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District Clerk
Collin County, Texas
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W380-81972-07-HC2

IN THE DISTRICT COURT
380TH JUDICIAL DISTRICT
COLLIN COUNTY, TEXAS

EX PARTE
KOSOUL CHANTHAKOUMMANE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Having considered (1) the subsequent application for writ of habeas corpus, (2) the State's answer, (3) official court documents and records from the trial, direct appeal, and these writ proceedings, (4) evidence presented at the hearing conducted on July 16-17, 2018, and November 1, 2018, (5) the arguments presented by the parties, and (6) the Court's personal experience and knowledge, the Court makes the following findings of fact and conclusions of law:

Background Facts

Guilt Phase Evidence

The Court of Criminal Appeals summarized the evidence presented in the guilt phase of trial in its opinion on direct appeal as follows:

> On Saturday, July 8, 2006, real estate agent Sarah Walker was murdered in the D.R. Horton model home where she worked in the "Craig Ranch" subdivision in McKinney, Texas. [Applicant] was charged with intentionally and knowingly causing Walker's death while in the course of committing or attempting to commit robbery.
>
> On the morning of July 8, Walker's ex-husband, Randy Tate, went to Walker's residence in Frisco, Texas. Walker planned to work at the model home that day, so Tate picked up their son early that morning. While Tate was at Walker's residence, Walker showed him a new Rolex watch that she said she had purchased the previous day. Later that morning, Walker went to a Bank of America in Frisco. Still photographs taken from the bank surveillance video showed Walker wearing a watch and a ring at around 11:45 a.m. Walker's cousin, Jessica Allen, testified that Walker often wore ornate rings and a Tag Heuer watch that she had owned for several years.
>
> Another real estate agent, Mamie Sharpless, received a phone call at 9:40 a.m. that morning from a man who identified himself as "Chan Lee." The man told Sharpless that he found her phone number in a Keller Williams advertisement and that he wanted to look at a town house she had listed in the Craig Ranch subdivision. He said that he had just moved from North Carolina to the Dallas area, that he had graduated from the University of North Carolina at Charlotte, and

that he worked for Texas Instruments. He said that he was calling from a phone booth at the 7–Eleven at Midway and Park and that he was staying in Room 245 at the "InTown Suites." When Sharpless asked him for a contact number, he said that he did not have a cell phone. The phone "cut off" before their conversation ended, so Sharpless tried to reach him by calling his hotel. Sharpless testified that she "called two InTown Suites, and one didn't have a [Room] 245, the other one did, but it just had a recording on it."

Sharpless arrived to show the town house between 11:30 a.m. and noon, and she brought her husband, Nelson Villavicencio, with her. As they sat in their car and waited, they saw a man drive by in a white Ford Mustang and park across from a D.R. Horton model home down the street. They observed the man getting out of the Mustang and starting to cross the street. They drove over to the man and asked him if he was "Chan Lee," and he replied, "No." Sharpless described him as a muscular man of Asian descent, about 5′ 4′ or 5′ 5′ tall, with a "buzz cut." She made an in-court identification of [applicant] as the man she saw that day, but explained that he was thinner with longer hair at the time of trial.

As Sharpless and Villavicencio drove away, they noticed that the Mustang had Texas license plates. When Villavicencio drove to the end of the block, turned around, and drove back, the Mustang was no longer there. He then drove back to the town house so Sharpless could show it to another potential buyer. As Villavicencio looked out the bedroom window while Sharpless showed the town house, he observed Walker arrive in her Porsche Boxster. Walker parked her car across the street from the D.R. Horton model home and went inside. At that point, Villavicencio also saw a white Mustang parked on the street in front of the model home. Sharpless then finished showing the town house and they left between 12:30 and 1:00 p.m. As they left the subdivision, Sharpless also noticed a white Mustang parked in front of the model home.

At about 12:30 p.m., Walker called her cousin, Jessica Allen. Allen testified that Walker was "in a really good mood" during their brief

telephone conversation. They talked for about 15 minutes, then Walker "said someone had walked in and she'd call [Allen] back."

At approximately 1:10 p.m., Andy Lilliston and his wife came to look at the D.R. Horton model home. When they entered the model home, Lilliston thought that it appeared to have been "ransacked." He observed a large pool of blood in the dining room, where the sales desk was located. He followed a trail of blood into the kitchen, where he saw Walker lying face-up on the floor, with the upper half of her body covered in blood. Lilliston directed his wife to call 9–1–1, and they exited the model home. Lilliston ran into the street and flagged down a vehicle for help. He briefly went back inside the model home to check on Walker, but she did not display any signs of life. Lilliston then went back outside and waited for emergency personnel to arrive.

When Texas Ranger A.P. Davidson arrived at the model home, he noticed signs of a struggle in the dining room. The desk was crooked, the desk chair was out of place, a plant stand was knocked over, and a potted plant was on the floor. A pair of women's shoes, a broken hair clip, and a broken earring were also on the floor. There was a trail of blood leading from the dining room into the kitchen. Walker's body was on the kitchen floor, and it appeared that she had multiple stab wounds. Davidson opined that Walker had been dragged by her feet from the dining room to the kitchen because the long skirt she was wearing was rolled up to her waistline.

McKinney police officer Pete Copin discovered a bloody fingerprint on the deadbolt lock on the front door of the model home; however, he testified that there were "not enough individual characteristics for a positive identification." Copin further observed what appeared to be blood on the plant stand, on the ceramic tile in the entryway, on the wall next to the edge of the window beside the front door, and on the pull cord for the window blinds. It also appeared that there had been blood in the kitchen sink that had been washed or diluted with water. Copin collected blood swabs and other evidence from the scene for further testing.

When Walker's body was discovered, she was no longer wearing the watch and ring that she had been shown wearing earlier on the bank surveillance video. When the police searched Walker's residence after her death, they found her Tag Heuer watch. The police never located her Rolex watch, but they did find the box and the receipt for the Rolex watch in her residence.

William Rohr, the Collin County Medical Examiner who performed Walker's autopsy, testified that Walker sustained several blunt force injuries to her head. He opined that the blunt force injuries were the result of "several blows," and that they were consistent with Walker being struck in the face and head with the plant stand in the model home. Walker had multiple bruises on her face and head, a broken nose, and fractured teeth. She had some defensive wounds, including an excised wound on her left arm and a broken fingernail on her right hand. She suffered a total of 33 stab wounds, 10 of which penetrated vital organs and blood vessels. Rohr testified that any one of those 10 wounds could have been "pretty much immediately fatal." Walker also had a bite mark on the back of her neck that Rohr opined was inflicted "at or near her death." Rohr testified that he preserved this evidence by using a scalpel to excise the bite mark and surrounding area.

DNA analysis linked [applicant] to evidence from the crime scene. [Applicant's] DNA profile was consistent with the DNA obtained from Walker's fingernails, the window blind pull cords, the deadbolt lock and faceplate, and some of the swabs taken from the living room, kitchen, and entryway of the model home. The DNA analyst testified that only a "partial profile" was obtained from a swab taken from the kitchen sink because the DNA extracted from that swab "was of low quality and degraded quality." However, the set of genetic markers that she was able to detect in the partial profile "corresponded with the genetic markers observed in the DNA profile of [applicant]."

After receiving the results of the DNA analysis, police arrested [applicant] at his apartment on September 5, 2006. Texas Ranger Davidson testified that [applicant] owned a white Ford Mustang and

that his apartment was located three miles away from the pay phones at Midway and Park. Davidson spoke to [applicant's] sister, who informed him that [applicant] had attended school in North Carolina and that he had moved from Charlotte to Dallas in February 2006. Davidson determined that applicant had filled out a lease application at an apartment complex near the InTown Suites on Trinity Mills. Davidson also discovered that [applicant's] bank account was overdrawn by $82.27 on the day before Walker's murder. Davidson testified that [applicant] was muscular and had a shaved head at the time of his arrest. Officer Copin, who later photographed applicant to document his appearance, testified that he observed what appeared to be some healed cuts or scratches on [applicant's] hands and fingers.

[Applicant] was transported to the McKinney Police Department, where he was interviewed by Officer Randall Norton. [Applicant] at first denied ever being in McKinney in his white Mustang. Upon further questioning, he stated that his car had broken down at "a model house," that he knocked on the door but no one answered, that he took "like three or four steps" inside and asked if anyone was home but no one was there, and that he spoke to a man and a woman in a green or blue "Corolla or Camry" as he left. Next, he admitted that he went to the kitchen sink for a drink of water, but said that he "didn't know how to use the faucet because the hot water came out," so he left. He acknowledged that he had "old cuts" on his hands "from work," so it was possible that he could have been bleeding when he was inside the model home. He also acknowledged that he had sold some of his own property for cash at a pawn shop on Greenville Avenue, including a tape deck, a drill, and an inexpensive Kenneth Cole watch.

