IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-87,470-01

EX PARTE GREGORY RAYMOND KELLEY, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 13-1367-K26A IN THE 26TH DISTRICT COURT FROM WILLIAMSON COUNTY

NEWELL, J., filed a concurring opinion, in which RICHARDSON, J., joined.

"[T]he stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence [of innocence] must be."[1] But, as Applicant Greg Kelley notes, the converse is also true. Where the evidence of guilt is exceedingly weak, the new evidence of innocence may more easily overcome the trial evidence under the applicable standard of review. In this aggravated sexual assault of a child case, evidence of guilt was weak, yet arguably legally sufficient. New evidence

[1] *Ex parte Elizondo*, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996) (quoting *Herrera v. Collins*, 506 U.S. 390, 443-44 (1993) (Blackmun, J., dissenting)).

undermines the State's case, and the full weight of it points the finger in another direction, or maybe two directions. The parties here agree on that. So does the trial court. So does this Court. But the parties also agree to (and the trial court recommends) relief on two other grounds: first, a due process violation "due to a deficient police investigation"; and second, a violation of the right to effective, conflict-free counsel.

The recommendations on these latter two issues have lured multiple elephants into the room. Although folks all seem to agree (or at least not actively disagree) with the bottom line that Applicant should have never been prosecuted, they disagree about what went wrong or how to make it right. Amicus briefs have been filed in this case on behalf of trial counsel Patricia Cummings, who makes a due process claim of her own, and the Actual Innocence Clinic at the University of Texas School of Law, et al., who argue Cummings ought not be able to intervene in this *ex parte* case. Also, Sixteen Texas District Attorneys, the Combined Law Enforcement Associations of Texas, and the State Prosecutor have weighed in on the due process claim. These amicus briefs have engendered reply briefs from Applicant, as well as objection briefs from the Williamson County District Attorney.

I, like some of the amici, disagree that relief is warranted on due

process and ineffective assistance grounds. While the judicial system has an obligation to set things straight when an innocent person is convicted of a crime he did not commit, it need not lay blame on good faith actors in doing so.

I. Introduction

In 2013, during his senior year at Leander High School, Applicant lived with his friend and classmate Johnathan McCarty and McCarty's parents, Shama and Ralph. Shama offered a daycare service at the home. Shortly after Applicant moved out, two unrelated four-year-old boys made outcries that "Greg" had sexually abused them. Both, either in the initial outcry or later, mentioned the use of lotion. Applicant maintained his innocence and went to trial, with the Honorable Billy Ray Stubblefield presiding.

One boy, HM, testified via closed circuit that "Greg" woke him up during naps, took down his (Greg's) SpongeBob pajama pants, and put his (Greg's) "pee-pee" in his (HM's) mouth "two times" and it tasted like "gross lotion"; the other boy, LM, also testified via closed circuit, and he denied any abuse. Applicant testified, acknowledged knowing the boys from the daycare, admitted being in the home while the kids were napping, but denied any abuse. A jury found Applicant guilty of two

counts of aggravated sexual assault of the first child, HM; he was acquitted of all charges relating to the second child, LM.

The State agreed to recommend to the trial court the minimum sentence of twenty-five years in exchange for Applicant's waiving of his right to appeal. Applicant accepted, and the trial court followed the agreed recommendation. Applicant filed this habeas application in the convicting court, now presided over by the Honorable Donna King, raising, among others, the three aforementioned grounds.

The three claims are based on a theory that either "look-alike" Johnathan McCarty (who made "street corner" admissions to the conduct) or his "look-alike" half-brother, N.D. (who has a juvenile record for sexual misconduct), was the actual assailant, and that this Johnathan-or-N.D.-did-it theory would have come to light but for an inadequate police investigation and but for defense counsel operating under a conflict of interest due to her relationship with the McCarty family. The evidence supporting the Johnathan-or-N.D.-did-it theory was uncovered by Texas Ranger Cody Mitchell, who, at the request of a new Williamson County District Attorney, investigated the allegations raised in the writ application. As the trial court put it, Ranger Mitchell spent

> hundreds of hours reviewing court documents, transcripts,

> photographs and handwritten notes from prosecutors and investigators, listening to recordings, viewing the interviews of the minor children, reviewing the investigative files of the Cedar Park Police Department and the Texas Department of Family and Protective Services (CPS), interviewing approximately 50 people in person, receiving tips from the public at large, attending the depositions of the witnesses, and performing many other tasks in connections with the investigation of this case.[2]

Two of the people he interviewed were Applicant and Johnathan. In the end, Ranger Mitchell concluded that three suspects remain in the case, Applicant, Johnathan, and N.D. Nevertheless, the only evidence against Applicant remaining is that which came out at trial. Applicant bases his innocence claim on new evidence, including that:

- In October 2014, Johnathan was overheard by Jade McLaughlin confessing to the crime, saying, "It was me that did it." "I'm the boss that put my dick in that kid's mouth." McLaughlin testified by deposition that he was at a party with about thirteen or so people —most from Leander High School—and

  > the night went on and everyone was having a fun time, and the next thing you hear is Johnathan just panicking and over exaggerating about things, and that's what caught my attention because I was just the curious out of the bunch. I was, you know, learning and exploring and -- the way the design of the room was set up was there was a kitchen, there was a side room, and then the stairs for going upstairs. And the way it was is they were in

[2] The resulting 57-page report is under a protective order. Part of that order is filed as an under seal exhibit in this case.

> this little room right here, which was closed off by a wall right here, and then there was an island coming out. So they [Johnathan and his girlfriend at the time] were discussing what was—whatever was going on in this little room right here, and . . . And he started panicking about something, which I wasn't aware of, and so that's what got my attention. And then the more that I heard, he's just saying, It was me, it was me, you know, I was the one that did it, I was the one that—you know, to the—to Mariah. And Mariah was like—at the time Mariah was—she was the boyfriend [sic] of the guy, so I guess it was like a matter of the well-being of, Oh, don't worry, I'll protect you, or don't worry, we'll—do you understand what I'm saying? . . . And, yeah, it just went on from there, and I heard him . . . What I saw, I'm the boss—well, what I heard was, I'm the boss that I put my dick in that kid's mouth. He didn't necessarily say it just like that, but that's what—that's the summary of what he pretty much said to Mariah. And Mariah did say, Just lie, you know, we'll lie about it, or she said —while they were discussing over the matter of the kid and Johnathan, he said that, You know, I was the guy he like—I was the guy that put, you know—that . . . He was the guy that said, I'm the boss, I put my dick in that kid's mouth. And Mariah after that said, Just lie. And as I said, they were both under the consumption of alcohol, so pretty much anything that you think that thought would be, you know, weird in a way, to them wasn't.

McLaughlin told his mom and his coach. He said he and his mom "didn't think it would get this far." Asked what that meant, he said, "Well, it's three years later and Johnathan is still out and Greg is still in."

- Johnathan confessed to Jacy Brown, "it was me, not Greg, I

did that to the little boy." Jacy testified in a deposition that she came to know Johnathan in August 2016 because they were neighbors.

> So we had just smoked—we had smoked a couple of blunts and we had just had sex and we were chilling, and he was like, You know, I did that to that little boy. And I was like, What do you mean? He was like, Greg didn't do it, I did it. And I was like No, you're just high, you're tripping. And I kind of pushed it aside, and then the case came back up and I said something.

She said that "whenever he had told me, I never said anything." But after Johnathan was in jail and she read about it on Facebook she realized "I need to say something" and she commented on Facebook for "anyone who has anything to do with the case to contact me."

- Johnathan kept photographs of naked children on his computer and phone; and
- Johnathan apparently lied to the Ranger about wearing SpongeBob pajamas and using lotion.[3]

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[3] Applicant also sets out the following evidence under his innocence claim:

- Johnathan was the only teenager living in the McCarty household on July 12, 2013, the date the police determined the assault occurred.
- Johnathan's facial features bore a striking resemblance to Applicant's.
- HM's description of "Greg's room" where the assault occurred was consistent with Johnathan's room.
- An 8-year-old boy who attended the daycare confused Johnathan and Applicant.
- LM also confused Applicant with Johnathan.
- Johnathan kept a Facebook picture of a boy who attended the daycare. The boy is shirtless, wearing someone else's bottoms, is posing in the bathroom and appears to have just showered.
- Four women have accused Johnathan of raping them after drugging them with a date rape drug.
- Johnathan frequently had children in his room, walked around the daycare barely clothed, and ingested substances like embalming fluid at the time.
- Johnathan acted out inappropriately in the high school locker room.

In other words, the new evidence on the innocence claim is that this was a case of mistaken identity; Johnathan, not Applicant, did it. (The N.D.-did-it alternative appears in the conflict-of-interest claim.)

Applicant's burden is to set forth qualifying new evidence and then to prove, by clear and convincing evidence, that despite the evidence of guilt no reasonable juror could have found him guilty in light of the new evidence.[4] I believe he has met that burden. But he has not met his burden on the due process issue because the failure to conduct a complete police investigation, in the absence of a specific constitutional violation involving state misconduct, does not constitute a due process violation.[5] And he has not met his burden on the ineffective assistance of counsel claim because counsel was not conflicted out of representing Applicant by her prior representation of McCarty family members.[6]

- Jade McLauglin testified that Johnathan tried to "butt rape" him in the locker room.
- After Applicant was sentenced to prison, Johnathan posted a "selfie" of himself smiling and with the caption, "Nigga, you ain't got nothin' to worry bout."

[4] *See Ex parte Elizondo,* 947 S.W.2d 202, 206 (Tex. Crim. App. 1996); *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006).

[5] *See Ex parte Brandley*,781 S.W.2d 886 (Tex. Crim. App. 1989); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Brady v. Maryland*, 373 U.S. 83 (1963).

[6] *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Acosta v. State*, 233 S.W.3d 349 (Tex. Crim. App. 2007).

Further, counsel's decision to pursue an it-didn't-happen defense rather than a Johnathan-or-N.D.-did-it defense was not ineffective assistance.[7]

II. The Facts as Presented at Trial

A. Applicant Moves in with the McCartys

Applicant, whose own parents were having significant health problems, moved in with the McCartys because he knew "Johnathan very well as one of my best friends," and Johnathan's mom Shama, "said she would take care of me and, you know, keep me on the right path to be successful." Applicant would live there for roughly a year. During that year, there were six or seven kids there on weekdays—including two four-year-old boys, HM and LM. HM started at the daycare in December 2013, halfway through Applicant's time at the house, but LM had been there since he was a baby, so was there the whole time Applicant was.

B. The Outcries, CAC Interviews, Investigation, and Pretrial Determination That the Boys Would Testify by Closed Circuit

A month after Applicant moved out (and a few days after HM broke his arm while at the daycare), HM told his mother, Tonya Mahan, that "Greg" put his penis in the boy's mouth. HM was using the restroom and said, spontaneously, "I wish my pee-pee was big." Asked why, HM said,

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[7] *See Strickland v. Washington*, 466 U.S. 668 (1984).

"I wish my pee-pee was big like Greg's." HM said he knew this, "Because he made me stick it in my mouth." Asked how many times it happened, HM said, "two times." He also said that "Greg tried to lick his pee-pee, but he stopped him as well." Mahan said that the only Greg she knew was Greg Kelley.

On July 18, 2013, after questioning HM several times to make sure his story was consistent, his dad Brent Davis made a report to the Cedar Park Police. Officer Kevin Freed collected the facts and turned them over to Detective Christopher Dailey. Meanwhile, Heather Bradley, a child care licensing investigator, was assigned the task of looking into the daycare.

On July 23rd, HM was interviewed at the Williamson County Children's Advocacy Center by Jennifer Deazvedo while Detective Dailey and Bradley observed. Asked what he had come to talk about, HM said, "With Greg he's always putting his pee pee in my mouth."[8] And, "Greg has a big pee pee than me." He said it happened "two times when I was sleeping at Mimi's[9] house . . . just two times." HM said he was sleeping in Greg's room "on the left side of his bed" when Greg woke him up the

[8] There is no official transcript of the interview. The video of it was played for the jury.

[9] Mimi is a nickname for Shama.

first time. Greg had "nighttime clothes" on, but HM could not describe them. Asked what direction Greg's pee pee was going, HM said, "To my mouth." Asked if it was sticking out from body or not, HM said, "Sticking out." HM said "it was just Greg and me" in the room.

HM said that the second time it happened it was in "the couch room, it's the coach,[10] where sometimes I sleep . . . in the middle of the long couch but I was on the floor." HM said his mom came in and, "When he was doing it . . . when my mom saw it, my mom was going to fight him . . . my mom saw me and she saw Greg fighting me, and then my mom was fighting him." HM indicated that Greg "was punching me but that hurt." He indicated the punches struck his ribs. "I was crying and wanted my mom. Ms. Shama called my mom and my mom saw me crying and she fight Greg."

Dailey never asked Mahan about HM's statement. Mahan testified that she "personally has not spoken to law enforcement," and did not witness what her son said she witnessed.

Q Did you walk in and actually witness Greg putting his pee-pee in [HM's] mouth?

A No, I did not.

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[10] This is not a typo.

Q Did you ever walk in to some place in Shama's house and see Greg and [HM] physically fighting?

A No.

Q Did you ever walk in and see something that appeared to be Greg punching [HM]?

A Not that I recall.

Q Not that you recall?

A Not that—I mean, like I said, I've seen them a couple of times interacting, so—no, not physically.

Q And I would think, certainly, if you saw him punching your son —

A Yes, I would notice. Yeah.

Q And finally, the last question. And I have to ask it, even though I know you said you didn't talk to law enforcement. But are you aware of law enforcement ever trying to contact you to ask you if you had seen Greg putting his pee-pee in [HM's] mouth?

A No.

Q Or Greg and HM fighting?

A No.

Dailey did try to call Applicant. He left a message but did not get a call back. And then, because Dailey believed that HM was telling the truth, he conducted no further investigation, took the information he had to the district attorney's office, and, on August 7th, got a warrant for Applicant's

arrest. On the 9th, Applicant turned himself in and the story hit the press.

Three days later Michael Sacchetti, LM's father, got a call from Detective Dailey. Dailey told Sacchetti about the allegations against Applicant; Sacchetti was concerned in part because Applicant had given LM an armband. Dailey asked that LM come to the CAC for an interview. Rebecca Most, LM's mother, made arrangements to have LM interviewed the next day.

