APPENDIX

APPENDIX A

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

(February 7, 2018)

***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.**

ORDER

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

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.

Publish

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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 Zandt where Robinson's half-brother,

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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."

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

[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).

"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. 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

[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.

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 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 16 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. Sometime 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.
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> 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

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

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, 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

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[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."

[7] *Id.* at *6.

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

district court addressed the merits of those claims "[i]n the interests of justice" and held that Carty was not entitled to relief.[9]

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

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

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

[11] *Id.* at *57-58.

maybe she wasn't as truthful as she should have been.[12] The federal court pointed out that "trial counsel asked 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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[12] *Id.* at *58.
[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*.

B. Carty' s right to due process was violated when the State presented false and misleading testimony at trial, in violation of

[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. . . ."

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?

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 party's instruction in the jury charge?" Mathis did not know what that meant.

2. Habeas Testimony of Chris Robinson

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. Habeas Testimony of Marvin Caston

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. Habeas Testimony of Gerald Anderson

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. Habeas Testimony of Connie Spence

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 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

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[20] *Ex parte Fierro*, 934 S.W.2d 370, 374 (Tex. Crim. App. 1996).
[21] 360 U.S. 264 (1959).
[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

held that 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 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

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introducing that testimony are not relevant to false testimony due-process error analysis." *Id*. at 208.

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

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

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]

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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.

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

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.

Finally, about 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, 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,

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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").

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 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*,

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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.

[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).

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 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.

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[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[.]").

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.

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

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 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

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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.

A. 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.[42] *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:

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[42] 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.

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 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 54 n.40 (Tex. Crim. App. Feb. 7, 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.

B. 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[43], 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,

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[43] *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).

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 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.[44]

C. 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
Publish

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[44] 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.

APPENDIX B

177TH DISTRICT COURT OF HARRIS, COUNTY, TEXAS

Cause No. 877592-B

EX PARTE LINDA CARTY, APPLICANT

(September 1, 2016)

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 Novem-

ber 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. *Daffy 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 ev-

identiary 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 Rob-

inson, 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 1913, 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 re-

sponded 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 Ap-

plicant 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. 139-49).

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 Appli-

cant; 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 am., 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 prosecu-

tor 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 Appli-

cant 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 wit-

nesses 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 126-7).

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 118-9).

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, 236-7)(V W.H. at 220-1).

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, 128-9).

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 Appli-

cant 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 evi-

dence 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 "case by case" 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, audiotaped or videotaped) the State provided to defense counsel were the statements of Carty. (VII W.H. pp. 149-150.)

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. 149-150.)

110. The State produced one witness statement each of Robinson, Comb, Caston, Josie Anderson, and Sherry Bancroft following or during each witness's direct exami-

nation. (XXI R.R., p. 60; XXII 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. 109-118; VII W.H., pp. 149-151.) 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 9-22.)

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 transcription) contained possible exculpatory and impeachment evidence that was not contained in the vid-

eo 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 20-21.)

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 152-154; VII W.H. at 149-150.)

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 information 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. ¶ 28-29.)

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 140-141.)

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.

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. 877592-B, 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.

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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-70049

LINDA ANITA CARTY,

Petitioner-Appellant,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

(September 17, 2009)

Before KING, DENNIS and OWEN, Circuit Judges.

OPINION

KING, Circuit Judge:

A Texas jury convicted and sentenced to death petitioner-appellant Linda Anita Carty for the intentional murder of Joana Rodriguez during the course of a kidnaping of Rodriguez and her newborn son. The Texas Court of Criminal Appeals affirmed the conviction and sentence and denied post-conviction relief. Carty then filed this federal habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. The district court denied substantive relief, denied Carty's request for an evidentiary hearing, and dismissed her case. It then granted a certificate of appeala-

bility ("COA") for two substantive claims. The first is whether trial counsel rendered ineffective assistance by failing to notify Carty's ostensible common-law husband of his marital privilege not to testify. The second is whether trial counsel rendered ineffective assistance by failing to present additional mitigation evidence in the punishment phase. The district court also granted a COA for the procedural issue that prevented adjudication of those substantive claims-whether Carty exhausted state court remedies.[1] Carty's appeal is now before us. We affirm the district court's judgment denying Carty relief.

I. Facts and Procedure

The district court's exhaustive opinion more than adequately documents the factual background and procedural development of this case. *See Carty v. Quarterman* (*Carty Federal Habeas*), No. 06-614, slip op. at 4-35 (S.D. Tex. Sept. 30, 2008). Here, we revisit only those facts relevant to our disposition of the presently appealed issues and claims.

Carty, a foreign national citizen of St. Kitts and thus the United Kingdom, was indicted by a Texas grand jury for the kidnaping and intentional murder of Rodriguez. Carty planned the kidnaping of Rodriguez and her baby, facilitated its execution, and murdered Rodriguez on May 16, 2001. Although Carty originally hired her own attorney, when her family could not pay his fees, the Texas trial court appointed Jerry Guerinot and Windi Akins to represent her (collectively, "trial counsel"). Trial counsel

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[1] The court denied a COA for the remainder of Carty's claims. In a separate opinion, we denied Carty's request for an additional COA. *See Carty v. Quarterman,* No. 08-70049, slip op. (5th Cir. Aug.28. 2009).

met Carty for the first time approximately two weeks before jury voir dire. They hired investigator John Castillo and psychologist Dr. Jerome Brown to aid Carty's defense. Investigator Castillo began his work about two weeks before trial.