Forensic dentistry consultant Brent Hutson examined [applicant] and made impressions of his teeth. Hutson compared [applicant's] teeth to the bite mark on Walker's neck and found enough similarities that he was "unable to exclude [applicant] from that population of individuals that could have inflicted this injury." Hutson concluded

> "within reasonable dental certainty beyond a doubt" that [applicant] was responsible for the bite mark on Walker's neck.

Chanthakoummane v. State, No. AP-75,794, 2010 WL 1696789, at *1-4 (Tex. Crim. App. Apr. 28, 2010) (not designated for publication).

Punishment Phase Evidence

At punishment, the State presented evidence of applicant's escalating criminal behavior as a juvenile and young adult. On March 15, 1995, applicant and some friends assaulted Larry Smith and stole his bicycle. (24 RR 79-83). After applicant began the assault by punching Smith without warning, he and his friends kicked Smith in the back, ribs, and face. (24 RR 82). Applicant was laughing during the assault. (24 RR 83). Smith suffered six fractured ribs and a concussion. (24 RR 83). The case was filed against applicant as a "strong-arm robbery," but applicant pleaded guilty to a lesser misdemeanor assault. (24 RR 119-20, 144). Other charges against applicant at the time included communicating threats and credit card fraud against his mother. (24 RR 120-21; SX 114 (juvenile records)). Applicant was placed on probation. (24 RR 118).

Applicant's next major charge was an assault with serious injury committed on October 10, 1995. (24 RR 22). During that incident, applicant was skipping school with other students when he assaulted Shawn Bank. (24 RR 24-26). Bank suffered a fractured arm and bruises to his head. (24 RR 26-28). In a non-custodial interview with police, applicant admitted committing the assault. (24 RR 30, 33). Applicant was unconcerned for Bank and showed no remorse during the interview. (24 RR 30-31).

New juvenile petitions were filed against applicant for this crime, as well as for several car thefts. (24 RR 154-56). Applicant's probation was revoked, and he was sent to training school at Swannoa, a campus-like facility where juveniles lived in cottages and attended school. (24 RR 157, 134, 160). After a certain amount of time with good behavior, juveniles at Swannoa were allowed furloughs. (24 RR 168-69). At one point, applicant was considered "AWOL" because he refused to return from a furlough. (24 RR 169).

At Swannoa, applicant wrote to his former probation officer and expressed some remorse for his assault crime. (24 RR 135-38; SX 115). The letter also

contained symbols and words indicating that applicant was a member of the Crips gang. (24 RR 135-38). One symbol, C4L, meant "Crips for Life." (24 RR 138). Other gang symbols included spelling out the word "six" instead of using the numeral, the way he defaced the letter "B" to show disrespect for Bloods, a pitchfork, and his signature, "Gangsta Crip John." (24 RR 138-40; SX 115). Applicant's conditions of probation had required him to avoid the Kaos Klan Kings, a gang associated with the Crips. (24 RR 125-26).

Applicant was on furlough from Swannoa when he committed his next crimes. (24 RR 174). On June 17, 1997, sheriff's deputies in Union County, North Carolina learned of a stolen vehicle after three suspects fled a traffic stop. (24 RR 47-48, 62). One of the suspects turned herself in immediately, but applicant and the other suspect later broke into a trailer occupied by two elderly women, tied them up with an electrical cord, ransacked the trailer, and stole a car. (24 RR 50-55; SX 116-21). Applicant was charged with two counts of kidnapping, two counts of robbery with a dangerous weapon, breaking and entering and larceny to the residence, and larceny to the car. (24 RR 57-58). Because he was 16 years old, applicant was charged as an adult and detained in the adult jail. (24 RR 62, 64). Applicant was sentenced to fifty-one to seventy-one months' imprisonment after pleading guilty to robbery and kidnapping. (24 RR 73-74; SX 122). Applicant's sentences ran consecutively, and he was paroled from North Carolina prison on February 19, 2006. (SX 122 at 6).

On July 7, 2006, the day before Sarah Walker's murder, applicant stalked another female real estate agent. (24 RR 181-90). Barbara Johnson, who specialized in rentals and relocations, had helped applicant locate an apartment in May 2006. (24 RR 179). They met one time during that process, and she did not tell him where she lived. (24 RR 181). On the evening of July 7, 2006, she was home alone with her dog when someone rang her doorbell. (24 RR 182-83). She did not recognize applicant at the time, but he was at her door mumbling something about his car being "broken down" or "in her driveway." (24 RR 183). She asked if he needed her phone, and he said yes. (24 RR 183).

Johnson closed her door, retrieved her phone, and went back to the front door. (24 RR 183). Applicant was not at the door or in her yard. (24 RR 183). Johnson thought applicant may have misunderstood her, and she closed the door and went through her house to the backyard, which was fenced off from her rear

entry driveway. (24 RR 183-84). She "hollered out at him" to see if he needed the phone. (24 RR 183-84). Her dog was very upset and barking. (24 RR 184). Applicant needed the phone, and she handed it to him over the fence. (24 RR 185). Applicant asked for water, and because she felt bad for him, she went inside and got him some. (24 RR 185). But she also became afraid. (24 RR 185). She gave him a glass of water over the fence and asked him where he lived. (24 RR 185). He said Plano, but he did not answer when she asked him why he was in her neighborhood. (24 RR 185). Johnson was becoming very scared, and she started back toward her house as applicant began trying to open her back gate. (24 RR 186). She thought he might be trying to return the water glass, but she told him the gate was broken. (24 RR 186). He asked her to let her dog out to keep him company while he waited, but she told him the dog would bite and went back inside. (24 RR 186).

Applicant went back to her front door, but she did not answer it. (24 RR 187). He then went to the back door and started beating on it. (24 RR 187). Johnson called the police. (24 RR 187). The police came and talked to applicant, and Johnson saw a white car while they were talking to him. (24 RR 187-88). The police lectured her about opening her door to a stranger. (24 RR 187-88). They also told Johnson that it appeared that applicant did have car trouble but had gone. (24 RR 188). Johnson lived in a cul de sac, and applicant would have had to make several turns from a main road and go down an alley to reach the spot where his car was parked. (24 RR 188-90).

Applicant's parole officer met with him the morning of the murder. (24 RR 192-94). He dropped by applicant's apartment unannounced at 7:30 a.m. (24 RR 196-97). Applicant's nephew answered the door and went to get applicant, who had been sleeping. (24 RR 198). Applicant and the parole officer talked for about ten minutes about applicant's job and the difficulties he had had reporting. (24 RR 198). The parole officer noted nothing unusual about applicant; he did not appear agitated or express any concerns. (24 RR 198). The parole officer had no idea applicant was about to commit a violent crime. (24 RR 199). Applicant also reported to another parole officer on July 10, 2006, two days after Sarah Walker's murder. (24 RR 199). Nothing unusual was recorded about that visit. (24 RR 199).

Procedural History

Applicant, Kosoul Chanthakoumanne, was convicted of capital murder and, on October 17, 2007, this Court sentenced him to death. The Court of Criminal Appeals subsequently affirmed applicant's conviction and sentence on direct appeal. *Chanthakoummane*, 2010 WL 1696789, at *27. Applicant filed his original article 11.071 writ application on April 5, 2010. The Court of Criminal Appeals subsequently denied that application. *Ex parte Chanthakoummane*, No. WR-78,107-01, 2013 WL 363124 (Tex. Crim. App. Jan. 30, 2013) (not designated for publication).

The federal district court and the Fifth Circuit Court of Appeals also denied applicant's request for habeas relief. *Chanthakoummane v. Stephens*, No. 4:13cv67, 2015 WL 1288443 (E.D. Tex. Mar. 20, 2015); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. Feb. 25, 2016). And the United States Supreme Court denied his requests for certiorari review of the state and federal courts' denials of habeas relief. *Chanthakoummane v. Texas* 562 U.S. 1006 (2010); *Chanthakoummane v. Davis*, 137 S.Ct. 280 (2016).

Consequently, this Court scheduled applicant's execution for January 25, 2017. However, the Court modified the date when applicant filed a subsequent habeas application under article 11.071. On June 7, 2017, the Court of Criminal Appeals stayed applicant's execution and issued the subsequent writ, returning the application to this Court to litigate the four issues raised therein. *Ex parte Chanthakoummane*, No. WR-78,107-02, 2017 WL 2464720 (Tex. Crim. App. June 7, 2017) (not designated for publication).

This Court subsequently conducted a hearing on July 16, 2018, July 17, 2018, and November 1, 2018. During the hearing, the parties presented testimonial, documentary, and video-recorded evidence. The parties subsequently filed proposed findings of fact and conclusions of law.

Claims Raised

Applicant raises four claims for relief centered on some of the evidence the State presented linking him to the murder, namely, the bitemark evidence, the testimony from two previously hypnotized eyewitnesses, and the DNA evidence.

Claim 1: Applicant alleges he is entitled to relief under article 11.073 of the Code of Criminal Procedure because developments in science since his 2007 trial have discredited the State's bitemark evidence, eyewitness testimony, and DNA evidence.

