No. CR27181

Ex Parte Clinton Lee Young, Applicant	In the 385th District Court of Midland County Texas

Answer to Fourth Application for Writ of Habeas Corpus

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1. Introduction

Applicant murdered two people in a multi-day crime spree in a quest to see his girlfriend. He succeeded, however briefly, in seeing her. After his conviction and sentence, Applicant has been on another quest to show that the State provided false evidence to obtain that conviction. That quest failed.[1] Now, Applicant raises a series of recycled claims to argue that there is new evidence that a State's witness gave false testimony. There is not any new evidence, but only creative repackaging of old, discredited claims wedded to unconvincing scientific evidence.

2. The Underlying Facts

The facts of this case have been discussed many times in many cases over 14 years. What follows is a somewhat abbreviated summary.[2] The facts will also be discussed as needed in the body of the argument.

Applicant, Darnell McCoy, Mark Ray and David Page decided to go to the nearby City of Longview to buy some marihuana. (RR. 22 pp. 47-48; RR. 22 pp. 62-68) None of them had a vehicle. Applicant asked Doyle Douglas to borrow his car. Mr. Douglas refused, but agreed to take the men to

[1] The State has provided a grid in Appendix at page 2 detailing the procedural history of this case.
[2] The State has also provided the Court of Criminal Appeals opinion on direct appeal, which has an excellent recitation of the facts, in the Appendix at page 3.

Longview in his vehicle, a white Pontiac (RR. 26 pp. 146-147, RR. 22 pp. 61-52)

When they arrived at their destination, David Page left the vehicle to buy the marihuana, but no one was at home. As Mr. Page was getting in the back seat of the car, the Applicant said "Doyle, I need your car," (RR. 22 pp. 80-92; RR. 26 pp. 158-161) and shot Doyle Douglas two times in his head with a .22 caliber semi-automatic handgun. (RR. 22 pp. 80-92; RR. 23 pp. 104-113; RR. 26 pp. 158-161)

Applicant got out of the car and threatened the others, telling them that they were in this as much as he. (RR. 26 pp. 161-162; RR. 21 pp. 113, 127.) Applicant pointed his gun at the men and told them that if they didn't get the body in the trunk of the car that they were going to end up like him. (RR. 22 pp. 94-98) Applicant opened the trunk of the car, and the others picked up Mr. Douglas, who was gurgling and trying to breath, and put him in the trunk. (RR. 26 p. 164; RR. 22 pp. 97-99)

The men then got back in the car, and Applicant got in the driver's seat and drove off. (RR. 22 pp. 99-192; RR. 21 p. 114) Applicant seemed unconcerned about shooting Mr. Douglas and was smiling and smirking.

(RR. 21 p. 115; RR. 21 pp. 224-225**)** Applicant later told Mr. Ray that he needed Douglas' car to go to Midland to see his girlfriend. (RR. 22 p. 103.) Applicant found a place to jettison Douglas' body and ordered all of the men out of the car and get the body out of the trunk. (RR. 26 pp. 172-174; RR. 22 p. 116) According to Mr. Ray, he, Mr. Page, and Mr. McCoy hauled the body out of the trunk and dragged the body to a little creek off to one side of a path. (RR. 22 pp. 117-118; RR. 26 p. 175) Applicant told the men to roll Douglas into the creek, stating that if the two shots didn't kill him the water would. (RR. 26 pp. 175-176) The men rolled Douglas face down into the water while the Applicant smoked a cigarette. (RR. 22 pp. 118-120; RR. 26 p. 176)

Mr. Page testified that the Applicant told Mr. Ray that he was going to have to prove himself by shooting Mr. Douglas in the head. (RR. 26 p. 176) Applicant got a pillow from the car, put it over the head of Mr. Douglas, and held it there with his gun. (RR. 26 p. 177) The Applicant told Mr. Ray that "if you don't do this, you're going to be laying in the creek with Doyle." (RR. 26 p. 178) Mr. Ray then put his gun against the pillow and fired it. (RR. 26 p. 178) As they drove away, Mr. Page asked why he shot

Douglas, and Applicant stated that he needed Douglas' car to go to Midland to see his girlfriend, Amber Lynch. (RR. 26 p. 179) Applicant later admitted to an individual named Patrick Brook that he killed Doyle Douglas. (RR 21 pp. 247-254)

After they visited with Mr. Brook, Applicant drove to a gas station. (RR. 22 pp. 139-140) Mr. Ray testified that after they left the gas station, Applicant announced that one of them had to go with him to Midland to see his girlfriend, and if those left behind should squeal, their friend would die. (RR. 22 pp. 141-142) David Page volunteered to go with the Applicant. (RR. 22 p. 142) Applicant took Mr. Ray and Mr. McCoy home. (RR 2 pp. 143-144) Applicant and Page then left together. (RR. 26 pp. 182-187)

Applicant and Page stopped at a Wal-Mart in Weatherford. Applicant then called Amber Lynch in Midland and learned that Amber's father, Bart Lynch, was with her. (RR. pp. 194-197) Applicant realized that Bart Lynch would recognize the vehicle because Mr. Douglas and Bart Lynch were related. (RR. 26 p. 197; RR. 24 p. 32) After an unsuccessful search for another car in Weatherford, they drove on to Eastland. (RR. 26 pp. 198-199)

In Eastland, they stopped at Brookshire's grocery store to buy some gas. (RR. 26 pp. 200-201) There Applicant encountered Samuel Petrey walking back to his white Chevrolet pickup truck, abducted him at gun-point, and drove him in his truck to a rest stop on highway I-20, while Page followed in the car. (RR. 26 pp. 203-207) At the rest stop Applicant and Page talked privately, and Applicant told Page that later they were going to slit Mr. Petrey's throat. (RR. 26 pp. 207-208)

Applicant informed Mr. Page that Mr. Petrey told him that he would take them somewhere to dump the car. (RR. 26 p. 209) Applicant got back in the pickup truck, and Mr. Petrey directed Applicant to a secluded location off the service road. There, Applicant and Mr. Page abandoned the car. (RR. 26 pp. 209-212) Before leaving, Applicant fired some shots at the car in an attempt to blow it up. (RR. 26 pp. 212-213) They then left with Mr. Petrey in the pickup truck, got back on I-20, and drove toward Midland. (RR. 26 p. 214.) Mr. Petrey was compliant because the Applicant told him that if he cooperated that he would let him go. (RR. 26 p. 218)

Early the next morning Page pulled into the Albertson's parking lot in Midland. (RR. 26 p. 220) That morning, while they waited to meet with

Amber, they went to various places in the Midland/Odessa area, eventually ending up at the Wal-Mart in Midland. (RR 26 pp. 226-237) While they were at the Wal-Mart in Midland Applicant threatened Mr. Petrey into buying him a $500 assault-type rifle. (RR. 26 p. 234) Mr. Petrey agreed filled out the paperwork to buy the gun. (RR. 26 pp. 234-237) They did not actually purchase the gun due to a background check restriction. (RR. 23 pp. 295-297)

After they left the Wal-Mart in Midland, Applicant drove around for a while. Applicant called Amber on Mr. Petrey's car phone. (RR. 26 pp. 227-238) Applicant talked to Amber, and then Amber's father, Bart Lynch, got on the phone. After the phone call ended, Applicant told Mr. Page that "they" found out something had happened to Doyle Douglas and the cops were after "us" because they knew "we" had some involvement in what happened to Mr. Douglas. (RR. 26 p. 239)

Applicant also told Mr. Page that Bart Lynch had talked to Mr. Page's father, who told Mr. Lynch that there was a warrant out for Mr. Page. Mr. Page's father also requested that Page call him, which Mr. Page did. (RR. 26 pp. 239-40) After speaking to his father, Page told Applicant that the Applicant needed to drop him off somewhere so he could turn himself

in. (RR. 26 p. 240)

Applicant refused, and told Mr. Page that Page was in it as much as he, and he needed to "ride it out with me." (RR. 26 p. 240) The Applicant drove to a pump jack site in the county. He pulled up and parked, and they all got out of the pickup truck. (RR. 26 p. 241)

The Applicant stated "we" needed to get rid of the evidence, and handed Mr. Page a butterfly knife and the .22 caliber bullets, and told him to put the knife and the bullets in the gloves. The gloves belonged to Mr. Page, who wore them when he was working with his father before he left for Midland with the Applicant. (RR. 26 p. 241; RR. 27 pp. 171-172) Mr. Page put the bullets and knife inside one glove and folded the other glove over it and threw the gloves as hard as he could. (RR. 26 pp. 241-242) Applicant handed a lug wrench to Mr. Petrey and told him to throw it away. Mr. Petrey complied by throwing the tool toward the pump jack. (RR. 26 p. 242)

Mr. Petrey was standing near the truck and had one hand in his pocket and a cigarette in the other hand. He was kicking at rocks as Applicant was pacing back and forth muttering to himself. Mr. Page was

leaning against the truck smoking a cigarette when he heard the Applicant say, "Sorry, Sam, you know too much. You got to die." Applicant then shot Samuel Petrey who fell to the ground. (RR. 26 pp. 244-246) Mr. Page testified that he did not know Applicant was going to shoot Mr. Petrey. (RR. 26 p. 247)

After Applicant shot Mr. Petrey, he told Mr. Page to get the blood off the bumper and get in the truck. Mr. Page grabbed a cup that had soda in it and splashed the soda on the blood on the bumper. They then got in the pickup truck and left the scene. (RR. 26 p. 247) Applicant drove and "punched" the vehicle, leaving at a high rate of speed. (RR. 26 p. 248) Mr. Page asked the Applicant about shooting Mr. Petrey, and Applicant said that Mr. Petrey knew too much. Mr. Page told Applicant that he thought that Applicant was going to let Mr. Petrey go. The Applicant stated that Mr. Petrey knew their names. (RR. 26 p. 248)

Applicant drove around a while. Mr. Page told Applicant that he needed to let him go so he could turn himself in and clear his name. (RR. 26 pp. 248-249) Applicant finally agreed but warned Mr. Page not to say anything about him. (RR. 26 p. 249) Applicant dropped off Mr. Page at the IHOP in Midland. (RR. 26 p. 249) Applicant said that he was going

to see Amber and then blow up the truck and head back to East Texas. (RR. 26 pp. 249-250)

While the deputies were searching for the crime scene with Mr. Page (who had turned himself in), Henry Wurtz was out looking for some oil-field pumpers when he discovered a body near an oil well. (RR 24 pp. 298-301) It was Samuel Petry. (RR 24 p. 316) Applicant was later apprehended after a high-speed chase. (RR 24 pp. 145-171)

3. The Latest Writ

In 2017 Applicant filed a third subsequent writ of habeas corpus under Article 11.071 § 5, which raised eight claims. The Court of Criminal Appeals dismissed seven of those claims but allowed the first, which alleged the unknowing use of false or perjured testimony. What follows is the response to that claim.