The trial proceeded in two phases: guilt/innocence and punishment. The evidence presented in the guilt/innocence phase revealed the following events. Approximately three years before Rodriguez's murder, Carty started living with Jose Corona, and the parties now dispute whether they entered into a common-law marriage. Corona testified that they lived together up until two weeks before the murder, and, during that period, they represented to others that they were husband and wife, as discussed in greater detail below. While they lived together, Carty, who had a grown daughter, Jovelle Carty, told Corona three times that she was expecting another child, but she did not allow him to attend her prenatal doctor's visits. In the first two instances, Carty eventually told him that she had miscarried. Corona believed that Carty lied about the pregnancies. At the beginning of May 2001, the month during which Rodriguez was murdered, Corona decided to leave Carty, in part because of her lies about being pregnant. When he told her that he was leaving, Carty again claimed that she was pregnant. Corona, however, did not believe her and moved out. Throughout May, Carty repeatedly called Corona to reconcile their relationship, claiming that she was pregnant and that her due date was in the middle of May. On May 15, she called multiple times and told him she was going to have a baby boy the next day, May 16. She called again on May 16-after she had murdered Rodriguez-and confirmed that she was going to have the baby. When Corona saw Carty later that day at the po-

lice station, after she had been arrested for Rodriguez's kidnaping and murder, he asked her if the baby had been born already, and she told him "not yet." Corona eventually found out that Carty had never been pregnant.

Other witnesses' testimonies revealed Carty's activities between Corona's departure and Rodriguez's murder. In early May, Carty began moving her things to a storage unit because the apartment lease was due to terminate at the end of the month. Sherry Bancroft, an employee at Public Storage, testified that Carty had an existing storage unit in their facility and rented a second one on May 10. Two days later, she rented a third unit. That day, she told Bancroft that she was already in labor and was expecting to give birth to a baby boy that day. To Bancroft, however, Carty did not look like she was in labor. Carty returned to the storage facility on May 15 in a Pontiac Sunfire. At that point, she told Bancroft that she had birthed a son and that he was at home with his father. She retrieved a baby blanket and two baby outfits from one of her storage units.[2]

Numerous witnesses testified about the kidnaping and murder that occurred the next day, May 16. Early in the morning on May 16, four men-three of whom were later identified as Christopher Robinson, Carliss "Twin" Williams, and Gerald "Baby G" Anderson-broke into the apartment where Rodriguez lived with her husband (Raymond Cabrera), her infant son, and her husband's cousin (Rigoberto Cardenas). Cardenas testified that the men demanded drugs and money. While the men were in the house, Cardenas heard a cell phone ring. One of the men answered it and said: "We are here inside," and "Do

[2] At least two additional witnesses testified that they knew Carty and that she had told them in the days immediately before Rodriguez's murder that she was expecting a baby.

you want it?" The man on the phone then yelled: "She's outside, we got to go." The intruders tied up Cabrera and Cardenas and, now joined by Carty, kidnaped Rodriquez and her baby.

The testimony of Robinson and other individuals with first-hand knowledge of the kidnaping and murder evidenced that Carty planned and orchestrated the crimes because she wanted Rodriguez's baby. On Sunday, May 13, Carty began recruiting a group of people to help her abduct the baby. She asked Robinson, Josie Anderson, and Marvin "Junebug" Caston to assist in a "lick"-a burglary wherein they would break into an apartment and steal what she claimed was approximately 200 pounds of marijuana. Carty brought them to her apartment, which was in the same complex as and in close proximity to Rodriguez's apartment. From Carty's apartment, they scoped out Rodriguez's apartment and familiarized themselves with the standard layout of apartments in the complex. Carty told them that Rodriguez was pregnant with Corona's child; that "I'm going to get the baby. I'm going to . . . take the baby from them. . . . I'm going to cut the baby out of the lady and take the baby"; and that "she needed the baby, needed a baby, needed a baby, needed their baby, that she needed the lady's baby." She repeated similar statements throughout the planning of the crime. Because Josie Anderson, Robinson, and Caston were only interested in stealing drugs and not in kidnaping Rodriguez's baby, the plan was for them to secure the drugs while Carty dealt with Rodriguez.

On the night of Sunday, May 13, the group went to the apartment complex to conduct the lick but soon aborted their attempt. Afterwards, Josie Anderson and Caston decided that they would no longer participate. Carty nonetheless persisted in her plan, and on Tuesday, May

15, she convinced Robinson, his friend Williams, and Josie's cousin Gerald Anderson to participate in the lick. The new plan was for Carty to wait outside the apartment, and the men would bring Rodriguez to her after they secured the drugs for themselves. After midnight on May 16, 2001, Carty, Robinson, Williams, and Gerald Anderson left 6402 Van Zandt Street, a house that served as the group's staging area. Carty drove her car and served as a lookout. After parking in a lot near the apartments, she called Gerald Anderson and told him to start the lick. The men kicked in the door of the apartment and tied up and beat Cabrera and Cardenas. Carty called Anderson again and told him that she was coming inside. When she entered the apartment, Robinson lied and told her that they had killed the men (to prevent her from doing it). Robinson then left the apartment. A few minutes later, Robinson saw Carty leave the apartment with the baby. Williams and Gerald Anderson followed with Rodriguez and put her in the trunk of Robinson's car. They left the apartment complex, met at a storage unit, and transferred Rodriguez to the trunk of Carty's car. Both cars then returned to Van Zandt Street.

