IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS
385TH JUDICIAL DISTRICT

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CAUSE NO. 27-181

EX PARTE
CLINTON LEE YOUNG,

APPLICANT

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A JUDGMENT OF DEATH

CLINTON LEE YOUNG IS SCHEDULED TO BE EXECUTED ON OCTOBER 26, 2017

HILARY POTASHNER (Cal. Bar No. 167060)
Federal Public Defender
MARGO A. ROCCONI (Cal. Bar No. 156805)*
Margo_Rocconi@fd.org
MARGARET A. FARRAND (Cal. Bar No. 235295)*
Margaret_Farrand@fd.org
JOSEPH A. TRIGILIO (Cal. Bar No. 245373)*
Joseph_Trigilio@fd.org
Deputy Federal Public Defenders
Office of the Federal Public Defender
321 East Second Street
Los Angeles, California 90012
Telephone: (213) 894-7528
Facsimile: (213) 894-1221

Attorneys for Applicant
CLINTON LEE YOUNG

*admitted pro hac vice

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APPLICATION FOR A WRIT OF HABEAS CORPUS IN A CAPITAL CASE

I. INTRODUCTION

Clinton Young faces execution for a capital murder he did not commit. He was sentenced to death for that crime in 2003, based on a jury's finding that he fatally shot Doyle Douglas and Samuel Petrey over the course of two days in November 2001. Douglas was killed in East Texas while travelling to buy drugs with Young and three other men. One of those men, David Page, then drove with Young to Midland, where Petrey was fatally shot the next morning at an oil pump site. The jury's finding that Young shot Petrey provided the basis for Young's capital murder conviction, and was a prerequisite to his death sentence. If Young did not shoot Petrey, he could not have been convicted of capital murder under the indictment and instructions given at his trial.

Only Page and Young were present at Petrey's murder, and Page provided the state's only evidence that Young shot him. No physical evidence supported that claim—in fact, Page failed a polygraph test when he denied shooting Petrey himself. Since trial, multiple witnesses have provided sworn statements saying they heard Page confess to shooting Petrey while wearing gloves: exactly what Young has always said occurred. Police found gloves at the site where Petrey was

shot. DNA inside the gloves matches Page but not Young, showing only Page wore the gloves. Newly-available scientific testing shows the gloves' exterior fibers are saturated with gunshot residue ("GSR"). Indeed, a 2017 test—ordered by the convicting court—found *over a hundred GSR particles* on a small test sample of less than one percent of the gloves' surface area, indicating many times that amount are likely present on the gloves overall. The particles were found not only on the gloves' surfaces but also between the fingers, where GSR would be unlikely to lodge unless the fingers were spread so as to fire a gun. Page now admits he bought the gloves immediately before the shooting, so the GSR could not have come from any prior event. Page also admits he lied at Young's trial about how and when he acquired the gloves, and sought to make Young look as bad as possible after Young's prosecutors told him, "You help us, and we'll help you."

Page's credibility has always been deeply in doubt. Before trial, Page protested his own innocence in a series of shifting and contradictory narratives. He made conflicting claims about where Young supposedly stood during the shooting, which side the shots came from, and even whether Page saw the shooting at all. His trial testimony was also physically impossible: he testified that Young shot Petrey from six to ten feet away, but stippling around Petrey's wounds showed the

distance could not have exceeded two feet. Though Page claimed he assisted in Petrey's kidnapping against his will and under duress, a 7-Eleven surveillance camera filmed Page sitting alone with Petrey in the truck for over ten minutes, with the car keys, as Young walked around inside the 7-Eleven. A phone was in the truck, but Page never used it to call for help. Page again made no attempt to escape when left alone with Petrey at a Wal Mart and rest stop. Page's shiftiness gave Young's jury pause: even without knowing the GSR evidence, it wrote a note expressing uncertainty about Young's role in the shootings.

Young's conviction of Douglas's murder was equally flawed. The state based its case on testimony by three tight-knit accomplices who exonerated themselves and blamed Young, claiming Young shot Douglas from the right side in Douglas's car with a .22 Colt pistol. But ballistics evidence—which the jury never heard—showed Douglas's right-side head wound was not inflicted by that gun. Douglas's wounds also lacked the soot or stippling that would ordinarily result from a close range shot inside a car. Physical evidence from the car's interior, which could have tested the accomplices' claim that Douglas was shot there, was destroyed by the state before Young's attorneys could test it. Though Young's lawyers asked to examine the car, law enforcement ignored their requests. New evidence also shows the District Attorney's office secretly persuaded five key

witnesses to testify against Young by threatening to make their jail time "hard," promising to "put in a good word" for them with prison authorities, telling them Young was guilty and a child molester, and promising them decreased prison time.

Still more errors marred Young's punishment trial. Without objection from trial counsel, the prosecutor distorted Young's personality into a grotesque caricature of a "serial killer," likening Young to reviled murderers like Charles Manson and waving a book titled "Serial Killer" in the courtroom until the judge himself objected that he was "inciting the jury." While the state argued Young's childhood aggression showed he was inherently evil, trial counsel failed to investigate or present the cause of that behavior: years of violence and abuse Young suffered as a child from his caregivers and at youth correctional facilities. The absence of that evidence gave the state free rein to argue that Young's childhood was close to normal, and ridicule his traumatized behavior as no "excuse" for violence. The jury never heard that Young had been a victim himself, and his aggression a desperate response to violent surroundings. In short, Young's jury never understood the person it sentenced to death.

Young has never had an adequate opportunity to litigate his trial counsel's errors. On direct appeal, the Texas Court of Criminal Appeals incorrectly relied on section 7.02(b) of the Law of Parties to reject Young's claim that he was convicted

on insufficient evidence. *Young v. State*, 2005 WL 2374669 *1 (Tex. Crim. App. Sept. 28, 2005). But that provision was not included in the instructions given to Young's jury, and thus could not have properly supported his conviction. Though Young was appointed a postconviction attorney, that attorney filed an abjectly meritless writ petition that amounted to little more than a mishmash of falsified evidence, frivolous claims, and quibbles about the trial court's assessment of costs. He never even interviewed trial counsel or obtained their files—tasks indispensable for even passingly competent representation—and failed to plead sufficient facts to support legitimate claims—even claims Young specifically identified and implored him to raise. Instead, he sloughed off his responsibilities onto a drug-addicted investigator so notoriously incompetent that other attorneys refused to assign her work. The result was a disastrous writ hearing, where the central claim in Young's petition was found to be based on false declarations the investigator had procured through bribery and fraud. The proceeding was an embarrassing farce, which provided no semblance of the "one full and fair opportunity to present all . . . claims in a single, comprehensive post-conviction writ of habeas corpus" that Texas law purports to provide. *Ex parte Graves*, 70 S.W. 3d 103, 117 (Tex. Crim. App. 2002).

Though Young tried to raise his ineffective assistance of trial counsel claims before this Court in a successive petition in 2009, the Supreme Court had not yet issued its decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911 (2013), which recognized ineffective assistance of state postconviction counsel as a basis to excuse procedural default for "substantial" Sixth Amendment claims. Those decisions now exist. Because Young's initial writ proceeding was extraordinarily deficient—so deficient as to constitute no legitimate proceeding at all—this Court should permit Young to litigate his ineffective assistance of trial counsel claims in this proceeding under the rationale of *Martinez*, *Trevino*, and *Ex parte Medina*, 361 S.W. 3d 633 (Tex. Crim. App. 2011), as explained more fully below.

Page's confessions to shooting Petrey, the abundant, recently-discovered GSR on Page's gloves, Page's lies about the gloves at trial and failed polygraph test, and his shifting and incredible testimony, all show Page was Petrey's shooter and Young is therefore innocent of capital murder. The other defects at Young's trial were so pervasive as to destroy its truth-seeking function. Young therefore asks this Court to remand this case to the trial court so that he can prove his innocence of capital murder and challenge his sentence of death.

II. STATEMENT OF THE CASE

A. The Shooting of Doyle Douglas

1. Young Falls in With Older Drug Users in East Texas

In February 2001, seventeen-year-old Clinton Young was released from the Texas Youth Commission ("TYC") after two and a half years of custody. Though Young suffered severe ADHD, for which he had been heavily medicated for years, his TYC discharge papers contained no provisions for continued treatment. They inexplicably stated, "no known medical needs." (34.RR.72-73, 93.)

Lacking job skills, education, or a treatment plan, Young soon fell under the sway of his older half-brother, Dano, a heavy methamphetamine user nine years his senior. (33.RR.126-28.)[1] Young began spending time with Dano at the Fisherman's Motel, a defunct fishing lodge in Harrison County, Texas. (21.RR.308.)

The Fisherman's Motel was a hotbed of drug use and violence. (22.RR.28; 24.RR.39; Ex. 154, A. Harrison Decl., ¶ 6; Ex. 170, A. Williams Decl., ¶¶ 8-11.) Residents injected methamphetamine, and violent conflicts erupted over drug

[1] "CR," "RR," and "SRR" refer, respectively, to the Clerk's Record, Reporter's Record, and Supplemental Reporter's Record of Young's trial. "CWR" and "RWR" refer, respectively, to the Clerk's Writ Record and Reporter's Writ Record of Young's first state writ proceeding. "CWR2d" and "RWR2d," respectively, refer to the Clerk's Writ Record and Reporter's Writ Record of Young's second state writ proceeding. Exhibits are cited as "Ex."

debts. (Ex. 170, A. Williams Decl., ¶¶ 8-10.) The electricity was periodically shut off for nonpayment. (24.RR.37-38.) One resident was beaten with a police baton for drug money, and another found dead with strangulation marks on her neck. (Ex. 170, A. Williams Decl., ¶¶ 9-10.) Residents often carried guns. (*Id.*, ¶ 11; 24.RR.49.) By November 2001, the motel had deteriorated so badly that its owner—himself a methamphetamine user—planned to demolish it. (24.RR.37-39.)

When Young began frequenting the motel, he did not use drugs. (Ex. 154, A. Harrison Decl., ¶ 6.) He was clean, friendly, respectful, and well-liked. (*Id.*, ¶3; 24.RR.40.) He began dating Amber Lynch, the daughter of the motel's owner. (Ex. 154, A. Harrison Decl., ¶¶ 1-2.) Young was protective of Amber, and made sure to keep her away from situations that seemed unsafe. (*Id.*, ¶ 8.) He helped Amber care for her three- and five-year old nephews, because their mother was often too high on methamphetamine to do so. (*Id.*, ¶ 7.) Young and Amber did everything for the children: feeding them, getting them ready for school, bathing them, and putting them to bed. (*Id.*)

Like everyone else at the motel, Young eventually began using drugs. He stopped attending to his personal hygiene, and his relationship with Amber deteriorated. (*Id.*, ¶¶ 10-11.) In November 2001 Amber's father, Bart Lynch,

moved her away from Harrison County to Midland, to get her away from the drug use at the motel. (24.RR.38-41.) Amber and Young were devastated at having to separate. (24.RR.56-57.)

In the ten days leading up to November 24, 2001, Young consumed twice his normal dose of methamphetamines. (34.RR.225-26.) He slept just one or two hours a day and ate very little. (*Id.*) A psychologist testified at trial that Young's drug use during this time was sufficient to cause methamphetamine-induced psychosis—a condition with symptoms indistinguishable from those of paranoid schizophrenia. (34.RR.190-97.)

2. Douglas is Shot on the Trip to the Drug House

On the evening of November 24, 2001, Young was at the Fisherman's Motel with three older drug users in their 20s: David Page, Mark Ray, and Darnell McCoy. (21.RR.94, 143-45, 306; 22.RR.153-54; 26.RR.137-38.) Ray, Page, and McCoy all carried guns, used methamphetamine, and were longtime associates, whereas Young was an outsider to their group. (Ex. 170, A. Williams Decl., ¶ 11; 21.RR.87, 143-44; 22.RR.152, 154.)

Page was particularly menacing. He gave Amber a "strange feeling," and she disliked being near him. (24.RR.87; Ex. 154, A. Harrison Decl., ¶ 12.) He once told an African-American boy that he (Page) could kill him and nobody

would care, because their school flew a Confederate flag. (Ex. 154, A. Harrison Decl., ¶ 12.) Another motel resident heard Page talking with McCoy about how not to get caught if he shot someone. (Ex. 170, A. Williams Decl., ¶ 4.) Page said you need to wipe off the bullets before putting them into the gun, so the casings don't leave any fingerprints. (*Id.*, ¶ 5.) He once remarked, "if you ever get in trouble, [you should] be the first one to go to the police because they will believe you more and you will get a better deal." (*Id.*, ¶ 7.)

Page was also romantically interested in Young's girlfriend, Amber—to such an extent that he had even fought Young over her. (24.RR.88.) Two days before Young and Amber began dating, Page wrote Amber a letter saying he wanted to date her himself. (Ex. 169, J. Villerius Decl., Exh. A at page 8, time stamp 32:13.08-33.14.14.) Though Amber chose to date Young, Page's romantic interest in her continued. (*Id*. at page 9, time stamp 33:36.09.)

Late in the evening of November 24, 2001, Page, Ray, McCoy and Young decided to travel to a drug supply house in Longview, Texas. Lacking a car, they asked an older methamphetamine user named Doyle Douglas to drive them there in his two-door Pontiac Grand Prix. (21.RR.99-100; 22.RR.61-62; 26.RR.145.) Douglas agreed, and the five men departed around midnight. On the way, they stopped and borrowed a .38 caliber gun from Young's brother, Dano. (21.RR.295-

98.) They also had a .22 semiautomatic pistol, called a Colt Huntsman, and a .22 revolver Young had borrowed two days earlier, with Page. (21.RR.181-82, 296-97; 22.RR.13-16; 26.RR.167-68; 27.RR.136, 175-76.)

After borrowing the .38 from Dano, the group proceeded to the drug house with the three guns: the .38, the .22 Colt Huntsman, and the .22 revolver. Douglas drove. They arrived and parked in the driveway, and Page got out and walked to the door to buy the drugs. (26.RR.152-55.) As Page returned to the car, Douglas—sitting in the driver's seat—opened the driver's side car door and leaned his seat forward so Page could climb into the back. (26.RR.154, 157-58.) The men testified that, as Page entered the car, Young—sitting to Douglas's right in the front passenger seat—suddenly pulled out the .22 Colt Huntsman and shot Douglas twice in the head. (21.RR.105-10; 22.RR.89; 26.RR.158). The .22 Colt Huntsman was introduced at trial as state's exhibit 3 and referred to at times as the "Clint Young gun."

After the crime, Page told police that he saw Young shoot Douglas in the right side of the head. An officer asked Page "did you see Clint pull the gun?" and Page said, "Yes, he pulled it out and stuck it straight up to the guy. I mean the

right side." (Ex. 53, D. Page Statement, Nov. 26, 2001, at 4.) The officer asked "On the right side of Doyle's head?" and Page said, "yeah." (*Id.*)[2]

3. The Men Drive to a Gas Station and Elsewhere

When Douglas was shot, Young's companions were armed with the .22 revolver and the .38, both loaded.[3] (21.RR.133, 182-89; 26.RR.167-69, 174-75; 27.RR.135-36, 175-76.) Yet they claimed Young was able to threaten and intimidate all three of them into picking up Douglas and placing him in the trunk. (26.RR.164-65.)

From there, they drove various places. McCoy testified that the group first visited a motel and spoke with a man named Patrick Brook, then left Douglas's body in the woods. (21.RR.123-28.) Ray testified that Brook was not at the motel when they arrived so the men went to a car wash, then left Douglas in the woods, returned to the motel and spoke to Brook, then went to a gas station where Young and Page went into an attached mini-mart. (22.RR.104-143.) As they drove, Page

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[2] The drug house has never been searched for evidence. No witnesses testified about any effort by law enforcement to search the location for shell casings, blood spatter, DNA, dropped items, or other evidence that might have contradicted the accomplices' claim that Young shot Douglas there.

[3] The group had these guns "all the whole evening." (27.RR.136.)

took money from Douglas's wallet and burned Douglas's ID cards. (21.RR.118-20, 170)(McCoy).

Page gave a different sequence of events, claiming the group went to the gas station and mini-mart immediately after Douglas was shot. (26.RR.165.) Page recently admitted that he bought a pair of gloves at the mini-mart. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 20.) Then, Page testified, they visited Brook at the motel with Douglas still in the trunk. (26.RR.166, 169-70.) Young, Ray, and McCoy went inside the motel while Page, according to his trial testimony, remained in the car with Douglas's body. (26.RR.169-70.) By his own testimony, Page did nothing to help Douglas. Leaving him for dead in the trunk, Page walked to a fast food restaurant where he bought French fries, then sat in the car reading a magazine. (*Id.*) After Young, Ray, and McCoy returned, the group left Douglas in the woods and went to a car wash. (26.RR.171-81).

Brook testified that Young, Ray, and McCoy came to his motel room at about 4:00 a.m., and that Young confessed to "sho[oting] [Douglas] twice in the back of the head." (21.RR.247-53.) Brook testified that Ray admitted to having "kicked [Douglas] down a little hill into a creek," getting a pillow and putting it over Douglas's head, and shooting Douglas twice. (21.RR.266-67.) Douglas's body had abrasions consistent with kicking. (22.RR.282.)

Brook's story that Ray shot Douglas twice conflicted with the testimony of the accomplices, who claimed Ray shot Douglas just once.[4] Brook also admitted being high on speed when he claimed to have heard Young confess, (21.RR.276), and had a motive to make statements against Young. Shortly after Douglas's murder Brook was arrested for aggravated assault—which carried a potential life sentence—and police "guaranteed" Brook that he "w[ouldn]'t do more than 10 years in prison" if he assisted their investigation of Douglas's shooting. (Ex. 147, P. Brook Decl., ¶¶ 1-3.)[5] Signaling who they wanted Brook to implicate, the interrogating officer told Brook that Young had "ill intentions" towards him and "wished [him] harm." (*Id.*, ¶¶ 3-4.) After hearing this, Brook implicated Young. (*Id.*, ¶ 5; Ex. 59, P. Brook Statement.) By the time of Young's trial, Brook was appealing a 35-year sentence for aggravated robbery and admitted it "couldn't hurt" to "have the state as a friend on [his] appeal." (30.RR.176-77).

4. Ray Shoots Douglas at the Creek

The accomplices also testified about leaving Douglas in the woods. They testified that Young drove down a narrow path and parked, and the three other men dragged Douglas to a creek and left him face down in the shallow water.

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[4] In 2015, Page changed his account to also say that Ray shot Douglas twice. (Ex. 169, J. Villerius Decl., Ex. A at page 6, time stamp 26.02.03.)

[5] The assault charge arose from an armed robbery of a drug dealer, in which Young allegedly participated. The state presented evidence about that incident at the punishment phase.

(21.RR.128; 22.RR.117-20; 26.RR.174-76.) Ray then shot Douglas in the head, with the .22 revolver. (21.RR.129-33; 22.RR.120-25; 26.RR.176-79.) Though the accomplices still had loaded guns and outnumbered Young three to one, they claimed Ray fired the shot under duress, because Young allegedly threatened him. (*Ibid.*) The .22 revolver was introduced at trial as state's exhibit 5, and referred to as the "Mark Ray gun." (22.RR.250; 25.RR.162.)

5. <u>The Accomplices' Story Contradicts the Physical Evidence</u>

The accomplices' statements about how Douglas was shot contradicted the physical evidence. They all claimed Young shot Douglas with the Colt Huntsman .22 while sitting to Douglas's right in the front passenger seat of Douglas's car. Page told police Young held the Colt Huntsman "straight up to Douglas['s] right side, (27.RR.15) and the prosecutor argued that Young shot Douglas "on the right." (29.RR.15.) But analysis of the bullets and Douglas's wounds showed the bullet to Douglas's right side did not match the Colt Huntsman. Trial counsel discovered this fact during trial, (3.RWR.99-100), but never explained it to the jury.

Other evidence also refuted the accomplices' claims. They testified that Young shot Douglas at close range inside the Grand Prix's front seat, but Douglas's wounds lacked the soot or stippling that normally result from close-

range shots. (22.RR.268-70; 288-96, 303-04.) Douglas's wounds showed his shooter could have fired from outside the car, where Page stood. (22.RR.293-96.)

6. McCoy's Brother in Law Reports the Incident to Police

After Ray shot Douglas at the creek, Young dropped off Ray and McCoy at their homes. (21.RR.135-36; 22.RR.143-44; 26.RR.181.) McCoy recounted Douglas's murder to his wife, who told her brother-in-law. (21.RR.137.) The brother-in-law insisted that McCoy report the incident, and helped lead police to Douglas's body. (21.RR.137-38.) The responding officer found Douglas face-down in the creek with his head turned to the left, the left side of his face facing up, and bullet entrance wounds in the left, right, and back of his head. (22.RR.263-68; 23.RR.126-31; Ex. 68, Douglas Autopsy Report.) Because the left side of Douglas's face faced up, the prosecutor argued at trial that the left-side shot must have been the last shot, delivered by Ray at the creek with the .22 revolver. (29.RR.15.) But ballistics evidence showed Douglas's left-side shot did not come from that gun. (*See* Ex. 14, R. Ernest Report, at 2; Ex. 15, R. Ernest Decl., ¶ 7.) Again, Young's trial counsel did not present that evidence to the jury.

B. The Shooting Of Samuel Petrey

1. Young and Page Depart for Midland

After Young dropped off Ray and McCoy, Page agreed to accompany Young to Midland, where Amber and her father were staying. (22.RR.142-43; 24.RR.41-42; 26.RR.186-87.) Before they departed, Page and Young returned the .22 revolver (the "Mark Ray gun") and the .38 to Dano Young and John Nunn, from whom they were borrowed. (21.RR.298-99; 22.RR.12-16; 26.RR.187-88.) Left with only the .22 Colt Huntsman, Young and Page set out for Midland in Douglas's car in the morning of November 25, 2001. (26.RR.188-91.) They drove through the day.

2. Young and Page Encounter Petrey

At some point that afternoon, Page testified, Young realized Amber's father would recognize Douglas's car and decided they needed a new vehicle. (26.RR.197-98.) Shortly after sundown, Page and Young encountered Petrey in the parking lot of a Brookshires grocery store in Eastland, Texas. Page testified that he watched Young walk up to Petrey's truck, pull out a gun, and tell Petrey "scoot over, I'm taking your truck." (26.RR.204-05.) But Young claimed Page kidnapped Petrey: shortly after the crime, Young told Amber that Page took

Petrey's truck while Young was in the store. (24.RR.91.) Young said that "when he came out of the store, [Page] had [the] truck." (*Id.*)

Page recently changed his description of how Petrey was abducted. In a 2015 interview Page said he did not see the abduction at all, because he was inside the store. (Ex. 169, J. Villerius Decl., Exh. A at page 20, time stamp 1:17:08:02.) Page claimed that when he came out of the store Young was already in the truck with Petrey. (*Id.*) This version of events is identical to the version Young told Amber after the crime but with the parties reversed, suggesting Young's original version was true and Page is reversing the parties' roles to exculpate himself.

The state failed to investigate Young's claim that Page kidnapped Petrey. Police reports reflect no effort to search for witnesses to the carjacking, or interview store employees about Young's claim that he went inside. No officer testified about any efforts to obtain surveillance tapes from the store or parking lot.

3. The Men Abandon Douglas's Car

After taking Petrey's truck, Young and Page abandoned Douglas's car at an isolated brush area outside Eastland, in Callahan County. (26.RR.210-14.) On the way there, Young and Page stopped at a rest area and talked outside the truck. Page testified at trial that Young suggested they slit Petrey's throat and leave him

somewhere. (26.RR.207-08.) But in 2015, Page admitted Young never said this. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 17.)

At the brush area, Young fired approximately nine shots at Douglas's car with the .22 Colt Huntsman, emptying the gun of bullets. (26.RR.213-14; 27.RR.29-30.) When the gun was recovered after the crimes, law enforcement noticed the bullets inside appeared to have come from a partially-emptied box of ammunition also found at Petrey's murder site. A report notes that the number of .22 casings found at the scene of Petrey's murder (two), plus those found in the magazine of the Colt Huntsman (eight), plus one found in a pair of gloves at the scene equaled the "same number missing from the submitted box of Federal .22 Long Rifle ammunition"— eleven. (Ex. 13, "Firearms Section Work Sheet," page 8, bottom of page, "Note of Interest.") The fact that the gun was apparently emptied and reloaded from the box of ammunition suggests Young emptied the gun when he shot at the car in Callahan County, to prevent Page from shooting Petrey.

Law enforcement found Douglas's car the next day, with its windows rolled down and several "defects," possibly bullet holes, in its interior and exterior. (23.RR.74-75; 242-43.) Five unspent ammunition rounds had been left in the car's console. (23.RR.41-42.) In the front seat were two spent .22 shell casings: one on

the passenger's side floorboard, and one on the passenger's seat. (23.RR.243.) The casings matched the .22 Colt Huntsman. (25.RR.159.)

At trial, Page testified that Young did not shoot the interior of the car when it was abandoned, only the exterior. (27.RR.81.) But in 2015, Page admitted that Young did, in fact, "shoot at the inside of the car," and that this could have produced the casings found in the front seat and floorboard. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 19.) Page states that the casings were not in the front seat during the journey from East Texas to Eastland. (*Id*., ¶ 18.)

4. Page Drives Petrey's Truck

After abandoning Douglas's car, Page and Young drove with Petrey in his truck toward Midland. Young initially drove, but asked Page to take over after he began falling asleep. (26.RR.216-17.) Page drove for several hours while Young slept, making no effort to knock Young unconscious or drive to a safe location. (27.RR.35-36.) There was a telephone in the truck (26.RR.206), but Page did not call for help. (26.RR.217-18.)

They reached Midland at about 2:00 a.m. (26.RR.217, 220.) At that point, Young told Page Petrey should be let go. Young said he had talked to Petrey during the drive and learned he had a family, grandchildren, and a wife who had just had surgery, and wanted to let Petrey return to his family. (26.RR.221-22.)

Young said they should just visit Amber, drop Petrey off and tell him where he could find his truck. (*Id.*)

5. Page Is Alone with Petrey but Does not Escape

Though Page testified he only participated in Petrey's kidnapping under duress from Young, (26.RR.219-20), the evidence showed otherwise. At one point, a 7-Eleven surveillance camera recorded Page sitting alone with Petrey in the truck for over ten minutes, while Young walked around inside the store. Page had the gun and car keys but did not leave.[6] (24.RR.216-19, 275-79, 27.RR.166, 294-95.) Page again guarded Petrey in a Wal-Mart while Young used the restroom, doing nothing to alert security. (27.RR.82-83.) At a rest stop, Page walked Petrey to the bathroom and back while Young remained in the truck. (26.RR.220; 27.RR.34-35.)

6. Page Learns He Is Wanted By Police

At about 7:15 a.m. on November 26, 2001 Young—still in the truck with Page and Petrey—called Amber and spoke with her father, Bart. (26.RR.238.) Bart said someone at the Fisherman's Motel had called and said East Texas law enforcement was searching for Page. (24.RR.42-43; Ex. 55, B. Lynch Statement; Ex. 60, B. Cotton Statement.) Bart said Young could visit Amber, but had to drop

[6] The state represented at trial that the surveillance video was lost, but a law enforcement officer testified about what it showed. (24.RR.232-33.)

Page off at the Sheriff's station first. (24.RR.43-44; Ex. 55, B. Lynch Statement.) Young told Page what Bart had said. (26.RR.239.)

Page then called his father, who confirmed that law enforcement was searching for Page in East Texas. (26.RR.239-40.) Page told Young to drop him off but Young refused, telling Page "you're in it just as much as I am." (26.RR.240.) Page told Young to get rid of the gun, but Young said he was going to keep it. (Ex. 64, Midland Sheriff's Office Supp. Report, Dec. 3, 2001, at 2).

Page, Young, and Petrey then drove to an oil pump site outside of Midland. (26.RR.240-41.) There Page picked up his gloves, stuffed one glove, a partially full box of .22 shells and a butterfly knife inside the other glove, and threw the gloves as hard as he could into the dirt. (26.RR.241-42.) Police found the knife and bullets in the gloves. (24.RR.211.)

Petrey's body was found at the site hours later, shot twice in the left side of the head. (24.RR.309-10, 314-16; 26.RR.27-30.) Soot and stippling showed he was shot at close range, from no more than two feet away. (26.RR.27-28.)

7. Page Tells Police He Did Something "Bad"

Immediately after the shooting, Page asked Young to drop him off and Young let him out at an IHOP restaurant. (26.RR.248-49.) Page used the IHOP's telephone to call the Midland Municipal Court warrants division and asked

whether they "had been looking for him." (24.RR.188.) Page spoke in a normal tone of voice, not remorseful or scared. (24.RR.199.) The officers checked their system but found no warrants. (24.RR.188-89.) Page then called the FBI and asked whether he had outstanding warrants in Harrison County, but was told the FBI's system "d[idn't] stretch that far." (26.RR.250-51.) Page called Midland police and again asked whether he had any warrants in Harrison County, but was again told "our computers won't stretch that far." (26.RR.251.) He also asked whether he had warrants in Midland. (*Id.*)

Page walked in search of the police station. He encountered a woman on the street and asked her how far away it was. When she said two miles Page gave her "a disgusted look," said "its that far?" then "squatted down in front of [her] and said he had to rest." (Ex. 65, B. Chatwell Statement.) She "was not comfortable being around [Page]" and "wanted away from him." (*Id.*)

Finally, Page got a ride to the courthouse from a woman at a convenience store. (26.RR.254.) At the courthouse, Page approached a Sheriff's Deputy and confessed he had done something "bad." (Ex. 67, Search Warrant Affidavit, at 2.)

Page's act of turning himself in was a conscious strategy to shift blame to Young. Amanda Williams, an acquaintance from Harrison County, once heard Page say, "if you ever get in trouble, [you should] be the first one to go to the

police because they will believe you more and you will get a better deal." (Ex. 170, A. Williams Decl., ¶ 7). Another acquaintance heard Page say that "if he ever killed someone, that he would just put it all off on Clint Young." (Ex. 33, Violent Crime Task Force Memorandum.)

8. Young Tells Amber that Page took Petrey's Truck

After dropping off Page, Young drove to an Albertson's grocery store where he had arranged to meet Amber and Bart Lynch. Young told Amber that Page had stolen Petrey's truck while he (Young) was inside the grocery store. Young said that "when he came out of the store, [Page] had [the] truck." (24.RR.91; Ex. 54, A. Lynch Statement.)

C. Police Search The Crime Scene And Arrest Young

About an hour after Petrey's murder, an oil equipment salesman found his body at the oil pump site and reported it to police. (24.RR.298-301.) At about 11:00 a.m., Midland Sheriff's investigator Paul Hallmark examined the crime scene. (24.RR.304-06, 321-22.) Petrey's body lay face up in the dirt, with one hand in his pocket and two bullet wounds in the left side of his head. (24.RR.310-316; 26.RR.27; State's Trial Exhs. 75-83.) A cigarette and two .22 shell casings lay nearby: one casing lay 2 feet 11 inches from Petrey, and the other 5 feet, 11 inches from Petrey. (State's Tr. Ex. 91; 24.RR.318-19.) Burned rubber lay on the

ground, as if a car had "peeled out" at high speed. (24.RR.313.) Hallmark walked the scene but failed to notice Page's gloves, which another officer later found lying in the dirt. (24.RR.207-08; 25.RR.56-57.) One glove, a partially-full box of ammunition, and a butterfly knife had been stuffed inside the other glove. (24.RR.209-11.) Page admitted the gloves were his. (26.RR.241.)

At about the same time Petrey's body was found, police apprehended Young in Petrey's truck after a high-speed highway chase. (24.RR.191-97.) The .22 Colt Huntsman was in the truck, lodged between the center console and the passenger seat where Page had sat before Young dropped him off. (24.RR.170.) Also in the truck was a plastic convenience store beverage cup partially filled with gasoline. (24.RR.327-28.) The cup was analyzed for fingerprints but none were found, consistent with it being handled by someone wearing gloves. (24.RR.329.)

D. Summary Of The Ballistics Evidence

State firearms expert Tim Counce testified about the ballistics evidence. Counce testified that State's exhibit 5, the so-called "Mark Ray gun," was an RG double action .22 caliber long rifle revolver. (25.RR.150-51.) State's exhibit 3, the so-called "Clint Young gun" was a .22 caliber semiautomatic pistol called a Colt Huntsman. (25.RR.144.) The Colt Huntsman automatically ejects shell casings when fired. (25.RR.145-46.) Counce test fired the Colt Huntsman and

found that it generally ejects the casings back and to the right. (25.RR.146-47.) But he testified that it was impossible to tell where Petrey's shooter stood based on the position of the shell casings, because shell casings can roll and move from their original location, or impact other objects such as grass. (25.RR.147-50.)

Counce testified that the two shell casings found at Petrey's murder scene matched the Colt Huntsman, based on microscopic markings within the firing pin impression. (25.RR.153-56.) The two casings recovered from Douglas's car were also fired from the Colt Huntsman. (23.RR.43-46; 25.RR.159.) The Colt Huntsman was examined for fingerprints, but none were found. (24.RR.331.)

Three bullets were recovered from Douglas's head and introduced as state's exhibits 9, 10, and 11. (22.RR.284-85.) Pathologist Jill Urban testified that exhibit 9 corresponded to Douglas's backside head wound. (22.RR.284.) She did not specify which of Douglas's wounds corresponded to the other two bullets. Her autopsy report, however, stated that the bullets had each been inscribed with an identifying number during the autopsy: the bullet to the back was "1," the bullet from the left side "4363 JU 2," and the bullet from the right side "4364 3." (Ex. 68, Douglas Autopsy Report, at 2-3.) Counce testified that the bullet fragments labeled state's exhibits 9 and 10—which he called "16-G" and "16-H"—could not be identified or eliminated as having been fired from the Colt Huntsman but could

be eliminated as having been fired from the .22 revolver. (25.RR.161-62.) He testified that state's exhibit 11, which he referred to as "16-I," could not be identified or eliminated as having been fired from the .22 revolver, but could be eliminated as having been fired by the Colt Huntsman. (25.RR.162.)

Three bullet fragments were recovered from the head of Petrey, and introduced as state's exhibits 97-A, 97-B, and 97-C. (26.RR.39.) Counce examined these fragments to determine whether they were fired from the .22 Colt Huntsman, the .22 revolver, or neither. One fragment Counce could not identify or eliminate as being fired from the Colt Huntsman, but could eliminate as being fired from the .22 revolver. (25.RR.165-66.) He could not determine whether the other two fragments were fired from either weapon. (25.RR.166.)

E. Young And Page Each Say The Other Shot Petrey

In police interviews, Young and Page each said the other shot Petrey. Young said Page shot Petrey while wearing the gloves found at the murder scene. (Ex. 67, Search Warrant Affidavit, at 6.) Page told police Young shot Petrey, but never claimed Young wore the gloves. (Ex. 53, D. Page Interview, Nov. 26, 2001, at 10.) Page never said he fired a gun himself.

Page gave several conflicting accounts of Petrey's shooting. At first, Page told police he watched Young shoot Petrey "in the right side of the head." (Ex. 53,

D. Page Interview, Nov. 26, 2001, at 10). The next day, Page claimed he heard Young say "Sorry Sam, but you know too much," then saw Young "pull[] out the gun" and shoot Petrey twice after Petrey turned towards him. (Ex. 56, D. Page Interview, Nov. 27, 2001, 11:39 a.m., at 17.)

