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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

Trial Court No. 2007-1625-C2
Court of Appeals No. 10-15-00032-CR

* * * *

DAMON LAVELLE ASBERRY
Appellant

v.

THE STATE OF TEXAS,
Appellee

* * * *

Appealed from the Court of Appeals for the Tenth Judicial District of Texas
Sitting at Waco

* * * *

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW ORAL ARGUMENT REQUESTED

December 18, 2018

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The Honorable Matt Johnson 54h District Court
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STATEMENT OF THE CASE

Appellant was charged by indictment with the felony offense of Murder. He entered a plea of not guilty and a jury trial commenced on June 10, 2008, in the 54th District Court of McLennan, Texas, the Honorable Matt Johnson, presiding. The jury returned a verdict of guilty on June 13, 2008. Punishment was subsequently assessed at Life in the Texas Department of Criminal Justice, Institutional Division. No fine was assessed.

Appellant took his appeal to the Tenth Court of Appeals, which affirmed his conviction and sentence in an opinion delivered on November 4, 2009. *Asberry v. State*, No. 10-08-00237-CR (Tex. App. - Waco, Nov. 4, 2009), *aff'd* No. PD-0257-10 (Tex. Crim. App. 2011)

PROCEDURAL HISTORY

Following the affirmance of his conviction, appellant filed a Motion for Forensic DNA Testing. (C.R. 4-23) The motion was denied by a written order from the trial court, which was issued on January 15, 2015 (C.R. 40-43) Appellant then timely filed Notice of Appeal (C.R.41), and took his appeal to the Court of Appeals for the Tenth Judicial District, sitting at Waco, Texas. In a

memorandum opinion, dated October 8, 2015, the court affirmed the judgment and order of the trial court. Appellant filed a Petition for Discretionary Review, which was granted on December 11, 2015. On December 7, 2016, the Court of Criminal Appeals issued an opinion remanding the case to this Court for reconsideration. *Asberry v. State*, No. PD-1409-15 (Tex. Crim. App., 12/7/2016). On remand, the Court again issued an opinion denying relief, dated, October 18, 2017.

Appellant now timely files this petition for discretionary review.

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals apply the proper standard of review when it failed to consider the conflict between the new test results and the results presented at trial, as well as the defensive evidence presented by appellant, when deciding whether the new test results cast doubt on the validity of the conviction?

GROUNDS FOR REVIEW

The Court of Appeals decision is in conflict with the decision in *Glover v. State*, 445 S.W.3d 858 (Tex. App. - Houston [1st Dist.], 2014), in failing to focus on the conflict between the new test results and the results presented at trial, in deciding whether the new results cast doubt on the conviction.

REASONS FOR REVIEW

REASON FOR REVIEW NUMBER ONE

The Court of Appeals erred in failing to consider the conflict between the new test results and the results presented at trial, as well as the defensive evidence presented by appellant, when deciding whether the new test results cast doubt on the validity of the conviction.

The ultimate issue in this case is what impact new DNA test results would have had on Appellant's case. The DNA evidence came from a car the State claimed had been used to transport the victim. During the investigation, the car was examined for evidence, and a blood stain was found on a seat cushion. (6 R.R. 108-10) That area was swabbed, and the swab was originally submitted in 2003 to the Southwest Institute of Forensic Sciences. ("SWIFS") (6 R.R. 110) The initial analyst who tested the evidence was Stacy McDonald. She testified at trial that presumptive tests for blood were positive on the car seat, cushion, seat belt and a shirt. (7 R.R. 60, 69)

The initial testing was done in July 2003. (7 R.R. 69) There was a second round of testing in October 2003, which was performed by Timothy Sliter, who was also with SWIFS. (7 R.R. 70) The second round of testing produced a partial profile; McDonald testified about those results, and stated that 5 of the 8 markers found matched the victim, as well as Appellant and an unknown male. As a

result, Appellant could not be excluded as a contributor to the sample from the seat cushion. (7 R.R. 83) She also testified that appellant could not be excluded as a contributor to a sample from a shirt that was in the back of the car. (7 R.R. 83-84)

