WR-79,318-02

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE

LEROY EDWARD COTY,
Applicant

On Application for a Writ of Habeas Corpus in Cause Number 1264113-B
180th District Court of Harris County, Texas

APPLICANT'S BRIEF

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STATEMENT OF THE CASE

The Statement of the Case provided by the State is accurate.

STATEMENT REGARDING ORAL ARGUMENT

The Court has granted oral argument.

ISSUE PRESENTED

> Under what circumstances, if any, should the Court of Criminal Appeals presume a due-process violation in a case handled by a forensic scientist who has been found to have committed misconduct in another case?

STATEMENT OF FACTS

The Applicant does not dispute the version of the facts as they are stated in either section A ("Seizure") or Section B ("Analysis and Reanalysis") of the State's Brief. [2] The Applicant does dispute the version presented under section C of the State's Brief ("Misconduct"), and will supply his version of the extent and nature of the misconduct of Jonathan Salvador, to the extent that it can be currently assessed, in the body of the argument which follows.

SUMMARY OF THE ARGUMENT

The State argues that this Court should conduct a two-step inquiry in determining when it should presume a due-process violation in a case handled by a forensic scientist who has been found to have committed misconduct in another case. The State suggests that this Court should first determine whether a "presumption of invalidity" should attach to a scientist's misconduct in other cases, by asking whether

[2] Although both the Applicant's and State's Brief were originally due on the same date, this Court allowed the Applicant additional time to file his brief.

the scientist's work was "so egregious as to necessitate that any testimonial or documentary evidence offered by [him] was presumptively invalid." *State's Brief*, at 10. The determination of whether a scientist's work should carry this "presumption of invalidity" should be made on a situation-by-situation basis, and should arise only when the misconduct is so persistent and pervasive that it "shocks the conscience." *Id.*, at 9. The State further argues that in the rare instances that such "presumption of invalidity" does attach to a scientist's work, the Court should apply a totality of the circumstances test to determine whether there was material prejudice in the case. The State adds that it should be the defendant's burden to prove such harm. *Id.*, at 26.

The State's suggestion that misconduct by a forensic scientist must "shock the conscience" before other cases by that scientist may be presumed invalid is an unworkable standard. Such an arbitrary standard would be unhelpful in approaching either the Salvador cases or other instances of systemic problems that may arise in the future. The added suggestion by the State that even where a scientist has "shocked the conscience" by his misdeeds, it is still the defendant's burden of proving that the taint does not attach to his particular case, unfairly shifts the burden from the party whose agent created the problem. Adoption of such a rule would create expensive havoc in trial courts for those defendants lucky enough to become aware of the problem, who would then be expected to prove that the conscience-shocking misconduct of the scientist did affect their case. The State's suggested approach would further undermine public confidence in a criminal justice system which has already seen too

many lab scandals, and would fail to have the deterrent effect that this Court's previous decisions in the Salvador cases have undoubtedly had.

The Applicant suggests that this Court should continue the course it has followed in *Ex Parte Turner*, 394 S.W.3d 513 (Tex. Crim. App. 2013) and *Ex Parte Hobbs,* 393 S.W. 3d 780 (Tex. Crim. App. 2013). There is no reason for this Court to overrule its own recent precedent. Instead, this Court should continue its zero-tolerance approach to forensic science misconduct by presuming a due process violation and granting relief in any case where a forensic scientist's misconduct has reached the point that all of work should be presumed invalid. On retrial, there is nothing to prevent the State from trying to prove that the results in a particular case are reliable, and that a conviction is appropriate.

In determining when a forensic scientist's demonstrated misconduct in other cases should trigger a presumption of a due process violation in a new case under review, the Applicant suggests that this Court consider the following factors:

1) whether prior decisions of this Court suggest that a due process violation should be presumed because of the scientist's misconduct;

2) the scope of the scientist's misconduct, meaning the number of cases which have experienced problems and the relative seriousness of the errors or intentional misconduct that has been discovered. Proof of drylabbing or other intentional misconduct should weigh heavily toward a finding that a due process violation must be presumed as to all of the scientist's work;

3) whether presuming a due process violation would deter future lab misconduct, negligence, or other material errors by sending a strong message to the scientific community that forensic misconduct will not be tolerated by the courts. Closely related to this factor is whether adopting a zero-tolerance approach to laboratory misconduct by presuming a due process violation in cases like Salvador's helps maintain public confidence in the reliability of forensic evidence used in the criminal justice system. As argued *infra*, the proactive response by law enforcement to the Houston Police Department Crime Lab scandal in 2003 provides an extrajudicial example of reacting to a systemic problem in a manner that instilled confidence in the system. Likewise, presuming a due process violation constitutes a valuable prophylactic rule that would help to deter future lab misconduct while allowing the State the opportunity to prove the reliability of its scientific evidence at a retrial; and

4) whether presuming a due process violation would promote judicial economy under the circumstances.

Applying the above factors to the instant case, the Applicant argues that this Court's prior decisions are correct in concluding that Jonathan Salvador's negligent and intentional misconduct was significant enough that a due process violation should be presumed as to all of his cases. Relief should be granted in this case, and in all cases in which it is shown that Salvador had sole custody of the drug exhibit in the case. The decision as to the Applicant's guilt should properly be decided by a judge or jury at a new trial, after considering a reanalysis of the drug exhibit, if any, and the

testimony of Jonathan Salvador, subject to cross-examination. It should be the trier of fact's determination at a new trial whether the chain of custody has been irreparably undermined, or Salvador so lacks credibility that a question still lingers as to the reliability of the results.

