No. 14-_____

In The
Supreme Court of the United States

LESTER LEROY BOWER, JR.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the former Texas special issues for death penalty sentencing do provide—as the Texas Court of Criminal Appeals held—or do not provide—as the Fifth Circuit has held—an appropriate vehicle for the jury to consider and give full effect to mitigating evidence of good character, such that failure to provide a separate question violates the Eighth and Fourteenth Amendments under this Court's *Penry* jurisprudence.

2. A central tenet of the prosecution's case was that the defendant was one of only a small number of people in Texas who possessed the rare specialty ammunition the prosecution assumed was used in the murders. After trial, the State disclosed evidence contradicting the prosecution's theory, showing that the evidence the prosecution relied on and the resulting jury arguments were false. These circumstances present the following question:

Whether a conviction aided by the prosecution's failure to produce such evidence violates the Due Process Clauses of the Fifth and Fourteenth Amendments under this Court's *Brady* jurisprudence.

3. Whether executing a defendant who has already served more than 30 years on death row while exercising his legal rights in a non-abusive manner serves any penological purpose and amounts to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Petitioner is Lester Leroy Bower, Jr.

Respondent is the State of Texas.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner Lester Leroy Bower, Jr. respectfully submits this petition for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS AND ORDERS BELOW

The order of the Texas Court of Criminal Appeals denying Mr. Bower's habeas petition is unreported. Pet. App. 1-5. The trial court's proposed findings of fact and conclusions of law, recommending that Mr. Bower receive a new sentencing trial, are unreported. Pet. App. 6-128. Reported decisions on Mr. Bower's direct appeal and earlier collateral proceedings are: *Bower* v. *State*, 769 S.W.2d 887 (Tex. Crim. App. 1989); *Ex parte Bower*, 823 S.W.2d 284 (Tex. Crim. App. 1991); *Bower* v. *Dretke*, 145 F. App'x 879 (5th Cir. 2005); *Bower* v. *Quarterman*, 497 F.3d 459 (5th Cir. 2007).

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals filed its order denying Mr. Bower's habeas petition on June 11, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ." U.S. CONST. amend. XIV, § 1.

The Texas sentencing procedure in a capital case, as applied in this case, TEX. CODE CRIM. PROC. art. 37.071 (1973 & 1981 amendment) (emphasis in original), stated in pertinent part:

(b) On conclusion of the presentation of the evidence, the court shall submit the following *three* issues to the jury:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

* * *

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life. The court, the attorney for the state, or the attorney for the defendant may not inform a juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

STATEMENT OF THE CASE

A. Statement Of Facts

On October 8, 1983, four men were murdered in an airplane hangar in Sherman, Texas. They were shot at close range with the same weapon. Petitioner Lester Leroy Bower, Jr. was arrested in January 1984 and convicted for these murders in April 1984. For

more than 30 years, Mr. Bower has steadfastly maintained his innocence and has accumulated both withheld and newly discovered evidence of his innocence. This is a case in which there is a significant lingering doubt regarding guilt or innocence.

At the time of his arrest, Mr. Bower was a 36-year-old, married father of two, with more than two years of college. He was employed full-time as a chemical salesman, earning today's equivalent of over $60,000 a year. He was also a licensed firearms dealer. He had no criminal record of any kind. The State's theory of the case was that Mr. Bower single-handedly shot four men in the hangar to steal a hobby aircraft worth about $4,500.

On October 8, 1983, the day of the murders, Mr. Bower purchased an ultralight aircraft (a small craft that is essentially a hang glider with an engine) from Bob Tate, one of the victims. The parties agreed that Mr. Bower would pay the $3,000 in cash that he brought with him and an additional $1,500 later, on condition that Mr. Bower leave his contact information with Mr. Tate. Mr. Bower gave Mr. Tate his business card with a $1,500 IOU written on the back.

Mr. Bower learned about the murders in the next day or two, but he did not come forward to police regarding his presence at the hangar earlier in the afternoon of October 8. Mr. Bower's wife had forbidden him to buy an ultralight, and he did not want her to learn of his purchase. When phone records showed calls between Mr. Bower and Mr. Tate, Mr. Bower was

questioned by the FBI, and he falsely denied any involvement with Mr. Tate or the ultralight. Mr. Bower was arrested when a search of his home revealed parts of the ultralight aircraft.

Shortly after his arrest, Mr. Bower told his wife's uncle (a pastor) what really happened, and he prepared a handwritten account in which he described giving Mr. Tate the $3,000 in cash and his business card with the $1,500 IOU on the back. Mr. Bower wrote this statement long before the prosecution had turned over any evidence. The medical examiner's report stated that a business card had been found in Mr. Tate's pocket, but the State somehow lost the card after the medical examiner conducted his inventory. It was never found. Also, Mr. Tate's wife called the sheriff's office asking whether $3,000 in cash had been found in her husband's possession. Mr. Bower could not possibly have known either of these details from the prosecution's file at the time he wrote his statement.

Law enforcement initially thought the murders were related to drugs or gambling. The FBI's background write-up on Mr. Tate stated the belief that Mr. Tate had been involved in drug trafficking. Authorities conducted some investigation into the drug angle, but the focus then turned to Mr. Bower.

No murder weapon was found. No witnesses testified that they saw Mr. Bower at the scene of the murders, and none of his fingerprints were found there. The State presented a circumstantial case,

relying heavily on Mr. Bower's possession of parts of the ultralight, his false statements to the FBI, and his previous purchase of a pistol and ammunition that the State theorized were used in the murders. Post-conviction proceedings have uncovered withheld evidence and generated new evidence that substantially undermine the State's case and suggest that one or more other specific individuals committed the murders during a drug deal that went awry.

Much of the State's circumstantial evidence has been called into serious question. For example, the State continually argued throughout trial that the victims were killed using a rare form of subsonic ammunition that only a handful of people had access to. Mr. Bower previously had purchased some such ammunition. Yet, there was no way to conclude that subsonic ammunition was in fact used in the murders; the prosecution knew as much but relied on it as fact just the same. Documents the prosecution withheld before trial also show that this ammunition was much more widely available than the prosecution led the jury to believe. The State further contended that Mr. Bower owned the same type of pistol that was used in the killings. Mr. Bower, however, lost this pistol long before the murders, and the State's own firearms examiner found that Mr. Bower's gun had a different firing pin than the one used in the killings—a finding that the prosecution decided to ignore. As a further example, Mr. Bower's post-conviction expert concluded that the totality of the evidence in the record is inconsistent with the State's theory of a

single shooter, acting alone, controlling four grown men, two of whom had law-enforcement training.

Not only has the State's case against Mr. Bower been undercut in several fundamental aspects, but new evidence, including undisclosed documents and six new witnesses, suggests that one or more specific people other than Mr. Bower committed the murders as part of a soured drug deal. In December 1983, the FBI interviewed a witness with a "drug problem" who stated that three or four of his drug contacts had told him, after the time of the murders, "that their source has been 'knocked off' in Sherman." The prosecution did not disclose this information before trial. Since Mr. Bower's conviction, six new witnesses have come forward that verify this drug link and identify specific others as being involved in the murders. The first witness came forward nearly 25 years ago with compelling personal knowledge that her ex-boyfriend and three of his colleagues committed the murders during a drug deal. Five more independent witnesses have come forward, and they all corroborate aspects of the first witness's account and each other's that one or more of these other individuals, not Mr. Bower, committed the murders and that the murders were drug-related.

B. Sentencing

During the punishment phase of the trial, the State presented no evidence, but six lay witnesses—Mr. Bower's friends and family—testified about,

among other things, his good and non-violent character, his past good deeds, and the absence of a prior criminal record.

Under the former Texas capital sentencing statute in effect in 1984, however, the jury was asked to answer only two questions:

> (1) Was the conduct of the Defendant * * * that caused the death of the deceased * * * committed deliberately and with the reasonable expectation that the death of the deceased or another would result?; and
>
> (2) Was there a probability that the Defendant * * * would commit criminal acts of violence that would constitute a continuing threat to society?[1]

The trial court gave the jury no guidance as to how it might take into consideration the mitigating evidence Mr. Bower presented. In fact, the trial court's minimal instructions did not even mention the words "mitigation," "mitigating evidence," or any words having similar meaning. Nor did the court ask the jury any question like the one that Texas has required in capital cases since the State's capital sentencing statute was amended in 1991, namely:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and

[1] The third special issue, regarding provocation, was not raised by the evidence and thus is not at issue in this case.

> background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. art. 37.071(e)(1) (Vernon Supp. 2005). Instead, the jury was simply asked the two special questions. The jury answered "yes" to both, and the trial court automatically imposed the death penalty, as was required by the statute.

C. Proceedings Below

Mr. Bower filed an application for a writ of habeas corpus in Texas state court on June 24, 2008. Among the claims included in this application were a *Brady* violation based on withheld evidence, *Penry* error based on the jury's inability to give full effect to Mr. Bower's mitigation evidence, and a claim that executing Mr. Bower after serving so long on death row is cruel and unusual punishment.

The Texas Court of Criminal Appeals ("CCA") directed the trial court to investigate and review the *Brady* and *Penry* issues. *Ex parte Bower*, No. WR-21005-02, 2012 WL 2133701, at *1 (Tex. Crim. App. June 13, 2012) (not designated for publication). The parties engaged in extensive briefing, and the trial court conducted an evidentiary hearing.

The trial court recommended that Mr. Bower receive a new sentencing trial, based on his *Penry*

claim. It issued proposed findings of fact and conclusions of law to the CCA, recommending that Mr. Bower's *Brady* claim be denied but that his *Penry* claim be sustained because the jury did not have an appropriate vehicle to give full effect to his mitigation evidence. Pet. App. 127.

The CCA rejected the trial court's recommendation to grant Mr. Bower a new sentencing trial and denied his *Penry* claim. In a single sentence, the CCA denied relief on Mr. Bower's *Brady* claim. The CCA did not accept the trial court's proposed findings and conclusions on the *Brady* issue but instead made its "own review" of the record and the trial court's recommendations and then summarily denied relief without explanation.[2] The CCA dismissed Mr. Bower's cruel and unusual punishment claim. Pet. App. 4-5. One week after the CCA's decision, the trial court scheduled Mr. Bower for execution on February 10, 2015.

[2] It is unsurprising that the CCA did not adopt the trial court's proposed findings and recommendations on the evidence-focused *Brady* issue. As Mr. Bower explained in his brief to the CCA, the trial court's findings on this and other issues, nearly all of which were copied verbatim from the State's proposed findings, contained so many errors, omissions, and internal inconsistencies as to be unworthy of any deference.

REASONS FOR GRANTING THE PETITION

This Court repeatedly has taken the Texas Court of Criminal Appeals ("CCA") and the Fifth Circuit to task for their decisions regarding the constitutionality of death sentences under the former Texas special issues. The former special issues required a mandatory death sentence if the jury answered yes to each of the special issues: whether the crime was deliberate, whether the defendant posed a risk of future danger, and, if raised by the evidence, whether the crime was due to provocation. *Penry* v. *Lynaugh*, 492 U.S. 302, 310 (1989) (*Penry I*). Under that scheme, if a defendant presented mitigating evidence that, although not negating, in the jury's view, deliberateness or future dangerousness, nevertheless might provide a reason to spare his life, the jury had no way to give full effect to that evidence. This feature of the pre-1991 Texas capital system violated the Eighth and Fourteenth Amendments. *Id.* at 317, 320; see also *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). This Court has reversed many Texas death sentences based on so-called *Penry* error.[3]

The Fifth Circuit has changed its approach, in deference to this Court's decisions, but the CCA has not followed suit. This case provides a perfect example.

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[3] See *Brewer* v. *Quarterman*, 550 U.S. 286, 296 (2007); *Abdul-Kabir*, 550 U.S. at 263-64; *Smith* v. *Texas*, 543 U.S. 37, 48-49 (2004); *Penry* v. *Johnson* (*Penry II*), 532 U.S. 782, 804 (2001); *Penry I*, 492 U.S. at 328; see also *Tennard* v. *Dretke*, 542 U.S. 274, 276 (2004).

During the punishment phase of his trial, Mr. Bower presented evidence of his good character and deeds. The jury was asked only to answer the two questions —regarding deliberateness and future dangerousness —but was given no opportunity to express a conclusion that death was not otherwise appropriate. Mr. Bower raised a *Penry* claim in his first state habeas proceeding, which the CCA denied in 1991. *Ex parte Bower*, 823 S.W.2d 284, 286-87 (Tex. Crim. App. 1991). He raised the same issue on federal habeas, and the Fifth Circuit denied his claim as well. *Bower* v. *Dretke*, 145 F. App'x 879, 885-86 (5th Cir. 2005). The evolution of this Court's *Penry* jurisprudence leaves no doubt that these decisions were incorrect because the jury had no way to give full effect to Mr. Bower's mitigating evidence, which went well beyond the scope of the special issues.

The Fifth Circuit recognized its error, stating in *Pierce* v. *Thaler*, 604 F.3d 197, 210 n.9 (5th Cir. 2010), that many of its pre-2007 decisions—*including specifically its decision in Mr. Bower's federal habeas proceeding*—were incorrect. But the CCA has steadfastly adhered to its old ruling, asserting that this Court's five decisions since the CCA's original 1991 decision did not change anything, and rejecting a recommendation from the trial court that Mr. Bower be given a new sentencing hearing in light of this Court's most recent rulings, as explained in *Pierce*. Pet. App. 117-24, 127. And Mr. Bower's case provides but one example of the CCA's refusal to give proper consideration to good character mitigation evidence. Certiorari review is needed to require the CCA to

align its rulings with this Court's decisions and to resolve the conflict between the CCA and the Fifth Circuit on the issue of whether good character mitigation evidence is fully comprehended within the scope of the former special issues.

Certiorari review is also needed based on issues raised during the guilt/innocence phase of trial. A key aspect of the prosecution's case rested on an assumption, dressed up as fact, that a certain specific type of ammunition—the subsonic version of ammunition manufactured by Fiocchi—was used in the murders. The fact is, however, that the exact type of ammunition used is unknowable, because the crime scene evidence (consisting of shell casings and bullet fragments) does not enable one to distinguish between supersonic or subsonic ammunition. The State and its investigators simply assumed that a specific type of ammunition was used—a type that was consistent with the crime scene evidence but not dictated by it—and that assumption shaped the entire investigation and substantially narrowed the suspect pool. The prosecution presented this assumption to the jury as an established fact. Much of the prosecution's theory, evidence, and argument is tied to this precise ammunition, including that it is extremely unique and rare—possessed by at most fifteen people in Texas at the time—and that its only purpose is killing.

This had a huge impact on Mr. Bower because, as a licensed firearms dealer, he previously had purchased this specific type of ammunition (as well as

numerous other kinds). At trial, several witnesses testified about this supposed unique and rare subsonic ammunition whose only purpose supposedly was killing. Most damning of all, the prosecution emphasized the ammunition at least five times during closing argument, stating that Mr. Bower was one of only at most fifteen people in the entire state of Texas to have that precise, rare ammunition. Pet. App. 129-33, 136-38.

Evidence disclosed during post-conviction proceedings, however, confirms that: 1) there was no way to determine the exact type of ammunition used in the murders; and 2) the particular ammunition the prosecution assumed was used in the murders was nowhere near as rare as the prosecution represented and had several legitimate uses. Pet. App. 133-36, 139-40. The State's entire theory regarding ammunition—a critical aspect of its case against Mr. Bower—was false.

In the face of this withheld evidence, the State has begun to backpedal. For the first time in the 30-year history of this case, the State now suddenly contends that the trial evidence shows that the number of people possessing the ammunition supposedly used in the murders was actually in the "low hundreds"—not the maximum of fifteen relied upon to get the original conviction. The State also now claims that the trial evidence showed only that the ammunition was quieter, not that it was used only for killing, though it told the jury the opposite. The State does not even attempt to square its jury argument with these new positions on the evidence.

It is undisputed that the prosecution withheld documents regarding the ammunition, documents that seriously undermine a significant aspect of the prosecution's case. The prosecution's arguments to the jury were false in light of this withheld evidence. And all of this in a capital case, where the stakes cannot possibly be higher. This conduct violates Mr. Bower's due process rights. See, e.g., *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

Finally, Mr. Bower has been on death row for more than 30 years. During this time, Mr. Bower has had a legal proceeding pending for all except 132 days. None of Mr. Bower's proceedings has ever been determined to be frivolous, and he has often waited for years at a time for a court to act. He has suffered through six death settings, sometimes with a reprieve coming only hours before execution. Executing Mr. Bower after he has served on death row for more than 30 years under these circumstances constitutes cruel and unusual punishment.

I. The Texas Court Of Criminal Appeals Jurisprudence Regarding The Former Special Issues For Death Penalty Sentencing Conflicts With This Court's Precedents And That Of The Fifth Circuit

This Court's precedents have made clear that when considering the death penalty, decisions must be individualized, based on a reasoned, moral

response, after giving full consideration and effect to any mitigating evidence. See, e.g., *Abdul-Kabir*, 550 U.S. at 246, 248; *Brewer*, 550 U.S. at 289. The jury must be given a vehicle to decide whether, based on mitigating evidence, a defendant should be sentenced to death or shown mercy. See, e.g., *Abdul-Kabir*, 550 U.S. at 246, 252; *Brewer*, 550 U.S. at 289. This applies to *all* mitigating evidence, that is, "'*any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence other than death.'" *Abdul-Kabir*, 550 U.S. at 247-48 (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978)) (emphasis added).

During the punishment phase in this case, the jury was asked only, in accordance with Texas law in effect in 1984:

> (1) Was the conduct of [Mr. Bower] that caused the death of the deceased * * * committed deliberately and with the reasonable expectation that the death of the deceased or another would result?; and
>
> (2) Was there a probability that [Mr. Bower] would commit criminal acts of violence that would constitute a continuing threat to society?

Because the jury answered these questions in the affirmative, a death sentence was mandatory. Indeed, the members of the jury were told repeatedly during voir dire that they would be asked only to answer the two special questions, not to decide

directly whether or not the death penalty should be imposed.[4]

As explained above, the former Texas special issues ran afoul of this Court's mitigation evidence requirements in many instances. If the jury could decide that the defendant's mitigation evidence had significance beyond deliberateness and future danger and therefore could provide an independent reason that the defendant should not be executed, the former special issues raised due process problems because they provided no mechanism for the jury to express this view. See, e.g., *Abdul-Kabir*, 550 U.S. at 252, 255-56, 259. Texas law has now changed to require an additional question, but at the time Mr. Bower was sentenced, death was mandatory if the jury answered the special issues in the affirmative. *Penry I*, 492 U.S. at 310. Because of this, Mr. Bower's sentence is unconstitutional if his mitigation evidence had relevance beyond the scope of the special issues.

At the punishment phase of this trial, several of Mr. Bower's friends and family members testified regarding, among other things: Mr. Bower's compassion, his religious devotion, his commitment to his

[4] The Texas capital sentencing statute in effect at the time of Mr. Bower's trial expressly precluded the trial court, the defense, and the prosecution from revealing to the jury what consequences would flow from the jury's failure to reach agreement on one or both of the special questions. See TEX. CODE CRIM. PROC. art. 37.071(e) (1973 & 1981 amendment), reproduced at pages 2-3.

family, his community service, his concern for others in need, his even temperament, his work with young children and church groups, and the complete absence of any violent or criminal behavior in his life. The State has contended that this evidence was relevant to the second special issue regarding future dangerousness. That is correct, but it is not the end of the matter. The jury could have concluded that Mr. Bower posed "a probability" of future danger but that his life nevertheless was worth saving. The former Texas special issues gave the jury no opportunity to express that view. The jury could have determined, in other words, that Mr. Bower's mitigating evidence showed that a quadruple murder was out of line with his life-long character and behavior. On this basis, the jury could have decided to show Mr. Bower mercy, regardless of the nature of the crime or future dangerousness.

The CCA, while recognizing that Mr. Bower's *Penry* claim was procedurally proper "because the law has evolved with regard to mitigating evidence," *Bower*, 2012 WL 2133701, at *1, dismissed his claim on the merits in four sentences. Pet. App. 4-5. The CCA's scant rationale is fundamentally flawed. First, the CCA emphasized the difference between Mr. Bower's good character evidence and *Penry*'s "double-edged evidence"—evidence that could suggest mitigation but could simultaneously support an affirmative answer to one of the special issues. *Id.* at 4. But this Court has solidly rejected such efforts to cabin *Penry* to only certain kinds of mitigating evidence. In the

Court's words, "It is also clear that *Penry I* applies in cases involving evidence that is neither double edged nor purely aggravating, because in some cases a defendant's evidence may have mitigating effect beyond its ability to negate the special issues." *Abdul-Kabir*, 550 U.S. at 255 n.16.

The CCA also relied on its 1991 holding in Mr. Bower's first state habeas proceeding that good character evidence is within the scope of the second special issue regarding future dangerousness, stating that this Court's decisions since 1991—including four reversals of Texas death sentences under the former special issues—did not change the rationale for its decision. Pet. App. 4. This is incorrect. The CCA in 1991 rejected Mr. Bower's *Penry* claim in part because his positive character evidence did not show "circumstances of his character which contributed to the four murders." *Bower*, 823 S.W.2d at 287. But this Court has unequivocally disavowed any requirement of a connection between the mitigation and the crime, stating that the defendant's mitigation evidence need not "establish[ ] a nexus to the crime." *Tennard*, 542 U.S. at 287; see also *Smith*, 543 U.S. at 45.

The CCA in 1991 also applied the wrong standard. It determined that because Mr. Bower's good character evidence was relevant to the future dangerousness special issue, "the statutory special issues provided an adequate vehicle for the jury's consideration" of the evidence. *Bower*, 823 S.W.2d at 287. But mere consideration is not the standard. This Court

repeatedly has emphasized that the jury must be able to give "full" consideration and "full" effect to the defendant's mitigation evidence. See, e.g., *Penry II*, 532 U.S. at 797 (internal quotation marks omitted); accord *Abdul-Kabir*, 550 U.S. at 255. In *Pierce*, the Fifth Circuit recognized that its decision in Mr. Bower's federal habeas proceeding was incorrect precisely for this reason—that it had applied a "some effect" standard rather than requiring "full" consideration and effect. 604 F.3d at 210 n.9; see also *McGowen* v. *Thaler*, 675 F.3d 482, 494-95 (5th Cir. 2012) (holding that good character evidence is not solely within the scope of the former special issues), *cert. denied*, 133 S. Ct. 647, 133 S. Ct. 648 (2012).

This is precisely why the trial court recommended to the CCA that Mr. Bower should be provided a new sentencing trial. But the CCA refused to accept that recommendation.

Mr. Bower's good character evidence is plainly relevant to more than whether he would be a danger in the future. But, as the prosecutor and trial court told the venire panel repeatedly during voir dire, the jury's sole function was to answer the special issues, and the death penalty was automatic and mandatory if the questions were answered in the affirmative. These statements reinforced the jury's limited role and lack of an option to make a reasoned, moral decision that Mr. Bower did not deserve to die based on his life as a whole, not just the events of October 8, 1983. See *Brewer*, 550 U.S. at 293-94.

The CCA repeatedly has refused to apply this Court's precedents to good character mitigation evidence. See, e.g., *Ex parte Hughes*, No. AP-76869, 2012 WL 3848404, at *2 (Tex. Crim. App. Aug. 29, 2012) (not designated for publication); *Ex parte Campbell*, No. AP-76907, 2012 WL 5452200, at *2 (Tex. Crim. App. Nov. 7, 2012) (not designated for publication); *Ex parte Jones*, No. AP-75896, 2009 WL 1636511, at *7 (Tex. Crim. App. June 10, 2009) (not designated for publication). There is no justification for the CCA's stubborn failure to follow this Court's *Penry* jurisprudence, which applies to all categories of mitigating evidence, including good character evidence. This Court should grant certiorari to remedy this problem and to bring the CCA in line with the Fifth Circuit's holdings that such evidence is not fully comprehended by the former special issues.

