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE ROBERT GENE WILL, II

Case No. _____

APPLICANT ROBERT GENE WILL, II'S SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

* Pro Hac Vice application submitted to the Texas Board of Law Examiners.

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TO THE HONORABLE COURT:

COMES NOW, ROBERT GENE WILL, II, by and through undersigned counsel, pursuant to Article 11.071 of the Texas Code of Criminal Procedure, and hereby files this Application for a Writ of Habeas Corpus.

INTRODUCTION

Robert Gene Will, II, ("Rob Will" or "Mr. Will") has steadfastly maintained that he is innocent of the crime for which he was convicted. Mr. Will has consistently asserted that [Codefendant] killed Deputy Barrett Hill. Documents belatedly produced by the Harris County District Attorney's Office have led to the discovery of new testimony implicating [Codefendant]. Despite the fact that these documents contained information critical to Mr. Will's defense, the State of Texas failed to tum them over before trial as required by *Brady v. Maryland ,* 373 U.S. 83 (1963), and its progeny.

Even before this new evidence had come to light, the federal district court reviewing Mr. Will's case expressed his "deeply felt concerns" about this case. *Will v. Thaler,* No. H-07-CV-1000, 2012 WL 948409, at *3 (S.D. Tex. Mar. 19, 2012). The court "lament[ed] the strict limitations placed upon it" by federal law and urged the State of Texas to "exercise restraint" in the execution of Mr. Will's sentence in light of the "disturbing uncertainties," "total absence of eyewitness testimony or strongly probative forensic evidence," and "considerable evidence supporting Will's innocence." *Will v. Thaler,* No. H-07-CV-1000, 2012 U.S. Dist. LEXIS 5233, at *31 (S.D. Tex. Jan. 17, 2012).

At the time of Mr. Will's conviction, the Harris County District Attorney's Office and the Harris County Sheriff s Office possessed documents that contained material evidence the jury never heard. The first is a Harris County Sheriff s Office document dated December 5, 2000, which reveals that the county jail was holding [Codefendant] in "administrative separation"

because [Codefendant] had solicited inmate [Inmate A] and the [Criminal Gang] prison gang to "make [a] hit on co-def. Robt. Will." *See* Ex.I, [Codefendant] Administrative Separation Review Sheet ("Hit Document"), at 1.

Discovery of this document has led to the new testimony of [Codefendant's] would-be hitman, [Inmate A]. In July 2013, [Inmate A] provided a sworn affidavit stating that [Codefendant] not only solicited Mr. Will's murder from the [Criminal Gang] but also confessed to shooting Deputy Hill during a trip back from court with [Inmate A]. *See* Ex. 2, Affidavit of [Inmate A] ("[Inmate A] Affidavit"), at 4, 5. Jail records found in the District Attorney's files confirm that [Codefendant] and [Inmate A] were housed in the same jail the day after the shooting and attended several court proceedings together in the Spring of 2001. *Compare* Ex. 3, [Codefendant] Inmate Records ("[Codefendant] Jail Records"), at 3 (showing [Codefendant] jail locations), *with* Ex. 4, [Inmate A] Inmate Records ("[Inmate A] Jail Records") (showing [Inmate A] jail locations); *compare* Ex. 1, Hit Document, at 2 (listing [Codefendant's] court dates), *with* Ex. 5, [Inmate A] Administrative Separation Review Sheet Last Updated 4-27-01, at 2 (listing [Inmate A's] court dates). Furthermore, updated copies of [Inmate A's] jail records contained in the District Attorney's files show that the State of Texas was keeping tabs on [Inmate A] and knew of his connection to this case before trial. *Compare* Ex. 6, [Inmate A] Administrative Separation Review Sheet Updated 2-10-01, at 1, *with* Ex. 5, [Inmate A] Administrative Separation Review Sheet Last Updated 4-27-01, at 1.

Another document reveals that days after Deputy Hill's murder, [Codefendant] admitted to [a HCSO Deputy] that he was "part of the reason" Deputy Hill was murdered. *See* Ex. 7, Report of [HCSO Deputy] ("[HCSO Deputy] Report").

The State, however, never disclosed the Hit Document, the [HCSO Deputy] Report, or [Inmate A's] connection to this case to Mr. Will's trial attorneys. *See* Ex. 8, Affidavit of

[trial counsel] ("[trial counsel] Affidavit"); Ex. 9, Affidavit of [trial co-counsel] ("[trial co-counsel] Affidavit"). Had the State made such disclosures, the implication of this evidence would have been clear to the jury: [Codefendant] murdered Deputy Hill and then sought to kill the only witness to his crime, Rob Will. Mr. Will now seeks to bring claims of actual innocence and violation of due process under *Brady v. Maryland* based on this newly discovered evidence.

STATEMENT OF THE CASE

Rob Will was convicted of a murder he did not commit. The fatal shooting occurred in a field in north Houston not far from where Rob Will and his childhood friend [Codefendant] grew up. At approximately 6: 16 a.m. on December 4, 2000, the Harris County Sheriff s Office received a report that several men were breaking into a vehicle at an apartment complex. Trial Transcript (hereinafter "Tr.") Vol. 19 at 14. Deputy Barrett Hill and [Deputy 2] responded to the call and found Rob Will and [Codefendant] in a parking lot. *See* Tr. Vol. 19 at 31, 34. As the deputies approached, the suspects fled and ran into a wooded field nearby. Tr. Vol. 19 at 35-36, 44; Tr. Vol. 21 at 48-50, 55. The deputies gave chase. Tr. Vol. 19 at 36-37; Tr. Vol. 21 at 48-52, 55-56.

In the thick brush of the field, Deputy Hill was murdered with a handgun. Mr. Will was shot with the same gun. *See* Tr. Vol. 25 at 108. No eyewitness other than Rob Will and [Codefendant] saw the shooting. No DNA or other forensic evidence identified Mr. Will as the shooter. *See, e.g.,* Tr. Vol. 17 at 155-56 (no latent fingerprints on murder weapon or casings); Tr. Vol. 24 at 114-118 (the only gunshot residue found on Mr. Will was a result of his gunshot wound, not firing a gun); Tr. Vol. 24 at 31 (no blood from Deputy Hill was found on Mr. Will); Tr. Vol. 24 at 24-25, 32, 35-36 (only a single, small spot of Mr. Will's blood was found on Deputy Hill). To the contrary, radio dispatches captured Deputy Hill reporting shortly before the shooting that he had Mr. Will "in custody." *See* Ex. 10, Radio Transcript of Deputy Barrett Hill #4119 Shooting

("Radio Transmissions"), Ins. 64, 72. Dispatches also recorded his partner [Deputy 2] reporting that he had "lost" [Codefendant] somewhere in the field before any bullets were fired. *See id.* Ins. 71, 72. After the shooting, the Harris County K-9 Unit traced [Codefendant's] path through the field directly to the location where Deputy Hill was murdered. *See infra* Part I.A. [Codefendant] later repeatedly bragged about the murder, stating to a fellow inmate that he "had no choice but to shoot the cop" and was not going to get caught because his dad was a Houston police officer. Tr. Vol. 26 at 10-11; *see infra* Part LG.

With no definitive evidence to prove Rob Will's guilt at trial, the pervasive theme of the State's case was an argument about what happened after the shooting. The State drew a false contrast between the behavior of Rob Will and [Codefendant] after Deputy Hill was murdered. The State argued that while Mr. Will was "desperate" to get away with a crime, [Codefendant] behaved like an innocent man after the shooting. Tr. Vol. 26 at 150-52. The State mocked the defense for attempting to characterize as suspicious [Codefendant's] "shadow boxing" and asking a woman for money after the murder. *See* Tr. Vol. 26 at 151-52. But the State had suppressed [Codefendant's] attempted "hit" on Mr. Will, which allowed the prosecution to close its case by posing the following questions to the jury: "[Are [Codefendant's] actions] the actions of somebody who has just executed one of the finest people in this world? . . . [A]re those the actions of somebody who's just killed a police officer . . . ?" Tr. Vol. 26 at 151-52. The State of course could make this argument only because it had withheld the evidence of what [Codefendant] actually did after Deputy Hill's murder -attempt to kill the only other eyewitness to his crime, Rob Will.

[Codefendant] sought to hide his crime by having the notorious [-- --] prison gang kill Mr. Will. *See infra* Part II.A. I. The evidence of [Codefendant's] cover up was reported to or intercepted by the Harris County Sheriff s Office and recorded in its files. *See* Ex. 1, Hit

Document, at 1. It was then turned over to the prosecution before trial. *See infra* Part II.A. I. Despite specific requests and subpoenas that should have led to its production, evidence of [Codefendant's] hit on Rob Will was never disclosed to defense counsel. *See infra* Part 11.A.2. This evidence, along with evidence developed as a result of its discovery, shows that [Codefendant] tried to eliminate Rob Will so that Mr. Will could not say a word to anyone about what [Codefendant] did to Deputy Hill. Mr. Will deserves a new trial so that a jury may now hear *all* the evidence.

PROCEDURAL HISTORY

On December 4, 2000, Mr. Will was arrested and charged with capital murder for the shooting of Deputy Barrett Hill in Harris County, Texas. On January 16, 2002, a jury convicted Mr. Will of capital murder as charged in the indictment. Following the punishment phase of trial, on January 23, 2002 the trial court sentenced Mr. Will to die. *See* Ex. 11, Judgment of Conviction. On direct appeal, the Court of Criminal Appeals affirmed the conviction and sentence on April 21, 2004.

On October 20, 2003, Mr. Will filed an application for writ of habeas corpus with this Court ("First State Application") through state-appointed counsel [state habeas counsel]. The First State Application raised two grounds for relief: (1) the Texas death penalty statute is unconstitutional; and (2) the trial court erred by admitting certain evidence during the punishment phase of trial. The trial court denied the First State Application on October 26, 2005. On March 29, 2006, the Court of Criminal Appeals ("CCA") affirmed the trial court's denial of relief.

