No. 17A1193

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IN THE SUPREME COURT OF THE UNITED STATES

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LINDA CARTY,

*Petitioner*,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISIONS,

*Respondent.*

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# APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner Linda Carty respectfully requests a 30-day extension of time, to and including July 9, 2018, within which to file a petition for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case, *Ex Parte Carty*, No. WR-61,055-02. The judgment of the Court of Criminal Appeals was entered on February 7, 2018. Justice Alito granted a 30-day extension on April 30, 2018. Unless extended, the time for filing a petition for a writ of certiorari would expire on June 7, 2018. Under this Court's Rule 13.5, this application is being filed at least 10 days before that date.

As explained below, petitioner requests an extension because Supreme Court counsel—who was not substantially involved in the matter below—needs additional time to review the record and study the case law before drafting the petition, and he has conflicting deadlines in other matters.

Respondent does not oppose this application. No execution date has been set.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The *per curiam* opinion of the Court of Criminal Appeals is attached as Exhibit 1. Judge Walker's concurring opinion is attached as Exhibit 2. Judge Richardson's concurring opinion is attached as Exhibit 3. The opinion of the state district court is attached as Exhibit 4.

1. This is a capital case. It raises the question whether and how courts on collateral review must assess the cumulative effects of constitutional errors that infected a trial. By denying petitioner a cumulative evaluation of the harm arising from multiple constitutional violations, the Court of Criminal Appeals undermined the Due Process Clause's bedrock guarantee of a fair trial. A trial may be rendered fundamentally unfair by the combined effect of two constitutional violations just as surely as by one independently prejudicial violation. The Court of Criminal Appeals' refusal to assess the cumulative harm of constitutional errors departs from the decisions of most circuits, including the Fifth Circuit.

2. In 2002, petitioner was convicted of capital murder by a jury in Harris County District Court and sentenced to death. Exhibit 1, at 1-3. Her conviction was affirmed on direct appeal. *Id.* at 3 (citing *Carty* v. *State*, No. AP-74,295 (Tex. Crim. App. Apr. 7, 2004) (not desig. for pub.)).

After state postconviction review, petitioner sought federal habeas relief, raising, as relevant here, a claim of ineffective assistance of counsel. See *Carty* v. *Thaler*, 583 F.3d 244, 246 (5th Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010). The district court denied relief but granted a Certificate of Appealability. See *ibid.*

The Fifth Circuit reviewed petitioner's ineffective-assistance claim *de novo*, rather than under AEDPA's deferential standards, because the Court of Criminal Appeals had not adjudicated that claim. *Id.* at 253. The court held that petitioner's trial counsel had rendered objectively unreasonable performance. *Id.* at 259. As to prejudice, the court found that the testimony occasioned by counsel's error was "undoubtedly damaging" and "provided motive and context for the crime," which "prosecutors emphasized * * * in their closing remarks." *Id.* at 261. The Fifth Circuit declared it a "close case," but nonetheless concluded that petitioner had narrowly failed to demonstrate prejudice under the *Strickland* standard. *Id.*

3. In 2014, petitioner discovered that the prosecution had suppressed numerous items of exculpatory evidence in violation of *Brady* v. *Maryland*, 372 U.S. 83 (1963). The Court of Criminal Appeals granted leave to file a successive

writ, and the state district court held an evidentiary hearing on the newly discovered violations. Exhibit 1, at 1, 3, 4; Exhibit 4, at 1, 3.

The district court found that "[t]he State was operating under a misunderstanding of *Brady*" at the time of trial. Exhibit 4, at 19. Acting pursuant to that misunderstanding, the Harris County District Attorney's Office only turned over impeachment or exculpatory evidence that it independently deemed to be "credible." *Id.* at 19-20. In this case, the State turned over *no* witness statements to the defense prior to trial, other than Carty's own statement. *Id.* at 20.

The district court found that the State violated *Brady* by withholding multiple witness statements (including, among others, the statement of an alleged co-conspirator named Chris Robinson). Moreover, the State improperly concealed evidence that the prosecution had a "deal" with one of its key witnesses (Marvin Caston) "that he would not get prison time if Carty received the death penalty." *Id.* at 21-22. The court held that all of this evidence was "exculpatory or could be used for impeachment purposes." *Id.* at 21-23. Nonetheless, the district court concluded that the withheld *Brady* evidence would not have altered the jury's verdict and thus did not meet the materiality standard. *Id.* at 23.

4. On appeal, petitioner challenged the district court's *Brady* ruling and also urged that the "'cumulative impact of the constitutional errors'"—the newly discovered *Brady* violations combined with the earlier-adjudicated ineffective assistance of counsel—"'violated her state and federal constitutional rights to due

process." Exhibit 1, at 4 (quoting without citation petitioner's Application for Post Conviction Writ of Habeas Corpus, at 56-58 (filed Sept. 10, 2014)).

An eight-judge Court of Criminal Appeals summarily dismissed petitioner's cumulative-error claim "as an abuse of the writ." Exhibit 1, at 4. The court stated only that it "failed to satisfy" the standard for relief on a successive writ. *Ibid.* (citing Tex. Code Crim. Proc. Art. 11.071, § 5(a)).

The Court of Criminal Appeals also affirmed the district court's denial of relief on the *Brady* claim. Exhibit 1, at 4. The court did not take issue with the district court's findings that the State committed numerous *Brady* violations. It instead cursorily affirmed the district court's conclusion that the misconduct did not materially alter the verdict. *Ibid.* Concurring opinions signed by three judges shed more light on the court's *Brady* reasoning. One concurrence discerned that the *Brady* violations were not material because "defense counsel, with or without the Caston deal, could have cross-examined two witness—Caston and Josie Anderson—about whether or not they had been charged by the State at the time of Applicant's trial, could have explored the existence of motive to testify against Applicant, and could have argued that fact to the jury." Exhibit 2, at 5 (Walker, J., concurring). A second concurrence agreed that the *Brady* violations were not material because of what defense counsel "could have" done even without the withheld evidence. Exhibit 3, at 56-57 (Richardson, J., concurring).

5. In denying petitioner a cumulative evaluation of the harm stemming from constitutionally deficient counsel and rampant *Brady* violations, the Court of Criminal Appeals failed to secure the Due Process Clause's baseline guarantee of a fundamentally fair trial. The judgment below highlights a division of opinion that has long riven the lower courts. Like the Court of Criminal Appeals, the Eighth Circuit refuses to cumulatively consider constitutional errors on habeas review, as does the Sixth Circuit in non-capital cases. *E.g.*, *Wainwright* v. *Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996); *Lorraine* v. *Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). By contrast, most circuits require cumulative-error analysis on habeas review, but "differing approaches to cumulating harmless errors have arisen." Blume & Seeds, Reliability Matters: Reassociating *Bagley* Materiality, *Strickland* Prejudice, and Cumulative Harmless Error, 95 J. of Crim. Law & Criminology 1185 n.117 (2005) (collecting cases). Some circuits apply an identical standard to cumulative error on both habeas and direct review. See *ibid.* The Fifth Circuit applies a stricter test to cumulative error on habeas review, but nonetheless holds that constitutional errors that did not individually deprive the defendant of a fair trial may add up to a Due Process violation. *Derden* v. *McNeel*, 978 F.2d 1453, 1456 & n.5 (5th Cir. 1992) (en banc) (joining the "majority 'rule'" regarding postconviction cumulative-error analysis and collecting cases).

6. Petitioner has never received *any* type of cumulative-error analysis, despite suffering multiple, adjudicated constitutional violations. Under the

majority circuit-court rule, petitioner was entitled to postconviction cumulative-error review. She was deprived of this opportunity because the State concealed *Brady* evidence for more than a decade after trial. Thus, while petitioner raised her ineffective-assistance claim on initial habeas, she could only raise her *Brady* claim through a successive state writ. The relevant courts assessed those claims on the merits and concluded that the respective violations *individually* did not call into question the reliability of the verdict. Petitioner may not be deprived of a postconviction assessment that considers the effect of these errors *cumulatively* simply because the State's misfeasance forced her to raise her constitutional claims in different proceedings years apart.

The Court of Criminal Appeals' failure to conduct a cumulative-harm analysis caused real harm to petitioner. This is the textbook case where individual constitutional violations compounded one another to raise serious doubts about the verdict's reliability. The Fifth Circuit concluded that counsel's objectively unreasonable performance presented a "close case" as to prejudice. *Carty*, 583 F.3d at 261. Thus, only a small measure of additional harm would dictate a finding that petitioner's trial was unfair and the verdict unreliable. When petitioner discovered the State's suppression of several items of *Brady* evidence many years later, the district court and Court of Criminal Appeals never assessed whether these violations added the sufficient, minimal harm to nudge the "close case" over the line to an unconstitutional one.

Worse, the Court of Criminal Appeals' *Brady*-materiality reasoning vividly illustrates the serious harm that can occur when *Brady* violations are combined with ineffective trial counsel. As noted above, the concurring opinions below declared the *Brady* violations non-material because trial counsel supposedly "could have" elicited some of the same material through cross-examination or otherwise. See *supra* at 5. But, of course, the court could not say that trial counsel *did* elicit such testimony because counsel did *not* do so; indeed, counsel was constitutionally defective. Thus, the Court of Criminal Appeals' *Brady* materiality analysis is based upon naked speculation about what a hypothetical trial counsel might have done to mitigate the State's misconduct. Only a cumulative-error analysis would appreciate that trial counsel's ineffectiveness meant that he could not have overcome the prosecution's suppression of evidence through skillful cross-examination. And a cumulative-error analysis would then aggregate this actual *Brady* harm with the *Strickland* prejudice that already rendered this a "close case." Cases like this demonstrate why scholars have highlighted the toxic mix of *Brady* and *Strickland* violations, see generally Blume & Seeds, *supra*, and why most courts mandate cumulative-error analysis on postconviction review.

The constitutional command is especially forceful in capital cases. No person should be put to death without any court having ever assessed whether constitutional errors collectively robbed her of a fair trial.

7. Petitioner respectfully requests an extension of time within which to file her petition for a writ of certiorari. Undersigned counsel of record did not substantially participate in earlier stages of this case. Counsel has not yet had a full opportunity to evaluate the complete record in this case, which will allow for an efficient and clear presentation of the issues to this Court. Counsel, moreover, has been and will continue to be heavily engaged with the press of other matters in this Court and other federal courts.*

Thus, the requested 30-day extension is necessary to afford counsel time to complete review of the record, study the relevant case law, draft the petition, prepare the appendices, and have those documents printed. The extension will not prejudice respondent. No execution date has been set, and respondent does not oppose the extension.

* These matters include a brief in opposition requested by this Court in *Stambler* v. *Mastercard International, Inc.*, No. 17-1140, due June 1; a petition for a writ of certiorari to the Second Circuit in *City of Providence* v. *BATS Global Markets, Inc.*, No. 15-3057 (2d Cir.), due on June 11 in this Court; and an *amicus* brief in *Atlantic Richfield Co.* v. *Christian*, No. 17-1498, due on May 31 in this Court.

Respectfully submitted.

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May 21, 2018

# Exhibit 1

# IN THE COURT OF CRIMINAL APPEALS
# OF TEXAS

**NO. WR-61,055-02**

**EX PARTE LINDA CARTY, Applicant**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS**
**CAUSE NO. 877592 IN THE 177TH JUDICIAL DISTRICT COURT**
**HARRIS COUNTY**

***Per curiam*. RICHARDSON, J., filed a concurring opinion in which HERVEY and WALKER, JJ., joined. WALKER, J., filed a concurring opinion in which HERVEY, J., joined. ALCALA, J., concurred. NEWELL, J., did not participate.**

**O R D E R**

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

Applicant was convicted of murdering Joana Rodriguez in the course of kidnapping her. Prior to the instant offense, Rodriguez was pregnant and was living in the same

apartment complex where Applicant resided. Applicant told people that she wanted Rodriguez's baby and that she was going to "cut the baby out" of her. Applicant recruited a group of men to break into Rodriguez's apartment to commit robbery and kidnap Rodriguez. These men included Christopher Robinson, Gerald Anderson, and Carliss Williams. A fourth man, Marvin Caston, was involved in their discussions but did not participate in the home invasion.

Robinson, Anderson, and Williams kicked in the door of Rodriguez's apartment after midnight on May 16, 2001, while Applicant waited outside. When the men entered the apartment, they became aware that Rodriguez had already given birth to a baby boy. They beat and bound Rodriguez's husband and another male relative. Rodriguez was brought outside and placed in a car trunk, and Applicant took the baby. The group drove to a residence where Applicant instructed the men to tie up Rodriguez. Williams opened the trunk, taped Rodriguez's mouth and hands, then shut the trunk. Another man, Zebediah Combs, was present at the residence and saw Rodriguez inside the car trunk.

Robinson testified at trial that he, Anderson, and Williams left the residence. When Robinson returned, he saw that the car trunk was open. He testified that Rodriguez was face down in the trunk and Applicant was holding a plastic bag over her head. Robinson testified that he tore open the bag and observed that Rodriguez was dead.

Police later questioned Applicant about the disappearance of Rodriguez and her baby. Charles Mathis, a Drug Enforcement Administration (DEA) agent with whom Applicant had

worked as a confidential informant, was present while she was being questioned. Applicant thereafter led police to the residence where the baby and Rodriguez's body were located.

Robinson, Caston, Combs, and Mathis testified for the State at Applicant's trial. The jury found Applicant guilty of the offense of capital murder in February 2002. *See* TEX. PENAL CODE § 19.03(a)(2). At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set Applicant's punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Carty v. State,* No. AP-74,295 (Tex. Crim. App. April 7, 2004)(not designated for publication). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Carty,* No. WR-61,055-01 (Tex. Crim. App. March 2, 2005)(not designated for publication).

Applicant presents six allegations in her -02 writ application in which she challenges the validity of her conviction and resulting sentence. We remanded this application for the trial court to consider three of Applicant's claims:

A. Whether Applicant's right to due process was violated by the State's presentation of false and misleading testimony at trial, in violation of her rights to due process and due course of law under *Giglio* and *Napue.*

B. Whether Applicant's right to due process and due course of law was violated by the State's presentation of false and misleading testimony against her at trial, in violation of her rights under *Chabot* and *Chavez.*

C. Whether Applicant's right to due process was violated by the State's failure to disclose impeachment and exculpatory evidence in violation of *Brady v. Maryland.*

Applicant specifically asserts in Claims A, B, and C that the prosecutors coerced Robinson and Caston to testify falsely at trial, that they threatened Anderson and Mathis, and that they failed to disclose impeachment and exculpatory evidence with regard to Robinson, Caston, Anderson, and Mathis.

After holding a hearing on Claims A, B, and C, the trial court made findings of fact and conclusions of law recommending that those claims be denied. This Court has reviewed the record with respect to those allegations. Based upon the trial court's findings and conclusions and our own review, we deny relief on Claims A, B, and C.

In Claims D and E, Applicant contends that the "cumulative impact of the constitutional errors" violated her state and federal constitutional rights to due process and due course of law. In Claim F, Applicant contends that she "is actually innocent and her conviction and death sentence therefore violates the Eighth and Fourteenth Amendments to the United States Constitution." With regard to these claims, we find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss Claims D, E, and F as an abuse of the writ without reviewing the merits of those claims.

Applicant has also filed in this Court a "Motion for Remand and Alternatively, Motion to Stay." Applicant asserts in this motion that the State failed to disclose to defense counsel that it had a deal with Combs in exchange for his trial testimony. This claim, which was not contained in the instant writ application, was raised by Applicant during the post-remand hearing in the trial court. Because we do not have jurisdiction to review this claim, we deny

Applicant's motion to remand this application to the trial court for consideration of the merits of the claim.

IT IS SO ORDERED THIS THE 7TH DAY OF FEBRUARY, 2018.

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# Exhibit 2

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-61,055-02**

**EX PARTE LINDA CARTY, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 877592 IN THE 177TH JUDICIAL DISTRICT COURT FROM HARRIS COUNTY**

**WALKER, J., filed a concurring opinion in which Hervey, J., joined.**

## CONCURRING OPINION

A majority of the Court finds that Applicant Linda Carty is not entitled to habeas corpus relief and denies her motion for remand. Because I agree with the Court's disposition of this case for the same reasons that Judge Richardson describes in his concurring opinion, I concur with the Court's decision but join Judge Richardson's concurring opinion for all but Part B. I write separately to emphasize the proper analysis of whether undisclosed evidence is material to support a *Brady* claim.

### I - Materiality of *Brady* Claims

The United States Supreme Court, in *Brady v. Maryland*, "[held] that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Thus, *Brady* is violated when three requirements are satisfied: (1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material.[1] *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). "Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal and includes both exculpatory and impeachment evidence." *Id.* at 408 (citing *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992)); *United States v. Bagley*, 473 U.S. 667, 676 (1985). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (adopting *Bagley* standard of materiality). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

In *Kyles v. Whitley*, the Supreme Court expanded on *Bagley*'s standard and emphasized four aspects of materiality:

> Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its

[1] If any one of these three is not met, for example, if the evidence is not favorable to the defendant, then there is no need to consider whether the evidence is material. At that point, there can be no *Brady* violation because one of the three requirements is missing.

> absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."
>
> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.
>
> Third, we note that, contrary to the assumption made by the Court of Appeals, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect of influence in determining the jury's verdict.'"
>
> . . .
>
> The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.

*Kyles v. Whitley*, 514 U.S. 419, 434-36 (1995) (internal citations omitted). The fourth aspect of *Bagley* described by *Kyles*, that materiality is considered collectively, and not item by item, deserves greater attention than courts sometimes give it, and it is for this reason that I write separately today. As Judge Richardson's concurring opinion notes, the Supreme Court has reemphasized this fourth aspect of *Bagley* materiality. *Ex parte Carty*, No. WR-61,055-02, concurring slip op. of Richardson, J. at 53 n.39 (Tex. Crim. App. Month, Day 2018) (citing *Cone v. Bell*, 556 U.S. 449, 473-74 (2009) and *Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016)). Just last term, the Supreme Court decided *Turner*

*v. United States*, where it found that "the cumulative effect of the withheld evidence" was insufficient to undermine confidence in the jury's verdict in that case. *Turner v. United States*, 137 S.Ct. 1885, 1895 (2017). Clearly, it is still good law that the materiality of withheld evidence must be considered cumulatively and not item by item.

Paradoxically, on the way to reaching the ultimate question of whether withheld evidence is cumulatively material, we necessarily must identify, describe, and consider each piece of withheld evidence individually. As the Supreme Court in *Kyles* noted, "[w]e evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately." *Kyles*, 514 U.S. at 436 n.10. Consideration of each piece of withheld evidence individually also makes sense from a "cumulative" effect standpoint. If any one improperly withheld item is found to be material on its own, *Brady* would be violated based on that one item, and the case would be subject to reversal because confidence in the verdict would, therefore, be undermined. The cumulative effect of one material item, combined with any number of non-material items, is obviously material by virtue of the finding that one item was material. If no individual item is itself material, reviewing courts should then look at the cumulative effect of all of the improperly withheld items of evidence. Even when no item in isolation is material, the combined, cumulative effect of multiple items can, in the right case, cross the *Bagley* standard of materiality, that there would be a reasonable probability the result of the proceeding would have been different.