II. The Texas Court Of Criminal Appeals Decision Conflicts With This Court's Decisions Regarding The Withholding Of Favorable, Material Evidence

A central feature of the prosecution's case against Mr. Bower involved the specific ammunition used in the murders. Shell casings and fragments from bullets manufactured by an Italian company called Julio Fiocchi were found at the crime scene. The investigators assumed that these shell casings were for Fiocchi *subsonic* ammunition. Subsonic ammunition is quieter and more difficult to obtain than Fiocchi *supersonic* ammunition. This assumption—

that the murders were committed with subsonic ammunition—influenced the entire scope of the investigation. Investigators began looking for sellers and buyers of Fiocchi subsonic ammunition, which is a much smaller pool of potential suspects than Fiocchi supersonic ammunition. And Mr. Bower previously had purchased Fiocchi subsonic ammunition, as well as many other types of ammunition, as a licensed firearms dealer.

The problem here is this: based on the spent shell casings and bullet fragments alone, which is the only evidence investigators had to go on, it is impossible to tell whether Fiocchi subsonic or supersonic ammunition was used. Evidence the State withheld, disclosed only after trial, shows that the shell casings for those two types of ammunition are the same, and Mr. Bower's post-conviction ballistics expert confirmed that it is impossible to determine whether subsonic or supersonic ammunition was used based on shell casings and bullet fragments alone. Thus, the specific ammunition used during the murders was unknowable. The State has adduced no evidence and made no argument to the contrary.

Nevertheless, the prosecution presented to the jury, as fact, that Fiocchi subsonic ammunition was the murder ammunition. It then repeatedly solicited information about the availability and nature of that subsonic ammunition. For example, the owner of a business that imported and distributed guns and ammunition testified that his store "was the only United States seller" of Fiocchi subsonic ammunition,

that it was an extremely small percentage of his market, and that only a few hundred people "[i]n the entire United States" and only "ten to fifteen" in Texas had *ever* purchased it, including Mr. Bower. The State's firearms examiner and an FBI special agent also stated that this ammunition was rare and that they had never encountered it before. The ammunition importer also testified that this ammunition is quiet and its purpose is to have "a more killing round." He also denied that he marketed the ammunition for use in small game hunting. Pet. App. 129-33, 136-38.

Previously withheld evidence obtained through post-conviction litigation reveals that critical portions of the prosecution's Fiocchi subsonic-related evidence were false. This evidence shows that Fiocchi subsonic and supersonic shell casings were the same, and thus shell casings could not determine which type of ammunition was used. The documents also show, for example, that the ammunition importer was not the sole seller of Fiocchi subsonic ammunition, as its owner had testified, and that another company had sold 20,000 rounds of the subsonic ammunition to two companies, one of which resold 6,000 of the rounds and the other of which had given samples to a Texas dealer to "stimulate business." This evidence refutes key prosecution evidence regarding the availability of subsonic Fiocchi ammunition in Texas. Pet. App. 133-36.

Undisclosed evidence also shows that Fiocchi marketed subsonic ammunition for small game

hunting, and other witnesses interviewed during the investigation verified using the ammunition for that purpose as well as to "stay abreast of the industry" and to teach someone to shoot without loud noise. This evidence shows legitimate uses for Fiocchi subsonic ammunition, and it negates any suggestion that buying the ammunition was tantamount to planning murder. Pet. App. 139-40.

The ammunition was a critical part of the prosecution's case. In its closing arguments, the prosecution repeatedly told the jurors that this ammunition was important to establishing Mr. Bower's guilt. This ammunition was such "rare and unusual ammunition that State and Federal firearms examiners had not seen it in all their years of experience," but Mr. Bower had purchased it previously. Indeed, Mr. Bower was one of only "twelve or fifteen people * * * in the State of Texas" that possessed the "unique and exotic" ammunition used in the murders. In the punishment phase, the prosecution stated that the ammunition seller testified that there is "no purpose for [Fiocchi subsonic ammunition] other than to kill." And on direct appeal, the State emphasized the ammunition, arguing that Mr. Bower was one of only ten or fifteen people in Texas who purchased the ammunition. Pet. App. 130-33, 138. The CCA, in affirming Mr. Bower's conviction, specifically referred to the ammunition as pointing to his guilt, stating: "Spent casings found at the scene of the crime were those of an extremely rare variety of ammunition. Appellant's purchases of this

type of ammunition was [*sic*] proven." *Bower* v. *State*, 769 S.W.2d 887, 894 (Tex. Crim. App. 1989).

This Court's *Brady* jurisprudence establishes that a conviction secured without disclosing favorable, material evidence violates due process. See *Smith* v. *Cain*, 132 S. Ct. 627, 630-31 (2012); *Brady* v. *Maryland*, 373 U.S. 83 (1963). This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence and to evidence in the possession not only of the prosecution but others working for or with the prosecution, including law enforcement. See *Kyles* v. *Whitley*, 514 U.S. 419, 438 (1995); *United States* v. *Bagley*, 473 U.S. 667, 676 (1985); *Giglio*, 405 U.S. at 154. If undisclosed, favorable evidence, whether impeachment or exculpatory, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," the conviction must be overturned. See *Cone* v. *Bell*, 556 U.S. 449, 470 (2009); accord *Kyles*, 514 U.S. at 434; see also *Giglio*, 405 U.S. at 154-55.

All of these elements are present here, and the CCA's failure to recognize as much conflicts with this Court's precedents. The documents that were undisputedly withheld significantly undercut the prosecution's trial theory regarding the murder ammunition. Thus, the State's failure to disclose this evidence undermines confidence in the jury's verdict, and under this Court's precedents, the verdict should be overturned. See *Cone*, 556 U.S. at 470; *Kyles*, 514 U.S. at 434. Compounding the due process problem is that the prosecution's evidence and argument

regarding the ammunition were simply not true, based on the withheld evidence, and this Court has long held that a conviction based on false evidence violates due process. See, e.g., *Giglio*, 405 U.S. at 153; *Napue*, 360 U.S. at 269. This conduct is even more inexcusable in a capital case, where the consequences of such prosecution tactics can literally mean the difference between life and death.

In light of Mr. Bower's aggressive pursuit of his *Brady* claim, the State has changed its tune. After more than 30 years of stressing first to the jury and then courts at all levels that this particular ammunition is exceedingly rare and useful only for murder, the State is backing off. It now claims that the trial evidence shows that a number of people in the "low hundreds" had access to the ammunition and that its primary purpose was to reduce noise. Mr. Bower does not agree with that characterization of the trial evidence, but even if true, that is *not* what the prosecution told the jury. The prosecution told the jury that Mr. Bower was one of only "twelve or fifteen people * * * in the State of Texas"—not one of a group of people numbering in the low hundreds—that possessed the "unique and exotic" ammunition used in the murders. The prosecution told the jury that there is "no purpose for [Fiocchi subsonic ammunition] other than to kill"—not that its primary purpose was to reduce noise. In giving its new interpretation of the trial evidence, the State never attempts to justify or reconcile its jury argument, because it cannot. So even if the State is correct in its new

interpretation of the trial evidence, the prosecution's inconsistent jury arguments show it used that evidence in a false manner, and that implicates due process as well. See *United States* v. *Boyd*, 55 F.3d 239, 243 (7th Cir. 1995); *Hamric* v. *Bailey*, 386 F.2d 390, 394 (4th Cir. 1967).

III. Executing Mr. Bower After More Than 30 Years On Death Row Is Cruel And Unusual

Mr. Bower has been on death row for more than 30 years. During this time, he has pursued a direct appeal, two state habeas proceedings, and one federal habeas proceeding. Mr. Bower's filings have never been found to be frivolous or abusive. Indeed, he has been granted two evidentiary hearings, and the trial court recommended that he receive a new sentencing trial. During this 30-year period, Mr. Bower has had a legal proceeding pending for all except 132 days. He has actively litigated his rights, and he has waited, often for years at a stretch, for courts to rule or schedule a hearing. For example, the CCA took five years before affirming Mr. Bower's conviction on direct appeal, and the federal district court did not set an evidentiary hearing on Mr. Bower's ineffective assistance of counsel claim in the federal habeas proceeding until eight years after the petition was filed.

All the while, the State has left Mr. Bower to languish on death row under the threat of eventual execution and the reality of six execution dates for

which stays arrived only days or hours before the scheduled execution. The past several years of Mr. Bower's time on death row have been particularly cruel, as the State (not as a consequence of any prison misconduct by Mr. Bower) has segregated him away from meaningful human contact, denied him distractions of work or hobbies, and forced him to sit alone as the "machinery of death" lurched forward around him.

For more than 200 years, a fundamental precept of the United States Constitution has been that "cruel and unusual punishment" is prohibited. U.S. CONST. amend. VIII. As the length of time inmates spend on death row prior to their executions has lengthened, there has been an increasing recognition that such treatment implicates serious Eighth Amendment concerns.

In 1995, Justice Stevens observed that the question of whether executing a prisoner after prolonged incarceration on death row violates the Eighth Amendment was important and "not without foundation." See *Lackey* v. *Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari). Justice Breyer has similarly noted that a claim that the United States Constitution forbids a defendant's execution after an extensive delay "is a serious one." *Elledge* v. *Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari).

Many years ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of

the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). This "description should apply with even greater force in the case of delays that last for many years," *Lackey*, 514 U.S. at 1046, as "executions carried out after delays of this magnitude may prove particularly cruel." *Elledge*, 525 U.S. at 945. This is so because "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted," and "the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal." *Lackey*, 514 U.S. at 1045-46. And, eventually, "an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty." *Elledge*, 525 U.S. at 945.

In more recent cases, Justice Stevens became definitive in his conclusion that "our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel." *Thompson* v. *McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., respecting denial of certiorari); see also *Valle* v. *Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay) (stating, in a case where the defendant had been on death row for over 33 years, "I have little doubt about the cruelty of so long a period of incarceration under sentence of

death."). And there likewise can be no doubt that execution after more than 30 years on death row "is unusual—whether one takes as a measuring rod current practice or the practice in this country and in England at the time our Constitution was written." *Elledge*, 525 U.S. at 945.

This issue remains an important, unresolved question of federal law, as Justices Stevens and Breyer first pointed out in *Lackey* almost 20 years ago. Although Justice Stevens initially observed that the question of whether executing a prisoner after prolonged incarceration on death row violates the Eighth Amendment was "not without foundation," he ultimately concluded that in view of the claim's "legal complexity and potential for far-reaching consequences," it should receive further study in the "laboratories" of the state and federal courts. *Lackey*, 514 U.S. at 1045, 1047.

In the almost 20 years since *Lackey*, both federal and state courts have considered this issue. Many of them have either (a) found generally that execution after prolonged incarceration under a sentence of death is not unconstitutional, noting that this Court has not ruled on this issue, or (b) refused to consider the question on its merits, foreclosing relief instead on procedural grounds. See, e.g., *Reed* v. *Quarterman*, 504 F.3d 465, 488 (5th Cir. 2007); *Alba* v. *Quarterman*, 621 F. Supp. 2d 396, 434 (E.D. Tex. 2008); *Bell* v. *State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996). But recently, a California district court ruled that the California death penalty system is unconstitutional and "resulted in a system in which

arbitrary factors, rather than legitimate ones like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed." See *Jones* v. *Chappell*, ___ F. Supp. 2d ___, No. CV 09-02158-CJC, 2014 WL 3567365, at *14 (C.D. Cal. July 16, 2014). According to the court, "[f]undamental principles of due process and just punishment demand that any punishment, let alone the ultimate one of execution, be timely and rationally carried out." *Id.* at *13. The issue has percolated sufficiently, and this Court's intervention is needed to address this important issue.

Mr. Bower has been held on Texas's death row for more than 30 years under threat of execution. By any standard, the length of Mr. Bower's incarceration on death row is "unusual" and far outside anything the Framers of the Constitution would have considered acceptable rather than "cruel." The inordinate amount of time that has passed since Mr. Bower's conviction and imposition of his sentence is not due in any measure to "abuse of the judicial system * * * or repetitive frivolous filings." *Lackey*, 514 U.S. at 1047. Particularly given the lingering substantial questions regarding guilt and innocence, executing Mr. Bower after more than 30 years on death row, with several execution dates stayed on the eve of execution, and after he has been held in solitary conditions for years, is cruel and unusual punishment and violates the Eighth and Fourteenth Amendments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 9, 2014

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-21,005-02, WR-21,005-03, WR-21,005-04 & WR-21,005-05

EX PARTE LESTER LEROY BOWER, JR.

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM CAUSE NOS. 33426, 33427, 33428, AND 33429 IN THE 15TH JUDICIAL DISTRICT COURT GRAYSON COUNTY

Per Curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In April 1984, a jury found applicant guilty of four counts of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment in each case at death. This Court affirmed applicant's convictions and sentences on direct appeal. *Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App. 1989). Applicant filed his initial post-conviction application for writ of habeas

corpus in the convicting court on October 2, 1989, pursuant to Article 11.07 then in effect. The application challenged all four convictions and sentences. This Court filed and set each case and ultimately denied applicant relief. *Ex parte Bower*, 823 S.W.2d 284 (Tex. Crim. App. 1991). Applicant then sought habeas relief in the federal district court. The district court conducted an evidentiary hearing in June 2000 and ultimately denied relief in a series of opinions issued in 2002-2004. The Fifth Circuit affirmed the district court's decision on September 18, 2007, and the United States Supreme Court denied applicant's petition for writ of *certiorari* on April 21, 2008.

The instant application attacking all four convictions and sentences was received in this Court on June 25, 2008, along with a motion to stay his execution.[1] However, before this Court ruled on the application, we received notice that the trial court had withdrawn the execution date pending its determination on applicant's motion for forensic testing. In an attempt to avoid piecemeal litigation in the case, this Court issued an order on July 21, 2008, stating that the Court would refrain from acting on the

[1] Because applicant had previously filed an application under Article 11.07, and because this Court had denied relief on that application prior to September 1, 1995, when Article 11.071 became effective, applicant was not entitled to file an initial application under Article 11.071. By the terms of the statute, this application is to be considered a subsequent application which must meet the dictates of Article 11.071 § 5 before the merits may be addressed by any court.

current writ application until the results of the forensic testing litigation were complete. *Ex parte Bower*, No. WR-21,005-02 (Tex. Crim. App. July 21, 2008) (not designated for publication). The trial court subsequently granted forensic testing, and the testing proceeded.

Applicant raised four issues in the instant application: (1) actual innocence based upon newly discovered evidence; (2) *Brady* violations; (3) a claim that Article 37.071 operated unconstitutionally because his jury did not have a vehicle to properly consider mitigating evidence; and (4) a claim that executing him after twenty-four years on death row amounts to cruel and unusual punishment. We held that applicant met the dictates of Article 11.071 § 5 with relation to his first two allegations and remanded those for the trial court to investigate the claims and develop the record. We made no decision regarding whether the third allegation met the Section 5 bar, but because the law had evolved with regard to mitigating evidence, we ordered the trial court to review the third allegation under the prevailing law and make appropriate findings and conclusions. *Ex parte Bower*, No. WR-21,005-02 (Tex. Crim. App. June 13, 2012) (not designated for publication). We did not dispose of the fourth allegation at that time in order to address all allegations together in a concise fashion.

Following the completion of the requested forensic testing, holding a live hearing, and considering the arguments by applicant and the State, the trial

court entered findings of fact and conclusions of law recommending that applicant's first and second claims be denied. After reviewing recent case law, the trial court recommends that the relief sought in applicant's third claim be granted.

We have reviewed the record and the trial court's findings of fact and conclusions of law. Based upon our own review, we deny relief on applicant's first two claims regarding actual innocence and *Brady* violations. We reject the trial court's findings and conclusions recommending relief on applicant's third claim. We have previously held that, unlike the double-edged evidence in *Penry v. Lynaugh*,[2] the mitigating evidence presented by applicant during the punishment phase of his trial – evidence of his good and non-violent character, his good deeds, and the absence of a prior criminal record – was not outside the scope of the special issues given, nor did it have an aggravating effect when considered within the scope of the special issues. *Ex parte Bower*, 823 S.W.2d at 286. The promulgation of more recent case law by the United States Supreme Court has not changed the definition or nature of what is considered mitigating evidence; thus, applicant was not constitutionally entitled to a separate jury instruction at the punishment phase of trial. *See, e.g., Penry*, 492 U.S. 302 (1989), and *Ex parte Jones*, No. AP-75,896 (Tex. Crim. App. June 10, 2009) (not designated for publication) (holding

[2] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

positive personal characteristics are the sorts of evidence that can be considered within the scope of the former special issues – no *Penry* issue required). Accordingly, the relief applicant seeks is denied.

Applicant's fourth allegation is dismissed.

IT IS SO ORDERED THIS THE 11th DAY OF JUNE, 2014.

Do Not Publish

CAUSE NO. 33426-B, 33427-B, 33428-B & 33429-B

EX PARTE	§	**IN THE DISTRICT**
	§	**COURT**
	§	
	§	**15TH JUDICIAL**
	§	**DISTRICT**
	§	
	§	**GRAYSON COUNTY,**
LESTER LEROY BOWER	§	**TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBSEQUENT 11.071 APPLICATION FOR WRIT OF HABEAS CORPUS

Having considered and granted Lester Bower's motion requesting DNA testing of evidence, received the lab results from the ordered testing, and considered the arguments by Lester Bower and the State, the Court makes the following findings of fact:

FINDINGS OF FACT

1. Lester Bower was found guilty of capital murder, in cause numbers 33426, 33427, 33428 & 33429 on April 28, 1984.

2. Punishment was assessed at death.

3. Lester Bower's conviction was affirmed by the Court of Criminal Appeals on January 25, 1989. *Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App. 1989).

4. Lester Bower filed his first 11.071 Application for Writ of Habeas Corpus with the Court of Criminal Appeals on October 2, 1989.

5. The trial court made findings of fact regarding that application.

6. The trial court made supplemental findings of fact regarding that application that found there was no credible evidence connecting Ches, Lynn, Bear or Rocky to the murders in this case.

7. Lester Bower's first 11.071 writ application was denied on December 4, 1991. *Ex parte Bower*, 823 S.W.2d 284 (Tex. Crim. App. 1991).

8. Lester Bower then filed an application for writ of habeas corpus in Federal Court, in the Eastern District of Texas. That Court held a week-long evidentiary hearing regarding essentially the same facts alleged in his current filing. The Federal District Court denied relief.

9. Lester Bower appealed that opinion to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the Federal District Court's opinion. *Bower v. Quarterman*, 497 F.3d 459 (5th Cir. 2007).

10. An execution date was set for July 22, 2008. (*see* Subsequent 11.071 Application for Writ of Habeas Corpus, EXHIBIT B)

11. Shortly before that date, Lester Bower filed this application and a Chapter 64 motion requesting DNA testing.

12. Lester Bower's execution was stayed pending the resolution of the DNA motion and this subsequent writ application.

13. Lester Bower alleges four claims for relief in his Application for Writ of Habeas Corpus.

14. The Court of Criminal Appeals has ordered Findings of Fact and Conclusions of Law on only three of those allegations.

15. In the first allegation, Lester Bower alleges actual innocence.

16. In his second allegation, Lester Bower alleges a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

17. In the third issue, Lester Bower alleges that under *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), the jury charge given at punishment was inadequate regarding mitigation.

18. In his first ground, Lester Bower does not raise any procedural claims attacking the constitutionality of his trial proceedings.

19. The appellant alleges new evidence in ground one, specifically 1) an affidavit and testimony by "Witness # 1" that she believed that her boyfriend and three other men committed the murders based on statements made to her and statements she overheard. Witness # 1 states that her boyfriend confessed to the murders to her and that she overheard her boyfriend, "Lynn", and Lynn's friend "Ches" make admissions to the murders; 2) an affidavit and testimony regarding a statement made by Witness # 1 to Witness # 4 regarding the fact that her "old man" had been "involved" in the murders; 3) testimony from Sheriff Arnold Isenberg,

from Marshall County, Oklahoma regarding the characters of Lynn, Ches, Bear and Rocky as well as their connections to drug manufacture and delivery; 4) affidavits from two defense investigators, hired by Lester Bower, reciting unsworn, hearsay statements from multiple individuals, about and attributed to Ches, Lynn, Bear and Rocky; 5) FBI memoranda, teletypes and "airtels" detailing a small portion of the murder investigation; 6) allegations from Billy Carothers regarding one of the victim's alleged drug activities; 7) and an affidavit from Witness # 5, Bear's wife, that Ches, Lynn, Bear and Tramp had discussed the murders being drug related.

20. Victim Bobby Glen Tate owned the B&B Ranch which was located near Sherman, Texas. (TRIAL RR VOL. XI, P. 39) Mr. Tate owned an ultralight aircraft which he stored in a hanger located on his property. (TRIAL RR VOL. XI, PP. 39-40) Another ultralight aircraft owned by David Brady was also stored in the hangar. (TRIAL RR VOL. XI, PP. 39, 42) Evidence was presented to show that Tate had decided to put his ultralight up for sale and his friend, Philip Good, another one of the victims, was attempting to find a buyer for the aircraft. (TRIAL RR VOL. XI, P. 40) A day or two before the commission of the offense, Tate told his wife, Bobbie, that Philip Good had met someone the previous Wednesday who was interested in buying the ultralight. (TRIAL RR VOL. XI, P. 40)

21. On October 8, 1983, Mr. Tate went out to his ranch to work on a house he was building.

(TRIAL RR VOL. XI, PP. 39-40) According to Bobbie Tate, her husband was to return to their home in town around 4:30 p.m. (TRIAL RR vol. XI, P. 44) About 7:30 p.m., when he failed to return, Bobbie and her stepson, Bobby, Jr., went to the ranch. (TRIAL RR VOL. XI, PP. 46-48) Outside the hangar, they saw vehicles belonging to Tate, Philip Good, and Ronald Mays. (TRIAL RR VOL. XI, PP. 48-49) The hanger was locked and no lights were showing through the windows. (TRIAL RR VOL. XI, PP. 49-50) Bobbie retrieved a key from her husband's pickup and unlocked the hangar door. (TRIAL RR VOL. XI, P. 49) Upon opening the door, they say the body of Ronald Mays lying in a pool of blood. (TRIAL RR VOL. XI, P. 49) Bobbie and Bobby, Jr. went to the nearest phone and called the police. (TRIAL RR VOL. XI, PP. 51-53)

22. Marlene Good, the widow of Philip Good, reiterated a similar story. She testified that on September 30, 1983, someone called their home and spoke with Philip for ten or fifteen minutes regarding an advertisement Philip had placed in "Glider Rider" magazine regarding the sale of an ultralight. (TRIAL RR VOL. XVI, P. 51) Philip told the caller that he sold the ultralight advertised in the magazine, but he had another that he could sell. (TRIAL RR VOL. XVI, P. 52) On the following Monday or Tuesday, the man called again. (TRIAL RR VOL. XVI, P. 54) On Wednesday, October 5, Philip met the man at the Holiday Inn in Sherman and took him out the B&B Ranch in order to show him Bob Tate's ultralight. (TRIAL RR VOL. XVI, PP. 54-55)

When Philip returned at about 4:00 p.m., he told Marlene that he thought he had sold Bob Tate's ultralight and the man was going to pick up the plane on Saturday, October 8. (TRIAL RR VOL. XVI, PP. 55-56) On October 8, Marlene testified that she spent the day with Ronald Mays' wife. (TRIAL RR VOL. XVI, P. 58) Philip spent the day helping Jerry Brown build an ultralight in Philip's hangar at a different location than the hangar belonging to Bob Tate. (TRIAL RR vol. XVI, P. 59) At 3:30 p.m., Philip called her and told her he was going to meet the man at the hangar on the B&B Ranch at 4:00 p.m. (TRIAL RR VOL. XVI, PP. 58-60) At approximately 4:30 p.m., Philip Good left to go to the hangar at the ranch. (TRIAL RR VOL. XVI, P. 61) When he had not returned by 6:30 p.m., Marlene went to the hangar to see what was happening. (TRIAL RR VOL. XVI, PP. 61-62) When she arrived, she, too, saw all the vehicles parked outside. (TRIAL RR VOL. XVI, P. 62) The door to the hangar was locked and when she looked into the hangar windows, she could see that Bob Tate's ultralight was missing. Seeing that no one was around, she went home. (TRIAL RR VOL. XVI, PP. 65-66)

23. When investigators arrived on the scene, they discovered a grisly sight. Immediately inside the door of the hangar, they found the body of Ronald Mays. (TRIAL RR VOL. XI, PP. 24, 76) Underneath a pile of carpeting, investigators found the bodies of Philip Good, Bobby Tate and Jerry Mack Brown. (TRIAL RR VOL. XI, PP. 24-25, 35, 77, 79) Good, Tate and Brown had each been shot twice in the head. (TRIAL

RR VOL. XII, PP. 7-9, 12-13, 19-20) Mays had been shot once in the head, once in the neck, once in the right arm and once in the right side of the chest. (TRIAL RR VOL. XII, P. 24) All victims still had their wallets and their jewelry. (TRIAL RR VOL. XVI, P. 86) Tate's ultralight, which had been in the hangar earlier in the day, was missing. (TRIAL RR VOL. XVI, PP. 66, 88) A table situated against one wall of the hangar had a large spot of blood on it. (TRIAL RR VOL. XI, P. 80) Tests showed that this blood matched a sample of blood taken from Tate's body during an autopsy. (TRIAL RR VOL. XII, P. 94; XVI, PP. 40, 46) This, plus the placement of the bodies underneath the carpet, led investigators to speculate that Tate had been shot while sitting at the table and then dragged over and placed with the bodies of Brown and Good. (TRIAL RR VOL. XVI, PP. 46) Investigators also found eleven spent .22 caliber shell casings which had been manufactured by Julio Fiocchi. (TRIAL RR VOL. XI, P. 84) The scattered arrangement of the casings on the floor of the hangar indicated that the killer had used a semi-automatic weapon rather than a revolver, since a semi-automatic ejects the cartridges after each shot. (TRIAL RR VOL. XII, P. 47)

24. Dr. Charles Petty performed autopsies on the victims. According to Dr. Petty, three of the victims – Good, Tate and Brown – all sustained two gunshot wounds to the head. (TRIAL RR VOL. XII, PP. 7-9, 12-13, 19-20) Both of Brown's wounds and one each on Tate and Good, were contact wounds. (TRIAL RR VOL.