But at trial, Page suddenly testified that he "didn't see [the shooting]," at all, because he wasn't looking. (27.RR.97; *see also* 26.RR.246-47.) Though he had told police Young shot Petrey in the right side of the head, Page now testified it was the left. (27.RR.43-44.) Page admitted he changed his story after being prompted by Midland law enforcement. (27.RR.44.) Though Page had told police that he (Page) stood to Petrey's left during the shooting—where the shooter must have stood—he changed his story at trial to put Young on Petrey's left. (27.RR.44, 209, 210-12, 215.)

Page also contradicted the physical evidence. He testified that Young shot Petrey from six to ten feet away, (27.RR.42), but soot and stippling on Petrey's head showed the distance was no more than two feet. (26.RR.27-31, 34-36; Ex. 15, R. Ernest Decl., ¶¶ 10-11.) Indeed, the Colt Huntsman is a small caliber weapon, capable of producing stippling only at very short distances. (Ex. 15, R. Ernest Decl., ¶ 12.) Page also claimed Young told Petrey "You got to die" before shooting him, (26.RR.246), and that Petrey "turn[ed] towards" Young (27.RR.90),

but photographs show Petrey lying in a relaxed position with one hand in his pocket, as if he died with no forewarning at all. (Ex. 6, Photographs of Petrey Crime Scene.) Even the prosecutor remarked that Petrey "apparently didn't flinch or reflex" before being shot. (26.RR.32.)

F. Page Fails A Polygraph Test

A year before Young's trial, Page took a polygraph test and failed it when he denied shooting Petrey. (27.RR.239-41.) Page did not show deception when he denied shooting Douglas. (27.RR.240.) The polygraph examiner told Page he had failed, and that she did not think he was being truthful about his involvement in the crimes. (27.RR.241-42.) Page did not deny his guilt or protest the results; he simply said, "I know what it is." (27.RR.242.)

G. Page Admits He Lied At Trial About His Gloves

Since trial, Page has admitted he testified falsely about how he obtained and used the gloves found at Petrey's murder site.

1. Page Testifies he Used the Gloves for Yard Work Before the Crimes

Page testified that the gloves found near Petrey's body were his "gardening gloves," which he had supposedly worn "all day long" before Douglas was killed, while "working in the yard" with his father, including "[m]owing the lawn . . . filing the [tree] limbs out of the front yard and getting all [the] scrap metal out of

the front yard." (26.RR.137, 241.) Page's father never testified, and police apparently never interviewed him to check Page's account.

2. Page Admits He Actually Bought the Gloves the Night of Douglas's Murder

In 2015 Page admitted the gloves were actually brand new when Petrey was killed. Rather than using them for "gardening," Page admitted he in fact "bought [them] from a convenience store, the night Douglas was shot," before embarking on the journey that culminated in Petrey's death. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 20.) Trial testimony supports this: Page and Ray both testified that the men visited a gas station convenience store just after Douglas was shot. (22.RR.139-40 (Ray); 26.RR.164-66 (Page).) Young's current counsel visited an EZ Mart in Longview, Texas in May 2017 and purchased a pair of gloves there virtually identical to Page's—with the same stitching pattern and red lining. (*Compare* Ex. 151, M. Farrand Decl., ¶ 2 and Ex. B with Ex. 5, 2017 Microtrace Report, at 12-15) (photographs of the back and front of both pairs of gloves.)

In 2015, microscopic examination confirmed that Page's gloves were new, and not his "gardening gloves," as he claimed at trial. The gloves' fibers were found to contain "no potential deposits of soil clumps, plant tissue or mineral grains" consistent with gardening. (Ex. 2, 2015 Microtrace Report, at 1.) The

fibers from the palm and back of each glove were compared, and the palm fibers were no more worn than those on the back. (*Id.* at 1-2.) Indeed, the gloves' fibers showed no extensive wear at all. (*Id.* at 2.)[7]

Page also admitted lying on other key points. His 2015 declaration admits that he lied when he testified that Young suggested slitting Petrey's throat and when he testified that Young asked Petrey to buy him clothes at Wal-Mart. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶¶ 17, 21.) Page admitted that he "tried to make Clint look as bad as possible" at trial in hopes that he would "get a better deal from the state on [his] own case." (*Id.*, ¶ 23.)

3. Page's DNA, not Young's, is Inside the Gloves

A criminalist with the Texas Department of Public Safety ("DPS"), tested four stains on Page's gloves for DNA. (26.RR.109-10.) Young's DNA was not present in any of the interior stains, but Page's was. (26.RR.110-23.) A DNA analyst with the Tarrant County Medical Examiner's Office analyzed additional cuttings from the inside palm of each glove. (27.RR.248-49.) Again, Page's DNA was found in the interior samples of both gloves. (27.RR.253-57.) Young was excluded as contributing DNA inside the gloves. (27.RR.256, 264.)

[7] Barium sulfate, an oil drilling additive, was found in the gloves' fibers because they were thrown into the dirt at the oil pump site where Petrey was killed. (*See* 24.RR.207-08; 26.RR.241-42; Ex. 7, Photograph of Gloves.)

4. Pretrial Testing Shows Lead on the Gloves' Exterior

Before trial, firearms expert Counce purported to examine the gloves for possible GSR. (25.RR.168-69.) But Counce did not use a test that could definitively detect GSR. Instead, he used a spray test called a "sodium rhodizonate" test, which only detects the presence or absence of lead, a GSR component. (25.RR.169.) Though several areas on the left glove tested positive for lead, that result did not show whether or not GSR was present because lead can come from other sources. (25.RR.174, 183; Ex. 176, T. Counce Decl., ¶ 5.)

H. Post-Trial Testing Shows GSR On Page's Gloves

1. 2015 Testing Shows GSR is Present on the Gloves

Twelve years after trial, in 2015, the gloves were subjected to new testing that conclusively detects GSR by using scanning electron microscopy/energy dispersive x-ray spectroscopy ("SEM/EDS," or "SEM"). SEM/EDS uses an electron beam to image particles and analyze their individual elemental compositions. (Ex. 1, S. Palenik Decl., April 2, 2015, at ¶ 20-21.) Unlike other available methods, SEM/EDS can definitively identify GSR because it shows both the shape and the elemental composition of the particles being analyzed. (*Id.*, ¶¶ 19-21.) It can conclusively detect the roughly spherical particles, composed of lead, barium, and antimony, unique to GSR. (*Id.*, ¶¶ 16, 21.)

The 2015 tests revealed unique GSR particles on both of Page's gloves. (Ex. 2, 2015 Microtrace Report, at 3.) These tests did not attempt to determine how much GSR was on the gloves, however—only whether GSR was present or absent. To do this, the SEM was scanned over two sample areas on each glove until the threshold number of tricomponent GSR particles—three—was found, and then testing ceased.[8] (Ex. 3, C. Palenik, Ph.D Decl., ¶¶ 7-8; Ex. 4, C. Palenik, Ph.D. Supp. Decl., ¶¶ 4-5, 8.)[9] The fact that two areas on each glove each met the threshold means each glove contained *at least twice* the amount of GSR normally required to declare an item was in the vicinity of a discharged firearm or contacted a GSR-related object. (Ex. 4, C. Palenik, Ph.D. Supp. Decl., ¶¶ 8-9.) The Colt Huntsman used to shoot Petrey produced residue, and would have left GSR on the gloves. (Ex. 13, "Firearms Section Work Sheet," at 7 ("Residue: yes")).

[8] A tricomponent GSR particle is one that contains lead, barium, and antimony.

[9] This three-particle threshold is the highest used by any laboratory except the U.S. Navy Crime Lab, which uses four particles due to higher background levels of GSR in military settings. (Ex. 3, C. Palenik, Ph.D. Decl., ¶ 8 & n.1; Ex. 4, C. Palenik, Ph.D. Supp. Decl., ¶ 6.)

2. 2017 Testing Shows GSR is Present on the Gloves in Large Amounts, Including Between the Fingers

Because the 2015 testing did not attempt to determine the amount or distribution of GSR on the gloves—only its presence or absence—more detailed tests were performed in July and August 2017. This time, four one-centimeter areas of each glove were analyzed to ascertain and compare the total number of GSR-related particles in each area: (1) the crux between the index and middle fingers (area A), (2) the crux between the middle and fourth fingers (area B), (3) the top of the fourth finger (area C), and (4) the underside of the fourth finger (area D). (*See* Ex. 5, 2017 Microtrace Report, at 2, 16.)

This test revealed *over a hundred* total GSR particles distributed among the tested areas. On the left glove, 13 GSR-related particles were found in area A (between the index and middle fingers), 5 particles in area B (between the third and fourth fingers), 58 particles in area C (on the top of the fourth finger), and 23 particles on area D (on the underside of the fourth finger). (Ex. 5, 2017 Microtrace Report, at 3.) On the right glove, 1 GSR particle was found in area A (between the index and middle fingers), 9 GSR particles were found on area C (on the top of the fourth finger) and 5 GSR particles were found in area D (on the underside of the fourth finger). (*Id.*) These numbers indicate that much more GSR is likely present on both gloves: because the four one-centimeter areas tested "represent[] less than

1% (0.75%) of the overall surface area of one glove . . . the total number of GSR particles on each evidence glove could be 10 times or even as much as 100 times greater than the sum of the particles" found. (*Id.* at 2.)

The large number and the relative distribution of GSR particles on Page's gloves—including between the fingers, an area not normally exposed unless the fingers are spread as when firing a gun—indicate that "the discharge of a weapon by a shooter wearing the questioned gloves *is the most likely scenario*" that could explain their presence. (*Id.* at 6) (emphasis added.) Though secondary transfer of GSR particles from other objects is possible, the presence of significant numbers of GSR particles in each of several tested areas of Page's gloves makes this unlikely, because "[secondary] transfers typically involve lower numbers of particles that have become localized in a specific area of contact." (*Id.*) The amount and distribution of GSR particles on the gloves makes the discharge of a gun by the gloves' wearer the most likely explanation for their presence. (*Id.*) Because only Page's DNA—not Young's—was found inside the gloves, that shooter must have been Page.

I. Page Repeatedly Confesses To Shooting Petrey

Other evidence further implicates Page. Since the crimes, four disinterested witnesses have provided sworn statements saying they heard Page confess to shooting Petrey. The witness do not know Young, recount accurate details of the crimes, and consistently describe Page's statements and demeanor.

1. Page's Pretrial Confession to Christopher McElwee

Christopher McElwee was a fellow inmate of Page's at the Midland County Jail between late 2001 and early 2003, before Young's trial. (27.RR.271-72.) He did not know Young. (27.RR.279.) One day he told Page "I know what you did" and accused Page of having "pulled the trigger on the second murder." (27.RR.273-74.) Page replied, "You don't know nothing," and then said, "Well, they can't prove it anyway." (27.RR.274.) When McElwee asked "What makes you think they can't prove it?" Page replied, "I was wearing gloves," and said there was no "powder burn" on his hands. (27.RR.274-75.)

Consistent with McElwee's testimony, Page himself used the phrase "powder burns" to claim his innocence at trial. During cross examination, defense counsel suggested Page was Petrey's shooter and Page said, "How could I be the shooter with no powder burns on my hands?" (27.RR.210).

2. Page's Pretrial Confession to Raynaldo Villa

Raynaldo Villa was incarcerated with Page at the Midland jail between 2001 and 2003, before Young's trial. One day, he overheard Page tell another inmate that he had shot a man named Petrey. The next day, Villa asked Page about what he had overheard. Page confessed that he, not Young, had shot Petrey outside Petrey's truck. (Ex. 168, R. Villa Decl., Sept. 23, 2008, ¶ 4.) Page said he was blaming Young to avoid a life sentence. (Ex. 167, R. Villa Decl., April 25, 2003.)

3. Page's 2010 Confession Overheard by John Hutchinson

Seven years after Young's trial, in 2010, John Hutchinson was incarcerated with Page at the Midland County Jail, where Page was being temporarily held for a postconviction hearing in Young's case. Hutchinson did not know Young or Page. (Ex. 156, J. Hutchinson Decl., ¶ 16.) One night Hutchinson overheard Page bragging to another inmate, through the air vent, that he had shot a man twice in the head with a .22 caliber handgun while his accomplice was asleep because he (the accomplice) had been using drugs. (*Id.*, ¶ 3.) Page said he got a good deal because the other guy involved was on death row. (*Id.*, ¶ 5.)

Consistent with Hutchinson's account, a psychiatrist testified at trial that Young would have been sleepy from methamphetamine withdrawal at the time of Petrey's murder. (34.RR.197-98.) Young told Bart Lynch after the crime that he

had gone to sleep and when he woke up Petrey was gone. (24.RR.50.) Except for Page's confession, Hutchinson had no reason to know that information.

4. Page's 2010 Confession Overheard by James Kemp

James Kemp was also incarcerated with Page in 2010 at the Midland County Jail. Like Hutchinson, Kemp did not know Young or Page. (Ex. 157, J. Kemp Decl., ¶¶ 5, 16.) One day, Kemp overheard Page talking with another inmate, Michael Kessler, through the jail's ventilation system. As Kemp listened through the air vent, Kessler asked Page what he was doing back in Midland, and Page said he had been subpoenaed to testify at Young's court hearing. (*Id.*, ¶ 6.) Page then described Petrey's shooting. (*Id.*, ¶ 7.) He said police never found fingerprints on the gun used in the shooting because Page had worn gloves the night it occurred. (*Id.*) Kessler told Page that he must be upset because he helped the DA convict Young but was still given a long prison sentence. (*Id.*, ¶ 8.) Page said he wasn't angry at all; rather, he was lucky because if the police really knew what had happened he might be facing capital murder. (*Id.*, ¶ 8.)

III. CLAIMS FOR RELIEF

CLAIM 1: THE STATE VIOLATED YOUNG'S RIGHT TO DUE PROCESS BY UNKNOWINGLY INTRODUCING FALSE OR MISLEADING TESTIMONY AGAINST HIM AT TRIAL. *EX PARTE CHABOT*, 300 S.W. 3D 768, 771 (TEX. CRIM. APP. 2009).

Young's conviction and sentence were obtained through the State's use of false or misleading testimony, in violation of his right to due process of law. U.S. Const. Am XIV; TX. CONST. art. I, §§ 1, 19; *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). The State hinged its capital murder case on false testimony from David Page that Young shot Samuel Petrey. But four witnesses—Villa, McElwee, Kemp, and Hutchinson—have now given sworn statements saying they heard Page confess to shooting Petrey himself. Two of those witnesses heard Page say that he committed the shooting while wearing gloves saturated with GSR particles in locations and amounts indicating they were worn to shoot a gun. Page admits he bought the gloves just hours before Petrey's murder, and Page's DNA, not Young's, is inside the gloves. Page's "testimony, taken as a whole, g[ave] the jury a false impression," of Young's role in Petrey's murder and falsely implicated Young as the shooter. *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012). Page also falsely testified that Young carjacked Petrey and suggested slitting his throat; that Page owned his gloves before the murders, and

that Young did not shoot the inside of Douglas's car so as to produce the shell casings found there. All of this testimony was untrue.

A. The Substantive Law Under *Chabot*

The Due Process Cause of the Fourteenth Amendment is violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. *Robbins*, 360 S.W.3d at 459. An applicant need not show a witness committed "perjury"; rather, "it is sufficient that the testimony was 'false.'" *Chavez*, 371 S.W.3d at 208 (quoting *Robbins*, 360 S.W.3d at 459). "[A] witness's intent in providing false or inaccurate testimony and the State's intent in introducing that testimony are not relevant." *Id*. A *Chabot* claim thus has two key elements: "the testimony used by the State must have been false, and it must have been material to the defendant's conviction." *Robbins*, 360 S.W.3d at 459.

Whether testimony is false, for purposes of a *Chabot* claim, turns on "whether the testimony, taken as a whole, gives the jury a false impression." *Chavez*, 371 S.W.3d at 208 (internal citations omitted). Testimony typically presents a "false impression" when a "witness omitted or glossed over pertinent facts." *Robbins*, 360 S.W.3d at 462.

To show that false testimony is material, an "applicant has the burden to prove by a preponderance of the evidence that the error contributed to his

conviction or punishment." *Chabot*, 300 S.W.3d at 771 (internal quotations omitted.) This is done by showing a "reasonable likelihood that the false testimony affected the applicant's conviction or sentence." *Chavez*, 371 S.W.3d at 207 (quoting *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011)). The standard of materiality is the same for knowing and unknowing use of false testimony. *Id*. This is a relaxed materiality standard, "more likely to result in a finding of error than the standard that requires the applicant to show a reasonable probability that the error affected the outcome." *Id.* (internal quotations omitted); *accord Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (appellant was entitled to relief by showing "a fair probability that appellant's death sentence was based upon . . . incorrect testimony").

B. Page Testified Falsely About The Origin Of His Gloves And Young's Role In The Crimes

Page's trial testimony was false in several important respects. He has already admitted several of them: his testimony that he owned the gloves before the crimes and used them for yard work, whereas he now admits he bought them the night of Douglas's murder; his testimony that Young said he wanted to slit Petrey's throat, whereas he now admits Young never said that; and his testimony that Young never shot the inside of Douglas's car when the car was abandoned

near Eastland, whereas he now admits that Young did shoot the inside, so as to leave the shell casings found there. Page also recently contradicted his trial testimony that he saw Young carjack Petrey at gunpoint, saying he was instead in the grocery store when Young got into Petrey's truck, and that Petrey drove them to Midland voluntarily. (Ex. 169, J. Villerius Decl., Exh. A at page 9, time stamp 34.40.17.)

Page's lies prejudiced the guilt and punishment verdicts. Combined with his confessions to shooting Petrey and the abundant GSR on his gloves, they show the falsity of Page's testimony that Young shot Petrey. *Cf. Calderon v. Thompson*, 523 U.S. 538, 562 (1998) ("[S]ince Thompson lied about almost every other material aspect of the case, the jury had good reason to believe he lied about" the dispositive issue bearing on petitioner's eligibility for a death sentence.)

1. Page Falsely Testified About When He Acquired his Gloves

Page admitted in 2015 that he testified falsely about when he obtained his gloves. At trial, he denied that he bought the gloves at an EZ Mart the night of Douglas's shooting. (26.RR.241.) He testified that he had owned them before the murders, and used them "all day long" before Douglas's murder to move scrap metal and tree limbs. (26.RR.137, 241; 27.RR.171.) But in 2015, Page admitted in a sworn declaration that he in fact "bought [them] from a convenience store, the

night Douglas was shot." (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 20.) The lack of wear, soil, or plant material on the gloves shows this is true, and Page's trial testimony was false. (Ex. 2, 2015 Microtrace Report, at 1-3.)

2. Page Falsely Testified that Young Suggested Slitting Petrey's Throat

Page also admits testifying falsely that Young proposed slitting Petrey's throat. (26.RR.207-08.) In 2015, Page admitted Young never said that. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 17.) Page says he "tried to make [Young] look as bad as possible" to "get a better deal . . . on [his] own [murder] case." (*Id.*, ¶ 23.)

3. Page Falsely Testified that he Saw Young Carjack Petrey

Page also testified falsely that he saw Young carjack Petrey at gunpoint. (26.RR.204-05.) In his 2015 videotaped interview, Page said he actually did not see the carjacking at all because he was inside the grocery store, and that when he walked out Young was already with Petrey in the truck. Page even claimed Petrey voluntarily agreed to drive him and Young to Midland because "he had family in Midland. He'd be[en] meaning to go out there anyway." (Ex. 169, J. Villerius Decl., Exh. A at page 9, time stamp 34.50.04); *see also id.* at time stamp 34.40.17) ("I walked up to the truck, Clint was sitting in the truck with the guy. The dude said he was going to give us a ride.")

Page's new story is the inverse of the account Young gave to Amber Lynch immediately after the crime in 2001, when Young told her Page took Petrey's truck while Young was inside the store. (24.RR.91.) The fact that Page now gives a version identical to Young's story—but with Young as the carjacker—suggests Young's version was true and that Page is trying to exculpate himself by changing the facts to implicate Young.

4. Page Falsely Testified that Young Shot Samuel Petrey

Page's lies about how he obtained and used the GSR-coated gloves, and his false claim that Young carjacked Petrey and suggesting slitting his throat, all point towards a larger, foundational lie at the heart of Page's testimony: his false claim that Young shot and killed Petrey at the oil pump site. Since trial, four disinterested witnesses—McElwee, Villa, Kemp, and Hutchinson—have given sworn statements saying they heard Page confess to shooting Petrey and framing Young. (27.RR.271-75 (McElwee); Ex. 156, J. Hutchinson Decl.; Ex. 157, J. Kemp Decl.; Ex. 167, R. Villa Decl., Apr. 25, 2003; Ex. 168, R. Villa Decl., Sept. 23, 2008.) They recount accurate details about the gloves, the lack of fingerprints on the gun, the lack of "powder burn" on Page's hands, and Young being asleep, that they had no reason to know apart from hearing Page's confessions. Page mentioned the gloves in two of these confessions: he bragged to McElwee in 2003

about having "no powder burn on his hands" because he "was wearing gloves" (27.RR.275), and confessed in 2010 that "police never found fingerprints on the gun . . . because [he] had worn gloves the night it occurred." (Ex. 157, J. Kemp Decl., ¶ 7.) Page also failed a polygraph test when he denied shooting Petrey. (27.RR.239-41; Ex. 69, D. Page Polygraph Report.)

a. The Witnesses Consistently Describe Page's Confessions

Kemp, Hutchinson, McElwee, and Villa recount similar details about Page's confessions that support their credibility. They consistently describe Page as mentioning the gloves, and his belief that the gloves prevented law enforcement from finding evidence that would have incriminated him. Kemp heard Page say the gloves prevented police from finding his fingerprints on the gun. (Ex. 157, J. Kemp Decl., ¶ 7.) McElwee, similarly, testified that Page said the gloves prevented him from having "powder burns" on his hands so that law enforcement could not "prove it." (27.RR.274-75.) McElwee's testimony is particularly credible because Page used the same phrase—"powder burns"—to exculpate himself in his own trial testimony. (27.RR.210.)

The witnesses also consistently describe Page's attitude and demeanor. They all describe Page as concerned about what evidence might implicate him, and satisfied at shifting blame to Young. Hutchinson says Page boasted about getting a

"good deal" because Young "was on Death Row." (Ex. 156, J. Hutchinson Decl., ¶ 5.) Kemp reports Page said "he wasn't angry" about his prison sentence, but considered himself "lucky" because "he might have been facing capital murder" "if only the police knew what really had happened." (Ex. 157, J. Kemp Decl., ¶ 8.) McElwee also describes Page as focusing on what the state could "prove," saying law enforcement "can't prove" his guilt, and crediting the gloves with the absence of "powder burn on his hands." (27.RR.274-75.) Villa states that Page said "that he killed Petrey but was pinning it on Young because he, Page, did not want to get life in prison." (Ex. 167, R. Villa Decl., April 25, 2003.) The similarity in their statements shows the witnesses are telling the truth. *See, e.g., United States v. Camacho*, 188 F. Supp. 2d 429, 442 (S.D.N.Y. 2002) (co-defendant's confession to third party was credible, where it was "consistent with and refere[red] to his earlier contacts with [other individuals].")

b. The Witnesses' Statements are Supported by Page's Own Conduct

Page's behavior further corroborates the witnesses' accounts. Before the shootings, Page mused about how to shoot someone and not get caught, saying "you need to wipe off the bullets in a gun before you put them in so the shell casings don't leave any fingerprints." (Ex. 170, A. Williams Decl., ¶¶ 4-5.) Page also said he would be the first to turn himself in after a crime, to ensure police believed him and get a "better deal." (*Id*., ¶ 7.) As Page admits, "self preservation" is his "first law in life." (Ex. 169, J. Villerius Decl., Ex. A at page 25, time stamp 01.35.35.17.)

Page also had the stronger motive to kill Petrey: he had just learned law enforcement was searching for him regarding Douglas's murder, while Young had not heard any similar news. (27.RR.87.) Indeed, Bart Lynch testified "they never said nobody was looking for [Young], and so [Young] knew that." (24.RR.44.) Bart even told Young he could visit Amber, so long as he took Page to the police station first. (24.RR.43-44; Ex. 55, B. Lynch Statement.) Page also coveted Young's girlfriend. By shooting Petrey and blaming Young for both murders, Page hoped simultaneously to deflect blame from himself and eliminate Young as

romantic competition. "When identity [of a killer] is in question, motive is key." *House v. Bell*, 547 U.S. 518, 540 (2006).

Page's actions after Petrey's shooting further show his guilt. Instead of acting scared or panicked, he acted menacing and nonchalant: instead of fright, he displayed "disgust" at how far he had to walk to the courthouse, causing a bystander to want "away from him." (Ex. 65, B. Chatwell Statement.) Instead of immediately reporting Petrey's shooting, Page carefully checked what evidence law enforcement had on *him*. In a remorseless voice, (24.RR.199), he meticulously telephoned the FBI, Harrison County, and Midland police to see whether warrants were out for his arrest, then turned himself in to bolster his credibility. In a momentary lapse, Page told police he had done something "bad." (Ex. 67, Search Warrant Affidavit, at 2.)

c. Additional Circumstances Corroborate Kemp's and Hutchinson's Statements

Still other circumstances support Kemp's and Hutchinson's statements that they overheard Page confess through the air vents at the Midland Jail to inmate Michael Kessler. (Ex. 156, J. Hutchinson Decl., ¶¶ 2-8; Ex. 157 J. Kemp Decl., ¶¶ 5-8.)[10] First, Kessler and Kemp both testified in 2010 that the vents were Midland

[10] Only Kemp identifies Kessler as the inmate with whom Page was talking. (Ex. 157, J. Kemp Decl., ¶ 5.) Hutchinson simply says he heard Page talking through the air vents "and

Jail inmates' primary means of communication. Kessler testified that he spoke to other inmates there "through the vents," and Kemp testified he would "[s]tand on my toilet and yell through the vent." (Ex. 77, M. Kessler 2010 testimony, at 15 line 13; *Id.*, J. Kemp 2010 testimony, at 29 line 19.)

Second, it is believable that Page would have spoken to Kessler in 2010 about Petrey's shooting, because Page and Kessler were friends from a prior incarceration. Kessler testified in 2010 that he knew Page because they had been incarcerated together about six years earlier. (Ex. 77, M. Kessler 2010 testimony, at 16 lines 5-14.) During that prior incarceration, Kessler was criminally charged with possessing a deadly weapon—a knife—in jail. (13.RR.13-14.) Page wrote a letter to prison authorities exculpating Kessler and claiming ownership of the knife, saying Kessler "was not even in the cell when [it] was found."[11] (Ex. 73, Letter signed David Page). Page's exoneration of Kessler shows the two trusted each other and had a reason to keep each other's secrets. This makes it believable that Page would have spoken to Kessler about his crime when they reunited at the Midland Jail in 2010.

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bragging about how he had shot and killed another man." (Ex. 156, J. Hutchinson Decl., ¶ 2.) It is unclear whether they are describing the same conversation.

[11] The prosecutor produced this letter at a January 2003 pretrial hearing. (13.RR.13-14.)

Kemp and Hutchinson also recount details about the crime, and about Page's and Kessler's relationship, that they would not have reason to know unless they heard Page confess. Kemp says he heard Kessler ask Page in 2010 "what he was doing back in Midland:" exactly the question Kessler would be expected to ask upon reuniting with his old friend after six years. Kemp also accurately states that no fingerprints were found on the gun used to shoot Petrey, (*see* 24.RR.331), that gloves were an item of evidence, that Page "helped" the DA's case against Young, and that Page received a long prison sentence. (Ex. 157, J. Kemp Decl., ¶¶ 7-8.) He had no reason to know those facts, apart from hearing Page's confession.

Hutchinson, similarly, says Page told Kessler Young was "asleep" when Page shot Petrey: information consistent with trial testimony that Young was sleepy from methamphetamine withdrawal during Petrey's murder, as well as Young's statement to Bart Lynch that he was asleep. Kemp's and Hutchinson's declarations are credible because they "contain[] factual allegations that [they themselves] could not have fabricated." *Lopez v. Miller*, 915 F. Supp. 2d 373, 404 (E.D.N.Y. 2013); *see also Berry v. State*, 363 P.3d 1148, 1157 (Nev. Sup. Ct. 2015) (witness's credibility was bolstered by "specific factual allegations that are not belied by the record.")

d. Page's Guilt is Confirmed by the GSR Evidence and His Lies About the Gloves

The copious GSR on Page's gloves—purchased just hours before Petrey's death—further corroborates Page's confessions. Page's trial testimony provided no explanation for how GSR could be in the gloves' fibers, let alone in large amounts or between the fingers. Page did not say Young ever wore the gloves, or that the gloves were worn by anyone to fire a gun. Nor did Page say that he himself fired a gun at any point during the two-day period when the crimes occurred. Page's DNA is inside the gloves, while Young's is not. (27.RR.254-262.) Recent testing shows the gloves have over 100 GSR particles on a small test sample comprising less than one percent of their surface area, suggesting "the total number of GSR particles on each evidence glove could be 10 times or even as much as 100 times greater." (Ex. 5, 2017 Microtrace Report, at 2-3.) The particles are located not just on the gloves' back and front but also between the fingers—areas that would not normally be exposed unless the gloves were being worn with the fingers spread, so as to fire a gun. (*Id.* at 3, 16.) The particles' number and distribution make "the discharge of a weapon by a shooter wearing the questioned gloves . . . the most likely scenario" that could explain the test results. (*Id.* at 6.)

The fact that Page lied at trial about how he obtained and used the gloves incriminates him still more. Page admitted in 2015 that he did not own the gloves before the crimes or use them to "garden," as he claimed at trial, but bought them the night Douglas was shot. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 20.) That conclusion is confirmed by the absence of soil, plant material, or wear in the gloves' fibers. (Ex. 2, 2015 Microtrace Report, at 1-3.) Page's lies about the gloves show both his consciousness of guilt and his understanding that the gloves were the evidence that could reveal it.

All this evidence tips the balance towards a conclusion that Page, not Young, shot Petrey at the oil pump site. The weight and consistency of the evidence against Page dwarfs the vacillating, self-serving testimony Page gave at trial against Young—the only evidence the prosecution ever proffered to support Young's guilt of Petrey's murder. Whereas Page's confessions are consistent with each other and the physical evidence, Page was unable to give a consistent or convincing account of Petrey's shooting at trial, contradicting himself as to the direction of the shots, where Young supposedly stood to shoot, and even whether Page witnessed the event at all. (*See* Section II(E).) Whereas GSR on the gloves corroborates Page's guilt, the forensic evidence at trial refuted Page's claim that Young shot Petrey from six to ten feet away. (26.RR.27-31, 34-36; 27.RR.42.)

Page, not Young, falsely testified that he was under duress despite videotape showing him guarding Petrey in a car for eleven minutes. The totality of the evidence shows Page was Petrey's shooter.

5. Page Testified Falsely that Young Did Not Shoot the Interior of Douglas's Car When It was Abandoned

Page also testified falsely that Young did not shoot the interior of Douglas's car when they abandoned it in Callahan County, well after Douglas's shooting. (27.RR.81.) Page now admits that Young did, in fact, "sho[o]t at the inside of the car . . . when we abandoned it," that the shell casings found in the car's front seat and floorboard could have come from that shooting, and that the casings were not in the car immediately after Douglas's shooting, indicating they were put into the car afterwards. (Ex. 163, D. Page Decl., August 20, 2015, ¶¶ 18-19.) Indeed, apparent bullet holes were found in the car's dashboard and steering wheel, suggesting the car's interior was shot. (Ex. 8, Photo of Glove Compartment; Ex. 9, Photo of Dashboard and Front Seat; Ex. 13, "Firearms Section Work Sheet," page 8.) Those bullets cannot have come from Douglas's shooting, because all the bullets shot at Douglas remained in his head. (Ex. 68, Douglas Autopsy Report.)

At trial, Page's false testimony that Young did not shoot the car's interior at the abandonment site allowed the prosecutor to falsely argue that the casings were

from Douglas's murder and corroborated Ray, Page's and McCoy's testimony that Young shot Douglas in the car. (29.RR.20) ("[T]hese shell casings. . . are positively identified as coming from the State's exhibit number 3, this little Colt automatic.") Accurate testimony by Page would have rebutted this argument.

C. Page's False Testimony Was Material At The Guilt/Innocence Phase

There is at least a "'reasonable likelihood that [Page's] false testimony affected [Young's] conviction or sentence." *Chavez*, 371 S.W. 3d at 207. Page's testimony was the only evidence presented at trial as to how Petrey was shot, and by whom. It formed the entire basis for the jury's conclusion that Young, not Page, caused Petrey's death: a prerequisite to Young's capital murder conviction and death sentence. But it has now been shown to be materially false.

1. Young Is Not Guilty of Capital Murder Unless He Shot Petrey or Assisted the Shooting with Intent to Cause Petrey's Death

Evidence that Young did not actually shoot Petrey would have negated his liability for capital murder under the indictment and jury instructions at his trial. The state charged Young with capital murder on two separate theories, each of which required Young to be responsible for causing Petrey's death. (*See* 13.RR.4) (prosecutor saying the indictment provided "two different ways of committing the offense of capital murder.") The State's first theory was that Young "intentionally

and knowingly cause[d] the death[s]" of *both* Petrey and Douglas, in different transactions but as part of the "same scheme and course of conduct." (4.CR.754-55.) The State's second theory was that Young "intentionally cause[d] the death of [Petrey] in the course of committing and attempting to commit the offense of kidnapping and robbery directed against Samuel Petrey." (*Id.*) If Young did not cause Petrey's death, he could not be guilty under either theory.

Young could not have caused Petrey's death unless he actually shot him or assisted in his shooting with the intent that he be killed. Though Young was charged as both the actual shooter and as a non-shooter party, the only Law of Parties provision included in the jury instructions at trial was Penal Code section 7.02(a)(2), under which a person is not guilty as a party unless he actually "solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense" while "acting with the intent to promote or assist the commission of the offense." (5.CR.813-14 (jury instructions); Tex. Penal Code § 7.02(a)(2).) Young's jury was *not* instructed with the broader section 7.02(b), which imposes party liability whenever one acts "in the attempt to carry out a conspiracy to commit one felony" and "another felony is committed by one of the conspirators." Tex. Penal Code § 7.02(b). If Young was simply present when Page shot Petrey, did not actually assist in the shooting, and/or did not intend for Petrey to be killed, he cannot be

guilty of causing Petrey's death under section 7.02(a)(2). Indeed, Young's jury was instructed that "[m]ere presence alone will not constitute one a party to an offense." (*See* 5.CR.813-14 (jury instructions).)

All the state's evidence was directed towards the theory that Young actually shot Petrey. No evidence indicated Young assisted Page in shooting Petrey, so as to be guilty as a non-shooter party under section 7.02(a)(2). As the CCA previously recognized, "[t]he evidence showed that [Young] personally shot both victims" and the jury "f[ound] that [Young], himself, actually caused the [victims'] death[s]." *Young v. State*, 2005 WL 2374669 (Tex. Crim. App. Sept. 28, 2005) (en banc). Young's guilt or innocence of capital murder thus hinged on whether he actually shot Petrey. No evidence supported party liability.

2. Page's Testimony was the Only Evidence that Young Actually Shot Petrey Or Intended for Him to be Killed

Absent Page's false testimony, the jury would have heard no evidence that Young shot Petrey *or* assisted the shooting with intent that he be killed, so as to be guilty as a party. *See Chabot*, 300 S.W. 3d at 772 (false testimony was material where it provided "the only direct evidence that the applicant . . . killed [the victim].") The only evidence of who shot Petrey would have been McElwee's testimony that Page admitted doing so. (27.RR.274-75.) The only evidence of

Young's involvement would have been his presence at the scene—an insufficient basis for guilt. (5.CR.813-14.) Nor would any evidence have shown Young intended for Petrey to die; on the contrary, it would have shown he wanted Petrey to be released and return to his family. (26.RR.218, 221-22.) Though Page testified that Young suggested "slit[ting] Petrey's throat," Page now admits Young never made that statement. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 17.)

