No. 63,436-B

EX PARTE	*	**IN THE 27TH JUDICIAL**
	*	
	*	**DISTRICT COURT OF**
	*	
GEORGE ROBERT POWELL III	*	**BELL COUNTY, TEXAS**

Findings of Fact and Conclusions of Law

Having considered the Applicant's Petition, the State's Answer, and the expanded record in the above numbered cause, this Court makes the following Findings of Fact and Conclusions of Law:

I.

Findings of Fact

History of the Case

1. The Applicant is currently incarcerated in the Correctional Institutions Division of the Texas Department of Criminal Justice, by virtue of a Judgment of Conviction entered in the 27th District Court of Bell County, Texas, in Cause Number 54,705, wherein he was convicted of the felony offense of aggravated robbery.

2. On November 16, 2009, the Applicant pled not guilty to the charge, but after hearing evidence, a jury found him guilty, and on November 20 2009, they assessed his punishment at twenty-eight (28) years imprisonment.

3. The Applicant appealed his conviction, but it was affirmed by the Third Court of Appeals on April 15, 2011.[1]

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[1] *See Powell v. State*, No. 03-09-00730-CR (Tex.App. – delivered April 15, 2011) (not designated for publication).

4. On May 24, 2011, the Applicant filed a pro se Petition for Discretionary Review ("PDR") with the Court of Criminal Appeals, but on December 9, 2011, it was dismissed as untimely filed.[2]

5. The record reflects that on November 4, 2013, the Applicant filed his first application for post-conviction Writ of Habeas Corpus relief pursuant to art 11.07 of the Code of Criminal Procedure, alleging that his PDR had been improperly dismissed as untimely.

6. On April 30, 2014, the CCA, after ordering that the trial record be supplemented with additional evidence, agreed with the Applicant, and granted him relief in the form of an out-of-time PDR.[3]

7. The record reflects that on November 19, 2014, the Applicant's PDR was refused.[4]

8. On November 17, 2016, the Applicant filed the instant, his second, application for Writ of Habeas Corpus relief. *See* Applicant's Petition filed 11-17-16.

9. The record reflects that the Applicant amended his Petition: on September 7, 2017, shortly before the evidentiary hearing began; on October 3, 2017, while the hearing continued and was ongoing; and on March 16, 2018, one day after the Court granted a one week extension to submit proposed Findings of Fact and Conclusions of Law.

10. The Court finds that in the Applicant's First Amended Petition, Ground Seven, failure to disclose impeachment evidence of State's witness Demetric Smith, and Ground Eight, failure to disclose impeachment evidence of State's witness Elsie Schultz, were added.

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[2] *See* George Robert Powell III, No. PD-0765-11 (Tex.Crim.App., delivered, October 5, 2011) (not designated for publication)

[3] *See* Ex parte George Robert Powell III, No. WR-80,713-01 (Tex.Crim.App., delivered April 30, 2014) (not designated for publication).

[4] *See* George Powell Powell III, No. PD-667-14 (Tex.Crim.App., delivered November 19, 2014, ref'd.) (not designated for publication).

11. In his Second Amended Petition filed October 3, 2017, another Ground Eight, that the State used false testimony at trial, was added, and the former ground eight, failure to disclose impeachment evidence on a State's witness Elsie Schultz, became "Ground Nine."

Allegations in the Applicant's Subsequent Petition

12. In ground one the Applicant alleges that "clear and convincing new evidence" establishes that he is actually innocent of the charged offense. *See* Applicant's Petition, pp. 6-7.

13. In ground two the Applicant alleges that "State sponsored perjury" deprived him of due process. *See* Applicant's Petition, pp. 8-9.

14. In ground three the Applicant alleges that there is "new scientific evidence, including the State's original expert's changed opinion," that would have prevented his conviction. *See* Applicant's Petition, p. 10.

15. In ground four the Applicant alleges that the State used "materially false evidence concerning the height of the robber which violated [the] Applicant's right to due process. *See* Applicant's Petition, p. 12.

16. In ground five the Applicant alleges that he received ineffective assistance of counsel at his trial, based on the failure of his counsel to review or rebut the testimony of the State's expert Michael Knox. *See* Applicant's Petition, p. 14.

17. In ground six the Applicant alleges that his trial counsel were ineffective in their failure to secure an expert to compare the Applicant's voice to that of the robber. *See* Applicant's Petition, p. 16.

18. In ground seven the Applicant alleges that his right to due process was violated when the State failed to disclose information that could have been used to impeach State's witness Demetric Smith. *See* Applicant's First Amended Petition, p. 18.

19. In ground eight the Applicant alleges that his right to due process was violated when his conviction was based on false testimony. *See* Applicant's Second Amended Petition, p. 19.

20. In ground nine the Applicant alleges that his right to due process was violated when the State failed to disclose information that could have been used to impeach State's witness Elsie Schulze. *See* Applicant's First Amended Petition, p.19.

Necessity for an Evidentiary Hearing or Expansion of the Record

21. The record reflects that the habeas court found that controverted, previously resolved facts material to the legality of the Applicant's confinement existed, therefore, it entered several Designations of Issues and Orders Expanding the Record, and pursuant to said Orders, numerous affidavits from persons with relevant facts were made a part of the record, by filing them with the habeas court, and/or introducing them into evidence.

22. The Court finds that affidavits from the following persons were reviewed by the Court: Demetric Smith; attorneys Michael F. White, Troy C. Hurley, Michael J. Magana, and Bobby Dale Barina; Assistant District Attorneys Paul McWilliams, Leslie McWilliams, Michael Waldman, and Fred Burns; Michael A. Knox and Grant Fredericks; Professor Al Yonovitz, Ph.D., and Scott Alan Kuntz; private investigators Karen Sanderson and Ricardo J.W. Ojeda; Diane A. Smith, Shayln Halvey, Victoria Noyola and Sherri Rose.

23. The record reflects that pursuant to its orders expanding the record, beginning, on September 18, 2017, and culminating on January 30, 2018, the habeas court presided over a series of evidentiary hearings receiving testimony from numerous witnesses called by the Applicant and the State.

24. The Court finds that the following witnesses testified at the evidentiary hearing, and their testimony is now part of the habeas record: Investigators Karl Ortiz and James Strunk; Dr. Charles Weaver; Assistant District Attorneys Michael Waldman, Fred Burns, and Paul McWilliams; Killeen Police Department officers Miguel Mirabel, Heath Crum, Tom Mallow and Roy Clayton;

Melissa Keen, Kimberly Moore, Shalyn Halvey, and Brandie Cecil; attorneys Michael J. Magana and Bobby Dale Barina; and, Grant Fredericks and Michael A. Knox.

Jurisdiction

25. The Court finds that this is a subsequent Petition by the Applicant, therefore, before the Court can review the merits of the Applicant's allegations, it must address the Court's jurisdiction to entertain them.

26. The Court finds that in his initial Petition, the Applicant alleged as his sole ground for relief, that he was entitled to out-of-time PDR, and was granted relief. *See Ex parte George Robert Powell III*, No. WR-80,713-01, *supra.*

27. In *Ex parte McPherson*, 32 S.W.3d 860, (Tex.Crim.App. 2000), the CCA held that because a defendant's initial application did not pertain to the validity of his prosecution or judgement, it was not a challenge to the conviction provoking the procedural bar of Article 11.07§ 4. *See McPherson* at 861.

28. Likewise, in the instant case, the Court finds that the Applicant's initial Petition, because it did not challenge his conviction, does not bar a review of the merits of his claims in the instant Petition.

Relevant Facts of the Case

29. The Court finds that before discussing the Applicant's grounds for relief, a review of the relevant facts in his case are necessary, and in its Supplemental Answer to the Applicant's Petition, the State summarized them as follows:[5]

"The Robbery

* * *

"On June 9, 2009, at approximately 12:10 a.m., Killeen Police Department ("KPD") officer Miguel Mirabel, while on patrol, was dispatched to the 7-Eleven convenience store located at 1001 South W.S. Young Drive in Killeen, Texas, to

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[5] References to "RR" signify the Reporter's Record of the Applicant's trial, while references to "HRR" signify the Reporter's Record of the Applicant habeas evidentiary hearing.

investigate a robbery (RR[6]-IX, pp. 27-28). Upon arrival, he parked his vehicle on the side of the store, exited it and went inside and made contact with Melissa Keen, the store clerk and lone occupant, who told him that she had just been robbed by a white male, about 5' 10" to 5' 11," tall who was wearing a white baseball cap, sunglasses, blue jeans and white shoes (RR-IX, p. 29).

* * *

"She said that she stepped back from the counter, opened the register, and gave him all the money inside. He then asked her to lift up the tray inside the resister, which she did, to revealed that there was no money underneath the tray. He then asked for the 'lottery money,' but when she explained that there was no lottery money that she was aware of, he then asked for two cartons of cigarettes instead. She retrieved the cigarettes, gave them to the suspect, and he left the store just as another customer was pulling up. She then pushed the silent alarm, which she later found out temporarily disables the telephone system, but she was able to use a customer's cell phone to call the police, the manager, and her husband (RR-X, pp. 13-19).

"The Investigation

"Thirty year veteran KPD officer Karl Ortiz, a detective in the crimes against persons section, was assigned to the investigation of the 7-Eleven robbery .... The first break in the case came on June 12, 2008, at about 10:00 p.m., when someone called the KPD Crime Stoppers hotline. The caller said that they watched the video of the robbery when it was broadcast on television, and identified the suspect as 'GQ,' and said that he resided at the Lone Star Inn in Killeen, in room 213, and drove a gold Cadillac (RR-X, pp. 111-115). Detective Ortiz subsequently drove to the Inn looking for the gold Cadillac and found it. He recorded the license plate number, then took it back to his office and ran it. The vehicle came back registered to a George Powell III, and listed his address as the Lone Star Inn (RR-X, pp. 116-117).

"Detective Ortiz searched KPD's data base to see if Powell had ever had any contact with them before, and if KPD had a picture. Turns out he had, and KPD had his picture which he used to compile a six-person photo lineup to show to Melissa Keen, the victim of the 7-Eleven robbery. He made contact with Keen on June 17, 2008, and had her come to the police station to view the lineup. He said that 'within seconds' of viewing the photo array, Keen picked out Powell's picture saying 'That's the one' (RR-X, p. 118)

"In addition, on June 19, 2008, Detective Ortiz made contact with Elsie

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[6] "RR" refers to the Reporter's Record at trial.

Schulze, the Crime Stoppers caller who initially identified Powell after viewing the store video on television. *Id.* Schulze worked part-time at the Lone Star Inn from September of 2007 to December of 2007, and remembered George Powell III, whom she knew as "GQ," as a resident through her tenure. She recalls that she had daily contact with him either at the front desk, or through her housekeeping duties. When she saw the Crime Stoppers video on a news broadcast she knew within seconds that the robber as "GQ" and called Crime Stoppers (RR-X, pp. 67-74).

"With Powell identified by Keen and Schulze as the robber, Detective Ortiz secured a warrant for his arrest, and after taking him into custody and reading him his rights, Powell denied any involvement in the 7-Eleven robbery, insisting that he was in a Mickey's Store on Trimmer Road in Killeen, right off of Jasper Street, at the time of the robbery. . . . Powell was subsequently indicted for the offense on July 30, 2008, and his trial began on November 16, 2009.

"The Trial

* * *

"During its case in chief, the State called 7-Eleven store clerk Melissa Keen and her manager Elizabeth Anderson as witnesses. Keen identified Powell as the man who robber her store. She told responding Officer Mirabel that the robber was about 5' 10" (RR-IX, p. 29), but she wrote in her written statement that he was 5' 6." She testified that she changed the height when she wrote her statement, because being 5' 1," someone who is 5' 6" or 5' 7" was 'pretty tall' for her. In addition, Keen said that Detective Ortiz played an audio tape for her and she recognized the voice as that of the man who robber her the morning of June 9, 2008 (RR-X, pp. 28-29)

* * *

"Next was Elsie Schulze, the Crime Stoppers caller who identified the Applicant as the robber after watching a broadcast of the 7-Eleven robbery video on a local newscast. Schulze testified that it took her 'not even seconds' after seeing the video to realize the robber was the person she knew as 'GQ,' and who Detective Ortiz later identified as George Powell III (RR-X, p. 69).

"After the lunch break, and out of the presence of the jury, the trial court, pursuant to Texas Rule of Evidence 702, held a hearing to determine the admissibility of the testimony of Michael Knox, the State's expert witness.

* * *

"According to Knox, photogrammetry, which has been around since the advent of modern photography, is used in many applications when taking actual measurements would be impractical or dangerous (RR-X, pp. 93-94). Knox also testified that photogrammetry is used more and more in crime scene investigations because it shortens the amount of time you spend at the crime scene collecting measurements (RR-X, p. 96).

* * *

"Knox testified that essentially, to perform 3-D photogrammetry, you need to start with control points within the photograph with known measurements. If you do not have multiple photographs from the same scene at the same instant, or two or more photographs from different angles, you can use a defined plane, which gives the object dimension (RR-X, pp. 97-98). Knox testified that he was provided with the videotape from the 7-Eleven robbery, and specific measurements of objects in the video at certain points. From that information he was able to determine that [the] robber who passed through the doorway was, at a minimum 6' 1" tall (RR-X, p. 99).

"Under cross-examination by the defense, Knox admitted: that he had not done the measurements himself; that he has (sic) not taken the Applicant's measurements; that he did not have access to or compare it to any other video footage; that he had not written an article on photogrammetry; that he has had his current computer program on photogrammetry for about a year; and, that this is probably the only case he has used it to measure height of someone with an unknown camera (RR-X, pp. 100-102).

"The defense objected to Knox being allowed to testify because he had not been using the software very long, he had not used it before to measure height, and claimed it would not aid the jury. The State countered that photogrammetry is part of crime scene reconstruction, the measuring of objects whose dimensions are unknown, and it is the same process. In addition, the State noted that the discipline has been accepted in courts in the State of Texas for many years. The trial court held that the evidence appeared reliable enough to present to the jury and overruled the objection (RR-X, pp. 103-104).

"When testimony resumed in front of the jury, the State presented the brief testimony of Brandie Cecil, a former Killeen resident, who, during the year 2008, worked at Killeen Motors, the company that held the note on George Powell III's 1999 Cadillac. She testified that she had brief meetings with Powell many times during her tenure at the company, about keeping his account current, and that his vehicle was repossessed on more than one occasion. She identified the Applicant in court as the George Powell III she knew (RR-X, 106-110).

"Next, the State called Detective Ortiz to the stand to detail the course of his investigation which led to the arrest of the Applicant. On cross-examination, Ortiz was asked about his efforts to investigate the robbery that occurred on May 28, 2008 at the Valero in Killeen. When he responded that he acquired the statements that the two victims had already given to KPD, the State objected to any testimony from Ortiz as to the (sic) either victim's description of the robber in that case, because it would be hearsay (RR-X, pp. 128-129).

"With the jury removed from the courtroom, the defense argued that Ortiz should be allowed to testify about the descriptions the witnesses made, because

the State opened the door when Melissa Keen testified about the audio she listen (sic) to, and how she believed it was the voice of the man who robbed her. The defense noted that according to the offense reports, this tape was an audio from the Valero robbery, not the 7-Eleven. The State object (sic) to further testimony on the subject as hearsay. The trial court held that the Valero witnesses could take the stand and testify, but testimony from Ortiz about the matter would be excluded as hearsay (RR-X, pp. 131-136).

* * *

"The following day the State continued with their case-in-chief by calling to the witness stand Demetric Smith, an inmate in the Bell County Jail, and a cell-mate of the Applicant. Smith testified that he was currently in jail awaiting trial on a Burglary of a Habitation case, and admitted to having done prison time in Arizona for various felony offenses (RR-XI, pp. 12-13). Smith said that in December of 2008, he sent Major Bob Patterson, the then administrator of the Bell County Jail, a note saying that he had information about his cell-mate George Powell, whom he then identified in the courtroom. He testified that while in their cell, Powell showed him a photograph, which Smith identified as State's Exhibit No. 6, and said to him: 'I'm in that photo, but look how skinny I am. I gained a little bit of weight so the jury, you know, might buy that's not me.' (RR-XI, p. 15). Smith testified that he was sent to Austin State Hospital after he spoke to Powell about the photographs, but states that Powell brought the subject up again when he got back (RR-XI, pp. 16-17). He testified that he has no kind of 'deal' with the State in exchange for his testimony, and has not asked for anything. *Id.*

"Smith admitted during cross-examination that he was sent to Austin State Hospital because he is bi-polar, and has a nervous condition for which he takes an unknown 'mood stabilizer' and a drug called 'Seroquel.' He also admitted that he was sent to Austin State Hospital because he was incompetent to stand trial, and returned to Bell County when he had regained competency (RR-XI, p. 18). In spite of his criminal record, Smith testified that he is a 'dependable' and 'reliable' person (RR-XI, p. 20).

"As its last witness, the State called Michael Knox, the forensic consultant from Florida, the subject of an earlier voir dire examination outside the jury's presence. Knox testified that he was paid $1,200.00 by Bell County for his services, and that the amount was less than his normal fee (RR-XI, p. 32).

* * *

"On cross-examination, Knox confirmed that the camera he ordinarily uses is calibrated for use in photogrammetry. He explained that any camera can be calibrated by taking pictures at different angles of a special grid, and feeding the resulting data into the photogrammetry software. The software then recognizes

that camera, its lens size and how big its sensor is, etc., for use in photogrammetry (RR-XI, p. 43). Knox admitted that he did not examine the cameras in the 7-Eleven that took the video, or measure the distance they were from the door or different objects in their view. Nor did he use more than one camera angle (RR-XI, pp. 45-47).

* * *

". . . The defense then called as its first witness Sherry (sic) Rose. Rose testified that she was employed at the Valero gas station located near East Gate in Killeen, when it was robbed near closing time on August 28, 2008.[7] She testified that she was just coming from behind the counter, and a man came through the front door with his hand in his pocket, and the next thing she knew she heard him yelling at Victoria, the assistant manager. She testified that Victoria thought he was kidding and asked him 'Are you serious,' and he yelled 'Yeah, I'm f- - king serious' (RR-XI, pp. 56-58).

"Rose testified that she was standing about five feet away for the robber and did notice immediately that he was holding a gun on Victoria. She testified that the robber was wearing a light cap, black sunglasses, a long-sleeved shirt, and blue jeans and was 5' 6" of 5' 7." KPD was called, and Rose testified that she told them essentially the same story, but did not go to the police station. She testified that she did get a visit at the Valero later from two KPD detectives, one of who was named Ortiz. She testified that they showed her a photo lineup, but it did not include a picture of the robber. She said that she did recognize one of the pictures in the lineup as the 'CD guy' but she told Ortiz that the robber was not him because the CD guy was much taller. She testified that the robber was about 5' 6," the same height as her ex-husband (RR-XI, pp. 58-63).

* * *

"The defense called Victoria Noyola as its next witness. She testified that she was the assistant manager of the Valero store in May of 2008 when the robbery occurred. Noyola said that the robber entered the store around 11:30 p.m., and came straight to the counter, and asked for the money out of the cash drawer. She describes him as being 5' 6," about 160 pounds, and wearing sunglasses and a maroon long-sleeved shirt. When she is shown Defendant's Exhibit # 2, a picture from the 7-Eleven robbery, she testified that the robber in the picture looks similar to the one who robbed her store. Noyola indicated that she had seen a video tape of the 7-Eleven robbery, and the robber of her store and the 7-Eleven appear to her to be the same person. However, she rejects the notion that George Powell III, whom she has known for about three years, is that person because the robber of her store was shorter (RR-XI, pp. 79-84).

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[7] Sherri Rose incorrectly testify at trial that the Valero robbery occurred August of 2008.

* * *

"On cross-examination, Noyola said that Ortiz came to her Valero store two days after the robbery alone (RR-XI, p. 90). She further testified, that before taking the witness stand today, she spoke to her co-worker Sherry (sic) Rose and they watched the 7-Eleven robbery tape together (RR-XI, pp. 92-97).

"The trial was recess (sic) for lunch and after the jury had retired, the State asserted that there had been a violation of the Rule because defense witnesses Rose and Noyola had discussed the case after the Rule had been invoked. The trial court noted that he had not placed these two witnesses under the Rule, but the State counter that it was the attorneys responsibility to inform them that the Rule had been invoked (RR-XI, pp. 99-102). After further discussion, the trial court, rather than strike testimony that had already been heard by the jury, gave the jury an instruction that the Rule had been violated, and allowed the State to cross-examine the witnesses on the issue (RR-XI, pp. 103-113).

* * *

"As its final rebuttal witness, the State called Michael Knox. Knox testified that after his testimony the previous day, the State requested that he determine the height of the robber seen entering and leaving the Valero store on May 28, 2008. He explained, that as with the 7-Eleven video, he extracted a frame from the Valero video that had the robber stepping into the plane of the doorway as much as possible. He said he then went to the Valero store and took a series of photographs from different angles with his calibrated camera. He then took measurements and affixed a 6' tape measure to the doorway. He testified that he fed all this information into the PhotoModuler (sic) software, which eventually allowed him to draw an outline of the robber coming through the door, which he was able then to measure. He testified that in the Valero case, the suspect measured 5.9726 which translates to 5' 11½," which would be his minimum height. He said like in the 7-Eleven case, this robber could be taller because there is some forward or backward 'lean' coming through the door that cannot be accounted for. He said that the distortion that comes from the camera lens makes it almost impossible to determine height from a photograph without some kind of analysis (RR-XII, pp. 26-35).