XII, P. 19) Mays sustained one contact wound to the head and four other wounds to the upper part of his body. (TRIAL RR VOL. XII, P. 24) Dr. Petty further testified that the presence of the contact wounds indicated that when the weapon was fired, the muzzle of the gun was placed directly against the victim's head. (TRIAL RR VOL. XII, P. 10) In addition, the gunpowder residue left on victims Good, Tate and Brown indicated that in each instance the murder weapon was equipped with a silencer. (TRIAL RR VOL. XII, PP. 10-11, 18, 20) Dr. Petty testified that he removed eleven bullets and fragments from the victims. All of the bullets appeared to be .22 caliber hollow point bullets. (TRIAL RR VOL. XII, PP. 27-29)

25. Larry Fletcher, a firearms examiner with the Dallas County Institute of Forensic Sciences, testified that tests run on the spent casings and the bullets indicated that the shots were fired from either an AR-7 caliber rifle, a Ruger .22 caliber semi-automatic pistol or a High Standard .22 caliber semi-automatic pistol. (TRIAL RR VOL. XII, P. 45) Markings on the bullets indicated that a silencer was used. (TRIAL RR VOL. XII, P. 47) In addition, the ammunition was manufactured by Julio Fiocchi and had hollow points. (TRIAL RR VOL. XII, PP. 48-49, 77-78)

26. Fletcher testified that A-sonic ammunition had the characteristic of reducing the noise discharge normally heard upon the firing of a weapon. (TRIAL RR VOL. XII, P. 49) Fletcher also testified that he had never encountered

Julio Fiocchi ammunition in his nine years as a firearms examiner. (TRIAL RR VOL. XVI, P. 50) Due to the condition of the bullets, Fletcher could positively say that only two of the bullets were fired from the same weapon. (TRIAL RR VOL. XII, PP. 71) One of these bullets was extracted from the body of Mr. Mays and one from the body of Mr. Tate. (TRIAL RR VOL. XII, PP. 28-29)

27. Much of Fletcher's testimony was duplicated by the testimony of Paul Schrecker, a firearms examiner with the FBI. Schrecker testified that all eleven casings were fired from a single weapon, and the markings on the casings were all consistent with a Ruger firearm. (TRIAL RR VOL. XV, PP. 86, 89) His examination of the bullets indicated that at least seven of the bullets were fired by the same weapon. (TRIAL RR VOL. XV, PP. 92) He agreed with Fletcher that a silencer was used. Schrecker also testified that he had never encountered Fiocchi .22 caliber long rifle ammunition before this case. (TRIAL RR VOL. XV, PP. 101-102)

28. Denis Payne, Bower's supervisor at Thompson-Hayward Chemical Company in Dallas, Texas, testified that Bower had worked for the company in Colorado until he was laid off in February of 1983. (TRIAL RR VOL. XII, PP. 82-83) Then, in May of 1983, Payne had hired him for a sales position in Dallas. (TRIAL RR VOL. XII, P. 84) Although Bower's job performance in Colorado had been adequate, his performance in Dallas was poor. (TRIAL RR VOL. XII, PP. 83-84) While working in Dallas, Bower

had been assigned a telephone credit card. (TRIAL RR VOL. XII, PP. 85-86) A review of the record of the Thompson-Hayward Chemical phone bills indicated that on Friday, September 30, a call was made and charged to Bower's credit card. (TRIAL RR VOL. XII, P. 88) This call was made to Philip Good's residence and the conversation lasted ten minutes. (TRIAL RR VOL. XII, P. 88) A direct dial call was made to Philip Good's residence again on Monday, October 3. (TRIAL RR VOL. XII, PP. 88-89) This was a two minute call. (TRIAL RR VOL. XII, P. 89) Another call was placed on Bower's credit card to Philip Good's residence on Friday, October 7. (TRIAL RR VOL. XII, P. 89) This call lasted three minutes. (TRIAL RR VOL. XII, P. 89) One of Bower's coworkers, Randal Cordial, testified that prior to the company sales meeting on January 3, 1984, Bower told him that he was building an ultralight plane and lacked only the engine. (TRIAL RR VOL. XIII, PP. 18-19)

29. FBI Special Agent Nile Duke testified that after they traced the above-mentioned phone calls to the Thompson-Hayward Chemical Company, he began interviewing all the employees of the company in hopes of finding out who had placed the calls. (TRIAL RR VOL. XIII, P. 22) After learning that Bower had told Special Agent Jim Knight that he had telephoned Philip Good, he scheduled an interview with Bower on January 11, 1984 at the company office. (TRIAL RR VOL. XIII, PP. 22-23) During the two hour interview, Bower told Duke that he had seen an advertisement in

Glider Rider's Magazine regarding an ultra-light aircraft that Good had for sale. (TRIAL RR VOL. XIII, P. 26) Bower admitted calling the Good residence twice. (TRIAL RR VOL. XIII, PP. 27-28) According to Bower, during the first call which he said was the shortest, he had spoken only with Mrs. Good who told him that Mr. Good was not at home. (TRIAL RR VOL. XIII, P. 27) He later called back and spoke with Mr. Good who informed him that the ultralight had been sold. (TRIAL RR VOL. XIII, P. 27) Bower told Special Agent Duke that he had made only two calls and none of the calls had been placed on company credit cards. (TRIAL RR VOL. XIII, P. 29) Bower also told Special Agent Duke that he had never made an appointment to see Good and had only passed through Sherman on his way to Tulsa or Gainesville. (TRIAL RR VOL. XIII, PP. 31-32) When asked his whereabouts on the day of the murders, Bower told Special Agent Duke that he could not account for his whereabouts on October 8, although he did remember that he was sick with a virus on Monday, October 10 and had stayed home from work. (TRIAL RR VOL. XIII, PP. 34-35) Finally Special Agent Duke testified that Bower admitted he owned a .300 Winchester Magnum rifle, a Remington 1100 shotgun, a Savage Model B side-by-side double barrel shotgun, a Ruger 277V .220 caliber rifle, a 6.5 caliber Japanese rifle, a Winchester bolt action .22 caliber rifle, a Marlin lever action .4570 caliber government rifle, a .243 caliber Remington 700 rifle and a .20 B Model 929 Smith and Wesson .44 caliber

Magnum revolver. (TRIAL RR VOL. XIII, PP.) Bower also told Duke that he had previously owned a .357 caliber revolver. When asked specifically about a .22 caliber handgun, Bower replied that he did not own one. (TRIAL RR VOL. XIII, P. 37)

30. On January 13, 1984, Bower went to the FBI office in Dallas to take a polygraph exam. (TRIAL RR VOL. XIII, P. 44) After talking with the agents there, Bower decided not to take the test. According to FBI agent William Teigen, at that point all the authorities knew about Bower was that he was employed at Thompson Hayward, that three telephone calls had been made on the company phone bill to Philip Good's residence and that he as interested in ultralights. (TRIAL RR VOL. XIII, P. 45) Bower stayed and talked with the FBI agents. During this conversation, Bower admitted that he had made the calls but that he decided not to buy the ultralight from Good and never had any further contact with him. (TRIAL RR VOL. XIII, P. 65) Bower also told the agents of his interest in ultralights. (TRIAL RR VOL. XIII, PP. 67-71) Bower related to the agents how he had spent hours researching ultralights and how he hoped someday to build an ultralight. (TRIAL RR VOL. XIII, PP. 67-71) Bower went on to tell the agents that he had already obtained a piece of fabric for the covering, a fiberglass boat seat and some aircraft aluminum. (TRIAL RR VOL. XIII, PP. 71-72) Teigen testified at trial that after talking with Bower he believed that Bower was obsessed with the aircraft. (TRIAL RR VOL. XIII, P. 71) When

asked specific questions by the agents, Bower said that he had never bought an ultralight (TRIAL RR VOL. XII, P. 73), that he had not been in Sherman on the day of the murders, that he had not met Philip good on the day of the murders and had never met him in person, that he did not know where the missing ultralight was and that he had never seen the missing ultralight. (TRIAL RR VOL. XIII, PP. 73-74)

31. After further investigation, a search warrant was obtained for Bower's residence. (TRIAL RR VOL. XIV, P. 7) The search of Bower's residence, garage and vehicle was conducted during the evening of January 20, 1984. (TRIAL RR VOL. XIV, PP. 7-8) Among the items seized were various manuals and magazines which were introduced into evidence at trial: a manual on the Cuyunna ultralight aircraft engine (TRIAL RR VOL. XIV, P. 22), a magazine entitled *Glider Rider's Magazine* which showed Bower as a subscriber (TRIAL RR VOL. XIV, P. 23), the *World Guide to Gun Parts* (TRIAL RR VOL. XIV, P. 22), the *Instruction Manual for Ruger Standard Model .22 Automatic Pistols*, VOL. II of *Firearm Silencer Manual* (TRIAL RR VOL. XIV, P. 25), two xeroxed pages from *Shotgun News* depicting silencers and silencer weapons (TRIAL RR VOL. XIV, P. 26), *The AR-7 Exotic Weapons System Book*, a manual on explosives entitled *High-Low Boom! Modern Explosives*, another manual entitled *Semi-Full Auto, AR-15 Modification Manual*, another weapons manual entitled *Rhodesian Leaders Guide* and several catalogs containing ads for military equipment including guns, clothing

and numerous publications, including books on how to kill. (TRIAL RR VOL. XIV, PP. 10-16)

32. Authorities also found a form letter addressed to "Dear Customer" from Catawba Enterprises, indicating that Bower had purchased an item from the company. (TRIAL RR VOL. XIV, P. 27) Authorities found inside a briefcase which was located inside Bower's garage an Allen wrench which could be used to mount a Catawba silencer to a pistol and a packet of materials which included among other things Bower's Federal Firearms License which permitted him to sell firearms, ammunition and other destructive devices. (TRIAL RR VOL. XIV, PP. 14-15) Bower's own Firearms-Acquisition and Disposition Record which was also seized during the search indicating that Bower bought a Ruger RST-6-automatic .22 pistol, serial number 17-28022 on February 12, 1982 (TRIAL RR VOL. XIV, P. 30) and sold it to himself on March 1, 1982. (TRIAL RR VOL. XIV, PP. 30, 32) Investigation showed that on February 12, 1982, Bower also ordered three boxes of Julio Fiocchi .22 ammunition. (TRIAL RR VOL. XIV, PP. 30-31)

33. Parts of the ultralight were found during the search. In the garage were two ultralight tires and rims with the name "Tate" scratched into each rim. (TRIAL RR VOL. XIV, PP. 17-19, 35-36; VOL. XI, P. 72) Another ultralight tire and rim were found in Bower's house. Six pieces of aluminum ultralight tubing were found in the garage (TRIAL RR VOL. XIV, P. 33) as well as warning stickers that had been removed from

the aluminum tubing of an ultralight. In addition, an ultralight harness was found in the garage. (TRIAL RR VOL. XIV, PP. 38-39) Authorities also removed a pair of rubber boots and a blue nylon bag from Bower's garage after noticing what appeared to be blood stains on those items. (TRIAL RR VOL. XIV, PP. 20-21, 36, 40) Also removed was a sledge hammer and some ash-like debris taken from the trunk of Bower's car. (TRIAL RR VOL. XIV, PP. 37-38, 40-41)

34. Scientific evidence presented at trial showed that a fingerprint belonging to one of the victims, Jerry Mack Brown, was found on one of the pieces of ultralight tubing found in Bower's garage. (TRIAL RR VOL. XIV, PP. 38, 41, 85-81) In addition, an analysis of the sledge hammer removed from Bower's garage showed that material present on one side of its head was polypropylene, the same material which was used to make the American Aerolights decals. Metallic smears present on the other side of its head tested out to be of the same type of aluminum alloy as was used to make the engine, the reduction unit for the engine, the crank case and the carburetor in Tate's ultralight aircraft. An analysis of the material taken from the trunk of Bower's car also revealed a fragment of this same aluminum alloy. (TRIAL RR VOL. XIV, PP. 37-38) A forensic metallurgist with the FBI determined that his metal fragment was once a portion of a reduction unit for an ultralight engine and it appeared that the reduction unit was fragmented by a smashing action, consistent with a blow from a sledge

hammer. (TRIAL RR VOL. XIV, PP. 39-46) Tests on the boots removed from the garage showed the presence of human blood on the right boot but an attempt to type the blood was inconclusive. (TRIAL RR VOL. XVI, PP. 8-9) Tests on the blue nylon bag found in Bower's garage also indicated the presence of human blood. (TRIAL RR VOL. XVI, P. 41; VOL. XIV P. 40)

35. Other testimony was presented to show that Catawba Enterprises dealt primarily in silencer parts (TRIAL RR VOL. XIV, P. 107) and that the Catawba silencer could be easily installed on a Ruger RST-6 semi-automatic .22 pistol with an Allen wrench. (TRIAL RR VOL. XIV, PP. 111-112) Ed Walters, the attorney for Catawba Enterprises testified that ninety-nine percent of the company's business was selling silencers and if Bower had one of the company's form letters acknowledging a transaction, Bower had probably purchased a silencer from the company. (TRIAL RR VOL. XVI, PP. 27-28)

36. Sanford Brygider, the owner of Bingham Limited, distributer of Julio Fiocchi ammunition in the United States testified that the .22 subsonic Fiocchi ammunition was not sold over the counter but rather was a specialty item used primarily for suppressed weapons. (TRIAL RR VOL. XIV, PP. 112-114) Brygider testified that in the previous three years, his company had sold Fiocchi ammunition to only ten or fifteen dealers in Texas. (TRIAL RR VOL. XIV, P. 115) He further testified that his company records showed that they had shipped three boxes of

Fiocchi .22 long rifle sub-sonic hollow point ammunition to Bower on February 12, 1982 and five more boxes on December 10, 1982. (TRIAL RR VOL. XIV, PP. 117-118)

37. Lori Grennan, the customer service coordinator for American Aerolights, testified that her company manufactured the ultralight owned by Bob Tate. (TRIAL RR VOL. XV, PP. 10-11) She testified that it was possible for the aircraft to be broken down and put into a thirteen foot carrying case and carried by one person. (TRIAL RR VOL. XV, P. 12) Grennan also testified that every ultralight manufactured by her company bears three company decals, two on one of the pieces of tubing and one on the engine. (TRIAL RR VOL. XV, PP. 12-14) However, after examining the tubing removed from Bower's garage, she noted that these decals were not present. (TRIAL RR VOL. XV, P. 14) She also testified that every ultralight has certain warning stickers. (TRIAL RR VOL. XV, PP. 15-16) When shown the wadded up stickers found on the box in Bower's garage, Grennan testified that those were the warning stickers that would go on the ultralight manufactured by her company. (TRIAL RR VOL. XV, P. 16) Finally, Grennan testified that the harness and tire rims found in Bower's garage came from an ultralight manufactured by American Aerolights. (TRIAL RR VOL. XV, PP. 16-17)

38. Marjorie Carr, the owner of a fruit stand in Sherman, testified that she had seen Bower in the company of Philip Good in Sherman in late September of 1983. (TRIAL RR VOL. XV,

PP. 70-71) According to Carr, Good and Bower had come into her stand and Bower was interested in buying some oranges. (TRIAL RR VOL. XV, P. 70) Carr related that she spoke with Bower for some ten or fifteen minutes and she remembered Bower telling her that he had moved from Colorado several months earlier and was then living in Dallas. (TRIAL RR VOL. XV, PP. 71-72)

39. Testimony also showed that Bower had gone to the Arlington Sportsman's Club on September 30, 1983 and had spent fifteen minutes firing .22 ammunition. (TRIAL RR VOL. XV, PP. 118-120)

40. There is no credible evidence that drugs where at the hangar or that drug dealing or drug use had ever occurred at the hangar. There were no drugs found at the hangar belonging to Bob Tate, nor was there any residue, baggies, scales, records or any other paraphernalia relating to the use, manufacture or distribution of drugs.

41. Witness # 1 provided an affidavit to defense counsel in 1989, gave testimony in a Federal hearing in 2000, gave an interview to a reporter for the Fort Worth Star Telegram in 2008, testified in front of a Grayson County Grand Jury in 2009, and testified at the STATE EVIDENTIARY HEARING in 2012.

42. Witness # 1 gave evidence which directly contradicts the physical evidence adduced at trial and facts to which Bower has subsequently admitted, namely, that someone other than

Lester Bower stole an ultralight aircraft from the murder victims.

43. During her testimony in front of a Grand Jury, Witness # 1 stated that although she had signed the affidavit referenced by Bower in his current motion, she admitted that she "probably didn't read it as closely as [she] should have . . . " (STATE'S RESPONSE, EXHIBIT 33; GRAND JURY RR, P. 37)

44. Witness # 1 testified at Grand Jury and at the 2012 state court evidentiary hearing that her inclusion of Rocky Ford as one of the men involved in the murders with her boyfriend, Lynn Langford, was an assumption on her part. (STATE'S RESPONSE, EXHIBIT 33; GRAND JURY RR, PP. 35-36; STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 32, 125-126)

45. Witness # 1 stated in her initial affidavit that Lynn told her that Lynn, Rocky and Ches had made a drug run. (STATE'S RESPONSE, EXHIBIT 24, P. 4)

46. Witness # 1 stated in her initial affidavit and testified at the federal court evidentiary hearing that her inclusion of Bear as one of the men involved in the murders with her boyfriend, Lynn Langford, was an assumption on her part. (STATE'S RESPONSE, EXHIBIT 24, P. 4; FEDERAL EVIDENTIARY HEARING, RR VOL. 3, P. 709)

47. Witness # 1 told a reporter at the Fort Worth Star Telegram in 2008 that Lynn had told her that Lynn, Ches and Rocky committed the

murders and she assumed the fourth man was Bear. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 129-131)

48. Witness # 1 testified at the Grand Jury in 2009 that she remembered Lynn, Ches, Rocky and Bear discussing the ultralight airplane stolen from the crime scene when Bob Tate, Philip Good, Jerry Mack Brown and Ronald Mayes were murdered. (STATE'S RESPONSE, EXHIBIT 33; GRAND JURY RR, P. 40)

49. Witness # 1 stated that she heard Ches ask Lynn, "did you get rid of the airplane?" (**STATE'S RESPONSE, EXHIBIT 33**; GRAND JURY RR, P. 41) Witness # 1 then testified that Lynn said, "Ches, it's not an airplane, you know." (**STATE'S RESPONSE, EXHIBIT 33**; GRAND JURY RR, P. 41) Witness # 1 said that Ches replied, " . . . whatever, whatever, you know, but you got it to Arkansas." (**STATE'S RESPONSE, EXHIBIT 33**; GRAND JURY RR, P. 41) Witness # 1 then testified that Lynn replied, "Yeah, everything, we got it all taken care of, you know." (**STATE'S RESPONSE, EXHIBIT 33**; GRAND JURY RR, P. 41)

50. Witness # 1 testified at the STATE EVIDENTIARY HEARING that Ches had made the trip to Arkansas to dispose of the ultralight. (STATE EVIDENTIARY, RR VOL. 1, PP.138-140)

51. At the STATE EVIDENTIARY HEARING, Witness # 1 stated, for the first time, that Bear had a U-Haul and loaded the ultralight.

(STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 45, 142)

52. At the STATE EVIDENTIARY HEARING, Witness # 1 stated, for the first time, that the four men had stolen the ultralight to make it look like a robbery. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 34, 125, 134-136)

53. Witness # 1 was very specific about remembering that Ches and Lynn said they had taken the ultralight from the victims that had been killed and had taken the ultralight to Arkansas. (**STATE'S RESPONSE, EXHIBIT 33**; GRAND JURY RR, PP. 42-43)

54. Witness # 1 never mentioned the ultralight being cut up in her initial affidavit.

55. Witness # 1 testified at the FEDERAL EVIDENTIARY HEARING and stated in her initial affidavit that she never saw the stolen ultralight. (FEDERAL EVIDENTIARY HEARING, RR VOL. 3, P. 726)

56. Witness # 1 testified at Grand Jury that the ultralight had been kept under a tarp in a shed owned by Ches before it was cut into pieces, and for the first time that the ultralight was kept in a shed that she only went to one time. (**STATE'S RESPONSE, EXHIBIT 33**; GRAND JURY RR, PP. 43-45)

57. At the 2012 state court evidentiary hearing, Witness # 1 testified for the first time that she observed poles, two wheels, a cage like in a go-cart, a seat and several boxes, and that she had been at the shed where the stolen ultralight

was stored twice. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 46-48, 141-142)

58. Neither the testimony at trial nor any credible evidence obtained since the trial placed Lynn, Ches, Bear or Rocky at the airplane hangar where the murders occurred at the time of this occurrence or at any other time. As such, they were never shown to be situated to commit the crime.

59. During her testimony before the Grand Jury, Witness # 1 admitted that Lynn was a small time criminal who wanted to be big and that she really did not believe Lynn. (**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1, PP. 33-34)

60. There is no credible evidence in the record to indicate that Lynn considered Witness # 1 to be a reliable confidante.

61. There was practically no relationship between Ches and Witness # 1.

62. Witness # 1 has stated that she had broken up with Lynn and was afraid of Lynn and Ches. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 64, 124, 171)

63. There is no independent evidence that any of the statements and testimony by Witness # 1 are trustworthy in regards to the individuals she named as having committed the murders.