3. The Jury had Doubts about Young's Role in the Crimes

Even with Page's false testimony, the jury clearly struggled over Young's role in the crimes. It deliberated for over five hours at the guilt phase and over eleven hours at the punishment phase,[12] stayed out overnight during punishment phase deliberations, and sent out a note during punishment-phase deliberations asking, "Regarding [Special] Issue Number 2, cause the death of deceased individuals, intended to kill the deceased individuals. Question: do you have to believe both or at least one?" (36.RR.135.) Given the jury's evident doubts and the suggestions of Page's guilt presented at trial, there is more than a "reasonable likelihood that [Page's] false testimony affected [Young's] conviction" of capital murder. *Chavez*, 371 S.W.3d at 207.

[12] At the guilt phase, the jury deliberated from 11:08 a.m. until 4:20 p.m. on March 27, 2003. (29.RR.72.) At the punishment phase, the jury deliberated from approximately 1:15 p.m. until 7:00 p.m. on April 10, 2003, and from 8:30 a.m. until 3:24 p.m. on April 11, 2003, when it returned its death verdict. (36.RR.134, 138; 37.RR.5, 27.)

D. Page's False Testimony Was Material At The Punishment Phase

Page's false testimony was equally material at the punishment phase because it affected the jury's answers to the "special issues" necessary to impose a death sentence. A Texas jury cannot sentence a defendant to death unless it unanimously answers "yes" to both of two special issues in Code of Criminal Procedure section 37.071(2)(b), each of which the state must prove beyond a reasonable doubt. Tex. Code Crim. Proc. Art. 37.071(2)(c), (2)(d)(2). The second issue asks "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. Art. 37.071(2)(b)(2).

Evidence that Page shot Petrey would have dramatically impacted the jury's consideration of the second special issue. Because the only evidence of Young's involvement in Petrey's murder was that he was the actual shooter, proof that Young was *not* the shooter would have left no evidence suggesting Young intended or anticipated his death. Without Page's false testimony that Young suggested slitting Petrey's throat, all the evidence would have shown Young expressed a desire to let Petrey go. (26.RR.221-22.) The jury's note asking whether it had to find Young killed, assisted, or anticipated "both or at least one" victim's deaths (36.RR.135) shows it already harbored doubts about Young's

culpability. Had the jury known Page was the shooter, that Young never suggested slitting Petrey's throat, that Page falsely testified that he saw Young carjack Petrey in the parking lot, that Page bought his gloves shortly before Petrey's death, and that the shell casings in Douglas's car were not from Douglas's shooting, at least one juror likely would have answered "no" to the second special issue and Young would have received a life sentence. *Buck v. Davis*, 580 U.S. __, 137 S. Ct. 759, 776 (2017) (the relevant inquiry is whether "at least one juror would have harbored a reasonable doubt"). Evidence that Young did not shoot Petrey would also have decreased his future dangerousness under special issue one, and constituted a mitigating "circumstance[] of the offense" under Texas's mitigation special issue. Tex. Code Crim. Proc. Art. 37.071(2)(b)(1); (2)(e)(1).

CLAIM 2: YOUNG IS ENTITLED TO RELIEF UNDER ARTICLE 11.073 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, BECAUSE PREVIOUSLY UNAVAILABLE SCIENTIFIC EVIDENCE SHOWS HE DID NOT CAUSE THE DEATH OF SAMUEL PETREY

Young is also entitled to relief under section 11.073 of the Texas Code of Criminal Procedure because recent GSR testing, not reasonably available at trial, shows he did not cause Petrey's death—a precondition to his liability for capital

murder. *See* Claim 1, subsection (C)(1).[13] Had this evidence been presented at trial, Young more likely than not would have been acquitted of that crime.

The Texas Legislature enacted section 11.073 to "fill a gap in habeas corpus law, ensure that the law kept pace with science, and provide a path for relief where false and discredited forensics may have caused the false conviction of an innocent person." House Research Organization Analysis of S.B. 344, at 3, *available at* www.hro.house.state.tx.us/pdf/ba83R/SB0344.pdf, last visited September 18, 2017. The bill was created to remedy "weaknesses in the current habeas corpus statute," including "the absence of statutory grounds upon which to grant relief, the speed of changing science that serves as the foundation of a conviction, and technical testimony that may change with scientific discovery." *Id.* at 2-3.

Here, new scientific testing shows that Page caused Samuel Petrey's death. Page's gloves were not tested for GSR at the time of trial, because neither the state nor Young's trial counsel had access to the SEM/EDS tests needed to definitively identify GSR particles. Nor did they have any reliable way in 2003 to test for GSR on cloth, as opposed to skin. But in 2015 and 2017, Young's counsel tested the gloves for GSR using SEM/EDS testing and a new method of removing GSR

[13] As explained, both of the state's theories of capital murder required that Young have caused Petrey's death. Young could only be liable for causing Petrey's death if he actually shot him or assisted Page in the shooting with the intent that Petrey be killed. (*See* Claim 1, subsection (C)(1).) No evidence at trial supported the latter theory. *Id.*

particles from cloth. That testing revealed large numbers of GSR particles on both gloves, including in the cruxes between the fingers. New fiber analysis, and Page's own admissions, show the gloves were new at the time of the crimes, so the GSR could not have come from any prior event. These findings confirm what Young has always said: Page shot Petrey while wearing the gloves.

A. Requirements For Obtaining Relief Under Section 11.073

Section 11.073 entitles a habeas corpus petitioner to relief if he can prove: (1) science relevant to a cause of death determination is available; (2) the petitioner could not ascertain this science through the exercise of reasonable diligence at the time of trial; (3) the science is admissible under the Texas Rules of Evidence; and (4) had this evidence been presented to a jury, it is more likely than not that the petitioner would not have been convicted. *See* Tex. Code Crim. Proc. art 11.073(b)(1)(A)-(C). Young meets each requirement.

B. Science Relevant To The Cause Of Petrey's Death Is Available

Page's gloves were analyzed for GSR in 2015 and 2017, using a form of microscopic analysis known as Scanning Electron Microscopy/Energy Dispersive X-Ray Spectroscopy ("SEM" or "SEM/EDS"). Unlike the testing done at trial, the SEM tests conclusively showed the unique spherical particles—composed of lead, antimony, and barium—that can only be produced by gunshot primer when a gun

is fired. (Ex. 1, S. Palenik Decl., April 2, 2015, at ¶¶ 15-16, 20-21; Ex. 2, 2015 Microtrace Report, at 3; Ex. 5, 2017 Microtrace Report, at 3-6.)

The 2015 and 2017 testing showed both of Page's gloves not only have GSR on them, but are saturated with GSR particles in large amounts and hard-to-reach areas that cannot readily be explained unless the gloves were worn by the shooter of a firearm. (Ex. 2, 2015 Microtrace Report, at 3; Ex. 5, 2017 Microtrace Report, at 3-6.) The 2017 testing detected ninety-nine GSR particles on a test sample comprising just 0.75% of the surface area of the left glove, and fifteen GSR particles on a sample comprising just 0.75% of the surface area of the right glove. (Ex. 5, 2017 Microtrace Report, at 3.) Because less than one percent of the gloves' surface area was tested, "the total number of GSR particles on each evidence glove could be 10 times or even as much as 100 times greater." (*Id.* at 2.) The particles are not only spread over the gloves' back and front, but also lodged between the fingers where GSR would be unlikely to land unless deposited when the fingers were spread, such as to fire a gun. The particles' concentration and distribution show "the discharge of a weapon by a shooter wearing the questioned gloves is the most likely scenario" that could explain their presence. (*Id.* at 6.)

This evidence shows Page shot Petrey. Page admits he bought the gloves just hours before Petrey was shot. Only Page's DNA, not Young's, is inside the

gloves. Though Page claimed Young was the shooter, he never claimed Young wore the gloves, or that anyone wore the gloves to fire a gun. Page's testimony provided no explanation for how GSR could have come to be on the gloves, let alone in large amounts or in the cruxes between the fingers. Page confessed to McElwee and Kemp that he wore the gloves to shoot Petrey. Indeed, Midland Sherriff's officer Kent Spencer agreed at trial that GSR on the gloves would "show us whether David Page is the one who shot Sam Petrey twice in the head." (24.RR.296-97.) Fourteen years later, it finally has.

C. Young Could Not Have Obtained The New GSR Evidence, Through Reasonable Diligence, At The Time Of His Trial

Page's gloves were tested before trial for lead, using a "sodium rhodizonate" test. (25.RR.169-70.) As explained, this test cannot determine whether GSR is present, because lead can come from sources other than GSR. (25.RR.174, 183-86; Ex. 176, T. Counce Decl., ¶ 5.) Indeed, the trial expert testified that it was impossible to tell whether the lead found on the gloves was from GSR or not. (25.RR.174.) To conclusively determine whether GSR is present, it is necessary to examine particles with a scanning electron microscope, or SEM, which uses an electron beam to image the particles and analyze their elemental compositions. (Ex. 1, S. Palenik Decl., April 2, 2015, ¶¶ 20-21.) Whereas sodium rhodizonate

testing only detects lead, SEM/EDS testing detects the unique chemical combination of lead, antimony and barium, and the spherical shape, unique to GSR particles. (*Id.*, ¶¶ 19-21, 35.) It is this testing that revealed GSR in 2015 and 2017. (Ex. 2, 2015 Microtrace Report, at 2-3; Ex. 5, 2017 Microtrace Report, at 3-6.) The 2017 testing compared the relative amounts of GSR at each of four tested locations on the gloves, to determine the GSR's likely source. It found significant numbers of GSR particles at several locations, indicating that the discharge of a gun was the most likely explanation for their presence and secondary transfer from other objects was unlikely. (Ex. 5, 2017 Microtrace Report, at 6.)

1. Law Enforcement Lacked SEM/EDS Testing Capability in 2003

The GSR test results were not reasonably available to Young's defense team at trial, because none of the law enforcement agencies involved in Young's case had SEM/EDS testing capabilities at that time. The Texas Department of Public Safety ("DPS"), which analyzed the evidence, did not even start using SEM technology until July 1, 2003, three months after Young's trial ended. (Ex. 11, DPS Standard Operating Procedures: Trace Evidence, SEM-EDS, DRN: TE-12-06, at 1, Revision July 1, 2003.) Before then, DPS—the foremost crime laboratory in Texas—used only "Atomic Emission Spectroscopy" ("AAS") to test for GSR,

and even this procedure was only used on "hand swabs," not clothing. (*Id.*, 8.1 Gunshot Primer Residue Analysis, at 1, Revision Sept. 1, 2001).

The AAS technology DPS used at the time of trial could not definitively show whether or not GSR was present on an item. A 2001 DPS manual states, "[t]he presence of significantly elevated levels of antimony, barium, and lead [in AAS tests] are highly indicative of, *but not specific to,* gunshot primer residue." (*Id*.) (emphasis added). AAS testing cannot definitively identify GSR because it cannot determine whether the lead, barium, and antimony it identifies are fused together into single particles. (Ex. 1, S. Palenik Decl., April 2, 2015, ¶¶ 19-21.) And DPS's AAS procedure would not have been used to test Page's gloves in any event, because it was only used to test "[h]and swabs" taken from skin, not cloth items like gloves. (Ex. 11, DPS Standard Operating Procedures: Trace Evidence, 8.1 Gunshot Primer Residue Analysis, at 1, Revision Sept. 1, 2001) (discussing AAS as used to analyze "[h]and swabs submitted for [GSR] analysis"). Indeed, a DPS firearms expert testified at trial that DPS "do[es]n't perform [GSR] analysis on gloves per se, but on hands." (25.RR.188.)

Midland law enforcement also lacked SEM testing capability. Midland County Sheriff's Department ("MCSO") investigator Paul Hallmark, who handled evidence collection, testified that the MCSO had no access to SEM testing.

(25.RR.18) (Q: "Back on November 26, 2001, did you have access to a gunshot residue test? A: Only the atomic absorption test, not the Scanning Electron Microscopy.") A search warrant affidavit, executed by Midland law enforcement after the crime, stated, "Gun powder residue tests on the gloves, to determine if the gloves had been worn on the hands of someone who was firing a weapon, *are not yet available*." (Ex. 67, Search Warrant Affidavit, at 6) (emphasis added).

2. No Reliable Method Permitted GSR Testing of Clothing in 2003

Even if DPS and Midland law enforcement had had SEM technology in early 2003 (which, as explained, they did not), they still could not have used it to analyze Page's gloves because no reliable method existed in 2003 for extracting GSR particles from cloth fibers for testing. (Ex. 1, S. Palenik Decl., April 2, 2015, ¶ 22.)[14] Without some means of removing GSR particles from cloth fibers, it is virtually impossible to test for their presence on clothing.[15] (*Id.*, ¶ 23.) The particles cannot be reliably examined by the SEM while still on the fibers, because GSR particles can hide on the undersides of the fibers so as to be invisible to the

[14] Indeed, a Midland sheriff's officer described SEM testing at trial as performable on human skin, not cloth. (25.RR.18 ("[Y]ou open the [SEM] vial [and] put it against the skin.")).

[15] Though law enforcement agencies typically use a three-or-four-hour window to test for GSR on human skin, that rule does not apply when testing cloth items because particles on cloth are not normally sloughed off through washing or normal movement. (Ex. 1, S. Palenik Decl., April 2, 2015, ¶ 18.)

microscope. (*Id.*, ¶ 24.) The fibers also interfere with the SEM's operation by building up an electron charge. (*Id.*; *see also* Ex. 179, C. Palenik, Ph.D. Second Supp. Decl., ¶ 5.)

At the time of Young's 2003 trial, law enforcement generally tried to extract GSR from cloth fibers by pressing adhesive stubs against the cloth. (Ex. 1, S. Palenik Decl., April 2, 2015, ¶ 24.) But the adhesive stub method was problematic, and cannot reliably be used to compare the relative amounts of GSR particles on samples collected from different areas of a glove: the analysis performed on Page's gloves in 2017. (Ex. 179, C. Palenik, Ph.D. Second Supp. Decl., ¶¶ 5(d), 10.) First, adhesive-based sampling methods cannot reliably extract GSR particles from below the surface of thick fabric like that of the gloves in this case; it will miss particles embedded deep in the fibers. (*Id.*, ¶ 5(a).) Second, cloth fibers typically stick to the adhesive stubs, so that some particles end up on the backsides of the fibers and cannot be seen by the microscope. (*Id.*, ¶ 5(b).) Third, the fibers build up an electrical charge that interferes with the microscope's operation. (*Id.*, ¶ 5(c).) Fourth, adhesive sampling is not reproducible, because it is impossible to replicate important factors like the pressure with which the adhesive is pressed against each area of the fabric, that affect how many particles are recovered at each tested location. (*Id.*, ¶ 5(d).) Young's trial attorneys

therefore lacked, in 2003, any reliable way to determine the amount and distribution of GSR particles on different areas of Page's gloves. That analysis was performed in 2017, using the newer GSR extraction method described below.

3. Sonication Now Permits GSR Particles to be Removed from Cloth Items and Analyzed Using SEM/EDS

A new method, sonication, now permits scientists to remove GSR particles from cloth so that they can be analyzed using SEM/EDS, and the concentrations of GSR particles on different areas of a glove can be determined and compared. This method was used in 2017 to ascertain and compare the numbers of GSR particles on different areas of Page's gloves. Unlike adhesive sampling, sonication is reproducible because it can be consistently applied to multiple samples, allowing for a comparison of the relative amounts of GSR particles found at different tested locations. (Ex. 179, C. Palenik, Ph.D. Second Supp. Decl., ¶¶ 7(d), 10.) Sonication also avoids the problems created by adhesive stubs, which pull off fibers along with the particles, by removing the particles from cloth fibers before they are analyzed. (*Id.*, ¶ 7(a)-(c); Ex. 1, S. Palenik Decl., Apr. 2, 2015, ¶¶ 24-25.)

In the sonication method, a piece of the cloth item is cut out and placed into a centrifuge tube with a pure inert liquid. (Ex. 1, S. Palenik Decl., Apr. 2, 2015, ¶ 25.) Ultrasonic waves are passed through the cloth, causing the GSR particles to

fall to the bottom of the centrifuge tube, where they are concentrated. (*Id.*) The particles can then be extracted and examined by SEM/EDS. (*Id.*) Because the tested sample consists almost entirely of isolated particles, not fibers, sonication avoids the electrical charging problem posed by adhesive sampling. (Ex. 179, C. Palenik, Ph.D. Second Supp. Decl., ¶7(c).) And, unlike adhesive stubs, sonication can reach GSR particles regardless of the thickness of the fabric. (*Id.*, ¶ 7(a)).

D. The New GSR Test Results Are Admissible Under The Texas Rules Of Evidence

The results of the 2015 and 2017 SEM/EDS testing on Page's gloves are admissible under the Texas Rules of Evidence. Under Rule of Evidence 702, scientific evidence is admissible if: (1) the underlying scientific theory is valid; (2) the technique applying the theory is valid; and (3) the expert properly applied the technique. *Wolfe v. State*, 509 S.W. 3d 325, 336 (Tex. Crim. App. 2017) (citing *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992)). Before admitting testimony under Rule 702, "the trial court must be satisfied that . . . : (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is appropriate for expert testimony; and (3) admitting the expert testimony will actually assist the

fact finder in deciding the case." *Burks v. State*, 2014 WL 1285731 at *5 (Tex. Ct. App.–Austin, Mar. 26, 2014).

Rule 702's first two requirements are met, because the scientific theory and techniques of SEM testing are valid. Indeed, Texas courts have repeatedly admitted expert testimony about SEM analysis, including of GSR particles. *See, e.g.*, *Molina v. State*, 450 S.W.3d 540, 550 (Tex. Ct. App. – Houston, 2014) (summarizing admitted expert testimony about use of an SEM to identify GSR particles); *Burks*, 2014 WL 1285731 at *5-6 (W.D. Tex. Mar. 26, 2014) (holding that trial court properly admitted testimony about the results of SEM testing and resulting finding of GSR); *Saldana v. State*, 2011 WL 846095, at *6 (Tex. Ct. App. – Eastland, 2011) (summarizing admitted expert testimony about SEM analysis of GSR test samples).

Use of sonication to extract GSR from cloth is also accepted in the scientific community and clearly explained in scientific reports submitted with this application. (*See* Ex. 1, S. Palenik Decl., April 2, 2015, ¶ 2; Ex. 2, 2015 Microtrace Report, at 2; Ex. 179, C. Palenik Second Supp Decl., ¶¶ 6-10.) *See Wolfe*, 824 S.W. 2d at 336 (factors bearing on reliability include acceptance in the scientific community and "the clarity with which the . . . scientific theory and technique can be explained to the court.") It is also supported by scientific

literature. Indeed, at least two published articles discuss sonication as a reliable method of removing small particles, like GSR, from cloth or other surfaces. (Ex. 179, C. Palenik, Ph.D. Second Supp. Decl., ¶¶ 8, 10; Ex. 180, Whitney B. Hill, M.S., *The Characterization of Nanoparticles Using Analytical Electron Microscopy*, Scanning Microscopes 2011 (2011); Ex. 181, Stoney, D.A. and Stoney, P.A., *Use of Scanning Electron Microscopy/Energy Dispersive Spectroscopy (SEM/EDS) Methods for the Analysis of Small Particles, etc.* (2012).) The validity of the sonication method is also shown by analysis of "blank" test samples, which show the particles recovered by sonication in this case did not result from contamination. (Ex. 179, C. Palenik, Ph.D. Second Supp. Decl., ¶ 9.)

Burks's admissibility requirements are also met, because the experts who conducted the testing, Samuel Palenik and Christopher Palenik, Ph.D., are clearly "qualif[ied] as . . . expert[s] by reason of [their] knowledge, skill, experience, training, [and] education." *Burks*, 2014 WL 1285731, at 5. Samuel Palenik has worked as a senior research microscopist at Microtrace, LLC since 1992, has a Bachelor's of Science degree in chemistry, and is trained in several fields relating to microscopic analysis. (*See* Ex. 1, S. Palenik Decl., April 2, 2015, Ex. A thereto (curriculum vitae).) Dr. Christopher Palenik holds a Ph.D. in geology and has

worked as a senior research microscopist at Microtrace, LLC since 2005. (*See* Ex. 3, C. Palenik, Ph.D. Decl., Ex. A thereto (curriculum vitae).) Both experts have published extensively in the field of microanalysis. They correctly applied the theory of SEM analysis, as described in their reports. (Ex. 2, 2015 Microtrace Report; Ex. 5, 2017 Microtrace Report.)

E. Had The New GSR Evidence Been Presented At Trial, Young More Likely Than Not Would Have Been Acquitted Of Capital Murder

Article 11.073 requires only a showing by a preponderance of the evidence that the applicant would not have been convicted had the scientific evidence previously been available. Art. 11.073 § (b)(2). Young satisfies this standard.

As explained, Young could not have been found guilty of capital murder under the instructions given to his jury unless he was the actual shooter of Petrey. *See* Claim 1, Section (C)(1).[16] Young's jury clearly had doubts on that question, as shown by the note it sent out during punishment deliberations asking whether it had to believe Young killed "both or at least one" of the victims. (36.RR.135.) The jury also heard some evidence that the shooter was Page: McElwee, a fellow

[16] As explained in Claim 1, section (C)(1), Young's jury was only permitted to find that he caused Petrey's death as the actual shooter or as a non-shooter party under Penal Code section 7.02(a)(2), which required that Young, if a non-shooter, must have actually assisted the killing with the intent that Petrey be killed. No evidence was presented at trial to support his guilt as a non-shooter party under section 7.02(a)(2) and the CCA recognized that Young was convicted as the actual shooter. *Young v. State*, 2005 WL 2374669 (Tex. Crim. App. Sept. 28, 2005). Young's liability for capital murder thus depended on whether he was Petrey's actual shooter.

inmate, testified that Page admitted shooting Petrey while wearing gloves, and that Page said the gloves were the reason he had no "powder burns" on his hands. (27.RR.274-75.) Though the jury apparently disbelieved McElwee's testimony, it had reason to do so at trial because McElwee was impeached with his criminal record and membership in a prison gang, and his testimony was uncorroborated by any GSR tests. (27.RR.275-79.) Had the jury heard the new GSR evidence presented here, it may well have believed him. The jury also heard that only Page's DNA, not Young's, was inside the gloves, (26.RR.118-23; 27.RR.254-64), that Page gave contradictory testimony about how Petrey was shot and whether he saw the shooting, (*see* Section II(E)), and that Page failed to take numerous opportunities to escape or assist Petrey. (*See* section II(B)(5).)

Had the jury known Page's gloves were saturated with actual GSR—not just inconclusive lead, as was testified to at trial—and that the GSR was distributed and lodged between the gloves' fingers such that the gloves being worn by a shooter was "the most likely scenario," (Ex. 5, 2017 Microtrace Report, at 6), it likely would have found a reasonable doubt as to whether Young caused Petrey's death and acquitted him of capital murder. Juror Michael Byrne states that "[i]f the defense had convincingly countered the State's ballistics evidence with regard to the Petrey murder, I would have been less likely to convict Young of killing

Petrey." (Ex. 148, M. Byrne Decl., ¶ 4.) Jury foreman James Bobo, similarly, states that a convincing ballistics challenge to Page's testimony "would have raised questions for me about Mr. Page's credibility and his own involvement in the shooting of Mr. Petrey." (Ex. 146, J. Bobo Decl., ¶ 3.) Even the trial bailiff, who sat through each day of testimony, believes Young's new evidence shows Young is not guilty beyond a reasonable doubt. (Ex. 178, R. Bearden Decl., ¶ 10.)

CLAIM 3: YOUNG'S EXECUTION WOULD VIOLATE THE UNITED STATES CONSTITUTION BECAUSE HE IS INNOCENT OF CAPITAL MURDER. U.S. CONST. AM. VIII & XIV; *HERRERA V. COLLINS*, 506 U.S. 390 (1993); *EX PARTE ELIZONDO*, 947 S.W.2D 202, 205 (TEX. CRIM. APP. 1996)

Young's conviction and sentence violate his First, Fifth, Sixth, and Fourteenth Amendment rights to due process, a fair trial, and a reliable determination of guilt and punishment because Page's confessions, recantations, and failed polygraph test, and recent GSR and fiber analysis of his gloves, clearly and convincingly show Young is innocent of capital murder because he did not cause Petrey's death. In light of all the evidence now available, no reasonable juror would have convicted Young of capital murder or sentenced him to death. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996); *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994).

A. The Legal Standard Governing An Actual Innocence Claim

To grant relief on a claim of actual innocence, the habeas court must be convinced that newly discovered facts establish the petitioner's innocence by clear and convincing evidence. *Elizondo*, 947 S.W.2d at 208-09. Evidence showing the petitioner's innocence must be "newly available." *Miles*, 359 S.W.3d at 671. Evidence is newly available if it "was not known to the applicant at the time of trial, plea, or post-trial motions and could not be known to him even with the exercise of due diligence." *Id.* Innocence need not be shown by a single, dispositive piece of evidence; it can also be shown by the combined effect of "multiple pieces of newly discovered evidence." *Id.*

Elizondo's standard "does not really focus on innocence per se." *Ex parte Cacy*, __ S.W. 3d __, 2016 WL 6471975 (Tex. Crim. App. Nov. 2, 2016) (Yeary, J. and Keller, P.J., concurring). Rather, it requires the applicant to show that "if newly available evidence were added to the evidentiary mix, no reasonable jury would have found the state's case to have been compelling enough to defeat the systematic *presumption* of innocence." *Id.* "Simply put, the State would not have been able to prove him guilty beyond a reasonable doubt, and a reasonable jury would be obliged to declare him *not guilty*." *Id.*

B. New Evidence Clearly And Convincingly Establishes Young's Innocence Of Capital Murder

Several newly-available pieces of evidence show Young is innocent of capital murder: (1) the 2014 statements of James Kemp and John Hutchinson that Page confessed to shooting Petrey; (2) the 2015 and 2017 GSR testing of Page's gloves, showing abundant GSR in the gloves' fibers and between the fingers, (3) Page's 2015 declaration recanting parts of his trial testimony; and (4) Page's 2015 recantation of his testimony that he saw Young carjack Petrey.

Had this evidence been presented, "the State would not have been able to prove [Young] guilty beyond a reasonable doubt." *Id.* Under the instructions given at trial, Young could not be guilty of causing Petrey's death unless he actually shot Petrey or intentionally assisted someone else in doing so. (*See* Claim 1, section (C)(1).) Because the state's evidence was directed solely towards the theory that Young was the actual shooter, *Young v. State*, 2005 WL 2374669 at *5 (Tex. Crim. App. Sept. 28, 2005), and no evidence suggested that he assisted a shooting by Page under Penal Code section 7.02(a)(2), Young could not be guilty of capital murder unless he actually shot Petrey.

Four credible, disinterested witnesses have now stated that Page confessed to shooting Petrey. Their statements were given years apart, contain accurate

details about the crimes and consistently describe Page's statements and demeanor. (*See* Claim I, section (B)(4).) They consistently describe Page as displaying concern about avoiding detection, and satisfaction at shifting blame to Young. *Id*. Kemp and Hutchinson accurately describe details of the crimes and Page's relationship with the inmate to whom he confessed, that they would have no reason to know unless they actually heard what they describe.

The witnesses' statements are further corroborated by the newly-available GSR evidence, Page's admissions to lying about buying the gloves before Petrey's murder, about Young saying he wanted to slit Petrey's throat, and about Young supposedly carjacking Petrey, and the fiber analysis showing the falsity of Page's testimony that he owned the gloves before the crimes. Page had the stronger motive to kill Petrey because he was wanted by police and coveted a relationship with Young's girlfriend. (Ex. 169, J. Villerius Decl., Exh. A at page 8, time stamp 33.14.14 ("I told her, hey look, I want to get together with you.") Page believed he would be a "hero" if people believed he had thwarted violent acts by Young: he said, "If I had a gun, I would have shot Clint. Man, that would have made me a hero." (*Id.* at page 7, time stamp 28.03.08.) Instead, Page shot Petrey and blamed Young to achieve the same goal.

Page's admissions and the new GSR evidence are just the latest additions to an already-overwhelming accumulation of errors, oversights, and misrepresentations that destroy the credibility of Young's conviction. Trial counsel failed to investigate or present exculpatory ballistics evidence about Douglas's shooting (*see* Claim 7(B)), examine Douglas's car (*see* Claim 7(C)), or have Page's gloves examined for wear and tear (*see* Claim 7(D)). The prosecution destroyed physical evidence from Douglas's car, released the car before Young's counsel could examine it, failed to preserve the cup of gasoline found in Petrey's truck (*see* Claim 4), failed to produce exculpatory statements from Daniel Gilbert or exculpatory notes from its ballistics expert (*see* Claim 6), and improperly secured the testimony of at least five key witnesses by offering them favorable treatment or shorter sentences, threatening one witness with "hard" jail time, and disparaging Young. (Claim 5). Police never investigated the Brookshires parking lot or the Albertson's store where Bart and Amber Lynch supposedly met Young after Petrey's shooting, and failed to obtain surveillance tape or witnesses from either location. The prosecution "lost" the surveillance tape from 7-Eleven showing Page guarding Petrey in the truck with Young nowhere nearby. (24.RR.274-79.) Had the new GSR evidence, and Page's confessions and

recantations, been added to this list, Young's jury could not reasonably have convicted him of capital murder beyond a reasonable doubt.

C. The Evidence Of Young's Innocence Is Newly Available

1. The GSR Evidence is Newly Available

The 2015 and 2017 GSR test results could not have been discovered at trial through reasonable diligence. *Miles*, 359 S.W.3d at 671. As explained, neither Midland law enforcement nor DPS had SEM/EDS testing capability at that time. (*See* Claim 2, section (C).) Even had SEM technology been available, no reliable or readily-available method existed in 2001-2003 for extracting GSR from cloth for testing. (*See* Claim 2, section (C)(2).)

2. Page's Partial Recantation is Newly Available

A trial witness's recantation constitutes new evidence for purposes of an actual innocence claim. *Miles*, 359 S.W.3d at 671. Reasonable diligence would not have permitted Young in 2003 to obtain Page's 2015 recantation of his trial testimony that he owned the gloves before the crimes, that Young suggested slitting Petrey's throat, or that he saw Young carjack Samuel Petrey.

3. Kemp's and Hutchinson's Declarations are Newly Available

Kemp's and Hutchinson's statements were also unavailable to Young at trial. They did not even hear Page's confession until 2010, several years later. The state then intimidated both men into withholding the information until 2013 and 2014, when they signed their declarations.

Page confessed in 2010 at the Midland County Jail, where he was being held temporarily for a postconviction hearing in Young's case. During the hearing, Young's counsel learned Kemp and Hutchinson were saying they had heard Page confess to Petrey's shooting. (Ex. 75, Hearing Transcript, at 6-8.) Young's counsel immediately tried to interview both men, but jail authorities denied them access. (*Id.* at 6-7.) The court ruled that Young's counsel could not interview them, but only question them in open court, without a prior interview. (*Id.* at 277.)

Meanwhile, two District Attorney investigators went to the jail and interrogated Kemp, who faced up to ninety-nine years of additional prison time from a pending escape charge. They pressured Kemp, asking him "questions about [his] own [criminal] case and t[elling] [him he] was looking at a lot of new prison time." (Ex. 157, J. Kemp Decl., ¶ 11.) One investigator had a taperecorder and tried to surreptitiously record Kemp. (*Id.*, ¶ 12.) Kemp worried the DA was trying to trick him, and feared going to "prison for years" if he testified favorably for

Young. (*Id*., ¶ 14.) When he testified at Young's hearing Kemp decided to "watch his words" rather than "risk [his] freedom by looking bad in front of the DA," (*id*., ¶ 15), and did not reveal what he had heard Page say.[17]

Hutchinson was also intimidated. Two DA investigators took him to an interview room and "asked him questions that seemed like they wanted to protect Page." (Ex. 156, J. Hutchinson Decl., ¶ 12.) They "got mad because [Hutchinson] wouldn't talk to them." (*Id.*, ¶ 13.) One "was rude as hell and tried to secretly tape record [Hutchinson] by putting a recorder on a book shelf and trying to hide it behind his arm." (*Id*.) When Hutchinson refused to talk to the investigators, they "got real angry and left the room and [Hutchinson] could hear them outside the room cussing." (*Id*., ¶ 14.) When Hutchinson testified at Young's hearing he felt "nervous," and found it "scary." (*Id*., ¶ 15.)

The DA investigators also visited Kessler, the inmate to whom Page confessed through the air vent. Kessler testified in 2010 that "[t]he day . . . I was trying to talk to Clint Young's lawyers [at the jail], the next morning they was there to talk to me." (Ex. 77, J. Kessler 2010 testimony, at 24.) Kessler identified,

[17] Even in his 2010 testimony, Kemp indicated that Page had made statements suggesting his guilt of Petrey's shooting. Kemp testified that he had asked Page what really happened, and Page "giggled" and said "if they only knew." (Ex. 77, J. Kemp 2010 testimony, at 32 lines 12-16.) Kemp also testified that he asked Page why he "did it," and Page said, "dope really fucks you up." (*Id.* at 33 lines 5-8.)

in court, one of the investigators who had interviewed him at the jail. (*Id*.) Defense counsel asked the investigator to identify himself, and he said "Bill Boyd . . . an investigator with the District Attorney's Office." (*Id.* at 24, lines 17-18.)

Because Kemp and Hutchinson did not hear Page's confessions until 2010, and were intimidated by the state into withholding that information at Young's 2010 hearing, the information in their declarations "was not known to the applicant at the time of trial, plea, or post-trial motions and could not be known to him even with the exercise of due diligence." *Miles*, 359 S.W.3d at 671.

For the foregoing reasons, this Court should conclude that Young has clearly and convincingly proven his innocence, and grant him relief on this claim.

CLAIM 4: THE PROSECUTION UNCONSTITUTIONALLY FAILED TO PRESERVE KEY EVIDENCE

The prosecution also violated Young's rights to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by systematically failing to investigate, preserve, or disclose numerous items of exculpatory evidence.

A. Relevant Law

Due process is violated when the prosecution fails to preserve evidence that is "material"—that is, evidence that has "exculpatory value that was apparent

before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). Materiality can be demonstrated by showing that law enforcement knew the evidence's exculpatory nature before its destruction; likewise, the exculpatory nature of the evidence can be inferred from law enforcement's testing of (or intent to test) the missing item. *Id.* If evidence is only "potentially," as opposed to "apparently," useful, a due process violation arises only if a defendant shows the state acted in bad faith in failing to preserve it. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

In practice, "*Youngblood's* bad faith requirement dovetails with the first part of the *Trombetta* test: that the exculpatory value of the evidence be apparent before its destruction." *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993). Thus, "[t]he presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed." *Id.* (citations omitted)

B. The Prosecution Failed To Preserve Numerous Items Of Evidence Whose Exculpatory Value Was Apparent When They Were Destroyed

Young's prosecutors failed to preserve numerous key items of evidence with clear exculpatory value. Even assuming the items were only "potentially," not

"apparently," useful to the defense, the state acted in bad faith by destroying them before Young's attorneys could test them. The destroyed items include trace evidence from Douglas's car; mikrosil casts of bullet holes in Douglas's car; Douglas's car itself; the plastic cup found inside Samuel Petrey's pickup truck; and a 7-Eleven surveillance video showing Page sitting in the truck alone with Petrey for over ten minutes while Young walked around inside the store. Numerous other potentially exculpatory items were never sought in the first place, and two critical crime scenes—the Brookshires store and the Longview drug house—were never investigated at all.