4. Applicant must show that there was false testimony that affected the jury's verdict.

Applicant contends that the State unknowingly introduced the allegedly false testimony of David Page that Applicant shot Samuel Petrey. This is a claim raised under *Ex Parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Under *Chabot*, the Applicant must prove by a preponderance of the evidence that this "false" testimony contributed to his conviction or

punishment. *Id.* at 771; *See also Ex Parte Chavez*, 371 S.W.3d 200, 206-07 (Tex. Crim. App. 2012)("The present standard for materiality of false testimony is whether there is a 'reasonable likelihood that the false testimony affected the applicant's' conviction or sentence.")

In deciding whether a particular piece of evidence is false, the question is whether the testimony, taken as a whole, gives the jury a false impression. *Ex Parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015). This answer will first examine the question of whether the testimony in question was "false" under *Chabot*, and then turn to the materiality of any such testimony.

5. The testimony of David Page is not false.

In this case, as will be shown below, the testimony of David Page that it was the Applicant shot and killed Samuel Petrey was not false. Over the course of 14 years Applicant has managed to find some convicted felons to say that Mr. Page gave them a different story. Their statements are of dubious value, not only because of their status as felons, but also because these felons have given conflicting statements and some of them have refused to repeat their stories under oath. Also, much of the testimony Mr. Page has allegedly changed is not germane to the question of

whether Applicant shot Mr. Petrey. Additionally, the jury heard the substance of all of these contentions at trial and rejected them in favor of a guilty verdict.

5.1. There is no proof that Page shot Samuel Petrey

5.1.1. The jailhouse witnesses are unreliable and unpersuasive.

There are 5 witnesses who have either testified or given statements regarding David Page's conversations with them.

•Raynaldo Rey Villa

Raynaldo Villa has given three affidavits in this case. In his first affidavit, executed on April 25, 2003, Mr. Villa states that while both were in jail Mr. Page told him that he had killed Samuel Petrey but was "pinning it on Young." (def. exh. vol. 5 p. 197) In his second affidavit dated May 27, 2003—not cited in the defense application—Mr. Villa declares that what he stated in his first affidavit "may not be totally accurate." (state's exh. no. 3; appendix at p. 13) Mr. Villa further states that he believes Mr. Page may have stated that he killed Samuel Petrey because he was afraid of the other Hispanics who were in the jail with him at the time. (state's exhibit no. 3 p. 13) Mr. Villa declared that Mr. Page was

having problems with "the Hispanics" and was saying things to scare them away from him. (state's exhibit no. 3 p. 13)

Mr. Villa also stated in this affidavit that he was later arrested and placed in a cell with Applicant. (state's exhibit no. 3 p. 13) Mr. Villa then told Applicant that Mr. Page told him (Mr. Villa) that he (Mr. Page) had shot Samuel Petrey *in the truck*. (state's exhibit no. 3 p. 13) According to Mr. Villa, the Applicant stated that he could not say anything more about the case as Mr. Villa "was telling him a different story then what the other seven people were going to say on his behalf." (state's exhibit no. 3 p. 13)

In his third affidavit (given to the defense on September 23, 2008) Mr. Villa again changes his story. Mr. Villa states that Mr. Page did not tell him the story of shooting Mr. Petrey in order to frighten Mr. Villa because Mr. Page "knew it would not frighten me." (def. exh. vol. 5 p. 197) Mr. Villa changed his account of talking to Applicant, this time claiming that he talked to Applicant but he "did not want to talk in front of the jailers and other inmates." (def. exh. vol. 5 p. 200) Now Mr. Villa claimed that he wrote a letter to applicant about Mr. Page's alleged confession to him.[3]

[3] A letter that has never been produced by Applicant.

(def. exh. vol. 5 p. 200) This was information previously undisclosed in the other affidavits.

Mr. Villa has an extensive criminal history[4] involving theft or dishonesty across multiple jurisdictions:

Crime	Jurisdiction	Date	Sentence
Failure to Identify to peace officer	Midland County Court at Law	11/13/98	$300 fine
Theft	Midland County Court at law	04/30/1998	5 days in jail
Theft	Howard County Court	04/11/2000	180 days probated for 1 year
Tampering with governmental records	385th District Court	05/04/2000	1 year state jail
Theft	Midland County Court at Law	08/08/2002	30 days in jail & $200 fine
Theft	Midland County Court at Law	03/20/2003	
Theft	Ector County Court at Law	02/20/2002	$400 fine
Theft	Ector County Court at Law	09/22/2003	45 days in jail
Theft by Repetition	142nd District Court	01/08/2004	6 months State Jail
Burglary of a habitation	142nd District Court	06/14/2005	6 years TDCJID

•James McElwee

[4] Mr. Villa's convictions are in the appendix starting at page 15 in state's exhibit no. 4.

Applicant cites James McElwee, whose testimony was heard by the jury that convicted Applicant. In his testimony for the defense, the Aryan Circle prison gang member[5] stated that he was incarcerated in the Midland County Jail for a time with David Page. (RR 27 pp 271-72) One day, according to Mr. McElwee, he stated to David Page, "I know what you did." (RR 27 p. 273) To which Mr. Page allegedly replied, "you don't know nothing." (RR 27 p. 274) Mr. McElwee then testified that he reminded Mr. Page of a conversation he had with a "Spanish dude"[6] in which Mr. Page allegedly said that he "pulled the trigger on the second murder." Mr. Page allegedly then stated to Mr. McElwee, "you don't know nothing" and "well, they can't prove it anyway." (RR 27 p. 274) After further prompting from Mr. McElwee, Mr. Page allegedly said that he was wearing gloves and there were "no powder burns on his hands." (RR 27 p. 275) Mr. McElwee, allegedly without having known Applicant, sent him a letter[7] telling him that he (Mr. McElwee) was going to testify about his conversation with Mr. Page. (RR 27 p. 278) Mr. McElwee testified that he "never really talked to" Applicant. (RR 27 p. 278)

[5] The Aryan Circle is an "organization" for the "betterment of the white race." (RR 27 p. 282)
[6] Presumably Mr. Villa.
[7] This letter has never been produced by Applicant.

Mr. McElwee has a criminal history[8] as well:

Crime	Jurisdiction	Date	Sentence
Possession of anhydrous ammonia with intent to manufacture methamphetamine	142nd District Court	07/18/2002	5 years TDCJID

•James Kemp

Mr. Kemp gave statements on two separate occasions. The first was in a 2010 deposition that was in preparation for a writ of habeas corpus.[9] He was an inmate at the county jail and knew David Page. (state's exh. no. 6 pp. 102-03) He was also familiar with an inmate named Michael Kessler. (state's exh. no. 6 p. 104) When asked if he knew Applicant, Mr. Kemp replied that that he didn't "know him know him, but [he] [knew] his voice" and had seen him go to speak with his attorneys before. (state's exh. no. 6 p. 103) Mr. Kemp testified that that was the extent of his knowledge of Applicant. (state's exh. no. 6 p. 103)

Mr. Kemp testified that he spoke with Mr. Page but "he didn't say [anything] about a murder." (state's exh. no. 6 p. 104) According to Mr. Kemp, Mr. Page did say that "his fall partner was on death row." (state's

[8] Mr. McElwee's conviction is in the appendix under state's exhibit no. 5 starting at p. 67.
[9] This is in state's exhibit no. 6 starting at p. 74 of the appendix.

exh. no. 6 p. 31) Mr. Kemp reiterated about David Page that "he never told me that he killed [anyone] . . . ."[10] (state's exh. no. 6 p. 104)

In 2014 Mr. Kemp executed an affidavit that differed in many important ways from his earlier testimony. Mr. Kemp stated that he heard Michael Kessler talking with David Page about the murder: "I heard Page describe the events surrounding the shooting of a man whose car was stolen. Page said that the police never found fingerprints on the gun used in the shooting because Page had worn gloves the night of the shooting." (def. exh. vol. 5 p. 74) According to Mr. Kemp, Mr. Page also said that "if only the police knew what really happened, he might have been facing capital murder." (def. exh. vol. 5 p. 74)

Mr. Kemp also related a conversation with Applicant, whom he had previously claimed only to know from having seen before. Mr. Kemp stated that he had told Applicant through the ventilation system about Mr. Page's conversation with Mr. Kessler and that he would testify about what he had heard. (def. exh. vol. 5 p. 75)

[10] Mr. Kemp also relayed a rather improbable story that he says he heard David Page relate. According to Mr. Kemp, Mr. Page, who was incarcerated, was in a café with his lawyer when they overheard Applicant's lawyers talking. (state's exh. no. 6 pp. 105-06) Allegedly, Mr. Page heard one of the lawyers saying "Well, why should I use all of my resources and call in all of my favors . . . and they're going to find my client guilty anyway." (state's exh. no. 6 pp. 105-06) It should be noted that Mr. Page did have lunch at a restaurant during his testimony. (RR 27 pp. 160-61)

James Kemp also has an extensive criminal history[11]:

Crime	Jurisdiction	Date	Sentence
Unauthorized Use of a motor vehicle-cause number CR30233	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause number CR30410	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause number CR30411	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause number CR30412	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause number CR30413	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause number CR30414	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause	385th District Court	04/05/2005	1 year state jail

[11] Mr. Kemp's convictions are included in the appendix under exhibit. No. 7 starting at p. 119 of the appendix.

number CR30415			
Unauthorized Use of a motor vehicle-cause number CR30416	385th District Court	04/05/2005	1 year state jail
Unauthorized Use of a motor vehicle-cause number CR30417	385th District Court	04/05/2005	1 year state jail
Possession of marijuana	Midland County Court at Law	01/27/2005	20 days in jail
Failure to identify fugitive by giving false name	Midland County Court at Law	01/25/2007	5 days in jail
Assault	Midland County Court at Law	12/06/2007	180 days in jail
Assault Family Violence	Midland County Court at Law	10/29/2009	30 days in jail
Interference with an emergency phone call	Midland County Court at Law	10/29/2009	30 days in jail
Attempted Escape	238th District Court	04/15/2010	10 months State Jail
Criminal trespass	Midland County Court at Law	04/21/2011	60 days in jail
Evading arrest	Midland County Court at Law	04/21/2011	2 months in jail

Criminal mischief	Midland County Court at Law	04/21/2011	2 months in jail
Possession of marijuana	Midland County Court at Law	08/19/2013	$500 fine
Possession of a controlled substance in penalty group 1	238th District Court	04/09/2015	3 years Institutional Division-TDCJ
Interference with an emergency phone call	Midland County Court at Law	04/14/2015	15 days in jail
Obstruction or retaliation	441st District Court	01/14/2015	3 years TDCJID
Assault family violence by strangulation	441st District Court	05/13/2015	3 years TDCJID

•Michael Kesler

Michael Kesler, referenced in Mr. Kemp's affidavit, testified in 2010. In his testimony, Mr. Kesler never related the conversation he allegedly had with Mr. Page through the vents that was related by Mr. Kemp[12], even though Mr. Kesler was asked directly about any conversations Mr. Page had about the case. (state's exh. no. 6 pp. 91-92) When Mr. Kesler was asked if he heard "Mr. Page say, 'I'm the one who killed that guy out in West Texas,'" Mr. Kesler said he couldn't "completely" say that he

[12] Although Mr. Kesler did remember hearing Mr. Page talking about a conversation he overheard between Applicant's lawyers, related in a previous footnote. (state's exh. no. 6 pp. 91-92)

heard that: "[B]ut I know for a fact that the man had him in his cell and said that he was incarcerated in the Midland County Jail for the murder that happened in East Texas and Midland. Texas. That's all he said." (state's exh. no. 6 p. 93)

•John Hutchinson

Mr. Hutchinson testified in 2010. He was asked by Applicant if he had ever had a conversation with David Page through the air vents of the jail:

> A: Well, I know in one conversation he was talking about lawyers talking to each other at a restaurant, and - -
>
> Q: Did you overhear another conversation?
>
> A: Man, I'm sorry. I'm still kind of asleep here.

