

THE COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS

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EX PARTE  
CLINTON LEE YOUNG,  
  
APPLICANT

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Cause No. WR 65,137-03  
  
Hon. Judge Robert H. Moore III  
  
Capital Case

OBJECTIONS TO THE COURT'S FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

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Applicant CLINTON LEE YOUNG lodges the following Objections to the Order on Applicant's Second Subsequent Application for Postconviction Writ of Habeas Corpus ("Order"), entered by the District Court of the 385th Judicial District in Midland, Texas on May 18, 2011.

**I.  
INTRODUCTION**

Almost half a century ago, the Supreme Court held that Due Process prohibits the state from withholding "evidence favorable to an accused." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The state's duty to assist the defense by disclosing favorable evidence creates an exception to the normal adversary process -- one that strives to ensure that the state does not procure a defendant's conviction at the cost of justice. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.*

In this case, the District Court misinterpreted *Brady* and its progeny by holding that the state need not disclose a prosecutor's statement, to a potential state's witness, that he "probably w[ould] make [the witness] an offer that [the witness] c[ould] not refuse" on the witness's pending criminal case. The District Court so held despite finding that District Attorney Rick Berry's statement "could have constituted a motive or inducement on the part of [co-defendant] Mark Ray for his testimony against Clinton Young." (Order, at 63.) Finally, the Court found that the "statement was not disclosed to the

defense.” (*Id.*) Contrary to the District Court’s ruling that this undisclosed statement was not a Constitutional violation, such insinuations that a witness will receive a benefit in exchange for his testimony fall squarely within *Brady*’s disclosure requirement. Not only did the state fail to inform Young or his counsel about the prosecutor’s statement, but it affirmatively presented false testimony that no such inducements were given. The state’s actions deprived Young of a fair trial. As the Supreme Court has recognized, “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959)).

The District Court’s Order also reflects a misunderstanding of the evidence. Abundant testimony, adduced at a multi-day evidentiary hearing, showed that the prosecutor in Young’s case offered a key prosecution witness numerous favorable plea deals, in addition to the promise of an “offer [the witness] c[ould] not refuse,” which were never disclosed to the defense. These offers culminated, before Young’s trial, in a plea agreement whereby the witness would avoid prosecution for murder and capital murder, and serve just five years in prison. The prosecutor also negotiated with a second key witness, promising him a thirty-year plea agreement that would allow him to escape a

possible life sentence for murder. None of this evidence was disclosed to Young or his counsel. The District Court failed to consider substantial testimony establishing these facts, or to weigh the credibility of the witnesses who testified at the evidentiary hearing. This Court should exercise its authority as the ultimate factfinder to determine that the state withheld information that bore heavily on the credibility of its critical witnesses against Young.

## II.

### THIS CASE ADDRESSES AN IMPORTANT QUESTION OF LAW

This case presents a prominent legal issue of recurring importance: whether *Brady* and its progeny require the disclosure of a prosecutor's *suggestion* to a potential state's witness that the witness will be rewarded for his testimony. Almost forty years ago this Court answered that question in the affirmative, holding that "suggestions and innuendos" to a witness that his testimony "could help his case" constitute impeaching material that the prosecution must disclose. *Burkhalter v. State*, 493 S.W. 2d 214, 216-18 (Tex. Crim. App. 1973). This Court reiterated that rule sixteen years later in *Duggan v. State*, saying: "[i]t makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal." 778 S.W. 2d 465, 468 (Tex. Crim. App. 1989).

These holdings were, and remain, consistent with federal law. As the United States Supreme Court has held, *Brady* extends not only to formal agreements or "deals" between prosecuting attorneys and witnesses, but also to suggestions by a prosecutor that

the witness will receive a benefit in exchange for his testimony. *Bagley*, 473 U.S. at 683. Such statements must be disclosed, because even an uncertain “possibility of a reward g[ives] [the witnesses] a direct, personal stake in [the defendant’s] conviction.” *Id.* It is just such a “possibility of a reward” that the District Court found existed here, but erroneously concluded did not rise to the level of *Brady*.

As this case exemplifies, lower courts need affirmation from this Court that Texas law continues to mirror Federal law regarding the application of *Brady* to suggestions of benefit from a prosecutor to a witness. Here, the District Court exhibited confusion on this point, mistakenly holding that a prosecutor’s statement that he would probably make a witness “an offer that he could not refuse” cannot violate *Brady* because it did not constitute an “express or implied plea agreement or understanding.” (Order at 63.) This Court should issue an opinion reiterating that *Brady*’s application does not hinge on an artificial distinction between “agreements” and other types of statements, but on whether the prosecutor’s statements imply that the witness will receive a reward in exchange for his testimony. *See Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

### III. PROCEDURAL HISTORY

This appeal arises from the District Court’s decision on Young’s Second Subsequent Application for Postconviction Writ of Habeas Corpus (“Second Subsequent Application”). Young was tried and convicted in early 2003 of the capital murder of

Samuel Petrey and Doyle Douglas. His trial, was jointly prosecuted by authorities from Midland and Harrison Counties, and constituted the first such joint prosecution in Texas history. Mark Ray, David Page, and Darnell McCoy were all with Young during the Douglas homicide, and Page was with Young during the Petrey homicide. Ray, Page, and McCoy testified at trial that Young shot Douglas twice and forced Ray to shoot him a third time. Page testified that Young shot Petrey. However, ballistics and other evidence cast doubt on the witnesses' accounts of both shootings.