1. Trace Evidence Recovered from Doyle Douglas's Car

The prosecution destroyed vaccumings from inside Douglas's car before they could be tested. If the vaccumings had contained hairs or DNA from the accomplices in the seat in which they claimed Young sat to shoot Petrey, that evidence would have suggested they were lying and someone else occupied that seat. Such contradictions would have assisted the defense, and trial counsel would have presented them to the jury. (Ex. 174, P. Williams Decl., Aug. 25, 2017, ¶ 4.) Evidence that the accomplices were lying would, in turn, have suggested their guilt of the shooting or at least raised a reasonable doubt as to who committed it.

a. The FBI Recovers Trace Evidence from the Grand Prix

On November 27, 2001 the FBI searched Douglas's car and obtained vacuumings from the car's seats. (23.RR.10-12; Ex. 18, FBI Evidence Recovery Log, Nov. 27, 2001.) FBI personnel examined the car again on December 3, 2001, and made Mikrosil casts of four apparent defects in the Grand Prix's exterior and interior. (Ex. 19, FBI FD-192 Form, Dec. 3, 2001; Ex. 20, FBI Evidence Recovery Log, Dec. 3, 2001; Ex. 21, FBI Report re Pontiac Grand Prix, Dec. 3, 2001.)

b. Law Enforcement tells DPS Not to Test the Trace Evidence, Which is then Destroyed

The evidence from Douglas's car was given to Harrison County law enforcement, which sent it to the Texas Department of Public Safety ("DPS") for testing. (23.RR.55-59; State's Trial Ex. 26, Chain of Custody Form; Ex. 25, DPS Physical Evidence Submission Form, Feb. 25, 2002.) The submission form told DPS "[e]xamine for *any and all types of trace evidence*." (*Id.*)(emphasis added). Two days later, Harrison County authorities again told DPS to perform "any and all possible tests . . . on all the evidence in this case. (Ex. 26, DPS Laboratory Information Sheet, Feb. 27, 2002).

But Harrison County law enforcement cut off the testing before it was complete. On August 26, 2002, Harrison County DA investigator Todd Smith told

DPS "that with the victim's DNA being found in the trunk of the vehicle it was not necessary to work the evidence for fibers or other trace." (Ex. 27, Laboratory Information Sheet Notes, Ivan Wilson, Aug. 26, 2002.) A DPS official confirmed that "[e]vidence submitted for this case will not be worked for trace evidence." (Ex. 29, Letter, I. Wilson to T. Smith, Aug. 26, 2002.) Young's counsel was never told the testing request had been withdrawn.

Much of the evidence, including the vacuumings, was then destroyed. A letter dated June 18, 2002 from DPS to Harrison County law enforcement states that certain items of evidence from the car were being "retained for further analysis," but the remainder "cannot be retained and will be sent to you under separate cover." (Ex. 28, Letter, M. Padilla to T. Smith, June 18, 2002, at 5.) The vacuumings are not mentioned in the letter, and were thus apparently part of the "remainder" of the evidence that DPS returned to law enforcement. (*Id.*)[18]

Though DPS sent some items to the Tarrant County Medical Examiner's Office for further testing in January 2003, the vacuumings were not among those items either. (*See* 12.RR.85; Ex. 32, Order Transferring Evidence, Dec. 24, 2002.) After that, DPS had no further evidence: prosecutor Schorre stated at a January 8, 2003 hearing that "everything DPS lab had is now in Fort Worth [at the Tarrant

[18] The vacuumings are identified as items V-3 through V-8 on DPS forms. (*See, e.g.*, Ex. 25, DPS Physical Evidence Submission Form, Feb. 25, 2002, at 4.)

County Medical Examiner's Office]." (34.RR.34.) As the vacuumings were not among the items transferred to Fort Worth, it appears they no longer existed.

c. The Destroyed Trace Evidence was Apparently Useful to Young's Defense, and the State Destroyed it in Bad Faith

The vacuumings had apparent exculpatory value when law enforcement abruptly destroyed them. One of the most critical issues at trial was the truth or falsity of the accomplices' claim that Young shot Douglas from the front passenger seat of the Grand Prix. Evidence that another accomplice actually occupied the front passenger seat would have undermined their testimony.

Even if the vaccumings' exculpatory value was not "apparent," they were at least potentially useful to Young's defense and the state acted in bad faith by destroying them. Young's counsel specifically asked the FBI for an opportunity to examine the car, putting the prosecution on notice of its potential value to Young's defense. (39.RR.21). But the FBI never called them back, instead disposing of the car without addressing their request to see it. (39.RR.20-21) (trial counsel "never actually got any kind of a call back from the FBI."); *see* section (B)(2), below. Without the car, evidence comparable to the vacuumings could not be obtained by "reasonably available means." *Bower v. Quarterman*, 497 F.3d 459, 476 (5th Cir. 2007) (quoting *Trombetta*, 467 U.S. at 489).

Law enforcement's decision to stop testing merely because Douglas's DNA was found in the trunk of his own car—a completely unremarkable fact—suggests bad faith. Douglas could have deposited his own DNA in the trunk of his own car at any time, in any number of ways with no relation to his murder. Douglas's DNA in the trunk thus sheds no light on which of the parties in this case was responsible for his death, and provided no legitimate basis to curtail testing.

2. Douglas's Car

Law enforcement also failed to preserve Douglas's car. The car had apparent bullet holes in the dashboard and steering wheel, that are visible in photographs. (Ex. 8, Photo of Glove Compartment; Ex. 9, Photo of Dashboard and Front Seat.) Recently-produced notes from the state's firearms expert—not provided to trial counsel—state that the dashboard hole had "a wake and cratering to varying degrees consistent with impact areas of some sort," suggesting it was a bullet hole. (Ex. 13, "Firearms Section Work Sheet," page 8, top of page). As explained, Young's trial counsel called the FBI and asked to examine the car, but the FBI never called them back. (39.RR.20-21 (post-trial testimony of trial counsel).) The Texas Ranger who initially found the car released it to a private towing company. (3.RWR.193.)

The car's exculpatory value was clear when law enforcement released it. Had the car been preserved, its dashboard and steering wheel could have been examined to determine whether bullets were embedded in them from gunshots: a clear possibility given the bullet holes visible in photographs. (Ex. 8, Photo of Glove Compartment; Ex. 9, Photo of Dashboard and Front Seat; *see also* 23.RR.74-75, 242-43 (car had apparent bullet holes).) Any bullets embedded in the car could not have come from Douglas's shooting, because all the bullets shot at Douglas remained inside Douglas's head. (*See* Ex. 68, Douglas Autopsy Report.) And the accomplices testified that the shots fired at Douglas were the only shots fired in the car that night.

Because all the bullets fired at Douglas remained in his head, any additional bullets found in the car's dashboard and steering wheel must have come from a different shooting event—such as Young shooting at the empty car in Callahan County when Young and Page abandoned it. (26.RR.213-14; 27.RR.29-30 (Young shot at the empty car in Callahan County).) Indeed, the car's windows were rolled down when it was found, (23.RR.242), such that casings could have fallen into the car's front seat from Young shooting at the car from outside it.[19] Evidence that the

[19] No analysis was ever conducted of the angle of the shots fired at the car, or the bullets' trajectories. Though law enforcement witnesses testified generally that the car had "defects" or apparent bullet holes (*see, e.g.*, 23.RR.14-16, 74-75, 242-43), no effort was made to determine where the shooter of those bullets stood relative to the car.

car contained bullets from a separate shooting in Callahan County would have provided a non-inculpatory explanation for the .22 casings found in the front seat, rebutting the prosecutor's claim that the casings showed Young's guilt of Douglas's murder. (29.RR.20.)

Had bullets been found in the dashboard, Young counsel could also have questioned Page about whether the casings were present immediately after Douglas's shooting, or appeared there afterwards. Page admitted in 2015 that the casings were *not* in the front seat before the car reached Eastland, indicating they came from Young shooting into the empty car at the abandonment site, long after Douglas was killed. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 18.)

3. The Plastic Cup Found Inside Samuel Petrey's Pickup Truck

The prosecution also destroyed a plastic beverage cup found in Petrey's truck, partially filled with gasoline, before Young's attorneys could examine it to determine where it was purchased or obtain surveillance video from the store showing Page, not Young, bought the cup and put the gasoline inside.[20] The cup was examined for fingerprints before trial, and Young's prints were not on the cup. (24.RR.329.) In fact, no fingerprints were found on the cup at all (*id.*)—a finding consistent with Page filling the cup with gasoline while wearing his gloves.

[20] Young did not know where the cup was purchased, because he was asleep during the journey from Eastland to Midland. (26.RR.217.)

The cup's exculpatory value was apparent when it was destroyed. At the punishment phase the prosecution argued the cup supported Young's future dangerousness because it showed Young intended to blow up Petrey's truck and harm other people to obtain a new vehicle. (36.RR.131.) The prosecutor emphasized the gasoline at the guilt phase as well, saying, "So he's going to set the truck on fire apparently . . . What do you think's going to happen next at some rest stop or some other person that's going to come along that has a car that will give him directions?" (29.RR.70.) Showing the cup and gasoline were bought by Page and not Young would have rebutted this argument and bolstered other indications that Page was the primary actor in Petrey's kidnapping.

4. <u>The 7-Eleven Surveillance Tape</u>

The prosecution also claimed to have lost an exculpatory surveillance videotape from a 7-Eleven showing Page holding Petrey hostage inside the truck. (24.RR.232-33; 29.RR.21.) The state's loss of the videotape was so unusual that the trial judge, Judge John Hyde, privately asked the defense investigator to check with East Texas authorities to see whether they had the tape. (Ex. 159, J. Marugg Decl., ¶ 9.) The investigator did so, but the authorities said they did not have it. (*Id.*) The investigator looked for the chain-of-custody form for the tape, but could not find it. (*Id.*, ¶ 10.)

The tape's exculpatory value was obvious, because it refuted Page's claim that he participated in Petrey's kidnaping only under duress from Young. Although a Sheriff's officer described the tape's contents at trial, nothing could substitute for the visual impact of watching Page guarding Petrey inside the truck, with the gun and the car keys and Young nowhere nearby, for over ten full minutes. And police failed to obtain any surveilliance video whatsoever from the other critical grocery store locations: the Brookshires market and the Albertson's where Young allegedly met Bart and Amber Lynch after Petrey's shooting.

C. The State's Loss, Destruction, And/Or Failure To Preserve Evidence Violated Young's Due Process Rights

Again and again, the state failed to preserve evidence that could have disproved the self-interested narratives provided by Ray, Page, and McCoy. The state's failure to respond to trial counsel's requests to see Douglas's car, decision to cease testing after initially ordering "any and all" tests, and inexplicable loss of the 7-Eleven tape, suggest bad faith. Had the state preserved the evidence, there is at least a reasonable probability that at least one juror would have found a reasonable doubt about Young's guilt, found sufficient doubt to answer "no" to special issue two at the punishment phase, and/or found sufficient mitigating information to answer "yes" to the mitigation special issue and reject a death

sentence. The jury already had doubts about Young's culpability, as shown by its five hour guilt deliberations, eleven hour punishment deliberations, and note asking whether it had to find Young culpable in "both or just one" of the murders. (36.RR.135.) Forensic evidence contradicted the accomplices' testimony about both shootings. (22.RR.268-70, 288-96, 303-04; State's Trial Ex. 12; Section II(E).) Because capital trials require heightened reliability, *Beck v. Alabama,* 447 U.S. 625, 627-46 (1980), this Court should not permit the state to execute Young based on accomplice testimony that could have been tested by evidence the state destroyed.

CLAIM 5: THE PROSECUTION WITHHELD NUMEROUS PIECES OF IMPEACHMENT AND EXCULPATORY EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963)

Young's 2009 habeas corpus application raised a *Brady* claim regarding deals offered by Young's prosecutors to Mark Ray and David Page. This Court denied that claim in 2012, after a hearing. *Ex parte Young*, 2009 WL 1546625 (Tex. Crim. App. 2009); *Ex parte Young*, WR-65,137-03 (Tex. Crim. App. June 20, 2012). This is not that claim.

Since this Court's 2012 ruling on the prior *Brady* claim, new evidence has surfaced that Young's prosecutors withheld a broad array of impeachment evidence, far beyond that addressed by Young's prior claim. The withheld

evidence would have impeached the state's *five* most critical witnesses: Patrick Brook, Dano Young, and Ray and Page at the guilt/innocence phase, and Patrick Brook and Joshua Tucker at the punishment phase. This evidence adds to the trial court's 2011 finding that Harrison County DA Rick Berry promised Mark Ray "an offer that he could not refuse" for his testimony, then falsely claimed in testimony that he was "unaware of any deals with any witnesses" in Young's case. (Court's Order on Second Subsequent Application, at 63; 2.SRR.110.)

There is more than a reasonable probability that, but for the prosecution's suppression of this impeachment, and false denial of its existence, at least one juror would not have voted to convict Young or sentence him to death. The nondisclosures violated Young's right to due process. U.S. Const. Am XIV; TX. CONST. art. I, §S 1, 19; *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

A. Overview

Before trial, Young's attorneys specifically requested disclosure of any agreements between the prosecution and its witnesses. (Ex. 36, Motion for Discovery; Ex. 37, Motion to Reveal Agreement.) The prosecution firmly denied that any existed. In a pretrial hearing, prosecutors testified that they were "unaware of any [such] deals" and had "not participated in any type of plea

negotiations." (2.SRR.110-113.) Despite these denials, Young's attorneys tried again at trial to uncover evidence that the prosecutors had engaged in plea negotiations with Page and Ray. But the prosecution again disclosed nothing, and Ray and Page denied having received anything for their testimony. (22.RR.147; 26.RR.257; 27.RR.157.)

In 2008, five years after Young's trial, Ray finally recanted that testimony and admitted that he had, in fact, negotiated with the prosecution for a plea deal and been offered a reduced sentence for his testimony. In 2010, the trial court held an evidentiary hearing to assess a potential Brady violation from withheld inducements to Ray and Page, but the state and Page—though not Ray—continued to deny that any offers or negotiations occurred. After that hearing, the trial court found that the evidence failed to show Page had received any inducements. The court did find that prosecutor Rick Berry made an undisclosed pretrial plea offer to Ray that "he probably would make [Ray] an offer that he could not refuse" for his testimony, but it found the offer not material and denied Young relief. (Order on Second Subsequent Application, at 63, 100-06.)

Since the 2010 hearing, new evidence has surfaced that the prosecution—in contrast to its pretrial representations—secretly offered inducements not only to Ray and Page, but also to Brook, Tucker, and Dano Young.

B. *Brady* Evidence Includes Impeachment Evidence And Incentives That Do Not Rise To The Level Of Formal Or Binding Contracts

Due Process prohibits the prosecution from withholding "evidence favorable to an accused." *Brady*, 373 U.S. at 87. To obtain habeas relief under *Brady*, an applicant must show that (1) the withheld evidence is "favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) the "evidence [was] suppressed by the state, either willfully or inadvertently"; and (3) "prejudice . . . ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Thomas v. State*, 841 S.W.2d 399, 402-04 (Tex. Crim. App. 1992). Even absent a formal agreement, statements by prosecutors to witnesses that suggest a "possibility of a reward" are favorable impeachment that must be disclosed. *United States v. Bagley*, 473 U.S. 667, 683 (1985).

C. Newly Discovered Evidence Shows The Prosecution Provided Inducements To At Least Five Of Its Witnesses For Their Testimony.

In 2014, Young learned the state had made undisclosed offers and threats to Brook, Tucker, Page, and Dano Young to secure their trial testimony against him. These witnesses all faced criminal charges, or were in prison, when they testified.

1. Patrick Brook and Joshua Tucker

Patrick Brook testified at the guilt and punishment phases. He provided the only evidence that Young ever confessed to shooting Douglas. (21.RR.253-54.)

At the punishment phase, Brook and Tucker testified that Young participated with them in a home-invasion robbery of drug dealer Carlos Torres in 2001. (30.RR.140-42.) Both testified that after the robbery Young suggested going back and killing Torres. (30.RR.144, 162.)[21]

In 2014, Tucker told Young's investigator that District Attorney investigator J.D. Luckie had convinced him and Brook to testify against Young by telling them Young was a "child molester"[22] who beat his girlfriend, and promising that the Harrison County District Attorney would "put in a good word" for them with authorities at the prisons where they were serving sentences from the Torres robbery. (Ex. 166, J. Tucker Decl., ¶¶ 1, 6, 9.)[23] Luckie also bought Brook and Tucker cigarettes and lunch at a hamburger stand. (*Id.,* ¶ 4.) Though Tucker had not initially wanted to testify against Young, the things Luckie said made Tucker angry at Young and more willing to do so. (*Id.*, ¶ 7.) Luckie's promise of a "good word" with prison authorities convinced Tucker that he could shorten his sentence

[21] Another participant in the Torres robbery, Krystal Wilbanks, testified that Young did not make that suggestion. (30.RR.134.)

[22] This allegation apparently related to an incident when Young's penis briefly touched another boy's ear during a scuffle at the Waco Center for Youth. (31.RR.15-16.)

[23] Though Young's investigator had previously interviewed both Brook and Tucker, they had not admitted the inducements in those prior interviews. (Ex. 48, G. Krikorian Decl., ¶¶ 2-6.)

by helping the prosecution. (*Id.*) Tucker would not have testified against Young had Luckie not said the things he said. (*Id.*, ¶ 10.)

2. Additional Inducements To Patrick Brook

The prosecution made further promises to Brook. In a 2014 interview, Brook told Young's investigator that three days after Douglas's murder, on November 28, 2001, Brook was arrested by Longview police and the Gregg County Sheriff's Office for aggravated assault on Torres. (Ex. 147, P. Brook Decl., ¶ 1.) He was held at the Longview police station and questioned for hours about the Torres robbery, Douglas's murder, and other crimes. (*Id.*, ¶ 2.)

At the beginning of the interview a detective told Brook—who faced a potential life sentence[24]—"I guarantee you, if you speak to us, you won't do more than 10 years in prison." (*Id.*, ¶ 3.) The detective also said Young had "ill intentions" towards Brook and "wished [him] harm." (Ex. 147, P. Brook Decl., ¶ 4.) After hearing all this, Brook implicated Young in Douglas's murder. (*Id.*, ¶ 5; Ex. 59; P. Brook Statement.)

3. Dano Young

Dano Young, Clinton Young's estranged half-brother, testified for the prosecution at Young's guilt/innocence trial that Young said before Douglas's

[24] Tex. Penal Code §§ 12.32, 29.03.

murder that he planned to "beat up" Douglas and take his car. (21.RR.289-92.) In a 2014 declaration, Dano stated that he was on parole when he testified and had drug charges pending, and that the state used threats and promises to secure his testimony. (Ex. 175, D. Young Decl., ¶¶ 2-7.) He was also "high on drugs," or coming down from being high, when he testified. (*Id*., ¶ 6.)

Dano was arrested on drug charges the day before he testified at Young's trial. (*Id.*, ¶ 3.) Harrison County Sheriff's Deputy Todd Smith told Dano that if he cooperated, the Sheriff's Department might be able to help him with his case. (*Id.*, ¶ 4.) DA investigator Luckie also threatened Dano that he would make Dano's jail time "hard" if he did not testify against Young, and repeatedly told Dano, "everyone knows Clint is guilty." (*Id.*, ¶ 5.)

4. <u>David Page</u>

Page was also offered incentives to testify. In a 2014 declaration, Page revealed for the first time that he had numerous meetings with Midland County DA Schorre, and Schorre's investigator Luckie, between his arrest and Young's trial. (Ex. 164, D. Page Decl., May 22, 2014, ¶ 2.) They offered him a 30-year prison sentence if he pled guilty and testified against Young. (*Id*., ¶ 4.) Schorre and Luckie both promised Page "You help us, and we'll help you," and Page told them, "Give me what I want and I'll give you what you want." (*Id*., ¶¶ 2, 8.) Based on

those discussions, Page believed that if Schorre liked his testimony he would get a sentence much shorter than the 30 years Schorre had already promised. (*Id.*, ¶ 8.) Indeed, Page's attorney recalled in 2003 that "before the Clint Young case went to trial, Al Schorre discussed a plea bargain offer 'in the thirty-five year range' in exchange for Page's testimony." (Ex. 44, Letter, W. Leverett to Judge DuBose, Dec. 29, 2003, at 2.) After Page testified, however, the state refused to offer him less than thirty years, and Page complained to his stepmother, "I helped them *and they said they would help me*." (Ex. 42, Letter, D. Page to "Kathy")(emphasis added.)

A fellow inmate, Elias Gomez, confirms Page had an implied plea deal. Gomez was incarcerated with Page starting in late 2001, and recalls that Page said he was cooperating with the District Attorney to avoid a life sentence. (Ex. 152, E. Gomez Decl., ¶ 3.) Page said he would testify against his co-defendant pursuant to a plea bargain with the District Attorney. (*Id.*, ¶ 4.)

After the 2010 state writ hearing, the trial court found that Page had no plea agreement when he testified at Young's trial, in part because Page failed a polygraph test that the court found had been a condition of the 15-30-year deal the state initially proffered to him. (*See* Court's Order on Second Subsequent Application, at 127-29.) In reaching that conclusion, the trial court cited

statements by Page's attorney that a successful polygraph result was a stated precondition of the deal. (*Id.*, Ex. 51, W. Leverett Decl., ¶ 4.) But Page now admits that a successful polygraph test was *not* a prerequisite to the proffered plea agreement, and that he was never told it was. (Ex. 164, D. Page Decl., May 22, 2014, ¶¶ 5, 8.)

Page's admission that the polygraph was not a requirement, and that the state offered to "help" him, are newly discovered. Page denied these facts at Young's trial and at the 2010 writ hearing, but recanted in 2014 because he had undergone a spiritual conversion and was no longer angry at Young. (Ex. 49, G. Krikorian Decl., Dec. 3, 2014, ¶ 4.) He was also no longer seeking help from Young's prosecutors in obtaining "time cuts" on his prison term, which he had been seeking in 2010. (Ex. 45, Letters, D. Page to Hon. DuBose and T. Clingman (2007-2008).)

D. <u>The State Suppressed Evidence Of The Inducements</u>

The state suppressed the inducements to Page, Dano Young, Brook, and Tucker by failing to disclose them despite the defense's request and the court's order directing their disclosure. *Strickler*, 527 U.S. at 281-82; Exs. 36-39, Motions and Orders re Plea Agreements. Young's prosecutors falsely denied the inducements during their own testimony at pretrial hearings, and failed to correct Ray's and Page's false trial testimony that they had received nothing from the

state. (2.SRR.109-110, 112-13; 22.RR.147; 26.RR.257; 27.RR.157.) Nor did the prosecution disclose its promises to Brook and Tucker to put in a "good word" with prison authorities, its promise that Brook would not serve more than ten years if he informed on Young, or its threat to make Dano Young's prison time "hard" if he did not cooperate. (Ex. 149, I. Cantacuzene Decl., Nov. 20, 2014, ¶¶ 2-6; Ex. 173, P. Williams Decl., Nov. 17, 2014, ¶¶ 3-7.) The prosecution's purported "open file" did not reference this information. (*Id.*)

The inducements to Brook, Tucker, Dano Young, and Page are just part of a larger, overarching pattern of prosecutorial efforts to improperly influence the outcome of Young's trial and skew the fact-finding process. Before trial, Young's prosecutor filed a baseless complaint against Young's mitigation investigator—causing him to cease interviewing witnesses—and threatened to file a similar complaint against Young's paralegal. (*See* Claim 7(G)(1)(d); 2.RWR130 (paralegal testifying that "I was going to not be able to interview witnesses if I didn't get my investigator's license because the District Attorney was going to shut me down.").) The attempts to suppress evidence of Young's innocence continued through his 2010 post-conviction proceedings, when DA investigators intimidated James Kemp and John Hutchinson into withholding the fact that they heard Page confess to shooting Samuel Petrey, implicitly threatening Kemp with increased

prison time and cowing Hutchinson with angry questions that "seemed like they wanted to protect Page." (*See* Claim 3, Section (C)(3).) In this context, it is likely that still further secret inducements, to other witnesses, remain unknown even to this day.

E. The State's Nondisclosures Prejudiced Young

Evidence is material "if there is a reasonable probability that, had [it] been disclosed to the defense, the result of the [guilt or punishment] proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. Here, the inducements to Ray, Page, Brook, Tucker, and Dano Young were material at both guilt and punishment.

1. The Materiality of the Inducements to Brook, Tucker, Dano Young, and Page Should Be Considered In Light Of This Court's Prior Finding of an Inducement to Ray.

In Young's prior *Brady* proceedings, the trial court found Mark Ray received a pretrial inducement from the state: the prosecutor told Ray, before Young's trial, that he "probably would make [Ray] an offer that he could not refuse" in exchange for his testimony. (Court's Order on Second Subsequent Application, at 63.)[25] Because materiality is assessed cumulatively, *Kyles v.*

[25] The court found that the statement was communicated to Ray, was not disclosed to the defense, and could have "constituted a motive" for his testimony against Young. *Id.* at 63-64.

Whitley, 514 U.S. 419, 436 (2002), the materiality of the undisclosed inducements to Brook, Tucker, Dano Young, and Page should be considered in light of the prosecutor's statement the trial court previously found was made to Ray.

2. The Withholding of the Inducements to Page, Ray, Tucker, Brook, and Dano Young Adversely Affected the Defense's Preparation and Presentation of its Case

Because trial counsel made a pretrial request for information about agreements with witnesses, (Ex. 37, Motion to Reveal Agreement), "[t]he reviewing court should assess the possibility" that the state's failure to disclose that information might have had an "adverse effect" on the "preparation or presentation of the defendant's case." *Bagley*, 473 U.S. at 683.

The state's nondisclosure of inducements to Page, Brook, Tucker, Ray, and Dano Young severely impaired Young's defense. The fact that prosecutors plied numerous witnesses with threats and possible rewards would have discredited its entire case. *See Kyles*, 514 U.S. at 447 (material undisclosed evidence could have "throw[n] the reliability of the [state's] investigation into doubt"). The prosecution's "lack of credibility" would have been "a central theme of Young's [guilt and punishment] defense." (Ex. 173, P. Williams Decl., Nov. 17, 2014, ¶¶ 9-13; Ex. 149, I. Cantacuzene Decl., Nov. 20, 2014, ¶ 12.) The defense would have sought a mistrial based on the misconduct, or—if it was denied—argued that the

inducements "showed a pattern of manipulation," that extended to other witnesses. (Ex. 173, P. Williams Decl., Nov. 17, 2014, ¶¶ 9-12.) Trial counsel would also have cross-examined Page about his plea agreement, and chosen jurors skeptical of witnesses who had been offered inducements. (Ex. 173, P. Williams Decl., Nov. 17, 2014, ¶8; Ex. 149, I. Cantacuzene Decl., Nov. 20, 2014, ¶ 13.)

3. The Inducements Were Material at the Guilt/Innocence Phase

a. Materiality as to the Douglas Homicide

The withheld inducements were also material to the jury's consideration of Douglas's homicide. Serious inconsistencies already plagued Ray's, Page's, and McCoy's testimony. They claimed Young intimidated them despite being armed with loaded guns, (21.RR.133, 181-89; 26 RR.167-68, 174; 27.RR.135-36), and Douglas's wounds were inconsistent with a close-range shot inside a car. (22.RR.268-70, 288-96, 303-04; State's Trial Ex. 12; 22.RR.290-96.) Page acted nonchalant after Douglas's death and even stole Douglas's money, (21.RR.118-20; 26.RR.169), and McCoy received favorable treatment from police on drug and traffic offenses after the crime. (Ex. 161, P. McCoy Decl., ¶¶ 5-11; Ex. 70, D. McCoy arrest records].) The jury could well have rejected the accomplices' testimony entirely had it known the state plied Page with offers of "help" and Ray with an offer he "could not refuse." Indeed, one juror says the plea offers to Ray

and Page would have convinced him that Young "was made the scapegoat for crimes that the others were also involved in." (Ex. 148, M. Byrne Decl., ¶ 3.)

Brook's testimony was equally questionable, and equally likely to have been rejected by the jury had the inducements been revealed. Though Brook said the accomplices recounted the shooting to him, he contradicted their statements: Brook said Ray shot Douglas twice, and that Douglas was killed for being a police informant, whereas the accomplices testified Ray shot Douglas just once and that Douglas was killed for his car. (21.RR.252-53, 265-66; 22.RR.85-91; 26.RR.178-79.) Brook also admitted being high on drugs when he heard Young's alleged confession, and needing help from the state in his appeal. (21.RR.276; 30.RR.76-77). The jury might have disbelieved Brook had it known the state "guaranteed" him just ten years in prison, promised to put in a "good word" for him with prison officials, and told him Young "wished him harm." Tex. Penal Code §§ 12.32, 29.03; Ex. 147, P. Brook Decl., ¶¶ 3-4; Ex. 166, J. Tucker Decl., ¶ 9.)

b. Materiality as to the Petrey Homicide

The inducements were also material as to Petrey's murder. As explained, Page provided the only evidence that Young shot Petrey. His account of the shooting was incredible, as was his claim that Young intimidated him even though he passed up numerous opportunities to escape. (*See* Section II(B)(5), II(E).) Page

had the strongest motive to shoot Petrey, because he had just learned that he (but not Young) was wanted for Douglas's murder, and was jealous of Young's romantic relationship with Amber Lynch. The revelation that Page and other witnesses were promised leniency and "help" for convicting Young would have rendered them even less credible. *Cf. Banks v. Dretke*, 540 U.S. 668, 701-02 (2004). Indeed, the jury showed it doubted Page's testimony by asking whether it had to find Young killed both victims. (27.RR.43; 36.RR.135.)

4. <u>The Inducements Were Material At The Punishment Phase</u>

The inducements were also material at the punishment phase. Even without knowing about the inducements, the jury deliberated for eleven hours and sent out two questions before deciding to sentence Young to death. (36.RR.134, 139; 37.RR.5, 27.) The fact that the state offered leniency to Page and at least four other key witnesses would have amplified the jury's doubts about whether Young actually shot Petrey, or intended for him to die. That evidence could well have caused at least one juror to answer "no" to special issue number two, "whether the defendant actually caused[, intended, or anticipated] the death of" the victims. Tex. Code Crim. Proc. Art. 37.071(2)(b)(2). These doubts could also have constituted mitigating circumstances sufficient to warrant a life rather than death sentence. Tex. Code Crim. Proc. Art. 37.071(e)(1).

CLAIM 6: THE PROSECUTION VIOLATED YOUNG'S DUE PROCESS RIGHTS BY FAILING TO DISCLOSE EXCULPATORY EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*

The prosecution also withheld other exculpatory evidence, in violation of *Brady*, 373 U.S. 83: (1) notes from its ballistics expert showing the hole on the dashboard of Doyle Douglas's car was a bullet hole, not a cigarette burn, and (2) a May 2003 FBI memorandum stating that witness Daniel Gilbert reported hearing Page say before the crimes that "if he ever killed someone, that he would just put it all off on Clint Young." The state also failed to correct false testimony that the dashboard hole could be a cigarette burn, when its expert's undisclosed notes showed otherwise. *Napue*, 360 U.S. 264; *Chabot*, 300 S.W.3d at 771.

A. Failure To Disclose Notes By Tim Counce

Douglas's car had holes in the dashboard and steering wheel when found. (Ex. 8, Photo of Glove Compartment; Ex. 9, Photo of Dashboard and Front Seat.) FBI personnel made a Mikrosil[26] cast of the dashboard hole on December 3, 2003. (Ex. 19, FBI FD-192 Form, Dec. 3, 2001; Ex. 20, FBI Evidence Recovery Log, Dec. 3, 2001.) The prosecution's ballistics expert, Tim Counce, examined the Mikrosil cast and concluded it was an "impact area." (Ex. 13, "Firearms Section Work Sheet," at 8). These notes were favorable to Young's defense because they

[26] Mikrosil is a special casting material used by forensic experts to capture small details and permit microscopic observations.

showed shots were fired at the car's dashboard and steering wheel, providing a non-inculpatory explanation for the shell casings the prosecutor argued came from Douglas's shooting and confirmed Young's guilt. (29.RR.19-20.)

The prosecution failed to produce these notes to trial counsel, despite specifically promising to produce all *Brady* material. Six months before trial, Young's counsel requested *Brady* information from DPS and the prosecutor sent trial counsel a responsive letter stating "[the DA's office] will be responsible for providing any *Brady* material that might develop." (Ex. 30, Letter, P. Williams to DPS, Sept. 18, 2002; Ex. 31, Letter, A. Schorre to P. Williams, Sept. 20, 2002.) Yet Counce's notes were not provided to Young's counsel until *twelve years after his trial*, in June 2015, when his postconviction counsel made a request to DPS. (Ex. 151, M. Farrand Decl., ¶¶ 6-9 and exhibits C and D to declaration.) They are not contained in trial counsel's file. (*Id*., ¶ 10.) The state not only withheld Counce's notes about the dashboard hole, but affirmatively prevented trial counsel from obtaining it by releasing Douglas's car before trial counsel could examine it, and not responding to counsel's requests to do so. (39.RR.20-21.) The FBI official who falsely testified that the dashboard defect might be a "cigarette burn," also refused to speak with trial counsel before her testimony. (3.RWR.62.)

B. Failure to Disclose Exculpatory Statements by Daniel Gilbert

The prosecution also failed to disclose a May 23, 2003 report by the FBI's Violent Crimes Task Force regarding its interview of Daniel Gilbert. (Ex. 33, Violent Crime Task Force Memorandum.) The report states that two VCTF officers spoke with Gilbert in May 2003, and Gilbert said that Page "had once told Gilbert that if he ever killed someone, that he would just put it all off on Clint Young." (*Id.*) Consistent with Gilbert's statement, Page admits that he "did a lot of dope" and would "speak [his] mind" during the time period before the murders. (Ex. 169, J. Villerius Decl., Exh. A at page 8, time stamp 31:33:19.) Gilbert's statement was favorable to Young because it would have supported Young's defense that Page shot Samuel Petrey.

C. The Nondisclosures were Material at Guilt and Punishment

Evidence that Page expressed an intent to blame Young "if he ever killed someone," and that the shell casings were not from Douglas's murder, was material at the guilt and punishment phases. Counce's notes would have allowed trial counsel to show the Grand Prix was shot from inside, providing a non-inculpatory explanation for the .22 shell casings found in the front seat. (29.RR.20.) Page stated in 2015 that Young shot the Grand Prix's interior when they abandoned the car in Callahan County, and that the shell casings were not in

the front seat before then: information trial counsel could have obtained from Page had they had Counce's notes. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 18.) Gilbert's statement would have suggested Page's guilt of Petrey's murder. There is at least a reasonable probability that this evidence would have made a difference, given the jury's eleven-hour punishment deliberations and note questioning Young's role in the murders. (36.RR.134-35, 139; 37.RR.5, 27.)

CLAIM 7: YOUNG'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT/INNOCENCE AND PUNISHMENT PHASES OF HIS TRIAL

Young's trial counsel rendered ineffective assistance, in violation of Young's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, section 10 of the Texas Constitution, and Article 1.051 of the Texas Code of Criminal Procedure, by committing several errors that prejudiced both the guilt and punishment phases of his trial.

A. The Law Regarding Ineffective Assistance of Counsel

"An ineffective assistance [of counsel] claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). The first component requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms.

Strickland v. Washington, 466 U.S. 668, 690-91 (1984). The second requires the petitioner to demonstrate that, but for counsel's errors, there is at least a reasonable probability that "at least one juror would have harbored a reasonable doubt" on the relevant issue. *Buck*, 137 S. Ct. at 776. Even where no single error warrants relief, cumulative prejudice from trial counsel's deficiencies may warrant a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 694 (prejudice examines the effect of "counsel's unprofessional *errors*")(emphasis added).