(state's exh. no. 6 p. 114)

In 2014 Mr. Hutchinson gave a written statement to defense investigator Nancy Piette, in which he related far more detail than he saw fit to relate when he was under oath and subject to cross-examination. He declared in Ms. Piette's statement that he heard Mr. Page say through the vents that he shot a man in the head with a .22 caliber handgun while his accomplice was asleep. (def. exh. vol. 5 p. 70) Mr. Hutchinson also declared that Mr. Page started backing off that statement. (def. exh. vol.

5 p. 70) In a serendipitous coincidence, another inmate "was brought in", and he started talking[13] about having been "convicted of capital murder but was innocent." (def. exh. vol. 5 p. 70) According to Ms. Piette's affidavit, Applicant said he was asleep during the murder, and this "clicked with" Mr. Hutchinson, who allegedly recalled his earlier conversation with Mr. Page. (def. exh. vol. 5 p. 70) In Ms. Piette's affidavit, Mr. Hutchinson remembered that Mr. Page had told him that Mr. Young was asleep during the murder. (def. exh. vol. 5 p. 70)

Mr. Hutchinson also has multiple convictions[14]:

Crime	Jurisdiction	Date	Sentence
Terroristic threats	Midland County Court at Law	06/08/2000	10 days in jail
Terroristic threat of a family/household	Midland County Court at Law	04/16/2015	3 days in jail
Unauthorized use of a motor vehicle	441st District Court	06/16/2016	9 months in State Jail
Violation of a protective order	Midland County Court at Law	04/16/2015	3 days in jail

Applicant contends that the stories these multiple convicted felons tell prove that Mr. Page was the shooter. In fact, these stories, told as they are by convicted felons, are inherently unreliable, as they are both

[13] Apparently speaking through the vents.

[14] Mr. Hutchinson's convictions are contained in exhibit 7 starting at page 119 of the appendix.

internally inconsistent and contradictory. Mr. Kemp, Mr. Kesler, Mr. Villa, and Mr. Hutchinson have all contradicted themselves at various times. Additionally, Mr. Hutchinson would not testify about the allegedly overheard conversation in open court.

To the extent that Mr. Page's alleged declarations can be viewed as recantations, the trial court is certainly not required to believe them. *Colyer v. State*, 428 S.W.3d 117, 126 n.53 (Tex. Crim. App. 2014). Established case law tells us that this type of evidence has very little value. In *Keeter v. State*, 74 S.W.3d 31, 39 (Tex. Crim. App.) the Court of Criminal Appeals states that a recantation by a convicted accomplice that exculpates his co-defendant is to be viewed with extreme suspicion. *See also Drew v. State,* 743 S.W.2d 207, 228 (Tex. Crim. App. 1987)("It is not unusual for one of two convicted accomplices to assume the entire fault and thus exculpate his codefendant by the filing of a recanting affidavit or other statement.") This makes sense, as the "exculpator" in such a situation has nothing to lose by telling a new story since he has already been spared jeopardy for the crime. *See Vo v. State*, NO. 01-98-01052-CR, 2001 Tex. App. LEXIS 4313, at *6 (Tex. App. – Houston [1st Dist.] June 28, 2001)(not designated for publication). These jailhouse "confessions" lack

even the most basic indicia of reliability and should thusly be disregarded.

5.1.2. The gloves found at the scene do not prove who the shooter was.

At the heart of Applicant's argument regarding the gloves is a syllogism:

> Major Premise: The gloves worn by the shooter will bear a predictable pattern of gunshot residue.
> Minor Premise: The gloves in this case had the predictable pattern of gunshot residue.
> Conclusion: The gloves were worn by the shooter, David Page.

As will be shown, both the major and the minor premise of this argument are flawed. And the conclusion does not necessarily follow from the major and minor premise, for many reasons. First, the only evidence that David Page shot Samuel Petrey comes from the jailhouse informants, who have been previously discussed. Also, the physical evidence indicates that Mr. Page isn't the only potential wearer of the gloves: DNA from Applicant was found on the gloves, indicating that Applicant, at some point, handled the gloves. (RR 26 p. 110)

Additionally, during their investigation, the trial defense attorneys in this case uncovered evidence that both Page had told other jailhouse informants that both he and Applicant had shot Mr. Petrey. (RR 35 pp.

265-67) This is a fact that was noted by the Federal District Court in its opinion. *Young v. Stephens*, No. MO-07-CA-002-RAJ, 2014 U.S. Dist. LEXIS 16007, *627-28 (W.D. TX. Feb. 7, 2014). Thus, the existence of the gloves and any pattern of gunshot residue on them does nothing to advance the theory that David Page was the lone shooter of Mr. Petrey. In other words, since the shooter wearing the gloves could have been either Mr. Page or Applicant, any gunshot residue pattern on the gloves does nothing to prove who the actual shooter was

5.1.3. The scientific reports contain nothing of significance.

• Declaration of Skip Palenik

At the behest of Applicant, Samuel "Skip" Palenik of Microtrace L.L.C. executed a declaration in 2015 in which he proposed to perform additional gunshot primer residue testing of the gloves in this case. (def. exh. vol. 1 pp. 11-22) In that declaration he explained that gunshot primer residue, or GPR, is composed of three elements: lead, barium and antimony. (def. exh. vol. 1 p. 13) Certain particles may contain only one or two of these elements, but particles that contain all three elements are called unique particles. (def. exh. vol. 1 p. 13) GPR particles can become embedded in clothing, making it possible to test for their presence

months or even years after the clothing contacts the particles. (def. exh. vol. 1 p. 14)

The main method of extracting GPR from cloth is the use of sticky tabs or adhesive stubs that are placed on the suspected item. (def. exh. vol. 1 p. 16) According to Mr. Palenik, this method has limitations. (def. exh. vol. 1 pp. 16-17) A new method, which is not generally known, involves cutting a piece of cloth from the suspected item and putting that piece in alcohol. (def. exh. vol. 1 p. 17) The alcohol and cloth is then subjected to ultrasonic waves (sonication & filtration), which would theoretically cause the GPR particles to dislodge. (def. exh. vol. 1 p. 17) Once they fall to the bottom of the test tube they could be examined under a scanning electron microscope. (def. exh. vol. 1 p. 17)

Mr. Palenik then went on to examine the testing done on the gloves at the time of the original investigation of this case. The gloves were originally tested for the presence of lead using a sodium rhodizonate test. (def. exh. vol. 1 p. 20) That test does not detect the presence of any other GPR particles. (def. exh. vol. 1 pp. 20-21) The process of sodium rhodizonate testing may destroy some GPR particles, Mr. Palenik conceded. (def. exh. vol. 1 p. 21) Mr. Palenik then draws a sweeping conclusion:

> [I]f the gloves are tested today and are found to contain substantial amounts of gunshot primer residue, that finding would strongly indicate that the gloves were, in fact, worn by the shooter of a gun, or located very close to a firearm at the time it was discharged, at some time before the gloves were recovered at the homicide site in 2001.

(def. exh. vol. 1 p. 21)

This report makes no mention of the methods of GPR transfer, other than from a fired weapon. It makes no mention of transfer from surfaces that had been exposed to GPR or of the cumulative effect of multiple contacts with GPR exposed surfaces. This is a deficiency that Microtrace would try to remedy in subsequent declarations.

•Microtrace 2015 Report

Microtrace was allowed to test the gloves using the method Mr. Palenik proposed (sonication and filtration), as well as the older adhesive stub test. To the credit of the authors of the report, Christopher S. Palenik and Samuel "Skip" Palenik, it is noted that the gloves were packaged together. (def. exh. vol. 1 p. 40) This is a crucial fact whose significance will be explained below.

The authors collected samples using the adhesive stubs from the front and back of each glove and cut a sample from the back of each glove for sonication and filtration. (def. exh. vol. 1 p. 41) Each of the samples was

then examined using a scanning electron microscope. (def. exh. vol. 1 p. 41) The results revealed possible GPR:

Table 1. Summary of tricomponent particles detected in each analyzed stub.

	Adhesive Stub Sampling*			Sonication and Filtration Sampling		
	Back Left	Back Right	Control	Back Left	Back Right	Control
PbBaSb**	3	3	0	3	3	0
$BaSO_4$	ND	ND	0	1389	762	0
Fe-rich	ND	ND	2	214	308	11
Total Particles	ND	ND	3	2000	2000	37
Total Frames	2307	1417	1641	64	39	2184

As was noted earlier, characteristic GPR is composed of all three metals, lead (Pb), barium (Ba) and antimony (Sb). There was no analysis reported for the adhesive stubs taken from the front of each glove.

・Christopher S. Palenik's Declarations

Christopher Palenik was the co-examiner (with his father) of the gloves. He gave a declaration in January of 2017 to propose further testing of the gloves. (def. exh. vol. 1 pp. 63-67) Christopher Palenik introduces the three tri-component GSR threshold. That is, if an item contains three or more tri-metal GSR particles, it is an indication that that item has been in the vicinity of a discharged firearm or made contact with a GSR related item.[15] (def. exh. vol. 1 p. 64) For the first time, Microtrace

[15] Christopher Palenik also does not tell us what amount of surface area the three-particle threshold applies to. For instance, if a particular piece of clothing was subjected to 30 adhesive stubs and three particles were found, would that mean that one could say that the item had made contact with a GSR related item? The three particle threshold is meaningless without providing some parameter as to the area sampled.

acknowledges in this report that not only can an item obtain GSR[16] from being in the vicinity of a discharging firearm but also from coming in contact with a GSR related item.[17] (def. exh. vol. 1 p. 64)