Young filed the Second Subsequent Application in the 385th Judicial District of Midland County, Texas, on March 25, 2009. The application raised two claims: (1) The prosecution's failure to produce exculpatory evidence, and presentation of false claims, violated Young's constitutional rights; and (2) The prosecution's suppression of evidence concerning state's witness A.P. Merillat violated Young's constitutional rights. The first claim alleged that the state had violated Young's Due Process and Confrontation Clause rights by failing to inform the defense that it had offered favorable plea agreements to Ray and Page before they testified against Young. The claim further alleged that the state had knowingly presented perjured testimony that Ray and Page had not engaged in plea deals with the prosecutor. Young subsequently withdrew his second claim, regarding witness A.P. Merillat. (7 E.H. 62.)<sup>1</sup>

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<sup>1</sup> Citations to "E.H." refer to the transcript of the evidentiary hearing held in this case in the District Court on January 11-13, 2010 and July 22, 2010.

The District Court held a hearing on the Second Subsequent Application on January 11-13, 2010, and July 22, 2010 in Midland, Texas. On July 23, 2010, the District Court ordered both parties to file Proposed Findings of Fact and Conclusions of Law within sixty days after the court reporter filed the transcript of the hearing. (Applicant's Motion to Strike Untimely-Filed "State's Summary of the Testimony," Rocconi Decl., Ex. A.) The Court instructed the parties not to request extensions of time, and said "I'm not interested in hearing any arguments about the law." (7 E.H. 88.)<sup>2</sup>

The court reporter filed the transcript on August 20, 2010. (Applicant's Motion to Strike Untimely-Filed "State's Summary of the Testimony," Rocconi Decl., Ex. B (Docket Sheet).) The parties were required to file their Proposed Findings and Conclusions by October 19, 2010, sixty days later. Applicant filed and served his findings by that date. Respondent filed its proposed findings and conclusions over three weeks late, on November 9, 2010.

On May 18, 2011, the District Court issued its Order on Young's Second Subsequent Application. In its Order, the District Court determined as a matter of fact that:

- "[T]here was no express or implied plea agreement or understanding between Mark Ray and the State with respect to the charges pending against [Ray] in

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<sup>2</sup> Consistent with that statement, the District Court's Order on Young's Second Subsequent Application does not contain any citations to law.

Harrison County[, Texas,] at the time that Mark Ray testified against Clinton Young;”  
(Order at 63);

- “Rick Berry, former District Attorney of Harrison County, Texas and prosecutor for the State at the trial of Clinton Young, told Richard Hurlburt, attorney for Mark Ray, that ‘he probably would make [Ray] an offer that he could not refuse’ on [Ray’s pending criminal case] before the trial of Clinton Young;” (Order at 63);

- “Richard Hurlburt [Ray’s attorney] communicated [Berry’s] statement . . . to Mark Ray before the trial of Clinton Young;” (Order at 63);

- “[T]he statement by Rick Berry to Richard Hurlburt and communicated to Mark Ray could have constituted a motive or inducement on the part of Mark Ray for his testimony against Clinton Young;” (Order at 63);

- “[T]he statement was not disclosed to the defense.” (Order at 63);

- Nevertheless, “the testimony of Mark Ray at the trial of Clinton Young that ‘he has not received any kind of deal, any kind of promise, any kind of favor from any District Attorney’s Office or anyone in exchange for [his] testimony [at Young’s trial] (RR. 22 p.146) was true.” (Order at 63.)

- “[T]here was no express or implied plea agreement or understanding between David Page and the State with respect to the charges pending against [Page] in Midland County, Texas or Harrison County, Texas or elsewhere at the time that David Page testified against Clinton Young;” (Order at 123);

- “[T]here was no express or implied agreement or understanding between the State and David Page at the time that David Page testified against Clinton Young that the State would give Page any reward or leniency for his testimony against Clinton Young;” (Order at 124);

- “[T]he testimony of David Page at the trial of Clinton Young that there was ‘no kind of deal’ or ‘any kind of offer’ or plea agreement with the prosecution for his testimony against Clinton Young was true.” (Order at 124.)

#### **IV. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS**

The District Court’s Order rests on a fundamental misunderstanding of the law: that a prosecutor’s statement to a witness that the witness will “probably” receive a benefit if he testifies for the state is not an “express or implied plea agreement or understanding” that must be disclosed under *Brady*. That conclusion flies in the face of decades’ worth of state and federal case law, including multiple decisions of this Court. The Order further errs in assessing the materiality of the state’s failure to disclose its plea negotiations with two key witnesses, because the Order fails to evaluate the effect the withheld evidence would have had on the entire trial. “When [this Court’s] independent review of the record reveals that the trial judge’s findings and conclusions are not supported by the record, [this Court] may exercise [its] authority to make contrary or alternative findings and conclusions.” *Ex parte Chabot*, 300 S.W. 3d 768, 772 (Tex. Crim. App. 2009). This Court should exercise its discretion to reject the District Court’s

erroneous findings of fact and conclusions of law and substitute its own.