Most also called Shama. And, said Most, "After that phone call, I went into the house and Michael and I started asking questions." LM was, by this time, at a new daycare, and Sacchetti asked him whether he missed Shama's house and the "boys upstairs" and LM said, "Yes," and, "They were our bosses . . . Mr. Greg and Mr. Johnathan."[11] Asked by Most what he meant by that, LM said "that Mr. Greg asked him to rub lotion on his tee-tee because it was old and it made it feel better." Asked what he was saying, LM repeated himself. He then said, "Nevermind. Everything's okay." Most said he was waiving his hands, saying

[11] "Johnathan" is mistakenly spelled "Jonathan" in the reporter's record and other places in the files related to this case. I have switched the Jonathans to Johnathan without adding brackets around the "h." I have switched some of the Johnathan McCartys and McCartys to Johnathan, again without brackets, for consistency sake (for instance, in findings).

"Everything's okay. Everything's okay. Nevermind. Nevermind," and "went back to doing his puzzle." Most said the only Greg that LM knew was Greg Kelley, and that no other Greg was associated with the daycare other than Greg Kelley.

LM was interviewed at the CAC by Mikey Betancourt, and then, a couple weeks later, by Jennifer Deazvedo. LM did not make any accusations either time. Dailey and Bradley, who had watched the interviews, entered the room after Deazvedo walked out and interviewed LM themselves.[12] Dailey said he "felt more direct questions needed to be asked." He agreed he "didn't attempt to build rapport," he was not a "trained forensic interviewer," and he had asked leading questions. Dailey, dressed in plain clothes but with a gun holstered at his hip, identified himself to LM as a police officer.

In the interview by Dailey and Bradley, LM did outcry. And besides naming "Greg," LM said that "Johnathan" was involved.[13] Dailey later told

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[12] Asked whether she had "qualms or problems with Detective Dailey and Heather Bradley immediately going in there to conduct another interview," Deazvedo said, "Yes."

[13] The video of this interview was not introduced at trial and not made part of the trial record. This exhibit is under seal in the habeas record. There is no transcript of it in the record. This is a rough translation of the part of the interview in which LM mentions Johnathan as being involved.

Q Your momma told me that Johnathan had a friend by the name of Mr. Greg?

A (Nods) "I went to school."

Bradley that he knew there were problems with the way he interviewed LM, but that it "would help with [HM's] case."

Johnathan was never investigated. But, the next day, Applicant was again arrested, this time at school.

At trial, it was clear that Dailey did no other investigation. Dailey said he did not order a sexual assault exam of either child because the alleged assaults were "outside the 96-hour window." Dailey acknowledged: he did not get the number and names of the children who attended the daycare; he did not get the number and names of all the adults that were living at Shama's house at the time the allegations were made; and, he did not go to Shama's house to get the physical lay out of it.

Q	Your Momma told me that you said that Mr. Greg was the boss of you, and that Mr. Greg got lotion and put lotion on his pee-pee; is that true?
A	(Shakes head).
Q	Did Mr. Johnathan do that?
A	No.
Q	Then why'd you tell you mom?
A	No, I told my dad.
Q	Why?
A	In the bathroom. Because I was going pee-pee and telling him.
Q	Was it Mr. Greg that gave you the lotion or Mr. Johnathan?
A	Mr. Johnathan.
Q	Mr. Johnathan gave you the lotion?
A	(Nods)
Q	And did you put the lotion on Mr. Greg's pee-pee or Johnathan's?
A	Mr. Greg's pee-pee.
Q	Did Mr. Greg have you put lotion on his pee-pee one time or more than one time?
A	One time.

Dailey said that such an investigation was not needed "[b]ecause there's only two people in that room when the offense happened." He knew that "[f]rom the outcries from the victims." which he concluded were "true."

Q And as a result, you believe there was no need to investigate into the possibility of something else having happened?

A Correct.

Q So deciding that it wasn't necessary to do an investigation into the names of the people, the adults and the children, and an investigation into the physical nature of the house, you also decided there really was no need to interview any other witnesses in regard to the allegations?

A There was only one other person.

Q I'm talking about witnesses.

A There wasn't any other witnesses.

He said that nothing in HM's CAC interview caused him any pause. He did talk to LM's dad, when he called to ask him about taking LM in for an interview, but he did not recall the content of the twenty-minute conversation. He "possibly" gave Mr. Sacchetti details of HM's outcry. He acknowledged he pushed for more interviewing of LM after finding out about LM's outcry. And, as mentioned above, he acknowledged that his entering the room, with his gun on his hip, and interviewing LM, was

unorthodox.

One thing Dailey did do was back date the offense date to a time when Applicant was living at the house. Officer Kevin Freed was told by HM's father, in the report made on July 18th, that the offense likely occurred between July 8th and July12th because HM made his outcry on July 13th. But Applicant had moved out of the McCarty home on June 11, 2013. So the offense date was changed, to on or about April 15, 2013.

Another thing Dailey did was delete the emails he exchanged with Heather Bradley. Dailey admitted he deleted, against Cedar Park Police Department Policy: an email he received from Bradley regarding the interview of another child at Shama's daycare"; an email he got from Bradley on August 15th, the day after LM had his first CAC interview, informing him that "LM had made an allegation of sexual abuse to his mother and his father"; an email he sent to Bradley about his "attempts to talk to the prosecutor and re-interview or at least have [LM] interviewed a second" time; an email he sent to Bradley about setting up LM for an "extended interview"; and an email he sent to Bradley "regarding getting a warrant and having Greg arrested." He agreed there

were "plenty of other emails that got deleted."[14] Bradley, against her work place policy which required printing emails, deleted those same emails without doing so.

Dailey's offense report totaled thirteen pages. Conspicuously absent from the offense report is HM's claim that Applicant attacked him in the presence of his mom.

Applicant was indicted for one count of Continuous Sexual Abuse of a Child (alleging several predicate acts against both HM and LM), two counts of Super Aggravated Sexual Assault of a Child (alleging two acts against HM), and two counts of Indecency with a Child by Sexual Contact (alleging one act against HM and one against LM).

Applicant refused to plead guilty on lesser charges in exchange for probation, despite facing a minimum of twenty-five years without the possibility of parole.[15]

Before trial, the State filed a motion to have the boys testify by closed-circuit pursuant to Article 38.071.[16] Section 3 of that statute allows the court to order that the testimony of a child be taken in a room

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[14] At the habeas hearing, Dailey would explain that he deleted the emails, "Because I didn't think they had any evidentiary value in the case."

[15] *See* TEX. PEN. CODE § 21.02(h); TEX. PEN. CODE § 22.021(f).

[16] TEX. CODE CRIM. PROC. art. 38.071 § 3(a), (b).

other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. This allows the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but the child cannot hear or see the defendant. Applicant filed a brief in opposition to the motion—arguing that closed-circuit procedure would violate his Sixth Amendment right to face-to-face confrontation and cross-examination.

In support of the motion HM's mom, Tonya Mahan, testified that HM was becoming increasingly anxious the closer it got to trial. As it's gotten closer, he's gotten "more reserved in his actions, doesn't like to be around a lot of people, gets very . . . shy as soon as we walk into a room where there's more than probably five people in the room, hides behind my leg." She testified that HM "doesn't really want to talk about anything pertaining to this case unless he's comfortable and it usually takes awhile for him to open up." On trips to the court house, HM would get stomach aches and headaches. When she explained to him, "that we might run into Greg" HM "gets very nervous and says, you know, 'What if he does this to me again?' And I calm him down." On cross-examination, Mahan acknowledged that HM wasn't "having any issues with anything until he

started having to come in more and start talking about it more."

The boys' therapist, Lacey Fisher, then testified. She said that when she talked to the boys about testifying, HM mentioned "he's nervous that he might see Greg again because he's afraid he'll be hurt." LM "seems not to want to answer questions about it at all. In fact, he changes the subject anytime something like that comes up[.]" Fisher testified that testifying is especially hard for younger children because it is "harder for them to cognitively know that they're still safe" even though they are talking about the situation.

Fisher gave her opinion that testifying would be "very, very damaging for" LM. And with HM, it would set back the progress he's made in therapy. Both boys would be better served by testifying by closed circuit because "then they wouldn't have to worry about what it feels like to be in front of the defendant, wondering about what they need to say. They wouldn't have the aspect of fear or their safety and concern. I believe they would feel less anxious about it."

On cross-examination, Fisher stated that she had not viewed the interview video-tapes because she gets her information on what happened from the parents before she meets the children. She admitted she'd never seen a child testify—or an adult for that matter.

After the testimony the judge said he would reserve ruling until he conversed with the children to discern their competency to testify. The State talked a bit about what the procedure would be should they testify by closed circuit. “What I think they're prepared to set up is just a one-way feed into a court—into a TV, essentially, rolled into the courtroom or displayed via the projector from a dedicated video line.” Trial counsel argued, “Constitutionally, I think we're in real serious trouble if we do it. But if, for whatever reason, you're persuaded to do it, I would just say that the IT people need to be cautioned as to what the law is regarding my ability to communicate simultaneously with my client so my client hears and sees what' s going on. And so, I mean, they need to understand that that's what the law requires.”

The parties then more fully argued their positions.

> Judge, I submitted a brief in support of our position regarding the constitutionality of allowing the closed circuit, so I would ask the Court to review that brief prior to making a ruling on Monday. The State submitted something; take a look at that, too. I think the State's relying on the *Gonzales* case to say that this can be done in conjunction with 38.071. And what I would point out to you, in the most succinct fashion that I can, is *Gonzales* was in 1991, and it's pre-*Coronado*. *Coronado* was cited in my brief, and *Coronado*-is a Court of Criminal Appeals decision in 2011. And the reason why that's so important is because what happens between 1991 and 2011 is *Crawford*. I think you're aware of that. And this is, smack dab, a *Crawford* issue. And I think that we're just in

> really, really dangerous territory, post *Coronado*, because the court is saying, you know, we really need to understand what a person's constitutional right is in regard to confrontation. And specifically, Judge, I would just say this: Even though it was a plurality opinion, the court is saying the right to confrontation includes not only the right to face-to-face confrontation, but also the right to meaningful and effective cross examination. [The] constitutional right[s] to confrontation and cross examination do not depend on the type of crime charged or the fragility of the witnesses. All accused citizens are entitled to the full protection of the Constitution. So, Judge, I — I think that, post *Crawford*, post *Coronado*, I think we've got some real serious issues regarding the constitutionality of 38.071.
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> Aside from that, just in general, I think specifically you're going to have problems in this case. There might be a case where the facts are different, where you might be treading water a little bit better, but I think in this case we simply don't rise to the level of 38.071, even if there's not a *Crawford* issue.

She went on to argue that the predicate for closed caption testimony set out of the statute had not been met.[17] Specifically, "there is no relationship between the kids and the defendant"; there is not an allegation of "something that was going on for a period of—a lengthy period. This is not sexual abuse where we're saying penetration occurred, where there was that kind of physical trauma." The boys are doing pretty

[17] Tex. Code Crim. Proc. art. 38.071 § 6. (requiring "good cause"); § 7 ("In making any determination of good cause under this article, the court shall consider the rights of the defendant, the interests of the child, the relationship of the defendant to the child, the character and duration of the alleged offense, any court finding related to the availability of the child to testify, the age, maturity, and emotional stability of the child, the time elapsed since the alleged offense, and any other relevant factors.").

good and "ultimately, what the therapist is saying in regard to both children is that, yes, they're certainly nervous about testifying; they're nervous about seeing Greg. Who wouldn't be? A 30-year-old accusing Greg Kelley of these accusations would be nervous about seeing him."

The State pointed out that the *Coronado* opinion "specifically references that closed-circuit TV testimony has been upheld by the Supreme Court." And,

> child witnesses testifying by closed circuit TV are still subject to physical presence. They're still subject to an oath. They're still subject to cross examination. And they're still subject to, perhaps most importantly, the observation of demeanor and credibility by the trier of fact. None of those elements are mitigated by closed circuit TV. And there is no opinion stating the converse, and no controlling opinion that controls the actions of this court says anything to the contrary. You will find none.

The State then argued that the "good cause" required by the statute was proved by Mahan and Fisher's testimony about the five-year-old boys' anxiety over having to see the defendant and having to testify in front of him. The State's position "is that they have made substantial progress since seeing Ms. Fisher, and we just don't want to reverse that. We don't want there to be a negative impact on the child's emotional, psychological well being."

After talking with the boys the trial ruled:

THE COURT: I believe that the State's argument that it introduced, the evidence that was adduced through the therapist, and my own observation of the children this morning, indicate to me that [LM] could testify in open court. But I believe that it would be traumatic and not in the best interest of [HM] to testify except through closed-circuit television.

MR. PURYEAR: Yes, sir.

MS. CUMMINGS: And, Judge, I just see a potential kind of technological difficulty in doing that, and also just in terms of confusing the jury. So at this point, if you're going to let one of them testify closed-circuit, I would rather, have both of them testify closed-circuit; otherwise, the jury's going to wonder what's going on.

MR. PURYEAR: And as long as that's part of Ms. Cumming's trial strategy to do it that way, the State certainly has no objection.

THE COURT: All right. Let me ask the question. What are the—what are the technical arrangements for that?

MR. PURYEAR: Your Honor, I have the equipment upstairs. And it's—it's been explained to me, it's been demonstrated to me. Again, a lot of this is out of my wheelhouse, so I can't really explain how it works. It is pretty easy to set up. My understanding is it could be—there's just — it's a camera that plugs into a power source. That power source then beams it, I believe, wirelessly to a receiver that could be plugged into our cart here in court and played on the screen and on the overhead.

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MS. CUMMINGS: Two brief things, Judge. I just want to be very cautious and make sure the record is clear; I certainly

> wasn't waiving my objection. But, in fact, Mr. Puryear is right, I had to make a strategy call because I think having one testify closed circuit and one in the courtroom creates a prejudice, and the jury's going to be wondering what's going on. So I want to be very clear that I'm not waiving the arguments that I have made against doing closed circuit at all. In addition to that, Judge—and this could be something y'all talked about but I just don't understand the technology. I just want to remind everybody that we have to have it set up in such a way that I'm able to simultaneously make sure my client is hearing and communicate with him so I'm able to effectively cross examine the children.