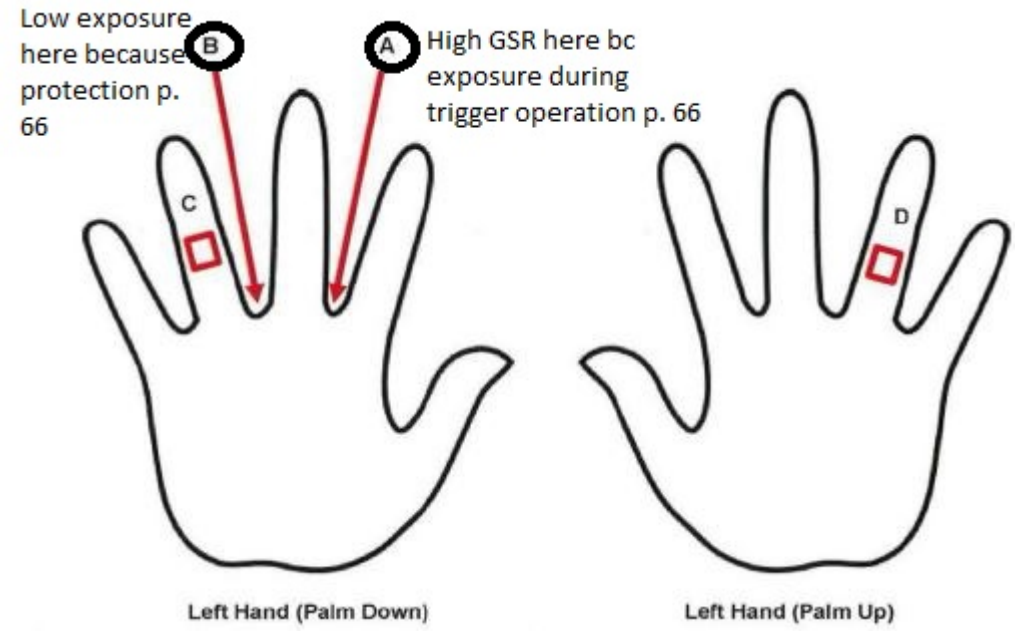
Christopher Palenik also stated that the previous report provided no insight into the "distribution or relative quantities of GSR particles on various parts of the glove." (def. exh. vol. 1 p. 65) He hypothesizes that GSR deposited from a weapon discharge would be unevenly distributed on the glove. (def. exh. vol. 1 p. 65) He further theorizes that GSR deposited from cross-contamination[18] would be more evenly distributed on the gloves. (def. exh. vol. 1 p. 66) He does not give an indication of why he believes this, as he cites no scientific studies on the matter.

To assess this theory, Christopher Palenik proposed testing four areas of the glove:

[16] Mr. Palenik *fils* uses the term GSR rather than the GPR.

[17] This part of the declaration raises another important question. In Skip Palenik's declaration he noted that the sonication and filtration method was not in wide use in GSR testing and that it had the potential of finding many more GSR particles. It would seem that the tri-component threshold was a rule for the less sensitive adhesive tab test. So is the tri-component rule even applicable sonication and filtration testing?

[18] He defines this as coming in contact with other GSR contaminated items.



The above graphic illustration is derived from the second Microtrace report with additional illustrations added. Christopher Palenik theorized that area A would have high GSR exposure because it would be exposed during trigger operation. (def. exh. vol. 1 p. 66) He theorized that area B would be more protected and contain less GSR. (def. exh. vol. 1 p. 66) Areas C and D would be control areas to be compared to the other samples. (def. exh. vol. 1 p. 66) Later in 2017 Christopher Palenik gave a second declaration in which he felt the need to reiterate his theory that a "relatively high" concentration of GSR in areas that would only be exposed during the discharge of a weapon would support the conclusion that the gloves were worn by a shooter. (def. exh. vol. 1 pp. 90-92)

•The Second Test Report

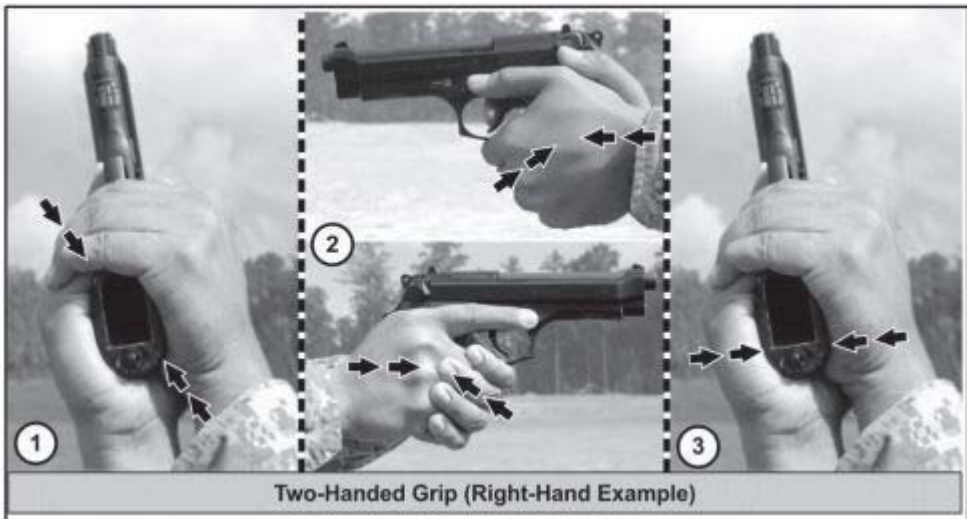
Microtrace performed a second test in conformity with what Christopher Palenik had previously proposed. In addition, a pair of "control gloves" were worn in a test fire. This was apparently to determine if the theory of disparate concentration of GSR was valid. There was no GSR on the control gloves. (def. exh. vol. 1 p. 97) Microtrace made its report, which will be discussed below. (def. exh. vol. 1 pp. 95-111)

•The GSR Distribution Hypothesis and the Control Gloves

As noted above, the GSR experts had a hypothesis that they proposed to test: That gunshot residue would be distributed in a certain way on gloves when they were worn firing a pistol. Indeed, this had to be their theory because the gloves were immersed in a GSR drenched environment from the moment Applicant shot Doyle Douglas. The hypothesis remains unproven because the control gloves had no GSR on them. In fact, the control gloves may actually prove that no predictable pattern of GSR can be gleaned from an item. Because he has not proved his theory, no pattern of GSR on an item has any particular meaning beyond conjecture.

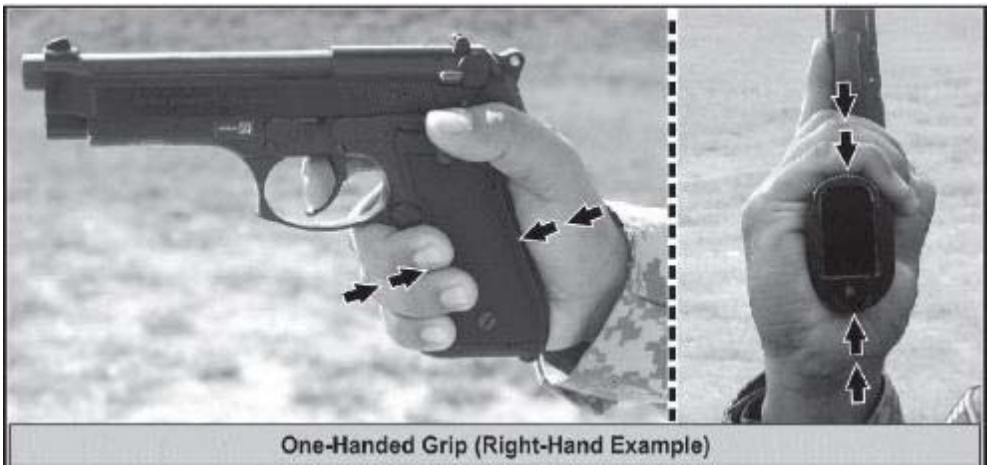
•The Variables Involved in Predicting a GSR Pattern

In trying to predict a GSR pattern, Microtrace has entirely ignored how the weapon would be held. That is, whether the shooter used one hand or two hands. Consider the two-handed grip, the preferred method of firing a pistol:



U.S. DEPARTMENT OF ARMY, TRAINING CIRCULAR 3-23.35, PISTOL (30 May 2017) at 6-4 [hereinafter TC 3-23.35]. If the weapon is held by a right-handed person with both hands, the left hand would cover part of the right hand while the trigger is pulled. The left hand would be the most exposed hand. If the weapon is fired by a left-handed person with both hands holding the gun, the right hand would cover part of the left hand and would be more exposed to GSR when the trigger is pulled.

Now, consider the one-handed grip:



TC 3-23.35 at 6-4. The weapon could be held by either a right or left-handed shooter. Under both of these scenarios the GSR on the non-shooting hand would be greatly diminished or nonexistent. Without knowing how the gun was held, we don't even have a way of predicting a probable GSR pattern.

Also, as we know from the control gloves, even gloves that are worn by the shooter of a firearm could have no GSR pattern at all. Of course, Applicant's explanation is the prevailing winds on the day of the test fire. Even if that explanation is accepted, it would introduce another variable in predicting a GSR pattern. Even a milder wind could affect the distribution of GSR on the hands of a shooter. Wind is an inherently unpredictable variable, especially in West Texas. Thus, without knowing how the wind was blowing at the precise time of the firing, we cannot predict how gunshot residue will be deposited on a firing hand or hands.

•The Lack of a Predictable Pattern

It is important to recall Microtrace's theory about the GSR:

> As I explained in my prior declaration, a relatively high concentration of GSR in areas of the gloves that would ordinarily only be exposed during discharge of a weapon *(i.e.,* areas shielded to environmental deposition vs. areas exposed from environmental deposition) would support the conclusion that they were worn by the shooter of a firearm, rather than cross-contaminated with GSR particles from other objects.

(def. exh. vol. 1 p. 92) The actual results:

Evidence Gloves

Left					Right				
Location	Tri	Bi	Mono*	Total Particles#	Location	Tri	Bi	Mono	Total Particles
A	2	1	10	8973	A	0	0	1	428
B	1	1	3	3500	B	0	0	0	274
C	16	9	33	8693	C	3	0	6	1152
D	1	1	21	12933	D	0	0	5	6028
Blank	0	0	0	30	Blank	0	0	0	0

Control Gloves

Left					Right				
Location	Tri	Bi	Mono	Total Particles	Location	Tri	Bi	Mono	Total Particles
A	0	0	0	7	A	0	0	0	10
B	0	0	0	27	B	0	0	0	10
C	0	0	0	29	C	0	0	0	24
D	0	0	0	10	D	0	0	0	11
Blank	0	0	0	13	Blank	0	0	0	4

*Mono includes lead and antimony rich particles. Barium rich particles are not included in the mono count due to the barium sulfate in the local environment
#Total particles include all particle types that were classified by the automated analysis software. A list of the particle classes is provided in appendix A.

(def. exh. vol 1 p. 97) The results are best explained with another grid:

Area	Prediction	Result
Right "A"	High GSR	With only one mono-component particle, this prediction fails.
Right "B"	Low GSR	In line with prediction
Right "C"	None	Three tri-component particles
Right "D"	None	Five mono-component particles

Left “A”	High GSR	2 tri, 1 bi, 10 mono. Would seem to be in line with prediction, depending on how the weapon was actually held.
Left “B”	Low GSR	1 tri, 1 bi, 3 mono. This fails the low GSR prediction.
Left “C”	None	16 tri, 9 bi, 33 mono. Under any standard, this is a high amount of GSR.
Left “D”	None	1 tri, 1 bi, 21 mono.