**II - The Evidence is Not Material**

Upon my own consideration of the entire, cumulative body of evidence in this case, I agree with the habeas court's conclusion as well as that of Judge Richardson in his concurring opinion that

the undisclosed evidence is not material. While the statements by Robinson, the deal with Caston, and Anderson's written statement were all withheld and favorable to Applicant, individually they were not material. Cumulatively, if the defense was given the withheld evidence, there is not a reasonable probability that the result would have been different, and I am confident that Applicant still would have been convicted by the jury and Applicant still would have been sentenced to death. This is so because had the defense received all of the complained of undisclosed evidence, the only significant difference in the trial would be that defense counsel would have been able to further impeach Robinson by exposing inconsistencies in his statements. The additional disclosure of the deal with Caston and Anderson's written statement would have had little to no effect on the jury's deliberations for two reasons. First, defense counsel, with or without the Caston deal, could have cross-examined Caston and Josie Anderson about whether or not they had been charged by the State at the time of Applicant's trial, could have explored the existence of motive to testify against Applicant, and could have argued that fact to the jury. Second, defense counsel was already able to get the substance of Anderson's written statement before the jury when counsel got Robinson to admit that he told the police in his statement that Applicant did not enter the apartment.

Consequently, even if Applicant had been given all of the improperly undisclosed evidence, the most that could have been done was to convince the jury that much of the testimony of Robinson (and possibly even Caston and Josie Anderson) was not credible. Had counsel done so, and, for argument's sake, even convinced the jury that neither Robinson, Caston, nor Josie Anderson were credible at all, I believe Applicant still would have been found guilty and given the death penalty. There was overwhelming evidence of guilt showing that not only was Applicant connected to the

crime,[2] but that she was a key player in the kidnapping and murder.

Zebediah Comb testified that Applicant "had a job" for the group to do involving a drug deal. "[F]or the drug deal she wanted a favor in return," which was for the group to "bring the lady to her" and Applicant was "going to handle it from there." Comb also testified that, after the kidnapping, Applicant said "I got my baby." Comb saw the victim in the trunk of Applicant's car. Applicant asked Comb to put the victim in another car parked in the yard, but he refused. Comb also testified that the group was angry at Applicant because there was no money or drugs in the victim's home. Comb told the group, including Applicant, to get in their cars and leave, but Applicant refused to drive her car with the victim in the trunk. He testified that when he woke the next morning, Robinson was there and Applicant arrived shortly thereafter driving a black Chevrolet with a baby in the car. He said that the victim's body was still in the trunk of Applicant's car, and Applicant talked about disposing of the body by burning it. Applicant left again and returned again two hours later with the baby. Comb further testified that he saw Robinson, Gerald "Baby G" Anderson, and Applicant put together packets of fake and real money to rip off a dope dealer before Applicant and Robinson left with the baby in the Chevrolet while Anderson and another man left in a different car. Robinson returned about three hours later with the baby, which he left in the Chevrolet with the air conditioner running.

Florencia Meyers testified that she saw Applicant sitting in Applicant's car, at the apartment complex, the day before the kidnapping. Meyers testified that Applicant said she was going to have a baby the next day. Sherry Bancroft testified that Applicant had a storage unit and that, four days

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[2] *See Carty v. State*, No. 74295, 2004 WL 3093229, at *4 (Tex. Crim. App. Apr. 7, 2004) (holding that there was sufficient non-accomplice evidence to tend to connect Applicant to the commission of the victim's kidnapping and murder).

before the kidnapping, Applicant told her that she was in labor and expecting a baby boy. Bancroft said that she saw Applicant again on May 15, when Applicant told her that the baby was at home with his father, and Applicant left with a baby blanket and two sets of baby clothes. Denise Tillman testified that she sold to Applicant a number of medical supplies four days before the kidnapping. Jose Corona, who was described as both Applicant's boyfriend and as her husband, testified that they lived together for two and a half years. During that time, Applicant had a pattern of telling him that she was pregnant, but she would never actually give birth to a child. She would not take him to any doctors' appointments, and she never actually appeared pregnant. Corona testified that he eventually left after becoming tired of Applicant's lies, and that, the day before the kidnapping, Applicant called him many times to tell him that she was going to have a baby boy the next day. She also called him on May 16 to tell him that the baby would arrive that day.

After questioning by police, Applicant led the police to the house on Van Zandt where the baby was. The baby was found alive in a car owned by Applicant's daughter. Inside the car was a live 0.38 caliber round, a receipt from the Hampton Inn, the medical supplies Applicant had recently purchased, and numerous baby items. The victim was found in the trunk of Applicant's rental car that was also parked at the house on Van Zandt.

Clearly, disclosure of the improperly withheld evidence in this case, even if it would have cast doubt on Robinson, Caston, or Josie Anderson, would not have cast doubt on the accuracy of such critical and inflammatory information. I am convinced that all of this evidence shows that Applicant not only had a fixation on getting the baby, but had been planning the offense for some time. In the mind of the jury, this evidence would substantially outweigh the impeachment value of

the improperly withheld evidence.[3]

## III - Conclusion

In conclusion, the materiality of improperly withheld evidence should be considered first individually and then cumulatively. If the disclosure of one piece of said evidence, individually, provides a reasonable probability that the result of the guilt-innocence or punishment phase of the proceeding would have been different, then the *Bagley* standard is met and *Brady* would be violated. If no individual piece of evidence reaches that standard, all of the improperly withheld pieces of evidence cumulated together could reach the *Bagley* standard. However, even if the withheld evidence had been disclosed to the defense, given the overwhelming and inflammatory evidence in this case, my confidence in the outcome–that Applicant was convicted and then sentenced to death–is not undermined. Accordingly, I concur in the result.

Filed: February 7, 2018
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[3] In many cases the analysis should be much more in depth and would have given a detailed analysis of exactly how an ably competent attorney would have used the undisclosed evidence and how such use would have affected the jury.

# Exhibit 3


**IN THE COURT OF CRIMINAL APPEALS**
**OF TEXAS**

**NO. WR-61,055-02**

**EX PARTE LINDA CARTY, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS**
**CAUSE NO. 877592 IN THE 177TH JUDICIAL DISTRICT COURT**
**FROM HARRIS COUNTY**

**RICHARDSON, J., filed a concurring opinion in which HERVEY and WALKER, JJ., joined.**

## CONCURRING OPINION

Applicant Linda Carty was convicted of the capital murder of Joana Rodriguez. She was sentenced to death in 2002. In this subsequent state habeas application, which was filed on September 10, 2014, Carty contends that newly discovered evidence shows that the State (1) knowingly used false testimony and (2) suppressed exculpatory evidence. Carty also filed a Motion to Remand. Today, this Court dismisses three of Carty's habeas claims as procedurally barred, denies the remaining three habeas claims on the merits, and denies Carty's motion for remand. I agree with the Court's decision.

## BACKGROUND FACTS[1]

On or about May 12, 2001, Raymundo Cabrera and Joana Rodriguez brought home their new baby boy, Ray. They shared their apartment with Cabrera's cousin, Rigoberto Cardenas. Carty and her boyfriend, Jose Corona, had lived in the same apartment complex in a unit very close to Cabrera's and Rodriguez's.

At 1:00 a.m., on May 16, 2001, Carty and three men went to the apartment complex. Those three men were Chris Robinson, Carliss "Twin" Williams,[2] and Gerald "Baby G" Anderson. Carty had driven to the apartment complex in a separate car and waited in the parking lot while the three men kicked in the door of Cabrera's and Rodriguez's apartment. The men beat Cabrera and taped his hands and feet together. Anderson taped up Cardenas who was asleep downstairs. They told Rodriguez to bring her baby outside and come with them. Williams and Anderson brought Rodriguez out of the apartment and put her in the trunk of Robinson's car. At some point Carty took the baby and put him in her car. The group left the complex with the baby and Rodriguez and met up at a storage unit. They moved Rodriguez to the trunk of Carty's car. Then they all went back to a house on Van

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[1] On September 30, 2008, the Federal District Court for the Southern District of Texas issued a lengthy opinion addressing Applicant Linda Carty's federal habeas writ. The federal court noted that this case "has a long and complex factual background," and it summarized in detail the extensive state and federal proceedings. *Carty v. Quarterman*, No. 06-614, 2008 WL 8104283 (S.D. Tex. Sept. 30, 2008).

[2] Throughout the various pleadings and records associated with this case, Williams has been referred to as "Carliss" and "Carlos." For the sake of uniformity, we will refer to him as "Carliss Williams" or by his nickname, "Twin."

Zandt where Robinson's half brother, Zebediah Comb (also known as "Jerome") and their grandmother lived. Williams taped Rodriguez's mouth and hands and closed the trunk. At some point the three men left, believing Carty would leave in her car (with Rodriguez in the trunk). Robinson returned to the house and said he saw Carty part-way in the trunk of her car. He said she "had [a plastic] bag over the lady's head." Carty and Robinson closed the trunk and left her car at the house. Robinson then drove Carty and the baby to a hotel room that Carty had rented and stocked with baby items. In the meantime, the police had been called to the crime scene. One of the witnesses they interviewed was a neighbor, Florencia Meyers, who tipped them off to Linda Carty's possible involvement based on Carty's odd behavior regarding having a baby. Thus, when Robinson and Carty were on the way back to the Van Zandt house, the police contacted Carty. She went to meet the police at the police station, and Robinson and the baby went back to the Van Zandt house.

When Carty was interviewed by the police, she told them that she had loaned a car she had rented to a group of men who must have been involved in the kidnapping of Rodriguez and her baby. She maintained that she knew nothing of their plan. She agreed to take the police to where she believed the car would be. When she and the police arrived at the Van Zandt house they found the baby alive in a car registered to Carty's daughter, and they found Rodriguez dead in the trunk of Carty's rental car.

After Robinson was arrested he was interviewed twice by police on the day after the murder (May 17, 2001). In his interviews, Robinson repeatedly said that Carty had manipulated the men into helping her take the baby. He said that Carty "conned" the men into believing that they were breaking into a drug dealer's apartment, but they didn't find any weed. He then said that after they broke into the apartment, Carty wanted them to kill everyone in the apartment and take the woman and the baby. According to Robinson, Carty lied to them because she wanted the baby. Robinson told the police that Carty had already bought a lot of baby clothes. Robinson also said that Carty was trying to "suffocate the lady" because "she had a bag around her head and the bag was stuck to her face." He said Carty talked about wanting to kill the lady, and burn her body.

Marvin "Junebug" Caston gave a police interview the next day, on May 18, 2001. In his interview, Caston said that he met Carty through his girlfriend, Josie Anderson. They met on Mother's Day (May 13, 2001), and he, Josie, Carty, and Chris Robinson got some weed and got high together. He noticed that there were a lot of "baby things" in the car (a baby stroller and a baby bag). Then they went to Zebediah Comb's house to "chill" for the day. Caston said that while they were at Comb's house Carty told them about a "lick" for 1000 pounds of weed. Then he said she started talking about having a baby. Caston said that she was "talking all crazy talking 'bout, well, I got a baby." He also said that "she was talking 'bout cutting the 'ho, cutting the lady and all that noise." Caston said Carty said "she wanted

her baby." He said that Carty told them her husband was having an affair with the woman. Caston said he realized that it was "all about some jealousy thing," and "ain't 'bout no weed or nothing else." Caston said Carty kept calling him but he wouldn't answer. The police were trying to find out from Caston who the other men were who were with Robinson, but Caston did not know about Carliss Williams and Gerald Anderson.

Josie Anderson was also interviewed by the police on May 18, 2001. She said Carty told her "she was fixing to have a baby . . . . And then she start talking about that she wanted to take somebody's baby." She said she knew Carty as "Linda Corona." Josie told police that she was in Carty's car and she saw "a bunch of baby stuff. . . . And she asked me do I know anybody that'll kidnap somebody." Josie told police that she thought Carty was "crazy" and that she "ain't fixing to be a part of no bull shit like that." Josie confirmed that they picked up Chris Robinson and Junebug (Caston), and Carty was talking at first about the lick:

> She was talking. She was going on to Bug and them about it. She was like, and they was, she was like, well, I'm looking for somebody that I can pay, first it was about a lick. It wasn't about a baby. You know what I'm saying? With them at first. It was supposed to have been a lick. Like I told you, it was supposed to have been 200 pounds or something like that in the house or some keys or something. She say, uh, that she looking for somebody to hit a lick. And she talked to him about it. You know? And after I got home and she dropped me off, you know? We had our, we passed our words and I told her, bitch, you can keep that shit away from me. You know, because I don't wanna have nothing to do with that. And after we passed our words, I guess she thought I was mad 'cuz I was mad and I was like, bitch. I'm not fixing to be involved in the kidnapping or none of that shit to nobody's baby. You know?

> So she say, alright. And she left. After that? I don't know nothing about what this lady did. Only thing I kept hearing was a lot of people talking about a lick, a lick, a lick.

Josie confirmed that on that Monday night before the kidnapping (May 14, 2001) she, Chris, Junebug and Carty went to the apartment complex to talk about the lick and so Carty could show them "where everything was." Josie said that at that time Chris and Junebug did not know they were being recruited to kidnap a lady and her baby. And they did not do the lick that night because "she got scared because the lights was on and somebody's window was up." Josie said that neither Chris nor Junebug wanted to have anything to do with kidnapping a baby. "They was just gonna go up in there and get the weed. And come outta there and leave."

The State presented evidence at Carty's trial to support the theory that Carty orchestrated the kidnapping and murder of Rodriguez because she wanted a baby and that she solicited individuals who would help her kidnap a newborn. When Carty took the police to the Van Zandt house, baby Ray was found alive inside a small black Chevrolet owned by Carty's daughter. Also found in the Chevrolet were a live .38 caliber round, a receipt from the Hampton Inn, a pair of life uniform medical scissors, a stethoscope, and name badge, a blue nurse's pin with a blue cord, and numerous baby items, including a diaper bag, a changing pad, a bottle holder, disposable diapers, a pacifier, infant clothing, disposable bottles, infant formula, Gerber washcloths, a hooded towel, and a baby stroller. Rodriguez's

body was found in the trunk of a Pontiac Sunfire that had been rented to Carty that was also parked at the Van Zandt house.

At trial, the following accomplice witnesses[3] testified:

**Josie Anderson**: A friend of Carty's. Josie saw that Carty had purchased a baby car seat, a diaper bag with baby items, and items from the medical supply store—a stethoscope, nurse's scrubs, and a pair of surgical scissors. Carty told Josie that she had planned a "lick" (a robbery where you kick in the door) of an apartment where there was a pregnant lady and her husband. Josie and Carty recruited Josie's boyfriend, Christopher Robinson, and his friend Marvin "Junebug" Caston to participate in the "lick." Carty told the group that she wanted the woman's baby and was going to cut it out of the lady. Josie thought that Carty "was crazy" and decided not to participate in either the home invasion or the kidnapping.

**Marvin Caston:** (Also known as "Junebug"). The group helping Carty with the "lick" did not believe they were going to do anything to Rodriguez or to the baby. A couple of days before the kidnapping, Carty picked up Caston and was "really, really talking about the baby thing." Carty told Caston that "she just wanted that specific baby because she was saying that her husband was having an affair with the woman." Caston testified that Carty said she "wanted to cut the baby out because she is not knowing that the baby was already born." Carty was living in a hotel because she had moved out of her apartment.

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[3] On direct appeal, Carty claimed that Chris Robinson, Josie Anderson, Marvin Caston, and Zebediah Comb were accomplices as a matter of law, and that the non-accomplice witness testimony was insufficient to support the conviction. Assuming, without deciding, that such witnesses were indeed accomplices as a matter of law, this Court held that, even without the testimony of the witnesses who were potentially accomplices, the evidence tended to connect Carty to the commission of the crime. *Carty v. State*, No. 74295, 2004 WL 3093229, *4 (Tex. Crim. App. April 7, 2004).

Caston carried a baby bag into the hotel room for Carty. When Josie and Carty showed up at Caston's mother's house where Caston was staying, he had his mother tell them he wasn't home. Caston did not participate in the "lick."

**Chris Robinson**: He testified at trial that he had not been promised anything or threatened with anything. He said that the first time he met Carty was on Mother's Day (May 13, 2001) when she was with Josie and "Junebug" (Caston). Carty was organizing a "lick." She told them about Rodriguez ("the lady") and the baby. Carty told them to kill everyone and take the pregnant lady so she could cut the baby out of the lady. He said the plan was for him (Robinson) and Twin (Williams) to kick in the door. Baby G (Anderson) was with them. Anderson and Twin brought the lady out and Carty had the baby. Anderson put the lady in the trunk, then they drove to a storage unit, and Anderson put the lady in Carty's trunk. Then they all met again at the Van Zandt house and Carty had the baby. The three men were mad at Carty because they felt that she used them. There was no marijuana at the apartment. They were there just to kidnap the lady and the baby. Robinson said that Carty was the one who instructed them to tape up the lady and close her in the trunk. They talked about shooting Carty and letting the lady go, but then the men left the house. When Robinson returned he saw Carty doing something in the trunk. When he got closer he saw that Carty had put a bag over the lady's head. Robinson tried to rip it off but the lady was already dead. Robinson then took Carty to her hotel and it was full of baby clothes and baby things. He ended up taking the baby back to the Van Zandt house and leaving him in his car seat in the air conditioned car.

**Zebediah Comb**: He was Robinson's half-brother and lived with their grandmother at the Van Zandt house where Rodriguez's body was found in Carty's rental car. Comb was on

electronic monitoring house-arrest for the federal offense of bank robbery and could not leave the Van Zandt Street address where he lived. Before the incident, the group that was preparing for the "lick" came to the Van Zandt address to pick up Robinson. Comb testified that Carty "had a job" for them to do involving a drug deal, and "for the drug deal she wanted a favor in return." The favor was to "bring the lady to her," and Carty was "going to handle it from there." Comb testified that he was present for conversations about the lick on May 13, 2001, that he helped recruit Carliss "Twin" Williams on May 15, 2001. Comb said he was also present when Rodriguez was brought to the Van Zandt house late that night, after the kidnapping. He testified that Carty said "I got my baby." Comb said that he saw Rodriguez in the trunk of Carty's Pontiac and refused her request to put Rodriguez in another car parked in the yard. Comb testified that the men were angry at Carty because there was no money or drugs in the house. Comb told Carty and the men that they needed to get in their cars and leave, but Carty refused to drive her car with the woman in the trunk. Comb testified that when he awoke the next morning Robinson was there, and Carty arrived about twenty minutes later driving a black Chevrolet with a baby in the car. He also said that Rodriguez's body was in the Pontiac's trunk and she was bound with tape with a torn bag over her head. Comb also testified that Carty was talking about disposing of the body by burning it. Carty then left again and returned one to two hours later with the baby. Comb said he saw Robinson, Carty, and Anderson putting together packets of fake and real money to use in ripping off a dope dealer. Then Carty, Robinson, and the baby left in the Chevrolet and Anderson and another man left in a different car. Robinson returned with the baby about three hours later, and he left the baby in the Chevrolet with the air

conditioner running. Comb said that Robinson then used Lysol to wipe down the cars.