"After Knox's rebuttal testimony, the State rested. The defense then called as (sic) rebuttal witness 6' 3" Steven Striegler. Striegler testified that he went to the 7-Eleven store and stood and (sic) in the inside of the doorway and a photograph was taken. However, when the defense tried to introduce the photograph, the State objected saying that it was not a fair representation of the robber in the 7-Eleven video. The Court sustained the objection. The defense then closed (RR-XII, pp. 41-46).

"After hearing the trial court's reading of the charge and the arguments of counsel, the jury deliberated and found the Applicant guilty, and subsequently

assessed his punishment at twenty-eight (28) years imprisonment." *See* Corrected Copy of State's Supplemental Answer and Response, pp. 3-21.

Ground One - Actual Innocence

30. In ground one the Court finds that the Applicant alleges that he is actually innocent of the charged offense of aggravated robbery based on "clear and convincing new evidence," which he enumerates and describes on pages 6 and 7 of his Petition as follows:

    1. "A new, reliable, and accurate scientific analysis of the store's security video confirms that the actual perpetrator of the crime was no taller than 5' 9.4", and could have been a short as 5' 5.8";

    2. "One of the State's key trial witnesses, Demetric Smith, who testified that Applicant admitted to the robbery when the two of them were incarcerated together in the Bell County Jail, has recanted his testimony";

    3. "New, reliable forensic evidence has established that the voice of the robber, is not the voice of the Applicant, therefore excluding him as the perpetrator of the robbery";

    4. "At trial, the State presented the eye-witness testimony of the victim of the 7-11 robbery, Melissa Keen, who had described the robber as 5' 6" tall, was subjected to an unreliable pre-trial identification procedure by Killeen police detective, Karl Ortiz, in which she mistakenly selected the photo of the Applicant as the man who robbed her."

Standard of Review

31. The Court notes that generally, actual innocence claims are categorized as either *Herrera*-type claims, or *Schlup*-type claims, and in his Petition the Applicant appears to advance a mixture of both. *See Herrera v. Collins*, 506 U.S. 390,113 S.Ct. 853, 122 L.Ed.2d 203 (1993), and *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

32. An *Herrera*-type claim involves a substantive claim in which an applicant asserts a "bare" claim of innocence based solely on newly discovered evidence. *See Ex parte Elizondo*, 947 S.W.2d 202, 208 (Tex.Crim.App. 1996).

33. It is well settled, that to succeed in an actual innocence claim based on newly discovered evidence, the Applicant must demonstrate by "clear and convincing evidence," that despite the evidence of his guilt that supports his conviction, no reasonable juror would have found him guilty in light of the new evidence. *See Ex parte Navarijo*, 433 S.W.3d 558, 560 (Tex.Crim.App. 2014).

34. On the other hand, a *Schlup*-type claim of actual innocence, is a procedural claim in which the claim of innocence does not provide the basis for relief, but is instead a gateway through which a habeas applicant must pass to have his otherwise barred constitutional claim considered on the merits. *Elizondo* , 947 S.W.2d. at 208 (*citing Herrera v. Collins*).

35. To prove a *Schlup*-type claim, the Court notes that an applicant must show that the constitutional error "probably resulted in the conviction of one who was actually innocent," or in other words, it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Schlup*, 130 L.Ed 2d at 833, 836.

36. In addition, the Court finds that the Applicant asserts that art. 11.073 of the Texas Code of Criminal Procedure provides another avenue through which he is entitled to habeas relief.

37. Relief under art. 11.073, the Court notes, requires a finding that had the scientific evidence been presented at trial, on the preponderance of the evidence standard, the person would not have been convicted.

Overview of Ground One

38. According to the Applicant, the State's expert, Michael A. Knox, who concluded that based on his analysis of a frame from the surveillance video, the robber was at least 6' 1" tall, "sold his junk science to the jury with [a] deceptive animation that was part of his demonstrative trial presentation." *See* Applicant's Memorandum in Support, pp. 5-6.

39. Hence, the Applicant alleges that "there should be no doubt that there is 'relevant scientific evidence' that was not available at the time of trial, and that evidence contradicts the evidence relied on by the State. *Id.* at 22.

40. With his first contention in ground one, that a "new, reliable and accurate scientific analysis" of the robber's height "excludes" him as the perpetrator of the crime, the Court finds that the Applicant advances: (1) a bare innocence claim, i.e., it cannot possibly be him because he is too tall; and (2) a 11.073 claim, i.e., the science was not available at the time of trial and a correct scientific analysis of the robber's height contradicts the scientific evidence relied on by the State.

41. The Court finds that the Applicant's second contention in ground one, that the State's witness, Demetric Smith, recanted his trial testimony that the Applicant confessed to him, appears to be a bare claim of innocence, citing new evidence.

42. The Applicant's third contention in ground one, that an audio analysis of the May 28, 2008 Valero robbery tape finding that the voice heard on the tape does not belong to the Applicant, the Court finds, appears to be another bare innocence claim based on new evidence, because the Applicant maintains that it "excludes" him as the perpetrator, because the assumption was that the Valero and four other robberies were all committed by the same person.

43. Lastly, the Court finds that the final contention in ground one, that State's witness Melissa Keen was unduly influenced by Detective Karl Ortiz to select the Applicant's photograph out of a photo-lineup, advances another procedural actual innocence claim highlighting a possible due process violation in his case.

1. Clear and Convincing New Evidence of Height

44. The Court finds that featured prominently among the reasons that the Applicant advances an actual innocence claim is his first contention in ground one, that a reliable scientific analysis now "excludes" him as the perpetrator of the crime because he is 6' 3" tall.

45. At the very least, the Court finds, the Applicant was skeptical of the accuracy and reliability of the analysis of the robber's height provided by the State's expert Michael A. Knox, as demonstrated by this passage from his Memorandum in Support of his Petition:

> "At the 2009 trial, the State presented the testimony of Jacksonville, Florida deputy Sheriff, Michael Knox, a purported forensic expert in video analysis, or 'photo-grammetry.' In fact, this case was the first time Deputy Knox had taken on such a project as an 'expert.'. . . At trial, Knox purported to provide an accurate measurement of the 7-Eleven robber's height, based on his claimed scientific analysis of one of the store's security video-tapes, depicting the robber.
>
> "Knox was retained by the Bell County District Attorney's office and began his 'analysis' long after the Applicant had been mistakenly identified as the suspect. When Knox began his analysis, Applicant had been arrested and charged with the robbery, and was awaiting trial. Knox's job as a law enforcement officer and a purported 'forensic expert' for the state, was to some how explain to the jury how the short man seen in the store security video and described by eye-witness as 5' 6" tall, was actually not short at all and, in fact, was somehow the 6' 3" George Powell. The Texas Forensic Science Commission ("FSC") has now conducted a thorough analysis of Knox's 2009 forensic findings and trial testimony. The Commission has issued an extensive report sustaining the complaint against Knox for his invalid and unscientific methodology and for his erro-

> neous conclusions. As a result, it is clear that Knox's testimony was junk science which, unfortunately, convicted an innocent man. *See* Applicant's Memorandum in Support, pp. 3-4.

46. According to Rule 702 of the Texas Rules of Evidence:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific knowledge will help the trier of fact to understand the evidence or to determine a fact issue."

Michael Knox

47. At the habeas evidentiary hearing, Paul McWilliams, one of the prosecutors who tried the Applicant's case, testified that as a May 2009 trial date approached in this case, he met with the defense attorneys and came to a mutual agreement that the May 2009 setting would be passed, and in the meantime, both sides would search for a witness who could take videotape or a still photograph and come up with an estimate of how tall the subject depicted in the video stood (HRR[8]-X, pp. 22-23).

48. Mr. McWilliams testified that he first researched what disciple he would be looking for, if he needed someone who could extract the height of a person who appeared in a still photograph or video, and determined that he needed someone who was able to perform "photogrammetry" (HRR-X, p. 25).

49. He testified at the hearing, that he and one of his investigators, searched the internet by entering the term "photogrammetry" in a search engine, and came up with about three names, one of which was Michael Knox who they contacted and retained in July of 2009 (HRR-X, pp. 25-26).

50. Mr. McWilliams testified that their search for someone who could perform

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[8] "HRR" refers to habeas Reporter's Record.

photogrammetry did turn up the name Grant Fredericks, but he was not contacted because none of the information connected to his name indicated that he performed photogrammetry (HRR-X, P. 58).

51. Mr. Knox, testified at the habeas evidentiary hearing that when he was contacted by the Bell County District Attorney's Office in July of 2009, he was asked if he could, using photogrammetry, extract from a surveillance video of an armed robbery, the height of the individual shown in the video perpetrating the robbery (HRR-XII, pp. 13-14).

52. The record reflects that in November of 2009, at trial, Mr. Knox testified that he was a forensic consultant, specializing in crime scene reconstruction, and was employed as a detective with the Jacksonville (Florida) Sheriff's Office, where he had been assigned for the last three years to the traffic homicide unit, and for the prior seven years in the crime scene investigation unit (RR-XI, pp. 25-26).

53. At the Applicant's trial, Mr. Knox testified that starting in 1996, he has taken a number of courses dealing with traffic accident reconstruction, crime scene reconstruction, shooting reconstruction, and used the discipline of photogrammetry to obtain measurements from photographs with a software program called PhotoModeler (RR-X, pp. 91-93).

54. Mr. Knox testified at the trial that as soon as he completed a foreign language requirement, he would graduate from the University of North Florida with a Bachelor of Science degree in Mechanical Engineering (RR-XI, p. 26).

55. The Court finds, under questioning by the State at the habeas evidentiary hearing in January of 2018, Mr. Knox's further elaborated on his educational qualifications:

> "Q (Mr. Proctor): And does - - I assume the degree in engineering requires courses in higher mathematics, like geometry and trigonometry and things like that?

"A (Mr. Knox): Quite a few courses. Just to get into the program in the first place you have to, of course, been in trigonometry; three semesters of calculus with analytic geometry; a semester of differential equations; two semesters of physics with calculus; some other courses; chemistry, computer programing, various different things like that. That's just prerequisites to get in. And, then, of course, all the course work. Every single course you take in the engineering program is heavily math-oriented. All your exams, everything do (sic) you is solving problems using math.

"Q So physics is part of this type of engineering, mechanical engineering.

"A Oh, absolutely. It's all based upon physics and mathematics of how mechanical systems work.

"Q Now, what year did you obtain your degree?

"A I completed all the course work in April of 2009 and then actually was conferred the degree in April of 2010. I had to finish a foreign language requirement so I spent the next year taking two semesters of foreign language.

"Q So you had already taken all these courses?

"A That is correct" (HRR-XII, pp. 12-13).

56. Moreover, the record reflects that at the Court's request, Mr. Knox submitted an affidavit ("Knox") detailing his involvement in the Applicant's case, and the Court has read the affidavit and finds it credible.

57. In his affidavit, he states the following:

> "At the time of my analysis and testimony in this case, I had received formal training in digital photography and image enhancement from the Institute of Police Technology and Management (2005). Through my training and experience in digital imaging, computer programing, and engineering, I had a strong familiarity with digital image compression but was aware that the effects of such compression are not relevant to photogrammetric analysis using mathematical methods (such as with the PhotoModeler software) because the compression effects are mitigated by the fact that known control points are referenced on the (compressed digital image and marking is likewise done on the same image. Marking is not restricted to the image pixel but, rather, is done in the software using the image to provide geometry. Those locations are cross-checked by checking the software's indicated residual count, the software's processing point, and the overlay of the control points and lines against the image to confirm that points and lines not marked on the image are placed by the software on the image in their correct locations." *See* Knox, pp. 2-3.

58. The record reflects, that at trial, Mr. Knox testified that the mathematical calculations and equations involved in photogrammetry are the same ones used in engineering, and though they were done by hand in the early days of NASA, they are now done by computer (RR-X, pp. 93-95).

59. He further testified that photogrammetrical applications are also used in architecture, engineering, and aerospace, just to name a few (RR-X, pp. 28-29).

60. During the *Daubert* [9] hearing at trial, on cross-examination, Mr. Knox testified that: he did not take the measurements of the doorway that figured into his initial analysis, but he did take his own measurements the day before he testified; he had not taken measurements of Mr. Powell for his analysis; he did not have access to video footage from other offenses for comparison purposes; he did not measure other objects in the crime scene; and he had used the Photo-Modeler software extensively for about a year, but this was probably the only case where he had used it to measure the height with an "unknown camera" (RR-X, p. 101-102).

61. At the end of the *Daubert* hearing, the defense objected to Mr. Knox's testimony because: this was the first instance he had measured height with this software; he had not been using PhotoModeler software very long; he had used it for traffic accidents and reconstruction; and, the defense did not think that his testimony would assist the trier of fact in any way (RR-X, pp. 101-103).

62. The record reflects, that the trial court allowed Mr. Knox to testify because he went to the scene the night before his testimony and took measurements of the doorway making his testimony reliable enough to give to the jury (RR-X, p. 104).

63. At the Applicant's trial, Mr. Knox testified that using the technique of photogrammetry with the aid of software, he took a frame from the surveillance video that showed the suspect in the plane of the doorway, then added the doorway's measurements, which allowed the software to trace an outline around the robber's figure, and take measurement from that outline (RR-XI, pp. 35-37).

64. The record reflects, that at trial the steps Mr. Knox used to arrive at his conclusion of the robber's height was illustrated by a slide presentation that was admitted into evidence at trial State's Exhibit No. 14[10], and played for the jury (RR-XI, pp. 34-37).

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[9] *See Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[10] Admitted at habeas hearing as SX-G.

65. Mr. Knox testified at trial the camera's "perspective" distorts the appearance of the robber's height, explaining that the camera lens itself distorts the way things appear, as in railroad tracks in a photograph that appear to join in the distance, and the distortion caused by a surveillance camera mounted on the ceiling, but he explained that PhotoModeler software removes that distortion (RR-XI, pp. 37-38).

66. At the trial, Mr. Knox testified that from his analysis, he concluded that the robber was at least 6' 1⅛" tall because in the frame from the surveillance video that was selected, the robber's body is leaning to the right and he is leaning in and out of the door, which tends to shorten his height and make him appear shorter than he actually is, and for those reason a maximum height determination is speculative (RR-XI, pp. 39-40).

67. At the habeas evidentiary hearing, the record reflects that SX[11]-C (introduced as State's Exhibit # 1 at trial), the surveillance video from the 7-Eleven robbery, was played for Mr. Knox and stopped at frame numbers 4:27-4:28, the camera view in the upper-left hand corner of the four camera split screen view (HRR-XII, pp. 20-21).

68. The record reflects that these frames show the robber entering the 7-Eleven and were deemed much more preferable by Grant Fredericks, the person hired by the FSC to conduct an analysis of Mr. Knox's work. *See* Memorandum in Support, Appendix-A (Grant Frederick's Report to the FSC), pp. 42-45.

69. At the evidentiary hearing, Mr. Knox testified that the reason he did not chose this image of the robber to measure was because: he was walking which lowers one's measured height; you are not able to tell the amount of bend in his knees because of his jeans, which would lower his height; and his feet are spread apart which also lowers his measured height (HRR-XII, pp.21-22).

70. At the habeas hearing, the record reflects that SX-C, the 7-Eleven video, was played until it reached frame 6:31, the one that Mr. Knox chose for his anal-

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[11] "SX" refers to State's Exhibits introduced at the habeas hearing, "PX" refers to exhibits introduced by the Applicant.

ysis, which was from the same upper left-hand camera (HRR-XII, pp. 22-23).

71. Mr. Knox testified at the evidentiary hearing about his reasons for choosing frame 6:31 as follows:

> "Q [Mr. Proctor] Okay, now why did you chose this frame?
>
> A [Mr. Knox] Because the particular stride, I mean, you can see here because you're talking about a person standing on one leg, there's no spreading of the feet or anything like that that would contribute to the reduction of the measured height. If you measured the length of the body all the way up through that leg, then you are going to get a much closer measurement than you would get if you were measuring somebody's feet that are spread or knees are bent, things like that (HRR-XII, p. 23).

72. The record reflects, that at the evidentiary hearing SX-G (introduced at trial as State's Exhibit # 14), a slide presentation of the report in the George Powell III case prepared by Mr. Knox, was played for him, and he explained how the slide shows how the camera's position effects the perspective of the image that is seen by the lens, and why when the robber's body is at an angle, a vertical measurement cannot yield an accurate result (HRR-XII, pp. 30-36).

73. At the evidentiary hearing, Mr. Knox testified that "interpolation" is a term that is used in an analysis involving video compression, but that video compression is not really any issue when using PhotoModeler software, because you are not measuring at the pixel level, you are measuring the gross geometry, and when you outline the geometry of the individual you are doing the same thing (HRR-XII, pp. 41-42).

74. Next, during the evidentiary hearing, SX-CC (also under Applicant's Memorandum in Support, Appendix-B1), a slide presentation prepared by Mr. Knox several years after the trial, when he became aware that his testimony in the Powell case was under scrutiny, was played for Mr. Knox (HRR-XII, p. 52).

75. The record reflects that as each slide was presented, Mr. Knox explained what was depicted and how it related to either the method he used to extract measurements, or was a comparison with the image of the robber entering the 7-Eleven in the frame that Mr. Fredericks selected, with the minimum and maximum height measurements arrived at by Mr. Frederick and made apparent with a line (*See* Applicant's Memorandum in Support, Appendix-Exhibit-A, p. 52) (HRR-XII, pp. 52-66).

76. Mr. Knox testified at the evidentiary hearing, that in the frames from the surveillance video contained in SX-CC, it is shown that the height range arrived at by Mr. Fredericks is exceeded by the top of the robber's head (HRR-XII, p. 56).

77. Next, Mr. Knox testified at the evidentiary hearing about SX-DD, which he described as a slide presentation he prepared of himself long after the trial, walking in and out of a doorway at a normal gait, then at a hurried gait, to demonstrate the method he used, and the discernable difference just walking in a normal manner has on a height measurement (HRR, XII, pp. 66-80).

78. At the evidentiary hearing, Mr. Knox testified that he forwarded a copy of the slide presentation depicted in SX-DD to: Henry Garza, Bell County District Attorney, Lynn Garcia, general counsel of the FSC, Paul McWilliams, Assistant District Attorney, and Grant Fredericks, but that he does not recall receiving any feedback for anyone (RR-XII, p. 81).

79. Next, Mr. Knox testified at the evidentiary hearing while viewing SX-II, a demonstration video prepared by Mr. Fredericks, referenced in his report, and submitted by Mr. Fredericks along with his report to the FSC (HRR-XII, p. 81) depicts the 7-Eleven store, the robber entering the store, and the scanned image of the Applicant, basically as he appears today, inserted into the crime scene for comparison purposes with the image of the actual robber (HRR-XII, p. 84).

80. After observing the scanned image of the Applicant placed in the doorway, Mr. Knox testified that the scanned image appeared to be standing very erect, and that from Mr. Frederick's report and his previous testimony at the evidentiary hearing, the scanned image of the Applicant is a composite of several different scans of him, one of which was taken while he was lying on the floor,

and that would tend to take away some of the natural compression forces of gravity (HRR-XII, p. 83).

81. Mr. Knox testified that when the Applicant's scanned image was inserted next to the image of the robber entering the store, it was apparent that the "relatively erect" image was leaning to a certain extent and the lean was not mimicked in the scanned figure of the Applicant, which makes, the comparison misleading (HRR-XII, p. 84).

82. Mr. Knox testified that because the scanned figure of the Applicant and the figure of the robber have different body position, i.e., one is standing erect, and one is not, and because it appears that he is at least 50 pounds heavier than 185 pounds he weighed in 2008, the comparison of his current image with that of the robber is less accurate (HRR-XII, pp. 89-90).

83. At the evidentiary hearing, Mr. Knox testified that he became aware that the FSC was involved in this case when he was notified by the Bell County District Attorney's Office in 2014 that the matter had been referred to them, but he was never contacted by the Commission, or asked to provide any information to them (HRR-XII, pp. 47-48).

84. Mr. Knox testified at the evidentiary hearing, that he was never contacted by Mr. Fredericks, and recalls that the only conversation he had with him being a conference call between Mr. Garza, Mr. McWilliams, Mr. Fredericks, and himself, and that he did not tell Mr. Fredericks that he lost his work product for his original analysis (HRR-XII, p. 39).

85. He testified that the information he no longer has, consisted of PhotoModeler project files, and that at the time he did not store to "the cloud" as he does now, but they would only be useful to someone who has PhotoModeler software and can use the product, because it is in a proprietary format (HRR-XII, pp. 43-44).

86. Mr. Knox testified, that he re-worked his analysis because of Mr. Fredericks' criticisms, trying to see if he could find "common ground" on the measurements, which primarily entailed not measuring the trailing foot in the frame he chose, because it was below the threshold of the doorway, which was not in the plane, a criticism which he did not entirely disagree with, although it

would lead to a less accurate measurement of the robber's body (HRR-XII, pp. 91-92).

87. Mr. Knox testified at the evidentiary hearing, that he did not change his opinion after the second analysis because he made a conscious decision to bias the numbers as low as he could get them in an attempt to find common ground, but Mr. Fredericks stuck with his height range of 5' 7" to 5' 9," even though the slide presentation Mr. Knox prepared, showed the robber to be taller than 5' 9" (HRR-XII, 93-94).

88. Mr. Knox testified that the results of the different analysis did not change his ultimate opinion, because the issue is still inclusion or exclusion of the Applicant as the robber, and he can still not be excluded on the basis of his height (HRR-XII, p. 95).