**A. The District Court Erroneously Held That *Brady* Does Not Extend To A Suggestion Of Benefit From A Prosecutor To A Potential State’s Witness**

The District Court found, as a factual matter, that Harrison County prosecutor Rick Berry told the attorney for Mark Ray, a key witness against Young, that Berry “probably would make [Ray] an offer that [Ray] could not refuse’ on [Ray’s pending criminal case] before the trial of Clinton Young.” (Order at 63.) The District Court further found that the statement was communicated to Ray, and that it “could have constituted a motive or inducement on [Ray’s] part . . . for his testimony against Clinton Young.” (Order at 63.)<sup>3</sup> Yet, the District Court determined that Berry’s statement did not fall within *Brady* because -- in the District Court’s view -- it was not an “express or implied agreement or understanding.” (*Id.*) Whether such promises are *Brady* material is a question of law that this Court should review *de novo*. *Spence v. State*, 325 S.W. 3d 646, 650 (Tex. Crim. App. 2010); *State v. Woodard*, --- S.W. 3d ---, 2011 WL 1261320 (Tex. Crim. App. 2011) (*de novo* standard applies in reviewing a lower court’s application of law to fact,

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<sup>3</sup> Berry’s statement that he intended to make Ray a deal he could not refuse was memorialized in an entry in the log of James Maxwell, an investigator who worked for Ray’s defense attorney. That same log entry also says that Berry told Ray’s attorney that the state “w[as] going to need [Ray] to testify for [the prosecution].” (2 E.H. 17.) The District Court did not mention or address the portion of the log entry regarding the prosecution’s need for Ray’s testimony. However, the fact that the District Court found one part of the log entry to be true suggests that it also found true Berry’s statement that he needed Ray to testify. The fact that Berry mentioned extending an offer to Ray concurrently with needing Ray’s testimony shows even more strongly that Berry’s offer established a *quid pro quo*.

where that application does not involve determinations of credibility or demeanor).

**1. A suggestion of leniency constitutes *Brady* material**

Abundant case law, from this Court and federal courts, establishes that Berry's suggestion that Ray would receive "an offer that [Ray] could not refuse" is a textbook example of *Brady* material that must be disclosed. In *Bagley*, the United States Supreme Court held that the prosecution must disclose any statement setting forth a "*possibility* of a reward," regardless of whether the statement constitutes an actual "promise." *Bagley*, 473 U.S. at 683 (emphasis added). Applying that rule, the Supreme Court held that the state was obligated to inform the defense that two government witnesses had been offered, but not promised, money for their testimony. *Bagley*, 473 U.S. at 683. "The fact that the [witnesses'] stake [in the defendant's conviction] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." *Id.*

Circuit courts have reached the same result. In the words of the Fifth Circuit, "the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary." *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008). Not only is "an express agreement between the prosecution and a witness . . . possible impeachment material that must be turned over under *Brady*," but "[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate." *Bell v. Bell*, 512 F.3d 223, 234

(6th Cir. 2008). As such, *Brady* requires the disclosure of even “unspoken” mutual understandings between the prosecution and a witness that the prosecutor will “intervene[]” in the witness’s pending criminal case, *id.*, or “give [the witness] a break on some pending criminal charge.” *Wisehart v. Davis*, 408 F.3d 321, 323 (7th Cir. 2005). “A deal is a deal - explicit or tacit.” *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009).

“Tacit” agreements do not require promises, or even verbal confirmation. Statements that a witness “might” benefit from his testimony are sufficient. In *Tassin*, for example, the Fifth Circuit held that *Brady* was triggered where the trial judge told a prosecution witness that he “typically gave defendants in [the witness’s] position a fifteen-to-thirty-year sentence, but that he might shorten that sentence to ten years if [the witness] testified consistently [with her prior statements].” *Tassin*, 517 F.3d at 779. The judge “emphasiz[ed] that nothing was guaranteed.” *Id.* at 779. Similarly, in *United States v. Shaffer*, the Ninth Circuit held that a “tacit agreement” was “impli[ed]” by the government’s failure to disclose that it knew that a government witness had acquired assets through drug profiteering, but failed to pursue asset forfeiture proceedings against the witness. *United States v. Shaffer*, 789 F.2d 682, 689 (9th Cir. 1986). Berry’s statement that he “probably” would make a Ray a favorable offer fits squarely within these holdings.

**2. The District Court erroneously concluded that Berry’s offer did not create an “agreement or understanding”**

The District Court apparently concluded that Berry’s statement that he “probably would make [Ray] an offer that he could not refuse” did not fall within *Brady* because it did not give rise to an “express or implied plea agreement or understanding.”<sup>4</sup> (Order, at 63.) That ruling contradicts decades of clear and consistent case law. In *Tassin*, the Fifth Circuit held that the judge’s statement to the witness that he “might” shorten her sentence if she testified consistently with her prior statement gave rise to just such an “understanding,” even though no “promise” was made and “nothing was guaranteed.” *Tassin*, 517 F.3d at 779. In *Burkhalter v. State*, this Court held that the prosecutor had an “understanding” with a potential prosecution witness where the only statement the prosecutor made to the witness was that “if he testified it could help him.” 493 S.W. 2d at 216.<sup>5</sup> This Court rejected the argument that such an “understanding” need not be disclosed simply because there was no “direct promise that [the witness] would not be prosecuted if he testified for the state.” *Id.* The same result was reached in *Duggan v. State*, in which this Court concluded that a prosecutor’s statement to accomplices that “he

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<sup>4</sup> The evidence presented at the evidentiary hearing established that Ray also had an express agreement with the prosecution before Young’s trial that he would receive a five-year plea deal in exchange for his testimony. However, the Court unreasonably failed to credit this testimony, and did not make a factual finding to that effect.