ARGUMENT

A. The State's suggestion that a "presumption of invalidity" should only be imposed when a forensic scientist's misconduct has "shocked the conscience of the Court" is an arbitrary standard that provides little guidance in approaching either the Salvador cases or future situations involving systemic misconduct.

While conceding that Jonathan Salvador's professional misconduct was "indisputably unethical," the State argues in its brief that it "does not rise to the level of shocking the conscience." *State's Brief*, at page 9. Comparing the extent of Jonathan Salvador's misconduct with problems in West Virginia, Washington State and Massachusetts, the State concludes that "[T]hough unethical, the conduct in question pales in comparison…" *State's Brief*, at pages 9-19. The Applicant addresses the extent of Salvador's misconduct *infra*, at pages 13-19.

In support of its proposition that "there may be certain extraordinary circumstances when a forensic scientist's misconduct is so pervasive and persistent that it shocks the conscience of the court," the State cites cases that have nothing to do with misconduct of forensic scientists, or even with problems on a broad scale such as those which are evident in the Salvador situation. They pertain to individual acts of extreme misconduct. For example, *Rochin v. California*, 342 U.S. 165 (1952),

cited at page 9 of the State's brief, dealt with a police officer who directed a doctor to pump a drug suspect's stomach, thereby inducing vomiting of drug evidence. Likewise, *Hernandez v. State,* 548 S.W.2d 904 (Tex. Crim. App. 1977), cited at page 9 of the State's brief, dealt with a police officer choking a drug suspect until he spit out balloons filled with heroin. The State has not cited a single case where a court has employed a "shock the conscience" test for determining when the misconduct of a forensic scientist, or any other systemic misconduct, should be presumed invalid.

In pointing out that each situation must be assessed on a case-by-case basis, the State cites *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)("Deliberate indifference that shocks in one environment may not be so patently egregious in another"). This is precisely the problem with requiring a forensic scientist's misconduct to "shock the conscience" before it triggers a presumption of invalidity or a presumption of a due process violation as to his other work. What shocks the conscience in one environment may not shock in another. What shocks the conscience of one person may not shock the conscience of another. If a large-scale problem erupts, such as that which currently plagues Massachusetts, or such as the Houston Police Department Crime Lab problems which surfaced in 2002 (see discussion *infra*, at pages 20-23), it will be of little utility to this Court to simply ask whether the problem "shocks the conscience."

That said, it is worth noting that whether it was because the cases involving Jonathan Salvador shocked their conscience, suffered from a "presumption of

invalidity," or faced some other insurmountable obstacle, the Harris County District Attorney's Office felt obliged in 2013 to dismiss all pending trial cases where Jonathan Salvador had been the sole lab analyst in the case. *See generally, After Drug Lab Scandal, Court Reverses Convictions*, available at *http://www. texastribune.org/2013/03/27/after-drug-lab-scandal-court-reverses-convictions* (March 27, 2013)("In Harris County, Sara Kinney, a spokeswoman for the district attorney, said all pending cases connected to Salvador's work were dismissed."). Moreover, in terms of shocking one's conscience, State's Exhibit 20 in this case, the Report of the Texas Forensic Science Commission, points out that: "[I]t was clear (D.P.S.) management made good-faith efforts to help Salvador improve, and were completely shocked that Salvador would ever use evidence from one case to support the results in another." (State's Exhibit 20, II C.R. at 286). Additionally, this Court granted relief on numerous Salvador cases from Galveston County, all of which came to it on agreed findings, suggesting that the Galveston County District Attorney's Office was sufficiently shocked by Salvador's misconduct as to not oppose habeas relief in any cases where he was the sole analyst in the case.

B. In determining whether a forensic scientist's misconduct has reached the point that a due process violation should be presumed, this Court should consider four factors.

There is no inflexible rule that yields the answer to the Court's question. However, as to when a forensic scientist's misconduct in other cases should cause this Court to presume a due process violation as to a new case under review, the Applicant suggests that the following factors be considered:

1) Whether prior decisions of this Court suggest that a due process violation should be presumed in the situation under review;

2) The number of cases affected and the relative seriousness of the errors or intentional misconduct that has been discovered. If possible, this inquiry must also determine whether the evidence under review was tested during the time period that the scientist was discovered to have committed misconduct. Proof of drylabbing or other intentional misconduct should weigh heavily toward presuming a due process violation. In reviewing the nature of the problems that have been discovered with the scientist's work, the focus should be on whether the misconduct undermines either his credibility or the reliability of his results to the extent that the State's ability to meet its burden at trial of proving beyond a reasonable doubt that the substance at issue is the particular drug that has been alleged is substantially impaired;

3) whether presuming a due process violation would deliver a strong message to both crime labs and to the public that forensic misconduct will not be tolerated by this Court; and

4) whether presuming a due process violation would promote judicial economy under the circumstances.

1. Whether prior decisions of this Court suggest that a due process violation should be presumed in the situation under review.

When this Court asks when it should presume a due process violation in a case handled by a forensic scientist who has been found to have committed misconduct in

another case, the immediate answer is that it should do so when its own precedent clearly provides that it should.

