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 SECOND SUPPLEMENTAL ANSWER TO
APPLICATION FOR WRIT OF HABEAS CORPUS
AND MOTION TO COMPEL

JUDGE WADDILL:

With this pleading, Applicant responds to the State's *Motion to Compel* and its *Second Supplemental Answer*.

The State has admitted filing false documents in Mr. Momot's case, and has told untruths to this Court about the documents in Applicant's case. For those reasons, among others, this Court should grant relief.

MOTION TO COMPEL

Please set this matter for an oral hearing on the merits. Applicant objects to the State's assertion that, if documents are ultimately produced to him and his counsel and exculpatory evidence is discovered, he should file a second writ. Such an exercise would not only severely hinder Applicant's efforts at obtaining timely relief concerning an offense he did not commit, but would also be contrary to basic principles of judicial economy.

There is an obvious means by which all potentially exculpatory evidence concerning Applicant can be obtained in this case: this Court

can order the Oak Point Police Department, the Denton County District Attorney, and the Denton County Community Supervision & Corrections Department to immediately turn over to defense counsel all documents, including communications, in their possession concerning Applicant that are not protected by the work-product doctrine. This Court can also order the production of a privilege log concerning any item that is not produced. Upon entry of such an order, this Court can permit these agencies of the State a reasonable period of time to comply with its order, permit the defense a reasonable time to review these documents and incorporate them into its case as appropriate, and set this case for a hearing on the merits.

Applicant asks that the Court do so.

Second Supplemental Answer

The State's *Second Supplemental Answer* contains numerous statements of fact that are either categorically false, patently absurd on their face, or which constitute judicial admissions of professional misconduct.

The Marquardt Affidavits (Exhibits FF, GG)

Rather than consider the Marquardt affidavits as a whole, the State has opted to pick and choose parts of the affidavit to emphasize for the purpose of fulfilling their selected narrative in this case.

The state first argues that Isaac Marquardt was available as a witness to Applicant at the time of his plea when, in fact, he was not. Marquardt's affidavit begins with background information, and then runs in roughly chronological order. It is apparent from the affidavit that Marquardt stopped living with Van Dyke on September 20, 2018, but still had access to Van Dyke's property and saw him socially in occasion. Exhibit FF, ¶ 12.

This apparently changed shortly after January 8, 2019 when Applicant advised Marquardt that he would be turning himself in on a warrant and asked that Marquardt take care of his dogs. Exhibit FF, ¶ 13. The affidavit shows that Marquardt had some contact with Applicant's father while Applicant was in jail. Exhibit FF, ¶ 16. However, the affidavit shows that after Applicant's release from jail on or around January 16, 2019, there was little or no contact between Marquardt and Van Dyke until May of 2019. Exhibit FF, ¶ 21-22, 24.

Marquardt, by his own admission, made efforts to avoid being served, and refused, when asked by defense counsel, to testify. Exhibit FF, ¶ 22; Exhibit GG. The affidavit does *not* state that Marquardt agreed to appear if subpoenaed and, when considered as a whole, shows that he had no intention of providing testimony in Applicant's case.

The State argues that the Marquardt affidavit is not affirmative evidence of innocence. But there would be no reason for Marquardt to invoke his Fifth Amendment privilege against self-incrimination unless he was somehow involved with burglary or intentionally provided false information to the Oak Point Police Department for some other reason. A more complete retraction by Marquardt would subject him to arrest by the Oak Point Police Department and prosecution by the Denton County District Attorney for the same offense of which Applicant stands wrongfully accused.

The Marquardt affidavits are troubling because, despite the assertions made by the State at a hearing on forfeiture by wrongdoing in this cause, they demonstrate that neither Applicant nor his father took any action to stop Marquardt from appearing as a witness in this case and that the decision not to testify (and evade service of process) was his alone. Exhibit FF, ¶ 14–23, Exhibit GG.