89. On cross-examination, Mr. Knox testified that he was not concerned about using the PhotoModeler software before taking the training program because the underlying theory, the mathematical equations, and everything was straight out of engineering course work that he was already familiar with and had been through (HRR-XII, pp. 99-100).

90. When questioned on cross-examination if he attempted to identify any special issues that he needed to be aware of when performing height analysis, as opposed to measuring skid marks in a roadway, Mr. Knox testified as follows:

> "A Well, I mean, I don't think that there's anything even today sitting here knowing what I know that there's really anything particularly different. If you're measuring something from a digital image, it's the same whether you're measuring a skid mark, whether you're measuring an object of some type, whether you're measuring a person. It's measurement. So it would be like if I took out a ruler in this room to measure, you know, a table in this room, as opposed to taking the ruler out to measure you, there nothing any different other than, perhaps, how I have you position yourself. But you're still measuring something so it's the same concept " (HRR-XII, p. 101).

91. On cross-examination at the evidentiary hearing, Mr. Knox testified that analysis of video from multiple cameras gives you multiple measurements, and you could calculate a confidence interval for the mean (HRR-XII, p. 117).

92. Mr. Knox testified on cross-examination that PhotoModeler software can be used with or without a calibrated camera, and using a camera that has not been calibrated is called an inverse camera solution, where you are solving for the parameters of an unknown camera, and he explained that the first analysis of the robber's height that he performed with PhotoModeler was an inverse camera solution (HRR-XII, pp. 113-115).

93. Mr. Knox testified as follows when asked his opinion of Mr. Fredericks' critique:

> "Well, I mean, I think the crux of it is, is that it's a critique of something by a person who doesn't do the methodology. He doesn't use PhotoModeler. He's never used PhotoModeler. He doesn't have the software and he's critiquing work that was done, and so, it seems clear to me that he doesn't really understand what I did. I mean, his criticisms say I didn't use - - I didn't use any methodology or didn't do things correctly, but he doesn't use the software. So, I mean, that's really the impression that I get it is just a lot of criticism about something that he's really not qualified to talk about" (HRR-XII, p. 51).

Grant Fredericks

94. The record reflects that on March 22, 2017, pursuant to an order expanding the record, Grant Fredericks filed an affidavit with the Court detailing his involvement in the Applicant's case, and the affidavit was later admitted into evidence as Petitioner's Exhibit Number 18 ("PX-18").

95. The Court has reviewed the affidavit and finds it credible, and notes that it

references numerous elements of a 2015 report[12] ("Report") that Mr. Fredericks was contracted to submit to the FSC after conducting an independent scientific review of height measurements evidence produced by two experts, Michael Knox, and Dr. Al Yonovitz. *See* PX-18, p. 1.

96. The Court finds that in his introduction, Mr. Fredericks states that the purpose of his report is to determine "whether forensic video analysis, and specifically the sub-discipline of height comparison from video images, is a junk science or a bone fide discipline that can be appropriately admitted into the Texas Courts." *See* Report, p. 2.

97. In his report, Mr. Fredericks uses the following definition of photogrammetry from the 4th Edition of the Manuel of Photogrammetry:

> "Photogrammetry is the art, science, and technology of obtaining reliable information about physical objects and the environment through the process of recording, measuring and interpreting photographic images and patterns of electromagnetic radiant energy and other phenomena. In forensic applications, this is the mathematically based scientific principle used to extract dimensional information from images, such as the height of subjects depicted in surveillance images and accident scene reconstruction." *Id.* at 3.

98. According to Mr. Fredericks' report, [t]here are a number of photogrammetric techniques and methodologies commonly practiced by various industries, from engineering and manufacturing, to mapping and warfare." *Id.*

99. In his report, Mr. Fredericks states that at the time of his testimony in this case, Mr. Knox had no post secondary degree, and no formal education in video analysis, television engineering, photogrammetry, image interpretation, video compression, reverse projection of compressed video images, or any of the

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[12] The entire report, entitled "Texas Forensic Science Commission Investigative Report - Forensic Video Analysis - Photogrammetry," is before the Court as Memorandum In Support, Appendix-Exhibit A.

functions listed in the industry training guidelines recommended for work in this field. *Id.* a 21.

100. The Court finds that as evidence of Mr. Knox's alleged lack of knowledge, Mr. Fredericks identifies in the trial transcript several instances where he claims that Mr. Knox misidentified the source of the video format of the 7-Eleven surveillance video as "videotape" rather than MPEG compressed digital images. *Id.*

101. However, the Court has reviewed each instance of "misidentification" cited by Mr. Fredericks, and finds that in each instance Mr. Knox was being questioned, and at no time did Mr. Knox use the term "videotape," rather the term was used by the questioner. *Id.* at 22.

102. According to his report, Mr. Fredericks states that Mr. Knox listed on his CV "no training on the PhotoModeler software" at the time that he completed the work on this case, although he testified at trial that he recently attended a training course on the software. *Id.*

103. Mr. Fredericks states in his report that Mr. Knox prepared his final report without having visited the crime scene himself to take measurements, and then Mr. Knox testified at trial to a "new" photogrammetric methodology he employed when taking measurements of the robber in the Valero, which he later used to compare to the measurements of the robber taken at the 7-Eleven. *Id.*

104. In his report, Mr. Fredericks explains, that apparently, from the description of his methodology at trial, Mr. Knox required that the camera producing the foundation photographs be calibrated prior to conducting the suspect's measurements, but the measurements he received from the police did not contain the gridded photographs that Mr. Knox said he needed for PhotoModeler to solve the camera calibration, and he acknowledged at trial that the first time that he applied this methodology was the night before trial. *Id.* at 25.

105. According to his report, the Court finds that Mr. Fredericks disagrees with Mr. Knox when he testified that: he did not have to know anything about the video recording system; the quality of the image could be poor; he was limited to two dimensional photogrammetry because there were no two images that

matched exactly; the height should be measured along the axis of the body; or, when the camera is rectified the perspective changes. *Id.* at 25-35.

106. In his report, Mr. Fredericks also reviews the height analysis conducted by Dr. Al Yonovitz, a Professor of Speech and Hearing Sciences at the University of Montana, and notes that "Dr. Yonovitz does not appear to have any advanced training or publications in the area of digital imaging sciences, or specifically in photogrammetry or reverse projection." *Id* at 36.

107. Mr. Fredericks in his report, summarizes Dr. Yonovitz's height analysis as follows:

> "Dr. Yonovitz' Declaration is void of any scientific methodology. He offers no clues as to his approach or standards used to formulate his conclusions. His report merely states that the robber is at the same plane of the doorway as the stickers, and if so, it appears (although not directly stated by Yonovitz) that his height can be compared to the height of the sticker. Although Dr. Yonovitz' approach applies some common sense, his analysis is akin to simply 'eye-balling' the video images. He fails to provide any basis for his conclusion. His approach offers no assistance to the trier of fact, it is not repeatable, and it fails to meet the threshold for expert evidence."

108. The record reflects that Mr. Fredericks testified twice during the habeas evidentiary hearing process, once on November 9, 2017, as a witness for the Applicant, and once on January 30, 2018, as a rebuttal witness for the Applicant, after Mr. Knox's testimony (HRR-VIII, p. 5; HRR-XII, p. 142).

109. At his initial appearance on November 9, 2017, Mr. Fredericks, on direct examination, testified that for thirty (30) years he has been a forensic video analyst, examining all types of video evidence for criminal and civil litigation (HRR-VIII, pp. 5-6).

110. Mr. Fredericks testified that he obtained a degree in broadcast television, with an emphasis on "television engineering," from Gonzaga University in 1982, and after graduation worked in television as a producer, before joining the Vancouver Police Department as a police officer in 1988, and remaining there for twelve (12) years, becoming head of their forensic video unit (HRR-VIII, pp. 6-8).

111. Mr. Fredericks testified that since 2002 he has been a contract instructor with the FBI National Academy in Quantico, Virginia, where he teaches courses related to digital video examinations and consults for a number of agencies. *Id.*

112. In addition, Mr. Fredericks testified that he is a member of the Law Enforcement and Emergency Services Video Association (LEVA), and recognized by that organization as a certified forensic video analyst, one of only 100 or so in the country to achieve that distinction (HRR-VIII, pp. 10-11).

113. At the evidentiary hearing, Mr. Fredericks testified on direct examination that he had testified in court throughout the United States, Canada, and the U.K. approximately 300 times or more as a forensic video analyst. *Id.*

114. Mr. Fredericks testified that there are different definitions of photogrammetry depending on the industry, and that reverse projection is a subdiscipline of photogrammetry, and other industries like aero-space, topography, and NASA all use some form of photogrammetry (HRR-VIII, p. 5).

115. At the hearing, Mr. Fredericks testified that reverse projection photogrammetry is a subdiscipline of photogrammetry which is used by forensic video analysts and he has been doing it "since the '90s," and further testified as follows when questioned by the Applicant's counsel, Water Reaves, Jr.:

> "Q [Mr. Reaves] Now as part of doing that, I guess, have you - - have you conducted photograph - - have you attempted to make or have made measurements from photos in the past?

"A Yes, many times.

"Q Okay, and testified to them.

"A Yes.

"Q Okay. As part of that, have you specifically conducted - - or reviewed images and done work to attempt to estimate height?

"A Yes.

"Q Have you done that on one or many occasions?

"A I have done it on many occasions. I had a Daubert hearing here in Texas ten-plus years ago, I think, in a homicide case on that exact science. I did a peer review or, pardon me, a peer examination with members of the LEVA organization back in 2004 of '05. We conducted about 3 of 400 measurements of the university and then I tested - - I have probably testified in height measurements and other photogrammetric observations dozens of times (HRR-VIII, pp. 14-15).

116. Mr. Fredericks testified that accident reconstruction traditionally does not use video evidence very often (HRR-VIII, p. 15).

117. At the hearing, Mr. Fredericks testified that he was contacted in the fall of 2014 by the FSC to review the work product of two experts, one who had given testimony at a trial, and one who had prepared a report post-conviction, and they had come to completely divergent opinions about a suspect's height (HRR-VIII, p. 18).

118. Mr. Fredericks testified that photogrammetry, when done by a qualified expert is a valid science:

> "If somebody is trained to number one, understand what digital video is in and all of the errors associated with digital compression, because it requires certain understanding to appreciate the fact that the image is not, you know, actually real, the image is fabricated through compression technology. So we have to understand what image is reliable and what isn't. So that is a foundational understanding of video for the purpose of examinations" (HRR-VIII, p. 20).

119. At the evidentiary hearing, Mr. Fredericks testified that he did have contact with Mr. Knox about his work product:

> ". . . And I had an opportunity to ask some questions of the expert and the – Specifically, I wanted to get the photographs and work products and everything that the expert had produced at the time. And I was instructed by the expert that he lost everything that the expert had produced at the time. And I was instructed by the expert that he lost everything so there was no record of any of his work product from that time period, he told me" (HRR-VIII, pp. 23).

120. Mr. Fredericks testified that the FSC gave him permission to conduct his own examination of the video images and the scene. *Id.*

121. At the hearing, Mr. Fredericks testified that he employed 3-D photogrammetry and reverse projection, two different methodologies of obtaining measurements that were meant to validate each other (HRR-VIII, p. 27).

122. The record reflects that Mr. Fredericks then played a video presentation that included many of the same images present in SX-II[13], which was played during

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[13] In Mr. Fredericks' report the video is referred to as TX_Powell_Demo.avi.

Mr. Knox's testimony, and is the video presentation that Mr. Fredericks prepared along with his report and submitted in to the FSC (HRR-VIII, p. 28).

123. Mr. Fredericks testified that on page 27 of his report, a series of "macro block" are visible which are made up of 64 pixels each and that is how video compression works for an MPEG video, but because none of this detail is visible in Mr. Knox's work, his ability to "measure with precision" is gone (HRR-VIII, p. 37-38).

124. At the hearing, Mr. Fredericks testified that when the scanned image of the Applicant in the white jumpsuit is inserted into the robbery scene and juxtaposed against the robber and a "common-sense" observation is that they could not possibly be the same person (HRR-VIII, pp. 44-45).

125. Mr. Fredericks testified that "it doesn't make any common sense and it would be no assistance to the trier of fact" to provide only a minimum height because there would be no scientific value to a statement that a person is taller than five feet (HRR-VIII, p. 53).

126. At the hearing, during direct examination, Mr. Fredericks testified that after he did his examination, he went through the FSC, and they contacted Mr. Garza and a "webinar' was set up where his results were shown to Mr. Garza and Mr. Knox, and after that he received a revised report from Mr. Knox revising the robber's height downward from 6' 1⅓" to 5' 10.4", but that he did not receive an explanation from Mr. Knox about the revisions "that he could understand" (HRR-VIII, pp. 57-58).

127. Mr. Fredericks testified that the "chronology" of the examinations that Mr. Knox articulated in his report and in his testimony was: he had not received any formal training on the tool that he used to form him opinion before he went to trial; he had not received any training in forensic video analysis; when he testified at trial he said he had received training on the tool, but he did not say that the training was done after he had done the work; the work that he did the night before the trial was based on the training he received and was based on a different technology – a calibrated camera using PhotoModeler technology (HRR-VIII, p. 59).

128. At the evidentiary hearing, Mr. Fredericks testified:

> "Yes he - - So he stated at trial that he relied on still images and measurements that were taken by, I believe an investigator and that he had not gone to the scene and conducted any of his own measurements until the day before the trial. So his methodology requires the use of a calibrated camera that can be read by the program. He didn't have that when he did his initial work so my concern was that now he's - - The night before he says he goes out redoes everything and comes up with the exact same measurements, that would be virtually impossible. Not applying the same technology, same methodology, having unreliable measurements, you can't possibly come up with the same results" (HRR-VIII, p. 61).

129. On cross-examination by the State, Mr. Fredericks testified that he did not know whether or not the Applicant looked today like he looked in 2009 (HRR-VIII, p. 70).

130. Mr. Fredericks, on cross-examination, testified that "television engineering" does not involve high level mathematics (HRR-VIII, p. 72).

131. On cross-examination, Mr. Fredericks testified that unless you are trained in forensic video analysis, including compressed video images, marco block, edge patterns, etc., one should not be extracting measurements from photographs (HHR-VIII, pp. 72-73).

132. Mr. Fredericks testified on cross-examination that though Mr. Knox stated in his affidavit that he was not a "forensic video analyst," he still examined digital video evidence which is very different from accident reconstruction photogrammetry (HRR-VIII, p. 74).

133. On cross-examination, Mr. Fredericks testified that "macro blocks" and "pixels" have to be interpreted by anyone who performs video analysis (HRR-VIII, p. 76).

134. At the hearing, Mr. Fredericks testified that unless one is trained in forensic video analysis to some degree, he or she should not be extracting measurements from digital images (HRR-VIII, p. 72).

135. Mr. Fredericks testified on cross-examination that he did not have to use the same method that Mr. Knox used to critique his work (HRR-VIII, p. 77).

136. On cross-examination, Mr. Fredericks testified that Mr. Knox in his initial analysis used PhotoModeler, but he did not use the methodology (HRR-VIII, p. 78).

137. In his affidavit on page 10, the Court finds that, Mr. Fredericks states that Dan Mills was "hired" by the prosecutor to review Mr. Knox's analysis post-conviction, but when testifying on cross-examination Mr. Fredericks agreed that Mr. Mills was engaged by the FSC (HRR-VIII, pp. 82-83).

138. Also on page 10 of his affidavit, the Court finds that Mr. Fredericks states that Mr. Mills sold Mr. Knox the PhotoModeler software, but on cross-examination he admitted that he may have incorrectly assumed as much (HRR-VIII, pp.84-85).

139. On cross-examination, Mr. Fredericks testified that the reason Mr. Knox thinks that you cannot determine a maximum height is "just a product of his lack of training and experience" (HRR-VIII, pp. 88-89).

140. Mr. Fredericks testified that he has never used PhotoModeler and has not been trained on it, and is not familiar with what is meant by the term "single-image inverse photogrammetry (HRR-VIII, pp. 89-90).

141. On cross examination, Mr. Fredericks testified that Mr. Knox made some adjustment to the measurements in his analysis leading to a different result because of his critique of Mr. Knox's previous analysis (HRR-VIII, p. 91).

142. Mr. Fredericks testified, that when Mr. Knox did his initial height analysis the results of which he testified to in court, he used no known methodology and the way he arrived at any height estimate was unknown (HRR-VIII, p. 93).

143. The record reflects that before Mr. Knox took the stand at the habeas evidentiary hearing, the Applicant requested that Mr. Fredericks, who was also present, be excused from the rule and allowed to remain in the courtroom to facilitate commenting on Mr. Knox's testimony, and the request was granted (HRR-XII, pp. 7-8).

144. In his rebuttal testimony at the evidentiary hearing, Mr. Fredericks testified, again, that there are a number of factors that are "significantly different" when perform height measurements of an individual as opposed to measuring a crime scene, i.e., the humans factor and the quality of the crime scene photographs as opposed to the low-resolution surveillance video (HRR-XII, pp. 43-144).

145. In his rebuttal testimony, Mr. Fredericks testified that:

> "It was never my opinion that the robbery suspect was 5' 9". I never articulated that at any time. And he chose an image where the robbery suspect was depicted outside the plane of the doorway and attributed that to me as that was the one that I had examined which was not correct" (HRR-XII, p. 147).

146. In his rebuttal testimony Mr. Fredericks again testified that Mr. Knox statement that only a minimum height can be established is "unfounded" and "no where to be found" in publications anywhere in the world (HRR-XII, p. 155).

147. Mr. Fredericks testified in rebuttal that when Mr. Knox talked about "rectifying" the camera image he probably meant "calibrating" the image, and it relates to Mr. Knox's view that the subject's height will "increase" if the camera's perspective is changed and that is "completely wrong" (HHR-XII, pp. 169-170).

148. On cross-examination in his rebuttal testimony, Mr. Fredericks testified that as stated on page 52 of his report, the robber's maximum height could be no taller than 5' 9.4" (HRR-XII, pp. 171-172).

149. The Court finds that a "Peer Review" ("Peer") by Dan Mills, proprietor of DMC Technical Services, Incorporated, of Toronto, Canada, was completed for the FSC in January of 2016, and is before the Court as Appendix Exhibit-J of the Applicant's Memorandum in Support.

150. Mr. Fredericks testified that he suggested to the FSC that Mr. Mills be contacted to do a peer review of Mr. Knox's work because Mr. Knox had received training on the PhotoModeler software from Mr. Mills (HRR-VIII, pp. 85-86).

151. The Court finds that the report begins as follows:

> "DMC Technical Services, Inc., was asked to complete a peer review of the available reports and analysis of a criminal case of the State of Texas v. George Powell. Specifically, DCM was tasked at (sic) to review the measurement methods used by two experts and comment on their validity of the scientific method. The two measurement methods identified were single image inverse photogrammetry and point cloud scanning. Both methods have been previously proven to be valid measurement procedures and would be considered valid by experts within the field of forensic measurements. A deeper investigation into the suitability of their application in this analysis, as well as adherence to best practices by the experts was undertaken." *See* Peer, p. 1.

152. The record reflects that efforts were made to secure an affidavit from Mr. Mills, but they were unsuccessful (HRR-II, p. 5; III, pp. 15-21).

153. Mr. Knox testified at the evidentiary hearing, that he did speak with Mr. Mills and informed him that he did not have the PhotoModeler project files from the first analysis, but provided him with the project files from the second analysis (HRR-XII, pp. 49-50).

154. The Court finds, that in his report, Mr. Mills described the two analysis completed by Mr. Knox with PhotoModeler software, the first without a calibrated

camera, and the second one with a calibrated camera, and concluded by saying:

> Both methods of analysis completed by Mr. Knox within PhotoModeler were utilizing valid photogrammetric procedures that are part of the PhotoModeler training class. Both would be expected to yield accurate results with the 2D, minimum height limitation that is included in Mr. Knox's report. Solving an inverse camera using control points is accurate assuming that the points being used for control were accurate. The second project, using control [points] determined from a calibrated camera would be considered accurate control and would be [the] solution that should be relied on as the most accurate photogrammetric solution in Mr. Knox analysis. Solving measurements using photogrammetry in this manner is scientifically valid and Mr. Knox's application of the method also was applied properly. *See* Peer, p. 2.

155. The Court finds that in his report, Mr. Mills titles the section where he analyzes the work of Mr. Fredericks as "Point Cloud Scanning," and begins his review as follows:

> "Mr. Grant Fredericks completed a measurement analysis of the convenience store as well as a male dressed in a white top and pants, Mr. Powell. The technology used to complete the measurements is unknown and the raw data was not provided to DCM for analysis. The result shown in a video file names TX_Powell_Demo.avi appear con-sistent with the point cloud measurement being comple-ted by a tripod based scanner. This technology, when properly calibrated and set up, would be considered a valid and accurate measurement method. Mr. Fredericks appears to have inserted the point cloud scan of the male into the point cloud scan of the convenience store. Assuming both models to be scaled

> at a 1:1 (life sized) and the male to be placed with his feet bottoms along the ground plane then this would provide a model that could position the male at various points in the store and allow for rotation of the model to show it from various angles. . ." *Id.* at 2-3.