As shown above, the Microtrace’s predictions as to the distribution of GSR fall far short of being proved. This is to be expected, though, as their theory of GSR prediction relies on too many variables that are unknown and unknowable. What is most interesting is the amount of GSR on some of the control areas. For instance, area D, which should not be exposed to GSR under any circumstance, has a relatively high number of possible GSR particles. Could this not be caused by contact with other surfaces that have GSR on them? A similar question could be asked about area C, which might be thought to have more exposure to fired weapon GSR. The extremely high number on both hands in area C would indicate that this area obtained its GSR not from a gunshot but from contact with other

surfaces, i.e. cross-contamination. In other words, one would not expect area C to have high levels of GSR from a fired weapon on both gloves.

One possible explanation for this seemingly random result is the fact that the two gloves were packaged together, not only after the fact but at the time they were thrown at the well site. It is entirely possible that GSR from one or the other glove could have migrated as a result of jostling or movement. (state's exh. no. 9 pp. 252-53)

5.1.3.1. The Journey of the gloves greatly reduces their evidentiary potential.

•When did Mr. Page acquire the gloves?

As noted below, Mr. Page testified that he had the gloves with him, as he had used them earlier in the day working with his stepfather outside. Mr. Page now says he bought the gloves on the evening of the first murder. Mark Ray, however, says he does not remember Mr. Page buying gloves at a store that evening. (RR 21 p. 223). Further complicating the matter, Doyle Douglas' DNA was found on the gloves, which would seem to throw into question the current claim of Mr. Page that he bought the gloves after Mr. Douglas' murder.

•The Trip from East Texas to Midland

Regardless of where the gloves came from, it is undisputed that Deputy Kent Spencer found the gloves at the oil well site. (RR 24 pp. 207-08) What happened to them on the way to that site is not entirely clear.

Mark Ray testified that Mr. Page had the gloves with him and used them to take Doyle Douglas' body out of the trunk. (RR 22 p. 256) The record is not direct as to whether Mr. Page had the gloves on when Doyle Douglas was shot at the creek. However, Mr. Ray did testify that Mr. Page threw the gloves in the back seat of the car. (RR 22 p. 256) Given that Mr. Ray was testifying at the time about taking Mr. Douglas out of the car and placing him in the woods, this would seem to indicate that Mr. Page had the gloves on at the creek. And by implication, Mr. Page had the gloves on when he was moving Mr. Douglas.[19] Mr. Ray further testified that he took the gloves from the backseat and placed them on the floorboard of the vehicle. (RR 22 p. 256)

The gloves then travelled from East Texas to Midland. We don't know exactly when Mr. Page retrieved the gloves from the floorboard, but he surely did. Mr. Page has given mixed testimony on the question of how he used the gloves on the trip: "[W]henever I was driving when we were

[19] This implication is backed up by the finding of Mr. Douglas' DNA on the gloves.

inside the car or the truck, I did not have the gloves on." (RR 27 p. 206) Earlier in his testimony, however, when asked when he had the gloves, he said this: "I had been wearing them all day long, whenever I was working with my dad, plus it was cold out, so I just left them on." (RR 26 p. 241) Thus, it is difficult to glean from the record when the gloves were worn during this trip. It is safe to say that they did not spend the entire trip on the floorboard of the Pontiac. The question of what was done with the gloves during this time has implications regarding gunshot residue, as will be discussed in more detail below.

•Cumulative GSR exposure

Another area in which the second report is deficient is in not considering cumulative GSR exposure. As detailed above, the gloves went on an extensive GSR laden journey. This second report played down the many ways in which the GSR could have been transferred to the gloves:

> Mr. Young's counsel have asked me to consider the following two scenarios: a) the GSR on the gloves resulted from the gloves being worn by a shooter during the discharge of a weapon, or instead b) the glove was on the floor, in the back of a vehicle, when a firearm was discharged in a vehicle, or the gloves were introduced into the back of the vehicle after the firearm was discharged. A detectable difference between the relative concentration of GSR on various areas of the gloves provides a means by which it may be possible to distinguish between these two scenarios.

(vol. 1 p. 65) Aside from the fact that this is actually three scenarios, this also fails to take into account the cumulation of contacts with GSR contaminated items:

1. Being in the Pontiac when Doyle Douglas was shot.

2. The inside of the Pontiac being sprayed with GSR, including the clothing of the other occupants.

3. Getting out of the Pontiac.

4. The moving of Doyle Douglas' body.

5. The second shooting of Doyle Douglas.

6. Getting back into the GSR laden Pontiac.

7. The contamination of Page's clothing in riding in the car from East Texas to Eastland, and the subsequent transfer from the clothes to the gloves.

8. Page's handling of the gun during the kidnapping.

9. The shooting of the gun in Callahan County at the Pontiac.

10. The transfer of GSR from Applicant in that event to the inside of the pickup.

11. The transfer of GSR deposited on the outside of the Pontiac to the gloves.

12. The transfer from the inside of the pickup to the gloves, wherever they were stored at this point in the pickup.

13. Any handling of the gun along the way.

14. Any transfer between the gloves when someone was wearing them.

15. Applicant's shooting of Mr. Petrey.

16. The placing of one glove inside the other.

17. The throwing of the gloves at the murder scene.

18. The packaging of the gloves together after they were seized as evidence.

Applicant treats this issue as if the gloves had been placed in a sealed container at the beginning of their journey, only to be taken out at the time Samuel Petrey was shot. We know this was not the case. And while we don't know what was done with them at every moment, we do know that they were worn, transferred, worn again, and so on. Thus, it is impossible for any alleged pattern of GSR on the gloves to tell us whether they were worn for the shooting of Mr. Petrey. (state's exh. no. 9 pp. 252-53) Accordingly, the gloves do not prove that David Page gave material false testimony at the trial.

5.2. Page's direct statements do not show his testimony at trial to be false.

•The Origin of the Gloves

Applicant asserts that Mr. Page's contradictory statements about the origin of the gloves found at the scene are damning evidence of his serial mendacity and unreliability as a witness. In fact, Mr. Page's recollections about the gloves are evidence of nothing more than the passage of time. Where and when Mr. Page obtained the gloves is not a crucial fact and only reflects the foibles of human memory.

Mr. Page has given contradictory statements about the gloves. He testified at trial that the gloves at the scene were his "gardening gloves" that he had used on the day Doyle Douglas was murdered to help his father work in the yard.[20] (RR 26 p. 137; 241) In a 2015 declaration Mr. Page stated that he bought the gloves at a convenience store the night Doyle Douglas was shot. (def. exh. vol. 5 p. 166) Later, in a 2017 statement Mr. Page stated that he bought the gloves after Mr. Douglas was killed. (state's exh. no. 10 p. 267)

At this point it is impossible to reconstruct the exact origin of the gloves. Mr. Page now says that the gloves were bought after Mr. Douglas

[20] In the GSR expert's first report, he says that they found no evidence of soil as if the gloves had been used in the garden. (def. exh. vol. 1 p. 42) Page, however, did not say he used them in the garden:

> Q. I see. What kind of cleaning up the yard were you doing? Just blowing the lawn or --
> A. Mowing the lawn, getting -- filing the limbs out of the front yard and getting all scrap metal out of the front yard, stuff like that.

(RR 26 p. 137) One would not necessarily expect to find soil in such a situation on the gloves. Interestingly, the first Microtrace reports that possible rust or iron or steel particles were found on the gloves. (def. exh. vol. 1 pp. 41-42)

was killed, but the DNA of Mr. Douglas was found on the gloves, suggesting he had the gloves earlier in the evening. (RR 27 p. 256) It is impossible to say what version of the glove origin story is definitively true. Thus Applicant has failed to show that Mr. Page gave false testimony at trial about where and when he obtained the gloves.

•The Suggestion of the Slitting of Samuel Petry's Throat

At trial Mr. Page testified that Applicant suggested that they both slit the throat of Mr. Petrey. (RR 27 pp. 207-08) In his 2015 declaration Mr. Page denies that Applicant said this. (def. exh. vol. 5 p. 166) Applicant argues that this is a new revelation that shows Mr. Page testified falsely. However, this is not a new disclosure. In a statement made the morning of November 27, 2001 to Detective Kent Spencer, Mr. Page denied Applicant's ideations in this area:

> Q: He hasn't said anything about using that knife or doing anything with it?
>
> A: No
>
> Q: Did he talk or say anything about using that knife to kill Sam?
>
> A: He's not the knife type of person, he uses knives for like cutting stuff not people. He's the type of person when he wants to kill somebody he wants it done quick and easy. That's what I got out of it.

(state's exh. no. 11 p. 292)

Mr. Page has been consistent in maintaining that Applicant talked of disposing of Mr. Petrey prior to his shooting at the hands of Applicant. He reiterated this in his 2017 statement.[21] The fact that Mr. Page equivocated on the method of killing Mr. Petrey did not leave the jury with a false impression.

•The Shooting of the Interior of the Pontiac

Applicant argues that Mr. Page lied when he testified that Applicant did not shoot the inside of the Pontiac. Applicant makes three assertions of "fact" to reach this conclusion:

1. When it was abandoned in Callahan County, there were two "apparent bullet holes" inside the vehicle.

2. Mr. Page (in his 2015 declaration) stated that Applicant shot *at* the inside of the vehicle.

3. Mr. Page stated (again, in his 2015 declaration) that he did not see any shell casings inside the vehicle as they were travelling from Longview to Eastland.

There are several infirmities with this argument. First, there were not two bullet holes on the interior of the car. FBI analyst Ann Hinkle, who was responsible for processing the vehicle for physical evidence (RR

[21] Applicant told Mr. Page, "We need to get rid of him." (state's exh. no. 10 p. 266)

23 p. 10), found only one "defect" on the inside of the car, and that could have been from a cigarette burn. (RR 23 pp. 74-75) A closer view of this defect does not definitively show it to be a hole caused by a bullet or a fragment of a bullet.[22] (RR 23 pp. 75-76) The other supposed bullet hole, on the steering wheel (def. exh. vol. 1 p. 120), could be any number of things, including a defect in the picture. What it is not, is conclusive proof that a bullet struck the steering wheel. Remember, Agent Hinkle went over the interior and found only one defect; whatever was on the steering wheel, if anything, did not merit noting. She surely would have noted anything that looked like a bullet hole.

Second, even if there were two bullet holes inside the vehicle, Mr. Page did not testify that Applicant didn't shoot the inside of the vehicle:

> Q. Did Clint ever fire inside of the car, inside of Doyle Douglas' car out there in Callahan County?
>
> A. Not that I can recall, no.

[22] Agent Hinkle testified that this defect was on the passenger side of the dashboard. (RR 23 75) This is the same defect portrayed in the defense exhibit number 8 from much farther away. (def. exh. vol 1 p. 118) The closer view—admitted at trial and seen by the jury—reveals that this was not a bullet hole at all; it was some other kind of defect. (state's ex. no. 12 p. 295) Applicant also cites the Firearms Section Worksheet (def. exh. vol 1 p. 151) as evidence that there were bullet holes in the dashboard. Specifically, Applicant points to submissions A2-A5, which were "casts of what [appear] to be questioned impact areas." There are three reasons why this is not any evidence of all of bullet holes inside the Pontiac. First, this appears to be a submission from the Harrison County Sheriff's Office, which did not process the car for evidence—the FBI did. Second, the submission does not say where on the car the casts came from, although the casts have metallic and paint transfers, suggesting they came from outside the vehicle. Third, the worksheet says the submission was made on February 25, 2001, some 9 months before this crime occurred.