Neither Gerald "Baby G" Anderson nor Carliss "Twin" Williams testified at Carty's trial.[4] The non-accomplice witness testimony at trial showed that Carty's stories about being pregnant and having a baby coincided with the kidnapping of baby Ray. At trial, the following non-accomplice witnesses testified:

**Florencia Meyers:** A resident of the same apartment complex who had seen Carty sitting in her car at the apartment complex a day before the kidnapping. Carty told Meyers that she was going to be having a baby the next day.

**Sherry Bancroft:** A Public Storage employee where Carty had a storage unit. She testified that on May 12, 2001, Carty told Bancroft that she was in labor and expecting a baby boy. Bancroft said that she saw Carty again on May 15, 2001 between 6:30 and 7:30 in the evening. Carty told her that the baby was at home with the father, and she left with a baby blanket and two sets of clothes.

**Denise Tillman:** She worked at a Houston medical uniform store. She testified that Carty visited the store on May 12, 2001, and bought a number of items, including a blue pen, a nurse's ID tag, a stethoscope, surgical scissors, and two scrub tops and scrub pants.

**Jose Corona:** The record refers to him as both Carty's boyfriend and husband. They had lived together for two-and-a-half

[4] Chris Robinson was charged with capital murder, pled guilty to aggravated kidnapping, and was sentenced to 45 years. Gerald Anderson, who did not testify at Carty's trial, pled guilty to aggravated kidnapping and was sentenced to life. Carliss Williams was convicted by a jury of kidnapping, and he was sentenced to twenty years.

years, but Corona moved out of the apartment before the kidnapping and murder. Carty had engaged in a pattern of telling Corona she was pregnant, then would never give birth. She would not take him to the doctor with her, she never appeared pregnant, and so Corona "was tired of lies" and decided to leave. On the day before the kidnapping, Carty called Corona "many times" to tell him that she was going to have a baby boy the next day. She also called him on May 16th to tell him that the baby would arrive that day.

**Charlie Mathis:** A DEA agent who had occasionally used Carty as a confidential informant some time before the offense occurred. He testified for the State. He said that he had known Carty for eight to ten years. Mathis said that in 1994 or 1995 she was "closed out," which meant that she was no longer on the books of the DEA as a confidential informant. Nevertheless, Carty would still contact Mathis from time to time with tips. Some time in 2001 Carty told Mathis that she gave birth to a boy. He said he was confused because the timing was off, and her husband did not seem to know about the baby. On the day of the kidnapping, Carty called Mathis and asked him to come to the police station. The police had also contacted Mathis to help interview Carty. Mathis said that when he arrived at the police station, he told Carty that she needed to tell the police anything she knew about the location of Rodriguez and baby Ray. Carty told Mathis that she had given two cars to people that she feared were involved in the kidnapping. She took the police to an address on Van Zandt Street where there was a car parked with baby Ray inside. There was another car parked there that had Rodriguez's body in the trunk. The police arrested Carty and other individuals who were at the Van Zandt address.

> On cross examination, Mathis testified that he did not believe Carty was involved in the kidnapping. He also testified that he did not believe Carty would do something like this. When defense counsel asked if Carty was a "good informant," Mathis said he had "no way of measuring who is good and who is not." Mathis said that Carty was generally truthful but that there were times when he felt that Carty "wasn't as truthful as she should have been."

Dr. Paul Shrode, an assistant medical examiner, testified as to the cause of Rodriguez's death. Dr. Shrode testified that Rodriguez died as the result of a "homicide suffocation." He said that her airway was compromised, and it could have resulted from the tape over her mouth, or the plastic bag taped around her neck, or her body position in the trunk.

The jury instructions allowed for Carty's conviction as the principal actor or as a party to Rodriguez's capital murder. The jury found her guilty of capital murder on February 19, 2002.

The prosecution then called several witnesses in order to prove that she should be given the death penalty. The prosecution showed that Carty was guilty of auto theft and drug offenses, and earlier testimony strongly questioned her credibility. The defense called witnesses in an attempt to show that Carty would not be a future danger. The defense also sought to place mitigating circumstances before the jury.

There were three punishment special issues. The second special issue presented to the jurors asked them if they found, beyond a reasonable doubt, that Linda Carty actually caused the death of Joana Rodriguez. In the alternative scenario where Linda Carty did not actually cause the death, the second special issue asked if she intended to kill Joana Rodriguez, or if she anticipated that a human life would be taken. The jury answered the three special issues in a manner requiring the imposition of a death sentence, and she was sentenced to death on February 21, 2002.

## PROCEDURAL HISTORY

### A. Direct Appeal

This Court affirmed Carty's conviction and sentence on direct appeal on April 7, 2004.[5] Carty asserted in her appeal that her conviction rested exclusively on uncorroborated accomplice-witness testimony. This Court held that, after eliminating all of the accomplice testimony from consideration, the remaining portions of the record contained evidence that tended to connect Carty with the commission of the crime in satisfaction of Article 38.14.[6] On direct appeal, Carty also complained about not being able to fully cross-examine Robinson and Comb using their prior inconsistent videotaped statements. This Court held,

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[5] *Carty v. State*, No. AP-74,295, 2004 WL 3093229 (Tex. Crim. App. 2004).

[6] *Id.* at *1 (citing *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001)). Texas Code of Criminal Procedure Article 38.14 provides, "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

however, that Carty was permitted to impeach Robinson and Comb with the contents of their statements made to the police. Additionally, she was allowed to call to the stand the officers who took the statements to question them regarding their inconsistencies. This Court held that Carty failed to show that the videotaped statements had impeachment value or that her right to cross-examination was improperly limited.[7]

**B. Previous Writ Applications**

Carty's first state writ application was filed on August 6, 2003. On December 2, 2004, the trial court adopted the State's proposed findings of fact and conclusions of law. This Court denied Carty's claim for state habeas relief on March 2, 2005, adopting the trial court's findings, conclusions, and recommendation.[8]

Carty then filed, on February 24, 2006, a comprehensive federal petition alleging ineffective assistance of counsel, trial court error, and prosecutorial misconduct. Although some of the claims Carty brought in her federal writ were procedurally barred because they had not been exhausted in state court, the federal district court addressed the merits of those claims "[i]n the interests of justice," and held that Carty was not entitled to relief.[9]

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[7] *Id.* at *6.

[8] *Ex parte Carty*, WR-61,055-01 (Tex. Crim. App. Mar. 2, 2005) (not designated for publication).

[9] *Carty v. Quarterman*, 2008 WL 8104283, at *31.

In her federal writ, the federal district court addressed the factual basis for her claims of trial error, prosecutorial misconduct, and ineffective assistance of counsel. The federal court held that the prosecution's actions did not call into doubt the integrity of Carty's conviction or sentence, and thus did not substantially affect her right to a fair trial.[10] The prosecutorial misconduct claims were not the same as those raised in this writ application. However, one of Carty's ineffective assistance claims asserted that her lawyer should have interviewed Charlie Mathis before trial and should have elicited testimony from Mathis (1) that Carty continued to work for the DEA even though she was no longer on the books, (2) that he would not have used someone like Carty as a confidential informant if he thought she was a compulsive liar, and (3) that he would have urged the jury not to give her a death sentence had he been called to testify during punishment.[11] The federal court held that Mathis "repeatedly stated" at trial that Carty was not a confidential informant at the time of the murder. Moreover, with regard to the claim that trial counsel should have explored Mathis's opinion that Carty was truthful, trial counsel *did* ask Mathis if Carty was "a good informant." Mathis responded that Carty "was truthful when she told [him] some of the things he was looking for," and that there were "times when [he] felt that maybe she wasn't as truthful as she should have been."[12] The federal court pointed out that "trial counsel asked

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[10] *Id.* at *36–37 (citing *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001)).

[11] *Id*. at *57–58.

[12] *Id*. at *58.

the question [Carty] blames him for not asking, and did not receive a completely favorable response."[13] Finally, the federal court pointed out that Carty's "hope that Mathis would urge the jury not to give her a death sentence is similar to his guilt/innocence testimony that he did not believe [Carty] was capable of committing the crime."[14] Thus, the federal court concluded that Carty "[did] not show[] that additional pre-trial discussion with Mathis would have helped her case."[15]

After exhaustively reviewing Carty's claims for relief, the federal district court denied her federal petition for relief and held that Carty did not show that constitutional error infected her trial. The federal district court's judgment was affirmed by the Fifth Circuit.[16] Specifically as to Mathis, the Fifth Circuit held that Mathis's opinion in the affidavit in support of the federal writ that Carty "is not a violent person, let alone a cold-blooded murderer" was "relatively unpersuasive" and "cumulative."[17] The Supreme Court denied Carty's petition for writ of certiorari.[18]

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[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Carty v. Thaler*, 583 F.3d 244 (5th Cir. 2009).

[17] *Id*. at 265. The Fifth Circuit pointed out that "Mathis's testimony would have been largely cumulative of his trial testimony. For example, Mathis testified during the guilt/innocence phase of trial that 'I've known Linda for a long time and I did not believe that she could do something like this.'" *Id*. at 265 n.15.

[18] *Carty v. Thaler*, 559 U.S. 1106 (2010), *pet. for reh'g. denied*, 561 U.S. 1039 (2010).

## C. This Subsequent Writ Application

In this subsequent state habeas application, which was filed on September 10, 2014, Carty contends that newly discovered evidence shows that the State (1) knowingly used false testimony and (2) suppressed exculpatory evidence. With her subsequent application, Carty submitted affidavits signed by Charlie Mathis, Marvin Caston, Chris Robinson, and Gerald Anderson. In their affidavits, the four men claimed as follows:

**Charlie Mathis:** Charlie Mathis executed two affidavits. The first one was dated October 5, 2005. It appears that this affidavit was available and used to support Carty's claims raised in her federal writ application. In the 2005 affidavit, Mathis states, in pertinent part, that:

- Carty was an effective and helpful confidential informant
- Through the years of working with her he got to know her very well.
- In May of 2001 he was called by HPD to come speak to Linda regarding her possible involvement in the abduction of Joana Rodriguez.
- He expressed concern that Carty had not been read her Miranda rights even though it was clear to him that she was in custody.
- He was called as a witness in Carty's trial by the prosecution. He never spoke with Carty's attorneys about what he was going to testify about. He spoke briefly with Carty's attorney during the trial but not about his testimony. He

found it "odd" that Carty's attorneys never attempted to contact him.

- He did not want Carty to get the death penalty. He did not think she deserved the death penalty. She is not a violent person. She is not a cold-blooded murderer.

- Though she might have been capable of exaggeration, he did not believe her to be a "compulsive liar."

- He would have been willing to testify that Carty should not have gotten the death penalty. He did not believe her to be a future danger. He would have testified that he did not believe Carty was capable of killing another human being.

- He would not have employed Carty as a CI if he had felt she was capable of murdering someone.

- Had Carty's counsel approached him he would have worked with them on her defense.

In his second affidavit, executed on September 8, 2014, Mathis made the following additional assertions:

- He has avoided speaking to Carty's defense team because he has "serious and on-going health complications," and "this case is a source of stress and difficulty" for him.

- When he came to the station on May 16, 2001, he asked Lt. Smith if Carty had been read her Miranda rights. Smith said she had not because he didn't want her to "lawyer up."

- After Carty disclosed where Rodriguez and the baby were, HPD still did not go to that location. They continued to attempt to extract a confession from her.

- Mathis wanted to leave HPD because he could not condone the tactics they used.

- When Connie Spence contacted Mathis he told her he did not want to testify against Carty. He said he told Spence he had known Carty a long time and she did not have it in her to kill anyone.

- He said that "Spence provided [him] with no option to testify against Linda: Spence threatened [him] with an invented affair that [he] was supposed to have had with [Carty]."

- When he told Spence that he did not want to testify, he said Spence told him "you don't want me to cross examine you about any inappropriate relationship with Linda Carty do you?"

- Mathis said he never had an inappropriate relationship with Linda Carty, and that Spence invented the whole concept.

- He felt Spence was threatening and blackmailing him into testifying.

- He said Spence limited his testimony and wanted him to testify only to a very tight set of facts.

- He told Spence that it didn't "ring likely" to him that Linda would be able to persuade these men to put their lives on the line purely on the word of someone they did not know.

**Marvin Caston:** By affidavit dated February 20, 2014, Caston ("Junebug") stated as follows, in pertinent part:

- When he was arrested and taken into custody, he was young and scared. He could not remember when he met Linda Carty, but he said he met her on Mother's Day (May 13, 2001) because that is what the police wanted him to say.

- Although he testified at trial that the first time he met Goodhart and Spence was in January 2002 in Spence's office, that was not true. He met with them when they came to his sister's apartment in 2001.

- When Spence and Goodhart talked to him in 2001 in his sister's apartment, they told him how to testify. They said if he did not testify exactly how they wanted, they would see that he was convicted and given thirty years.

- He said that each time he met with Spence and Goodhart they would threaten him with a thirty-year sentence unless Carty got the death penalty and Robinson got thirty to forty years.

- He said that Goodhart and Spence rehearsed his testimony with him so much that he ended up saying untrue and misleading things at Carty's trial.

- He said that Josie Anderson had brought up the lick first, and that Josie was the ringleader, not Carty.

- He said that there was never a plan that Carty was going to be a part of the lick, but Spence and Goodhart made him testify that she was.

- He said that there was never a plan to take Rodriguez or the baby from the apartment, but Spence and Goodhart kept pushing their own version of the story.

- Caston said that Rodriguez's death was an accident.

**Gerald Anderson:** By affidavit dated September 2, 2014, Anderson, who did not testify at trial, stated in an affidavit as follows, in pertinent part:

- In July 2001, he was arrested in connection with this case.

- The HPD officers who interviewed Anderson told him that "everyone" had snitched on him for this capital murder.

- He said Spence and Goodhart told him he needed to get on the witness stand and say he was present when Carty said she was going to "cut the baby out of the bitch," but he said he never heard Carty say that.

- He said Spence told him that he had to say they had a plan to take the lady and the baby. He said there was never any plan to take the lady and the baby.

- He said Robinson contacted him about a lick. He said he never talked to Carty.

- He told Spence he would not lie on the witness stand.

- He said if he testified Spence would make his drug charge go away. But ultimately, he would not, and did not, testify.

**Chris Robinson:** By affidavit dated September 3, 2014, Robinson stated in an affidavit as follows, in pertinent part:

- Each time the police interviewed him, before they turned on the tape recorder, they would tell him what they wanted him to say.

- Detective Novak told him that Linda Carty had snitched on him.

- Robinson said that Spence and Goodhart had "threatened [him] and intimidated [him]." He said they made it clear what he had to say at Carty's trial.

- They coached him and threatened him.

- He told them that he had not seen Carty put a bag over Rodriguez's head, but they wanted him to testify that he had seen Carty kill Rodriguez by putting a bag over her head.

- Robinson told them that Carty had not told them to kill the men in the apartment, but "this was a detail that got included at trial through the various rehearsals with the District Attorneys."

- He told them that Carty never instructed anyone to tape up Rodriguez, but this was what he ultimately said at trial.

- Spence and Goodhart wanted him to say he'd seen Carty bathing the baby, but he didn't see that.

- Robinson said that Josie Anderson was the ringleader, not Carty.

- He said that Rodriguez was not dead in the trunk of the car. When he ripped the bag that was on her head she was breathing.

- When they were using Lysol to clean the car for prints, that is when he saw that Rodriguez was dead.

- No one intended for Rodriguez to die. There was never a plan to kill anyone. This was an accident.

Because these affidavits were dated after Carty's first writ application had been filed, this Court decided that the three claims raised in Carty's writ application that were based on these affidavits are not barred by the subsequent writ provision in Article 11.071, § 5.[19] By order dated February 25, 2015, we remanded the case to the trial court for consideration of three claims:

A. Carty's right to due process was violated when the State presented false and misleading testimony at trial, in violation of her rights to due process and due course of law under *Giglio* and *Napue*.

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[19] *Ex parte Carty*, No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App. Feb. 25, 2015). Texas Code of Criminal Procedure Article 11.071, section 5 provides, in pertinent part, that "[i]f a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a timely initial application. . . ."

B. Carty's right to due process was violated when the State presented false and misleading testimony at trial, in violation of her rights to due process and due course of law under *Chabot* and *Chavez*.

C. Carty's right to due process was violated by the State's failure to disclose impeachment and exculpatory evidence in violation of *Brady v. Maryland*.

I agree that any claim of ineffective assistance of counsel based on Carty's counsel's failure to interview Charlie Mathis before trial and failure to solicit defense testimony from him is procedurally barred. As the federal district court pointed out, such testimony would have been cumulative of his trial testimony during the guilt phase. Only Mathis's second affidavit signed in 2014, asserting coercive tactics by the prosecution, is at issue here.

On May 5, 2016, the trial court signed an Order Designating Issues reciting the following factual issues that needed resolving:

1. Did the State coerce witnesses Chris Robinson, Marvin Caston, Charles Mathis, and Gerald Anderson to submit false testimony?

2. Did the State withhold or misrepresent statements from Chris Robinson, Marvin Caston, Gerald Anderson, and Charles Mathis?

3. Did the State fail to disclose notes and recorded interviews with witnesses or potential witnesses?

4. Did the State fail to disclose preferential treatment to Marvin Caston in exchange for his testimony against the applicant?

## D. The Habeas Hearing Testimony

### 1. Habeas Testimony of Charlie Mathis

Charlie Mathis testified to the following at the habeas hearing:

- On the morning of May 16, 2001, Mathis noticed that he was getting a call from Carty, but he did not answer it because he was on another call. He did, however, answer the call from Lt. Smith.

- He drove to HPD and met with Lt. Smith. He said he was "very shocked that they had Linda there."

- Mathis also said that he thought it was a "big mistake" because "Linda was not a violent person."

- Then he talked to Carty and asked Lt. Smith if they had read Carty her Miranda rights. Mathis said that they did not because they did not want Carty to "lawyer up."

- Mathis was very concerned about the kidnapping and wanted to help find the mother and baby.

- He was surprised at Carty's involvement but as he interviewed her he could tell she had knowledge of it.

- He gave the location of the mother and baby to the officers and he was surprised that they did not immediately go to the location.

- After Mathis's initial interview with Carty he had several subsequent visits with Connie Spence.

- Mathis said he explained to Spence that he did not believe Carty was guilty of murder; that he had known Carty for a number of years; that

she was not violent, and that she was not dominant enough to control these criminals.

- Mathis told Spence that he did not want to testify against Carty.

- Mathis said Spence then asked him if he was having a sexual affair with Carty. He did not see that as an innocent question. He saw it as a threat.

- Mathis said his testimony at trial was truthful, but limited.