The evidence was tested again in 2006, this time by the Texas Department of Public Safety Crime lab ("TDPS").[1] The car was still in storage, and swabs were taken from the seat cushions. Leslie Johnson, did the testing at TDPS and testified at trial that DNA was recovered from the seat cushion, but it did not produce a profile. (7 R.R. 18-28) That testing was done in May 2006. *Id.*

In July of 2013, Appellant filed a Motion for Forensic DNA testing pursuant to Chapter 64 of Texas Code of Criminal Procedure. (Ch 64 C.R. 4-23)[2] Appellant sought an order to test the evidence that had previously been tested. The court ultimately granted the motion, and ordered the evidence to be tested by the TDPS crime lab. (Ch 64 C.R. 26) Initially, there was confusion over what had been tested, with the Department submitting a letter to the court indicating the evidence had already been tested using the same test that would be used if the evidence was re- tested. (Ch. 64 C.R. 28-29) However, it was subsequently determined that different items were tested; SWIFS tested cuttings that were taken from the seat cushions, whereas TDPS had tested swabs from the

[1] No arrests had been made at this point in the investigation. This testing was done after the case was re-opened.

cushions. (Ch. 64 2 R.R. 12-13)

When the evidence was re-tested, no results were obtained for one of the cuttings from the seat cushion or the two swabs from the shirt. However, results were obtained for the other cutting from the seat cushion, which was the same item that had produced the result testified to at trial. Whereas the initial testing could not exclude either appellant or the victim, the new test excluded both. (Ch. 64 2 R.R. 15-16) Specifically, TDPS was able to obtain a mixture that was consistent with at least three contributors, with both appellant and the victim being excluded. According to Erin Casmus, the analyst from TDPS, she was able to obtain a "fuller profile", using a newer technique for extraction. (Ch. 64 2 R.R. 17)

Despite the difference in results, the State argued the new results would not have altered the verdict. The trial court agreed, and entered Findings of Fact. In those findings, the Court found that "The State's evidence aside from the DNA evidence presented at trial was strong." The court also found that the testimony of two jailhouse witnesses that was presented at trial was credible. The court concluded by finding:

> that had the results been known at the time of trial, there is NOT a reasonable probability of innocence, and that it is NOT more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence (CR 41)

Law and Standard of Review

Post-conviction DNA testing is governed by Chapter 64 of the Texas Code of Criminal Procedure. Art. 64.03 establish the requirements for ordering the testing of evidence, and require the Court to order testing when a defendant establishes by a "preponderance of the evidence ...that the person would not have been convicted if exculpatory results had been obtained through DNA testing."

Once testing is Ordered and the results are in, the trial court must make an additional finding. The court must hold a hearing and "make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." The determination of whether the defendant has shown a reasonable probability that the verdict would have been different had the evidence been available at trial is reviewed *de novo*. *Routier v. State*, 273 S.W.3d 241 (Tex. Crim. App. 2008)

The proper inquiry is not whether appellant is actually innocent. Instead, the issue is whether the new results "cast doubt" upon the validity of the conviction. *Glover v. State*, 445 S.W.3d 858 (Tex. App. - Houston [1st Dist.], 2014) The issue is whether the new results "create a probability of innocence sufficient to undermine confidence in the outcome of the trial. *Fuentes v. State*, 128 S.W.3d 786 (Tex. App. - Amarillo, 2004).

Failure to consider fact that new results conflict with results presented at trial

While the Court of Appeals recited the correct standard, Appellant suggests the Court failed to properly apply it. The most glaring failure is the failure to recognize the fact that the current results are in conflict with the results presented at trial. *Glover, supra.* The Court downplayed the significance of the new results by focusing on the low probabilities, and characterizing the prior results as not conclusively proving that either the victim or appellant was the source of the DNA. (opinion, pg. 6) Even though the odds were low, Appellant suggests it is significant that the prior results could be used to place the bleeding victim in appellant's car, and the new results could not.[2] As a result, the State could not place the victim in the car after he had been stabbed. Appellant suggests that is significant, since it is the only piece of physical evidence that tied appellant to the offense.