64. Corroboration of basic information like names, addresses and criminal history does not corroborate the portion of Witness # 1's statements

implicating Ches, Lynn, Bear and Rocky in the murder under these cause numbers.

65. In the alleged statement made to Witness # 1, Lynn states he was involved in a drug deal that "went wrong" and "men were murdered." (STATE'S RESPONSE, EXHIBIT 24, P. 4; FEDERAL EVIDENTIARY HEARING, RR VOL. 3, P. 714; GRAND JURY TESTIMONY, P. 36; STATE EVIDENTIARY HEARING, RR VOL. 1, P. 125)

66. Trial counsel for the defense testified at the FEDERAL EVIDENTIARY HEARING that the possibility of drugs or gambling being involved in these murders was investigated and he could not find anyone willing to testify to such. (**STATE'S RESPONSE EXHIBIT 25**; FEDERAL EVIDENTIARY HEARING RR VOL. 4, P. 962-963)

67. There is no credible evidence in the record that the murder of the victims in this case were connected to drugs.

68. There is no credible evidence that Lynn, Ches, Bear or Rocky were in Grayson County at the time of the murders or that they were ever suspects in this case.

69. Witness # 1 testified to the Grand Jury that Lynn would talk about how loud the gunshots were in the "tin building." (**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1, P. 41)

70. The gun used in the murder had a silencer. (TRIAL RR VOL. XII, PP. 47-50)

71. Justin Holbert is a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and has been so employed since July 2007. He is a credible firearms expert. Special Agent Holbert examined the RST-6 .22 caliber Ruger semi-automatic handgun equipped with a Catawba silencer entered into evidence as STATE'S EXHIBITS 110 and 140 in trial of this case, and test fired the weapon both with and without the silencer using subsonic ammunition. The noise produced by this .22 caliber weapon using subsonic ammunition and equipped with a silencer, was minimal.

72. The statements by Witness # 1 that Lynn was having nightmares about the loud sound from the gunshots is inconsistent with the use of .22 caliber subsonic ammunition used in combination with a silencer on the firearm.

73. Witness # 1 was a heavy drug user and is not credible. (STATE EVIDENTIARY HEARING, RR VOL. 1, P. 96)

74. Marijuana use affected Witness # 1's memory. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 96-97)

75. During her testimony in front of the Grand Jury, Witness # 1 admitted using "quite a bit of" marijuana during the time she was with Lynn. (**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1, PP. 19-20)

76. Witness # 1 lived with a man who manufactured and distributed methamphetamine.

(**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1, PP. 19-21)

77. Witness # 1 attended Narcotics Anonymous meetings. (**STATE'S RESPONSE EXHIBIT 11**, AFFIDAVIT OF WITNESS # 4, P. 1)

78. Witness # 1 never reported the alleged confession by Lynn to law enforcement, but instead contacted a reporter and the defense attorneys. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 69-70, 76, 79-80)

79. Prior to her GRAND JURY TESTIMONY, defense counsel procured an attorney for Witness # 1 to attempt to quash the Grand Jury subpoena issued for Witness # 1. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 84-88)

80. Witness # 1 has been convicted of forgery and interference with child custody. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 93-95)

81. Witness # 1 has stated that Lynn and Ches had possession of the ultralight stolen during the murders and that they arranged for the ultralight to be disposed of in Arkansas. (**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1 RR PP. 40-46; STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 45-48, 138-144)

82. Lester Bower had possession of the ultralight immediately following the murders. Mr. Tate's ultralight which had been in the hangar earlier in the day of the murders was the only ultralight missing. (TRIAL RR VOL. XVI, PP. 66,

88) A search of Bower's residence, garage and vehicle was conducted during the evening of January 20, 1984. (TRIAL RR VOL. XIV, PP. 7-9, 17-22, 33, 35-46, 66, 72, 81-85) The record does not reflect that any other ultralight or parts from an ultralight, or any other item was missing from victim Bob Tate's hangar.

83. In the Bower's current version of events, not the version given to the FBI when this case was investigated, Bower admits having possession of the ultralight, although he now claims to have purchased the plane in Sherman from victim Bob Tate. (STATE EVIDENTIARY HEARING, RR VOL. 2, PP. 84-84)

84. Witness # 4 met Witness # 1 through Narcotics Anonymous meetings. (STATE'S RESPONSE EXHIBIT 11, P. 1)

85. Witness # 4 testified at the FEDERAL EVIDENTIARY HEARING.

86. In his affidavit and at the FEDERAL EVIDENTIARY HEARING, Witness # 4 stated that he knew one of the victims and shared this at a Narcotics Anonymous meeting in 1984, on an unidentified date, but apparently after Bower's trial. (**STATE'S RESPONSE EXHIBIT 12**; FEDERAL EVIDENTIARY HEARING RR VOL. 3, PP. 730-732; **STATE'S RESPONSE EXHIBIT 11**; SUBSEQUENT 11.071 APPLICATION EXHIBIT E; SUPPLEMENT TO CH. 64 DNA MOTION, SECOND AFFIDAVIT OF ANTHONY ROTH, EXHIBIT 33)

87. Witness # 4 testified and stated in his affidavit that Witness # 1 confided in Witness # 4 that her "old man" in Oklahoma had been involved in the murders and that he drove the same type of car seen leaving the crime scene. (**STATE'S RESPONSE EXHIBIT 12**; FEDERAL EVIDENTIARY HEARING RR VOL. 3, PP. 732-733; **STATE'S RESPONSE EXHIBIT 11**; SUBSEQUENT 11.071 APPLICATION EXHIBIT E; SUPPLEMENT TO CH. 64 DNA MOTION, SECOND AFFIDAVIT OF ANTHONY ROTH, EXHIBIT 33)

88. Witness # 1 testified at the state evidentiary hearing that neither Lynn nor Ches had expressed concern about being seen leaving the scene of the murders. (STATE EVIDENTIARY HEARING, RR VOL. 1, P.169)

89. The record does not indicate that Witness # 1 told Witness # 4 that her "old man" had confessed to Witness # 1.

90. The record does not indicate that Witness # 1 told Witness # 4 anything about her "old man" possessing the stolen ultralight.

91. Witness # 1's statement to Witness # 4 is inconsistent with her later testimony regarding Lynn admitting to the murders.

92. The record does not contain any evidence of a car being identified as leaving the scene of the murders.

93. Witness # 1 did not identify who her "old man" was when she spoke to Witness # 4, whether it was her husband or her boyfriend, Lynn.

94. Witness # 1's statement to Witness # 4 is inconsistent with the evidence adduced at trial as no vehicle was ever identified as leaving the crime scene.

95. Witness # 1 had no explanation for how she would know about the description of a car leaving the murder scene since neither Lynn nor Ches, told her this information. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 166-169)

96. Witness # 1 indicated that Lynn drove a LeBaron or a Trans Am. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 35-36, 104, 117-118, 147)

97. Neither the Trans Am or the Chrysler Le Baron would be capable of transporting the ultralight, especially if four people were in the vehicle.

98. Witness # 1 testified that she left for Hillsboro, Texas on the 5th of 6th of October, 1983, to talk to police about a forgery charge against Witness # 1. (STATE'S RESPONSE, EXHIBIT 24, P. 3; STATE EVIDENTIARY HEARING, RR VOL. 1, P. 103)

99. The forgery for which Witness was interviewed, and eventually charged and convicted, was not reported until October 7, 1983. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 105-106; STATE EVIDENTIARY HEARING, State's EXHIBIT D)

100. Witness # 1 testified that she returned to Oklahoma with Lynn on October 9, 1983, and did not return to Texas for several weeks. (STATE

EVIDENTIARY HEARING, RR VOL. 1, PP. 103-104)

101. Witness # 1 gave a statement to the police in Mesquite, Texas on October 12 or 14, 1983. (STATE EVIDENTIARY HEARING, RR VOL. 1, P. 106-107; CONTINUATION OF EVIDENTIARY HEARING, RR VOL. P. 132; STATE EVIDENTIARY HEARING, State's EXHIBIT D)

102. Witness ## 1's assertion regarding when she came and left Texas cannot be true based on the Mesquite police report. (STATE EVIDENTIARY HEARING, State's EXHIBIT C)

103. In her GRAND JURY TESTIMONY, Witness # 1 denies moving in with Lynn in August or September, 1983, saying it was October 9 or 10, 1983. (STATE'S RESPONSE, EXHIBIT 33, PP. 20-21)

104. In her affidavit provided to Lester Bower's attorneys, Witness # 1 stated that she moved in with Lynn about the end of August, 1983. (STATE'S RESPONSE, EXHIBIT 24, P. 2)

105. Witness # 1 testified at the FEDERAL EVIDENTIARY HEARING that she moved in with Lynn in the latter part of August, 1983. (STATE'S RESPONSE, EXHIBIT 34, VOL. 3, P. 711)

106. Witness # 1 testified that Lynn's confession to her regarding the murders was a life changing event that she could never forget. (STATE'S RESPONSE, EXHIBIT 33, GRAND JURY

TESTIMONY, P. 71; STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 110-111)

107. Witness # 1 stated in her initial affidavit and in her federal testimony that Lynn told her of the murders while lying in bed with her at her mother's house. (STATE'S RESPONSE, EXHIBIT 24, P. 4; EXHIBIT 33, P.709)

108. Witness # 1 testified at the Grand Jury and at the STATE EVIDENTIARY HEARING that Lynn confessed to her in the car while driving back to Oklahoma. (STATE'S RESPONSE, EXHIBIT 33, PP. 29-30; STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 31-34; 113)

109. Witness # 1 testified at Grand Jury that she "loved to read" but denied reading about these murders in the paper or attempting to read about the murders in the paper and denied hearing anything at all about the murders prior to Lynn's alleged statement to her on October 9, 1983. (STATE'S RESPONSE, EXHIBIT 33, P. 38)

110. Witness # 1 admitted that she might have seen a news report of read something about the murders in the paper. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 166-168)

111. Witness # 1 is inconsistent regarding when and where Lynn made his alleged confession to her.

112. Witness # 1 is inconsistent regarding who Lynn allegedly stated was involved in the murder.

113. Witness # 1 appeared confused while testifying about who Lynn had allegedly stated was

involved in the murder. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 131-134)

114. Witness # 1 stated in her initial affidavit that Ches referred to seeing the eyes of one of the victims that Lynn shot. (STATE'S RESPONSE, EXHIBIT 24, P. 4)

115. Witness # 1 stated in her GRAND JURY TESTIMONY that Ches referred to the face of a victim shot by Lynn. (STATE'S RESPONSE, EXHIBIT 33, P.64)

116. Witness # 1 testified at the FEDERAL EVIDENTIARY HEARING that Ches and Lynn referred to a victim shot by Ches. (STATE'S RESPONSE, EXHIBIT 34, P. 716)

117. Witness # 1 told a reporter in 2008 that Ches had shot the victim. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 129-131)

118. Witness # 1 testified at Grand Jury that Ches, Lynn, Bear and Rocky carried guns but that they said, "you can't break a dirt clod with a .22." (STATE'S RESPONSE, EXHIBIT 33, GRAND JURY TESTIMONY, P. 63)

119. Witness # 1 denied at Grand Jury ever having been involved with Lynn's drug deals. (STATE'S RESPONSE, EXHIBIT 33, GRAND JURY TESTIMONY, P. 35; STATE EVIDENTIARY HEARING, RR VOL. 1, P.146)

120. Witness # 1 testified at the STATE EVIDENTIARY HEARING that she had acted as a decoy on Lynn's drug runs. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 19-20)

121. Witness ## 1's testified that Lynn was gone a lot and she came and went to work. (STATE EVIDENTIARY HEARING, RR VOL. 1, PP. 124, 171-172)

122. Witness # 1 states that Lynn was never abusive to her which contradicts her testimony that she was scared of Lynn. (STATE EVIDENTIARY HEARING, RR VOL. 1, P. 145; STATE'S RESPONSE, EXHIBIT 33, GRAND JURY TESTIMONY, P. 50)

123. Witness # 1 testified at Grand Jury that she learned to take what Lynn said "with a grain of salt." (STATE'S RESPONSE, EXHIBIT 22, GRAND JURY TESTIMONY, PP. 73-74)

124. Witness # 1 testified at Grand Jury that in 1983 she used marijuana daily and would smoke it two to three times a day. (STATE'S RESPONSE, EXHIBIT 33, GRAND JURY TESTIMONY, PP. 47-48)

125. Witness # 1 admitted that she had tried methamphetamine. (STATE EVIDENTIARY HEARING, RR VOL. 1, P. 95-96; STATE'S RESPONSE, EXHIBIT 33. GRAND JURY TESTIMONY, P. 24)

126. Witness # 1 lived with people manufacturing, dealing and using methamphetamine daily. (STATE EVIDENTIARY HEARING, RR VOL. 1, P. 96)

127. Witness # 1 admitted that her use of marijuana could affect her memory at Grand Jury and at the STATE EVIDENTIARY HEARING. (STATE EVIDENTIARY HEARING, RR VOL.

1, PP. 96-97; STATE'S RESPONSE, EXHIBIT 33, GRAND JURY TESTIMONY, P. 48)

128. The affidavit and testimony of Witness # 4 do not corroborate any of the allegations against Lynn, Ches, Bear or Rocky.

129. The fact that Witness # 1 has made accusations against Lynn, Ches, Bear and Rocky multiple times does not corroborate the allegations against Lynn, Ches, Bear or Rocky.

130. Sheriff Arnold Isenberg of Marshall County, Oklahoma, gave testimony at the FEDERAL EVIDENTIARY HEARING in this case. The Sheriff stated that he knew of Lynn, Bear and Rocky and knows that they have a reputation as drug dealers and bad people. (**STATE'S RESPONSE EXHIBIT 13**; FEDERAL EVIDENTIARY HEARING RR VOL. 2, PP. 370-376) He also testified that they lived in Southern Oklahoma during 1983. (**STATE'S RESPONSE EXHIBIT 13**; FEDERAL EVIDENTIARY HEARING RR VOL. 2, P. 386-387)

131. Nothing in Sheriff Isenberg's testimony implicates Lynn, Ches, Bear or Rocky in the murders in Grayson County subject of the above numbered cases.

132. Sheriff Isenberg did not, and could not testify that these four men were the only dangerous drug dealers in Southern Oklahoma during that time period.

133. There is nothing in Sheriff Isenberg's testimony that vouches for the credibility of Witness # 1.

134. Sheriff Isenberg's testimony does not corroborate the accusations of Witness # 1 against Lynn, Ches, Bear or Rocky in regards to them being involved in the murders.

135. Two employees of Lester Bower, Roy Taylor and Douglas Crewse, have created affidavits containing hearsay statements about or attributed to Ches. (**STATE'S RESPONSE EXHIBITS 14, 15, 16, 17**; 11.071 SUBSEQUENT APPLICATION EXHIBITS F, G, H; DOUGLAS O. CREWSE AFFIDAVIT, DATED JULY 25, 2008, ATTACHED TO Lester Bower's SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR FORENSIC DNA TESTING; SUPPLEMENTAL EXHIBITS TO DNA MOTION, SECOND AFFIDAVIT OF ANTHONY ROTH, EXHIBITS 35, 36, & 37)

136. Ches has not provided a sworn statement or given testimony.

137. Lester Bower has failed to cite to any exception to the hearsay rule which would make those hearsay statements admissible.

138. The affidavits of Roy Taylor and Douglas Crewse do not corroborate the allegations made against Ches by Witness # 1.

139. One of the hearsay statements attributed to Ches by the first investigator hired by the defense was that Ches owned a Ruger handgun and used Julio-Fiocchi ammunition. (**STATE'S RESPONSE EXHIBIT 15**; SUBSEQUENT 11.071 APPLICATION, EXHIBIT G, P. 10) Another hearsay statement attributed to Ches was

that Ches was acquainted with one of the victims, Ronald Mayes and the son of one of the victims, Bob Tate, Jr. (**STATE'S RESPONSE EXHIBIT 15**; SUBSEQUENT 11.071 APPLICATION, EXHIBIT G, P. 10) The balance of the first investigator's information regarding Ches consists of identifying information and Ches's criminal background. The second investigator's affidavit, likewise, contains a considerable amount of background information regarding Ches's criminal background. (**STATE'S RESPONSE EXHIBIT 17**; DOUGLAS O. CREWSE AFFIDAVIT, DATED JULY 25, 2008, ATTACHED TO Lester Bower's SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR FORENSIC DNA TESTING) In the second investigator's affidavit, that investigator stated that Ches provided "hypothetical" answers to questions regarding the murders in this case. (**STATE'S RESPONSE EXHIBIT 17**; DOUGLAS O. CREWSE AFFIDAVIT, DATED JULY 25, 2008, ATTACHED TO Lester Bower's SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR FORENSIC DNA TESTING) The investigator does not state what "hypothetical" questions Ches was asked or the context for the answers. Ches did not say he owned a .22 caliber Ruger or sub-sonic Julio-Fiocchi ammunition, he merely admitted that he owned a ruger automatic pistol and had used some form of Julio-Fiocchi ammunition at some unspecified time. (**STATE'S RESPONSE EXHIBIT 15, P. 10**; 11.071 SUBSEQUENT APPLICATION, EXHIBIT 6, P. 10) Ches did not admit to murder using that

weapon and ammunition. The "hypothetical" answers given to the second investigator are not admissions of guilt.

140. None of the hearsay statements attributed to Ches corroborates anything stated by Witness # 1 and does not implicate Ches in the murders committed by Lester Bower.

141. An employee of Lester Bower, Roy Taylor, has created affidavits containing hearsay statements about or attributed to Bear. (**STATE'S RESPONSE EXHIBIT 14, 15, 16, 17**; 11.071 SUBSEQUENT APPLICATION EXHIBITS F, G, H; SUPPLEMENTAL EXHIBITS TO DNA MOTION, SECOND AFFIDAVIT OF ANTHONY ROTH, EXHIBITS 35, 36, & 37)

142. Bear has not provided a sworn statement or given testimony.

143. Bear is dead.

144. Lester Bower has failed to cite to any exception to the hearsay rule which would make those hearsay statements admissible.

145. Even if there were a hearsay rule that would make the statements attributed to Bear, the affidavits would not corroborate the allegations made against him by Witness # 1.

146. Roy Taylor's information regarding Bear consists of identifying information and Bear's criminal background. (**STATE'S RESPONSE EXHIBIT 15**; SUBSEQUENT 11.071 APPLICATION, EXHIBIT G, PP. 4-8; SUPPLEMENTAL EXHIBITS TO DNA MOTION, ANTHONY

ROTH'S SECOND AFFIDAVIT, EXHIBIT 36, PP. 4-8)

147. Bear did not admit to murder to Roy Taylor.

148. Although Bear acknowledged living in Kingston, Oklahoma, and knowing Ches, Lynn and Rocky, among other things, none of the hearsay statements attributed to Bear or the hearsay statements about Bear corroborated anything stated by Witness # 1 and did not implicate Bear in the murders committed by Lester Bower.

149. An employee of Lester Bower, Roy Taylor, has created affidavits containing hearsay statements about or attributed to Lynn. (**STATE'S RESPONSE EXHIBIT 15**; 11.071 SUBSEQUENT APPLICATION, EXHIBITS F, G, H; SUPPLEMENTAL EXHIBITS TO DNA MOTION, SECOND AFFIDAVIT OF ANTHONY ROTH, EXHIBITS 35, 36, & 37)

150. Lynn has not provided a sworn statement or given testimony.

151. Lester Bower has failed to cite to any exception to the hearsay rule which would make those hearsay statements admissible.

152. Even if there were a hearsay rule that would make the statements attributed to Lynn in the three affidavits, they still would not corroborate the allegations made against him by Witness # 1. The first investigator's information regarding Lynn consists of identifying information and Lynn's criminal background.

153. Lynn did not admit to murder.

154. None of the hearsay statements attributed to or about Lynn corroborates anything other than background information stated by Witness # 1 and does not implicate Lynn in the murders committed by Lester Bower.

155. An employee of Lester Bower, Roy Taylor has created an affidavit containing hearsay statements about or attributed to Rocky. (**STATE'S RESPONSE EXHIBIT 15**; 11.071 SUBSEQUENT APPLICATION, EXHIBITS F, G, H; SUPPLEMENTAL EXHIBITS TO DNA MOTION, SECOND AFFIDAVIT OF ANTHONY ROTH, EXHIBIT 35, 36, & 37)

156. Rocky has not provided a sworn statement or given testimony.

157. Lester Bower has failed to cite to any exception to the hearsay rule which would make those hearsay statements admissible.

158. Even if there were a hearsay rule that would make the statements attributed to or about Rocky in the three affidavits, the affidavits do not corroborate that allegations made against him by Witness # 1.

159. Roy Taylor's information regarding Rocky consists of identifying information and Rocky's criminal background.

160. None of the hearsay statements attributed to or about Rocky corroborates anything stated by Witness # 1 and does not implicate Rocky in the murders committed by Lester Bower.

161. The ultimate accusation, that "Lynn" confessed to Witness # 1 in detail and that "Ches" and "Lynn" made admissions in the hearing of Witness # 1, have not been corroborated.

162. The information referenced by Lester Bower as corroborating is inadequate to establish any reliability or credibility regarding Witness # 1's accusations against Lynn, Ches, Bear and Rocky.

163. Witness # 1 has repeatedly claimed that the stolen ultralight plane owned by Bob Tate was in the possession of "Lynn" and "Ches." (**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1, PP. 40-45; SUBSEQUENT 11.071 APPLICATION, EXHIBIT D; FEDERAL EVIDENTIARY HEARING, VOL. 3, P. 716)

164. Witness # 1 went into great detail on the discussions regarding the ultralight between "Lynn" and "Ches" and how the ultralight was disposed of in Arkansas. (**STATE'S RESPONSE EXHIBIT 33**; GRAND JURY TESTIMONY OF WITNESS # 1, PP. 40-45)

165. Lester Bower, in his current version of events, admits to possessing the Bob Tate's ultralight. (**STATE'S RESPONSE EXHIBIT 29**; SUBSEQUENT 11. 071 APPLICATION, ex. L, PP. 3-8; FEDERAL EVIDENTIARY HEARING, VOL. 2, PP. 446-454, 464-465)

166. Witness # 1's testimony in regards to Lynn's statements and her observations of an ultralight are not credible.

167. During the STATE EVIDENTIARY HEARING and after witness # 1 and #5 had testified, witness Ricky Joe Doneghey, came forward alleging that Brett Leckie, a.k.a. Bear, had confessed to the murders to Ricky Joe Doneghey. (CONTINUATION OF Evidentiary Hearing, RR PP. 10, 67)

168. Ricky Joe Doneghey is a two-time convicted felon. (CONTINUATION OF EVIDENTIARY HEARING, RR PP. 29-31)

169. There is insufficient evidence to corroborate Bear's alleged confession to Ricky Joe Doneghey.

170. According to Ricky Joe Doneghey, who provided two affidavits and testified at the STATE EVIDENTIARY HEARING, Bear acted alone, was dropped off at a hangar to search for three kilos of cocaine, was confronted by three men, killed them, continued searching for the cocaine, then shot a fourth man who arrived at the hangar, dragged the fourth man's body over where the other three bodies were laying and covered all four bodies with a tarp. (CONTINUATION OF EVIDENTIARY HEARING, EXHIBITS D, F; RR PP. 44-48)

171. The crime scene had three bodies near each other and a fourth body separate near the door to the hangar. (TRIAL RR VOL. XI, PP. 24-25, 35, 77, 79)

172. The record does not reflect that any of the bodies were covered by a tarp as alleged in the statement and testimony from Ricky Joe Doneghey.

