

aggravated sexual abuse of a child. Applicant's convictions were affirmed by the Fifth District Court of Appeals in *Nicholson v. State*, Nos. 05-82-01307-CR, 05-82-01308-CR, 05-82-01309-CR (Tex. App.—Dallas February 27, 1984, no pet.) (per curiam) (not designated for publication). Applicant was released from prison on June 17, 2003 and is currently on sex-offender parole, which has been transferred to the State of Maryland. Applicant filed his first Application for Writ of Habeas Corpus in State Court on February 22, 2021, and the State filed its response on March 4, 2021. These Findings of Fact and Conclusions of Law address all evidence submitted by the parties and reflects the agreement of the parties.

II.

SUMMARY OF THE FACTS

On June 12, 1987, 9-year-old B.M. and his 7-year-old cousin, L.M., were playing outside near their grandmother's apartment when they were approached by a black male who offered them \$5 to help him enter a nearby apartment.¹ After a failed attempt at entering the apartment from a broken window², the male lifted the boys and himself up into an adjacent vacant apartment window and from there, kicked in the drywall to get through the

¹ Due to the confidential nature of the case, the complainants' initials will be used instead of their full names.

² The police reports indicate the assailant broke the window by throwing a rock through it, but there was no testimony at trial to this point.

wall of the neighboring apartment's bathroom. Once inside the apartment, the male took a television, clock radio, articles of clothing, and both raw and cooked meat from the refrigerator and put them in a plastic bag. He made several trips out the front door with the items before returning.

Upon his return, the male told B.M. and L.M. to lie down on the bed and when they resisted, grabbed a pair of scissors from the bedroom dresser and told them he would stab them with the scissors if they did not obey. B.M. and L.M. then laid down on the bed and the male forced them to remove their clothing. The male retrieved a sweater from the bedroom closet, wrapped it around his hand, and struck both boys with his covered fist. The male removed his pants and poured rubbing alcohol and curl activator he found in the bedroom onto his penis. He then anally sexually assaulted both boys and, at some point during the assault, the male urinated on B.M., then left the apartment. After a period of time, the boys escaped through the bedroom window and reported the assaults to their aunt, Tajuana Miller, who called the Dallas Police Department.

Patrol officers Robert McCleod and Robert Mitchell responded to the call and took B.M. and L.M. to Parkland Memorial Hospital for sexual assault exams where it was reported that they were assaulted by a 14-year-old

assailant. A 14-year-old boy, J.M, who went by the nickname “CoCo”³, was listed in the initial patrol reports as the suspect; and the nickname “CoCo” was also listed in an Investigative Supplement Report by Physical Evidence Detective Richard Dodge. The case was then turned over to youth investigator Detective Carol Gregston and burglary investigator Detective Paulette Dallmann. The following day, Detectives Gregston and Dallmann went to take B.M. and his mother to the crime scene. On the way there, while riding in the patrol car, B.M. saw a man sitting on a porch talking to a friend and identified the man, Mallory Nicholson, as the perpetrator.

Nicholson was arrested and his photo was placed in a 6-photo lineup and presented by Detective Gregston to L.M., who did not identify Nicholson as the perpetrator. After Detective Gregston left L.M.’s home, his mother called Detective Gregston to report that L.M. had recognized the perpetrator in the photo line-up, but was afraid to identify him. The next day, Nicholson was placed in a live line-up and after each man was instructed to state “Shut up boy or I’ll stab you with these scissors”, L.M. picked Nicholson out of the lineup. Nicholson denied the allegations, but was arrested and charged with burglary of a habitation and two offenses of aggravated sexual abuse of a child based on the eyewitness identifications, despite there being no physical

³ J.M. was killed in 1989 and the Dallas County District Attorney’s Office’s trial file for that murder case confirms J.M.’s nickname was “CoCo”. Since he was a juvenile, we will use his initials instead of his full name.

evidence tying Nicholson to the offenses. He was subsequently indicted and convicted of all charges.

III.