156. The Court finds that Mr. Mills' report stated that with regard to the comparative representation of the suspect in the surveillance video relative to the inserted image of Mr. Powell:

> "It needs to be noted that the 3D model of the (sic) Mr. Powell shows him standing very erect and the 2D surveillance image provides a single plane representation of the suspect and any lean out of plane or the 3D nature of the human body is not accounted for in this type of single plane representation. While both people seen in Figure 2 have their feet placed in almost the exact relative positions, their shoulders and heads are tilted to different positions in a left/right manner. The forward tilt of the suspect cannot be accounted for in this single image analysis. As such, any comparison would result in the 2D suspect height being somewhat taller than shown in the comparison. The exact height of the suspect cannot be quantified as much as the minimum height as he passes through this plane. This was stated in Mr. Knox's report and the same remains true in this form of comparative analysis completed by Mr. Fredericks. This would also remain true for each of the comparisons shown in the TX_Powell_Demo.avi video. The position and perspective of both the suspect and Mr. Powell is presented in a scientifically valid manner in Mr. Fredericks' comparisons." *Id.* at 3-4.

157. According to his report, the Court finds that Mr. Mills determined that within the TX_Powell_Demo.avi video, using the green line to represent the height of the suspect can be considered a scientifically valid way of determining the

minimum height of the suspect, but he cautioned that the point chosen by Mr. Fredericks to measure the top of the suspect, signified by a red dot, is "subjective" and he suggested that it be moved higher than the point selected, and that moving it: "to the top of the suspect's head and in a similar position to the points selected by Mr. Knox, the height results obtained in this 3D model of the suspect would appear to result [in] similar results to the measurements provided by Mr. Knox. *Id.* at 4.

158. Under the heading "Suggested Next Steps," the Court finds that Mr. Mills ends his peer review as follows:

> "Both experts' measurements methods have been set up using proper procedures and the height measurements represents a minimum in Mr. Knox's report. Given the difference between the 2D minimum height results in the single image inverse photogrammetry solution, and the 3D point cloud solution for the convenience store/Mr. Powell analysis, the height comparison results are subject to expert opinion. While all analysis of this manner contains expert opinion in the conclusions, the two different measurements methods will leave a large amount of subjectivity in the interpretation. . ." *Id.* at 5.

159. The Court finds that Mr. Mills Peer Review is dated January 29, 2016, and it was followed by a letter from Mr. Mills to the FSC ("FSC Letter") in which he addresses several questions posed to him by Lynn Robitaille Garcia, General Counsel to the FSC, about his Peer Review. *See* Memorandum in Support, Appendix-Exhibit C.

160. The record reflects that Mr. Mills begins the letter by stating to Ms. Garcia that she is correct in her understanding that his review was more heavily based on Mr. Knox's second analysis using more detailed measurement control inputs than the original analysis. *See* FSC Letter, p. 1.

161. Mr. Mills writes in his letter the questions from Ms. Garcia and his answers as follows:

"**Question** - Are you able to offer any observations regarding the photogrammetric files you reviewed in light of the case report and testimony?
"**Dan Mills' Answer** - The digital file that I analyzed was a more scientifically relevant representation of the suspect's minimum height as he passed through the doorway of the 7-Eleven. This is due to the increased knowledge of control measurement inputs to use in the analysis. Mr. Knox trial testimony of a minimum suspect height of 6' 1⅛" was consistent with his August 7th , 2009 written report. The testimony did not reference the 5' -10.4" measurement.

"**Question** - Are the conclusions in the case report and testimony supported by the data?
"**Dan Mills' Answer** - No, the digital Modeler file with 5' 10.4" minimum height was a subsequent analysis with updated information that was not reflected in the written report and also does not appear to be reflected in the testimony.

"**Question**- What are the standards in the discipline relative to changes in height assessments?
"**Dan Mills' Answer** - The discipline of photogrammetric measurement and image analysis is measurement science and does not take into account what is being measured. Distances between coordinated points are determined but the actual object does not typically change the scientific method used. The height of the suspect was determined using the upper and lower point of the suspect deemed to be passing through a vertical plane created by the doorway. The same method could be used on any object passing through the plane. The practitioner does have some subjectivity on what part of the object (in this case the top of the suspect's head and the bottom of his shoe) is crossing the vertical plane. This can be characterized by a variance in one or two pixels of where a practitioner selects a measurement point.

"**Question** - Would a change such as this (6' 1" to 5" 10.4") merit the

issuance of an amended report?
"**Dan Mills' Answer** - I do not know of a specific variance that is considered the boundary requiring an amendment to a report. In this instance, Mr. Knox's original testimony indicated that the suspect had a minimum height of 6' 1⅛" and the subsequent PhotoModeler analysis determined the minimum height to be 5' 10.4". This represents a percentage difference of 3.8% in the suspect's minimum height. I would consider that a noteworthy variance. I would not consider that the variance is what would require an amended report. Any time further data is analyzed a report, even in the form of a short letter, would normally be provided. . . ." *See* FSC Letter, pp. 2-3.

162. In his testimony at the November 9, 2017 session of the habeas evidentiary hearing, Mr. Fredericks was asked by the State on cross-examination why he stated on page ten of his affidavit that Dan Mills was "engaged" by the prosecutor when the cover page of his Peer Review states that it was completed for FSC:

> "A [Mr. Fredericks] My understanding at the time when I wrote this was that prosecutor's office provided- - was supposed to have provided Mr. Mills with a certain amount of scientific documentation relating to the trial; instead he was provided with different measurements that Mr. Knox had subsequently come up with. So they engaged him to review different material than what he was originally hired to review.
>
> "So rather than reviewing the issues at trial and the testimony at trial and the height at trial, he was not given that information. Instead he was given the lowered height provided by Mr. Knox in his subsequent re-analysis. As a result of that, Mr. Mills was mislead about what Mr. Knox's original opinions were. Since then Mr. Mims (sic) has rewritten that report, as you know, and I'm sure that's going to be introduced.
>
> "Q [Mr. Proctor] Can you answer my question?

My question was: Did the prosecutor employ Dan Mills to write a report?

"A That's now my understanding, yes.

"Q Why does it say on here that the analysis [was] completed for Lynn Garcia [phonetic] of the Texas Science Commission?

"A Because you have just shown that to me.

"Q That's why it says it on here? Because I showed it to you?

"A Well, you asked me if I were - - if I was - - if I was incorrect in saying, I believe, that the prosecutor engaged. That was my understanding when I wrote this. I'm aware that Mr. Mills was paid by the Forensic Science Commission, but it was Mr. Garza who provided him with the incorrect information. So in other words he was - -

"Q That wasn't my question, okay?

"A Well, I'm agreeing with you. I'm agreeing with you" (HRR-VIII, pp. 82-83).

Scott Alan Kurtz

163. On September 18, 2017, the affidavit of Scott Alan Kurtz ("Kurtz"), of Dane County, Wisconsin, was filed with the Court, offered into evidence by the Applicant, and admitted, without objection, as Petitioner's Exhibit Number 11 (HRR-V, p. 41).

164. According to his affidavit, the Court finds that Mr. Kurtz is a certified forensic video analyst, and was contacted by the Applicant's counsel who asked him to:

review the affidavits that Michael Knox and Grant Fredericks submitted to the Court; review Knox's August 2009 report, his trial testimony, and the information he submitted to the FSC; and the report that Fredericks submitted to the FSC, and to "offer [his] opinions as to the validity of the techniques and processes that each analyst employed in their respective forensic height estimation work," and the Court has read Mr. Kurtz affidavit and finds it credible. *See* Kurtz, p. 3.

165. The Court finds that, according to his affidavit, Mr. Kurtz's analysis of Mr. Knox's work product appears to be, much like that of Mr. Fredericks, seen through the prism of a certified forensic video analyst.

Additional Findings

166. The Court finds, that at the time of the Applicant's trial in November of 2009, Mr. Knox's background in higher mathematics, physics, computer science, and his experience in crime scene reconstruction using the software program PhotoModeler qualified him to perform photogrammetry.

167. The Court finds, that Mr. Knox performed single image inverse photogrammetry using the PhotoModeler software in his first analysis, when he determined the robber's minimum height to be 6' 1⅛," and in he second analysis when he determined the robber's minimum height to be 5' 10.4, " the difference being, that in the second analysis, he biased the measurements as low as he could in an effort to find common ground with Mr. Fredericks.

168. The FSC, the Court finds, although investigating a complaint against Mr. Knox's expertise, never contacted him or asked him to submit information to support his challenged analysis, however, on his own accord, Mr. Knox did forward his second analysis and other information to them.

169. The Court finds that the change in numbers in Mr. Knox's first and second analysis from 6' 1⅛" to 5' 10.4" was the result of a change in measurements used to arrive at a conclusion, not a change in the scientific method used.

170. Mr. Fredericks, the Court finds, after being retained by the FSC to review

Mr. Knox's two analysis, and reviewing them, concluded that Mr. Knox did not possess the qualifications to analyze video tape because he was not a forensic video analyst, and was not familiar with aspects of digital images and compression, though he acknowledges that other industries unconnected to forensic video analysis utilize photogrammetry.

171. The Court finds that Mr. Fredericks has a Bachelor of Arts degree in Broadcast Communications from Gonzaga University, and is a certified forensic video analyst with extensive experience in forensic video applications, and has testified as a expert throughout the United States, Canada, the U.K., Australia, and New Zealand.

172. Mr. Fredericks, the Court finds, does not have a background in higher mathmatics, and has never used PhotoModeler, the software Mr. Knox used to conduct the height analysis.

173. The Court finds, that Mr. Fredericks incorrectly wrote in his report to the FSC and in his affidavit, and testified at the habeas evidentiary hearing in this case, that Mr. Knox used "no methodology" when he conducted his first analysis, when, in fact, he used PhotoModeler software.

174. The Court finds, that Mr. Fredericks complained that he was unable to analyze the methodology of Mr. Knox's first analysis because he was told that Mr. Knox no longer had his project files, yet, when Mr. Knox sent Mr. Fredericks the project files from his second analysis, Mr. Fredericks remarked that he could not understand them (HRR-VIII, p. 58).

175. The Court finds that Mr. Fredericks lack of knowledge of PhotoModeler software calls into question what difference it would have made to his critique had the project files from Mr. Knox's first analysis been available, since, in all likelihood, he would not have understood those either.

176. In SX-II, the comparison video prepared by Mr. Fredericks of the Applicant's scanned image in a white jumpsuit, superimposed into the 7-Eleven store crime scene with the robber, the Court finds that the comparison is not as accurate as it could be because the scanned image of the Applicant standing erect and is not in the same position as the robber, does not have the same posture,

does not appear to be standing on the same plane, and is much heavier than the Applicant was in 2008.

177. Dan Mills, the Court finds, was not mislead when he analyzed Mr. Knox's second analysis, because before he wrote his peer review, he had been contacted by the FSC, District Attorney Henry Garza, and Mr. Knox, and was told that the project files for the first analysis were no longer available and all that was left from the first analysis was the report.

178. The Court finds that Dan Mills after reviewing analysis by Mr. Knox and the analysis by Mr. Fredericks, concluded that both men used scientifically appropriate methods in their height analysis.

179. The Court finds that in his letter to the Lynn Garcia of the FSC, Mr. Mills rightly says that his review of Mr. Knox's second analysis does not support Mr. Knox's first analysis because he had no project files from the first analysis to analyze.

180. The Court finds that in SX-CC, Mr. Knox, using PhotoModeler and complementary software, took the frame from the surveillance video selected by Mr. Fredericks of the robber walking into the 7-Eleven, and instructed the program to place lines across the doorway at the minimum (5' 7") and maximum (5' 9") heights arrived at by Mr. Fredericks in his analysis, and it shows that the top of the robber's head protrudes past the 5' 9"line.

Entitled To Relief Under Article 11.073

181. According to the Applicant, he is "scientifically excluded" as the assailant of the aggravated robbery in this case because he is too tall, and the evidence that excluded him was not available at the time of trial, and contradicts the evidence relied upon by the State.

182. The Court finds that the Applicant invokes Article 11.073 of the Texas Code of Criminal Procedure, which states, in relevant part, as follows:

> "(a) This article applies to relevant scientific evidence that:

"(1) was not available to be offered by a convicted person at the convicted person's trial; or

"(2) contradicts scientific evidence relied on by the state at trial.

"(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

"(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072 containing specific facts indicating that:

"(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

"(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

"(2) the court makes the findings described by subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

"(c) For the purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the con-

victed person on or before the date on which the original application or previously considered application, as applicable, was filed.

"(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or scientific method on which the relevant scientific evidence is based has changed since:

"(1) the applicable trial date or dates, for a determination made with respect to an original application; or

"(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application." *See* Tex. Code Crim. App. Ann., art 11.073 (West Supp 2018).

Availability

183. In the instant case, the Court finds that the "relevant scientific evidence" is the discipline of photogrammetry, and more specifically its subdisciplines single image inverse photogrammetry and reverse projection photogrammetry, which were used by the experts to obtain height measurements of the robber from a frame of the 7-Eleven store surveillance video.

184. The Applicant claims that Michael Knox, the State's expert, reduced the discipline of photogrammetry to "junk science" by the shoddy manner in which he performed his analysis, by over estimating how tall the robber could be, thereby keeping the 6' 3" Applicant a suspect.

185. In his habeas action, the Court finds that the Applicant counters the State's trial expert with his own expert in photogrammetry and video analysis, Grant Fredericks, a certified forensic video analyst, with a long and distinguished

career spanning over thirty (30) years in the field of digital image analysis.

186. As explained in detail above, the Court finds that Mr. Fredericks reviewed the State's expert's height analysis, conducted his own analysis, and reached the conclusion that the robber in the video was no more that 5' 9", which would exclude the Applicant as the perpetrator.

187. The Court finds, that art. 11.073 makes clear, that in order to be granted relief under its provisions, an applicant must show that the relevant scientific evidence was not available at the time of his trial "because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial."

188. At the habeas evidentiary hearing, Mr. Fredericks testified that he has performed reverse projection photogrammetry, one of the methods he used in this case to perform his analysis "since the '90s," and added that he has probably testified in height measurement and other photogrammetric observations dozens of times (HRR-VIII, pp. 14-15).

189. Moreover, in his testimony at the evidentiary hearing, the record reflects that in May of 2009, when prosecutor Paul McWilliams conducted an internet search for persons skilled in photogrammetry, Grant Fredericks name appeared in the search results, but he was not selected (HRR-X, p. 58).

190. The Court finds that there is no showing by the Applicant that this "new, relevant scientific evidence" introduced by the Applicant through Grant Fredericks at his evidentiary hearing was unavailable at the time of his trial in November of 2009.

Contradicts the State's Evidence

191. The Court finds that art. 11.073 also allows an applicant to pursue relief using its provisions, if the relevant scientific evidence contradicts the scientific evidence relied on by the State at trial.

192. In the instant case, the record reflects that Mr. Knox, the State's expert, testified that from his photogrammetric analysis, the robber depicted in the

surveillance video was at least 6' 1⅛" tall (RR-XI, p. 39), whereas, at the evidentiary hearing, Mr. Fredericks, the Applicant's expert, testified that his analysis showed him to be about 5' 7," but no taller than 5' 9¼" tall (HRR, V, p. 54).

193. At the evidentiary hearing, during Mr. Knox's testimony, SX-CC a slide presentation prepared by Mr. Knox, was offered and admitted into evidence.

194. The record reflects that SX-CC consists of series of slides showing how Mr. Knox, using PhotoModeler software: (1) took a frame from the surveillance video[14] that Mr. Fredericks used to arrive at his height estimates of 5' 7" with a maximum height of 5' 9¼"; (2) fed all the measurements of the 7-Eleven doorway and height estimates by Mr. Fredericks into the software; (3) marked control points on the selected frame; (4) and projected Mr. Fredericks' height estimates onto the frame.

195. The Court finds that it is apparent from slide eight (8) and several of the following slides, that the robber's head exceeds the 5' 9¼" line, therefore, exceeds the maximum height limit asserted by Mr. Fredericks.

196. At the evidentiary hearing, after Mr. Knox concluded his testimony, Mr. Fredericks, who had been allowed to remain in the courtroom during Mr. Knox's testimony, testified in rebuttal as follows:

> "When I watched Mr. Knox testify, he attributed my measurements to 5' 9." It was never my opinion that the robbery suspect was 5' 9." I never articulated that at any time. And he chose an image where the robbery

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[14] The Court finds that Mr. Fredericks used frame 00:04:28 to estimate the robber's height of 5' 6.8," whereas Mr. Knox used frame 00:04:27 in his slide presentation to demonstrate the robber was outside Mr. Fredericks' maximum height of 5' 9.35." The Court finds that it is unclear what, if any, effect this discrepancy would have on the conclusion of Mr. Knox's demonstration, but the record does reflect that Mr. Fredericks pegged that robber's height at 5' 7" with a two inch margin of error (HRR-VIII, p. 54), and the robber exceeds this level by several inches.

> suspect was depicted outside of the plane of the doorway and attributed that image to me as that was the one that I examined which was not correct. I didn't examine that one because as the individual is further outside the door they're going to appear higher" (HRR-XII, pp. 147-148).

197. One of the primary reasons for the Applicant's assertion that his evidence contradicts that of the State, the Court finds, is that Mr. Knox maintains he is unable to give a maximum height because of factors that cannot be quantified, like bending, leaning, etc., hence, his analysis concludes the robber is at least 6' 1" tall.

198. The Court finds that Mr. Fredericks disagrees, and testified that a maximum height can be established, and since he calculates it to be no more than 5' 9 ⅓," the Applicant is " scientifically excluded" as the perpetrator because he is 6" 3" tall.

199. However, the Court finds that Mr. Fredericks method of measurement from the top of the image straight down to the floor underneath the body, necessarily omits height that may be lost due to other factors like position, posture, stance, gait, etc.

200. The Court finds that even Mr. Fredericks' maximum height, since it is based on a measurement that does not include unknowables, cannot be viewed as definitive.

201. The Court further finds that because, as noted by Mr. Mills, of the subjectivity of interpretation involved in different measurement methods, on this record the Court does not find that Mr. Fredericks results contradict, within the meaning of art.11.073, those of Mr. Knox.

Change

202. The Court finds, that pursuant to art. 11.073, when making a finding on whether or not the relevant scientific evidence was ascertainable, a court may take into consideration whether or not the field of scientific knowledge, the

scientific method used, or the testifying expert's scientific knowledge has changed.

203. Here, there is no showing that either the field of photogrammetry or the various subdisciplines of it which the two experts used in this case has changed.

204. However, the Court finds that according to the Applicant, Mr. Knox has changed his opinion because he re-did his analysis of the Applicant's minimum height and lowered his estimate to 5" 10.4" from 6' 1."

205. But the Court finds, that Mr. Knox explained that this does not represent a change, because he intentionally biased the measurements as low as he could, after reviewing Mr. Fredericks' critique, in order to see if they could find "common ground."

206. Moreover, Mr. Knox testified at the evidentiary hearing, that the ultimate conclusion to draw from the exercise, is whether the Applicant could be included or excluded as a suspect because of his height, and whether the number is 5" 10" or 6' 1," because the difference between those two height measurements and 6' 3" is at most five (5) inches, which "can be accounted for by a way that a person is moving, walking, leaning, knees bent, posture slouched," it would be inappropriate to exclude someone because he was 6' 3" tall (HRR-XII, pp. 94-95).

207. Therefore, the Court finds, Mr. Knox's re-worked analysis is not the result of a different methodology or increased knowledge, but different data which resulted in a different outcome but that still comes to the same conclusion.

208. The Court finds that based on this record, the State's expert opinion did not change withing the meaning of art. 11.073.

2. Witness Recanted Testimony

209. In the second contention in his first ground for relief, the Applicant claims that the State used the perjured testimony of an "incentivized" jailhouse infor-

mant," Demetric Smith, to secure his conviction. *See* Memorandum in Support, p. 13.

210. According to the Applicant, Smith also falsely testified that he had no expectation of receiving leniency from the State on his own pending felony case, but later claimed that a "hope" and "expectation" of leniency, and favorable treatment in exchange for his testimony was the entire motivation for "fabricating his lie" and selling it to the prosecutors, and ultimately the jury. *Id.* at 14.

Smith's Involvement

211. In May of 2008, the record reflects that Demetric Smith was arrested by the KPD pursuant to a probable cause affidavit and complaint issued for the offense of Burglary of a Habitation. *See* Affidavit of Arrest, Complaint & Magistrate's Warning (Cause No. 63,479).

212. The record reflects that in August of 2008, Smith was indicted in Cause Number 63,479 for the offense of Burglary of a Habitation, and remained in custody, until he was ordered transferred to Austin State Hospital ("ASH") in October of 2008, because he was declared incompetent to stand trial, but he was later returned in January of 2009 after his competency was restored. *See* Order (incompetency), Bench Warrant filed 12-2-08 & Judgment Restoring Competency.

213. Demetric Smith testified at the Applicant's trial, that before he was sent to the ASH, he and the Applicant were cell-mates, and he identified SX-K (introduced at trial as State's Exhibit # 6) as a picture that the Applicant showed to him and remarked that he (the Applicant) is the man in the photo, but he might not be recognized because he was "skinny" and looked short (RR-XI, p. 15).

Leslie McWillams

214. The Court finds that pursuant to its order expanding the record, Assistant District Attorney Leslie McWilliams has submitted and affidavit ("L. McWilliams") to the Court detailing her involvement in the Applicant's case, and the Court has read the affidavit and find it credible.