<sup>5</sup> Although in *Burkhalter* the prosecutor told the witness’s lawyer that it would not prosecute the witness if he testified without claiming immunity, this understanding was not communicated to the witness himself. *Id.* at 216.

would consider leniency in exchange for their testimony” gave rise to an “understanding” that the state had to disclose. 778 S.W. 2d at 467. This Court held that the lower court erred by “scann[ing] the record for a ‘formal agreement’ or an agreement ‘for any specific recommendation by the district attorney in exchange for [the witnesses] testimony.’” *Id.* “It makes no difference,” this Court reasoned, “whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal.” *Id.* The test is not whether any formal agreement exists, but whether “the evidence . . . ‘tends to confirm rather than refute the existence of some understanding for leniency.’” *Id.*

Here, Berry’s statement that he would “probably” make Ray “an offer he could not refuse” clearly “confirm[ed] . . . the existence of some understanding for leniency.” *Duggan*, 778 S.W. 2d at 467. Indeed, Berry’s use of the word “probably” more strongly promised a benefit than the judge’s statement in *Tassin* that he “might” reduce the witness’s sentence, the *Burkhalter* prosecutor’s statement that the witness’s testimony “could help him,” or the *Duggan* prosecutor’s statement that “he would consider leniency in exchange for [the witness’s] testimony.” Moreover, Berry’s statement that the deal would be one Ray “could not refuse” even more strongly indicated an inducement than the statements in *Burkhalter* and *Duggan*, because it suggested Ray would receive *extraordinary* leniency. The fact that no specific terms were offered or guaranteed is immaterial: “A promise is unnecessary. Where, as here, the witness’s credibility ‘was . .

. an important issue in the case . . . evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.” *Tassin*, 517 F.3d at 778 (quoting *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).) Under *Bagley*, *Tassin*, *Burkhalter*, and *Duggan*, among other cases, Berry’s offer established an understanding because it told Ray he would likely benefit from his testimony.<sup>6</sup>

**3. The District Court erroneously concluded that anything short of an “agreement or understanding” need not be disclosed under *Brady*.**

Assuming, *arguendo*, that Berry’s statement did not rise to the level of an “agreement or understanding,” the District Court erred by concluding that anything short of an “agreement or understanding” is not covered by *Brady*’s disclosure rule.

As this Court has confirmed, *Brady* extends not only to agreements and understandings, but also to “suggestions and innuendos” to a witness that his testimony “could help his case.” *Burkhalter*, 493 S.W. 2d at 216-18. In *Duggan*, this Court cautioned against drawing an artificial line between formal and informal discussions: “[i]t [is] judicially imprudent to attempt to distinguish express agreements between the State and a testifying accomplice from those agreements which are merely implied,

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<sup>6</sup> In addition, by crediting the part of Maxwell’s log entry containing the statement regarding an “offer that [Ray] could not refuse,” (Order at 63) the District Court implicitly also credited Maxwell’s notation that Berry had said he needed Ray to testify against Young.

suggested, insinuated or inferred.” 778 S.W. 2d at 468.<sup>7</sup> Indeed, in *Giglio* the United States Supreme Court held that a prosecutor’s statement to a witness that he “would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the ‘good judgment and conscience of the Government’ as to whether he would be prosecuted” rose to the level of *Brady* evidence because it “contain[ed] at least an *implication* that the Government would reward the cooperation of the witness.” 405 U.S. at 153 n.4 (emphasis added). Berry’s statement that he would “probably” make Ray a favorable offer created more than an “implication” of reward.

The Eighth Circuit’s decision in *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989), is instructive. There, the Eighth Circuit held that “[t]he fact that there was no agreement [between the prosecutor and prosecution witness] . . . is not determinative of whether the prosecution’s actions constituted a *Brady* violation requiring reversal under the *Bagley* standard.” *Id.* at 582. Thus, the court held, *Brady* required the state to disclose the fact that a key prosecution witness was scheduled to appear, just a few days after his testimony, at a hearing on his application for sentence commutation before a parole board,

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<sup>7</sup> For this reason, it was incorrect for the District Court to rely on Hurlburt’s testimony that he did not view Berry’s statement that he would “probably . . . make [Ray] an offer that [Ray] could not refuse” as a “promise.” (Order at 65.) Whether or not Hurlburt would label Berry’s statement as a “promise” is irrelevant to the fact that the statement indicated an intent to confer a benefit on Ray. *See, e.g., Bagley*, 473 U.S. at 683 (absence of “promise or binding contract” did not remove the state’s duty to disclose its suggestion that witnesses would benefit in exchange for their testimony); *Tassin*, 517 F.3d at 778 (“A promise is unnecessary.”)

of which a prosecutor at the defendant's trial was a member. *Id.* The court determined that, "[e]ven absent an express or implied agreement, 'the fact of [the witness's] impending commutation hearing was material in the *Bagley* sense.'" *Id.* at 582.

Because Berry's statement that he would "probably" make Ray an offer Ray "could not refuse" "contain[ed] at least an implication that the Government would reward the cooperation of the witness," *Giglio*, 405 U.S. at 153 n.4, the District Court should have concluded that the state was required to disclose it under *Brady*.