On May 15, 2007, Mr. Will filed a second application for habeas corpus raising ineffective assistance of counsel and actual innocence claims ("Second State Application"). The CCA denied the Second State Application as an abuse of the writ on September 12, 2007, over the dissent of Presiding Judge Sharon Keller.

On March 26, 2007, Mr. Will filed a federal petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, which he later amended ("Federal Petition"). The federal district court denied the petition on May 25, 2010, but the Fifth Circuit Court of Appeals remanded the petition for reconsideration in light of the Supreme Court's decision in *Martinez v. Ryan,* 132 S. Ct. 1309 (2012). The federal proceedings have now been stayed so that this Court may review the instant claims. Ex. 12, *Will v. Stephens,* No. H-07-CV- 1000, Order (S.D. Tex. Aug. 20, 2013).

Mr. Will is still incarcerated against his liberty on death row at the Polunsky Unit, Texas Department of Criminal Justice, Institutional Division, Livingston, Texas. William Stephens, Director of the Texas Department of Criminal Justice, Institutional Division, is the state official responsible for the confinement of Mr. Will. Mr. Will remains unlawfully confined pursuant to the judgment imposing the death penalty.

GROUNDS FOR RELIEF

Mr. Will avers that (1) his death sentence and further incarceration violate his Eighth and Fourteenth Amendment rights because he is actually innocent; and (2) the State violated his due process rights under *Brady v. Maryland* by withholding material exculpatory evidence. In the alternative to his *Brady* claim, Mr. Will asserts that if the exculpatory evidence was disclosed then he was deprived of his Sixth Amendment right to effective assistance of counsel.

This Court may consider the merits of Mr. Will's claims and grant relief because he is innocent. Pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5(a)(2), Texas courts may reach the merits of a successive application if an applicant asserts a federal constitutional claim accompanied by sufficient proof of innocence. According to that section, the application must contain facts establishing "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty

beyond a reasonable doubt." Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a)(2). The facts outlined here show that Mr. Will has met this standard.

In addition, Article 11.071, Section 5(a)(l) allows review of the claims contained in a successive petition if those claims "have not been and could not have been presented previously in a timely initial application" because the factual basis for the claim was "unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a)(l). Here, the facts demonstrate that Mr. Will's new evidence was not available to Mr. Will when he filed his prior applications because it had been suppressed by the State. As set forth below, Mr. Will's trial counsel made several *Brady* requests and issued two subpoenas that should have turned up jail records related to [Codefendant's] attempted "hit" on Mr. Will as well as the [HCSO Deputy] Report. *See infra* Part 11.A.2. These documents were never produced. *See* Ex. 8, [trial counsel] Affidavit; Ex. 9, [trial co-counsel] Affidavit. The suppressed records were also not available to Mr. Will's state habeas counsel [--]. [Habeas counsel's] sworn affidavit states that he had not seen either document until recently, despite extensive review of the District Attorney's files. *See* Ex. 13, Affidavit of [state habeas counsel] ("[state habeas counsel] Affidavit"). Nor were the records available to previous federal habeas counsel who had issued a subpoena for "all" of [Codefendant's] inmate records. *See* Ex. 14 (federal subpoena to Harris County Sheriff s Office); Ex. 15 (State's response to federal subpoena). The State failed to produce either the Hit Document or the [HCSO Deputy] Report, despite: (1) the State's purported "open file policy on this case," Tr. Vol. 16 at 16; (2) the State's "pledge to . . . produce all *Brady* material," Tr. Vol. 2 at 24; (3) trial counsel's motion for *Brady* material, Ex. 16; (4) trial counsel's *two* subpoenas, Exs. 17, 18; and (5) federal habeas counsel's *additional* subpoena that covered these documents, Ex. 14. *See also infra* Part 11.A.2.

Lastly, Mr. Will asserts that his *Brady* claim meets the requirements of Article 11.071, Section 5(a)(3) because, by clear and convincing evidence, no rational juror would have answered in the State's favor one or more of the special issues – the future dangerousness and mitigation issues – Had the State not suppressed the Hit Document and [HCSO Deputy] Report.

I.

MR.WILL IS ACTUALLY INNOCENT

Before the new evidence submitted in this application came to light, the federal district court reviewing this case voiced grave concerns about the State's evidence. As Judge Ellison explained:

> On top of the considerable evidence supporting Will's innocence and the important errors in the trial court, there [is] also [a] total absence of eyewitness testimony or strongly probative forensic evidence. With facts such as these, and on1y circumstantial evidence supporting Will's conviction and death sentence, the Court laments the strict limitations placed upon it. . . . [T]he state executive branch might consider the evidence of actual innocence in this case and exercise restraint in the execution of Will's sentence.

Will, 2012 U.S. Dist. LEXIS 5233, at *31-32.

Since that opinion, Mr. Will's counsel has discovered additional new evidence that supports his innocence claim. The new evidence shows that [Codefendant] attempted to eliminate his childhood friend Rob Will because he feared Mr. Will would expose him as the shooter in Deputy Hill's murder. The new evidence also shows that [Codefendant] confessed to being the shooter, boasting to [Inmate A] and [HCSO Deputy] that he believed he was untouchable because his father was a police officer. This new evidence, along with the other evidence outlined below, demonstrates that Mr. Will is innocent.

Mr. Will advances two types of innocence claims in this application. The first type is based on Section 5(a)(2) of Article 11.071 and the standards adopted by the Supreme Court in *Schlup v. Delo,* 513 U.S. 298 (1995). A *Schlup* innocence claim brought under Section 5(a)(2) is

one that "does not by itself provide a basis for relief," but serves as a procedural "gateway" through which an applicant may have claims raised in a subsequent habeas application decided on the merits. *In re Allen,* 366 S.W.3d 696, 704, 706-07 (Tex. 2012); *Ex parte Reed,* 271 S.W.3d 698, 733 (Tex. Crim. App. 2008). The second type of innocence claim advanced in this petition is a standalone innocence claim based on *Herrera v. Collins,* 506 U.S. 390 (1993). A *Herrera*- type innocence claim is one in which the applicant asserts that his death sentence and continued incarceration violate the Eighth and Fourteenth Amendments to the U.S. Constitution because he is innocent. *See Ex parte Elizondo,* 947 S.W.2d 202, 204-09 {Tex. Crim. App. 1996).

Mr. Will's two innocence claims have different requirements. An applicant asserting a *Schlup-type* innocence claim under Section 5(a)(2) needs to show that he is "probably" innocent, meaning that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Allen,* 366 S.W.3d at 705; *see also Reed,* 271 S.W.3d at 733-34. To establish a *Herrera* innocence claim, an applicant must show "by clear and convincing evidence that no reasonable juror could have convicted him in light of the newly discovered evidence." *Elizondo,* 947 S.W.2d at 209.

To determine whether an applicant has satisfied his burden, the reviewing court "must make a holistic evaluation of all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.'" *Reed,* 271 S.W.3d at 733-34 (quoting *House v. Bell,* 547 U.S. 518, 537- 38 (2006)).

Here, a review of "all the evidence, old and new" reveals a "complete, rational exculpatory narrative" that shows [Codefendant] -not Rob Will -killed Deputy Hill. *See id.* at 746. Although there was a "total absence of eyewitness testimony" and the State's case

was devoid of any "strongly probative" forensic evidence, *see Will,*2012 U.S. Dist. LEXIS 5233, at *31, the State secured a guilty verdict and death sentence relying solely on circumstantial evidence. In response, defense counsel maintained that "Robert Gene Will is not a killer" and directly pointed the finger at [Codefendant]. Tr. Vol. 17 at 42-43. Defense counsel argued that [Codefendant] outran [Deputy 2], caught up with Deputy Hill and shot.him, freed Rob Will, and then snuck away into the dark field. Throughout trial, the prosecution responded to the defense's theory. *First,* the prosecution argued that [Codefendant] could not have killed Deputy Hill because [Codefendant] "ran east, away from the location . . . where Deputy Hill [was] shot." *See* Tr. Vol. 26 at 102. However, reliable State evidence traces [Codefendant's] path west to the exact location where Deputy Hill was killed. *Second,* the State developed a false theory that [Codefendant] did not have enough time to cover the distance between the locations where [Deputy 2] lost him and where Deputy Hill was killed. Tr. Vol. 26 at 103, 148. Record evidence refutes the State's timeline and demonstrates that [Codefendant] had ample time to commit the murder. *Third,* the prosecution emphasized that certain ambiguous forensic evidence pointed to Mr. Will as the shooter. Tr. Vol. 26 at 96-97. However, the forensic evidence shows that Mr. Will almost certainly could not have fired the gun, and that [Codefendant] was in a position to commit the murder and free Mr. Will from custody. *Fourth,* the State argued that [Codefendant] did not know that a policeman had been shot and mocked the defense's evidence that [Codefendant] acted suspiciously after the murder. The evidence shows that [Codefendant] did act suspiciously, washing blood off his clothing after the murder and repeatedly lying to the police about the shooting. *Fifth,* the State introduced evidence that immediately after the shooting Mr. Will told [Witness C] that he had "just shot a policeman." Tr. Vol. 21 at 74. This testimony was not true. [Witness C] never told police this story until trial when, as new evidence shows, the prosecution showed her

inflammatory and "extremely graphic" photos of Deputy Hill to secure her biased testimony. *Finally,* the State argued that Mr. Will's actions after the shooting showed that he was "desperate" to get away with the crime, while [Codefendant] acted like an innocent man. Tr. Vol. 26 at 150-52. New evidence shows that after Deputy Hill was murdered, [Codefendant] *attempted to kill the only witness to the crime, Rob Will.* The new evidence also shows that [Codefendant] admitted to [Inmate A] that he killed Deputy Hill and made incriminating statements to [HCSO Deputy]. All of this evidence, both new and old, shows that Rob Will is actually innocent and more than satisfies his burdens of proof under both *Schlup* and *Herrera.*

A. Reliable Evidence Traces [Codefendant] to the Location Where Deputy Hill Was Murdered

One of the State's key theories at trial was that [Codefendant] could not have been the shooter because he ran "east, away from the location . . . where Deputy Hill [was] shot." *See* Tr. Vol. 26 at 102. It is undisputed that [Codefendant] ran from the deputies through a field via an overgrown concrete driveway. From there, the State argued, [Codefendant] turned east. However, reliable evidence the jury never heard shows that this theory is not true and, in fact, [Codefendant] was traced west to the exact location of Deputy Hill's body.