215. According to her affidavit, the Court finds that Ms. McWilliams was assigned the prosecution of the Applicant's two Aggravated Robbery cases in June of 2008, and both cases, Cause Numbers 63,435 and 63,436, were indicted by the Bell County Grand Jury in July of 2008. *See*, L. McWilliams, p. 1-2.

216. The Court finds that on December 16, 2008, according to her affidavit, Smith sent an Inmate Service Request to the jail staff requesting to talk to an ADA, and in response they sent two investigators from the DA's Office to meet with Smith, and he told them that the Applicant confessed to both robberies and showed him a picture from the surveillance video and told Smith that it was him. *Id.* at 3.

217. According to Ms. McWilliams' affidavit, the Court finds that after Smith met with the DA investigators, he was brought to the DA's office where she, and co-counsel Paul McWilliams, met with Smith and he told them the same story that he told the investigators, which was the same story he testified to at trial. *Id.*

218. The Court finds, that according to Ms. McWilliams affidavit, at no time did she or her co-counsel: meet with Smith at the jail; advise Smith that he would get a minimum sentence for testifying falsely; give Smith a copy of his testimony; or asked by Smith what would happen if he got caught lying. *Id.* at 3-4.

Paul McWilliams

219. At trial, under direct examination by prosecutor Paul McWilliams, Smith testified that when he got back from ASH, he and the Applicant became cell-mates again, and though he did not look at the picture again, he would ask the Applicant how his case was going, and he would tell Smith that since the witnesses were saying that he was 5' 8" and 5' 9" he knew they were going to buy that it was not him because he is 6' 3" (RR-XI, p. 16).

220. In compliance with its order expanding the record, Assistant District Attorney Paul McWillaims submitted an affidavit ("P. McWilliams") to the Court concerning his involvement in this case, and the Court has read the affidavit and finds it credible.

221. According to his affidavit, the Court finds that Leslie McWilliams was assigned the prosecution of the Applicant's case, and he assisted her at the trial. *See* P. McWilliams, p. 2.

222. At the habeas evidentiary hearing, Mr. McWilliams testified that he first learned that Smith had information concerning this case when Smith sent an Inmate Service Request to the Administrator at the Bell County Jail, and it was forwarded it to the DA's Office (HRR-X, p. 32).

223. Mr. McWillams testified that he sent DA investigators over to talk to Smith, and the feeling was that Smith was credible because he knew things about the case that he would not have been able to get from reading a probable cause affidavit (HRR-X, pp. 34-35).

224. At the hearing, Mr. McWilliams testified that he and his co-counsel had Smith brought up to the DA's Office to speak with them, and he told them that the Applicant had talked to him about the discrepancy between his actual height and the descriptions, showed him a photograph, and told him "that's me," but he did not think that he would be recognized (HRR-X, p. 34).

225. Mr. McWilliams testified at the hearing, that Smith testified at the Applicant's trial consistent with what he said when he and his co-counsel spoke to him in their office, and that after his testimony in the Applicant's case, he had no further contact with Smith (HRR-X, p. 35).

226. At the hearing, Mr. McWilliams testified that he and co-counsel did tell the Applicant's defense team about Smith prior criminal record and mental health issues, but with respect to the criminal record, they would have told them about it or let them see the records to make notes, and with regard to his mental health records, they advised them that Smith's attorney was Troy Hurley and they could request the information from him, or, if necessary, from the trial court (HRR-X, pp. 42-44).

227. Mr. McWilliams testified that in situations where the DA's Office has a defendant with a pending felony case, who wants to provide information on another felony case, the defendant's attorney and the State's attorney who is assigned

to the defendant's case, are contacted and advised of the situation, and permission is sought from the defendant's attorney, by the State's attorney assigned to the defendant's case, to allow his client to give us information (HRR-X, pp. 37-38)

228. Mr. McWilliams testified at the hearing that in Smith's case the State's attorney assigned the case was Michael Waldman, and so he was advised about the situation, and he secured permission from Troy Hurley to speak with his client, and they made it clear to Smith that they were not promising him anything, but would tell Mr. Waldman whether or not he cooperated, and it would be up to Mr. Waldman what, if any, plea bargain was offered. *Id.*

229. At the hearing, Mr. McWilliams testified, that after Smith testified at the trial in November of 2009, he had no further contact with him, but did learn that he had written an affidavit recanting his testimony soon after the DA's Office received it on April 14, 2016 (HRR-X, p. 35).

230. The record reflects that Demetric Smith's affidavit states, in relevant part as follows:

> "In 2009 I Gave perjured testimony at Inmate George Robert Powell III Trial in the Bell county District court in late 2009. he later received a 35 yrs sentence in TDCJ. based on my lies. how this happened was I was house (sic) with Mr Powell and we new (sic) each other because we used to pray together. at that time I was facing a 5-99 yrs TDCJ prison sentence for Burglary of a Habitation in the 2nd Degree Repeat offender, and I was looking for a way out & and I found one in George Robert Powell III. he was a good mark because he was one of the very few inmates that is prepared to fight for there (sic) innocence in trial. and he was facing so much prison time. that the ADA will give me anything for a false statement. and I was right. I told my story to the sheriff investigater (sic) & they forward it the (sic) ADA of his case. Then the ADA payed (sic) me a visit. To

here (sic) the story from my own mouth. but the ADA had some notes in his hand that I was able to see. it said if you can get your story straight in front of the jury at Mr Powell Jury trial I will see to it that you get the minimum for your case. before the meeting I got a visit from my attorney & I told my attorney that I want to back out and not testify because I did not want another charge for lieing (sic) to the Judge. he stated to me that the ADA new (sic) already that my story on what Inmate George Robert Powell III had confessed to me was not true. instructed me to go along with it & I will be going home soon. Right befour (sic) trial the ADA payed (sic) me a visit outside the courtroom in a holding tank to give me a heads up on what to expect on the witness stand. at that time I ask (sic) the ADA "(will I get in trouble if I get caught lieing (sic) & the ADA just smiled at me & Gave me a copy of the Testimony I was about to give to the court and then left the Room.)" See how I got so close to a beleiveable (sic) was because why (sic) Inmate Powell was asleep I stold (sic) the Affidavit of Arrest so I had a good Idea on what to say to make it sound like I had heard it from Inmate Powell. I take full responsa-bility (sic) for my actions at the trial. I helped put away a man based off of false testimony/perjured testimony. I was a coward that day. The ADA, my lawyer new (sic) I was about to Give Perjured testimony. To help make this right. I will do a polygraff (sic) test to prove Im telling the truth of what I said in this Affidavit. I did this because it is the right thing to do. No one made me write this Affidavit. Everything I said on the stand was a lie. Mr Powell never confessed anything to me at any time. never told me anything about his case at all. Thank you and sorry for the spelling mistakes." *See* Memorandum in Support, Appendix, Exhibit-I.

231. During his direct testimony at the evidentiary hearing, Mr. McWillams was

questioned by the State about the allegations that Smith makes in his affidavit, and testified that it was false when Smith: (1) claimed that he "paid him a visit" because Smith was brought to the DA's office for their meeting and neither he nor his co-counsel every went to the jail to see him; (2) claimed that he had written "notes" when he saw Smith or had any part in the disposition of his pending burglary case; (3) claimed that the State knew his testimony was false or that he ever communicated that notion to Troy Hurley, who he does not recall every speaking to about the case; (4) claimed that he met with the State in a holding tank prior to trial and gave him a script containing his testimony, because they only met that one time in the DA's Office and he never told him what to say while on the stand (HRR-X, pp. 36-39).

232. The record reflects, that at the Applicant's trial, Smith was on the witness stand and was being questioned by defense attorney Michael Magana, who asked him whom he spoke to in the DA's Office, and Smith responded that it was a "husband and wife team," but when asked what the "guy" looked like he was unable to identify McWilliams as the prosecutor that he spoke to, even after Mr. McWilliams was pointed out to him by Mr. Magana (RR-XI, p. 22).

233. The Court finds that Mr. McWilliams, who during Smith testimony was seated before Smith in the courtroom, is the same man who Smith claimed in his affidavit gave him a script containing his testimony right before he testified.

Troy Hurley

234. The record reflects that attorney Troy Hurley was appointed to represent Demetric Smith in what became Cause Number 63,479, Burglary of a Habitation in May of 2008, and that Court knows that at all times relevant to his case, Mr. Hurley was an attorney, licensed to practice law in the State of Texas, and experienced in the area of Criminal Law, having practiced in the misdemeanor and felony courts of this jurisdiction and elsewhere in the State of Texas since the year 1970.

235. The Court finds that pursuant to its order expanding the record, Mr. Hurley has filed with it an affidavit ("Hurley") explaining his involvement in Demetric Smith case, and responding to the allegations against him by Smith, and the

Court has read the affidavit and finds it credible.

236. According to Mr. Hurley's affidavit, the Court finds that at some point in his representation of him, Smith advised Mr. Hurley that he wanted to speak to the State about another felony case, because his cell-mate, George Robert Powell III, told Smith about his involvement in the crime he was charged with committing. *See* Hurley, p 1.

237. The Court finds, that according to Mr. Hurley's affidavit, he was contacted by State's attorney Michael Waldman seeking his permission to talk to Smith, and he made Smith available, telling Smith to be honest and advising him, that there were no promises made by the State, but if he helped their case against Powell, he might get consideration for his assistance in his case. *Id.*

238. According to Mr. Hurley's affidavit, the Court finds that he told Smith to be honest and never told Smith to give false testimony, nor did Smith ever inform him that he planned to give false testimony, because he would never suggest or condone anyone committing perjury. *Id.* at 2.

Michael White

239. The record reflects that in July of 2015, attorney Michael F. White was appointed to represent Demetric Smith in Cause Numbers 69,815 and 73,695, burglary of a habitation and Escape, respectively, and that Court knows that at all times relevant to these cases, Mr. White was an attorney, licensed to practice law in the State of Texas, and experienced in the area of Criminal Law, having practiced in the misdemeanor and felony courts of this jurisdiction and elsewhere in the State of Texas since the year 1992.

240. The Court finds that pursuant to its order expanding the record, Mr. White has filed with it an affidavit ("White") explaining his involvement with Demetric Smith, and responding to the allegations against him, and the Court has read the affidavit and finds it credible.

241. According to Mr. White's affidavit, the Court finds that he was appointed to represent Smith in a Burglary and an Escape cases in July of 2015, and in April of 2016 Smith entered plea of guilty in those two cases. *See* White,

pp. 1-2.

242. The Court finds that according to Mr. White's affidavit, he found out about the affidavit that Smith wrote in April of 2016 recanting his testimony in the Powell case shortly after it had been submitted to the trial court because he was sent a copy. *Id.* at 2.

243. According to Mr. White's affidavit, the Court finds that when Smith speaks in the affidavit about "his attorney," he is not referring to him but to his attorney back in 2009 who represented him in Cause Number 63,479, because he and Smith had no conversation about the affidavit Smith wrote or about his testimony in the Powell case. *Id.*

Smith's Credibility

244. The Court notes that a habeas applicant, as here, is entitled to a hearing if he makes a claim that, if true, establishes affirmative evidence of his innocence, but at the hearing the habeas judge assesses the witness's credibility, examines the newly discovered evidence, and determines whether that new evidence, when balanced against the old inculpatory evidence, unquestionably establishes the applicant's innocence. *See Ex parte Brown*, 205 S.W.3d 538, 546
(Tex.Crim.App. 2006).

245. In assessing the credibility of witnesses, the Court notes that a habeas court is assumed to be in the best position to evaluate the credibility of testifying witnesses as long as the habeas court's findings and conclusions are supported by the record. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex.Crim.App. 2008).

246. The Court finds that on September 7, 2017, this court held a status conference in this case, and arrangements were finalized to set up a video-link between the Bell County Courthouse and the Clallam Bay Correctional Center in Clallam Bay, Washington, where Smith was being housed, to allow him to testify at the habeas evidentiary hearing (HRR-III, pp. 3-9).

247. The record reflects, that at the September 7, 2017 status hearing, the Applicant

tendered to the habeas court, for the record, an audio recording of an interview that Smith gave on July 6, 2016, while in custody in Washington State, to private investigator Karen Sanderson as Petitioner's Exhibit No. 1 ("PX-1"), but it was not offered into evidence at this time (HRR-III, pp. 12-14).

248. The Court finds that on September 18, 2017, the evidentiary hearing was continued, and as planned, and a video-link was established at about 11:30 a.m. between the Bell County Courthouse and the Clallam Bay Correctional Center in Clallam Bay, Washington, where Smith was being housed, to facilitate his testimony (HRR-IV, pp. 42-49).

249. The Court finds that the tenuous connection was with the office of Helen Donatacci, Smith's classification counselor at the prison, and within minutes of the connection being established, Smith, who had been waiting in Ms. Donatacci office for about thirty-five (35) minutes, rose and the record reflects the following:

> "DEMETRIC SMITH: Well, I won't - - I won't be having anything to say to the Court today so I will be walking out of this room here in about five seconds.
>
> "THE COURT: All right, sir. At least let me get your identify for the record.
>
> "(Demetric Smith walks off video)
>
> "All right.
>
> "MS. DONATACCI: He just walked out of the room.
>
> "THE COURT: Ma'am, I take it that he has no intention of taking part in this hearing today, would that be a fair statement?
>
> "MS. DONATACCI: No, he didn't.

"THE COURT: All right. And where are you, ma'am, for the record?

"MS. DONATACCI: I'm at Clallam Bay Correctional Center in Washington, State.

"THE COURT: And he is at your facility?

"MS. DONATACCI: Yes, he is" (HRR-IV, p. 43).

250. The record reflects on October 3, 2017, the evidentiary hearing was continued and the affidavit of Karen Sanderson, the investigator who interviewed Smith, was offered as Petitioner's Exhibit No. 16 ("PX-16"), and Applicant again offered PX-1, the audio tape of Smith's interview with Sanderson, and Petitioner Exhibit No. 1A, a transcription of the interview, into evidence (HRR-V, pp. 42-43).

Karen Sanderson

251. According to her affidavit, the Court finds that Karen Sanderson is a private investigator in the King County, Washington, area who was hired by the Innocence Project of Texas to interview Demetric Smith about his testimony at the Applicant's trial. *See* PX-16, p. 1.

252. The Court finds that she conducted the recorded interview of Smith on July 26, 2016 at the Washington State Reformatory Unit in Monroe, Washington, and Smith identified himself to her as the same Demetric Smith who testified at the Applicant's trial in Texas in 2009. *Id.*

253. According to her affidavit, the Court finds that Ms. Sanderson has listened to the entire recording of the interview, and concludes that it fairly and accurately depicts the interview that she conducted, and the transcript of the recording (PX-1A) is a complete and accurate transcription of the interview. *Id.*

254. The Court finds that the State renewed its objection to PX-1 and PX-1A, not-

ing that the interview had not been properly authenticated, and that the Applicant claimed it was against Smith's penal interest because he could be prosecuted for perjury under Section 37.06 of the Texas Penal Code (Inconsistent Statements), but that this provision requires that both inconsistent statements have been under oath, and Smith's interview with Sanderson was not under oath (HRR-V, pp. 43-45).

255. The Applicant, the Court finds, countered that statements against penal interest do not have to be under oath, but the State noted, that they do if you are claiming that you can be prosecuted for them for perjury as inconsistent statements. *Id.*

256. The record reflects that PX-1 and PX-1A were admitted into evidence (HRR-V, p. 47).

Smith's Interview

257. In the interview, the Court finds that Smith said that he was arrested in May of 2008 and met the Applicant, whom he described as an "outgoing guy," 6 or 7 months later. *See* PX-1A, pp. 8-9.

258. Smith told the investigator in the interview, that he and the Applicant were in a 30-person dormitory type cell, but no one saw him when he rummaged through the Applicant's legal papers at least three times while the Applicant was away from his bunk to find out information about the Applicant's case. *Id.* at 11-14.

259. In the interview, Smith said that after he wrote the Inmate Service Request to the Jail Administrator saying that he had information about a crime, he was visited at the jail by two investigators, and then later by a "lady and a guy." *Id.* at 18 & 20.

260. Smith said during the interview that he learned he could get less prison time if he helped the prosecution for television shows like "Law and Order," and not from being involved in the Texas Criminal Justice system. *Id.* at 17.

261. The morning of the trial, Smith told the interviewer that he was in a holding

cell and met with the DA or someone who gave him papers to look over, but his lawyer was not at the meeting, and he never told his lawyer that he was going to testify falsely about the Applicant. *Id.* at 22, 24, 26-27 & 32.

262. In the interview, Smith said that he thinks that he was speaking with the prosecutor when he said to him with a "smirk" that he could not promise Smith anything about his time. *Id.* at 28.

263. Smith told the interviewer that the State recommended that he get two years because of his work with law enforcement on the Applicant's case and other matters. *Id.* at 36.

264. In the interview, Smith said that he worked with KPD after he was granted a bond on his Burglary case in January of 2010, and that he did it to assure that he would receive a two year sentence. *Id.* at 37.

265. Smith told the interviewer, that he told his mother, Diane Smith, before he testified in the Applicant's case, that he was going to testify falsely, and then, after the Applicant's trial, they discussed it a couple of times when they were "just talking." *Id.* at 40-41.

Heath Crum

266. The Court finds that KPD detective Heath Crum, a 15-year veteran KPD, testified at the evidentiary hearing about his contact with both Demetric and Diane Smith (HRR-VII, pp. 16-17).

267. During the evidentiary hearing, Detective Crum testified that in 2012, he worked in the burglary unit, and investigated a burglary case assigned to Fred Burns, an assistant in the Bell County DA's Office, in which Demetric Smith was eventually charged and convicted of the crime, and received a sentence of 20 years imprisonment. *Id.*

268. Detective Crum testified, that the case involved electronics stolen from a Killeen resident's home and pawned in an local pawn shop and in Colorado, but through their investigation and a face-to-face interview with the victim,

they determined that the woman pawning some of the items locally, was using the identify of the innocent victim (HRR-VII, pp. 18-19).

269. He testified that they discovered some of the victims's stolen items had been pawned at Pawngo in Colorado, an online pawn shop that allows a person to email them a picture of the item they are selling, and Pawngo will email back the amount they will pay for it, and if agreed, Pawngo sends the seller a receipt and a box, and the item is mailed to them, and when they receive it they electronically transfer funds into the seller's bank account. *Id.*

270. Detective Crum testified, the victim's stolen items in Pawngo's possession had been pawned ostensibly by either Mary Jo Brown, the victim, or Diane Smith, he could not remember which, but he did remember that the funds from the sale were transferred to the bank account controlled by Diane Smith (HRR-VII, pp. 20-21).

271. In his testimony, Detective Crum explained that Pawngo gave him the contact information on the seller, he called the phone number and a male answered the phone, and when he told the male he was looking for Diane Smith to give her some stolen property back, the male gave him another number, which he called, and the woman who answered the phone identified herself as Diane Smith (HRR-VII, p. 22).

272. Detective Crum testified that he spoke with Diane Smith by phone, and later met her in person, and she told him that Demetric Smith was her son, and she allowed him to use her bank account for the pawn transactions because he did not have an account, he told her that it was legitimate, and he said that she could keep some of the money for herself (HRR-VII, p. 23).

273. In his testimony, Detective Crum read from the supplemental offense report he prepared, which was admitted into evidence as SX-U, which memorializing his contact with Diane Smith, and where she told him that she was afraid of Demetric because he is trouble, a thief and has violent tendendcies, which is why, she said, Demetric is not allowed to stay with her or any of her family members (HRR-VII, p. 26, SX-U).

274. Detective Crum testified that Diane Smith was oblivious to Demetric Smith's antics, and was afraid of him, and just did not want to get involved any more than she already was (HRR-VII, pp. 34).

Fred Burns

275. The Court finds that Fred Burns, the State's attorney who prosecuted Demetric Smith in the burglary case investigated by Detective Crum, pursuant to the Court's order expanding the record, has submitted an affidavit and also testified at the Applicant's evidentiary hearing (HRR-IV, p. 143).

276. The Court has read Mr. Burns affidavit ("Burns") and finds it credible.

277. According to his affidavit, the Court finds that Mr. Burns was lead prosecutor in Cause Number 69,518, the burglary of a habitation that Detective Crum investigated, and escape, and in both these cases Demetric Smith was the defendant. *See* Burns, p. 1.

278. However, the Court finds that according to his affidavit, he knows nothing about Smith testimony at the Applicant's trial, because that trial occurred before he began working for the Bell County DA's Office in 2011. *Id.*

279. Mr. Burns testified at the evidentiary hearing that Cause Number 73,695, the escape case, materialized when Smith was order by the trial court in the burglary case to be confined at ASH for treatment in November of 2012, but Smith escaped and fled to Seattle, Washington, where he was eventually incarcerated for crimes he committed there (HRR-IV, pp. 144-147).

280. During his testimony, Mr. Burns explained that Bell County obtained tempoary custody of Smith from Washington to dispose of these two cases, but it was very difficult doing so, because Smith bullied and threatened his lawyers, so the trial court would end up appointing new ones, and at one point he reasserted the insanity defense, which also delayed the cases (HRR-IV, pp. 148-151).

281. Mr. Burns testified that because of Smith's criminal history, he filed a motion

to cumulate his sentences, and since the cases were enhanced, Smith was looking at 25 years minimum, to life imprisonment, and this prospect made Smith very upset, and caused him to constantly try to avoid going to trial (HRR-IV, pp. 151-153).

282. In his testimony, Mr. Burns described Smith as a sociopath, career criminal, and extremely manipulative, and said that as a trial date approached in his cases, he would become extremely agitated in court, and was prone to long out bursts where he sometimes had to be removed from the courtroom (HRR-IV, p. 154).

