

NO. 12-06-07085-CR-(1)

EX PARTE

NICOLE NADRA BAUKUS

§ **IN THE DISTRICT COURT FOR**
§
§ **THE 435TH JUDICIAL DISTRICT,**
§
§ **MONTGOMERY COUNTY, TEXAS**

**STATE'S ANSWER TO APPLICATION FOR
POST-CONVICTION WRIT OF HABEAS CORPUS**

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

COMES NOW THE STATE OF TEXAS, by the undersigned assistant district attorney, and moves the Court to find that there is no necessity for a hearing on any of the applicant's allegations and to recommend to the Court of Criminal Appeals that habeas corpus relief be denied. The State would respectfully show the Court the following:

NATURE OF THE CASE

The applicant, Nicole Nadra Baukus, was charged by indictment with two counts of intoxication manslaughter (Counts I and II), and one count of intoxication assault (Count III) (C.R. 29). The applicant pleaded not guilty to all three counts at the start of her trial (4 R.R. 9), but changed her pleas to guilty during the guilt-innocence phase (7 R.R. 71). The trial court accepted the applicant's pleas, and the jury found her guilty in accordance with the trial court's instructions (8 R.R. 229–30). After hearing additional evidence, the jury

assessed the applicant's punishment at imprisonment for fifteen years in Count I, fifteen years in Count II, and eight years in Count III (8 R.R. 229–32). The trial court ordered those sentences to run consecutively (8 R.R. 232).

The applicant appealed her conviction and sentence, arguing in part that her pleas were involuntary due to trial counsel's failure to raise a plausible defense. *See Baukus v. State*, No. 09-13-00397-CR, 2016 WL 908281, at *6–9 (Tex. App.—Beaumont Mar. 9, 2016, pet. ref'd) (mem. op., not designated for publication). The court of appeals rejected that argument and affirmed the applicant's conviction, which became final on September 21, 2016. *See id.*

On September 11, 2017, the applicant filed her first application for a writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure, alleging the following grounds for relief:

1. “INVOLUNTARY GUILTY PLEAS DUE TO OUTRAGEOUS GOVERNMENTAL MISCONDUCT”; and
2. “INVOLUNTARY GUILTY PLEAS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.”

On October 11, 2017, this Court designated issues of fact to be resolved and ordered the State to respond with supportive evidence within thirty days of the Court's order. The Court subsequently granted a fifteen-day extension of that deadline, to November 28, 2017.

On October 23, 2017, this Court issued an order directing DNA testing for several samples taken from the applicant's truck. And on November 9, 2017, this Court issued an order directing the download of the Restraint Control Module (RCM) from the applicant's truck.

BACKGROUND

The undisputed evidence shows that the applicant consumed at least twenty-one alcoholic drinks at a bar called "On The Rox" before she left at approximately 2:00 a.m., got in her truck, and exited the parking lot as the sole occupant of the truck (5 R.R. 239, 274–75). At approximately 3:00 a.m., the applicant's truck drove northbound in the southbound lanes of Interstate 45 and struck a vehicle head-on, killing two of the vehicle's occupants and seriously injuring another (5 R.R. 16, 48–51, 87; 6 R.R. 115).

Several bystanders, firefighters, emergency medical personnel, law enforcement officers, and passersby crowded the crash scene (4 R.R. 40; 5 R.R. 51–52; AX 200A, 200B, 200C¹). Deputy Jake Reuvers of the Montgomery County Sheriff's Office² was the first law enforcement officer to arrive, and

¹ This response identifies the exhibits submitted with the application for writ of habeas corpus as "AX __", and the exhibits submitted with the State's response as "SX __".

² Reuvers has since voluntarily left the sheriff's office and is now a patrol sergeant for SPD (SX 1 at 1, 3).

Officer Cody Harmon of the Shenandoah Police Department (SPD)³ was the second (5 R.R. 67–68; State’s trial exhibit 71). Officer Todd Schmaltz of SPD⁴ was the third officer to arrive (5 R.R. 67–68; AX 200A, 200B, 200C). Trooper Orlando Ortega of the Texas Department of Public Safety (DPS) later arrived and was assigned as the lead officer investigating the crash, while Trooper Andre Brack, Patrol Sergeant Angela Fountain, and other DPS troopers assisted with the investigation (5 R.R. 79–80; 7 R.R. 140).

THE REQUESTED RELIEF SHOULD BE DENIED

I. The applicant bears a “heavy burden” of proving her pleas were involuntary.

“In a post-conviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief.” *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). An applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. *See Ex parte Adams*, 768 S.W.2d 281, 287–88 (Tex. Crim. App. 1989). Texas courts define “preponderance of the evidence” as “the greater weight of credible evidence that would create a reasonable belief in the truth of the claim.” *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, at *24 (Tex. Crim. App.

³ Harmon has since voluntarily resigned from SPD and no longer works in law enforcement (SX 2 at 1, 3).

⁴ Schmaltz has since left SPD and now works as a law enforcement officer in California.

Sept. 20, 2017) (not yet published) (quoting *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006)). This standard of proof requires a showing that is “more likely than not” to be true and entitles the applicant to relief. *See Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008).

The applicant seeks relief on the basis that her pleas were involuntary. A guilty plea must be knowing, intelligent, and voluntary. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *see also* Tex. Code Crim. Proc. Ann. Art. 26.13(b) (West 2009). In assessing the voluntariness of a plea, a reviewing court examines the record as a whole and determines whether the plea was entered voluntarily based on the totality of the circumstances. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). “[A] plea is not involuntary simply because a defendant does not correctly assess every relevant factor entering into his or her decision.” *Ex parte Barnaby*, 475 S.W.3d 316, 323 (Tex. Crim. App. 2015).

When the record shows that the trial court gave an admonishment, a prima facie showing of a knowing and voluntary plea exists. *Id.* After a defendant has pleaded and attested to the voluntary nature of her plea, she bears a “heavy burden” to demonstrate a lack of voluntariness. *Martinez v. State*, 513 S.W.3d 87, 96 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Here, when the applicant notified this Court that she wished to change her pleas, the trial judge admonished her at length (7 R.R. 65–68). The applicant repeatedly acknowledged her understanding of the surrounding circumstances and still insisted upon changing her pleas (7 R.R. 65–68). And after the applicant entered her pleas, she specifically attested to their voluntariness:

[The trial court]: Are you doing this voluntarily?

[The applicant]: Yes, sir.

[The trial court]: Of your own free will?

[The applicant]: Yes, Your Honor.

[The trial court]: You understand the nature and consequences of what you're doing here?

[The applicant]: Yes, Your Honor.

(7 R.R. 71–72). So the applicant bears a heavy burden to show her pleas were involuntary. *See Martinez*, 981 S.W.2d at 197; *Martinez*, 513 S.W.3d at 96.

She has failed to satisfy this burden.

II. The applicant's pleas were not involuntary due to government misconduct.

The applicant claims in her first ground for relief that government misconduct rendered her guilty pleas involuntary (Memorandum at 10). Specifically, the applicant theorizes that police officers planted the applicant's shoes and sock in her truck to help prove she was driving at the time of the crash;

the State failed to disclose that police planted such evidence; and the State presented false testimony regarding the planted evidence (Memorandum at 10).

A. No credible evidence shows that police officers planted the applicant's shoes and sock in her truck.

Although circumstantial evidence may be used to establish any material fact, the circumstances relied upon must have probative force sufficient to constitute the basis of a reasonable inference. *Suarez v. City of Texas City*, 465 S.W.3d 623, 634 (Tex. 2015). An inference premised on mere suspicion is not reasonable: “some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence.” *Id.* Nor is an inference reasonable if it is susceptible to multiple, equally probable inferences, requiring the fact finder to guess to reach a conclusion. *Id.*; *see also Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007) (“Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented.”).

No one has stated on the record in this case that he or she saw a police officer touch either of the applicant's shoes or her sock prior to their collection as evidence. The applicant's assertions that officers planted evidence are merely speculative and do not satisfy her burden of proof.

1. The evidence establishes that the applicant's left shoe and sock came off during or immediately after the crash.

By all accounts, the applicant's left shoe remained lodged under the steering wheel for the entirety of the civilian and law enforcement response efforts in the immediate aftermath of the crash. Schmaltz and Reuvers each testified unequivocally that the applicant was not wearing her left shoe and sock upon their initial encounter with her, and Reuvers specifically saw the applicant's left shoe and sock on the driver's floorboard of her truck (4 R.R. 53; 5 R.R. 57–58). Reuvers's affidavit confirms that the applicant was wearing only one shoe when he first approached her, and Reuvers saw a matching shoe on the driver's floorboard of her truck (SX 1 at 2). Although Reuvers could not specifically recall whether the applicant was wearing a left sock or whether Reuvers saw a bloody sock in the applicant's truck when he first saw the left shoe, Reuvers stated that his recollection at trial was better, and he would defer to his trial testimony regarding those details⁵ (SX 1 at 2).

Harmon's affidavit also avers that he initially noticed the applicant missing a left shoe and sock but wearing a right shoe and sock (SX 2 at 2). Harmon later

⁵ Reuvers told defense investigators that when Reuvers first approached the applicant, "[o]ne of her shoes was off" and "still on the driver side floor board of the truck" (AX 305 at 5). Reuvers also said that the applicant had both socks on and one sock had blood on it (AX 305 at 5–6, 8). Since trial, however, Reuvers has wavered on his memory's reliability several times, and the investigators represented to Reuvers in this unsolicited conversation that they worked for an insurance company and were concerned with who was at fault for civil-case purposes (AX 305 at 1, 9). Reuvers had no reason to know that his words would be used as evidence in a proceeding challenging the applicant's conviction.

noticed a white shoe and bloody sock on the driver's floorboard of the applicant's truck (SX 2 at 2).

No eyewitness has said that he or she ever saw the applicant wearing both shoes and socks after the crash, despite bystanders Fisher Hampshire, Arnes Buchanan, and Steven Ramirez arriving mere moments after the impact. The applicant's claim that officers planted her left shoe rests exclusively on a distant and grainy still-shot taken from Reuvers's COBAN video (AX 102). This image is not compelling evidence that the applicant exited her truck wearing both shoes and socks. Other still-shots from the same video appear to depict a discrepancy between the applicant's right and left foot (SX 3). The apparent white reflection on the applicant's feet could be two socks, two shoes, one shoe and one sock, or even a reflection of light on the applicant's bare white foot.

It is possible that the applicant exited her vehicle wearing both socks and, at some point, took off her own bloody left sock to tend to her injured left foot, and then deposited her sock in her truck.⁶ Indeed, the applicant appears to raise

⁶ The applicant recognizes that she could have taken off her own sock, but argues that she likewise took off her left shoe to alleviate pain (Memorandum at 16). She suggests that the gathering of blood on the ground next to her truck, rather than inside her truck, supports the inference that her left shoe had applied pressure on her left foot injury, thus restricting blood loss (Memorandum at 16).

(cont'd next page)

her arm in a possible throwing motion near the 2:10 mark in Reuvers's COBAN video (AX 200A). And the photos of the sock in the applicant's truck show the sock's position as such that the applicant could have easily tossed the sock back into her truck rather than leave it on the side of the road (AX 106). This scenario—as with other imaginable scenarios—is more likely to have occurred than police officers conspiring together to plant evidence in a case for which they would have little ultimate responsibility.

2. How or when the applicant's right shoe was deposited in the truck is unknown.

A witness's failure to remember a fact constitutes an absence of evidence, not positive evidence. *See Ex parte Bowman*, No. PD-0208-16, 2017 WL 2799976, at *10 (Tex. Crim. App. June 28, 2017) (not yet published). And an absence of evidence fails to satisfy an applicant's burden of proof in an application for writ of habeas corpus. *Id.*

Whether the applicant was wearing her right shoe as she initially exited the passenger side of the truck is unknown. At best, no one has a definitive memory of whether the applicant was ever wearing her right shoe at the scene.

But it is more likely that the applicant wiggled her injured foot out of her left shoe while it remained lodged underneath the truck's pedals, and that her sock absorbed most of the blood until she removed that barrier upon her exit from her truck. The presence of blood under the steering wheel and on the driver's airbag supports this theory. Regardless, this Court is left to guess as to what actually happened.

The applicant may argue that the existence of a phone call from Sergeant Fountain to EMS paramedic Abbey Radford constitutes definitive evidence that the applicant's right shoe was not deposited in her truck until after the crash.⁷ But Fountain arrived at the crash scene after EMS had already transported the applicant via ambulance (SX 4 at 1), and Trooper Brack took pictures depicting both shoes inside the applicant's truck before he left the crash scene and followed the ambulance to the hospital where he interviewed the applicant (5 R.R. 81, 89). So Fountain likely just failed to see the applicant's right shoe in the truck.⁸

Regardless of how the applicant's right shoe ended up in her truck, there is no evidence that any police officer planted the shoe to be used as evidence against the applicant. Given the presence of the applicant's left shoe in the truck,

⁷ Radford's last name at the time of trial was Staggs. Radford provided in an e-mail what she remembers about the phone call:

[The applicant] was being backboarded by [the fire department] when we arrived on scene. She had an injury to her foot so at least one shoe was removed on scene. But I don't remember if the other was and I don't remember if they were transported. Sgt [F]ountain called asking if we transported a shoe to the hospital and the trash and biohazard bins were check[ed] but nothing was found. Jolene was my partner and Patrick was the supervisor on scene.

(SX 5). Radford then clarified in a subsequent e-mail what she meant by "at least one shoe was removed on scene," explaining that she has "no memory of anyone removing the shoe or if [it] was already off when the fire department initiated contact with the patient." (SX 5).

⁸ Fountain's affidavit provides that she remembers placing a phone call to EMS, but she does not remember the contents of their conversation (SX 4 at 1).

there was no need for officers to plant the matching shoe. If anything, the presence of both shoes in the truck could support a theory that the applicant was not wearing either shoe at the time of the crash. A hypothetically-corrupt officer would have benefitted more from leaving the applicant's right shoe on her foot if the goal was to match the two shoes and frame her as the driver. And even if the applicant's right shoe was removed after she crawled out of the passenger side of the truck, it is more likely that either the applicant or a bystander inadvertently threw the shoe back into the applicant's truck. It is highly unlikely that Reuvers or Harmon removed the applicant's right shoe and planted it in her truck while numerous witnesses crowded the scene.

More importantly, the State did not argue or otherwise imply that the presence of the applicant's right shoe proved she was driving the truck. Prosecutor Andrew James did not mention the applicant's right shoe when he argued in opening statement that there was no question the applicant was driving; James relied on the applicant's left shoe and sock found on the driver's floorboard (4 R.R. 13). And, as the applicant concedes, "prosecutors did not elicit testimony or otherwise mention that the right shoe was on the driver's floorboard . . ." (Memorandum at 18). The right shoe was simply a nonfactor, and there is no evidence that any officer acted in bad faith by planting the shoe in the applicant's truck.

B. The officers lacked a realistic motive to frame the applicant.

The applicant has not suggested why Reuvers, Harmon, or any other law enforcement officer would want to plant evidence to show the applicant was driving. In any case, the evidence suggests no such motive exists.

Reuvers testified at trial and provided in his affidavit that when he located the crash scene, he knew DPS would respond to investigate the crash, and his role was that of a first responder (5 R.R. 55, 67; SX 1 at 1). Reuvers confirmed this role in an interview with the applicant's investigators: "we just basically held the scene until [DPS] arrived" (AX 305 at 6–7). Reuvers was looking for people who needed emergency assistance, not evidence of a crime; his affidavit explains that his purpose was "essentially complete" after the crash scene was secure and all parties were accounted for⁹ (5 R.R. 54, 57–58; SX 1 at 3). So Reuvers was not responsible for a criminal investigation and did not write a report in the investigation, and his agency did not ultimately arrest the applicant.

⁹ Daryl Brooks of the Needham Fire Department, who also responded to the crash and had an independent personal relationship with the applicant, confirmed the notion that non-DPS responding agencies would not take the lead in any crash investigation. In an interview with the applicant's investigator, Brooks stated that "it would have been the troopers' scene by that point 'cause they—they're the ones that go in the depth—in depth with the—the vehicle crashed and stuff like that. . . . [T]hey go in a lot deeper than the regular uh- like sheriff or Shenandoah and stuff like that." (AX 311 at 10).

Similarly, Harmon responded to the crash knowing that neither he nor his agency would lead the crash investigation:

As one of the initial responding officers, my primary role was to secure the scene. This included locating the individuals involved in the crash and determining whether they needed emergency medical care. My secondary role was to hold the scene and divert traffic until other law enforcement agencies arrived. Based on my knowledge and experience, the procedure for the local law enforcement agencies was to allow the Texas Department of Public Safety State Troopers to work all vehicle crashes that occurred on the highway and outside of the city limits. This was especially true in the case of a vehicle crash involving serious bodily injury or death. So I knew immediately that a DPS Trooper would take the lead in investigating the crash and any potential criminal investigation related to the crash. And I had no reason to believe I would write a report on this incident based on my secondary role as an assisting officer.

(SX 2 at 1). Harmon “was not concerned about anyone’s potential criminal culpability related to the crash. . . . [His] primary concern was to locate and assess the status of those involved in the crash” (SX 2 at 2).

Moreover, Reuvers and Harmon were merely professional acquaintances, and neither of them knew the applicant or any of her victims prior to the night of the crash (SX 1 at 3; SX 2 at 2–3). Thus, Reuvers and Harmon lacked the type of personal relationship with each other or any interested party that would realistically foster collusive misconduct. In fact, Harmon did not even follow the applicant’s case as it proceeded to trial (SX 2 at 3). Reuvers and Harmon also knew the potential consequences of planting evidence in a criminal

investigation (SX 1 at 3; SX 2 at 3). There was simply no reason for Reuvers and Harmon to risk their jobs, careers, and freedom by committing the felony offenses of tampering with evidence and—as to Reuvers—aggravated perjury.

The applicant alleges that Reuvers likely planted evidence and lied under oath because he disclosed to prospective law enforcement employers that he stole merchandise while he worked at Target between the ages of sixteen and eighteen (Memorandum at 15; AX 303). Yet Reuvers further disclosed to prospective employers that he was paid cash for helping his girlfriend’s father deliver packages for Federal Express, was at fault in two car accidents, slept on duty while working at the Harris County Jail, had been in a fist fight in Wisconsin in 2008, received a citation for underage drinking in 2005, and once took Robaxin without a prescription for back pain (AX 303). Notwithstanding the fact that such evidence is not admissible to prove Reuvers’s character,¹⁰ such exhaustive disclosure of trivial demerits evinces Reuvers’s character for truthfulness, not a lack thereof. A teenage theft from an employer—nearly a decade prior to the

¹⁰ Extrinsic evidence of specific instances of misconduct is not admissible to prove a person’s character in order to show action in conformity with that character. *See* Tex. R. Evid. 404(b)(1), 608(b); *see also Flores v. State*, No. 01-10-00531-CR, 2013 WL 709100, at *19 (Tex. App.—Houston [1st Dist.] Feb. 26, 2013, pet. ref’d) (mem. op., not designated for publication) (holding that trial court properly excluded evidence of officer’s suspension for “failing to comply with the rules regarding interfering with the investigation of cases and truthfulness” where no evidence demonstrated a bias against defendant or motive to testify falsely in his case).

applicant's crime—does not show that Reuvers is the type of person who would risk his career by committing a felony in an effort to incriminate a stranger.

Similarly, the applicant suggests that Harmon would plant evidence because he disclosed to a prospective employer that “when [he] was younger[, he] took baseballs [and] used bats from [a] batting cage where [he] worked,” and the SPD reprimanded Harmon for lack of professionalism (Memorandum at 15; AX 304). A closer review of Harmon's personnel records shows that he was reprimanded for forgetting to notify dispatch of his location while eating dinner and for allegedly mocking his supervisor over the radio (AX 304). Such negligible misbehavior does not amount to a felonious character trait.

The applicant has also taken out of context an e-mail exchange in which Harmon suggests that another officer's report inaccurately described Harmon's role in an investigation—the officer's report stated that Harmon conducted a vehicle inventory search when Harmon merely assisted and did not touch any inventoried items (AX 304). This innocuous clarification does not “suggest that corruption is commonplace at the SPD” (*see* Memorandum at 15 n.15).

C. The applicant's speculative allegations fail to meet the requisite burden of proof.

Ultimately, the allegation that officers planted the applicant's shoes, bloody sock, and DNA in her truck lacks evidentiary support and forces the fact-finder to guess to reach a conclusion. Officers lacked a sensible reason to plant

evidence against the applicant, and there are various explanations for the presence of the applicant's shoes and sock in her truck that are more probable—or at a minimum, equally probable—than officers planting evidence. The applicant's conjecture does not prove by a preponderance of the evidence her theory of government corruption. Thus, the applicant has failed to show her plea was involuntary due to government misconduct.