On December 4, 2000 at approximately 6:30 a.m., [Codefendant] and Rob Will were breaking into two parked cars when Deputy Hill and [Deputy 2] arrived on the scene. Tr. Vol. 19 at 30-34. [Codefendant] and Mr. Will fled and a foot chase ensued. *See* Tr. Vol. 19 at 36-37. Deputy Hill chased Mr. Will directly into a wooded field through thick brush. *See* Tr. Vol. 21 at 49-52. [Codefendant] ran through the same field by way of an overgrown concrete driveway. Tr. Vol. 19 at 43-44 (testimony of [Deputy 2]); Tr. Vol. 21 at 56 (testimony of [Witness B]). From a distance [Deputy 2] attempted to follow [Codefendant] but lost sight of him. Tr. Vol. 19 at 48. [Deputy 2] lagged behind [Codefendant], never getting close enough to see his

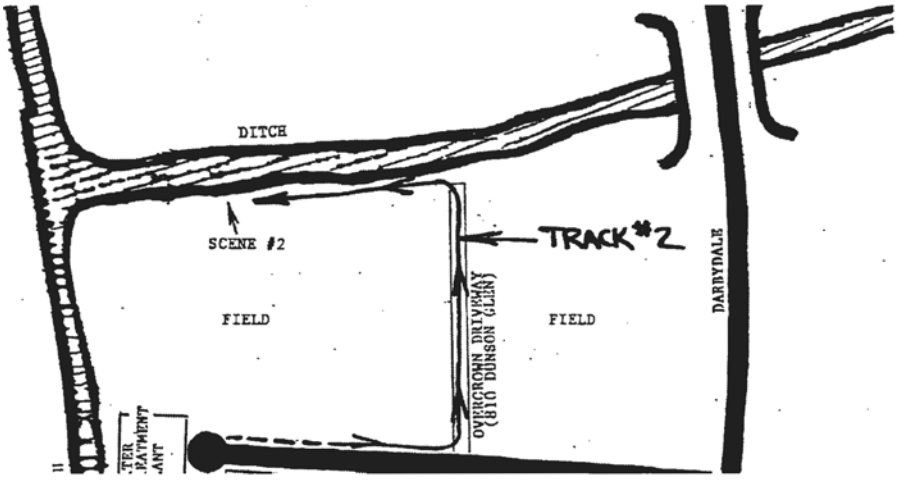
face or even tell what he was wearing. Tr. Vol. 21 at 21-22. [Deputy 2] initially reported that [Codefendant] ran to the end of the driveway and then east along the bayou. Tr. Vol. 21 at 33-34. But at trial [Deputy 2] agreed that his original report was based on an "incorrect belief." Tr. Vol. 21 at 34.

The State argued that [Codefendant] "ran east" away from the location where Deputy Hill was killed, Tr. Vol. 26 at 104, 147, but the jury never heard that shortly after the murder a Harris County K-9 Unit bloodhound tracked [Codefendant] along the concrete driveway and then *west* to the exact location where Deputy Hill was killed. According to the K-9 Unit report, a Harris County bloodhound picked up a scent off of two tool bags that Mr. Will and [Codefendant] had been using to break into the cars. Ex. 19, Supplemental Report of Det. [J.R.J.] ("K-9 Report"), at 9. The police bloodhound then "strongly tracked" the scent from the tool bags northward on the overgrown concrete driveway through the field and then *"westbound* . . . to the crime scene . . .near [Deputy Hill's] body." *Id.* at 9-10 (emphasis added). The reporting detective noted that the bloodhound wanted "to track all of the way to [Deputy Hill's body], but was not allowed to enter the inner security perimeter." *Id.* at 10.

This evidence is critical because every witness who saw the events testified that [Codefendant] ran through the field via the overgrown concrete driveway. Tr. Vol. 19 at 43-44 (testimony of [Deputy 2]); Tr. Vol. 21 at 56 (testimony of [Witness B]). Rob Will, on the other hand, never stepped foot anywhere near the concrete pathway; instead, he ran directly "into the brush." *See* Tr. Vol. 21 at 49-51. As a result, there can be no question that the Harris County K-9 Unit bloodhound picked up [Codefendant's] scent, which led her directly to Deputy Hill's body. This evidence flatly contradicts one of the State's principal arguments at trial -that [Codefendant] was never near the scene of the shooting. *See, e.g.,* Tr. Vol. 26 at 102 (State's summation

arguing that just before the shooting, "[Codefendant] is running east, away from the location . . . where Deputy Hill is shot").

Harris County K-9 Unit Diagram of
Bloodhound Track No. **2 to Scene** No. **2 (Deputy Hill's Body)**[1] **1**
Prepared by Det. [J.R.J.], December 11, 2000



Innocence evidence must be evaluated without regard to whether it would necessarily be admitted under "the rules of admissibility that would govern at trial." *Schlup,* 513 U.S. at 327. Even so, Texas courts recognize the reliability and admissibility of bloodhound dog-tracking evidence. *See, e.g., Winfrey* v. *State,* 323 S.W.3d 875, 883 (Tex. Crim. App. 2010) ("Cases involving the use of dogs, usually bloodhounds, to track humans are abundant and the law is well settled in regards to admissibility of such evidence . . . ."); *Winston* v. *State,* 78 S.W.3d 522, 526 (Tex. App.-Houston [14th Dist.] 2002) (citing cases and noting that the "ability of certain breeds of dogs, especially bloodhounds," to follow the scent of humans is "well documented"); *see also* Wright & Miller, Federal Prac. & Proc. § 5181.1 (2013) ("[T]he overwhelming majority

[1] This diagram shows the top portion of Exhibit 20. Track #1 on the bottom portion of Exhibit 20 tracks [Codefendant's] path as he ran behind the apartment complex. The bottom half of the diagram and the report indicate that the bloodhound lost the scent trail at the approximate location where [Codefendant] cut through the complex to the overgrown driveway. *See* Ex. 19; Ex. 20.

of the courts find dog tracking evidence admissible."). This critical evidence, which was never heard by the jury, refutes a central part of the State's case and serves to show that Rob Will is actually innocent of the murder of Deputy Hill.

B. Contrary to the State's Theory at Trial, [Codefendant] Had Ample Time to Kill Deputy Hill

At trial, the State also argued that [Codefendant] could not have killed Deputy Hill because he did not have enough time. Tr. Vol. 26 at 103, 148. This argument is demonstrably false. According to the State's timeline, [Codefendant] had only eight seconds to run the 400 feet[2] between where he was last seen by [Deputy 2] on the overgrown driveway and the location where Deputy Hill was killed. Tr. Vol. 26 at 102-03. The State based its eight-second theory on the assumption that [Deputy 2] reported losing [Codefendant] to the radio dispatcher immediately - indeed, the very second that [Codefendant] disappeared. *See* Tr. Vol. 26 at 147-48. However, [Deputy 2's] testimony shows that is not true.

The evidence in fact demonstrates that [Codefendant] had somewhere between 26 and 104 seconds between the time [Deputy 2] lost sight of him and the time the first shot was fired. In his testimony at trial, [Deputy 2] distinctly described a radio transmission he made *"after"* he lost sight of [Codefendant]:

> **Question (District Attorney Rosenthal):** *After* you lost sight of [[Codefendant]], did you make any communication to anyone else that might have been arriving to try to help you catch him?
>
> **Answer ([Deputy 2]):** I asked my dispatcher if I had any other units en route [to] where I had lost sight of him.

[2] State witness [Officer 3] testified that the measured distance between the concrete driveway where [Deputy 2] lost [Codefendant] and the location of Deputy Hill's body was only 400 feet. Tr. Vol. 17 at 65. The State falsely argued to the jury that the distance was 470 feet. Tr. Vol. 26 at 102.

Tr. Vol. 19 at 48-49 (emphasis added). According to the time stamp on the recording, this "en route" radio transmission occurred 26 seconds before the shooting. *See* Ex. 10, Radio Transmissions, Ins. 66, 72 (at 6:38:03 a.m., [Deputy 2] radioed the dispatcher "I got any units enroute [sic] to me?"; 26 seconds later at 6:38:29 a.m., the first shot is fired).[3]3 Consequently, [Deputy 2] lost [Codefendant] at least 26 seconds prior to the shooting -not eight seconds as the State contended.

Further, 26 seconds is the *minimum* amount of time [Codefendant] had to reach Deputy Hill. The record shows that [Codefendant] in all probability had much longer. The last transmission [Deputy 2] heard while he still had [Codefendant] in sight occurred at 6:36:45 a.m., 104 seconds before the shooting. *Compare* Tr. Vol. 19 at 47 ("Q: [A]s [[Codefendant]] turned around to look at you, [did] you get any communication from Deputy Hill about that time? A: . . . I believe he said, I've got the tall one."), *with* Ex. 10, Radio Transmissions, Ins. 60, 72 (Deputy Hill reported that he had "the tall one" at 6:36:45 a.m., 104 seconds before the shooting, which occurred at 6:38:29). After that transmission, [Deputy 2] testified that he lost sight of [Codefendant]. Tr. Vol. 19 at 48 ("Q: About the time that you get [the 6:36:45 "tall one"] report, are you still closing in on [[Codefendant]]? A: Yes, sir. Q: And did you catch [[Codefendant]]? A: No, sir. Q: What happened? A: I lost sight of him . . . . I saw him disappear around a tree."). In short, the record shows that [Codefendant] had at least 26 seconds and up to 104 seconds (1:44 minutes) to reach Deputy Hill. A summary of the transmissions appears below:

- At **6:36:27 a.m.** (2:02 minutes before the shooting), all four men are running north through the field toward a bayou located on the other side. *See* Ex. 10, Radio Transmissions, In. 57.