283. Mr. Burns testified that Smith was a prolific motion and letter writer, and that he received items that he had written frequently, including offers by Smith to work with the police to solve burglary cases in exchange for lesser sentences, and he knew from listening to jail phone conversations between Smith and his mother, that Smith was "absolutely petrified" about receiving a 40 or 50 year sentence.

284. During his testimony, Mr. Burns explained that he was not interested in any of Smith's offers to "work" off his sentences by helping KPD, and this made Smith very unhappy (HRR-IV, p. 156).

285. At the evidentiary hearing, Mr. Burns testified when his office received the recantation affidavit on the Powell case from Smith in April of 2016, he thought Smith was trying to leverage information to make them back off of the prosecution in his cases (HRR-IV, pp. 156-157).

286. On cross-examination at the evidentiary hearing, Mr. Burns testified that from what he recalled about Smith's interview with the investigator, his opinion was that Smith was not telling the truth when he said that he recanted his testimony because his conscience was bothering him (HRR-IV, p. 162).

287. On cross-examination, Mr. Burns testified that he has listened to many phone conversations between Demetric Smith and his mother, Diane Smith, and he knows that Smith confides in her about the crimes he commits, and that if one considers someone who would lie for their son a "good woman," then she fits

that description (HRR-IV-pp. 162-163).

Diane Smith

288. The Court finds that Diane L. Smith, Demetric Smith's mother, filed an affidavit with the Court and it had been entered into evidence as PX-6, and the Court had read the affidavit and finds it credible.

289. According to her affidavit, the Court finds that Ms. Smith currently lives in Virginia with her daughter and son-in-law and helps takes care of their two children. *See* PX-6, p. 1.

290. In late 2009 or possibly 2010, according to Ms. Smith's affidavit, the Court finds that her son Demetric called her and told her that he was expecting to be released from jail soon because he had helped the State convict a man who he prayed with by testifying falsely in court at the man's trial. *Id.* at 2.

291. According to Ms. Smith's affidavit, the Court finds that Demetric told his mother that he made up a story that the man confessed to him, then the State contacted him about it, and they used him as a witness at trial, and now the State was giving him a deal on his pending case and letting him out of jail. *Id.*

292. The Court finds, that according to her affidavit, Ms. Smith told Demetric that she was very upset with him and that God would punish him, but that several months ago, when she was talking to Demetric, he told her that he was going to "get right with God" and contact the District Attorney about the lie he told on George Powell because he felt bad about what he had done. *Id.*

Roy Clayton

293. At the habeas evidentiary hearing, 19-year KPD Detective Roy Clayton testified, that back in 2008 he was part of a burglary unit created by KPD and it was during that time that he became familiar with Demetric Smith (HRR-X, pp. 5-6).

294. Detective Clayton testified that he met Smith when Smith was actually caught

committing a burglary, and because Smith was a person involved in committing burglaries, and had other burglary cases pending, he approached KPD and wanted to know if he worked with KPD and helped them clear some burglary cases, if we could help him get favorable treatment on his cases (HRR-X, p. 7).

295. At the hearing, Detective Clayton testified that Smith began working with KPD around 2008 by giving them information, like names of people who purchased stolen property, and they would verify the information by either surveillance or researching records (HRR-X, p. 7-9).

296. Detective Clayton testified that to his knowledge, all the information that Smith gave them was accurate, and Smith never retracted any of it (HRR-X, p. 11).

Summary Findings

297. The Court finds that in December of 2008 inmate Demetric Smith initiated contact with the Bell County DA's Office to give them information about the Applicant's aggravated robbery cases, Cause Number 63,435 and 63,436.

298. Investigators from the DA's Office, the Court finds, met with Smith at the Bell County Jail, where he told them that the Applicant had confessed to him that he committed the robberies, and identified himself as the man depicted in a photograph taken from a surveillance video of the 7-Eleven robbery.

299. The Court finds that Smith was then brought to the DA's Office where he met with the prosecutors and told them the same story he told to their investigators.

300. At the Applicant's trial in Cause Number 63,436, in November of 2009, the Court finds that Smith testified consistent with his prior statements to the DA investigators and the prosecutors.

301. The Court finds that after the Applicant's trial, Smith was released from jail and he worked with KPD solving burglary cases, and because of his extensive co-operation with the police, when he was sentenced the State waived the enhancement paragraphs in his indictment, and recommended that he be given a two year sentence, and the trial court followed their recommendation.

302. The Court finds that Smith was arrested in Bell County for a subsequent burglary in 2012, and during the pendency of this case, he was sent to ASH for psychological evaluation and treatment but escaped, and fled to Seattle, Washington, where he was subsequently incarcerated for crimes committed there.

303. Bell County, Texas, the Court finds, obtained temporary custody of Smith to dispose of the pending burglary and escape charges being prosecuted by State's attorney Fred Burns.

304. In April of 2016, while in Bell County's custody, the Court finds that Smith authored an affidavit recanting his testimony in the Applicant's trial.

305. The Court finds that arrangements were made for Smith to testify at the Applicant's habeas evidentiary hearing by video-link from Washington, but at the scheduled hearing time, he appeared on camera briefly to announce that he was not going to participate, and left the room.

306. The Court finds that Smith's recantation affidavit not credible, and specifically finds unpersuasive his claims that: the prosecutors in the Applicant's case went to the jail to hear his story; that when he visited the prosecutors in the Applicant' case, one of them had notes in his hand that he read advising Smith that he would get a minimum sentence if he got his story straight on the stand; that he told his attorney, Troy Hurley, that he wanted to back out of testifying because he did not want to lie; that Troy Hurley knew he was going to lie and told him that the State already knew he was going to lie; or, that Paul McWilliams visited Smith in a holding cell before he testified and gave him a script.

307. In his interview with investigator Sanderson, the Court finds that many of the same themes that Smith claims in his affidavit are present, and the Court again finds them unpersuasive, and/or not credible.

308. The Court also finds unpersuasive the Smith's claim that he rummaged through the Applicant's personal belongings in a 30-man cell three times and was never seen by another inmate, and finds that it directly contradicts the statement he made in his affidavit that he "stole" the Applicant's Affidavit for Arrest while he slept to gain information on his case.

309. Likewise, the Court finds unpersuasive the claim by Smith that he learned that he could make deals with the State for lesser sentences for television shows like "Law and Order."

310. The Court notes that in his interview, Smith claims that he called his mother, Diane Smith, before and after he allegedly testified falsely, however in her affidavit Ms. Smith only claims that he called her after his testimony.

311. The Court finds that this discrepancy makes both versions less credible.

312. The Court finds that Smith has a history of giving information on others to law enforcement with the hope of getting more favorable treatment on his criminal cases, and there is no showing that any of the information he has previously provided been inaccurate or untrustworthy.

313. The Court finds, that to believe that Smith testified falsely at the Applicant's trial, based on Smith's affidavit and interview, would require the Court to disbelieve or ignore most of the other individuals who have given evidence on this issue.

314. Hence, the Court finds that it is not persuaded that Smith testified falsely at the Applicant's trial, and his recantation fails to prove by clear and convincing evidence that no reasonable juror would have convicted the Applicant in light of the newly discovered evidence.

3. <u>New Reliable Voice Evidence</u>

315. In the third contention of actual innocence in his first ground for relief, the Applicant claims that "new reliable forensic evidence has established that the voice of the robber, is not the voice of the Applicant, therefore "excluding"

him as the perpetrator of the robbery." *See* Applicant Amended Petition, p. 6

316. The Court finds that Exhibit-L in the Appendix of his Memorandum in Support is the report of Dr. Al Yonovitz, a member of a Dallas, Texas, firm who describe themselves as "a team of forensic audio/video analysis experts and consultants. *See* Appendix, Exhibit-L, p. 1.

317. According to the Applicant, Dr. Al Yonovitz, has analyzed the voice on the audio recording of the Valero robbery, which three witnesses identified as being the voice of the same man who robbed them, and has concluded "with at least a reasonable degree of scientific certainty that there is a Probable Elimination when comparing the voice of the robber on the video . . . with that of the voice of Mr. George Powell II's (sic) voice." *See*, Memorandum in Support, p. 34.

318. The Court finds that the Applicant presented Dr. Yonovitz as an expert in the field of forensic audiology, and the admissibility of his analysis and conclusions at trial would be governed by the same rules of evidence that determine the admissibility of any expert testimony.

319. It is well settled, that in determining that admissibility of expert testimony, the Texas Rules of evidence require that a trial judge make three separate inquiries, whether: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of his testimony is an appropriate one for expert testimony; and, (3) admitting the expert testimony will actually assist the fact-finder in deciding the case. *See Rodgers v. State*, 205 S.W.3d 525, 533 (Tex.Crim.App. 2006).

320. The Court notes that a trial court's ruling on the admissibility of scientific expert testimony will only be overturned if it is outside the zone of reasonable disagreement, i.e., an abuse of discretion. *See Tillman v. State* 354 S.W.3d 425, 442 (Tex.Crim.App. 2011).

321. In the instant case, the Court finds that Dr. Yonovitz presents himself and his firm as audio and video analysts, and it was, in fact, partly his video analysis that triggered an investigation by the FSC into the use of height analysis in the instant case (HRR-XIII, p. 18).

322. The Court finds that in his testimony at the evidentiary hearing, Grant Fredericks, the Applicant's expert in video analysis, described the scientific post-conviction video analysis conducted by Dr. Yonovitz's of the robber's height in the instant case as follows:

> "In relation to the second set of experts, I think from reading their report, looking at what they had in front of them, they articulated eyeballing the image. So their process, their methodology, was to eyeball it, to look at the individual going in the doorway, to look at the measurements that were on the door at the time of the incident and draw a line and say, therefore, this is how high the person was. That's a common sense approach. It's not something scientific, it's not something that is repeatable because their eyes might be a little different than someone else's. But they came up with the right number. So my concern about them was that they - - And at the time I didn't know if they came up with the right number or not until I came up with my work. But they came up with something that looked reasonable but they didn't apply any methodology" (HRR-XIII, p. 22).

323. The Court finds, that although Dr. Yonovitz presents himself and his firm as audio and video experts, the Applicant's own video expert found that they used no scientific methodology when conducting their height analysis.

324. In addition, the Court has listened to SX-H[15] (admitted at trial as State's Exhibit # 17), the Valero audio identified by witnesses as the voice of the robber, and compiled a script of the words spoken by the robber (on the right), which differs from the script of the words spoken by the robber compiled by

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[15] The Court notes that the Valero audio file may be found on SX-H under: Agg Robberies Det Ortiz; Media Clips; Valero Audio TimeSE.

Dr. Yonovitz (on the left):

"Hey, how you doing?"	"Hey, how you doing?"
"Give me the money"	"Give me the money"
"Open the register"	**"Hurry up"**
"Hurry up"	"Open the register"
"The money underneath."	"Hurry up"
"Give me all the money."	**"Hurry up"**
"That's it."	"Give me all the money"
"Where's the rest of it?"	**"Hurry up"**
	"**The hundreds** underneath"
	"That's it?"
	"Where's the rest of it?"

325. The record reflects that in their written statements, both the Valero witnesses wrote that the robber told them to give him "the hundreds" underneath the cash drawer. *See* SX-FF and SX-GG.

326. The Court finds, that with so few words to analyze, it would appear important to the expert to compile all the available examples of the robber's speech from the audio file.

Brandie Cecil

327. Moreover, at the habeas hearing, the record reflects that the State called Brandie Cecil to the witness stand (HRR-XI, p. 9).

328. The record reflects Ms. Cecil was the finance manager at Killeen Motors, where the Applicant purchased a car in February of 2008, and testified at trial about items she observed and inventoried that were inside the vehicle when it was repossessed for non-payment.

329. At the habeas evidentiary hearing, Ms. Cecil testified about her numerous face-to-face interactions with the Applicant from the end of February 2008 when he purchased the car, until June of 2008, after he was arrested for this offense and Killeen Motors had to retrieved the car from storage, because it had been towed by the police (HRR-XI, pp. 11-28).

330. The record reflects that at the habeas evidentiary hearing, the audio recording played for the witnesses by Detective Ortiz, was played for Ms. Cecil, who testified that she had not heard it until it was played twice for her by a DA investigator several days before she was to testify at the hearing (HRR-XI, pp. 32-34).

331. The record reflects that Ms. Cecil did not know the origins of the audio tape, but was just asked if she could identify the voice on the tape (HRR-XI, pp. 32-34, 37).

332. Ms. Cecil testified at the evidentiary hearing that she listened to the audio tape a total of four times, but she recognized the Applicant's voice in three seconds after she heard the tape the first time it was played (HRR-XI, p. 34).

333. The Court finds that whether or not Dr. Yonovitz's would be admitted as an "expert" in audio analysis would be up to the trial court, and the credibility to be given his testimony, analysis, and conclusions would be decided by the trier of fact.

334. Hence, the Court finds that the Applicant's claims that he is "excluded" as the perpetrator by Dr. Yonovitz's analysis of the robber's voice is unpersuasive and does present affirmative evidence of his innocence, and perhaps most importantly, the audio file was freely available before trial.

4. Mistaken Identification

335. In the final contention of actual innocence in his first ground for relief, the Applicant claims that he is actually innocent because the detective's "outdated and prejudicial techniques" in presenting the photographic array "unduly influenced Melissa Keen, the victim." *See* Applicant Amended Petition, p. 7.

336. The Court finds that in his Memorandum in Support, the Applicant explains his "misidentification" as follows:

> "After Applicant was purportedly named, in a mis-guided 'crime-stopper' tip, as the man in the 7-Eleven video shown on television, on June 12, 2008, Ortiz assembled a 'photo-spread' that included Applicant's photograph. Ortiz then displayed the photo spreads to

> various victims of the robberies. He had mixed results. At least three victims, including Melissa Keen from the 7-Eleven, allegedly selected Applicant's photo, notwithstanding the significant height difference between their contemporaneous statements of the robber's height, and Mr. Powell's height of 6' 3."
>
> "Notably, none of the photospread identification procedures were conducted pursuant to universally recognized best practices.
>
> * * *
>
> "Contrary to current law, Ortiz did not administer the 'photographic array in a blind manner or in a manner consistent with other proven or supported best practices designed to prevent opportunities to influence the witness . . ." *See* Memorandum in Support, pp. 8-9.

337. The Court finds, that the Applicant cites Article 38.20 of the Texas Code of Criminal Procedure as the codification of the "universally recognized best practices" that were not followed in his case.

338. The Applicant notes that art. 38.20 took effect September 1, 2011, and the Court takes judicial notice that the law's effective date was more than three years after the Applicant's picture was subject to a photo array in June of 2008.

339. Moreover, the Court finds that Section 5(b) of Article 38.20 states as follows:

> "(b) Notwithstanding Article 38.23 as that article relates to the violation of a state statute and except as provided by Subsection (c), a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this article or with the minimum requirements of this article does not bar the admission of eyewitness testimony in the courts of this state." *See*

Tex. Code Crim. Proc. Ann., art 38.20 §5(b) (West Supp. 2018).

340. In other words, the Court finds that not only is art. 38.20 inapplicable to the instant case because this case predates the statute, even today, eyewitness identification testimony is not barred by an alleged failure to use "best practices."

Melissa Keen

341. The Court finds that Melissa Keen, the victim in the 7-Eleven robbery, rephrased her trial testimony at the habeas evidentiary hearing.

342. Ms. Keen testified at the hearing, that when Detective Ortiz showed her the photo-lineup of six photographs back in June of 2008, he did not tell her that the suspect's photograph would be in the array, and that it took her two seconds to pick out the robber's picture (HRR-V, pp. 6-87-88).

343. During the evidentiary hearing, Ms. Keen testified that she remembered the robber's facial features because she is an avid "drawer" and would have drawn a sketch of him herself if that had become necessary (HRR-VI, p. 21).

344. At the hearing, Ms. Keen testified that when Detective Ortiz showed her the 6-person photo-lineup, he asked her look at it and see if there was someone in it that she recognized, but he did not suggest that there would be (HRR-V, pp. 87-87).

Dr. Charles Weaver

345. The Court finds, that at the evidentiary hearing, Dr. Charles Weaver, a professor of psychology at Baylor University, was called to the witness stand by the Applicant as an expert in eye witness identification.

346. In addition, the Court finds that Dr. Weaver has authored a report that is before the Court as the Applicant's Appendix Exhibit-G, which accompanies his Memorandum in Support.

347. Dr. Weaver testified at the hearing, that there have been studies done comparing the difference between administering line-ups in a "six-pack" of photographs, or one photograph at a time, and there is not much difference between the two (HRR-IV, p. 71).

348. Dr. Weaver testified at the hearing, that witnesses who view lineups within a few hours or a few days of the event tend to be "considerably" more accurate than those that wait months or weeks (HRR-IV, p. 76).

349. At the hearing, Dr. Weaver testified as follows:

> "Height estimates, it's not uncommon for us as witnesses to be off by a few inches in height estimates, but off significantly more than that is unusual. The most striking fact, though is that we tend to be quite good at estimating height of people who are our own height . . . So what we tend to see is that the estimates of witnesses tend to be more accurate when the suspect's height is very close to their own" (HRR-IV, p. 75).

350. The Court finds that on page 21 of Dr. Weaver's report, he makes the following observations about the instant case:

> "The description given by the witnesses place the height of the perpetrator ranges from 5' 6" (Keen's written statement) to 5' 10" (Keen at trial), the suspect's height is (6' 3"). Witness's estimates of height are not particularly accurate (Flin & Shephard), but a 9 inch discrepancy is beyond what would be considered 'normal' error. Furthermore, Keen's written statement, given as close in time to the crime as any evidence in the trial, ***list his height as 5' 6" — which is her own stated height.*** We are considerably more accurate at making height estimates for individuals whose height is close to ours (Twedt, Crawfrod, & Proffitt, 2015), making this 9-inch height difference particularly noteworthy." *See* Memorandum in Support, Appendix, Exhibit-G, p. 21.

351. However, the Court finds that Dr. Weaver's observation above is based on an incorrect premise that is demonstrated by Ms. Keen's testimony at the Applicant's trial in November of 2009:

> "Q [Leslie McWilliams]: Now, Melissa, when you gave your statement to officer Crossman, did you change the height that you had initially told Officer Mirabel?
>
> "MR. MAGANA: Objection, Your Honor, leading.
>
> "THE COURT: Overruled.
>
> "A Yes, ma'am. I did change the height when I wrote it on my statement, and it was different from what I had told Officer Mirabel when he first came.
>
> "Q (By Mrs. McWilliams) Okay. And tell me what the reason is behind that.
>
> "A ***The reason why I changed it is because I'm pretty short. I'm 5' 1".*** And after I was reading the statement, I thought about everything. I was trying to remember as much as I could. And I was thinking, I'm pretty short. Five-eleven is a really big gap for me. And, so, 5' 6" is still pretty tall for me. ***And I was figuring more or less it must have been somewhere around there because I'm only 5' 1", and 5' 6" is pretty tall for me.*** So. . ." (RR-X, pp. 28-29).

352. The Court finds that there is no showing that the photo array was presented to Ms. Keen by Detective Ortiz in a suggestive manner, or that she was unduly influenced to select a certain photograph, hence the Court finds the Applicant's contention here unsupported by the record.

Ground Two - State Sponsored Perjury

353. In ground two, the Applicant alleges that "State sponsored perjury" deprived the Applicant of due process of law.

354. Specifically, according to the Applicant, he was deprived of a fair trial by State's witness Demetric Smith who testified at his trial that when he and the Applicant were cell-mates in the Bell County Jail, the Applicant confessed to him that he had committed the aggravated robbery in the instant case, but has now recanted his testimony, and claims that it was all a rouse to garner leniency on his pending felony case,

355. However, the Court has previously found that the recantation by Demetric Smith, given that no other person involved in his burglary case or the Applicant's case corroborates his version of the events, is not credible.

356. The Court finds that Applicant's second ground for relief unsupported by the record.

Ground Three - New Scientific Evidence Prevents a Conviction

357. In ground three the Applicant alleges that there is "new scientific evidence," including the State's original expert's changed opinion, that would have prevented a conviction.

358. First, the Court has previously found while it is true that the State's expert Michael Knox performed a second analysis which resulted in a conclusion of 5' 10.4" as opposed to 6' 1" in his first analysis, he engaged in a conscious effort to bias the measurements that he used, which led to a different result.

359. In other words, the Court finds that Mr. Knox did not use a different methodology, just different data which, logically, led to a different result.

360. Second, the Court finds that Mr. Knox's second analysis was not a change within the meaning of art. 11.073, because there was a deliberate decision to alter the outcome, and, according to Mr. Knox, the ultimate conclusion of the analysis, that the Applicant cannot be excluded as the perpetrator, remains the same (HRR-XII, pp. 94-95).

361. Third, the Court finds that to claim that Dan Mills said Michael Knox's analysis is "not supportable" misstates the record.

362. The Court finds that Mr. Mills was retained by the FSC to conduct a peer review of the height analysis prepared by Mr. Knox and Mr. Fredericks (HRR-V, pp. 82-83).

363. The record reflects that Mr. Knox talked to Mr. Mills and explained to him that he did not have his PhotoModeler project files from his first analysis that he testified to at trial, but did have the ones for the second post-trial analysis he had done, so he forwarded those to Mr. Mills (HRR-XII, pp. 49-51).