**B. The District Court Applied The Wrong Standard In Evaluating Materiality**

**1. The District Court failed to consider the impact that the evidence, if disclosed, would have had on the totality of the trial**

The District Court further erred in evaluating the materiality of the state's failure to disclose its plea negotiations and agreements with Ray and Page. (Order at 100-102, 141.) The District Court applied an unreasonably constrained standard to determine the "prejudice and harm" of the nondisclosure. Rather than examining the effect that disclosure would have had on the trial, as it should have done, the District Court simply set forth the prosecution's evidence that Young was guilty after purporting to "eliminat[e] the testimony" of Ray and Page. (*Id.*)<sup>8</sup> That approach was contrary to law.

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<sup>8</sup> The District Court's discussion of what evidence would have supported Young's guilt after "eliminating" Ray's and Page's testimony is invalid even on its own terms: in the portion of its Order that purports to discuss the prosecution evidence that would remain after "eliminating" Page's testimony, the District Court continues to rely on Page's testimony to show that Young would still be found guilty. (Order at 100-102.)

To determine whether withheld evidence is material, courts must “examine the alleged error in the context of the entire record.” *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App.1992). In conducting this analysis, “the reviewing court may consider directly any adverse effect that the prosecutor’s [nondisclosure] might have had on the preparation or presentation of the defendant’s case” and “should assess the possibility that such effect might have occurred in light of the totality of the circumstances[.]” *Taylor v. State*, 93 S.W.3d 487, 501 (Tex.App.-Texarkana 2002) (quoting *Bagley*, 473 U.S. at 683). The District Court failed to do that here.

Had the District Court considered the effect that the nondisclosure of the deals and incentives offered to either Ray or Page had on trial counsel’s preparation, strategy, and presentation of Young’s case, it would have found the nondisclosure “undermine[d] confidence in the outcome” of the trial. *Thomas*, 841 S.W.2d at 404. Young’s trial counsel, Ian Cantacuzene, testified at the evidentiary hearing that disclosure of any incentives or deals between the state and Ray or Page would have “affected how the individual voir dire was conducted.” (2 E.H. 195.) He explained that “[m]ore emphasis could have been placed on trying to pick a jury that was more geared towards people who might be more skeptical of the accomplice witness [.]” (*Id.*)<sup>9</sup> Had Young’s counsel

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<sup>9</sup> Cantacuzene explained that he had retained a “jury consultant expert.” (2 E.H. 196.) Such an expert could have assisted trial counsel more effectively had the defense been informed of an incentive or deal offered to Ray or Page in exchange for their testimony. (*Id.*)

chosen a different jury based on knowledge of the plea deals, the verdict might well have been different: Cantacuzéne testified at a hearing on Young's motion for a new trial that an alternate juror told him, after being dismissed from the jury, that she "would have hung out for murder," instead of voting for capital murder. (38 R.R. 238.) That alternate could well have been on the jury, had Young's counsel chosen differently because of the plea deals.

Young's co-trial counsel, Paul Williams, echoed Cantacuzéne's testimony that evidence of any deals or incentives to Ray and Page would have been essential during voir dire. Williams testified that, had he known of the existence of any deals or incentives offered to Ray or Page, he "would have voir dired the potential jurors" about "how they would feel if the State of Texas had paid, not with money, but with freedom and/or a person's life, how they would feel about the credibility of that witness." (2 E.H. 109.) The "difficulty of reconstructing in a post-trial proceeding" how the composition of the jury would have been different "had the defense not been misled by the prosecutor's" failure to disclose weighs in favor of finding prejudice at this point. *Bagley*, 473 U.S. at 683.

Beyond voir dire, evidence that Ray or Page received incentives or deals to testify would have fundamentally altered trial counsel's overall approach. Evidence that the state offered deals to prosecution witnesses "would have taken a front seat in the . . . closing argument on the first stage of the trial." (2 E.H. 197.) Trial counsel explained

that such evidence is used on “one witness to impeach another witness or to set up your themes.” (2 E.H. 197.) The existence of any plea agreements would also have enabled trial counsel to cast doubt on the credibility of multiple prosecution witnesses.

Prosecution witness Darnell McCoy, for example, was with Young, Page and Ray in the road-trip leading to the double-homicide, but never faced charges stemming from the Douglas and Petrey murders. Had the defense known of Ray’s and Page’s plea discussions, it might have drawn an inference that McCoy was also offered a plea deal. Exposure of the Ray and Page deals would have cast doubt on the testimony of guilt phase witness Patrick Brook. Brook, who testified that Young said he had killed Douglas, (21 R.R. 246-54), faced criminal charges of his own and had outstanding warrants at the time of the Douglas murder. (*See* 21 R.R. 234, 270.) Indeed, Midland County District Attorney Joe Black admitted offering Brook a twenty-one year sentence in exchange for Brook’s testimony. (2 S.R.R. 130.)