B. Trial Counsel Performed Ineffectively At The Guilt/Innocence Phase By Failing To Present Or Explain Exculpatory Ballistics Evidence

Trial counsel unreasonably failed to investigate, explain, or present ballistics evidence that would have discredited the accomplices' account of Douglas's shooting and raised a reasonable doubt as to whether Young committed it. The accomplices claimed Young shot Douglas with the .22 Colt Huntsman while sitting to his right in Douglas's car, then forced Ray to shoot him in the left side of the head with the .22 revolver. (*See* Section II(A).) But ballistics evidence showed the bullet to Douglas's right side was not from the .22 Colt Huntsman, and the bullet to Douglas's left side was not from the .22 revolver.

This contradiction was apparent the state's ballistics expert's report and the autopsy report, which could be read together to correlate the bullets and wounds.

But trial counsel never explained this information to the jury because they failed to study the reports and bullets before trial. Had trial counsel explained the ballistics evidence, they would have created a reasonable doubt regarding which of the four men involved—Young, Ray, Page, and McCoy—shot Douglas, and whether Young caused his death at all, either as the actual shooter or as a non-shooter party under Penal Code section 7.02(a)(2).[27]

1. The Accomplices' Testimony and Contrary Ballistics Evidence

The accomplices testified that Young shot Douglas twice with the .22 Colt Huntsman (state's exhibit 3) while sitting to his right in the front passenger seat of Douglas's car, then forced Ray to shoot Douglas a third time with the .22 revolver (state's exhibit 5) as Douglas lay in the creek. Page told police that Young shot Douglas in the "right side." (Ex. 53, D. Page Statement, Nov. 26, 2001, at 4.) After the shootings, authorities found Douglas face-down in the creek, with the left side of his face facing up and bullet holes in the left, right, and back of his head. (22.RR.263-68; 23.RR.126-31; State's Trial Ex. 12.) Because the left side of Douglas's head faced up, the prosecutor argued that the left-side shot must have

[27] Section 7.02(a)(2) was the only provision of the law of parties included in the instructions given to Young's jury. It provided that Young could only be guilty as a non-shooter party if the state showed he "solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid," another person to commit the offense, "with intent to promote or assist the commission of the offense."

been the final shot, delivered by Ray at the creek with the .22 revolver. (29.RR.15.)

But the ballistics evidence told a different story. Contrary to the accomplices' claims, Douglas's right-side wound was *not* caused by the .22 Colt Huntsman the accomplices testified Young used (the "Clint Young gun"). And the wound to Douglas's left, supposedly delivered at the creek, was not caused by the .22 revolver the accomplices testified Ray used (the "Mark Ray gun"). A postconviction study of the bullets revealed that the "Mark Ray gun" could only have caused Douglas's *right-side* wound, and the "Clint Young gun" could only have caused the wounds to Douglas's back and left: the opposite side from where the accomplices claimed Young sat in the car. (Ex. 15, R. Ernest Decl., ¶¶ 6-7.)

2. <u>The Expert Testimony at Trial Regarding Ballistics</u>

The conflict between the ballistics and the accomplices' testimony was ascertainable from information in the reports of the state's pathologist and ballistics expert. The pathologist, Dr. Jill Urban, arbitrarily numbered Douglas's head wounds 1, 2, and 3. Wound number 2 was on the left side of the head, wound number 3 was to the right temple, and wound number 1 was to the back. (22.RR.261-271.) Dr. Urban recovered bullets from the wounds, which were submitted as State's exhibits 9, 10, and 11. (22.RR.284.) She testified that the

bullet labeled Exhibit 9 corresponded to Douglas's backside wound. (*Id.*) But she did not testify about which wounds corresponded to the other two bullets.

Dr. Urban's autopsy report, however, did correlate the bullets with the wounds. (Ex. 68, Douglas Autopsy Report, at 2-3.) The report says each bullet was inscribed with a number: the bullet from the back wound was inscribed "1," the bullet from the left wound "4363 JU 2," and the bullet from the right wound "4364 3." (*Id.*) But Dr. Urban did not testify about those markings, and defense counsel never asked her to do so.

The prosecution's ballistics expert, Tim Counce, testified about which gun could have fired which bullet. Counce used his own numbering system to identify the bullets: he called state's exhibit 9 "16-G," state's exhibit 10 "16-H," and state's exhibit 11 "16-I." (25.RR.160-62.) He testified that state's exhibits 9 and 10 (bullets 16-G and 16-H), were not fired from the .22 revolver, or "Mark Ray gun," but could have been fired from the .22 Colt Huntsman, or "Clint Young gun." (25.RR.161-62.) State's exhibit 11 (bullet 16-I), was not fired from State's exhibit 3, the "Clint Young gun," but could have been fired from State's exhibit 5, the "Mark Ray gun." (25.RR.162-63.) Counce did not state which bullet matched which wound, and trial counsel did not ask him to do so.

Counce prepared a written report setting forth his testimony regarding which bullets were eliminated as coming from which gun. (*Id.*) The report referred to the bullets using Counce's numbering system: 16-G, 16-H, and 16-I. It did not reference the bullets' exhibit numbers or the numbers inscribed on the bullets by Dr. Urban at the autopsy. Counce's report was not admitted into evidence, and defense counsel did not request that it be admitted.

3. Near the End of Trial, The Defense Paralegal Discovers the Ballistics Contradict the Accomplices' Testimony

No member of the defense team examined the ballistics evidence before trial to correlate the guns, bullets, and wounds. (Ex. 17, N. Piette Supp. Decl., ¶ 3; *see also* 3.RWR.99 (trial counsel testifying that the defense conceived its ballistics argument "during the trial"). Trial counsel never considered retaining a ballistics expert for that purpose. (Ex. 17, N. Piette Supp. Decl., ¶ 4.)

The first time anyone from the defense attempted to correlate the bullets and wounds was the second to last day of the guilt/innocence trial, when the defense paralegal began studying the reports. According to trial counsel, the defense was "alerted" to investigate the ballistics after testimony by an East Texas officer, who seemed to be "going out of his way to try to state that the wound to the left side of

Doyle Douglas' head was inflicted by Mark Ray, whereas that was not our understanding [of] what Mark Ray was going to testify to." (3.RWR.99-100).

"At that point," trial counsel "started to become suspicious of [the state's theory of how Douglas was shot]." (*Id.*) The paralegal "started really looking into this in a great deal of detail and feeding [trial counsel] information on [the ballistics]." (*Id.*) But because trial was almost over, it was too late to get a "forensic expert to contradict the State's theory of the gunshot sequence." (*Id.*)

When the paralegal compared the ballistics and autopsy reports, she discovered the bullet the autopsy report identified as causing Douglas's right-side wound was noted in the ballistics report as conclusively *not* fired by the Colt Huntsman, or so-called "Clint Young gun." (Ex. 17, N. Piette Supp. Decl., ¶ 6.) She also discovered that the bullet the autopsy report attributed to Douglas's left-side wound was noted in the ballistics report as conclusively *not* fired by the "Mark Ray gun," or .22 revolver. (*Id.*, ¶ 7.) She immediately told trial counsel what she had found. (*Id*., ¶ 8.) Trial counsel agreed this information was helpful to the defense, and that it was necessary to cross-reference the information from the autopsy and the ballistics report to explain it to the jury. (*Id*., ¶10.) But they said there was no time to hire a ballistics expert to do so. (*Id.*)

With trial almost over, the paralegal scrambled to help trial counsel prepare some sort of ballistics presentation. She told them to cross-reference the autopsy and ballistics reports for the jury, and even mapped this information out for counsel in a note showing the different numbering schemes various witnesses used to refer to the bullets. (Ex. 17, N. Piette Supp. Decl., ¶ 9 and exhibit A thereto [note to trial counsel]). The note instructed, "Cross reference the #s on state's exhibits 9, 10, and 11 w/Urban autopsy and Counce testimony." (*Id*., exhibit A thereto; Ex. 16, Note re 16G, 16H, 16I.) Trial counsel could have recalled the prosecution's experts to correlate the bullets, wounds and guns, but said there was no time. (Ex. 17, N. Piette Supp. Decl., ¶ 11.)[28] They did not do so.

4. Despite the Paralegal's Discovery, Trial Counsel Fails to Explain the Ballistics to the Jury

Trial counsel intended to explain the ballistics and autopsy reports to the jury in closing argument, as he discussed with the paralegal, but either failed or forgot. He testified in 2006 that he "intended to make [a] final argument on the various entry wounds into the head of Mr. Douglas," and that "you had to look at the autopsy report in conjunction with a couple of other reports . . . to get the

[28] Trial counsel were unreasonable in concluding there was no time. The prosecutor recalled DPS witness Maurice Padilla to testify about supplemental analysis of a pair of tennis shoes. (26.RR.82-83; 27.RR.74.) There is no reason trial counsel could have done the same with Counce and Urban, and/or requested a continuance for that purpose.

proper information to argue to the jury." (3.RWR.58). Trial counsel had every reason to explain the information in the reports, because it supported "[t]he defense theory . . . that none of these [shots to Douglas] were inflicted by Clint Young," because "it would have been virtually impossible for Clint Young to inflict the gunshot wound to the left side of Doyle Douglas's head [which came from the .22 Colt Huntsman] unless he somehow climbed over [in the car to Douglas's left side], and there was no testimony of any of that." (3.RWR.98.)

Despite intending to do so, trial counsel never explained the information in the ballistics and autopsy reports to the jury. Instead, he simply made a conclusory statement in closing argument that the "Colt automatic pistol" shot Douglas in the back and left sides, and the "revolver" shot the front right. He told the jury:

> [S]o we have [the] Colt automatic pistol here in the back of the head and here in the left side of the head, we have a revolver wound here, front right of the head. The state's theory apparently is that while Doyle Douglas is in the car, he's looking away, he's looking towards the driver's side door, that Clint Young is in the right passenger seat and Clint Young shoots Doyle Douglas in the back of the head and front right of the head. It is, if not impossible, certainly be very difficult under these ballistics.

(29.RR.44.)

Trial counsel failed to explain or substantiate his statement that "we have the Colt automatic pistol here in the back of the head and here in the left side of the

head, we have a revolver wound here, front right of the head." (*Id.*) Trial counsel never explained to the jury where that information came from, how the autopsy report correlated the wounds and bullets, or how the ballistics report correlated the bullets and guns, to reach that conclusion. Though trial counsel could have done this by recalling the pathologist, they did not. Nor did they admit into evidence the only document that specified which bullet could not have come from which gun: Counce's written ballistics report. Trial counsel Paul Williams acknowledged this error in closing, saying "I just remembered that Mr. Counce's report is not in evidence" and suggesting the jury request a readback of Counce's testimony because "you may not remember about bullets 16-G, H, and I." (29.RR.47-48.) Yet counsel never explained why that information was significant.

Absent testimony by the pathologist linking the bullets and wounds, or Counce's report correlating the bullets and guns, the jury could not understand the defense's claim that Young did not cause Douglas's right-side wound. The only information the jury had on that issue were statements buried in the autopsy report—never mentioned at trial—that the bullet from each wound was inscribed with a specific marking. But without Counce's report, which trial counsel failed to admit into evidence, the jury could not have used that information to match the wounds with the guns. The jury had only its memory of Counce's testimony to aid

it in that attempt. (Ex. 68, Douglas Autopsy Report.) Trial counsel never showed the jury how to put that information together, or why it should. Trial counsel compounded the jury's confusion by incorrectly describing the numbering schemes the witnesses used: he argued the pathologist had labeled the bullets 16-G, 16-H, and 16-I, when in fact those markings were used only by Counce. (29.RR.43.)

Trial counsel also misdescribed the evidence in closing, causing co-counsel and the defense paralegal to interrupt him. Trial counsel told the jury that Counce:

> testified that on [bullets] 16-G and 16-H, you cannot identify or eliminate as having been fired from the Colt pistol [the Clint Young gun], but he can state they were not fired from the Colt revolver [the Mark Ray gun] . . . so that the back of the head and the left side of the head were not fired from the Colt revolver, but they were fired from the Colt—*I'm sorry, not fired from the .22 revolver*, but presumably were fired from the Colt automatic pistol.

(29.RR.43-44)(emphasis added). The statement that "the left side of the head [was] not fired from the Colt revolver," was incorrect. In fact, the left-side wound was not fired from the *RG* revolver, which was Ray's gun. (*See* Ex. 14, R. Ernest Report, at 2; Ex. 15, R. Ernest Decl., ¶ 7.) The Colt Huntsman was the gun that could have produced the left-side wound. (*Id*.) Trial counsel Ian Cantacuzene admitted in 2006 that, "When [lead trial counsel] Williams was doing his closing argument on the innocence or guilt phase of the trial . . . we did kind of interrupt him." (2.RWR.236-37.) The paralegal gestured to Williams from counsel table to

call him over, and there was a pause while she urged him to explain the evidence more clearly. (Ex. 17, N. Piette Supp. Decl., ¶ 12.) The prosecution seized on this mistake to argue that defense counsel "has the testimony on the spent bullets, the projectiles and where they were recovered and what they match up to entirely wrong." (29.RR.67.) This criticism of trial counsel's command of the facts was impactful, because it was the last comment the jury heard on that issue. Trial counsel failed to rebut it.

5. Trial Counsel's Errors were Deficient

Where ballistics evidence is potentially exculpatory, trial counsel performs ineffectively by failing independently to investigate it. *Draughon v. Dretke*, 427 F.3d 286, 296-97 (5th Cir. 2005) (trial counsel was ineffective for failing to obtain a forensic examination of the path of the fatal bullet to support defendant's testimony that he did not shoot intentionally or at close range); *Soffar v. Dretke*, 368 F.3d 441, 478 (5th Cir. 2004) (trial counsel was ineffective for failing to consult a ballistics expert to test the account of the state's only known eyewitness).

Here, trial counsel performed deficiently by failing to investigate the ballistics evidence, review the reports, or even consult a ballistics expert before the start of Young's guilt phase trial. To create a reasonable doubt of Young's guilt, it was essential to test the credibility of the accomplices' testimony about how

Douglas was shot. Ballistics evidence had clear potential to support or contradict their stories, and any reasonable trial counsel would have investigated it. Trial counsel's failure to do so violated their duty under the 2003 ABA Guidelines to "conduct thorough and independent investigations relating to the issue[] of . . . guilt . . . regardless of" how strong the evidence was. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, ("ABA Guidelines") (2003), Guideline 10.7(A). "Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process.'" *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (internal quotations omitted).

6. Trial Counsel's Failure to Explain the Ballistics was Prejudicial at the Guilt/Innocence Phase

Had trial counsel explained the ballistics evidence, there is a reasonable probability that at least one juror would have found a reasonable doubt as to whether Young committed or assisted in Douglas's shooting so as to cause his death. The ballistics would have shown the accomplices were not truthfully describing how Douglas was killed, suggesting they played a greater part in the murder than they claimed. Presented with such evidence, the jury might well have concluded that the tight-knit accomplices had colluded to blame Young for a crime they committed. Trial counsel's failure to present contrary ballistics evidence left

the accomplices' narrative "largely unchallenged, relinquishing openings for questioning [its] accuracy." *Draughon*, 427 U.S. at 294. It also permitted the prosecutor to argue that the ballistics must support Young's guilt, because the defense "w[asn't] able to bring up any contradictory physical evidence, none on the ballistics . . . after 16 months." (29.RR.30.)

The ballistics would also have suggested that Page—who stood outside Douglas's car—was Douglas's more likely shooter, because the lack of soot or stippling on Douglas's wounds suggested he was shot from a greater distance than the Grand Prix's cramped front seat would have allowed. Indeed, a postconviction examination showed that "[b]ecause of the physical dimensions and limitations involved in an automobile . . . it is unlikely that these two shots (State's exhibits 9 and 10) were fired inside the automobile by the front seat passenger, Clinton Young, into the left [and back of Douglas's head] while [Douglas] was in the driver's position." (Ex. 15, R. Ernest Decl., ¶ 8.) "[I]t is more likely that Douglas was shot by someone who was firing from the victim's left side." (*Id*.) Such evidence would have bolstered trial counsel's theory that Douglas was shot by Page, who stood to Douglas's left outside the car. (21.RR.314-15; 29.RR.45.)

7. Trial Counsel's Failure to Explain the Ballistics was Prejudicial at the Punishment Phase

Young's jury struggled to decide between a life or death verdict. It deliberated for over eleven hours and sent out two notes, including one asking whether it had to find Young culpable in one or both murders. (36.RR.134, 139, 155; 37.RR.5, 27.) Had the jury known that the ballistics impeached the accomplices' testimony, it is reasonably probable at least one juror would have been swayed to answer "no" to special issue number 2 and spare Young's life. The jury could also have found sufficient mitigating evidence to reject a death sentence, because it concluded Young was being treated too harshly compared with accomplices who were apparently lying about their involvement. (29.RR.25.)

C. Trial Counsel Performed Ineffectively At The Guilt/Innocence Phase By Failing To Investigate Or Present A Non-Inculpatory Explanation For The Shell Casings In Douglas's Car

Trial counsel were also ineffective for failing to investigate or present evidence that the two .22 shell casings found in the front passenger seat of Douglas's car resulted from the car's interior being shot when the car was abandoned, and not from Douglas's murder.

1. The Prosecution Argued that the Casings Found in Douglas's Car Showed Douglas Was Shot by Young in the Front Seat

Law enforcement found two .22 casings in Douglas's car: one on the passenger's side floorboard, and one on the passenger's seat. (23.RR.242-43.) Counce testified that the casings matched the .22 Colt Huntsman, or so-called "Clint Young gun." (25.RR.159.)

FBI evidence coordinator Ann Hinkle testified that she found a "defect" in the Grand Prix's passenger side dashboard. (23.RR.75.) That hole, and another in the steering wheel, appear in photographs. (Ex. 8, Photo of Glove Compartment; Ex. 9, Photo of Dashboard and Front Seat.) The FBI made a Mikrosil cast of the dashboard hole. At trial, Hinkle testified the dashboard hole might be a "cigarette burn," not a hole at all. (23.RR.74-75.) The prosecutor argued that the casings' presence in the front passenger seat corroborated the accomplices' testimony that Young shot Douglas inside the car. (29.RR.20.)

2. Young told Trial Counsel the Car's Interior was Shot in Eastland, But Trial Counsel Never Investigated

Young told trial counsel that at least one defect in the car's interior was a bullet hole, and asked them to examine the car to confirm this. (3.RWR.51-52; Ex. 174, P. Williams Decl., Aug. 25, 2017, ¶ 5.) Trial counsel had documents showing a Mikrosil cast had been made of the dashboard hole, but never had the Mikrosil

cast analyzed. (Ex. 174, P. Williams Decl., Aug. 25, 2017, ¶ 5.) They called the FBI "to arrange times for us to go view the car," but gave up after the FBI did not return the call. (39.RR.20-21.) Trial counsel admitted the matter "probably could have been" pursued further. (39.RR.20-21.)

Reasonable trial counsel would have followed up with the FBI until permitted to examine the car. They would also have had the Mikrosil cast of the dashboard hole examined to determine whether it showed a bullet hole—which would have provided a non-inculpatory explanation for the shell casings found in the front seat and floorboard—questioned Page about whether the car was shot from inside, and requested discovery from the prosecution about any analysis of the car's interior and the dashboard hole. But trial counsel did not do these things. Lead trial counsel testified, "I don't recall ever hiring any kind of an expert to go out and investigate [the bullet holes in the car], . . . so beyond talking to Mr. Young about it, no, sir, I guess it was not [investigated]." (3.RWR.61.) Even when the state produced the Mikrosil casts to the defense, trial counsel never had them analyzed. (Ex. 32, Order to Forward Evidence, at 2; Ex. 174, P. Williams Decl., Aug. 25, 2017, ¶ 5).

3. Minimal Investigation Would Have Shown the Grand Prix's Interior was Shot in Callahan County

Investigation would have shown the casings came from shots fired at Douglas's empty car when Young and Page abandoned it in Callahan County, not from Young shooting Douglas. Page rode in the front passenger seat after Douglas's shooting, and states that "there were no shell casings on the front passenger seat or on the floor of the car*"* during the drive from Harrison County to Eastland. (Ex. 163, D. Page Decl., Aug. 20, 2015, ¶ 18.) The casings appeared only later, when the car was shot in Callahan County. (*Id.*, ¶ 19.)

Trial counsel would have obtained further evidence of the casings' origins by asking for notes from the DPS's examination of the Mikrosil casts that were referenced in the discovery provided by the prosecution. Trial counsel had a November 20, 2002 DPS report referencing the Mikrosil casts, but unreasonably failed to request the examiner's underlying notes. (Ex. 12, T. Counce Report, Nov. 20, 2002; Ex. 151, M. Farrand Decl., ¶ 11 (trial counsel's file contained the November 20, 2002 report)). These notes—recently produced to Young's counsel—say the casts show "a wake and cratering to varying degrees consistent with impact areas." (Ex. 13, "Firearms Section Work Sheet," page 8.)

4. Trial Counsel's Failure was Prejudicial

Had trial counsel investigated and presented evidence that the Grand Prix's interior was shot, there is a reasonable probability that at least one juror would have found a reasonable doubt as to Young's guilt of Douglas's shooting. Any bullets shot into the Grand Prix's interior must necessarily have come from a different shooting event than Douglas's murder, because all the shots fired at Douglas remained in his head, and no other shots are alleged to have been fired at the time he was killed. (Ex. 68, Douglas Autopsy Report.) Evidence that the car's interior was shot later, in Callahan County, would have explained the shell casings and refuted what the State claimed was corroboration for the accomplices' testimony that Young shot Douglas inside the car. Without that corroboration, at least one juror may have rejected the accomplices' testimony as incredible: the accomplices' story conflicted with forensic evidence, and the accomplices contradicted each other about how the shooting occurred. (*See* Section II(A)(4)-(5).)

D. Trial Counsel Failed To Test Page's Gloves For GSR Or Wear

Young argues, above, that SEM testing was not reasonably available to trial counsel during Young's pretrial and trial proceedings, in 2001 to 2003, because neither the Texas DPS nor Midland law enforcement possessed SEM testing

equipment and no reasonably available means existed for removing GSR particles from cloth fibers for testing. (*See* Claim 2, subsection (C).)

But assuming this Court concludes that SEM testing of the gloves *was* readily available at trial, trial counsel were ineffective in failing to have the gloves tested for GSR using SEM analysis. Trial counsel recognized GSR tests would be helpful. Indeed, trial counsel tried to show that lead found on the gloves suggested GSR was present, and elicited testimony from Counce that lead smears on the left glove "could . . . be caused by gunshot residue." (25.RR.182-83.) The gloves' potential to exculpate Young of Petrey's murder was clear, because Young told police that Page shot Petrey while wearing the gloves (24.RR.285-86; Ex. 67, Search Warrant Affidavit, at 6), and only Page's DNA was inside them. (*See* Section II(G)(3).) Trial counsel had documents showing Young made that statement. (Ex. 67, Search Warrant Affidavit, at 6; Ex. 151, M. Farrand Decl., ¶ 11 (trial counsel's file contained Exhibit 67)).

Trial counsel were further ineffective for failing to have the gloves' fibers microscopically examined to test the truth of Page's testimony that he owned the gloves before the crimes and used them for yard work. Showing the gloves were new when Petrey was shot—as Page now admits, they were bought the night of

Douglas's murder—would have magnified the importance of the GSR in the gloves' fibers by showing the GSR could not have come from any prior event.

Failure to have the gloves tested for GSR or wear prejudiced Young by forfeiting evidence of Page's guilt. As explained above, SEM testing in 2015 and 2017 showed GSR particles on the gloves in large amounts, including between the fingers: ninety-nine particles were found in a sample comprising less than one percent of the left glove, and fifteen particles were found on an equally small sample of the right glove, indicating many times that amount is present on the gloves overall. (Ex. 2, 2015 Microtrace Report; Ex. 5, 2017 Microtrace Report, at 3-6.) The fact that the gloves were new when Petrey was killed and had GSR in their fibers, and that Page lied about those issues, confirm Young's claim that Page wore them to shoot Petrey.

E. Trial Counsel Failed To Investigate Or Present Evidence That Page, Ray, And Mccoy Communicated Before Trial

During closing arguments at the guilt/innocence phase, the State argued that Page, Ray, and McCoy must be truthfully describing Douglas's murder, because they "never had a chance to get together and concoct their story." (29.RR.66.) But that was untrue because the accomplices communicated from jail before trial. Because the state's case hinged on the accomplices' credibility, reasonable trial

counsel would have investigated whether or not they were communicating to coordinate their accounts of the crime.

Had trial counsel investigated, they would have discovered that Ray, Page, and McCoy were indeed communicating. Before trial, Page sent Ray a letter saying, "Tell your lawyer that whenever you go to court to have me subpeanuad [sic] to testify in your favor and I will tell them that Clint forced you to shoot Doyle or he would shoot you." (Ex. 74, Letter, D. Page to M. Ray, June 2002). This letter would have shown that the accomplices were loyal to each other and coordinating their stories, supporting the defense's argument that they were "all close friends" whereas Young was "the new guy," and the "patsy that it would be easy to blame things on." (29.RR.40.) Page admitted in 2015 that he and Ray sent letters back and forth "the whole time [they] were locked up," through a third party—Page's stepmother—to circumvent prison authorities. (Ex. 169, J. Villerius Decl., Exh. A at page 7, time stamp 28.53.01.)

F. Trial Counsel Performed Ineffectively At The Guilt/Innocence And Punishment Phases By Failing To Present Testimony From Amanda Williams Or Daniel Gilbert Regarding Page's Prior Statements

Trial counsel performed deficiently at the guilt/innocence and punishment phases for failing to interview, or present testimony, from Amanda Williams or Daniel Gilbert. Williams would have testified that she spent time at the

Fisherman's Motel in 2001 and knew Ray, Page, and McCoy. (Ex. 170, A. Williams Decl., ¶¶ 1-2.) One night, she was sitting in a car with Page and McCoy and heard them talking about how not to get caught if you shoot someone. (*Id.*, ¶ 4.) Page did most of the talking. (*Id.*, ¶ 5.) Williams heard them say that you need to wipe off the bullets before putting them into the gun, so the shell casings don't leave any fingerprints. (*Id.*) Though Williams initially thought they were joking, as they kept talking about ways not to get caught she realized they were serious. (*Id.*, ¶ 6.) Another time, Williams heard Page say that if you're ever in trouble, you should be the first one to go to police "because they will believe you more and you will get a better deal." (*Id.*, ¶ 7.) Gilbert, similarly, would have testified that he heard Page say "if he ever killed someone, that he would just put it all off on Clint Young." (Ex. 33, Violent Crime Task Force Memorandum.)[29]

Young "told [trial counsel] about [Williams and Gilbert] right off the top" and asked trial counsel to speak with them, but trial counsel unreasonably decided against it after Young made an offhand comment that Williams and others from East Texas were "no good, they're liars and one's a drug addict[]." (38.RR.248-50.) Trial counsel knew Young's comment was probably just the result of "frustrat[ion]" because the witnesses were "so critical and we couldn't find them,"

[29] Officers with the FBI's Violent Crimes Task Force interviewed Gilbert after trial, and he told them Page made that statement. (*Id.*)

(38.RR.250-51) but nevertheless relied on it to decide "well, we're not going to use them, then." (38.RR.250.) Trial counsel admitted that Williams and Gilbert "would have helped us," and that he "would like to have had both of these people [Williams and Gilbert]" as witnesses. (38.RR.249, 267.) Nor did trial counsel think they were lying; he testified that he "really believe[d] that Mr. Page made the[] statements" Williams and Gilbert attributed to him. (38.RR.250)

Trial counsel acted unreasonably in curtailing efforts to locate and interview Williams and Gilbert based on a comment from Young that trial counsel knew was just the result of frustration. Trial counsel's admission that he "would have liked" to have them testify shows the failure to present their testimony was not tactical. Though trial counsel testified that Young's comments made him think "they're not going to be very good witnesses," (38.RR.251), trial counsel could not reasonably dismiss them sight unseen. Rejecting witnesses because they were impeachable "drug addict[s]" was especially unreasonable given that this description applied to many of the witnesses who testified at trial: as trial counsel admitted, "seeing the other people from East Texas, all these people didn't make just the shiniest witnesses I've ever seen." (38.RR.251.)

Young was prejudiced by trial counsel's failure to interview Williams and Gilbert and present their testimony. Whereas Page's act of turning himself in

bolstered his credibility, Williams's and Gilbert's testimony would have shown it was actually a strategic tactic to shift blame from himself and "get a better deal." (Ex. 170, A. Williams Decl., ¶ 7.) Page's sinister comments about how to get away with shooting someone would also have supported his guilt, and comported with Young's claim that Page strategically wore gloves to shoot Petrey.

G. Trial Counsel Performed Ineffectively At The Guilt/Innocence And Punishment Phases By Failing To Investigate Or Present Evidence That Young Suffered Trauma In His Childhood Home And At TYC

Trial counsel were further ineffective for failing to investigate or present evidence that Young was physically and psychologically abused by his stepfather, Quentin Sexton, throughout his childhood, witnessed Sexton physically abuse his mother, and suffered trauma and post-traumatic stress disorder ("PTSD") from these experiences as well as his two and a half years at the ultraviolent Texas Youth Commission ("TYC"). The absence of that evidence prejudiced the punishment phase by depriving Young of mitigating evidence about the effects of his traumatic childhood on his development, personality, and decisionmaking, permitting the prosecutor to falsely portray Young as an evil psychopath with no cause for his aggression. (36.RR.93.) It also prejudiced Young at the guilt phase, by depriving him of an explanation for his flight from police.

1. Trial Counsel Unreasonably Failed to Investigate, or Provide Experts with Information About, Young's PTSD from Abuse and Trauma Caused by his Stepfather and TYC

a. Trial Counsel Had Indications that Sexton Physically and Verbally Abused Young Throughout his Childhood

Trial counsel had a clear "obligation to conduct a thorough investigation of [Young's] background," *Williams v. Taylor,* 529 U.S. 362, 396 (2000), including "efforts to discover all *reasonably available* mitigating evidence." *Wiggins,* 539 U.S. at 524. Applicable ABA Guidelines specifically required trial counsel to investigate "physical, sexual, or emotional abuse" Young suffered in childhood. ABA Guidelines (2003), Guideline 10.7, "Investigation," Commentary, Penalty. Indeed, as early as 1997 "an objective standard of reasonable performance for defense counsel in a capital case would have required counsel to inquire whether the defendant had been abused as a child." *Ex parte Gonzales,* 204 S.W. 3d 391 (Tex. Crim. App. 2006).

Physical abuse of Young by Sexton was a particularly obvious area of investigation, because numerous red flags in trial counsel's file suggested it occurred. Young's biological father told trial counsel that "Clint used to tell him that Quentin [Sexton] beat him, and that he ha[d] seen bruises on Clint's face and neck." (Ex. 88, Summary of Interview with Billy Young; Ex. 151, M. Farrand

Decl., ¶ 11 (trial counsel's file contained Exhibit 88)). Young's stepsister, Brandy Sexton, told trial counsel that Sexton was an alcoholic who did not get along with Young, and that she would hear Young screaming while Quentin hit him in the bedroom. (Ex. 85, Transcript of B. Sexton Interview, at 5; Ex. 87, Summary of B. Sexton Interview.) Gerald Byington, the defense mitigation specialist, could tell that Young's home was "dysfunctional," with possible verbal and physical abuse, and that "the way that people interacted with each other was also problematic." (2.RWR.92.) Young's TYC records, which trial counsel also had, contained statements that Sexton, "[was] rigid—no compromising or patience with Clint," was an alcoholic, and that there was "reason to believe" Young had been physically and verbally abused. (State's Trial Ex. 147, TYC Records, at bates numbers 291, 318; Ex. 151, M. Farrand Decl., ¶ 11.) Trial counsel also had a 1998 medical report stating that Young reported "a lot of anger recently towards his stepfather." (Ex. 84, Medical Evaluation, May 27, 1998; Ex. 151, M. Farrand Decl., ¶ 11 (trial counsel's file contained Exhibit 84)). Young himself told trial counsel that his stepfather had made him stand in a corner with a spider when he was young, and shot a nail gun at him. (2.RWR.240 (Ian Cantacuzene)). These "red flags" would have prompted reasonable trial counsel to investigate the extent

of trauma Young suffered in Sexton's household. *Rompilla v. Beard*, 545 U.S. 374, 392 (2005).

b. Trial Counsel had Information Suggesting Young was Traumatized at TYC

Additional red flags suggested Young had been traumatized by violent attacks during his three-year incarceration at TYC from ages fifteen through eighteen, shortly before Douglas's and Petrey's murders. Young's father told trial counsel that Young had written him letters from TYC, and that TYC "didn't sound like a good place and that Clint said he had to be in a gang and fight or he wasn't going to make it." (Ex. 88, Trial Counsel interview memo re Billy Young, at 3.) Another memorandum in trial counsel's file indicates that several TYC employees would testify that "joining a gang is a method of self-preservation" at TYC. (Ex. 96, Trial Counsel Memorandum Titled "TYC Ladies".)

c. Trial Counsel Ignored Indications of Trauma

Any reasonable trial counsel would have investigated these red flags that Young suffered trauma from abuse from Sexton and violence at TYC. *See Wiggins*, 539 U.S. 510, 525 (2003)(counsel's failure to investigate was "unreasonable in light of what counsel actually discovered"). Indeed, the applicable ABA Guidelines specifically identified "poverty and abuse" as subjects

that should be investigated for the punishment phase. ABA Guidelines (2003), The Defense Presentation at the Penalty Phase. But trial counsel did not do so. Instead, they focused their investigation and presentation on abuse inflicted on Young by his biological father, Billy, who only lived with Young for isolated periods throughout his life. Because of Billy's limited contact with Young, his abusiveness was confined to a few brief incidents: one time when Billy was convicted of child abuse after beating Young, and an instance when Billy hit Young with a 2x4. (Def. Tr. Ex. 16, 33.RR.114 (Carla Sexton).) The prosecution disparaged those two instances in closing as "all the evidence [of abuse] that you have," and not "enough to cause you to forgive what [Young] has done." (36.RR.97-98.)

Trial counsel never meaningfully investigated the extensive, chronic abuse Young and his mother suffered at the hands of his stepfather, who lived with Young continuously throughout his childhood. Though trial counsel spoke with Young's mother, Carla, they could tell she was withholding information about the household. (Ex. 81, J. Byington Decl. ¶ 12) She gave the defense team a sense that the Sextons' home was chaotic and dysfunctional, but did not reveal the nature of the dysfunction. (*Id*.) The defense mitigation specialist believed "there was more information about [Carla's and Sexton's] household that could have

benefitted the defense had it been pursued further through additional family member interviews and more in-depth questioning." (*Id.*, ¶ 12.)

Carla's evident withholding of information should have prompted trial counsel to question other members of Sexton's household. Obvious sources were Young's stepsister, Brandy, and his half-sister Jessie. Brandy was two years older than Young and lived with the family on summer vacations and during the schoolyears when Young was in about second, fifth, and sixth grades. (34.RR.117.) Jessie was seven years younger than Young, and lived in the household with him continually from the time she was born (when Young was seven), until Young was sent away to live in institutions as a teenager. (Ex. 153, J. Gonzales Decl., ¶ 2.)

