CR17-00306

THE STATE OF TEXAS,	)	
	)	**IN THE 235th JUDICIAL**
Plaintiff,	)	
	)	
v.	)	**DISTRICT COURT**
	)	
YYYY XXXX,	)	
	)	**COOKE COUNTY, TEXAS**
Defendant.	)	
	)	

MOTION FOR NEW TRIAL AND REQUEST FOR EVIDENTIARY HEARING

Defendant, YYYY XXXX, pursuant to Tex. R. App. P. 21 hereby moves this Court to order a new trial in the above-referenced case. In support of this motion, the Defendant sets forth the following facts and argument.

I. FACTUAL BACKGROUND[1]

This trial focused on whether Mr. XXXX was the source of the plastic bag of methamphetamine seized from the home of Chase Wood on May 18, 2017.

The State's chief witness, despite the fact that she was not identified on the State's witness list, was Mahalia Markezinis. Markezinis testified, *inter alia.*: (1) Mr. XXXX was the person she originally saw with the bag of methamphetamine and (2) Mr. XXXX and his friend, Amanda Blackman, were smoking methamphetamine in her presence.

In addition, K-9 Officer Marc Parsons testified that his canine alerted to the passenger car of Ms. Blackman's vehicle that had been parked at the Big Lots' parking lot although no drugs were located in her vehicle. The State's argument was that Mr. XXXX was a passenger in Ms. Blackman's vehicle and in possession of the methamphetamine at issue when he was in the vehicle.

[1]Undersigned counsel is in possession of a transcript of the testimony of Mahalia Markezinis. All additional factual background was obtained from Mr. XXXX and/or his trial counsel.

Various text messages were introduced regarding Mr. XXXX's and Ms. Blackman's decision not to drive her car to Whiskey River the morning of the police raid.

Finally, Chase Wood and Mark Ilczyszyn testified that, on other occasions, Mr. XXXX allegedly provided drugs to Mr. Ilczyszyn. Nevertheless, upon information and belief, neither testified that Mr. XXXX was the source of the bag of methamphetamine located on May 18, 2017.

II. ARGUMENT

A. The Failure of One of the Jurors to Acknowledge She Knew a State's Witness Since Elementary School Requires a New Trial be Awarded as Mr. XXXX was Denied His Right to Due Process Under the United States Constitution and His Right to Due Course of Law Under the Texas Constitution

As part of the defense's post-trial investigation, a defense investigator spoke to various jurors. *See* Declaration of Alyssa Piland (attached hereto as Attachment A) at ¶ 1. When the investigator first spoke to juror Danielle King, Ms. King did not mention that she knew any of the witnesses in this case. *Id*. at ¶ 3. It was later learned from juror Charlotte Vincent that, at the conclusion of the deliberations in this case, Juror King told some jurors that, in fact, she knew Marc Parsons. *Id*. at ¶ 2. Mr. Parsons, was the K-9 handler and one of only a few witnesses who testified in the case.

Upon learning this information from Juror Vincent, the defense investigator followed up with Juror King. *Id*. at ¶ 3. The defense investigator asked Juror King directly if she knew any witnesses who testified at the trial. *Id*. At first Juror King told the investigator "no." *Id*. Later in the conversation, Juror King "reluctantly" admitted that she knew Deputy Parsons. *Id*. Juror King told the investigator that she knew Deputy Parsons for a long time and that they had went to elementary and middle school together. *Id*. Juror King also told the investigator that she knew Deputy Parsons

outside of the fact that they had attended school together. *Id*.

Trial counsel for Mr. XXXX, Mike Pool, has informed undersigned counsel that he read the State's witness list to the venire panel prior to selecting the jury in this case and, despite the fact that Deputy Parson's name was on that list, no juror indicated that they knew Deputy Parsons. Moreover, it does not appear that Juror King informed the parties or the Court at any time regarding her relationship with Deputy Parsons.