(RR 27 p. 81) The defense attorney was asking if Applicant had ever fired the weapon *inside* the car, not if Applicant shot at areas that were inside the car. Indeed, Mr. Page never testified that some of the bullets shot at the car from outside did not hit the interior of the vehicle.

Applicant is laboring mightily to imply that the two shell casings found inside the vehicle did not come from the shooting of Doyle Douglas. This is understandable, since the two casings are powerful corroborative evidence of the testimony that Applicant shot Mr. Douglas twice in the head inside the Pontiac. Hence the 2015 statement (given to the defense) from Mr. Page that there were no shell casings inside the Pontiac when they were travelling from Longview to Eastland.[23] However, this apparent contradiction is clarified in Mr. Page's 2017 statement in which he says he says he did not remember seeing the shell casings inside the Pontiac.[24] Even if there were two bullet holes, those holes could have been

[23] One of the few of Mr. Page's statements Applicant argues should be believed.

[24] Ms. Nodolf: . . . . [Wh]en you and Mr. Young were in Doyle Douglas' car driving towards Eastland, did you observe any shell casings in the front passenger seat or on the floor of the car?
Mr. Page: No ma'am. I figured they had to have been there unless Clint grabbed 'em up out of there but now that you say something, they probably were there.
Ms. Nodolf: Okay. And I hate to be picky about this but I need to ask . . . and – and granted this has been years ago, to the best of your memory, were they there or were they not there?
Mr. Page: No ma'am, I don't remember if they were there or not.
Ms. Nodolf: Okay.
Mr. Page: Not like I said if -- they have had to have been there because … it's an automatic weapon

made when Applicant shot the vehicle in an attempt to blow it up, which, again, would not blunt the evidentiary value of the two shell casings inside the vehicle.

5.3. Because the jury heard the essence of all of these claims at trial and rejected them, the testimony is not false.

•*Ex Parte De La Cruz*

In 2015 the Court of Criminal Appeals considered the question of whether new evidence in the *Chabot* context can adequately establish falsity when the essence of that evidence was heard and rejected by the trial jury. *Ex parte De La Cruz*, 466 S.W.3d 855 (Tex. Crim. App. 2015). *De La Cruz* was a murder case in which a central question was whether the victim had been shot at one location and moved to another, as was the State's theory, or whether the victim had been shot at the location at which he was found. *Id.* at 858. The State called a witness, Torres, who testified that the victim had been shot and moved. *Id.* at 859. The defense cross-examined Torres—who admitted to being drunk and on other drugs during the shooting—about the various inconsistencies in his story. *Id.*

Ms. Nodolf: Right. So if your if you -- would you say that your trial testimony being closer in time to the time of the event would be a better recollection than maybe today?

Mr. Page: Yes ma'am.

(state's exh. no. 10 pp. 266-67)

In particular, Torres testified that the Defendant moved the victim's body himself to the vehicle that transported the body to the dumping scene. *Id.* At first, Torres testified that he did not remember how the defendant moved the body to the vehicle. *Id.* Later during cross-examination Torres changed that story to testify that the Defendant picked the victim "straight up and dragged him to the car." *Id.* Four police officers who were at the scene (not medical or forensic experts) opined that based on their observations of the scene the victim had been shot somewhere else and dumped where he had been found. *Id.*

The defense relied on the testimony of the medical examiner, Dr. Paul Shrode, for support of its theory that the body was not moved. Dr. Shrode testified that, in his opinion, the victim was shot where he was found. *Id.* at 860. Dr. Shrode testified that, in his opinion, it would be unusual for a five-foot-ten, 256 pound man to be transported in such a way as Torres testified and still be found lying face down, with his shirt tucked in, with one hand in his pocket, and with no dirt or grass stains on his clothing. *Id.* Additionally, Dr. Shrode testified that there likely would not have been a large pool of blood under the victim's head (as there was in this case) if he had not been shot where he was found because the victim's

heart would have stopped beating within several minutes, stopping the flow of blood almost immediately. *Id.* Dr. Shrode further opined that the victim's heart would not have continued beating for the 15 minutes it would have taken to transport the victim to where he was found. *Id.*

About the fatal wound to the victim, Dr. Shrode testified there was a "single perforating gunshot wound to the face" with an exit wound in the back of his head. *Id.* Dr. Shrode's description of the wound was consistent with Torres description of the shooting. *Id.* at 861.

Defense counsel extensively attacked Torres' credibility during closing argument, contrasting his testimony with Dr. Shrode's. *Id.* The Defendant was convicted and given a 99 year prison sentence, affirmed on direct appeal. *Id.*

The Defendant filed a post-conviction false evidence claim. *Id.* Central to his claim was an amended autopsy report by the Deputy Chief Medical Examiner of Harris County, Dr. Wolf. *Id.* That report repudiated the conclusion of Dr. Shrode, that the victim had only been shot once, and concluded that there were actually two gunshot wounds, one entering the face and one entering the back of the head. *Id.* Dr. Wolf also concluded that the wound to the face was "an intermediate range gunshot wound"

in contrast with Dr. Shrode's opinion that the wound was either a contact wound or a wound caused by a weapon one to two inches from the victim's face. *Id.* at 862.

At the live hearing on the writ of habeas corpus, Dr. Wolf largely agreed with Dr. Shrode's testimony outside of the conclusions in his report. *Id.* Dr. Wolf agreed that the blood pool and the presence of blood stains on the victim militated in favor of the victim being shot where he was found. *Id.* There was nothing in the physical evidence that led Dr. Wolf to think that the victim was shot anywhere than where he was found. *Id.* The second shot to the back of the head, Dr. Wolf testified, most likely occurred after the victim fell from the first shot. *Id.* According to Dr. Wolf, any forensic testimony suggesting that the victim had been moved after he had been shot "would be erroneous." *Id.*

The habeas court recommended relief based its conclusion that Torres had testified falsely, and that this testimony was material to the finding of guilt. *Id.* at 863.

The Court of Criminal Appeals reviewed its previous "false evidence" cases and stated "that definitive or highly persuasive evidence . . . may show by a preponderance of the evidence that testimony used to obtain a

conviction was false." *Id.* at 867. What these previous precedents do not address, according to the court, was "whether new evidence introduced on habeas adequately establishes falsity when the essence of that evidence was heard and rejected by the jury at trial." *Id.*

The applicant in *De La Cruz* contended that the testimony of Dr. Wolf and the amended autopsy report had conclusively shown the falsity of Torres' testimony. *Id.* The Court of Criminal Appeals disagreed, stating that to so find "would improperly circumvent the jury's role in assessing the credibility of witness testimony and resolving the inconsistencies in the evidence presented at trial." *Id.*

• The jury heard James McElwee and the alleged "confession" at trial.

As recounted above, James McElwee testified that he overheard a conversation between Mr. Page and another person in which Mr. Page admitted to having "pulled the trigger" on the second murder. Additionally, Mr. Page allegedly told Mr. McElwee that "they can't prove it anyway" and there were no "powder burns" on Mr. Page's hands.

The jury heard testimony that Mr. Page had allegedly confessed to the shooting of Mr. Petrey and rejected it, just as the jury in *De La Cruz*

had heard that the physical evidence contradicted the eyewitness' testimony. The Court of Criminal Appeals concluded that Dr. Wolf's testimony on the probable location of the shooting was "largely redundant" of Dr. Shrode's testimony on the same subject and did not establish the falsity of the eyewitness. *Id.* at 868. In this case, the extra, contradicted, and unreliable testimony of the other jailhouse informants was redundant of Mr. McElwee's testimony and does not establish the falsity of Mr. Page's testimony.

•The jury was aware of the David Page's contradictory statements.

In David Page, the jury knew exactly who they were hearing. Numerous times during cross-examination Mr. Page admitted to lying or giving conflicting statements.[25] (state's exh. no. 13) Mr. Page admitted to lying when he told investigators that Applicant was the only person who shot Doyle Douglas. (RR 27 p. 107) In fact, several times Mr. Page admitted trying to make Applicant look worse. (RR 27 pp. 28-29; 227-28) Mr.Page admitted to lying when he told investigators that Applicant put Doyle Douglas face down in the creek. (RR 27 pp. 65-66) Mr. Page also admitted

[25] The State has included in the appendix at exhibit no. 13 a list of the various inconsistencies and admissions in Mr. Page's testimony starting at page 296 of the appendix.

to changing his story when confronted by the physical evidence. (RR 27 pp. 43-44; 58-59; 63)

Page's testimony, taken as a whole, is a complete denial of any guilt in the case. This is at odds with Mr. Page's subsequent plea of guilty to the offense of kidnapping. The State, in its closing argument, as much as conceded that Mr. Page was guiltier than he was letting on:

> Okay. All of them are hedging, I would submit to you, to some degree. They're all trying to cut down on their responsibility to some degree to make themselves look better, including David Page. David Page is charged with this murder.

(RR 29 p. 25) The jury, as was there province, believed certain parts of Mr. Page's testimony. *See Limuel v. State*, 568 S.W.2d 309, 311 (Tex. Crim. App. 1978)(jury may accept or reject any or all of the testimony of any witness). Indeed, when one looks at Mr. Page's testimony in light of all the evidence, it is easy to see how the jury believed all or parts of his testimony.

•The defense advanced the theory that Page was the shooter at trial

The theory that David Page shot Samuel Petrey is not a novel theory; it was the central lynchpin of the defense case on guilt-innocence. It was the defense at trial who had the gloves at the scene tested for DNA. (RR 26 pp. 256-57) It was the Applicant's lawyers at trial who advanced the

idea that the lead on the gloves could have been from gunshot residue. (RR 25 p. 183) At closing argument the defense strongly implied that David Page was the murderer of Samuel Petrey:

> If Clint Young had wanted to kill Sam Petrey, he could have done so out there in the boondocks in Callahan County where that white Pontiac was dumped. Clint Young did not kill Sam Petrey out there in Callahan County. One thing that changed is David Page became aware that David Page was wanted and David Page panicked. It was right after that that Sam Petrey was, in fact, murdered.

(RR 29 pp. 52-53)

The jury at Applicant's trial heard the very theory—with supporting evidence—advanced by applicant in the application and rejected it.

The central lesson of *De La Cruz* is when a jury has heard the essence of the claims being advanced at habeas and rejected those claims, additional evidence that merely bolsters those assertions will not support a *Chabot* claim. The idea that Mr. Page was testifying falsely about the shooting of Mr. Petrey was vigorously litigated in front of the jury. The jury believed Mr. Page. The additional evidence that however weakly bolsters this discredited assertion is not definitive or highly persuasive, and does not show that Mr. Page's testimony was false under the *Chabot* standard.

6. The testimony, even if "false", was not material to Applicant's conviction or sentence.

•An applicant must show that "false" testimony affected the judgment of the jury.