Failure to consider defensive evidence presented at trial

Appellant suggests the Court of Appeals focused on the evidence which supported a finding of guilt, and ignored the evidence presented by Appellant. That evidence included:

- Evidence that another person – Brandon Trotter – admitted to

[2] The Court of Appeals also failed to recognize this was a blood stain, which would place the victim in the car after he had been stabbed.

committing the offense

- Alibi evidence, establishing that Appellant was home when he would have been out committing the offense
- Evidence that jailhouse informants were not in a position to have discussions with Appellant, and that one was a member of the Aryan Brotherhood, which is a group Appellant would not have any contact with.

The evidence the Court recited follows the arguments made by the State, and did not extensively address the alibi evidence or Trotter's admission. While the different facts cited by the court may be consistent with guilt, they are far from overwhelming. Appellant suggests the inquiry is not whether he could still be convicted, but whether there is at least a 51% chance he would be found not guilty. Put another way, is there a better than 50-50 chance that without physical evidence placing the victim in the car, would the State still be able to meet their burden of proving guilt beyond a reasonable doubt. In *Glover*, the Court focused on whether the new results would have "changed the claimed weaknesses, or made them more relevant." Appellant suggests the answer here must be yes; the attacks on the jailhouse informants, along with the confession of another person and appellant's alibi, would be more relevant without evidence that placed the

victim in Appellant's car, even if the odds weren't high.

Failure to consider prior arguments made by the State

While not controlling, Appellant suggests the Court of Appeals erred in not at least considering the position taken by the State concerning the strength of the case. After the defense rested, the State sought to introduce of extraneous offenses; specifically, they wanted to introduce testimony concerning appellant providing young men with alcohol or drugs and taking advantage of them (which is evidence the Court now relies on to support the trial court's finding on the DNA motion). In arguing why such evidence was admissible, the State said the following:

> Every single witness who testified for the State was impeached in the same way, whether it was the Lacy-Lakeview Police department having tunnel vision and not looking outside of who the suspect was, close to the time of the crime...
>
> Also, of course, the only direct evidence witnesses the State has are convicted felons who were in a cell with the defendant. And there was a lot of testimony yesterday by the defense witnesses that there was no privacy in those cells, how they're laid out and all that stuff before the jury and there's some question as to whether the jury would believe that they had the opportunity to even have the conversation, much less,
> you know, the content of what they said. (9 R.R. 8)
>
> And third, of course, is the issue of alibi. That puts his identity now even more at issue than it was when we've got DNA, that, you know corresponds to half of the population and we have nobody but felons to say he's the one who said he did it. (9 R.R. 9)

Appellant does not suggest the State is not always bound by arguments made during trial, but does suggests it is something the Court should take into consideration. At a minimum, it establishes the evidence against appellant was not as strong as the Court now appears to claim.

As already noted appellant does not have to establish beyond a reasonable doubt that he would not have been convicted with the new results. Instead, he must only do so by a "preponderance of the evidence". Appellant suggests the Court of Appeals effectively required him to prove his innocence, and for that reason, review should be granted.

PRAYER

WHEREFORE, APPELLANT PRAYS the court grant this petition, reverse the decision of the Court of Appeals and remand the case for further consideration.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for discretionary review has been delivered to Abel Reyna, District Attorney for McLennan County, Texas, and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on this the 9th day of December, 2015.

/s/ Walter M. Reaves, Jr.

Walter M. Reaves Jr.

IN THE
TENTH COURT OF APPEALS

No. 10-15-00032-CR

DAMON LAVELLE ASBERRY,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2007-1625-C2A

MEMORANDUM OPINION

This is an appeal to review a post-judgment, post-DNA testing, determination that the results, if known at the time of the original trial, are not such that it is reasonably probable that the defendant would not have been convicted. Because the trial court did not err in its unfavorable finding, the trial court's Findings of Fact and Conclusions of Law are affirmed.