364. The Court finds that in his peer review Mr. Mills described Mr. Knox's first analysis, and analyzed the second since he had the project files, but having spoken to Mr. Knox, the Court finds it is unlikely that Mr. Mills "mistakenly" believed he was analyzing Mr. Knox's first analysis because he knew from speaking to Mr. Knox that he no longer had his PhotoModeler project files.

365. In a follow up letter from the FSC's Chief Counsel, Lynn Garcia, to Mr. Mills, clarifying points in his peer review, the Court finds that she asked him are the conclusions in Mr. Knox's case report and testimony (the first analysis) "supported" by the data, and since Mr. Mills had only reviewed PhotoModeler project files from Mr. Knox's second analysis, the only answer he could give was "no," and hence, the misdirected claim by the Applicant that his first analysis is "unsupportable." *See* Memorandum in Support, Appendix-C.

366. In summary, the Court finds that the height estimate produced at trial was not shown to be inaccurate by a preponderance of the evidence, nor did an expert engaged by the FSC to conduct a peer review of both experts find that the State's expert's trial testimony was "not supportable" because he did not analyze it.

367. Therefore, based on this record, the Court finds ground three unsupported by the record.

Ground Four - State Used Materially False Evidence of the Robber's Height

368. In ground four the Applicant alleges that the State used false evidence concerning the height of the robber, which violated his right to due process.

369. The Court finds, that according to the Applicant, "the State's newest expert" admits that the testimony provided at trial concerning the height of the robber is "not supported with the current information available," and "even the expert used at trial has admitted that the estimate he testified to is not correct," therefore, "there can be no dispute that the State used 'false' evidence at trial.

370. The Court has previously found that to say that Dan Mills, in his peer review, concludes that Mr. Knox's first analysis and trial testimony is "not supported" is a misstatement of the record

371. In general, the Court notes that to be entitled to post-conviction habeas relief on the basis of false evidence, an applicant must show that the false evidence was presented at his trial, and the false evidence was material to the jury's verdict of guilt. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex.Crim.App. 2014).

372. The Court finds the following cases are examples where the CCA has held that evidence introduced on habeas demonstrated the falsity of the evidence introduced at trial: *Ex parte Weinstein*, where the CCA determined that based on the presentation of government documents, a witnesses's testimony that he had never experienced hallucinations was false; *Ex parte Chavez*, 371 S.W.3d 200 (Tex.Crim.App. 2012), where the CCA determined that eyewitness testimony that Chavez was the shooter in an armed robbery was false when someone else confessed and entered a plea of guilty to the crime; and *Ex parte Chabot*, 300 S.W.3d 768 (Tex.Crim.App. 2009) where the CCA determined that an accomplice witness's testimony at trial implicating Chabot in the sexual assault of the victim was false, when DNA testing conclusively linked the accomplice witness to the sexual assault.

373. When determining whether a piece of evidence has been demonstrated to be false, the Court notes, that the relevant question is whether the testimony taken as a whole, gives the jury a false impression. *See Ex parte Ghahremani,* 332 S.W. 3d 470, 479 (Tex.Crim.App. 2011).

374. The Court finds, that as is apparent from the cases cited, the evidence introduced on habeas, highlights trial testimony that did not appear contradictory at

trial, but when the false testimony was revealed, it was.

375. In the instant case, the Court finds, that according to the Applicant, the "false evidence" is allegedly the height analysis provided and testified to by Mr. Knox, but if that is so, the question becomes what contradictory evidence did the "false evidence" coverup?

376. The Court takes judicial notice that the Applicant was present in the courtroom each and every day of his trial, and the jury was well aware of his height, and had the ability to compare it to the images on the surveillance video, as well as the descriptions by the witness.

377. The Court finds that it is not supported by the record to suggest in this case that this allegedly "false evidence" gave the jury a "false impression" of either the Applicant's height or the robber's height, because they saw the Applicant in the courtroom, and heard from his defense team and the witness stand how tall he was, and how "short" the robber looked, and how short the witnesses said he was in their statements.

378. Likewise, the Court finds, that the jury was able to assess the plausibility of the State's contention that the robber in the surveillance video was in fact the same person that was seated in the courtroom, or accept the defense's and their witnesses assertions that the Applicant was "too tall" to be the "short guy" in the surveillance video.

379. The Court finds that the Applicant's allegation that "false evidence" concerning the height of the robber gave the jury a false impression of the facts is not supported by the record. *See Ex parte Ex parte Robbins*, 360 S.W.3d 446, 462 (Tex.Crim.App. 2011) (doctor's opinion, though changed from trial, did not result in a false impression of the facts).

Grounds Five & Six - Ineffective Assistance of Counsel

380. In ground five, the Court finds that the Applicant alleges he received ineffective assistance of counsel because his attorneys failed to secure an expert to rebut the testimony by Michael Knox. *See* Applicant's Petition, p. 14.

381. Specifically, the Applicant alleges that his counsels made no attempt to rebut or explain the height and had they obtained their own expert, they could have discredited the State's expert at trial. *Id.*

382. In ground six, the Court finds that the Applicant alleges that he received ineffective assistance from his trial attorneys because they failed to obtain an expert to compare the Applicant's voice to the robber's. *See* Applicant's Petition, p. 16.

383. In this ground, the Court finds that the Applicant alleges that the audio recording containing the robber's voice and identified by Melissa Keen and other witnesses as the voice of the man who robbed them, should have been analyzed by an expert, because a post-trial audio analysis purportedly shows that the voice on the audio does not belong to the Applicant, purportedly establishing that he did not commit the robbery. *Id.*

Attorneys of Record

384. The Court finds, that at trial the Applicant was represented by attorneys Michael J. Magana and Bobby Dale Barina.

385. The Court knows, that at all times relevant to this case, Mr. Magana and Mr. Barina were attorneys licensed to practice law in the State of Texas, and experienced in the area of Criminal Law, Mr. Barina having practiced in the misdemeanor and felony courts of this jurisdiction and elsewhere in the State of Texas since the year 1991, and Mr. Magana since the year 1996.

386. The Court finds, that pursuant to its order expanding the record, Mr. Magana and Mr. Barina have filed with it affidavits ("PX-13" and "PX-14," respectively), explaining their involvement in the Applicant's case, and responding to his allegations of ineffective assistance of counsel, and the Court has read the affidavits and made them a part of the record.

387. In addition to filing affidavits, the record reflects that both attorneys testified at the habeas corpus evidentiary hearing.

388. The Court notes, that to obtain habeas corpus relief for ineffective assistance

of counsel, an applicant must show that his counsel's performance was deficient, and that there is a reasonable probability that the outcome in his case would have been different but for counsel's deficient performance. *See Ex parte Scott*, 190 S.W.3d 672, 673 (Tex.Crim.App. 2006).

389. In addition, the Court notes that whether a defendant has received effective assistance of counsel is to be judged by the totality of the representation, rather than isolated facts or omissions of trial counsel, and it is presumed that trial counsel made all significant decisions in the exercise of reasonable professional judgment. *See Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex.Crim. App. 1983) (counsel held ineffective for not independently investigating case), *Delrio v. State*, 840 S.W.2d 443 (Tex.Crim.App. 1992) (citing *Strickland*, all significant decision strongly presumed made in the exercise of reasonable professional judgment).

Michael Magana

390. At the habeas hearing Mr. Magana testified that he was appointed to represent the Applicant after his arrest in June of 2008, and when he met with him, one of the first issues that they discussed was the height discrepancy between him and the robber in the video (HRR-VII, pp. 94-96).

391. Mr. Magana testified that he discussed the height discrepancy with the State and they were looking for an expert, which, he said was one of the reasons for multiple delays in the trial (HRR-VII, p. 96).

392. At the hearing Mr. Magana testified that he learned about the State's expert right about the time of trial, and he does not recall pre-trial discussions with the State about the height expert (HRR-VII, p. 97).

393. Mr. Magana testified that the Applicant did not want to delay the trial setting again to obtain a height expert, because he felt it was apparent he was not the robber. *Id.*

394. During the hearing, Mr. Magana testified that he did not contact any height experts, but that he did discuss the matter with the State before trial, as well as his client, but he did not recall the exact day that he and the Applicant discussed the matter (HRR-IX, pp. 17-19).

395. According to Mr. Magana's affidavit, the Court finds that he states that he did not find out about the State's expert until the day of the jury trial. *See* PX-13, p. 2.

396. Mr. Magana testified at the hearing that he felt the trial court would have had granted a continuance had he approached and claimed he was blind-sided by the State's expert (HRR-IX, p. 18).

397. At the hearing, Mr. Magana testified that he was aware of the audio tape with the Valero robber's voice on it, but after discussing it with the Applicant determined that they did not need an audio expert, because one of their witnesses knew the Applicant and his voice, and said it was not him (HHR-VII, p. 98).

Bobby Dale Barina

398. At the habeas evidentiary hearing Mr. Barina testified that he was appointed as co-counsel in the Applicant's case in November of 2008 (HRR-IX, pp. 43-44.

399. Mr. Barina testified that Mr. Magana primarily handled the trial preparation, and he assisted at trial when he was asked to. *Id.*

400. The Court finds that in his affidavit, Mr. Barina states that the first time he knew of the State's expert Michael Knox was when the State was beginning its voir dire and Mr. Knox's name appeared on the overhead projector. See PX-13, pp. 2-3.

401. Mr. Barina testified at the hearing that the first time he knew of the State's expert was the day of trial, and that he and Mr. Magana did not discuss the issue of a height expert prior to trial (HRR-IX, pp. 46-47).

402. At the hearing, Mr. Barina testified that his personal opinion was that he did not feel that the trial court would grant a continuance because of the expert (HRR-IX, p. 48).

403. Mr. Barina testified that he and Mr. Magana did not discuss the audio recording at all (HRR-IX, p. 50).

Paul McWilliams

404. Assistant District Attorney Paul McWilliams, who tried the Applicant's case, testified at the habeas hearing that a May 2009 trial date was passed to give both sides more time to prepare, and that is when both sides were supposed to begin their search for an expert on height analysis (HRR-X, pp. 22-23).

405. Mr. McWilliams testified at the hearing, that within a short time of the State retaining Mr. Knox in July of 2009, they would have notified the defense (HRR-X, pp. 26-27).

406. At the hearing, Mr. McWilliams testified that the State filed a Motion to Disclose Experts on November 5, 2009, shortly before the trial date, because the defense never disclosed to the State whether or not they found an expert (HRR-X, pp. 28-29).

407. Mr. McWilliams testified at the hearing, that he does not recall the defense expressing surprise at the State's expert, nor would he have objected if the defense had asked for a continuance based on surprise at the State's expert (HRR-X, pp. 29 & 32).

Summary Findings

408. The Court find that Mr. Magana's testimony that the State and defense talked about an expert before trial, but he did not find out about the expert until the day of trial.

409. In general, the Court finds the testimony of defense counsels that they were not notified by the State before the day of trial, that it had retained and were going to use at trial a height expert.

410. Yet, even if the defense had retained a height expert, the Court finds that whether or not he would have added anything to the Applicant's defense is

unknown, because the jury is free to give an expert's testimony, like that of any other witness, whatever credibility they think it merits.

411. In addition, the Court finds that the jury heard all the witnesses and reviewed all the evidence, and assigned credibility where they saw fit, and there is no guarantee that another opinion, from someone who was not at the scene, would have swayed them to a different out come.

412. Similarly, the Court finds that Mr. Magana spoke with the Applicant and made the calculation that an audiologist was unnecessary because the defense had a witness who knew the Applicant, was present at the crime scene, and stated that he was not the culprit.

413. The Court finds that it is logical to think that such a well positioned defense witness would, at the very least neutralize, a State's witness's voice recognition testimony.

414. Given the totality of their representation, the Court finds that the performance of the defense team, was not so deficient that the outcome of the Applicant's trial would have been different but for their performance.

Grounds Seven & Nine - State Failed to Disclose Impeachment Information

415. In ground seven, the Court finds according to the Applicant, his due process right were violated when the State failed to disclose information that could have been used to impeach State's witness Demetric Smith. *See* Applicant's Petition, p. 18.

416. Specifically, the Applicant maintains that the State failed to disclose any deal Demetric Smith had with the State for his testimony, and they failed to disclose information concerning Smith medical records.

417. In ground nine, the Court finds according to the Applicant, his due process rights were violated when the State failed to disclose that State's witness Elsie Schulze received a reward from CrimeStoppers.

418. The Court notes, that generally, where there is a claim that the prosecution

suppressed exculpatory evidence, and thereby violated due process, to prevail there are three prongs that he must prove by a preponderance of the evidence: (1) that the State failed to disclose the evidence; (2) that the evidence withheld was favorable to the defense; and (3) that the evidence is material. *See Ex parte Richardson*, 70 S.W.3d 865, 872 (Tex.Crim.App. 2002).

419. It is now well settled, that exculpatory evidence means impeachment evidence, that is evidence that disputes, denies, disparages or contradicts other evidence. *See United States v. Bagley,* 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

420. In the instant case, the Court finds that the Applicant alleges that the State withheld impeachment evidence on State's witness Demetric Smith concerning consideration for his testimony in the Applicant's case, and information pertaining to his criminal and mental health records.

421. The Court finds that the Applicant also alleged that his due process rights were violated when the State failed to disclose information that State's witness Elsie Schulze received a monetary reward for calling CrimeStoppers with information on the Applicant's identity and location.

Michael Magana

422. In his affidavit, the Court finds that Mr. Magana states the following about his knowledge of the State's use of Demetric Smith:

> "The state (sic) called Mr. Smith to testify knowing that he had credibility issues, psychological issues, drug addition problems, mental health matters and constantly trading information for reduced sentences or leniency. In addition, Mr. Smith recanted he (sic) story regarding George Powell's confession, Mr. Barina and I were never informed regarding multiple issues like these surrounding Demetric Smith." *See* PX-13, pp. 2-3.

423. At the habeas hearing, Mr. Magana testified that he found out about Demetric Smith testifying during trial, and he did get some information about his mental

issues, but it was not detailed (HRR-VII, pp. 104-105).

424. Mr. Magana testified that with more detailed information about mental health issues and plea deals, he could have attacked Demetric Smith's credibility (HRR-IX, p. 8).

425. At the hearing, Mr. Magana admitted that at trial he cross-examined Smith about his mental health and criminal record, but said all he had was "surface stuff" that is available publicly (HRR-IX, pp. 16-17).

Bobby Barina

426. Mr. Barina testified that the first time he heard about Demetric Smith testifying in the Applicant's case was at trial (HRR-IX, p. 58).

427. At the evidentiary hearing, Mr. Barina testified that the State never told him that State's witness Elsie Schulze was "paid cash money for her role in this" (HRR-IX, pp. 57-58).

Paul McWilliams

428. At the hearing Mr. McWilliams testified that after they had spoken to Smith and decided to use him, they told the defense at least by the April 2009 pre-trials (HRR-X, pp. 42-43).

429. In terms of disclosing criminal record, Mr. McWilliams testified that they would only let the defense view the records and make notes, because they are prohibited from distributing them. *Id.*

430. Mr. McWilliams testified that he recalls that the State made the defense aware that Smith had been declared incompetent and whatever mental health records they needed to see, they could get them from his attorney Troy Hurley, or if need be, they would get an order from the court (HRR-X, pp. 43-44).

431. At the hearing, Mr. McWilliams testified that he did not think that specific medical reports or evaluation on Smith, unless they were connected to a specific incident, were either exculpatory or impeachment evidence (HRR-X,

pp. 77-81).

432. Mr. McWilliams testified that the May 4, 2009 trial date was very significant because they were going to try the Applicant's case to trial, so they made sure at the April 2009 pre-trial hearings leading up to the May 4, 2009 trial date, that the defense had all the discovery they wanted (HRR-X, pp. 85-86).

433. At the hearing, Mr. McWilliams testified, that in this case the State found out that Elsie Schulze was the Crime Stoppers tipster but typically they remain anonymous, and he knows now that she was paid, but not how much (HRR-X, pp. 49-50).

Karl Ortiz

434. Detective Ortiz testified that CrimeStoppers tipsters are paid up to $1,000 if their tip leads to an arrest and indictment, but the person's identity remains anonymous (HRR-VII, pp. 77, 91-92).

Summary Findings

435. The Court finds that in preparation for a jury trial in May of 2009, the State during pre-trial hearings in April of 2009, made available to the defense numerous items of discovery, but did not make full disclosure concerning "deals" as required by *Duggan*, *Burkholter* and *Napue.*

436. Demetric Smith, the Court finds, had contacted the State with information in December 2008, and they had decided to use him as a witness at trial, and they notified the defense of their intentions, and made Smith's criminal record available for defense review, and the defense was instructed to seek detailed information about Smith's mental health issues for his attorney, Troy Hurley, or, if need be, obtain an order from the trial court.

437. The Court finds that during the trial, Mr. Magana questioned State's witness Demetric Smith about his criminal history and his mental health issues. The Court finds that the information concerning the details of Smith's recent history of severe mental illness including paranoid schizophrenia, delusional thought process, active psychosis, and auditory and visual hallucinations, was not disclosed, that it was potential impeachment that could have been used to

discredit Smith's trial testimony, and now under *Brady* would have to be disclosed. The Court finds that it is new evidence. The Court finds by a preponderance of the evidence that such evidence is material and that there is a reasonable probability that its disclosure could have affected the outcome of the trial.

438. The Court takes judicial notice that, for as long as the CrimeStoppers program as been in existence, they have paid monetary rewards to the person who calls their phone number and give them information that leads to the arrest of criminal suspects.

439. However, the Court finds that the Applicant has failed to show, by a preponderance of the evidence that the State had information that State's witness Elsie Schulze had received compensation at the time of trial for the information she provided the to the CrimeStoppers organization, and they failed to disclose it.

441. The Court finds the Applicant fails to show by a preponderance of the evidence that the State failed to disclose impeachment information on State's witness Elsie Schultz.

Ground Eight - Conviction Based on False Testimony Provided by Smith

442. In ground eight the Court finds that the Applicant alleges that his due process rights were violated where his conviction was based on false testimony provided by Demetric Smith. *See* Applicant's Petition, p. 20.

443. Here, the Court finds that the Applicant alleges that State's witness Demetric Smith testified falsely when he claimed that he had no deals with the State for his testimony because the Applicant recently found a note in the DA's file saying: "D assisting in a murder case where George Powell is the defendant. I agreed to give credit for cooperation, "No up front deal though." *Id.*

444. In addition, the Applicant alleges that when the Smith testified that his only motivation for testifying was that he wanted to "do the right thing" that too was false because the State knew that Smith's was assisting the State to help himself on his pending charges. *Id.*

445. As noted previously, testimony is false, when it leaves a false impression of the facts. *See Ex parte Weinstein*, supra.

Paul McWilliams

446. At the evidentiary hearing, Mr. McWilliams testified that at least by the end of April 2009, before the May 4, 2009 trial setting, they disclosed to the defense that Demetric Smith was cooperating with the State, and that his cooperation would consider in the disposition of his pending felony case (HHR-X, pp. 42-43; 85-86).

447. Mr. McWilliams testified that he did not know what was motivating Demetric Smith to come forward (HHR-X, p. 87).

448. At the hearing, Mr. McWilliams testified that after the Applicant's trial was over he communicated to Michael Waldman what happened, and any action on Smith's case from that point on was between Mr. Waldman and Mr. Hurley (HRR-X, p. 83).

Michael Waldman

449. The Court finds that Michael Waldman, an Assistant District Attorney with the Bell County District Attorney's Office, in response to the Court's order expanding the record has submitted an affidavit ("Waldman") to the Court detailing his involvement with Demetric Smith, and the Court had read the affidavit and finds it credible.

450. According to his affidavit, the Court finds that on May 20, 2008, Mr. Waldman "screened" the police report and was later assigned the case that lead to Smith being indicted for Burglary of a Habitation in Cause Number 63,479. *See* Waldman, p. 1.

451. The Court finds that Mr. Waldman, according to his affidavit, met with Smith's appointed attorney, Troy Hurley, but they encountered numerous delays during the pendency if his case, including those caused by Smith being declared incompetent to stand trial, and being ordered confined in a psychiatric

hospital until he regained competence. *Id.* at 2.

452. The Court finds that Mr. Waldman, according to his affidavit, during the pendency of Smith's case, received numerous letters from Smith in which he claimed to have knowledge that he was willing to share with the State, of various other crimes committed in Bell County, and since he was interested to talk to Smith about these matters, he sought and obtained permission from Mr. Hurley to have DA investigators speak with Smith. *Id.*

453. In May of 2009, according to his affidavit, the Court finds that Mr. Waldman spoke with State's attorney Leslie McWilliams, who advised him that Smith was assisting in the Powell aggravated robbery case that she was prosecuting, and that Smith was willing to testify at trial for the State. *Id.*

454. The Court finds, that Mr. Waldman, according to his affidavit, made clear to Smith through Mr. Hurley that the State was offering "no up front deals" for his testimony, but that the State would be fair and give consideration on his case, by way of a plea offer. *Id.*

455. At the habeas hearing, Mr. Waldman testified that after the Applicant's case was tried, he was advised by others that Smith did a good job testifying truthfully he told Mr. Hurley that he would recommend five (5) years (HRR-IV, p. 107).

456. Mr. Waldman testified that, then Smith's bond was reduced and he got out of jail and began working with KPD's burglary unit where he provided "exceptional cooperation," and so when taking that into cooperation he reduced the sentence to two (2) years (HRR-IV, p. 108).