At Van Zandt Street, Carty demanded that the men tape up Rodriguez. Robinson and Gerald Anderson refused, but Williams complied. He then closed Rodriguez in the trunk of Carty's car. At this point, the men were angry because they had obtained little drugs or money in the lick; they believed that Carty had set them up for a kidnaping that they did not want to commit. Hearing the argument, Zebediah Combs, who lived at 6402 Van Zandt Street and did not participate in the lick, came outside and demanded that everybody be quiet. Carty said to him, "I got my baby. I got my baby." After seeing Rodriguez in the trunk of her car, Combs told Carty to

move the car away from the house. Carty refused, and Combs went back inside. Meanwhile, Robinson, Williams, and Gerald Anderson went to make change for the money they had stolen.

When they returned around 3:30 a.m. to 4:00 a.m., Carty was standing partially in the trunk of her car and partially on the ground. Rodriguez was face down in the trunk, and Carty had placed a plastic bag over her head. Robinson ran up and pushed Carty away, but he could see that Rodriguez had stopped breathing. Robinson ripped the bag while attempting to remove it from Rodriguez's head. When Robinson confronted Carty about why she had killed Rodriguez, Carty replied that it was her baby, her husband's baby.

During the police investigation of the burglary and kidnaping, a tenant in Carty's apartment complex, Florence Meyers, told police about an encounter with Carty the day before that was suspicious. On the evening of May 15, Meyers saw Carty sitting in the Pontiac Sunfire in the parking lot of the apartment complex. Carty told Meyers that she was pregnant and that the baby was going to be born the next day. There was an infant's car seat in the back seat of Carty's car. To Meyers, Carty did not appear to be pregnant. Meyers's statement caused the police to suspect Carty had committed the kidnaping.

After taking Meyers's statement, the police called Carty at around 9 a.m. on May 16 and pretended to respond to a complaint she had filed a few days earlier. She agreed to meet them. At the time of the call, Carty was in a car with Robinson and the baby. Robinson drove Carty to meet the police, and she agreed to go with them to a police station. When Carty did not return from the

meeting, Robinson went back to Van Zandt Street with the baby.

Upon arriving at the police station, Carty told the police that she was a confidential Drug Enforcement Agency ("DEA") informant, and asked to speak with her DEA agent, Charlie Mathis. A few days before the kidnaping and murder, Carty had called Mathis and told him about being pregnant. The police then asked Mathis to help them find out what Carty knew about Rodriguez and the missing baby. Mathis told Carty she was in a lot of trouble and advised her to help the police.

After speaking with Mathis, Carty gave a statement to the police, telling them that she had loaned her daughter's car and rental car to some people she believed might be involved in the kidnaping. She directed officers to the house at 6402 Van Zandt Street. When the police arrived, a black Chevrolet Cavalier belonging to Carty's daughter Jovelle, and the Pontiac Sunfire, which was rented in Jovelle's name, were both parked at the house. Police found the kidnaped baby boy alive in the Cavalier. They found Rodriguez's body in the trunk of the Sunfire. Her arms and legs were bound with duct tape, her mouth and nose were also taped, and she had a ripped plastic bag over her head which appeared to be taped around the bottom. A forensic expert later determined the cause of death to be homicidal suffocation. Carty's fingerprints were in both cars. Inside the cars, the officers found, *inter alia,* baby clothes, baby blankets, a diaper bag containing infant formula, and other baby paraphernalia. The diaper bag also contained a live round of .38 caliber ammunition. A .38 caliber gun was found by police in a drawer inside the house at 6402 Van Zandt Street; it was similar in appearance to a .38 caliber gun that Corona saw Carty possess before he left in early May.

The police traced Carty's cell phone records, which led them to Gerald Anderson. He eventually gave a statement and was charged with capital murder. Carty's cell phone records showed eleven calls logged between Carty's phone and the cell phone number that led police to Gerald Anderson from 12:50 a.m. and 2:50 a.m. on May 16. Seven of those calls were placed between 1:09 a.m. and 1:14 a.m., the time of the kidnaping.

Based on this and other evidence, the jury returned a verdict of guilty against Carty on the charge of capital murder.

During the subsequent punishment phase, both the state and Carty presented evidence relevant to Texas's "special issues."[3] The state primarily presented evidence about Carty's criminal history to show her ongoing dangerousness. For example, in 1992, Carty was arrested for auto theft when she rented a car that she never paid for or returned. To rent the car, Carty identified herself as an FBI agent, so the FBI also investigated her for impersonating an officer. Carty pleaded guilty and was placed on a ten-year term of probation (she was still on probation when arrested for murdering Rodriguez). The state agreed to dismiss the auto theft charge if Carty would act as an informant. Although she provided information leading to two arrests, her supervising officer concluded that she was an uncontrollable informant. Her

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[3] In Texas, jurors must answer three "special issues" in favor of the death penalty for the court to impose capital punishment: (1) whether the defendant would "commit criminal acts of violence that would constitute a continuing threat to society"; (2) whether the defendant actually caused or intended to cause the death of the victim; and (3) whether mitigating evidence warranted "the imposition of life imprisonment rather than a death sentence."

service came to an end when she was arrested on drug charges. Police officers had been observing a large drug transaction when Carty entered the house under observation with a package. When she left, the police followed her. She led them on a high-speed chase. During the chase, Carty attempted to run over an officer. The police eventually recovered two pistols, $3,900 in cash, and fifty pounds of marijuana from her car.[4]