Exposing plea agreements with Ray and Page would have led the jury to suspect that McCoy also bargained with the State in exchange for his testimony. Trial counsel could have fronted the theme that all of the accomplices were lying to save themselves, and the State was complicit by granting them favors in exchange for their testimony. As Cantacuzene explained, “if you can’t lie to save your life, [in] what circumstances could you lie about something?” (2 E.H. 197.) Such a theme would have “potentially changed what strikes [trial counsel] used on [its] jury selection, and . . . would have made a big

difference in this case.” (2. E.H. 197-98.) The district court’s failure to consider, much less rule out, prejudice stemming from the totality of the trial preparation renders its findings on prejudice erroneous.<sup>10</sup>

## **2. The District Court Improperly Concluded That the Jury Instructions Cured Any Prejudice from the Withholding of the Evidence**

The District Court further erred in concluding that disclosure of the plea offers was not material because the jury was informed that Ray and Page were “corrupt witness[es],” and told to “view [their] testimony with skepticism.” (Order at 105, 144.) Apparently, the District Court believed that because the jury was told Ray and Page were “corrupt witness[es],” any additional impeachment would have been superfluous. That is not the law. On the contrary, “the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner [does not turn] what was otherwise a tainted trial into a fair one.” *Napue v. Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959). In *Reutter*, the Eighth Circuit rejected the state’s argument that evidence that a witness was seeking parole from the prosecution was immaterial “because [the witness] was a convicted felon [and thus] his credibility was [already] suspect.” *Reutter*, 888 F.2d at 581. Regardless of the witness’s

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<sup>10</sup> Ray’s plea deal would have been especially significant to the jury because at the time of Young’s trial Ray was the only other person, besides Young, facing charges of capital murder. Ray therefore had the most incentive to shift blame to Young. Yet, the prosecution and Ray’s attorney, Hurlburt, permitted Ray to insinuate at Young’s trial, no fewer than three times, that he -- Ray -- was facing trial and the death penalty. (22 R.R. 147-48, 206, 240.)

prior conviction, the court reasoned, the additional evidence would have made cross-examination of the witness “significantly more effective.” *Id.* The Ninth Circuit reached a similar result in *Silva v. Brown*, holding that “[t]he failure of a defendant’s efforts to impeach a witness does not prove that additional impeachment would have been ineffectual, or merely cumulative, any more than it supports the opposite conclusion.” *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir. 2005). Instead, the fact that withheld evidence “would have provided the defense with a new and different ground of impeachment” weighs strongly in favor of finding it material. *Id.* (quoting *Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002).) *See also Kyles v. Whitley*, 514 U.S. 419, 443 n.14 (1995) (though the evidence at trial “provided [the defense with] opportunities for chipping away on cross-examination,” additional impeachment would have been material where the existing evidence did not allow “for the assault that was warranted.”)

Here, evidence that Ray and Page had been offered plea agreements, and that Ray had accepted one, would have provided the defense a whole new avenue of attack on their credibility notwithstanding the jury’s instruction to view their testimony with skepticism because they were accomplices. If anything, the court’s instruction to the jury to be wary of their testimony would have *highlighted* the need to consider doubts about their credibility, based upon the existence of any plea agreements.

**C. The District Court Failed To Consider The Prejudicial Effect Of The Nondisclosure At The Punishment Phase**

*Brady* violations may be material to both the guilt and punishment portions of a

trial. *East v. Johnson*, 123 F.3d 235 (5th Cir. 1997) (failure to disclose the criminal record of a witness violated *Brady* where the witness's testimony was critically relevant to the State's case at the punishment phase). Absent from the District Court's prejudice analysis, however, is the impact that the disclosure of any alleged plea agreements would have had on the punishment phase of Young's trial.

The jury was required to answer at the punishment phase whether Young actually killed Douglas or Petrey. *See* TEX. CODE. CRIM. PROC., Art. 37.071(b)(2). Moreover, the jury was obligated to "consider all evidence admitted at the guilt or innocence stage," including the "circumstances of the offense[.]" TEX. CODE. CRIM. PROC. ART. 37.071(d)(1). Ray and Page's guilt phase testimony, combined with that of other witnesses whose testimony would have been thrown into question by evidence of Ray's and Page's plea agreements, provided essential evidence that Young was the actual shooter. These witnesses painted a picture of Young as the ringleader of their group, who allegedly forced Ray, Page and McCoy to comply with his demands while he killed Douglas and Petrey for no apparent reason. Yet other evidence suggested a different group dynamic. Young was only eighteen while Page was twenty-one, McCoy twenty-three or twenty-four, and Ray nineteen. (21 RR 143 (McCoy).) As the youngest member of the group, Young was considered an outsider. (22 R.R. 154 (Ray).) Had the jury been told that Ray and Page had been offered plea agreements, it could have discredited their testimony and credited contrary evidence that the accomplices blamed Young because he

had the lowest status in their group.

Ray offered particularly harmful evidence against Young relevant to the punishment phase of his trial. Ray repeatedly depicted Young as the murderer and mastermind behind their journey. (*See, e. g.*, 22 R.R. 89-126.) Ray testified that Young shot victim Douglas in the head twice after saying, “Doyle, I need your car,” and then violently ordered the others to place Douglas’s body in the trunk. (22 R.R. 89-90, 93-98.) Ray also told Young’s jury that Young forced him to kneel down and shoot Douglas in the head, explaining, “I was in a hostage situation.” (22 R.R. 127, 177, *see also* 22 R.R. 186 (Ray confirming that he felt he, McCoy, and Page were “hostages” of Young).) The District Court wholly failed to assess how the punishment phase of Young’s trial would have been affected had Ray’s testimony been discredited by evidence of a plea agreement.