The State agreed—and such provisions were made.

C. The Boys' Trial Testimony

On July 7, 2014, the case was called for trial. At arraignment, the State abandoned the continuous sexual abuse count, and the remaining counts proceeded to trial before a jury. Before the boys testified, the trial court described the procedure by which they would be testifying:

> Ladies and gentlemen, we're going to have a witness testify this morning via closed-circuit television. This is a first for me, so we're going to be learning as we go. The 368th, which is the courtroom right next-door, has made their courtroom available for us for this morning. I anticipate the attorneys for the defendant and the attorneys for the State and I will go next-door, and we will meet with the witness. The witness will be sworn in to tell the truth, and we will proceed. The defendant will be able to observe through the closed-circuit television that's here in the courtroom, and he will be able to communicate with his attorneys through a method that is going to be a little awkward, but it will nonetheless provide him the ability to communicate with his attorneys.

HM and LM then testified by closed-circuit TV. HM testified that "Greg" abused him. Greg woke him up when he was napping and, "He put his pee-pee in my mouth twice." Both times it was upstairs on the couch, and Greg had "SpongeBob" pajamas on, but he took his pants down. HM said it tasted "like, yucky," was, "like, this big" and was "pointing out." HM said that the second time, Greg asked, "Can I put my pee-pee in your mouth?" and he said no, but Greg "just did it anyway" which made him "angry." It tasted like "gross lotion" and touched "the back of my mouth." HM shook his head when asked whether anybody else had put their pee-pee in his mouth. "Just Greg," he said.

After a short cross examination, the State attempted to get HM to walk into the courtroom to identify Applicant. It did not happen.

Outside the jury, the parties discussed the attempted identification. HM had been taken a back way, to enter the courtroom from the jury room, but had refused to enter. Instead, he got on his hands and knees at the threshold of the entry. Applicant's attorney ended up closing the door because she considered what was going on prejudicial.

Counsel lodged her objection:

> MS. CUMMINGS: Judge, I just — I wanted to make an objection and put on the record what happened. First of all, I didn't object to the attempt to do the in-court identification.

> My understanding is they were just going to walk him out, have him look, and then come back and say whether or not that was Greg. That's not the way it happened. What happened is, instead of taking him in the courtroom like any other person, they took him back through the back and tried to bring him in through the jury door. So with the jury door wide-open and the jury sitting in the box just a few feet away, they tried to get him into the courtroom. And he ended up, I think — I couldn't see everything, but I could hear — I think he ended up kind of getting down on his knees and was kind of whining, and both of them are kind of -- and when I say "both of them," I'm going to say the prosecutors are kind of pleading with him, trying to get him to go into the courtroom. And after probably, I'm guessing, 30 seconds to a minute of that, I realized the prejudicial effect was so outrageous that I needed to do something to stop it.
>
> And recall, the whole reason why we did this closed-circuit was because the State's position was he was too traumatized to actually go in that courtroom and see Greg, so they certainly were on notice. And then they took him and they created that scene for the jury. So I object. I want the record to be clear that it shows that. And what I did is I got up and walked towards them and I shut the door in order to stop any potential damage that was occurring with the jury witnessing what they were doing.

The State explained it was trying to comply with the closed-circuit statute that "does require that if identity has been brought up through some kind of examination, that an in-court identification is necessary."[18] Counsel responded that the statute only requires it if identity is put at issue, and she wasn't putting it at issue. The court noted:

> THE COURT: Well, I think I know where Mr. Puryear's coming

[18] *See* Tex. Crim. Proc. Code art. 38.071, § 9.

> from in terms of whether identity was an issue, since the child of the McCartys was brought up numerous times, "Was it he," "Was it Greg." And so I think one could fairly say that the identity of the alleged perpetrator is at play. . .

HM never identified Applicant. And HM had not been asked to identify him pretrial.

Before LM testified, the State asked for instruction from the trial court on the identity issue. Counsel stated there was "ample identification of him as the Greg Kelley at Shama's house, so I don't think there is any need for them to do an in-court identification." The trial court again brought up Johnathan, saying that "during the first day or so of trial, post-seating of the jury, there were questions, the import of which were to question whether Johnathan—I think his name is—was a suspect." Counsel replied, "I'm not taking the position that Johnathan committed this crime, not my client," and that she intended on putting on evidence "that says Greg Kelley, my Greg Kelley, was the one at Shama's house." She added, "But I want to-be abundantly clear, I'm saying he didn't do it."

THE COURT: But you're not saying that someone else—

MS. CUMMINGS: That some other Greg—

THE COURT: –in the house did it.

> MS. CUMMINGS: I'm saying I don't have any idea. I don't even know if "it" ever occurred. You know what I mean? I don't know. I'm just saying my client didn't do it. And I'm going to say my Greg lived at Shama's; my Greg was at Shama's.
>
> MR. PURYEAR: And, I mean, there has to be some—some testimony developing the contested issue of identity, and it doesn't sound like that is going to be affirmatively explored. And so the State's comfortable to just, rather than attempt that again, the State's just going to just leave that alone, so—okay.
>
> MS. CUMMINGS: I think the record is clear. If the jury were to convict him, I think the record is clear he's Greg Kelley. You know what I mean?
>
> MR. PURYEAR: And I think that's clear as well, Your Honor.
>
> THE COURT: All right. Are you ready for me to bring LM in?

LM, on the stand, denied anything happened to him. He acknowledged that Greg, "a big boy," slept at the house and said he sometimes napped in his room. LM testified he and Greg would play catch inside the house. He denied: that Greg ever touched him or showed him lotion; that he had ever told people that Greg had showed him lotion; that he ever did anything in bed with Greg; that he ever saw any part of Greg's body; that he showed Greg any part of his body; that he ever told anybody he saw parts of Greg's body; and that he'd ever told his parents about Greg. Eventually LM said he did not know "Johnathan"

and he didn't know "Greg." Shown a photo of Shama's backyard and play scape, LM said he "didn't know it," then said "he did know it," and then said the house was "in Florida."

Asked who he slept with when he slept in Greg's bed, LM said "I just slept by myself." LM was shown a photo of Applicant and identified the photo as being of "Greg" that's "been at Mimi's house awhile."[19]

D. The Experts

Both parties put on forensic psychologists who gave opinions based on a hypothetical first child (HM) and a hypothetical second child (LM). The State's expert, Dr. Lee Carter, deemed HM's outcry to his mom reliable but was critical of how LM's outcry was provoked, and then re-provoked after two denials at the CAC. "And if you were to call me and say 'I want you to consult with me on a case and here are the facts,' I would say 'Well, it's not a very good case.'" In LM's case "we don't have

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[19] At this point the State tried to get in a statement LM had made to his therapist Lacey Fisher in April 2014. In a proffer, Fisher testified that he stated, "I rubbed Greg's tee-tee with lotion because he told me to." The trial court agreed with defense counsel that the statement was not admissible under 803(4) or as a prior inconsistent statement. The trial court did allow Fisher to testify that both boys engaged in repeated play therapy—something consistent with trauma. She also testified that HM was happy and sweet but when the talk turned to events at Shama's house, "There was a change. He seemed to be really shy and almost embarrassed[.]" She described LM as energetic and fun, confident at times. But his demeanor, too, would change when talk turned to events at Shama's house. "He was just avoidant, would not even–he really withdrew from any conversation about it." Fisher saw LM from roughly October of 2013 to July 2014, and HM, from April 2014 to July 2014.

a good idea of what happened to him."

Both experts did put stock into the "sensory detail" of both kids mentioning "lotion." But the experts agreed that preschool-age children are the most susceptible to the creation of false memories, and that the repeated questioning that took place here was not ideal. The evidence showed that HM was subjected to some eight "non-professional conversations," prior to the CAC interview, and four or five meetings with the district attorney's office after, including one in which he was shown the video recording of his CAC interview; and that LM was questioned by his parents, repeatedly interviewed at CAC, and then met with the district attorney's office four times.[20] As Dr. Carter put it, "repeated questions about that event, whether it's true or not, may cause the child to believe 'Well–she keeps asking me the same question. It must be because something happened.' And so the answer has been telegraphed and they offer it."

The defense expert, Dr. Stephen Thorpe, noted that there was a failure to follow up on evidence of contamination in HM's CAC interview. He pointed to HM jumping straight into mentioning Greg, his report that

[20] The number-of-conversations evidence came in through cross-examination of State's witnesses.

he was sleeping on the "left side" of Greg's bed, and his report of fighting. Dr. Thorpe also took issue with Jennifer Deazvedo's use of semi-structured interviews, which, he said, are no "better than flipping a coin when trying to determine if the allegations are true."

E. Shama's Testimony

Shama McCarty testified about her day care and Applicant coming to live at the house. Shama's testimony was contradictory, defensive, and included a lot of "I don't remember"s. It was impeached with inconsistent statements she had made to Heather Bradley while Bradley was investigating the day care. For example, Shama first told the jury she had three kids at the day care (a number that conformed to what Bradley had said would have been permissible), but then named eight kids.

Shama also told the jury she "can't remember" if there were times when Applicant and Johnathan were around the kids and that she "didn't know" if they, Applicant and Johnathan, even knew the kids. Shama maintained that she'd been honest with Bradley during the investigation.

F. Character Witnesses

Six character witnesses testified as to Greg's truthful and law-abiding character including, a football teammate, his football coach, his

mom's friend, his oldest brother, his girlfriend, and his girlfriend's dad. These witnesses testified that Greg was good around children and treated them "morally and safely."

G. Applicant's Testimony

Applicant took the stand and denied committing the offenses. Applicant outlined his tight schedule, which included school, football and track practices, work at his part-time jobs, and lifting weights. Applicant said he did not see the kids in the morning because he was out the door before they came over for care. And for the most part, the kids were gone by the time he got home. He acknowledged knowing the kids—including HM and LM. Asked to describe an interaction, Applicant stated,

> I would see them mostly when they were playing in the playroom they had when I would walk in, coming home from practice. Some still stayed. I would go over there and give them a high-five, see how they were doing. Saw a couple of them running around the kitchen when I would eat.

He said the kids sometimes jumped on him, and he would let them hang on his arms. He also let the kids play with his iPad. He denied he gave LM an armband, but said LM might have picked one up from his room.

He remembers seeing both kids' moms.[21] He also said he was at the house a couple of times when the kids were taking naps, "two or three times, from my recollection . . . maybe it was a school break or something, school holiday day, I can't remember exactly what, but I remember them—seeing them napping." He said the kids would be all scattered out[22] and that once he opened his door and found a kid sleeping in his bed, "And the first thing I did was I closed it, and I asked Shama 'If you could please move him. I need to get my football stuff so I can go to the gym and work out,' and that is exactly what she did."

Applicant said he was never alone with HM or LM. He agreed the house was like "Grand Central Station" after school with all the kids and "Johnathan's friends coming in and out." He acknowledged that Shama was not a good witness. "She was untruthful on some things," including her statements that he was not in the house when the kids were there and that he did not interact with the kids. He agreed that her "memory got fuzzy" when it came to things that could hurt him with respect to the

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[21] In his interview with the Ranger, Applicant said that he knew LM's parents, but not HM's.

[22] He represented the same to the Ranger, saying he would come home and discover kids had been put down for naps all over the place—in his room, in Johnathan's room, in Shama's room, and in the guest room. Johnathan also told the Ranger that Shama let the kids sleep in their rooms and that he knew it was not a good idea, that you can't run a day care that way, and that he told her so, but "she just wanted everyone to be comfortable."

case. Applicant said he didn't know why Shama was dishonest.

Applicant was asked on cross-examination about his membership at Anytime Fitness and whether he'd told the manager there, Phillip Forbes, "anything different about where you might have been in the spring of 2013." He denied telling Forbes that he was a Marine sniper.

H. Rebuttal Testimony of Phillip Forbes

Forbes, a veteran, testified that Applicant represented himself as a Marine. Forbes said he had "brief conversations with Mr. Kelley about his time in the service and his deployments to Afghanistan, and then just recently when he got back from a deployment." He had such a conversation with Applicant "a week to 10 days" before the trial started.

Forbes said he felt compelled, after seeing Applicant in the news, to come forward to the Cedar Park Police and tell them that "this guy's been lying about his military service." Before he saw Applicant on the news and learned he was a high school football player charged with sexual assault "I would have believed anything he said." Now, "I wouldn't believe anything he says."

I. The Jury Questions, Guilty and Not Guilty Verdicts, and Plea Agreement on Punishment

Closing arguments focused on whether the kids were telling the

truth about Applicant abusing them.

While deliberating, the jury sent out notes asking about testimony. The trial court described them as follows:

> "Request transcript of Rebecca Most's testimony under questioning by the prosecution . . . We disagree on what she said."
>
> "The jury has a dispute as to the testimony of Rebecca Most. Lawyer questioning witness at the time of statement: Sunday Austin. Subject of question: [LM's] initial outcry in regard to the word lotion."
>
> "The testimony of Tonya Mahan; lawyer, Geoffrey Puryear; question, mother's account of initial outcry. Disagreement on mother's response."

The trial court's response to the first note was to ask for a more direct question, which resulted in the second note. Excerpts responsive to these second two notes were read back to the jury. The jury later sent out another note asking about testimony, as well as a note indicating deadlock.

> "Testimony of [HM]; Lawyer, Geoffrey Puryear; Question, [HM's] recount of initial outcry. Disagreement on consistency between [HM's] and his mother's testimony."
>
> "Judge, after 10-plus hours we are still split 9-3. The last several votes have shown no real movement. We, the jury, welcome any guidance the Court can offer."

The judge decided it was premature to given an Allen Charge, and

instructed the jury that he would read an excerpt responsive to its last question, and that it should "go back into the jury room, discuss what you've heard in this excerpt, and if you all want to break for the evening and return tomorrow we have made arrangements for hotel rooms for each of you."