[3] [Deputy 2] described his search for [Codefendant] after his "en route" transmission: "I made it to the . . . right-of-way of the bayou. I looked that way towards the bridge at the end of the street . . . ." Tr. Vol. 19 at 49. [Deputy 2] continued: "I remember looking down . . . the right-of-way back towards Darbydale, this bridge along the bayou and telling my dispatcher that I had lost sight of him . . . ." Tr. Vol. 19 at 72.

- At **6:36:45 a.m.** (1:44 minutes before the shooting), Deputy Hill reported that he had "the tall one" (Rob Will) "over here." *Id.* In. 60. [Deputy 2] testified that this was the last transmission he heard with [Codefendant] in his sight. *See* Tr. Vol. 19 at 47-48. ("I believe he said, I've got the tall one. . . . I lost sight of him.").

- At **6:37:45 a.m.** (44 seconds before the shooting), Deputy Hill radioed in that he had Mr. Will "in custody." Ex. 10, Radio Transmissions, In. 64.

- At **6:38:03 a.m.** (26 seconds before the shooting), [Deputy 2] radioed to ask if there were any units en route to where he had lost sight of [Codefendant]. *See id.* Ins. 66, 70, 71. [Deputy 2] made this "en route" transmission "after" he had "lost sight" of [Codefendant]. Tr. Vol. 19 at 48-49.

- At **6:38:21 a.m.** (8 seconds before the shooting), [Deputy 2] belatedly radioed in that he had "lost [[Codefendant]] on the bayou." *See* Ex. 10, Radio Transmissions, ln. 71. [Deputy 2] testified that he had already lost [Codefendant] before this transmission. *See* Tr. Vol. 19 at 48-49.

- At **6:38:29 a.m.,** the first gunshot is heard over the radio. Ex. 10, Radio Transmissions, In. 72.

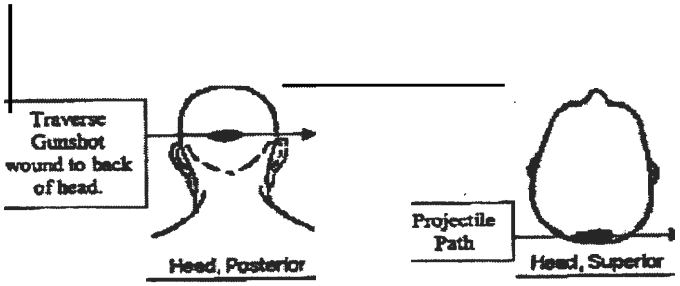
In light of the clear record evidence to the contrary, no reasonable juror could accept the State's fallacious theory that [Codefendant] had only eight seconds to catch up with Deputy Hill. In other words, no reasonable juror could accept the State's argument that not even "Olympic runners on flat surfaces could make that distance in less than eight seconds." *See* Tr. Vol. 26 at 103. To run 400 feet in 26 to 104 seconds is no Olympic feat; north Houston middle school students routinely run 100 meter *hurdles* (approximately 329 feet) in 20 seconds or less.[4]

C. There is Forensic and Physical Evidence Showing that [Codefendant] Shot Deputy Hill, Freed Rob Will, and Then Escaped

After eluding [Deputy 2] on the overgrown driveway, [Codefendant] took Deputy Hill and Rob Will by surprise. Deputy Hill's bright flashlight in the dark field would have made the two easy for [Codefendant] to spot. *See* Ex. 21, Dec. 4, 2000 Statement of Person in Custody ("[Codefendant] Dec. 4 Statement"), at 2 ([Codefendant] statement to police admitting that he saw Deputy Hill's

[4] *See* North Houston Athletic Track & Field Top 10, http://www.athletic.net/TrackAndField/Division/Top.aspx ?DivID=46248.

flashlight); Ex. 22, Dec. 5, 2000 Statement of Person in Custody ("[Codefendant] Dec. 5 Statement"), at 3 (same). [Codefendant] killed Deputy Hill with several "long range" gunshots. *See* Tr. Vol. 25 at 41-44. One of the long-range gunshots was a shot to the back of Deputy Hill's head from his left -an improbable shot for Rob Will, who was "in custody."[5] *See* Tr. Vol. 17 at 93; Tr. Vol. 25 at 64-65.



Ex. 24, Harris County Medical Examiner Report ("State Autopsy Report"), at 19.

It is undisputed that Deputy Hill never got off a shot. *See* Tr. Vol. 25 at 92. During the commotion [Codefendant] mistakenly shot Rob Will in his left hand. *See* Tr. Vol. 23 at 56. As a result, gunshot residue was found on Mr. Will's left-hand glove. Tr. Vol. 24 at 114, 116. The State forensic examiner confirmed at trial that the residue on Mr. Will's left-hand glove was "almost certainly" the result of Mr. Will's gunshot wound rather than the result of Mr. Will firing a gun. Tr. Vol. 24 at 118. Furthermore, a highly-sensitive microscopic examination of the glove Mr. Will was wearing on his right hand -the hand he allegedly used to shoot Deputy Hill - was "inconclusive." Tr. Vol. 24 at 116. Notably, "negative" was not even an option for the State forensic examiner; according to State testimony, gunshot residue test results are either "positive" or "inconclusive." Tr. Vol. 24 at 108-10.

[5] Before his murder, Deputy Hill had amassed a total of 1063 training hours as a licensed peace officer. Of those 1063 hours, 40 consisted of specific training on the "mechanics of arrest," which he completed as part of his "Basic Peace Officer" training course on June 3, 1998. *See* Ex. 23, Texas Commission in Law Enforcement Office Standards and Education Personal Information Sheet for Barrett T. Hill.

After shooting Deputy Hill, [Codefendant] freed Mr. Will from custody by opening his handcuffs from behind Mr. Will's back. [Codefendant] either: (1) used his own handcuff key to free Rob Will -[Codefendant] was the son of a police officer and Hill's handcuffs could have been opened with any handcuff key bought at any police supply store, *see* Tr. Vol. 18 at 29-30, 54-55; or (2) used a key that was found tied to the laces of Deputy Hill's right boot -a "fail-safe" or "backup" key often used by police officers that [Codefendant] would have known about from his father, *see* Tr. Vol. 18 at 46-47, 55. Indeed, blood from Mr. Will's injured hand was found on Hill's right boot near the spare handcuff key. Tr. Vol. 24 at 24-25, 35-36. After Mr. Will was freed, [Codefendant] gave Mr. Will the murder weapon and escaped.

Shortly after the last shot was fired, [Deputy 2] saw Mr. Will running north from the area where Deputy Hill's body was later found and chased him. Tr. Vol. 19 at 50-51. [Deputy 2's] pursuit of Mr. Will gave [Codefendant] the opportunity to sneak away by running in the opposite direction into a dark field. *See* Tr. Vol. 21 at 29-30. [Codefendant's] jacket and pants were found in the field approximately 700 feet east of Deputy Hill's body. Tr. Vol. 17 at 68-69. The clothes had blood on them, presumably [Codefendant's]. *See* Tr. Vol. 23 at 133-34, 150. [Codefendant] claimed that he was injured and bleeding from an earlier slip and fall at the edge of the overgrown driveway. Ex. 21, [Codef.] Dec. 4 Statement, at 2; Ex. 22, [Codefe.] Dec. 5 Statement, at 3. [Deputy 2] and [Witness B] should have seen this alleged fall from their vantage points, but both testified that it never happened. Tr. Vol. 21 at 63 (testimony of [Witness B]); Tr. Vol. 21 at 19, 41-42 (testimony of [Deputy 2]). [Codefendant] told police that he ran from the scene -jumping a fence and hiding in an apartment building -wearing stained white wind pants. [Codefendant] claimed that the stain was grease from jumping over the fence. But [--], a forensic scientist at Gene Screen in Dallas, testified at trial that she saw traces of blood on [Codefendant's] pants but was unable to get DNA from them because the pants had been washed and/or bleached Tr. Vol. 23 at

123, 159-61.

D. [Codefendant] Washed the Blood Off His Clothing After the Murder

The morning of the shooting, [Codefendant] went to the apartment that Mr. Will shared with his girlfriend, [--]. *See* Tr. Vol. 25 at 181, 183-84. [Witness E] was also present at the apartment and testified that [Codefendant] was "[n]ervous, in a hurry, [and] rushing to leave." Tr. Vol. 25 at 184. [Witness E] told police that [Codefendant] "put on his white nylon windbreaker pants" and then remarked "[t]he blood came off of 'em." Ex. 25, Voluntary Statement of [Witness E], at 2. The jury never heard this testimony. When [Codefendant] left the apartment, he told [girlfriend] "[n]ot to say anything to the cops about him because they could trace it back to what him and Robert ha[d] done." Tr. Vol. 25 at 199. This testimony, some of which was not presented to the jury, shows that [Codefendant], not Mr. Will, shot and killed Deputy Hill.

E. [Codefendant] Lied to Police on Multiple Occasions

Harris County investigators first questioned [Codefendant] the night of Deputy Hill's murder. [Codefendant] began lying immediately. His first lie to the police was that he did not know Rob Will. *See* Ex. 26, Supplemental Report by Det. [H.B.F.] ("Detective [H.B.F.] Report"), at 1. [Codefendant] then admitted to knowing Rob Will, but told detectives that he was not at the crime scene on the night of the murder. *Id.* at 1-2. The detectives soon learned from other sources that [Codefendant] was indeed at the crime scene. *Id.* at 2. Because "[Codefendant] was being deceptive and evasive with his answers," *id.,* detectives confronted him with his lies, but [Codefendant] continued to deny having been at the scene, *id.* at 3.