The District Court also failed to acknowledge that Page’s testimony painted Young in an extremely aggravating light, which bore heavily on the jury’s deliberations at the punishment phase. Page testified that Young shot Douglas in the head after saying he needed Douglas’s car. (26 R.R. 158.) According to Page, Young began waving his gun and threatening Page, Ray and McCoy, saying “[you all] are in it just as much as I am.” (26 R.R. 162-63.) He supported Ray’s testimony that Young forced Ray to shoot Douglas in the head. (26 R.R. 176.) Page also provided the only evidence that Young was

responsible for shooting Petrey. (26 R.R. 248.)<sup>11</sup>

The District Court unreasonably ignored the fact that the jury appeared to have doubts about Young's culpability in at least one of the shootings. During deliberations, the jury asked the Court whether, to answer Special Issue Number 2 affirmatively, Young must have caused the death or intended to kill "both or at least one" of the victims. (36 R.R. 135.) The only reasonable inference from that question is that the jury questioned whether Young caused the death or intended to kill one of the victims. Had the jury been provided with evidence that an essential witness to both murders, and the only witness to one murder, had a strong incentive to give favorable testimony to the State, the jury likely would have decided Young was not responsible for at least one of the murders. There is at least a reasonable probability that, had the jury made such a finding, it would not have answered Special Issue Number 2 affirmatively and would not have sentenced Young to death.<sup>12</sup>

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<sup>11</sup> As it did with respect to the guilt phase, the District Court failed to consider that the withheld impeachment evidence against Page was particularly material given that the trial court excluded evidence that Page had failed a polygraph exam when he was asked questions about who killed Petrey. (27 R.R. 237-243.)

<sup>12</sup> If the jury had heard evidence of the deals offered to Ray and Page, it is reasonably probable they would have believed, as Juror Michael Byrne did, "that Mr. Young was being treated too harshly" in comparison, and that "Mr. Young was made the scapegoat for crimes that the others were also involved in." (Habeas Pet. Ex. 101, Decl. of Michael Duane Byre, ¶ 3.)

V.  
**THE DISTRICT COURT MISAPPREHENDED THE FACTS**

The District Court also erred in its factual findings. It issued just eight such findings, which addressed the ultimate issues of whether Ray and Page had “agreement[s] or understanding[s]” with the state and whether they testified falsely that they had none. The District Court did not make any express findings as to most of the specific factual issues litigated at the evidentiary hearing, including whether prosecutor Rick Berry offered Mark Ray a series of plea deals ranging from sixty years to five years, whether Berry promised Ray a five-year deal during a lunch that occurred during Young’s trial, whether prosecution investigator J.D. Luckie affirmed the viability of Ray’s plea deal the morning before Ray testified, and whether prosecutors offered to “help” David Page in connection with his criminal case. Nor did the District Court make any findings regarding witnesses’ credibility.<sup>13</sup>

“In post-conviction review of habeas corpus applications, [the Court of Criminal Appeals] is the ultimate factfinder.” *Chabot*, 300 S.W. 3d at 772. It is only appropriate for this Court to accept the convicting court’s findings of fact and conclusions of law to the extent those findings and conclusions are supported by the record. *Id.* Where the

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<sup>13</sup> Young does not contest the District Court’s factual findings that Berry told Hurlburt “that ‘he probably would make [Ray] an offer that he could not refuse” (Order at 63), that this statement was communicated to Ray, or that the statement “could have constituted a motive or inducement on the part of Mark Ray for his testimony against Clinton Young,” or that “the statement was not disclosed to the defense.” (Order at 63.)

convicting court fails to make factual findings to support its conclusions, this Court should only imply supporting factual findings to the extent the record supports such findings. *State v. Ross*, 32 S.W. 3d 853, 855 (Tex. Crim. App. 2000). “When [this Court’s] independent review of the record reveals that the trial judge’s findings and conclusions are not supported by the record, [this Court] may exercise [its] authority to make contrary or alternative findings and conclusions.” *Chabot*, 300 S.W. 3d at 772.

Here, the convicting court failed to make specific factual findings to support its conclusions. The record does not support the implied findings necessary to sustain the District Court’s determination that Ray and Page had no express or implied plea agreements or understandings with the state. This Court should thus exercise its authority to reject those findings, and adopt the alternative findings of fact set forth in Young’s previously-filed Proposed Findings of Fact and Conclusions of law.

**A. Unsupported Findings As To Mark Ray**

**1. Apparent finding that Harrison County prosecutors did not offer plea deals to Mark Ray**

The District Court apparently concluded that Harrison County prosecutors Rick Berry and/or Joe Black did not offer Ray the plea deals to which Ray testified at the evidentiary hearing. Those deals ranged from 60 years down to 5 years. The record clearly shows that those deals were made.

Ray testified that he engaged in extensive plea negotiations with prosecutor Berry and his own attorney, Hurlburt, between January 2002 and Young’s trial in March 2003.

Ray testified that those negotiations culminated, before Young's trial, in an agreement that Ray would receive a five-year prison sentence in exchange for his testimony. As of the hearing, Ray had been released from prison and had no incentive to testify falsely.

In or about December 2001, Ray testified, Hurlburt communicated an offer from Berry that Ray could enter a plea deal for sixty years to aggravated first degree murder. (2 E.H. 138-39.) Ray did not accept that offer. (2 E.H. 138-39.) Soon thereafter, Hurlburt visited Ray again in prison and told Ray that Berry had offered Ray a plea deal for between forty and forty-five years. (2 E.H. 139-40, 161.) Ray did not accept that plea offer either. (2 E.H. 140.) Berry then offered Hurlburt a thirty-year plea deal, which Hurlburt conveyed to Ray. (2 E.H. 140.) Ray did not accept that plea offer. (2 E.H. 140.)