173. Ricky Joe Doneghey moved out of the house he shared with Bear due to a business dispute and because Bear was sexually interested in Ricky Joe Doneghey's girlfriend at that time, Kathleen Michalk. (CONTINUATION OF EVIDENTIARY HEARING, EXHIBITS D, F; RR P. 66)

174. Ricky Joe Doneghey never saw Bear in possession of a firearm. CONTINUATION OF EVIDENTIARY HEARING, EXHIBITS D, F; RR P. 51)

175. Ricky Joe Doneghey's wife, Kathleen Michalk, also testified as to what Ricky Joe Doneghey had told her Bear had said to him. (CONTINUATION OF EVIDENTIARY HEARING, RR PP. 14-15, 96)

176. Both Ricky Joe Doneghey and Kathleen Michalk were heavy methamphetamine users at the time Bear allegedly confessed to Ricky Joe Doneghey. (CONTINUATION OF EVIDENTIARY HEARING, RR P. 14-15,101, STATE'S EXHIBIT C, E, P.)

177. Ricky Joe Doneghey testified that he and Kathleen Michalk stopped using drugs in 2005, immediately after leaving Bear's house where they had been living. (CONTINUATION OF EVIDENTIARY HEARING, RR P. 15)

178. Ricky Joe Doneghey testified that Bear told him that Bear had been investigated in 1989 and that Bear was a prime suspect. (CONTINUATION OF EVIDENTIARY HEARING, RR P. 57)

179. Ricky Joe Doneghey testified that Kerye Ashmore told him that Bear was investigated in 1989 and there was overwhelming evidence against Bear. (CONTINUATION OF EVIDENTIARY HEARING, RR P. 79)

180. Kerye Ashmore did not tell Ricky Joe Doneghey that that there was overwhelming evidence against Bear. (AFFIDAVIT OF J. KERYE ASHORE)

181. There is no credible evidence on the record that on during or prior to 1989 Bear was ever a suspect in the case, ever interviewed, ever investigated or ever cleared as a suspect by law enforcement. (AFFIDAVIT OF KARLA HACKETT)

182. Kathleen Michalk testified that it was in 2006 or 2007 before she and Ricky Joe Doneghey stopped using methamphetamine. (CONTINUATION OF EVIDENTIARY HEARING, RR P. 94)

183. Both Ricky Joe Doneghey and Kathleen Michalk testified that methamphetamine users were prone to lie and exaggerate. (CONTINUATION OF EVIDENTIARY HEARING, RR PP. 58-59, 65-66, 107)

184. Both Ricky Joe Doneghey and Kathleen Michalk both testified that Bear was a heavy methamphetamine user. (CONTINUATION OF EVIDENTIARY HEARING, RR PP. 15, 26-27, 100-102)

185. Ricky Joe Doneghey's version of events contradicts the allegations by Witness # 1 and by Kristopher Leckie.

186. Ricky Joe Doneghey's testimony is not credible.

187. Lester Bower's attorneys produced an affidavit in late November, 2012, that is included in the record, from Bear's son, Kristopher Leckie, that Bear had confessed to him that he had been present outside a hangar when two men were murdered, but denied killing anyone.

188. The alleged statement by Bear to Kristopher Leckie is not corroborated.

189. Kristopher Leckie's version of events in his affidavit has two men murdered, not four. (KRISTOPHER LECKIE AFFIDAVIT, P. 2)

190. Kristopher Leckie's version of events contradicts the allegations by Witness # 1 and Ricky Joe Doneghey.

191. Kristopher Leckie refused to testify at the STATE EVIDENTIARY HEARING. (CONTINUATION OF EVIDENTIARY HEARING, RR PP.140-141)

192. Kristopher Leckie is not credible.

193. The text of the FOIA materials cited as "new evidence" under Lester Bower's subsequent 11.071 application, including reports and memorandum, do not contain any facts or evidence supporting Lester Bower's allegation that drugs were involved in this case.

194. The FOIA materials referenced by Lester Bower in his subsequent 11.071 application at EXHIBIT P and in the supplemental materials file with the DNA motion at 46, include:

1. An FBI teletype dated 1/22/1984, detailing a title change on the murders, the addition of the Hobbs Act designation, brief description of state search warrant, brief description of arrest warrant and arrest, and a notice to all offices that they did not have to continue investigating at that time. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 46, PP. FBI 190-193)

2. An FBI airtel dated 1/17/1984 that is a cover sheet for the transmission of an interview report. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 46, P. FBI 197)

3. An FBI airtel dated 1/1/1984 that is a cover sheet for the transmission of an interview report. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 46, P. FBI 204)

4. An FBI memorandum dated 1/24/1984 indicating that a review of indices was negative and that an attempted interview was unsuccessful. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION,

ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 46, P. FBI 205)

5. An FBI teletype dated 11/29/1983 summarizing the crime and speculating that the murders were *possibly* drug or gambling related. Also summarizes a portion of the investigation and the efforts to identify persons who received shipments of the .22 caliber subsonic Julio-Fiocchi ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 884-889)

6. An FBI teletype dated 12/1/1983 regarding a failure to develop any information on the stolen ultralight aircraft and that no further information on the murders has been developed. It also includes a hearsay statement regarding efforts of the Texas Rangers in regards to alleged "hit men" and a request to Oklahoma agent to interview a potential witness. This appears to be in relation to the information provided by Thomas Daniels referenced above. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 890-891; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 85-92)

7. An FBI airtel announcing a title change, a brief hearsay description of the murders, references to interviews by the Texas Rangers, a redacted summary of conclusions drawn by the Texas Rangers based on the Texas Rangers' investigation, a

statement that phone records for victim Phillip Good's phone had been obtained, references to phone calls to Prescott, Arizona by Good, a redacted notation of some military investigation in Germany, a redacted statement that an unnamed witness had become uncooperative, a notation that no hard evidence had been found confirming that victim Bob Tate had been involved in illegal "cock fighting"0 and narcotics trafficking, and that victim Bob Tate was targeted because of bad debts and illegal activities while the other three were just victims of circumstance, a notation regarding the review of phone calls made by the victims Bob Tate and Phillip Good and the lack of success in identifying the "Dallas buyer" who was supposed to come look at the ultralight aircraft the day of the murder. The airtel also includes a section entitled "LEADS" requesting a continuation on searching out the subscribers of phone numbers called by victims Bob Tate and Phillip Good prior to the murders, six of which were located in Oklahoma. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 924-932)

8. A redacted copy of phone calls from Bob Tate's telephone between 7-26-83 and 9-11-83. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 951)

9. A portion of an FBI report regarding contact with a purchaser of the .22 caliber

subsonic Julio-Fiocchi ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 957)

10. A portion of an FBI report regarding a witness who purchased .22 caliber subsonic Julio-Fiocchi ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 958)

11. An FBI airtel summarizing an unsuccessful attempt to locate an individual in Tulsa, Oklahoma. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1096)

12. An FBI airtel regarding Oklahoma phone subscribers and a lack of criminal record as well as information on an ultralight and hang glider business. Also contains "LEADS" regarding plan to check local criminal information on individuals in Durant, Kingston and Tulsa. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1097-1098)

13. FBI memorandum regarding interview with an unnamed gun collector who had purchased .22 caliber subsonic Julio-Fiocchi ammunition from Bingham Limited. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1182-1184)

14. FBI memorandum regarding interview with an unnamed individual who had purchased .22 caliber subsonic Julio-Fiocchi ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1239-1240)

15. FBI memorandum regarding interview with an unnamed individual who had purchased .22 caliber subsonic Julio-Fiocchi ammunition from Bingham Limited. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1241-1242)

16. A portion of an FBI report regarding contact with an unnamed individual who had purchased .22 caliber subsonic Julio-Fiocchi ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1182-1184)

17. An FBI airtel regarding submission of ammunition obtained from an unnamed purchaser of the .22 caliber subsonic Julio-Fiocchi ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1245)

18. An FBI airtel regarding submission of bullets and bullet fragments from the bodies of the victims to be compared to bullets from the same lot as sold to Lester Bower. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1268)

19. An FBI airtel dated 2-23-1984 regarding submission of bullets from an unnamed person to be compared to bullets from the murdered victims. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1271)

20. An FBI memorandum regarding submission of bullets from an unnamed person to be compared to bullets from the murdered

victims. Also contains information regarding Bingham Limited shipments all being subsonic and that attempts to contact Catawba had been unsuccessful. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1278-1279)

21. A portion of FBI report dated 2-27-84 regarding the purchase of the .22 caliber sub-sonic Julio-Fiocchi ammunition by an unnamed person and the resale of a portion of that ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1282)

22. An FBI airtel dated 2-27-84 regarding the purchase of .22 caliber subsonic Julio-Fiocchi ammunition from Euclid Sales Company and Bingham Arm Limited by an unnamed person from Bob's Lock and Safe Company in Billings, Montana. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1288-1289)

23. An FBI airtel regarding submission of Julio-Fiocchi ammunition to the Elemental Analysis Unit of the FBI Laboratory, to determine the composition of the ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1290)

24. An FBI airtel regarding submission of .22 caliber subsonic Julio-Fiocchi ammunition and requesting FBI Laboratory perform any analysis required by the Dallas Division. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1297)

25. A portion of FBI report dated 3-1-84 regarding the purchase of the .22 caliber subsonic Julio-Fiocchi ammunition by an unnamed person. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1282)

26. An FBI airtel dated 3-1-84 regarding submission of .22 caliber subsonic Julio-Fiocchi ammunition and the purchase of that ammunition by and unnamed person from Woods Paint Center in Charlotte Hall, Maryland. A portion of FBI report dated 2-27-84 regarding the purchase of the .22 caliber subsonic Julio-Fiocchi ammunition by an unnamed person and the resale of a portion of that ammunition. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, PP. FBI 1301-1302)

27. A portion of an FBI report regarding the purchase of .22 caliber subsonic Julio-Fiocchi ammunition by an unnamed FBI agent in Murray, Kentucky. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1303)

28. An FBI airtel regarding an interview of an unnamed individual in Murray Kentucky. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1304)

29. A portion of an FBI report dated 2-28-84 regarding the purchase of .22 caliber subsonic Julio-Fiocchi ammunition by an unnamed person in Washington State. (SUBSEQUENT

11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1315)

30. An FBI airtel dated 2-28-84 regarding the submission of .22 caliber subsonic Julio-Fiocchi ammunition for testing at the FBI Laboratory. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1317)

31. Portion of an FBI report dated 2-6-84 regarding the interview of an unnamed person at Hang Glider Ultralight Shop in Oklahoma City, Oklahoma, who did not know victims Bob Tate or Phillip Good and did not recall receiving a phone call from either of those men. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1507)

32. Portion of an FBI report dated 2-6-84 regarding the interview of an unnamed person at Hang Glider Ultralight Shop in Oklahoma City, Oklahoma, who did not know victims Bob Tate or Phillip Good and did not recall receiving a phone call from either of those men. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1507)

33. Portion of an FBI report dated 2-6-84 regarding the interview of an unnamed person in Oklahoma City, Oklahoma, who did not know victims Bob Tate or Phillip Good and did not recall receiving a phone call from either of those men. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1508)

34. Portion of an FBI report dated 2-6-84 regarding the interview of an unnamed person in Oklahoma City, Oklahoma, who did not know victims Bob Tate or Phillip Good and did not recall receiving a phone call from either of those men. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 1509)

35. An FBI airtel regarding the decision not to proceed with analysis of submitted ammunition and return of evidence to the Dallas Division. (SUBSEQUENT 11.071 WRIT APPLICATION, EXHIBIT P, P. FBI 2227)

195. The FBI FOIA documents do not provide any evidence linking the murders to any alleged illegal activity or evidence that the murders were drug related.

196. The FBI FOIA documents summarize investigative theories that the FBI was pursuing, theories that Bower's counsel acknowledged he was aware of but didn't extensively pursue himself. (SUBSEQUENT 11.071 APPLICATION, EXHIBIT P)

197. The FBI FOIA documents state that the "initial information developed indicated" that the murders may have been related to illegal activity but that "further investigation" identified Bower.

198. None of the evidence in the FBI FOIA documents relating to illegal activity disproves the state's evidence adduced against Bower.

199. The information contained in the FBI FOIA materials referenced in Lester Bower's Subsequent 11.071 application are not new evidence.

200. The contents and information contained in the FBI FOIA materials referenced in Lester Bower's subsequent 11.071 application was known at the time of trial through discovery materials provided to the defense. (**STATE'S RESPONSE EXHIBIT 22**; FEDERAL EVIDENTIARY HEARING, RR VOL., EXHIBITS 1-7; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39-45)

201. The discovery materials containing information regarding .22 caliber ammunition or possible connections to drug activity, disclosed to trial counsel prior to trial, include:

    1. Defense notes to talk to Glen and Bobbie Ward regarding Tate's "dealings". (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 1)

    2. Notation regarding Fleming and an unfinished investigation regarding Carothers and dope. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 2)

    3. A list of the names and customers to whom the Julio-Fiocchi .22 subsonic ammunition

had been sold. (STATE'S RESPONSE EXHIBIT 22; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, PP. 4-7)

4. Defense notes stating that the investigation into Robert Marshall, Herb Brady and Larry Contreas as suspects had not panned out, that a Neal Fisk had purchased the Julio-Fiocchi ammunition at a gun show, that Sandy Brygider could testify to all purchases of Julio-Fiocchi ammunition, that Marlene Good was cleared as a suspect, that Glenn Ward was a suspect due to a falling out with Bob Tate, that Don Jarvis was a suspect but no evidence tied him to the crime, that Marlene Good had undergone hypnosis and the results, that Lemual and Donald Leyhe were suspects but no evidence tied them to the crime, and that Robert Baca was a suspect but no evidence tied them to the crime. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, PP. 8-10)

5. A part of a criminal mischief report where .22 caliber ammunition was used. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 11)

6. Defense notes regarding a stolen .22 rifle. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 23)

7. DPS report regarding a stolen .22 rifle. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, PP. 24-26)

8. Report referencing CI tip regarding drugs. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 53)

9. Report referencing CI tip regarding drugs. (**STATE'S RESPONSE EXHIBIT 2**2; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 56)

10. Defense notes regarding a .22 caliber weapon. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 77)

11. A DPS report including a stolen .22 rifle. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, PP. 78-79)

12. Defense notes regarding Robert Marshall and Glen Ward. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 81)

13. DPS report regarding Thomas Wayne Daniels and information he "knew" about the murders. Hand written note saying "dope deal." (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 84)

14. DPS report regarding Thomas Wayne Daniels giving information to officer about Robert Marshall, Sr., Larry Contrerras and Herb Brady asserting that this was a murder regarding drugs and the investigation into those allegations. DPS could not find any evidence to corroborate Daniel's story. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 85-92)

15. FBI report regarding investigation into Robert Marshall, Jr., pursuant to information given by Thomas Wayne Daniels. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 93-94)

16. DPS report regarding Roger Wingo's information that Thomas Wayne Daniels had information on the murders. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 96)

17. Defense notes including information regarding victim Good and marijuana use. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 40, P. 167)

18. FBI report regarding victim Good and marijuana use. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 40, PP. 168-70)

19. Defense notes regarding Sheriff Jack Driscoll contacting ATF about distributors of Julio-Fiocchi. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 42, P. 447)

20. Defense notes regarding Troy French alleging that murders were drug related. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 42, P. 465)

21. Defense notes regarding ATF's assistance in finding Julio-Fiocchi distributors. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 42, P. 468)

22. Defense notes regarding unidentified informant who stated that three men were bragging about the murder and that those three unidentified men were known for selling stolen goods and drugs. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 42, PP. 474-475)

23. Defense notes regarding Gary Maultbay, a suspected drug dealer allegedly involved with victims Tate and Brown. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 42, PP. 478, 503-504)

24. Defense notes regarding possibility of a gambling debt by victim Tate regarding chicken fighting. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 594)

25. Defense notes regarding Robert Marshall being involved in the murders over non-payment of a drug debt. Same informant – Daniels. (**STATE'S RESPONSE EXHIBIT**

22; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 599-600)

26. DPS report regarding who distributed Julio-Fiocchi ammunition. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 616)

27. DPS report setting the investigation into information provided by Thomas Wayne Daniels regarding Robert L. Marshall knowing of the murders prior to the murders, that it involved drugs and was ordered by "Servelio" from Kansas City, Missouri. *This information could not be proven and the investigation turned up no ties to the Grayson County murders*. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP.637-645)

28. Defense notes regarding Julio-Fiocchi ammunition. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 685, 692)

29. Defense notes regarding suspect Robert Marshall. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO

CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 693)

30. DPS report setting out investigation into Julio-Fiocchi dealers. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 697)

31. DPS report listing contact information with Thomas Wayne Daniels regarding information that this might be drug related. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 700)

32. DPS report regarding Billy Carothers allegations that he had been paid by Bob Tate to transport a briefcase filled with drugs and money three years prior to the murders. Carothers refused to give a signed statement to law enforcement or take a polygraph. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 705)

33. FBI report regarding John Bonnard and his purchase and possession of Julio-Fiocchi ammunition. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION,

ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 768)

34. FBI report regarding interview of Robert Marshall, Jr., regarding the investigation of information given by Thomas Daniels. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 796-798)

35. FBI report of interview with Neal Fisk regarding Fisk's possession and knowledge of Julio-Fiocchi ammunition. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 814-815, 818-819)

36. Defense notes from FBI regarding information that murders might be tied to chicken fighting and a gambling debt. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 826)

37. FBI report containing rumor regarding victim Bob Tate and the suspicion that he was involved in some kind of illegal activity. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 833)

38. FBI report of interview with Cathy Sherrill regarding the fact that victim Bob Tate often bragged to her that he had "weed." (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 848-850)

39. FBI report of interview with Tim Randolph regarding victim Philip Good being a heavy user of marihuana back in the 1970's. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 43, P. 851)

40. Defense notes regarding over-the-counter sales of ammunition. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 43, P. 947)

41. FBI report setting out a long list of persons who had purchased .22 caliber subsonic Julio-Fiocchi ammunition from early 1981 to October of 1983.[3] Hand written notes on the report show that 149,100 rounds of that ammunition were sold with 3,200 being sold in Texas and 800 rounds being sold in Oklahoma. (**STATE'S RESPONSE**

[3] None of the four men named by Witness # 1, Ches, Lynn, Bear or Rocky, were listed as purchasers of the Julio-Fiocchi ammunition.

EXHIBIT 22; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 43, PP. 952-976)

42. Hand written Defense notes regarding Thomas Daniels and the investigation into the allegations of Robert Marshall and others. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, P. 1101)

43. Hand written Defense notes regarding Robert Marshall. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, P. 1106)

44. Tip sheets from GCSO regarding a possible drug or gambling connection to the murders. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, PP. 1126, 1128, 1149, 1156, 1157, 1163, 1173, 1195, 1196, 1205, 1237)

45. Defense notes regarding Troy French stating that French "knew" the murders were drug related. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, P. 1143)

46. Defense notes summarizing tip sheets from GCSO. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, PP. 1146-1147)

202. The theory that these murders might have been drug related was well known to trial counsel and fully investigated by the police. (**STATE'S RESPONSE EXHIBIT 22**; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 39, PP. 2,8-10, 53, 56,81,84-94; 42, PP. 465, 474-475, 503-504; 43, PP. 594, 637-645, 700, 705, 796-798, 826, 833; 45, PP. 1126, 1128, 1149, 1156, 1157, 1163, 1173, 1195-1196, 1205, 1237, 1143; FEDERAL EVIDENTIARY HEARING, RR VOL. 4, PP. 362-363)

203. The affidavit created by Witness # 5 does corroborate the involvement of Ches, Lynn, Bear and Rocky in the murders committed by Lester Bower as alleged in the affidavit and testimony by Witness # 1 for R. 803(24) purposes.

204. Witness # 1 states that "[t]oward the end of 1983, through the year 1985, [Witness # 5] often overheard Brett [a.k.a. Bear], Lynn, "Ches" and "Tramp" talk about four men that got shot at an airplane hangar in Sherman, Texas over a drug deal that went bad."

205. The murders of the four men in this case were highly publicized in Grayson County, Texas, and in Southern Oklahoma in the printed press

and on the local television stations. (STATE COURT EVIDENTIARY HEARING, RR, VOL. 4, PP. 70-73)

206. The statements overheard by witness # 5 are consistent with the idle talk and speculation by the public-at-large in response to the high profile murder case rather than an admission of guilt.

207. Witness # 5 never states that any of those four men confessed to or admitted to the murders.

208. Rocky is never mentioned in Witness # 5's affidavit. (**STATE'S RESPONSE EXHIBIT 31**; SUBSEQUENT 11.071 WRIT, EXHIBIT CO)

209. In a second affidavit, Witness # 5 makes it clear that she never heard any of the four men admit to murder. (**STATE'S RESPONSE EXHIBIT 32**)

210. Lester Bower alleges that the Ruger hand gun owned by Lester Bower could not have been the murder weapon.

211. At trial, the actual murder weapon was never produced.

212. During the investigation of the case, a Ruger pistol owned by victim Bob Tate was examined and determined to not have been used in the murders. (TRIAL, RR VOL. XII, P. 51)

213. Lester Bower ordered and received a shipment of Julio-Fiocchi .22 caliber subsonic ammunition after he claimed to have lost his .22 Ruger

in Colorado. (TRIAL, RR VOL. XII, PP. 116-117; VOL. XVII, PP. 82-83)

214. Lester Bower testified that he had to order multiple boxes of Julio-Fiocchi .22 caliber subsonic ammunition from Bingham Limited, because they would not allow the purchase of a single box. (STATE EVIDENTIARY HEARING, RR VOL 2, PP. 94-97; VOL. 3, PP. 33)

215. Multiple persons purchased a single box of the Julio-Fiocchi .22 caliber subsonic ammunition from Bingham Limited at or near the time Lester Bower made his purchases. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 952-976)

216. No person other than Shari Bower testified that they remembered, prior to his arrest, Lester Bower leaving a firearm on a mountain in Colorado due to a kidney stone attack.

217. Lester Bower's evidence that he had lost his gun prior to the murders is not credible.

218. Based on a handwritten note by Sheriff Driscoll, Lester Bower also asserts that the State's own expert, Larry Fletcher "told" Sheriff Driscoll that the weapon used in the murder would be a Ruger model *older* than Bob Tate's gun and that the unidentified weapon would have a firing pin *of a different shape* than the firearm that belonged to Bob Tate. This statement attributed to Larry Fletcher was not part of Mr. Fletcher's testimony at trial.

219. There is nothing in Larry Fletcher's testimony at trial stating what shape the firing pin would have been on the murder weapon.

220. Mr. Fletcher did not testify that the shape of the firing pin from the missing weapon could only come from a gun *older* than the one owned by Bob Tate.

221. Regarding the age of the weapon, Mr. Fletcher only testified that if the weapon had a locking mechanism on the weapon, the weapon could hold eleven rounds at once. Mr. Fletcher was never asked about the age of the weapon in relation to the shape of the firing pin. In his testimony during cross-examination, in the only questions regarding the age of the weapon, Mr. Fletcher's testimony was as follows:

Q: Did you call Sheriff Driscoll and tell him that the pistol we are looking for here had to be an older model than that one you were looking at, and, it had to have a locking slide mechanism to hold eleven rounds?

A: I remember a conversation with Sheriff Driscoll, yes, sir.

Q: Do you recall when you examined this pistol we have been talking about, this .22 Ruger pistol that was submitted with the eleven cartridge cases, whether or not it was able to hold eleven rounds?

A: The magazine only holds ten.

Q: Did it have a locking slide mechanism?

A: No, sir, it did not. I do not recall that it did.

Q: Is the statement correct that. "In order to hold eleven rounds, the Ruger pistol in question must be prior to the advent of the locking slide mechanisms to hold eleven rounds"?

A: I believe had a conversation with Sheriff Driscoll such as that.

Q: Is that statement correct, sir?

A: That you are making now?

Q: Yes, sir.

A: That is a possibility, yes, sir.