- Mathis said "I believe Linda was involved in this crime in some form or fashion, but I don't believe that she killed the woman."

- Mathis was then asked, "You know there was a law of parties instruction in the jury charge?" Mathis did not know what that meant.

**2. <u>Habeas Testimony of Chris Robinson</u>**

On direct examination by Carty's attorneys, Chris Robinson said he was not there to testify for Linda Carty. He said he was there because the prosecutors "overstepped their boundaries the way they handled this case." He testified that he was there to tell the truth. Then the State began its cross examination of Robinson:

Q. So, the first statement you gave regarding Linda Carty was on May 17th, 2001 at about 3:00 in the morning. Right?

A. That's what it says right there.

Q. Do you remember talking to Deputy Novak?

A. Yes.

Q. The second one – and then you gave a second statement, right, the same day around 3:00 in the afternoon again to Novak, right?

A. That's what it says, yes.

* * *

Q. Then you testified at the Linda Carty trial, right?

A. Right.

Q. Okay.

A. Yes.

Q. Then you testified in the Carlos William [*sic*] trial, right?

A. Right, yes.

Q. And you testified to the same set of facts in the Carlos [*sic*] Williams trial that you testified to in the Linda Carty [*sic*], right?

A. Yes.

Q. Okay. Including the fact that you saw Linda Carty pulling a bag over Joana Rodriguez's head, right?

A. Right.

Q. Then you testified – then you were sentenced, right, in your PSI hearing? Remember that?

A. Yes.

Q. And isn't it true that at your PSI hearing you testified: Linda Carty duked me off into believing something was in there that wasn't.

* * *

Q. You gave an interview in a documentary, right?

A. Right.

Q. Okay. And you told Werner Herzog that it was time to tell your side of the story, right? Right?

A. Right.

* * *

Q. You told Werner Herzog: Like Linda told me, we're in this together. If I go down, you go down. She wasn't lying. Did you say that?

A. Yes.

Q. And isn't it true you said – you told the director: My understanding was it was Linda. From what I've seen, it was only [Rodriguez] and Linda. Everyone else had left. It was only her and Linda. And when we come back, that was it. That's what you told the director, didn't you?

A. [I]f that's on the tape, then I said it.

* * *

Q. . . . And you said – you told Linda – when you got back to the Hampton Inn, you told the director: I told her that's what this is all about. . . . "From that point there, I wanted to kill Linda." . . . You told him: I probably should have done it the first chance I got. I probably would have saved the lady's life. Right?

A. Yes, I said that.

* * *

Q. And your side of the story, again, if you had killed Linda, the lady would be alive, right?

A. Pretty much, yes, sir.

Q. And yet, you write in your affidavit that Josie Anderson was the ringleader.

A. Well, Jose [*sic*] was the one who introduced us to Linda. So, I didn't know – nobody else knew Linda but Josie.

Q. But Josie didn't go to the lick the second night, did she?

A. Well, she went – no, she didn't.

Q. She didn't, right. Josie didn't have that baby at that motel room, right?

A. No.

Q. Okay. You say in your affidavit . . . "Connie Spence and Craig Goodhart threatened me and intimidated me, telling me I would get the death penalty myself if Linda Carty did not get the death penalty. They told me I had to testify at Linda's trial to avoid the death penalty, and they made it clear what it was I had to say." Do you see that?

A. Yes.

* * *

Q. Okay. I want to make sure I understand all of the false statements that you say Connie and Craig forced you to make. Okay? "Linda didn't instruct us to kill all the guys in the apartment." Is that one of them?

A. Well, this is – there was so many different interviews with Connie and Craig Goodhart. . . . I just can't pinpoint exactly one different statement that would make it – make it seem better than what it is. If you say what did they say about what part of threaten – okay – well, you say – well, when you went – when you went to the motel room and left a fingerprint on the newspaper that I was supposed to read off the sports page, a lot of stuff was not true.

Q. Okay. Let me ask you –

A. I don't remember any of that.

Q. But you were in the hotel room, right?

A. Yeah.

Q. Linda had all that baby stuff there?

A. Yeah.

Q. I will point you to the direction of one specific one. I'm looking at Paragraph 18. . . . "Another example was adding a detail that Linda had instructed us to kill all the guys in the apartment during the lick. . . . The truth is, Linda didn't instruct us to kill all the guys in the apartment. This was a detail that got included at trial through the various rehearsals with the district attorneys." Right?

A. Yes.

Q. Okay. And that's specific to the district attorneys, right?

A. Yes.

Q. Okay. Isn't it true that when you spoke with deputy Novak during your first interview that –

A. I said the same thing.

Q. Well, actually isn't it true that she said she wanted everyone else dead?

A. Yes. That's what I told – I told Novak.

Q. You told Novak that, right?

A. Yeah.

Q. That Linda Carty wanted everyone else in the apartment dead, right?

A. Right.

Q. Okay. Connie Spence and Craig Goodhart weren't involved in the case yet, right?

A. Well, not to my knowledge.

Q. Right. But, according to your affidavit in Paragraph 15, that specific detail got added through the various rehearsals with the district attorney. Isn't that what it says, Mr. Robinson?

A. Well, yes, it does say that.

Q. Okay. And so that was false, right?

A. Well, it's been stretched.

* * *

Q. Okay. At the Carlos [*sic*] Williams trial, you testified, did you not, that everyone came back to Van Zandt Street, right?

A. Yes.

Q. It's you, Carlos [*sic*], Baby G, talking about letting the victim go, right?

A. Yes.

Q. You all talked about killing Linda, right?

A. Yes.

Q. And then Zeb came out and he wanted everyone to leave, right?

A. Yes.

* * *

Q. Okay. You went to your baby's mama's house to drop off some money?

A. Yeah.

Q. Came back at 3:00 in the morning? . . . Okay. You don't remember the time frame because it's so long ago, right?

A. Yeah.

Q. Okay. And Linda is still there, right?

A. Yes.

Q. Okay. And you testified at the Williams trial that you saw Linda pulling the bag over the head, right?

A. Well, I testified I saw the bag over her head. I can't say that I saw her pull the bag over the head.

* * *

Q. Did you put the bag over her head?

A. No, I didn't.

Q. Did Carlos [*sic*]?

A. No.

Q. Okay. Baby G?

A. No.

Q. Zeb?

A. No.

Q. Who?

A. Well, Linda was the only one out there.

Q. Exactly. . . .

**3. <u>Habeas Testimony of Marvin Caston</u>**

Caston testified to the following on direct examination during the habeas hearing:

Q. Now, Mr. Caston, I want you to tell us in your own words, when you met with Connie Spence and Craig Goodhart on those visits, did they ever threaten you to get you to tell a story?

A. Yes.

Q. Okay. I want your words. Tell me – tell me what they said to you and what you – tell us the story?

A. Okay. One day I was at my sister's house, but I was leaving my sister's house. So, I just start seeing – I seen the lady before, but I was like this can't be the lady that's chasing me right here. And it was Connie Spence and Mr. Craig, whatever. So, I was like – so, they were at my sister's house and we was sitting at the table. And Mr. Craig, he had seen some marijuana in the ashtray. I was like: You know I could take you to jail for this, right? So, I was like, man. I really wasn't – so, they started asking me questions like about Ms. Linda and other people. Then he was like: If they don't get the death penalty or a life sentence, I was going to get 30 years. So, they had me scared. You know what I'm saying, at the time, because I'm not knowing what was the right thing to say. So, they start telling me on this such and such date did this happen. So, I was under the influence of drugs at the time. So, they asked me – and they give me the date. It's playing in my mind that the dates – that's supposed to be date, but it's really like I don't know.

* * *

Q. And did Ms. Spence and Mr. Goodhart make any other threats to you that day?

A. Yes, sir.

Q. And what were those?

A. If Linda McCarty [*sic*] and Chris Robinson didn't get a life sentence or a death penalty, I was going to get 30 years.

Q. Did that scare you?

A. Yeah, because I was like for what. I didn't do anything. I'm being honest with them. I'm telling them what I know.

* * *

Q. Okay. Okay. And Mr. Caston, were you involved either a day or a week before this incident happened in terms of perhaps going to do this lick?

A. I was hanging around with them at the time.

Q. Okay. And did you actually drive out to do the lick?

A. Well, it wasn't like drive out to do a lick. It was a drive out to go visit Linda's house. And she – by us being there, she showed us Ms. – I think her name was Ms. Rodriguez, whatever, where she stayed.

Q. Right.

* * *

Q. Okay. Who was the person – well, you say in here Josie Anderson brought up the lick first. Is that true?

A. Yes, but I made a mistake and said Linda, but it wasn't Linda. It was Josie.

On cross-examination, Caston testified as follows:

Q. Mr. Caston, aside from that mistake that you said at trial – and you testified it was a mistake, right? And that was who brought up the lick first, right?

A. Uh-huh.

Q. The rest of your testimony at trial was truthful because you were there to tell the truth, right?

A. Yes, sir, but for the times and the dates and the . . . .

Q. Right. You got a little confused about the times and the dates, right?

A. Uh-huh.

Q. And you're saying you testified falsely or wrongly about who brought up the lick first, right?

A. It wasn't false. I wasn't trying to be falsely about it, but it was at the time my mind was just racing, so . . . .

* * *

Q. Mr. Caston, isn't it true that you told me, when I interviewed you, that Linda Carty said she was going to cut the baby out?

A. That's true.

Q. Isn't it true that you told me Linda Carty said: I'm going to cut the baby, cut the bitch's stomach open; ya'll know what I'm saying?

A. Not cut the baby, though.

Q. Okay. Cut the baby out?

A. Yes.

* * *

Q. Isn't it true that you told me or confirmed Linda was the one organizing people to try to rip the baby out?

A. No. She wasn't trying to get nobody to rip the baby out. She said she was going to cut the baby out herself.

Q. Linda said she was going to cut the baby out herself?

A. Yes.

Q. Okay. And isn't it true that you told me: Linda said her husband was having an affair and she was going to take the baby from the bitch?

A. Yes.

Q. And isn't it true that you told me Linda was the person who was organizing the stuff for the drug lick?

A. Yes, but Josie played a role, too. That's what I'm trying to explain to you.

Q. So, Josie and Linda – what you are telling the Court right now – they both played a role in the drug lick?

A. Yes.

* * *

Q. Okay. But you weren't there for the drug lick, were you?

A. No, sir.

Q. Because you backed out?

A. Yes, sir.

Q. Because you freaked out because you wanted no part of anything where any baby was being taken out of a stomach, right?

A. Yes, sir.

Q. Right? And you don't know if Josie was there or not?

A. I don't.

Q. And you really have no idea as to what happened in that apartment because you weren't there, right?

A. That's right.

* * *

Q. Isn't it true you told me Linda said: When ya'll go in there, I'm going to go get the chick; don't worry about the chick?

A. Yes.

**4. <u>Habeas Testimony of Gerald Anderson</u>**

At the habeas hearing, Gerald Anderson testified that Connie Spence tried to pressure him into testifying in Linda Carty's trial. He said that Spence told him she knew he "didn't do it," but she felt he knew more than he was telling her, so if he didn't testify against Linda Carty she would build a case against him "because of his priors." Anderson said that when he was arrested for the capital murder of Joana Rodriguez, the police came to his house, he

had been arguing with his wife, and he was intoxicated. The police told him they had been told he was involved and he told the police that he "wasn't involved in anything." He said he told Connie Spence that he "wasn't there." He said that Spence "knew that I was present and something about the lady said about cutting a baby out of somebody. I told her that I don't know nothing about cutting no baby and taking no baby out of nobody." Anderson said that Spence told him "to come forward and say the lady said she was going to take a baby out of somebody, take a baby. I told her: I can't say that because I wasn't present. . . . I told her I wasn't recruited by nobody to do nothing." Anderson was then asked,

> Q. I've got to ask you, Mr. Anderson: What was your involvement in the whole Joana Rodriguez case? Just tell us what it was, if any, or none. Just tell us.
>
> A. Well, I know Mr. Robinson. You know, we drank codeine. I'd buy codeine from him. He said he needed a phone for – to take care of a lick. I told him okay. I gave him a phone and that was that.
>
> * * *
>
> Q. All right. And what did you tell the police the night that you were arrested, do you remember?
>
> A. I told them I didn't have nothing to do with it. "What's up, what's going on?"

**5. Habeas Testimony of Craig Goodhart**

Craig Goodhart was one of the two prosecutors who are being accused of presenting false testimony and withholding *Brady* material. As to these two allegations, the significant portions of Craig Goodhart's testimony at the habeas hearing are as follows:

> A. There was a materiality component to a Brady disclosure. So, one, did it affect guilt or innocence. And two, did it affect punishment in some material nature. I did not make those decisions as a general rule. I lived by what Johnny Holmes taught me.
>
> Q. What did he teach you?
>
> A. Don't be afraid of it, give it all up, argue to the jury later. And I always followed that rule to the best of my ability my entire career.
>
> * * *
>
> Q. And at that – in that case [the David Temple case], you took the position collectively as this team if you didn't believe the material, even though exculpatory, was true, you didn't have to disclose it?
>
> A. I didn't take that position.
>
> Q. Okay. So, that's a wrong position to take?
>
> A. For me.
>
> * * *
>
> Q. All right. I'm sorry. Mr. Goodhart, I want to talk to you about another element of Brady, which is impeachment. Impeachment – do you agree that Brady requires the disclosure of impeachment evidence?
>
> A. Yes.

Q. Okay. How do you define – or back in 2002, how did you define your obligations for disclosing impeachment evidence?

A. The same way I do now, the Johnny Homes' rule.

Q. What is the Johnny Homes' rule on disclosing impeachment evidence?

A. Give everything to the defense and argue it at trial to the jury.

Q. Give everything to the defense before trial, correct?

A. Yes.

* * *

A. I may have had different theories of how that case – of what happened based on all of the interviews I did and the physical evidence.
Q. I understand.

A. And obviously I did have a different theory.

Q. What was the other theory?

A. Under the law of parties they were all guilty of killing this lady.

Q. Okay. Felony murder?

A. No, sir.

Q. Law of parties?

A. Law of parties. Everybody that participated committed the crime of capital murder.

* * *

Q. Do you recall in these eleven meetings discussing specifically with Chris Robinson changing his testimony from she was alive after the bag until when she's dead at trial?

A. Counsel, I've never manufactured testimony in my life.

Q. I understand, sir. My question is: Do you recall –

A. You know, I don't recall, but I'm telling you I don't do that.

Q. And what investigation can you tell me about did you do, that you can remember, as a prosecutor to try to resolve which one of these were true, alive or dead?

A. I would have done anything I had in my power to find out whether it was true or not true. And if I presented it, I believed it to be true.

**6. <u>Habeas Testimony of Connie Spence</u>**

Connie Spence testified at the habeas hearing that:

- She has no specific recollection of throwing anything away that pertained to the Carty trial.

- She has no explanation why Virginia Almanza, a victim-witness coordinator, would delete e-mails regarding Linda Carty.

- Her understanding of Brady is that "any evidence that is favorable to the defendant is to be turned over." That includes any evidence in her possession that a witness was either lying or changing their story. She testified that they "gave access to defense counsel at all times anything that she did not consider work product."

- Spence agreed that if she had some information that was exculpatory or impeachment, but it wasn't written down, it would still be something that she would turn over to the defense.

- Spence did admit that, back in 2001-2002, generally speaking, if she did not find the evidence credible, she would not turn it over to the defense. She believed she had a "gatekeeping" role to determine whether exculpatory evidence was turned over to defense counsel. She testified that the Michael Morton Act changed things and that, now, prosecutors do not have discretion regarding whether to turn over evidence to the defense.

- But, with regard to this particular case, Spence stated that they were very "open and upfront" with defense counsel regarding the witness testimony.

- Spence stated that she did not recall whether anything was specifically withheld from defense counsel in this case.

- Again, though, Spence stated that if she had information that someone else had put together this conspiracy and was the ringleader of this crime, she would have revealed that to defense counsel.

- Spence also said that it was her recollection that every single witness's statement that the D.A. had access to was always in the open file and accessible to defense counsel.

- With regard to Chris Robinson, Spence agreed that he was an important witness because he was an "important piece of the puzzle." She said that she "believed his testimony to be crucial or very important, an integral part." When asked if she thought he was "critical" to their case, Spence testified that

> his testimony put all the pieces together and certainly included Linda Carty being able to identify the place where the body was found, the baby was found in the car that were [*sic*] rented to her and her daughter, her crazy story, and the fact that she was the connection between that apartment complex and the Van Zandt home. Yeah, Chris Robinson did put the pieces together that we wouldn't have otherwise known, but there was a lot of

evidence that supported and corroborated what Chris said that was independent of Chris.

- Spence denied telling Chris that if Carty did not get the death penalty, he would.

- Spence denied threatening Chris with the death penalty.

- Spence denied insisting that Chris change his story or change his answer to a question.

- Spence denied rehearsing testimony with Chris Robinson. She insisted that they "specifically told him to tell [them] the truth."

- Carty's habeas counsel continued to focus on the fact that, at one time, Robinson said that he tore at the bag over Rodriguez's head, and she was still alive, but at trial Robinson testified that when he saw Carty with the bag over Rodriquez's head and he tore at it, Rodriguez was already dead. Spence testified that she did not recall when or why he may have changed his story.

- Carty's habeas counsel also focused on the discrepancies in testimony regarding whether Carty actually entered the apartment or whether she remained outside. Again, Spence did not have any information regarding whether or when Chris changed his position on that issue.

- Regarding Zebediah Comb, Spence testified that he was "important because he was there." She agreed that Comb admitted that he knew Rodriguez was in the trunk, and he admitted seeing her in the trunk, but Comb could not have been charged because the evidence did not show that he was chargeable as a party.

- Spence did not recall promising that if Comb testified she would dismiss his gun charge. Spence also did not remember making a deal with Comb about his federal charge.

- Regarding Marvin Caston, Spence said he was another piece of the puzzle. She recalled that

> when Linda went to Josie and asked her if she knew of anybody who would want to do a lick for a lot of money, Josie led them to Junebug (Marvin Caston) and others. [Caston] went on a dry-run with Chris Robinson and Josie and Linda Carty to the complainant's apartment maybe a day – sometime before the actual event went on. Between that dry-run and the actual event, he hinged up and backed out of the deal.

- Regarding Charlie Mathis, Spence denied saying anything to Mathis about him having an affair with Linda Carty. She said she had never heard whether Mathis had an affair with any confidential informant, and she never spoke to anybody about whether or not Charlie had an improper relationship with Linda Carty.

- Regarding Gerald Anderson, Spence testified that she did not recall interviewing him. She stated, however, that she knows she did not tell him that if Linda Carty did not get the death penalty that he would get convicted and sentenced to 30 years. Spence said that she would not have told him that because that is "not conducive to him being cooperative.