At 11:23 p.m., the jury returned a verdict. The jury believed only part of what Applicant said: It found Applicant guilty of the two counts of Aggravated Sexual Assault of a Child (HM) and not guilty of the remaining count of Indecency with a Child (LM). The State asked that Applicant be taken into custody and he was. The next morning, the parties entered into a plea agreement on punishment: Applicant waived his right of appeal in exchange for twenty-five years confinement.

III. Applicant's 11.07 Application

Having waived his appeal and not having success at obtaining a new trial, Applicant filed this Article 11.07 application, alleging seven claims, among them, as mentioned above: actual innocence; a due process violation "due to a deficient police investigation"; and a violation of the right to effective and conflict free counsel. I address each of these three claims individually.

A. Applicant Has Met the Actual Innocence Legal Standard

1. The Actual Innocence Standard

An applicant can obtain relief on the basis that he is actually innocent of the crime for which he was convicted in light of newly discovered evidence.[23] If an applicant can present such qualifying evidence, he must then show by clear and convincing evidence that despite the evidence of guilt no reasonable juror could have found the applicant guilty in light of this new evidence.[24] This is a Herculean burden.[25] Newly discovered evidence is that which "was not known to the applicant at the time of trial, plea, or post-trial motions and could not be known to him even with the exercise of due diligence."[26] An applicant may rely on a single piece or multiple pieces of new evidence so long as the burden of proof is met, and the newly discovered evidence must affirmatively support the applicant's innocence.[27] To determine whether an applicant has met that burden, the court must weigh the newly discovered evidence against the State's case at trial to determine the

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[23] *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996).

[24] *Ex parte Tuley*, 109 S.W.3d 388, 390-91 (Tex. Crim. App. 2002).

[25] *Ex parte Brown*, 205 S.W.3d 538, 655–45 (Tex. Crim. App. 2006).

[26] *Ex Parte Miles*, 359 S.W.3d 647, 671 (Tex. Crim. App. 2012).

[27] *Id*.

probable impact the evidence would have had at trial if the new evidence had been available.[28]

2. The Evidence of Innocence

As set out above, the new evidence of innocence includes: Johnathan's admissions, his possession of photographs of naked children, and his apparent lies to the Ranger about critical evidence. The trial court makes findings on other evidence which is not new, including alibi evidence and evidence that the "Greg" referred to by HM was Johnathan, but which the trial court labeled new. The alibi evidence was known to Applicant because he was aware of his own whereabouts. And the evidence that HM meant Johnathan when he said "Greg" is either record-based or based on immutable factors that existed at the time of trial. Some of this evidence was not presented or emphasized at trial because the defense theory at trial was that the crime never occurred—not that someone else committed the crime.

But because new evidence supports that the "Greg" referred to by HM may have been Johnathan, I do not see those two classes of evidence as critical to the trial court's recommendation. I discuss some of the non-new evidence to give proper context to the new evidence.

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[28] *Elizondo*, 947 S.W.2d at 206.

a. *The Trial Court's Findings on the New Evidence, Supporting its Innocence Recommendation*[29]

i. *Johnathan's Admissions and Photos*

The trial court found, in part, as follows:

- Jade McLaughlin [a young man who played football at Leander High] testified that in October of 2014, he was at a party where he noticed Johnathan McCarty was "panicking and over-exaggerating" while he conversed with his girlfriend, Mariah. "What I saw, I'm the boss - well, what I heard was, . . . I'm the boss, I put my dick in that kid's mouth. And Mariah after that said, Just lie."[30]

- Rosalinda Castillo [who helped at the day care and who is the mother of football player Angel Perez] provided an affidavit to the Court wherein she averred that Johnathan McCarty told the children at the day care to call him "the boss."[31]

- [Jacy] Brown [Johnathan's neighbor and friend] testified, "So we had just smoked–we had smoked a couple of blunts and we had just had sex and we were chilling, and he was like, you know, I did that to that little boy. And I was like, what do you mean? He was like, Greg didn't do it, I did it. And I was

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[29] Like the other findings referenced in this opinion, some findings are shortened. Some are combined. Some are supplemented or footnoted with context information.

[30] Ranger Mitchell testified that he interviewed Mariah Wallace and asked her about Jade's testimony

Q And what did she say about that?
A She has no recollection of that conversation taking place.
Q Okay. So did—Mariah Wallace did not corroborate that that confession was made?
A That's correct.

[31] Rebecca Most, of course, testified at trial that LM called both Johnathan and Greg "his bosses." Applicant, in his interview with the Ranger, said that it was a nickname for both of them that the kids had picked up. There was evidence too that N.D. referred to himself as a boss.

like, No, you're just high, you're tripping. And I kind of pushed it aside, and then the case came back up and I said something."

- Mike Adams, an expert forensic digital examiner, acquired the McCarty's home computer and found that it contained pictures of naked children under the user profile Johnathan McCarty.

- Both Mike Adams and Texas Ranger Cody Mitchell testified that they considered some of the pictures of naked children to constitute child pornography.

- Joel [Joey] Chambers, a friend of Johnathan's, testified that during the summer of 2014 (around July or August), Johnathan was at his house and his "phone was open, and I looked through his pictures. . . . And he had a whole bunch of pictures of- it wasn't bad necessarily. It was just a whole bunch of pictures of [4 to 6 year old] kids (both girls and boys)... and on one of the pictures I saw a picture of a kid in a bathtub naked." Chambers asked him about it, and he told him that his mother ran a day care.

- Esteban Nanez [who lived with Joel and was friends with Johnathan through Joel] testified: "I saw a picture of a little boy probably about three to five. He was naked in the bathtub, just like a normal shot [on] Johnathan's phone."

- Nanez said the pictures he saw were similar to the pictures attached to Applicant's writ application.

- Chambers later told Gaebri Anderson [Greg's girlfriend] and Daniella Collazo [who knew Joel through school], what he saw on the cell phone.

- Daniella Collazo provided an affidavit which states in part that [Joel] Chambers told her that he borrowed Johnathan's phone at a party to call someone and saw naked pictures of little boys. "He told me that one of the pics was a little boy standing up naked and another pic was another little boy on

> the toilet and he was naked. He indicated there were lots more photos on Johnathan's cell phone, but he didn't want to talk more about it."

- Gaebri Anderson said both Nanez and Chambers were "freaked and weirded out" by their discovery of the photos on Johnathan's cell phone.

The trial court found these witnesses credible, and these findings are supported by the record. This is new evidence. The trial ended in July 2014. Johnathan's admissions, in October 2014, and then sometime after August 2016, the date that Jacy said she met Johnathan, postdate the trial. The photos of naked children on the McCarty home computer were uncovered in a 2016–17 forensic exam by Mike Adams. Adams testified that "Johnathan's activity under his profile . . . was really almost completely about porn, Skype chats, porn chats, all kinds of porn data." Johnathan had images of naked children in a "folder on the computer." They are pictures of the same couple of kids just coming out of the bath. And, according to Johnathan's statement to the Ranger, they are his relatives.

The State took the position at the habeas hearing that the photos were "not actually child pornography, but they are naked pictures of children . . . that are certainly abnormal, inappropriate, you know, in the context." The State also pointed out that while there was a lot of adult

pornography on the computer, the pictures of naked children "were more contained in those files saved on the computer and they were smaller in number, much smaller in number."

Joel Chambers and Esteban Nanez saw similar photos on Johnathan's unlocked phone during the summer of 2014, about the same time Applicant was on trial. Applicant's failure to discover or obtain the evidence was not due to a lack of due diligence. As Applicant's trial attorney stated:

> The weekend before the jury trial began, a person communicated to me that Greg's girlfriend told him that a third person, unidentified to me, told her that a fourth person told the third person that someone had seen what appeared to be child pornography on Johnathan McCarty's cell phone. No other information was provided to me regarding the issue at that time.[32]

Counsel decided investigating this unsubstantiated "11th-hour rumor" would be counter-productive. She knew of neither Chambers nor Nunez and said that the specific information that Johnathan had actual pictures of naked children on his cell phone during the summer of 2014 "was unknown to me before and during trial." Counsel also noted that, "given the expressed reluctance of both witnesses to share the information contained in the affidavits, it seems unlikely that either witness would

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[32] This is from Cummings' affidavit filed February 14, 2017. (WR-2-299)

have made the information available to me at the time of trial even if I had known their identity." Counsel's statement is supported by the record. Joel Chambers testified that he didn't tell anyone about the photos at first "because I don't want to be a part of like all this." Esteban Nanez said at first he just "left it alone" because he "never wanted to be a part of the trial like I still am" but "I understand like I have to now."

When the Ranger asked about the photos, Johnathan denied he had such photos on his phone ("those were never on my phone") and said that any photos of naked children on his computer came from his father's sister—sending photos of her own children.

ii. Evidence That Johnathan Falsely Denied Wearing SpongeBob Pajamas

The trial court found, in part, as follows:

- HM testified that his assailant wore SpongeBob pajamas.
- Johnathan owned a pair of SpongeBob pajamas, which he received as a Christmas gift along with a pair of plaid pajamas and Family Guy pajamas.
- Applicant wore Johnathan's pajamas a few times at night, after the children were gone.[33]
- Johnathan wore SpongeBob pajamas around children, at school, around the neighborhood and to other people's homes.

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[33] I cannot completely credit this finding given Cummings' representation of what Applicant told her about the pajamas, as discussed *infra*.

- Angel Perez [a fellow football player and student who stayed in the McCarty household during the spring and summer of 2013],testified that Johnathan wore SpongeBob pajamas "quite a bit."

- [Jacy] Brown testified: "[When Johnathan] came outside, he would always have on either the boxers the - like the sleeping pants that's had - that has SpongeBob on them."

- When interviewed by Texas Ranger Mitchell on May 25, 2017, Johnathan denied any connection to SpongeBob pajamas. Ranger Mitchell described his reaction as "[e]vasive and stated that he did not have SpongeBob pants, but tried to say that Kelley may have."

- Mitchell interviewed "AVI," a female sexual assault victim he encountered from his investigation, who said she saw Johnathan in SpongeBob pajamas.

- Angel Perez testified that he only saw Applicant wear "some plaid, like regular pajamas, like gray-green-type pajamas," but not SpongeBob pajamas.

The trial court found these witnesses credible. The record supports the trial court's findings about Johnathan wearing the pajamas. Witness after witness attested to seeing Johnathan wearing SpongeBob pajama pants, around the house, at other people's houses, outside, and at school. The sheer number of people who swore that Johnathan wore SpongeBob pajamas makes it likely that it is true, and it is critical evidence given HM's testimony.

As can be heard in the interview recordings, Applicant explained to

the Ranger that Johnathan got three pairs of pajamas for Christmas that year (including the SpongeBob ones) that were a larger size—ones he too was able to wear; they were a little long on Johnathan, and a little short on Applicant. Applicant said Shama mixed up their clothes and he would find Johnathan's clothes in his dresser and wear them and vice versa. He said he wore the SpongeBob pants a couple of times, but claimed he only wore them to bed, so the kids would not have seen him wearing them.

Johnathan also told the Ranger they shared clothes. But, as stated in the findings, he denied any connection to SpongeBob pajamas. He went to lengths to do so. He told the Ranger that after trial, Johnathan's girlfriend Gaebri had asked him, "Didn't you have SpongeBob boxers or PJs?" Johnathan said he told her no, and that he was pretty sure that she, Gaebri, got those for Applicant. Told by the Ranger several people had said they'd seen him, Johnathan, in the pants, Johnathan said, "Yeah? I've never put on a pair of SpongeBob pajamas. . . I don't recall wearing those things at all, especially when I go out." He said if it was a pajama day at school, he would not participate.

Ranger Mitchell testified that, as he had "heard from a lot of people that [Johnathan] did" wear the SpongeBob pajamas, he "was assuming that [what Johnathan said] was untrue." Although Applicant told his

attorney that the kids may have seen him in the pajamas, and told the Ranger they would not have, his willingness to admit he wore them contrasted with Johnathan's denial is previously unknown evidence that supports the trial court's recommendation.

On March 18, 2014, HM said in an interview that his assailant wore SpongeBob pajamas. The prosecution did not disclose this information until the date of trial, July 7, 2014. The disclosure was too late for counsel to make effective use of this fact at trial.[34] The information she had at the time was that Applicant himself had worn such pajamas—and she had that information because she exercised due diligence, as explained in an affidavit she filed responsive to a now-dropped ineffective assistance of counsel claim.[35]

After the State's late disclosure, Counsel asked Applicant if he wore SpongeBob pajamas at the day care when the children were around, and Applicant said he did. Counsel was concerned that if that fact came out

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[34] This is the subject of a *Brady* claim raised in this writ. Applicant argues that the "tardy disclosure was too late for counsel to make effective use of this fact at trial."

[35] This affidavit is dated August 2, 2017. The dropped claim involved the failure to object to the prosecutor's line of questions regarding Applicant's character for truthfulness under Rule 608. Habeas counsel Keith Hampton dropped the claim preventing trial counsel from providing information regarding her representation of Applicant. Although the trial court finds Cummings' communications with Applicant during her time of representation remain privileged because of the dropped ineffective assistance claims, I find that privilege waived by the remaining claims against her. See discussion *infra*.

in front of the jury, it could be "devastating."

> As a result, my co-counsel and I had several discussions with each other and with Kelley about whether he should not testify so as to avoid any risk of that coming out in front of the jury. I even made a decision to investigate as to whether the SpongeBob pajamas still existed. I asked Kelley if he still had them and he informed me that he left them at Shama's when he moved out of her home. I then asked Shama if she had any SpongeBob pajamas at her house because one of the children described the assailant as wearing SpongeBob pajamas. During the middle of trial, Shama brought me a backpack full of pajamas that she said the teenage boys wore. Although one pair of the pajamas had a cartoon character insignia on them, none of them were SpongeBob pajamas. I vividly recall being confused by what Shama brought me. I wondered if Kelley was mistaken when he told me he wore SpongeBob pajamas so I asked Kelley again. He reiterated that he wore SpongeBob pajamas and that the children could have seen him in them because he would wear them when he would change clothes after school or on days off from school. He also explained to me that Shama had bought all of the boys cartoon pajamas as Christmas presents when he was living with her.

