WRIT NO. CR-2018-07544-E-WHC-1
TRIAL NO. CR-2018-07544-E

EX PARTE JASON LEE VAN DYKE | IN COUNTY CRIMINAL COURT NUMBER FIVE
DENTON COUNTY, TEXAS

RESPONSE TO STATE'S SUPPLEMENTAL ANSWER TO
APPLICATION FOR WRIT OF HABEAS CORPUS

JUDGE WADDILL:

This *Response*, with Applicant's previously filed *Initial Reply to State's Response to Application for Writ of Habeas Corpus*, comprises Applicant's written reply to the State's responsive pleadings filed to date.

ADDITIONAL NEWLY DISCOVERED EVIDENCE AND *BRADY* EVIDENCE: THE MARQUARDT AFFIDAVITS

As Applicant wrote in his *Initial Reply*, "since his no-contest plea the State has received additional evidence that would exculpate him." The State has now disclosed this additional newly discovered evidence, in the form of the Marquardt Affidavits, State's Exhibit FF and D.

These affidavits would be admissible at a retrial in a hearing to determine whether Mr. Van Dyke had forfeited his right to confront Mr. Marquardt at trial. Tex. R. Evid. 104.

In light of Mr. Marquardt's statements that Applicant had had nothing to do with his avoidance of service of a subpoena, and Mr. Marquardt's disclosure that the Oak Point Police Department apparently had interviews with Mr. Marquardt that were not disclosed

to Applicant's counsel,[1] the forfeiture-by-wrongdoing decision would likely have come out differently—this Court would not have been justified in finding that Mr. Van Dyke had forfeited his right to cross-examine Mr. Marquardt, and Mr. Marquardt's statements would not have been admissible.

The State in its September 27, 2019 *Answer* highlighted Mr. Marquardt's out-of-court statements and Applicant's alleged forfeiture by wrongdoing. Now Applicant has evidence that he was not responsible for Mr. Marquardt's unavailability at trial. Mr. Marquardt's out-of-court statements would not be admissible against Applicant unless Mr. Marquardt could be cross-examined about them, and Mr. Marquardt has made it clear that is not going to testify, but will instead invoke his right to remain silent under the Fifth Amendment.

When did the State conclude that Mr. Momot burglarized Mr. Van Dyke's vehicle?

The State continues to characterize Mr. Momot's guilty plea to burglary of a motor vehicle as a plea "to a lesser misdemeanor offense." But of course burglary of a motor vehicle is not a lesser offense of theft of a

[1] That Mr. Momot had interviews with the police after the last interview that Applicant was told about was *Brady* evidence that should have been disclosed, as it would have affected this Court's forfeiture-by-wrongdoing decision.

firearm—each offense has an element that the other lacks, and so neither is a lesser of the other.

If the State had wanted to plead Mr. Momot to a lesser-included misdemeanor offense, it could have written the plea papers for either *Attempted Theft of a Firearm*, which would have been a Class A Misdemeanor, or *Theft of Property Over $100*, which would have been a Class B Misdemeanor.

Instead the State chose to cause Mr. Momot to plead guilty to burglary of a motor vehicle—a guilty plea that included a judicial confession that would have constituted Aggravated Perjury if it had not been true, and that would have made the prosecutor responsible for the plea a party to aggravated perjury. If the State's position now is that both Mr. Momot and Assistant Criminal District Attorney Lauren Marshall committed Aggravated Perjury and Tampering With a Governmental Record on July 11, 2019, then let them take that position.

But the State, having participated in—indeed, having sponsored—Mr. Momot's judicial confession that he burglarized Applicant's motor vehicle cannot now take the position that Mr. Momot was not the person who burglarized Applicant's motor vehicle.

The *Brady* question, then, is when Ms. Marshall first realized that Mr. Momot burglarized Applicant's motor vehicle. If she realized this before February 26, 2019, she should have revealed it to Applicant. She did not.

The State takes the position here that Mr. Momot's plea papers, which it drafted and signed off on, were merely an expedient fraud upon the district court in Mr. Momot's case.[2] Taking that position, the State cannot deny that its ultimate view of the case was formed long before Applicant's no contest plea.

Even if the State could deny that it realized before February 26, 2019, that Mr. Momot had burglarized Applicant's vehicle, the State could not be believed—its every statement in this case should be measured against the fact that it contends that it may have filed false sworn documents in Momot's case.

The Marsala Affidavit

Applicant's trial counsel, Dominick Marsala, has signed an affidavit describing what effect this newly discovered evidence and Brady material would have had on his trial strategy. That affidavit is attached

[2] "It appears that Momot agreed to the lesser misdemeanor charge as part of a plea deal." State's Answer 16.

as Exhibit H. The court's forfeiture-by-wrongdoing decision "severely hampered the defense strategy of suggesting that Marquardt had the most motive and opportunity to set up and benefit from the burglary."

In a thorough discussion of his trial strategy, Mr. Marsala also notes the importance of Momot's guilty plea:

> The defense now has evidence that Momot entered a plea of guilty and signed a judicial confession to committing the same type of burglary described by Yan Dyke to the Oak Point police officers. Marquardt, the only witness arguably capable of refuting the truth of anything stated by Van Dyke to the officers, has invoked his Fifth Amendment privilege.

Conclusion

As Mr. Marsala writes, the law requires a showing that Applicant intended to deceive Officer Roach. Considering the old evidence together with the new, no reasonable juror would convict Applicant of the offense of false report to a peace officer.

Prayer

For these reasons, please order 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 including Mr. Momot's sworn confession to burglarizing Mr. Van Dyke's motor vehicle, no reasonable juror would have convicted Appellant.

Respectfully Submitted,

Mark W. Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
✆713.224.1747
Email mb@ivi3.com

Attorney for Applicant

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