This Court should recommend denial of the applicant's first ground for relief.

III. The applicant's pleas were not involuntary due to the ineffective assistance of counsel.

The applicant's second ground for relief alleges that her guilty pleas were involuntary because her trial counsel failed to conduct an adequate investigation and failed to inform her of evidence indicating that she was not driving her truck at the time of the crash (Memorandum at 19). The applicant also complains that her trial counsel presented the implausible defense that the applicant was drugged instead of the plausible defense that she was not the driver (Memorandum at 26).

A. This Court must consider all the circumstances surrounding the plea and avoid hindsight-based criticism of counsel's tactical decisions.

A guilty plea may be involuntary due to ineffective assistance of counsel. *Ex parte Moussazadeh*, 361 S.W.3d 684, 689 (Tex. Crim. App. 2012); *see also Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To establish a claim of

involuntary plea based on ineffective assistance of counsel, an applicant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the applicant would not have pleaded guilty and would have insisted on going to trial—or, as in this case, continuing in the guilt-innocence phase of her trial to a jury verdict. *See Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985); *Moussazadeh*, 361 S.W.3d at 691; *Baukus*, 2016 WL 908281, at *5.

Because there “are countless ways to provide effective assistance in any given case[,]” the Court’s review is highly deferential, and the Court “indulge[s] a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (internal citations omitted). Judicial review of counsel’s performance should avoid the distorting effects of hindsight and should not question counsel’s tactical decisions unless such conduct was “so outrageous that no competent attorney would have engaged in it.” *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

B. Counsel made a reasonable strategic decision to advise his client to plead guilty while the proffered defense remained viable.

“A guilty plea is a matter of trial strategy.” *Enard v. State*, 764 S.W.2d 574, 575 (Tex. App.—Houston 1989, no pet.). “Defense counsel’s unsuccessful

strategy in advising a client to plead guilty will not render the plea unknowing or involuntary even though the defendant is sentenced to a greater sentence than expected.” *Id.* (citing *West v. State*, 702 S.W.2d 629, 633 (Tex. Crim. App. 1986)); *see also Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006) (sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel). Voluntariness of a guilty plea may be inferred when a guilty plea is shown to be a part of the defendant’s trial strategy. *See Gardner v. State*, 164 S.W.3d 393, 399 (Tex. Crim. App. 2005). An error in trial strategy will be considered inadequate representation only if counsel’s actions lack any plausible basis. *Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. 1978).

To illustrate, the applicant claimed on direct appeal that her plea was involuntary because trial counsel failed to inform her of the “plausible” defense that she was drugged with a “date rape drug” (GHB) instead of diazepam. *See Baukus*, 2016 WL 908281, at *5–6. The Ninth Court of Appeals rejected the applicant’s claim that her trial counsel was ignorant of the possibility of asserting the proffered defense of involuntary intoxication. *Id.* at *9. The court of appeals concluded that the evidence rather showed that counsel “was aware of this defensive possibility but decided it would not be an effective trial strategy . . . likely based on the lack of quality evidence to support the theory.” *Id.*

In finding that the applicant's plea was voluntary, the Ninth Court of Appeals concluded that the proffered defense that the applicant was drugged with GHB was not plausible. *Baukus*, 2016 WL 908281, at *9. The court of appeals first reasoned that the proffered evidence supporting that theory merely established that it was *possible* that the applicant ingested an unknown intoxicant, and her claim that someone put something in her drink was based solely on speculation, not evidence. *Id.* at *8. Because there was no evidence of an intoxicant other than the one the applicant voluntarily consumed (alcohol), the applicant's claim to have a plausible alternative defense lacked merit. *Id.* at *9. Thus, counsel's strategy of advising the applicant to plead guilty was reasonable, and counsel was not constitutionally deficient. *Id.*

1. The applicant's trial counsel sought leniency from the jury.

Trial counsel's initial strategy was to raise the defense of involuntary intoxication because the applicant could not explain how diazepam was in her system after the crash (AX 3 at 1).¹¹ Trial counsel discussed with the applicant "the possibility of trying to show that she was not driving the truck at the time of the collision[,]" but counsel "did not believe that [they] could successfully

¹¹ The applicant's trial counsel, Michael A. McDougal, has executed three affidavits over the course of the applicant's post-conviction litigation. This brief denotes the affidavit in response to the motion for new trial as "SX 6" the affidavit attached to the application in this proceeding as "AX 3"; and the affidavit executed in light of the State's post-conviction investigation as "SX 7."

present [that] defense because both of [the applicant's] tennis shoes and her bloody sock were found on the driver's floorboard and her DNA was found on the driver's airbag" (AX 3 at 1; *see* SX 7 at 1). "However, as the trial progressed it became clear that there was no credible evidence that she was drugged, so [counsel] had her change her 'not guilty' plea to a 'guilty' plea. [Counsel] felt this was the best way to create some sympathy for her from the jury" (AX 3 at 1; *see* SX 7 at 1).

Trial counsel further explained this strategy in his affidavit in response to the applicant's motion for new trial:

I questioned [toxicologist Dr. Gary Wimbish] at length as [to] the possibility of the diazepam causing Ms. Baukus to become so disoriented that her ingestion of alcohol was involuntary. Dr. Wimbish continuously assured me that the diazepam could very well cause Ms. Baukus to become involuntarily intoxicated. . . . Never once, prior to his coming to court did he inform me that the diazepam was ingested 20 to 24 hours prior to the time her blood sample was taken. However, the day Dr. Wimbish came to court to testify and listen to the State's toxicologist, he informed me, for the very first time, that the diazepam was ingested at least 20 to 24 hours before her blood sample was taken.

* * *

When Dr. Wimbish told me that the diazepam got into Ms. Baukus'[s] system at least 20 to 24 hours prior to her blood sample being taken, I decided to wait and see if the State's toxicologist testified to the same conclusion. When he did is when I wrote the note that "we are dead." Subsequently, I met with Ms. Baukus and her family to decide what we were going to do. Neither Ms. Baukus nor her family could come up with any explanation as to how the diazepam could have gotten into her system in the time frame we

were faced with. I then told Ms. Baukus and her family that I thought changing her plea to “guilty” would have a more beneficial effect on the jury than continuing with a defense that was certainly not plausible and would cause the jury to view Ms. Baukus in a harsher light.

(SX 6 at 3). Counsel and the applicant “thoroughly discussed this change of strategy,” and counsel believed “that such was appropriate to lessen the punishment the jury would give” the applicant (SX 6 at 3).

So it is clear that counsel’s decision to advise the applicant to plead guilty was part of a trial strategy in an effort to obtain leniency from the jury in punishment. Courts have consistently held that such a strategy can be reasonable. *See, e.g., Gardner*, 164 S.W.3d at 399.

2. The defense that the applicant was not driving remained available when she changed her plea.

Counsel never conceded that the applicant was driving prior to her entry of a guilty plea. In fact, he cross-examined multiple witnesses on the topic:

- Counsel explored Arnes Buchanan’s testimony that he did not see the driver of the applicant’s truck, saw what looked like the applicant in the passenger’s seat with the seatbelt buckled, and did not see anyone in the driver’s seat (5 R.R. 34–35);
- Counsel questioned Keeliegh Mackay’s testimony that challenged Buchanan’s ability to see inside the truck, thereby establishing that Buchanan’s viewpoint was closer to the truck; and counsel further clarified that Mackay used male pronouns when describing the truck driver (5 R.R. 43–44);

- Counsel questioned Reuvers whether he checked to see if the driver's seat could have moved and whether he asked witnesses about someone else driving (5 R.R. 68–70);
- Counsel questioned Brack about whether he knew Buchanan said he saw someone only in the passenger's seat and whether horizontal and vertical gaze nystagmus tests establish who was driving the truck (5 R.R. 135–39);
- Counsel questioned Paramedic Patrick Langan about whether the applicant's disorientation could explain her inconsistent statements regarding who was driving (5 R.R. 158); and
- Counsel established that the crash investigation calculations of Michael Chapman, the DPS crash investigator, did not identify the driver (6 R.R. 152).

Counsel also offered a speaking objection in front of the jury to prevent Clare Moyers, the DNA analyst, from testifying about whether certain facts consistent with her findings led her to form a conclusion about who was behind the wheel of the truck (6 R.R. 193–94). So even after counsel decided that his alternative defense of involuntary intoxication would likely be unsuccessful, he was clearly aware that he could have continued to pursue the defense that the applicant was not driving.

3. Consistent with his strategy, trial counsel chose not to raise an implausible defense to the jury.

Counsel specifically stated that he chose not to pursue the defense that the applicant was not driving because her shoe and bloody sock were found in the driver's floorboard of the truck, and the applicant's DNA was found on the

driver's airbag (AX 3 at 1). Those facts have not changed despite the applicant's contrary speculation. *See supra* Part II.

And because the evidence proving that the applicant was driving is overwhelming, counsel's decision not to raise such an implausible defense was sound. To explain, the evidence at trial established that the applicant was the sole occupant of her own truck as she drove out of the bar parking lot approximately one hour before the crash (5 R.R. 239, 274–75). The applicant's whereabouts during that hour are unknown, but there is no evidence that anyone other than the applicant entered her truck after she left the bar parking lot. The applicant points to phone calls and text messages placed by or to the applicant's phone as proof she was not driving, but ominous missed phone calls are not probative to show that someone else entered the applicant's vehicle. An actual, documented conversation occurred between the applicant and her friend, Maygen Bates, a little after 2:00 a.m., in which the applicant told Bates that the applicant was going home and did not mention any plans to meet with anyone else (5 R.R. 181).

Further, the applicant's left shoe—which corresponds with the left foot and ankle injury she suffered during the crash—was lodged underneath the driver's pedals (4 R.R. 51–53; 5 R.R. 58, 149; State's trial exhibit 35); a bloody sock containing the applicant's DNA and matching the sock the applicant wore that night was near the driver's side of the truck (5 R.R. 58; 6 R.R. 188–89); the

applicant was the only person whom anyone saw exit the truck after the crash; the applicant's blood was on the driver's airbag (6 R.R. 188); the applicant was the sole contributor of DNA on the steering wheel (6 R.R. 187); the driver's seat was pushed close to the steering wheel, consistent with the applicant's five-foot, two-inch frame (5 R.R. 59–60); the truck was registered to the applicant (SX 8 at 3); and the applicant's belongings were strewn throughout the truck (SX 8 at 3).

The applicant also admitted that she was driving to medical personnel, Trooper Brack, and a firefighter (4 R.R. 40; 5 R.R. 94, 153). And although the applicant initially claimed she was not driving, her attribution of blame was inconsistent—she accused her “dad”; under a charitable interpretation of muffled speech, Kambiz Duran¹²; and an unidentified “friend” (4 R.R. 39–40; 5 R.R. 53–53; AX 200B). These inconsistent claims plainly lack credibility and indicate an attempt to escape guilt.

Thus, although the applicant has identified some evidence to support a speculative theory that she was not driving at the time of the crash, any reasonable attorney could have concluded that such a defense was futile in light of the overwhelming evidence implicating the applicant as the driver. So counsel's decision to limit his investigation and forego this defense was

¹² Duran was at On The Rox on the night of the crash and provided drinks to the applicant and other patrons (5 R.R. 270–72). Duran had met the applicant, through mutual friends, a few weeks prior to that night (SX 9 at 1).

reasonable, just like his decision not to raise the defense the applicant proposed on direct appeal. *See Baukus*, 2016 WL 908281, at *8–9; *see also Strickland*, 466 U.S. at 691 (attorney’s decision not to investigate or to limit the scope of the investigation receives “heavy measure of deference”). And counsel’s decision to advise the applicant to plead guilty after waiting for the evidence to develop during trial was likewise reasonable. *See Sanchez v. State*, No. 05-10-00292-CR, 2011 WL 2240910, at *5–6 (Tex. App.—Dallas June 9, 2011, no pet.) (not designated for publication) (advising change of plea to guilty after hearing evidence could be sound trial strategy); *Hanson v. State*, No. 11-09-00278-CR, 2011 WL 704639, at *4 (Tex. App.—Eastland Jan. 13, 2011, pet. ref’d) (mem. op., not designated for publication) (pleading guilty and showing contrition is a reasonable trial strategy when evidence effectively precludes a meaningful defense); *Harrison v. State*, No. 05-99-00424-CR, 2000 WL 1896, at *2 (Tex. App.—Dallas Jan. 3, 2000, no pet.) (not designated for publication) (given strong evidence of guilt, counsel pursued reasonable trial strategy of pleading guilty and asserting his defenses to mitigate punishment).

The applicant suggests that trial counsel now acknowledges he should have pursued the defense that she was not driving based on what habeas counsel presented to him since trial (Memorandum at 29). To clarify, counsel’s affidavit merely states that he “could” have presented the defense that the applicant was

not driving (AX 3 at 2–3). While counsel states that he “would not have had [the applicant] change her ‘not guilty’ pleas to ‘guilty’” (AX 3 at 3), his subsequent affidavit explains that this assertion relied on a hypothetical scenario where compelling evidence showed that officers planted evidence to frame the applicant (SX 7 at 1–2). Counsel did not believe that the evidence presented to him by the applicant’s habeas counsel was compelling, so counsel “would not have antagonized a Montgomery County jury or lost credibility by claiming that police officers planted evidence” (SX 7 at 2).

Regardless, such subjective second-guessing is exactly the type of hindsight-based criticism that the Court of Criminal Appeals avoids in reviewing an allegation of deficient performance. Even with additional investigation, while counsel *could* have pursued a different defense, the applicant has failed to establish that counsel *should* have done so instead of advising the applicant to plead guilty. The applicant’s guilt was clear, so counsel sought leniency and chose to avoid alienating himself and his client from the jury. This decision was not so outrageous that no competent attorney would have done the same.

But even if this Court assumes counsel’s actions were deficient, the applicant has failed to prove that but for those errors, she would not have pleaded guilty and would have proceeded with trial.

C. Any deficiency by counsel did not prejudice the applicant.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Ex parte Briggs*, 187 S.W.3d 458, 466–67 (Tex. Crim. App. 2005). The assessment of whether there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial depends largely on a prediction of whether evidence undiscovered by counsel due to an inadequate investigation likely would have changed the outcome of a trial. *Id.* at 469. A defendant may rely on counsel to independently investigate the facts, circumstances, pleadings, and laws involved, and then to offer his informed opinion as to what plea the defendant should enter. *Id.*

For a guilty plea to be voluntary, however, a defendant need not know every fact that could possibly support a potential defense:

While any defendant who is deciding whether or not to plead guilty would certainly prefer to be apprised of his exact odds of an acquittal at trial, the reality is that every defendant who enters a guilty plea does so with a proverbial roll of the dice. . . . [E]ven if the defendant is less well-informed, as long as he has a sufficient awareness of his circumstances—including an awareness that some facts simply remain unknown to him or are undetermined as of the time of the plea—his potentially unwise plea is still a voluntary one.

Ex parte Palmberg, 491 S.W.3d 804, 809 (Tex. Crim. App. 2016) (internal citations omitted).

So when a defendant decides to plead guilty but lacks some knowledge of her case as a result of deficient assistance, that lack of knowledge must be *material* to that decision for the plea to be involuntary:

In the context of a guilty plea, materiality affects the voluntariness of the plea, and the voluntariness of the plea affects whether the information that was considered by the defendant in making a decision to plead guilty was material. The materiality of counsel's deficient performance is measured by what impact counsel's errors had on the defendant's decision to plead guilty.

Barnaby, 475 S.W.3d at 325.

1. At the time of the applicant's plea, she and her trial counsel knew most of the information she now claims counsel failed to discover.

The applicant claims that her trial counsel's investigation was inadequate because he did not: (1) watch the COBAN videos; (2) listen to audio recordings; (3) carefully examine scene photos; (4) interview civilians; (5) consult with experts; or (6) realize officers planted evidence (Memorandum at 15, 18).

But several of those items were admitted and published in court *prior to trial counsel's advice that the applicant should plead guilty*:

State's Trial Exhibit Number(s)	Admission in Record	Description
1	4 R.R. 46	Schmaltz's COBAN audio/video from crash scene
2	4 R.R. 46	Schmaltz's cell phone recording of applicant at hospital
3–51	4 R.R. 46	Crash scene photographs
52–67	5 R.R. 82	Crash scene photographs

69	5 R.R. 40	911 audio recordings
71	5 R.R. 62	Reuvers's COBAN audio/video from crash scene
83	5 R.R. 163	Surveillance video from On The Rox showing applicant with Duran
93–146, 150–52	6 R.R. 105	Crash scene photographs
147–49	6 R.R. 129	Crash scene photographs
159–214	6 R.R. 167	Truck photographs from DPS lab
219–20, 220A–C	6 R.R. 169	DPS lab reports and data re: DNA

So before the applicant pleaded guilty, both she and her attorney knew the contents of the COBAN videos, the audio recordings, and the scene photographs, regardless of counsel's pre-trial investigative efforts.¹³ And the only civilian witness who has stated that he saw someone matching the applicant's description in the passenger's seat prior to the crash—Arnes Buchanan—had already testified that he saw only a seat-belted passenger inside the applicant's truck as it cut in front of him, and "[i]t didn't look like anybody was in the driver's seat" (5 R.R. 29, 34). This allegedly-unknown evidence could not have been material to the

¹³ Likewise, the applicant and her trial counsel knew about the evidence the applicant has now utilized to manufacture the theory that police officers planted the applicant's shoes and socks in her truck. Evidently, however, such a theory was not feasible to them until sometime after the applicant's conviction became final. The applicant's trial counsel still opines that such evidence would not have changed his mind regarding his advice for the applicant to change her plea (SX 7 at 2).

applicant's decision to plead guilty because she knew about it at the time she changed her plea, and the proffered defense remained available.

And despite this knowledge, the applicant expressly attested that she was waiving the defense:

[The trial court]: You are abandoning any defense you may have to this case. Do you understand, Ms. Baukus?

[The applicant]: Yes, sir.

[The trial court]: Is it your wish and desire to do that?

[The applicant]: Yes, sir.

(7 R.R. 71–72).

2. The previously-undiscovered evidence is unconvincing.

By the time the applicant changed her pleas, counsel's allegedly-inadequate review of the evidence failed to discover only: (1) Fisher Hampshire's post-trial statement to defense investigators that he heard someone say that a man ran away; (2) Steven Ramirez's statement that when he approached the applicant's truck *after the crash*, she was in the passenger's seat; and (3) the applicant called Duran at 2:44 a.m. (*see* AX 2 at 5–6). But counsel knew that Hampshire's statement that he heard someone else say that a man ran away is inadmissible hearsay (AX 3 at 3). *See* Tex. R. Evid. 802. And in context, Hampshire's statement likely stemmed from the officers' efforts to locate a driver after the applicant denied driving. Moreover, Ramirez's statement that he saw

the applicant in the passenger seat after the crash is not surprising; it is undisputed that the applicant was at some point in the passenger side of the truck after the crash because she exited the passenger door. Further, the applicant's call to Duran does not tend to show that he was driving the applicant's truck approximately fifteen minutes later; if anything, that fact shows that Duran and the applicant were not together at the time of the crash. No evidence shows that they ever planned to meet or that Duran was ever inside the applicant's truck. And if counsel had interviewed Duran, he would have learned that Duran missed the applicant's call and was at home during the crash (SX 9 at 1–2).

Finally, the applicant complains of counsel's failure to consult experts to evaluate the evidence. To be clear, counsel hired and utilized an expert to evaluate the evidence related to his defensive theory of involuntary intoxication. The applicant now claims that counsel should have consulted with experts regarding the defensive theory that the applicant was not driving. Those experts appear to include David Pearson, a traffic accident reconstructionist for the Harris County Sheriff's Office; Robin Wright, a former DPS traffic accident reconstructionist; and David DeLonga, a medical doctor and forensic engineer. At the outset, the record does not reflect whether any of the uncalled witnesses—Ramirez and the experts—were available to testify at the applicant's trial. *See Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (to obtain relief on an

ineffective-assistance claim based on an uncalled witness, the defendant must show that the witness had been available to testify and that his testimony would have benefitted the defense).

More importantly, Pearson's and Wright's affidavits merely establish that a person weighing less than 110 pounds may not trigger the passenger airbag sensor in the applicant's truck (AX 409–10). The applicant's trial counsel averred in his affidavit that he “did not believe that [they] could successfully present [the defense that the applicant was not driving] because both of her tennis shoes and her bloody sock were found on the driver's floorboard and her DNA was found on the driver's airbag” (AX 3 at 1). Counsel did not rely on the fact that the passenger's airbag did not deploy to determine the applicant was driving; he instead relied on her DNA on the driver's airbag—a fact that has not changed. More importantly, the Restraint Control Module (RCM) download shows that the passenger's seat was “empty”¹⁴ and the seatbelt was unbuckled (SX 10, 10A). This direct evidence erases Pearson's and Wright's speculative possibilities.