Trial counsel countered with testimony showing that Carty would not be a future danger and that mitigating circumstances existed. To dampen the impact of the prosecutor's evidence of Carty's future dangerousness, trial counsel enlisted the services of Dr. Jerome Brown, a clinical psychologist who evaluated Carty, interviewed her mother and daughter, and reviewed police interrogation tapes. He testified, *inter alia*, that Carty did not have problems with anger or aggression, was not prone to violence, and was not predatory towards other people. She had a stable family life and employment history. She did not have disciplinary problems as a child and described her upbringing as spoiled. Dr. Brown noted that Carty had a grown daughter and had given another child up for adoption when she became pregnant after a sexual assault. Dr. Brown opined that she would not be capable of committing the crime of which she was convicted, that her clinical profile indicated that she was not antisocial, and that she lacked characteristics normally associated with criminals. The prosecution, however, cross-examined Dr. Brown extensively to show that Carty was a liar. Dr. Brown also admitted that Carty met some characteristics of a child abductor, although on redirect

[4] The prosecution also presented victim impact testimony from Rodriguez's family (her husband Cabrera, her sister, and her father).

he reaffirmed that she did not have traits commonly associated with violent people.

Trial counsel also presented testimony from Carty's family to support the mitigation special issue. Carty's mother testified that Carty was a beloved teacher in St. Kitts and that her former students still asked about her. Carty did not have a history of criminality while on St. Kitts, was kind and generous to others, and was never cruel to people or animals. Jovelle, Carty's daughter, testified that her mother was sweet and kind, was not mean, and had not harmed anyone. She had worked hard her whole life to put Jovelle through school. Isalyn DeSouza, Carty's closest sister, testified that she had never known her sister to be violent, destructive, or cruel.

Based on this evidence, the jury answered all three of Texas's special issues in favor of sentencing Carty to death. The trial court entered her conviction and death sentence on February 21, 2002. The Texas Court of Criminal Appeals ("CCA") affirmed Carty's conviction and sentence. *See Carty v. State,* No. 74295, 2004 WL 3093229, at *1 (Tex. Crim. App. Apr. 7, 2004).

The trial court appointed counsel to represent Carty during the state habeas process. Carty timely applied for state habeas relief on August 6, 2003. One of Carty's claims was that trial counsel rendered ineffective assistance by failing to advise her of her right, as a citizen of St. Kitts and the United Kingdom, to consular notification and assistance. *See* Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The British Government became aware of Carty's citizenship and filed a motion on February 2, 2004, seeking time to retain counsel who could amend Carty's application. Although recognizing that Carty was

not authorized to raise new issues at that late date, it nonetheless asked the state habeas court to grant a period of 180 days in which "any amendment or supplement filed in that time should be accepted without the application of [TEX. CODE CRIM. PROC. ANN. art.] 11.071 [§] 5(f)." The state habeas court denied this application for want of jurisdiction.

Carty's habeas counsel filed a reply to the state's answer and later filed a further response, again asking the court to allow the British Government to intervene. The state habeas court did not issue an order on her request. The British Government, however, hired attorneys from Baker Botts, L.L.P., who entered an appearance unopposed on May 28 to serve as Carty's co-counsel. Carty's new co-counsel met with the state habeas judge and the prosecutors to discuss their role. They agreed to submit any additional pleadings to the court by November 1, 2004, the same day that both sides were due to submit their proposed findings of fact and conclusions of law. The parties dispute, however, whether they agreed to permit Carty to raise entirely new claims at that time. Carty asserts that Jane Scott, a Harris County assistant district attorney, and Roe Wilson, Harris County's chief of the postconviction writs division, agreed that co-counsel would have approximately six months to familiarize themselves with Carty's case and make any additional filings, including proposed findings of fact and conclusions of law, by November 1, 2004. The state denies that any such agreement included permission to raise new claims. Absent a proper extension, November 1, 2004 was well after the deadline for Carty to file new claims. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a) (Vernon 2007).

On November 1, Carty's co-counsel filed an Additional Further Response to the state's answer. On the same day, both parties filed their proposed findings of fact and conclusions of law. The Additional Further Response stated, "[C]ounsel for Carty and the State agreed to additional time for Carty's counsel to examine Carty's claims further. The Court approved this agreement." In the Additional Further Response, Carty raised entirely new claims, supported by exhibits and appendices. The new claims included the two substantive claims that Carty maintains in this appeal-whether trial counsel rendered ineffective assistance (1) by failing to notify Corona of his marital privilege not to testify and (2) by failing to present additional mitigation evidence in the punishment phase.

On November 30, 2004, the state trial court heard argument regarding Carty's habeas application. During that hearing, co-counsel addressed the Additional Further Response on behalf of Carty and argued about claims contained only therein. In particular, co-counsel raised the claims now on appeal. The state did not object and the state habeas court did not mention any delinquency in the filings of those claims. Nonetheless, the court only reviewed the claims Carty raised in her initial application and recommended that the CCA adopt the state's findings of fact and deny those claims, *see Ex Parte Carty,* No. 877592-A, Order (Tex. Dist. Ct. Dec. 2, 2004), a recommendation that the CCA adopted, *see Ex Parte Carty,* No. WR-61,055-01, slip op. at 2 (Tex. Crim. App. Mar. 2, 2005). Neither state court addressed the claims she raised for the first time in her Additional Further Response. Carty did not bring this omission to the attention of either court.