- On cross-examination by the district attorney, Spence testified as follows:

Q. You were asked on several occasions regarding corroborating evidence, right –

A. Yes.

Q. – today? Okay. And I think we can agree that there was a host of corroborating evidence in this case, correct?

A. Yes.

Q. Both Carlos [*sic*] – related to Ms. Carty, right?

A. Yes.

Q. Both Josie and Marvin Caston said that Linda Carty wanted to cut the baby out of the bitch, right?

A. Yes.

Q. She made statements to a neighbor that she was about to get a baby?

A. Yes.

Q. She made odd statements to Charles Mathis?

A. Yes.

Q. She bought medical supplies?

A. Yes.

Q. And the only connection between Van Zandt and the housing complex is Linda Carty living there, right?

A. Yes. . . .

* * *

Q. Did you fail to disclose a deal with Zeb Comb to Jerry Guerino or Windi Akins?

A. No.

Q. Would you have interviewed a witness without the attorney present?

A. Well, if the witness had an attorney.

Q. If the witness had an attorney, you wouldn't interview them without the attorney there, right?

A. Correct.

Q. With regard to possible deals for Zeb Comb with the assistant U.S. attorney, you researched e-mail traffic about that?

A. Yes, I did.

Q. With your more than 20 years as a prosecutor, have you ever been able to tell an assistant U.S. attorney of the Federal Government what they should do?

A. No, sir.

* * *

Q. I'm showing you what's been admitted as Applicant's 54. The first paragraph: Junebug is surprisingly cooperative after I assured him I was not interested in him as a defendant. Do you see that?

A. Yes, sir.

Q. You didn't offer him a deal, did you?

A. No, sir.

* * *

Q. So, there was no deal with Marvin Caston?

A. No, there was no deal.

Q. Under the law of parties, it wouldn't have made a bit of difference whether Linda Carty came in or not, right?

A. That is correct.

* * *

Q. Ms. Spence, did you coerce or pressure any witness in this case to testify falsely?

A. No, sir.

Q. Did you coerce or force or threaten Charlie Mathis to testify in this trial?

A. No, sir.

## ANALYSIS

### A. Claims A & B: The Presentation of False and Misleading Testimony

As a general rule, the State's use of material false testimony violates a defendant's due process rights. In cases involving the State's *knowing* use of false testimony in violation of due process, an "applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment."[20] Under the standard set by the Supreme Court in *Napue v. Illinois*,[21] a State's knowing presentation of false testimony will result in a new trial for the applicant if there is "any reasonable likelihood that the false

[20] *Ex parte Fierro*, 934 S.W.2d 370, 374 (Tex. Crim. App. 1996).

[21] 360 U.S. 264 (1959).

testimony could have affected the jury's verdict."[22] The Supreme Court continued to use the *Napue* standard in *Giglio v. United States*,[23] wherein it held that the State knowingly used false testimony, and such false testimony was material in that it could in any reasonable likelihood have affected the judgment of the jury.

However, an applicant's due process rights can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly.[24] In *Ex parte Chabot*[25] we held for the first time that the admission of false testimony could violate an applicant's due process rights even when the State was unaware at the time of trial that the testimony was false.[26] "False" testimony is testimony that, "taken as a whole, gives the jury a false impression."[27] Testimony gives a false impression when a "witness omitted or glossed over pertinent facts."[28] In *Ex parte Chavez*,[29] we held that

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[22] *Ex parte Weinstein*, 421 S.W.3d 656, 669 (Tex. Crim. App. 2014); *Napue*, 360 U.S. at 271 ("[T]he false testimony could not in any reasonable likelihood have affected the judgment of the jury.").

[23] 405 U.S. 150 (1972).

[24] *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011).

[25] 300 S.W.3d 768 (Tex. Crim. App. 2009).

[26] *Id*. at 772.

[27] *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012).

[28] *Robbins*, 360 S.W.3d at 462.

[29] 371 S.W.3d 200 (Tex. Crim. App. 2012). "A witness's intent in providing false or inaccurate testimony and the State's intent in introducing that testimony are not relevant to false-testimony due-process error analysis." *Id*. at 208.

testimony need not be perjured to constitute a due process violation. It is sufficient that the testimony was false. Thus, a *Chabot* claim has two essential elements: the testimony used by the State was false, and it was material to the applicant's conviction. To show that the State's presentation of false testimony is material, an "applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment."[30] This is done by showing that there is a "reasonable likelihood that the false testimony affected the applicant's conviction or sentence."[31] The standard of materiality is the same for knowing and unknowing use of false testimony.

In this case, the habeas court found, based on the trial record and evidence presented during the habeas proceedings, that Carty failed to demonstrate that the prosecution threatened or coerced witnesses Robinson, Caston, Mathis, and Gerald Anderson into testifying falsely during Carty's capital murder trial.

Regarding Robinson, on the day after the murder, police interviewed Robinson. Among the details of the offense he relayed in his interview were that Carty manipulated him and two other men into robbing what they thought was a dope house so that Carty could kidnap the baby, which she told them was her husband's child. Robinson told police that they kicked down the door and hogtied the occupants. Carty then called one of the other

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[30] *Chabot*, 300 S.W.3d at 771 (citing *Fierro*, 934 S.W.2d at 374).

[31] *Chavez*, 371 S.W.3d at 207.

robber's cell phones and told him to get "the package," which Robinson assumed was the baby. He said that Carty told him and the others to kill the occupants of the apartment. Carty then took the baby, one of the men put the baby's mother (Rodriguez) into the trunk, and they went to Robinson's grandmother's house. Robinson told police in the initial interview that Carty tried to kill the woman by suffocating her. Spence and Goodhart did not speak to Robinson until after police had interviewed Robinson. The habeas court found that Robinson's version of the incident told in his initial police interviews—before he ever met with Spence or Goodhart—was consistent with his trial testimony. Thus, the habeas court found that Carty failed to show that Robinson was coerced by the prosecution into providing false and misleading testimony at Carty's trial. The habeas court found that Robinson's trial testimony was consistent with and corroborated by other witnesses who never have recanted their trial testimony—Josie Anderson, Marvin Caston, and Zebediah Comb. During the writ hearing, Robinson was unable to specify or articulate any portions of his trial testimony where he presented false testimony or where he felt threatened into testifying in a particular manner. The habeas court found that Spence and Goodhart's habeas testimony—that they did not collude with Robinson or coerce him to present false testimony—was credible. The habeas court found that Robinson's assertions contained in his 2014 affidavit were "suspect and unpersuasive" given his admissions during the writ hearing that the statements in his habeas affidavit were "stretched." Thus, the habeas court found unpersuasive Carty's claim

that the prosecutors presented false testimony through Robinson. The record supports these findings.[32]

With regard to Marvin Caston, the habeas court found that Caston's trial testimony regarding the events leading up to the incident was consistent with and cumulative of the testimony presented by witnesses Josie Anderson and Zebediah Comb, both of whom have not recanted their testimony. The accuracy of Caston's memory was presented at Carty's trial for the jury's consideration. Moreover, Carty has failed to establish that the State coerced Caston into presenting false and misleading testimony. Caston testified at the habeas hearing that his trial testimony was truthful, but for his confusion regarding dates and times. Thus, the habeas court found unpersuasive Carty's claim alleging that the prosecution presented false testimony through Caston. The record supports these findings.

With regard to Charlie Mathis, the habeas court found that Carty failed to demonstrate that the State presented false and misleading testimony from Charlie Mathis. Mathis said at the writ hearing that he testified truthfully and honestly at Carty's trial. The habeas court did

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[32] As noted by Presiding Judge Keller in her dissenting opinion related to the Court's remand of this subsequent writ, *see Ex parte Carty*, No. WR-61,055-02, 2015 WL 831793, *3 (Tex. Crim. App. Feb. 25, 2015), Carty relies on "affidavits" submitted by four jurors who claim that, had they known about certain allegedly exculpatory facts contained in Robinson's affidavit, they would not have found Carty guilty of capital murder or assessed the death penalty. Actually, these "affidavits" are entitled "Declaration of Juror," and, although they are signed and witnessed, they are not notarized. Moreover, I agree with Presiding Judge Keller that these declarations are inadmissible under Texas Rule of Evidence 606(b) and cannot be considered. And, even if they could be considered, evidence of a juror's hindsight speculation stating that they would not have voted for guilt and/or death if the evidence had been different does not establish that no rational juror would have done so.

not find Mathis's claims that Spence threatened or coerced him to be credible. The record supports these findings.

Finally, with regard to Gerald Anderson, the habeas court found that, because Gerald Anderson did not testify during Carty's capital murder trial, Carty failed to demonstrate that the State presented false and misleading testimony through Anderson. The habeas court found unpersuasive Anderson's assertion that he was threatened and/or coerced by Spence.

All of these findings are supported by the record. The habeas court concluded, and I agree, that the evidence presented by Carty to support her claim that the prosecution presented false testimony is not credible. "This Court ordinarily defers to the habeas court's fact findings, particularly those related to credibility and demeanor, when those findings are supported by the record."[33] Carty's claim that witnesses were coerced and/or threatened by the prosecution has not been established with credible evidence. Therefore, I agree that Carty's claims fail under both *Giglio* and *Chabot* because she has not shown that the testimony at issue was false, misleading, or material. Even if we were to assume Robinson and Caston gave false or misleading testimony, it was not material.[34] Ultimately, it did not matter whether Carty was the ringleader, whether Carty entered Rodriguez's apartment,

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[33] *Ex parte De La Cruz*, 466 S.W.3d 855, 865-66 (Tex. Crim. App. 2015) (citing *Ex parte Navarijo*, 433 S.W.3d 558, 567 (Tex. Crim. App. 2014)).

[34] *See Weinstein*, 421 S.W.3d at 665 (holding that false testimony is material if there is a "reasonable likelihood that it affected the judgment of the jury").

whether Robinson actually saw Carty put the bag over Rodriguez's head, or even whether Rodriguez was dead when Robinson tore the plastic bag that was wrapped around Rodriguez's head. Carty was convicted as a party to capital murder, and none of the evidence eliminates her or even casts reasonable doubt on her role as a party to this offense. Because the trial court's findings are supported by the record, I agree that Claims A and B should be denied.

**B. Claim C: Withholding of Brady Material**

In *Brady v. Maryland* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[35] "The State's duty to reveal *Brady* material to the defense attaches when the information comes into the State's possession, whether or not the defense requested the information."[36] *Giglio v. United States* extended the rule in *Brady* to include impeachment evidence as well as exculpatory evidence.[37] To establish entitlement to a new trial based on Brady violation, a defendant must demonstrate that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to

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[35] *Brady*, 373 U.S. at 87.

[36] *Harm v. State*, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006) (citing *Thomas v. State*, 841 S.W.2d 399, 407 (Tex. Crim. App. 1992)).

[37] 405 U.S. 150, 153–54.

him; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.[38] Furthermore, the Supreme Court in *Kyles v. Whitley* explained that the materiality of suppressed evidence is considered collectively, rather than item by item.[39] The Supreme Court has, since *Kyles*, reemphasized the importance of evaluating materiality cumulatively.[40]

The habeas court agreed that the State was operating under a misunderstanding of *Brady* at the time of the Carty trial. The habeas court found that, at the time of Carty's trial, the prosecution did not believe that impeachment or exculpatory evidence needed to be disclosed if the prosecutor did not find the testimony credible. This finding is supported by Spence's testimony, but it is not supported by Goodhart's testimony. Goodhart testified that he did not operate under that policy. Spence, however, mistakenly believed that she did not have to turn over evidence favorable to the defense if she did not find the evidence credible.

The habeas court found that several witness statements and interview transcriptions were not disclosed to the defense prior to trial. The main points of contention were whether

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[38] *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

[39] *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *see also Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011) (citing *Kyles*), *and Ex parte Miles*, 359 S.W.3d 647, 666 (Tex. Crim. App. 2012) (same).

[40] *See Cone v. Bell*, 556 U.S. 449, 473–74 (2009) (Although the Court ultimately found that the undisclosed evidence was not material, it "[took] exception to the Court of Appeals' failure to assess the effect of the suppressed evidence 'collectively' rather than 'item by item[.]'"); *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (holding that "the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively[.]").

Robinson saw Carty placing the bag over Rodriguez's head, whether Rodriguez was alive or dead when Robinson tore open the bag, and whether Carty went inside Rodriguez's and Cabrera's apartment during the lick. At trial, Robinson testified that Carty "had the bag over the lady's head," that Rodriguez was not breathing when he tore open the bag, and that Carty came in through the front door as Robinson was exiting the apartment during the lick.

There were three statements given by Robinson. One videotaped statement of Robinson was provided to the defense during trial and counsel was able to use it to impeach Robinson's credibility on these matters. On cross-examination, defense counsel got Robinson to admit that he told the police in the videotaped statement that Carty did not enter Rodriguez's apartment. Defense counsel also got Robinson to admit that he told police that when he opened the trunk the next morning, he saw Rodriguez with a bag over her head and tore a hole in it so she could breathe. Further, defense counsel pointed out that Robinson told the police in his statement that he did not know Rodriguez was dead until the police came and opened the trunk. Defense counsel also used this statement to point out that Robinson told police conflicting information about when Carty was at the Van Zandt residence, whether Robinson knew the people involved, who brought Rodriguez and the baby out of the house, and how Carty got to the hotel. With regard to the two Robinson statements that were not turned over to the defense, these were mostly consistent with the statement he gave that was turned over. Any inconsistencies could have been used for impeachment, but I agree

that they were not material because they were not significant enough to have changed the outcome of the trial.

The habeas court also found that the State withheld impeachment evidence because it failed to disclose the details of a deal with Caston. However, it ultimately concluded that such evidence was not material. Although there were no formal "deals" entered into between the prosecution and Caston, Robinson, and Josie Anderson, it was more than likely communicated to them that they would benefit by cooperating with the State. To represent to the defense, to the court, and to the jury that there were no deals, and thus no incentive for the witnesses to testify favorably for the State, is somewhat misleading. Nevertheless, as to Caston and Josie Anderson, Carty's defense lawyers would have been able to cross examine them about whether or not they had been charged by the State at the time of Carty's trial. The existence of an incentive to testify favorably for the State could have been explored and argued by defense counsel. Thus, I would not be able to conclude that the State "withheld" this information, or conclude that this is "new" evidence, and I would not conclude that it was material.

The habeas court found that the State withheld Gerald Anderson's written statement. In that statement, Gerald Anderson says that Robinson brought Rodriguez and the baby out and that Carty waited in her car. If this statement had been produced, defense counsel could have impeached Robinson's testimony. However, the habeas court also found that such

evidence was not material. The testimony of Cabrera and Cardenas confirmed that three men entered the apartment and a woman who was waiting outside called one of them on a cell phone. Neither of them said anything about a woman being in the apartment, so their testimony discounted Robinson's story to the extent that he said that Carty came inside the apartment. Moreover, defense counsel got Robinson to admit that he told police in his statement that Carty did not enter the apartment. Therefore, that impeachment evidence was before the jury even without Gerald Anderson's statement. The record supports the trial court's finding that the evidence was not material.

The habeas court concluded that, "in light of the entire body of evidence presented, including the trial testimony," there is no reasonable likelihood that it could have affected the jury's verdict. The record supports this conclusion. Individually, each piece of undisclosed evidence is not material. Even cumulatively, the evidence is not material. Even if the statements by Robinson, the deal with Caston, and Gerald Anderson's written statement were all disclosed to defense counsel, there is no reasonable likelihood that the jury's verdict would have changed. Even if defense counsel had been able to further impeach Robinson by exposing inconsistencies in his statements, it would not have changed the outcome. And, with or without disclosure of the deal with Caston, defense counsel could have cross-examined Caston and Josie Anderson about whether or not they had been charged by the State at the time of Carty's trial, and defense counsel could have explored and argued to the

jury the existence of an incentive to testify favorably for the State. There was overwhelming evidence of guilt admitted at trial that was not subject to impeachment.

Finally, the withheld witness statements were not exculpatory. Exculpatory evidence is that which may justify, excuse, or clear the defendant from alleged guilt.[41] None of the witnesses stated that Carty was not involved in the murder. While the withheld witness statements may have contained inconsistencies that could have been brought out at trial to impeach those witnesses, none of those statements contained information justifying, excusing, or clearing Carty from the alleged guilt, or eliminating her as a party to this offense.

Because the withheld information was not exculpatory, and because of the overwhelming evidence of guilt admitted at trial that was not subject to impeachment, I agree that the cumulative effect of all the withheld *Brady* evidence was not material. There is not a reasonable probability that, had the undisclosed evidence been disclosed to the defense, the result of the proceeding would have been different. I agree that Claim C should also be denied.

## THE MOTION TO REMAND

After the evidentiary hearing, Carty's habeas counsel filed a Motion for Remand And, Alternatively, Motion to Stay. That motion asks this Court to remand the case for

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[41] *Pena v. State*, 353 S.W.3d 797, 811 (Tex. Crim. App. 2011).

consideration of specific due process violations "uncovered shortly before and during the evidentiary hearing due to the State's improper and dilatory tactics." Carty alleges in this motion that one month prior to the evidentiary hearing ordered by this Court the State produced emails that the State had previously claimed did not exist and that contained evidence that should have been disclosed years earlier. Carty claims that, through the e-mails and through Connie Spence's testimony at the habeas hearing, Carty learned that the State failed to disclose deals made with Zebediah Comb.

The trial court did not consider claims related to Zebediah Comb because such claims had not been raised in the writ application and were not the subject of this Court's earlier remand order. The trial court believed them to more properly be the subject of a subsequent writ.

In Carty's motion for remand, she asserts that Connie Spence hid from Carty's counsel the existence of a deal that she entered into with Comb that she would intervene on his behalf with the federal authorities in an effort to reduce his sentence on a federal charge if he cooperated and testified for the State in Carty's trial. In addition, there was a second deal struck with Comb for the dismissal of a felon in possession of a weapon charge brought by Spence and Goodhart against Comb in exchange for his testimony against Carty. Carty's habeas counsel asks this Court to issue findings on whether the State violated Carty's due

process rights by presenting false testimony about deals with Comb and by failing to disclose the deals prior to the Carty trial.

At Carty's trial, Zebediah Comb testified that the prosecution had not made a deal with him in exchange for his testimony:

> Q. Now, Zebediah, you've got this case pending, this felon in possession of a weapon, this bank robbery case. Have I made you any promises in return for what you have testified to today?
>
> A. No, ma'am.
>
> Q. Have I threatened you or anything other than tell you to tell the truth?
>
> A. Ma'am?
>
> Q. Have I threatened you?
>
> A. No, ma'am.
>
> Q. What have I asked you to do always?
>
> A. Just to tell the truth.

It is true that Spence's e-mails reflect representations that she may have made to Comb to encourage him to testify. However, there was no evidence of a concrete deal or arrangement entered into with Comb. In fact, in an e-mail from Connie Spence to Bill Delmore, dated May 2, 2002, related to the Williams trial, Spence states as follows:

> This time around, I'm trying a different co-defendant (Carliss Williams). Witness [referring to Comb] has told me that he does not want to testify. He is quite antagonistic and openly hostile to me. (The reason for the change in heart is because the during [*sic*] the last trial, he had not been sentenced in a

> federal matter. And, even though no deals had been made between me, him, or the AUSA . . . he apparently held out hope that his cooperation in my case would help him out in his federal case. At any rate, he's been sentenced and is not happy with the time he got in the federal case. Therefore, now he's mad at everybody and anybody. Unfortunately, I REALLY need him.)
>
> I don't really know what will happen at trial. I read him parts of his testimony from the prior trial and while he doesn't deny that what he testified to is true . . . he won't say it either. If I ask him non-leading open ended questions, basically he'll just say, "I don't remember."
>
> He's just very angry and doesn't want any part of this trial.