Claim 2: Applicant alleges the State's bitemark evidence, eyewitness testimony, and DNA evidence constituted false evidence that violated his Fourteenth Amendment right to due process.

Claim 3: Applicant alleges the admission of the State's bitemark evidence, eyewitness testimony, and DNA evidence violated his Fourteenth Amendment right to a fair trial.

Claim 4: Applicant alleges he is actually innocent because the new scientific evidence debunks all of the State's evidence connecting him to the offense and, thus, his execution will violate the Eighth and Fourteenth Amendments.

Applicant Fails to Prove Any Right to Relief

(1) Applicant bears the burden to allege and prove by a preponderance of the evidence facts which, if true, entitle him to relief. *Ex parte Chappell*, 959 S.W.2d 627, 628 (Tex. Crim. App. 1998).

(2) Applicant failed to sustain his burden of proving a right to relief under any of the four claims raised in his subsequent writ application.

Article 11.073 Claim (Claim 1)

(3) Article 11.073 authorizes relief if:

- relevant scientific evidence is currently available and was not available at the time of his trial because the evidence was not ascertainable through the exercise of reasonable diligence by him before or during his trial; and

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

- had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Tex. Code Crim. Proc. Ann. art. 11.073(b)(1) & (2) (West Supp. 2018).

(4) Article 11.073 applies to relevant scientific evidence that (a) was not available to be offered by a convicted person at his trial, or (b) contradicts scientific evidence relied on by the state at trial. *Id*. at (a).

(5) "When assessing reasonable diligence, courts consider whether 'the field of science, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based' has changed since the applicant's trial." *Ex parte Chaney*, No. WR-84,091-01, 2018 WL 6710279, at *10 (Tex. Crim. App. Dec. 19, 2018); *see also* Tex. Code Crim. Proc. art. 11.073(d).

(6) "Scientific method is defined as '[t]he process of generating hypotheses and testing them through experimentation, publication, and republication.'" *Chaney*, 2018 WL 6710279, at *10 (quoting *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014)).

(7) "'Scientific knowledge' includes a change in the body of science (e.g., the field has been discredited or evolved) and when an expert's opinion changes due to a change in their scientific knowledge (e.g., an expert who, upon further study and acquisition of additional scientific knowledge, would have given a different opinion at trial)." *Id*.; *see also* art. 11.073(d).

(8) With respect to the science of bitemark and DNA analysis, applicant presented relevant scientific evidence that was unavailable at the time of his trial. That new evidence was not ascertainable through the exercise of reasonable diligence by him before or during his trial.

(9) Also, that evidence would be admissible under the Texas Rules of Evidence at a trial held on the date applicant filed his subsequent writ application.

(10) With respect to the science of hypnosis, however, applicant has failed to present relevant scientific evidence that was unavailable at the time of his trial. The evidence applicant presented in these writ proceedings was ascertainable through the exercise of reasonable diligence before and during his trial.

(11) Furthermore, applicant has failed to prove by a preponderance of the evidence that he would not have been convicted if the evidence he presented during these writ proceedings on the science of bitemark, hypnosis, and DNA had been presented at his trial.

(12) Therefore, applicant has failed to prove by a preponderance of the evidence that he is entitled to relief under article 11.073.

Bitemark

(13) At applicant's 2007 trial, the State presented the expert testimony of Dr. Brent Hutson, a forensic odontologist. Hutson compared applicant's teeth to the bitemark on Sarah Walker's neck. He found enough similarities that he was unable to exclude applicant from that population of individuals that could have inflicted the injury. Hutson concluded "within reasonable dental certainty beyond a doubt" that applicant was responsible for the bitemark on Walker's neck. (22 RR 258-59).

(14) Since applicant's 2007 trial, knowledge in the scientific field of bitemark comparison has evolved. Under today's scientific standards, no expert could identify applicant as the source of the bitemark on Sarah Walker's neck. Matching a particular person's teeth to a particular bitemark left on skin is no longer sound science.

(15) These changes in the scientific field are evidenced by the affidavit and testimony of applicant's own expert, Dr. Michael Bowers, a forensic odontologist. (2 WRR 13-48; Applicant's Exhibits 1-3). Bowers is a credible witness whose testimony is based on valid and reliable information.

(16) The changes are further evidenced by (1) the 2009 National Academy of Science's report, "Strengthening Forensic Science in the United States: A Path Forward," (2) the Texas Forensic Science Commission's February 2016 recommendation of a moratorium on bitemark comparison evidence and subsequent April 2016 report on such evidence, and (3) the President's Council of Science and Technology (PCAST) 2016 report on bitemark evidence and 2017 addendum. (2 WRR 25-28; Applicant's Writ Exhibits, Vols. 1 & 2, pp. 36-1376).

(17) Moreover, as of March 2016, the American Board of Forensic Odontology (ABFO) has determined that the science supports only three conclusions: (1) excluded as having made the bitemark; (2) not excluded as having made the bitemark; and (3) inconclusive. AMERICAN BD. OF FORENSIC ODONTOLOGY, INC., DIPLOMATES REFERENCE MANUAL: SECTION III: STANDARDS & GUIDELINES at 102 (March 2016); (2 WRR 24).

(18) The Court of Criminal Appeals recently recognized these changes in the science of bitemark comparison in *Ex parte Chaney*, No. WR-84,091-01, 2018 WL 6710279 (Tex. Crim. App. Dec. 19, 2018). In particular, the Court held that the science no longer supports "matching" a person's teeth to a mark left on skin. *Id*. at *15. The science now completely disavows individualization. *Id*.

(19) This disavowal is premised on the discovery that it is not scientifically established that human dentition is unique, that teeth leave a unique pattern on skin, or that skin is able to maintain a unique pattern. *Id*. at 13-15; (2 WRR 36-41). In addition, "[a] standard for the type, quality, and number of individual characteristics required to indicate that a bitemark has reached a threshold evidentiary value has not been established." *Id*. at 13; (2 WRR 35-36).

(20) Therefore, as appellant alleges, there is new, relevant scientific evidence in the field of bitemark comparison.

(21) Moreover, this new evidence would have been admissible at a trial conducted on the date applicant filed his subsequent writ application. Dr. Bowers's expertise is unquestioned and bitemark comparison is still founded in science. *Id*. at 15 (holding bitemark evidence admissible because expertise of witnesses was unchallenged and, notwithstanding changes in field, bitemark comparison is based in science).

Hypnosis

(22) At applicant's trial, the State presented the eyewitness testimony of Mamie Sharpless and Nelson Villavicencio, both of whom identified applicant in court as the man they saw near the scene shortly before the murder. (21 RR 87-121). Both Sharpless and Villavicencio participated in a hypnosis induction session with Texas Ranger Richard Shing before trial. (21 RR 68-69, 121-22; State's Writ Exhibits 4 & 20). At trial, applicant sought to exclude Sharpless's and Villavicencio's testimony

under the Sixth, Eighth, and Fourteenth Amendments, several evidentiary rules, and *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988). (21 RR 84-86). The Court overruled all of applicant's objections. (21 RR 86).

(23) In support of his attack on Sharpless's and Villavicencio's eyewitness testimony, applicant presented the testimony of Curt Carlson, Ph.D., a cognitive psychologist.

(24) Dr. Carlson's testimony does not advance applicant's claim that new science discredits the eyewitness testimony of Sharpless and Villavicencio.

(25) Dr. Carlson testified to the overall unreliability of in-court identifications in comparison to line ups. He opined that Sharpless's and Villavicencio's in-court identifications of applicant were unreliable because of the passage of time and the suggestive nature of the in-court identifications. He also opined that cross-racial bias could have affected their in-court identifications. (3 WRR 109-24, 127-29).

(26) Applicant has failed to show that Dr. Carlson's testimony constitutes new scientific evidence.

(27) Furthermore, Dr. Carlson's testimony is not probative of applicant's allegation that new scientific evidence in the field of hypnosis has come to light since applicant's trial.

(28) Applicant also presented the affidavit and testimony of Dr. Steven Lynn, Ph.D., a hypnosis expert, as new scientific evidence regarding the use of hypnosis to facilitate memory recall.

(29) In his affidavit, Dr. Lynn opined, "[T]oday a virtual consensus exists among cognitive scientists and the larger psychological community that hypnosis imposes risks of false memory creation and that hypnosis further carries a risk of unwarranted confidence in memories, with attendant risks of grievous errors in eyewitness identification." (Applicant's Exhibit 5).

(30) Dr. Lynn further opined, "[G]iven the new information about the risks of hypnosis, serious consideration should be given to the possibility that a miscarriage of justice was perpetrated in the case of [applicant]."