PROCEDURAL HISTORY

Damon Lavelle Asberry was convicted of murder and sentenced to life in prison.

TEX. PEN. CODE ANN. § 19.02(b) (West 2011). We affirmed his conviction, and our judgment was affirmed by the Court of Criminal Appeals. *Asberry v. State,* No. 10-08-00237-CR, 2009 Tex. App. LEXIS 8512, *1 (Tex. App.—Waco Nov. 4, 2009) (not designated for publication), *aff'd*, No. PD-0257-10, 2011 Tex. Crim. App. Unpub. LEXIS 101 (Tex. Crim. App. 2011).

Five years after his conviction, Asberry filed a motion for DNA testing. Based on the motion and the agreement of the parties, the trial court ordered post-trial DNA testing. After the results were obtained and a hearing held regarding those results, the trial court made a finding unfavorable to Asberry.

We initially affirmed the trial court's finding because we found the very limited record before us of the evidentiary post-DNA-test-result hearing did not support a finding by the trial court that had the DNA results been available during the trial of the offense, it was reasonably probable that Asberry would not have been convicted. Specifically, and most problematic for our review, was that the record of the previous trial was not part of the evidence at the hearing because it had not been introduced into evidence as an exhibit. We had only the test results to consider, and those alone did not satisfy Asberry's burden to establish, by a preponderance of the evidence, that he would not have been convicted had the jury been presented with the new DNA test results. *See Asberry v. State,* No. 10-15-00032-CR, 2015 Tex. App. LEXIS 10415 (Tex. App.—Waco Oct. 8, 2015) (not designated for publication). However, the Court of Criminal Appeals held

that all of the "evidence" that was before the trial court when the court made its ruling should be available to, and considered by, this Court and remanded the case to us for our reconsideration. *Asberry v. State*, 507 S.W.3d 227, 229 (Tex. Crim. App. 2016).

Once the case was remanded, we abated the proceeding and ordered the parties to prepare a record of anything that the trial court had before it so that we could conduct our de novo review.[1] *Asberry v. State*, 524 S.W.3d 335 (Tex. App.—Waco, Jan. 18, 2017, order). And because the trial judge made reference to his personal recollections in the trial court's findings, we ordered the trial court to provide those personal recollections, if any, upon which the trial court's decision was based in a format capable of being reviewed by this Court. *Id.* The requested record and supplemental briefs have been filed.

DNA TEST RESULTS-REVIEW

Article 64.04 states that "after examining the results of [the DNA] testing under Article 64.03…, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." TEX. CODE CRIM. PROC. ANN. art. 64.04 (West 2006). After conducting the required hearing, the trial court found:

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[1] We did not have any of the record from the original trial because the Court of Criminal Appeals retained that record when it originally reviewed Asberry's conviction. *Asberry v. State*, 524 S.W.3d 335, n.1 (Tex. App.—Waco, Jan. 18, 2017, order).

that had the results been known at the time of trial, there is NOT a reasonable probability of innocence,[2] and that it is NOT more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence.

Our review of a trial court's article 64.04 ruling is de novo, and we review the entire record to determine whether Asberry established, by preponderance of the evidence, that he would not have been convicted had the new results of the DNA test been available at trial. *Asberry v. State*, 507 S.W.3d 227, 228 (Tex. Crim. App. 2016). In deciding whether Asberry met his burden, we should consider whether the new test results would cast an affirmative doubt on the validity of his conviction. *See Flores v. State*, 491 S.W.3d 6, 9 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Glover v. State*, 445 S.W.3d 858, 862 (Tex. App.—Houston [1st Dist.] 2014, pet ref'd).