[Codefendant] then asked to speak with his father, who was a Houston police officer. *Id.* [Codefendant] was allowed to meet privately with his father. *Id.* Afterwards, [he] provided his first written statement. *See* Ex. 21, [Codefendant] Dec. 4 Statement. In that statement, [he] finally

admitted that he was at the scene, but he pointed the finger at Mr. Will. *Id.* at 2. This too was a lie.

[Codefendant's] next lie to police was that he did not know who had been shot until he returned to Mr. Will's apartment and [girlfriend] "told [him] what happened." *Id.* at 3. [Codefendant's] version of events is contradicted by [Witness A], the assistant manager of an apartment complex near the crime scene. Shortly after the shooting, [Witness A] found [Codefendant] sitting near her office. Tr. Vol. 26 at 47-48, 55. [Witness A] testified that [Codefendant] was "nervous acting" after the shooting and that he knew "what was going on down the street." Tr. Vol. 26 at 49-50. In her police statement, which the jury never heard, [Witness A] further explained that [Codefendant] told her, "A cop had got shot." Ex. 27, Voluntary Statement of [Witness A], at 1. By contrast, five days after the shooting, [Codefendant] told police that when he arrived at [girlfriend]'s apartment, he still "thought Robert had been shot, because I didn't know who had been shot." The State took advantage of [Codefendant's] lie at trial. Tr. Vol. 26 at 105 (arguing at closing that "[Codefendant] had to wonder, he had to hear those gunshots, too, and he had to be wondering, gosh, is my buddy dead? Is he the one that's shot? What's going on?").

In his first written statement, [Codefendant] also claimed to have seen the gun used to shoot Deputy Hill in Mr. Will's possession, but [Codefendant] lied and said that he had never touched it. Ex. 21, [Codef.] Dec. 4 Statement, at 3. After realizing that his fingerprints or DNA might tum up on the murder weapon, [Codefendant] changed his story again, telling police in a new statement that he had held the gun that night. Ex. 22, [Codef.] Dec. 5 Statement, at 3.

F. Rob Will Never Admitted to Shooting Deputy Hill

At trial, the State called [Witness C], a resident of the Sun Prairie Apartments near the scene of the shooting. Tr. Vol. 21 at 69-70. [Witness C] testified that on the morning of the murder, she had dozed off in her parked car outside her apartment building. Tr. Vol. 21 at

71. A man whom she later identified as Rob Will opened her car door and told her to get out of the vehicle. Tr. Vol. 21 at 72-73. [Witness C] testified that Mr. Will then told her "he had just shot a policeman," before jumping into her car and driving away. Tr. Vol. 21 at 74-75. However, Mr. Will never made any such statement.

As defense counsel elicited on cross examination, [Witness C] had discussed the events of December 4th with at least eight separate law enforcement officials on the day of the shooting. *See* Tr. Vol. 21 at 104. She did not tell a single one of them that Mr. Will claimed to have shot a policeman:

- When [Witness C] called 911 after her car was stolen, she did not tell the 911 operator that the individual who had taken her car told her that he had shot a police officer. Tr. Vol. 21 at 91.

- [Witness C] did not tell [Deputy 2], the first officer on the scene, that Mr. Will had said he shot a police officer. *See* Tr. Vol. 21 at 92-93.

- At 8:37 a.m. the morning of the shooting, [Witness C] spoke with [Deputy 3] and gave him a description of the person who took her car. She did not tell [Deputy 3] that this person had said he shot a police officer. Tr. Vol. 21 at 93-95.

- Police then bagged [Witness C's] hands. By this time, [Witness C] was aware that an officer had been killed in the field near her apartment. Again, she did not tell the officer bagging her hands that Mr. Will had said he had shot anyone. Tr. Vol. 21 at 95.

- Another officer came to collect blood from [Witness C]. She said nothing to this officer about Mr. Will's alleged statement. Tr. Vol. 21 at 95-96.

- [Witness C] then spoke with a police photographer. [Witness C] was now aware that there was a "murder investigation going on involving the death of a police officer" and she had also "figured out that [her] car ha[d] some connection to the[] investigation." But again she did not mention Mr. Will's alleged statement. Tr. Vol. 21 at 96.

- An officer drove [Witness C] to the detectives' bureau where she met with [Deputy 4] at approximately 9:45 a.m. At 10:15 a.m., [Witness C] signed a written statement about what happened to her that morning. Her statement did not include Mr. Will's alleged admission that he had just shot a police officer. Tr. Vol. 21 at 96-99, 101.

- Around 4:00 p.m. that same day, [Witness C] met with [a Lieutenant] and another deputy sheriff. Tr. Vol. 21 at 103. The officers showed [Witness C] pictures of Mr. Will; again, she did not tell them about Mr. Will's alleged statement. Tr. Vol. 21 at 104.

[Witness C] did not tell the police or prosecutors about Mr. Will's alleged admission for *thirteen months*. *See* Tr. Vol. 21 at 108. It was not until trial, after [Witness C] met with the assistant district attorney, that she told law enforcement about her new version of what happened the morning of the shooting. *See* Tr. Vol. 21 at 108. Unbeknownst to defense counsel, on the eve of her trial testimony prosecutors had shown [Witness C] "very gruesome and extremely graphic" pictures of the slain Deputy Hill. Ex. 28, Affidavit of [Witness D].[6] These photos – which were completely irrelevant to any of [Witness C's] testimony – no doubt biased her testimony,[7] causing her to recount a statement that, the evidence shows, was not part of her actual recollection of the events.

G. New Evidence Shows that [Codefendant] Attempted to Kill Rob Will and Admitted to Killing Deputy Hill

New evidence reveals that after [Codefendant] was booked at the Harris County Jail, he attempted to have Rob Will, the only witness to his crime, killed. *See* Ex. 1, Hit Document, at 1. The Hit Document indicates that [Codefendant] was placed into administrative separation in the Harris County Jail after Deputy Hill's murder because [Codefendant] solicited inmate [Inmate A] and the [Criminal Gang] prison gang to "make [a] hit on co-def. Robt. Will." *See* Ex. 1. The discovery of this document led to the recent sworn affidavit of [Inmate A], which confirms that

[6] The fact that the State showed [Witness C] these photos should have been disclosed to defense counsel before trial under *Brady v. Maryland. See United States v. Bagley,* 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rules."). The State made no such disclosure.

[7] In addition, a witness who overheard the incident only reported hearing, "Get out of the car now!" Ex. 29, Supplemental Report of Det. [R.R.H.], at 2. This witness did not recount hearing anything about Mr. Will's alleged admission. *See id.*

[Codefendant] asked [Inmate A] to "get the [Criminal Gang] to do a 'hit' on Will." *See* Ex. 2, [Inmate A] Affidavit, at 4. The new evidence demonstrates that [Codefendant] attempted to kill his childhood friend Rob Will because he feared Mr. Will would expose him as the shooter in Deputy Hill's murder. *See infra* Part 11.B. In his July 25, 2013 sworn affidavit, [Inmate A] also reports that during a trip to court [Codefendant] confessed to shooting Deputy Hill and told [Inmate A] he planned to "blame Will." *See* Ex. 2, [Inmate A] Affidavit, at 5. [Codefendant's] confession is corroborated by [Codefendant's] and [Inmate A's] jail records, which show that the two attended several court dates together in the Spring of 2001. *Compare* Ex. 1, Hit Document, at 2, *with* Ex. 5, [Inmate A] Administrative Separation Review Sheet Last Updated 4-27-01, at 2. [Codefendant's] confession to [Inmate A] is similar to at least two other confessions he made. First, [Inmate B], a Harris County Jail inmate who had frequent contact with [Codefendant], testified that [Codefendant] told him "he had no choice but to shoot the cop," that it was 'just instinct" and then "he ran." Tr. Vol. 26 at 10-11. [Inmate B] also testified that [Codefendant] told him that he had used "a big .40, .40 mag, [or] something like that" to shoot Deputy Hill, and that [Codefendant] "said his father was a police officer" so there "was really nothing anybody could do to him." Tr. Vol. 26 at 11.

Second, [a HCSO Deputy] reported that [Codefendant] had bragged to her about his involvement in Deputy Hill's murder. *See* Ex. 7, [HCSO Deputy] Report. According to her report, [HCSO Deputy] was returning Harris County jail inmates, including [Codefendant], from court on December 7, 2000, three days after the murder. [Codefendant] looked directly at the mourning badge cover that [HCSO Deputy] had been wearing in honor of Deputy Hill and said, "Do you know why you are wearing that? . . . I am part of the reason you are wearing it, do you know who I am?" *Id.* [Codefendant] then "pointed to his armband caution text which indicated '*PROTECTION*" ' and said, "I'm high-profile! Do you know who my father is?" *Id.*

According to [HCSO Deputy], [Codefendant's] demeanor was "cocky" and "arrogant," and he "appeared to take pleasure in his notoriety." *Id.*

[Inmate B] was the only trial witness to testify that [Codefendant] confessed to murdering Deputy Hill, but the newly discovered Hit Document and [HCSO Deputy] Report corroborate [Inmate B's] testimony. These documents also lend credibility to [Inmate B's] testimony by confirming [Codefendant's] boastful manner and belief that he was untouchable because of his father's position as a Houston police officer.