Von January v. State, 576 S.W.2d 43 (Tex. Crim. App. 1978), dictates that a new trial be awarded in this case. There, during jury selection, a person who served on the jury (Dunn) did not answer when asked whether potential jurors knew specific members of the complainant's family and three such names were recited to the potential jurors. *Id*. at 44. In connection with a new trial motion, it was learned that Juror Dunn did, in fact, know one of the named family members. *Id*. At a hearing on the new trial motion, Juror Dunn testified:

> that although he knew and recognized the Parkers he did not answer defense counsel's question because he did not have any close personal dealings with the family. He believed that it was only this personal type of relationship that counsel was interested in when he propounded the question.

Id. at 45.

The Court of Criminal Appeals held that a new trial was required:

> It was not Dunn's function to second-guess defense counsel. It was for defense counsel, and not the prospective juror, to decide whether Dunn's relationship to the Parkers made him unacceptable and subject to a peremptory challenge. Dunn's failure to truthfully answer the question propounded to him prevented defense counsel from making this determination. When a partial, biased, or prejudiced juror is selected without fault or lack of diligence on the part of defense counsel, who has acted in good faith upon the answers given to him on voir dire not knowing them to be inaccurate, good ground exists for a new trial.

Id.

As noted above, *Von January* is controlling. The Court of Criminal Appeals recognizes that "where a juror withholds material information during the voir dire process, the parties are denied the opportunity to exercise their challenges, thus hampering their selection of a disinterested and impartial jury." *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App.1978). Moreover, the fact that the juror did not intend to intentionally withhold information "is largely irrelevant when considering the materiality of information withheld." *Franklin v. State*, 12 S.W.3d 473, 478 (Tex. Crim. App. 2000).

Here, despite being asked, Juror King did not reveal she knew one of the few State's witnesses and, in fact, has known him since elementary school. She never revealed it to the parties or the Court. She also denied it initially to the defense investigator who contacted her post-trial. Ultimately, however, whether Juror King intentionally withheld this information is "largely irrelevant," nor is it dispositive that her knowledge might not have affected her verdict. *Salazar*, 480 S.W.2d at 482.

Simply put, "[i]t was for defense counsel, and not the prospective juror, to decide whether [her] relationship to [Deputy Parsons] made her unacceptable and subject to a peremptory challenge. *Von January v. State*, 576 S.W.2d at 45. Here "[Juror King's] failure to truthfully answer the question propounded to [her] prevented defense counsel from making this determination. *Id*. Just as in *Von January*, a new trial is required.

B. Trial Counsel Operated Under a Conflict of Interest Rendering His Representation of Mr. XXXX Ineffective

Both Mr. XXXX and Ms. Blackman were represented by the same trial counsel, Mike Pool, at the time of Mr. XXXX's trial. Mr. Pool did not discuss the conflict this created with either Mr.

XXXX or Ms. Blackman. *See* Affidavit of YYYY XXXX ("XXXX Aff.") (attached hereto as Attachment B) at ¶ 1; Affidavit of Amanda Joe Blackman ("Blackman Aff.") (attached hereto as Attachment C) at ¶ 9.[2]

Ultimately, Mr. Pool's client, Amanda Blackman, could have offered exculpatory testimony on behalf of Mr. XXXX, Mr. Pool's other client. Indeed, her testimony could have refuted and/or offered innocent explanations for almost all of the State's evidence. As noted in her affidavit, had she been called as a witness, she could have testified:

> 2. ....Mr. XXXX and I took to Whiskey River on the morning of our arrest was a spur of the moment trip made as we were returning from Win Star Casino. I would have also testified that Mr. XXXX won a jackpot at Win Star which was the source of almost all of the money he possessed at the time of his arrest.
>
> 3. I would have testified that Mr. XXXX had been promising his friend, Mark Ilczyszyn, that he would stop by and see where he worked and, since we were so close to the area while we were returning from Win Star, we had decided to stop.
>
> 4. Significantly, I would have testified that Mr. XXXX was driving my car on our trip back from Win Star, that I was the one sitting in the passenger seat, and that there we no drugs in the car.
>
> 5. I would have testified that we had difficulty locating Whiskey River, despite using a GPS, and that we saw police in the general area where we believed Whiskey River was located. Given that we were not sure of the location and I was concerned that my car had an expired registration, we decided to ask Mr. Ilczyszyn to meet us a Big

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[2] In instances of permissible multiple representation:

(i) the clients should be fully advised that the lawyer may be unable to continue if a conflict develops, and that confidentiality may not exist between the clients;

(ii) informed written consent should be obtained from each of the clients, and

(iii) if the matter is before a tribunal, such consent should be made on the record with appropriate inquiries by counsel and the court.

ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Section 4.17(e) (2015).

> Lots and the three of us traveled to Whiskey River together in Mr. Ilczyszyn's vehicle..
>
> 6. Contrary to the testimony of Ms. Markezinis, I would have testified that Mr. XXXX was never in possession of any plastic bag, let alone a plastic bag containing drugs, neither during our trip nor at the home of Chase Wood.
>
> 7. Also contrary to the testimony of Ms. Markezinis, I would have testified that neither Mr. XXXX nor I smoked any drugs while at Mr. Wood's home.

Blackman Aff. at ¶¶ 2-7. Indeed Ms. Blackman's testimony addresses all of Ms. Markezinis' material allegations and the implications and argument from Deputy Parson's testimony. Ms. Blackman's testimony would have also explained the true purpose of their visit to Whiskey River and put the text messages in perspective. Finally, Ms. Blackman would have been able to categorically state that she never saw Mr. XXXX with the bag of methamphetamine in question. Nevertheless, it was only after the close of evidence that Attorney Pool informed Ms. Blackman that he did not call her as a witness at Mr. XXXX's trial "because he did not want me testifying as a defense witness for Mr. XXXX because it could impact my case or any plea bargain I might be offered." *Id*. at 9.

Again there is a Court of Criminal Appeals case directly on point. In *Ex Parte Parham*, 611 S.W.2d 103 (Tex. Crim. App. 1981), an attorney (Morgan) represented two brothers in connection with the same alleged criminal episode. Similar to Mr. Pool's unilateral decision in this case, the attorney advised one brother not to testify at the other brother's trial. The Court of Criminal Appeals reversed the conviction of the brother who went to trial:

> Also, because Morgan was advising his client Donny Parham not to testify, at the same time that his duty to his client John David Parham was to attempt to secure the testimony of Donny, we conclude that his divided loyalties adversely affected his representation of the applicant. *See Ex parte Alaniz*, Tex. Cr. App., 583 S.W.2d 380. This conflict of interest was a denial of effective assistance of counsel.

Id. at 105.

Here, Attorney Pool operated under an actual conflict of interest. Indeed, Ms. Blackman wanted to testify and had very relevant and exculpatory information. Nevertheless, Mr. Pool made the unilateral decision not to call her as a witness, not even giving her that choice, because he thought her testimony could adversely affect her at her trial (*e.g.* that she was in the passenger seat and was worried about police) and/or could adversely affect any plea offer made by the State to Ms. Blackman. Ever since the United States Supreme Court decided *United States v. Glasser*, 315 U.S. 60, 75-76 (1942), courts are concerned when an attorney engages in a "struggle to serve two masters" and will not engage in "nice calculations as to the amount of prejudice" attributable to the conflict. Furthermore, once a conflict of interest is shown actually to have affected adequacy of representation, an accused "need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan,* 446 U.S. 335, 349-50 (1980).

As in *Parham*, a new trial is required in light of Attorney Pool being caught on the "horns of dilemma" and attempting to "serve two masters." In fact, the need for a new trial is even clearer. In *Parham* at least the attorney gave his client the option to testify at his other client's trial, albeit against his advice. Here, Ms. Blackman was not even given that option.

III. CONCLUSION

This Court should hold an evidentiary hearing and, based on the grounds set forth above, either separately or combined, this Court should award YYYY XXXX a new trial.

Respectfully submitted,

/s/ F. Clinton Broden

F. Clinton Broden
TX Bar 24001495
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)
clint@texascrimlaw.com

Attorney for Defendant
YYYY XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on March 15, 2019, I caused the foregoing document to be served by first class mail on:

Eric Erlandson
Cooke County District Attorney's Office
101 S Dixon Street, Suite 309
Gainesville, TX 76240

/s/ F. Clinton Broden
F. Clinton Broden