The State in its *Second Supplemental Response* refers to this Court's forfeiture-by-wrongdoing finding as a *fait accompli*. *Second Supplemental Response* at 7 fn.2. The Marquardt affidavits reveal that finding to have been incorrect. This Court should reverse its finding of forfeiture by wrongdoing, and consider the evidence in this case in light of that error.

Equally disturbing are paragraphs fifteen and twenty-three, which relate to further contacts Marquardt had with the Oak Point Police Department. In addition to the fact that he was interviewed a second time by that department—a fact not disclosed by the State to Applicant before his plea—Marquardt writes "[a]fter being interviewed by offices [sic] from the Oak Point Police Department for a second time, it was clear to me that they were not serving the interests of justice and were simply trying to pin as many charges as they could onto [Applicant]." These interviews occurred in January while Applicant was confined to jail and were never disclosed to the defense by Marquardt or by the State. While the defense did receive reports and body camera footage from the night of the actual incident, it never received any such material concerning this subsequent interview by the arresting agency of a material witness in the case just weeks before a trial setting.

The concerns expressed by Marquardt in his affidavit underscore the need for this material, which *still* has not been provided to the defense.

When considered as a whole and read by any person of reasonable intelligence, Marquardt's affidavit does four things with respect to this case: (1) it amounts to a retraction of the statements made by Marquardt

to the Oak Point Police Department, or at the very least, casts serious doubt on their veracity, Exhibit FF,¶ 11, 23; (2) it completely refutes the facts presented and arguments made by the state during its forfeiture by wrongdoing motion which implicated Applicant's constitutional rights, Exhibit FF, ¶ 14, 16 – 26; (3) it shows the existence of potentially exculpatory evidence in the possession of the Oak Point Police Department that was not turned over to the defense and which may not have been turned over to the State, Exhibit FF ¶ 15, 23; and (4) it suggests that Marquardt's malfeasances in this case may have been due to coercion or improper influence by a person—Thomas Christopher Retzlaff—with a well-known and well-documented history of harassing and stalking Applicant. Exhibit FF, ¶ 5 – 8, 23, 26.

By itself, Marquardt's affidavit is more than sufficient for this Court to grant Applicant's writ and order a new trial in this matter.

Cory Momot

Even when considered in the best light possible, the State's assertions in its Second Supplemental Answer concerning the significance of the Momot plea contain judicial admissions of incompetency and prosecutorial misconduct by the Denton County District Attorney. For the purpose of this response, Applicant will assume that State's

representations to this Court concerning its prosecution of the Momot case are true.

The State claims that it entered into a false plea-bargain agreement with Mr. Momot because Applicant, the complainant in Mr. Momot's theft case,

> had pleaded guilty to giving a false report to a police officer, an offense that makes a witness impeachable under Texas Rules of Evidence 609(a).

But Applicant had not pleaded guilty. He had pleaded no contest, and has consistently maintained his innocence since his plea.

More importantly, though, Applicant was never convicted of making a false report. Texas Rule of Evidence 609(a) provides that evidence that the witness has been *convicted* of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party. See *Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008).

Deferred adjudication is not a conviction and cannot be used to impeach a witness under 609(a) unless the proponent makes a showing that the witness testified as a result of bias, motive or ill-will emanating

from his status of deferred adjudication. *Jones v. State*, 843 S.W.2d 487, 496 (Tex. Crim. App. 1992), cert. denied, 507 U.S. 1035 (1993); *Callins v. State*, 780 S.W.2d 176, 196 (Tex. Crim. App. 1986) (op. on reh'g), cert. denied, 497 U.S. 1011 (1990). In its *Second Supplemental Answer*, the State makes no such assertions and asserts instead that applicant's testimony would be impeachable as a crime of moral turpitude "because Applicant had pleaded guilty to giving a false report to a police officer" (p. 10).

Under well-settled law, Applicant's testimony would not have been impeachable under Rule 609(a) because he had not been convicted.