But trial counsel made almost no effort to ask Brandy or Jessie about Sexton's treatment of Young and Carla. Trial counsel never interviewed Jessie about her home life at all, and never asked her whether Quentin was abusive towards Young or his mother. (Ex. 153, J. Gonzales Decl., ¶ 10.) Counsel's mitigation specialist never interviewed Jessie at all. (2.RWR.94-95.) Though Jessie testified at trial, counsel asked her no questions about Quentin's treatment of Young or Carla. (34.RR.153-59.) Nor did trial counsel talk with their mitigation specialist about abuse of Young by Sexton. (Ex. 81, G. Byington Decl., ¶ 15.)

Trial counsel also failed to seek this information from Brandy. Trial counsel interviewed Brandy in October 2002, but never asked her whether Sexton physically abused Young, even after Brandy said Sexton was an alcoholic and "belligerent," "sometimes . . . did things that he probably shouldn't have done," wrestled too roughly with Young when he was about six years old, and called him "a woos, or a pussy." (Ex. 85, Transcript of B. Sexton Interview, at 5-6.) Even then, trial counsel only asked about verbal abuse by Sexton: *i.e.* whether there was "anything that he might have said to Clint . . . that w[as] offensive or hurtful." (*Id.* at 5.) A defense paralegal interviewed Brandy again before trial and Brandy said Quentin sometimes hit Young. (Ex. 87, Summary of B. Sexton Interview.) But trial counsel failed to ask Brandy detailed questions, such as how often these incidents occurred, over what time period, whether Sexton attacked Young any other times, or whether Sexton abused Carla as well. (Ex. 85, Transcript of B. Sexton Interview, at 5-6; Ex. 155, B. Harvey Decl., ¶ 12.)

Trial counsel also failed to ask Carla about the information Brandy provided. Carla minimized Sexton's abuse of Young in pretrial interviews, but trial counsel never confronted her with the contrary facts they learned from Brandy. In one pretrial interview, Carla claimed the extent of Sexton's discipline of Young was occasional "verbal abuse," and making Young stand in a corner. (Ex. 89 Summary

of C. Sexton Interview.) Trial counsel did not tell Carla that Brandy had described Sexton hitting Young, or that Billy Young had said Young reported being beaten by Sexton. (*Id.*) Notes in trial counsel's file indicate that Sexton was interviewed by a member of the defense team, but either was not asked about abuse of Young or did not admit it. (Ex. 90, Notes re Interview of Quentin Sexton.)

Young's trauma from violence at TYC also went unexplored at trial. If anything, Young's TYC experience was inaccurately portrayed as positive: Carla testified that Young obtained his high school GED, or diploma equivalent, at TYC, and that upon his release Young "was more calm and settled and not as rambunctious and seemed like he had the ability to think things through more." (33.RR.122.) Trial counsel never investigated indications that TYC was a violent and traumatic environment, or presented evidence of such trauma to their retained experts for consideration towards the possibility that he suffered from PTSD. Reasonably competent counsel would at least have explored this possibility.

d. Trial Counsel Failed to Consistently Employ a Mitigation Specialist

Trial counsel also failed to retain a mitigation specialist after their initially-appointed mitigation specialist ceased conducting interviews. One year before trial, in April 2002, the trial court appointed Gerald Byington as the defense

mitigation specialist. (Ex. 91, Order Appointing Gerald Byington, April 23, 2002.) But in September 2002 the District Attorney filed a complaint against Byington with the Texas Commission on Private Security, claiming Byington could not legally interview witnesses because he was not licensed as a private investigator. (8.RR.6.) On September 19, 2002, the trial court held a hearing on the District Attorney's complaint, but did not rule on whether or not Byington could resume interviewing witnesses. (8.RR.38-39.)

Uncertain of his status, Byington conducted no interviews after September 2002. (Ex. 81, G. Byington Decl., ¶ 10.) In the six months leading up to Young's March 2003 trial, he restricted his work to consulting with the defense team, record gathering, and utilizing expert witnesses for the punishment phase. (*Id.*) The only witnesses Byington ever interviewed were Young's mother, Carla Sexton, and biological father, Billy Young. (*Id.*, ¶ 4; 2.RWR.94-95.)

Trial counsel never replaced Byington with a qualified mitigation specialist. They simply interviewed witnesses themselves, or relied on an untrained paralegal to do so. Documents for the defense's psychological expert were thrown together by the paralegal at the last minute, the day before she testified. (2.RWR.152-53.) The failure to engage a substitute mitigation professional was deficient on its face, and prevented the defense from eliciting details of the abuse and trauma Young

suffered from his stepfather and TYC. *See, e.g.*, *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014) (trial counsel's failure to hire a mitigation specialist prevented counsel from learning of "an extensive history of physical abuse, emotional abuse, and neglect"); *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014) (granting a COA for an ineffective assistance of counsel claim based in part on counsel declining to hire a mitigation specialist); *Morales v. Mitchell*, 507 F.3d 916, 935 (6th Cir. 2007) (failure to hire a mitigation specialist prevented counsel from "present[ing] to the jury compelling mitigating evidence that was readily available at the time of trial"); *Lampkin v. State*, 470 S.W.3d 876, 915 (Tex. App.—Texarkana 2015, pet.ref'd) (trial counsel was deficient for not hiring a mitigation investigator when counsel knew the defendant had mental health problems).

e. <u>Trial Counsel Failed to Provide Their Experts with Information about Young's Trauma</u>

Trial counsel also failed to provide its psychological experts with information about Sexton's treatment of Young. The defense neuropsychologist, Dr. Daneen Milam, never spoke with Brandy, Jessie, Carla, Quentin, or any of Young's other relatives. (2.RWR.164.) She relied solely on records and an interview of Young himself. (*Id*.) ("Q: Okay. So you're just giving [sic] your information straight from the defendant?" A: And review of records.") The

records she reviewed did not include transcripts or summaries of family member interviews. (Ex. 151, M. Farrand Decl., ¶ 14.) Dr. Milam also had insufficient time to prepare: the defense paralegal gave the bulk of the records to her the day before she took the stand, so she had to "integrate the data that she gave me into what I had" in a rushed fifteen-hour period one day before testifying at trial. (2.RWR.152-53.) The defense psychiatrist, Dr. Roy Mathew, was equally uninformed: he conducted no interviews of Young's family members, and relied solely on records that did not include information about Sexton's parenting. (Ex. 83, Defense Tr. Ex. 28 (list of records reviewed by Dr. Mathew)).

f. Trial Counsel had no Tactical Reason for not Investigating or Presenting Evidence that Young was Traumatized at Home or at TYC

No tactical rationale supported trial counsel's failure to investigate Sexton's abuse of Young or his mother. Byington, the defense mitigation specialist, states that evidence of physical abuse and trauma from Sexton would have been fully consistent with the defense's trial strategy of showing that Young's chaotic home life impaired his development. (Ex. 81, G. Byington Decl., ¶¶ 16-18.) Trial counsel states that Sexton's abuse of Young and his mother would have been mitigating, and that the defense would have provided such information to their experts and presented it at trial had they known about it. (Ex. 174, P. Williams

Decl., Aug. 25, 2017, ¶¶ 11-12.) Indeed, the CCA has repeatedly held that childhood violence and abuse are mitigating factors that a jury may consider. *See Ex parte Goodman*, 816 S.W.2d 383, 384 (Tex. Crim. App. 1991, reh'g denied); *Lewis v. State*, 815 S.W.2d 560, 567 (Tex. Crim. App. 1991, reh'd denied).

2. Trial Counsel's Omissions were Prejudicial

a. Brandy and Jessie Sexton Could Have Testified that Sexton Routinely Assaulted And Verbally Abused Young and his Mother

Trial counsel's failure to ask Young's family members about physical abuse by Sexton severely prejudiced his defense. If asked by trial counsel, Young's stepsister Brandy and half-sister Jessie would have testified that Sexton constantly abused Young both verbally and physically throughout his childhood. Brandy, who lived with the family while Young was in fourth, seventh, and eighth grades, would have told trial counsel that Sexton was constantly drunk, beat Young at least once a month, took out his anger on Young and called him "dumb" "stupid," and a "pussy," and beat him with paddles, belts, and sticks until he bled. (Ex. 155, B. Harvey Decl., ¶¶ 4-10.) Jessie recalls a time when Sexton brutally beat Young simply because Young asked Jessie to borrow a cassette tape. (Ex. 153, J. Gonzalez Decl., ¶ 6.) Brandy recalls Sexton repeatedly kicking Young with steel-toed boots after Young was annoyed at his sister for waking him up early. (Ex.

155, B. Harvey Decl., ¶ 6.) Brandy would also have testified that Sexton was jealous and sexually aggressive towards Young's mother, Carla, grabbed her in sexual ways in front of Young, and physically abused her as well. Before trial, Carla showed Brandy photographs of terrible bruises Sexton had left on Carla's face and body, and told Brandy she had had Young take the pictures "just in case" Carla needed to divorce Sexton or prove his abusiveness. (*Id*., ¶ 12.) Young's stepsister Jessie would also have testified that Sexton constantly beat Young and was physically abusive to Carla, hitting her and pulling her hair. (Ex. 153, J. Gonzalez Decl., ¶ 5.) He was also violent and destructive, throwing furniture and breaking dishes in the house during drunken rages. (Ex. 155, B. Harvey Decl., ¶ 10.) Trial counsel never elicited this information from Brandy or Jessie in pretrial interviews or at trial.

b. Trial Counsel's Failure to Investigate Abuse by Sexton Permitted the Prosecutor to Argue Young's Childhood was Unremarkable

Trial counsel's failure to investigate or present Sexton's abusiveness allowed the prosecutor to misrepresent Young's childhood as unremarkable and untraumatic. Though Young's siblings testified about isolated instances when Young was abused by his biological father, Billy, that testimony carried little weight because Young lived with Billy only sporadically. (33.RR.165-66, 191,

203-06.) Young's siblings admitted on cross-examination that they only actually saw Billy abuse Young a few times. (33.RR.211-20 (Christy Young); 33.RR.249 (Timothy Williams)).

Brandy was the only witness who testified that Young suffered any physical punishment from Sexton: she testified that Sexton disciplined Young with paddles. (34.RR.121.) But trial counsel never asked Brandy in detail about Sexton's abuse. (34.RR.119-20.) Had she been asked more detailed questions, Brandy would have testified about Sexton's chronic beatings of Young, his violent and destructive rages, his "discipline" of Young with belts until he bled, and his abuse of Carla. (Ex. 155, B. Harvey Decl., ¶¶ 11-12.) Because trial counsel did not know that information, the prosecutor was able to argue that Young was only mistreated a few times: "[a]n incident where he got spanked once by his father" and "[an] incident where his father hit him with a 2x4." (36.RR.97.)

Trial counsel's lack of investigation also allowed false testimony to reach the jury. Young's mother, Carla, falsely testified that Sexton never abused Young, except for one time when Sexton hit Young with a broom on his ear. Other than that, Carla testified, Sexton merely "spank[ed]" Young and made him stand in a corner. (33.RR.99.) On cross-examination, Carla agreed with the prosecutor's statement, "you [and Sexton] never beat [Clinton] or never gave him a bunch of

spankings or anything," but only "gave him time out[s] . . . put him in a corner, that sort of thing." (33.RR.146.) Carla said, "we didn't beat him," (33.RR.149), and misleadingly portrayed Sexton as a concerned father who did his "best to get help for [Young]" (33.RR.145) and "didn't act aggressively [towards Young] in any way." (35.RR.139.) Trial counsel made no attempt to rebut this false testimony on redirect, asking only, "were there a lot of problems between [Clinton] and Quentin Sexton?" (33.RR.150-51.) Carla said "yes," but trial counsel asked no followup questions. (*Id.*)

Young's trauma from TYC also went unexplored at trial. Had trial counsel investigated, they could had shown that TYC was a "gladiator farm" where TYC staff "use[d] the alpha male inmates to control the prison," watched the juvenile wards fight without intervening, and even bet on which boy would win. (Ex. 93, S. Gold, Ph.D. Decl., at 9.) The lack of commissary privileges encouraged the boys to fight each other for food and take each other's food at mealtimes. (*Id*.) As one of relatively few white wards, Young was singled out for attacks. (*Id*.) TYC staff joked about the scarcity of food, making fun of one inmate who was losing weight. (*Id*.) The repeated assaults Young endured at TYC gave him a lasting anxiety around groups of people, to the extent he had to drop out of community college. (*Id.* at 7.)

In contrast to this reality, Young's TYC experience was inaccurately portrayed at trial as positive: Young's mother testified that Young obtained his high school GED at TYC, and that upon his release Young "was more calm and settled and not as rambunctious and seemed like he had the ability to think things through more." (33.RR.122.) Trial counsel never investigated indications that Young was repeatedly attacked at TYC, or presented such evidence to their retained experts for consideration towards the possibility that he suffered trauma. Reasonably competent counsel would at least have explored this possibility. ABA Guidelines, Guideline 10.7, "Investigation" (2003).

H. Trial Counsel Unreasonably Failed To Object To The Prosecutor's Improper References To "Serial Killers" And Display Of A Book Titled "Serial Killer"

Trial counsel unreasonably failed to object at the punishment phase to the prosecutor's unfounded characterizations of Young as a "serial killer," and comparisons of Young to reviled murderers like Charles Manson and John Wayne Gacey. Every time a psychological expert testified, the prosecutor wove the phrase "serial killer" into his questioning and asserted that it described Young—a claim no evidence supported. The prosecutor even held up a book titled "Serial Killer," during questioning, in full view of the jury. The prosecutors also ridiculed Young at counsel table and displayed inflammatory photographs: the trial bailiff recalls

with dismay that the prosecutors were "giggling and talking to one another during the trial" during witnesses' testimony, and had "graphic crime scene pictures scattered all over their desk" where the jury could see them. (Ex. 178, R. Bearden Decl., ¶ 7.)

These tactics were blatantly improper. No evidence suggested "serial killer" was a valid psychological description, let alone one that applied to Young: indeed, the prosecution's own witness testified she had no basis to conclude Young was a psychopath. (32.RR.56-59). The prosecutor continued improperly referring to "serial killers" even after the trial court admonished him for "inciting the jury" by doing so. (32.RR.63.) The prosecutors' unseemly giggling and display of graphic photographs only compounded the prejudice to Young. Trial counsel unreasonably failed to object to these tactics. *See Brown v. State*, 978 S.W.2d 708, 713-14 (Tex. App.-Amarillo 1998) ("Comparing an accused or his acts to those of a notorious criminal is, according to the Texas Court of Criminal Appeals, an improper and erroneous interjection of facts not in the record.")

1. "Serial Killer" References and Display of "Serial Killer" Book During Testimony of Dr. Short

The prosecutor's first reference to "serial killers" came during the testimony of Dr. Helen Short, who had been Young's physician at the Waco Center for

Youth. Dr. Short testified that she had diagnosed Young with ADHD, conduct disorder, and antisocial personality disorder ("ASPD"). (32.RR.48-50.) At the prosecutor's prompting, Dr. Short testified that Young was bright, impulsive, and manipulative, liked to control others, and was "easily in the top five percent" of the most dangerous children she had treated. (32.RR.49-51.)

The prosecutor then asked, "Just because you have ADD, that's not going to make you a serial killer?" (32.RR.55.) After Dr. Short said very few ADD patients are dangerous, the prosecutor asked how she viewed her prior ASPD diagnosis given Young's conviction of the Douglas and Petrey murders. Dr. Short responded that she "would speculate" that "Clint is a psychopath." (32.RR.56-57.) But she conceded that she lacked sufficient information to determine whether Young was a "psychopath" or not. (32.RR.56-59.)

When the prosecutor continued asking Dr. Short about psychopaths, a sidebar was called. Defense counsel argued that the prosecutor's questioning was misleading, and its prejudicial effect far outweighed any probative value, because Dr. Short had testified that she could not opine that Young was a psychopath without further evaluation. (32.RR.61.) The court instructed the prosecutor that while it was "legitimate" to ask about "characteristics of someone who's got antisocial personality disorder or let's say psychotic behavior," asking about serial

killers was "inciting the jury." (32.RR.63.) The court chastised the prosecutor for waving the "Serial Killer" book in front of Dr. Short, saying, "[i]f she makes that evaluation, that's one thing, but you have suggested it to her by raising that book." (32.RR.63.) Trial counsel made a "running objection" to testimony from Dr. Short about psychopaths or antisocial personality disorder, but did not object to questions about "serial killers" or to such references by witnesses other than Dr. Short.

Despite the court's admonition, the prosecutor continued asking Dr. Short about serial killers. With no objection from trial counsel, he asked whether "most serial killers tend to show signs of being a psychopath?" and then, after she said yes, asked, "But not all psychopaths are serial killers?" (32.RR.67.) The prosecutor then invoked notorious serial killers, saying, "the people we find, the Bundys and Henry Lee Lucases and the John Wayne Gacys, *and these folks generally*, according to psychiatrists, fall within the psychopath range? (32.RR.67-68) (emphasis added). Dr. Short said yes. (*Id.*) Trial counsel did not object.

2. <u>"Serial Killer" References During Testimony of Dessie Cherry</u>

The prosecutor returned to his "serial killer[]" theme while cross-examining defense witness and former warden Dessie Cherry, who testified about security in Texas prisons. After Cherry testified about the number of murders that occur in Texas prisons, DA Schorre drew a distinction between "normal" murderers who

kill acquaintances because of a dispute, and murderers who "abduct[] and kill[] strangers," and suggested Young fell in the latter category. (33.RR.73.) He asked Cherry, "serial killers, those that kill more than one person . . . serial murder is where you kill one person and then you wait a period of time and then you kill another person and then you kill another person, correct?" (33.RR.74.) The prosecutor then asked Cherry if there was a distinction between "the guy that kills his wife because he's drunk and they had an argument" and "the Mansons, the Corals,[30] *they're a different breed of cat."* (33.RR.74-75) (emphasis added). The prosecutor then explicitly categorized Young as a "serial killer," akin to these notorious murderers, saying, "he killed two people, he did his best to kill a third," and was thus a "different breed of cat" from people who murder due to personal conflicts. (33.RR.75.) Trial counsel did not object.

3. "Serial Killer" References During Testimony of Dr. Mathew

The prosecutor again brought up "serial killers" when cross-examining defense expert Dr. Roy Mathew. The prosecutor again drew a distinction between people who kill because "he was mad at [his] wife or mad at his business partner," and people who are "more along antisocial lines or what we used to call

[30] This was presumably a reference to Carl Eugene Watts, nicknamed "Coral," who admitted to committing at least a dozen killings in Texas in 1982. *See https://en.wikipedia.org/wiki/Carl_Eugene_Watts.*

psychopathic lines." (34.RR.233.) He asked Dr. Mathew whether the "psychopathic" people "can be rather manipulative, they try to control the situation, they try to shift the blame, and at the same time, they can be narcissistic, totally self-centered?" (34.RR.234.) When Dr. Mathew admitted, "they can be," the prosecutor asked whether Dr. Mathew "notice[d] from the history as documented that this Defendant shares a lot of those traits?" (34.RR.234.) Mathew said that Young had "several of those, but so do [the] majority of kids with severe ADD. They don't all turn into serial killers." (34.RR.234.) The prosecutor then equated Young with a serial killer saying "That's my point." (34.RR.234-35.) The prosecutor then launched into his own improper testimony, asserting that he had read that "there could be as many as 500 serial killers wandering around in this country as we speak," and asked Mathew if he had "read that statistic before." (34.RR.235.) Mathew said no. (*Id.*)

Trial counsel failed to object to any of these references to "serial killers" on grounds of relevance, undue prejudice in relation to probative value, lack of foundation, or any other basis.

4. "Serial Killer" References During Testimony of Dr. Greene

The prosecutor reprised his "serial killer" theme yet again while questioning defense psychological expert Ross Greene. The prosecutor asked Dr. Greene

whether he had "done any particular study or research on what we might term serial killers?" (36.RR.55.) When Greene asked the prosecutor to define "serial killer," the prosecutor asked whether Greene was aware that the FBI "ha[s] done studies on serial killers, people that kill—that kill or are trying to kill more than one person." (*Id.*) Greene said he "d[id]n't have a great deal of expertise in people who are serial killers." (36.RR.56.) Trial counsel did not object.

5. <u>"Serial Killer" References During Testimony of Dr. Cirkovic</u>

The prosecutor invoked serial killers still further while examining the state's rebuttal expert, Dr. Herman Cirkovic. Dr. Cirkovic testified, contrary to the DSM and accepted psychological theory, that ADHD is not an actual disorder and that Young instead suffered from "mania" and conduct disorder. (35.RR.164-66.) DA Schorre asked Cirkovic whether "these folks," which he defined as "serial killers"—apparently a reference to Young—are "a big area to date that has been overlooked" by the fields of neurology, psychology, and psychiatry. (35.RR.197.) Dr. Cirkovic said, "yes," without expressly agreeing or disagreeing with Schorre's implication that Young was a serial killer. DA Schorre then reiterated his definition of "serial killer" in implicit reference to Young, saying that "certain individuals, for whatever reason, fall in this category . . . kill multiple people, different person at a different time, then they go on and kill another?" (*Id.*) He

asked Cirkovic, "Would you state whether or not serial killers have been studied in any depth in this country?" (35.RR.198.) After Dr. Cirkovic said no, Schorre asked, "Is it—the literature on how to fix these kind of people readily available?" (*Id*.) Cirkovic said the literature "goes back about 30 years," and Schorre said "We won't go down that road, ok?" (35.RR.199.) These statements were simply a vehicle to create a fictional and prejudicial category of "serial killers" and place Young within it.

6. "Serial Killer" References in Rebuttal Testimony of Dr. Mathew

The prosecutor persisted in its serial killer references during the rebuttal testimony of Dr. Mathew. Dr. Mathew rebutted Dr. Cirkovic's opinion by testifying that ADHD is a true diagnosis and that Young could be treated. Dr. Mathew testified that many people are helped through spiritual programs such as Alcoholics Anonymous. (35.RR.208.) Seeing an opening to reference "serial killers," the prosecutor said, "that's great. I'll tell you what, if you can come up with Serial Killers Anonymous, you are going to save the world a lot of misery, but we're not there yet, are we?" (35.RR.212.) Trial counsel again did not object.

7. Trial Counsel's Failure to Object was Deficient

Trial counsel unreasonably failed to object to the prosecutor's relentless, foundationless descriptions of Young as a "serial killer," comparison of Young to notorious serial killers, or display of the "Serial Killer" book. No reasonable tactical rationale could have supported that omission. Trial counsel themselves filed a motion before trial to preclude the prosecutor from making "[r]eferences to heinous, infamous criminals." (Ex. 76, Motion to Limit Jury Argument, November 4, 2002, at 3.) They could easily have called a sidebar to object to the prosecutor's improper statements outside the jury's hearing. Trial counsel also admit they should have objected to the prosecution's display of the "serial killer" book, and had "no strategic reason for not" doing so. (5.CWR.641; Ex. 171, P. Williams Decl., Sept. 7, 2005.)

"Comparing an accused or his acts to those of a notorious criminal is . . . an improper and erroneous interjection of facts not in the record." *Burton v. State*, 2012 WL 1034920 (Tex. App.-Fort Worth, March 29, 2012). Courts have repeatedly deemed it misconduct to compare defendants to notorious murderers. *See, e.g.*, *Brown v. State*, 978 S.W.2d 708, 713-14 (Tex. App.-Amarillo 1998) (misconduct to compare the defendant to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy); *Cauthern v. Colson*, 736 F.3d 465 (6th Cir. 2013) ("clearly improper"

for the prosecutor to "compare[] Petitioner to two of the most widely despised criminals of the then-recent past"); *Gonzalez v. State*, 115 S.W.3d 278, 283-85 (Tex. App.-Corpus Christi 2003) (prosecutor committed misconduct by comparing the defendant to Osama bin Laden in closing argument); *Stell v. State*, 711 S.W.2d 746, 748 (Tex.App.-Corpus Christi 1986) (improper for the prosecutor to compare the defendant to Lee Harvey Oswald). Failure to object to such tactics is clearly deficient. *See, e.g.*, *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005) (trial counsel performed deficiently by failing to seek a mistrial after prosecutor's "inflammatory and improper" references to Jeffrey Dahmer and Theodore Oswald in closing.) The prosecutor's comparison of Young to Charles Manson, John Wayne Gacy, Coral Eugene Watts, and "serial killers" was equally objectionable.

I. Trial Counsel Performed Ineffectively At The Punishment Phase By Failing To Rebut The Prosecution's Aggravating Evidence

Trial counsel also deficiently failed to investigate or rebut two items of aggravating evidence presented at the punishment phase: fingerprint evidence that supposedly linked Young to the robbery of a gun store, and testimony by two TYC guards that Young assaulted them.

1. Failure to Challenge Fingerprint Evidence

Trial counsel unreasonably failed to investigate fingerprint evidence that the prosecution claimed implicated him in the robbery of a gun store in Diana, Texas, shortly before Douglas's murder. Several guns were taken, including the .22 Colt Huntsman. The gun store owner did not see the perpetrators. (30.RR.31-33.) The prosecutor argued that Young committed the robbery based on perfunctory testimony by an unqualified fingerprint expert who trial counsel did not challenge.

a. Young was Implicated by a Fingerprint

The only physical evidence tying Young to the robbery was a single fingerprint, located on the top of an outside doorknob. Police investigator John Warren analyzed the fingerprint and compared it to Young. (30.RR.58-59.) Warren's only training as a latent fingerprint examiner consisted of attending a "40 hour school" held by a retired FBI instructor. (30.RR.55.) He testified that the doorknob fingerprint matched Young's right middle finger, based on "several different points of identification." (30.RR.60-61, 64.) Trial counsel did not cross-examine Warren, except to ask whether Young resisted his request to take additional fingerprints. Warren said Young did not. (30.RR.66.)

b. Trial Counsel Unreasonably Failed to Investigate the Validity of the State's Fingerprint Evidence

Trial counsel unreasonably failed to investigate the adequacy of Warren's training or analysis, or consult or hire their own fingerprint expert for that purpose. This failure contravened the applicable ABA guidelines' directive to "investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence." ABA Guidelines (2003), Guideline 10.7, at 85. The gun store robbery was aggravating because the prosecutor used it argue Young posed a future danger. (36.RR.93-94.) Any reasonable trial counsel would have at least consulted a fingerprint expert to determine whether there was any basis to impeach Warren.

c. Investigating the Fingerprint Evidence Would have Yielded Impeaching Evidence

Had trial counsel investigated, they would have largely discredited Warren's testimony. A sound fingerprint examination requires four steps: (1) analysis of the unknown fingerprint; (2) comparison of the unknown fingerprint against a known fingerprint; (3) evaluation of the results of the comparison; and (4) verification of the comparison by a second examiner. (Ex. 160, M. Marvin Decl., ¶ 5.) Matthew Marvin, a certified fingerprint examiner, states that Warren's testimony does not

even indicate whether these steps were performed, or that the results were verified by a second examiner—a critically important step. (*Id.*)

Even on its own terms, Warren's testimony was insufficient to demonstrate a match. Warren claimed he made a "match" based on eight points of comparison between Young's right middle fingerprint and the print from the store. (30.RR.63; Ex. 160, M. Marvin Decl., ¶ 6.) But he did not explain what features of the fingerprints he compared. Certain fingerprint features are not sufficiently distinctive to show a match, because they are common among individuals. (*Id.*) Though Warren stated that he found eight points of comparison, he did not specify whether the features on which he relied are common or not. Indeed, it is possible for there to be nine points of comparison between fingerprints—one more than Warren found—and still have the fingerprints be from different individuals. (*Id.*) Even assuming Young's fingerprint did match the one on the doorknob, no evidence showed when that print was deposited on the knob or whether it came from the break-in. (*Id.*, ¶ 7.)

Warren's credentials were also inadequate to meet professional standards. He stated only that he had attended a "40 hour school," but latent print examiners typically undego formal training that takes two years. (*Id.*, ¶ 8.) Though Warren said he is "certified," the minimal training he described is insufficient to qualify for

the only recognized certification for latent print examiners, the International Association for Identification, or IAI. (*Id.*) As of 2016, Warren was not listed as being a certified member of the IAI. (*Id.*) Trial counsel had Warren's limited CV and 40-hour certificate in their files, (Ex. 72, M. Warren CV and certificate; Ex. 151, M. Farrand Decl., ¶ 11 (trial counsel's file contained Exhibit 72)), but unreasonably failed to research the credentials' sufficiency or impeach Warren on that basis.

2. Failure to Investigate Alleged Assaults of TYC Guards

Trial counsel also unreasonably failed to investigate or rebut aggravating testimony by two TYC guards who claimed Young assaulted them. The two alleged assaults were the only documentation of attacks on prison guards in Young's TYC records. (34.RR.82-83). The guards' testimony that Young assaulted them was critical to the prosecution's claim that Young would pose a danger in prison if given life without parole. Trial counsel's failure to investigate the assaults forfeited testimony that would have exculpated Young in both.

a. The Garrett Gilliam Incident

Garrett Gilliam, a former TYC caseworker, testified for the prosecution that Young hit him while he was trying to break up a fight between Young and another juvenile ward in August 2000. (31.RR.261-62.) Gilliam testified that a female

TYC staff member put herself between Young and the other ward as Gilliam walked towards them to intervene. Then, Gilliam testified, all three people—Young, the other ward, and the TYC staff member—fell down to the ground together. After they landed, Gilliam testified, Young continued to punch the other ward even though the staff member was still between them. (*Id.*) Gilliam testified that as he tried to grab Young, Young looked at Gilliam over his shoulder, made eye contact with him, and hit him in the chin "very hard." (31.RR.262, 264.) Gilliam then tackled Young and "took him down." (31.RR.264.)

Reasonably competent trial counsel would have interviewed witnesses to the assault to determine whether Gilliam's account could be impeached. Trial counsel had a document identifying such a witness: Derrick Charles. An August 25, 2002 report of an internal TYC adjudication stated that Charles witnessed the event and testified at the TYC hearing that Young did not hit Gilliam. (Ex. 95, Allegations Found, Aug. 25, 2000.) Young was acquitted of the assault in the TYC adjudication. (*Id.*) Though trial counsel had this document in their file, they never interviewed Charles. (Ex. 150, D. Charles Decl., at 3; Ex. 151, M. Farrand Decl, ¶ 11 (trial counsel's file contained Exhibit 95)).

If interviewed and called at trial, Charles would have testified that Gilliam's account was false. Charles was housed with Young at TYC, and saw the incident.

(Ex. 150, D. Charles Decl., at 1.) According to Charles the altercation between Young and the other ward, named Demarcus, began when Demarcus came into Young's personal area, or "p.a." (*Id*.) Young asked Demarcus to leave, and Demarcus swung a punch at Young. (*Id*.) Young ducked the punch, grabbed Demarcus, and both men fell to the ground with Young tucking his head in as if to avoid being hit. (*Id*.) A TYC employee named Ms. Parker broke up the fight. Gilliam then approached Young, grabbed him, and slammed him to the ground. (*Id*.) Charles would have said that Gilliam needlessly threw Young down, and that Young never hit Gilliam. (*Id.*)

Charles's account was credible. Indeed, Young was acquitted of the incident at the TYC hearing. (31.RR.276-77; *see also* Ex. 95, Allegations Found, Aug. 25, 2000.) Gilliam also admitted on cross-examination that his report of the incident did not include his claim that Young supposedly looked him in the eye and deliberately punched him in the face. (31.RR.275.) Charles's testimony would likely have convinced the jury to reject Gilliam's unsupported account.

b. The Jacqueline Timmons Incident

Trial counsel also unreasonably failed to investigate or rebut testimony about a second alleged assault by Young, on TYC guard Jacqueline Timmons. Timmons testified that she "received several blows from both Clint and [an]other youth" while she was trying to break up a fight between them. (31.RR.291-92.)

Charles also saw the Timmons incident. Though trial counsel had the Gilliam incident report showing Charles was in Young's same TYC group, they failed to interview him. (Ex. 151, M. Farrand Decl., ¶ 11 (trial counsel's file contained the Gilliam report); Ex. 150, D. Charles Decl., at 3 (trial counsel never spoke with him)). If interviewed and called at trial, Charles would have testified that Young and the other ward were fighting when Ms. Timmons arrived with a cup of coffee in her hand, grabbed Young by the shirt, and spilled her coffee all over him. Young screamed and yanked himself away. Young then ran towards the other ward, but was grabbed by Ms. Timmons and another guard and placed in handcuffs. Neither Young nor the other inmate hit Ms. Timmons. (*Id.* at 2-3.)

As with the Gilliam incident, Charles's testimony would have been supported by corroborating evidence. The incident report written by Timmons did not mention Young hitting her, as she claimed he did at trial. (Ex. 94, TYC Incident Report, Jan. 26, 2000.) But the jury never heard Charles's account.

3. Failure to Investigate, Rebut, or Object to Prejudicial Information in Young's County Jail Records

Trial counsel unreasonably failed to object to the prosecutor's admission of Young's Midland County Jail records on the basis of hearsay, the Confrontation Clause, or Texas Rule of Evidence 403, investigate the records' contents, or seek to redact prejudicial information from them. (30.RR.179.) The records contained a false and aggravating report that Young was heard talking on the telephone, saying "I got a list of all my jurors names, addresses, and telephone number[s]" "Let's see if I can get a hung jury." (Ex. 71, Midland Jail File, Jan. 10, 2003 Report.) The jail official who wrote the report did not testify at trial.

Reasonable trial counsel would have objected on Confrontation Clause and hearsay grounds, and sought to redact this report under Rule of Evidence 403. Young's statement had little to no bearing on the issues in his trial, but extreme potential to prejudice jurors. A juror hearing that Young claimed to have his or her address, and expressed an intent to get a "hung jury," could not impartially decide Young's penalty because he or she would feel Young posed a threat to his or her safety.[31] Counsel's mistake thus deprived Young of his right to a fair and impartial jury. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984)

[31] There has never been any allegation that Young ever attempted to contact, let alone harm, any of the jurors.

("One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'"); *United States v. Blitch*, 622 F.3d 658, 665 (7th Cir. 2010) (defendant's right to a fair trial was violated when the trial judge failed to individually question jurors who discussed concerns that the defendant had their personal identifying information); *United States v. Simtob*, 485 F.3d 1058, 1063-65 (9th Cir. 2007) (evidentiary hearing was warranted on juror bias where one juror indicated that he felt "threatened" by the defendant's alleged "eye-balling" of him).

J. Trial Counsel Failed To Preserve Objections To The Court's Supplemental Jury Instruction

Trial counsel also unreasonably failed to preserve objections to the court's supplemental jury instruction regarding special issue number 2. During jury deliberations at the punishment phase, the jury sent out a note asking, "Regarding Issue No. 2, caused the death of deceased individuals, 'intended to kill the deceased individuals.' Question: Do you have to believe both or at least one." (36.RR.134-35.) The trial court told the jury, "If your consideration of Issue No. 2 on punishment is as to Paragraph 1 of the indictment, the death of two individuals is required to be found by the jury. If your consideration is as to the second

paragraph of the indictment, the death of an individual, Samuel Petrey, is required." (36.RR.135).

Trial and appellate counsel objected to the instruction on the basis that it lessened the prosecution's burden of proof, and generally violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article 10, sections 9, 10, and 19 of the Texas Constitution. (36.RR.136-37.) But trial counsel did not object on the basis that it improperly coerced the jury to answer the special issue "yes", that it failed to require all twelve jurors to answer "yes" to the second special issue, that it constituted an improper comment on the weight of the evidence by the trial court, or that it prevented the jury from considering circumstances of the offense that might have been considered mitigating. (*Id.*) Young's appellate counsel was present and made the objections to the instruction, but he, too, failed to assert these arguments. (*Id.*)

Texas law requires counsel to "stat[e] the specific ground of objection" in order "to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it." *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002). "[A]n objection to [a jury] charge which is too general to call the court's attention to the defect or omission and which does not point out where the charge did not correctly set forth the law presents nothing for review." *Brown v. State*,

716 S.W.2d 939, 943 (Tex. Crim. App. 1986). Texas courts apply this rule stringently, such as by holding a general complaint that a jury "charge failed to adequately apply the law to the facts" is too vague to preserve any issue. *Id*.