ISSUE ON APPEAL

In his sole issue, both initially and on remand, Asberry contends the trial court erred in its finding that there was not a reasonable probability that Asberry would have been acquitted had the new results been known at the time of trial. Asberry asserts that the State's case against him was weak. He argues that in recognizing its weaknesses, the State introduced evidence of extraneous offenses. He also suggests that the new DNA test results "completely contradict" the results offered at trial and if the case was tried

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[2] We realize that "a reasonable probability of innocence" is no longer the standard in reviewing the significance of Chapter 64 DNA test results. *See Glover v. State*, 445 S.W.3d 858, 861-862 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). However, neither Asberry nor the State argue that the trial court erred in the standard as expressed by the court. Further, the remainder of the finding is substantially similar to the standard in effect now and at the time of the hearing. Thus, we review the trial court's finding as if it were an unfavorable finding as stated under the statute.

now, there would be no physical evidence to link Bryan Daugherty, the murder victim and a student at Texas State Technical College (TSTC), to the car Asberry was driving. He asserts that what the State was left with—non-credible testimony by jailhouse informants, past instances of Asberry luring men to his vehicle and attempting to have sex with them, statements that Asberry knew he was a suspect, and an admission by Asberry that he was with Daugherty earlier in the day—proved by a preponderance of the evidence that Asberry would not have been convicted had the new DNA results been available at trial.

After reviewing the complete record, we disagree with Asberry's assessment of the record and the impact of the new DNA test results.

Facts

Before trial, DNA testing was conducted on the back seat cushion of the blue Mazda which Asberry had been driving and in which Daugherty had been a passenger. The test results were admittedly weak. The DNA that was obtained and tested before trial was a "low quantity" and only eight genetic markers were located in three of the nine places tested. It was determined that the DNA was a mixture of at least two people, and Daugherty, Asberry, and Asberry's brother were not excluded from the DNA profile.

The analyst testified that the DNA profile was of "low significance" because half of the population of Texas would be included as a possible source of the DNA. The analyst stated that the most conservative estimate of the number of people who would match the DNA profile was one in two matches; that is, one in two people would be included as a possible source of the DNA. He concluded that "[o]ne in two matches is a

weak match." Asberry's trial counsel elicited testimony from the analyst that nothing conclusively linked the DNA to Daugherty and argued to the jury that "there's nothing there."

Pursuant to Asberry's motion for DNA testing after his conviction, the lab at the Department of Public Safety retested the sample tested before trial using the same kit as the previous test but using 16 locations rather than 9 and extracting the DNA robotically. Using these techniques, the analyst was able to exclude Asberry and Daugherty as possible contributors to the DNA.[3]

Because the previous testing resulted in a weak match which did not conclusively prove that either Daugherty or Asberry was the source of the DNA, the new test results are not a "complete contradiction" of the previous results as Asberry asserts. And without the initial DNA test results, the State had substantially more evidence of Asberry's guilt than what Asberry suggests.

Although the jail house informants' credibility was attacked, they both knew facts that only the killer would know. They both knew that Asberry and Daugherty drove to Groesbeck and used drugs; that Asberry made sexual advances to Daugherty which Daugherty rebuffed; that Asberry then took Daugherty back to Waco; and that Daugherty and Asberry then fought and Asberry stabbed Daugherty. One informant knew that Asberry had the car he and Daugherty rode in detailed after the murder. He also knew that Asberry heard a pop when he stabbed Daugherty. The medical examiner testified at

[3] The analyst was not asked if Asberry's brother was excluded as well.

the trial that Daugherty was stabbed in the lung and the lung would make a popping sound when punctured. The other informant knew that Asberry and Daugherty went to Groesbeck to give a car back to Asberry's brother and pick up a different car. Further, neither inmate was in Waco at the time of the murder and it was unlikely they would have seen, heard, or read any of the stories about the murder.

As for the past instances of luring men to his vehicle and attempting to have sex with them, a former friend of Asberry's testified that she helped Asberry lure young men at least 100 times so that Asberry could take advantage of them. Even if the friend was not credible, a former TSTC student testified that when he was a student, Asberry took the student to Asberry's home in Groesbeck the week before the murder, got the student drunk, and made sexual advances toward him. A verbal and physical altercation followed when the student refused Asberry's advances.