If an applicant makes a "falseness" showing, he must then show that there is a reasonable likelihood that the testimony affected the judgment of the jury, either in the guilt or punishment phase. *Ex parte Chavez*, 371 S.W.3d 200, 206-07 (Tex. Crim. App. 2012). *Chavez* concerned an armed robbery in which there was testimony at trial that the defendant was in the residence when the victim was shot and killed in his home. *Id.* at 202. The defendant was convicted of robbery and received a 55 year sentence. *Id.* at 203. After the trial the prosecution received credible information that two other individuals, one of whom admitted to actually shooting the victim, were involved in the robbery. *Id.* These individuals related that the defendant had devised and coordinated the robbery, but remained in the getaway car as the crime was being perpetrated. *Id.* The defendant eventually filed a due-process claim under *Chabot*.

The Court of Criminal Appeals found that the testimony that the defendant was the shooter did give the jury a false impression, satisfying the "falseness" prong of the false testimony due-process *Chabot* claim. *Id.*

at 208. However, as the court noted, there is a materiality prong to the *Chabot* claim: Has the applicant shown that there is a reasonable likelihood that the false testimony affected the conviction or sentence? *Id.* at 206-07. As explained below, the defendant in *Chavez* did not meet the materiality test.

The defendant in *Chavez* argued that he would have received a lesser punishment had the jury not been misled by the false testimony that he was the shooter. *Id.* at 209. The court disagreed, observing that the defendant was acquitted of the murder charge, showing that the jury disbelieved the testimony that the defendant was the shooter. *Id.* Additionally, one of the implicating witnesses was impeached with his prior inconsistent statements to the effect that he couldn't see who the shooter was. *Id.* at 209. Furthermore, there was additional evidence at trial that the defendant was deeply involved in the planning and showed cold indifference when he found out the victim had died. *Id.* The jury also heard extensive punishment evidence of the defendant's violent criminal behavior. *Id.* at 210. In light of the record, the court held, the defendant did not show that there was a reasonable likelihood that the false testimony affected the defendant's sentence. *Id.*

In 2014 the Court of Criminal Appeals considered a *Chabot* claim in a murder trial in which a key witness had lied about experiencing hallucinations. *Ex Parte Weinstein*, 421 S.W.3d 656 (Tex. Crim. App. 2014). The victim was found in the defendant's home in an advanced state of decomposition, and there was extensive testimony about the defendant's motive to kill the victim. *Id.* at 659-61. The witness, Adams, claimed that the defendant had shown him how he had strangled the victim while Adams was in the same cell with the defendant in jail. *Id.* at 661-62. Adams was impeached extensively by the defense at trial and admitted to suffering from bipolar disorder. *Id.* at 662. When asked if he ever suffered from hallucinations, Adams answered in the negative. *Id.*

In later proceedings the defense showed that Adams had, in fact, suffered extensively from hallucinations, including at the time he shared a cell with the defendant. *Id.* at 666. The Court of Criminal Appeals found that, while Adams testimony about hallucinations was indeed false, the testimony was not material to the jury's verdict. *Id.* at 667. This was so, the court stated, because the defense already had a "plethora" of impeachment evidence against Adams. Also, many aspects of Adams testimony were corroborated by other evidence. *Id.* In addition, there was

much evidence showing the defendant's guilt that was unrelated to Adam's testimony. *Id.* at 667-68. With this precedent in mind, Applicant's allegations about the materiality of the allegedly false testimony will be examined.

6.1. The evidence introduced at trial, exclusive of Page's testimony, abundantly shows Applicant's guilt either as a principal or a party.

•Applicant's Contentions on Materiality

Applicant contends that 4 aspects of Mr. Page's testimony are false: (1) that Applicant shot Mr. Petrey; (2) that Mr. Page had used the gloves for gardening before the killings; (3) that Applicant had an intention to slit Mr. Petrey's throat; and (4) that Applicant shot the interior of Doyle Douglas' vehicle. Also, it is anticipated that Applicant will contend that Mr. Page's testimony about the kidnapping of Mr. Petrey is false. These contentions will be addressed, *seriatim*, below.

• There was other evidence that applicant was the shooter.

It is important to remember that without David Page's testimony, the evidence would have been more than sufficient to support the jury's verdict of guilty, contrary to Applicant's assertion. The circumstances of Applicant's apprehension by law enforcement alone show his guilt.

Sergeant Darrin Clements had gone to a home in Midland to talk with Amber and Bart Lynch regarding suspects in a homicide. (RR 24 p. 135) While at the residence, Sgt. Clements received information that the suspect was armed and was driving a white extended cab pickup. (RR 24 p. 136) Subsequently, Sgt. Clements learned that a vehicle matching the description had been located and the driver was on a cellular phone. (RR 24 p. 139) Sgt. Clements returned the residence, where he found Amber Lynch on the phone with the suspect. Sgt. Clements began to speak with the suspect and asked him to surrender his weapon. (RR 24 pp. 139-40) The subject told Sgt. Clements, "Officer, I swear I didn't have anything to do with it. I cannot go back to jail." (RR 24 p. 140) Sgt. Clements told the subject to surrender, and he could hear through the phone that the subject was complying. (RR 24 p. 141)

Officer Greg Chatwell was off-duty that day but heard radio traffic that the suspect vehicle was in his vicinity. (RR 24 pp. 146-47) He saw the vehicle, a white Chevrolet pickup that matched the radio description, and started to follow it. (RR 24 pp. 148-49)

Officer Ken Callahan eventually joined in the chase. At first, Officer Callahan thought the vehicle was going to pull over, but then it suddenly

accelerated. (RR 24 p. 166) The pickup was travelling east in the west-bound lane of traffic, causing vehicles to take evasive action to avoid a collision and travelling up to 90 miles per hour. (RR 24 p. 167) At some point one of the tires on the pickup came off the rim. (RR 24 pp. 167-68) Eventually, after the pickup came to a stop, Officer Callahan found the weapon used to shoot Mr. Petrey[26] in the passenger side door between the center console and the passenger seat. (RR 24 p. 170)

It is important to remember that Applicant stole the .22 Colt Huntsman pistol—the murder weapon—found in his possession. Shortly before Applicant's crime spree, Mr. Ronnie Wall went to his sporting goods store in Diana, Texas in response to a burglary alarm and discovered that his store had been burglarized. (RR. 30 pp. 30-32; 30 pp. 32-21) Several handguns and a shotgun had been stolen including the pistol seized from Applicant. (RR. 30 pp. 33-38) Officer John Warren, a fingerprint expert, employed by the Gilmer Police Department, obtained a set of fingerprints (State's Trial Exhibit 118) from the Applicant, compared them to the latent prints found at the scene of the burglary and determined that they matched. (RR. 30 pp. 54-58) Shortly after Thanksgiving Deborah Sanders

[26] As shown by the testimony of Tim Counce, DPS forensic firearms and toolmark examiner, who examined the shell casings found at the scene of the murder and matched them to the weapon. (RR 25 pp. 136-156)

observed the Applicant with three guns stuffed in his pants. The Applicant told Ms. Sanders that he got the guns from a gun shop in Diana. (RR. 30 pp. 116-117)

Thus—entirely excluding Mr. Page's testimony—there is ample evidence that shows Applicant murdered Samuel Petrey. First, Applicant fled from the police. Flight is admissible as a circumstance from which an inference of guilt can be drawn. *Foster v. State*, 779 S.W.2d 845, 859 (Tex. Crim. App. 1989). Second, Applicant stole the weapon that was used to murder Mr. Petrey. Third, Applicant had with him that same weapon when he was apprehended. Fourth, Applicant was driving Mr. Petrey's truck when he was apprehended. Fifth, Applicant admitted to various witnesses (not David Page) that he stole Mr. Petry's truck. (RR 24 p. 125) Thus, even if Mr. Page's testimony meets the falseness prong, it was not material to Applicant's conviction.

•It does not matter where the gloves came from.

The State has argued above that Mr. Page's testimony that he had the gloves for use helping his stepfather before the killings has not been shown to be false. Even if the testimony was false, question of where and

when Mr. Page acquired the gloves was peripheral (at best) to the question of Applicant's guilt. It is undisputed that the Mr. Page's gloves were found at the scene of the second murder. Whether they were worn while the shooter killed Mr. Petrey is not affected by the question of when they were acquired. Put simply: It doesn't matter when and how Mr. Page acquired the gloves. Thus, the question of the origin of the gloves was not material to Applicant's conviction.

• Applicant wanted to kill Mr. Petrey, regardless of the means.

As detailed above, Mr. Page has given conflicting stories about the manner in which they were to murder Mr. Petrey. Even if Mr. Page's testimony that Applicant suggested cutting Mr. Petrey's throat was false, the fact remains that Applicant suggested that Mr. Petrey should not be allowed to live. A short time later Mr. Petrey was murdered using a firearm. Any previous discussions between Mr. Page and Applicant are irrelevant to the ultimate result and did not affect the jury's verdict of guilt.

•The Shooting of the Interior of the Pontiac meant nothing as to the jury's ultimate verdict.

The State has addressed above the evidence surrounding the shooting of the interior of Doyle Douglas' car. Even if Mr. Page testified falsely

about whether Applicant shot the interior of the vehicle[27], the fact is, whether there were two bullet holes in the interior of the Pontiac is not a fact of consequence.

• The kidnapping of Mr. Petrey was, in the best case for Applicant, a joint venture between Mr. Page and Applicant.

In October of 2017 Mr. Page gave a statement to the District Attorney's Office in which he confessed a greater role in the kidnapping of Samuel Petrey. Applicant did not know about this statement at the time he filed his application. It is anticipated that Applicant may raise a new contention based on this new information. What follows is a "prebuttal" to their anticipated argument.[28]

In an early statement to law enforcement, Mr. Page intimated that Mr. Petrey initially voluntarily travelled with them:

> Q: How did you pick up Sam?
>
> A: He walked up.
>
> Q: I mean where did you find him what made you go with him?
>
> A: He was by himself and a nice people and said he wanted to come over here with nice people.

[27] Mr. Page has never testified or declared that Applicant fired the weapon while he was inside the car when the car was in Callahan County.

[28] The State expresses no opinion at this point as to whether Applicant can raise this argument article 11.071 §4 of the Code of Criminal Procedure.

(state's exh. no. 14 p. 319) It was only after they had been on the road, according to Mr. Page in this statement, did Applicant kidnap Mr. Petrey:

> A: We had just got done getting gas and we started to pull out (inaudible)
>
> Q: Where was yall's current car?
>
> A: We were driving it.
>
> Q: Ok.
>
> A: So we saw a sheriff and we pulled behind (inaudible) get down come on. (inaudible)
>
> Q: So at that point Clint pulled a gun on Sam and told him to pull over?
>
> A: Correct.