Spence and Goodhart both denied making any promises or threats to Comb to get him to testify, and Comb denied that there were any promises or threats by the State. Nevertheless, there was indeed a felon in possession charge pending against Comb when he testified for the State in the Carty trial in February of 2002, and the felon in possession charge was dismissed in March of 2002, shortly after Carty's trial. Thus, even though there was no evidence of a formal "deal" between Comb and the prosecutors, there was evidence that prosecutors may have provided Comb an incentive to testify for the State in Carty's trial. This information should have been turned over to the defense. In any event, however, for the reasons noted below, I agree with the Court that this *Brady* violation would not support a right to relief in this case.

First, I agree with the State that the issue of the Comb deal is a new claim that is not encompassed under Claim C in this subsequent writ application. In order for this Court to

have jurisdiction to consider this claim, Carty would have to raise it by filing a third writ application in the trial court.

Second, the pending charges against Comb were ascertainable by Carty's defense counsel before Carty's trial. Carty's counsel had the opportunity to question Comb about his pending felon in possession charge. Even though Comb denied the existence of a deal, Carty's counsel could have argued in Carty's trial how Comb may have been inclined to testify favorably for the State while the State had a case pending against him. Comb could have been impeached with this evidence even if the prosecution had not disclosed their conversation with Comb regarding the possible dismissal of Comb's gun case.

Third, Carty was convicted in February 2002. Before Comb testified in Carty's trial, the trial court questioned both Comb and his attorney, Charles Brown, about his pending state and federal charges and whether there were any deals. Both of them denied the existence of any deals. Comb's gun charge was dismissed in March 2002. He was sentenced in his federal case after Carty's trial and before Williams's trial. When Comb testified in Carliss Williams's trial in May 2002, Comb said that he testified truthfully in Linda Carty's trial. He also testified in Williams's trial that the State had agreed to dismiss his gun charge if he testified in the Carty trial. And, in fact, the gun charge was dismissed after Carty's trial. And, when questioned by the State about his federal charge, he responded: "You recommended if I testify against them, y'all would write a letter and tell them – talk to the U.S. attorney over there to give me a time reduction." Since all of this occurred before

Carty's first application for writ of habeas corpus was filed in 2003, the factual basis of this claim was ascertainable through the exercise of reasonable diligence on or before that date. It would therefore be procedurally barred under Article 11.071 § 5(a)(1) and § 5(e). If Carty had filed the motion for remand in the trial court, instead of in this Court, then we could have labeled it as an "-03" writ and dismissed it pursuant to Article 11.071 § 5.

Finally, even if we were to look into the merits of such claim, I would conclude that the evidence of an "understanding" that Comb's gun case would be dismissed in exchange for his testimony was not material enough to have changed the outcome of the trial. Comb's testimony was consistent with the testimony given by other witnesses. This evidence was not exculpatory. Thus, I agree with the Court that Carty's "motion to remand" should be denied.

**CONCLUSION**

Habeas counsel has alleged that the prosecution committed egregious misconduct that entitles her to relief. The record does not support these habeas claims. The record supports the trial court's finding that the prosecution did not present false or misleading evidence. And, although the record supports the habeas claims alleging that the prosecution failed to timely disclose *Brady* evidence, the record also supports the trial court's conclusion that such evidence was not material. It is true that, in some cases, several instances of improper-withholding-of-evidence could have the cumulative effect of making such *Brady* violations material, even when no one violation is material on its own. However, this is not one of those cases. I therefore agree with this Court that the record supports the habeas court's

conclusion that even if the withheld *Brady* evidence had been timely disclosed to the defense, the outcome of the proceedings would not have changed.

For the reasons outlined herein, I concur in the Court's decision to deny Claims A, B, and C; dismiss Claims D, E, and F; and deny Carty's Motion for Remand and, Alternatively, Motion to Stay.

FILED: February 7, 2018

PUBLISH

# Exhibit 4

Cause No. 877592-B

| | | |
|---|---|---|
| EX PARTE | § | IN THE 177TH DISTRICT COURT |
| | § | OF |
| LINDA CARTY, | § | HARRIS COUNTY, TEXAS |
| APPLICANT | | |

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

The Court, having considered the Applicant's application for writ of habeas corpus; the State's original answer; the evidence elicited during the writ evidentiary hearing conducted in Cause No. 877592-B; the affidavits and exhibits in Cause No. 877592-B; the court reporter's record from the trial in Cause No. 877592; and, the official court documents and records, makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

**procedural history**

1. On July 18, 2001, Linda Carty, the Applicant, was indicted for the May 16, 2001 capital murder of complainant Joana Rodriguez in Cause No. 877592 (I C.R. at 28).

2. The Applicant's co-defendants, Chris Robinson, Gerald Anderson, and Carliss Williams were also indicted for capital murder in Cause Nos. 877593, 919665, and 904462, respectively.

3. On February 19, 2001, a jury found the Applicant guilty of capital murder, Cause No. 877592, in the 177th District Court of Harris County, Texas (I C.R. at 184).

4. The guilt/innocence charge included an instruction applying the law of parties and requiring a verdict of guilty on the capital murder charge if the jury found that the Applicant "acting alone or with Carliss "Twin" Williams and/or Gerald "Baby G" Anderson and/or Chris Robinson and/or other person(s) as a party to the offense . . . did then and there unlawfully, while in the course of committing or attempting to commit the

kidnapping of Joana Rodriguez, intentionally cause the death of Joana Rodriquez by asphyxiating Joana Rodriguez by an unknown manner or means . . . " (I C.R. at 177).

5. On February 21, 2002, pursuant to the jury's responses to the three special issues, the trial court assessed the Applicant's punishment at death by lethal injection (I C.R. at 209).

6. Connie Spence and Craig Goodhart prosecuted the instant case at the trial level while Jerry Guerinot and Wendi Akins Pastorini (hereinafter "Akins") represented the Applicant.

7. On May 23, 2002, a jury found co-defendant, Carliss Williams, guilty of the lesser offense of kidnapping in Cause No. 904462 and sentenced him to twenty (20) years imprisonment.

8. Co-defendant Chris Robinson plead guilty, pursuant to a presentence investigation report and no recommendation on punishment from the State, to a reduced charge of aggravated kidnapping in Cause No. 877593 before testifying in the primary case; Robinson was sentenced to forty-five (45) years imprisonment on November 22, 2002, after testifying in co-defendant Williams' trial.

9. Co-defendant Gerald Anderson plead guilty, pursuant to a presentence investigation report and no recommendation on punishment from the State, to the reduced charge of aggravated kidnapping and another charge of possession with intent to deliver a controlled substance. The trial court sentenced Anderson to life in both cases to run concurrently. *See AX 57, Punishment Hearing in Anderson v. State, Cause Nos. 882167 and 919665.*

10. On April 7, 2004, the Court of Criminal Appeals affirmed the Applicant's conviction. D*affy v. State,* No. AP-74,295, 2004 WL 3093229 (Tex. Crim. App. April 7, 2004) (not designated for publication).

11. On August 6, 2003, Kurt Wentz filed an initial state habeas application, Cause No. 877592-A.

12. On May 28, 2004, Michael Goldberg and Maryanne Lyons with Baker Botts L.L.P. ("habeas counsel") filed a notice of appearance as co-counsel for the Applicant in Cause No. 877592-A, and, on March 17, 2005, Kurt Wentz withdrew from representing the Applicant. Habeas counsel then represented the Applicant throughout federal habeas proceedings and in the instant state writ proceedings, Cause No. 877592-A.

13. On March 2, 2005, the Court of Criminal Appeal denied relief on the Applicant's initial habeas application alleging sixteen grounds for relief. *Ex Parte Carty,* No. WR-61,055-01 (Tex. Crim. App. March 2, 2005).

14. Carty filed her federal petition for a writ of habeas corpus on February 24, 2006. On September 30, 2008, the United States District Court granted the State's motion for summary judgment, denied her motion for an evidentiary hearing, denied her federal habeas corpus petition, and dismissed the case with prejudice. *Carty v. Quarterman,* No. CIV.A 06-614, 2008 WL 8104283 (S.D. Tex. Sept. 30, 2008). The District Court certified only two issues for consideration by the Fifth Circuit—whether "(1) trial counsel should have informed her boyfriend/husband [Corona] of possible spousal immunity and (2) trial counsel should have presented more mitigating evidence at the punishment phase." *Carty v. Quarterman,* No. CIV.A 06-614, 2008 WL 8097280 at *2 (S.D. Tex. Dec. 16, 2008).

15. The Fifth Circuit found that "trial counsel performed objectively unreasonably by failing to interview Corona to determine if he could or would assert a marital privilege" and recognize that the state did not disagree. *Carty v. Thaler*, 583 F.3d 244, 259 (5th Cir. 2009). Despite this, the Fifth Circuit found that Carty was unable to make the requisite showing of *Strickland* prejudice, as Corona's testimony "provided nuance to the case" but was not necessary to prove capital murder, and affirmed the District Court's decision dismissing her writ. Id. at 262.

16. On January, 25th, 2010, Carty filed a petition for writ of certiorari in the US Supreme Court, which was denied on May 3, 2010. *Carty v. Thaler*, 559 U.S. 1106 (2010).

17. On September 10, 2014, the Applicant filed a subsequent state habeas application urging six grounds for relief; subsequently the Court of Criminal Appeals found that three of the Applicant's six claims satisfied the subsequent writ provisions of Section 5(a), TEX. CODE CRIM. PROC. Art. 11.071, and remanded the three claims to the trial court to consider. *Ex Parte Carty,* No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App. Feb. 25, 2015).

18. Based on Carty's post-application writ and the order of the Court of Criminal Appeals, on May 5, 2016, this court entered an Order designating the following issues to be resolved by an evidentiary hearing:

A. Whether Applicant's right to due process was violated when the State presented false and misleading testimony at trial, in violation of her rights to due process and due course of law under *Giglio* and *Napue.*

Specifically: 1. Did the State coerce witnesses Chris Robinson, Marvin Caston, Charles Mathis, and Gerald Anderson to submit false testimony?

B. Whether Applicant's right to due process and due course of law was violated when the State presented false and misleading testimony against her at trial, in violation of her rights under *Ex Parte Chabot* and *Ex Parte Chavez.*

Specifically: 1. Did the State coerce witnesses Chris Robinson, Marvin Caston, Charles Mathis, and Gerald Anderson to submit false testimony?

C. Whether Applicant's right to due process was violated by the State's failure to disclose impeachment and exculpatory evidence in violation of *Brady v. Maryland.*

Specifically: 1. Did the State withhold or misrepresent statements from Chris Robinson, Marvin Caston, Gerald Anderson, and Charles Mathis?

2. Did the State fail to disclose notes and recorded interviews with witnesses or potential witnesses?

3. Did the State fail to disclose preferential treatment to Marvin Caston in exchange for his testimony against the Applicant?

19. Following preliminary hearings addressing scheduling and discovery matters, the evidentiary hearing began on June 27, 2016 and concluded on July 5, 2016, with closing arguments and the submission of proposed findings of fact and conclusions of law, by both the Applicant and the State, on August 29, 2016. The evidentiary hearing included the testimony of 13 witnesses, the admission of 72 exhibits, the trial court's judicial notice of the trial transcripts of the Carty trial, the Carliss Williams trial, and the contents of Chris Robinson's PSI hearing, and the closing arguments of counsel for both Carty and the State.

Based on the evidence and argument of counsel, the Court hereby makes the following findings of fact and conclusions of law with regard to Applicant's claims.

20. The Applicant waived her appearance during the writ evidentiary hearing.

21. At the conclusion of a pre-trial suppression hearing, the trial court held that both the Applicant's statements to police were admissible; that she was not in custody during the first statement, and that she was in custody during the second statement but waived her rights (IV R.R. at 6-7) (IV R.R. at 118-9).

**PRIMARY OFFENSE**

22. At approximately 1:00 a.m. on May 16, 2001, three black males broke down the apartment door of complainant, Joana Rodriguez, where she was sleeping with her newborn son Ray and her husband Raymundo Cabrera; two of the men entered their bedroom, pointed guns at Cabrera, demanded money, bound Cabrera with duct tape and phone cord, covered his mouth and eyes, and beat him (XX R.R. at 29-39).

23. Cabrera heard someone say, "we are going to take the baby and the mother" and someone instruct the complainant to "take your baby and let's go," and Cabrera felt the complainant get off the bed and leave the room with the baby (XX R.R. at 39-40).

24. Cabrera's cousin, Rigoberto Cardenas, who was asleep in the ground floor living room of Cabrera's apartment when the men broke into the apartment, was bound with cords, struck in the head, and asked for money and drugs (XX R.R. at 54-9).

25. Cardenas heard a cell phone ring and heard one of the men say, "we are here inside" and "do you want it;" he also heard a man yelling "she" was outside and it was

time to leave; Cardenas then heard the baby crying and people coming down the apartment stairs before the men exited the apartment, leaving Cabrera and Cardenas who freed themselves and summoned help (XX R.R. at 60-3).

26. Florentino Martinez, Houston Police Department (HPD), interviewed apartment complex resident Florence Meyers and learned that the Applicant had just moved out of her apartment located across the sidewalk from the complainant's apartment; that Meyers saw the Applicant sitting in a small rental car with a baby seat in the car the day before; that the Applicant told Meyers she was going to have baby the next day; and, that Meyers did not believe that the Applicant was pregnant and thought that the whole thing sounded strange (XX R.R. at 104, 139-41, 151-5).

27. Subsequently, the Applicant was contacted and Officer Martinez met the Applicant and accompanied her to her apartment where she consented to a search of her almost-empty apartment and then accompanied officers to the HPD homicide division (XXI R.R. at 78-82, 100, 105-10, 114).

28. Drug Enforcement Administration ("DEA") agent Charles Mathis spoke to the Applicant while she was at HPD, and the Applicant said she may have made a mistake by loaning her daughter's car and a rental car to some individuals who she felt might be involved in the primary case abductions, and the Applicant offered to lead police to a location where the vehicles might be parked (XXI R.R. at 81-3, 110).

29. The Applicant directed police to a residence on Van Zandt Street where a small black Chevrolet belonging to the Applicant's daughter and the Applicant's rental car, a tan Pontiac Sunfire, were parked; a .38 caliber Charter Arms was found in the house, and there was a warm BBQ pit in the yard without food and also a can of Lysol (XXI R.R. at 84-5, 141-2,153-4).

30. Police found the complainant's infant son alive inside the Cavalier along with a child's car seat and a pacifier; the complainant's body was in the trunk of the Sunfire with duct tape around her legs and a plastic bag around her head (XXI R.R. at 124-5, 142-3, 154, 161).

31. Assistant medical examiner, Paul Shrode, testified that the complainant's cause of death was homicide suffocation with her significantly compromised airway caused by not only tape and plastic but also by body position;" that the complainant had been dead for at least twelve hours; that there was tape over the complainant's mouth, a plastic bag taped around her neck, and her hands and legs were bound with tape; that Shrode believed that the plastic bag was initially placed over the complainant's head, taped around the neck, and then ripped and the complainant was retape on her mouth and under her nose after the bag was ripped. (XXII R.R. 223, 237, 240-3, 247); *State's Trial Ex. 92).*

32. Dr. Shrode testified under cross-examination that any of the factors -- the bag, the tape obstructing the complainant's airways, and the positioning of the complainant's body in the car -- could all have caused the complainant's death (XXIII R.R. at 243).

33. Evidence collected from the Cavalier included a live .38 caliber round, a receipt from the Hampton Inn, a pair of life uniform medical scissors, a stethoscope, and name badge, a blue nurse's pin with a blue cord, and numerous baby items, including a diaper bag, a changing pad, a bottle holder, disposable diapers, a pacifier, infant clothing, disposable bottles, infant formula, Gerber washcloths, a hooded towel, and a baby stroller (XXI R.R. at 177-9).

34. Chris Robinson and Zebediah Comb were at the Van Zandt residence when police arrived and both men were arrested, gave statements to the police, and testified for the State regarding the primary offense (XXIII R.R. at 111).

35. Telephone records showed that calls were made to and from the Applicant's cell phone at the time of the primary offense to a phone used by Gerald Anderson; Anderson, and Carliss Williams were identified as the two men who participated in the offense, and they were arrested and charged with capital murder (XXI R.R. at 68-70).

36. Neither Gerald Anderson nor Carlos Williams, testified during the Applicant's trial; however, Jose Corona, Josie Anderson, Marvin Caston, Zebediah Comb, Denise Tillman, and Sherry Bancroft testified for the State concerning the events preceding the instant offense.

**Jose Corona's Trial Testimony**

37. Jose Corona testified that he separated from the Applicant and moved out of their apartment before the offense; that the Applicant told him she worked undercover for the government and her brother "Charlie" was her boss; and, that Corona never saw the Applicant work and never saw any money from her alleged employment (XX R.R. at 189-95, 206, 224-5).

38. Corona testified that the Applicant told him several times that she was pregnant and bought baby items; that the Applicant made excuses and never allowed Corona to accompany her to the hospital or doctor's appointments; that eventually the Applicant told Corona that she lost the babies when he questioned her about the supposed pregnancies; that Corona did not believe the Applicant was pregnant; and, that Corona never saw evidence that the Applicant was pregnant or had miscarried (XX R.R. at 191-3, 193, 200-3, 206-9).

39. Corona testified that he eventually grew tired of the Applicant's lies, including her lies about having babies, and decided to leave the Applicant; that when he told her in May, 2001 that he was leaving, the Applicant again told Corona that she was pregnant and asked him to stay with her if she had the baby; and, that Corona responded that he did not believe she was pregnant (XX R.R. 205-7).

40. Corona testified that the Applicant called him on May 15, 2001, and said she was having a baby boy the next day, and the Applicant again called on May 16th to tell him that the baby would arrive that day (XX R.R. at 208-9).

**Josie Anderson's Trial Testimony**

41. Josie Anderson ("Josie") testified that, before the complainant's murder, the Applicant made many references to her alleged pregnancies; that Josie never saw any babies, and the Applicant never mentioned having miscarriages; that the Applicant told Josie that she was pregnant on May 13, 2001, and would have the baby in twenty-four hours; and, that the Applicant also remarked several times that she needed the lady's baby (XXI R.R. at 18, 21).

42. Josie further testified that, on May 13, 2001, the Applicant asked Josie whether she knew of anyone who was interested in participating in a "lick" or kick-door robbery that she had set up where there was 200 pounds of marijuana and some cocaine in an apartment inhabited by a pregnant woman and her husband, and that Josie saw baby and medical items in the car that the Applicant was driving, including a baby seat, a diaper bag, infant formula, Pampers, baby food, baby clothes, a stethoscope, surgical scissors, and blue surgical scrubs (XXI R.R. at 206-14).