The State would have this Court believe that two able and experienced felony prosecutors, working in the same office that prosecuted Applicant, either were unaware of the nature of his plea, or did not understand that Applicant's testimony would *not* have been impeachable on Rule 609(a).

While credulity strains under the weight of that notion, it snaps altogether when considering the State's remedy to the perceived problem with sponsoring Applicant as a witness. The State asserts that, at the suggestion of Momot's defense counsel, they permitted Momot

to plead guilty to burglary of a motor vehicle, amending the indictment and sponsoring a judicial confession to that offense.

Rule 3.03(a) of the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from knowingly making a false statement to a tribunal or from offering evidence that the lawyer knows to be false. Rule 3.09(a) also prohibits a prosecutor in a criminal case from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause.

When a prosecutor feels that she will be unable to meet its burden of proof in a criminal case, the correct remedy is to dismiss that case—not to manufacture new charges out of thin air "to prevent the situation of a trial where the complaining witness of the case is impeachable due to the complaining witness' judicial confession that he made a false statement to a peace officer" (a judicial confession which, incidentally, never existed).

That district attorney's office prepared and filed a charging instrument reflecting (maybe falsely, it now says) the lesser charge, prepared a document for Momot to sign containing a (maybe false, it now says) judicial confession to this charge, procured Momot's signature on that document, and offered it as (maybe false, it now says)

evidence substantiating Momot's guilt of a crime that it now says it did not believe him to have committed.

The plea and the signed judicial confession remain *Brady* evidence that was not reasonably available to Applicant prior to his plea. Furthermore, because of the charges pending against him at the time, Momot himself was not reasonably available at a witness prior to Applicant's plea due to the pending charges against him. The confession together with both the old and new evidence before this Court, strongly supports Applicant's claim of actual innocence. It is especially strong when considered in conjunction with the Marquardt affidavit.

Judicial Confession

In the State's *Second Supplemental Answer* to Applicant's Application for Writ of Habeas Corpus, it argues that the Applicant's judicial confession in this case is among the pieces of evidence that (a) substantiate his guilt (p. 7), which made him impeachable under Rule 609(a) of the Texas Rules of Evidence (p. 11), and to hypothetically support a charge of aggravated perjury and tampering with a government record (p.13).

There is one major flaw with the State's arguments concerning a judicial confession in this case: it doesn't exist. There is a section of the plea papers in Applicant's which states the following verbatim:

> Plea and Judicial Confession: I voluntarily enter my plea of nolo contendere to the above-mentioned offense. My plea is entered freely and voluntarily, and without any coercion, distress, or promise of benefit other than the plea bargain agreement.

What the State deceptively calls a "judicial confession" contains no admission of guilt and does not even attempt to meet the basic requirements of a judicial confession, that it embrace every constituent element of the charged offence. *Menefee v. State*, 287 S.W.3d 10, 14 (Tex. Crim. App. 2009).

Applicant's non-confession stands in sharp contrast to the judicial confession in Momot's misdemeanor case, which states the following verbatim:

> I do further admit and judicially confess that I am the person named in the charging instrument and that I understand the charge contained therein and: I am GUILTY of the offense Burglary of a Motor Vehicle as alleged in the charging instrument including any amendments or modifications thereto and I confess that I did unlawfully commit the said offense in Denton County, Texas on the date alleged in the charging instrument; I further agree that the amount of restitution determined is fair and reasonable"

The State's repeated reference to evidence that doesn't actually exist in this case is an attempt to trick this Court that is similar to the trick it claims to have played on the court in the Momot case.

The difference is that, in this case, the State has falsely alleged that Applicant judicially confessed to a crime he did not commit while, in the Momot case, the State has taken the position that it sponsored as evidence a false judicial confession.

That the State has both attempted to deceive this Court about what happened in Applicant's case, and admitted filing false documents in the Momot case, should be considered by this Court in determining this writ.