¹⁴ Counsel for Ford Motor Company explained in an e-mail the significance of the “empty” classification status from the RCM download:

“Based upon the RCM download provided, the ‘empty’ classification means that either 1) the seat was truly empty, or 2) there was something in the seat so light (not heavy enough) to trigger the next classification up which is ‘occupied below threshold.’ The data is not

(cont'd next page)

DeLonga's affidavit avers that the applicant's injuries, or lack thereof, are consistent with her sitting in the passenger's side of the truck at the time of the crash (AX 412). Conspicuously absent from DeLonga's affidavit is a conclusion that the applicant's injuries are *inconsistent* with her sitting in the driver's seat. Moreover, Patrick Langan, a paramedic supervisor who treated the applicant, testified at trial that her left foot injury is consistent with a left-side impact on the driver's side (5 R.R. 149–53); and any lay person could view the post-crash photographs of the applicant's truck and conclude that the applicant's left-side injuries are consistent with the left-driver's-side impact of the collision. And that officers found the applicant's left shoe lodged underneath the steering wheel further supports the common-sense conclusion that the applicant's left foot broke as a result of the left-side impact on the driver's floorboard area. Finally,

specific enough to say definitively why the OCS reads empty. (The third classification is 'occupied above threshold.')

(SX 10A). Thus, the RCM is capable of differentiating between a seat that is unoccupied or contains an item of negligible weight and a seat that is occupied by an individual or item with a greater-than-negligible weight yet is still lower than the threshold required to trigger activation of the passenger airbag. The applicant would theoretically fall into the second classification, but the RCM download revealed a status consistent with the first classification.

An affidavit by a Ford Design Analysis Engineer, Erich Kemnitz, that better explains the RCM classifications is forthcoming, but did not complete the corporate approval process prior to the filing deadline for this response. The undersigned counsel will supplement the record with this affidavit upon its receipt.

DeLonga did not have at his disposal the RCM data showing that the passenger's seat was unoccupied and the belt was unbuckled during the crash when DeLonga claimed that the applicant's injuries are consistent with a buckled passenger.

3. A full investigation into the proffered defense would not have changed counsel's strategy or advice.

As discussed, if trial counsel had chosen not to limit his investigation and had fully pursued the defense that the applicant was not driving, he would have learned that the RCM reveals that the passenger's seat was empty and the passenger's seatbelt was not buckled at the time of the collision event (SX 10, 10A, 10B). This data debunks the applicant's theory that she was seated in the passenger seat of her truck at the time of the crash. Given the applicant's undisputed presence in the truck, the only logical explanation for the unoccupied passenger seat is the applicant's position in the driver's seat.

A full investigation would have also revealed that no comparable male DNA profiles could be developed from anything inside the applicant's truck (SX 11), and both Harmon and Reuvers would swear under oath that they did not plant evidence and have no reason to believe anyone planted evidence (SX 1 at 2; SX 2 at 2).

Counsel would have also learned that Duran would swear under oath that he did not talk to the applicant after he left On The Rox, did not meet the applicant, and was not driving her truck on the night of the crash; Duran stands

five-foot, six-or-seven inches tall and would not have been seated so close to the steering wheel (SX 9 at 1–2; 9C); and significant force could not dislodge the driver’s side door of the applicant’s truck (SX 8). These facts expose the guesswork supporting the applicant’s claims that she was not driving.

Importantly, upon learning of the aforementioned facts, the applicant’s trial counsel maintains that he would not have raised the proffered defense and would not have altered his advice that the applicant should change her pleas to guilty (SX 7 at 2). Thus, any claim that trial counsel’s discovery of the foregoing evidence would have changed his advice or changed the applicant’s mind regarding her decision to plead guilty lacks merit and is not credible. These purported missing facts were not “crucial to this case.” *See Palmberg*, 491 S.W.3d at 811.

4. The evidence of the applicant’s guilt is overwhelming.

When counsel is deficient for failing to adequately raise a defensive theory, that deficiency is less likely to be prejudicial when the evidence disproving that defensive theory is strong. *See Ex parte Saenz*, 491 S.W.3d 819, 830–33 (Tex. Crim. App. 2016); *Strickland*, 466 U.S. at 696 (“a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”). And when a defendant claims that she would not have pleaded guilty and would have proceeded to trial but for her

counsel's ineffectiveness, the likely success of raising the defense is relevant insofar as it informs the evaluation of the defendant's decision-making. *See Burch v. State*, No. PD-1137-16, 2017 WL 5476333, at *6 (Tex. Crim. App. Nov. 15, 2017) (not yet published) (Keel, J. concurring) (defendants "obviously weigh their prospects at trial" in deciding whether to forfeit a proceeding, citing *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017)).

Here, the only direct evidence that the applicant was not driving consists of Buchanan's assertion that he saw a person matching the applicant's description sitting in the passenger's seat as her truck passed him. That is, Buchanan purported to see inside the applicant's truck while Buchanan was going approximately forty-five miles per hour toward the applicant's truck, which "floored it" when Buchanan got within twenty-five yards of the truck and "took off" at an approximate forty-five-degree angle across the front of Buchanan's vehicle (5 R.R. 27–29). This occurred around 3:00 a.m., in the dark, and the applicant's headlights were facing Buchanan's eyes (5 R.R. 28). And despite the driver's proximity to Buchanan, he claimed not to see any driver and that he could see only one person in the truck, buckled in the passenger's seat (5 R.R. 29, 34). This claim is utterly ridiculous. Applying common sense, there is no way Buchanan could see such detail inside the speeding truck, in the dark, with headlights in his face. Suspiciously, Buchanan knew the applicant from high

school and had incentive to be biased; and Buchanan's passenger disputed his claims:

It was really hard to see because it was dark. [The applicant] was going really fast or the truck was going really fast, and the headlights were kind of blinding. So I couldn't really see inside the vehicle.

(5 R.R. 39). And even if Buchanan could have seen such detail inside the truck, he did not say that any individual other than the applicant was inside. Buchanan's account lacks credibility and does not plausibly support the defensive theory that the applicant was not operating her truck at the time of the crash, especially after considering the RCM data showing that the passenger's seatbelt was unbuckled.

All the remaining evidence the applicant offers in support of her claim that the defense was plausible is mere speculation and would not have convinced the applicant to proceed with trial instead of pleading guilty. *See supra* Part II; Part III, section 2. Further, the allegation that the applicant may have moved around to the passenger side to vomit does not show that someone else was with her in the truck or that she was not driving at the time of the crash.

By contrast, compelling evidence proves that the applicant was, in fact, driving at the time of the crash:

- surveillance video shows the applicant driving alone in her own truck only an hour before the crash;

- her belongings were in the truck;
- her truck was registered to her;
- her injuries were consistent with the left driver's side impact of the crash;
- she lied about who was driving before admitting to Trooper Brack and medical personnel that she was driving the truck;
- no one saw anyone else inside the applicant's truck immediately before or after the crash;
- no identifiable person saw anyone running from the truck;
- the applicant's left shoe was lodged under the pedals;
- her bloody sock was near the driver's seat;
- her left foot was broken, consistent with the location of her left shoe and the left-side impact;
- the driver's seat was close to the steering wheel, consistent with her diminutive stature;
- the driver's door could not be dislodged with significant force, thus explaining the applicant's exit from the passenger's side;
- the opening at the top of the driver's door is too small for someone to contort his body and run away before bystanders arrived on scene;
- the applicant was the sole contributor of DNA on the steering wheel and the driver's airbag;
- no comparable male DNA profiles could be obtained from any swab from inside the truck; and

- the RCM showed the passenger seat was empty, and the passenger's seatbelt was not buckled.

Naturally, the court of appeals agreed that the evidence of the applicant's guilt was "overwhelming." *See Baukus*, 2016 WL 908281, at *15 (Kreger, J., majority), *17 (Horton, J., dissenting). Even the applicant testified that she became "100% sure" she was driving when she learned of the DNA evidence against her (8 R.R. 183). Given that the DNA evidence at trial was legitimate, *see supra* Part II, the applicant's claim that she would have raised the implausible defense that she was not driving instead of pleading guilty is unreasonable.

5. The applicant's hindsight-based claim that she would have proceeded with trial is not credible.

As discussed, this is not the first time the applicant has claimed her plea was involuntary due to counsel's failure to raise a plausible defense. *See Baukus*, 2016 WL 908281, at *5–6. In support of her motion for new trial, the applicant executed an affidavit in which she stood by her claim that she became involuntarily intoxicated, but alleged that her trial counsel should have claimed that she was drugged with a "date rape drug" (GHB) instead of valium (C.R. 329–31). The applicant claimed that she would not have pleaded guilty if she had known information that supported this "plausible" defense (C.R. 331). Despite knowing all the information discussed in the previous section, the applicant did not mention the potential defense that she was not driving (C.R.

328–33). The applicant then wrote a second affidavit apparently in support of her motion for new trial, and again, she did not mention anything about not being the driver (Supp. C.R. 63–64).

Conveniently, the applicant has now claimed for the first time in her third post-trial declaration under oath that she would not have pleaded guilty but for counsel’s failure to raise the “plausible” defense that she was not driving at the time of the crash (AX 2 at 5). This novel claim is a transparent attempt to get out of prison and does not evince her true state of mind at the time of her plea.

At each point during the pendency of this case, the applicant has said what she thought would get her out of trouble. Immediately after the crash, the applicant claimed she was not driving when asked by law enforcement personnel, but when medical personnel asked her, she let her guard down and admitted to driving. When faced with trial, the applicant claimed she was drugged with diazepam. When faced with a conviction and sentence, the applicant claimed she was drugged with another intoxicant. After that claim failed, the applicant claimed she was not the driver. And when faced with overwhelming evidence that she was the driver, the applicant has further speculated that officers must have planted evidence to frame her. Given the strength of the evidence showing that the applicant was driving at the time of the crash, the applicant’s latest claim

in support of her attempt to avoid her conviction and sentence—like her other claims seeking to avoid trouble—lacks credibility and is unreasonable.

Thus, the applicant has failed to establish that any deficiency of trial counsel caused her prejudice. This Court should recommend denial of the applicant's second ground for relief.

THEREFORE, the State requests that the Court find that there remain no controverted, previously unresolved facts material to the legality of the applicant's confinement; that there is no necessity for a fact-finding hearing, as there is ample evidence in the record for the Court to rule on the relief sought; and that the Court enter appropriate findings of fact and conclusions of law, and recommend to the Court of Criminal Appeals that habeas corpus relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document complies with the requirements of Tex. R. App. P. 73.1 because there are 10,498 words in this document as calculated by the Microsoft Word computer program used to prepare it, and further certify that copies of the State's answer in opposition to the application for writ of habeas corpus and the State's proposed findings of fact and conclusions of law have been served via efile.txcourts.gov to Randy Schaffer, counsel for the applicant, at noguilt@swbell.net, on or about the date of the submission of the original with the Clerk of this Court.



BRENT CHAPPELL
Assistant District Attorney
Montgomery County, Texas

State's Habeas Exhibit List

1. Affidavit of Jacob Reuvers
2. Affidavit of Cody Harmon
3. Still-shot photos from Reuvers's COBAN video
4. Affidavit of Angela Fountain
5. E-mail exchange with Abbey Radford
6. Affidavit of Michael A. McDougal in response to motion for new trial
7. Affidavit of Michael A. McDougal after State's post-conviction investigation
8. Affidavit of John Stephenson
 - Appendix A – photos of RCM removal
 - Appendix B – DPS major crash packet
 - Appendix C – photos of driver's door of truck
 - Appendix D – vehicle registration information
9. Affidavit of Kambiz Duran
 - Appendix A – screenshot of text message to Nicole Baukus
 - Appendix B – screenshot of text message exchange with Romi Flowers
 - Appendix C – photos of Duran's driving position
10. Affidavit of Steven Binder
 - Appendix A – RCM download report
 - Appendix B – e-mail from Ingrid Evert re: RCM download
 - Appendix C – excerpt from 2006 Ford F-150 owner's manual
11. Forensic Case Report for Agency Case # HOU-1206-04868
 - Appendix A – e-mail from Christina Nash re: preliminary quantification
 - Appendix B – e-mail exchange with Nash re: interpreting preliminary results
12. Affidavit of Erich Kemnitz (forthcoming, not yet attached)

State's Exhibit 1
(Affidavit of Jacob Reuvers)

**STATE OF TEXAS
COUNTY OF MONTGOMERY**

AFFIDAVIT

Before me, the undersigned notary public, personally appeared JACOB REUVERS,
who upon being duly sworn, deposed and stated the following:

My name is Jacob Reuvers. I am over twenty-one years of age, of sound mind, and fully competent to testify to the following facts, which are within my personal knowledge.

I am a licensed peace officer with the State of Texas. I entered the academy in August of 2009 and became a licensed peace officer in May of 2010. My license number is 370844. I have been employed by the Shenandoah Police Department since November of 2012, and I have reached the rank of Patrol Sergeant.

On June 29, 2012, I worked as a Patrol Deputy for the Montgomery County Sheriff's Office. While on patrol that night, I responded to an attempt-to-locate dispatch call regarding a wrong-way driver on Interstate 45 near Shenandoah. I drove toward the reported driver and turned on my overhead lights and siren on my patrol vehicle so I could arrive as fast and as safely possible. Before I located the wrong-way driver, I received word that a "major" crash had occurred. When I located the scene, several wreckers and civilians were already present. I was the first law enforcement officer to arrive.

Based on my experience and what my training officers had previously told me, I knew that at the time of the crash, in Montgomery County, the Texas Department of Public Safety would take the lead role in investigating any crash on the highway. My role in responding to the crash was to assess the scene and determine who was involved, who was alive, who was injured, and who needed emergency medical assistance. My role was also to hold the scene for the arrival of the DPS Trooper who would lead the crash investigation and to assist with traffic control. I knew that my agency would not take a primary role in the investigation, and my purpose was not to investigate a potential crime. I had responded to a crash involving a fatality approximately one week before the June 29, 2012 crash, and the same procedure was followed.

Upon my arrival at the crash scene, I saw a Ford F150 pickup with damage to its front-driver's side, but I did not have a view of the second involved unit. I saw a female who appeared to have just exited the passenger's side door of the pickup, and an unidentified male was next to her. The female was later identified as Nicole Baukus. I parked my patrol vehicle on the left side of the freeway, behind the pickup, in an effort to divert traffic and keep traffic away from the scene of the crash.

I approached Baukus and asked whether she was hurt, and she indicated that her foot hurt. I observed she was only wearing one shoe at that time, which was white. Baukus also said she was not driving the pickup, so I began to look around for the driver. I briefly looked into the cab of the pickup from outside the vehicle solely to check for another occupant and did not see anyone else inside. I feared the occupant she referred to may have been ejected due to the violent nature of the crash. I checked the immediate area while making my way to the second unit to identify and assess the welfare of its occupants. At some point during my assessment of the scene, I saw in Baukus's pickup a white shoe on the driver's-side floorboard. This shoe matched the single shoe Baukus was wearing on her right foot. I do not specifically remember whether I saw a bloody sock at that point, but my recollection was better at the time I testified during trial, and I defer to that recollection.

I never touched either of Baukus's shoes or socks, and I did not manipulate any item so that blood or other biological material would deposit on any portion of Baukus's vehicle. I did not enter Baukus's vehicle at any time during the investigation.

At some point after I viewed the shoe in the driver's-side floorboard, I concluded that Baukus must have been the driver of the pickup because I saw nothing to make me believe that another individual had been present in her vehicle at the time of the crash. While I was assessing the welfare of the victims in the second unit, Officer Cody Harmon of the Shenandoah PD arrived as the second law enforcement unit on scene. I informed Harmon of my conclusion that Baukus was the driver. Harmon and I also spoke about the condition of the individuals in the second unit, and I updated dispatch to inform the emergency medical personnel of their status. I also requested for other units to respond to help divert traffic.

At that point, I did not believe that any further video or audio recording of the scene from my patrol vehicle was necessary. Other law enforcement

units had arrived and were en route to assist with traffic control, the scene was secure, all individuals involved in the crash were accounted for, and I was not investigating anyone for any potential criminal activity. Because my purpose was essentially complete, I turned off the recording device in my patrol vehicle. My practice at that time was to run my recording device until my involvement was no longer pertinent. I followed that practice in this case, and I stayed to assist with traffic control until I left the scene several hours later.

I knew Cody Harmon prior to our involvement in this incident on a professional basis. We shared mutual acquaintances between our law enforcement agencies, and I knew Harmon often worked the same shift that I did. I did not have a personal relationship with Harmon outside of our employment. I have no reason to believe that Harmon or any other law enforcement officer planted either of Baukus's shoes or socks in her pickup, and I have no reason to believe that anyone manipulated items in an effort to deposit Baukus's DNA on any portion of her pickup.

Prior to June 29, 2012, I did not know Baukus or any of the three occupants of the second unit involved in the crash.


In November of 2012, I left the Sheriff's Office and joined the Shenandoah PD. I left the Sheriff's Office voluntarily; my employment was not terminated, and I was not asked to resign. I sought the open position due to professional opportunity and for financial reasons.

The video recording of this incident was stored on the secure servers of the Montgomery County Sheriff's Office after it was uploaded via WiFi from my Coban in-car unit. Due to our role as an assisting agency in the crash and criminal investigation, I was not aware of the status of any criminal proceedings until I was later subpoenaed for the first jury trial. I also had not been previously requested to provide audio/video recordings as an assisting agency at that point in my career. I had very little experience with crash scenes prior to the date of this incident due to our primary duties revolving around call for service response and being limited to traffic control pending DPS Trooper arrival. The recording of this incident was not withheld intentionally, purposefully, or with any malicious intent.



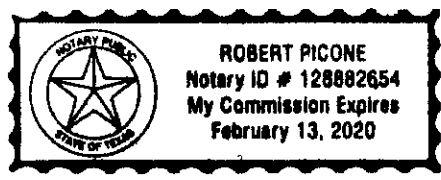
Jacob Reuvers

Signed and sworn to before me, the undersigned notary public, on this 3
day of November, 2017.



NOTARY PUBLIC
Montgomery County, Texas

My commission expires:



State's Exhibit 2
(Affidavit of Cody Harmon)

**STATE OF TEXAS
COUNTY OF MONTGOMERY**

AFFIDAVIT

Before me, the undersigned notary public, personally appeared CODY HARMON, who upon being duly sworn, deposed and stated the following:

My name is Cody Harmon. I am over twenty-one years of age, of sound mind, and fully competent to testify to the following facts, which are within my personal knowledge.

I am a former Police Officer for the Shenandoah Police Department. On June 29, 2012, I was on active duty with the Shenandoah PD when I responded to a dispatch call indicating there was a wrong-way driver on the southbound lanes of Interstate 45. On my way to the reported location of the driver, I learned that a crash occurred. I drove my patrol vehicle onto I45 and located the crash. I was the second law enforcement unit to arrive on scene, as Montgomery County Sheriff's Office deputy Jake Reuvers had arrived first. Some wrecker drivers were already on scene, as well as some civilians passing by. I parked my patrol vehicle, with the overhead lights flashing, at an angle across multiple lanes of traffic in an effort to block the scene, divert traffic, and alert oncoming drivers.

As one of the initial responding officers, my primary role was to secure the scene. This included locating the individuals involved in the crash and determining whether they needed emergency medical care. My secondary role was to hold the scene and divert traffic until other law enforcement agencies arrived. Based on my knowledge and experience, the procedure for the local law enforcement agencies was to allow the Texas Department of Public Safety State Troopers to work all vehicle crashes that occurred on the highway and outside of the city limits. This was especially true in the case of a vehicle crash involving serious bodily injury or death. So I knew immediately that a DPS Trooper would take the lead in investigating the crash and any potential criminal investigation related to the crash. And I had no reason to believe I would write a report on this incident based on my secondary role as an assisting officer.

Upon my arrival at the scene of the crash, I located a female sitting next to an open passenger's side door of a Ford F150 pickup with extensive damage to the front-driver's side. The female, whom I later identified as Nicole Baukus, told me that she had not been driving the pickup, and I noticed that Baukus did not have a sock or shoe on her left foot. The left foot appeared to be injured and was bleeding. I initially believed Baukus's representation that she had not been driving the pickup, so I began to search the scene for the driver. I feared that the driver of the pickup had been ejected and thrown, given that I had recently responded to a crash scene in which the driver had been ejected and thrown nearly 100 yards from the final resting point of his vehicle. I did not initially smell any alcohol on Baukus, and I was not concerned about anyone's potential criminal culpability related to the crash. Again, my primary concern was to locate and assess the status of those involved in the crash.