GENERAL FINDINGS

1. This Court takes judicial notice of the entire contents of the Court's file in Cause Numbers F82-87267-PN, F82-87305-PN, F82-7443-QN, W82-87267-PN (A), W82-87305-PN (A), and W82-7443-QN (A).
2. The Court finds that although Applicant is no longer confined in prison, he remains confined on all charges, for purposes of article 11.07, §3(C), in that he remains on parole for the sexual assault charges and, as a collateral consequence of his cases, is required to register as a sex offender.
3. The Court entered an Order Designating Issues on March 12, 2012, sua sponte posing an additional question as to whether Applicant's claims are barred by the equitable doctrine of laches. The State and Applicant filed responses in regard to the laches question. The Court adopts the State's position regarding laches, as briefed, regarding Ground One; and therefore, finds that Applicant's claim in Ground One is not barred by the equitable doctrine of laches.
4. Applicant has raised two claims in his Application for Writ of Habeas Corpus. The parties have advised this Court that they have come to an

agreement regarding Ground One. The parties also acknowledge that the State is continuing its investigation into Ground Two, and thus, have not reached an agreement on that issue at this time.

5. The Court adopts the parties' agreement and, therefore, finds and recommends that Applicant be granted relief on Ground One as agreed by the parties. The Court reserves findings and recommendations on Ground Two and requests the Court of Criminal Appeals remand the case for further findings if the Court of Criminal Appeals is unable to reach a conclusion on Ground One.

IV.

FINDINGS OF FACT

GROUND ONE: BRADY VIOLATION

6. The parties agree that the State withheld favorable, material evidence, in violation of Applicant's constitutional due process rights and *Brady v. Maryland*, and its progeny. In particular, this withheld favorable and material evidence, which was disclosed by the State for the first time during the current habeas investigation, is regarding an alternate suspect, as well as inconsistent statements made by the State's key fact witness.

Legal Standards

7. The United States Constitution requires the State to disclose exculpatory and impeachment evidence to the defense that is material to either guilt or punishment. *Ex parte Reed*, 271 S.W.3d 698, 726 (Tex. Crim. App. 2008). Thus, Applicant's right to due process prohibits the State from withholding material, favorable evidence from him. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
8. To prevail on his due process claim, Applicant must establish the following by a preponderance of the evidence: (1) the State failed to disclose evidence, either intentionally or inadvertently; (2) the evidence was favorable to him; and (3) the evidence was material. *Reed*, 271 S.W.3d at 726; *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997) (holding that the burden of showing materiality rests on the defendant); *see also Spence v. Johnson*, 80 F.3d 989, 994 (5th Cir. 1996). Evidence is material if there is a reasonable probability that, in light of all the evidence, the outcome would have been different had the withheld evidence been timely disclosed to the defendant. *Hampton v. State*, 86 S.W.3d 603, 612 (*quoting United States v. Agurs*, 427 U.S. 97, 109 (1976)). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Reed*, 271 S.W.3d at 727 (*citing United States v. Bagley*, 473 U.S. 667, 682 (1985)). When

evaluating the materiality standard, the strength of the favorable evidence is balanced against the evidence supporting conviction, and the suppressed evidence is to be considered collectively, rather than item-by-item. *Ex parte Miles*, 359 S.W.3d 647, 666 (Tex. Crim. App. 2012).

9. Since Applicant raises these claims on collateral review, he bears the burden of proving these factors by a preponderance of the evidence. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002) (citing *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997) (habeas Applicant bears the burden of proving the constitutional violation and his entitlement of habeas relief by a preponderance of the evidence)).

Merits of the Claim

10. The Court finds that Applicant was 35 years old at the time of the offense.
11. The Court finds that DPD Detective Richard Dodge authored a PES Investigative Supplement Report on the evening of the offense, which stated that the suspect was a black male names “Coco.”
12. The Court finds that DPD Detective Robert McLeod authored three Offense Incident Reports (one for each criminal offense) in the early

morning hours of June 13, 1982, each of which list the suspect of the offense as J.M., a 14 year old black male with the alias of “Coco” and a listed address of 2718 Cleveland Street, Apartment 103, Dallas, Texas. The Court finds that J.M.’s address was across the street from the offense location of 2727 Cleveland Street. The Court further finds that Officer McLeod authored an additional Offense Incident Report on June 16, 1982 and another on June 17, 1982, both of which list the suspect as J.M. with the same identifying information contained in the reports from June 13, 1982.

13. The Court finds that defense counsel filed a pre-trial Motion for Evidence Favorable to the Defendant, which was granted by the trial Court.

14. The Court finds that patrol reports authored by Officer McLeod and the Physical Evidence Section (PES) report authored by Detective Dodge listing an alternate suspect – J.M., a 14-year-old black, male – were suppressed by the State.