(TRIAL RR VOL. XII, PP. 53-57)

222. The maximum number of bullets the weapon would hold was irrelevant since the shooter merely had to reload to fire eleven rounds if the weapon held less than that. (TRIAL RR VOL. XII, PP. 63, 77)

223. The note written by Sheriff Driscoll regarding statements attributed to Larry Fletcher is hearsay.

224. The note written by Sheriff Driscoll is not a police report.

225. The note written by Sheriff Driscoll said in part, "Larry states we can eliminate the pistol [owned by Bob Tate] sent in. It doesn't have the right firing pin for a match on the casings." Later in the note, Sheriff Driscoll also wrote

"Needs to have a square rectangular firing pin."

226. There is nothing in the note written by Sheriff Driscoll that says that the *shape* of the firing pin on Bob Tate's gun wasn't "square rectangular," merely that the firing pin did not "match."

227. Lester Bower's missing Ruger was a newer model than that owned by Bob Tate and submitted to the lab for comparison. (SUBSEQUENT 11.071 APPLICATION, EXHIBIT J)

228. Lester Bower did not produce evidence regarding the shape of the firing pin in either firearm except to state that the design of the firing pins on models from 1949 to 1982 were "substantially" similar, acknowledging that there might be "machine tolerances" and "manufacturing variations." (SUBSEQUENT 11.071 APPLICATION, EXHIBIT J)

229. The information regarding the availability of the Julio-Fiocchi ammunition as alleged in Lester Bower's subsequent 11.071 application is not new or material.

230. The availability of the Julio-Fiocchi ammunition was provided in discovery prior to trial and was discussed during the trial. (**STATE'S RESPONSE EXHIBIT 22**; TRIAL RR VOL. XIV, PP. 112-115; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 39, PP. 4-7)

231. Denise Kneppa testified at the FEDERAL EVIDENTIARY HEARING that she had researched

the availability of Julio-Fiocchi ammunition for the defense attorney during trial. (FEDERAL EVIDENTIARY HEARING, RR. VOL. 1, PP. 256-257)

232. Lester Bower had over two hundred names provided to him from a list of the names and customers to whom the Julio-Fiocchi .22 subsonic ammunition had been sold provided during discovery. (**STATE'S RESPONSE EXHIBIT 22**; (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 43, PP. 952-976)

233. The FBI FOIA materials referenced by Lester Bower in his subsequent 11.071 application at EXHIBIT P and in the supplemental materials file with the DNA motion at 46, include evidence that there were other people who had purchased the Julio-Fiocchi ammunition.

234. The FBI FOIA materials do not prove, as asserted by Lester Bower, that the .22 caliber subsonic ammunition was readily available and common.

235. The information in the FBI FOIA materials does not contradict the state's expert testimony or exonerate Lester Bower.

236. The FBI FOIA files contain information regarding numerous individuals who had purchased Fiocchi ammunition for various purposes, which does not directly contradict the state's evidence adduced at trial that the ammunition was not widely available and was distributed to only a few people, in the low hundreds.

(TRIAL RR VOL. XII, P. 50; RR XIV, PP. 112-115; SUBSEQUENT 11.071 APPLICATION, EXHIBIT P)

237. The evidence adduced at trial was not that the purchase of the subsonic ammunition was only for illegal purposes, but that it's primary purpose was to produce less noise. (TRIAL RR VOL. XII, PP. 49-50; RR VOL. XIX, PP. 113-114)

238. Testimony from Jeremy Mountain and the affidavit from Jerry Kitchens regarding the disassembly of an ultralight aircraft does not prove that the evidence at the crime scene (TRIAL, STATE'S EXHIBIT 29) was not evidence that the stolen ultralight was disassembled improperly during the theft, but just "ordinary maintenance debris."

239. Testimony from Jeremy Mountain and the affidavit from Jerry Kitchens regarding the amount of time it would take to disassemble an ultralight aircraft alone does not prove that Lester Bower could not have stolen Tate's ultralight.

240. Testimony from Jeremy Mountain and the affidavit from Jerry Kitchens does not prove when the stolen ultralight was disassembled, who disassembled the ultralight in whole or in part or whether the victims in this case were forced at gunpoint to disassemble the ultralight.

241. Testimony from Jeremy Mountain and the affidavit from Jerry Kitchens regarding the disassembly of an ultralight aircraft could have

been obtained at the time of trial and is not new evidence.

242. Testimony from Jeremy Mountain and the affidavit from Jerry Kitchens regarding the disassembly of an ultralight aircraft does not discredit evidence adduced at trial or exonerate Lester Bower.

243. Jerry Kitchens did not state in his affidavit that he ever saw the crime scene as a whole, talked to the victims' families or other persons who might have been in the hangar on a regular basis, or had ever been in victim Bob Tate's hanger.

244. Jerry Kitchen's interpretation for the defense of the evidence in State's EXHIBIT 29 at trial is his opinion, but is not definitive proof that the debris were "ordinary maintenance debris" rather than evidence that the stolen ultralight aircraft had been improperly dismantled to flee the murder scene. Mr. Kitchens gives no evidence as to why the debris *could not* under any circumstance be from Lester Bower dismantling the ultralight by cutting the cords rather than removing them correctly.

245. Pursuant to a search warrant in January of 1984, police removed a pair of rubber boots and a blue nylon bag from Bower's garage after noticing what appeared to be blood stains on those items. (TRIAL RR VOL. XIV, PP. 20-21, 36, 40)

246. Prior to trial, tests on the boots removed from the garage showed the presence of human

blood on the right boot but an attempt to type the blood was inconclusive. (TRIAL RR VOL. XVI, PP. 8-9)

247. Prior to trial, tests on the blue nylon bag found in Bower's garage also indicated the presence of human blood that could not be further analyzed. (TRIAL RR VOL. XVI, P. 41; VOL. XIV P. 40)

248. In 1999, lab results were reported after the State sent the boots and the bag for DNA analysis.

249. Human DNA could not be located on the nylon bag and no blood could be found on the hunting boots. (**STATE'S RESPONSE EXHIBIT 23**; SUBSEQUENT 11.071 WRIT, EXHIBIT U)

250. The 1999 lab report states that the lab could not obtain DNA at that time. The lab makes no statement regarding whether the blood sample taken from the blue nylon bag in 1984 was human or not human.

251. The 1999 lab report states that the lab could not find blood on the boots at that time, but did not find that there was no blood on the boots in 1984 and acknowledged the reason for a lack of blood by mentioning the previous lab testing and referring the reader to the prior lab reports. (**STATE'S RESPONSE EXHIBIT 23**; SUBSEQUENT 11.071 WRIT, EXHIBIT U)

252. The negative lab results from 1999 are not new evidence.

253. Lester Bower asserts that because the estimated time of death was between 4:30 p.m. and 6:30 p.m. the day of the murder that he could not have been the murderer because he would not have had time to dispose of the stolen ultralight and drive home by the time his wife says he arrived at home.

254. The testimony from Lester Bower's wife, Shari Bower, at trial or at the state court evidentiary hearing, regarding what time Lester Bower arrived at their home on October 8, 1983, is not credible.

255. Shari Bower testified at the state court evidentiary hearing that there was nothing unusual about Lester Bower's pants when he arrived home. (STATE EVIDENTIARY HEARING, RR VOL. 3, PP. 52-53)

256. Lester Bower testified at the evidentiary hearing that his pants were wet when he arrived home. (STATE EVIDENTIARY HEARING, RR VOL. 2, PP. 119-120)

257. Lester Bower was not able to give a credible reason for destroying the engine to the ultralight. (STATE EVIDENTIARY HEARING, RR VOL. 2, PP. 45-51)

258. Shari Bower could not give a credible reason Lester Bower would destroy the engine to the ultralight when his practice was to sell or trade items not needed or used. (STATE EVIDENTIARY HEARING, RR VOL. 4, PP. 63-64)

259. Bower's affidavit does not allege that he obtained the stolen ultralight from Lynn or Ches

nor does he indicate that ultralight was ever in Oklahoma or Arkansas. (**STATE'S RESPONSE EXHIBIT 29, PP. 3-8**; SUBSEQUENT 11.071 APPLICATION EXHIBIT L, PP. 3-8; Lester Bower's MOTION dated April 16, 2012, P. 22)

260. Lester Bower testified at the STATE EVIDENTIARY HEARING that there were two assembled ultralights but no other ultralights or parts in the hangar the day of the murder. (STATE EVIDENTIARY HEARING, RR VOL. 3, PP. 20-22)

261. Lester Bower agreed that he had no knowledge of a third ultralight being stolen from victim Bob Tate's hangar. (STATE EVIDENTIARY HEARING, RR VOL. 3, PP. 23)

262. Lester Bower testified at the STATE EVIDENTIARY HEARING that he left victim Bob Tate's hangar between four and five o'clock p.m., but did not know the exact time. (STATE EVIDENTIARY HEARING, RR VOL. 2, PP. 118-119)

263. Lester Bower testified at the STATE EVIDENTIARY HEARING that he arrived home around 7:30 p.m. or 7:45 p.m., but was not sure of the exact time. (STATE EVIDENTIARY HEARING, RR VOL. 2, P. 120)

264. Lester Bower's testimony is not credible.

265. Shari Bower testified at the STATE EVIDENTIARY HEARING that Lester Bower returned home a little after 7:00 p.m. (STATE EVIDENTIARY HEARING, RR VOL. 4, PP. 34)

266. Shari Bower's testimony is not credible.

267. There is no credible evidence regarding how fast Lester Bower drove from Grayson County, Texas, to his home in Arlington.

268. There is no credible evidence as to the exact time Lester Bower arrived at Tate's airplane hangar in Grayson County, Texas.

269. There is no credible evidence as to the exact time Lester Bower left Tate's airplane hangar to drive back home.

270. Lester Bower testified at the evidentiary hearing that had the police questioned him sooner, he would have been truthful. (STATE EVIDENTIARY HEARING, RR VOL. 3, PP. 29-30)

271. There is no credible evidence that Lester Bower left an envelope with $3,000 in it that had Lester Bower's contact information written on it or that he left his business card with a written IOU on it.

272. There is no credible evidence as to why Bob Tate would have agreed to take an IOU from a perfect stranger and allow that stranger to take the ultralight.

273. Lester Bower testified at the STATE EVIDENTIARY HEARING that he had no reason for not leaving the allegedly purchased ultralight at Bob Tate's hangar instead of taking the ultralight and hiding it in tall weeds.

274. Lester Bower testified at the STATE EVIDENTIARY HEARING and had no reason not to arrange for a storage building or other proper

storage for the ultralight. (STATE EVIDENTIARY HEARING, RR VOL. 3, P. 28-29)

275. Lester Bower could not remember the name of his urologist in Colorado after he allegedly left his .22 Ruger on a mountain when he had to leave unexpectedly due to a kidney stone attack. (STATE EVIDENTIARY HEARING, RR VOL. 3, P. 55)

276. Lester Bower testified at the STATE EVIDENTIARY HEARING that he had no problem unloading the ultralight and engine by himself. (STATE EVIDENTIARY HEARING, RR VOL. 3, P. 41)

277. Witness # 2 testified at the FEDERAL EVIDENTIARY HEARING.

278. The testimony of Witness # 2 having seen several men in front of the murder scene at approximately 5:30 p.m. the day of the murder is not credible.

279. At the FEDERAL EVIDENTIARY HEARING Witness # 2 testified that she saw several men standing in front of a building at exactly 5:38 p.m. the day of the murder. (**STATE'S RESPONSE EXHIBITS 26 & 27**; FEDERAL HEARING RR VOL. 2, PP. 419-420, 430)

280. Witness # 2 also stated at the FEDERAL EVIDENTIARY HEARING that the building was similar to a large barn and was a yellowish-beige probably made of tin. (**STATE'S RESPONSE EXHIBIT 26 & 27**; FEDERAL HEARING RR VOL. 2, PP. 435, 440-442)

281. The only tin building on the Tate property at that time was the airplane hangar located on the far side of the property approximately half a mile from the front gate which could not be seen from the entrance to the property where Witness # 2 stated that she was parked when she "saw" several men in front of the hangar. (**STATE'S RESPONSE EXHIBIT 28**; FEDERAL HEARING RR VOL. 4, PP. 794-800)

282. Lester Bower alleges that Marjorie Carr was mistaken when she testified that she saw Lester Bower with victim Phillip Good at the end of September.

283. The evidence regarding Marjorie Carr's testimony and the weather patterns in late September and early October of 1993 was available at the time of trial and prior to when Lester Bower filed his first 11.071 application and is not new evidence.

284. The evidence regarding Marjorie Carr's testimony and the weather patterns in late September and early October of 1993 is not material.

285. Marjorie Carr testified that she saw Lester Bower in the latter part of September, but she was not certain of the date. (TRIAL RR VOL. XV, PP. 70-71)

286. Marjorie Carr did not testify that a cold front had come through Grayson County, Texas that very day, but merely stated that it had been warm previously and it was cool that day. (TRIAL RR VOL. XV, P. 72)

287. In 2008, Lester Bower requested DNA testing on evidence gathered during the investigation of the four murders for which Lester Bower was convicted.

288. The evidence for which Lester Bower requested testing included cigarette butts, hairs gathered by hand, and hairs collected when an officer vacuumed the hangar.

289. All testing has been completed on items recovered from the crime scene that Lester Bower had requested be subjected to DNA testing.

290. Nuclear DNA results are extremely discriminating, providing exclusion or inclusion of one in millions, billions, or more.

291. Mitochondrial DNA results can exclude a donor or include him.

292. There are no databases or frequency charts to quantify mitochondrial DNA results into the same narrow conclusions available to nuclear DNA.

293. For purposes of *exclusion*, mitochondrial DNA ["mtDNA"] testing is as satisfactory a method as nuclear DNA ["STR"] in that if types of the questioned sample and known samples are *different*, one can say with confidence that the questioned sample did not come from that known individual or his/her maternal relatives.

294. If a known sample is compared to an unknown sample and there is no exclusion, it only means that the known individual and every single maternal relative of the known individual cannot

be excluded as *potential* contributors of the unknown sample.

295. The total number of mtDNA sequences in the entire human population is not known, making reliable frequency estimates for most mtDNA sequences not possible because small databases are not effective tools for estimating frequencies of rare events.

296. There are no state or federal mitochondrial DNA databases available to compare known mtDNA samples with an unknown sample, as there is with nuclear DNA.

297. The presence of an unknown person's DNA at the semi-public crime scene in this case would not invalidate the value of the other evidence presented at trial which connected Bower to the murders.

298. The presence of an unknown person's DNA at the semi-public crime scene in this case does not prove that an unknown person was involved in the murders.

299. The testing of the cigarette butts and the hand collected hair do not inculpate or exculpate Lester Bower.

300. The only nuclear DNA detected on the cigarette butts and the hand collected hair from which a DNA profile was possible were from three of the cigarette butts. Of those, victim Phillip Good cannot be excluded as the contributor with an estimated frequency of 1 in approximately 53.2 trillion Caucasians, 1 in approximately 1.6 quadrillion African Americans, and

1 in approximately 212 trillion Southwestern Hispanics. Of the DNA profiles on the other two cigarette butts, Bobby Tate cannot be excluded as the contributor of the DNA, with a frequency of occurrence of 1 in approximately 3.2 quintillion Caucasian individuals, 1 in approximately 26.3 quintillion African American individuals and 1 in approximately 33.3 quadrillion of Southwestern Hispanic individuals. These results are explained in the lab report from the University of North Texas Health Science Center that are part of the record.

301. The is no evidence which can prove when the hairs, either collected by hand or from the vacuum bag, collected at the crime scene in this case were deposited at the crime scene.

302. There is no way to establish how the hairs collected at the crime scene in this case were deposited at the murder scene.

303. A comparison between the hairs taken from the crime scene from which a mtDNA profile was taken and any other person, would only prove, at best, that the other person could not be *excluded* as a contributor.

304. Analysis on the multiple hairs from the vacuum bag submitted for analysis were as follows: Mitochondrial DNA profiles were obtained from 27 of 29 hairs. Only four hairs are unsourced. By unsourced, the lab means that all four victims and Lester Bower can be excluded as potential contributors of the profile. Victim Bobby Tate cannot be excluded as the source of two of the remaining hairs. Victim Jerry Mack Brown

cannot be excluded as the contributor of another five of the hairs. Lester Bower cannot be excluded as the contributor of 16 of the hairs. All of these results are explained in the lab report from Mytotyping Technologies included in the record.

305. The FBI had possession of a number of teletypes, "airtels," a list of the phone records from one of the victims and various other paperwork were produced to Lester Bower's appellate attorney pursuant to a Freedom of Information Act (FOIA) request.

306. In his subsequent 11.071 application, Bower identified the alleged *Brady* material as "documents showing that in the months following the murders the FBI and the State developed evidence that the murders had been related to gambling or narcotics, and that the FBI had been pursuing 'leads' in Durant, Oklahoma near where Ches, Lynn and Bear were living . . . [and] documents establishing that the FBI had no trouble obtaining the supposedly rare Fiocchi ammunition that was used in the murders and confirming that there were various, innocent reasons that people bought the Fiocchi ammunition." (11.071 SUBSEQUENT APPLICATION, PP. 37-38)

307. The FBI FOIA documents listed in the subsequent 11.071 application are contained in EXHIBIT P of Lester Bower's 11.071 Subsequent Application, under Section V.

308. Lester Bower was actually aware of the alleged "exculpatory evidence" in the FBI FOIA described in the 11.071 Subsequent Application.

309. The information included in the discovery material provided to Lester Bower prior to trial detailed leads and investigation activity looking into the possibility that the murders had some connection with drugs or gambling and the investigation into the .22 caliber subsonic Julio Fiocchi ammunition. (**STATE'S EXHIBIT 22**; SUPPLEMENTAL EXHIBITS TO DNA MOTION, ANTHONY ROTH'S FOURTH AFFIDAVIT, EXHIBITS 39-45)

310. The FBI FOIA documents in Lester Bower's EXHIBIT P was not favorable to him.

311. The items included in EXHIBIT P of Lester Bower's Subsequent 11.071 Application, indicate that early in the investigation, the police, both State and Federal, were looking into the possibility that drugs or gambling were involved. However, those leads did not produce any evidence regarding drug trafficking or gambling which could be proven or which had anything to do with the four murders.

312. Trial counsel for Lester Bower testified at the federal hearing that he was aware of the rumors regarding drugs and gambling but was also aware that the investigations into those rumors failed to prove that the rumors had a foundation. (FEDERAL EVIDENTIARY HEARING, VOL. 4, PP. 962-963)

313. There is no evidence that the murders were actually drug related or related to gambling.

314. The FBI FOIA materials contain conjecture, unsubstantiated rumors and innuendo, but no hard evidence exculpating Lester Bower or inculpating any other person.

315. Julio-Fiocchi ammunition was uncommon and/or rare in 1983.

316. Lester Bower testified that when he purchased the Julio-Fiocchi ammunition he had never heard of it prior to that purchase. (STATE EVIDENTIARY HEARING, RR VOL. 3, PP. 40-41)

317. The two ballistic experts who testified for the state were unfamiliar Julio-Fiocchi ammunition. The number of people to whom the ammunition had been sold was in the low hundreds. (TRIAL RR VOL. XVI, P. 50; RR XIV, PP. 112-115.)

318. Larry Fletcher testified that sub-sonic ammunition had the characteristic of reducing the noise discharge normally heard upon the firing of a weapon. (TRIAL RR VOL. XII, P. 49)

319. Sandy Brygider, owner of a company that distributed Julio-Fiocchi ammunition at that time testified that the sub-sonic ammunition was a specialty item usually ordered for use in suppressed weapons because of the nature of the velocity of the rounds which was a very small percentage of the market. (TRIAL RR VOL. XIV, P. 113-114)

320. Nothing in the records produced by the FBI regarding the use and availability of .22 subsonic Julio-Fiocchi ammunition exculpate Lester Bower or inculpate any other person.

321. The FBI FOIA documents do not provide any evidence linking the murders to the victims' alleged illegal activity.

322. None of the evidence relating to alleged illegal activity by the victims in this case refutes the state's evidence regarding Bower.

323. The evidence in the FBI FOIA files concerning the availability of Fiocchi ammunition does not contradict the state's expert testimony regarding whether the Julio-Fiocchi ammunition was widely available.

324. Lester Bower has failed to reference any exception to the hearsay rule which would make the FBI teletypes and "airtels" admissible or provide any documentation or testimony to invoke an exception to the hearsay rules.

325. In an order dated June 13, 2012, the Court of Criminal Appeals ordered the trial court to consider Issue 3 in Bower's 11.071 subsequent application for Habeas Corpus relief. The Court of Criminal Appeals did not make a decision regarding the 11.071 Section 5 procedural bar but instead ordered the trial court to make the appropriate findings of fact and conclusions of law.

326. Lester Bower's habeas claim under his third claim to relief, regarding the lack of a mitigation instruction, was raised in an earlier application for habeas relief.

327. The Court of Criminal Appeals addressed the appellant's *Penry* issue in Lester Bower's first 11.071 application.

328. The Court of Criminal Appeals found that, at the punishment phase of trial, Lester Bower introduced evidence regarding Lester Bower's good and non-violent character, his good deeds, and the absence of a prior criminal record. The Court of Criminal Appeals found that Lester Bower presented this evidence to convince the jury that he would not be a future threat to society.

329. The Court of Criminal Appeals found that unlike the mitigating evidence presented in *Penry,* positive character evidence did not reflect that Lester Bower was less morally culpable for committing the four capital murders than the average citizen. *Ex parte Bower*, 823 S.W.2d 284 at 286-87.

330. The Court of Criminal Appeals rejected Lester Bower's claim under *Penry*, stating that "the statutory special issues provided an adequate vehicle for the jury's consideration of his mitigating evidence and no instruction regarding the evidence was necessary." *Id*. at 286-87.

331. Lester Bower states that new case law set out in *Smith v. Texas*, 543 U.S. 37, 48, 125 S. Ct. 400, 160 L. Ed. 2d 303 (2004); *Brewer v.*

Quarterman, 550 U.S. 286, 289-90, 127 S. Ct. 1706, 167 L. Ed. 2d 622 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 240-41, 256, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007); *Ex parte Moreno*, 254 S.W.3d 419 at 425; *Chambers v. Quarterman*, 550 U.S. 915, 127 S. Ct. 2126, 167 L. Ed. 2d 861 (2007); and *Nelson v. Quarterman*, 472 F.3d. 287, 293 (5th Cir. 2006), entitle him to have the issue of the sufficiency of the charge considered in his subsequent writ application based upon evidence of "good character."

332. Lester Bower suggests that his evidence related to good character was mitigating and outside the scope of the special issues.

333. Lester Bower did not show evidence of a seriously troubled childhood. There was no evidence of learning disabilities, low IQ, or neurological damage. There was no testimony that he abused substances.

334. Of the categories of evidence that have been noted by the Supreme Court as relevant mitigating evidence, only testimony regarding positive personal characteristics, are present in this case.

335. After Lester Bower filed his subsequent 11.071 application for writ of habeas corpus, three documents were forwarded to the Grayson County Criminal District Attorney's office on June 14, 2012. These documents were provided by the FBI pursuant to FOIA litigation filed by the attorneys for Lester Leroy Bower. These items, State's EXHIBITS 36, 37 and 38 were forwarded to Lester Bower.

336. Lester Bower indicated that he wants State's EXHIBITS 36, 37 and 38 to be considered by the court under his *Brady* argument in his Subsequent 11.071 Application for Habeas Corpus. (**STATE'S EXHIBIT 35**)

337. State's EXHIBIT 36 is a one page report by FBI Special Agent James F. Blanton regarding information from an unnamed source that Brian Tate told the source that Billy Carouthers[sic] was bragging about having information about the murders of Bob Tate and the three other men. The report confirmed that this information had already been given to the Texas Rangers.