At some point during my assessment of the scene, I noticed a white shoe and sock which had blood on it on the driver's side floorboard of the pickup. I did not place either of Baukus's shoes or socks in her pickup. I never touched Baukus's shoes or socks. I never saw anyone else move Baukus's shoes or socks, and I do not know how any shoes or socks ended up in the pickup.

I did not manipulate Baukus's sock, or any other property of Baukus, in an effort to plant blood or any other biological material on the deployed, driver's side airbag in Baukus's pickup. I never saw anyone else manipulate Baukus's sock to plant blood or any other biological material on the deployed airbag, and I have no reason to believe that anyone did so.

On June 29, 2012, I knew that if I were to plant evidence in an effort to prove someone's criminal culpability, I would have been subject to criminal prosecution, my employment likely would have been terminated, I likely would have lost my peace officer's license, and I likely would not have been able to procure employment in any other law enforcement agency.

At the time of the crash, I knew who Jake Reuvers was and that he worked for the Sheriff's Office, but I only knew him through work-related channels. I did not have a personal relationship with Reuvers, and I would not consider us to be more than professional acquaintances.

I did not know and, to my knowledge, had never met Nicole Baukus


prior to my encounter with her after the crash on June 29, 2012. I also did not know and, to my knowledge, had never met any of the victims involved in the crash.

I do not recall if or why I was unavailable to testify during the week of July 29, 2013. I did not follow Baukus's criminal case and did not learn of its disposition until 2014.

In 2014, I resigned from the Shenandoah PD and accepted a position in management of the Montgomery County Animal Shelter. I left the Shenandoah PD on my own volition, seeking better hours and better job opportunities. I did not leave because of any alleged misconduct, I was not terminated, and I was not asked to resign. I have since left the animal shelter and now work in asset protection for Walmart. To obtain the position in asset protection, I passed a background check that is more thorough than the ordinary background checks for prospective employees.


Cody Harmon

Signed and sworn to before me, the undersigned notary public, on this 21st
day of November, 2017.

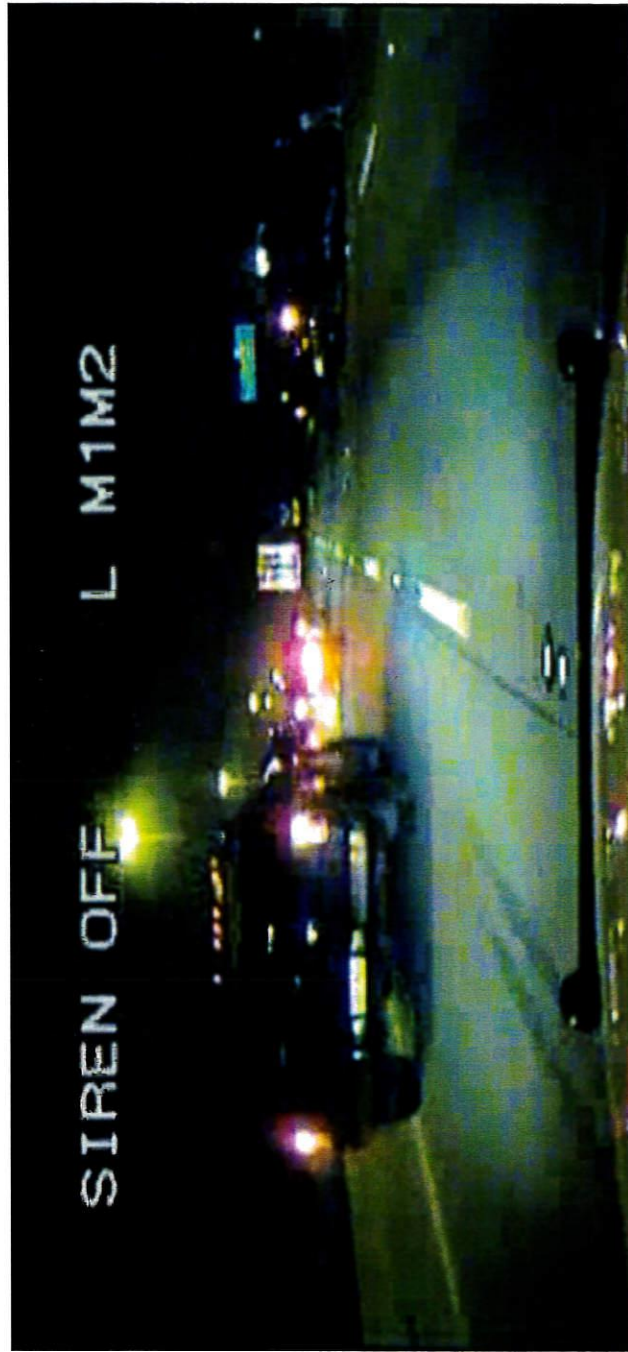

NOTARY PUBLIC
Montgomery County, Texas

My commission expires:
9/11/2021



State's Exhibit 3
(Still-shot photos from Reuvers's COBAN video)

SIREN OFF L M1M2



SIREN OFF L M1M2



SIREN OFF

L M1M2



State's Exhibit 4
(Affidavit of Angela Fountain)

**STATE OF TEXAS
COUNTY OF [REDACTED]**

AFFIDAVIT

Before me, the undersigned notary public, personally appeared Angela Fountain, who upon being duly sworn, deposed and stated the following:

My name is Angela Fountain. I am over twenty-one years of age, of sound mind, and fully competent to testify to the following facts, which are within my personal knowledge.

I am a licensed peace officer with the State of Texas. I entered the academy in June 1998 and became a licensed peace officer in 1996. My license number is 51428. I have been employed by the Texas Department of Public Safety since June 1998 and I have reached the rank of Sergeant. I previously worked for Houston Police Department as a patrol officer for approximately 2 years. After successfully graduating from the DPS Academy, I was assigned to The Woodlands / Magnolia area as a Highway Patrol Trooper / Corporal for 10 years. I then promoted to the rank of Highway Patrol Sergeant in August of 2008. I was stationed in Austin for 4 months and returned to The Woodlands as the Sergeant in December 2008. In April 2013, I made the choice to demote myself and return to the rank of Highway Patrol Trooper and have been stationed in Bryan since that date. I have successfully obtained my Master Peace Officer License in the State of Texas.

On June 29, 2012, I worked as a Sergeant for the Texas Department of Public Safety. I responded to a crash scene on the southbound main lanes of Interstate 45 near Shenandoah to assist with a crash investigation conducted by other Troopers. By the time I arrived at the scene, the two individuals who were involved in the crash and remained alive—David Porras and Nicole Baukus—had been transported by ambulance away from the scene. I never saw Baukus at the scene.

At some point during the investigation, I remember placing a call to the emergency medical personnel who had responded to the crash scene, but I do not remember the contents of that conversation or the purpose of the call.

I do not remember whether I saw one shoe or no shoes in Baukus's

truck, but I do not believe that I ever saw multiple shoes in Baukus's truck. I did not plant any shoes or socks in Baukus's truck, nor did I manipulate Baukus's shoes or socks in any way. I have no reason to believe that anyone planted Baukus's shoes or socks in her truck or manipulated them in an effort to create evidence in Baukus's criminal case.

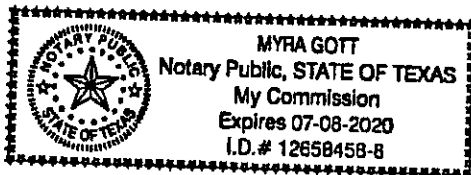
AC Fountain
AC FOUNTAIN
TK DPS

Signed and sworn to before me, the undersigned notary public, on this 27th
day of November, 2017.

[Signature]

NOTARY PUBLIC
Montgomery County, Texas

My commission expires: 07/08/20



State's Exhibit 5
(E-mail exchange with Abbey Radford)

From: Abbey Radford
To: [Chapell, Brent](#)
Subject: Re: revised affidavit - Baukus
Date: Tuesday, November 28, 2017 3:27:01 PM

I have no memory of anyone removing the shoe or if was already off when the fire department initiated contact with the patient.

Sent from my iPhone

On Nov 28, 2017, at 3:22 PM, Chapell, Brent <brent.chapell@mctx.org> wrote:

For clarification, are you saying that you 100% remember someone removing the shoe from the injured foot? Or are you saying that the shoe must have been removed at some point because her foot was injured? In other words, is it still possible, based on your memory, that the shoe from her injured foot came off during the crash and was never on her foot during your time at the crash scene?

From: Abbey Radford [<mailto:abbey.radford@gmail.com>]
Sent: Tuesday, November 28, 2017 2:39 PM
To: Chapell, Brent
Subject: Re: revised affidavit - Baukus

I'm not gonna be able to make it in today.
Things I remember 100%

She was being backboarded by FD when we arrived on scene. She had an injury to her foot so at least one shoe was removed on scene. But I don't remember if the other was and I don't remember if they were transported. Sgt fountain called asking if we transported a shoe to the hospital and the trash and biohazard bins were check but nothing was found. Jolene was my partner and Patrick was the supervisor on scene.

Let me know if you have any questions.

Thank you
Abbey

Sent from my iPhone

State's Exhibit 6

(Affidavit of Michael A. McDougal in response to motion for new trial)

NO. 12-06-07085-CR

THE STATE OF TEXAS	*	IN THE DISTRICT COURT OF
VS.	*	MONTGOMERY COUNTY, TEXAS
NICOLE NADRA BAUKUS	*	435 TH JUDICIAL DISTRICT

AFFIDAVIT OF MICHAEL A. McDOUGAL

STATE OF TEXAS

COUNTY OF MONTGOMERY

BEFORE ME, the undersigned authority, on this day personally appeared MICHAEL A. McDOUGAL, who, upon being sworn, stated:

“My name is Michael A. McDougal. I am over 21 years of age, of sound mind, and competent to testify to the following facts, which are within my personal knowledge.

“I am a lawyer licensed to practice in the State of Texas. I was admitted to the State Bar on September 20, 1971. I became Board Certified in Criminal Law in December, 1980. I was the lawyer for Nicole Nadra Baukus.

“Ms. Baukus claims in her Motion for New Trial that she was denied the effective assistance of counsel because her pleas of guilty and true to her indictment were involuntary and she was denied an impartial trial. She has included her affidavit and the affidavit of Dr. Gary Wimbish.

“I was appointed to represent Ms. Baukus in January, 2013. The first thing I did was I told her she needed to start going to the Resource Center operated by Peggy Heath. Her reply, along with her father, was to the effect that I was not approaching the case in the right way – she was not guilty because she was not driving at the time of the accident. In one of her claims, she says I did not call Peggy Heath as a witness in her trial. The reason I did not call Peggy Heath as a witness is because I had talked to Ms. Heath and learned that Ms. Baukus went to a couple of sessions and then quit going. I did not think such testimony would be beneficial to Ms. Baukus’ defense.

“In another claim, Ms. Baukus states that I did not call Alexia Camfield as a witness. Ms. Camfield was Ms. Baukus’ counselor. I did not call Ms. Camfield because never, during the time I represented Ms. Baukus did Ms. Baukus divulge to me that she was seeing Ms. Camfield. All Ms. Baukus could relay to me was that she was not driving, and when it became obvious that she was driving, she was drugged. I learned that Ms. Camfield was counseling Ms.

Baukus for the first time during the trial. When Ms. Camfield's office was contacted, we were informed that she was out of town and not available to testify. If I had known of her involvement prior to trial, I certainly would have called her to testify, but neither Ms. Baukus nor anyone else ever relayed such information to me in spite of our numerous hours together prior to the trial.

As to my *voir dire* of the jury, I was satisfied that their answers to the prosecution's questions indicated that each of them could consider probation in an appropriate case. In fact, a significant number of them indicated that they thought rehabilitation was more appropriate than punishment.

As to Dr. Wimbish, I questioned him at length as the possibility of the diazepam causing Ms. Baukus to become so disoriented that her ingestion of alcohol was involuntary. Dr. Wimbish continuously assured me that the diazepam could very well cause Ms. Baukus to become involuntarily intoxicated. Dr. Wimbish, also, was certainly aware that what we were talking about was that the diazepam got into her system during her time at "On the Rox," and not before that. In fact, on July 28, 2013, I sent Dr. Wimbish an e-mail (attached hereto as Exhibit A) asking him specifically if he could tell me how long the diazepam had been in Ms. Baukus' system, to which he did not respond. Never once, prior to his coming to court did he inform me that the diazepam was ingested 20 to 24 hours prior to the time her blood sample was taken. However, the day Dr. Wimbish came to court to testify and listen to the State's toxicologist, he informed me, for the very first time, that the diazepam was ingested at least 20 to 24 hours before her blood sample was taken.

As to any other "date rape" drug getting into Ms. Baukus' system, again Dr. Wimbish told me that her blood sample did not have any such drug in her system. On July 27, 2013, I e-mailed Dr. Wimbish and asked him if GHB or related "date rape" drug was tested for (attached hereto as Exhibit B). He never informed that such a drug would likely not show up in her blood sample if it was taken 5 hours prior to her blood sample being taken. In any case, the "persons of interest" Ms. Baukus refers to in her affidavit did not give her any drinks prior to 12:00 midnight which was less than 5 hours from the time her blood sample was taken. Therefore, a valid defense was not available in spite of her and her lawyers' claims in the Motion for New Trial.

On May 21, 2013, Kay Sanders, the court-appointed investigator for Ms. Baukus, interviewed the State's toxicologist, Michael Maness. He, also, never mentioned the diazepam

getting into Ms. Baukus' system 20 to 24 hours prior to her blood draw. Mr. Maness also stated that the date rape drug, rohypnol, has not been seen in the last 10 years (attached hereto as Exhibit C).

When Dr. Wimbish told me that the diazepam got into Ms. Baukus' system at least 20 to 24 hours prior to her blood sample being taken, I decided to wait to see if the State's toxicologist testified to the same conclusion. When he did is when I wrote the note that "we are dead." Subsequently, I met with Ms. Baukus and her family to decide what we were going to do.

Neither Ms. Baukus nor her family could come up with any explanation as to how the diazepam could have gotten into her system in the time frame we were faced with. I then told Ms. Baukus and her family that I thought changing her plea to "guilty" would have a more beneficial effect on the jury than continuing with a defense that was certainly not plausible and would cause the jury to view Ms. Baukus in a harsher light.

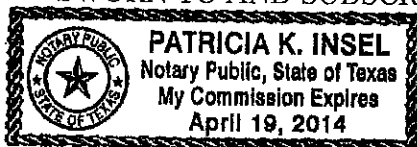
We thoroughly discussed this change of strategy and everyone, Ms. Baukus and her family, were aware of the punishment possibilities that Ms. Baukus faced. I do not believe that I specifically discussed the "deadly weapon" issue with them, but, in light of the massive amount of evidence which the State had produced, I felt that a plea of "true" to the "deadly weapon" allegation was the appropriate plea to make to be in conformity with the plea of "guilty." Again, it is my belief that such was appropriate to lessen the punishment the jury would give Ms. Baukus.

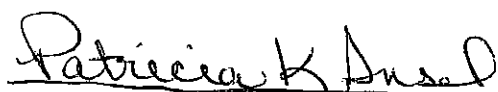
As to my calling Ms. Baukus to testify in spite of her reluctance to do so, I did not feel that Ms. Baukus' reasons for not wanting to testify were not validly based. Ms. Baukus told me that she did not want to testify because she did not want those spectators in the courtroom, including her mother and father, to see the nude pictures of her which were displayed in her phone records which the State had introduced into evidence. At that point in time, such evidence was minimal in comparison to the effect Ms. Baukus' testimony would have in swaying the jury to a less severe punishment. As it turned out, everyone involved, including Ms. Baukus, was satisfied that her testifying was beneficial to her case.

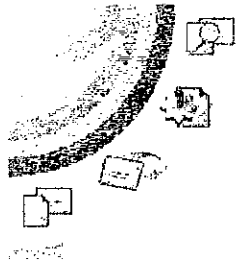


Michael A. McDougal

SWORN TO AND SUBSCRIBED before me on September 16, 2013.




Notary Public, State of Texas 18



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0/1/1/1


Status: Message successfully sent


To: <garywimbish@forensictoxiologyinc.com>

Cc:

Subject: baukus

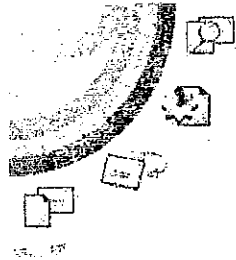
Dr. Wimbish - From the testing, can you tell how long the diazepam had been in Nicole's system?

 [New Message](#)

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A



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Status: Message successfully sent

To: <garywimbish@forensictoxiologyinc.com>


Cc:

Subject: baukus

Dr. Wimbish - Was GHB or related "date rape" drug tested for? Is the amount of diazepam in the test enough to cause the same basic effect as GHB?

Also, the State should be finished by Thursday, so I would ask you to be in Court on Friday, August 2, 2013 at 9 am

 [New Message](#)

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B

Interview of Michael Manes Forensic Toxicologist

May 21, 2013

Re: Nicole Backus, Defendant

1. HPD LAB, Bought out Sam Houston lab.
2. Accidentally spoke with him, looking for a toxicologist.
3. "There are some Forensic Toxicologist for the defense, that are better than others, some hurt more than help.
4. "IT is a science, you are not on anyone's side when you are telling a scientific test result.
5. "I will tell the truth. You can ask these same questions when I am on the witness stand. The DA asks these same questions.
6. Or "Recommends defense to use SWIFS, Southwestern Institute.
7. "Google DPS lab accreditation to find suitable acceptable labs.
8. "Hypothetically speaking:
9. "Don't take a chance without checking if she has a script somewhere(DPS data base)
10. "With these numbers, diazepam, 46 and 43, she might have been given as many as two pills.
11. "Who is the defendant? "Nicole Backus"
12. "I performed those test myself.
13. "There is an interaction going on between the Diazepam and Alcohol.
14. "Things depend on her Metabolic rate.
15. "Regarding .7 THC, ("inactive") recent use, history of taking the drug, under 2 usually not reported.
16. The "Big Dog" is the Alcohol and the Narcotic, Diazepam.
17. "Can't put a time scale on eliminating profile on metabolic rates.
18. "HOW IT GOT THERE IS THE QUESTION?
19. "WE CAN'T DETECT THE SYNSTER.
20. He has pulled it upon the screen, we are talking, hypothetically.
21. "Unknown if there was a check on the BACN.
22. "What is that?
23. "Basic Acid Neutral Test
24. "IT covers Meth, Acid, Mushroom, etc.
25. "An Alisa Test was performed on Nicole's blood work.
26. "It covers "Benzo" family, coke opiates and PCP.
27. "That is not a super high level of Diazepam.
28. Roxyphol would have been a benzo family, rarely seen, not seen in last 10 years.
29. One Being Drugged is 2 parts
30. 1. Not alot reported, not collected
31. 2. Reported, rare, not common
32. Depends on her metabolic rate.

Pamela K. Sanders, Licensed Investigator

C

State's Exhibit 7

(Affidavit of Michael A. McDougal after State's post-conviction investigation)

**STATE OF TEXAS
COUNTY OF MONTGOMERY**

AFFIDAVIT

Before me, the undersigned notary public, personally appeared Michael A. McDougal, who upon being duly sworn, deposed and stated the following:

My name is Michael A. McDougal. I am over twenty-one years of age, of sound mind, and fully competent to testify to the following facts, which are within my personal knowledge.

I represented Nicole Baukus in 2013 before and during her trial for intoxication manslaughter and intoxication assault. I chose not to pursue the defense that Baukus was not driving because the evidence indicated otherwise, and I did not believe that such a defense had any chance of success in front of a Montgomery County jury. I decided to raise the defense at trial that Baukus was involuntary intoxicated, but it became clear as the evidence developed that such a defense would likely be unsuccessful. Accordingly, I advised Baukus to change her plea to guilty in an effort to gain leniency from the jury during punishment.

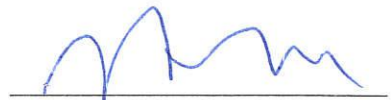
At some point after the trial, Randy Schaffer and Frank Powell came to my office and presented several items of evidence related to the trial. These included a video purportedly depicting Baukus standing next to her truck with a white reflection coming from her feet, other COBAN videos from the crash scene, and statements from witnesses at the crash scene. After this meeting, I executed an affidavit in which I acknowledged the possibility that I could have explored the defense that Baukus was not driving.

Although it would have been possible to raise the defense that Baukus was not driving, I would not have raised such a defense, even after considering the evidence they discussed with me. None of this evidence overcame my feeling at the time I advised Baukus to change her plea that she had no plausible defense. The representation that I could have raised such a defense or would not have advised Baukus to change her plea relied on the assumption that the facts Shaffer and Powell alleged were actually true. From what they told and showed me, I do not believe that the evidence proved that officers planted evidence or that Baukus was not driving her truck. In the absence of

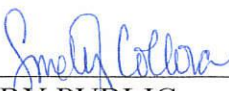
compelling evidence, I would not have antagonized a Montgomery County jury or lost credibility by claiming that police officers planted evidence.