Applicant's Three Questions

What information did the State have at the time of Applicant's plea about Momot's burglary of Applicant's motor vehicle?

If the information provided by the State to this Court is true, we will not know the answer to this question until a determination can be made concerning the nature of Marquardt's contacts with the Oak Point Police Department between January 8, 2019 and January 16, 2019. We know from the Marquardt affidavits and Mr. Marsala's affidavit that:

- There was subsequent contact by the arresting agency with Marquardt during this time period;
- The nature of that contact was sufficient to place Marquardt into fear; and
- Defense counsel was never provided any information concerning these contacts; in fact, defense counsel did not know that they existed until well after the date of Applicant's plea.

WHAT INFORMATION HAS THE STATE RECEIVED, SINCE APPLICANT'S PLEA, RELEVANT TO THE TRUTH OR FALSITY OF APPLICANT'S REPORT THAT HIS TRUCK WAS BURGLARIZED ON SEPTEMBER 13, 2018?

The most obvious information that has been received by the State since the Applicant's plea is the sworn judicial confession of Momot, a person found to be in possession of one of the firearms reported stolen by Applicant, to committing the burglary described by Applicant to the Oak Point Police Department.

A person does not commit the offense of false report when he provides information to law enforcement concerning the events of an actual burglary as he perceived those events. Even if the information provided later turns out to be incorrect, the offense of false report to a police officer requires the state to show that Applicant intentionally or knowingly provided false information to a police officer with the intent to deceive.

Momot's confession to the burglary, however it was obtained, negates the possibility of an offense having been committed. Furthermore, the State has come into possession of evidence in the form of one or more affidavits from Marquardt which amount to a retraction of the statements he made to police, which completely refute facts presented by the State in a forfeiture by wrongdoing motion in the case, and which at least suggests that a malevolent third party with a history of stalking and harassing Applicant may have influenced Marquardt's behavior.

Considering all of the admissible evidence, including Momot's sworn confession to burglarizing Applicant's motor vehicle, no reasonable juror would have convicted Applicant.

There is no credible admissible evidence of Applicant's guilt. Applicant reported a burglary of his motor vehicle on September 13, 2018. Despite the state's assertions to the contrary, he has not made inconsistent statements on any material matters with respect to that burglary. Marquardt, the state's only witness who had ever refuted Applicant's version of events from that evening, was not present when the burglary occurred and has since invoked his Fifth Amendment privilege against self-incrimination. Applicant passed a polygraph examination

concerning his version of the events. After his report of the burglary, Momot was found to be in possession of one of the firearms that Applicant reported stolen, confessed to burglarizing Applicant's motor vehicle, and plead guilty to the offense of burglary of a motor vehicle. Notwithstanding their reasons for permitting a plea, the same District Attorney's office that prosecuted Applicant filed that charge against Momot, prepared the guilty plea and judicial confession, and sponsored that evidence in district court. When considering this evidence, no reasonable juror could find that this Applicant knowingly provided false information to Officer Roach with the intent to deceive.

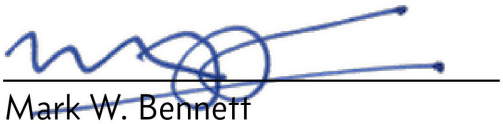
PRAYER

For these reasons, please:

- Order the Oak Point Police Department, the Denton County District Attorney, and the Denton County Community Supervision and Corrections Department to immediately turn over to defense counsel all documents, including electronic materials and communications, in their possession concerning Applicant that are not protected by the work product doctrine;
- Order the production of a privilege log concerning any item that is not produced pursuant to a claim of privilege;
- Set this matter for an oral hearing on the merits after these agencies have had a reasonable period of time to comply with this Court's order and the defense has had a reasonable period of time to review any such documents; and

- Grant Applicant the habeas relief that he has requested, and any other relief to which he might be entitled.

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