338. State's EXHIBIT 38 is a three page memorandum regarding the investigation into information from an unnamed inmate in the Texas prison system regarding the possible involvement in the murders of Bob Tate, Phillip Good, Jerry Brown and Ronald Mays of Robert Marshall, Sr., Robert Marshall, Jr., someone named "Sirvio" and men working at a body shop in Richardson, Texas, named Herb Brady and Larry Contreas.

339. State's EXHIBIT 38 is a three page Confidential Human Source (CHS) Reporting Document from 2008 detailing information relayed from a CHS to FBI Special Agent Christopher Derks regarding the murders of Bob Tate, Phillip Good, Jerry Brown and Ronald Mays and a confrontation between former Grayson County Sheriff Jack Driscoll and Anthony Roth, an attorney for Lester Bower.

340. Regarding EXHIBITS 36, 37 and 38, there is no *Brady* violation because Lester Bower was actually aware of the alleged "exculpatory evidence" complained of in the 2012 FOIA documents.

341. Documents included in EXHIBITS 36 and 37 included information previously disclosed in the discovery material provided to Lester Bower regarding the investigation into the possibility that the murders had some connection with drugs or gambling from information provided by Billy Carothers and from Thomas Wayne Daniels, an inmate in a Texas prison, implicating Robert Marshall, Sr. and others.

342. EXHIBIT 22, attached as part of the State's Reply to the Subsequent 11.071 Application for Writ of Habeas Corpus, contains excerpts from Lester Bower's trial attorney's trial notebooks setting out information regarding leads and investigation activity looking into the possibility that the murders had some connection with drugs or gambling. The full notebooks were introduced into this record as supplemental documentation supporting Lester Bower's Chapter 64 DNA motion filed by Lester Bower in 2008.

343. The information contained in EXHIBITS 36 and 37 were known to Lester Bower prior to trial from information contained in the following documents provided during pre-trial discovery:

    1. Notation regarding Fleming and an unfinished investigation regarding Billy Carothers and dope. (SUPPLEMENTAL

ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 2)

2. Defense notes stating that the investigation into Robert Marshall, Herb Brady and Larry Contreas as suspects had not panned out. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, PP. 8-10)

3. Defense notes regarding Robert Marshall and Glen Ward. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 81)

4. DPS report regarding Thomas Wayne Daniels and information he "knew" about the murders. Hand written note saying "dope deal." (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 84)

5. DPS report regarding Thomas Wayne Daniels giving information to officer about Robert Marshall, Sr., Larry Contrerras and Herb Brady asserting that this was a murder regarding drugs and the investigation into those allegations. DPS could not find any evidence to corroborate Daniel's story. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 85-92)

6. FBI report regarding investigation into Robert Marshall, Jr., pursuant to information given by Thomas Wayne Daniels. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 93-94)

7. DPS report regarding Roger Wingo's information that Thomas Wayne Daniels had information on the murders. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 39, P. 96)

8. Defense notes regarding Robert Marshall being involved in the murders over non-payment of a drug debt. Same informant – Daniels. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 599-600)

9. DPS report setting the investigation into information provided by Thomas Wayne Daniels regarding Robert L. Marshall knowing of the murders prior to the murders, that it involved drugs and was ordered by "Servelio" from Kansas City, Missouri. *This information could not be proven and the investigation turned up no ties to the Grayson County murders*. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP.637-645)

10. DPS report listing contact information with Thomas Wayne Daniels regarding information that this might be drug related. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 700)

11. DPS report regarding Billy Carothers allegations that he had been paid by Bob Tate to transport a briefcase filled with drugs and money three years prior to the murders. Carothers refused to give a signed statement to law enforcement or take a polygraph. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, P. 705)

12. FBI report regarding interview of Robert Marshall, Jr., regarding the investigation of information given by Thomas Daniels. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBITS 43, PP. 796-798)

13. Hand written Defense notes regarding Thomas Daniels and the investigation into the allegations of Robert Marshall and others. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, P. 1101)

14. Hand written Defense notes regarding Robert Marshall. (SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION,

ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 45, P. 1106)

344. In EXHIBIT 38, the information contained therein is from an FBI Confidential Human Source (CHS) Reporting Document. This document summarizes information given by Douglas Crewse, an investigator employed by the attorneys for Lester Bower in this case, to FBI Special Agent Christopher Derks regarding the Lester Leroy Bower case on July 22, 2008. Douglas Crewse outlined "evidence" regarding five men who may have committed the murders, most of which is rank hearsay. The statement also sets out information obtained by Anthony Roth, one of Lester Bower's defense attorneys in this case, regarding a confrontation between Anthony Roth and the former Grayson County Sheriff, Jack Driscoll.

345. Special Agent Christopher Derks has given a credible affidavit.

346. SA Derks states that the CHS is a man named Douglas Crewse who was formerly employed by Anthony Roth and the other defense attorneys for Lester Bower as a private investigator.

347. SA Derks states that at no time did Mr. Crewse indicate that his information came from outside his employment as an investigator for the attorneys representing Lester Bower or that he concealed any of this information from his employers.

348. SA Derks attempted to corroborate Mr. Crewse's information by contacting defense attorney

Anthony Roth. Mr. Roth refused to answer any questions posed by SA Derks and became belligerent.

349. Mr. Crewse was released as a CHS by the FBI based on his unreliability.

350. The information in EXHIBIT 38 was not withheld from Lester Bower because the information actually came from the defense attorneys.

351. The information in EXHIBIT 38 was not developed or obtained by the FBI until 2008, long after the trial had been completed and prior to the resolution of this writ.

352. The FOIA documents in EXHIBITS 36, 37 and 38 was not favorable to Lester Bower.

353. EXHIBITS 36 and 37 reflect that early in the investigation, the police, both State and Federal, were looking into the possibility that drugs or gambling were involved. Those leads did not produce any evidence regarding drug trafficking or gambling which could be proven or which had anything to do with the four murders.

354. The FBI FOIA materials in EXHIBITS 36 and 37 contain conjecture, unsubstantiated rumors and innuendo, but no hard evidence exculpating Lester Bower or inculpating any other person.

355. The information in EXHIBIT 38 does not provide any information not already known to the defense and already discounted as favorable to

Lester Bower. (STATE'S RESPONSE EXHIBIT 22)

356. The FBI FOIA documents in EXHIBITS 36, 37 and 38 do not provide any evidence linking the murders to the victims' alleged illegal activity.

357. None of the evidence in EXHIBITS 36, 37 and 38 refutes the state's evidence regarding Bower.

358. Lester Bower supplemented his original subsequent 11.071 application regarding, actual innocence, his *Brady* argument and his argument regarding *Penry*.

359. Lester Bower supplemented his pleadings with selected pages of information obtained by Lester Bower's defense attorneys through a FOIA request to the FBI. He now claims that this alleged "new" material would have proven that the State's witness Sandy Brygider gave false testimony about being the sole "seller" of Julio-Fiocchi ammunition and that it would have proven that one cannot tell if a bullet was subsonic or asonic based on the analysis of the shell casings and bullets.

360. The FBI FOIA documents referenced in Lester Bower's supplement to the subsequent 11.071 application include a list of magazine subscribers, airtels and memos regarding the status of the investigation into the four murders, the investigation into Bower, the investigation into persons on a list of people or businesses who had purchased Julio-Fiocchi ammunition from Bingham Limited, a company that dealt in the manufacture, export, import sale and

distribution of firearms, ammunition, and firearms accessories and information from a Julio-Fiocchi brochure.

361. Lester Bower was either already aware of the information contained in the items attached to his Supplement to Subsequent Application as EXHIBIT 1 or that information was available at the time of trial and is therefore not "new" evidence.

362. Lester Bower's "new" evidence is described by Lester Bower as evidence that could have been used to impeach the testimony of Sandy Brygider. Lester Bower states that Mr. Brygider testified that he was the sole seller of Julio-Fiocchi ammunition in the United States. Lester Bower also states that this "new" evidence could rebut testimony that the Julio-Fiocchi ammunition was rare.

363. A full reading of Mr. Brygider's testimony is clear that his testimony regarding being the sole "seller" of Julio-Fiocchi ammunition in the United States in the early eighties was that he was the sole "distributor" from which all other sales originated.

364. The record is not clear as to the time period covered by Mr. Brygider.

365. The FBI FOIA documents do not prove or disprove whether Mr. Brygider was the sole distributor of Julio-Fiocchi ammunition prior to the murders or prior to trial.

366. At no time did Mr. Brygider testify or imply that none of his buyers would ever re-sell the ammunition bought from Bingham Limited.

367. The list of buyers provided by Mr. Brygider show numerous gun and ammunition stores as purchasers. (RR VOL. XIV, PP. 112-115; SUPPLEMENTAL EXHIBITS TO DNA MOTION, ANTHONY ROTH'S FOURTH AFFIDAVIT, EXHIBIT 39, PP. 4-7)

368. Mr. Brygider testified that the number of purchaser's during a three year period of the Julio-Fiocchi ammunition would be in the low hundreds and that Julio-Fiocchi was a specialty item, not a common ammunition type as opposed to Winchester, Remington, Federal and CCI. (RR VOL. XIV. PP. 113-114)

369. Mr. Brygider's testimony is that during the early 1980's, Julio-Fiocchi ammunition was an extremely small percentage of the market. (RR VOL. XIV, PP. 113-114)

370. The FBI FOIA documents do not disprove that Julio-Fiocchi ammunition was rare and "extremely small percentage" of the ammunition market.

371. The State never presented evidence that there were no legal uses for subsonic ammunition.

372. Sandy Brygider testified that subsonic ammunition could be used with a silencer to muffle the sound of the discharge. (RR VOL. XIV, PP. 114) Another witness testified, however, that the purpose of using subsonic ammunition was

merely "to reduce the noise of discharge when the firearm is discharged." (RR VOL. XII, P. 49)

373. Fingerprints were obtained at the crime scene in 1983 and neither the victims' or Lester Bower's prints matched the latent prints collected by the Grayson County Sheriffs Department officers. The known fingerprints and available known palm prints of Ches, Lynn, Rocky, Bear and Tramp were compared in 2012 to the latent prints from the crime scene. The known fingerprints of Ches, Lynn, Rocky, Bear and Tramp do not match the latent fingerprints from the crime scene. The known palm prints of Bear do not match the latent palm prints from the crime scene. There are no available palm prints from Ches, Lynn, Rocky or Tramp.

374. The fingerprint comparisons done in this case do not corroborate the statements and/or testimony given by Witness # 1, Ricky Joe Doneghey or Kristopher Leckie.

375. Lester Bower's business card is irrelevant.

376. Lester Bower did not mention his business card when interviewed by the FBI prior to his arrest.

377. The FBI FOIA documents attached as EXHIBIT 1 to the supplement to the subsequent 11.071 application regarding the availability of the Julio-Fiocchi ammunition is not new or material.

378. The availability of the ammunition was provided in discovery prior to trial and was discussed during the trial. (**STATE'S RESPONSE EXHIBIT**

22; TRIAL RR VOL. XIV, PP. 112-115; SUPPLEMENTAL ATTACHMENTS TO CH. 64 DNA MOTION, ANTHONY ROTH'S FIRST AFFIDAVIT, EXHIBIT 39, PP. 4-7)

379. Lester Bower was actually aware of the alleged exculpatory evidence he alleges is contained in attachment 1 to Lester Bower's Supplement to Subsequent Application, and could have accessed it from the discovery provided to Lester Bower prior to trial.

380. The information provided in discovery makes it clear that other sellers of guns and ammunition purchased ammunition from the distributer, Bingham Limited and that numerous persons had made those purchases.

381. The information in the FBI FOIA documents in the attachment 1 to Lester Bower's Supplement to Subsequent Application was not favorable to Lester Bower.

382. The information in the FBI FOIA documents in the attachment 1 to Lester Bower's Supplement to Subsequent Application show that early in the investigation, the police, both State and Federal, were looking into the purchasers of Julio-Fiocchi ammunition. This does not dispute, disparage, deny or contradict evidence adduced at trial.

383. The trial testimony was clear that numerous persons had purchased that type of ammunition in the early 1980's. (RR VOL. XIV, P. 115)

384. None of the information in attachment 1 of the Supplement to the subsequent 11.071 application contradicts the evidence used by the state to convict Bower or affirmatively impeach the evidence produced by the State.

CONCLUSIONS OF LAW

1. Claims of actual innocence are categorized either as *Herrera-type* claims or *Schlup-type claims*. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993); *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) *Ex parte Elizondo*, 947 S.W.2d 202, 208 (Tex. Crim. App. 1996). A *Herrera-type* claim involves a substantive claim in which Lester Bower asserts his bare claim of innocence based solely on newly discovered evidence. *Schlup*, 513 U.S. at 314; *see also Ex parte Elizondo*, 947 S.W.2d at 208. A *Schlup-type* claim, on the other hand, is a procedural claim in which Lester Bower's claim of innocence does not provide a basis for relief, but is tied to a showing of constitutional error at trial. *Schlup*, 513 U.S. at 314.

2. In a *Schlup-type* situation, the petitioner must show that the constitutional error "probably resulted" in the conviction of one who was actually innocent.

3. For a *Herrera-type* claim the bare claim of innocence would fail unless the court was convinced that the new facts "unquestionably establish" Lester Bower's innocence.

4. This showing must overcome the presumption that the conviction is valid and it must unquestionably establish Lester Bower's innocence.

5. Lester Bower asserts a *Herrera-type* innocence claim and must show by clear and convincing evidence that no reasonable jury would have convicted him in light of the newly discovered evidence.

6. Lester Bower must produce evidence that proves his innocence and not merely raises doubt about his guilt.

7. The State of Texas bears the burden of proving the defendant's guilt beyond a reasonable doubt, but once the State of Texas has done so, the burden of proving innocence must shift to the convicted defendant.

8. In a *Herrera-type* claim based on newly discovered evidence, the evidence presented must constitute affirmative evidence of Lester Bower's innocence. Once Lester Bower provides such evidence, it is then appropriate to proceed with a determination of whether Lester Bower can prove by clear and convincing evidence that no reasonable juror would have convicted him in light of the newly discovered evidence.

9. The statements and testimony regarding statements made by Lynn and Ches alleged by Witness # 1 are hearsay but are admissible under Tex.R. Evid. 803(24).

10. Tex.R. Evid. 803(24) provides an exception to the rule against hearsay statements as follows:

    Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

11. There is sufficient corroborating evidence of the trustworthiness of the statements and testimony of Witness # 1 as required for admissibility purposes under R. 803(24).

12. Lester Bower has proven by a preponderance of the evidence that the circumstances were sufficiently corroborative to clearly indicate the trustworthiness of Witness # 1's various and inconsistent statements implicating Lynn, Ches, Bear and Rocky in the murders in this case for admissibility purposes.

13. As such, the portions of Witness # 1's affidavit and testimony containing hearsay statements attributed to Lynn and Ches are admissible hearsay.

14. The affidavit and testimony of Witness # 4 do corroborate some of the allegations against Lynn, Ches, Bear or Rocky.

15. Sheriff Arnold Isenberg's testimony does not corroborate the accusations of Witness # 1 against Lynn, Ches, Bear or Rocky.

16. None of the contents of the FOIA materials are actually "new" evidence tying the murders to drug activity for purposes of an actual innocence claim.

17. Lester Bower has proven by a preponderance of the evidence that Witness # 5 corroborated the allegations against Ches, Lynn, Bear or Rocky made by Witness # 1 or implicated them in the murders committed by Lester Bower for Tex.R. Evid. 803(24) purposes.

18. Upon a claim of actual innocence, Lester Bower must make a truly persuasive showing of innocence and prove that the evidence he relies upon is "newly discovered" or "newly available."

19. The term "newly discovered evidence" refers to evidence that was not known to Lester Bower at the time of trial and could not be known to him even with the exercise of due diligence. He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions, such as a motion for new trial.

20. Lester Bower has failed to prove by a preponderance of the evidence that the missing Ruger pistol owned by Lester Bower could not be the weapon used in the murders in this case.

21. Lester Bower has failed to prove by a preponderance of the evidence that he has "new" evidence that undermines the State's expert testimony at trial.

22. Lester Bower has failed to prove by clear and convincing evidence or by a preponderance of the evidence that the information regarding the availability of the Julio-Fiocchi ammunition is new or material.

23. Lester Bower has failed to prove by a preponderance of the evidence that new evidence showed that the Julio-Fiocchi ammunition was "not rare."

24. Lester Bower's "new" evidence regarding "lawful" purposes for the use of sub-sonic ammunition is irrelevant because the evidence at trial did not include the fact that sub-sonic ammunition was only for illegal use.

25. Lester Bower has failed to prove clear and convincing evidence or by a preponderance of the evidence that evidence from Jerry Kitchens and Jeremy Mountain regarding their opinion that the evidence at the crime scene was not evidence that the stolen ultralight was disassembled improperly during the theft, but just "ordinary maintenance debris," is not "new evidence" for purposes of an 11.071 habeas corpus application.

26. Lester Bower must prove that the evidence he relies upon is "newly discovered" or "newly available."

27. The term "newly discovered evidence" refers to evidence that was not known to Lester Bower at the time of trial and could not be known to him even with the exercise of due diligence. He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions, such as a motion for new trial.

28. Lester Bower has failed to prove by a preponderance of the evidence that "new evidence" from Jerry Kitchens or Jeremy Mountain exonerates Lester Bower.

29. Lester Bower has failed to prove by clear and convincing evidence that the lack of lab results available from 1999 are "new evidence."

30. Lester Bower has failed to prove by a preponderance of the evidence that the blood evidence was "wrong" at trial or that the testing done in 1999 exonerates Lester Bower.

31. Lester Bower has failed to prove by clear and convincing evidence that he could not have been the murderer because he would not have had time to dispose of the stolen ultralight and drive home by the time his wife says he arrived at home.

32. Lester Bower has failed to prove clear and convincing evidence that the unproven time line evidence exonerates Lester Bower.

33. Lester Bower's claims that Marjorie Carr was mistaken when she testified that she saw Lester Bower with victim Phillip Good at the end of September is not "new evidence" for

purposes of an 11.071 habeas corpus application.

34. Lester Bower has failed to prove by clear and convincing evidence that evidence regarding the weather during September of 1983 is new evidence or that such evidence disproves Ms. Carr's testimony that she had seen Lester Bower in Grayson County, Texas, prior to the murders or that this exonerates Lester Bower.

35. Lester Bower has failed to prove by a preponderance of the evidence that the DNA testing performed in this case exonerates Lester Bower.

36. Lester Bower's first ground in his writ application is based upon the theory espoused in *Herrera* and as such he must establish his innocence of the crime by clear and convincing evidence and not merely that he would be found not guilty by a subsequent jury. While there is no question that in an appropriate case the principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration," *Engle v. Isaac*, 456 U.S. 107, 135, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982), Lester Bower has not presented this Court with such a case.

37. Lester Bower has failed to prove by clear and convincing evidence a prima facie case for relief or that he was actually innocent.

38. To prevail upon a post-conviction writ of habeas corpus, Lester Bower bears the burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief. *Ex parte*

Morrow, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997); *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995); *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281, 287-88 (Tex. Crim. App. 1989); *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

39. Where, as here, Lester Bower claims that the prosecution suppressed exculpatory evidence and thereby violated his right to due process Lester Bower must satisfy a three-pronged test. *Brady*, 373 U.S. 80 at 83; *Ex parte Kimes*, 872 S.W.2d 700 at 702.

40. Lester Bower must first show that the State failed to disclose evidence, regardless of the prosecution's good or bad faith. *Id*. He must then show that the withheld evidence is favorable to Lester Bower. *Id* Finally, Lester Bower must show that the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Id*. at 702-03.

41. In a habeas proceeding, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

42. Under *Brady*, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the

trial would have been different had the prosecutor made a timely disclosure. *See Bagley*, 473 U.S. 667 at 682; *United Slates v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *Amos v. State*, 819 S.W.2d 156, 159B60 (Tex. Crim. App. 1991); *Turpin v. State*, 606 S.W.2d 907, 916 (Tex. Crim. App. 1980). In other words, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109; *see also Stone v. State*, 583 S.W.2d 410, 415 (Tex. Crim. App. 1979).

43. Additionally, the evidence central to the *Brady claim* must be admissible in court. *Ex parte Kimes*, 872 S.W.2d 700 at 703; *Ex Parte Miles*, 359 S.W.3d, 665.

44. Lester Bower has failed to satisfy any of those three prongs set out in *Brady* and followed in *Kime*s.

45. *Brady* held that the State has a constitutional duty to disclose to a defendant material, exculpatory evidence. The scenarios to which *Brady* applies "involve[ ] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103. Consequently, "*Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist."

Hafdahl v. State, 805 S.W.2d 396, 399 n. 3 (Tex. Crim. App. 1990).

46. The State does not have such a duty under *Brady* if the defendant was actually aware of the exculpatory evidence or could have accessed it from other sources. *See, e.g., Harm v. Slate*, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006); *Havard v. State*, 800 S.W.2d 195, 204 05 (Tex. Crim. App. 1989); *Jackson v. State*, 552 S.W.2d 798, 804 (Tex.Crim.App.1976).

47. There is no *Brady* violation in this case because the defendant was actually aware of the supposed "exculpatory evidence" complained of in ground 2.

48. The State did not violate *Brady* because the defendant was actually aware of the alleged potentially exculpatory evidence and could have accessed it from other sources, specifically from the discovery provided to Lester Bower prior to trial. *See, e.g., Harm*, 183 S.W.3d, 407; *Havard*, 800 S.W.2d at 204B05; *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976).

49. Lester Bower has failed to prove by a preponderance of the evidence that the information contained in the documents obtained from the FBI through FOIA were not known to Lester Bower.

50. Lester Bower has failed to prove by a preponderance of the evidence that the State withheld the information contained in the FIOA documents.

51. The FBI FOIA materials referenced in the subsequent 11.071 application are not "favorable" to Lester Bower for purposes of *Brady*.

52. Because the information regarding the investigation of possible drug connections and the fact information regarding the purchase or and use for the Julio-Fiocchi subsonic ammunition did not exculpate Lester Bower or affirmatively rebut any evidence produced at trial by the State, Lester Bower has failed to prove by a preponderance of the evidence that the evidence obtained from the FBI through the FOIA was favorable to Lester Bower.

53. Evidence is not material if it is of such a nature that the defendant could "obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413 (1984); *see also Allridge v. Scott*, 41 F.3d 213, 218 (5th Cir. 1994) (holding that when the undisclosed evidence is merely cumulative of other evidence, no *Brady* violation occurs).

54. None of the evidence in EXHIBIT P of Lester Bower's Subsequent 11.071 Writ Application, is actually exculpatory; that is, none of the evidence is sufficient to "undermine confidence in the jury's verdict." *Bagley*, 473 U.S. 667 at 682; *see Thomas*, 841 S.W.2d 399 at 404; *Lempar v. State*, 191 S.W.3d 230, 241 (Tex. App. – San Antonio 2005, pet. Ref'd) (citing *Ex Parte Richardson*, 70 S.W.3d 865, 870 n. 22 (Tex. Crim. App. 2002)).

55. When reviewing a *Brady* claim, the determination of the materiality of withheld evidence must be made "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Against the cumulative evidence adduced at trial, the materials provided by the FBI after trial are not material.

56. Lester Bower has failed to prove by a preponderance of the evidence that the FIOA documents were exculpatory.

57. Even if the evidence could be considered exculpatory, the State does not have a duty to disclose favorable, material evidence if it would be inadmissible in court. *Ex parte Kimes*, 872 S.W.2d 700 at 703.

58. Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Tex.R. Evid. 801(d). Generally, hearsay statements are not admissible unless the statement falls within a recognized exception to the hearsay rule.

59. The information in the FBI FOIA documents complained of by Lester Bower in his subsequent 11.071 application is rank hearsay, hearsay within hearsay, and/or conjecture, rumor, gossip or merely a "theory" which would not be admissible at trial.

60. Lester Bower's habeas claim under his third claim to relief, regarding the lack of a mitigation instruction, is not procedurally barred

even though he raised it in an earlier application for habeas relief as the law as applied in this case has changed since that time.