* * *

All of this evidence, both old and new, demonstrates that Rob Will is actually innocent of the murder of Deputy Hill. When analyzing an innocence claim under *Herrera, Schlup,* or Section 5(a)(2), the framework is the same. *See House,* 547 U.S. at 554-55 (using the same framework in determining the merits of petitioner's *Schlup* and *Herrera* claims); *Reed,* 271 S.W.3d at 733 (holding that *Schlup's* standard should guide this Court's consideration of claims under Section 5(a)(2)). Innocence claims involve a "probabilistic determination about what reasonable, properly instructed jurors would do." *House,* 547 U.S. at 538 (quoting *Schlup,* 513 U.S. at 329). The prescribed inquiry does not tum on a court's "independent judgment" or upon "discrete findings on disputed points of fact." *Id.* at 539-40. Instead, a court must assess how reasonable jurors would vote, in light of "all the evidence," both "old and new." *Id.* at 538. This includes an assessment of the impact of evidence pointing to an alternative suspect, *see id.* At 540, confessions from that alternative suspect, *id.* at 549, and the significance of physical evidence (or lack thereof), *id.* at 547. Here, Mr. Will presents a powerful claim of innocence that (1) renders his continued incarceration and impending execution unconstitutional under *Herrera* because there is "clear and convincing" evidence of his innocence; and (2) at the very least,

permits this Court to consider the constitutional claims raised in this application because under *Schlup* the evidence shows that he is probably innocent. *See Reed,* 271 S.W.3d at 733 (applying *Schlup* standard to determine whether the applicant met the criteria contained in Section 5(a)(2)).

Mr. Will incorporates into this claim all allegations and arguments made in Part II below.

II.

THE STATE VIOLATED MR. WILL'S CONSTITUTIONAL DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND* BY WITHHOLDING MATERIAL EXCULPATORY EVIDENCE

New evidence suppressed by the State shows that [Codefendant] attempted to kill Rob Will. In *Brady v. Maryland,* the Supreme Court held that suppression of material exculpatory evidence by the prosecution, whether deliberate or inadvertent, violates due process. 373 U.S. at 87. The prosecution's duty to disclose material evidence arises without regard to whether it was specifically requested, *Banks v. Dretke,* 540 U.S. 668, 690 (2004), or whether it was in the possession of the prosecution or others acting on the prosecution's behalf, *Kyles v. Whitley,* 514 U.S. 419, 438 (1995). To establish a *Brady* claim, a habeas applicant must show that: "(I) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; [and] (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Ex parte Miles,* 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) (alteration in original).

A. The State Failed to Disclose Evidence Showing that [Codefendant] Attempted to Have Rob Will Killed

1. The Undisclosed Jail Records

In September 2012, federal habeas counsel was provided a document by the District Attorney which states that after Deputy Hill's murder [Codefendant] was separated from the

general population in the Harris County Jail because [Codefendant] had solicited the murder of Mr. Will. *See* Ex.I, Hit Document, at 1. Specifically, [Codefendant's] "Administrative Separation Review Sheet" dated December 5, 2000 (the day after the shooting), states that [Codefendant's] "REASON FOR SEPARATION" was that [Codefendant] was "soliciting [the [Criminal Gang] prison gang] to make [a] hit on co-def. Robt. Will." *See id.* The Hit Document also indicates that contact was made "with the [Disruptive Group Unit] to visit [Inmate A] [[Criminal Gang]]." *Id.*

Discovery of this document has led to the new testimony of [Inmate A]. [Inmate A] has provided a sworn affidavit stating that [Codefendant] not only solicited the [Criminal Gang] to kill Rob Will, but also confessed to murdering Deputy Hill. *See* Ex. 2, [Inmate A] Affidavit, at 4, 5. The District Attorney's files contain other documents corroborating [Inmate A's] account, including jail records showing that [Inmate A] and [Codefendant] were housed in the same jail together on December 5, 2000, and attended several different court hearings together between February and April of 2001. *Compare* Ex. 3, [Codefendant] Jail Records, at 3 (showing [Codefendant] jail locations), *with* Ex. 4, [Inmate A] Jail Records (showing [Inmate A] jail locations); *compare* Ex. 1, Hit Document, at 2 (listing [Codefendant's] court dates), *with* Ex. 5, [Inmate A] Administrative Separation Review Sheet Last Updated 4-27- 01, at 2 (listing [Inmate A's] court dates). Further, the files contain evidence that the District Attorney's Office knew about [Inmate A's] relevance to this case before Mr. Will's trial. The files contain two copies of [Inmate A's] jail records: one copy of [Inmate A's] cell block transfer records updated on February 10, 2001, and another copy of the identical document that was updated on April 27, 2001. *See* Ex. 6, [Inmate A] Administrative Separation Review Sheet Updated 2-10- 01, at 1; Ex. 5, [Inmate A] Administrative Separation Review Sheet Last Updated 4-27-01, at 1. The District Attorney's Office thus received this update on [Inmate A's] status well before Mr. Will's trial, which began in January 2002.

Another document never disclosed to Mr. Will's defense counsel reveals that only days after Deputy Hill's murder, [Codefendant] admitted to [HCSO Deputy] that he was "part of the reason" Deputy Hill was murdered. *See* Ex. 7, [HCSO Deputy] Report. The [HCSO Deputy] Report goes on to describe how [Codefendant] bragged about his father's position as a police officer -boasting similar to that described by [Inmate A], [Inmate B], and other witnesses to whom [Codefendant] has confessed.

2. The State Suppressed Evidence of [Codefendant's] "Hit" on Rob Will

Even though the State had an "affirmative duty" to disclose material exculpatory evidence, *see Kyles,* 514 U.S. at 432, it never produced any information about [Codefendant's] "hit" on Rob Will to Mr. Will's attorneys, either before or after trial. In three sworn affidavits, Mr. Will's trial and state habeas counsel aver that no such information was disclosed to them, despite repeated attempts to obtain precisely this type of material. *See* Ex. 8, [trial counsel] Affidavit; Ex. 9, [trial co-counsel] Affidavit; Ex. 13, [state habeas counsel] Affidavit; *see also Kyles,* 514 U.S. at 437 (the prosecution "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

Trial counsel [--] has described the difficulties defense counsel faced in obtaining documents from the Harris County Sheriff s Office and the extensive efforts made to secure those documents. *See* Ex. 8, [trial counsel] Affidavit. [Trial counsel] swore that, despite assurances that "we had received or been permitted to inspect all *Brady* materials," the Hit Document "was never made available to the defense." *Id.* [Trial co-counsel] has also sworn that the Hit Document and the [HCSO Deputy] Report were never produced or made available for inspection, explaining that the District Attorney's so-called "open file" policy did not extend to "the files of co-defendants or documents that the District Attorney or the Harris County Jail determined could potentially relate to ongoing gang activities." Ex. 9, [co-counsel] Affidavit.

The pre-trial record confirms the State's reluctance to produce *Brady* material. Before Mr. Will's trial, defense counsel made *Brady* requests that should have turned up State records related to [Codefendant's] attempted "hit" on Mr. Will as well as the [HCSO Deputy] Report. *See* Ex. 16, Pretrial Motion for Discovery and Inspection, and Order Granting Motion. In addition to the *Brady* requests, trial counsel issued two subpoenas to the Harris County Sheriff s Disruptive Group Unit (DGU). *See* Ex. 17; Ex. 18. The subpoenas specifically requested:

> [A] complete copy of any and all records relating to any interviews regarding inmates Robert Gene Will II, [Codefendant] or any other inmates concerning the death of Deputy Barrett Hill. These records shall include any and all information obtained from any source which directly or indirectly suggests that an individual other than defendant Robert Gene Will II shot Deputy Barrett Hill.

Id.

The Harris County Sheriff initially refused to produce *any* documents to Mr. Will's trial counsel in response to these subpoenas. In an effort to seek compliance, Mr. Will's defense counsel ordered Harris County Jail Deputy [Deputy 5], who worked for the DGU, to testify in a pre-trial hearing about the Sheriff s lack of response. Tr. Vol. 3 at 5-7. In answering defense counsel's questions, [Deputy 5] testified that "I have nothing pertaining to [Mr. Will's] case." *Id.* at 10. [Deputy 5], whose job it was to stay apprised of gang-related activity and impose administrative separation to maintain security, was openly hostile to producing jail records that contain information he considered "confidential." *See id.* at 14-15. Instead, he believed those inmates were speaking "on a confidential record." *See id.* [Deputy 5] eventually agreed to produce documents, but only to the District Attorney or the trial judge. Tr.Vol. 3 at 6-7, 13; Tr. Vol. 16 at 8-9. In a December 2001 letter, the Harris County Sheriff further explained that it had "a policy of not providing records directly to trial counsel when . . . a criminal prosecution is pending." *See* Ex. 30, Dec. 6, 2001 Harris County Sheriff s Office Subpoena Response. It is well-established, however, that information obtained from inmates,

even if given in "confidence," must yield to the Due Process requirements of the U.S. Constitution. *See Banks,* 540 U.S. at 697-98 (citing *Roviaro v. United States,* 353 U.S. 53, 60-61 (1957)). Moreover, the State's duty to disclose *Brady* material extends beyond just the prosecutors to State officials "acting on the government's behalf." *Kyles,* 514 U.S. at 437.

In a pre-trial hearing held ten days after [Deputy 5] testified, the trial court asked the prosecution a pointed question: Did the State have "anything exculpatory" to produce to the defense? *See* Tr. Vol. 4 at 20. In response, the prosecutor made no mention of any documents or information concerning [Codefendant's] "hit" on Mr. Will. *See id.* at 20-21; *see also Kyles,* 514 U.S. at 437 (the prosecution "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"). At another hearing concerning Harris County jail records, the prosecutor stated: "I will pledge to this Court that I will produce all *Brady* material." Tr. Vol. 2 at 24. That pledge went unfulfilled. The fact that [Codefendant] attempted to have Rob Will killed was never disclosed to Mr. Will's counsel.

3. The Undisclosed Evidence Would Have Been Admissible At Trial

Although not mandated by the United States Supreme Court, the suppressed evidence would have been admissible for a variety of reasons. *First,* the suppressed Hit Document gave rise to the discovery of [Inmate A's] current, admissible testimony. *See Ex parte Miles,* 359 S.W.3d at 669. So too would the [HCSO Deputy] Report.

Second, the suppressed evidence might have led the defense to change its strategy and call [Codefendant] as a trial witness. As a witness for the defense, albeit a hostile one, [Codefendant] could have been asked about the "hit" and impeached by the jail records or [Inmate A's] testimony had he denied it. *Harm v. State,* 183 S.W.3d 403, 408 (Tex. Crim. App. 2006) *(Brady* evidence "includes both exculpatory and impeachment evidence").