Additionally, on November 20, 2017, I met with Assistant District Attorneys Bill Delmore, Brent Chapell, and Andrew James. They presented evidence to me regarding whether Baukus was driving her truck at the time of the crash. This evidence included the Restraint Control Module (RCM) data showing that the passenger seatbelt was not buckled and that the occupant status of the passenger seat was "empty"; the DNA findings establishing that no comparable male DNA profiles could be developed from Baukus's shoes, sock, and airbag; Kambiz Duran's claim that he missed Baukus's call before the crash and was not driving her truck; Reuvers and Harmon's willingness to swear under oath that they did not plant Baukus's shoes in her truck; and DA Investigator John Stephenson's inability to open the driver's side door to Baukus's truck after applying significant force.

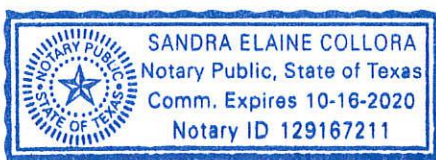
I put little weight into Duran's claims because of his criminal past, but the remaining evidence further convinced me that I would not have raised the defense that Baukus was not driving. The RCM data was particularly significant in reaching this conclusion. Thus, had I fully investigated the defense that Baukus was not driving, I still would not have presented that defense to a jury, and I still would have advised Baukus to plead guilty.


Michael A. McDougal

Signed and sworn to before me, the undersigned notary public, on this 21st
day of November, 2017.


NOTARY PUBLIC
Montgomery County, Texas

My commission expires: 10/16/20



State's Exhibit 8
(Affidavit of John Stephenson)

**STATE OF TEXAS
COUNTY OF MONTGOMERY**

AFFIDAVIT

Before me, the undersigned notary public, personally appeared JOHN STEPHENSON, who upon being duly sworn, deposed and stated the following:

My name is John Stephenson. I am a licensed peace officer with the State of Texas, and I have been employed as a commissioned peace officer since 1978. I currently hold a commission as a Montgomery County District Attorney's investigator, and I have been employed by the Montgomery County district attorney as an investigator since 1988. I hold a bachelor's of science degree in criminal justice, and I currently serve as the Assistant Chief Investigator for the district attorney's office. I am over twenty-one years of age, of sound mind, and fully competent to testify to the following facts.

I have been asked to assist with various tasks associated with the post-conviction investigation in the matter related to the Nicole Baukus intoxication manslaughter/assault case.

On October 17, 2017, I traveled to the DPS Crime Lab on West Road in Harris County and obtained a sealed DPS blood kit labeled "Baukus" and case # HOU-1206-04868 and a 4x9 inch brown evidence envelope containing buccal swabs of Nicole Baukus. I transported the items to the Montgomery County District Attorney's Office in Conroe, and I maintained care, custody, and control of the items until I released the buccal swabs to the Montgomery County Sheriff's Office Crime lab on October 17, 2017. The blood kit was placed in the MCDAO vault for safekeeping. On October 23, 2017, I retrieved a 6x9 inch envelope (State's trial exhibit 217), which contained a sock, and a brown U-line evidence bag (marked as State's trial exhibit 218), which contained two shoes, from the Montgomery County District Clerk's Office. I maintained care, custody, and control of these items until they were released to the Montgomery County Sheriff's Office Crime Lab on October 25, 2017.

On October 27, 2017, Kambiz Duran met with myself, Assistant District Attorney Brent Chapell, and Assistant District Attorney Andrew James. During this meeting, Duran denied ever having been inside Baukus's truck. Duran indicated that he went home after he left On The Rox on June 29,

2012, and Duran never planned to meet with Baukus. Duran showed us a cell phone screenshot of a conversation he had with Romi Flowers the morning after the events leading to Baukus's conviction in this case. Duran also showed us a screenshot showing that Duran texted a number I know to be associated with Baukus and asked, "Who is this[?]" At the conclusion of this meeting, James and I followed Duran to his vehicle that he had parked in a lot adjacent to the district attorney's office. We instructed Duran to sit in his vehicle in his normal driving position, and I took photos of Duran in that position. I also took photos of his empty driver's seat. Prior to Duran's entry into the district attorney's office building for the purpose of this meeting, no one had informed him that we planned on taking pictures of his natural driving position.

On November 14, 2017, Chapell, James, and I traveled to the Milstead Towing lot located at 1702 Rayford Road in Montgomery County. Upon arrival, Texas Department of Public Safety Trooper Charles Williams was already present at the location, along with Baukus's representative, Frank Powell. Trooper Williams began working on a gray 2006 Ford F-150 registered to Russell and Nicole Baukus. This is the same truck that Baukus was allegedly driving in the crash in this case. I watched Williams remove the center seat and console and the metal support for the center console, and then cut the carpet between the remaining truck seats to expose the Ford Restraints Control Module (RCM). Williams removed the RCM and placed it in an evidence bag, and I took custody and control of the RCM at that time. The RCM showed a part number of 6L34-14B321-BA and a possible serial number of 24A712193121. The date of 1/29/2006 also appeared on the RCM. Photos of this process are attached to this affidavit as Appendix A.

While Powell remained present and watching, I entered Baukus's truck from the passenger door and attempted several times to open the driver's door of the truck, without success. The door of the truck appears to have been severely and materially compromised during the crash that resulted in this case. The door does not appear to be able to be opened by any conventional means, and the general appearance of the door does not appear to be consistent with opening and closing due to the crash. This appearance is consistent with the findings in the major crash packet created by DPS at the time of the crash in this case, which is attached to this affidavit as Appendix B. I am much larger in size than Baukus, and I applied a significant amount of force in my unsuccessful attempts to open the door. Photos of the current condition of the driver's door are attached to this affidavit as Appendix C.

I also observed Powell attempt to open the same door from the outside while Williams was working to remove the RCM. Powell used his right hand to pull on the door, and the door did not budge. Powell took several photographs of the truck and touched the truck with his bare hands in multiple locations.

On this same date, I received a driver's license and a credit card from Williams, who was inside the truck, and I placed them into an evidence bag. Both cards showed to belong to Nicole Baukus.

Later that day, I packaged the RCM for FedEx delivery to Autoliv located at 26545 American Drive, Southfield, Michigan. The package was tendered to the FedEx Office location at 1405 W. Davis in Conroe for next day delivery. The next day, I received a delivery confirmation from FedEx, which included a digital signature of receipt.

Within the last ten days, I ran the gray 2006 Ford F-150, Vin# 1FTRW12W16FA97888, LP# AE48892, using an online database that receives information from the Texas Department of Transportation. I have used this database numerous times in the past and can confirm its accuracy based on my experience. This database showed that the registered owners of the truck are Russell Baukus and Nicole Baukus. A copy of that report is attached to this affidavit as Appendix D.

John Stephenson

JOHN STEPHENSON

Signed and sworn to before me, the undersigned notary public, on this 28th day of November, 2017.

Leah Manske

NOTARY PUBLIC

Montgomery County, Texas

My commission expires: 9/11/2021











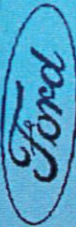


EVIDENCE

DO NOT OPEN
EVIDENCE
DATE
INITIALS

DO NOT OPEN
EVIDENCE
DATE
INITIALS

Restraints Control Module
▽ 6L34-14B321-BA



MADE IN CANADA

01/29/2006

P221

FORWARD

B

DISASSEMBLY OF MODULE FROM VEHICLE
BY AUTHORIZED SERVICE PERSONNEL ONLY.
DANGER OF INJURY AND MALFUNCTION!



24A712193121

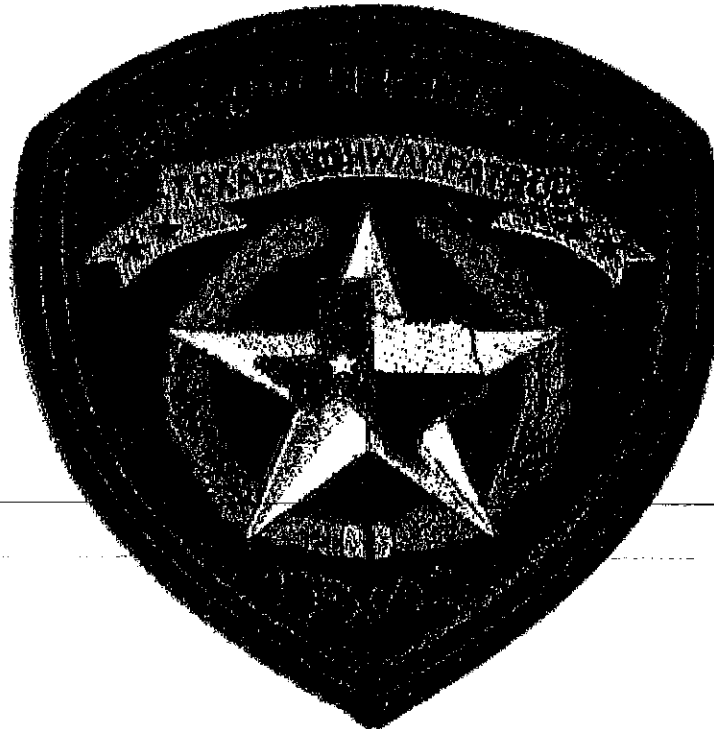
Law Enforcement and TxDOT Use Only

☒ FATAL ☐ CMV ☐ SCHOOL BUS ☐ RAILROAD ☐ VAB ☐ SUPPLEMENT ☐ ACTIVE SCHOOL ZONE

Total Num. Units	2	Total Num. Prsns.	4	TxDOT Crash ID
------------------	---	-------------------	---	----------------

IDENTIFICATION AND LOCATION	* Crash Date (MM/DD/YYYY)		06/29/2012		* Crash Time (24HRMM)		0255		Case ID		Local Use											
	* County Name				MONTGOMERY				* City Name				<input checked="" type="checkbox"/> Outside City Limit									
	In your opinion, did this crash result in at least \$1,000 damage to any one person's property?				<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Latitude (decimal degrees)				30.20963		Longitude (decimal degrees)		-095.45645							
	ROAD ON WHICH CRASH OCCURRED																					
	* 1 Rdwy. Sys.		IH		* Hwy. Num.		45		2 Rdwy. Part		1		Block Num.		3 Street Prefix		* Street Name		4 Street Suffix			
	<input type="checkbox"/> Crash Occurred on a Private Drive or Road/Private Property/Parking Lot				<input type="checkbox"/> Toll Road/Toll Lane				Speed Limit		65		Const. Zone		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Workers Present		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Street Desc.	
	INTERSECTING ROAD, OR IF CRASH NOT AT INTERSECTION, NEAREST ROAD OR REFERENCE MARKER																					
	At Int.		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		1 Rdwy. Sys.		SH		Hwy. Num.		242		2 Rdwy. Part		Block Num.		3 Street Prefix		Street Name		4 Street Suffix	
	Distance from Int. or Ref. Marker				0.1		<input type="checkbox"/> FT <input checked="" type="checkbox"/> MI		3 Dir. From Int. or Ref. Marker		N		Reference Marker		Street Desc.		RRX Num.					

TEXAS HIGHWAY PATROL DIVISION



MAJOR CRASH INVESTIGATION

Investigated by: TROOPER ORTEGA

Approved by: SGT. FOUNTAIN Date: _____

REVISION 04/11 SCRT 00/02

Blumberg No. 5138

STATE'S EXHIBIT

83

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 1 Page 1 of 6
INTERIOR

LICENSE PLATE OR VEHICLE DESCRIPTION:	<u>TX - CH2C186</u>		
SPEEDOMETER LOCKED ON SPEED:	YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	SPEED <u>54 MPH</u>
HEADLAMP SWITCH:	ON <input checked="" type="checkbox"/>	OFF <input type="checkbox"/>	OPERATIVE: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
TURN INDICATOR:	UP <input type="checkbox"/>	DOWN <input type="checkbox"/>	OFF <input checked="" type="checkbox"/>
HORN:	OPERABLE <input type="checkbox"/>	NOT <input type="checkbox"/>	NO POWER <input checked="" type="checkbox"/>
HIGH BEAM INDICATOR LIGHT:	HIGH BEAM <input type="checkbox"/>	LOW BEAM <input type="checkbox"/>	NO POWER <input checked="" type="checkbox"/>
HIGH BEAM SELECTOR SWITCH:	OPERABLE <input type="checkbox"/>	NOT <input type="checkbox"/>	NO POWER <input checked="" type="checkbox"/>
MILEAGE:			NO POWER <input checked="" type="checkbox"/> (DIGITAL)
POSITION OF GEAR SHIFT:	<u>DRIVE</u>		
WINDSHIELD WIPER:	ON <input type="checkbox"/>	OFF <input checked="" type="checkbox"/>	OPERATIVE: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
RADIO OR STEREO SYSTEM:	ON <input type="checkbox"/>	OFF <input checked="" type="checkbox"/>	VOLUME: _____
C.B. RADIO:	N/A <input checked="" type="checkbox"/>	ON <input type="checkbox"/>	OFF <input type="checkbox"/> VOLUME: _____
REAR VIEW MIRROR:	INTACT <input type="checkbox"/>	GONE: <input checked="" type="checkbox"/>	OTHER: _____
POSITION OF TEMPERATURE CONTROL:	OFF HEAT <input type="checkbox"/>	A/C VENT <input checked="" type="checkbox"/>	DEFROST NORMAL <input type="checkbox"/> MAX OTHER <input type="checkbox"/>
ASH TRAY:	FULL <input checked="" type="checkbox"/>	EMPTY <input type="checkbox"/>	LOCATION/CONTENTS _____
RADAR DETECTOR:	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	
SEAT BELTS: (DRIVER)	OPERABLE: YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	
FRONT SEAT MIDDLE:	OPERABLE: YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	
SEAT BELT ANCHORS BROKEN:	YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	
PASSENGER:	OPERABLE: YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	
SEAT BELT ANCHORS BROKEN:	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	
BELTS CUT, BROKEN, OR OTHER:	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	
CONDITION OF BRAKE AND GAS PEDALS:	<u>SMASHED IN</u>		
NOTE ANY PROBLEMS WITH REAR SEAT BELTS:	<u>NONE</u>		
LOCATION OF TINTED GLASS:	<u>NONE</u>		
LOCATION OF BLOOD:	<u>BACK LEFT PASSENGER</u>		
LOCATION OF BODY TISSUE:	<u>DRIVER DOOR</u>		
LOCATION OF HAIR:	<u>LEFT SIDE PILLAR</u>		
LOCATION OF OTHER:	_____		
NOTE AND DESCRIBE ANY ODORS:	<u>BURNING SMELL</u>		

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 1 Page 2 of 6
TIRES

FRONT LEFT

SIZE: 185/60R14 WEAR PATTERN: NORMAL TREAD DEPTH: 4MM LUGS: 4
MANUFACTURER: ZIEX TREAD CONDITION: ☒ GOOD ☐ WORN
AIR PRESSURE: 0 DAMAGE TO TIRE OR WHEEL: CRUSHED
BLOW OUT: ☒ LOST AIR: ☐ OTHER: _____
D.O.T. SERIAL NUMBER: _____

FRONT RIGHT

SIZE: 185/60R14 WEAR PATTERN: NORMAL TREAD DEPTH: 4MM LUGS: 4
MANUFACTURER: ZIEX TREAD CONDITION: ☐ GOOD ☒ WORN
AIR PRESSURE: 0 DAMAGE TO TIRE OR WHEEL: _____
BLOW OUT: ☐ LOST AIR: ☒ OTHER: _____
D.O.T. SERIAL NUMBER: _____

BACK LEFT

SIZE: 185/60R14 WEAR PATTERN: NORMAL TREAD DEPTH: 4MM LUGS: 4
MANUFACTURER: ZIEX TREAD CONDITION: ☒ GOOD ☐ WORN
AIR PRESSURE: 32 PSI DAMAGE TO TIRE OR WHEEL: _____
BLOW OUT: ☐ LOST AIR: ☐ OTHER: _____
D.O.T. SERIAL NUMBER: _____

BACK RIGHT

SIZE: 185/60R14 WEAR PATTERN: NORMAL TREAD DEPTH: 4MM LUGS: 4
MANUFACTURER: ZIEX TREAD CONDITION: ☒ GOOD ☐ WORN
AIR PRESSURE: 0 DAMAGE TO TIRE OR WHEEL: _____
BLOW OUT: ☐ LOST AIR: ☒ OTHER: _____
D.O.T. SERIAL NUMBER: _____

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 1 Page 3 of 6
LEFT SIDE

FRONT

DOOR:
FORCED OPEN BY COLLISION: ☒ YES ☐ NO
LOCKED INSIDE: ☐ YES ☒ NO
JAMMED SHUT: ☒ YES ☐ NO
OPERATE NORMALLY: ☐ YES ☒ NO
WAS THE WINDOW UP ? ☒ YES ☐ NO
WINDOW BROKEN: ☒ YES ☐ NO
BROKEN GLASS: ☒ INSIDE ☐ OUTSIDE

OUTSIDE MIRROR CONDITION:

BROKEN BEFORE ACCIDENT: ☐ YES ☒ NO
BROKEN DURING ACCIDENT: ☒ YES ☐ NO

REAR

IS THERE A REAR DOOR ? ☒ YES ☐ NO
FORCED OPEN BY COLLISION: ☒ YES ☐ NO
LOCKED INSIDE: ☐ YES ☒ NO
JAMMED SHUT: ☒ YES ☐ NO
OPERATE NORMALLY: ☐ YES ☒ NO
IS THERE A REAR WINDOW ? ☒ YES ☐ NO
WAS THE WINDOW UP ? ☒ YES ☐ NO
WINDOW BROKEN: ☒ YES ☐ NO
BROKEN GLASS: ☒ INSIDE ☐ OUTSIDE

REAR WINDSHIELD

☒ DAMAGED ☐ INTACT ☐ OBSTRUCTED/FOGGED

NOTE ANY OTHER CONDITIONS OF THE LEFT SIDE OF THE VEHICLE

FRONT OF VEHICLE

LEFT HEADLAMP BROKEN: ☒ YES ☐ NO RIGHT HEADLAMP BROKEN: ☒ YES ☐ NO
AMOUNT OF DIRT ON HEADLAMP: MISSING AMOUNT OF DIRT ON HEADLAMP: MISSING
DESCRIBE FILAMENT: BROKEN DESCRIBE FILAMENT: BROKEN
LEFT TURN INDICATOR BROKEN: ☒ YES ☐ NO RIGHT TURN INDICATOR BROKEN: ☒ YES ☐ NO
DESCRIBE FILAMENT: BROKEN DESCRIBE FILAMENT: BROKEN

NOTE ANY AUXILIARY LIGHTING, TYPE, CONDITION, AND IF IN USE: NONE

NOTE LOCATION OF ANY PHYSICAL EVIDENCE: _____

NOTE WEATHER CONDITION: CLEAR

NOTE ROAD CONDITION: DRY

COMMENTS: _____

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 1 Page 4 of 6
RIGHT SIDE

FRONT

DOOR:

FORCED OPEN BY COLLISION: ☐ YES ☒ NO

LOCKED INSIDE: ☐ YES ☒ NO

JAMMED SHUT: ☐ YES ☒ NO

OPERATE NORMALLY: ☒ YES ☐ NO

WAS WINDOW UP?: ☒ YES ☐ NO

WINDOW BROKEN: ☐ YES ☒ NO

BROKEN GLASS: ☐ INSIDE ☐ OUTSIDE

OUTSIDE MIRROR CONDITION:

BROKEN BEFORE ACCIDENT: ☐ YES ☒ NO

BROKEN AFTER ACCIDENT: ☐ YES ☒ NO

REAR

IS THERE A REAR DOOR? ☒ YES ☐ NO

FORCED OPEN BY COLLISION: ☐ YES ☒ NO

LOCKED INSIDE: ☐ YES ☒ NO

JAMMED SHUT: ☐ YES ☒ NO

OPERATE NORMALLY: ☒ YES ☐ NO

IS THERE A REAR WINDOW? ☒ YES ☐ NO

WAS THE WINDOW UP? ☒ YES ☐ NO

WINDOW BROKEN: ☐ YES ☒ NO

BROKEN GLASS: ☐ INSIDE ☐ OUTSIDE

NOTE ANY OTHER CONDITIONS OF THE RIGHT SIDE OF THE VEHICLE

REAR OF VEHICLE

LEFT TAIL LAMP BROKEN: ☐ YES ☒ NO

AMOUNT OF DIRT ON LENS: NONE

DESCRIBE FILAMENT: NORMAL

LEFT TURN INDICATOR BROKEN: ☐ YES ☒ NO

DESCRIBE FILAMENT: NORMAL

BACK UP LIGHTS CONDITION: GOOD

REAR EXHAUST CONDITION: ☒ GOOD

RIGHT TAIL LAMP BROKEN: ☐ YES ☒ NO

AMOUNT OF DIRT ON LENS: NONE

DESCRIBE FILAMENT: NORMAL

RIGHT TURN INDICATOR BROKEN: ☐ YES ☒ NO

DESCRIBE FILAMENT: NORMAL

REAR LENSES REFLECTIVE: ☒ YES ☐ NO

OTHER: _____

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 1 Page 5 of 6

TOWING AND UNDERCARRIAGE

TOWING ? ☐ YES ☒ NO WHAT ? _____

HITCH TYPE: _____

HITCH BROKEN ? ☐ YES ☐ NO WHERE ? _____

TYPE OF LIGHTING ON TRAILER: _____

BRAKES OF TRAILER: ☐ YES ☐ NO TYPE ? _____

BREAK AWAY DEVICE: ☐ YES ☐ NO TYPE ? _____

NOTE ANY OTHER CONDITIONS

UNDERCARRIAGE

CONDITION OF DRIVE SHAFT: ☐ GOOD OTHER: N/A

CONDITION OF SHOCKS: ☒ GOOD OTHER: FRONT SHOCKS DAMAGED, REAR SHOCKS GOOD

CONDITION OF EXHAUST: ☒ GOOD OTHER: _____

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 2 Page 1 of 6
INTERIOR

LICENSE PLATE OR VEHICLE DESCRIPTION: TX - AE48892

SPEEDOMETER LOCKED ON SPEED: YES ☐ NO ☒ SPEED

HEADLAMP SWITCH: ON ☒ OFF ☐ OPERATIVE: YES ☒ NO ☐

TURN INDICATOR: UP ☐ DOWN ☐ OFF ☒

HORN: OPERABLE ☐ NOT ☒ NO POWER ☐

HIGH BEAM INDICATOR LIGHT: HIGH BEAM ☐ LOW BEAM ☐ NO POWER ☒

HIGH BEAM SELECTOR SWITCH: OPERABLE ☐ NOT ☐ NO POWER ☒

MILEAGE: NO POWER ☒ (DIGITAL)

POSITION OF GEAR SHIFT: PARK

WINDSHIELD WIPER: ON ☐ OFF ☒ OPERATIVE: YES ☐ NO ☒

RADIO OR STEREO SYSTEM: ON ☒ OFF ☐ VOLUME: HALF WAY

C.B. RADIO: N/A ☒ ON ☐ OFF ☐ VOLUME:

REAR VIEW MIRROR: INTACT ☒ GONE: ☐ OTHER:

POSITION OF TEMPERATURE CONTROL:

OFF HEAT	<input type="checkbox"/>	A/C VENT	<input checked="" type="checkbox"/>	DEFROST NORMAL	<input type="checkbox"/>	MAX OTHER	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

ASH TRAY: FULL ☐ EMPTY ☒ LOCATION/CONTENTS

RADAR DETECTOR: YES ☐ NO ☒

SEAT BELTS: (DRIVER) OPERABLE: YES ☒ NO ☐

FRONT SEAT MIDDLE: OPERABLE: YES ☒ NO ☐

SEAT BELT ANCHORS BROKEN: YES ☒ NO ☐

PASSENGER: OPERABLE: YES ☒ NO ☐

SEAT BELT ANCHORS BROKEN: YES ☐ NO ☒

BELTS CUT, BROKEN, OR OTHER: YES ☐ NO ☒

CONDITION OF BRAKE AND GAS PEDALS: BROKEN

NOTE ANY PROBLEMS WITH REAR SEAT BELTS: NONE

LOCATION OF TINTED GLASS: REAR

LOCATION OF BLOOD: FLOOR

LOCATION OF BODY TISSUE: NONE

LOCATION OF HAIR: NONE

LOCATION OF OTHER: NONE

NOTE AND DESCRIBE ANY ODORS: NONE

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 2 Page 2 of 6
TIRES

FRONT LEFT

SIZE: P265/70R17 WEAR PATTERN: NORMAL TREAD DEPTH: 8/32 LUGS: 5
MANUFACTURER: PRODIGY TREAD CONDITION: ☐ GOOD ☐ WORN
AIR PRESSURE: 0 DAMAGE TO TIRE OR WHEEL: BROKEN FROM VEHICLE
BLOW OUT: ☒ LOST AIR: ☐ OTHER: _____
D.O.T. SERIAL NUMBER: CC70

FRONT RIGHT

SIZE: P265/70R17 WEAR PATTERN: NORMAL TREAD DEPTH: 6/32 LUGS: 5
MANUFACTURER: PRODIGY TREAD CONDITION: ☒ GOOD ☐ WORN
AIR PRESSURE: 29 PSI DAMAGE TO TIRE OR WHEEL: NONE
BLOW OUT: ☐ LOST AIR: ☐ OTHER: _____
D.O.T. SERIAL NUMBER: CC70

BACK LEFT

SIZE: P265/70R17 WEAR PATTERN: NORMAL TREAD DEPTH: 3/32 LUGS: 5
MANUFACTURER: CONTINENTAL TREAD CONDITION: ☐ GOOD ☒ WORN
AIR PRESSURE: _____ DAMAGE TO TIRE OR WHEEL: PUNCTURED
BLOW OUT: ☐ LOST AIR: ☒ OTHER: _____
D.O.T. SERIAL NUMBER: _____

BACK RIGHT

SIZE: P265/70R17 WEAR PATTERN: NORMAL TREAD DEPTH: 2/32 LUGS: 5
MANUFACTURER: PRODIGY TREAD CONDITION: ☐ GOOD ☒ WORN
AIR PRESSURE: 29 PSI DAMAGE TO TIRE OR WHEEL: NONE
BLOW OUT: ☐ LOST AIR: ☐ OTHER: _____
D.O.T. SERIAL NUMBER: CC70

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 2 Page 3 of 6
LEFT SIDE

FRONT

DOOR:

FORCED OPEN BY COLLISION: ☒ YES ☐ NO

LOCKED INSIDE: ☐ YES ☒ NO

JAMMED SHUT: ☒ YES ☐ NO

OPERATE NORMALLY: ☐ YES ☒ NO

WAS THE WINDOW UP ? ☒ YES ☐ NO

WINDOW BROKEN: ☒ YES ☐ NO

BROKEN GLASS: ☒ INSIDE ☐ OUTSIDE

OUTSIDE MIRROR CONDITION:

BROKEN BEFORE ACCIDENT: ☐ YES ☒ NO

BROKEN DURING ACCIDENT: ☒ YES ☐ NO

REAR

IS THERE A REAR DOOR ? ☒ YES ☐ NO

FORCED OPEN BY COLLISION: ☐ YES ☒ NO

LOCKED INSIDE: ☐ YES ☒ NO

JAMMED SHUT: ☒ YES ☐ NO

OPERATE NORMALLY: ☐ YES ☒ NO

IS THERE A REAR WINDOW ? ☒ YES ☐ NO

WAS THE WINDOW UP ? ☒ YES ☐ NO

WINDOW BROKEN: ☐ YES ☒ NO

BROKEN GLASS: ☐ INSIDE ☐ OUTSIDE

REAR WINDSHIELD

☐ DAMAGED ☒ INTACT ☐ OBSTRUCTED/FOGGED

NOTE ANY OTHER CONDITIONS OF THE LEFT SIDE OF THE VEHICLE

FRONT OF VEHICLE

LEFT HEADLAMP BROKEN: ☒ YES ☐ NO

RIGHT HEADLAMP BROKEN: ☐ YES ☒ NO

AMOUNT OF DIRT ON HEADLAMP: N/A

AMOUNT OF DIRT ON HEADLAMP: NONE

DESCRIBE FILAMENT: N/A

DESCRIBE FILAMENT: NORMAL

LEFT TURN INDICATOR BROKEN: ☒ YES ☐ NO

RIGHT TURN INDICATOR BROKEN: ☐ YES ☒ NO

DESCRIBE FILAMENT: N/A

DESCRIBE FILAMENT: NORMAL

NOTE ANY AUXILIARY LIGHTING, TYPE, CONDITION, AND IF IN USE: NONE

NOTE LOCATION OF ANY PHYSICAL EVIDENCE: _____

NOTE WEATHER CONDITION: CLEAR

NOTE ROAD CONDITION: DRY

COMMENTS: _____

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 2 Page 4 of 6
RIGHT SIDE

FRONT

DOOR:

FORCED OPEN BY COLLISION: ☐ YES ☒ NO

LOCKED INSIDE: ☐ YES ☒ NO

JAMMED SHUT: ☐ YES ☒ NO

OPERATE NORMALLY: ☒ YES ☐ NO

WAS WINDOW UP?: ☒ YES ☐ NO

WINDOW BROKEN: ☐ YES ☒ NO

BROKEN GLASS: ☐ INSIDE ☐ OUTSIDE

OUTSIDE MIRROR CONDITION:

BROKEN BEFORE ACCIDENT: ☐ YES ☒ NO

BROKEN AFTER ACCIDENT: ☐ YES ☒ NO

REAR

IS THERE A REAR DOOR? ☒ YES ☐ NO

FORCED OPEN BY COLLISION: ☐ YES ☒ NO

LOCKED INSIDE: ☐ YES ☒ NO

JAMMED SHUT: ☐ YES ☒ NO

OPERATE NORMALLY: ☒ YES ☐ NO

IS THERE A REAR WINDOW? ☒ YES ☐ NO

WAS THE WINDOW UP? ☒ YES ☐ NO

WINDOW BROKEN: ☐ YES ☒ NO

BROKEN GLASS: ☐ INSIDE ☐ OUTSIDE

NOTE ANY OTHER CONDITIONS OF THE RIGHT SIDE OF THE VEHICLE

REAR OF VEHICLE

LEFT TAIL LAMP BROKEN: ☐ YES ☒ NO

AMOUNT OF DIRT ON LENS: NONE

DESCRIBE FILAMENT: NORMAL

LEFT TURN INDICATOR BROKEN: ☐ YES ☒ NO

DESCRIBE FILAMENT: NORMAL

BACK UP LIGHTS CONDITION: GOOD

REAR EXHAUST CONDITION: ☒ GOOD

RIGHT TAIL LAMP BROKEN: ☐ YES ☒ NO

AMOUNT OF DIRT ON LENS: NONE

DESCRIBE FILAMENT: NORMAL

RIGHT TURN INDICATOR BROKEN: ☐ YES ☒ NO

DESCRIBE FILAMENT: NORMAL

REAR LENSES REFLECTIVE: ☒ YES ☐ NO

OTHER: _____

VEHICLE INSPECTION REPORT FOR MAJOR CRASH

Vehicle # 2 Page 5 of 6

TOWING AND UNDERCARRIAGE

TOWING ? ☐ YES ☒ NO WHAT ? _____

HITCH TYPE: BUMPER

HITCH BROKEN ? ☐ YES ☒ NO WHERE ? _____

TYPE OF LIGHTING ON TRAILER:

BRAKES OF TRAILER: ☐ YES ☐ NO TYPE ? _____

BREAK AWAY DEVICE: ☐ YES ☐ NO TYPE ? _____

NOTE ANY OTHER CONDITIONS

UNDERCARRIAGE

CONDITION OF DRIVE SHAFT: ☒ GOOD OTHER: _____

CONDITION OF SHOCKS: ☒ GOOD OTHER: FRONT LEFT SHOCK DAMAGED

CONDITION OF EXHAUST: ☒ GOOD OTHER: _____









Texas - Department of Motor Vehicles [Owners] Detail

Record Details

<i>Owner Name</i> RUSSELL BAUKUS NICOLE BAUKUS	<i>Owner Street</i> 29618 WILDFERN TRAIL	<i>Owner City</i> SPRING	<i>Owner State</i> TX
<i>Owner ZIP Code</i> 77386-	<i>Previous Owner Name</i> PLANET FORD	<i>Previous Owner City</i> SPRING	<i>Previous Owner State</i> TX
<i>Renewal Notice Street</i>	<i>Renewal Notice City</i>	<i>Renewal Notice State</i>	<i>Renewal Notice ZIP Code</i>
<i>Renewal Notice ZIP+4</i>	<i>License Plate Number</i> AE48892	<i>Previous License Plate Number</i> AE48892	<i>Previous Expiration Month</i> 03
<i>Previous Expiration Year</i> 2012	<i>Registration Expiration Year</i> 2013	<i>Registration Expiration Month</i> 03	<i>Registration Effective</i> Apr 4 2012
<i>Title Date</i> Feb 11 2010	<i>Ownership Information</i> 22 = REPOSSESSION	<i>Model Year</i> 2006	<i>Make</i> FORD
<i>Model</i> F1	<i>Model Description</i> FORDF1	<i>Vehicle Body Type</i> PK = PICKUP	<i>Vehicle Major Color[Color Group]</i> GRAY (Color Group GRAY)
<i>Vehicle Minor Color[Color Group]</i>	<i>Vehicle Class Code</i> TRK<=1	<i>Vehicle Tonnage</i> 0050	<i>Vehicle Sales Price</i> 0001570000
<i>Vehicle Sold Date</i> 00000000	<i>Vehicle Empty Weight</i> 005000	<i>Vehicle Gross Weight</i> 006000	<i>Vin Number</i> 1FTRW12W16FA97888
<i>Bonded Title Information</i> none found	<i>Document Type Information</i> 01 = REGULAR TITLE	<i>Vehicle Odometer Information</i> A = ACUTAL MILEAGE	<i>Diesel Information</i> 0 = VEHICLE IS NOT DIESEL POWERED
<i>DOT Standards Information</i> 0 = VEHICLE DOES NOT MEET STANDARDS	<i>DPS Stolen Indicator</i> 0 = VEHICLE IS NOT STOLEN	<i>Registration Exemption</i> 0 = VEHICLE IS NOT EXEMPT FROM REGISTRATION FEES	<i>Fixed Bed Weight Information</i> 0 = VEHICLE DOES NOT HAVE OVER 2/3 OF BED WITH PERMANENTLY MOUNTED EQUIPMENT
<i>Flood Damage Information</i> 0 = VEHICLE HAS NO FLOOD DAMAGE	<i>Government Ownership Information</i> 0 = VEHICLE IS NOT U.S. GOVERNMENT OWNED	<i>Title Hot Check Information</i> 0 = NO HOT CHECK EXISTS FOR TITLE APPLICATION	<i>Inspection Waived Information</i> 0 = TEXAS SAFETY INSPECTION IS NOT WAIVED
<i>Junk Title Information</i> 0 = VEHICLE HAS NO JUNK RECORDS	<i>Permit Required Information</i> 0 = NO PERMIT REQUIRED	<i>Rebuilt Information</i> 0 = NEVER SALVAGED	<i>Reconstructed Information</i> 0 = NOT A RECONSTRUCTED VEHICLE

<i>Survivorship Agreement Information</i> 0 = SURVIORSHIP AGGREEMENT IS NOT PART OF THE VEHICLE'S TITLE	<i>Title Revoked Information</i> 0 = TEXAS TITLE IS NOT REVOKED	<i>DPS Suspension Information</i> 0 = SUSPENSION NOT ISSUED	<i>Heavy Use Tax Information</i> 0 = VEHICLE IS EXEMPT FROM PROOF OF PAYMENT FOR THE HEAVY VEHICLE USE TAX
<i>Registration Validity Information</i> 0 = REGISTRATION IS VALID	<i>Registration Hot Check Information</i> 0 = NO HOT CHECK ISSUED FOR REGISTRATION OF VEHICLE	<i>License Plate Seizure Information</i> 0 = REGISTRATION PLATES NOT SEIZED	<i>Registration Sticker Seizure Information</i> 0 = REGISTRATION STICKER NOT SEIZED
<i>Electronic Title Information</i> 2 = NEGOTIABLE TITLE ON PAPER	<i>Lemon Law Information</i> 0 = VEHICLE HAS NOT BEEN IDENTIFIED AS BEING REAQUIRED TO DO LEMON LAW COMPLAINTS		
<i>Above information as provided by state - below are our annotations</i>			
<i>Click here for more vehicles at this address</i> 29618 Wildfern Trl Spring, TX 77386-5103	<i>Click here for more vehicles in this area</i> 29618 Wildfern Trl Spring, TX 77386-5103	<i>Plate Number</i> LPAE48892	

Lien Holders

<i>Lien Holder Postion</i> 1	<i>Lien Date</i> 20100105
---------------------------------	------------------------------

Lien Holder Information

<i>Lien Holder Name</i> FORD MOTOR CREDIT COMPANY	<i>Lien Holder Number</i> 044260305	<i>Street</i> P.O. BOX 105704	<i>Street (cont)</i>
<i>City</i> ATLANTA	<i>State</i> GA	<i>Zip Code</i> 30348-	<i>Country</i>

Certified Lien Holders

none found

I 'Look-up' has been deducted from your account 008124570-UID total on November 22, 2017 at 14:35:31.

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State's Exhibit 9
(Affidavit of Kambiz Duran)

**STATE OF TEXAS
COUNTY OF MONTGOMERY**

AFFIDAVIT

Before me, the undersigned notary public, personally appeared Kambiz Duran, who upon being duly sworn, deposed and stated the following:

My name is Kambiz Duran. I am over twenty-one years of age, of sound mind, and fully competent to testify to the following facts, which are within my personal knowledge.

I was at On The Rox on the night of June 28, 2012, into the early-morning hours of June 29, 2012. I remember seeing Nicole Baukus at On The Rox that night. Before that night, I had met Nicole once before, approximately two to four weeks prior to June 28, 2012. We met through mutual friends.

On the night of June 28, 2012, most of my interactions with Nicole were fairly brief. The bar was hosting a game night in which winners of the card game “Blackjack” would receive a token for a free drink at the bar. I played this game and won several tokens—more than I could use for myself—so I cashed in some of those tokens in exchange for drinks that I gave to multiple people, including Nicole. I do not remember for sure, but I may have given Nicole my phone number that night. My number at that time was 832-512-6712.

I left On The Rox when it closed, at approximately 2:00 a.m. I remember that Nicole and I took a few shots before I closed out my tab, but I do not know whether Nicole was still there when I left. When I left, I went straight home to where I was living then: 3030 Tall Tree Ridge Way, Spring, Texas 77389. I drove southbound on I45 to the Spring Stuebner Road exit, where I took a right to go westbound on Spring Stuebner, to get home. It would take me at most approximately fifteen minutes to get home on that route.

I did not meet up with Nicole after I left On The Rox, and Nicole and I never arranged to meet with each other that night or in the future. At some point that night, I received a missed call from the phone number 281-636-7154, which I now believe could have been Nicole. I responded via text

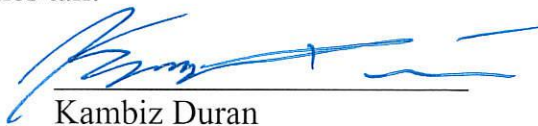
message to that number by asking, "Who is this?" but I never received a response. A screen shot of that message from my phone is attached to this affidavit as Appendix A.

I learned the next morning that Nicole had been in a crash and was arrested. I exchanged text messages with a mutual friend of Nicole's and myself—Romi Flowers—in which we discussed an article from the Montgomery County Police Reporter about Nicole and the crash. A screen shot of that message exchange is attached to this affidavit as Appendix B.

Before I learned about the crash, I did not know what kind of vehicle Nicole drove. I have never been inside Nicole's vehicle, and I was not driving Nicole's vehicle at the time of the crash. I was at home, likely asleep.

On October 27, 2017, I met with three representatives from the Montgomery County District Attorney's Office and discussed my memory of the night of June 28, 2012 and early morning of June 29, 2012. I drove myself to the meeting and parked outside of the District Attorney's Office. At the conclusion of the meeting, Investigator John Stephenson and Assistant District Attorney Andrew James followed me to my car and took photographs of the driver's seat position in my car. Prior to leaving my car for the meeting, I did not know that anyone had any intention of photographing the inside of my vehicle. The seat position was not altered for the photographs and is indicative of the natural seating position in which I regularly operate my car. The photographs taken by Mr. Stephenson are a true and accurate depiction of my natural seat position and are attached to this affidavit as Appendix C.

At the time of the crash—and still now—I stand approximately five feet, six inches or five feet, seven inches tall.