Having found no success in the Texas courts, on February 24, 2006, Carty filed an application in federal district court for a writ of habeas corpus under § 2254. She presented approximately twenty issues to the district court. The district court initially denied the state's motion for summary judgment and ordered briefing on certain issues, including whether Carty exhausted state court remedies for the claims she raised for the first time in her Additional Further Response. After briefing, the state renewed its motion. Carty responded and requested an evidentiary hearing. Without a hearing, the district court concluded that Carty failed to raise a triable issue of fact, granted the state's motion for summary judgment, and dismissed the case. *See Carty Federal Habeas,* No. 06-614, slip op. at 142. The district court held that Carty failed to exhaust the claims raised for the first time in her Additional Further Response and that, in any case, her substantive claims were not meritorious.

Carty then moved for a COA. The district court granted Carty a COA on whether she failed to exhaust the claims that she raised for the first time in her Additional Further Response[5] and on whether trial counsel rendered ineffective assistance by failing to notify Corona of his spousal privilege and by failing to produce more mitigation evidence during the punishment phase of trial. It denied a COA for all other claims. *See Carty v. Quarterman* (*Carty COA*), No. 06-614, slip op. at 2-3 (S.D. Tex. Dec. 16, 2008). Carty now appeals the claims for which the district court granted her a COA.

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[5] As part of their briefing on the issue of exhaustion, both parties have addressed whether the state waived the defense.

II. Standards of Review

We review de novo whether Carty exhausted available state court remedies and whether the state waived exhaustion. *See Taylor v. Cain,* 545 F.3d 327, 332-33 (5th Cir. 2008); *Wilder v. Cockrell,* 274 F.3d 255, 259 (5th Cir. 2001). We apply the same de novo review to Carty's claims of ineffective assistance of counsel. *See Richards v. Quarterman,* 566 F.3d 553, 561 (5th Cir. 2009); *Smith v. Quarterman,* 515 F.3d 392, 403 (5th Cir. 2008). Both types of claims present mixed questions of law and fact. *See Ward v. Dretke,* 420 F.3d 479, 486 (5th Cir. 2005) (ineffective assistance of counsel); *Wilder,* 274 F.3d at 259 (exhaustion). When examining mixed questions of law and fact, our de novo standard requires that we "independently apply[] the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous." *Ramirez v. Dretke,* 396 F.3d 646, 649 (5th Cir. 2005); *see also Wilder,* 274 F.3d at 259.

Our de novo review is governed by AEDPA. Under AEDPA, a federal court may not grant habeas relief after a state court adjudicates the merits of a claim unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Therefore, neither the district court nor this Court may grant a writ of habeas corpus based solely on a finding of error by a state court." *Evans v. Cockrell,* 285 F.3d 370, 374 (5th Cir. 2002). Yet, the AEDPA-mandated deference to state court decisions does not apply if the petitioner properly

exhausted his claim by raising it in the state court, but the state court did not adjudicate that particular claim on the merits. *See Henderson v. Cockrell,* 333 F.3d 592, 598 (5th Cir. 2003). We instead review such claims de novo without applying AEDPA-mandated deference. *Riley v. Cockrell,* 339 F.3d 308, 318 (5th Cir. 2003); *see also Jones v. Jones,* 163 F.3d 285, 299-300 (5th Cir. 1998) (applying de novo review to an ineffective assistance of counsel claim that the petitioner raised in state court, but the state court did not adjudicate on the merits). In this case, the CCA did not address Carty's claim of trial counsel's ineffective assistance in failing to inform Corona of his marital privilege. It adjudicated part, but not all, of her claim of ineffective assistance in failing to investigate and present additional mitigation evidence. We review under AEDPA's heightened standard the portion of Carty's claim of trial counsel's ineffective assistance in presenting mitigation evidence that the CCA adjudicated on the merits; the rest of her claims, including whether she exhausted them in state court, we review de novo.

III. Discussion

A. Exhaustion

Carty raised most of her present claims for the first time in her Additional Further Response.[6] The state habeas court did not address these claims, which raises the issue of whether Carty exhausted them in state court. Under AEDPA, "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it

[6] For the portion of Carty's claim related to trial counsel's deficient presentation of mitigating evidence that she raised in her initial application for habeas relief in state court, this discussion does not apply. We review that portion on the merits below.

appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). "This longstanding exhaustion requirement is not jurisdictional, but 'reflects a policy of federal-state comity . . . designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (quoting *Wilder*, 274 F.3d at 260). When undertaking review, "we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary opportunity, the prisoner must fairly present his claim in each appropriate state court . . . ." (quotation marks and citations omitted)); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) ("The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court."). To fairly present the claims, "'the applicant must present his claims in a procedurally correct manner.'" *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001) (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993)); *see also Mercadel*, 179 F.3d at 275 ("[A] claim is not exhausted unless . . . the applicant present[s] his claims before the state courts in a procedurally proper manner according to the rules of the state courts." (quotation marks and citations omitted)). Fair presentation does not entertain presenting claims "for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons therefor." *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (quotation marks omitted). The purposes of the exhaustion requirement "would be

no less frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Texas's habeas statute requires an inmate seeking relief from a judgment imposing a penalty of death to file an application for a writ of habeas corpus in the trial court, "returnable to the [CCA]," by the later of two dates: "the 180th day after [the appointment of counsel]" or "the 45th day after the date the state's original brief is filed on direct appeal." TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a). This deadline is subject to a single, discretionary 90-day extension. *Id.* § 4(b). The state trial court is not authorized to consider any subsequent habeas application unless the applicant shows the statutory equivalent of cause and prejudice or actual innocence. *Id.* § 5(a). Texas courts usually treat an amended pleading filed after the deadline as a new habeas action: "If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section." *Id.* § 5(f). The state statute establishes detailed procedures for processing such subsequent applications. *See id.* § 5(b), (c).