15. The Court finds that the patrol and PES reports were part of the State’s file at the time of trial and that they were not mentioned by the State nor used by the defense at trial to support Applicant’s defense of

misidentification. The Court finds that nothing in the record indicates that the trial prosecutors provided Applicant's counsel any copies of the reports before or during trial. Therefore, the Court finds that the reports were not provided to Applicant's counsel and were, thus, suppressed by the State.

16. The Court finds the information contained in the patrol and PES reports listing an alternate suspect constitutes exculpatory *Brady* material, which was favorable to Applicant.

17. The Court finds that the information in the patrol and PES reports listing an alternate suspect would have been powerful evidence to argue to the jury that Applicant was not the perpetrator and would have coincided with, and supported, his misidentification defense at trial.

18. The Court finds that B.M. and L.M. were taken to Parkland Memorial Hospital the evening of the offense and that Dr. Stephen Hardeman completed Sexual Assault Examinations on B.M. and L.M. The Court finds that Dr. Hardeman completed a Sexual Assault Examination Report for both B.M. and L.M. The Court further finds that in Dr. Hardeman's "Brief Description of Assault" in the report for B.M., he references a 14 year-old black male assailant and that he again

mentions a 14 year-old assailant in the “Brief Description of Assault” in the report for L.M.

19. The Court finds that the Sexual Assault Exam Reports authored by Dr. Stephen Hardeman noting the assailant to be a 14-year-old black male were suppressed by the State.

20. The Court finds that the Sexual Assault Exam reports were part of the State’s file at the time of trial and that they were not used by the defense at trial to support Applicant’s defense of misidentification. The Court finds that nothing in the record indicates that the trial prosecutors provided Applicant’s counsel any copies of the reports before or during trial. Therefore, the Court finds that the reports were not provided to Applicant’s counsel and were, thus, suppressed by the State.

21. The Court finds the information contained in the Sexual Assault Exam reports stating the assailant was a 14-year-old black male constitutes exculpatory *Brady* material. The Court finds that this information is consistent with the alternate suspect, J.M., and is not consistent with Applicant, who was 35 years old at the time of trial. The Court further finds this information was favorable to Applicant.

22. The Court finds that the information contained in the Sexual Assault

Exam Reports stating the assailant was a 14-year-old black male would have been powerful evidence to argue to the jury that Applicant was not the perpetrator.

23. Pursuant to the State's post-conviction investigation, through the Dallas County District Attorney's Conviction Integrity Unit (CIU), an affidavit was obtained from the lead trial prosecutor, Mark Nancarrow, which describes his practices regarding discovery and *Brady* information at the time of Applicant's trial. The Court finds that Mark Nancarrow's affidavit is credible in its entirety and that it is further evidence that the favorable *Brady* information described above was suppressed by the State.

24. Pursuant to the State's post-conviction investigation through the CIU, an affidavit was obtained from former youth investigator, Detective Carol Gregston, which describes her general investigative practices at the time and states that it is unlikely she followed up on J.M. as a suspect. The Court finds that Detective Gregston's affidavit is credible in its entirety and that it is further evidence that the favorable *Brady* information described above was suppressed by the State.

25. The Court finds that each suppressed item described above is material

and that the cumulative non-disclosure of any combination of these items is also material.

26. The Court finds that at the time of trial, the Texas Rules of Evidence had not been enacted; but that each suppressed item described above would have been admissible under Texas case authority.

27. The Court further finds that each suppressed item described above would be admissible under the Texas Rules of Evidence at a trial held on the date of the instant application.

28. The Court finds that inconsistent statements were made by B.M. during his testimony before the grand jury. The Court further finds that B.M. was a critical witness to the State's case.

29. The Court finds that the inconsistent statements made by B.M. during his testimony before the grand jury constituted impeachment evidence that would have exposed weaknesses in the State's case or cast doubt on the credibility of B.M.

30. The Court finds that Applicant's counsel filed a Motion for Production and Inspection of Grand Jury Transcript, specifically seeking information that could be used for impeachment purposes. The Court finds that despite the motion being denied, the State was still required

to disclose B.M.'s inconsistent statements to Applicant pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972) once B.M. testified at trial, and that the State failed to do so.