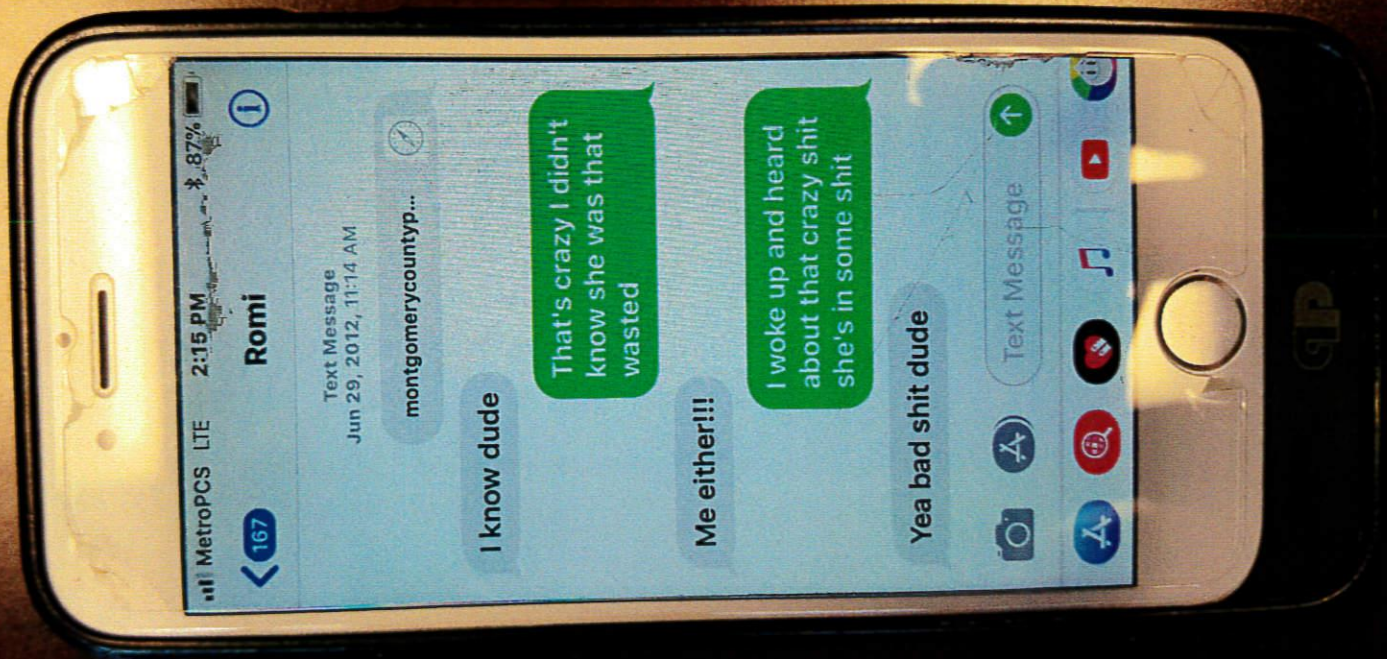

Kambiz Duran

Signed and sworn to before me, the undersigned notary public, on this 21st

day of November, 2017.




NOTARY PUBLIC
Montgomery County, Texas











State's Exhibit 10
(Affidavit of Steven Binder)

STATE OF MICHIGAN
COUNTY OF OAKLAND

AFFIDAVIT OF STEVEN BINDER

STEVEN BINDER, being first duly sworn, deposes and states the following:

1. My name is Steven Binder. I am over the age of eighteen and am competent to make this affidavit. I have personal knowledge of the facts contained herein and certify, based upon my personal knowledge, that they are true and correct.

2. I am currently employed by Autoliv ASP, Inc. ("Autoliv"), and am responsible for, among other things, performing data retrieval on restraint control modules manufactured and supplied by Autoliv and predecessor companies. I joined Autoliv in April 2002 and have been performing data retrieval on Autoliv supplied restraint control modules for over fifteen (15) years utilizing proprietary software owned by Autoliv. Prior to my employment with Autoliv, I worked for Visteon Corporation and Ford Motor Company. Since September 1999, I have spent my career working on, and performing, data retrieval on restraint control modules manufactured by Ford, Visteon, and Autoliv.

3. On or about November 15, 2017, I was informed that the Montgomery County District Attorney's Office had sent a request, along with a Court Order executed and dated November 9, 2017 (hereinafter the "Request"), to Autoliv seeking the retrieval of crash information recorded by a restraint control module which was installed in a 2006 model year Ford F-150 (VIN No. 1FTRW12W16FA97888). Based upon the age of the vehicle, and my personal knowledge, original equipment restraint control modules supplied for this vehicle would have been manufactured by Autoliv, and Autoliv's proprietary software can be utilized to retrieve crash information from those restraint control modules.

4. I received Restraint Control Module bearing serial no. 24A712193121 from the Montgomery County District Attorney's Office on November 15, 2017.


5. Pursuant to the Request, I performed a download of the module to retrieve the crash information recorded in the restraint control module's memory. The attached Restraint Control Module Analysis report (the "Report") provides a summary of the crash information stored in this module, including a copy of the hexadecimal, or raw data, which is decoded on page 1 of the Report. At the time the recorded event occurred, the occupant classification system of the module indicated that the passenger front seat was empty.

6. Upon completion of the download and my authoring of the attached Report, I returned the module to the Montgomery County District Attorney's Office via UPS delivery on November 16, 2017, with delivery confirmed on November 20, 2017.

Further affiant sayeth not.

Subscribed and sworn to before me
this 22 day of November, 2017.


STEVEN BINDER


Deborah A. Cox, NOTARY PUBLIC
My Commission Expires: 10/13/2023

DEBORAH A. COX
Notary Public, State of Michigan
County of Macomb
My Commission Expires Oct. 13, 2023
Acting in the County of DAKLAND

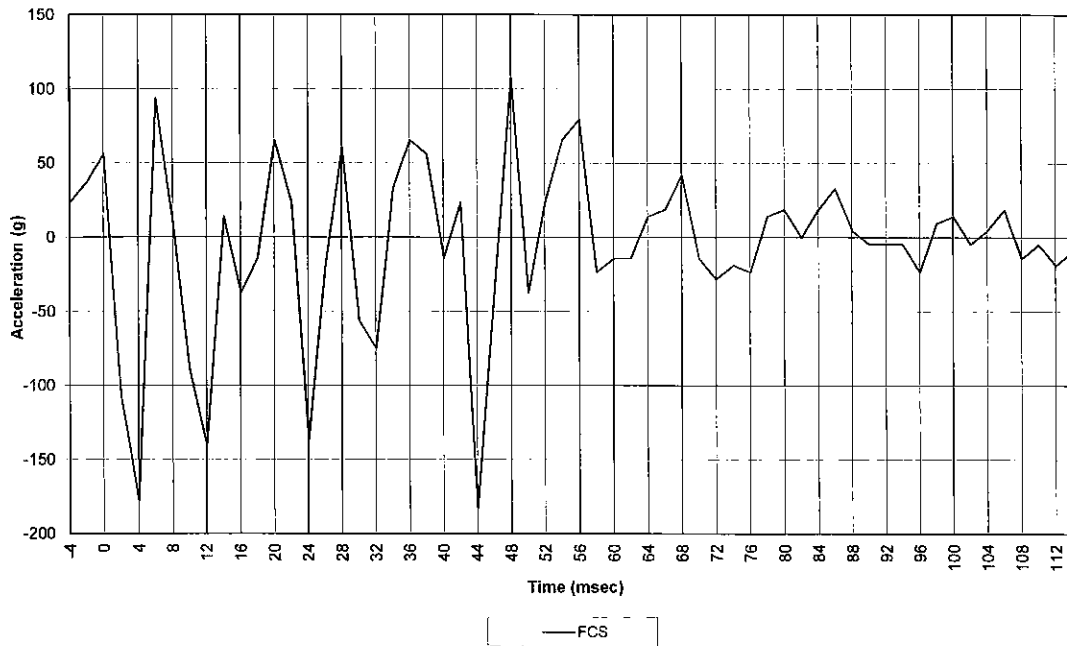
RESTRAINT CONTROL MODULE REPORT

REPORT INFORMATION		RESTRAINT CONTROL MODULE		HISTORICAL RESTRAINT CONTROL MODULE DIAGNOSTIC CODES	
ID #	J287	TYPE	ARM461+	(Codes are listed in the order in which they are detected)	
ID	Montgomery County	PART #	6L34-14B321-BA	PAD_LAMP_SHORT_TO_GROUND_OR_OPEN	
REPORT DATE	November 16, 2017	SERIAL #	24A712193121	1 Key-ons with the code present	
CUSTOMER CONTACT		BUILD DATE	January 29, 2006	Code cleared	
NAME		VEHICLE INFORMATION		PAD_LAMP_SHORT_TO_GROUND_OR_OPEN	
COMPANY	Andrew James	MODEL YR.	06	2 Key-ons with the code present	
POSITION	Montgomery County District Attorney's Office	NAME	F190	Code cleared	
PHONE	Assistant District Attorney	CODE	P221	CRASH_MEMORY_FULL	
EMAIL	936-538-3551	VIN	1FTRW12W16FA97888	256 or greater key-ons with the code present	
	andrew.james@mcx.org	MILEAGE	Data not supplied	0 Key-ons since the code was last detected	
RESTRAINT CONTROL MODULE ANALYSIS					
<p>1. The restraint control module recorded a command to deploy the following restraints at the following fire times. The fire times are referenced to frontal algorithm wakeup:</p> <ul style="list-style-type: none"> - Driver Front Airbag Stage 1 = 12.624ms - Driver Front Airbag Stage 2 (Disposal after 112.528ms) <p>The safing criteria was met 1ms after algorithm wakeup.</p> <p>There were between 8 to 9 minutes from key-on until frontal algorithm wakeup.</p> <p>2. The system status was the following at the time of the event:</p> <ul style="list-style-type: none"> - Driver Seat Track "Forward" - Driver "Unbuckled" - Passenger "Unbuckled" - Occupant Classification "Empty" <p>3. There were no diagnostic codes detected between key-on and the onset of the event.</p> <p>4. The diagnostic codes are listed in the next column.</p>					
				HISTORICAL RESTRAINT CONTROL MODULE DIAGNOSTIC CODES DETECTED WHILE IN A LOW BATTERY CONDITION BPS_VOLTAGE_HIGH CHARGE_PUMP_LOW ASIC_1_VZ_12 ASIC_1_VZ_34 ASIC_2_VZ_12 ASIC_2_MISBUILD ASIC_1_EVZ2 ASIC_2_EVZ2 CASE_GROUND_HIGH	

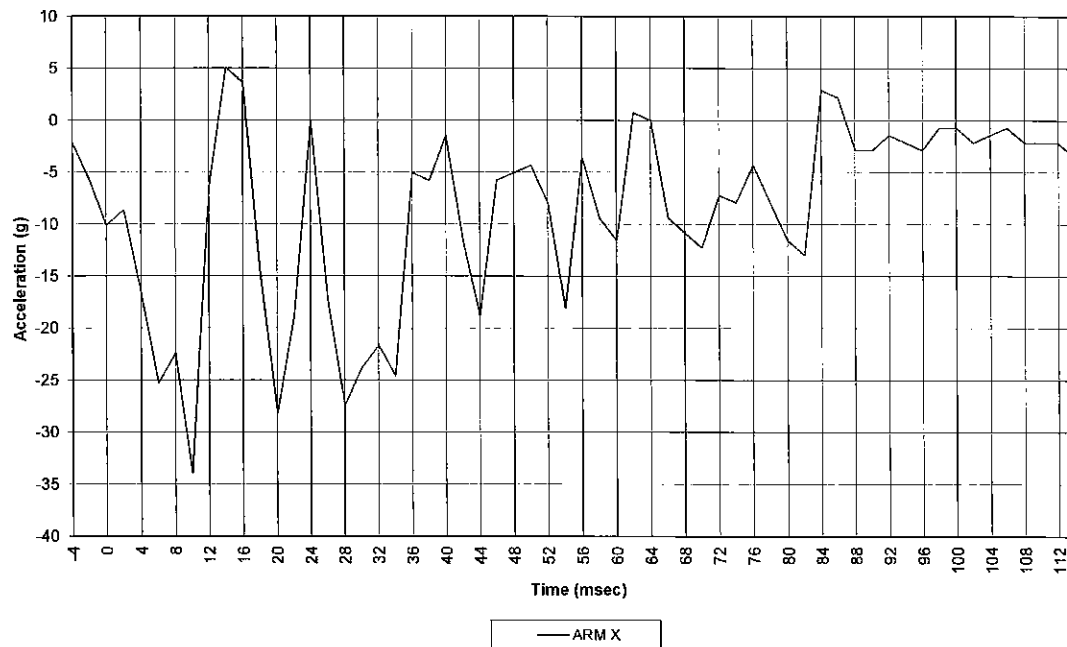
CONFIDENTIAL AND PROPRIETARY
1 OF 1

J287 06 F150 Montgomery County Acceleration and Delta Velocity Charts

Frontal Algorithm Acceleration Crash Data
(0msec = Algorithm Wakeup)

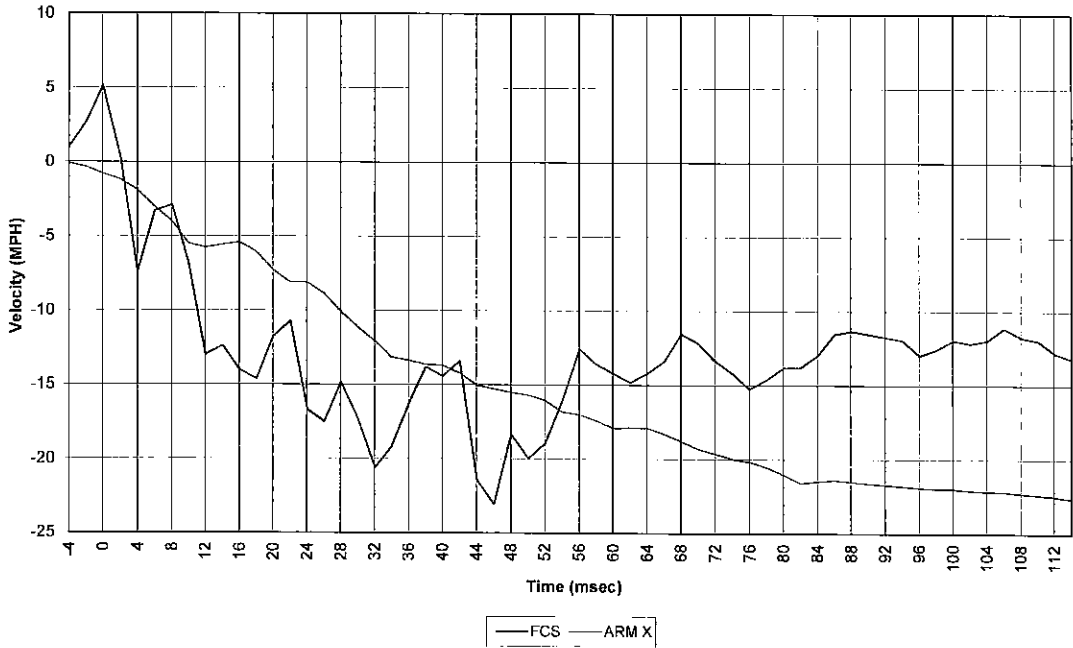


Frontal Algorithm Acceleration Crash Data
(0msec = Algorithm Wakeup)



J287 06 F150 Montgomery County
Acceleration and Delta Velocity Charts Continued

Frontal Algorithm Velocity Crash Data
(0msec = Algorithm Wakeup)



Page 1

Page 1

j287 3121.abs

S11303E007060B19050D10FF000D0F110A0B060B64
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S9030000FC

From: Ingrid Evert
To: James, Andrew; Chapell, Brent
Cc: Stephenson, John
Subject: RE: 2006 Ford F-150 RCM Report + Affidavit
Date: Tuesday, November 28, 2017 8:52:58 AM

Good Morning Andrew –

Here's what I was able to ascertain. Your questions below for reference.

Re 1 below: Based upon the RCM download provided, the “empty” classification means that either 1) the seat was truly empty, or 2) there was something in the seat so light (not heavy enough) to trigger the next classification up which is “occupied below threshold.” The data is not specific enough to say definitively why the OCS reads empty. (The third classification is “occupied above threshold.”)

Re 1 (3) below: if there was a malfunction with the OCS a fault would be found in the system and would be present during the readout of the RCM. There are no faults in the OCS per the report provided by Autoliv.

Re 1 (c) below: “Empty” classification isn’t based on airbag deployment (the question seems backwards). Airbag deployment is based on crash severity, whether the occupant is buckled, and what the OCS registers (above threshold, below threshold, or empty). This is outlined in the owner guide. The OCS classification(s) are also outlined in the owner guide. If the owner guide is no longer in the vehicle you can find it publicly at:
<https://owner.ford.com/content/ford-dot-com/en/tools/account/how-tos/owner-manuals.html>

Re 2 below: If Autoliv was able to do a successful readout of the RCM, then there is no issue.

The decision on an affidavit comes from somewhere else in Ford, not engineering. It is a process. Let me know if this information is helpful to you and if you have what you need. Thanks!

1. We see on the report that the occupant classification is “empty.” It is our understanding that the airbag in the passenger seat could not be deployed in a crash of this force under three scenarios: (1) there is no occupant in the seat; (2) the occupant or item in the seat is below the weight threshold that would trigger airbag deployment; or (3) the occupant or item in the seat is above the weight threshold, but the airbag does not deploy due to a malfunction or manual deactivation.
 - a. Is this a fair assessment of potential scenarios regarding the airbag?
 - b. And, if so, does the data from the RCM show which of these scenarios were in play? In other words, is the data specific enough to show *why* the occupant classification is “empty”?
 - c. Is the “empty” classification based on any data other than that related to the airbag deployment? If so, what are those considerations?
2. The truck from which the RCM was pulled has been stored outdoors with little to no coverage from the elements for approximately five years. The property is not known to have flooded,

but again, the truck was subject to rainstorms, extreme heat, and freezing cold. Granted, we had to cut the RCM out of a carpeted compartment under the middle console. With all that being said, could that exposure to elements affect the data retrieval? In other words, should we be concerned about the reliability of the data based on the storage environment?

3. Are you willing to execute an affidavit detailing your findings? This does not need to be lengthy; but essentially, we are looking for the conclusion that the passenger was unbuckled and that the occupant status was "empty"; what those designations mean; and how you know them to be true based on the data.


Ingrid A. Evert

Bowman and Brooke LLP

Direct: 1.248.205.3374

Seating and Safety Restraints

Returning the seat to seating position

 Before returning the seatback to its original position, make sure that cargo or any objects are not trapped underneath the seatback. After returning the seatback to its original position, pull on the seatback to ensure that it has fully latched. An unlatched seat may become dangerous in the event of a sudden stop or collision.

1. Pull control on the side of the seat to release seat cushion from storage position.
2. Push seat cushion down until it locks into horizontal position.

SAFETY RESTRAINTS

Personal Safety System™

The Personal Safety System™ provides an improved overall level of frontal crash protection to front seat occupants and is designed to help further reduce the risk of airbag-related injuries. The system is able to analyze different occupant classifications and conditions and crash severity before activating the appropriate safety devices to help better protect a range of occupants in a variety of frontal crash situations.

Your vehicle's Personal Safety System™ consists of:

- Driver and passenger dual-stage airbag supplemental restraints.
- Front outboard safety belts with pretensioners, energy management retractors, and safety belt usage sensors.
- Driver's seat position sensor.
- Front crash severity sensor.
- Front passenger sensing system
- Passenger Airbag Off indicator light.
- Restraints Control Module (RCM) with impact and safing sensors.
- Restraint system warning light and back-up tone.
- The electrical wiring for the airbags, crash sensor(s), safety belt pretensioners, front safety belt usage sensors, driver seat position sensor, and indicator lights.

Seating and Safety Restraints

How does the Personal Safety System™ work?

The Personal Safety System™ can adapt the deployment strategy of your vehicle's safety devices according to crash severity and occupant classification and conditions. A collection of crash and occupant sensors provides information to the Restraints Control Module (RCM). During a crash, the RCM activates the safety belt pretensioners and/or either none, one, or both stages of the dual-stage airbag supplemental restraints based on crash severity and occupant classification and conditions.

The fact that the pretensioners or airbags did not activate for both front seat occupants in a collision does not mean that something is wrong with the system. Rather, it means the Personal Safety System™ determined the accident conditions (crash severity, belt usage, etc.) were not appropriate to activate these safety devices. Front airbags and pretensioners are designed to activate only in frontal and near-frontal collisions, not rollovers, side-impacts, or rear-impacts unless the collision causes sufficient longitudinal deceleration.

Driver and passenger dual-stage airbag supplemental restraints

The dual-stage airbags offer the capability to tailor the level of airbag inflation energy. A lower, less forceful energy level is provided for more common, moderate-severity impacts. A higher energy level is used for the most severe impacts. Refer to *Airbag Supplemental Restraints* section in this chapter.