Counsel acted diligently given the time that she had to work with the information. Even if counsel could have learned that Johnathan also wore the pajamas, she could not have known that Johnathan would deny that—which such denial occurred after trial.

iii. Evidence That Johnathan Falsely Denied Using Lotion

Whether or not members of the McCarty household used lotion could have been discovered before trial. But again, what came out in the

Ranger's interview is new: Johnathan stated, "I don't use lotion" but "Greg is OCD about how he looks, he would use lotion." Thus, as with the SpongeBob pajamas, Johnathan was defensive, and seemed to lie, about evidence that both experts put stock into as a "sensory detail"—both kids mentioning "lotion."[36]

The trial court found, in part, as follows:

- Angel Perez [a fellow football player and student who stayed in the McCarty household during the spring and summer of 2013], testified that Johnathan had lotion in his room and that he used it quite a bit after he took a shower.

- Ranger Mitchell interview[ed] Mariah Wallace: She recalled [Jonathan] using lotion pretty regularly. . .

- Martin Nwakamma, [a] fellow teammate who shared a locker room with Applicant for two and a half years, said that Applicant used lotion in an ordinary manner.

- Angel Perez testified that he never saw Applicant use lotion.

- When asked by Ranger Mitchell about the use of lotion, Johnathan denied the use of lotion, stating: "I don't use lotion, I never use lotion, and you can ask my mom, I barely use lotion."

The trial court found these witnesses credible, and these findings are supported by the record. And the "lotion" evidence matters,

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[36] It was late in the interview with the Ranger that Johnathan was confronted with questions tied to evidence of the crime. Before that Johnathan was very defensive of Applicant, said he loved him and "from the person he's seen, there was no way" Applicant committed the crime.

particularly Jonathan's denial that he used the lotion. In his third interview at CAC LM mentions Johnathan as supplying lotion.

> Q Was it Mr. Greg that gave you the lotion or Mr. Johnathan?
>
> A Mr. Johnathan.
>
> Q Mr. Johnathan gave you the lotion?
>
> A (Nods)
>
> Q And did you put the lotion on Mr. Greg's pee-pee or Johnathan's?
>
> A Mr. Greg's pee-pee.

The jury never heard LM's CAC interview; but it did hear that LM told his mom "that Mr. Greg asked him to rub lotion on his tee-tee because it was old and it made it feel better." And it did hear HM testify that Greg's penis tasted like "Gross lotion."

b. The Trial Court's Findings on the Non New Evidence

i. Alibi Evidence Regarding July 12, 2013

The trial court found, in part, as follows:

- Applicant lived in the McCarty household, but moved out on June 11, 2013.
- Angel Perez testified that Applicant was not present at naptime, routinely arriving well after naptime.
- Johnathan continued to live in the McCarty house after Applicant moved out of the home.

- It was reported to the police that the offense occurred "most likely" on July 12, 2013.

- Applicant helped his brother move from Hutto, Texas to South Austin on July 12, 2013. Applicant arrived at Berduo's Hutto home about 9:45 a.m. or 10:00 and they all left at about 2:15 p.m.

- Applicant's cell phone records for July 12, 2013, reflect he helped his brother move on that date. Applicant took a "selfie" when he was stuck in traffic at 2:30 p.m.

The trial court found the witnesses behind these facts credible, and these findings are supported by the record. As this Court has pointed out, the rationale behind not characterizing alibi testimony as new is apparent—a defendant, "must have known prior to the trial where he was, what he was doing, and who he was with" at the time of an offense, and therefore, in general, alibi evidence cannot be considered "newly discovered."[37]

What is new about it is the Texas Ranger's post-investigation gloss on this information.

Ranger Mitchell testified at the habeas hearing as follows:

Q Okay. So did you find any evidence in your review of this case to contradict that the offense against HM did not occur on 7-12-13 as reported by the parents?

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[37] *Baker v. State*, 504 S.W.2d 872, 875 (Tex. Crim. App. 1974).

A No, nothing to contradict it.

Q Okay. And it was reported as the most likely date by the dad, correct?

A According to this, yes.

Q So when this case was presented, what was the date of offense that—actually, at trial, what was the date of the offense stated? It was a range, wasn't it?

A Yeah, it was. I think it was anywhere from a month and a half to two-month time period, and the cutoff date was June 12th, I believe.

Q So when they presented this case at trial, they actually excluded the date that the parents and the outcry witness reported to the police, correct?

A That's correct.

Q So do you know why they did that?

A I can tell you what my assumption is based off of the facts.

Q Okay.

A Greg Kelley was their suspect. They believed that Greg Kelley moved out of the house on that date, and they backtracked it a month, month and a half, two months from the date that he moved out going backwards. They were concentrating on time frames that he was there.

Q And when you say they, you mean the Cedar Park Police Department and the district attorney's office, correct?

A That's correct.

The indictment alleged that the crime occurred on or about April 15,

2013. Applicant has provided school, medical, and work records from March through June, as well as cell phone records from December 2012 activation through June 11, 2013 (the day Applicant moved out). The records show he was rarely, as he testified at trial, in the home during HM's naptime (from 1:00 p.m. to 3:00 p.m.).

On the other hand, Johnathan's records reflect that he was either absent or late from school on March 1st, March 6th, and March 28th; was absent on March 25th and 28th; and April 16th and 17th; was placed on in school suspension on April 25th, was late to class on May 2nd; and had un-excused absences on the 21st and 29th of that month. He did not attend school on June 6th. Before he graduated, he had become a truant. There are no records after June 2013.

Regardless of the exact day or days of these alleged naptime offenses, it is certainly the case that Johnathan was around the house—or at least out of school—more than Applicant. Applicant originally argued that "School, medical and work records establish that Greg Kelley could not have committed the crime."[38] As the trial court found, "the evidence

[38] Applicant continued, "By collating his school, medical, cell phone and work records with the records showing the days that the boy was actually in the home, it cannot be reasonably concluded that Greg Kelley and the boy were in the home at the same relevant time."

does not completely exclude Applicant from the McCarty household during the entire relevant time period."[39] But the records do prove one thing: that Johnathan had a greater opportunity to commit the offense. The school records in particular support Rosa Castillo's averment that "It was rare that the boys [Angel and Applicant] would come home in the afternoon at nap time, except for Johnathan."

ii. Evidence that the "Greg" referred to by HM was Johnathan McCarty

The trial court found, in part, as follows:

- Applicant and Johnathan have very similar facial features.
- Esteban Nanez agreed that a person could confuse them.
- [Jacy] Brown testified that Applicant and Johnathan looked similar.
- Marah Thornhill, [a classmate of both Johnathan and Applicant from high school], stated that Applicant and Johnathan have "facial features similar enough to be mistaken if you look at their faces."
- Ranger Mitchell testified that "when I first took this case, I didn't know anybody. I had to write on the back of [the photos of Johnathan and Applicant] which one was which because I kept getting them confused."

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[39] The trial court made this finding in response to a habeas claim of "Ineffective Assistance of Counsel-Failure to Obtain a Hearing on the Motion for New Trial." The court continued, "even if Applicant's counsel had obtained a hearing on his amended motion for new trial, Applicant would not have been able to demonstrate that the timeline evidence excludes him from the subject residence during the relevant time period. Therefore, this Court finds that Applicant was not harmed by his counsel's failure to obtain a hearing on the motion for new trial."

- Jaylon Plunkett's six-year old son attended the McCarty day care and mistook Applicant for Johnathan.

- HM said during his interview at the Child Advocacy Center that he was sleeping, woken up, then assaulted in "Greg's room."

- HM remarked "it's the coaches," said that he was assaulted on a couch, and "where the babies sleep."

- HM's mother testified at trial: "The one time I was there to get [HM] when he was still asleep, it looked like a trophy room," which she specified as "wrestling trophies."

- LM testified at trial:

  Q Where did you take your naps at Mimi's house?
  A Upstairs and downstairs. I sleep in—in Greg's bed and then I sleep in the—in the couch by over there.
  Q Do you know Mr. Greg that lived at Mimi's house?
  A (Shook head.) He doesn't live at Mimi's house, only Greg.
  Q He doesn't live where?
  A Only Greg.
  Q Where does he live?
  A He lives at his house.

- The photographs of Johnathan's room depict trophies, a couch and a crib.

- The photographs of Applicant's room have no association with HM's description and the bed in Applicant's room takes up most of the space of the room.[40]

- Johnathan confirmed that the photograph in Exhibit 6 was his

[40] Applicant told the Ranger that when Johnathan's brother Dinusha would visit, Dinusha would take his (Applicant's) room and he (Applicant) would either sleep in Johnathan's room or on the couch in the living room.

room.

These findings are supported by the record. CPS took a picture of one of the rooms and a pack-n-play crib is visible. Johnathan himself identified to Texas Ranger Cody Mitchell that it was his room. The boy's mother also testified at trial that she retrieved her sleeping son from a room that "looked like a trophy room" with "wrestling trophies." Defense investigator Allen Keirn photographed Greg's room. The bed in Applicant’s room filled up the space of the room. It is unlikely that the crib could fit into his room. There is no couch and nothing that would conjure the imagery of "it's the coaches" in the mind of a young boy. It is also located in the least accessible portion of the house, an unlikely place "where some babies sleep."

But the fact that Applicant and Johnathan look alike was available at the time of trial. None of this look-alike evidence, or the trial evidence that HM described being abused in Johnathan’s room and his mom described finding him napping in that room, was accumulated or focused on at trial because the defense theory did not depend on it. As counsel states, “Kelley and McCarty physically resembled each other at the time.” She also notes, as others have, that Johnathan is much shorter.

But the information that other children confused the two, or could

not recognize Applicant, gives the "mistaken identity" theory more credence than it would otherwise have. As alluded to in the trial court's findings, Jaylon Plunkett, the father of one of the children that was in the McCarty day care, filed an affidavit stating that when Greg Kelley appeared on the news following his arrest, his seven-year-old son asked why there was a photograph of Johnathan on TV. Plunkett stated that he told him it was "not Johnathan, it was Greg," to which his son responded, "Greg who?" and then, "oh, it looks like Johnathan." And, a mother of two of the children that attended Shama's day care filed an affidavit and stated that her four-year-old daughter did not know Greg Kelley, and even after being shown a picture of him, stated that she never met him.

3. The Trial Court's Conclusion and Some Additional Evidence

The trial court concluded: "After weighing the extreme weakness of the State's circumstantial case against the newly discovered evidence identified herein, this Court concludes that no reasonable juror could have found the Applicant guilty." The court recommended that "Applicant's claim of actual innocence be GRANTED and that his conviction be set aside."

There is other evidence in the record that the trial court did not rely upon—at least for the innocence recommendation. It includes evidence

that: Johnathan is under investigation for allegedly drugging and sexually assaulting four different women; the child described an un-circumcised penis and Applicant, but not Johnathan, is circumcised;[41] Johnathan, in the locker room, pulled down a fellow athlete's pants and his own pants and pretended to "butt rape" him;[42] Johnathan made the other athletes in the locker room uncomfortable by "getting too close" to them while naked; Johnathan would walk around with only pajama bottoms or just a towel around the children at the day care; N.D. (who had a sex-related juvenile adjudication) was released from custody in March 2013, and he initially lived at the McCarty house, but was required to move from that residence due to sex offender restrictions;[43] N.D. physically resembled Applicant and Johnathan; N.D. had access and opportunity to commit the offense against HM; N.D. "was dominant and would argue with Johnathan and say things like 'I am the boss'"; Applicant's cell phone was forensically examined after he was convicted

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[41] This came out in the Ranger's interview with Johnathan.

[42] Applicant told the Ranger that Johnathan, as far as he witnessed, was on the receiving end of locker room hazing.

[43] Johnathan's father testified that N.D. could not be at the house because of his felony conviction for robbery; N.D., he said, was not a registered sex offender.

and it had over 9,000 images on it, none of nude children;[44] Maria Molett, the executive director of the Counseling Institute of Texas, conducted a psychosexual risk evaluation of Applicant and found "no characteristics of a sex offender . . . no evidence of any psychopathology, deviant sexual behavior, criminal history, and substance abuse problem or anger/aggressive behavior"; Mollet assessed Johnathan McCarty (based on a 57 page preliminary report written by Ranger Mitchell), listed 26 traits and risk factors for him, and classified him as a "High Risk Offender . . . [with] multi-paraphillic sexual interest and arousal. That is arousal to pre-pubescent male children; and rape of adult females."[45]

4. Balancing of the Evidence

In this case HM has not recanted. But he never identified Applicant as "Greg." And though he said he was assaulted in "Greg's" room, he described Johnathan's room. The evidence presented in the habeas

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[44] In his interview with the Ranger, Applicant was asked about his use of computers at the McCarty household. He said he never used the laptop, but he used the desktop to check "huddle," a football website. He said he and Johnathan each got new iPhone 5s for Christmas. Asked about the iPad he let the children play with, he said he didn't know where it was now, but then said he had left it in the trunk of a car and it got burned up, overheated, and was broken so he threw it away. Although he gave his phone up for examination after he was convicted, Applicant resisted his attorney's efforts to get information from it before trial.

[45] At trial, the State's expert testified that "A person who has a history, say, of substance abuse, or domestic violence, or juvenile delinquency, and so forth and so on, may be at a higher risk for a criminal offense—and you can parlay that into sexual offenses—than a person who does not have any of those red flags."

proceeding has eroded the persuasiveness of the State's case, which was already very weak to begin with, as shown by the jury's verdict finding Applicant not guilty of the offenses against LM, a child who seemed to conflate Applicant and Johnathan. As in *Ex parte Chaney*, much of the evidence of innocence was discovered during the State's post-conviction investigation.[46]

Johnathan's admissions alone are factual bases that were unavailable and not ascertainable through the exercise of reasonable diligence before trial; they post date the trial. Rather than being vague admissions, they speak to the crime: "I'm the boss that put my dick in that kid's month" and "it was me, not Greg." These are classic statements made against the declarant's interest. And it is easy to credit these admissions in light of the Ranger's investigation. The trial evidence that the kids conflated Applicant and Johnathan, and their rooms, takes on new importance and must be re-examined and viewed in a different light when considered with the newly discovered evidence.[47] So does the lack of an adequate investigation. Again, HM never identified Applicant as his assailant. His identity was assumed. As Dailey testified at the

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[46] *Ex parte Chaney*, 563 S.W.3d 239, 266-69 (Tex. Crim. App. 2018).