457. At the hearing, Mr. Waldman testified that nothing is certain until after whatever is being offered is done by a defendant, and an intervening event like a failure to appear while out on bond could vitiate the promise for consideration (HHR-IV,p. 114).

Michael Magana

458. At the evidentiary hearing, Mr. Magana testified that he did not know that

the State would call Demetric Smith as a witness until during the trial (HRR-VII, pp. 98-99).

459. Mr. Magana testified that he was never told that Smith had an "agreement" with the State that he would be given credit for his testimony, and when he tried to argue that he did, because Smith testified that he did not, Mr. Magana testified that he was shut down "harshly" (HRR-VII, pp. 108-109).

Bobby Dale Barina

460. At the hearing, Mr. Barina testified that he learned about Smith testifying for the State during the trial (HRR-IX, p. 58).

461. Mr. Barina testified that the State let Smith "lie" to the jury and say that he did not have an "agreement" for consideration (HRR-IX, p. 59).

Additional Findings

462. The Court finds that State's witness Demetric Smith, under questioning by Mr. McWillaims at the Applicant trial, testified as follows:

> "Q Have you made any kind of deal with us or anybody else in the D.A.'s office about your testimony?
>
> "A No, sir.
>
> "Q Have you asked for anything?
>
> "A No, sir.
>
> "Q You just wanted to tell Major Patterson and then come talk to us?
>
> "A Pretty much, Yes, sir.
>
> "Q Okay. Do you hope you will get some kind of credit?

"A No. I just want to - - I was feeling good about myself.

"Q Okay.

"A And that helped me (RR-XI, p. 17).

463. During the defense closing argument, the Court finds that the following objection occurred:

"[by Mr. Magana] But, I'll tell you what we do know: He's been in jail for over 18 months for burglary of a habitation. Range of punishment, he said, 5 to life, 17, 18 months. Guess when his day is court is? Next week, end of the month. Is that a coincidence that he's going to be sentenced with an offer from the District Attorney's Office after this case is over.

"MR. McWILLIAMS: Your Honor, I'm going to object to that. There's absolutely no evidence of that.

"THE COURT: Sustained (RR-XIII, p. 27).

464. The Court notes that in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the United States Supreme Court ("Supreme Court") held that it was a violation of due process for the State to use false testimony to obtain a conviction.

465. In *Napue*, the State, in a post-conviction proceeding, admitted that it had promised a co-defendant a recommendation of a reduced sentence if he testified at trial for the State, but at trial the co-defendant testified falsely that "ain't nobody promised me anything. *Napue*, 360 at 267.

466. The Illinois Supreme Court denied Napue relief, but the Supreme Court reversed, holding that the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial.

467. Similarly, in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court again faced the issue of false testimony.

468. In *Giglio*, defense counsel discovered in a post-trial proceeding that the State failed to disclose that key government witness, and co-conspirator, Robert Taliento had been promised immunity from prosecution if he appeared before the grand jury, and testified at trial. *Giglio*, 405 at 152.

469. The Taliento apparently appeared at grand jury, and was told by the State shortly before trial, that he would definitely by prosecuted if he did not testify at trial, but at trial the following dialog occurred between him and defense counsel:

> "[Defense Counsel] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?
>
> "[Taliento] Nobody told me I wouldn't be prosecuted." *Id.* at 151.

470. The federal district court denied Giglio's motion for new trial, and the United State Court of Appeals for the Second Circuit affirmed the district court's denial, but on Writ of Certiorari the Supreme Court reversed, holding: "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 155.

471. Finally, the Court notes the Texas case, *Duggan v. State*, 778 S.W.2d 465 (1989), cited by the Applicant at the evidentiary hearing [HRR-X, p. 84] in support of the view that "consideration" is an "agreement" that must be disclosed.

472. In *Duggan*, the Appellant who was charged with aggravated possession of amphetamine was convicted and sentenced to 50 years with the help of two accomplices, who both testified at trial, that neither had an agreement with the State for leniency. *Duggan* at 467.

473. Duggan appealed his conviction, but the 11th Court of Appeals, seeing no formal agreement with the State in the record, overruled his due process claims, but the CCA reversed, and citing both *Napue* and *Giglio* held:

> "The prosecutor himself in the present case confirmed the existence of an understanding between the accomplices and the State when he admitted telling the accomplices that he would consider leniency in exchange for their testimony. Because some sort of understanding between the State and the accomplices did exist, the accomplices firm, sweeping assertions that no such agreements existed lent a false impression to the court." *Duggan* at 468.

474. The Court finds these three leading cases instructive, in that each stands for the proposition that if there is some kind of communicated benefit between a witness and the State, i.e., a sentence reduction (*Napue*), a non-prosecution (*Giglio*), or leniency (*Duggan*), then it must be disclosed to the defense, and a witness who denies its existence is creating a false impression of the facts.

475. The instant case, the Court finds, is not distinguishable; that a communicated benefit between the State and Smith existed; and the State's promise that his cooperation would be "considered" if he fulfilled his obligations, i.e., "no up front deals." was a "deal" which was required to be disclosed.

476. In this respect, the Court finds that the trial court's rebuke of Mr. Magana asserting in his final argument that Smith was going to enter his plea with an "offer from the District Attorney's Office" was not warranted, because there was evidence in the record that the State, at that point, had stated that consideration is not a deal contrary to existing case law.

477. The record reflects that the State had interviewed Smith, and decided to use his testimony in December of 2008, and Mr. McWilliams testified that at least by the late April 2009 pre-trial hearing, leading up to the May 4, 2009 trial date, the defense had been informed that Smith was cooperating with the State and he would be given consideration.

479. The record reflects that both defense attorneys testified that they first learned of Smith during the trial.

480. The Court finds that Applicant calls Smith's testimony that he was coming forward because he wanted to do "the right thing" a "lie," that the State should have corrected, and the Court agrees and so finds.

481. The Court finds that the State promised their witness Smith that he would be given consideration for his testimony.

Other Affidavits

482. In addition to the affidavits already referred to in these Findings of Fact, the Court is in receipt of the affidavits from the following persons Ricardo J.W. Ojeda, Shayln Halvey, Victoria Noyola, and Sherri Rose.

483. The Court finds that none of these affidavits were requested in any of its orders expanding the record, however, the Court ruled that it would allow any relevant affidavit in the expanded record.

Shayln Halvey

484. The record reflects that on September 18, 2017, Shayln Halvey filed her affidavit ("PX-17") with the Court, and it has been read and made a part of the record.

485. According to her affidavit, in May and June of 2008, she and the Applicant lived with their young son in the Lone Star Inn in Killeen, and she was in the room when KPD served a search warrant looking for the Applicant. *See* PX-17, p. 1.

486. The Court finds that according to Ms. Halvey's affidavit, when KPD executed the search warrant, they "tore up" the room, seized a few small items, and offered her a reward for helping to convict the Applicant. *Id.*

487. According to her affidavit, the Court finds, Ms. Halvey states that she has now seen videos of the robberies, and the suspect in the video does not look like the Applicant, and besides he was with her all night. *Id.*

488. The Court finds that, according to her affidavit, Ms. Halvey would have testified at trial if she had been contacted by the Applicant's attorney. *Id* at 2.

489. The Court finds that after she wrote the affidavit she was subpoenaed to testify at the evidentiary hearing, and did so on October 16, 2017 (HRR-VII, p. 35).

490. The Court finds that Karl Ortiz, a detective with KPD at the time of the Applicant's arrest of 2008, and trial in 2009, denied all the allegations Ms. Halvey made against him and KPD in her affidavit (HRR-VII, pp. 77-79).

491. The Court finds Ms. Halvey's trial testimony and affidavit unpersuasive, but the jury could have considered it otherwise.

Ricardo J.W. Ojeda

492. The record reflects that on October 4, 2017, Ricardo J.W. Ojeda filed an affidavit ("Ojeda") with the Court, and it has been read and made a part of the record.

493. The record reflects that Mr. Ojeda is a licensed private investigator, and according to his affidavit in September of 2016, he tried several times to get in touch with the listed address of Elsie Schulze, but was unsuccessful. *See* Ojeda, p. 1.

494. According to his affidavit, on September 20, 2016 a person identifying themselves as Elsie Schulze called him from a cell phone and agreed to be interviewed about identifying George Powell and a CrimeStoppers video. *Id.*

495. The Court finds that according to Mr. Ojeda's affidavit, Schultz told him that she saw the video and called CrimeStoppers knowing there was a reward, and that she received money for the information, but would not say how much. *Id.*

Victoria Noyola and Sherri Rose

496. The record reflects that on January 25, 2018, Victoria Noyola ("PX-45") and

Sherri Rose ("PX-46") filed affidavits with the court, and they have be read and made a part of the record.

497. The Court finds that Ms. Noyola and Ms. Rose are the two clerks present at the Valero store in Killeen on Rancier on May 28, 2008 when it was robbed.

498. The Court finds that both affidavits were executed on October 16, 2017, although they were not filed with the Court until January of 2018.

499. The record reflects that both women testified for the defense at the Applicant's trial in November 2009, and both affidavits recount their testimonies, and appear to provide explanations for any discrepancies or mistakes.

500. The record reflects the Applicant subpoenaed both women to testify at the habeas evidentiary hearing on September 18, 2017, but it is unknown whether or not they were served, but the record reflects that neither woman ever testified at the hearing.

503. Finally, the Court finds that both affidavits end with similar sentences:

> Victoria Noyola - "The only impact knowing him had on me was the ability to truthfully say that since Powell was about 6' 3" - it was impossible for him to be the 5' 7" person who robbed us." *See* PX-45, p. 3
>
> Sherri Rose - "In fact, the only impact knowing Powell had on my testimony was that I was positive he was too tall to have been the robber." *See* PX-46, p. 3.

II.

Conclusions of Law

Based on the contentions raised by the Applicant, and a study of the applicable law raised by the issues, this Court makes the following Conclusions of Law:

Ground for Relief - Actual Innocence Based on Newly Discovered Evidence

1. When the Applicant claims that he is "excluded" as the perpetrator based on new evidence, he makes a substantive *Herrera*-type claim of actual innocence, therefore, his burden of proof is to show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. *See Ex parte Elizondo,* 947 S.W.2d 202, 209 (Tex.Crim.App. 1996) (defendant convicted of the aggravated sexual assault of his stepson and assessed life sentence, entitled to habeas relief where step-son's recantation was more credible than trial testimony).

2. Clear and convincing evidence "is defined as the measure or degree of proof, which will produce in the mind of the trier of fact, a firm belief or conviction as to the truth of the allegations sought to be established." *See State v. Addington*, 588 S.W.2d 569, 570 (Tex.Crim.App. 1979) ("This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings, and the reasonable doubt standard of criminal proceedings.")

3. However, to prevail on actual innocence claim, the Applicant must show that the evidence he is presenting is newly available or newly discovered, and because the evidence presented here is not new, the science is not new, and there is no way for the conditions that existed at the time of the offense to be replicated, the Applicant does not present an actionable actual innocence claim. *See Ex parte Spencer*, 337 S.W.3d 869, 897 (Tex.Crim.App. 2011) (expert report saying it was too dark and far away for witnesses to see the car does not affirmatively establish innocence, it attempts to discredit the witnesses who stated they saw the Applicant get out of the car).

4. The Applicant does present newly discovered evidence, in the recantation affidavit and interview of Demetric Smith, but his claim of actual innocence must fail because the affidavit and interview are unpersuasive and not credible, when viewed in light of the credible controverting affidavits and testimony, and weighed against the evidence of the Applicant's guilt, including all the testimony introduced at his trial, therefore, he fails to meet his burden to unquestionably establish his innocence. *See Ex parte Navarijo*, 433 S.W.3d 558, 560 (Tex. Crim.App. 2014) (even though habeas court found recantation credible, CCA held recantation did not unquestionably establish his innocence in light of the incriminating evidence in the record).

5. The Applicant must show that the evidence he is presenting is newly available or newly discovered, and because the Valero audio recording presented here is not newly discovered or newly available the Applicant does not present an actionable actual innocence claim. *See Ex parte Spencer*, supra.

6. The Applicant, in challenging the witness identification of Melissa Keen, apparently presents a *Schlup*-type actual innocence claim alleging a due process violation in the presentation of the photo array by then KPD Detective Karl Ortiz, but since there is no showing that Ms. Keen repudiated or stepped back from her original identification (quite the contrary) he presents no new, newly discovered, or newly available evidence with which to advance a habeas actual innocence claim, and, therefore, his request for relief must fail. *See Ex parte Brown*, 205 S.W.3d 538, 545 (Tex.Crim.App. 2006) (cannot rely on facts or evidence that were available at the time of trial, plea, or post-trial motion).

Ground Two - State Sponsored Perjury Deprived Powell of Fair Trial

7. The Applicant claims that the State sponsored perjury at his trial through its witness Demetric Smith, who has now in writing and in an audio recording made a part of the record, recanted his trial testimony that the Applicant confessed his involvement in the crime to him. *See Ex parte Weinstein*, 421 S.W. 3d 656, 666 (Tex.Crim.App. 2014) (false testimony gives the jury a false impression of the evidence).

8. However, the Court having also discovered within the four corners of Smith's affidavit his assertions that the State and his attorney knew he lied, and the State handed him a script before he testified, all of which has been denied by the relevant parties through either credible affidavits or live testimony, the Court found Smith's affidavit and interview not credible and is unpersuasive, and hence, and the Applicant's ground fails for an insufficient showing that the State sponsored perjured or false testimony. Smith's testimony, whether true or not, could have affected the outcome of the trial. *See Ex parte Weinstein*, 421 at 665.

Ground Three - New Scientific Evidence Prevents Conviction

9. Under 11.073, a court may only grant relief to a convicted person if relevant scientific evidence is currently available and was not available at the time of

the convicted person trial, here, there is no showing that the method of analysis used by either expert's was unavailable at the time of the Applicant's trial,[16] nor did the State's expert at trial "change" his position (HRR-XII, pp. 94-95), thus, the Applicant does not meet the prerequisites for relief under Article 11.073. *See* Tex Code Crim. Proc. Ann., art 11.073(b)(1)(A) (West Supp. 2018).

Ground Four - State Used Materially False Evidence of Height at Trial

10. The Applicant fails to show that the height evidence introduced at his trial in any way hid or created a false impression of either the robber's height as seen in the surveillance video, the Applicant's height, or a comparison of the two by the fact-finder, hence, there is no showing that the height evidence introduced by the State was "false." The Applicant did not want to delay his trial for the defense to secure another height witness. *See Ex parte Ghahremani,* 332 S.W. 3d 470, 479 (Tex.Crim.App. 2011).

Grounds Five & Six - Ineffective Assistance of Counsel

11. The Applicant fails to show, that given the totality of Mr. Magana's and Mr. Barina's representation, their performance fell below an objective standard of reasonableness, or that they committed unprofessional errors hindering the Applicant's defense. *See Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Ground Seven - Failed to Disclose Impeaching Information on Demetric Smith

12. The Court finds that impeachment information on Smith was disclosed at least by May 2009 in preparation for trial, the Applicant has made an insufficient showing that the State violated his rights by withholding impeachment evidence on Smith. However a more timely disclosure could have affected the outcome of the trial. *See Ex parte Richardson*, 70S.W.3d 865, 872 (Tex.Crim.App. 2002) (must prove that State failed to disclose the evidence).

Ground Eight - Conviction Based on Smith's False Testimony

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[16] The Applicant expert testified at the habeas hearing that he had been using reverse projection and 3-D scanning for years, and argued that they were available in 2009 at the time of trial.

13. Because the State told Smith that they would "consider" his testimony in exchange for his cooperation in the George Powell III case, and because at the time he testified, there were "no up front deals" of any kind with the State, there is a sufficient showing that Smith's testimony was false. Smith's testimony could have affected the outcome of the trial. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (deal with State for reduction of sentence); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (deal with State for non-prosecution); *Duggan v. State*, 778 S.W.2d 465 (1989) (deal with State for leniency).

Ground Nine - State failed to Disclose Impeaching Information on Schultz

14. The Applicant fails to show that the State had in its possession or under its control impeachment information on State's witness Elsie Schultz and failed to disclose it to the defense. *See Ex parte Richardson*, 70 S.W.3d 865, 872 (Tex.Crim.App. 2002) (must show that State had evidence and failed to disclose it).

III.

Recommendation

The Court finds that a combination of Grounds Seven, Eight and Nine deprived the defendant of due process. Having considered the Applicant's Petition, the State's Answer, and the expanded record the Court recommends that the relief requested be granted in part and that a new trial be granted.

IV.

Transmittal Order

The Clerk is directed to prepare a transcript to include copies of the following documents from Cause Number 63,435:

1. Indictment;

2. Dismissal;

and the following documents from Cause Number 63,479:

3. Affidavit for Arrest;
4. Complaint;
5. Indictment;
6. Order Appointing Expert/Competency;
7. Order (incompetency) filed 10-3-08;
8. Judgment Restoring competency;
9. Personal Bond;
10. Judgment of Conviction;

and the following documents from Cause Number 69,518

11. Affidavit for Arrest;
12. Complaint;
13. Magistrate's Warning;
14. Indictment;
15. Judgment of Conviction;

and the following documents from Cause Number 73,695;

16. Indictment;
17. Judgment of Conviction;

and the following documents from Cause Number 63,436;

18. Indictment;
19. Judgment of Conviction;
20. Docket Sheets;

and the following documents from Cause Number 63,436-B:

21. Applicant's Petition filed 11-16-17;
22. State's Answer;
23. Applicant's Memorandum in Support & Appendix;
24. State's Supplemental Answer & Response;
25. State's Designation of Issues and Order Expanding the Record;

26. State's Motion Requesting Supplemental Designation of Issues;
27. Supplemental Designation of Issues and Order Expanding;
28. State's Motion to Substitute Corrected/Supplemental Answer;
29. Corrected Copy of State's Supplemental Answer;
30. Order (substitute corrected State's Supplemental Answer);
31. the affidavit of attorney Michael F White;
32. Applicant's Motion to Take Deposition (Dan Mills);
33. Applicant's Motion to Take Deposition (Michael Knox);
34. Motion for Second Supp. Designation of Issues Order Expanding;
35. Second Supp. Designation of Issues Order Expanding;
36. Order Designating Controverted, Previously Unresolved Facts;
37. the affidavit of Assistant District Attorney Paul McWilliams;
38. the affidavit of Assistant District Attorney Leslie McWilliams;
39. the affidavit of Michael A. Knox;
40. Motion for Third Supp. Designation of Issues and Order Expanding;
41. Third Supp. Designation of Issues and Order Expanding/Order;
42. the affidavit of Assistant District Attorney Michael Waldman;
43. the affidavit of attorney Troy Hurley;
44. the affidavit of Assistant District Attorney Fred Burns;
45. Applicant's Reply to Corrected Copy of State's Supp. Answer;
46. State's Motion to Strike Exhibit-M;
47. Applicant's Response to State's Motion to Strike Exhibit-M;
48. State's Reply to Applicant's Response to the State's Motion to Strike;
49. Order on State's Motion to Strike Applicant's Exhibit-M;
50. Petition for Certification of Materiality;
51. Affidavit re Certificate of Materiality;
52. Certificate of Materiality and Order for Out of State Witness;
53. Applicant's First Amended Petition filed 9-7-17;
54. Petitioner's Application for Subpoena re 9-18-17 setting;
55. Letter from Sean Proctor to George Critchlow re Demetric Smith;
56. Letter to Judge Gauntt from Sean Proctor re immunity 9-14-17;
57. Sanderson Investigations (information);
58. Letter to Judge Gauntt from Mike Ware re immunity;
59. Motion to Allow Defendant to Present/Testimony/Grant Fredericks;
60. Motion for Order Compelling State to Produce/Michael Knox;
61. Letter to Henry Garza/Fred Burns re discovery;
62. Letter to Judge Gauntt from Sean Proctor re Discovery filed 9-27-17;
63. State's Response Opposing Live Testimony from Grant Fredericks;
64. Applicant's Second Amended Petition filed 10-3-17;

65. State's Response Opposing Order to Compel Michael Knox;
66. Motion to Take Petitioner to Scene;
67. State's Response Opposing Motion to Take Petitioner to Scene;
68. First Amended Memorandum in Support of Application;
69. Letter to Judge Gauntt from Sean Proctor re intervention;
70. Letter to Judge Gauntt from Walter Reaves, Jr., re intervention;
71. State's Motion for Extension to Time to file Findings/Conclusions;
72. Order (on State's Motion for Extension);
73. Applicant's Motion to Include Transcript/Exhibit-4 in Writ Record;
74. State's Response Opposing Motion to Include Transcript/Exhibit-4;
75. Applicant's Reply to State's Response Opposing Applicant's Motion;
76. State's Reply to Applicant's Reply;
77. Order on Applicant's Motion to Include Transcript/Exhibit;
78. State's Second Motion for Extension to File Findings/Conclusions;
79. Order on State's Second Motion;
80. Applicant's Third Amended Petition filed 3-16-18;
81. Applicant's proposed Findings of Fact and Conclusions of Law;
82. State's proposed Findings of Fact and Conclusions of Law;
83. the Findings of Fact and Conclusions of Law of the Court;

and transmit the same to the Court of Criminal Appeals in Austin, Texas. The Clerk is further ordered to serve a signed copy these Findings of Fact and Conclusions of Law upon all the attorneys of record in this habeas corpus action.

Signed on 01-29-2019.

John Gauntt

JUDGE PRESIDING
27TH DISTRICT COURT
BELL COUNTY, TEXAS

FILED
2019 JAN 29 PM 4:16