Ray further testified that, at some point before March 2003, he met with Berry and Hurlburt at the Harrison County Jail. (2 E.H. 141.) At that meeting, Berry told Ray that he did not want to prosecute Ray, and that Young was the person he wanted to prosecute. (2 E.H. 141.) Berry told Ray that Ray could receive a twenty-year sentence by pleading guilty to kidnapping Doyle Douglas. (2 E.H. 141.) Ray did not accept that offer. (2 E.H. 141.)

Ray testified that he wrote a letter to Berry on October 29, 2002, asking Berry to "come up here and discuss my case with me," and saying "I am ready to plea bargain with you." (App.'s Ex. 5 at 2.) The letter was presented as an exhibit at the evidentiary hearing. (*Id.*) Ray testified that wrote this letter because he hoped to obtain a plea

agreement from Berry in writing. (2 E.H. 186.) The fact that Ray believed Berry would be willing to come to the jail and discuss a plea agreement directly with Ray strongly suggests that the two men had already engaged in plea discussions. This letter was not provided to Young's defense lawyers before Young's trial, nor was it in the prosecutor's file.

Shortly after Ray sent the letter to Berry, Ray testified, Hurlburt visited him in jail. (2 E.H. 143.) Hurlburt told him that Hurlburt "had gotten chewed out by Rick Berry [because of Ray's letter], and that pretty much that's not the way they do things in Harrison County, [and] that if I needed to make contact with Rick Berry for any reason, I need to go through my lawyer and not write a letter directly to him, that he didn't appreciate it very much." (2 E.H. 144.) Ray's testimony that Berry did not want to deal directly with him is consistent with Ray's testimony that most of the plea offers from Berry were communicated through Hurlburt. Berry's dismay at receiving a letter from Ray, and Berry's reluctance to deal directly with Ray, further suggests that Berry was attempting to avoid making a written record of his plea negotiations with Ray.

During the same visit, Ray testified, Hurlburt told Ray that Berry had offered him a ten year sentence if he would plead guilty to kidnapping. (2 E.H. 144.) Ray did not accept that plea offer. (2 E.H. 144.) Hurlburt then visited Ray one more time, and said that Berry had offered to give Ray a five-year plea deal to non-aggravated kidnapping in exchange for Ray's testimony at Young's trial, and that Berry did not want to take Ray's

case to trial and was not concerned with obtaining a conviction of Ray. (2 E.H. 144-45.) Ray was told that the five-year plea deal could not be memorialized in writing until after Young's trial, because to do so before the trial would jeopardize the State's case against Young. (2 E.H. 145; App.'s Ex. 2 at ¶¶ 11, 14 (Ray Declaration).) Ray accepted Berry's offer of a five-year plea deal to non-aggravated kidnapping. (2 E.H. 145-46.)

Ray's account of these offers was corroborated by testimony from his mother, Caroline Ray. Mrs. Ray testified that Mark Ray mentioned the offers to her multiple times before Young's trial. Carolyn Ray, like her son, had no incentive to testify falsely on this point. While Ray was imprisoned in the Harrison County Jail, Carolyn testified, she and her husband, Jimmy Ray, visited Ray approximately every two weeks. (5 E.H. 18.) Carolyn Ray also received letters written by Ray and spoke with Ray by telephone. (5 E.H. 23, 26, 27.) Ray told his mother two or three times, before Young's trial, not to worry because Ray was going to enter a plea agreement for five years and get credit for time served. (2 E.H. 146; 5 E.H. 23-24, 26-32.) Ray first told his mother about the five-year deal before March 2002, and reiterated his claim that he would receive a five-year deal after March 2002. (2 E.H. 146; 5 E.H. 31.)

Carolyn Ray testified at one point that she did not hear about Ray's five-year plea deal until Ray's attorney told her about it during a lunch that occurred during Young's trial (5 E.H. 19.) However, she later reconciled that statement with her testimony that Ray had previously told her about the offers by saying that the lunch was the first time she

had heard about the plea agreement from an attorney, rather than from her son. (5 E.H. 23-25.) Although the District Court set forth Carolyn Ray's inconsistent testimony in its Order, (Order at 74-75), it did not set forth her testimony reconciling the two statements.

Mark Ray's testimony that he received plea offers before Young's trial was further corroborated by testimony from James Maxwell, an investigator for Ray's defense attorney Hurlburt. Maxwell, like Mark Ray and Caroline Ray, had no incentive to testify falsely. Maxwell testified that he ceased all work on Ray's case less than two months after being appointed, because Hurlburt told him to stop. (1 E.H. 16-17.) A notation in Maxwell's investigation log, which Maxwell identified, said that Hurlburt contacted Maxwell on January 29, 2002 and told him to stop investigating Ray's case because "the Harrison County District Attorney's Office had told [Hurlburt] that they wanted to make [Ray] a deal he could not refuse and . . . were going to need Mark to testify for them." (2 E.H. 15-17; App.'s Ex. 1, at 3.) Hurlburt testified that Maxwell's log entry was "a true statement." (3 E.H. 74.)

Maxwell testified that he performed no further work on Ray's case after Hurlburt told him to stop on January 29, 2002. (2 E.H. 17; 3 E.H. 109.) According to Maxwell, the two months he spent on the case was atypically short for a murder case. (2 E.H. 18.) In a typical murder case, Maxwell would have conducted a more in-depth investigation. (2 E.H. 17-18.) Maxwell's log shows that Maxwell conducted only a handful of interviews on Ray's case: he interviewed Ray and his parents, McCoy, and Ray's sister,