[47] *Id*. at 278.

habeas hearing,

> Q Okay. The—was it the victim or was it the victim's father that identified him?
>
> A Victim's father.
>
> Q Okay. So the victim himself just identified a Greg. Then it was the victim's father that gave you the information of a Greg Kelley that he knew, is that correct, in the house?
>
> A Yes, sir.
>
> Q Okay. Did you do anything to have the child himself identify specifically Greg Kelley?
>
> A No.
>
> Q Okay. Did you inform the forensic interviewer of this concern about identification or definitely identifying a Greg Kelley?
>
> A I don't think so.
>
> Q Okay. Was that something that would normally be done in a forensic interview, identification?
>
> A Yes.

HM was never asked to identify "Greg" by Dailey or in his CAC interview. And of course, HM was not asked to identify him at trial.

Dailey never went to the McCarty household, never interviewed any of the adults present at the house other than Shama, never even knew who all lived at the house, and never interviewed Johnathan about LM's statement. He didn't look into Johnathan because he thought LM "was

confused." He didn't know Johnathan looked like Applicant because he hadn't seen Johnathan. Dailey arrived at an offense date "between December 2012 and June 2013" because that was the time when HM was in care and Applicant was living at the house. Dailey never talked to Officer Freed about the offense date. There was no attempt in the forensic interviews to pinpoint when exactly these alleged assaults—which took place in a house described as Grand Central Station because of number of people coming and going—occurred. It was then, and remains, a thin case.

As in many cases like this one, no physical evidence connected Applicant to the offense. Applicant has maintained his innocence throughout this process. And although the State discredited his character for truthfulness at trial, his white lie about serving in the military pales in the face of the new evidence. Applicant has provided, in these habeas proceedings, ample evidence of his good character via a multitude of letters from his high school peers, work peers, TDCJ peers, coaches, teachers, bosses, friends, and family.

The State's case, as the State here acknowledges, has been significantly undermined by the newly discovered evidence. I agree with the parties and the trial court that Applicant has met his exceedingly high

burden. He has shown that if the new evidence were added to the evidentiary mix, no reasonable jury would have found the State's case compelling enough to defeat the systemic presumption of innocence; the State would not have been able to prove him guilty beyond a reasonable doubt, and a reasonable jury would be obliged to declare him not guilty.

Deferring to the trial court's credibility determinations, especially those made about the witnesses testifying to Johnathan's admissions, I agree that Applicant's judgment of conviction should be set aside.

B. Applicant Was Not Deprived of Due Process Due to an Incomplete Police Investigation

1. The Due Process Standard

The Due Process Clause of the Fourteenth Amendment directs that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[48] In *Ex parte Brandley*, this Court held that if a State's "investigative procedure is so improper, it may result in a denial of an accused's rights to due process of law."[49] Due Process violations have been found based on the use of suggestive identification

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[48] U.S. CONST. amend. XIV, § 1.

[49] *Ex parte Brandley*, 781 S.W.2d 886, 891 (Tex. Crim. App. 1989); *see also Cook v. State*, 940 S.W.2d 623, 630 (Tex. Crim. App. 1996)(Baird, J., concurring and dissenting).

procedures,[50] the deliberate concealment of a material witness so that he could not be contacted by the defense or testify at trial,[51] the knowing use of perjury by the State,[52] or the use of the defendant's coerced confession.[53]

2. Applicant's Specific Due Process Claim

Applicant argues he was deprived of due process due to reckless and bad faith police conduct. The facts he lists supporting this ground include that the police: conducted no investigation of him or of Johnathan; ignored clues as to the assailant's identity; based their case on the least reliable evidence, the inconsistent recollections and identification of a 4-year-old boy; failed to make an effort to corroborate the outcry; disregarded the risk of prosecuting an innocent person; ignored a prosecutor's instruction not to file the case involving LM; and proceeded to charge Applicant with this case in order to portray him as a serial child molester and to increase the odds that he would be convicted of assaulting HM.

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[50] *Foster v. California*, 394 U.S. 440, 442 (1969); *Dispensa v. Lynaugh*, 847 F.2d 211, 214-16, 220 (5th Cir. 1988).

[51] *Hernandez v. Estelle*, 674 F.2d 313, 315 (5th Cir. 1981).

[52] *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

[53] *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

3. The Trial Court's Findings and Erroneous Due Process Conclusion

The trial court found the following:

- Dailey's investigation consisted only of speaking to the victim's parents and talking to Shama over the phone.
- Dailey failed to gather corroborating information as to the identity of "Greg" after LM failed to outcry.
- Dailey failed to investigate Johnathan after LM mentioned Johnathan as being the perpetrator.
- Dailey failed to interview any of the adults at the McCarty day care.
- Dailey conducted no investigation at the McCarty household.
- Against CCPD policy, Dailey deleted emails between himself and the CPS investigator.
- Dailey entered the CAC interview room to "get [LM] to make an outcry."
- Dailey ignored then-ADA Stacey Matthews's recommendation not to file charges against Applicant based on LM.
- Dailey did not discuss the reported offense date with Freed and did not investigate when the offense might have occurred.

The record supports the trial court's findings of fact. But those facts do not support the trial court's legal conclusion that the investigation violated Applicant's due-process rights. Here, the trial court concluded that the investigation violated Applicant's due-process rights because Dailey failed to take basic steps that would have ensured that the trial

was not a "pretense of a trial which in truth is but used as a means of depriving a defendant of liberty." The trial court supported that conclusion with *Ex parte Brandley*.[54] But, as the State Prosecutor points out, that case, and the others cited by the trial court, *Mooney v. Holohan*,[55] and *Brady v. Maryland*,[56] all support the principle, that in the absence of an existing, classified, specific constitutional violation involving police misconduct, there is no legitimate foundation to support a due process violation.

In *Brandley*, the State presented perjured testimony, suppressed evidence favorable to the defendant, and consciously disregarded physical evidence that could indicate the defendant's innocence.[57] There, the detective did not interview three potential witnesses separately; instead, with all potential witnesses present, he walked through the sequence of events of the murder and questioned the witnesses.[58] When the potential witnesses' statements did not corroborate the detective's account, the

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[54] 781 S.W.2d 886, 891 (Tex. Crim. App. 1989).

[55] 294 U.S. at 110.

[56] 373 U.S. 83, 86 (1963).

[57] 781 S.W.2d at 894.

[58] *Id.* at 888.

detective assaulted or threatened them.[59] The State resisted multiple efforts to test biological evidence and compare it to other possible suspects.[60] And the State failed to inform the defense about exculpatory witness statements.[61] This Court held that "the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law[.]"[62]

Here, Dailey's conduct—his bare-bones investigation, his deleting emails, his questioning of LM, his filing charges based on LM's outcry, and his determination of an offense date—did not comply with best practices. But it was not "so improper" as to constitute a due-process violation.

Dailey did conduct an investigation. Dailey scheduled and attended the forensic interviews of the boys. Dailey spoke with the boys' parents and also spoke with Shama multiple times—even though it was over the phone. Dailey produced a thirteen-page offense report and collaborated with CPS investigator Heather Bradley, who was performing a joint investigation. Dailey testified at the habeas hearing: "Well, [I] talked to

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[59] *Id.* at 888–89.

[60] *Id.* at 890.

[61] *Id.* at 888–91.

[62] *Id.* at 894.

the victims' parents. We had the victims interviewed, talked to Ms. McCarty, talked to the CPS investigator that was doing a joint investigation as well. . . . We had other children interviewed at the advocacy center."

The trial court judged the strength of Dailey's investigation in hindsight, finding that he should have interviewed more people, investigated an alternate suspect, and investigated inside the McCarty home. But I am not aware of a due-process right to have the police conduct an investigation that unearths every fact or piece of evidence that might be relevant to a case.[63] And determining when the evidence is "sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions."[64] So finding a due-process violation based on the strength of Dailey's investigation in hindsight would require this Court to step outside of its circumscribed role and "impose on law enforcement officials our 'personal and private

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[63] *See State v. Krizan-Wilson*, 354 S.W.3d 808, 818–19 (Tex. Crim. App. 2011) ("There is no requirement that the police or prosecutors conduct a continuous investigation[.]"); *Patterson v. New York*, 432 U.S. 197, 208 (1977) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.").

[64] *United States v. Lovasco*, 431 U.S. 783, 793 (1977). In Texas, when the victim is 17 years old or younger, the testimony of the victim alone is generally sufficient to support a sexual-assault conviction. See TEX. CODE CRIM. PROC. art. 38.07(b) ("The requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was a person . . . 17 years of age or younger[.]").

notions' of fairness."[65] Dailey's bare-bones investigation did not violate Applicant's due process rights.

Dailey deleting his emails was not "so improper" as to amount to a due-process violation. Dailey testified that he, against work-place policy, deleted the majority of emails between himself and Heather Bradley. Bradley testified that she, against work-place policy, deleted those same emails before printing them. But this Court stated in *Brandley* that "[a]bsent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not, in and of itself, result in the denial of due process of law."[66] There was no bad faith here: Dailey was part of an effort, pretrial, to retrieve the emails. But because Cedar Park got new servers, information prior to September 2013 could not be retrieved.

Further, unlike in *Brandley*, nothing here was "suppressed." There was no showing that the emails contained information that did not otherwise get before the jury. The jury heard the content in those emails because it was incorporated into Dailey's supplements and Bradley's

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[65] *Lovasco*, 431 U.S. at 790 (holding that instead of such imposition, judges determine only whether the action complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency).

[66] *Ex parte Brandley*, 781 S.W.2d at 894; *Arizona v. Youngblood*, 488 U.S. 51 (1988).

"contacts" entries. Both witnesses were extensively cross-examined about the emails. And although the evidence in this case was not completely destroyed, counsel successfully argued for a jury instruction on spoliation. The jury was instructed that if it were to find that the police had destroyed evidence in bad faith, it could infer that the evidence was beneficial to the defense and not the State. The jury, as the factfinder, was entitled to assess the witnesses' credibility and could "choose to believe all, some, or none of the testimony presented by the parties."[67] After hearing about the deleted emails, the jury still chose to convict Applicant of the sexual assault against HM. Because the information in the emails was before the jury, and the State did not fight the attempt to retrieve the emails, I cannot find a due process violation in the act of deleting emails.

Dailey's questioning of LM was not "so improper" as to constitute a due-process violation. When police conduct is aimed at gathering evidence, courts look to whether the methods are "'so brutal and so offensive to human dignity' that they 'shoc[k] the conscience.'"[68] "[T]he official conduct 'most likely to rise to the conscience-shocking level' is the

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[67] *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

[68] *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (plurality opinion).

'conduct intended to injure in some way [that is] unjustifiable by any government interest.'"[69]

Here, Dailey's conduct regarding LM does not shock the conscience. Dailey himself acknowledged that his questioning of LM did not follow best practices and might cause problems in the case against Applicant. But Dailey testified at the habeas hearing that he questioned LM because he "felt that [LM] was too scared to make an outcry, and since [he] had information that [LM] was offended on as well and the suspect was out in the public, that it was a public safety concern." And unlike in *Brandley*, there are no findings here that Dailey threatened or assaulted anyone to create false testimony or that the State hid from the defense the fact that Dailey questioned LM. Dailey's questioning of LM did not violate Applicant's due-process rights.

Dailey filing the charges against Applicant based on LM was also not "so improper" as to constitute a due-process violation. At the habeas hearing, Stacey Matthews, an Assistant District Attorney with the Williamson County District Attorney's Office at the time of the investigation, testified that she spoke with Dailey and recommended that

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[69] *Id.* at 775 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

Dailey not file charges against Applicant based on LM.[70] Dailey testified that he never spoke with Matthews. The trial court found Matthews's testimony "credible" and Dailey's testimony on this point "unreliable." But no law required Dailey to follow Matthews's recommendation. And as mentioned above, determining when the evidence is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions. Dailey had probable cause to obtain an arrest warrant. Dailey filing charges based on LM did not violate Applicant's due-process rights.

Lastly, Dailey's conduct in deciding on an approximate offense date was also not "so improper" as to constitute a due-process violation because everything surrounding the offense date was guesswork. Although Ranger Mitchell testified that the Cedar Park Police Department backtracked the offense date "a month, month and a half, two months from the date that he moved out going backwards" to include a time frame when Applicant still lived at the house, HM never stated the exact date—or even an estimate—of when the sexual assault occurred. It was HM's father—not HM himself—who told Officer Freed that he believed that

[70] Stacey Matthews had become a judge after the investigation of the crime but prior to the habeas corpus hearing.

the offense occurred between July 8, 2013 and July 12, 2013 because HM outcried on July 13, 2013. Based on that information, Freed then wrote in his report that it occurred on July 12, 2013. Freed also testified at the habeas hearing that on the date he took the report, HM's father did not have the offense date "pinpointed per se." The forensic interviewers also did not establish an offense date. And further complicating the issue is that it is not uncommon for children to make a delayed outcry.[71] Thus, all potential offense dates, even the one in Freed's report, were approximates; nothing was certain. So Dailey's approximate offense date cannot amount to a due-process violation.

The officer conducted a less-than-thorough investigation in this case; but there is no requirement that police and prosecutors conduct an investigation of a particular length. Applicant has not proved some "impermissible purpose" in the State's failure to investigate, such as

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[71] *See* Kamala London et al., *Disclosure of Child Sexual Abuse: A Review of the Contemporary Empirical Literature*, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 10, 20 (Margaret-Ellen Pipe et al., eds., 2013) (Studies show that "when children do disclose, it often takes them a long time to do so."); *see also* Colin Miller, *A Shock to the System: Analyzing the Conflict Among Courts Over Whether and When Excited Utterances May Follow Subsequent Startling Occurrences in Rape and Sexual Assault Cases*, 12 WM. & MARY J. WOMEN & L. 49, 64-65 (2005) ("Even when children do understand that sexual abuse is wrong, they may delay in reporting it because of confusion, guilt, and fear. Children are also likely to repress these incidents before fully experiencing the stress from them.").

seeking to gain a tactical advantage.[72] And, absent that impermissible purpose, there "is no requirement that the police or prosecutors conduct a continuous investigation."[73] Recklessness does not equate to bad faith.[74] And mere negligence fails to support a violation of the Due Process Clause of the Fifth and Fourteenth Amendment.[75] The investigation here, judged by the totality of the circumstances, did not violate due process.