43. Josie further testified that she was present when the Applicant showed her boyfriend, Marvin Caston, and Chris Robinson the specific apartment where the robbery was to take place; that the Applicant mentioned cutting the baby out of its mother; that Josie heard the Applicant talk about taking the pregnant woman's baby because the woman had slept with the Applicant's husband; and, that ultimately, Josie did not participate in the primary offense (XXI R.R. at 218-9, 221-2).

**Marvin Caston's Trial Testimony**

44. Marvin Caston testified that the Applicant recruited people to participate in a lick at an apartment where there was supposed to be a large quantity of marijuana on May 13, 2001; that the Applicant said that she wanted to take a baby from a pregnant woman and planned to cut the baby out from its mother; that Caston had a subsequent conversation with the Applicant where the Applicant said that she wanted that specific baby because the woman had an affair with the Applicant's husband; that the Applicant further stated that she told her husband that she was pregnant even though she had a miscarriage; and, that Caston ultimately avoided the Applicant and did not participate in the primary offense (XXII R.R. at 61-4, 80).

**Zebediah Comb's Trial Testimony**

45. Zebediah Comb testified that, at the time of the primary offense, he was on house arrest for a federal case, wearing a monitor which prevented him from going

further than the street; that he first met the Applicant on the evening of Mother's Day when the Applicant arrived at the Van Zandt residence in her Pontiac with Josie Anderson and Caston and said she wanted to recruit people for a drug rip at her apartment complex; that the targets of the robbery were a pregnant woman and her husband who lived a few units down from the Applicant; that the Applicant stated that there was supposed to be about 200 pounds of marijuana at the apartment and proposed that the robbers could keep whatever drugs or money that they found in exchange for bringing the pregnant woman to the Applicant; and, that the Applicant commented that her husband was the father of the pregnant woman's child, and she would handle the rest of the arrangements once she got the woman (XXIII R.R. at 42-5, 53-8, 60).

*46.* Comb testified that the Applicant returned to the Van Zandt residence with Caston the following day, but they left because Chris Robinson was not there; that the Applicant came by the Van Zandt residence again on Tuesday looking for Robinson who was not there; that, at the Applicant's request, Comb called Robinson a couple of times who said he was busy and did not want anything to do with it; that the Applicant told Comb that the robbers would get 200 pounds of drugs in payment for the job; and, that the Applicant said she wanted the pregnant woman because the Applicant's husband was the father of the child (XXIII R.R. at 64-9).

47. Comb testified that the Applicant left the Van Zandt residence but returned later that evening; that Comb saw the Applicant talking with Robinson, Gerald Anderson and Carliss Williams about her proposed drug deal, saying that they would get 200 pounds of marijuana in exchange for bringing the pregnant woman to the Applicant; and, that the Applicant, Robinson, Gerald Anderson and Williams left the Van Zandt residence for the Applicant's apartment driving two cars, the Applicant's small gold sedan and a blue car, at around 1:00 a.m. (XXIII R.R. at 73-8).

48. Comb testified that the group returned about two hours later, and the Applicant remarked, "I got my baby" while carrying an infant in her arms; that Comb saw the complainant in the trunk of the Applicant's Pontiac and refused the Applicant's request to put the complainant in another car parked in the yard; that the men were angry at the Applicant because there were no drugs or money in the house; that the Applicant asked Comb to calm the men down, saying that she did not have any money but she had another lick for the men the next day; that Comb told the Applicant and the other men that they needed to get in their cars and leave, but the Applicant refused to drive her car with the woman in the trunk; and, that Comb then returned to the house and went to sleep (XXIII R.R. at 80-92).

49. Comb testified that Robinson was there when Comb awoke the next morning; that the Applicant arrived about twenty minutes later driving a black Chevrolet with the baby in the car; that the Applicant's Pontiac was still in the yard but it was closer to the BBQ pit; that the complainant was in the Pontiac's trunk, bound with tape and with a torn bag over her head; that the Applicant talked about disposing of the complainant's body and suggested they burn her body there; and, that the Applicant then left, saying

that she had to get money to extend the time on the Pontiac which was a rental car (XXIII R.R. at 93-100).

50. Comb testified that the Applicant returned one to two hours later with the baby and started talking about another drug deal; that Comb saw Robinson, the Applicant and Gerald Anderson putting together packets of fake and real money to use in ripping off a dope dealer; that the Applicant, Robinson, and the baby left the Van Zandt residence in the Applicant's black Chevrolet while Gerald Anderson and another man followed in a different car; that Robinson returned with the baby in the black Chevrolet about three hours later; that Robinson left the baby in the car with the air conditioning running; and, that Robinson used a towel and Lysol to wipe down the cars before the police arrived (XXIII R.R. at 101-9).

**Denise Tillman's Trial Testimony**

51. Denise Tillman, an employee at a Houston medical uniform store, testified that the Applicant visited the store on May 12, 2001, and bought a number of items, including a blue pen, a nurse's ID tag, a stethoscope, surgical scissors, and two scrub tops and scrub pants that were the common color used for Memorial hospitals (XXIII R.R. at 178-182, 184).

**Sherry Bancroft's Trial Testimony**

52. Sherry Bancroft, an employee at a Houston storage facility testified that, on May 9, 2001, the Applicant rented a storage unit, saying that she and her fiancé were having troubles and she was moving; that the Applicant also told Bancroft that she was pregnant, but Bancroft did not think the Applicant looked any different; that Bancroft also saw the Applicant on May 12 and 15, 2001, and the Applicant told Bancroft that she was in labor and expecting a baby boy that day; and, that the Applicant told Bancroft that the baby was at home with his father on May 15th, and left her storage unit with a blue baby blanket and two sets of clothing from the storage unit (XXI R.R. at 43-51).

**GROUNDS A AND B – Claims under Giglio/Napue and Ex Parte Chabot/Chavez**

53. The Court finds, based on the trial record and evidence presented during the instant habeas proceedings, that the Applicant fails to demonstrate that the prosecution threatened or coerced witnesses, including Chris Robinson, Marvin Caston, Charles Mathis, and Gerald Anderson, into testifying falsely during the Applicant's capital murder trial (IV W.H. at 212, 236-7).

**Chris Robinson**

54. HPD officer Novak talked to Robinson and took some notes before conducting a videotaped interview of him at around 3:00 a.m., on May 17, 2001, during which Robinson related details of the primary offense, including but not limited to, asserting that the Applicant manipulated him and two other men into robbing what they thought

was a dope house so that the Applicant could get a baby; that they kicked down the door of the apartment and hogtied the occupants; that, during the robbery, the Applicant called one of the other robber's cell phones and told him to get the package which Robinson assumed meant the baby; that the Applicant told Robinson and the others to kill the occupants of the apartment; that the Applicant took the baby while the woman was put into the trunk of a car, and they went to Robinson's grandmother's house; that the Applicant tried to kill the woman by suffocating her; and, that the Applicant said that the baby was her husband's child (IX W.H. at 38, 43); *AX 33 and 34, Novak's notes and transcript of Robinson's videotaped interview.*

55. Novak conducted a second interview of Robinson on the afternoon of May 17, 2001 which was audio-taped. *See AX 35, transcript of Robinson's audio-taped interview.*

56. The Court finds, based on the trial and writ hearing record, that Novak's knowledge regarding the primary case was very limited when he first interviewed Robinson; that Novak had no interaction with prosecutors Spence or Goodhart when he first interviewed Robinson; and, that prosecutors Spence and Goodhart did not speak to Robinson until after Novak had interviewed Robinson (VII W.H. at 130)(IX W.H. at 910).

**Chris Robinson's Trial Testimony**

57. Robinson testified that he was initially charged with capital murder for his role in the primary case, but he had plead guilty to the reduced offense of aggravated kidnapping pursuant to a pretrial sentence investigation report; that the State had nothing to do with punishment in his case; and, that neither prosecutor in the instant case threatened him or promised him anything in exchange for his testimony in the Applicant's capital murder trial (XXII R.R. at 136). (When Robinson testified at the Applicant's capital murder trial, he had one felony and six prior misdemeanor convictions. CXXII R.R. at 132.)

58. Robinson testified that he first met the Applicant on Mother's Day, May 13, 2001; that the Applicant, Josie Anderson and Marvin Caston were in a gold car with Florida plates when they stopped Robinson as he exited from his girlfriend's house; that Josie introduced Robinson to the Applicant who asked whether Robinson wanted to make some money; that the Applicant and Josie started discussing plans for a robbery of an apartment at the Applicant's complex where the Applicant said there was a lot of marijuana; that the Applicant drove the group over to see the complex, and they discussed items that they needed for the robbery, such as ski masks, duct tape and guns; and, that, after agreeing to meet again at midnight, the Applicant dropped Robinson and Caston at a residence on Van Zandt Street where Robinson's grandmother and halfbrother, Zebediah Comb, lived (XXII R.R. 13949).

59. Robinson testified that he retrieved his .38 caliber gun and met the Applicant, Josie Anderson, Caston, and two unknown armed men at the Van Zandt residence where they continued planning the robbery; that the Applicant had a mask made from panty hose while Josie and the Applicant produced three masks and two rolls of black duct tape; that the Applicant told the group that two men and a pregnant woman lived at the targeted apartment, and the plan was for Robinson and the other men to kill the males in the apartment while Josie and the Applicant grabbed the pregnant woman; and, that the Applicant said that her husband was the father of the pregnant woman's child, and she wanted to cut the baby from the pregnant woman (XXII R.R. at 151-61).

60. Robinson testified that the Applicant then suggested that the group see her apartment because its layout was similar to the apartment where the robbery was to take place; that the group proceeded to the Applicant's apartment with the Applicant and Josie in the Applicant's car, Caston and Robinson in a green Cadillac, and the other men in their car; that all six went into the Applicant's apartment which was empty except for a few boxes because the Applicant was moving; that the Applicant then had second thoughts about the robbery, and everyone left the Applicant's apartment in their respective vehicles; and, that Robinson never saw the two unknown men again (XXII R.R. at 153-8, 165).

61. Robinson testified that, on Monday, May 14, 2001, Robinson was walking to the store when the Applicant, Josie Anderson and Caston drove up in the Applicant's car with the Florida license plate wanting to know whether Robinson was ready to return to the apartment complex later that day, but Robinson was not interested (XXII R.R. at 168-9).

62. Robinson testified that, on Tuesday, May 15, 2001, at 10:00 a.m. or 11:00 a.m., Robinson's half-brother, Zebediah Comb, called to let him know that the Applicant was waiting for him at the Van Zandt residence; that Robinson told Comb he did not want to talk to the Applicant; that later that evening, Robinson and Carliss Williams went to the Van Zandt residence where they encountered the Applicant talking to Gerald Anderson; that, when asked whether he was going to participate in the robbery, Robinson stated that he did not have his gun; and, that there were further discussions regarding the robbery during which the Applicant said that they had to get the pregnant woman out of the house (XXII R.R. at 170-5).

63. Robinson testified that Carliss Williams took Robinson to retrieve his gun, and they returned to the Van Zandt residence; that the Applicant left the Van Zandt residence in her Florida car while the men followed five to ten minutes later in Gerald Anderson's car; that the men parked in back of the targeted apartment while the Applicant parked in front; and, that the three men waited in the car until the Applicant

called Gerald Anderson's cell phone about midnight or 12:30 a.m., to say that everything was alright in front of the apartment (XXII R.R. at 176-81).

64. Robinson testified that he and Williams' kicked in the door of the complainant's apartment and went upstairs to the bedroom where they found a man, woman, and baby; that Williams taped the man's mouth, hands, and legs with duct tape while Robinson pointed his gun at the man and demanded "mota" and "dinero"; that Robinson hit the man and searched the apartment where he saw Gerald Anderson on top of another man, taping him; that Robinson found money in a jacket; that he cut lamp and telephone cords and hog-tied both men; that a phone rang and Gerald Anderson told Robinson that the Applicant was on her way; that the Applicant was entering the apartment as Robinson was exiting it; that the Applicant asked whether they had taken care of the guys to which Robinson responded in the affirmative; that, by asking whether they had taken care of the guys, the Applicant was asking whether they had killed the men; and, that Gerald Anderson and Williams went upstairs while Robinson returned to the car parked behind the apartment (XXII R.R. at 181-203).

65. Robinson testified that he moved the car so that he saw the Applicant come around the corner, huddled over like she had both hands up under her; that Robinson knew that the Applicant had the baby; that Gerald Anderson and Williams brought the complainant out of the apartment and put her in the trunk of the car; and, that the men followed the Applicant to a storage lot where they transferred the complainant to the trunk of the Applicant's car (XXII R.R. at 204-11).

66. Robinson testified that, at around 1:30 a.m. or 2:00 a.m., on May 16, 2001, the three men returned to the Van Zandt residence where they found the Applicant standing outside her car holding the baby; that they then began to discuss what to do with the complainant; that Robinson wanted to release the complainant; that the Applicant wanted someone to tape up the Applicant and did not want to free the complainant because she had seen their faces; and, that the Applicant stood by the open trunk holding the baby while Williams taped the complainant's mouth, arms and legs and shut the car trunk (XXII R.R. at 212-6, 220-4, 238).

67. Robinson testified that the group then got into an argument which became so loud that Comb exited the residence and asked what was going on; that the men were mad and considered shooting the Applicant because they felt that she had lied about the money and drugs that were supposed to be in the apartment; that Robinson told Comb about the complainant and the baby, and Comb demanded that Robinson remove them from the yard; that Gerald Anderson, Williams and Robinson then left the residence in separate vehicles; and, that Robinson returned at around 3:30 a.m. or 4:00

a.m., to discover that the Applicant's car was pulled further into the yard next to a BBQ pit with the trunk open and the Applicant's body halfway into the car trunk (XXII R.R. at 212-6, 226-7, 232-3).

68. Robinson testified that he realized that the Applicant was doing something so he ran up and saw that there was a black bag over the complainant's head; that Robinson was unsuccessful in his effort to pull the bag up, and he ripped the bag from the complainant's head; that, when Robinson looked down, the complainant did not breathe or move; that Robison asked the Applicant "what the hell she was doing" and told the Applicant that she could not do anything to the complainant in his grandmother's yard; that the Applicant pretended to cry and responded that it was her husband's baby and she was taking it; and, at that moment, some other people drove into the yard, and Robinson shut the car trunk (XXII R.R. at 235-9).

69. Robinson testified that the Applicant refused to drive her car with the complainant's body in it; that Robinson took the Applicant and the baby to a Galleria area hotel; that Robinson stayed at the Applicant's hotel room for about fifteen to twenty minutes; that the Applicant gave the infant a bath and made a bed for the baby while Robinson was there; that Robinson asked the Applicant why she played them like that when all along she just wanted a baby; that the Applicant just looked at Robinson and responded that she would bring someone with her in the morning to pick up the car at the Van Zandt residence; and, that the Applicant also said that she would make everything right with another drug rip once she reached a man named "Flaco" (XXII R.R. at 244-6).

70. Robinson testified that he returned to the Van Zandt residence where he fell asleep in his car; that the Applicant arrived at the house in a black Chevrolet at around 9:00 a.m.; and, that the Applicant suggested various ways to dispose of the complainant's body, including burning her (XXII R.R. at 247-9, 257-8).

71. Robinson testified that Gerald Anderson then arrived and began discussing another drug rip with the Applicant; that Gerald Anderson and an unnamed man left in one car, and the Applicant, Robinson, and the infant left in the black Chevrolet; that Robinson and the Applicant were on their way to the Galleria area when a police detective called the Applicant and asked her to return to her apartment complex; that the Applicant parked her car by a mechanic's shop and told Robinson to wait in the car with the baby until she returned; that, after two hours, Robinson drove the black Chevrolet and the infant back to the Van Zandt residence where he left the infant in the car with the air conditioning running; that, before police arrived that evening, Robinson found a .32 caliber pistol in the glove compartment of one of the Applicant's cars; and,

that Robinson wiped the prints from the Pontiac Sunfire and the black Chevrolet using a bottle of Lysol (XXII R.R. at 250, 252, 255-6, 258-61).

**Chris Robinson's Testimony in Carliss Williams' Trial**

72. The Court finds that, on May 17, 2002, Robinson again testified for the State during co-defendant Carliss Williams' trial; that his testimony in Williams' trial was consistent with his earlier testimony in the Applicant's trial; and, that Robinson reiterated that neither prosecutor had threatened him or promised anything in return for his testimony (Williams Trial VII R.R. at 11-3).

73. The Court finds that, during Williams' trial, Robinson testified that the Applicant said that there were two men and a woman where she stayed who had cash and drugs; that the Applicant said that she would take care of the lady – that [Carty] would cut the baby out of the lady; that the Applicant said that the guys might have to kill the men in the apartment; that, when Robinson asked the Applicant what was so important about taking the lady, the Applicant said that the woman was sleeping with her husband and was pregnant with her husband's child; and, that the Applicant took Robinson, Josie Anderson, Caston, and two other men to her apartment so that they could get a picture of the other apartment where the complainant lived (Williams Trial VII R.R. at 17, 27, 32, 36, 44).

74. The Court finds that, during Williams' trial, Robinson testified that the Applicant parked in front of the apartment; that once the men were inside the complainant's apartment, the Applicant called Gerald Anderson and Robinson heard "Yeah, the lady and the baby" and "okay"; that Gerald Anderson told Robinson that the Applicant was on her way in; that the Applicant wanted them to kill everyone in the house; that Robinson saw the Applicant holding the baby when she exited the apartment, and Gerald Anderson had his gun on the complainant; that the men transferred the woman from the trunk of their car to the Applicant's car trunk; that the men were mad at the Applicant because they felt that she had played them, saying that there were drugs and money when all the Applicant wanted was the lady and the baby; that the Applicant's car was parked at the Van Zandt residence when the men arrived in their car, and the Applicant was just holding the baby; that the Applicant wanted the men to tape up the complainant because she did not want her moving around in the trunk; that the Applicant and Williams approached the car trunk, and the complainant looked up at the Applicant holding her baby; that Williams first taped the complainant's mouth and then her arms and legs before someone shut the car trunk; that Robinson told everyone that they had to leave, and he saw the other men and the Applicant get in their cars even though he did not see the Applicant leave; that, before Robinson left, the complainant was alive and did not have a bag over her head; that, when Robinson returned to the

Van Zandt residence at close to 3:00 a.m., the Applicant's car was pulled father back onto the property closer to the BBQ pit; that Robinson saw the Applicant in the trunk of her car, with one foot in the trunk and a bag over the complainant's head; that Robinson tore the bag open, but the complainant appeared lifeless and was not breathing; that the Applicant had said earlier that she could not let the complainant go because she knew her; and, that Robinson cussed the Applicant while the Applicant just held the baby (Williams Trial VII at 67, 80-1, 83, 87-90, 94-5, 98, 102, 104, 108-14, 116-8).