During the period of February-June of this year, this Court issued *per curiam* opinions granting relief in 18 cases involving Jonathan Salvador, including two published opinions, *Ex Parte Turner*, 394 S.W.3d 513 (Tex. Crim. App. 2013) and *Ex Parte Hobbs,* 393 S.W. 3d 780 (Tex. Crim. App. 2013).[3] *Turner* and *Hobbs* clearly indicated to anyone contemplating filing an application for writ of habeas corpus in a Salvador-related case, or to the judge of a convicting court in such a case, that a due process violation would be presumed in any case if it were shown that at some point Jonathan Salvador had sole custody of the drug exhibit. *See*, *e.g.*, remand order from December 5, 2012 in *Ex Parte Turner*, *supra*. Such opinions clearly indicated that insofar as which grounds for review needed to be pled in a writ application in a

[3] *Ex Parte Flores*, No. AP-76,996, 2013 WL 1149824 (Tex. Crim. App. March 20, 2013)(not designated for publication); *Ex Parte Hinson,* No. AP-76,983, 2013 WL 831183 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Cooper,* No. AP-76,955, 2013 WL 1149821 (Tex. Crim. App. March 20, 2013)(not designated for publication); *Ex Parte Sellers*, No. AP-76,975, 2013 WL 831142 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex parte Broussard*, No. AP-76,976, 2013 WL 831171 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Rent*, No. AP-76,981, 2013 WL 831171 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Eagleton*, No. AP-76,986, 2013 WL 831237 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Gaines,* No. AP-76991, 2013 WL 1149806 (Tex. Crim. App. March 20, 2013)(not designated for publication); *Ex Parte Artmore*, No. AP-76,982, 2013 WL 831178 (Tex. Crim. App. March 6, 2013) (not designated for publication); *Ex Parte McCardell*, No. AP-76,984, 2013 WL 831189 (Tex Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Martin*, No. AP-76,985, 2013 WL 831196 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Carrasco*, No. AP-76,992, 2013 WL 1149810 (Tex. Crim. App. March 20, 2013)(not designated for publication); *Ex Parte Jackson,* No. AP-77008, 2013 WL 1232325 (Tex. Crim. App. March 27, 2013)(not designated for publication); *Ex Parte Smith,* No. AP-76988, 2013 WL 831359 (Tex. Crim. App. March 6, 2013)(not designated for publication); *Ex Parte Williams,* No. WR-78685-01, 2013 WL 2285490 (Tex. Crim. App. May 22, 2013)(not designated for publication); *Ex Parte Penrice*, No. WR-46426-05, 2013 WL 2730667 (Tex. Crim. App. June 12, 2013)(not designated for publication).

Salvador-related case, a single ground would suffice, namely, that the applicant had suffered a due process violation because custody had been compromised. Obviously, prior to this Court's June 26, 2013 order requesting briefing in this case, the trial court also recommended relief in this case, and this Court initially granted relief based on the one ground the Applicant had pled, supported by only two pieces of evidence that spoke in any detail to Jonathan Salvador's work, the O.I.G. Report and the Texas Rangers Report.

A due process violation should be presumed in all of Jonathan Salvador's cases because this Court has indicated to a multitude of lawyers and trial judges dealing with these problems in the Gulf Coast region that it should. Post-conviction writ applications have been drafted and findings entered in reliance on this Court's previous decisions. [4] This Court indicated that only one ground needed to be pled in any writ application and only four pieces of evidence needed to be supplied. Obviously, other grounds and evidence were therefore reasonably discarded as being unnecessary, especially since some applicants (such as Mr. Coty), were still in prison and matters needed to be expedited. If this Court decides to reverse course from its *Hobbs* and *Turner* opinions, it would only be fair to remand any pending applications to give an opportunity for habeas applicants to add grounds that this Court has clearly

[4] Indeed, based on this Court's initial ruling in this case on June 5, 2013, the State and the undersigned have agreed to findings recommending relief in two other felony cases in Harris County. Those cases are now pending before this Court. *See Ex Parte Ibarra*, No. WR-79,821-01 and *Ex Parte McSwain*, No. WR-79,809-01.

indicated were not necessary. See argument *infra*, at pages 28-30.

The United States Supreme Court has warned that a court disregards its own precedent at the risk of eroding the public's confidence in its rulings. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992):

> Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation. 505 U.S. at 854.

As argued *infra*, this Court has good reason to presume a due process violation in all of Jonathan Salvador's cases. Its holdings in *Ex Parte Turner*, 394 S.W.3d 513 (Tex. Crim. App. 2013) and *Ex Parte Hobbs,* 393 S.W. 3d 780 (Tex. Crim. App. 2013) should not be disturbed because they send an important message to the public, to the forensic community and to prosecutors, defense counsel and the judiciary that misconduct by forensic scientists like Salvador will be met with zero tolerance by this Court. These opinions ensure the reliability of criminal convictions in cases involving Salvador by requiring the State to overcome the taint his misconduct has cast on the reliability of the drug evidence in these cases.

2. The number of cases affected and the relative seriousness of the errors or intentional misconduct that has been discovered.

It would seem obvious that as the number of errors discovered in a forensic scientist's past work increases, so does the likelihood of problems with any of his cases that have not been reviewed. It also seems self-evident that if it is possible to determine with some precision when a scientist's misconduct began, cases analyzed before such date may be less suspect.

a. Relatively few of Salvador's cases have yet been reanalyzed.

As a threshold matter, it should be noted that even as this brief is being filed, only a small percentage of Salvador's cases have been reanalyzed. In its brief, the State utilizes the April 5, 2013 Report of the Texas Forensic Science Commission (hereafter "The Report") to reach conclusions regarding both the percentage of Jonathan Salvador's cases experiencing errors and the general quality of his work, concluding that "it is clear that [Salvador's] misconduct does not rise to the level that should shock the conscience and necessitate a rebuttable presumption of invalidity." *See* State's Brief, at pages 19-25. However, Salvador's cases continue to be reanalyzed. As will be shown *infra*, new problems continue to be discovered.