Third, the jail records would also have been admissible as business records under Texas Rule of Evidence 803(6). The Harris County Sheriff produced the same type of documents, including an Administrative Review Sheet, related to inmates other than [Codefendant]. Those documents were accompanied by a sworn affidavit from the Special Assistant to the Harris County Sheriff that tracks the requirements of Rule 803(6), namely that: (1) such jail records are kept by the Harris County Sheriff s Office "in the regular course of business"; (2) it is the regular course of the Sheriff s Office for an employee with "knowledge of the act, event or condition" to make the records; and (3) that "such records were made at or near the time or reasonably soon thereafter." *See* Ex. 31, Affidavit for Records of Harris County Sheriff s Office.

Fourth, [Codefendant's] statements to [Inmate A] contained in the Administrative Review Sheet and in [Inmate A's] affidavit are admissible as statements against interest under Texas Rule 803(24). [Codefendant's] statements to [Inmate A] clearly tended to expose [Codefendant] to criminal liability for the attempted murder of Rob Will and the murder of Deputy Hill. In addition, [Codefendant's] statement to [HCSO Deputy] exposed him to criminal liability for the murder of Deputy Hill. Moreover, as with [Witness E's] proffered testimony concerning [Codefendant's] statement that the "blood came off ' his pants, [Codefendant's] declarations to [Inmate A] and [HCSO Deputy] would also have been admissible as excited utterances, present sense impressions, or statements of [Codefendant's] then- existing state of mind, as well as under the Sixth and Fourteenth Amendments to the U.S. Constitution. *See Holmes v. South Carolina,* 547 U.S. 319 (2006) (holding that trial court's exclusion of defense evidence of third-party guilt violated the defendant's rights to a fair trial and to present a defense under Sixth and Fourteenth Amendments).

Finally, the suppressed documents and statements are admissible as non-hearsay evidence which would have undercut the reliability of the State's investigation.[8] In spite of the suppressed documents in its possession, the State from the beginning of this case focused its attention and investigative resources on Rob Will to the almost complete exclusion of [Codefendant]. These documents show the fallacy (and danger) of that rush to judgment, and they impugn the integrity and thoroughness of the State's investigation. *See Kyles,* 514 U.S. at 446- 47.

B. The Information Contained in the Suppressed Jail Records Was Favorable and Material to the Defense

Under *Brady* and its progeny, the State violates a defendant's right to Due Process if it withholds evidence that is both "favorable" and "material" to his guilt or punishment. *Brady,* 373 U.S. at 87. Favorable evidence includes both exculpatory and impeachment evidence that, if disclosed and used effectively, could make a difference between conviction and acquittal. *Ex Parte Miles,* 359 S.W.3d at 665. Evidence is material for purposes of *Brady* if there is a "reasonable probability" that the result at trial would have been different had the evidence been disclosed. *Banks,* 540 U.S. at 699. A "reasonable probability" does not require that the undisclosed evidence would have led to acquittal. *Kyles,* 514 U.S. at 434. Instead, the question is whether the applicant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* This standard "is *not* a sufficiency of the evidence test" that asks if there is enough State evidence left to convict. *Id.* at 434 (emphasis added). It is a determination of whether the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. A court must consider

[8] Evidence offered for purposes other than to show the truth of the matter asserted is not hearsay. *See* Tex. R. Evid. 801(d).

"any adverse effect that the prosecutor's failure [to disclose the evidence] might have had on the preparation or presentation of the defendant's case." *United States v. Bagley,* 473 U.S. 667, 683 (1985); *see also Pena v. State,* 353 S.W.3d 797, 812 (Tex. Crim. App. 2011).

In this case, the undisclosed evidence is undeniably both favorable and material to Mr. Will. The new suppressed evidence demonstrates that [Codefendant] attempted to kill his childhood friend Rob Will because he feared Mr. Will would expose him as the shooter in Deputy Hill's murder. The suppressed evidence also shows that [Codefendant] confessed to being the shooter, boasting to both [Inmate A] and [HCSO Deputy] that he believed he was untouchable because his father was a police officer.

Because the State withheld this critical evidence, its case was much stronger and the defense case was much weaker than it would have been had all of the facts come to light. The undisclosed evidence and the resulting testimony it produced refute one of the State's primary theories at trial: that [Codefendant] acted like an innocent man after the shooting. Throughout its case, the prosecution stressed that the strongest evidence of Rob Will's guilt was his "desperate" actions to avoid getting caught after the shooting.[9] At the same time, the prosecution falsely argued that [Codefendant's] actions showed that he had nothing to do with the murder. In the final moment of the State's closing argument, the prosecution reached the bottom line of its case: the ambiguity of the evidence against Rob Will regarding the events leading up to the shooting did not matter because *after* the murder [Codefendant] showed no signs that he was guilty.

[9] *See* Tr. Vol. 26 at 97 ("Because what [Rob Will is] doing that day is getting away. He's not going to jail."); *id.* at 98 (arguing that Mr. Will has a gun and cash in his pocket "[b]ecause he's not going to jail"); *id.* at 99 ("He wants to make sure he's not going to get caught."); *id.* at 150 ("He's desperate. And he's not going to get caught."); *id.* at 152 ("[Is the shooter [Codefendant]] [o]r is it the guy who is not going to get caught?"); *id.* ("[T]he acts of the desperate man continue because he's not going to let that officer survive to be able to be a witness against him.").

But that was not true. [Codefendant] had attempted to kill a witness -the only witness -to his crime after the shooting. And the State knew it.[10] Instead of producing information about [Codefendant's] "hit" on Rob Will, the prosecution took advantage of its nondisclosures and exploited the absence of evidence regarding [Codefendant's] actions to belittle the defense's proof. Defense counsel attempted to prove that [Codefendant] was acting desperate and erratic after the shooting by calling witnesses who testified that [Codefendant] was seen "shadow boxing," acting nervous, and asking for money in the hours after Deputy Hill was murdered. Tr. Vol. 26 at 39 (testimony of [Witness F], stating that [Codefendant] was "shadow boxing" and "real nervous"); Tr. Vol. 26 at 49-51 (testimony of [Witness A], stating that [Codefendant] "seemed kind of nervous" and asked for money). The prosecution jumped on the opportunity it had created by its suppression of evidence by arguing the following in the final moment of its case:

> So . . . when you look at the level of desperation, who is it? Is it [Codefendant] who is seen . . . later in the morning . . . shadow boxing? . . . [A]re those the actions of somebody who has just executed one of the finest people in this world? . . . [A]re those the actions of somebody who's just killed a police officer by asking little [Witness A] for some money? Or is it [Rob Will,] the guy who is not going to get caught? . . . When you look at all the facts in the case, the puzzle is so clear. [Rob Will] is the man who killed Deputy Barrett Hill. And I ask you to find him guilty of capital murder.

Tr. Vol. 26 at 151-52.

Had the State not concealed [Codefendant's] "hit" on Rob Will, the prosecution would never have been able to pose these final questions to the jury, because [Codefendant's] attempt to murder the only witness to his crime was, without a doubt, the *"action[] of somebody who's just killed a police officer."* Tr. Vol. 26 at 152 (emphasis added).

[10] This deception alone warrants a new trial. *See Banks,* 540 U.S. at 676-77 ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.").

With this new evidence in hand, the defense would have had questions of its own for the jury: If [Codefendant] was innocent, why did [Codefendant] try to have Rob Will killed? If [Codefendant] had nothing to do with Deputy Hill's murder and was hiding in the brush when Hill was shot, why did [Codefendant] feel the need to have his childhood friend murdered? To the jury, the answer would have been plain: [Codefendant] wanted to eliminate the only witness to his crime. There is no innocent conclusion about [Codefendant's] attempted "hit" that a jury necessarily *would* have reached. *See Smith v. Cain,* 132 S. Ct. 627, 630-31 (2012) (finding *Brady* violation where State advanced only reasons why a jury *"could"* have discounted the new evidence, rather than reasons "that it *would* have done so") (emphasis in original).

Had the defense been able to present [Inmate A's] new testimony about [Codefendant's] "hit" and confession, along with the Hit Document and the [HCSO Deputy] Report, there is a reasonable probability that such evidence would have turned the tide in an already close and contentious trial. *See Will,* 2012 U.S. Dist. LEXIS 5233, at *31 (observing that "only circumstantial evidence support[s] Will's conviction and death sentence," and noting the "total absence of eyewitness testimony or strongly probative forensic evidence"); *see also supra* Part I; *cf Wolfe v. Clarke,* 819 F. Supp. 2d 538, 551-52 (E.D. Va. 2011) (finding *Brady* violation where police suppressed information about a "hit").

But the effect of this new evidence would not have been confined to exposing one of the prosecution's chief theories and final argument as shams. Rather, it would also have put [Codefendant's] involvement in Deputy Hill's murder -and the ensuing investigation in which [Codefendant] escaped scrutiny -in an entirely different light.

First, disclosure of the suppressed evidence would have led the jury to question whether [Codefendant] was merely a distant bystander to Deputy Hill's murder, as the State contended

throughout trial. In light of [Codefendant's] guilty actions after the shooting, no reasonable juror for example would have accepted the shoddy timeframe the State used to advance its demonstrably false theory that [Codefendant] had no time to reach Deputy Hill before he was shot. *See supra* Part I.B. To the contrary, a reasonable, well-instructed juror would have looked carefully to discover that [Deputy 2]'s testimony and the time-stamped radio transmissions, which were mischaracterized by the State, showed that [Codefendant] had ample time to kill Deputy Hill. *See id.*

Second, with the benefit of the suppressed evidence, the defense could have called [Codefendant] as an adverse witness. Then [Codefendant] would have been forced to explain his "hit" on Rob Will, and the jury would have been required to believe [Codefendant] in spite of his multiple prior confessions and numerous admittedly false statements to police. Even if defense counsel left [Codefendant] off the stand, they could have cross-examined police investigators such as Detective [--] (the lead detective in this case) to good effect on their knowledge, or lack thereof, of [Codefendant's] attempt to kill Rob Will. This line of questioning would have allowed the defense to attack the integrity of the police investigation and the Sheriff s Office's remarkably uncritical attitude toward [Codefendant]. *See Kyles,* 514 U.S. at 453 *(Brady* material includes evidence "that the lead police detective who testified was either less than wholly candid or less than fully informed").