**Chris Robinson and the instant habeas claim**

75. The Court, based on evidence presented during the habeas proceedings, finds that the Applicant fails to show that Robinson was coerced by the prosecution into providing false and misleading testimony at the Applicant's trial based on the fact that, before the prosecution ever met with Robinson, he provided the police with numerous details regarding the primary offense details consistent with his subsequent testimony.

*76.* The Court finds that much of Robinson's testimony was consistent with and corroborated by other witnesses namely, Josie Anderson, Marvin Caston and Zebediah Comb who never recanted their trial testimony. (During the instant writ hearing, Caston stated that he tried to testify truthfully as best as he could during the Applicant's capital murder trial. (VI W.H. at 71, 80.)

77. The Court finds that, during the writ hearing, Robinson was unable to specify or articulate any portions of his trial testimony where he presented false testimony or where he felt threatened into testifying in a particular manner, including Robinson's response that "I just can't pinpoint exactly one different statement that would make it make it seem better than what it is" when questioned on the issue by the presiding judge (VII W.H. at 1267).

78. The Court finds that, during the writ hearing, Robinson acknowledged that he told the interviewer in the 2012 documentary that it was the Applicant [who killed the complainant] because everybody else had left; that Robinson confronted the Applicant at the Hampton Inn saying, "I told her that's what this is all about;" that Robinson had wanted to kill the Applicant; and, that Robinson would have saved the complainant's life if he had killed the Applicant (VII W.H. at 1189).

79. The Court finds unpersuasive the habeas claim that the prosecutors presented false testimony through Robinson during the Applicant's trial in light of Robinson's repeated testimony that neither prosecutor threatened him or promised him anything in exchange for his testimony, in light of the credible testimony of prosecutors Goodhart and Spence that neither colluded with Robinson to present false testimony, in light of much of Robinson's testimony being consistent with and corroborated by other witnesses, and in light of Robinson being unable to articulate or specify what testimony, if any, was false (XXII R.R. at 136) (Williams Trial VII R.R. at 113)(IV W.H. at 212,

2367)(V W.H. at 2201).

80. The Court finds the assertions contained in Robinson's 2014 affidavit suspect and unpersuasive given Robinson's admissions during the writ hearing that, while a statement in his habeas affidavit was not false, it was "stretched" and that he could not say whether he would have given habeas counsel an affidavit alleging coerced and false testimony if habeas counsel had questioned him about the issue in 2004 or 2005 (VII W.H. at 122, 1289).

**Marvin Caston**

81. During the Applicant's capital murder trial, Marvin Caston testified that prosecutor Goodhart had not promised him anything in exchange for Caston's testimony in the primary case, and Goodhart had not threatened Caston in any way since the day that they first met (XXII R.R. at 54).

82. The Court finds, based on the trial record, that Caston's trial testimony concerning the events leading up to the primary offense was consistent with and cumulative of the testimony presented by witnesses Josie Anderson and Zeb Comb who have not recanted their trial testimony.

83. The Court finds, based on the trial record, that trial counsel cross-examined Caston regarding the preciseness of his memory regarding the events preceding the primary offense, and Caston admitted that he did not remember dates and times, but he did remember what happened; accordingly, information regarding the accuracy of Caston's memory was presented at trial for the jury's consideration. (XXII R.R. at 112).

84. The Court finds that the Applicant fails to establish that the State coerced Caston into presenting false and misleading testimony during the Applicant's capital murder trial, based on Caston's trial testimony and his writ evidentiary hearing testimony that he tried to testify truthfully as best as he could during the Applicant's capital murder trial even though he was nervous and got a little confused about times and dates, but that the rest of his trial testimony was truthful (VI W.H. at 71, 80).

85. The Court finds unpersuasive the Applicant's habeas allegations in light of Caston's previous statements to prosecutor Reiss concerning the accuracy of his trial testimony and the details of the primary offense, including Caston's statements that he made only "small" mistakes while testifying during the Applicant's capital murder trial because he was nervous (VI W.H. at 79); that the Applicant said that she was going to cut the baby out herself (VI W.H. at 72, 74); that the Applicant showed Caston where the complainant lived (VI W.H. at 73); that the Applicant played a role in planning the drug lick (VI W.H. at 74-5); that the Applicant said that her husband was having an affair, and the Applicant was going to cut the baby from the bitch (VI W.H. at 74); that the Applicant said "I'm going to go get the chick, don't worry about the chick" (VI W.H. at

76-7); and, that the Applicant was going to give Caston, Gerald Anderson and Robinson drugs (VI W.H. at 76-7).

**charlie mathis**

86. During the pre-trial suppression hearing, Charlie Mathis, a twenty-eight year special agent for the DEA, testified for the State that he first became involved with the Applicant in the early 1990s when the Applicant worked as a DEA informant; that Mathis was the Applicant's primary case agent and he got to know the Applicant and her family over the years; that the Applicant called Mathis her "brother"; that the Applicant was not an active informant for the DEA at the time of the primary offense because she was on a 10-year deferred adjudication probation out of state court; that, on the afternoon of May 16, 2001, Mathis spoke to the Applicant regarding the primary offense at the request of Lt. Smith with HPD; and, that, after speaking with the Applicant, Mathis stayed at HPD for a long time but he refused HPD officers' offer to go along when they left homicide with the Applicant (IV R.R. at 88-97).

87. On cross-examination during the suppression hearing, Mathis testified that he implored the Applicant to tell police everything that she knew about the woman and the baby; that Mathis did not think that the Applicant was involved in the primary offense; and, that Mathis did not read the Applicant her *Miranda* rights (IV R.R. at 100-1).

88. During the Applicant's trial, Mathis testified that he had known the Applicant for eight to ten years; that the Applicant worked as an informant for Mathis and other law enforcement agencies; that DEA closed the Applicant out as an informant in 1995, and she was never reopened or paid by the DEA or HPD since 1994; and, that Mathis was the Applicant's main contact at the DEA. Mathis also testified regarding the nature of his relationship with the Applicant, including that she referred to Mathis as her "brother," and that Mathis did not socialize with the Applicant but was familiar with the Applicant's family and personal life (XXI R.R. at 91, 93-5, 97-9, 101). During the writ hearing, Mathis acknowledged that the State subpoenaed him to testify in the Applicant's trial. (VI W.H. at 72.)

89. Mathis testified, during the Applicant's trial, that the Applicant called him in 2000 and said that she was expecting a baby; that, in 2001, the Applicant told Mathis that she gave birth to a baby boy; that the Applicant again told him she was pregnant and expect to deliver shortly in January, 2001 but she and Jose Corona were having problems; that, at the Applicant's request, Mathis conducted a three-way call with the Applicant and Corona during which Mathis said it would be ridiculous for them to separate because of the Applicant's pregnancy; that Corona seemed confused by Mathis' comments and started laughing, saying "what baby"; and, that, before the primary offense, the

Applicant told Mathis that she was going to have a baby boy (XXI R.R. at 101, 103-5, 107).

90. Mathis testified that, on May 16, 2001, the Applicant called and asked Mathis to come talk to her because she had gone in with the police; that Lt. Smith with HPD also called Mathis and asked him to speak with the Applicant; that, when Mathis spoke to the Applicant at HPD, she told Mathis that she made a mistake by giving her cars to some people that she felt were involved in the kidnapping of the woman and baby, and she knew where the people were located; and, that Mathis stayed at HPD until the police left with the Applicant (XXI R.R. at 106-11).

91. On cross-examination, Mathis testified regarding the Applicant's work for DEA and his sentiment that he felt that the Applicant was incapable of committing the primary offense (XXI R.R. at 112, 114, and 119).

92. The Court finds that Mathis did not testify during the punishment phase of the Applicant's trial.

93. The Court finds that the Applicant fails to demonstrate that the State presented false and misleading evidence from witness Mathis at trial based on Mathis' writ hearing testimony that he testified truthfully and honestly during the Applicant's capital murder trial within the parameters of the questions posed to him during direct and cross-examination, and he was not going back on anything that he testified to during the Applicant's trial (VII W.H. at 21).

94. The Court finds unpersuasive Mathis' habeas assertions concerning alleged threats and/or coercion by the prosecution before or during trial based on his writ hearing testimony that he never thought to complain to a supervisor or anyone at HCDA that he was allegedly threatened or coerced by prosecutor Spence notwithstanding his lengthy law enforcement career (VII W.H. at 91).

95. The Court finds unpersuasive Mathis' habeas assertions concerning alleged threats and/or coercion by the prosecution based on his writ hearing testimony that he did not mention the prosecution's alleged threats in his 2005 habeas affidavit because he "didn't really even think about it" when habeas counsel interviewed him in 2005 (VII W.H. at 29).

96. The Court finds suspect and unpersuasive Mathis' assertions of threats/coercion by the prosecution based on the Applicant's lengthy delay in presenting such allegations, regardless of the fact that the Applicant was aware of Mathis as a potential witness and obtained his affidavit in 2005.

**gerald anderson**

97. The Court finds, based on the trial record, that Gerald Anderson did not testify during the Applicant's capital murder trial.

98. The Court finds, based on the record of Gerald Anderson's punishment hearing, that the same judge who presided over the Applicant's trial presided over the trial level proceedings in Anderson's case, and, in September, 2002, during jury selection on Anderson's capital murder case, Anderson decided to plead guilty to aggravated kidnapping and possession of a controlled substance, pursuant to a presentence investigation report and without the State's recommendation on punishment. *AX 57 at p. 7, 16-17, Anderson punishment hearing.*

99. On November 22, 2002, the trial court sentenced Anderson to consecutive life sentences. See *AX 57 at p. 20, Anderson's punishment hearing.*

100. Because Gerald Anderson did not testify during the Applicant's capital murder trial, the Court finds that the Applicant fails to demonstrate that the State presented false and misleading testimony from Anderson during the Applicant's capital murder trial.

101. The Court finds unpersuasive Anderson's habeas assertions that he was threatened and/or coerced by prosecutor Spence in light of Anderson's writ hearing testimony. that his attorney Brian Coyne was present when he spoke to the prosecution regarding the primary offense, and he did not complain to Coyne about any alleged threats until his testimony at his own punishment hearing. (VI W.H. at 37-9); *AX 57 at p. 20, Anderson's punishment hearing.*

**GROUND C: BRADY**

102. The State was operating under a misunderstanding of *Brady* at the time of the Carty trial.

103. At the time of the Carty trial, whether impeachment evidence constituted *Brady* evidence was determined on a "casebycase" basis and was resolved with a "judgment call" based on "gut instinct." (IV W.H. at 153-157.)

104. At the time of the Carty trial, the Harris County District Attorney's Office did not believe that impeachment or exculpatory evidence needed to be disclosed if the prosecutor did not find the testimony credible. (IV W.H. at 156, lines 26 (regarding whether to disclose prior inconsistent statements by a witness) ("*Q. So, in your mind in that instance there is a judgment call on your part about whether they're telling you the truth? A. In 2002, that was a judgment call. Today, it's not even a judgment call. It's automatic notification.*")

105. Spence herself decided the credibility and materiality of evidence. (V W.H. at 33, lines 12 (acknowledging that she would not turn over exculpatory evidence she did not feel was true: *"That's kind of why I'm a lawyer, is to make those judgments."*)

106. The State claims to have had an "open file" in the Carty case, available to defense counsel for review. (IV W.H. at 121.)

107. Spence did not include what the State considered work product in the "open file." (V W.H. at 23, 46.)

108. Prior to trial, the only statements (written, audio-taped or videotaped) the State provided to defense counsel were the statements of Carty. (VII W.H. pp. 149150.)

109. Other than the statements of Carty, the State did not disclose the contents or substance of any statements in its possession prior to the Carty trial. (VII W.H. pp. 149150.)

110. The State produced one witness statement each of Robinson, Comb, Caston, Josie Anderson, and Sherry Bancroft following or during each witness's direct examination. (XXI R.R., p. 60; XX11 R.R. Vol. 22, pp. 5, 25, 104;XXIII R.R., pp. 1314; XII WH.H., p. 150, line 17 p. 151, line 9)

111. The State did not produce numerous statements of individuals to defense counsel until required pursuant to PIA requests in connection with Carty's appeal: (VI W.H. pp. 109118; VII W.H., pp. 149151.) Most of those individuals did not testify at trial.

112. None of Robinson's statements were contained in the "open file." (VI W.H. p. 128, lines 16-20; *see also VI W.H.*, p. 134, line 23 - p. 135, line 2

113. None of Robinson's statements (or the content therein) were produced to defense counsel prior to the Carty trial. (VI W.H. at 153-154; VII W.H. pp. 151, 158, 161-163. XXIII R.R., p. 13; VII W.H. p. 149, line 17 - p. 150, line 16

114. The May 17, 2001 videotaped statement of Robinson was produced to defense counsel during the Carty trial following the direct examination of Robinson. (XXIII R.R. at 13-14.)

115. The only Robinson tape provided to defense counsel at any point was the May 17, 2001 videotape. *(XII W.R.at* 151, lines 10-25

116. Robinson's May 17, 2001 audio-taped statement was not provided to defense counsel prior to or during trial. (VI W.H. at p. 153, lines 922

117. The State also had a transcript of Robinson's May 17, 2001 audiotape that had been provided by the Houston Police Department that was not produced. (V W.H. at 100.)

118. Robinson's May 17, 2001 audio-taped statement (and its trnascription)contained possible exculpatory and impeachment evidence that was not contained in the video taped statement that was produced to defense counsel at the time of trial.

119. Robinson's August 16, 2001 audio-taped statement was not produced to defense counsel until September 2015, in response to PIA requests served during the appellate process. (VIII W.H. at 2021.)

120. Robinson's August 16, 2001 audio-taped statement is inaudible.

121. The State should have known that each of the prior statements of Robinson could be used to impeach him at trial.

122. The State failed to disclose that Robinson had previously provided two consistent statements that conflicted with and were inconsistent with what they represented to Carty's counsel would be Robinson's trial testimony (and what was, in fact, Robinson's trial testimony). (VI W.H. at 152154; VII W.H. at 149150.)

123. Carty's defense counsel was surprised by the contents of Robinson's videotaped statement that was produced during trial. (VI W.H. at 146, lines 1421

124. Carty's counsel was unaware that Robinson had previously provided two consistent statements that conflicted with and were inconsistent with what the State had represented would be Robinson's trial testimony (and what was, in fact, Robinson's trial testimony)

125. The State met with Caston on multiple occasions prior to the Carty trial. (VI W.H. at 56.)

126. In meetings with Spence and Goodhart, Caston was promised that he would not get prison time if Carty received the death penalty. (W.H. AX 59, Caston Aff. ¶ 8 ; Writ Ex. 9, Rosalind Caston Aff. ¶ 4

127. There is no evidence that the State disclosed to defense counsel the details of a deal with Marvin Caston. . (VI W.H. at 64; W.H. AX 59, Caston Aff. ¶ 6.)

128. Had the State disclosed the informaiton to Caston, defense counsel would have been able to impeach Comb with that information.

129. In his written statement, G. Anderson stated that Robinson brought Rodriguez and baby out and that Carty waited in the car. (W.H. AX 45.)

130. Had the G. Anderson statement been produced to defense counsel, they would have been able to impeach the testimony of Robinson either through G. Anderson or the police officers who took the statement.

131. The State failed to disclose oral statements from Mathis, which among other things include that Mathis told Spence:

a. That he did not believe Carty was a danger to society; (W.H. AX 77, Mathis Aff. ¶ 27.)

b. That he believed it would have been very difficult for Carty to persuade the men to do something as risky as stealing a lady and a baby; (Hearing Tr. AX 77, Mathis Aff. ¶ 2829.)

c. That Carty's mental issues regarding pregnancies explained her strange statements about babies; and (W.H. AX 77, Mathis Aff. ¶ 27.)

d.That Carty was not a violent person. *(W.H. AX 77, Mathis Aff. ¶ 30.)*

132. Spence advised the investigator for the defense that Mathis did not want to meet with them. (W.H. AX 76; W.H. AX 77, Mathis Aff. ¶ 18;

133. Had the State disclosed the information provided by Mathis to the prosecution regarding his knowledge of and opinion of Carty, the defense could have subpoenaed him to testify in the punishment phase of the trial.. (VI W.H. at 140141.)

134. Mathis knew Windi Akins and defense counsel Akins had a conversation with Mathis while the jury was deliberating on the guilt/innocence of Applicant. Akins told Mathis that the defense on the punishment phase really needed his help. Mathis told Akins that there was nothing he could do to help her.. (W.H. V-7 Pg 156-157; VII W.H. at 25..)

**CONCLUSIONS OF LAW**

No. 1. The credible evidence presented before this Court fails to show that the State knowingly used perjured testimony or allowed untrue testimony to go uncorrected at trial and fails to meet the standards of proof required under Giglio vs. U.S. 405 U.S. 150 (1972), and Napue vs. Illinois 360 U.S. 264 (1959), to show a denial of Applicant's rights to due process and due course of law.

No. 2. The credible evidence presented before the Court fails to show that the State presented false and misleading testimony at trial and fails to meet the standards of proof required under Ex Parte Chabot, 300 S.W.3d 762 (Texas Crim. Appeals 2009) and Ex Parte Chavez 371 S.W.3d 200 to show a denial of Appellant's rights to due process and due course of law.

No. 3. The Court finds that the State withheld or failed to disclose witnesses' statements and information that were exculpatory or could be used for impeachment purposes in violation of the obligations placed upon the State pursuant to Brady v. Maryland, 373, U.S. 83 (1963) and its progeny.

No. 4. In considering the Brady violations cumulatively, in consideration of the evidence, in light of the entire body of evidence presented, including the trial testimony, the Court finds there is no reasonable likelihood it could have affected judgments returned by the jury and does not meet the Brady materiality standard.

No. 5. The Applicant's writ of habeas corpus asserts that her claims meet the requirements of Section 5(a)(2) of Article 11.071 of the Texas Code of Criminal Procedure. The Court, based upon the credible evidence presented at this hearing and the trial testimony in the case, finds that Applicant fails to meet the requirements of Section 5(a)(2) of Article 11.071 of the Texas Code of Criminal Procedure.

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**Subsequent Habeas Ground**

Because the Applicant's claim concerning an alleged deal between the State and Zeb Comb was not contained in the Applicant's second habeas petition, Cause No. 877592B, nor was the claim included in the grounds for relief that the Court of Criminal Appeals ordered to be resolved in its February 25th, 2015 remand order, the Applicant's claim concerning an alleged deal constitutes a subsequent application for writ of habeas corpus pursuant to Tex. Code Crim. Proc. Art. 11.071, and, as such, must be sent to the Court of Criminal Appeals to determine whether such claim meets the Section 5 exception requirements of subsequent claims which can be considered by the Court.

**RECOMMENDATION**

This Court recommends to the Court of Criminal Appeals that the claims asserted by the Applicant in her Subsequent Writ of Habeas Corpus be DENIED.

Signed this the 1st of September, 2016.

David Garner
Acting Judge
177th District Court
Harris County, Texas