Limiting habeas claims to those timely filed in the initial application encourages efficient, all-inclusive applications. *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). As such, a dismissal for an abuse of the writ in the form of a tardy application is an adequate and independent state-law bar to federal review. *Whitaker v. Quarterman*, 200 Fed. Appx. 351, 356-57 (5th Cir. 2006).

In this case, Carty timely filed her initial habeas application on August 6, 2003. After the filing period expired,

the state trial court denied the British Government the opportunity to amend Carty's application without treating the amended application as a subsequent application pursuant to article 11.071 § 5(f). With the assistance of co-counsel, Carty nonetheless filed her Additional Further Response on November 1, 2004, raising new claims for the first time. The trial court and CCA did not address those claims; however, they also did not follow the procedures for handling subsequent applications as established in article 11.071 §§ 5(b), (c), and (f), and did not dismiss the Additional Further Response for abuse of the writ. Furthermore, although the state did not move to treat the Additional Further Response as a subsequent application, Carty did not raise with the state courts their failure to consider the claims contained in her Additional Further Response.

Carty does not and cannot argue that her Additional Further Response was timely; instead, she urges that the parties entered into an agreement (sanctioned by the state habeas court) to permit her to add new claims in that filing that article 11.071 § 4(a) would otherwise bar. As the parties have framed it, the exhaustion question has three components: (1) did the parties and state habeas court agree to permit late-filed claims; (2) under Texas law, can the parties extend the filing deadline by agreement; and (3) did the state waive its exhaustion defense.

For the first issue, the district court found that Carty did not show an agreement in fact to permit late-filed claims in the Additional Further Response. *Carty Federal Habeas,* No. 06-614, slip op. at 48 ("Nothing in the record . . . suggests that the parties and state habeas court agreed to suspend TEX. CODE CRIM. PROC. [ANN.] art. 11.071 § 5's limitation on tardy amendments."); *id.* at 53 ("Even if an agreement allowed her to file something,

[Carty] has not shown that the parties agreed to suspend the application of TEX. CODE CRIM. PROC. [ANN. art.] 11.071 § 5(f), as was previously requested."). We hold that the district court's factual conclusion was not clearly erroneous.[7] Although Carty has pointed to some record evidence showing some agreement regarding co-counsel's submission of the Additional Further Response, she has not pointed to sufficient evidence to call into question the district court's conclusion that there was no agreement to permit tardy claims in that document. While statements in Carty's Additional Further Response and by co-counsel during oral argument before the state habeas court show that her habeas counsel proceeded as if the claims would be permitted, those statements permit only the weakest of inferences of any agreement. Co-counsel's generic statements of timeliness are hardly exceptional and are no basis on which to conclude an agreement existed. On the other hand, the state's failure to object to those statements or to the new claims in general raises a stronger inference of an agreement, but that inference is counterbalanced by Carty's failure to follow-up with either state habeas court when both the trial court and the CCA did not rule on her new claims. Similarly, the state trial court's failure to submit the Additional Further Response to the CCA for review pursuant to article 11.071 § 5 also permits an in-

[7] The district court based its decision in part on an affidavit presented by the state's federal habeas counsel, Neelu Sachdeva, who attested that "[t]here was no agreement between the State and habeas counsel concerning habeas counsel filing 'Additional Further Response to Respondent's Original Answer' and no agreement between the State and habeas counsel as to the substance of such document." Sachdeva, however, has not shown that she had firsthand knowledge of the meeting between Carty's habeas counsel and the state's counsel.

ference that the new claims therein were not considered tardy by the trial court, but that inference is again counterbalanced by that court's and the CCA's decision not to rule on those new claims. Carty presents no other record evidence supporting her assertion that an agreement permitted her to file new claims in the Additional Further Response. Thus, Carty has failed to dislodge the district court's findings of fact. Having affirmed the district court's finding, we need not weigh the more difficult second issue-whether Texas statutory law permits the parties, with the tacit approval of the court, to agree to set aside the statutory deadline contained in article 11.071 § 4(a).[8]

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[8] For this issue, Carty argues that state habeas courts may set aside the time line in certain circumstances, especially where the parties rely on the court. She cites cases in which courts have permitted or considered claims filed outside of the initial application. *See, e.g., Coleman v. Dretke,* 395 F.3d 216, 220 (5th Cir. 2004); *Ex parte Ramos,* 977 S.W.2d 616, 617 (Tex. Crim. App. 1998); *Ex parte Jennings,* Nos. AP-75,806, 75,807, 2007 WL 4377072, at *1 (Tex. Crim. App. Dec. 12, 2007); *see also Bagwell v. Dretke,* 372 F.3d 748, 755-56 (5th Cir. 2004); *Riley,* 339 F.3d at 318. These case are distinguishable. In *Jennings,* 2007 WL 4377072, at *1, the CCA treated the supplement to the application as a successive petition and concluded that it met an exception to the successive writ bar. Here, the CCA did not rule that Carty's Additional Further Response qualified under an exception. In *Ramos,* 977 S.W.2d at 617, the state habeas court miscalculated the deadline for filing an initial application, so the prisoner's initial application was timely according to the court order but not under § 4(a). Here, no such mistake occurred, and Carty timely filed her initial application. Finally, *Coleman,* 395 F.3d at 220, was not a death penalty case; thus, Texas Code of Criminal Procedure art. 11.07 (which does not contain deadlines), not article 11.071 (which contains deadlines), applied. Furthermore, in *Riley* and *Bagwell,* we defined some of the ways in which a petitioner may exhaust a claim, but did not consider whether the claims were properly before the state habeas court. At best, the cases cited by Carty stand for the unremarkable proposition that in certain circumstances that do not