As the April 5, 2013 Report of the Texas Forensic Science Commission makes clear, the investigation that was undertaken of Jonathan Salvador's work by the O.I.G. (Department of Public Safety Office of Inspector General), following the inadvertent discovery in January of 2012 that Salvador had drylabbed in an alprazolam case, was

very limited in nature:

> On February 21, 2012, DPS management alerted the Commission, ASCLD-LAB, prosecuting attorneys and submitting law enforcement agencies about the alprazolam incident (reference omitted). The email communication advised affected parties that all evidence worked by Salvador in the previous 90 days would be re-analyzed. On April 26, 2012, DPS management emailed a second notice to the agencies explaining that two additional errors were discovered in Salvador's work during the review of 148 cases constituting 90 days of work. DPS also identified 4,944 total drug cases by county (equaling 9,462 pieces of evidence) worked by Salvador during his employment from 2006-2012, and advised law enforcement that they could request re-analysis of any case in which the evidence has not yet been destroyed. On June 30, 2012, DPS submitted a follow-up written disclosure to the Commission, including the results of retesting conducted.
>
> The Commission contacted submitting law enforcement agencies in an attempt to estimate the percentage of the 4,944 total cases for which evidence was destroyed as part of the normal course. Evidence submitted by DPS officers constituted a total of 1,978 cases, and only 21 of those cases were destroyed. Though the Commission did not receive answers from all agencies, staff estimates that between 50-75% of the evidence is available for re-testing, including evidence submitted by DPS officers. (III C.R. at 275-276).

Thus, the O.I.G. reviewed only 148 of Salvador's 4,944 cases. Evidence in another 440 cases was re-analyzed prior to the Report being issued in April of 2013 (II C.R. at 290). Therefore, as of the date of the issuance of the Report, only 588 of Salvador's 4,944 cases had been reanalyzed. That accounts for less than 12%. Thus, it must be understood that any conclusions regarding the scope of the Salvador problem are based on a relatively small sample. However, the Applicant believes that even from the cases that have been reanalyzed, it is clear that the extent and nature of Salvador's misconduct should weigh heavily in favor of this Court presuming a due

process violation in all cases where Salvador had sole custody of the drug exhibit.

b. The State's conclusions regarding Salvador's work do not place sufficient weight on his intentional misconduct.

The State downplays the extent of the Salvador problem. Although the Report found than 1 of 3 of Salvador's case folders were returned for corrections, the State downplays the corrections as being merely "administrative." State's Brief, at page 22. The State also points out that "DPS' reanalysis of Salvador's casework in 440 cases, including the 90-day period prior to the (misconduct discovered in January of 2012), resulted in seven (7) corrective actions." *Id.* The State also reassures this Court that it was likely because Salvador's work underwent routine peer reviews that there was a correction rate of less than two (2) percent. *Id.* at page 23. In other words, the State suggests that Salvador's problems as a scientist were mostly technical in nature and were not serious, adding that "[T]he laboratory relied on the technical and administrative peer review process to catch Salvador's mistakes," the suggestion being that most of his mistakes were caught through the safety net of peer review. *Id.*, at page 22. The State declares that Salvador's work is "not an instance of systematic evidence tampering or falsifying evidence." *Id.*, at page 23. In addition to the small sample of cases where drugs were actually retested, the State also relies in its brief on Performance Evaluation Reports from co-workers of Salvador's (III C.R. at 640-679) to draw its conclusion that his mistakes were mainly "administrative." *Id.,* at page 22.

But as the Texas Forensic Science Commission Report makes clear regarding

the peer review process, "[T]his (type of) review ensures that results meet the reporting criteria and standards set by DPS. However, the *misrepresentation of the data would not be identified* during the technical review process." (II C.R. at 283)(italics added). In other words, Performance Evaluation Reports and the technical and administrative peer review process would not reveal misrepresentation or intentional misconduct. The only way to detect fraudulent conduct in Salvador's cases, such as drylabbing,[5] would be to reanalyze the drug exhibit in each case to see if the new results comport with the original testing done by Salvador. Put another way, the peer review process may show no "administrative" mistakes at all in a case that had in fact been drylabbed. A scientist could easily run a drug exhibit from another case and posit the scientific results from that case as the documentation supporting a new case for which he had done no testing at all. There would be nothing to alert anyone involved in the peer review that anything was amiss.

c. Salvador was negligent and dishonest.

In addition to noting a "high correction rate" of an error in one of every three of Salvador's cases, the Report notes that Salvador was admonished by his supervisors to "avoid short cuts." (II C.R. at 285). He "struggled with corrections and an overall

[5] "Drylabbing" is a colloquial term for a form of egregious scientific fraud involving the fabrication and reporting of scientific results for tests that actually never were conducted. It has been referred to as "the most egregious form of scientific misconduct that can occur in a forensic science laboratory," as well as a "hanging offense" in the scientific community. *See* http://www.hpdlabinvestigation.org., Final Report, June 13, 2007, Page 5, fn. 5; Page 8, fn. 10.

understanding of the chemistry, especially in difficult cases." *Id.* Examiners at the D.P.S. "were consistent in their view that Salvador was very friendly and helpful, just not the right type of person for the job." *Id.*, at 286. [6] It was concluded by his coworkers that Salvador's drylabbing in the 2012 alprazolam case stemmed from the fact that he "simply 'could not afford' to have another mistake." *Id.* The Report paints a picture of a forensic scientist whose work was widely-known "as 'right on the edge' of acceptability." *Id.*

Reanalysis of Salvador's casework during the 90-day period preceding the January 2012 incident, as well as the 440 additional cases that were reanalyzed by request, revealed "poor documentation, poor technique and poor decision-making," including instances where he failed to perform necessary tests, misidentified a substance as marijuana that was not marijuana, and reported the weight of a cocaine exhibit as 33 grams, when in fact it was only .33 grams (II C.R. at 291).

