WRIT NO. _____
TRIAL NO. CR-2018-07544-E

EX PARTE JASON LEE VAN DYKE

IN COUNTY CRIMINAL COURT NUMBER FIVE
DENTON COUNTY, TEXAS

INITIAL REPLY TO STATE'S RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

JUDGE WADDILL:

Jason Lee Van Dyke files this initial reply to the State's *Response* to Mr. Van Dyke's Application for *Writ of Habeas Corpus* while he gathers documentation for a more thorough rebuttal.

This is a case in which the State accused Mr. Van Dyke of faking the burglary of his truck and then, when he had pleaded no contest to that charge, convicting the man who had in fact burglarized his truck of doing so. Now the State claims that Mr. Van Dyke's report could have been false because, even though the truck was actually burglarized, the report *might have* been false for some other reason.

Please withhold ruling on Mr. Van Dyke's *Application* until Mr. Van Dyke has had an opportunity to more fully reply to the State's *Response*, which raises and leaves unanswered these three issues:

1. What information the State had at the time of Mr. Van Dyke's plea about Mr. Momot's burglary of Mr. Van Dyke's motor vehicle (*Brady* evidence);
2. What information the State has received, since Mr. Van Dyke's plea, relevant to the truth or falsity of Mr. Van Dyke's report that his truck had been burglarized on September 13, 2018 (newly discovered evidence); and

3. Whether, considering *all* of the admissible evidence (and not just the State's cherry-picked facts) including Mr. Momot's sworn confession to burglarizing Mr. Van Dyke's motor vehicle, no reasonable juror would have convicted Appellant.

Please order, under section 6(b) of article 11.072 of the Texas Code of Criminal Procedure, the deposition of a witness or witnesses from the Denton County District Attorney's Office with full knowledge of the prosecutions of Mr. Van Dyke and Mr. Momot to answer questions and produce documents concerning the first two issues.

Or please order, under section 6(b) of article 11.072 of the Texas Code of Criminal Procedure, a witness or witnesses from the Denton County District Attorney's Office with full knowledge of the prosecutions of Mr. Van Dyke and Mr. Momot to answer interrogatories concerning the first two issues.

Further, please order, under section 6(b) of article 11.072 of the Texas Code of Criminal Procedure, the Denton County District Attorney's Office to produce, either to Mr. Van Dyke or to the court for *in camera* review, its complete files on Mr. Van Dyke's and Mr. Momot's prosecution.

Finally, please order, under section 6(b) of article 11.072 of the Texas Code of Criminal Procedure, a hearing on the three issues listed above.

The State's response is obfuscatory.

The State in its response confuses three things:

a) *Its knowledge or belief, before Mr. Van Dyke's plea, that Mr. Momot had burglarized Mr. Van Dyke's vehicle* (which was exculpatory, which should have been revealed to Mr. Van Dyke, and which was not);
b) *Mr. Momot's sworn confession that he burglarized Mr. Van Dyke's vehicle* (which is newly discovered evidence of actual innocence); and
c) *The fact that Mr. Momot was found with Mr. Van Dyke's stolen pistol* (which was disclosed to the defense before trial).

These are different things. The State's failure to disclose (a) is Mr. Van Dyke's Brady claim. Mr. Van Dyke's newly discovered evidence claim is based on (b). And (c) was disclosed to Mr. Van Dyke before his no contest plea, but it does not subsume (a) or (b).

The State does not contest Mr. Van Dyke's *Brady* claim.

The State does not contest that it possessed and did not disclose (a)—the knowledge or belief, before Mr. Van Dyke's plea, that Mr. Momot

had burglarized Mr. Van Dyke's vehicle—to Mr. Van Dyke before his no-contest plea.[1]

Nor does the State contest that this was *Brady* information that should have been disclosed to Mr. Van Dyke. Mr. Van Dyke would not have waived his right to a jury trial and pleaded "no contest" if he knew that Mr. Momot was the person who had burglarized his vehicle (instead of just a person found in possession of his stolen firearm).

The State does not even deny that, before Mr. Van Dyke's guilty plea, it had information leading it to believe or know that Mr. Momot had burglarized Mr. Van Dyke's truck.

Instead the State tries to argue that it didn't conceal *Brady* information because it revealed (c)—the fact that Mr. Momot possessed Mr. Van Dyke's stolen pistol.[2]

The fact that Mr. Momot was found in possession of the stolen pistol does not suggest that he was known or believed to have committed the burglary that Mr. Van Dyke reported.

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[1] The failure to contest this is not necessarily an admission. But it's a good reason for this Court to order discovery rather than rely only on those facts that the State chooses to share with this Court.

[2] See State's Response at 6 ("the State disclosed the information regarding Momot and Applicant's recovered gun prior to Applicant pleading in the case.")