(31) Dr. Lynn identifies the following as "new information" in his scientific field:

a. Memory is not a vast, permanent, and potentially accessible storehouse of information;

b. The mind does not record everything that a person witnesses and experiences;

c. Memory is reconstructive in nature;

d. Non-hypnotic suggestive procedures can implant false memories of complex events;

e. Hypnosis results in false memories;

f. People will confabulate memories, i.e., fill in gaps in memory with information that is not necessarily accurate;

g. Asking people to imagine events can create false memories or have increased confidence that a particular event occurred, i.e., "imagination inflation";

h. Highly hypnotizable subjects tend to report more false memories than "low" hypnotizable persons;

i. Hypnosis increases suggestibility;

j. Hypnosis inflates confidence in the accuracy of memories, i.e., "concreting";

k. Warning subjects about the imperfections of hypnotically elicited recall does not increase the accuracy of recall; and

l. The emotional significance of an event does not necessarily increase the accuracy of recall.

(Applicant's Exhibits 5). Dr. Lynn reiterated the above during his testimony in these writ proceedings. (2 WRR 56-75).

(32) The information Dr. Lynn identified in his affidavit and his testimony as "new" is not, in fact, new.

(33) Dr. David Spiegel, M.D., the State's hypnosis expert in these writ proceedings, attested that myths regarding memory and hypnosis and the risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980's. (4 WRR 21, 23, 29-31).

(34) Dr. Spiegel is a credible witness whose expert opinion is founded on valid and reliable information in the scientific field.

(35) Furthermore, his expertise in the field exceeds Dr. Lynn's.

(36) Dr. Spiegel is a research and clinical psychiatrist. He is a full-time tenured professor of psychiatry and behavioral sciences at Stanford University School of Medicine. (4 WRR 5; State's Writ Exhibit 16).

(37) Dr. Spiegel has received prestigious awards related to his work in hypnosis, he belongs to two professional hypnosis organizations, he participated in the DSM-IV and DSM-5 working groups and was charged with the dissociative disorders sections in both editions, he has run 8 major studies in lab clinical trials related to the use of hypnosis, he has authored 75 research journal articles related to hypnosis, and he has written 45 chapters on hypnosis and one textbook. (4 WRR 6-9).

(38) Dr. Spiegel has also hypnotized between 7000-8000 subjects during his career. (4 WRR 9).

(39) Dr. Spiegel has extensive forensic experience, two-thirds of which has been for the defense. (4 WRR 9-10, 59).

(40) Moreover, Dr. Spiegel served as a member of the panel organized in 1985 by the American Medical Association's Council on Scientific Affairs to examine the use of hypnosis in the forensic setting. (4 WRR 13-14). That panel published a report identifying the risks and concerns of using hypnosis to recall memories. (4 WRR 14, 31; State's Writ Exhibit 2). The report prompted many states to establish guidelines for assessing the admissibility of testimony from witnesses who had undergone hypnotic induction before trial. (4 WRR 23).

(41) Texas was one of the states to adopt such guidelines. The Court of Criminal Appeals enunciated the guidelines in 1988 in the *Zani* case. *Zani*, 758 S.W.3d at 243-44. The *Zani* guidelines still govern the admissibility of testimony from

previously hypnotized witnesses. *State v. Medrano*, 127 S.W.3d 781, 786-87 (Tex. Crim. App. 2004).

(42) Dr. Spiegel's assertion that the information attested to by Dr. Lynn has been available since the 1980's is corroborated by numerous articles and studies, some of which Dr. Lynn cites himself. (4 WRR 29-30; State's Writ Exhibits 1-2; Applicant's Exhibit 5). Indeed, the concerns were first published in the United States in a law review article published in 1980 by Dr. Bernard Diamond. (State's Writ Exhibit 1). And those concerns were acknowledged by the Supreme Court of California in 1982 in *People v. Shirley*, 31 Cal.3d 18 (1982).

(43) Even Dr. Lynn confirmed that the concerns and risks that accompany the use of hypnosis for memory recall have been known since the 1970's or 1980's. (2 WRR 88-92).

(44) The knowledge of the risks and concerns associated with the use of hypnosis for memory recall has not changed since the mid-1980's. (4 WRR 30-31). Although new research and studies have been conducted in the field since applicant's trial, their results simply confirm the risks and concerns first identified by experts in the field in the 1980's. At most, there is more information about the fallibility of memory generally. (4 WRR 29-31).

(45) If anything, new research shows the risks and concerns identified in the 1980's may have been exaggerated. Indeed, the results of Dr. Lynn's most recent research, published in a 2015 journal article, show that hypnosis had no adverse impact on the accuracy of recollections. (2 WRR 93-94; 4 WRR 30; State's Writ Exhibit 3).

(46) Thus, contrary to applicant's assertions, the field of scientific knowledge related to the use of hypnosis in facilitating memory recall has not changed since applicant's trial. The risks and concerns associated with using hypnosis to help recall memories have been well-known and documented since at least the mid 1980's.

(47) Applicant has failed to prove any new, relevant scientific evidence in the field of hypnosis was unavailable at the time of his trial.

DNA

(48) At trial, the State presented DNA evidence linking applicant to the murder. Dr. Stacy McDonald, a DNA analyst employed by the Southwestern Institute of Forensic Sciences (SWIFS),[1] testified that she found a DNA profile matching applicant's DNA profile alone or included in a mixture on various items found at the scene and on Sarah Walker's fingernail clippings.

(49) Specifically, McDonald found a lone DNA profile matching applicant's profile on swabs from the living room (L-3 and L-4), swabs from the kitchen (K-13 and K-15), and the deadbolt. McDonald found a DNA profile matching applicant's profile included in DNA mixtures found on the pull cords, Walker's fingernail clippings, a swab from the kitchen (K-12), the faceplate, and a swab from the entryway (E-5). Walker's DNA profile matched the other profile found in the mixtures. (22 RR 272-84; 3 WRR 15-18; State's Trial Exhibits 108-110)).

(50) The statistical significance of the profiles was determined using one of three different methods – the combined probability of inclusion (CPI), the modified random match probability, or the likelihood ratio. (3 WRR 18-19; State's Trial Exhibits 108-110).

(51) In 2015, two discoveries were made in the scientific field of DNA analysis. The first related to errors in the FBI database. The second related to the interpretation of DNA mixtures.

(52) Specifically, the FBI discovered errors in the frequencies in its database for specific genetic markers. Corrections were subsequently made to the database. The corrections were not expected to have significant ramifications on statistical calculations; statistics already varied slightly between databases. But the discovery prompted recalculations of the statistical significance of prior DNA test results, and some produced significantly different results. The difference was not due to the database errors; it was due to errors in the interpretation of DNA mixtures. In short, some labs were interpreting DNA results based on the false

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[1] In his writ application, applicant asserts that the DNA testing in his case was performed by the ~~Texas Department of Public Safety's DNA lab~~. (Application at 20-21). This is incorrect. SWIFS performed all of the DNA testing in applicant's case. (3 WRR 14).

assumption that they were seeing all of the data at a particular loci. Since this discovery, labs across the state have instituted new guidelines and procedures to ensure the accurate interpretation of DNA mixtures.

(53) In applicant's case, SWIFS utilized the FBI database in its interpretation of the statistical significance of some of the DNA results in applicant's case. Furthermore, there were DNA mixtures in applicant's case, and SWIFS subsequently modified its procedures and guidelines for interpreting mixtures. The changes to SWIFS procedures and guidelines were not significant because SWIFS had employed stochastic thresholds since 2000, which helped ensure the analysts were seeing all of the data at each loci. Nevertheless, on its own initiative, the State asked Dr. McDonald to re-evaluate the results in applicant's case using the corrected FBI database and SWIFS' new procedures and guidelines. When she did, the statistical significance of some of the results changed, and the State furnished the new results to applicant.[2] (3 WRR 19-35; State's Writ Exhibit 12).

(54) The 2015 discoveries and the resulting modifications to interpretation of DNA results were made in 2015, well after applicant's 2007 trial. Neither could have been ascertained by applicant through the exercise of reasonable diligence before 2015. Therefore, as appellant alleges, there is new, relevant scientific evidence in the field of DNA analysis.

(55) Furthermore, Dr. McDonald's testimony and recalculations would have been admissible at a trial conducted on the date applicant filed his subsequent writ application. McDonald's expertise is unquestioned. (4 WRR 12-14). And it is well-settled that DNA analysis is a valid and reliable scientific field. *See e.g., Roberson v. State*, 16 S.W.3d 156, 166 (Tex. App. – Austin 2000, pet. ref'd) (recognizing reliability of science of DNA identification evidence).

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[2] The State provided applicant's counsel a copy of Dr. McDonald's amended DNA report documenting the recalculations in May 2016, more than seven months before applicant filed his subsequent writ application. Thus, applicant was aware of the impact the recalculations had on the DNA evidence when he filed his subsequent application.

Impact on Applicant's Trial

(56) Applicant contends he would not have been convicted if the new relevant scientific evidence he presented in these writ proceedings had been presented at a trial conducted on the date he filed his subsequent writ application.

(57) Whether the evidence pertaining to each scientific field is considered separately or collectively, applicant has failed to prove by a preponderance of the evidence that the jury would have acquitted him.