More significantly, Salvador committed fraud on at least two occasions. The Texas Forensic Science Commission Report provides the following definition of "professional misconduct" from its Policies & Procedures:

> "Professional Misconduct" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate

[6] One co-worker joked that when another forensic scientist was called upon to conduct a peer review of a file submitted by Salvador, "one would need a whole note pad of sticky notes to mark the corrections needed within the file." (II C.R. at 329, paragraph 1.16)

> act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis." (TFSC Policies and Procedures at 1.2).

The Commission voted unanimously that Salvador's actions of January 2012 constituted "professional misconduct" as defined above, based on the fact that "Salvador fraudulently misrepresented data after attempting analysis on a pharmaceutical drug exhibit." *Id.*, at 290.

In addition to the alprazolam drylabbing incident in 2012, which prompted the investigation into Salvador's work, the State has also pointed out in a footnote that "[S]ince the [Texas Forensic] Commission released its report, ongoing reanalysis discovered an April 2009 laboratory report in which it appears that Salvador used the results in one case to justify the results in another case. *State's Brady v. Maryland Notice*, cause no. 1264113-B." *State's Brief*, fn. 4, at page 22. The *Brady* notice referred to by the State in its brief comprises a supplemental reporter's record which has been filed with this Court after its briefing order of June 26, 2013. [7]

As the Report points out, "[T]he act of using evidence in one case to support the results in another case is one of the most serious ethical violations that can occur in a crime laboratory. As set forth in ASCLD-LAB's *Guiding Principles of Professional*

[7] On Wednesday, August 14, 2013, the undersigned and the prosecutor made still another record in the trial court, in order to provide more evidence for this Court concerning the Fort Bend County case that was the subject of the State's *Brady* notice. The supplemental record consists in part of Jonathan Salvador's trial testimony in the Fort Bend County case on January 13, 2010. Such record only became available to the undersigned on August 9, 2013. In his sworn testimony, Salvador claims to have tested a drug exhibit that he apparently did not test.

Responsibility for Crime Laboratories and Forensic Scientists, forensic scientists are obligated to conduct full and fair examinations." (II C.R. at 283).

If this Court had before it a case involving a police officer who had been proven to have planted evidence on a suspect even once, a taint would attach to anything that officer claimed to be true. Jonathan Salvador has now been shown to have "planted evidence" twice, in the sense that he provided evidence of scientific conclusions without doing any underlying testing to support the results.

Salvador's untruthfulness during the investigations by the Texas Rangers and Office of Inspector General reveal a person who was capable of routine dishonesty. The O.I.G. Report reflects that even as his misconduct came to light, Salvador was untruthful and evasive during the D.P.S. investigation:

> All witnesses interviewed during this investigation cooperated fully and appeared truthful except for Jonathan Salvador. The Investigation revealed Salvador was not truthful during the investigation and his account of the events for 01-26-2012 contradicted known evidentiary facts and were not consistent with witness statements. Salvador's repeated attempts at deception when questioned about his actions were a clear attempt to impede and interfere with the Department's ability to ascertain the truth of the matter in question. Salvador failed to follow Standard Operating Procedures for testing of controlled substances. Evidence and supervisory statements also revealed Salvador demonstrated a failure to maintain sufficient competency· to properly perform his duties and assume the responsibilities of his position. In Salvador's attempt to explain away the allegation made against him as a series of possible mistakes, those attempts exposed him to critical evaluation of his integrity, knowledge, competency, and overall inability to perform required duties for his position as a forensic scientist. (II C.R. at 311).

When interviewed by the Texas Rangers regarding possible criminal

misconduct, Salvador "made several references to 'Jesse,' a DPS Crime Lab employee who was found guilty of stealing drug evidence from the DPS Crime Lab several years ago, and SALVADOR continually compared himself to 'Jesse.' Ranger WOLF found this awkward, as the circumstances surrounding this investigation were completely different from the circumstances involved in 'Jesse's' investigation." (II C.R. at 333, paragraph 1.33). Salvador further "conceded he might have made a mistake, but he refused to admit to 'dry-labbing' the evidence because he had seen too many people go down after they had admitted that they 'dry-labbed.'" (II C.R. at 335, paragraph 1.39).

As for the point that there must be some temporal connection between the time period when the scientist is shown to have committed misconduct and the date that he did testing of the items under review, the 2009 Fort Bend County drylabbing incident by Salvador occurred approximately one year before the Applicant was arrested. The Applicant's arrest was nearly two years before the drylabbing incident of January 26, 2012 that led to Salvador's misconduct being discovered. Thus, although there might be situations where there may be some question as to whether misconduct occurred during a scientist's "period of misconduct," in this case it is undisputed that Salvador was drylabbing both before and after the date that he tested drugs in the Applicant's case.

It is still unclear how many cases were affected by Salvador's misconduct. There is apparently no ongoing systematic review of all of his cases. Instead, they are

apparently being reanalyzed as various law enforcement agencies request it. As to those cases where evidence has been destroyed (estimated at 25%-50% by the Report), it would be impossible to know whether drylabbing occurred, since the original data could not be compared to data obtained from reanalysis. Obviously, in those cases where there is no request that drug evidence that was analyzed by Salvador be reanalyzed, any drylabbing would also go undetected.

In light of the widespread criticism of his work, coupled with two documented cases of drylabbing and false testimony concerning one of those instances, the taint cast upon Salvador's work clearly suggests that this factor weighs in favor of presuming a due process violation as to all of his work.