(state's exh. no. 14 p. 319)

In a statement given the next day, Mr. Page gave a significantly different account of the kidnapping:

> We got up there and he had just gotten in his truck and he was like man you want a soda and I was like sure. So he pulled down to where the beverages were at and got out and he goes excuse me sir, how do you get back to 20? And he told him and everything how to get to 20 and he was like I have one more question for ya and he looked over and was like well what's that and he pulled out the gun and said it's loaded get inside your (inaudible) and Clint told him to follow him and he was driving a white truck and I followed him and he wound up lying down and we hit the exit 320. I am not sure how far down it was I wasn't paying attention I was just following him and we wound up taking the exit right before 320 and got off on 20 and we went up around to the back roads and everything and dropped off the car. And then after that Clint fired a couple of

shots and (inaudible) He didn't see much and we got in the truck and took off.

(state's exh. no. 11 p. 283) This is substantively in accord with Mr. Page's testimony at trial:

A. At that point, Clint was walking back from the soda machines, and whenever Mr. Petrey closed his door, Clint walked up to the door and Mr. Petrey had rolled down his window and was like --

Q. Could you hear what was being said?

A. Yes, ma'am.

Q. How could you hear what was being said from where you were in the car?

A. Because the window was rolled down.

Q. Were you driving the Pontiac at that time?

A. No, ma'am, I was in the passenger seat.

Q. All right. Your window was down, is that right?

A. Yes, ma'am.

Q. So what did Clint say?

A. He asked how to get back to I-20.

Q. And what did Mr. Petrey say?

A. He said, "You go out -- go pull out of Brookshire's parking lot, get on to this road, the road that's right outside the Brookshire's," and said, "Go up a little ways and you'll see an on-ramp, get on the on-ramp and it will take you right on to I-20."

Q. Was Mr. Petrey nice to Clint?

A. Yeah.

Q. Pleasant?

A. He was like an every day Good Samaritan.

Q. Okay. And what happened then?

A. He was like -- Mr. Petrey asked him, "Can I help you with anything else," and at that point, Clint pulled out the gun and said, "Yeah, scoot over, I'm taking your truck."

(RR 26 pp. 204-05)

In 2017 Mr. Page gave a more inculpatory account of his role in the kidnapping, while not exculpating Applicant:

Q: . . . . How did you kidnap Mr. Petrey?

A: Walked up to him with the gun in my hand down by my side.

Q: How were you holding the gun? (Movement) Does it I mean like if I'm standing up and if I'm like just...did you have your finger on the trigger or did you have your finger beside the trigger?

A: I can't remember.

Q: It's okay. And you have it down to your side and then what did you do?

A: Whenever I walked up to him I had it pointed out I said, "hey, just, let you know you're comin' with us."

Q: Okay. And then what did you do?

A: Uuhh just like, "whoa okay, just don't do nothing stupid." After that Clint came up and said," hey so what's up do you wanna, you wanna ride with him or do you want me to?" I said, "you go ahead." He then took the gun I got in Doyle's car, we went and ditched the car . . . .

(state's exh. no. 10 pp. 268-69)

Assuming that the later version of the kidnapping is more accurate, these differing accounts are not material. Even if Mr. Page took a more active role in the kidnapping than his testimony at trial would indicate, Applicant's role was not diminished. Indeed, Mr. Page's latest version shows the kidnapping was a joint enterprise.[29] This is hardly surprising, as Mr. Page pleaded guilty to aggravated kidnapping after he testified. (state's exh. no. 16 p. 362)

The evidence at trial also showed that Page was more involved than his testimony indicated. The testimony of the security guard at the hospital showed that Page was the driver of Mr. Petrey's pickup when it first arrived at the hospital.[30] There is also testimony from Det. Spencer that Applicant went into a convenience store—possibly without the gun—while Mr. Page stayed in the pickup with Mr. Petrey, indicating that Mr. Page was guarding Mr. Petrey. (RR 27 pp. 293-95)

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[29] Mr. Page stated that Applicant handed him the gun for the purpose of kidnapping Mr. Petrey. (state's exhibit no. 10 p. 268)

[30] Q. Now, when you say two of them had gotten out of the truck, can you describe at all what those two looked like?

A. One of them was a short young guy, he was the driver, and the other was a taller guy, he was the passenger. See, I didn't know how many were in the truck at that time.

(RR 24 p. 12) Mr. Page's testimony indicates he is shorter than Applicant. (RR 27 pp. 100-01)

While Mr. Page may now inculpate himself more than he did at trial[31], this revision would not have affected Applicant's conviction or punishment. The fact remains that all the evidence shows that Applicant was the person who shot Samuel Petrey twice in the head and that Mr. Page and Applicant acted together in the kidnapping of Mr. Petrey.

- If Applicant was a party to the shooting of Mr. Petrey, it does not diminish his culpability.

The jury charge on guilt-innocence authorized the jury to convict Applicant as a party if it believed that *David Page* intentionally or knowingly caused the death of Mr. Petrey and that Applicant, acting with the intent to promote the murder of Mr. Petrey, solicited, encouraged, directed, aided, or attempted to aid Mr. Page to commit the murder. (state's exh. no. 15 pp. 339-41)

The idea that David Page shooting Samuel Petrey absolves Applicant from criminal responsibility from that crime is risible. Every stage of this criminal episode shows that Applicant was in control of what was happening and what was going to happen. At the very beginning, Applicant shot Doyle Douglas with the idea of taking his car and going to see his

[31] It is worth reiterating that (leaving aside the dubious jailhouse informants) Mr. Page has never, in any testimony or direct statements, stated that he was the shooter of Samuel Petrey—even in those statements given to "Applicant friendly" individuals.

girlfriend. He directed the other occupants in the car to put Mr. Douglas in the trunk. The trip to Midland would not have even happened but for Applicant. The kidnapping of Mr. Petrey would have happened with or without Mr. Page, as Applicant saw the need to be in Midland without Mr. Douglas' car.[32] Applicant threatened Mr. Petrey into attempting to buy him a firearm at Wal-Mart. Applicant maintained possession of the murder weapon and the stolen vehicle even after Mr. Petrey had been shot—even up to the time of his apprehension. Applicant was only apprehended after a high speed chase. These are hardly the actions of a passive bystander to a murder.

It is entirely possible for the jury to have believed that David Page pulled the trigger at the behest and direction of Applicant. After all, Applicant had already directed Mark Ray to shoot Doyle Douglas. At the very least, if Mr. Page was the shooter, Applicant aided Mr. Page by providing the weapon for the shooting. It strains credulity to believe that Applicant was a passive (or even sleeping) bystander to the shooting when all of his actions up to that point had been to lead this joint criminal

[32] Applicant admitted his agency in stealing the pickup—and thus in the kidnapping—when he admitted to numerous people that he and Mr. Page had stolen the car.

enterprise. Thus, because the jury was perfectly within its bounds to convict Applicant as a party, Mr. Page's testimony that Applicant shot Mr. Petrey was not material to Applicant's conviction.

6.2. Excluding the allegedly false testimony, the evidence, both at guilt and punishment, reflects that Applicant intended to cause Mr. Petrey's death.

•Applicant's Argument

In a capital case in which it was permissible for the jury to find a defendant guilty as a party, an "anti-parties" charge must be given to the jury at punishment:

> Do you find from the evidence beyond a reasonable doubt that the defendant, himself, actually caused the death of the deceased individuals or he did not himself actually cause the death of the deceased individuals, but he intended to kill the deceased individuals or anticipated that human life would be taken?

See Tex. Code Crim. Proc. art. 37.071 §2(b)(2).

Applicant argues, in the absence of almost any evidence, that Applicant became a passive, sleeping non-participant in any further crime after the brutal murder in East Texas. Therefore, the argument continues, because the only evidence of Applicant's active participation came from David Page, his testimony was material to his punishment. For the reasons detailed below, the State disagrees.

• Applicant's Intended to cause death from the beginning.

As argued above, Applicant's intention to cause death is evident from the beginning of his crime spree. Applicant murdered a man simply because he wanted his car. He then enlisted his compatriots to move the body and to make sure that the victim was really dead. He threatened the other witnesses if they were to report this crime. Also, a short time prior to the killing, Applicant had engaged in an aggravated robbery in which he expressed a desire to kill the victim.[33]

In addition, the weapon used to kill the victim was stolen by Applicant. Indeed, all the evidence at trial (aside from Det. Spencer's viewing of Applicant on a recording of a convenience store surveillance camera) indicates that the gun was in the possession of Applicant at all times.[34]

[33] Four days before Applicant murdered Doyle Douglas, Mr. Carlos Torres Ramos was alone at his duplex in the City of Spring Hill. About 9:00 a.m. Mr. Ramos heard a knock on the front door. He went to the front door and saw two men running around to the back of the house. (RR. 30 p. 69) The men, armed with pistols, kicked open the back door and entered, telling Mr. Ramos not to move. (RR. 30 pp. 68-72) Mr. Ramos ran to his bedroom and locked the door and ran to his closet where he had an unloaded .22 caliber rifle. (RR. 30 pp. 72, 74-76) The two armed men shot at the bedroom door, and then entered the bedroom and shot at Mr. Ramos in the closet. (RR. 30 pp. 73-74) Mr. Ramos was shot in the back and in the leg. The bullet went through his leg and lodged in his left testicle. (RR. 30 pp. 76-77) Mr. Ramos managed to get one bullet in the rifle and shoot at one of the gunmen, and the gunmen then fled. (RR. 30 pp. 74, 77) Mr. Ramos ran after the gunmen, and saw them get into a black Dodge that was occupied by a third man and a woman. Mr. Ramos knew one of the gunmen, and identified him as Pat Brook. (RR. 30 p. 74) Mr. Brook testified that he and Applicant perpetrated the robbery, in which he was shot in the buttocks. (RR 30 pp. 157-161) When they got back in the getaway car, Applicant stated, "Let's go back and kill the motherfucker." (RR 30 p. 162)

[34] Even if the latest statement from Mr. Page is taken into account, it does not lessen Applicant's culpability for the crime. In fact, it increases his culpability because it shows the joint nature of their criminal enterprise. It certainly shows that Applicant was willing to provide Mr. Page with the weapon if it furthered their goals.

Thus, even if Mr. Page was the shooter, the inference that Applicant provided him the weapon for the purpose of shooting Mr. Petrey is very strong.

•Applicant's killing mission continues as he leaves East Texas.

From the time Applicant left East Texas until Mr. Petrey's death, the evidence of Applicant's intent to cause death continues. Regardless of the method, Applicant deliberated about killing Mr. Petrey shortly after he was kidnapped. If Mr. Page did indeed shoot Mr. Petrey, it was at the direction and behest of Applicant, as shown not only by his ideation but also by his control of the weapon used. This conclusion is only made stronger by Applicant's previous actions in directing Mark Ray to shoot Doyle Douglas. Thus, even if Mr. Page was the sole shooter of Mr. Petrey, there was more than enough evidence that Applicant aided and actively planned Petrey's death. This means any evidence that Mr. Page was the shooter could not have affected the jury's verdict on punishment.

7. Conclusion

Applicant has not shown by a preponderance of the evidence that Mr. Page's testimony was false in any respect. Neither has he shown that any allegedly false testimony affected the jury's verdict as to either guilt or

punishment. Because of this, his claim under *Ex Parte Chabot* should be denied, without the necessity of a hearing.

Respectfully submitted,

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