C. Applicant Was Not Denied the Effective Assistance of Counsel

1. The Sixth Amendment Right to Effective, Conflict-Free Counsel

Strickland v. Washington mandates that claims of ineffective assistance be evaluated with a two-part test: (1) whether the attorney's performance was deficient; and if so, (2) whether that deficient performance prejudiced the party's defense.[76] The adequacy of attorney performance is judged against what is reasonable considering prevailing

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[72] *See Krizan-Wilson*, 354 S.W.3d at 819 (no violation of the due process prohibition against pre-accusation delay where State's delay in prosecution was not intentionally committed in order to gain a tactical advantage).

[73] *Id.* at 818-19.

[74] *See United States v. Tyerman*, 701 F.3d 552, 560 (8th Cir. 2012).

[75] *See Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir. 1995).

[76] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

professional norms.[77] Because "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," our review is "highly deferential."[78] To implement that deference, there is a presumption that, considering the circumstances, a lawyer's choices were professional and motivated by sound trial strategy.[79]

The constitutional right to effective assistance of counsel entitles the defendant to the undivided loyalty of his counsel.[80] The defendant does not receive counsel's full efforts when counsel's decisions are influenced by obligations owed to persons other than the defendant. Such divided loyalty can arise from various defense arrangements that may subject counsel's representation to conflicting interests. An actual conflict of interest which adversely affects counsel's performance is one way in

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[77] *Id*. at 688.

[78] *Id*. at 689.

[79] *Id*.

[80] *Glasser v. United States*, 315 U.S. 60, 75-76 (1942).

which counsel's assistance may be rendered constitutionally ineffective.[81] To prevail on an ineffective-assistance claim due to a conflict of interest, the record must show that trial counsel had an actual conflict of interest, and the conflict affected the adequacy of counsel's representation in specific instances.[82] As we stated in *Acosta v. State*,[83] an actual conflict of interest exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest.[84]

2. Applicant's Specific Ineffective Assistance of Counsel Claims and a Note

Applicant's two claims are that 1) counsel's advice to waive direct appeal was deficient, prejudicial conduct because the evidence of identity was insufficient so he would have been entitled to an acquittal on appeal; and 2) counsel labored under a conflict of interest due to counsel's prior representation of N.D. and her close relationship with the McCarty family.

These were not Applicant's original claims. In Applicant's original

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[81] *Strickland*, 466 U.S. at 686, 692; *Routier v. State*, 112 S.W.3d 554, 581 (Tex. Crim. App. 2003).

[82] *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *Odelugo v. State*, 443 S.W.3d 131, 136 (Tex. Crim. App. 2014); *Acosta v. State*, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007).

[83] 233 S.W.3d at 356.

[84] *Acosta*, 233 S.W.3d at 355; *Odelugo*, 443 S.W.3d at 136.

and first amended habeas applications, Applicant alleged that counsel was ineffective for failing to object to the prosecutor's line of questions regarding Applicant's character for truthfulness under Rule 608. And in his first amended application, Applicant alleged that counsel was deficient for failing to pursue Johnathan McCarty as a more likely suspect. Patricia Cummings submitted two affidavits concerning the claims alleged in the first two writ applications. On August 3, 2017, the day of the habeas hearing, Cummings and habeas counsel Keith Hampton met with the trial judge in an ex parte, in camera hearing. The State was excluded from this hearing. After meeting for two hours, counsel for the State was summoned to Judge King's chambers, and advised that Cummings' communications had convinced Applicant's habeas counsel to drop the two allegations of ineffective of counsel. The trial court then sealed Cummings' affidavits.

Applicant filed an amended writ on August 22, 2017, (and a final application on December 14th) to include the waiver of appeal and conflict grounds. But the ineffective assistance claim based on counsel's failure to pursue Johnathan McCarty as a more likely suspect was never waived; it is part and parcel to the conflict claim. Because the sealed affidavits (which are also included in the exhibit volume of the habeas

record) are responsive to the conflict claim, I consider them here.[85]

3. The Trial Court's Findings and Erroneous Conclusion That Counsel Was Ineffective for Advising Her Client to Waive His Right to Appeal

This claim, that counsel's advice to waive direct appeal in exchange for the minimum sentence was ineffective, is grounded in the assumption that the evidence in this case was insufficient because HM failed to identify Applicant as the offender. The trial court set out Cummings' response to this claim.

Counsel states she had 1) an extensive conversation with Applicant about his limited options on appeal; 2) a phone conversation with Keith Hampton about the "legal appellate viability of various issues" such as

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[85] The State told the trial court it could:

> foresee a scenario also where the evidence so establishes an actual conflict of interest and that the counsel–it colored counsel's actions during trial to where strategy doesn't matter. It becomes irrelevant. Now, again, whether this is that situation or not, that's–depending on all the evidence that's been presented, Your Honor may come to that conclusion or not. I don't know.

The State continued by saying that if the trial court were to unseal the affidavits, the State wants a chance to see them.

> THE COURT: And just to be clear, you're requesting that should I make that latter determination, you'd like to have another opportunity to further inquire regarding the merits of the claim involving Ms. Cummings?
> MR. GONZALEZ: I think—in all fairness, I think that would be the proper thing to do. I think not only unsealing the affidavit. We would—the State would then ask the Court to unseal the transcript of the ex parte hearings. To the extent that anything might have been discussed that wasn't recorded, we'd ask either Mr. Hampton or Ms. Cummings on the record to disclose the nature of those conversations before the Court. We'd ask the opportunity to have Ms. Cummings take the stand and fully examine her on whatever issues are finally at issue in this ground for relief.
> THE COURT: Okay.

"sufficiency of the evidence, competency of the child witness, spoliation of evidence, closed circuit testimony and the constitutionality of super aggravated sexual assault as applied"; 3) another conversation with Applicant, this time with co-counsel, about those same legal issues, as well as the difference between a direct appeal, motion for new trial, and a writ of habeas corpus; and 4) a private meeting with Applicant, then co-counsel Marjorie Bachman, then Applicant and his family to discuss these issues for a second time, answer questions from family, and discuss the plan to get Hampton on board "immediately in order to file a motion for new trial."

The trial court found Cummings' account is "not an accurate account of the advice she gave Applicant." The court points to the testimony of Keith Hampton, Marjorie Bachman, Applicant's brother Aldo Berduo, and Applicant himself that Cummings' account was not true. They testified that Cummings was distraught after the conviction, the conversations were short, and Cummings never discussed the possible appellate issues that Applicant would be waiving. The trial court concluded that the advice to waive appeal in the face of the extreme weakness of the State's case was not based on sound trial strategy because "the evidence presented at trial was likely legally insufficient to support Applicant's conviction

[and] . . . was likely statutorily insufficient to support Applicant's conviction, as it did not comply with Tex. Code Crim. Proc. art. 38.071, § 9." And, "It is likely that had Applicant been afforded the opportunity the court of appeals would not have found the evidence sufficient."

Regardless of what transpired between the verdict and the decision to accept the plea bargain on punishment, the trial court's finding of prejudice here is based on the conclusion that the case would have been overturned on sufficiency grounds on appeal—a conclusion that lacks a basis in law.

The trial court suggested that an in-court identification of the defendant by a child is required if the child testifies via closed circuit; this is not the case. Under Section 9, Article 38.071, "if the court orders the testimony to be taken under Section 3 or 4 of this article and if the identity of the perpetrator is a contested issue, the child . . . must make an in-person identification of the defendant either at or before the hearing or proceeding."[86] And of course, to be legally sufficient under the federal constitution, identity, like any element in a case, must be proven beyond a reasonable doubt.[87] But in this case 1) identity was not a contested

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[86] TEX. CRIM. PROC. CODE art. 38.071, § 9.

[87] *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984).

issue for purposes of Article 38.071, and 2) identity was proven beyond a reasonable doubt by circumstantial evidence.

First, Article 38.071 is not a sufficiency standard; it is a statutory rule, that, like the accomplice witness rule, is not wedded to federal constitutional principles.[88] It is a rule of procedure which, if violated, would be subject to a harm analysis. Even so, the failure of HM to make an in-court identification did not run afoul of Article 38.071 because identity was not a contested issue for purposes of Article 38.071.[89] The State explained at trial that it was trying to comply with the closed-circuit statute that "does require that if identity has been brought up through some kind of examination, that an in-court identification is necessary." Counsel then responded, "The statute doesn't generally require it. It requires it if it's an issue, if it's been put into issue. There has not been one statement that I have made or one statement that's been elicited to put it in issue. In fact, quite the opposite." There was no error under Article 38.071, much less one that would have entitled Applicant to a reversal on appeal.

Second, identity was proven beyond a reasonable doubt here

[88] *See Cathey v. State*, 992 S.W.2d 460, 463 n.4 (Tex. Crim. App. 1999).

[89] See the discussion of the trial facts, supra.

through circumstantial evidence.[90] This Court has held that a child victim's unsophisticated terminology can establish the elements of a sexual crime beyond a reasonable doubt.[91] HM himself testified that "Greg" put his "pee-pee" in his [HM's] mouth "two times." And though HM did not identify Greg in person, it was reasonable for a fact-finder to infer that HM was talking about Applicant. Multiple witnesses, and Applicant himself, testified that he was the "Greg" who lived at the McCarty's house. But there was more than a child victim's unsophisticated testimony here. HM's testimony was corroborated by his mother; she testified to his outcry that "Greg" assaulted him at the day care. Such an outcry of sexual abuse is considered substantive evidence of the crime.[92] Given HM's testimony, and his mother's testimony about his outcry, the evidence in this case is legally sufficient.

Contrary to the trial court's conclusion, Applicant would not have been entitled to an acquittal on direct appeal. Cummings' negotiating a deal for Applicant to receive the minimum sentence in exchange for waiving appeal made sense; The jury had heard, and disregarded, the

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[90] *See Hooper v. State*, 214 S.W.3d 9, 14 (Tex. Crim. App. 2007).

[91] *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990).

[92] *Bays v. State*, 396 S.W.3d 580, 581 n.1 (Tex. Crim. App. 2013); *Martinez v. State*, 178 S.W.3d 806, 811 (Tex. Crim. App. 2005).

type of character evidence that would have comprised Applicant's punishment case. He had nothing to gain and much to lose. And, as co-counsel allowed, because the trial court sustained many of the trial objections, there would be little to appeal. Counsel was mindful that, by waiving appeal, she was not waiving Applicant's right to file a motion for new trial.[93]

Unlike the trial court, I find that counsel's advice in this regard was reasonably professional and motivated by sound strategy. The trial court's prejudice finding is based on its prediction that, "It is likely that had Applicant been afforded the opportunity the court of appeals would not have found the evidence sufficient." But that holding is not supported by the current state of the law.

4. The Trial Court's Findings and Erroneous Conclusion That Counsel Labored under a Conflict of Interest That Colored Her Representation of Applicant

Applicant's claim in this regard is two-fold. First, he asserts that Cummings operated under an actual conflict of interest when she "undertook the representation of a client accused of a crime more likely committed by her former client, [N.D.]." Second, he argues that trial

[93] *Lundgren v. State*, 434 S.W.3d 594, 600 (Tex. Crim. App. 2014).

counsel operated under an actual conflict of interest because she was too close to the McCarty family and that kept her from adequately investigating Johnathan McCarty as an alternate suspect.

As the trial court found, Applicant hired Cummings on the McCarty family's recommendation. Cummings was friendly with Shama and had represented three of Shama's sons, including Manusha, Dinusha, and N.D. over the years 2005–07. And Cummings had knowledge of N.D.'s sex-related adjudication. The trial court pointed to the Ranger's testimony that, after conducting a thorough investigation of this matter, Johnathan and N.D. are suspects.

The trial court quoted parts of Cummings' response to this claim, including that: she has never (and does not now) have a personal relationship with the McCarty family; the facts in Applicant's indictment do not go back to a time of her prior representation of the brothers; she has never represented Johnathan; her team took steps to investigate and ascertain whether pursuing Johnathan as the perpetrator was a valid theory of defense; she interviewed Johnathan three times and interviewed many other witnesses to gather information about Johnathan; after seeing Johnathan in person it did not seem likely the two would be confused; and she consulted with Applicant and decided, with his

permission and approval, that it was not in Applicant's best interest to try the case on a theory that Johnathan committed the crimes and that a better theory of the case was that the accusations were false.

The trial court found trial counsel, in some regards, not credible. It found she ignored numerous "red flags," including that the offense allegedly occurred in the McCarty home over a span of time when Johnathan lived in the home and other family members also had access to the children in the day care and that the nature of the crime here is similar to the nature of the crime at issue in one of Cummings' prior representations of N.D. The court found counsel misled initial co-counsel, James McDermott, co-counsel, Marjorie Bachman, and Applicant about the number and nature of her prior representations of the McCarty family. The court credited Applicant's testimony that he never told counsel to not pursue Johnathan as an alternate suspect and investigator AJ Keirn's testimony that he was directed by counsel not to pursue Johnathan. The court found Applicant's friends and family raised the issue of Johnathan as a possible alternative suspect to Cummings but she "did not want to hear about it."[94] The trial court concluded: that counsel's failure to pursue

[94] Initial co-counsel McDermott testified that Gaebri and her parents wanted to talk about Applicant, not Johnathan.

an alternative suspect defense (focused on either N.D. or Johnathan) was the result of labor under an actual conflict of interest and that, but for the failure, the outcome of the trial on guilt/innocence would have been different.

a. There Is No Actual Conflict as to N.D., Nor Was Cummings Ineffective in Failing to Pursue a N.D.-Did-it Defense

Constitutional conflicts are most likely found where jointly represented co-defendants are tried together and the facts require counsel to offer evidence exculpatory as to one but adverse as to the other, or there are antagonistic defenses, or where there are differing degrees of culpability.[95] Conflicts may be based on former clients, if that client is a now a prosecution witness. But if that former client is not a witness, the potential conflict never becomes an actual conflict.[96]

> I was present for many conversations with Gaebri and her parents and Ms. Cummings, and what was particularly noteworthy to me about those conversations was they were entirely centered on the feelings that they had about Greg Kelley and they were not really interested in talking about anything else except for Greg Kelley and what they thought of Greg Kelley, and if you tried to bring up any other topic with them at all, they refused to talk about it and only wanted to talk about Greg Kelley.