Carty also argues that the state waived its exhaustion defense. Under AEDPA, the state may waive the exhaustion requirement through an express statement by counsel: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Although AEDPA requires an express waiver, it "does not require 'magic words' in order for a state to expressly waive exhaustion." *D'Ambrosio v. Bagley,* 527 F.3d 489, 497 (6th Cir. 2008).[9] "The touchstone for determining whether a waiver is express is the clarity of the intent to waive." *Id.* In *Bledsue v. Johnson,* 188 F.3d 250, 254 (5th Cir. 1999), we considered whether such a waiver had occurred. There, the state admitted, in its original answer to the federal habeas petition, that " 'Bledsue has sufficiently exhausted his state remedies.'" *Id.* We held that "the state has waived any independent exhaustion argument, as well as the exhaustion argument included within the doctrine of procedural default." *Id.* In *McGee v. Estelle,* 722 F.2d 1206, 1213 (5th Cir. 1984) (en banc), we reached the opposite conclusion. In that case, we held that the state did not make an express waiver because "its pleading asserted only that it 'believed' that

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exist in fact in this case, state courts have carved exceptions to the time lines of article 11.071 § 4(a).

[9] In *D'Ambrosio,* the Sixth Circuit looked in depth at the concept of express waiver, and held that "[t]he warden expressly waived the exhaustion requirement because her counsel's conduct during the district court proceedings manifested a clear and unambiguous intent to waive the requirement." 527 F.3d at 495-96. It clarified that "this is not a case in which the State simply failed to raise the exhaustion requirement in the district court" and that the fact that "the warden participated in discovery and moved to expand the record" did not "indicate, by itself, that the warden expressly waived the exhaustion requirement, as [the applicant] argues." *Id.* at 497.

[the applicant] had exhausted state remedies." *Id.* Although we held that this was not an express waiver, we concluded that it was "at least the equivalent of failure to assert the defense of non-exhaustion." *Id.* We also approved of the Eleventh Circuit's treatment of a similar statement, which that court determined to be "closely related to an express waiver." *Id.* at n. 22 (citing *Thompson v. Wainwright,* 714 F.2d 1495, 1502 (11th Cir. 1983)).

In this case, the parties dispute whether the state's statements and actions before the district court expressly waive exhaustion. The state argued to the district court in its motion for summary judgment that

> All but one of Carty's claims appear to be exhausted. Nevertheless, Carty fails to establish that she is entitled to habeas relief. Carty's claim of trial court error based on *Crawford v. Washington,* 541 U.S. 36 (2004), was never raised in state court. As a result, the claim is unexhausted and procedurally defaulted. Carty cannot overcome this procedural hurdle where, as here, she does not acknowledge exhaustion deficiencies or attempt to establish cause and prejudice as might serve to excuse her default. For those remaining claims which appear exhausted, Carty fails to demonstrate that the state court's adjudication was both incorrect and objectively unreasonable, that her claims merit relief, or that relief is not precluded under *Teague v. Lane,* 489 U.S. 288 (1989).

In the section entitled "Statement Regarding Exhaustion," the state also announced that "[t]he Director believes that Carty's claim of trial court error under *Crawford v. Washington* is unexhausted." These express statements show that the state treated only one claim,

not presently at issue on appeal, as unexhausted. The rest, including the claims on appeal, it expressly treated as exhausted.[10] Thus, the district court's cursory conclusion that the state has not explicitly waived exhaustion was erroneous as a matter of law. *See Carty Federal Habeas,* No. 06-614, slip op. at 52. The state clearly considered exhaustion as a defense and chose not to exercise that defense for the close issue of whether Carty exhausted the claims contained in her Additional Further Response. The state has waived exhaustion, but in any case, Carty's substantive claims lack merit.

B. Ineffective Assistance of Counsel

Carty contends that her trial counsel's assistance was ineffective. The Sixth Amendment guarantees a criminal accused the right to assistance of counsel, and "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686

[10] The state does not argue that its assertion of the defense of failure to exhaust after prompting by the district court preserved that defense if it had already expressly waived it. The district court has the ability to *sua sponte* raise procedural defenses like failure to exhaust; however, in the face of an express-as opposed to inadvertent-waiver, the district court typically abuses its discretion by raising a waived defense. *See Magouirk v. Phillips,* 144 F.3d 348, 359 (5th Cir. 1998) ("A state's purposeful waiver may also pose an obstacle to *sua sponte* reliance upon a procedural default, and the nature of the state's alleged 'waiver' should be given consideration by the district court. . . . Where omission is the result of a purposeful or deliberate decision to forgo the defense, the district court should, in the typical case, presume that waiver to be valid.").

(1984). Under the *Strickland* standard, the Sixth Amendment right to effective assistance of counsel "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms," by reference to "all the circumstances." *Id.* at 688; *see also Sonnier v. Quarterman*, 476 F.3d 349, 357 (5th Cir. 2007) (same). "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . ." *Strickland*, 466 U.S. at 688. In all cases, "[j]udicial scrutiny of counsel's performance must be highly deferential" and must avoid second-guessing. *Id.* at 689. We avoid the distorting effects of hindsight. *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000). "We must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Id.* (quotation marks and alterations omitted).