Bitemark

(58) If applicant's new bitemark comparison evidence had been presented at trial, Dr. Hutson's opinion "matching" applicant's teeth to the bitemark on Sarah Walker's body would have been excluded as scientifically unsupportable and, thus, unreliable. *See Chaney*, 2018 WL 6710279, at *15 (holding expert testimony "matching" Chaney to bitemark on victim's body "is now known to be scientifically unsupportable"), *see also Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) (expert testimony must meet criteria establishing reliability to be admissible under rule 702); Tex. R. Evid. 702.

(59) But the exclusion of Dr. Hutson's "matching" testimony would have only minimally impacted the State's case against applicant. Dr. Hutson's testimony was not the linchpin of the State's case. In fact, in closing arguments in the guilt phase, the State did not argue that the bitemark proved applicant was the perpetrator. The State argued only that the bitemark showed the savagery of the offense. (23 RR 25, 36).

(60) Today, the State could still utilize the bitemark evidence to show the heinousness of the offense. To the extent the State's evidence showed that the injury to Walker was a bitemark, it would still be admissible through either Dr. Hutson or Dr. Rohr, the medical examiner. (22 RR 225, 239-40). Applicant's expert, Dr. Bowers, confirmed that the science supports the identification of a mark as a bitemark and that the mark on Walker's body was a bitemark. (2 WRR 49-50). Moreover, Dr. Rohr's testimony that the bitemark was inflicted at or near the time of death is unimpeached. (22 RR 230-31).

DNA

(61) If there was a linchpin to the State's case, it was the DNA evidence. That evidence was very strong at the time of trial, and it still is.

(62) Back in 2007 and today, the DNA evidence puts applicant at the scene of the murder. Specifically, a DNA profile matching applicant's profile was found on the townhome's kitchen sink, the living room floor, entryway floor, front door deadbolt, and the pull cords to the blinds in the window beside the front door. Second, and more importantly, the DNA evidence puts applicant on the victim's body, namely, on Sarah Walker's fingernails.

(63) On some items, the matching profile was found alone, i.e., as a single source profile. In others, it was found mixed with a DNA profile matching Walker's profile.

(64) A profile matching applicant's DNA profile was found alone on the living room floor (L-3 & L-4), the deadbolt (96), and the kitchen sink (K-13 & K-15). (21 RR 225-26; 3 WRR 15-16).

(65) A profile matching applicant's profile was found in a mixture on the pull cords (12AT1 & 12BT1), the kitchen sink (K-12), the entryway floor (E-5), the faceplate to the deadbolt (97), and Walker's fingernail clippings (13NT1). (21 RR 222-23, 224-226; 3 WRR 16-18).

(66) Dr. McDonald did not retest any evidence in 2016. She merely recalculated the statistical significance of the 2007 DNA test results. She prepared a report on May 19, 2016 that documented her re-evaluation of the prior results. The report contains a chart that details what she re-evaluated and what, if any, statistical weight changes she made. (State's Writ Exhibit 12).

(67) In some instances, the statistical significance of the DNA test results remained the same. In others, it changed. The changes were due either to the corrections to the FBI database or to changes in the method used to interpret DNA mixtures.

(68) Whether or not they changed, however, the results that were statistically strong in 2007 are still strong today and those that were weak are still weak. Where they were and are weak, it is due only to the poor quality of the sample.

The previous results including or matching applicant's profile to the profiles found on the victim and at the scene still include or match his profile. They do not now exclude applicant; nor have any become inconclusive.

(69) Unchanged Results: The statistical weight of the results from the pull cords, the living room floor, and the deadbolt remained the same. The DNA profile found in the mixture on the pull cords is still 216 million times more likely to be that of Walker and applicant than Walker and someone else. You would expect to find the profile found on the living room floor and on the deadbolt 1 in 38.1 billion people. The statistical weight of these results was high in 2007 and is still high. (3 WRR 34-35; State's Writ Exhibit 12).

(70) Changed Results: The statistical weight of the results from Walker's fingernails, the kitchen sink, the faceplate, and the entryway floor changed as set out below:

(71) *Fingernails*: In 2007, McDonald determined that the profile in the mixture on the fingernails was 16.5 billion times more likely to be Walker and applicant than Walker and someone else. In 2016, McDonald determined that you would expect to find the profile 1 in 5.09 billion people. The statistical weight of this result was high in 2007 and is still high. (3 WRR 29-30; State's Writ Exhibit 12).

(72) *K-12 (kitchen sink):* In 2007, McDonald determined that you would expect to see the profile 1 in 635 trillion people. In 2016, McDonald determined that you would expect to find the profile 1 in 89.8 trillion people. This statistic changed solely because of changes to the FBI database. The statistical weight of this result was high in 2007 and is still high. (3 WRR 31; State's Writ Exhibit 12).

(73) *K-15 (kitchen sink):* In 2007, McDonald determined that you would expect to find the profile 1 in 105 people. In 2016, McDonald determined that you would expect to find it 1 in 177 people. This statistic changed solely because McDonald switched from the TDPS database to the FBI database. The testing on K-15 yielded a low-level or degraded profile. Consequently, the result was statistically weak in 2007 and is still weak today. (3 WRR 31-32; State's Writ Exhibit 12).

(74) *K-16 (kitchen sink):* In 2007, McDonald determined that you would find this profile 1 in 4 people. In 2016, McDonald determined that you would find it 72 in

100 people. The result was statistically weak in 2007 and is still weak today. (3 WRR 32; State's Writ Exhibit 12).

(75) *K-18 (kitchen sink):* In 2007, McDonald determined that you would expect to see this profile 1 in 5 people. In 2016, McDonald determined that you would expect to see this profile 97 in 100 people. The result was statistically weak in 2007 and is still weak today. (3 WRR 32-33; State's Writ Exhibit 12).

(76) *Faceplate:* In 2007, McDonald determined you would expect to see this profile 1 in 278,000 people. In 2016, McDonald determined you would expect to see this profile 1 in 9,180 people. The result was statistically weak in 2007 and is still weak today. (3 WRR 33; State's Writ Exhibit 12).

(77) *Entryway:* In 2007, McDonald determined that you would expect to find the profile 1 in 1.6 billion people. In 2016, McDonald determined that it was 216 million times more likely that the DNA mixture was a mixture of Walker and applicant than Walker and someone else. The statistical weight of this result was high in 2007 and is still high. (3 WRR 33-34; State's Writ Exhibit 12).

(78) In sum, there is considerable, statistically strong DNA evidence placing applicant on Sarah Walker's body and throughout the crime scene. This was true in 2007, and it is still true today.

(79) The only reasonable inference to be drawn from the DNA evidence is that applicant violently attacked Walker, suffering injuries to himself in the process and, consequently, leaving his DNA on her body and around the crime scene.

Hypnosis

(80) Applicant asserts that his "new" hypnosis evidence shows "how the State's hypnotism likely created false eyewitness identification of [him]." (Application at 47).

(81) Even assuming the evidence applicant presented was new, it merely confirms the existence of certain risks and concerns associated with the use of hypnosis to refresh recollection. Applicant has failed to demonstrate that those risks and concerns negatively impacted the recollections and identifications of him by Mamie Sharpless and Nelson Villavicencio.

(82) Neither Dr. Lynn nor Dr. Carlson opined that Sharpless and Villavicencio misidentified applicant. In fact, both explicitly stated that they were not rendering such an opinion and acknowledged that Sharpless and Villavicencio could have accurately identified applicant. (2 WRR 97, 126-27).

(83) Dr. Lynn overestimated the dangers of suggestibility and confabulation and entirely disregarded the actual consequences of using hypnosis in this case. (4 WRR 27-28).

(84) Just because a witness undergoes hypnotic induction does not render their memories unreliable. (4 WRR 25).

(85) One-third of the population is not hypnotizable; even if they think they were hypnotized, they were not. And among those who can be hypnotized, hypnotizability ranges from low to moderate to high. (4 WRR 25, 34-35).

(86) Also, the risks and concerns with using hypnosis in the forensic setting can be minimized or eliminated to ensure the reliability of testimonial recollections.

(87) As previously noted, the Texas Court of Criminal Appeals established a standard for assessing the trustworthiness of testimony from witnesses who have undergone a hypnotic induction before trial. The Court first set out this standard in *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988). And notwithstanding the adoption of evidentiary rules governing the admissibility of expert testimony, the *Zani* standard still governs. *State v. Medrano*, 127 S.W.3d 781, 786-87 (Tex. Crim. App. 2004).

(88) The *Zani* standard is a highly specific framework of procedural safeguards designed to minimize the four dangers of hypnosis: hyper-suggestibility, loss of critical judgment, confabulation, and memory cementing. *Medrano*, 127 S.W.3d at 783 and 787; (4 WRR 23).