31. The Court finds that the State's trial file contains notes indicating B.M. made additional inconsistent statements to the State prior to trial. Specifically, the Court finds that notes contained in the State's trial file indicate that the State was informed by members of B.M.'s family that they knew Applicant and knew about his wife's recent death. The Court finds there is nothing in the record to indicate that this information was disclosed to Applicant. The Court further finds that this information was favorable impeachment testimony, which Applicant could have used in questioning B.M. and to support the defense theory that information about Applicant could have been inadvertently suggested to B.M.

32. The Court finds that the State's trial file also contained a note indicating that B.M. stated the assailant had "very short hair." The Court finds that Applicant had an Afro both at the time of trial and at the time he was identified as the perpetrator of the offense. The Court further finds this information was favorable to Applicant and could have been used by the defense to advance their defensive theory.

33. The Court finds that nothing in the record indicates that the trial prosecutors disclosed any of the above impeachment information to Applicant's counsel before or during trial.
34. The Court finds that the notes contained in the State's trial file described above constitute admissible impeachment information that would expose weaknesses in the State's case or cast doubt on the credibility of B.M.
35. The Court finds that the impeachment evidence was material and that there is a reasonable probability that, in light of all the evidence in this case, the outcome of Applicant's case would have been different had the withheld evidence been timely disclosed.
36. The Court further finds that Applicant's ability to impeach B.M.'s testimony was lost due to the State's failure to disclose his prior inconsistent statements.

V.

CONCLUSIONS OF LAW

1. The Court concludes that testimony regarding the alternate suspect, J.M. would have been admissible at the 1982 trial under Texas case

authority as it would be admissible under the Texas Rules of Evidence at a trial held on the date of the instant application.

2. The Court concludes that the State had a duty to disclose the information regarding the alternate suspect to Applicant under *Brady*, yet suppressed it in violation of Applicant's due process rights.
3. The Court concludes that B.M.'s prior inconsistent statements, including his testimony before the grand jury, would have been admissible at the 1982 trial under Texas case authority, as it would be admissible as impeachment evidence under the Texas Rules of Evidence at a trial held on the date of the instant application.
4. The Court concludes that the State had a duty to disclose B.M.'s prior inconsistent statements, including his testimony before the grand jury under *Brady* and *Giglio*, yet suppressed these statements, in violation of Applicant's due process rights.
5. This Court concludes that all of the suppressed evidence was material because there is a reasonable likelihood that it affected the judgment of the jury.
6. The Court concludes that had the suppressed *Brady* material been disclosed to the jury, there is a reasonable probability that the outcome

of the trial would have been different.

7. This Court concludes that Applicant has met his burden of proof, by preponderance of the evidence, that he would not have been convicted in light of the suppressed evidence.
8. This Court concludes that Applicant is entitled to habeas corpus relief from his conviction and sentence in this cause under article 11.07 as presented in Ground One.

ORDERS OF THE COURT

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

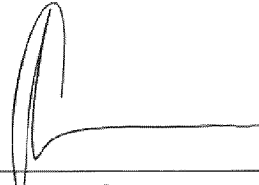
1. Prepare a transcript of the papers in this cause and transmit the Court's Findings and Order, including the Judgment, Sentence, Indictment, docket sheets, and other exhibits and evidentiary matter filed in the trial records of this cause, to the Court of Criminal Appeals as provided by Article 11.07, of the Texas Code of Criminal Procedure.

2. Send a copy of these Findings of Fact and Conclusions of Law, and the Order thereon, to the State and the Applicant's counsel by depositing the same in the United States Mail.

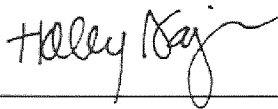
AGREED AS TO BOTH FORM AND SUBSTANCE:



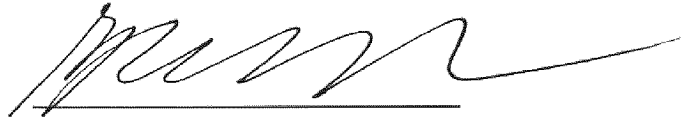
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Gary Udashen
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Signed and entered this 18th day of May, 2021.



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Date: 2021.05.18 11:47:18 -05'00'

HON. CHIKA ANYIAM, PRESIDING JUDGE
CRIMINAL DISTRICT COURT NO. 7
DALLAS COUNTY, TEXAS