3. Whether presuming a due process violation would deliver a strong message to both crime labs and to the public that forensic misconduct will not be tolerated by this Court.

c. **When the State doesn't take steps to ensure public confidence in the wake of forensic science misconduct, this Court should.**

The national epidemic of major crime lab scandals has plagued not only Texas, but states like Massachusetts and Colorado. In Massachusetts, a chemist for the state drug lab has confessed to altering test results and mishandling evidence in what a just-released report estimates to be more than 40,000 cases she has handled. For fiscal 2013, lawmakers in Massachusetts have set aside $30 million to handle the crisis.[8] In

[8] David Abel and John R. Ellement, *Drug Mishandling may have tainted 40,000 cases*, The Boston Globe, August 20, 2013; online at: /http://www.bostonglobe.com/metro/2013/08/20/annie-dookhan-alleged-rogue-state-chemist-may-have-affected-more-than-people-cases-review-

Colorado "the state lab has suspended all blood-alcohol and blood-drug tests and outsourced samples to six private labs," and "a total of 800 blood-drug and blood-alcohol samples will be retested" due to laboratory misconduct. [9]

Texas has had its own major problems related to faulty forensics over the years, much of it in Houston, which has experienced recent problems with urine testing,[10] breath alcohol tests,[11] and fingerprint evidence.[12] However, the worst forensic scandal to face Texas occurred in 2002 when the DNA and toxicology sections of the Houston Police Department Crime Lab were suspended following a highly-publicized exoneration in a sexual assault conviction.[13] The problems which were revealed with the Houston Police Department Crime Lab resulted in what has even been called "the

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finds/GuEEMIzbAfAss1clatettI/story.htmlhttp://tinyurl.com/meqeksc(accessed August 22, 2013).

[9] Jordan Steffen, *Colorado Lab Report Shows Potential Issues with Testimony on Blood-Tests*, The Denver Post, July 18, 2013; online at: http://www.denverpost. com/news/ci_23682443/colorado-lab-report-shows-potential-issues-testimony-blood (accessed July 31, 2013).

[10] Brian Rogers, *DA's Office Stops Using Probation Agency's Drug Tests*, Houston Chronicle, August 28, 2012; online at: http://www.chron.com/ news/houston-texas/article/DA-s-office-stops-using-probation-agency-s-drug-3821767.php (accessed August 1, 2013).

[11] Anita Hassan, *Controversy Continues to Dog BAT Vans*, Houston Chronicle, September 7, 2011; online at: http://www.chron.com/news/houston-texas/article/More-BAT-van-cases-questioned-2160150.php (accessed August 1, 2013).

[12] Moises Mendoza and Bradley Olson, *HPD Fingerprint Unit is Focus of Criminal Probe*, Houston Chronicle, December 2, 2009; online at: http://www.chron.com/news/houston-texas/article/HPD-fingerprint-unit-is-focus-of-criminal-probe-1622998.php (accessed August 1, 2013).

[13] Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, New York Times, March 11, 20013; online at: http://www.nytimes.com/2003/03/11/us/houston-dna-review-clears-convicted-rapist-and-ripples-in-texas-could-be-vast.html (accessed August 22, 2013); See also *Ex parte Sutton,* No. AP-75,181 (Tex. Crim. App. May 25, 2005) (not designated for publication).

most significant laboratory scandal in the nation's history." [14]

As the scandal grew worse and gained a national audience, the law enforcement community in Houston, including the Houston Police Department and the Harris County District Attorney's Office, reacted quickly to determine whether other convictions had been compromised and to assure the public that everything possible was being done to make sure that wrongs would be righted. As summarized in a voluminous report that was compiled as part of an independent review of the lab, commissioned by the Houston Police Department:

> Within a month of the airing of the first news reports, HPD commissioned an outside review of the Crime Lab's DNA/Serology Section. Representatives from the Texas Department of Public Safety Crime Lab Headquarters and the Tarrant County Medical Examiner's Office performed an audit of the Crime Lab's DNA/Serology Section over the course of two days, December 12 and 13, 2002, during which they found profound deficiencies in the operations of the Section. In December 2002, soon after the completion of this audit and based on the preliminary oral report of the auditors prior to the issuance of their final audit report, HPD suspended the performance of all DNA analysis by the Crime Lab. The final report documenting the audit's findings was issued on January 10, 2003. DNA work by the Crime Lab has remained continuously suspended to this day, although HPD is hoping to re-start DNA analysis by the end of this calendar year. [15]
>
> In early 2003, HPD, in close consultation with the Harris County District Attorney's Office, began a time-consuming process of

[14] Ryan M. Goldstein, Note, *Improving Forensic Science Through State Oversight*, 90 Texas L. Rev. 225, 225-226 (2011).

[15] This excerpt, from the second of six installments which comprised the report, was released on May 31, 2005. *See* http://www.hpdlabinvestigation.org. The report came to be known as the Bromwich Report, issued in six installments over a two-year period. The report was issued by an investigative team led by Michael Bromwich of Fried, Frank, Harris Shriver and Jacobson, a law firm in Washington, D.C., and was commissioned by the City of Houston and the Houston Police Department.

> identifying all cases in which some form of DNA analysis had been performed by the Crime Lab. This process evolved into a long-term retesting project coordinated among HPD, the Harris County District Attorney's Office, and outside DNA laboratories, which has identified for retesting a total of 407 criminal cases involving DNA analysis performed by the Crime Lab.

Although the response to the Houston Police Department Crime Lab's problems was extrajudicial, the policy concerns which triggered the response in that situation are similar to those that face this Court in the Salvador cases. In addition to ensuring that that no wrongful convictions were obtained on the basis of unreliable forensic evidence, a primary concern on the part of law enforcement was to do everything it could to maintain the integrity of the criminal justice system in the eyes of the public.