Third, [Inmate A's] testimony would have made the jury more likely to believe the testimony of defense witness [Inmate B]. At trial, [Inmate B] was the only witness who testified that [Codefendant] had confessed to the murder of Deputy Hill. [Inmate A's] testimony would have bolstered [Inmate B's] testimony, because the existence of a second confession tends to make the existence of a first confession more likely. Moreover, [Inmate A] would have provided critical insight into [Codefendant's] trust in gang members. If [Codefendant] was willing to ask [Inmate

A] to solicit the [Criminal Gang] to have Rob Will killed, [Codefendant's] confession to [Inmate B] -a member of another prison gang, *see* Tr. Vol. 26 at 15 -becomes more credible. Further, [Codefendant's] confession to [Inmate B] tracks [Codefendant's] suppressed statements to [Inmate A] and [HCSO Deputy]. In all three accounts, [Codefendant] brags that he can get away with anything because his father is a Houston police officer.

Finally, knowledge of [Codefendant's] attempt to murder the only eyewitness to his crime would have provided powerful evidence to any reasonable juror that [Codefendant] killed Deputy Hill. *Cf Peoples v. State,* 874 S.W.2d 804, 809 (Tex.App-Fort Worth 1994, pet. ref d) ("[E]vidence that a witness has been threatened . . . is admissible to show the accused's 'consciousness of guilt.' Threats . . . are hardly the actions of an innocent [person], and evidence of such [threats] is every bit as probative of guilt as would be flight by the accused.") (citations omitted); *see generally Holmes,* 547 U.S. 319 (holding that the right to a fair trial includes the right to present evidence of a third party's guilt). [Codefendant's] actions after the shooting were *exactly* what the State argued they were not -"the actions of somebody who's just killed a police officer." The State's argument that Rob Will was "desperate" not to get caught would have also applied to [Codefendant] -but with more compelling force -in light of the suppressed evidence. No doubt Rob Will went to great lengths to avoid arrest, but the record is clear that he never tried to kill anyone to ensure his escape. The new "hit" evidence shows that [Codefendant's] actions were not so restrained.

There can be no doubt that the undisclosed evidence of [Codefendant's] "hit" on Rob Will "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See Kyles,* 514 U.S. at 435.

C. The Information Contained in the Suppressed Jail Records Was Also Favorable and Material to Mr. Will During the Trial's Punishment Phase

As discussed above, the undisclosed evidence showing that [Codefendant] attempted to kill Rob Will, as well as [Inmate A's] related testimony that [Codefendant] confessed to Deputy Hill's murder, was undeniably both favorable and material to the guilt phase of Mr. Will's trial. The same is true with regard to Mr. Will's punishment. The materiality of the *Brady* violation should also be "assess[ed] . . . in light of the mitigating case . . . presented for [the defendant]" during the trial's punishment phase. *Smith v. Black,* 904 F.2d 950,.969 (5th Cir. *1990), judgment vacated on other grounds,* 503 U.S. 930 (1992). If it is "reasonably probable that a different [punishment] result might have been obtained had the evidence been disclosed," then the sentence should be reversed. *See Lindsey v. King,* 769 F.2d 1034, 1043 (5th Cir. 1985). The fact that jurors have convicted the defendant "does not necessarily mean that no juror entertained any doubt whatsoever . . . . [T]he juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremediable penalty of death." *Smith v. Balkcom,* 660 F.2d 573, 580-81 (5th Cir. 1980); *see also Johnson v. Cockrell,* 301 F.3d 234, 240 (5th Cir. 2002) ("'Residual doubt' left over from the guilt phase of a capital murder trial can have substantial impact on whether that same jury imposes a death sentence during the punishment phase.").

This Court has recognized that jurors can "give[] mitigating effect to any 'residual doubt' in answering the [two] special issues" presented to them during the punishment phase of a Texas capital case. *Blue v. State,* 125 S.W.3d 491, 502-03 (Tex. Crim. App. 2003). The "special issues" presented to the jury ask: (1) whether the defendant presents "a continuing threat to society" ("Special Issue No. 1"); and (2) whether in light of "all of the evidence, including the circumstances of the offense," there are sufficient mitigating circumstances to warrant life

imprisonment instead of death ("Special Issue No. 2"). Tex. Code Crim. Proc. Ann. Art. 37.071 § 2(b), (e)(l).

The defense arguments as to the two special issues would have been materially strengthened if jurors had known that [Codefendant] had attempted to kill Mr. Will. During the punishment phase, the jury heard evidence from both the State and the defense concerning whether [Codefendant] or Rob Will killed Deputy Hill. *See, e.g.,* Tr. Vol. 30 at 72-74 (testimony regarding [Codefendant's] conduct in the hours after Deputy Hill's murder). Indeed, the State introduced testimony from Harris County Sheriff s Deputy [Deputy 6], who worked with [Deputy 5] at the jail's Disruptive Group Unit (DOU) -the same unit that, according to the Hit Document, had knowledge of [Codefendant's] solicitation of [Inmate A] to kill Rob Will. *See* Tr. Vol. 29 at 124-45; Ex. 1, Hit Document, at 1 ("Made contact w/ DOU to visit with [Inmate A] [Criminal Gang]…"). The State's failure to disclose the evidence of [Codefendant's] attempted hit on Mr. Will, as well as [Codefendant's] related confession to [Inmate A], prevented the defense from examining DOU deputies -including [Deputy 6] -about [Codefendant's] "hit" and weakened its argument that a death sentence was not warranted in this case. Given that this case involved a "total absence of eyewitness testimony or strongly probative forensic evidence," *Will,* 2012 U.S. Dist. LEXIS 5233, at *31, no rational juror considering *all* of the evidence would have sentenced Mr. Will to death.[11]

Mr. Will reiterates and incorporates into this claim all allegations and arguments made in Part I above.

[11] Indeed, the record reflects that even without this evidence, jurors had doubts as to Mr. Will's suitability for a death sentence. *See* Tr. Vol. 31 at 132-133 Juror request to rehear testimony bearing on Special Issue No. 2).

III.

ALTERNATIVE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

In the alternative to Mr. Will's *Brady* claim, if the Court should find that the jail records were not withheld, Mr. Will asserts that he would be entitled to relief based on the failure of trial and appellate counsel to discover, investigate, and present the disclosed exculpatory evidence. Such performance would constitute ineffective assistance of counsel in both phases of trial and on appeal, including habeas proceedings.

As articulated in *Strickland v. Washington,* 466 U.S. 668 (1984), to establish a deprivation of the Sixth Amendment right to effective assistance of counsel, a habeas applicant must show that: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. *Id.* at 687. Although counsel is presumed to have performed adequately, *id.* at 690, this deference does not extend to decisions that are "uninformed by an adequate investigation into the controlling facts and law." *United States v. Drones,* 218 F.3d 496, 500 (5th Cir. 2000); *see Ex Parte Welborn,* 785 S.W.2d 391, 393 (Tex. Crim. App. 1990) ("It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision."). In other words, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691.

Mr. Will maintains that the affidavits of counsel and other evidence presented here prove that the State failed to disclose the Hit Document and [HCSO Deputy] Report, thereby precluding investigation by defense counsel into documents and events that counsel did not know existed. *See Banks,* 540 U.S. at 696 ("[A] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *see also*

United States v. Tavera, 719 F.3d 705, 711-12 (6th Cir. 2013) *("Brady* imposes an independent duty to act on the government" and an individual "does not lose the benefit of *Brady* when the lawyer fails to 'detect' the favorable information"). However, should the Court find that the evidence was not withheld, and therefore was known to trial counsel, they would then have had a professional duty to investigate and present this critical evidence to the jury. *See Ex parte Ybarra,* 629 S.W.2d 943, 948 (Tex. Crim. App. 1982) ("It is well settled that an attorney has a professional duty to present all available testimony and other evidence to support the defense of his client."). Failure to discharge that duty, particularly with regard to crucial evidence supporting Mr. Will's defense, would amount to constitutionally deficient performance.

The second *Strickland* prong requires an applicant to show that he was prejudiced. *Strickland,* 466 U.S. at 694. The standard for prejudice under *Strickland* is identical to the standard for determining materiality under *Brady*. *See Johnson v. Scott,* 68 F.3d 106, 109-10 (5th Cir. 1995). Mr. Will reiterates and incorporates into his alternative claim for ineffective assistance of counsel all allegations and arguments made in Parts I and II above.

It is thus immaterial whether the jury's inability to hear the evidence at trial was due to the fault of the State or defense counsel -the damage to the integrity of the verdict and to Mr. Will's constitutional rights is the same. For the reasons set forth above, the Hit Document, the [HCSO Deputy] Report, and [Inmate A's] testimony were evidence that would have made a substantial difference at trial. This verdict is not worthy of confidence. After serving nearly 13 years in prison for a crime he did not commit, Mr. Will is entitled to a new trial where the jury can consider *all* of the evidence.

PRAYER FOR RELIEF

Therefore, ROBERT GENE WILL, II, respectfully requests that:

1. The Court issue a writ of habeas corpus under Article 11.071, Section 6 of the Texas

Code of Criminal Procedure to have Mr. Will brought before the district court for an evidentiary hearing to determine his writ of habeas corpus.

2. After a hearing, the Court grant Mr. Will's request for issuance of a writ of habeas corpus releasing Mr. Will from the custody of the Texas Department of Criminal Justice or permanently suspending Mr. Will's death sentence.

3. The Court award Mr. Will any other relief to which he is entitled or justice may require.

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