(89) "The Zani standard permits admission of hypnotically enhanced testimony '[i]f after consideration of the totality of the circumstances, the trial court should find by clear and convincing evidence that hypnosis neither rendered the witness's posthypnotic memory untrustworthy nor substantially impaired the ability of the opponent fairly to test the witness's recall by cross[-]examination.'" *Medrano*, 127 S.W.3d at 783 (quoting *Zani*).

(90) *Zani* instituted the following non-exclusive list of factors to consider in determining trustworthiness:

a. the level of training in the clinical uses and forensic applications of hypnosis by the person performing the hypnosis;

b. the hypnotist's independence from law enforcement investigators, prosecution, and defense;

c. the existence of a record of any information given or known by the hypnotist concerning the case prior to the hypnosis session;

d. the existence of a written or recorded account of the facts as the hypnosis subject remembers them prior to undergoing hypnosis;

e. the creation of recordings of all contacts between the hypnotist and the subject;

f. the presence of persons other than the hypnotist and the subject during any hypnosis session;

g. the location of the hypnosis session;

h. the appropriateness of the induction and memory retrieval techniques used;

i. the appropriateness of using hypnosis for the kind of memory loss involved;

j. the existence of any evidence to corroborate the hypnotically-enhanced testimony; and

k. the presence or absence of overt or subtle cuing or suggestion of answers during the hypnotic session.

Zani, 758 S.W.2d at 243-44.

(91) These factors are responsive to the risks and concerns associated with using hypnosis in the forensic setting and appropriately focus on what actually happened rather than what might have happened. (4 WRR 23-25).

(92) The trial record and extrinsic evidence presented by the State in these writ proceedings affirmatively show the reliability of Sharpless's and Villavicencio's recollections and identification testimony. More specifically, it shows their participation in the hypnosis sessions with Ranger Richard Shing did not affect the accuracy of their recollections.

(93) As recommended by *Zani*, Ranger Shing was trained in the use of hypnosis. He was a licensed as a hypnotist. He received formal training that was supervised and approved by the Texas Commission on Law Enforcement Officer Standards and Education (TCLOSE). (21 RR 67). To obtain his license, he completed a series of lectures and practical applications of hypnosis, and he passed a written exam. *Id*.

(94) Shing employed TDPS's guidelines for using hypnosis in his sessions with Sharpless and Villavicencio. (State's Writ Exhibit 5). These guidelines, which closely resemble the *Zani* factors, are designed to minimize or eliminate the risks and concerns associated with the forensic use of hypnosis. *Id*.

(95) In keeping with the *Zani* factors and TDPS guidelines, Shing meticulously recorded all of his contact with Sharpless and Villavicencio and had no contact with them beforehand. (4 WRR 32-33; State's Writ Exhibit 11).

(96) Before their hypnosis induction, Shing obtained a description of the suspect from both Sharpless and Villavicencio so that it could be compared to their descriptions after the session. (4 WRR 33; State's Writ Exhibits 5, 11, 20; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(97) Shing's questioning of Sharpless and Villavicencio during the sessions was not leading or suggestive. Indeed, it would have been difficult for Shing to be suggestive. He was not involved in the investigation and took pains to shield himself from all but the most basic information about the offense. And most importantly, applicant had not been identified as a suspect at the time of either hypnosis session. Thus, Shing could not have suggested him particularly to Sharpless or Villavicencio during their sessions. (4 WRR 32-34, 71-74; State's Writ Exhibits 5, 11, 20; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(98) During their sessions, Shing exerted no pressure on Sharpless or Villavicencio to provide information. In fact, he told them that it was okay if they

could not recall information, and he took no for an answer. (4 WRR 32-33; State's Writ Exhibit 11; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(99) Shing's reference to "the mind's eye" was not improper. It did not equate memory to a video-recorder that permanently recorded everything for later recall. The "mind's eye" reference is a good approximation of what the brain does when one tries to remember something. The reference appropriately implies you are looking inward to see what you remember, not what you saw. Moreover, it does not suggest that the person possesses more information than they can remember. (4 WRR 28-29; State's Writ Exhibit 11; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(100) Although Shing did not assess the hypnotizability of Sharpless or Villavicencio beforehand, it can be reliably inferred from the recordings and transcripts of the sessions that neither was highly hypnotizable. Both were hypnotized in their sessions, but, at most, they were only low to moderately hypnotizable. This is evidenced by the mild time distortion Mamie experienced, and the tingly feeling both reported. (4 WRR 34-36; State's Writ Exhibits 5, 11, 20; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(101) Also, it can be reliably inferred from the recordings and transcripts of the sessions that Sharpless and Villavicencio were not highly suggestible. In conjunction with their low to moderate hypnotizability, which tends to correspond with lower suggestibility, both readily and freely declined to provide some information during their sessions when they could not remember it. (4 WRR 34; State's Writ Exhibit 11; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(102) Significantly, the descriptions Sharpless and Villavicencio gave of the suspect remained the same over time.

(103) Their description was the only source of information about that suspect for quite some time. They first shared it with police the day after the offense. (4 WRR 65). They later memorialized it in their written statements, repeated it to Ranger Shing during their hypnosis sessions, and testified to it at trial. (State's Writ Exhibits 4, 7-8, 20).

(104) Sharpless and Villavicencio always described the suspect as an Asian male, with a very short buzz cut, a muscular or athletic build, wearing a blue tank top, muscle shirt, or golf shirt. Sharpless's and Villavicencio's descriptions varied from each other's only with respect to whether the suspect wore shorts, pants, or jeans. (21 RR 98-101, 105-06, 112-14, 118-20; 4 WRR 36-37, 65-68; State's Writ Exhibits 7-8, 11; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(105) After his hypnosis session, Villavicencio worked with a sketch artist to create a drawing of the suspect's face, and that sketch was consistent with Villavicencio's prior descriptions. (21 RR 120-22; 4 WRR 69-70; State's Writ Exhibit 6; State's Trial Exhibit 7).

(106) The only descriptive fact that ever changed was Sharpless's description of the suspect's height. She initially described him to police as 3-4 inches taller than she did at trial. (21 RR 100-01; 4 WRR 65-66; State's Writ Exhibits 7, 11).

(107) Furthermore, both Sharpless and Villavicencio always described the suspect's vehicle as a white Mustang with a Texas license plate. (21 RR 98-99, 102, 112-14; 4 WRR 65-67; State's Writ Exhibits 7-8, 11; Applicant's Writ Exhibits, Vols. 16 & 17, pp. 1627-1738).

(108) Clearly, their hypnosis sessions with Shing had no impact whatsoever on Sharpless's and Villavicencio's memory of the suspect's appearance.

(109) And last but not least, Sharpless's and Villavicencio's recollections and in-court identifications of applicant were strongly corroborated by other evidence.

(110) First, although neither Sharpless nor Villavicencio mentioned seeing an arm tattoo or eyeglasses, applicant resembles the descriptions they gave, and he owned a car fitting the description of the car they described.

(111) Second, and perhaps most obviously, the DNA evidence puts applicant at the scene at the time of the offense and in contact with the victim's body.

(112) Also, as set out in greater detail below, other evidence links applicant to the crime, including his own admissions, his similarities to "Chan Lee," injuries to his hands and arms, and his need for money.

(113) Thus, contrary to applicant's allegation, Sharpless and Villavicencio did not misidentify him. Rather, they accurately described and rightly identified him as the individual they saw near the scene around the time of the murder.

Additional Incriminating Evidence

(114) In addition to the bitemark, DNA, and eyewitness testimony, the State presented other significant evidence implicating applicant as Walker's murderer.

(115) Most notably, applicant implicated himself in the offense during his police interrogation. (22 RR 86-90; State's Trial Exhibits 77 & 78; State's Writ Exhibit 14). In particular, he admitted to being inside the townhome around the time of the offense. *Id*. And as previously noted, he described seeing a man and woman resembling Sharpless and Villavicencio outside of the townhome. *Id*. He even accurately described their car's color and model. *Id*.

(116) Furthermore, applicant was linked to the offense by the parallels between himself and "Chan Lee," the individual who had arranged to meet Sharpless near the scene. The mysterious "Chan Lee" told Sharpless that he was from North Carolina, and applicant had gone to school in North Carolina and had just moved to Texas from there. (21 RR 90, 196-97). "Chan Lee" told Sharpless he was calling from an InTown Suites, and applicant had filled out an application for an apartment near an InTown Suites. Moreover, his sister, Sopha, had stayed at an InTown Suites in September 2006. (21 RR 90, 199-200; State's Trial Exhibit 44. According to Sharpless, "Chan Lee" spoke with an African-American accent, and so does applicant. (21 RR 93; 4 WRR 66; State's Trial Exhibit 77). Sharpless and Villavicencio saw the suspect in a white Mustang, and applicant owned a white Mustang. (21 RR 98-99, 182-83, 185; 4 WRR 65-67; State's Trial Exhibit 49). Also, "Chan" is a patent derivative of applicant's last name – "Chanthakoummane."