[95] *See, e.g., Ex parte Acosta*, 672 S.W.2d at 474; *Ex parte McCormick*, 645 S.W.2d 801, 806 (Tex. Crim. App. 1983). In *Acosta v. State*, 233 S.W.3d 349, 354 (Tex. Crim. App. 2007), this Court noted that while the Supreme Court has not expanded *Cuyler*'s presumed prejudice standard beyond cases involving multiple representation, it has never expressly limited *Cuyler* to such cases either.

[96] *Ex parte McFarland*, 163 S.W.3d 743, 759 (Tex. Crim. App. 2005) (former client did not testify in this case, so counsel never had the opportunity to cross-examine him, so any potential conflict never became an actual conflict of interest).

Whether the alleged conflict is based on loyalties to a concurrently represented or former client, to establish the actual conflict, the defendant has to show that, during the course of representation, the interests of the attorney and the defendant diverged with respect to a material fact or legal issue. That did not happen here. N.D. was not a witness. There was no "struggle to serve two masters."[97] So any potential conflict never materialized into an actual conflict. So we are left with what this claim is: a straightforward ineffective assistance of counsel claim that the wrong defense was presented. And, as Cummings' amicus curiae point out, "there was, and apparently still is, not one iota of evidence that [N.D.] had anything to do with this."

"Although a defendant obviously has a right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged

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[97] *Cf. Glasser*, 315 U.S. at 75 (record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence–all in an effort to diminish the jury's perception of a co-defendant's guilt); *Acosta*, 233 S.W.3d at 351–52 (record showed that defense counsel discredited a State witness in a manner that would later benefit Acosta's wife (also a client) in a custody proceeding but was "no help whatsoever to" Acosta).

'alternative perpetrator.'"[98] Applicant has not met that burden. The proffered evidence suggesting that N.D. committed this crime is both "meager and speculative."[99] It consists of bad character evidence, including sexual misconduct—a big focus of the trial court's findings.

And, the trial court's finding that the nature of the allegation against Applicant was consistent with the nature of one of the allegations against N.D. may not be correct.[100] Even now, after the Ranger investigation,

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[98] *Wiley v. State*, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002).

[99] *Id*.

[100] The court records (incorporated into one of the State's exhibits) show Cummings represented a juvenile N.D. in 2005 on two counts of public lewdness and one count of indecent exposure. He later was adjudicated on one count of public lewdness. According to the amicus brief filed on Cummings' behalf, this juvenile adjudication was based on him "touching the breast of a high school girl, while he was in high school." Initial co-counsel McDermott testified that the offense was "some sort of sexual encounter between a peer or the opposite sex." He was then quizzed about this by Keith Hampton:

Q Did you know that she represented [N.D.] for indecency with a child?
A I don't have memory right now of what she's represented anybody on.
Q Okay.
A I just can remember that, that I've given you all the information that I can remember.
Q Okay. The reason I'm asking is that case was not of the opposite sex. They were the same sex, so–
A I don't know.
***
Q I know that you–so you had some discussion with her about a conflict. She gives you a response. You're satisfied. You mark it. I guess you just put a cross through it or whatever. Do you think you would have done that if you knew that she had represented a–he was at the time a juvenile, for indecency with a child, a boy, and that he had gone to prison, had been released on parole, and was in the household at the time of the alleged offense?
A I don't know anything about such a case.
Q I know, but if you had known that, do you think you would have crossed out conflict of interest or would you have pursued it a little bit more with her?
A It depends on what I was told.
Q Just that.

there is no evidence—at least before this Court—suggesting that N.D., as an adult, has a sexual interest in young children.[101] And although the Ranger uncovered evidence of N.D.'s access,[102] Cummings had no reason to believe that N.D. was living at the house when her own client represented (and still represents) that N.D. did not.

As she states, "Early during my representation, Kelley and I discussed the fact that I had represented two of Shama's sons—N.D. and Minusha. During at least one of those discussions, Kelley informed me that neither son was living in Shama's home. I do not recall talking to Kelley about Shama's other son Dinusha." Applicant himself testified at the writ hearing that he never saw N.D. in the house when he was there. Applicant was aware that N.D. was released from prison "like about maybe three months before I moved out, but he was living with his aunt,

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A I don't know.

[101] *Cf. United States v. Stevens*, 935 F.2d 1380, 1401, 1404 (3d Cir. 1991) (proof that defendant did not commit similar crime should have come in as reverse Rule 404(b) evidence; the evidence would have shown that someone else had committed similar crimes in the same area and at about the same time, which, in turn, would have undercut the persuasiveness of the victim's identification).

[102] The Ranger noted in a part of his report, filed under seal here, that "[N.D.] was released from prison on parole on March 28, 2013, approximately three months before HM's outcry. As part of my review and investigation of the case, I contacted the Texas Parole Office. I learned that when [N.D.] was released from custody in March 2013, he initially lived with his mother, Shama McCarty, at 2014 Marysol Trail, Cedar Park, Texas. [N.D.] was required to move from that residence because sex offender restrictions were attached to his parole conditions that prohibited him from contact with children."

which is Shama's sister . . . . he had paroled to her house." Asked how often N.D. would come over to Shama's house, Applicant responded, "I didn't see him ever come over while I was there."

Even Cummings' investigator, AJ Keirn, who testified that he felt Johnathan need a harder look, did not say anything about N.D.

> Q This may not be something you can say, but are there other pieces of evidence that you feel should be brought forward in Mr. Kelley's defense that have not been brought forward at this point?
>
> A I—no, sir. I think just the lack of the investigation into Johnathan was the major focus.

An alternate-perpetrator defense cannot be based on unsupported speculation that another person may have committed the crime. Such "speculative blaming" invites the fact finder to make a decision based on emotion or prejudice.[103] In order to introduce alternative perpetrator evidence, there has to be a nexus between the alleged alternative perpetrator and the offense. There is none when it comes to N.D. Because the alternate-perpetrator N.D.-did-it defense lacks a basis in fact, Cummings was not deficient in not pursuing it.

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[103] *See United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998) ("alternative perpetrator" evidence admissible when record shows sufficient connection between charged crime and alleged alternative perpetrator; defendant may not offer "unsupported speculation" that another person may have committed offense).

b. There Is No Actual Conflict as to Johnathan, Nor Was Cummings Ineffective in Failing to Pursue a Johnathan-Did-it Defense

As Cummings' amicus curiae point out, "There is no case law that says an attorney has an actual conflict of interest if he has a former client, who has a relative, and the relative is someone who the lawyer could accuse of committing the offense as part of a blame another guy strategy." This is, like the claim above, an ineffective assistance of counsel claim, and a claim of deficient performance cannot rest on Monday morning quarter-backing. Whether or not, in hindsight, counsel's decision was the best possible trial strategy is not an appropriate inquiry.[104]

Unlike N.D., Johnathan did have a nexus to the crime charged because HM named him as an additional perpetrator in his statement to the CAC. Recognizing this, Johnathan's access, and Johnathan's likeness to their client, Cummings and her team investigated Johnathan. Cummings' pretrial co-counsel, James McDermott, testified that Cummings thoroughly considered whether an argument blaming

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[104] *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979) ("This Court will not second-guess through hindsight the strategy of counsel at trial nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness.").

Johnathan would be appropriate.[105] Cummings interviewed Johnathan three times and "many other witnesses" in an effort to gather information about Johnathan. She consulted "extensively with Greg" who told her, on March 22, 2014, that although he was originally suspicious of Johnathan, he no longer believed that Johnathan was involved in the crimes and he believed the children made the accusations because they had been exposed to some sexual conduct.

Cummings concluded, with Applicant's permission and approval, that "it was not in Greg's best interest to try the case on a theory that McCarty committed the crimes"; a better theory of the case was that the accusations were false.

Though not mentioned in the trial court's findings, Cummings points to the following considerations that supported her decision: HM's recorded interview contained allegations that were fantastic and untrue (child's mother entered room while abuse was occurring and a physical fight ensued where Applicant punched child in the chest); HM's statement lacked sensory details that one would expect to be present and contained cognitive details a four-year-old child would not understand; LM

[105] McDermott testified that he was on the case from October to April and that Cummings was "more open to–and wanting to juggle more theories for a longer period of time than I thought was necessary," including the Johnathan-did-it theory.

repeatedly denied any abuse occurred until improperly questioned by law enforcement; LM recognized that Applicant and Johnathan were two distinct individuals that he knew; when LM described the alleged abuse to law enforcement, he described a scenario where both Applicant and Johnathan could be considered parties to the crime (that Johnathan gave LM the lotion and then LM put it on Applicant's penis); though Applicant and Johnathan resembled each other at the time, Applicant is 6'1" and Johnathan is 5'4"; and another 5-year-old child at the day care understood who Applicant was and who Johnathan was, and that same child said they sometimes took care of the children. Counsel concluded that it would be dangerous to go to trial pointing the finger at Johnathan, "who could be viewed as Kelley's accomplice rather than the sole perpetrator of the crimes."

That Applicant told Cummings that she did not think Johnathan was involved is supported by what Applicant told the Ranger.[106] That

[106] According to Cummings, Applicant was very defensive of Johnathan. She said that he:

- ignored her advice to have no contact with Johnathan or his family while the charges were pending;
- often did not cooperate with his legal team regarding questions about Johnathan and Johnathan's possible involvement in the crimes;
- defended Johnathan during discussions about Johnathan's possible involvement;
- during a one-on-one interview with co-counsel, was evasive and appeared to be saying what he thought co-counsel wanted to hear; and
- deleted all text messages between himself and Johnathan before February 1,

interview took place on April 10, 2017. When asked when he suspected Johnathan of committing the crime, Applicant responded that "for the longest time I didn't want to make that accusation." He "100% felt it didn't happen." But then "4 to 5 months ago" he "started to believe [Johnathan] did it." That puts Applicant in the Johnathan-did-it camp starting in December 2016 or January 2017. And still, he said he hoped that if Johnathan were to be accused, that they be "100% sure" because he knows the feeling of being wrongly accused.

5. Applicant's Right to Effective Counsel Was Not Abridged

Given counsel's strategic decision made after investigation, it cannot be said that she performed deficiently. First, Cummings was not ineffective in negotiating the plea agreement of the minimum punishment in exchange for a waiver of appeal: The evidence at trial was not insufficient.

Second, Cummings was not ineffective in pursuing the it-did-not-happen defense that she did. To argue that Johnathan or N.D. was the

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2014, and refused to provide her with the only three text messages between himself and Johnathan exchanged since that time.

She concluded that, "The way in which Greg handled questions posed by myself and my co-counsel regarding McCarty convinced me that claiming McCarty had committed the offenses was a risky strategy since we were not able to determine why Greg had the attitude he had about McCarty. However, separate from this, the more important consideration was that the better defense was that the abuse simply did not happen."

abuser, and not Applicant, Cummings would have had to not only agree with the prosecution that the boys were abused, but also that, although both mentioned "Greg" in all outcries, Johnathan (alongside "Greg") in only one, and N.D. in none, they didn't mean Applicant. A court will not judge by hindsight the trial decisions of an attorney when those decisions follow accepted legal strategy and when, in the context of the time when they were made, they appeared to be in the best interest of the client. I end with the obvious: Patricia Cummings' defense was successful as to one child.

IV. Conclusion

I agree that the system failed Applicant; for it convicted an innocent man. But I do not agree that Applicant's constitutional rights were violated by either the Cedar Park Police, or trial counsel. Adopting the trial court's findings on the due process and ineffective assistance of counsel claims would require changing the law in the following significant ways. First, investigative procedures could violate due process of law even in the absence of police conduct that is so outrageous, egregious, reckless, or intentional that it shocks the conscience. Second, the lack of an in-court identification of a defendant by a child in a child sexual assault case could be fatal to the sufficiency of the evidence even in the

face of ample circumstantial evidence of identity. Third, a *Cuyler* conflict could arise where counsel has 1) a former client who she represented on an unrelated matter many years ago, who may have been around the child victim in a child sex assault case, and who counsel could accuse of committing the crime as part of a he-did-it strategy; or 2) a former client who she represented on an unrelated matter many years ago that has a relative, who has been around the child victim in a child sex assault case, who counsel could accuse of committing the crime as part of a he-did-it strategy. And this conflict could be proven absent a showing of some action by counsel, adverse to the Applicant, that cannot be justified on sound strategic grounds. At root, both the due process and conflict claims are Monday morning quarter-backing of ordinary investigative and strategic decisions.

But there is no need to distort the law or Monday morning quarterback to reach the result justice requires here—actual innocence relief for Applicant. In this case, evidence of guilt was weak to begin with, consisting of the seemingly coached, largely uncorroborated, testimony of a very young child who never identified Applicant as the "Greg" he was talking about. This child has not recanted, but the ultimate calculus does not change. The ultimate question for us to decide

is: has the evidence presented in the habeas proceeding sufficiently eroded the persuasiveness of the State's case? The answer to that question is yes. The post-conviction investigation in this case, by major crimes investigator Texas Ranger Cody Mitchell, was, unlike the original investigation, thorough.[107] And it produced significant evidence eroding the persuasiveness of the State's case. The new evidence includes Johnathan being overheard confessing to the crime; Johnathan confessing to Jacy Brown; Johnathan keeping photographs of naked children on his computer and phone; and Johnathan apparently lying to the Ranger about wearing SpongeBob pajamas and using lotion. Deferring to the trial court's credibility determinations on the new evidence, I agree with that court and the parties that Applicant has proven by clear and convincing evidence that no reasonable juror, confronted with this evidence, would have found him guilty beyond a reasonable doubt.

Delivered: November 6, 2019

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[107] Ranger Mitchell testified, on August 3, 2017, that he had been working on the case since March 14, 2017 at the behest of the Williamson County District Attorney.

Q Okay. Any idea on how many hundreds of hours you've invested since March?
A My math isn't that quick, but add up those days and multiply it by about 16 hours a day.