Front crash severity sensor

The front crash severity sensor enhances the ability to detect the severity of an impact. Positioned up front, it provides valuable information early in the crash event on the severity of the impact. This allows your Personal Safety System™ to distinguish between different levels of crash severity and modify the deployment strategy of the dual-stage airbags and safety belt pretensioners.

Driver's seat position sensor

The driver's seat position sensor allows your Personal Safety System™ to tailor the deployment level of the driver dual-stage airbag based on seat position. The system is designed to help protect smaller drivers sitting close to the driver airbag by providing a lower airbag output level.

Front passenger sensing system

For airbags to do their job they must inflate with great force, and this force can pose a potentially deadly risk to occupants that are very close to the airbag when it begins to inflate. For some occupants, like infants in

Seating and Safety Restraints

rear-facing child seats, this occurs because they are initially sitting very close to the airbag. For other occupants, this occurs when the occupant is not properly restrained by safety belts or child safety seats and they move forward during pre-crash braking. The most effective way to reduce the risk of unnecessary injuries is to make sure all occupants are properly restrained. Accident statistics suggest that children are much safer when properly restrained in the rear seating positions than in the front.



Air bags can kill or injure a child in a child seat. NEVER place a rear-facing child seat in front of an active air bag. If you must use a forward-facing child seat in the front seat, move the seat all the way back.



Always transport children 12 years old and under in the back seat and always properly use appropriate child restraints.

The front passenger sensing system can automatically turn off the passenger front airbag when a rear facing child seat, a forward-facing child restraint, or a booster seat is detected. Even with this technology, parents are **STRONGLY** encouraged to always properly restrain children in the rear seat. The sensor also turns off the airbag when the passenger seat is empty to prevent unnecessary replacement of the airbag(s) after a collision.

When the front passenger seat is occupied and the sensing system has turned off the passenger's frontal airbag, the "pass airbag off" indicator will light and stay lit to remind you that the front passenger frontal airbag is off. See *Front passenger sensing system* in the *Airbag supplemental restraint system (SRS)* section of this chapter.

Front safety belt usage sensors

The front safety belt usage sensors detect whether or not the driver and front outboard passenger safety belts are fastened. This information allows your Personal Safety System[®] to tailor the airbag deployment and safety belt pretensioner activation depending upon safety belt usage. Refer to *Safety belt usage sensors* later in this chapter.

Front outboard safety belt pretensioners

The safety belt pretensioners at the front outboard seating positions are designed to tighten the safety belts firmly against the occupant's body during frontal collisions. This helps increase the effectiveness of the safety belts. In frontal collisions, the safety belt pretensioners can be activated alone or, if the collision is of sufficient severity, together with the front airbags.

Seating and Safety Restraints

Front outboard safety belt energy management retractors

The front outboard safety belt energy management retractors allow webbing to be pulled out of the retractor in a gradual and controlled manner in response to the occupant's forward momentum. This helps reduce the risk of force-related injuries to the occupant's chest by limiting the load on the occupant. Refer to *Energy management retractors* section in this chapter.

Determining if the Personal Safety System™ is operational

The Personal Safety System™ uses a warning light in the instrument cluster or a back-up tone to indicate the condition of the system. Refer to the *Warning lights and chimes* section in the *Instrument Cluster* chapter. Routine maintenance of the Personal Safety System™ is not required.

The Restraints Control Module (RCM) monitors its own internal circuits and the circuits for the airbag supplemental restraints, crash sensor(s), safety belt pretensioners, front safety belt buckle sensors, and the driver seat position sensor. In addition, the RCM also monitors the restraints warning light in the instrument cluster. A difficulty with the system is indicated by one or more of the following.

- The warning light will either flash or stay lit.
- The warning light will not illuminate immediately after ignition is turned on.
- A series of five beeps will be heard. The tone pattern will repeat periodically until the problem and warning light are repaired.

If any of these things happen, even intermittently, have the Personal Safety System™ serviced at an authorized dealer immediately. Unless serviced, the system may not function properly in the event of a collision.

Safety restraints precautions



Always drive and ride with your seatback upright and the lap belt snug and low across the hips.



To reduce the risk of injury, make sure children sit in the back seat where they can be properly restrained.

Seating and Safety Restraints



Never let a passenger hold a child on his or her lap while the vehicle is moving. The passenger cannot protect the child from injury in a collision.



All occupants of the vehicle, including the driver, should always properly wear their safety belts, even when an airbag supplemental restraint system (SRS) is provided.



It is extremely dangerous to ride in a cargo area, inside or outside of a vehicle. In a collision, people riding in these areas are more likely to be seriously injured or killed. Do not allow people to ride in any area of your vehicle that is not equipped with seats and safety belts. Be sure everyone in your vehicle is in a seat and using a safety belt properly.



In a rollover crash, an unbelted person is significantly more likely to die than a person wearing a safety belt.



Each seating position in your vehicle has a specific safety belt assembly which is made up of one buckle and one tongue that are designed to be used as a pair. 1) Use the shoulder belt on the outside shoulder only. Never wear the shoulder belt under the arm. 2) Never swing the safety belt around your neck over the inside shoulder. 3) Never use a single belt for more than one person.

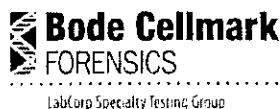


Always transport children 12 years old and under in the back seat and always properly use appropriate child restraints.



Safety belts and seats can become hot in a vehicle that has been closed up in sunny weather; they could burn a small child. Check seat covers and buckles before you place a child anywhere near them.

State's Exhibit 11
(Forensic Case Report for Agency Case # HOU-1206-04868)



10430 Furnace Road, Suite 107
Lorton, VA 22079
Phone: 703-646-9740

Forensic Case Report
November 15, 2017

To:
Terance Greenwood
Montgomery County Sheriff's Office
1 Criminal Justice Drive
Conroe, TX 77301

Bode Cellmark Case #: CCC1738-0266
Agency Case #: HOU-1206-04868

Partial list of evidence received on October 27, 2017 for possible DNA analysis:
(Evidence received and evaluated, but not isolated for possible DNA analysis, is listed in the case inventory.)

<u>Bode Cellmark Sample Name</u>	<u>Agency Sample ID</u>	<u>Agency Description</u>
CCC1738-0266-E01	CI-180799	Evidence envelope containing 2 swabs (1 wet, 1 dry) collected from outside of [sic] white sock (excluding visible blood staining)
CCC1738-0266-E02	CI-180802	Evidence envelope containing 2 swabs in white swab box collected from inside of white - right tennis shoe.
CCC1738-0266-E03	CI-180802	Evidence envelope containing 2 swabs in white swab box collected from exterior of right tennis shoe.
CCC1738-0266-E04	CI-180802	Evidence envelope containing 2 swabs in white swab box collected from interior of left tennis shoe.
CCC1738-0266-E05	CI-180802	Evidence envelope containing 2 swabs in white swab box collected from exterior of left tennis shoe.
CCC1738-0266-E06	CI-180835 [Item 1G]	Coin size envelope marked item 1G-gear shift swabs from Ford F-150
CCC1738-0266-E07	CI-180835 [Item 1E]	Coin size envelope marked item 1E-swabs of front side of airbag of Ford F-150
CCC1738-0266-E08	CI-180835 [Item 1F]	Coin size envelope marked item 1F-swabs of back side of airbag of Ford F-150
CCC1738-0266-E09	CI-180835 [Item 1B]	Coin size envelope marked item 1B-trace evidence (hair) on front driver's side armrest of Ford F-150
CCC1738-0266-E10	CI-180835 [Item 1M]	Coin size envelope marked item 1M-swab of stain on panel beneath steering wheel of Ford F-150
CCC1738-0266-E11	CI-180835 [Item 1L]	Coin size envelope marked item 1L-possible tissue from front passenger door armrest of Ford F-150

List of evidence received on November 2, 2017 for possible DNA analysis:

<u>Bode Cellmark Sample Name</u>	<u>Agency Sample ID</u>	<u>Agency Description</u>
CCC1738-0266-R13	CI-181263	Evidence envelope containing 2- Buccal swabs from Nicole Baukus

Forensic Biology Conclusions:

1. Sample CCC1738-0266-E09 contained three apparent human hairs that are not suitable for nuclear DNA analysis but may be suitable for mitochondrial DNA analysis. These apparent human hairs were not processed further.

Male DNA Screening Conclusions:

The evidence was screened to identify samples containing male specific DNA.

1. Male DNA was indicated in the following sample. This sample was processed further in Y-STRs:

CCC1738-0266-E03

2. Due to the limited amount of male DNA detected, the following samples were inconclusive for the presence of male DNA. These samples were processed further in Y-STRs:

CCC1738-0266-E01
CCC1738-0266-E02
CCC1738-0266-E04

3. Due to the limited amount of male DNA detected, the following sample was inconclusive for the presence of male DNA. This sample was processed further in STRs:

CCC1738-0266-E11

4. Male DNA was not detected in the following sample. This sample was processed further in Y-STRs:

CCC1738-0226-E05

5. Male DNA was not detected in the following samples. These samples were not processed further:

CCC1738-0226-E06
CCC1738-0226-E07
CCC1738-0226-E08
CCC1738-0226-E10

STR Processing, Results, Conclusions, and Statistics:

The evidence was processed for DNA typing using the Investigator® 24plex QS kit.

1. A DNA profile was obtained from sample CCC1738-0266-R13 (Nicole Baukas).
2. The partial DNA profile obtained from sample CCC1738-0266-E11 is consistent with a female contributor.

STR Processing, Results, Conclusions, and Statistics (continued):

This partial DNA profile matches the DNA profile obtained from sample CCC1738-0266-R13 (Nicole Baukas).

The probability of randomly selecting an unrelated individual with this DNA profile at 21 of 21 loci tested is approximately:

- 1 in 22 nonillion in the US Caucasian population
- 1 in 2.7 decillion in the US African American population
- 1 in 330 nonillion in the US Hispanic population

See **Table 1** for summary of alleles reported for each sample.

Y-STR Processing, Results, and Conclusions:

The evidence was processed for DNA typing by analysis of Short Tandem Repeat (STR) loci specific to the male Y chromosome (also called Y-STRs) using the Promega PowerPlex® Y23 kit.

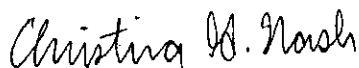
1. A partial Y-STR profile was obtained from sample CCC1738-0266-E01. Due to the limited data obtained, no conclusions can be made on this partial profile.
2. No Y-STR profile was obtained from samples CCC1738-0266-E02, CCC1738-0266-E04, and CCC1738-0266-E05.
3. The partial Y-STR profile obtained from sample CCC1738-0266-E03 is consistent with a mixture of three or more individuals. Due to the possibility of allelic drop out, no conclusions can be made on this mixture profile.

See **Table 2** for summary of alleles reported for each sample.

Notes:

1. Testing performed for this case is in compliance with accredited procedures under the laboratory's ISO/IEC 17025 accreditation issued by ASCLD/LAB. Refer to certificate and scope of accreditation for certificate number ALI-231-T.
2. Any reference to body fluids in evidence descriptions are based on the written descriptions of the samples by the submitting agency.
3. The DNA extracts and submitted evidence will be returned to the Montgomery County Sheriff's Office.
4. Sample CCC1738-0266-R12 was inventoried but not examined further.

Report submitted by,



Christina H. Nash, MSFS
DNA Analyst II
[DNA]



Dywayne Martin, BS
Forensic Biology Analyst I
[Forensic Biology]

Table 1: Analysis of Short Tandem Repeat Loci

Locus	CCC1738-0266-E11a1	CCC1738-0266-R13a1 (Nicole Baukus)
Amelogenin	X, X	X, X
TH01	6, 8	{6, 8}
D3S1358	15, 17	15, 17
vWA	17, 18	17, 18
D21S11	32, 32.2	32, 32.2
TPOX	8, 9	8, 9
DYS391	No Results	No Results
D1S1656	13, 17.3	13, 17.3
D12S391	{15, 23}	15, 23
SE33	21, 29.2	21, 29.2
D10S1248	12, 13	12, 13
D22S1045	11, 14	{11, 14}
D19S433	12, 13	12, 13
D8S1179	11, 12	11, 12
D2S1338	24, 25	24, 25
D2S441	11, 11	11, 11
D18S51	14, 16	14, 16
FGA	21, 23	21, 23
D16S539	9, 13	9, 13
CSF1PO	13, 13	13, 13
D13S317	8, 8	8, 8
D5S818	11, ---	11, 11
D7S820	11, ---	11, 11

--- – Possible additional alleles

{ } – Imbalanced alleles

Table 2: Analysis of Short Tandem Repeat Loci on the Y Chromosome (Y-STR)

Locus	CCC1738-0266- E01a1	CCC1738-0266- E02a1	CCC1738-0266- E03a1	CCC1738-0266- E04a1
DYS576	No Results	No Results	17, 18, (19)	No Results
DYS389 I	No Results	No Results	13, ---	No Results
DYS448	No Results	No Results	19, 20	No Results
DYS389 II	No Results	No Results	29, ---	No Results
DYS19	No Results	No Results	No Results	No Results
DYS391	No Results	No Results	10, (11)	No Results
DYS481	No Results	No Results	22, (23)	No Results
DYS549	13, ---	No Results	11, 13	No Results
DYS533	No Results	No Results	No Results	No Results
DYS438	No Results	No Results	No Results	No Results
DYS437	No Results	No Results	No Results	No Results
DYS570	17, ---	No Results	16, 17, 18, 19	No Results
DYS635	23, ---	No Results	23, ---	No Results
DYS390	23, ---	No Results	23, ---	No Results
DYS439	No Results	No Results	11, ---	No Results
DYS392	No Results	No Results	11, ---	No Results
DYS643	No Results	No Results	No Results	No Results
DYS393	No Results	No Results	(12), 13, (14)	No Results
DYS458	17, ---	No Results	14, (16), 17	No Results
DYS385 a/b	14, ---	No Results	11, 13, (14), 15	No Results
DYS456	No Results	No Results	No Results	No Results
Y-GATA-H4	No Results	No Results	No Results	No Results

--- – Possible additional alleles

() – Minor allele

Table 2: Analysis of Short Tandem Repeat Loci on the Y Chromosome (Y-STR) (continued)

Locus	CCC1738-0266- E05a1
DYS576	No Results
DYS389 I	No Results
DYS448	No Results
DYS389 II	No Results
DYS19	No Results
DYS391	No Results
DYS481	No Results
DYS549	No Results
DYS533	No Results
DYS438	No Results
DYS437	No Results
DYS570	No Results
DYS635	No Results
DYS390	No Results
DYS439	No Results
DYS392	No Results
DYS643	No Results
DYS393	No Results
DYS458	No Results
DYS385 a/b	No Results
DYS456	No Results
Y-GATA-H4	No Results

From: Nash, Christina <mailto:Christina.Nash@bodetech.com>
Sent: Monday, November 06, 2017 10:29 AM
To: Greenwood, Terance Terance.Greenwood@mctx.org; Bivens, Kenneth <Ken.Bivens@mctx.org>
Subject: RE: CCC1738-0266/ HOU-1206-04868 status

Hi Det. Greenwood,

Here are the quant results obtained from the item submitted:

		Small Autosomal	Y - Male			
Sample Name	Agency Descriptions	Quantity (ng/ul)	Quantity (ng/ul)	Male Quantity/ Human Quantity	Degradation Index	Male Status
CCC1738-0266-E01a1	Outside of white sock	0.006	<0.001	9.6%	1.12	INC
CCC1738-0266-E02a1	Inside of white – right shoe	0.005	0.0011	22.1%	1.16	INC
CCC1738-0266-E03a1	Exterior of right shoe	0.024	0.0106	44.3%	1.38	POS
CCC1738-0266-E04a1	Interior of left shoe	0.006	<0.001	6.6%	3.05	INC
CCC1738-0266-E05a1	Exterior of left shoe			---	---	NEG
CCC1738-0266-E06a1	1G – gear shift			---	---	NEG
CCC1738-0266-E07a1	1E – front air bag	<0.001		0%	---	NEG
CCC1738-0266-E08a1	1F – back side airbag			---	---	NEG
CCC1738-0266-E10a1	1M – stain on panel			---	---	NEG
CCC1738-0266-E11a1	1L - tissue	0.021	0.0014	6.7%	1.19	INC

Since the quant values are so low I would not advised splitting the samples to run both STRs and YSTRs. If you are looking for male profiles on the female defendants socks and shoes then I recommend Y-STR testing on samples E01 – E05. We can also preform STR testing on sample E11. We will need to concentrate the samples and consume them to complete the recommended testing. I would not recommend processing samples E06-E10 any further. Please let me know if you have any questions.

Christina H. Nash, MS

DNA Analyst II, Customized Casework
Bode Cellmark Forensics
 10430 Furnace Road, Suite 107
 Lorton, VA 22079
 703-646-9855



From: Nash, Christina
To: [Chapell, Brent](#)
Cc: [Nash, Christina](#); [Greenwood, Terance](#); [James, Andrew](#)
Subject: Re: RE: CCC1738-0266/ HOU-1206-04868 status
Date: Thursday, November 9, 2017 6:14:48 PM

Brent,

Answers below. It is my understanding that you all agreed with the processing plan Det. Greenwood relayed so it is already underway. If you have anymore questions please let me know. It may be better to explain via phone if you still have pending questions. I will be available Monday ~3pm to discuss this case. Please confirm this time if you would like to discuss further.

Christina Nash
Bode Cellmark Forensics
703-646-9855

On Nov 9, 2017 5:43 PM, "Chapell, Brent" <brent.chapell@mctx.org> wrote:

EXTERNAL: This email originated from outside of the organization. Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Christina,

I am one of the prosecutors working this case and going through Terance Greenwood with MCSO. I am seeking a little clarification based on the preliminary testing you have performed in the case below.

1. Why, exactly, would you not recommend performing any further analysis on samples 6-10? Is that because you know that you will not receive any meaningful data and the samples will undoubtedly be consumed? [Correct. We don't expect to obtain any comparable data from those samples.]
2. Will you explain to me how Y-STR results differ from your preliminary results regarding the presence of male DNA. For instance, do you preliminary results merely show that male DNA is present, while Y-STR allows you to develop a profile for potential comparison? [Correct. Quantification is an estimation of how much DNA is present. A DNA profile is what results after the quantification, amplification, and the fragment separation step. These can range from partial, mixture, or single source profiles. The samples mentioned above will likely result in no profiles.]
3. What would be the benefit, if any, of performing Y-STR testing if we did not create a comparable data profile for comparison to other males? [YSTR testing targets male DNA only. If a comparable evidence profile is developed then there is no benefit unless you have a potential suspect and/or other males to compare to. This is because YSTRs are not CODIS eligible so the profile cannot be searched to identify an individual. YSTR testing will also not distinguish between paternally related males. I believe in this case one party is hoping to compare to the male officers in the case who "planted" the shoe and sock. If comparable data is obtained references can be submitted for them to be tested in YSTRs.]
4. How reliable is your preliminary testing regarding the presence of male DNA? In other words, is it possible that if your preliminary testing comes back negative for male DNA, that Y-STR testing could ultimately show that male DNA is, in fact, present? [Our quantification method has been validated for "stop at quant". This means we have tested the limits of the system and know when we can expect or not expect a comparable profile. Although it is highly unlikely it is possible as there is no method that is 100% accurate.]

Thank you for all your assistance with this matter.



Sincerely,

Brent Chapell

Assistant District Attorney

Montgomery County, Texas

From: Nash, Christina [<mailto:Christina.Nash@bodetech.com>]

Sent: Monday, November 06, 2017 11:57 AM

To: Greenwood, Terance <Terance.Greenwood@mctx.org>

Subject: RE: CCC1738-0266/ HOU-1206-04868 status

Answers in red below – as a note, turnaround time will be extended as we await further instructions. Let me know if they have any further questions.

1. Does "INC" mean inconclusive? **YES**
2. If that means inconclusive, what does that mean exactly? **It means male DNA was detected at less than 0.001ng/uL so we cannot confirm or deny that male DNA is present.**
3. On items, E06, E07, E08, and E09, does that mean that those are negative for DNA or negative for male DNA? Are those able to be compared to her known sample? **E06, E07, and E08 were screened for human DNA and were below the limit of detection. They are negative for male DNA. This is quantitation data which simply gives us an estimate of how much DNA is present. DNA profiles have not been developed at this point. Comparisons can only happen if comparable DNA profiles are developed. Based on these quants we do not expect to obtain any comparable data.**
4. When did Bode receive the items originally? **The evidence was received 10/27/17. The reference for Nicole Baukus was not included.**
5. When did they receive the known sample of Baukus after they contacted us that what we thought was the known was only sticks? **11/2/17**

Christina H. Nash, MS

DNA Analyst II, Customized Casework

Bode Cellmark Forensics

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