Young's counsel failed to appreciate or satisfy the level of specificity Texas law requires for objections. Though they generally objected that the charge lessened the jury's burden of proof and violated various constitutional amendments, they failed to explain how. Thus, when counsel tried to raise the omitted arguments on appeal, the CCA refused to consider them because "appellant's objections at trial do not comport with the claims he now raises." *Young v. State*, 2005 WL 2374669 at * 7 (Tex. Crim. App. Sept. 28, 2005). Counsel could not have had any reasonable tactical basis for not making these objections below. Indeed, they agreed in postconviction proceedings that they "weren't intending to waive anything at all." (3.RWR.83.)

Trial and appellate counsel's failures prejudiced Young. The trial judge's instructions are "necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (internal quotations and citation omitted). Without the supplemental instruction, the second special issue required the jury unanimously to find that Young caused, intended, or anticipated the deaths of both victims. The

instruction lessened that burden by permitting a "yes" answer when each juror simply believed that Young caused, intended, or anticipated the death of one of the victims, even if different jurors did not agree on which one. It also coercively suggested a "yes" answer to special issue number two, and improperly suggested that evidence that Young lacked intent that Petrey be killed was not mitigating, by saying that the deaths of both victims were "required to be found."

K. Counsel's Errors Were Cumulatively Prejudicial To Punishment

Had trial counsel raised proper objections, diligently investigated and presented Young's history of abuse and trauma, challenged the state's aggravating evidence, and presented available exculpatory evidence, the jury would have received a completely different picture of Young's character, future dangerousness, and ability to live a peaceful life in prison. Instead of a remorseless "serial killer," the jury would have understood Young as a victim of lifelong trauma, forced to adopt an aggressive persona to survive violent surroundings, who could be successfully treated.

More than a reasonable probability indicates at least one juror would have voted against death had it heard this presentation. Even on the existing record, the jury struggled over the proper punishment, deliberating for over eleven hours and sending out notes asking about Young's medication in jail and whether it was

required to find he killed or intended to kill one or both victims. (36.RR.134, 139; 37.RR.5, 27.) Evidence of Young's lifelong struggles with abuse and trauma, and rebuttals of the state's future dangerousness evidence, would almost certainly have tipped at least one juror's decision in Young's favor.

The state's punishment evidence fell into three categories: (1) aggravating evidence of Young's alleged prior crimes; (2) psychological testimony depicting Young as inexplicably aggressive, calculating, and remorseless; and (3) testimony by Young's former teachers and correctional officials that Young was aggressive and assaultive as a child and teenager. A thorough investigation would have rebutted each category, and significantly humanized Young.

1. A Proper Investigation Would have Eliminated the State's Inflammatory "Serial Killer" References

Simply objecting to the prosecution's pervasive use of the phrase "serial killer" would have dramatically improved the tone of the proceeding. Absent that inflammatory mantra, the jury would have been better able to consider evidence that Young did not fit the stereotype of an evil psychopath the state tried to invoke. Dr. Mathew testified that Young suffered from drug-induced hallucinations at the time of the crimes. (34.RR.200-02, 226, 235-36). Young's other criminal acts were also inconsistent with a "serial killer": burglary and theft, a home invasion

robbery of a drug dealer, and asserted minor juvenile offenses like stealing a flute and bringing an inoperative antique gun to school. (*See, e.g.*, 31.RR.216, 237-38, 254-55.) Four TYC staff members described Young as a well-behaved and respectful inmate. (35.RR.9-22 (Drucilla Hamilton, Rachel Polk); 35.RR.32-38 (Sherone Morris); 35.RR.43-54 (Homerica McRae).) Others described Young as a kind, reliable, and supportive friend. (33.RR.223-232; 33.RR.232-241) (Patricia and Shauntel Feela). Evidence also showed Young's disciplinary incidents at TYC decreased dramatically when doctors finally found a combination of medications that worked for him. (33.RR.143 (Carla Sexton); 34.RR.70-71, 73 (Daneen Milam, Ph.D.).) All this evidence would have had greater impact absent the state's continual references to "serial killers," display of the "Serial Killer" book, and improper display of graphic crime scene photographs to the jury on the DA's counsel table. (Ex. 178, R. Bearden Decl., ¶ 7.)

2. Proper Investigation Would have Shown Young Could be a Productive and Non-Violent Inmate in Prison

A proper investigation would also have blunted the state's future dangerousness evidence by showing Young did not assault the two TYC guards who testified—Jacqueline Timmons and Garret Gilliam—and did not rob the gun store. The two alleged assaults were the only times Young was ever alleged to

have attacked prison personnel at all. (34.RR.82-83)(Daneen Milam). And the gun store robbery was the only evidence that Young was willing to steal firearms—an argument the prosecutor emphasized in closing. (36.RR.94.) Without these incidents, the only violent acts about which the jury would have heard would have been Young's participation in robbing a drug dealer, and his assault of a fellow juvenile ward at the Waco center during a dormitory scuffle.[32] Those incidents were both already mitigated: the drug dealer told police he did not see Young with a gun, and only reported being threatened by the other perpetrator, (30.RR.80-84), and the victim of the Waco Center assault testified that the incident was "no big deal." (31.RR.23-26.)

3. Investigation of Young's Abusive Childhood Would have Shown his Aggression Resulted from Trauma

Evidence that Young suffered trauma from his stepfather's brutal beatings and the attacks at TYC would have further humanized him. One of the prosecution's main arguments to the jury was that Young had no "explanation" for his aggression, and simply chose to hurt others "to suit his needs." (36.RR.93.) Evidence that Young had PTSD from abuse and trauma would have explained his juvenile aggression as a response. PTSD is also inherently more mitigating than

[32] Though the state also presented evidence that Young participated in robbing a Dairy Queen, that incident did not involve violence but simply a coordinated effort with a store employee to remove money from the store safe after hours. (30.RR.181-85.)

the defense Young's counsel did present—that Young suffered from Attention Deficit Hyperactivity Disorder ("ADHD")—because PTSD results from victimization and hardship. By contrast, trial counsel presented Young's ADHD as simply an inherent defect in him, without any apparent cause or link to Young's juvenile aggression. The prosecutor seized on this lack of connection at trial, calling ADHD an "excuse." (36.RR.98.)

Evidence of trauma would have caused the defense's trial experts to diagnose him with PTSD or another mitigating trauma-related impairment. Dr. Daneen Milam, the defense neuropsychologist who testified at trial, states that such information would have prompted her to explore whether Young suffered from PTSD. At a 2006 postconviction hearing, Dr. Milam testified that "[i]f a child is physically abused, they become very angry and they act out against the world and they even model the behavior:" exactly the type of behavior Young's early teachers described. (2.RWR.145-46.) In a 2005 post-trial declaration, Dr. Milam stated that PTSD commonly results from "violent personal assaults," that she would have investigated a PTSD diagnosis if she had known Young suffered "chronic victimization" during childhood, and that Young had three factors in his life "that increase the detrimental effects of PTSD:" ADHD, "early age onset of trauma, and a lack of a functional support system." (Ex. 162, D. Milam Decl.,

April 21, 2005, at 2.) Indeed, Young's trauma shows that he meets nine out of ten risk factors, or "adverse childhood experiences," that increase the risk of psychological difficulties. (Ex. 93, S. Gold, Ph.D. Decl., at 12-14.)

Young's trauma history would also have shown that his aggression resulted at least partly from the medications he was given. The stimulants Young was prescribed for ADHD are known to increase aggression in individuals—especially those with a history of childhood trauma like Young's. (*See* Ex. 177, P. Stewart, M.D. Decl., ¶ 20.) Indeed, FDA literature states that Ritalin, which Young was prescribed throughout elementary school, is contraindicated for sufferers of "marked anxiety, tension, and agitation," because it "may aggravate those symptoms," and that it may increase "[a]ggressive behavior or hostility . . . in children and adolescents with ADHD." (*Id.*; FDA guide to Ritalin, *available at* https://www.accessdata.fda.gov/drugsatfda_docs/label/2013/010187s077lbl.pdf, last visited August 10, 2017.) Adderall and Wellbutrin, which Young was also prescribed, are also stimulants with similar effects. (Ex. 177, P. Stewart, M.D. Decl., ¶ 20.) Young's use of stimulants also made him more vulnerable to methamphetamine (another stimulant) when he was released from TYC, as he sought to self-medicate with a substance similar to what he was used to. (Ex. 93, S. Gold, Ph.D. Decl., at 16-17; Ex. 177, P. Stewart, M.D. Decl., ¶ 21.)

Dr. Steven Gold, a licensed psychologist, recently interviewed Young for 7 ½ hours and reviewed extensive information about Young's life. (Ex. 93, S. Gold, Ph.D. Decl. at 1.) Based on the interview and records, he concluded that Young satisfied all of the criteria for PTSD set forth in the DSM IV-TR. (*Id.* at 16.) Young's PTSD coexisted with his ADHD, causing "a tendency toward intense emotionality, impulsive behavior, and a lack of focus that in PTSD can extend in instances of high arousal to black-out states." (*Id.* at 17.) The similarity of the two disorders also helps to explain why Young's trial experts failed to recognize his PTSD in the absence of evidence that he suffered abuse from his stepfather and attacks at TYC. (*Id*.)

a. <u>Abusive and Neglectful Home Environment</u>

Dr. Gold states that Young's childhood was "marked by repeated moves, . . . consequent repeated changes in schools, chaotic interpersonal situations including violence toward himself and his siblings in both [his parents'] households, and a prevailing atmosphere of maltreatment and neglect." (*Id.* at 3.) Young "was physically abused as a child by both his biological father Billy and his step-father Quentin." (*Id*.) His biological father verbally and physically abused Young and his mother, Carla, until Carla and Billy divorced when Young was approximately

nine months old. (*Id.* at 2-4.) Carla married Sexton when Young was three years old. (*Id.* at 3.)

Sexton was little better than Billy had been. He "had a drinking problem and was physically abusive toward Clint," as well as to Carla. (*Id.* at 4.) He beat Young on a regular basis, pulled his ear and hair, "discipline[d]" Young with paddles and belts until Young bled, and—on at least one occasion—kicked Young repeatedly with steel-toed boots. (Ex. 155, B. Harvey Decl., ¶¶ 4-6.) He also beat Carla, leaving terrible bruises she documented in photographs in case she had to escape. (*Id.*, ¶ 9.) He called Young a "pussy," "dumb" and "stupid," when he was just six or seven years old, told him to "go cry on your mom's tit," and once broke a broomstick over his head. (*Id*., ¶¶ 4-8; Ex. 93, S. Gold, Ph.D. Decl., at 4, 13.) He constantly called Young a "sissy" and ridiculed him for supposedly being weak. (Ex. 93, S. Gold, Ph.D. Decl., at 15.) Young recalls that Sexton "just hated me for [being] me, "tr[ied] to emasculate me and call me a titty baby," made sexual comments about Young's mother, and generally made Young fear him. (*Id*.) Sexton also terrorized the family with drunken rages, throwing furniture around the house and breaking dishes and tables. (Ex. 155, B. Harvey Decl., ¶ 10.)

Sexton's criticism of Young as a "sissy," "weak," and a "pretty boy" caused Young to believe "that he was being targeted for violence" and "that he was

unmanly, vulnerable, and therefore an easy target for victimization." (Ex. 93, S. Gold, Ph.D. Decl., at 15.) Young's insecurities were worsened by Billy's neglect: Young looked forward to spending time with his father, but Billy would fail to show up. (*Id.*) As Young grew older, it became clear to him that his mother chose Sexton over him, and "as [Sexton] started becoming increasingly physically abusive toward [Young's] mother, [Young] became increasingly rebellious" in an attempt to gain some measure of control. (*Id*. at 4.)

Young's abusive home environment went largely unnoticed by adults who could have intervened. "[T]eachers, mental health professionals, and authority figures . . . were largely unaware of the violent and neglectful conditions in which he was living." (*Id.* at 16.) Young's early teachers simply blamed him for his behavior and used corporal punishment and isolation as a response. His first grade teacher would "put him in the corner to do his work and . . . at a table by himself in the cafeteria." (31.RR.113.) In kindergarten, Young received "[a] whole lot" of corporal punishment at school, and almost failed. (31.RR.117-18.)

b. <u>Abuse and Mismedication with ADHD Drugs</u>

Young also suffered sexual abuse from various adults, who were able to victimize him because of his parents' neglect. When Young was almost eleven, his mother admitted him to the Triangle Pines Therapeutic Group home. (33.RR.105-

06.) Young received essentially no treatment there; instead, he was expelled for the same hyperactivity and impulsivity for which he had been admitted. (Ex. 93, S. Gold., Ph.D. Decl., at 5.) He was tormented by the son of an employee, who turned against Young because of Young's conflict with her son and frequently tried to lock Young in his room. (*Id*.) At one point, an adult repeatedly fondled Young and another juvenile ward, and grabbed Young's crotch, during a multi-day outing to a trade show. (*Id*.)

Young was molested again at age 13, while living briefly with his biological father in North Carolina. With his father often absent, Young was left vulnerable to predators. A man named Bob began taking Young camping and giving him positive attention. (*Id.* at 6.) Bob showed Young pornographic pictures at his house and gave Young Nyquil until Young fell asleep. (*Id*.) Young awoke to find Bob performing oral sex on him. (*Id.*) Young pushed and kicked Bob away, only to have Bob confront him with a knife. (*Id.*)

Young also suffered violent assaults at youth correctional facilities. At age fourteen, he was placed in a juvenile detention center where boys, mostly gang members, fought to establish dominance. (*Id.* at 7.) The staff did nothing to protect the children. They simply watched the fights without intervening, leaving

the wards unprotected to the extent that Young made a shank to protect himself. (*Id.* at 7-8.)

In January 1998 Young was sent to the Waco Center for Youth. (*Id.* at 8.) There he was mismedicated with the ADHD medication Adderall, a stimulant that—because of Young's undiagnosed PTSD and trauma impairments—only made him more aggressive and unable to control his anger. (32.RR.44-45.) Young spun out of control, starting fights and "blacking out" when he became angry. (Ex. 93, S. Gold, Ph.D. Decl., at 8.) He experienced this as "tunnel vision," saying "the next thing I remember I'm standing over the other person hitting him," and that when a staff member would restrain him "it goes black again and the next thing I remember I'm back in my room." (*Id.*) Young was ultimately expelled after an altercation with a roommate. (31.RR.12-14.)

c. <u>Attacks at the Texas Youth Commission</u>

After the Waco Center Young was sent to TYC, where he spent two and a half years in an intensely violent environment.

Young's first experience with TYC was at the Marlin TYC Unit, where Young recalls "intense physical abuse of inmates by staff." (Ex. 93, S. Gold, Ph.D. Decl., at 9.) In March 2007, the Marlin Unit's Superintendent was arrested and charged with lying to investigators when he denied allegations of sexual abuse at

the facility. (*See* Ex. 78, KBTX-TV ("Affidavit: Marlin TYC Superintendent Lied to Investigators".) That same month, the Texas Rangers began a large-scale investigation of over 750 complaints of sexual misconduct against correctional officers and other TYC employees, at all 13 TYC prisons, since January 2000. (*See* Ex. 80, Doug J. Swanson, TYC Sex Allegations Exceed 750, The Dallas Morning News, March 6, 2007.) Also in 2007, the Governor's Office conducted a management overhaul of TYC prisons after it was reported that TYC officials had ignored signs of sexual abuse of inmates for over a year at the West Texas State School. (*Id*.) After the Marlin Unit, Young was assigned to the Jefferson County State School, which is now called the Al Price Juvenile Corrections Facility. He remained there until February 22, 2001.

Young described TYC as a "gladiator farm" that "taught me that violence was a form of communication." (Ex. 93, S. Gold, Ph.D. Decl., at 9.) Instead of protecting the children, TYC staff simply watched them fight and even bet on which boy would win. (*Id*. at 9-10.) Fourteen year-old Young was incarcerated with 19-year olds facing life sentences for murder. (*Id.* at 9.) As one of only a few white inmates, who did not look "tough," he became a target for attacks. (*Id*.) Yet again, Young was forced to gain respect by fighting.

Young was released from TYC in February 2001, at age seventeen, with none of the necessary skills for adult life. "[A]s a youth who entered a prison-type environment without a mature identity or the ability to make sound independent judgments, [Young] lacked the internal structure to revert to or rely upon when the controls of the institution were removed." (Ex. 158, T. Knox Decl., at 39-40.) Young tried to attend junior college, but had to drop out because his TYC experiences and PTSD had made him anxious around large groups of people. (Ex. 93, S. Gold, Ph.D. Decl., at 7.) After unsuccessful stints as a dishwasher and carpet layer, Young began spending time with his brother Dano at the Fisherman's Motel, where methamphetamine abuse was rampant. (*Id.* at 10-11; 33.RR.127-28.) It was during this time that Young met Ray, Page, and McCoy.

d. Young's Treatability

Young's PTSD would have explained not only his aggression, but also why he failed to respond the ADHD medications he was prescribed, and shown he could be "fixed" with proper treatment. The jury apparently found that issue significant, as shown by its note requesting evidence of what ADHD medication Young took at the Midland Jail. (37.RR.5.) ADHD medication often has the opposite of its intended effect in PTSD sufferers like Young, by "intensif[ying their] PTSD symptoms." (Ex. 93, S. Gold, Ph.D. Decl., at 17; *see also* Ex. 177, P.

Stewart, M.D. Decl., ¶¶ 19-20.) Trauma sufferers like Young instead benefit from behavior therapy that teaches strategies for coping with impulsivity. (*Id*.) Indeed, numerous highly-effective treatments existed at the time of Young's trial for sufferers of trauma from childhood abuse. (Ex. 177, P. Stewart, M.D. Decl., ¶ 22.) Evidence that Young was not correctly treated in childhood because his trauma history was unknown, but that his condition was treatable, would have shown the jury he could be nonviolent if sentenced to life in prison.

e. Young's Flight from Police

Young's PTSD would also have mitigated his flight from police after Petrey's murder. At trial, the prosecution presented a videotape and extensive testimony about Young leading police in a high-speed chase in Petrey's truck down the oncoming lane of freeway traffic. (*See* 24.RR.133-198.) This incident had a powerful effect on jurors, who gasped audibly in the courtroom upon seeing the tape. (Ex. 174, P. Williams Decl., Aug. 25, 2017, ¶ 2.) Had trial counsel investigated the impact of trauma on Young's functioning, an expert could have testified that Young's flight was motivated not by consciousness of guilt but by his fear of losing his girlfriend, Amber Lynch—a fear intensified by his history of trauma. (Ex. 93, S. Gold, Ph.D. Decl., at 17-18.) Had the jury heard this

information, it would have been able to see Young's actions not as calculated, remorseless, and threatening, but as a survival response of a vulnerable teenager.

CLAIM 8: THE COMBINED EFFECT OF ALL THE ERRORS RENDERED YOUNG'S GUILT/INNOCENCE AND PUNISHMENT TRIALS FUNDAMENTALLY UNFAIR.

Even when no single constitutional violation is sufficiently prejudicial to warrant relief, due process requires a new trial if the errors, in combination, had a "substantial and injurious effect" on the verdict. *Fry v. Pliler*, 551 U.S. 112, 121 (2007); *see also Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). Here, a confluence of errors destroyed the fairness of Young's trial. Page falsely inculpated Young to escape a death sentence and secure a favorable plea deal, and neither side meaningfully challenged his story. (*See* Claims 1-3.) Though Page failed a polygraph test and contradicted his own testimony and the physical evidence, the state accepted his account and told Page it would "help him" if he helped convict Young. (*See* Claim 5.) The state bolstered Page's false story by plying other witnesses with secret threats, promises of leniency or a "good word" with prison officials. (*Id.*) Evidence that could have tested the credibility of Page's story—GSR and microanalysis of the gloves' fibers—was never pursued. (*See* Section II(H) and Claim 7(D).)

The evidence regarding Douglas was equally skewed. The prosecution withheld Counce's notes, which would have explained the shell casings in Douglas's Grand Prix, and trial counsel failed to present or explain ballistics evidence that would have refuted the accomplices' claim that Young shot Douglas inside the car. (*See* Claims 6(A); 7(B).) Law enforcement released Douglas's car before Young's attorneys could examine it, threw away vacuumings from inside the car, and presented false testimony that a dashboard hole was a cigarette burn instead of a bullet hole. (*See* Claim 4.)

The punishment phase trial was no better. Trial counsel failed to investigate or present Young's abusive childhood, permitting the prosecution to twist Young into a caricature of a "serial killer." Though the jury heard that Young's father beat him a few times, it never learned about the extensive, chronic abuse Young suffered from his stepfather, the neglect Young experienced at home, his stepfather's continual attacks on Young's adequacy and masculinity, the sexual molestation Young experienced in his parents' absence, or the trauma Young sustained during his violent years at TYC. (*See* Claim 7(G).) False evidence that Young supposedly attacked prison guards, and robbed a gun store, was simply never challenged. (*See* Claim 7(I).) These errors combined into a false and damning portrait that destroyed the fairness of Young's trial.

IV. BASIS FOR AUTHORIZATION

A court may not consider the merits of a subsequent application for a writ of habeas corpus unless the application sets forth specific facts showing that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Tex. Code Crim. Pro., Art. 11.071, § 5(a).

Authorization is proper under section 5(a)(1) if the applicant shows that (1) the factual or legal basis for the claims was unavailable as to all the applicant's previous applications; and (2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence. *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Authorization is proper under section 5(a)(3) if the applicant shows by clear and convincing evidence a constitutional violation but for which no

rational juror would have answered at least one of the statutory special punishment issues in the State's favor. *Ex parte Blue*, 230 S.W. 3d 151, 161 (Tex. Crim. App. 2007).

A. CLAIM 1: THE STATE VIOLATED YOUNG'S RIGHT TO DUE PROCESS BY UNKNOWINGLY INTRODUCING FALSE OR MISLEADING TESTIMONY AGAINST HIM AT TRIAL. *EX PARTE CHABOT*, 300 S.W. 3D 768, 771 (TEX. CRIM. APP. 2009).

Claim One alleges that the State violated Young's rights to due process and a fair trial by presenting the false and misleading testimony of David Page. This claim could not have been presented previously in a timely initial application, or in a previously considered application, because its legal basis was unavailable on March 25, 2009, when Young filed his previous application for a writ of habeas corpus under Article 11.071, § 5(a)(1) of the Texas Code of Criminal Procedure.

The CCA first recognized the existence of a claim based on unknowing presentation of false testimony in *Chabot*, 300 S.W.3d 768, more than eight months after Young filed his previous state habeas application in March 2009. In 2012, the CCA recognized *Chabot*'s unknowing presentation of false testimony claim as resting on a previously unavailable legal basis, permitting merits review under section 5 of Article 11.071. *Chavez*, 371 S.W.3d at 207-08. "[The CCA's] recognition of a due-process violation stemming from the State's unknowing use of

false testimony[] was not firmly established by [the TCCA] until its 2009 opinion in *Ex parte Chabot*, 300 S.W. 3d 768, 771 (Tex. Crim. App. 2009)." *Ex parte De La Cruz*, 466 S.W.3d 855, 865 (Tex. Crim. App. 2015). Before then, that claim's legal basis "was not recognized by [and] could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of [Texas]." Tex. Code Crim. Proc. Art. 11.071, § 5(e); *Chavez*, 371 S.W.3d at 207-08.

B. CLAIM 2: YOUNG IS ENTITLED TO RELIEF UNDER ARTICLE 11.073 OF THE TEXAS CODE OF CRIMINAL PROCEDURE BECAUSE PREVIOUSLY UNAVAILABLE SCIENTIFIC EVIDENCE SHOWS HE DID NOT CAUSE THE DEATH OF SAMUEL PETREY.

Claim Two alleges that Young is entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure, because newly-available scientific evidence shows, by a preponderance of the evidence, that he did not cause the death of Samuel Petrey, a precondition of his liability for capital murder under the instructions given at his trial.

The legal basis for this claim was unavailable to Young on March 25, 2009, when Young filed his previous habeas corpus application, because Article 11.073 had not yet been passed. It took effect on September 1, 2013, giving rise to a new legal basis for claims based on new scientific evidence. *Ex parte Robbins*, 478

S.W.3d 678, 689-90 (Tex. Crim. App. 2014), rehearing denied January 27, 2016. "Prior to the enactment of article 11.073, newly available scientific evidence per se was generally not recognized as a basis for habeas corpus relief and could not have been reasonably formulated from a final decision of [the CCA] or the United States Supreme Court, unless it supported a claim of 'actual innocence' or 'false testimony.'" *Id.* at 689. Article 11.073 therefore "provides a new legal basis for habeas relief in the small number of cases where the applicant can show by the preponderance of the evidence that he or she would not have been convicted if the newly available scientific evidence had been presented at trial." *Id.* at 690.

C. CLAIM 3: YOUNG'S EXECUTION WOULD VIOLATE THE UNITED STATES CONSTITUTION BECAUSE HE IS INNOCENT OF CAPITAL MURDER. U.S. CONST. AM. VIII AND XIV; *HERRERA V. COLLINS*, 506 U.S. 390 (1993); *EX PARTE ELIZONDO*, 947 S.W.2D 202, 205 (TEX. CRIM. APP. 1996)

Claim Three alleges that Young's execution would violate the Eighth and Fourteenth Amendments because he is innocent of capital murder. Authorization of this claim is proper under Article 11.071, section 5(a)(2), because it shows that no juror could have found Young guilty of capital murder by a preponderance of the evidence, for the reasons explained in the claim.

Authorization is also proper under Article 11.071, section 5(a)(1), because this claim's factual basis was unavailable as of March 25, 2009, when Young filed

his previous application. Young's innocence claim rests on several categories of new evidence, each of which surfaced after March 25, 2009 and was not reasonably available before then. These include sworn statements of two witnesses, James Kemp and John Hutchinson, that Page confessed in 2010 to Petrey's shooting; newly-obtained scientific testing showing that Page's gloves contain GSR and do not exhibit fiber wear consistent with his trial testimony that they were his "gardening gloves;" and partial recantations of his trial testimony by Page in a 2015 declaration. Such evidence meets article 11.071's standard because it was not previously discoverable through due diligence. *See, e.g., Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (actual innocence claim satisfied section 11.07, § 4(a), because witness recantations and newly-disclosed police reports were previously unavailable).

1. The Sworn Statements of James Kemp and John Hutchinson Were Not Reasonably Discoverable Before March 25, 2009

Part of the factual basis for Young's innocence claim are the sworn statements of Kemp and Hutchinson that they heard Page confess in 2010 that he was the shooter of Samuel Petrey. Obviously, Page's 2010 confessions were not available in March 2009, because Page had not made them yet. Even in 2010, Young could not obtain Kemp's or Hutchinson's statements because the Midland

District Attorney's Office intimidated them into withholding the information as described in Claim 3, Subsection (C)(3), above.

2. The GSR on Page's Gloves Was Not Reasonably Discoverable Before March 25, 2009

Another part of the factual basis for Young's innocence claim is physical evidence obtained from GSR testing and microanalysis of Page's gloves, found at the scene of Petrey's murder. The gloves were not tested for GSR before trial, but only for lead. (Ex. 1, S. Palenik Decl., April 2, 2015, ¶¶ 34-35.) As explained above, the GSR testing performed in 2015 and 2017 was not reasonably available during Young's 2003 trial. Neither DPS nor Midland law enforcement had SEM testing capabilities, and there was no readily-available way to extract GSR particles from cloth so that they could be tested. (*See* Claim Two, section C.) The method of GSR sampling used in 2003, adhesive stubs, could not reliably be used to compare GSR concentrations on various areas of a glove. (Ex. 179, C. Palenik, Ph.D. Decl., ¶¶ 5(d), 10.)

Though SEM testing methods became available after trial, Young was not able to obtain access to the gloves for re-resting until 2015, when his counsel requested them from the Midland District Attorney's office based on the newly-enacted Article 11.073, which took effect on September 1, 2013. The District

Attorney's Office voluntarily released them and they were tested for GSR using SEM/EDS technology. (*See* Ex. 2, 2015 Microtrace Report; Ex. 151, M. Farrand Decl., ¶¶ 15-16.) Young could not have obtained the gloves as of March 25, 2009, when he filed his previous application, because as of that date there was no legal basis for habeas corpus relief based on new, previously-unavailable scientific evidence as Article 11.073 had not yet been passed. *Robbins*, 478 S.W.3d at 689-90. Young requested access to the gloves during his federal habeas proceedings, but the district court denied his request. *Young v. Stephens*, 2014 WL 509376 at *99 (Feb. 10, 2014) (denying relief and all other motions filed by petitioner).

3. The Lack of Fiber Wear on Page's Gloves Was Not Reasonably Discoverable Before March 25, 2009

Another part of the factual basis for Young's innocence claim is the lack of fiber wear or plant material on Page's gloves when they were microscopically examined in 2015. (*See* Ex. 2, 2015 Microtrace Report, at 1-3.) This evidence impeaches Page's trial testimony that the gloves were "gardening gloves," which he supposedly owned before the crimes and used for yard work. (*See* Claim One, section (B)(1).) This information could not have been obtained by reasonable diligence before the gloves were released to Young's counsel for examination before 2015.

4. Page's Recantations Were Not Reasonably Discoverable Before March 25, 2009

Finally, Young's innocence claim rests in part on recantations Page made of significant portions of his trial testimony in a declaration and videotaped interview he signed in 2015. (*See* Section II(B)(2).) Page did not make his 2015 recantations until after years after March 25, 2009, when Young filed his previous application, and were therefore not reasonably available to Young at that time. *See, e.g.*, *Miles*, 359 S.W.3d 647 (witness recantations and newly-disclosed police reports were previously unavailable for purposes of section 11.07, section 4(a)).

D. CLAIM 4: THE PROSECUTION UNCONSTITUTIONALLY FAILED TO PRESERVE KEY EVIDENCE

Claim Four satisfies § 5(a)(1), because the factual basis of this claim was unavailable in March 2009, when Young filed his previous writ application. Young was entitled to rely on the Midland District Attorney's express representation, before trial, that it would "be responsible for providing [the defense with] any *Brady* material that might develop," (Ex. 31, Letter, A. Schorre to P. Williams, Sept. 20, 2002), and was also entitled to assume that the District Attorney's office would not destroy evidence with apparent exculpatory value. *See, e.g.*, *Banks*, 540 U.S. at 693 (a habeas petitioner has cause for delaying presentation of a claim where the state knows the information, but "k[eeps] [it]

back," asserts before trial that it will reveal all *Brady* information, and continues to conceal the relevant information in state postconviction proceedings); *Starns v. Andrews*, 524 F.3d 612, 619 (5th Cir. 2008) (a habeas petitioner does not fail to exercise due diligence by not investigating a potential *Brady* claim where the state makes representations about the "content, scope, and relevance" of the withheld evidence that misleadingly suggest it is not helpful to the defense).

E. CLAIM 5: THE PROSECUTION WITHHELD NUMEROUS PIECES OF IMPEACHMENT AND EXCULPATORY EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*

Young's *Brady* claim about inducements to Patrick Brook, Joshua Tucker, David Page, and Dano Young should be authorized under Article 11.071, section 5(a)(1), because its factual basis could not have been discovered with reasonable diligence before Young filed his prior petition on March 25, 2009.

The claim is based on declarations by Brook, Tucker, Dano Young, and Page that Young's counsel obtained in 2014 and 2015, during the pendency of his federal habeas proceedings. Young had previously interviewed Brook, Tucker, and Dano Young, but they had not provided the information about prosecutorial inducements that is set forth in this petition. (*See* Claim 5, section (D).) As soon as Young learned the new evidence, he requested permission from the federal court to stay his federal case and present Texas courts with the new evidence, but the

court rejected his request. *Young v. Stephens*, Western District of Texas case no. 07-00002, docket nos. 138, 157 (Motion to Stay.)

Although Young raised a *Brady* claim in his previous successor petition, based on withheld inducements to Ray and Page, this claim is different. The prior claim rested on 2008 declarations by Mark Ray and Page's lawyer, Woody Leverett, regarding prosecutorial incentives to those witnesses. (*See Ex parte Clinton Lee Young*, Cause No. 27, 181, Exs. 111 and 117 to Subsequent Application for a Writ of Habeas Corpus.) Following an evidentiary hearing, the claim was rejected. Young is not attempting to relitigate that claim.

This claim relies on fundamentally different evidence regarding Brook, Tucker, and Dano Young, as well as newly-discovered evidence of inducements made by the Midland District Attorney's Office to Page. These facts were unavailable to Young at his prior writ proceeding because the prosecution failed to disclose the inducements to Brook, Tucker and Dano Young and Page affirmatively denied receiving any inducements in his 2010 hearing testimony. This new evidence—demonstrating that the prosecution withheld impeachment evidence pertaining not just to Ray and Page, but to three other critical witnesses—forms the basis of an entirely new *Brady* claim. *See, e.g.*, *Vasquez v. Hillery*, 474 U.S. 254 (1986) (a new claim arises when additional evidence does not merely

"supplement" the prior claim but "fundamentally alters" it); *Sorto v. Davis*, 859 F.3d 356, 362 (5th Cir. 2017) (new evidence fundamentally alters a claim when it makes the claim "significantly different and stronger"); *Smith v. Quarterman*, 515 F.3d 392 (5th Cir. 2008) (new evidence gives rise to a new claim when it "change[s] the focus of [the petitioner's] claim to substantive areas not previously raised."); *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003) (holding that the petitioner pled a new claim by submitting an affidavit and psychological report in support of his previously-asserted claim that trial counsel ineffectively failed to investigate his background and mental illness.)

F. CLAIM 6: THE PROSECUTION VIOLATED YOUNG'S DUE PROCESS RIGHTS BY FAILING TO DISCLOSE EXCULPATORY EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND*

Claim Six alleges that the prosecution unconstitutionally withheld exculpatory notes by its ballistics expert, Tim Counce, that would have shown that a hole in the dashboard of Doyle Douglas's car was an "impact area," or bullet hole. This claim was not reasonably discoverable before 2015, when DPS first produced the notes to Young's counsel in response to Young's counsel's request. Before that time, Young's counsel lacked notice of the need to request the notes, because trial counsel had specifically sent a request to DPS on September 18,

2002, for all exculpatory information under *Brady*, 373 U.S 83, but had not received the notes. (Ex. 30, Letter, P. Williams to Texas DPS, Sept. 18, 2002.) The District Attorney had specifically promised to "provid[e] [Young's defense with] any *Brady* material that might develop," without the need for defense counsel to request it from DPS. (Ex. 31, Letter, A. Schorre to P. Williams, Sept. 20, 2002.) Trial counsel also filed a motion in the trial court for "discovery and inspection," requesting, *inter alia*, "all reports and results of scientific tests, experiments, and comparisons, and all other reports of experts, including but not limited to reports pertaining to weapons, bullets, shots, waddings, cartridge cases, tool marks, and chemical analyses." (Ex. 36, Motion for Discovery, at 2.) The notes were not produced. (*See* Ex. 151, M. Farrand Decl., ¶ 10 (notes not in trial counsel's file.))

During state habeas corpus proceedings, the state continued to represent that it had provided all exculpatory information. Prosecutor Teresa Clingman testified at a 2006 writ hearing that Midland maintained an open file policy, "and within a few weeks of when the actual case was tried, we provided copies of almost every document we had to the defense." (3.RWR.94-95 (statement of Teresa Clingman).) Clingman further asserted that "not only did [the prosecution] have a complete open file policy, the entire time this case was pending, but they were

provided photographs and copies of almost as far as I can remember every record we had." (3.RWR.95.) Clingman did not mention Counce's notes.