(117) Although another person with a name similar to "Chan Lee" existed, police pursued that lead and rightly determined that the individual was unconnected to Walker's murder. His name was not an exact match, his Mustang was silver - not white, and he spoke with a thick Asian accent. (21 RR 173-76; 4 WRR 67-68)

(118) Additionally, physical evidence at the crime scene and on Walker's body indicated that Walker had engaged in a violent struggle with her attacker. Consistent with his participation in such a struggle, applicant bore healing cuts

and scratches on his hands and arms at the time of his arrest. (21 RR 232-35; State's Trial Exhibits 72-74).

(119) And lastly, applicant had a motive for robbing Walker of her Rolex watch and expensive ring. He was broke. The day before the murder his bank account was overdrawn. (21 RR 201).

Conclusion

(120) In conclusion, although the bitemark identification evidence would have been excluded, evidence of the bitemark's existence would still be admissible to show the violent nature of the attack on Walker. Moreover, if there was a linchpin to the State's case implicating applicant, it was, and still is, the DNA evidence, connecting him to the crime scene and the victim's body. The eyewitnesses' testimony identifying applicant still bears significant indicia of reliability and would still be admissible today. And on top of this evidence, the State had, and still has, other evidence implicating applicant in Walker's murder, not the least of which is applicant's own admissions.

(121) In sum, the relevant scientific evidence applicant has presented in these writ proceedings would not have altered the outcome of his trial. The evidence inculpating him in the offense would still be substantial and compelling. In all likelihood, the jury would still convict him of the capital murder of Sarah Walker.

(122) Therefore, applicant is not entitled to relief under article 11.073.

(123) The Court recommends the denial of relief on applicant's article 11.073 claim.

False Evidence Claim (Claim 2)

(124) Applicant claims the State used "false scientific evidence to secure his conviction and death sentence." (Application at 58).

(125) "Due process is violated when a conviction is obtained using false evidence, irrespective of whether the false evidence was knowingly or unknowingly used against the defendant." *Chaney*, 2018 WL 6710279, at 17; *see also* U.S. Const., amends. IV & XIV.

(126) To obtain relief on a false-evidence claim, applicant must prove (1) the complained-of evidence was false, and (2) the false evidence was material. *Id*.

(127) "Whether the evidence is false turns on whether the jury was left with a misleading or false impression after considering the evidence in its entirety." *Id*. "Neither the witness's nor the State's good or bad faith is relevant." *Ex parte Weinstein*, 421 S.W.3d 656, 666 (Tex. Crim. App. 2014). Falsity is a factual inquiry, and the court's findings are reviewed under a deferential standard. *Chaney*, 2018 WL 6710279, at *17.

(128) False evidence is material when there is a reasonable likelihood that it affected the jury's judgment. *Id*. Materiality is a legal question reviewed do novo. *Id*.

(129) Applicant has failed to prove that the post-hypnosis testimony of Sharpless and Villavicencio and the DNA evidence was false.

(130) Also, applicant has failed to prove that the bitemark-comparison testimony and the post-hypnosis testimony of Sharpless and Villavicencio was material.

(131) Thus, applicant has failed to prove a violation of his constitutional right to due process.

Bitemark

(132) Dr. Hutson's bitemark comparison testimony identifying applicant as the source of the bitemark on Walker's body was false.

(133) The science does not support "matching" a person's teeth to a bitemark on skin.

(134) Dr. Hutson's testimony left the jury with the false impression that a forensic odontologist could scientifically identify the bitemark as applicant's.

(135) Dr. Hutson's testimony was not material, however. It played a minimal role in linking applicant to Walker's murder.

(136) Although the State relied on Dr. Hutson's bitemark-comparison testimony to link applicant to the crime, it was not the linchpin of the State's case. As

previously noted, the State relied primarily on the DNA evidence, which still strongly inculpates him.

(137) Moreover, the State had the eyewitness identification testimony of Sharpless and Villavicencio, applicant's admissions to being at the scene around the time of the offense and encountering Sharpless and Villavicencio, the parallels between applicant and "Chan Lee," the injuries to applicant's hands and arms that were consistent with his participation in a violent struggle, and applicant's motive for committing a robbery.

(138) The State's other evidence linking applicant to the crime was so substantial that the State did not even argue in closing that Dr. Hutson's testimony proved applicant was the murderer. The State only referred to the bitemark as evidence of the savagery of the crime, an argument it could still make today. (23 RR 25, 36).

(139) Thus, there is no reasonable likelihood that Dr. Hutson's testimony affected the judgment of the jury. *See Weinstein*, 421 S.W.3d at 667-669 (holding witness's false denial of hallucinations was not material to jury's verdict where defense impeached witness on other, more significant grounds at trial, facts to witness attested to were corroborated by other evidence, and an abundance of evidence unrelated to witness's testimony supported conviction).

Hypnosis

(140) The post-hypnosis testimony of Sharpless and Villavicencio was not false.

(141) Their testimony did not leave the jury with a false or misleading impression about the accuracy of their recollections or the reliability of their in-court identification of applicant.

(142) As previously noted, applicant presented evidence of the risks and concerns associated with using hypnosis to recall memories, but he failed to prove that those risks and concerns affected the recollections of Sharpless and Villavicencio.

(143) Moreover, as previously noted, the trial record and extrinsic evidence presented by the State in these proceedings affirmatively shows that hypnosis did not negatively impact the accuracy of their recollections or the reliability of their in-court identification of applicant.

(144) Sharpless's and Villavicencio's recollections were accurate and their identifications of applicant were reliable.

(145) Even assuming otherwise, however, Sharpless's and Villavicencio's testimony was not material.

(146) There is no reasonable likelihood that their testimony affected the judgment of the jury. As previously noted, the State relied primarily on the DNA evidence to link applicant to the offense, and that evidence still strongly inculpates him. The State also had applicant's admissions to being at the scene around the time of the offense and encountering Sharpless and Villavicencio, the parallels between applicant and "Chan Lee," the injuries to applicant's hands and arms that were consistent with his participation in a violent struggle, and applicant's motive for committing a robbery. *See Weinstein*, 421 S.W.3d at 667-669.

DNA

(147) The State's DNA evidence was not false.

(148) The evidence that appellant's DNA was found at the scene and on the victim was accurate.

(149) As previously noted, the statistical weight of some of the evidence was recalculated after trial in light of changes to the FBI database and to SWIFS guidelines and procedures for interpreting DNA mixtures. But where the statistical weight of the evidence back in 2007 was strong, it is still strong; and where it was weak, it is still weak. Also, applicant has not been excluded from any results where he was previously included. Nor have any results that previously included him become inconclusive. Thus, even though recalculations were necessary after trial, the 2007 testing results did not mislead the jury or leave it with a false impression about the strength of the DNA evidence linking applicant to the crime.

In Conclusion

(150) The post-hypnosis testimony of Sharpless and Villavicencio and the DNA evidence were not false or misleading.

(151) Dr. Hutson's bitemark comparison testimony and the post-hypnosis testimony of Sharpless and Villavicencio were not material.

(152) Thus, whether considered separately or in combination, the admission of the bitemark comparison testimony, Sharpless's and Villavicencio's eyewitness testimony, and the DNA evidence did not violate applicant's right to due process.

(153) The Court recommends the denial of relief on applicant's false evidence claim.

Fair Trial Claim (Claim 3)

(154) Applicant claims his due process right to "fundamental fairness" has been violated because his conviction "was secured through multiple discredited forensic sciences." (Application at 61).

(155) The United States Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

(156) As the Supreme Court observed in *United States v. Lovasco*, 431 U.S. 783 (1977):

> Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to disregard the limits that bind judges in their judicial function. Our task is more circumscribed. We are to 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."

Lovasco, 431 U.S. at 790 (citations omitted).

(157) Applicant argues "[j]unk science evidence that is proven demonstrably false by scientific advances" can undermine the fundamental fairness of a trial. (Application at 61).

(158) To the extent applicant is once again seeking relief under the due process clause based on the admission of false testimony, his claim is addressed by the above findings on his second writ claim.

(159) To the extent applicant is seeking relief under the due process clause based on the admission of evidence that is merely "faulty," not false, he fails to present controlling authority for his position. (Application at 61-62).

(160) Applicant cites to two federal circuit court of appeals cases: *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016) and *Tan Lee v. Glunt*, 667 F.3d 397 (3rd Cir. 2012). (Application at 61).

(161) Applicant does not cite to authority from any Texas court, the Fifth Circuit Court of Appeals, or the United States Supreme Court holding that the admission of flawed or faulty evidence violates due process.

(162) Furthermore, applicant presents no authority for his contention that the admission of flawed or faulty evidence is governed by the same standard as a false evidence claim, i.e., that he need only show a reasonable likelihood that the "faulty" evidence affected the jury's judgment.

(163) Indeed, under *Gimenez*, the authority applicant cites, the admission of flawed or faulty evidence warranted relief only if the habeas applicant showed by clear and convincing evidence that no reasonable factfinder would have found him guilty but for the introduction of the purportedly flawed evidence. *Gimenez*, 821 F.3d at 1145.