61. Article 11.071, § 5, of the Texas Code of Criminal Procedure provides that a subsequent post-conviction habeas application is barred unless the claim asserted therein was factually or legally unavailable at the time the previous habeas application was filed. Lester Bower's current habeas claim is based on *Tennard v. Drake*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and *Penny*, 492 U.S. 302.

62. *Tennard* announced new law regarding the application of *Penry*; however, this only applies to applicants to whom *Penry* applies. *See Ex parte Hood*, 304 S.W.3d 397, 409 (Tex. Crim. App. 2010). Therefore, a subsequent claim under this issue is barred unless *Penry* evidence was presented at Lester Bower's trial and unless new law now requires that evidence regarding Lester Bower's good character must be submitted under more than just the future dangerousness issue at punishment and was not adequately addressed by one of the special issues submitted at the time of Lester Bower's trial.

63. Lester Bower has proven by a preponderance of the evidence how the law changed regarding punishment evidence consisting solely of good character evidence.

64. The case law set out in *Smith v. Texas*, 543 U.S. 37, 48, 125 S. Ct. 400, 160 L. Ed. 2d 303 (2004); *Brewer v. Quarterman*, 550 U.S. 286,

289-90, 127 S. Ct. 1706, 167 L. Ed. 2d 622 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 240-41, 256, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007); *Ex parte Moreno*, 254 S.W.3d 419 at 425; *Chambers v. Quarterman*, 550 U.S. 915, 127 S. Ct. 2126, 167 L. Ed. 2d 861 (2007); and *Nelson v. Quarterman*, 472 F.3d. 287, 293 (5th Cir. 2006), do extend *Penry* to cases where the only mitigation evidence presented at trial was good character evidence.

65. In 2007, the Supreme Court issued opinions in two companion cases, *Abdul-Kabir*, 550 U.S. 233, and *Brewer*, 550 U.S. 286. In *Abdul-Kabir*, which revisited *Penry I* and its progeny, the Court stated that the jury must be permitted to "consider fully" such mitigating evidence and that such consideration "would be meaningless" unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence. *Penry*, 492 U.S. at 321, 323, (internal quotation marks omitted); *Abdul-Kabir* at 260. *See also Ex parte Moreno*, 245 S.W.3d at 422 ("a jury must be empowered by the trial court's instructions to give 'meaningful effect' to all mitigating evidence that a capital defendant introduces at the punishment phase of his trial."). In other words, the jury in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence. *Tennard*, 542 U.S. 274 at 284-85; *Penry*, 492 U.S. at 318.

66. Relevance in the context of mitigating evidence introduced in a capital sentencing proceeding

is no different than in any other context, thus the general evidentiary standard applies: evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence is relevant. *Id*, *citing McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Thus the state cannot bar the consideration of evidence if the jury could reasonably find that it warrants a sentence less than death. *Id*. "Once this low threshold for relevance is met, 'the Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Id*. at 285, *quoting Boyde v. California*, 494 U.S. 370, 377-78, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Id.* at 284-85, *quoting McKoy v. North Carolina*. Such *Penry* error produces a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of the mitigating evidence. *Smith II* at 316.

67. Among the issues the Supreme Court has identified as being outside the special issues charged to the jury in Lester Bower's case are, under *Brewer*, 550 U.S. at 289-90 and *Ex parte Moreno*, 254 S.W.3d 419 at 425, evidence of a troubled childhood. Under *Smith*, 543 U.S. at 48, evidence of learning disabilities, low IQ/ special education and status. Under *Abdul-Kabir*, 550 U.S. at 240-41, 256, evidence of

neglect, abandonment and neurological damage. Under *Brewer*, 550 U.S. at 289-90, substance abuse, family violence in childhood, mental illness and domination by another.

68. *Ex parte Hood*, 304 S.W. 3d 397, 409 (Tex. Crim. App. 2010) states that *Tennard, Smith*, *et al*, did announce new law and that those death row inmates were entitled to have the merits of their *Penry* claims addressed. Bower's claim that the statute operated unconstitutionally because his jury did not have a vehicle to properly consider mitigating evidence is therefore, not barred by Art. 11.071 § 5.

69. In *Smith*, the Supreme Court described a variety of mitigating evidence: at an early age, the defendant had been diagnosed with potential organic learning disabilities and speech handicaps; the defendant had IQ scores of 75 and 78, and as a result had been in special-education classes during most of his time in school; despite his low IQ and learning disabilities, the defendant's behavior at school was often exemplary; the defendant's father was a drug addict who engaged in gang violence and criminal activities and stole money from family members to support a drug addiction; and the defendant was 19 years old when he committed the crime. *Smith*, 543 U.S. at 41. Of these, the Supreme Court found that Smith's evidence of his IQ scores and history of participation in special-education classes was relevant mitigating evidence that a jury might have considered to be a reason to impose a sentence less than

death and was outside the scope of the special issues. *Id*. at 44-45.

70. In *Abdul-Kabir*, 550 U.S. 233, the Supreme Court noted mitigating evidence that included the defendant's family members' testimony describing his unhappy childhood of neglect and abandonment, as well as expert testimony from two psychologists "that his violent propensities were caused by factors beyond his control-namely, neurological damage and childhood neglect and abandonment" and "suggesting that his dangerous character may have been the result of his rough childhood and possible neurological damage[.]" *Abdul-Kabir*, 550 U.S. at 240-41, 256.

71. In *Penry I*, the Supreme Court concluded that the special issues were too limited to give mitigating effect to the defendant's evidence of mental retardation and severe childhood abuse and that such mitigating evidence was thus outside the scope of the special issues. While "[t]he jury must have a meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence[,]" *Abdul-Kabir*, 550 U.S. at 259, *quoting Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), the special issues alone may provide for the adequate consideration of the defendant's mitigating evidence.

72. In *Moreno*, the mitigating evidence at issue involved Moreno's troubled childhood, including a birth defect to his left ear which required multiple surgeries throughout his first seven

years. There was evidence that he was also taunted by neighborhood boys because of the deformity, although he was consoled by his mother. When he was still a small child, his mother and grandmother both became very ill, and his father had to get a second job in order to pay the medical expenses. When he was fifteen years old, his mother died, and he took her death very hard. Thereafter he dropped out of school, worked at various poorly paid jobs, and lived in his father's house relatively unsupervised. He was eighteen years old at the time he committed the charged offense. Additional mitigating evidence included testimony from various family friends and jail chaplains about his good personal characteristics. *Ex parte Moreno*, 245 S.W.3d at 423-24. The Court of Criminal Appeals concluded that "[a]t least with respect to his evidence of a troubled childhood, [Moreno] was entitled to" a jury instruction as a vehicle to express its reasoned moral response to such mitigating evidence. *Id.* at 425. The Court held that because circumstances of the offender can reasonably justify a jury assessment of a life sentence, and if those circumstances are not already fully or meaningfully encompassed within one or both of the special issues, then a separate jury instruction is constitutionally required. *Id*. at 426. The Court of Criminal Appeals also noted that we could "no longer maintain that evidence of a troubled childhood is adequately encompassed within the statutory special issues." *Id*. Because the evidence of Moreno's troubled childhood could not be given meaningful effect

within the context of the statutory special issues and the trial court failed to give a separate jury instruction that would empower the jury to assess a life sentence on the basis of such mitigating evidence, notwithstanding its answers to the special issues, the Court vacated the punishment portion of Moreno's judgment and remanded to the trial court for a new punishment hearing. *Id*. at 431.

73. In *Ex parte Martinez*, 233 S.W.3d 319, 320 (Tex. Crim. App. 2007), the Court of Criminal Appeals noted mitigating evidence of the defendant's hospitalization on multiple occasions in state psychiatric facilities, his abuse of alcohol since the age of thirteen, and a troubled childhood. The Court concluded that Martinez had presented constitutionally relevant mitigating evidence and that the jury did not have a vehicle to give this evidence meaningful consideration and granted habeas corpus relief, set aside the death sentence, and remanded the case to the trial court for another punishment hearing. *Ex parte Martinez*, 233 S.W.3d at 323-24.

74. The Supreme Court has said that it has "never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability. . . . Rather, the question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death, *Skipper v. South Carolina*, 476 U.S. 1,

106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) . . . "; *Tennard*, 542 U.S. 274 at 286.

75. Of all the sorts of evidence that have been noted by the Supreme Court as relevant mitigating evidence, only testimony regarding positive personal characteristics, are present in this case.

76. Regarding FBI FOIA documents set out in State's EXHIBITS 36, 37 & 38, the applicant has failed to satisfy any of those three prongs set out in *Brady* and followed in *Kimes*.

77. Regarding **EXHIBITS 36, 37** and **38**, there is no *Brady* violation because the defendant was actually aware of the supposed "exculpatory evidence" complained of in the 2012 FOIA documents.

78. The State did not violate *Brady* because the defendant was actually aware of the alleged exculpatory evidence in EXHIBITS 36, 37 and 38, and could have accessed it from the discovery provided to the applicant prior to trial. *See, e.g., Harm*, 183 S.W.3d, 407; *Havard*, 800 S.W.2d at 204B05; *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976).

79. The applicant has failed to prove by a preponderance of the evidence that the information contained in the documents obtained from the FBI through FOIA in EXHIBITS 36, 37 and 38 contained information which was withheld in violation of *Brady*.

80. Even if the FOIA documents in EXHIBITS 36, 37 and 38 contained information unknown to

the applicant, the evidence was not favorable to him.

81. The applicant has failed to prove by a preponderance of the evidence that the information contained in EXHIBITS 36, 37 and 38 were favorable to the applicant.

82. The applicant has failed to prove by a preponderance of the evidence that the FIOA documents in EXHIBITS 36, 37 and 38 were exculpatory or would have changed the outcome of the trial.

83. The items set out in EXHIBITS 36, 37 and 38 are hearsay statements and would not have been admissible at trial and are therefore not subject to the ruling in *Brady*.

84. Lester Bower has failed to prove that the information in attachment 1 to Lester Bower's Supplement to Subsequent Application is actually "new."

85. Lester Bower has failed to prove by clear and convincing evidence that any of the information contained in attachment 1 to Lester Bower's Supplemental to Subsequent Application was "new" evidence or that such evidence proves he is actually innocent.

86. Lester Bower has failed to prove by clear and convincing evidence that fingerprint evidence from the crime scene was new evidence or proves he is actually innocent.

87. Lester Bower has failed to prove by clear and convincing evidence that a business card from

the early eighties is "new" evidence or proves actual innocence.

88. Lester Bower has failed to prove by clear and convincing evidence that the ballistic evidence or evidence regarding the disassembly of an ultralight is "new" evidence or that such evidence proves he is actually innocent.

89. *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012), is not new law relevant to this case. *Ex parte Miles* involved a case where an eyewitness recanted his identification, an expert witness recanted her gun shot residue testimony, a fingerprint from the crime scene was identified as belonging to a person who lived near the crime scene at the time of the crime and who failed a polygraph examination when questioned about his involvement in the crime for which Miles was convicted.

90. The alleged confession to Ricky Joe Doneghey by Bear is hearsay.

91. The alleged statement to Kristopher Leckie by Bear is hearsay.

92. The alleged confession to Ricky Joe Doneghey by Bear does not corroborate the statements and testimony of Witness # 1 for R. 803(24) purposes.

93. The alleged statement to Kristopher Leckie by Bear does not corroborate the statements and testimony of Witness # 1 for R. 803(24) purposes.

94. The State did not violate *Brady* because the defendant was actually aware of the alleged exculpatory evidence he alleges is contained in attachment 1 to Lester Bower's Supplement to Subsequent Application, and could have accessed it from the discovery provided to Lester Bower prior to trial. *See, e.g., Harm*, 183 S.W.3d, 407; *Havard*, 800 S.W.2d at 204B05; *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976).

95. Lester Bower has failed to prove by a preponderance of the evidence that the information in attachment 1 was exculpatory or would have changed the outcome of the trial.

96. Lester Bower has proven by a preponderance of the evidence that there is new law applicable in Lester Bower's case legally unavailable at the time the previous habeas application was filed *Ex Parte Hood*, 304 S.W. 3d 397 (Tex. Crim.App. 2010).

97. Under Article 11.071, § 5, of the Texas Code of Criminal Procedure, this issue is not procedurally barred. The "good character" evidence asserted by Bower is relevant to a determination, independent of the special issues, of whether to impose the death penalty. Therefore, Bower should be granted a new punishment trial. Good character evidence is not excluded from being considered mitigating evidence. *Pierce v. Thaler*, 604 F. 3d 197 (5th Cir. 2010)

98. While the new evidence produced by the Defendant could conceivably have produced a different result at trial, it does not prove by clear

and convincing evidence that the Defendant is actually innocent under *Herrera*. The Court cannot find as a conclusion of law that no reasonable jury would have convicted the Defendant in light of the "newly discovered evidence" when the total evidence presented at trial and through the proceedings since trial is considered in whole. Nor has the Defendant met the burden of proof under *Schlup* that a constitutional error occurred which probably resulted in the conviction of one who was actually innocent.

ORDER

The clerk is **ORDERED** to send a copy of the Court's findings of facts regarding the subsequent 11.071 writ application in the above-styled case and the instant order to the Applicant's counsel and to Assistant Criminal District Attorney Karla Baugh Hackett at 200 S. Crockett St., Sherman, TX 75090.

Date: 12-10-12 /s/ Jim Fallon
Judge Presiding

Appendix CC, "Tables Collecting *Brady*-Related Documents and Testimony," to Applicant Lester Leroy Bower, Jr.'s Brief in Support of Habeas Corpus Relief, filed in the Texas Court of Criminal Appeals, Jan. 31, 2013 [Excerpted]

Table 1: Disclosed Documents Regarding Rarity/ Availability of Fiocchi Subsonic Ammunition

Table 1 identifies the four FBI documents that the prosecution produced regarding sales of Fiocchi subsonic ammunition in the United States. Copies of the documents are attached.

Tab	Description and Summary	Identification
1	From Bingham Arms invoices, the FBI prepared a list of persons who had received shipments of Fiocchi .22 caliber asonic hollow point long rifle ammunition	ORA 001377-001401
2	FBI transmittal memo and copies of Bingham Arms invoices showing shipments of Fiocchi .22 caliber asonic hollow point long rifle ammunition to Mr. Bower	ORA 001358-61; *see also* Trial Exs. 111 and 112
3	FBI memorandum regarding interview of a man who bought Fiocchi .22 caliber subsonic ammunition at Austin gun show	ORA 001346-001347

4	FBI memorandum regarding interview of man who bought Fiocchi .22 caliber ammunition from Bingham Arms	ORA 001368

Table 2: Trial Testimony and Argument Regarding Rarity/Availability of Fiocchi Subsonic Ammunition

Table 2 shows all the testimony and argument offered during Mr. Bower's trial regarding the availability of Fiocchi subsonic ammunition. Copies of the trial testimony and argument are attached.

Tab	Description and Summary	Identification
5	Ammunition used in the murders was "characterized by being A-sonic"	Vol. 12 at 48:13-49:2
6	In nine-year career, State Firearms Examiner had never before encountered Fiocchi ammunition	Vol. 12 at 50:5-13
7	This case was first time State Firearms Examiner ever saw Fiocchi ammunition	Vol. 12 at 73:19-74:1
8	State Firearms Examiner had worked several thousand cases without ever encountering Fiocchi ammunition	Vol. 12 at 79:18-80:1

9	State Firearms Examiner did not know how many Fiocchi ammunition dealers there were in the United States	Vol. 12 at 80:16-18
10	Bingham Arms was "the only United States seller of [Fiocchi .22 caliber subsonic ammunition] in the United States"	Vol. 14 at 112:22-113:4
11	Fiocchi .22 caliber subsonic ammunition was a "specialty item" not "sold over the counter . . . at your average gun store"	Vol. 14 at 113:5-16
12	Fiocchi .22 caliber ammunition was uncommon in the United States and Fiocchi's market share was "miniscule," "an extremely small percentage" that you might not even be able to measure	Vol. 14 at 113:23-114:7
13	Only a few hundred people "[i]n the entire United States" and only "ten to fifteen" in Texas purchased Fiocchi .22 caliber subsonic ammunition	Vol. 14 at 115:1-16
14	Fiocchi .22 caliber subsonic ammunition is "not very commonplace"	Vol. 14 at 118:4-120:18
15	3,200 rounds of Fiocchi .22 caliber subsonic ammunition sold in Texas is "not a large quantity"	Vol. 14 at 121:4-8, 16-18

16	Bingham Arms had 40,000 to 50,000 unsold rounds of Fiocchi .22 caliber subsonic ammunition, about 25% of its entire purchase	Vol. 14 at 122:4-11
17	In eight years working on many nationwide cases in FBI laboratory in Washington, DC, FBI special agent had never encountered Fiocchi .22 caliber ammunition	Vol. 15 at 99:12-100:8
18	In eight years working on many nationwide cases in FBI laboratory in Washington, DC, FBI special agent the only Fiocchi ammunition he had ever encountered was .12 gauge shotshell	Vol. 15 at 111:3-8
19	State's closing argument emphasized murders committed with "rare and unusual ammunition that State and Federal firearms examiners had not seen "in all their years of experience," but Mr. Bower "ordered Julio Fiocci [*sic*] ammunition on two occasions"	Vol. 18 at 12:8-18
20	State's closing argument regarding "web of guilt" included "the unique ammunition"	Vol. 18 at 23:4-13

21	State's closing argument included claim that Mr. Bower possessed "exotic and unique ammunition" that only "eleven people in the State of Texas have bought"	Vol. 18 at 66:18-24
22	State's closing argument include claim that Mr. Bower "knew a whole lot" about "unique ammunition"	Vol. 18 at 70:8-10
23	State's closing argument included claim that only "twelve or fifteen people . . . in the State of Texas" possessed the "unique and exotic ammunition"	Vol. 18 at 83:17-19
24	State's punishment phase argument asked the jurors to remember that Mr. Bower "had . . . the bullets"	Vol. 19 at 38:1-3

Table 3: Undisclosed FBI Documents Regarding Rarity/Availability of Fiocchi Subsonic Ammunition

Table 3 identifies the documents the prosecution withheld regarding the availability of the Fiocchi subsonic ammunition. Copies of the documents are attached.

Tab	Description and Summary	Identification
25	February 27, 1984 FBI memorandum regarding Mo's Competitor Supplies which sold 6,000 rounds of Fiocchi .22 caliber asonic hollow point long rifle ammunition	FBI 04047
26	October 25, 1983 FBI teletype identifying IGI Domino as a "major importer of Julio Fiocci [*sic*] ammunition" and stating that Euclid Avenue Sales with be contacted for a list of customer who purchased Fiocchi .22 caliber asonic hollow point long rifle ammunition	FBI 04370-75
27	November 3, 1983 FBI memorandum referring for further consideration the request that Euclid Avenue sales compile a list of its customer who purchased Fiocchi .22 caliber asonic hollow point long rifle ammunition because it would take several days to go through the company's paper invoices	FBI 04378-79

28	November 29, 1983 FBI memorandum stating that IGI Domino sold 20,000 rounds of Fiocchi .22 caliber asonic hollow point long rifle ammunition to Mo's Competitor Supplies and Sanction Firearms, that it "gave samples" of the ammunition to a dealer in Texas "in order to attempt to stimulate business," and "emphatically" denied selling the ammunition to Bingham Arms	FBI 04427-30
29	FBI memorandum regarding November 26 and 30, 1983 interviews of "collector" who purchased customer who purchased Fiocchi .22 caliber asonic hollow point long rifle ammunition at a Dallas gun show and identified Euclid Avenue Sales as "a distributor of Fiocchi ammunition"	FBI 04491-92
30	December 20, 1983 FBI teletype identifying IGI Domino as an "importer of Julio Fiocchi ammo" that sold 20,000 rounds to Mo's Competitor Supplies and Sanction Firearms	FBI 04494-96

31	January 05, 1984 FBI memorandum stating that the investigation IGI Domino's customer, Sanction Firearms, would be abandoned because Sanction Firearms said none of the Fiocchi ammunition it received was subsonic	FBI 04519-20
32	January 12, 1984 FBI airtel compilation of a list of Euclid's Fiocchi .22 caliber asonic hollow point long rifle ammunition customers would require review of 200,000 invoices	FBI 04588-89

Table 4: Disclosed DPS Entries Regarding Rarity/Availability of Fiocchi Subsonic Ammunition

Table 4 identifies two DPS log entries and three defense notes about DPA log entries that the prosecution produced regarding Fiocchi subsonic ammunition in the United States and the FBI document showing that Fiocchi of America did not receive any shipments of ammunition prior to January 1984 (months after the murders). Copies of the documents are attached.

Tab	Description and Summary	Identification
33	DPS entry concerning ATF information regarding past (Smith & Wesson) and present (Fiocchi of America) Fiocchi gun distributors	Exhibits to Fourth Affidavit by Anthony C. Roth at 615 (TN 000615)

34	DPS log entries regarding names of two Texas Fiocchi distributors, neither of whom sold Fiocchi ammunition (*see* FBI 04444), and Fiocchi advertising the ammunition for use in hunting small game with a silenced weapon	Exhibits to Fourth Affidavit of Anthony C. Roth at 697 (TN 000697)
35	Defense notes regarding DPS entry stating that Sheriff Driscoll requested ATF assistance in locating Fiocchi distributors (*see* Exhibits to Fourth Affidavit of Anthony C. Roth at 620), but without a response	Exhibits to Fourth Affidavit of Anthony C. Roth at 447 (TN 000447)
36	Defense notes regarding above DPS entries	Exhibits to Fourth Affidavit of Anthony C. Roth at 468 (TN 000468)
37	Defense notes regarding above DPS entries	Exhibits to Fourth Affidavit of Anthony C. Roth at 685 and 692 (TN 000685, 692)

Table 5: Trial Testimony Regarding Uses of Fiocchi Subsonic Ammunition

Table 5 identifies all the trial testimony regarding the uses of Fiocchi subsonic ammunition. Copies of the trial testimony and argument are attached.

Tab	Description and Summary	Identification
38	Bingham Arms representative testifying that "the purpose of a sub-sonic hollow point Fiocci [*sic*] bullet" is to have "a more killing round"	Vol. 14 at 114:8-21
39	Bingham Arms representative denying that Fiocchi .22 caliber asonic hollow point long rifle ammunition is advertised or recommended for small game hunting	Vol. 14 at 119:18-120:5
40	State's punishment argument stating that Bingham Arms representative testified that "'There is no purpose for a Fiocci [sic], sub-sonic, .22 hollow-point bullet, other than to kill'"	Vol. 19 at 43:16-18

Table 6: Undisclosed Documents Regarding Legitimate Uses of Fiocchi Subsonic Ammunition

Table 6 identifies the documents the prosecution withheld regarding the legitimate uses of the Fiocchi subsonic ammunition. Copies of the documents are attached.

Tab	Description and Summary	Identification
41	A Pennsylvania man told the FBI that he purchased the ammunition because "he is interested in all types [sic] of guns and ammo"	FBI 03342-44
42	A man told the FBI that he bought the ammunition because "he likes to keep track of any new and different items which appear on the market so that he can stay abreast of the industry"	FBI 03984-85
43	A Montana man told the FBI that "he purchased the ammunition for the purpose of teaching his wife how to shoot" because the ammunition is very quiet and "his wife does not like the loud noise associated with shooting"	FBI 03990-91

44	A Kentucky man told the FBI that "he purchased the ammunition to get rid of a [redaction] he was having in the neighborhood"	FBI 04004
45	Fiocchi catalog marketing the ammunition for hunting "small game and varmint" and to "avoid disturbing sounds"	FBI 04144-49
46	Fiocchi catalog marketing the ammunition for hunting "small game and varmint" and shooters wishing to avoid "disturbing noise"	FBI 04150-85

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