After the initial audit of the DNA/serology section of the crime lab in late 2002 revealed dire problems, the Houston Police Department, in conjunction with the Harris County District Attorney's office, did not wait for post-conviction writs to be filed before requesting DNA retesting of evidence. No one in law enforcement asked questions about whether the problems with the crime lab sufficiently "shocked the conscience" or properly earned a "presumption of invalidity." No one at the district attorney's office took the position that despite the taint had been cast upon the crime lab, the burden remained on those convicted to try to prove that there was misconduct in their case, or that any errors were material. Rather, because the integrity of the criminal justice system hung in the balance, an immediate retesting project was

begun of all cases that had undergone DNA testing at the lab. Put another way, the police department and the district attorney's office erred on the side of caution, proceeding in every case on the presumption that until it had been affirmatively established through DNA retesting that the results in a given case were reliable, the doubt engendered by the lab's highly publicized problems would linger.

The scope of the review of the lab expanded significantly. The Bromwich Commission's two-year investigation ultimately reviewed 25 years of the lab's work, included more than 100 interviews, and involved the review of more than 3,500 forensic science cases analyzed by the lab. [16] Following Bromwich's final report, which called for a "special master" to review whether serious problems uncovered with the serology section of the lab had compromised convictions in nearly 200 sexual assault and homicide cases from the 1980s, the district courts appointed a team of attorneys to review the records from such old convictions to determine whether, in each case, DNA testing was necessary to ensure the validity of the conviction.

The exhaustive response by the criminal justice community in Houston to the problems with the police crime lab drew praise from Bromwich in his final report:

> The City and HPD should be commended for authorizing an independent and public assessment of the extremely serious historical problems that have generated so much adverse publicity for the Crime Lab and for HPD and have created profound doubts about the integrity of important aspects of the criminal justice system in Harris County. It should serve as a model as to how to responsibly address failures of

[16] http://www.hpdlabinvestigation.org., Final Report, June 13, 2007, Introduction, at page 3.

critical institutions in the criminal justice system. [17]

In contrast to their response in 2002, the approach by the Harris County District Attorney's office in the Salvador situation seems to have been a reactive one, *i.e.*, to become involved in any Salvador-related problems only when a post-conviction writ has been filed. The response of the Harris County District Attorney's Office also stands in stark contrast to that of the Galveston County District Attorney's Office, which has apparently concluded that the Salvador problem so tainted prosecutions in that county that all convictions relying upon his work should be vacated through agreed findings on post-conviction writs.

This Court should continue the course of presuming a due process violation in all of Jonathan Salvador's cases because the State has not reacted to the problem caused by their agent in a manner that instills confidence in the reliability and integrity of the evidence they have used to secure convictions. While the legislative branches of state and county governments may be responsible for inadequate funding that results in some of these problems, and the executive branch responsible for inadequate regulation and oversight of crime laboratories and their personnel, the fact remains that the judiciary does have the power and duty to insure that the evidence that is presented in the courts is reliable and trustworthy. By following its own precedent in *Hobbs* and *Turner*, by presuming a due process violation in any case in which it can be shown that Jonathan Salvador had sole custody of drug exhibits, this

[17] http://www.hpdlabinvestigation.org., Final Report, June 13, 2007, Introduction, at page 1.

Court can send a strong message to the public that it will take proactive steps to ensure that forensic misconduct will not be tolerated by the courts.

d. **Presuming a due process violation in the case of forensic science misconduct is an appropriate prophylactic rule that will help deter future lab misconduct.**

There can be no doubt that by presuming a due process violation in all cases where Jonathan Salvador had sole custody, this Court sends a clear and important message to the forensic science community that it has "zero-tolerance" for lab misconduct and that convictions will be overturned in the face of systemic or recurring misconduct. Such an approach would be analogous to, but different in critical respects than, the exclusionary rule. The United States Supreme Court has pointed out that "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Considering the ongoing problems that have occurred in crime labs in Texas, it would seem appropriate to adopt a similar approach in the case of systemic negligence or intentional misconduct by a forensic scientist. Like the exclusionary rule, a rule which imposes a presumption of a due process violation in one case where a

forensic scientist has been shown to have committed misconduct in other cases certainly would have the desired deterrent effect. One must assume that if relief is granted in every Jonathan Salvador case, the forensic science community will likely become aware of it.

The undersigned understands that the exclusionary rule results in evidence being excluded only where it can be shown that the evidence in that particular case was obtained through illegal police conduct. The rule that this Court has adopted in *Hobbs* and *Turner* is broader in its reach, presuming a due process violation in a case without any showing of misconduct in that particular case. However, whereas application of the exclusionary rule acts to exclude evidence from a trial, frequently resulting in guilty persons going free, the rule this Court adopted in *Hobbs* and *Turner* does no such thing. It only requires that the State be required, in the face of widespread forensic misconduct, to prove the reliability of its scientific evidence at a new trial. Evidence is not excluded. It must simply be proven to be reliable, to be free from the taint that the scientist's misconduct in other cases has caused it to have. This Court should not abandon its approach in *Hobbs* and *Turner*, which deters improper forensic misconduct while providing the State an opportunity to prove at a new trial that the evidence is reliable.

4. Whether presuming a due process violation would promote judicial economy under the circumstances.

a. If this Court reverses course from its holdings in *Hobbs* and *Turner*, any pending habeas applications would have to be remanded to provide an opportunity for adding other grounds for relief.

As pointed out *supra*, at pages 10-11, in *Hobbs* and *Turner*, this Court clearly indicated to any prosecutors, defense counsel and judges involved in Salvador-related habeas claims that there was a due process violation solely upon proof that Salvador had sole custody of the drug exhibit in the case. If this Court reverses course, then obviously any pending claims will need to be remanded to trial courts so that habeas applicants who relied upon such opinions may have a fair opportunity to add other grounds that were not deemed necessary in light of this Court's prior rulings.