(164) Nevertheless, assuming applicant's representation of the law is valid, he has failed to prove that the trial testimony of Dr. Hutson, Ms. Sharpless, Mr. Villavicencio, and Dr. McDonald was so flawed or faulty that it undermined the fundamental fairness of his entire trial.

(165) As previously noted, Dr. Hutson's bitemark comparison evidence was unreliable and should have been excluded. But the State still could have offered the bitemark itself as evidence of the heinous and violent nature of Walker's murder.

(166) Also, as previously noted, the eyewitness testimony of Sharpless and Villavicencio was not flawed or faulty. Although there are potential risks and

concerns with the use of hypnosis to recall memories, applicant failed to prove they negatively impacted the recollections and identification testimony of Sharpless and Villavicencio. Indeed, the record and extrinsic evidence shows that notwithstanding those concerns, the witnesses' recollections were accurate and their identification testimony was reliable.

(167) Moreover, as previously noted, the corrections to the FBI's DNA database and the changes to DNA mixture interpretation procedures and guidelines only minimally impacted the State's DNA evidence. The statistical weight of some of the evidence was recalculated after trial in light of changes to the FBI database and to SWIFS guidelines and procedures for interpreting DNA mixtures. But where the statistical weight of the evidence back in 2007 was strong, it is still strong; and where it was weak, it is still weak. Also, applicant has not been excluded from any results where he was previously included. Nor have any results that previously included him become inconclusive.

(168) And lastly, as previously noted, the State presented other evidence implicating applicant in the murder. In particular, applicant was implicated in the offense by his recorded admissions to being at the scene around the time of the offense and encountering Sharpless and Villavicencio, the parallels between applicant and "Chan Lee," the injuries to applicant's hands and arms that were consistent with his participation in a violent struggle, and applicant's motive for committing a robbery.

(169) In sum, not all of the complained-of evidence was flawed or faulty.

(170) Moreover, there is no reasonable likelihood that any flawed or faulty evidence affected the judgment of the jury. *See Weinstein*, 421 S.W.3d at 667-669.

(171) Thus, whether considered separately or in combination, admission of the bitemark-comparison testimony, the eyewitness testimony, and the DNA evidence did not deprive applicant of a fundamentally fair trial.

(172) The Court recommends the denial of relief on applicant's "fundamentally" fair trial claim.

Actual Innocence Claim (Claim 4)

(173) A habeas applicant may obtain relief based on actual innocence in light of newly discovered evidence. *Chaney*, 2018 WL 6710279, at *25 (citing *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996)).

(174) To obtain relief based on actual innocence, applicant must prove by clear and convincing evidence that no reasonable juror would have convicted him based on the newly discovered evidence. *Id*. "This is a Herculean burden." *Id*. (citing *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006)).

(175) Newly discovered evidence is evidence not known to applicant at the time of trial, plea, or post-trial motions and that could not have been known to him even with the exercise of due diligence. *Id*. (citing *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012)). 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. *Id*. To determine whether an applicant has met that burden, the newly discovered evidence must be weighed against the State's case at trial to determine the probable impact the evidence would have had at trial if the new evidence had been available. *Id*. (citing *Elizondo*).

(176) Not all of the evidence applicant has presented is newly discovered. As previously noted, the risks and concerns associated with using hypnosis to recall memories have been well-known since the 1980's.

(177) Moreover, whether the evidence applicant presented is newly discovered or not, he has failed to prove by clear and convincing evidence that no reasonable juror would have convicted him.

(178) As previously noted, the evidence presented in these proceedings shows that applicant's teeth cannot be scientifically matched to the bitemark on Sarah Walker's body.

(179) But the evidence does not scientifically exclude applicant as the person who made the mark. (22 RR 258-59).

(180) And, obviously, the evidence does not identify someone other than applicant as the maker of the mark. (2 WRR 50).

(181) Also, as previously noted, the DNA evidence still strongly implicates applicant as the murderer. The evidence puts applicant at the scene and on the victim. The only logical inference to be drawn from this evidence is that applicant left his DNA during his violent attack on Walker.

(182) In addition, as previously noted, the risks and concerns associated with using hypnosis to recall memories did not negatively impact the recollections and identification testimony of Sharpless and Villavicencio. The recollections and identifications of both witnesses are accurate and reliable.

(183) And importantly, there is other, unimpeached evidence implicating applicant in the murder. As previously noted, applicant is further implicated by his recorded admissions to being at the scene around the time of the offense and encountering Sharpless and Villavicencio, the parallels between applicant and "Chan Lee," the injuries to applicant's hands and arms that were consistent with his participation in a violent struggle, and applicant's motive for committing a robbery.

(184) Simply put, the evidence relied on to prove applicant's guilt in his 2007 trial still overwhelmingly implicates him in Walker's murder.

(185) The evidence presented in the guilt phase of applicant's trial is not the only evidence implicating him in the murder, however. There is also evidence from the punishment phase of his trial that implicates applicant in Walker's murder, namely, his extraneous attempt to victimize Barbara Johnson.

(186) The day before Sarah Walker's murder, applicant showed up at Johnson's home, claiming his white Mustang had broken down and asking to use her phone. Johnson lived alone with her dog. Applicant had previously met Johnson. She had assisted him with finding an apartment when he first moved to the area. Initially, applicant knocked on Johnson's front door, then he came into Johnson's backyard against her wishes and banged on her back patio door. Feeling threatened, Johnson called 911 and the Carrollton police responded and confronted applicant. Applicant identified himself to police and, when his car started, he left. (24 RR 178-90; State's Writ Exhibit 9).

(187) When Johnson heard of the murder of Sarah Walker, another female real estate agent, she considered contacting police to report the incident with

applicant. She delayed contacting the police until she saw the sketch of the suspect that had been generated with Villavicencio's help. (4 WRR 70-73; State's Writ Exhibits 6, 9-10).

(188) It may be reasonably inferred from the incident involving Johnson, that applicant was engaged in a scheme to isolate and rob vulnerable female real estate agents. When his plan to rob Johnson the day before failed, applicant attempted to rob Sharpless. And the same day his plan to rob Sharpless failed, he attacked, robbed, and killed Walker.

(189) With or without the evidence of his attempt to victimize Johnson, applicant has failed to sustain his burden of proving that no reasonable juror would have convicted him in light of the evidence he presented in these writ proceedings.

(190) Applicant does not claim innocence under the *Schlup* standard for relief. Under *Schlup*, an innocence claim is merely a gateway through which to obtain review of an otherwise barred claim of constitutional error. *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

(191) But still, even assuming *Schlup*'s lower standard of proof applied, applicant has failed to sustain his burden of proving he is entitled to relief.

(192) Specifically, applicant fails to prove it is more likely than not that no reasonable juror would have convicted him in light of the "new" evidence he presented. *See Schlup*, 513 U.S. at 326-27.

(193) It can only be reasonably concluded that the evidence applicant presented in these writ proceedings would not have affected the jury's judgment.

(194) Plainly put, the jury's verdict is correct. Applicant is guilty of the capital murder of Sarah Walker.

(195) Therefore, his execution will not violate the Eighth and Fourteenth amendments.

(196) The Court recommends the denial of relief on applicant's actual innocence claim.

ORDER

The Court adopts the foregoing findings of fact and conclusions of law.

THE CLERK IS **ORDERED** to prepare a transcript of all papers in Cause Number W380-81972-07-HC2 and to transmit the same to the Texas Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure.

The transcript shall include certified copies of the following documents:

1. Applicant's subsequent application for writ of habeas corpus and any other pleadings filed by applicant in cause number W380-81972-07-HC2, including any exhibits, unless they have been previously forwarded to the Court;

2. The State's answer to applicant's subsequent writ application filed in cause number W380-81972-07-HC2;

3. Any other pleadings filed by the State in cause number W380-81972-07-HC2;

4. Any proposed findings of fact and conclusions of law filed by the State and applicant in cause number W380-81972-07-HC2;

5. This Court's findings of fact and conclusions of law, and order in cause number W380-81972-07-HC2;

6. Any and all orders issued by the Court in cause number W380-81972-07-HC2;

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number W380-81972-07-HC2, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS ALSO **ORDERED** to send a copy of these Findings of Fact and Conclusions of Law, including its Orders, to counsel for applicant: Carlo D'Angelo at carlo@dangelolegal.com; Gregory Gardner at ggardner@ggardnerlaw.com; and Eric Allen at eric@eallenlaw.com; and to counsel for the State, Lisa Smith, at lsmith@co.collin.tx.us.

SIGNED the 29th day of March, 2019.

Benjamin A. Smith

Digitally signed by Judge Benjamin Smith
DN: cn=Judge Benjamin Smith, o=State of Texas, ou=380th District Court, email=bsmith@co.collin.tx.us, c=US
Date: 2019.03.29 13:01:43 -05'00'
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BENJAMIN SMITH
PRESIDING JUDGE
380TH JUDICIAL DISTRICT COURT