Mr. Van Dyke knew that Mr. Momot had been charged with the theft of—that is, the exercise of control over, with the intent to deprive Mr. Van Dyke of—his firearm.

As far as Mr. Van Dyke knew at the time of his no-contest plea, Mr. Momot's connection to the burglary was attenuated—he received the stolen pistol from the person who committed the burglary, or from some third party, with knowledge that it was stolen. And while Mr. Van Dyke's counsel had subpoenaed Mr. Momot to trial, he had no mechanism for getting Mr. Momot to waive his Fifth Amendment privilege and testify about how he got the firearm.

The State does not dispute that it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely pre-plea disclosure—that, knowing that the police had arrested the burglar (rather than some peripheral crook), Mr. Van Dyke would not have waived his right to a jury trial.

THE STATE DOES NOT DISPUTE THAT THERE IS NEWLY DISCOVERED EVIDENCE.

Nor does the State dispute that (b)—Mr. Momot's sworn confession that he burglarized Mr. Van Dyke's vehicle—exists and is newly discovered evidence. Instead the State claims that this newly discovered

evidence would not have led to an acquittal, and in support it lays out its case against Mr. Van Dyke.

But the State's case against Mr. Van Dyke is not the entire case. Mr. Van Dyke had experienced trial counsel who had prepared to meet the State's case. They would have had a say at trial. And Mr. Van Dyke will, given time to obtain an affidavit or a hearing, show this Court point-by-point how the State's circumstantial arguments would be rebutted at trial, and how the additional fact of Mr. Momot's confession is evidence in light of which no reasonable juror would have convicted Mr. Van Dyke.

The State attempts to mislead this Court about the date of Mr. Momot's burglary.

The State makes much of the fact that Mr. Momot was charged with burglarizing Mr. Van Dyke's truck with an offense date of September 28, 2018."[3] Of course, the amended indictment alleges that Mr. Momot committed that crime *on or about* that date, which means before the date of the indictment and within the statute of limitations, which includes the date that Mr. Van Dyke reported the burglary.

[3] State's Response at 16, 17.

The State has provided no evidence, and there can be no evidence, that Mr. Van Dyke's truck was burglarized on September 28, 2018 rather than September 13, 2018.

The State appears to imply that Mr. Momot's guilty plea was fraudulent.

The State claims that Mr. Momot pleaded no contest to burglary of a motor vehicle.[4] This is false. Mr. Momot pleaded guilty, and the State prepared the papers.

The State says, "It appears that Momot agreed to the lesser misdemeanor charge as part of a plea deal."[5] Why Mr. Momot agreed to plead guilty to burglary of Mr. Van Dyke's motor vehicle is immaterial. Why the State, which prepared the papers, agreed that Mr. Momot burglarized Mr. Van Dyke's motor vehicle is the important question, and the State should not be allowed to argue that it was for any reason other than that the State believed that Mr. Momot had burglarized Mr. Van Dyke's motor vehicle.

The State, by preparing the plea papers for Mr. Momot to sign and stipulating to the fact that Mr. Momot had committed the crime of

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[4] State's Response 2.

[5] State's Response 16.

burglary of a motor vehicle, represented to Mr. Momot's trial court that Mr. Momot had committed the burglary. It should not now be heard to argue that Mr. Momot's judicial confession was a fraud perpetrated on the trial court by Mr. Momot.

If Mr. Momot lied to the court, then the State lied too. And if the State claims now that it lied to the court in Mr. Momot's case, nothing it says in this case can be believed.

The State has other newly discovered evidence.

Mr. Van Dyke has reason to believe that since his no-contest plea the State has received additional evidence that would exculpate him. The State is not, of course, interested in voluntarily sharing this with this Court. The discovery permitted by section 6(b) of article 11.072 will answer this question as well.

Conclusion

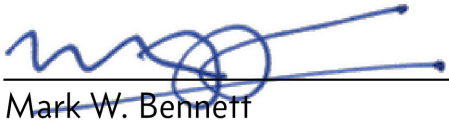
For these reasons, please order discovery—depositions, affidavits, or interrogatories—and a hearing to determine three issues:

1. What information the State had at the time of Mr. Van Dyke's plea about Mr. Momot's burglary of Mr. Van Dyke's motor vehicle (*Brady* evidence);
2. What information the State has received, since Mr. Van Dyke's plea, relevant to the truth or falsity of Mr. Van Dyke's report that

his truck had been burglarized on September 13, 2018 (newly discovered evidence); and

3. Whether, considering *all* of the admissible evidence (and not just the State's cherry-picked facts) including Mr. Momot's sworn confession to burglarizing Mr. Van Dyke's motor vehicle, no reasonable juror would have convicted Appellant.

Respectfully Submitted,



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Certificate of Service

A true and correct copy of the above and foregoing document was hand delivered to the attorney for the State on the day it was filed with this Court.

Mark W. Bennett