Likewise, there was more evidence to link Asberry to the murder than just statements by Asberry that he knew he was a suspect and that he was with Daugherty the day before the murder. Asberry was a long-time student at TSTC and participated in the work-study program, working in the Financial Aid Office. Co-workers of Asberry at TSTC saw Daugherty with Asberry the day before the murder, and Asberry admitted to smoking marijuana with Daugherty at that time. Another TSTC work-study participant joined Asberry and Daugherty in smoking marijuana earlier that day as well. Within a day after the murder, Asberry told co-workers at TSTC that the police were trying to pin the murder on him. He made these and other statements to co-workers prior to any contact with the police which did not occur until four days after the murder. Asberry

also admitted to a co-worker that he had a knife capable of committing the murder. He told that same co-worker that he dropped Daugherty off at his apartment the morning of the murder. But he later told police that he dropped Daugherty off at a 4-way stop sign by TSTC.

Additional incriminating actions or statements by Asberry occurred shortly after the murder involving the car Asberry was seen driving.

Asberry told police that he and Daugherty drove around in a white Mazda. He happily agreed to let police search the white Mazda. Oddly, before his conversation with police, he asked a co-worker what she knew about a white car and informed her that no blood would be found in that car. Asberry's brother, Elgin, stated that Asberry had been driving Elgin's white Mazda the day before the murder, but that at about 8 p.m., Asberry and Daugherty took Elgin's blue Mazda. Elgin gave written and verbal consent to police to search and then impound the blue Mazda. While police were looking at the blue Mazda, Asberry came out of his mother's home where he lived and immediately became very upset and started yelling that he and "that boy" were never in that car. He was very agitated and was also not happy with Elgin.

When searched, the blue Mazda smelled foul, like "spoiled meat, blood." The back seat was wet, and when the seat was touched, the residue was "like soapy bloody water…." The foul odor seemed to be stronger in the rear of the car than it did towards the front, and a suspicious stain was located on the right rear seat of the vehicle.

The week after the murder, Asberry and a friend attempted to detail the blue Mazda at a carwash in Groesbeck. Asberry drove the car to the carwash, and the friend

followed him there. On the way, Asberry pulled over to the side of the road because he thought a police officer was following him and it made him nervous. Only the inside of the vehicle was cleaned, not the outside; and Asberry was responsible for cleaning the back seat area.

Shortly after the blue Mazda was searched and then impounded and was being stored at an impound lot, someone threw a homemade firebomb or "Molotov cocktail" on top of it. However, it was not destroyed.

Application

Although the new DNA test results affirmatively excluded Daugherty and Asberry as possible contributors to the DNA tested, the results did not cast an affirmative doubt on the validity of Asberry's conviction. Thus, in light of the evidence presented at trial and the facts necessary to prove Asberry's guilt, Asberry failed to establish by a preponderance of the evidence that he would not have been convicted had the new results of the DNA test been available at trial, and thus we cannot conclude the trial court erred in making its unfavorable finding.

Accordingly, Asberry's sole issue is overruled.

CONCLUSION

Having overruled Asberry's sole issue, we affirm the trial court's Findings of Fact and Conclusions of Law signed on January 15, 2015.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed October 18, 2017
Do not publish
[CRPM]

THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

DAMON LAVELLE ASBERRY	*	
Appellant	*	
	*	
vs.	*	PD No.
	*	COA #10-15-00032-CR
	*	
THE STATE OF TEXAS	*	
Appellee		

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), I hereby certify that the Appellant's brief filed in this cause contains 2,780 words. The document was prepared using Word 2016, and the word count was generated using that program.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing certificate was mailed to the Office of the District Attorney for McLennan County, Texas, on December 9, 2015

/s/ Walter M. Reaves,
Walter M. Reaves, Jr.