For example, in *Commonwealth v. Rodriguez*, 2013 WL 2420416 (Mass. Super.), delivered May 29, 2013, the defendant pled guilty to one count of trafficking in cocaine over 28 grams. In April of 2007, police officers were waiting at Rodriguez's front door as he ran outside and dropped "a softball-sized piece of cocaine" onto the foot of one of the officers. In 2013, in the wake of the scandal involving chemist Annie Dookhan in Massachusetts, Rodriguez filed a motion to vacate his guilty plea. In resolving the motion, the Superior Court asked a question very similar to the one now posed by this Court: "what is the effect of Ms. Dookhan's misconduct on the validity of Mr. Rodriguez' plea where Ms. Dookhan was the primary chemist but there is no evidence that Ms. Dookhan mishandled the evidence recovered from Mr.

Rodriguez?" The court allowed Rodriguez to withdraw his guilty plea, pointing out that: "the evidence of Ms. Dookhan's misconduct calls into question not only Ms. Dookhan's credibility as a witness, but also the reliability of the drug certificate itself, thereby potentially jeopardizing the Commonwealth's ability to meet its burden at trial of proving "beyond a reasonable doubt that the substance at issue 'is a particular drug'…It is reasonably probable, then, that Mr. Rodriguez would not have entered a guilty plea if he had known of Ms. Dookhan's misconduct." *Id.*, at page 4. If this Court reverses its holding in *Hobbs* and *Turner*, applicants should fairly be allowed to amend any pending writ applications to include similar involuntary plea claims if applicable. Trial courts will need to conduct additional evidence gathering as to such new claims.

Additionally, a ground might fairly be raised that Salvador's misconduct is newly-discovered impeachment evidence that could "make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). As one court phrased the question to be asked concerning whether newly-discovered impeachment evidence could form the basis of a new trial: "is there a strong exculpatory connection between the newly discovered evidence and the evidence presented at trial or does the newly discovered evidence, though not in itself exculpatory, throw severe doubt on the truthfulness of the critical inculpatory evidence that had been introduced at the trial?" *United States v. Quiles,* 618 F.3d 383, 393 (3d Cir.2010). Thus, another arguable ground that could be raised is whether there is such a strong exculpatory connection

between the impeachment evidence that has now been discovered about Jonathan Salvador's lab misconduct and the evidence that was used to secure the conviction that it "throws severe doubt on the truthfulness of the critical inculpatory evidence," namely, his scientific conclusions. As another court dealing with a forensic scientist's misconduct noted: "the evidence of (the scientist's) malfeasance is more than 'merely' impeaching; it is critical, with respect to (his) own credibility, the validity of his testing, and the chain of custody." *State v. Roche,* 114 Wash.App. 424, 438, 59 P.3d 682, 691 (2002).

b. This Court's opinions in *Hobbs* and *Turner* recognize that it is appropriate and in the interest of judicial economy that the State should be required to prove at a new trial the reliability of drug evidence that has been called into question because of misconduct of a State's agent.

The State insists that "the defendant should not be absolved of their well established burden to actually plead and prove that he was materially prejudiced by (scientific) misconduct." State's Brief, at page 26. However, this Court's decisions in *Hobbs* and *Turner* implicitly recognize the fact that because it was the State's agent whose misconduct cast a taint on scientific evidence used in nearly 5,000 prosecutions, it should therefore be the State's burden to prove the reliability of its drug evidence at a new trial.

To hold otherwise would not be in the interest of judicial economy. Those habeas applicants fortunate enough to even learn of Salvador's misconduct would face practical obstacles in establishing their entitlement to relief. Absent the creation

of a special defense bar to handle such claims, or orders by this Court to appoint counsel in specific cases, defendants still in prison would likely be left to proceed *pro se* in those counties which follow a policy of not appointing counsel in habeas cases unless required to do so. Defense experts would need to be privately hired or appointed by trial courts to conduct retesting of drug exhibits that still exist, which would presumably be in the custody of the State, as well as reviewing the procedures followed by Salvador. Trial courts would swell with Salvador-related claims, as habeas applicants attempt to prove that the taint of his negligence or intentional misconduct affected their case. The cases would drag on interminably, as Jonathan Salvador himself would presumably be a necessary witness in each case.

In terms of judicial economy, the better course is to follow the path already taken by this Court in *Hobbs* and *Turner*. By imposing a presumption of a due process violation, the Court properly puts the burden on the State to prove the reliability of the drug exhibit that formed the basis of their conviction, and which has now been put in doubt through the misconduct of their agent.

CONCLUSION AND PRAYER

The proactive response by this Court in *Hobbs* and *Turner* to this latest forensic lab scandal sends a strong message that: "[T]he most important consideration for us now is the preservation of the integrity of the criminal justice system. We must handle these… cases now before us in such a fashion that the public, the defense bar, the prosecuting attorneys, and the courts…will clearly understand that we will not

tolerate criminal convictions based on tainted evidence, but will insist upon proper standards of conduct and procedure." *State v. Roche,* 59 P.3d 682, 691 (2002).

For the reasons stated above, the Applicant prays that this Court follow its previous opinions in *Ex Parte Turner*, 394 S.W.3d 513 (Tex. Crim. App. 2013) and *Ex Parte Hobbs,* 393 S.W. 3d 780 (Tex. Crim. App. 2013), presume a due process violation in this case, and grant relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of August, 2013, a copy of this brief has been hand-delivered to Joshua Reiss, assistant district attorney for Harris County Texas.

_____
Bob Wicoff

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i). Exclusive of the portions exempted by Tex. R. App. Proc. 9.4 (i)(1), this brief contains approximately **8,863** words.

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Bob Wicoff