Because the prosecution repeatedly claimed it had provided all exculpatory information, Young's counsel had no reason to request it. "A defendant "cannot be faulted for relying on [the state's] representation" "that it w[ill] disclose all *Brady* material." *Banks*, 540 U.S. at 693. Here, as in *Banks*, the state not only failed to disclose the exculpatory material in Counce's notes, but affirmatively presented contrary false testimony by Ann Hinkle that the hole was a cigarette burn, which the notes would have disproved by showing it was an "impact area." (*See* Claim 6.) "[T]he prosecution allowed [that] testimony to stand uncorrected," making it "appropriate for [Young] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Id.* at 694; *see also Starns*, 524 F.3d at 619 (a habeas petitioner cannot be faulted for not discovering a *Brady* claim when the state misleads the defense about the "content, scope, and relevance" of the withheld information).

G. CLAIM 7: YOUNG'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT/INNOCENCE AND PUNISHMENT PHASES OF HIS TRIAL

Young's March 2009 petition asserted several claims of ineffective assistance of trial counsel ("IATC"), which this Court did not authorize for

consideration under article 11.071, section 5. *See Ex parte Young*, 2009 WL 1546625 (Tex. Crim. App. June 3, 2009). Young recognizes that this claim is currently procedurally precluded under *Ex parte Graves*, 70 S.W. 3d 103 (Tex. Crim. App. 2002). But a new legal basis for those claims should now be found to exist, because of the Supreme Court's intervening decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911 (2013). Just as those decisions adopted an equitable exception to procedural default under federal law based on ineffective assistance of initial postconviction counsel, this Court should adopt a similar exception as a matter of Texas state law.

As explained below, Young's IATC claims would qualify under such an exception because of the extraordinary ineffectiveness of his initially-appointed state habeas attorney, Gary Taylor, who filed an abjectly meritless habeas petition for Young, that was based on false evidence and omitted potentially meritorious claims. Under *Martinez, Trevino*, Texas Code of Criminal Procedure article 11.071, section 2(a), and *Ex parte Medina*, 361 S.W. 3d 633 (Tex. Crim. App. 2011), Taylor's egregious incompetence should entitle Young to assert his current IATC claims in this petition. *See also Ex parte Medrano*, 2017 WL 554779, __ S.W.3d __ (Tex. Crim. App., Feb. 8, 2017) (new writ petition permitted after

initially-appointed writ counsel filed a deficient "bare bones" application that "did not sufficiently present Applicant's claims").

1. The Holdings of *Martinez* and *Trevino*

Martinez held that an attorney's ineffective assistance in initial state postconviction proceedings constitutes cause to excuse a procedural default of a "substantial" IATC claim, where state collateral review is a petitioner's first opportunity to raise that claim. The majority reasoned that "the advisability of the participation of counsel at [the initial state postconviction] stage—at least for claims that can be raised for the first time only at that stage—is as urgent as on direct appeal." *Ex parte Alvarez,* 468 S.W.3d 543 (Tex. Crim. App. 2015) (discussing the holding of *Martinez*). *Trevino* confirmed that *Martinez*'s rule applies in Texas. *Trevino,* 133 S. Ct. at 1918-19.

2. The CCA Should Adopt a Similar Exception as a Matter of Texas State Law

Under current Texas law, "[an] allegation [of deficient performance by prior habeas counsel] cannot fulfill the requirements of article 11.071 section 5 [to establish timeliness] for a subsequent writ." *Graves,* 70 S.W. 3d at 104-05. But just as the Supreme Court did in *Martinez* for purposes of federal law, the CCA should create an equitable exception to Texas's abuse of the writ rule permitting

habeas applicants who received ineffective assistance of counsel in their initial writ proceedings to assert substantial IATC claims in a subsequent application. Such a rule would preserve Texas courts' ability to adjudicate IATC claims on the merits and receive deference for those rulings in federal court under 28 U.S.C. § 2254(d). It would also recognize the critical importance of competent counsel in initial state habeas corpus proceedings, which are supposed to be habeas petitioners' "one full and fair opportunity to present all . . . claims in a single, comprehensive post-conviction writ of habeas corpus." *Graves*, 70 S.W. 3d at 117. Several judges of the CCA have recognized the benefits of this approach. *See, e.g., Ex parte Alvarez*, 468 S.W.3d 543, 551 (2015) (Yeary, Johnson, and Newell, J., concurring) (adopting a *Martinez*-like rule under Texas law would require federal courts to defer to Texas courts' merits rulings); *Ex parte McCarthy*, 2013 WL 3283148 at *7 (Tex. Crim. App. June 24, 2013) (Alcala & Johnson, J., dissenting) (reversing *Graves* is essential to prevent federal courts from "decid[ing] a vast number of ineffective-assistance claims de novo."); *Ex parte Ruiz*, 2016 WL 6609721 (Tex. Crim. App., Nov. 9, 2016) (Johnson, J., concurring) (competent counsel should be required because "[a]n egregiously deficient first writ deprives an applicant of the one full and fair hearing that the legislature envisioned."); *Ex parte Preyor*, 2017 WL 3379283 *6 (Tex. Crim. App. July 24, 2017) (Alcala, J, dissenting) (Article

11.071, section 5's text "indicates that the Legislature intended to provide for competent representation in an initial habeas application.'")

Even assuming this Court does not revisit *Graves*, the extraordinary inadequacy of Young's initial writ proceeding justifies an entirely new proceeding under *Medina*, 361 S.W. 3d 633, in which the CCA permitted the applicant to file a new writ application after concluding that his prior writ counsel's failure to plead facts that could entitle him to relief meant he never received a "proper 'application' for a writ of habeas corpus" at all.

3. Young Never Received a Proper State Writ Proceeding, Because his Initial Postconviction Counsel was Abysmally Ineffective

If there were ever a case where a new writ proceeding was justified, this is it. Young's attorney failed to conduct basic investigation, never spoke with Young's trial counsel or obtained their files, omitted meritorious claims Young specifically implored him to raise, raised frivolous claims relating to court fees, and delegated key tasks to a notoriously drug-addicted investigator who falsified declarations and bribed a witness with crack cocaine. The result was an abysmal and fraudulent petition comprised of "frivolous claims or claims lacking evidentiary support." *Ex parte Preyor*, 2017 WL 3379283 *6 (July 24, 2017) (Alcala, J., dissenting).

a. Taylor Knowingly Relies on a Drug-Addicted Investigator

Gary Taylor was appointed as Young's state postconviction counsel on April 16, 2003 and filed Young's application on April 22, 2005. (1.CWR.1; 3.CWR.346, 351-55.) After filing the petition, but before the evidentiary hearing, he withdrew as counsel and was replaced by attorney Ori White. (3.CWR.359-65). White attempted to add additional grounds to Young's habeas application, but the CCA dismissed them as an abuse of the writ. *Ex parte Young*, 2006 WL 3735395 (Tex. Crim. App. Dec. 20, 2006). Those claims were therefore defaulted.

Taylor's performance was shockingly abysmal. He failed to perform basic and critical tasks, like interviewing trial counsel and reviewing their files. Even the minimal investigation that was done was sloughed off by Taylor—with no supervision or oversight—onto a drug-addicted investigator, Lisa Milstein, so notoriously incompetent that other attorneys refused to employ her. Though Taylor's colleagues had warned him about Milstein's dysfunction for years, he ignored that information with disastrous consequences for Young's case.

(1) Taylor is repeatedly warned about Milstein

The complaints Taylor received about Milstein stretched back to the late 1990s, when death penalty activist Barbara Bacci warned Taylor that Milstein had

sent flirtatious letters to their mutual client, appeared ignorant about the death penalty, and was so easily upset that any attempts to focus her work would bring her to tears. (Ex. 112, B. Bacci Decl., ¶¶ 1-11.) Taylor did not respond. (*Id.*, ¶ 12.) Another time, Bacci told Taylor that Milstein had seemed unprepared while giving a presentation at an anti-death penalty conference. Taylor told Bacci she was "too hard on Ms. Milstein." (*Id.* ¶¶ 5-6, 10-12.)

In 2001, Taylor was warned about Milstein again when he worked with her on the case of Michael Rodriguez. Taylor presented evidence obtained by Milstein that Rodriguez had been sexually molested as a teenager—evidence Rodriguez contends Milstein fabricated. (Ex. 130, M. Rodriguez Decl., ¶¶ 2-6.) Rodriguez states that Milstein "encouraged me to come up with the [false] molestation story" in the spring and summer of 2001. (*Id.*, ¶¶ 5-6.) Taylor never questioned Rodriguez about it. (*Id.*, ¶ 7.)

Throughout 2002, Milstein continued to display alarming incompetence. In August of that year, attorney Bruce Anton was appointed as federal habeas corpus counsel to David Lynn Carpenter and consulted with Taylor. (Ex. 111, B. Anton Decl., ¶¶ 2-3.) Anton retained Milstein as his investigator, on Taylor's recommendation. (*Id.*, ¶ 3.) But he soon ceased working with Milstein because she failed to complete assignments or respond to phone calls. (*Id.*, ¶ 5.) Anton

later discovered "major inaccuracies" in several declarations Milstein had obtained for Taylor in state court, including one declaration the witness had never seen. (*Id.*, ¶ 7.)

In 2003, Taylor was warned again about Milstein by attorney Nicholas Trenticosta and his wife, attorney/mitigation specialist Susana Herrero, who worked with Milstein on the case of Walter Sorto. (Ex. 136, N. Trenticosta Decl., ¶¶ 1-2; Ex. 119, S. Herrero Decl., ¶¶ 1-2.) After talking with Milstein, Trenticosta concluded that she lacked knowledge about the case and was unprepared to develop mitigation. (Ex. 136, N. Trenticosta Decl., ¶¶ 3-4.) Milstein displayed bizarre behavior during an investigative trip to El Salvador: bursting into tears for no reason, detailing her personal problems to Herrero, and saying she was taking psychotropic drugs for anxiety and depression. (Ex. 119, S. Herrero Decl., ¶¶ 5-7.) Trenticosta reported his concerns about Milstein to Taylor's associate, attorney Gerald Bierbaum, who also knew Milstein. (Ex. 136, N. Trenticosta Decl., ¶¶ 5-6.) Taylor admitted in 2006 that "if there were issues that [Bierbaum] had . . . with [Milstein] . . . I would be aware of it" because he and Bierbaum "worked very closely together," and communicated several times a day. (Ex. 139, G. Taylor Depo. at 9.)

Taylor again ignored serious complaints about Milstein in the 2003 case of his client, Vaughn Ross. (Ex. 99, CCA Appointment of Taylor to Ross case; Ex. 134, V. Ross Decl., ¶ 2.) During 2003 interviews with Ross's family and friends, Milstein appeared drug-addled and bizarre. Her eyes were red, she was sniffling and jittery, and she asked unfocused questions. (Ex. 132, M. Ross Decl., at ¶¶ 3-4.) She spoke jarringly about her personal problems, and said she was a recovering alcoholic seeking medical help for depression and estranged from her mother. (Ex. 122, V. Martin Decl., ¶¶ 3-5.)

Milstein also pressured witnesses to give false information. She urged Ross's sister to say Ross was abusive to women, acting as if the sister was hiding information when she refused. (*Id.*, ¶ 8.) Milstein urged Ross's former girlfriend to say Ross had been violent towards her, even though the girlfriend insisted he had not, saying things like "you can do better than that" and asking the girlfriend to imagine a fabricated scenario where Ross cut her face and breasts with a knife. (Ex. 118, M. Green Decl., ¶¶2-11.) Milstein tried to get another of Ross's sisters to say he was violent with former girlfriends, appearing "shifty" as she urged the sister to say things that were not true. (Ex. 133, T. Ross Decl., ¶¶ 2-4.) The declaration Milstein submitted on behalf of that sister contained statements the sister had never made. (*Id*., ¶5.)

(2) Ross warns Taylor that Milstein is fabricating evidence and abusing drugs

In late 2004, Ross told Taylor that Milstein appeared to be fabricating information and abusing drugs. After reading the petition Taylor filed for him and speaking with the declarants, Ross wrote Taylor a letter saying, "[Milstein] misquoted and or exaggerated the things that were told to her." (Ex. 145, Letter, V. Ross to G. Taylor, Sept. 1, 2004.) In October 2004, Ross wrote Taylor another letter saying Milstein had appeared "under the influence of drugs," in a recent visit, with dilated eyes and a "visible sore on her face," seemed uninformed about the case, and lied to him about interviewing witnesses. (Ex. 145, Letter, V. Ross to G. Taylor, Oct. 26, 2004, at 1.) Milstein "could not keep her train of thought," scratched herself uncontrollably, fell asleep mid-sentence, "jump[ed] from one subject to the other" and "br[ought] up things that had no relevance to [Ross] or [his] case." (*Id.*) Ross reported that Milstein "could not tell me who all she spoke with or when and where she spoke with them" and that "when I questioned her about these things she accused me of calling her a liar, got loud making a scene and a plain fool of herself, while cursing me out." (*Id.* at 1-2.)

(3) Taylor ignores Ross's allegations

Taylor ignored Ross's allegations. Though he spoke with Milstein about Ross's letter, he did not ask her whether she was using drugs. (Ex. 135, G. Taylor Decl., ¶ 4.) Milstein shrugged off Ross's claims, saying Ross was upset during the visit because he did not like certain mitigation information she had uncovered about his mother. (*Id*.) Taylor accepted Milstein's explanation, dismissing Ross's reports of Milstein's dishonesty and drug-addled behavior. (*Id*.)

(4) Taylor's practice group fires Milstein

As 2004 wore on, Milstein spiraled downward. Taylor and Bierbaum noticed that she was failing to complete assignments or interviews for months at a time. According to Bierbaum, "it just wouldn't happen. I mean, three months later it still wouldn't happen." (Ex. 138, G. Bierbaum Depo., at 10.) By late November 2004, Taylor knew Milstein "was having some problems" and had consulted a psychologist. (Ex. 139, G. Taylor Depo. at 13-14.) But he turned a blind eye to her issues: he recalled that "when [Milstein] would start getting into that personal stuff, I tried my best to not be involved." (*Id.*)

By November 2004, Milstein's problems had become so serious that the other attorneys in Taylor's practice group decided they "weren't going to work with her anymore." (Ex. 138, G. Bierbaum Depo. at 10; *see also id.* at 12, 15-16.)

Taylor knew Milstein's problems stemmed from "more than" just having too much work. (Ex. 139, G. Taylor Depo. at 9-10.) She ceased paying her office rent and utility bills, lost her office space, and began suffering from what Bierbaum, Taylor, and the rest of the practice group thought were seizures and neurological problems. (Ex. 139, G. Taylor Depo. at 8-11; Ex. 138, Bierbaum Depo. at 15, 31.)

On November 13, 2004, Taylor filed a letter to the Court in Young's case saying that, "due to personal issues which have arisen for Ms. Milstein, I may be required to use different investigators for different parts of the investigation." (Ex. 103, Letter, G. Taylor to Judge Hyde.)[33] Though the deadline for Young's application was just four months away, Milstein had done almost no work on the case. Her billing records list just two meetings with the client, and less than two hours spent reviewing records and drafting a report and "investigation plan." (Ex. 143, Milstein billing records); Ex. 117, T. Francis Decl., ¶ 15; Ex. 135, G. Taylor Decl., ¶ 2). Taylor was "very concerned" that Milstein was not doing anything, but inexplicably did not replace her. (*Id*.)

[33] Though Taylor did seek help from investigators Tina Frances and Nancy Piette, they did only minimal work on the case. Billing records list Francis only as interviewing one witness and reviewing some case materials. (Ex. 144, T. Francis Billing Records.) Piette describes her duties on Young's case as interviewing jurors, collecting CPS records, and reviewing the DA's case file. (Ex. 128, N. Piette Decl., ¶¶ 8-9.)

(5) Taylor continues his reliance on Milstein

Between November 2004 and April 2005, when he filed Young's petition, Taylor relied on Milstein even as she continued to do nothing. Though he lacked enough confidence in Milstein to give her new work, he continued "pushing her" to come up with a mitigation strategy for Young's case. (Ex. 139, G. Taylor Depo, at 9.) Taylor did so because he lacked any ideas of his own: he "did not know what mitigation evidence I was going to present if Milstein did not come up with something." (Ex. 135, G. Taylor Decl., ¶ 2.)

(6) Milstein conducts interviews in Young's case while spiraling out of control

As the application deadline drew near, Milstein fabricated evidence out of desperation. She did not even "beg[i]n conducting mitigation interviews" until March 2005, the month before the application was filed. (Ex. 135, G. Taylor Decl., ¶ 2.) Investigator Tena Francis, who did a small amount of work on Young's case, recalls Milstein working on the case for only a "couple of weeks." (Ex. 117, T. Francis Decl., ¶ 15.) Every affidavit Milstein obtained was signed within days of the April 22, 2005 filing. (1.CWR.127-155) (affidavits).

During the couple of weeks she worked on Young's case, Milstein acted erratic and out of control. While interviewing witnesses in East Texas, Milstein

called investigator Nancy Piette in distress, sounding "upset and crazy." (Ex. 128, N. Piette Decl., ¶ 10-11.) Milstein said she was in East Texas working on Young's case, was lost, and had forgotten her psychiatric medication in Houston. (*Id*., ¶ 10.) Piette thought Milstein was "unraveling at the seams." (*Id*.) Piette called Taylor and left him a voice mail message reporting that Milstein seemed to be "having a nervous breakdown." (*Id.*, ¶ 12.) Taylor never responded. (*Id.*)

b. Taylor's Reliance on Milstein was Clearly Deficient

Taylor's continued reliance on Milstein in Young's case was deficient by any measure. The governing ABA Guidelines required capital post-conviction counsel to "continue an aggressive investigation of all aspects of the case." ABA Guidelines (2003), Guideline 10.15.1(E)(4)(2003). Taylor conducted no semblance of a thorough, or even adequate, investigation. Instead of jettisoning Milstein, as other attorneys were doing, Taylor delegated core tasks to her that he should have done himself, such as identifying issues for investigation, on the basis that she "ha[d]. . . been to the same trainings that I ha[d]." (Ex. 139, G. Taylor Depo., at 35.) But no reasonable attorney would have relied on Milstein for anything as the complaints about her performance mounted and she failed to complete tasks.

c. Taylor's Failure to Interview Trial Counsel or Review their Files was Deficient

ABA Guidelines required postconviction counsel, "at minimum," to "interview[] prior counsel and members of the defense team and examin[e] the files of prior counsel." ABA Guidelines (2003), Guideline 10.7(B)(1). Taylor did none of this. Trial counsel Ian Cantacuzene testified in 2006 that "[Taylor and Milstein] never talked to me at all, which I thought was shocking and inappropriate," even when Cantacuzene "called [Taylor's] office[]" and offered to "fly down there." (2.RWR.201-02.) Neither Taylor nor any of his agents ever requested trial counsel's files, let alone reviewed them. (3.RWR.68-69.)

d. Taylor Filed an Abjectly Deficient State Petition

The result of Taylor's negligence was a sham habeas corpus petition, based largely on false evidence scrounged up at the last minute by Milstein, including by bribing a witness with crack cocaine. The petition also omitted claims Young specifically asked Taylor to raise, in defiance of the ABA Guidelines' requirement that counsel "seek to litigate all [arguably meritorious] issues," and "preserve them for subsequent review." ABA Guidelines (2003), Guideline 10.15.1(C) ("Duties of Post-Conviction Counsel"); *see also* Guidelines and Standards for Texas Capital Counsel, Guideline 11.2, "The Duty to Assert Legal Claims."

(1) Witnesses testify that Milstein fabricated their declarations, and bribed one witness with drugs

The main claim Taylor raised in Young's state Application was that trial counsel failed to investigate or present evidence that Young had supposedly been sexually abused by his father.[34] The evidence to support this claim was collected solely by Milstein.

As the hearing progressed, it became clear that much of the evidence Milstein had obtained was false. Amber Lynch Harrison, Young's former girlfriend, testified that she had signed her declaration after Milstein faxed it to her, but did not read it because the print was blurry and illegible. (2.RWR.176-77.)[35] When shown a legible copy at the hearing, Amber testified that about half of it was untrue, including statements that her father did not object to her relationship with Young, that Douglas was rumored to be a police informant, the type of clothing Young was wearing when she saw him in Midland, that her sister refused to speak with the defense investigator, that the District Attorney told her not to speak with Young or his lawyers at trial, that she had previously made exculpatory statements

[34] Neither Taylor nor Milstein discussed the molestation claim with either of Young's trial counsel. (2.RWR.201-02).

[35] The print on Lynch's affidavit is indeed very blurry. (*See* 1.CWR.150 (Statement by Amber Lynch, dated April 2005); *see also* 2.RWR.177 ("[A]ttached is a signature that is on some very blurry paper."))

about Young to the police and District Attorney, and that the District Attorney was not interested in hearing anything good about Young. (2.RWR.182-93.)

Young's brother, Dano, testified that Milstein had bribed him with crack cocaine into signing a false affidavit. Though Dano's affidavit said that his father, Billy, had sexually molested him many times when he was a child, Dano testified that this was false. (Ex. 137, D. Young affidavit, April 2005; 3.RWR.130, 149-50; 4.RWR.115, 126; 5.RWR.117-18.) Dano testified that he signed the affidavit after spending two days smoking crack cocaine with Milstein, that Milstein bought him hundreds of dollars' worth of drugs at a crack house and offered to have sex with Dano at her motel room, that Dano was high when he signed his affidavit and that—at Milstein's prompting—he falsely stated that his father had molested him so that Milstein would continue to buy him drugs. (3.RWR.125-43, 148-55, 164-66; 5.RWR.118-33.) Dano testified that Milstein asked him if he wanted to return to the crack house, then begged him to tell her Young was molested by his father until Dano falsely did. (3.RWR.148-49; 5.RWR.123-26.)

Dano and his wife, Crystal Deshotel, also testified that Milstein manipulated their three-year-old son, Dylan Keen, into falsely alleging that he had been molested by Billy Young. (3.RWR.143, 159-60.) Milstein interviewed little Dylan alone, refusing to let Dano or Crystal be present. (3.RWR.143; 5.RWR.76,

135.) After the interview, Milstein reported that Dylan had said Billy had anally abused him, and played a tape recording of Dylan's interview for Dano and Crystal. (5.RWR.77.) On the tape, Dylan did not describe being molested by Billy Young in narrative form, but simply gave "yes" and "no" answers to Milstein's questions. (3.RWR.143; 5.RWR.78-79, 82.) Milstein spent about three hours interviewing Dylan outside the family home, but the recording was much shorter and contained only "snippets" of the interview.[36] (5.RWR.77-79, 135.) After hearing the tape Crystal and Dano took Dylan to a child advocacy center and had him evaluated, and were told Dylan did not appear to have been molested by anyone. (3.RWR.126, 142-43, 164-65; 4.RWR.137-38; 5.RWR.137-38.) Dano asked Dylan if he had been molested by Bill Young and Dylan responded, "No." Crystal asked Dylan why he had said he was molested and Dylan replied, "That lady told me to." (3.RWR.143.)[37]

Crystal Deshotel, too, testified that the affidavit she signed for Milstein was false. Crystal's affidavit said that Dylan had once complained that his "butt hole

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[36] Apparently when Milstein returned home, the cellphone had not saved the recording, and the phone company was not able to retrieve it. (5.RWR.81.)

[37] Dino Young, Young's other brother, was also visited by Milstein and questioned about being molested by Billy Young. Dino denied being molested by his father and never supplied a statement to Milstein. (3.RWR.167-69, 175-76.) Dano went to see Dino a few weeks after Milstein's visit, and told Dino about riding around with Milstein smoking crack cocaine. (3.RWR.168, 177.)

hurt" after he had spent time outside with Bill Young, and that Crystal checked her son but never found anything unusual. (Ex. 116, C. DeShotel Affidavit, Apr. 20, 2005.) At the hearing Crystal testified that Dylan never said those things and that she never had any reason to check him for sexual abuse.[38] (5.RWR.89-90, 99-100.) Crystal testified that she did not read the affidavit before signing it because she was upset by Milstein's claim that her son had been molested and angry that her husband had gone off with Milstein for several hours. (5.RWR.83-84, 93-94.)

Patricia McCoy also testified at the state hearing, by deposition, and had also been interviewed by Milstein for Young's writ application. (Ex. 140, P. McCoy Depo. at 6.) McCoy had signed a two-page affidavit, which Milstein notarized. (*Id.* at 9.) The second page contained only the signature block. (*Id.* at 29-30.) However, what was introduced for purposes of the state application was a four-page declaration. (Ex. 123, P. McCoy Affidavit, Apr. 19, 2005.) McCoy did not recognize the second and third pages of the affidavit introduced into evidence. (Ex. 140, P. McCoy Depo. at 10.)

The third and fourth pages added to McCoy's declaration contained false information. The third page stated that Young had told McCoy he was sexually abused by his father (Ex. 123 P. McCoy Affidavit, Apr. 19, 2005, at 3), but in fact

[38] The affidavit Crystal signed also alleged that Dano's sister, Renee, told Crystal that Bill Young raped her. Crystal denied that Renee had ever told her that. (5.RWR.103.)

Young only told McCoy that he was physically abused by his father. (Ex. 140, P. McCoy Depo, at 18, 26-27.) McCoy testified that other portions of the affidavit were also untrue, including statements that Douglas was a pedophile; Young found a pair of young girls' panties in Douglas's car; when Douglas was on drugs, he tried to touch people in a sexual manner and that he was disgusting; Douglas let Young drive his car all the time; that McCoy had never seen Young act in a violent manner, and that the District Attorney showed McCoy and her husband photographs of Douglas's body "over and over again" before trial. (*Id.* at 14-16, 19-22, 28-31.) During the interview Milstein took Xanax, appeared to be on drugs, perhaps "uppers," and asked McCoy if she knew where to buy Xanax, and if she had any marijuana. (*Id.* at 10-11, 29.)

Taylor testified that he did not know that the affidavits filed by Milstein were false. (Ex. 139, G. Taylor Depo. at 17, 34, 40.) On advice of counsel, Milstein made herself unavailable to testify at Young's state hearing.[39] (5.CWR.764-65; Ex. 139, G. Taylor Depo. at 23-25.) By Taylor's own admission at the state habeas hearing, the investigation into the alleged molestation issue foreclosed the investigation and presentation of other claims in Young's application due to time and resources. (Ex. 139, G. Taylor Depo. at 32, 35-36.)

[39] Young's federal habeas counsel later attempted to interview Milstein, but she refused to talk with them on the advice of her counsel. (Ex. 120, G. Krikorian Decl., ¶¶ 2-6.)

(2) Every claim in Young's writ application was either fraudulent or patently meritless

Young's initial writ petition was patently deficient and fraudulent. Each of its fourteen claims was either patently meritless, barred by Texas law, or based on fraudulent evidence obtained by Milstein.

Claims Ten through Fourteen, the petition's central and final claims, rested on false allegations that Young was sexually abused by his father, and/or false allegations that the prosecution dissuaded witnesses from talking with the defense and repeatedly showed them graphic crime scene photos.[40] As explained, Milstein fraudulently obtained the information about sexual abuse by bribing Dano Young with crack cocaine and manipulating a child—Dylan Keen—into falsely claiming to have been molested in a doctored taperecording. The witnesses disavowed these allegations at the hearing. (2.RWR.191-92 (A. Harrison); Ex. 140, P. McCoy Depo., at 24; 5.RWR.83-84, 93-94 (C. Deshotel); 3.RWR.130, 149-50; 4.RWR.115, 126.) (D. Young).) Witnesses also disavowed the allegations about prosecutors telling them not to talk to the defense and repeatedly showing them

[40] Claim twelve also asserted that Young's trial counsel were ineffective for not objecting to admission of Young's records from the Texas Youth Commission. But that claim failed to allege sufficient facts to support relief because Young's writ counsel never spoke with trial counsel about whether or not they had a tactical basis for not objecting to the records' admission, and never obtained or reviewed their files to determine whether such a basis existed. (2.RWR.201-02; 3.RWR.68-69.)

crime scene photographs. (*See, e.g.*, Ex. 140, P. McCoy Depo., at 17, 25; 2.RWR.190-91 (A. Harrison).)

The petition's remaining claims were abjectly meritless. Claims one through five did not even relate to the legality of Young's conviction or sentence at all, but only to the trial court's assessment of costs. (1.CWR1st.1-3) (listing claims for relief.)[41] Claims six and seven, challenging the CCA's refusal to review the

[41] The claims Taylor raised in Young's application were:

(1) Young's right to due process was violated by the trial court's assessment of costs associated with his trial;

(2) Young's rights to Equal Protection were violated by the trial judge's assessment of costs associated with his trial;

(3) Young's Eighth Amendment rights were violated by the trial judge's assessment of costs associated with his trial;

(4) the trial judge's assessment of costs was not supported by Texas law or any constitutional provision;

(5) the trial judge's assessment of costs, to be withheld from Young's inmate trust account, was an unconstitutional taking without due process;

(6) Young's rights to due process were violated by the Texas Court of Criminal Appeals's refusal to review the sufficiency of the mitigating evidence to support the jury's verdict;

(7) Young's rights under the Eighth Amendment were violated by the Court of Criminal Appeals's refusal to review the sufficiency of the mitigating evidence to support the jury's verdict;

(8) Young's execution would violate the Eighth and Fourteenth Amendments;

(9) The Eighth and Fourteenth Amendments prohibit Young's execution based upon his age and immaturity;

(10) Young's rights to effective assistance of counsel under the Sixth Amendment were violated by trial counsel's failure to discover and present evidence of physical, emotional, and sexual abuse in Young's home;

(11) Because of the additional evidence discovered since Young's conviction and sentence, Young's due process would be violated by his execution;

sufficiency of the mitigating evidence, were clearly barred by then-existing Texas law. *See, e.g., Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999) (citing cases rejecting the proposition that the CCA must review the sufficiency of the evidence to support the jury's negative answer to the mitigation special issue). The remaining claims, eight and nine, simply duplicated claims that had already been presented and rejected on direct appeal: insufficiency of the evidence to support Young's conviction of capital murder; and the unconstitutionality of executing a person Young's age and immaturity.[42] In short, each and every claim in the petition was either frivolous, clearly meritless, or fraudulent.

(3) Taylor omitted potentially meritorious claims that Young specifically asked him to assert

The petition also omitted potentially-meritorious claims that Young specifically identified for Taylor and asked him to raise. In March 2005, a month before Taylor filed the petition, Young wrote Taylor a letter describing various claims in detail and asking Taylor to assert them. (Ex. 105, Letter, C. Young to G.

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(12) Young's rights to the effective assistance of trial counsel were violated;

(13) Young's rights to due process under the Fourteenth Amendment were violated by the actions of the prosecutor; and

(14) The prosecutor and police interfered with Young's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.

[42] Direct appeal claims eleven through fourteen argued that the evidence was legally and factually insufficient to sustain the jury's verdict of capital murder. Claim thirty-three was that the Eighth Amendment prohibits executing a person under the age of twenty-one.

Taylor, March 21, 2005; Ex. W-11 at 1st State Writ Hearing.) These claims included, among others, (1) ineffective assistance of trial counsel for failing adequately to present ballistics evidence regarding Douglas's shooting; (2) ineffective assistance of trial counsel for failing to test Douglas's car to explain the origin of shell casings found inside; (3) ineffective assistance of trial counsel for failure to challenge the prosecutor's admission of Young's county jail records; and (4) prosecutorial misconduct by prosecutor Rick Berry. Young's letter said, "I would like something raised in my State Writ of Habeas Corpus on each of these issues," to "insure [sic] that all claims are raised at state level, so as not to be procedurally defaulted." (Ex. 105, Letter, C. Young to G. Taylor, Mar. 21, 2005.)

Taylor ignored Young's requests. He devoted just two sentences in the petition to Young's claim that trial counsel failed to present ballistics evidence, and provided no supporting facts. (1.CWR1st.90-91).[43] Taylor did not identify counsel's specific deficiencies, or make any argument that trial counsel lacked a tactical basis for their error or that it had a prejudicial effect. Taylor completely failed to raise Young's proposed IAC claims regarding Douglas's car or county jail

[43] Taylor devoted just two vague sentences to the ballistics: "Applicant further believes that trial counsel were in possession of ballistics reports which demonstrate that the gun to which accomplice witnesses testified he was in possession of did not shoot Doyle Douglas twice in the head as indicated by the testimony at trial. According to these reports, Mark Ray was in possession of the gun which caused the injury to the right side of Douglas's head."

records, or Young's claims regarding prosecutorial misconduct. (*See* 1.CWR.1-98.) Instead of investigating those issues or talking to trial counsel, Taylor focused his efforts on the meritless sexual molestation claim concocted at the last minute by Milstein—who Taylor knew to be drug-addicted and unreliable—and supported by false evidence.

Taylor's reckless shifting of his responsibilities to Milstein violated his duties under the applicable ABA and Texas guidelines for performance in state post-conviction litigation. It was a sham representation that should entitle Young to an entirely new writ proceeding, *Medina*, 361 S.W. 3d 633; *Medrano*, 2017 WL 554779, or—at minimum—merits review of the ineffective assistance of trial counsel claims raised in this application. *Martinez*, 566 U.S. 1.

H. CLAIM 8: THE COMBINED EFFECT OF ALL THE ERRORS RENDERED YOUNG'S GUILT/INNOCENCE AND PUNISHMENT TRIALS FUNDAMENTALLY UNFAIR.

Authorization of this cumulative claim is proper for the reasons set forth above, in connection with the individual claims.

V. CONCLUSION

For the foregoing reasons, Young requests that this court grant his application for a writ of habeas corpus. He further requests that this Court stay his execution, file and set any claims and/or issues whose resolution warrants further briefing; authorize and remand claims for consideration on the merits by the convicting court; and grant any other relief that law or justice requires.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: September 29, 2017 By: Margaret A. Farrand

Margaret A. Farrand (Cal. Bar No. 235295)
Margo A. Rocconi (Cal. Bar No. 156805)
Joseph A. Trigilio (Cal. Bar No. 245373)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-1221
Electronic Mail: Margaret_Farrand@fd.org

Attorneys for Applicant,
Clinton Lee Young

DECLARATION OF MARGARET A. FARRAND

State of California

County of Los Angeles

I, Margaret A. Farrand, hereby declare:

1. I am a member of the State Bar of California in good standing.
2. I have been admitted to appear pro hac vice in the 385th Judicial District Court of Midland County, Texas
3. I am duly authorized attorney for Clinton Lee Young, having the authority to prepare and to verify Mr. Young's application for writ of habeas corpus.
4. I have prepared and read the foregoing application and I believe all of the allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury.

Margaret A. Farrand

Margaret A. Farrand

SUBSCRIBED AND SWORN TO BEFORE ME on September 29, 2017.

Veronica Garcia, Notary Public.

VERONICA GARCIA
Notary Public - California
Los Angeles County
Commission # 2205122
My Comm. Expires Jul 15, 2021

Notary

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, I provided, a true and correct copy of the foregoing motion titled **APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A JUDGMENT OF DEATH** by providing an extra copy for counsel for Plaintiff to the Clerk of the Court to be conformed for service upon the counsel for Plaintiff at the following address. Also, I have provided a non-conformed true and correct copy by email to rlphptty@mygrande.net.

Laura Nodolf, District Attorney
Ralph Petty, Assistant District Attorney
Office of the District Attorney
500 North Loraine Street, Floor 2
Midland, TX 79701-4745

Margaret A. Farrand

Margaret A. Farrand