Sufficient prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. The deficient assistance must be "so serious as to deprive [her] of a fair trial, a trial whose result is reliable." *Id.* at 687.

"It bears repeating that," where the state habeas court ruled on the petitioner's ineffective assistance of counsel

claim, "the test for federal habeas purposes is *not* whether [the petitioner] made [the required] showing." *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003). "Instead, the test is whether the state court's decision-that [the petitioner] did *not* make the *Strickland*-showing-was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (*Strickland*), for succeeding on [the petitioner's ineffective assistance of counsel] claim." *Id.* With these standards in mind, we now turn to Carty's claims of ineffective assistance of counsel.

1. Failure to notify Corona of his marital privilege

Carty asserts that trial counsel rendered ineffective assistance by failing to interview Corona and notify him of his right to assert his marital privilege not to testify against Carty. Under Texas law, the spouse of the accused has the right to refuse to testify against the accused in a criminal case. TEX. R. EVID. 504(b)(1).[11] Nonetheless, the privilege is the spouse's, not the accused's; the spouse may testify voluntarily for the state. *Id.*

Corona testified during the prosecution's case in chief. As discussed in greater detail above, he testified that Carty repeatedly claimed that she was pregnant, that none of those purported pregnancies resulted in the birth of a child, that he left her in May 2001, and that he did not believe Carty when she told him that she was pregnant in May 2001-shortly before she kidnaped and murdered Rodriguez. The prosecution emphasized his testi-

[11] Rule 504(b)(1) provides: "In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state." "The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse." TEX. R. EVID. 504(b)(3).

mony to explain Carty's motive and provide the context for her otherwise inexplicable crime.

If permitted to refuse to testify, Corona attested that he would have exercised the option:

> I did not want to get involved in the trial or to testify against Linda, but when the prosecutor's office called me to testify, I thought that I had to testify and that I had no other choice. Neither Mr. Gerry Guerinot nor Ms. Windi Akins talked to me before I testified at Linda's trial. It was never explained to me before I testified that in Texas there is a marital privilege and that under that privilege I had the right to refuse to testify at Linda's trial. If Linda's attorneys had explained to me or informed me about this marital privilege, I would have refused to testify at Linda's trial unless Linda's attorneys had asked me to do so.

Trial counsel neither informed Corona of the potential availability of a marital privilege nor interviewed him to establish the factual predicate. Although Corona was on the state's witness list, Guerinot admitted that, "[i]n my representation of Linda, I did not contact her husband Jose Corona prior to trial. I assumed that my investigator John Castillo would speak with him." Castillo, however, "never spoke to Corona." Guerinot also conceded that "I never attempted to inform Jose Corona that he had the right as her husband to not testify."

The district court held that "[z]ealous counsel should have interviewed Corona before trial and provided him the information necessary to try exerting [sic] the marital exemption." *Carty Federal Habeas,* No. 06-614, slip op. at 97. It held, however, that trial counsel's deficiency did not sufficiently prejudice Carty's defense to warrant relief. We agree that although trial counsel performed ob-

jectively unreasonably by failing to interview Corona to determine if he could or would assert a marital privilege, that omission did not prejudice Carty's defense.

The state does not disagree that trial counsel's failure to inform Corona of the potential availability of the marital privilege fell below the objective standard of reasonableness; instead, it argues only that Carty suffered no *Strickland* prejudice as a result of trial counsel's deficient investigation. The state provides two reasons why Carty was not sufficiently prejudiced, both of which she disputes. First, Corona was not Carty's common-law husband, so the state trial court would not have permitted him to assert the marital privilege. Second, in any case, Corona's testimony did not render the jury's guilty verdict unreliable.

Both Corona and Carty agree that they shared a common-law marriage. "Common law marriages have been recognized in Texas since 1847." *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex. 1993). The elements of a common-law or informal marriage, as codified in § 2.401 of the Texas Family Code, are "(1) an agreement to be married, (2) after the agreement, the couple lived together in [Texas] as husband and wife, and (3) the couple represented to others that they were married." *Id.* at 932.[12]

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[12] As currently codified, the Texas statute establishing informal marriage provides:

> (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
>
> . . .
>
> (2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

"Proof of cohabitation and representations to others that the couple are married may constitute circumstantial evidence of an agreement to be married." *Id.* at 933.

The district court held that "the record does not show that, given the information he had, that trial counsel could have made a plausible argument that would allow Corona to exert [sic] his marital privilege." *Carty Federal Habeas,* No. 06-614, slip op. at 96; *see also id.* at 97 ("[T]he mixed record does not suggest that the trial court would have allowed Corona to avoid testifying."). The district court based its conclusion in part on the record of mixed statements by Carty and Corona, on Carty's statements about the termination of their relationship after Corona moved out, and on the absence of prior attempts to authenticate officially their marriage or to seek a divorce.

The district court in part misconceives Texas law as it applies to the evidence in this case. Although Carty's and Corona's mutual conclusory assertions that they have a common-law marriage "[are] not sufficient, standing alone, to establish a common law marriage," *Tompkins v.*

> (b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

TEX. FAM. CODE ANN. § 2.401. Regarding the presumption contained in subsection (b), the state's prosecution of Carty was commenced prior to the second anniversary of the date that Carty and Corona separated; however, the state habeas application and present federal habeas litigation were not commenced within that time frame. Because the state does not argue that the adverse presumption contained in § 2.401(b) applies to this case, we do not rule on its applicability to the present case.

State, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987), it is undisputed that they lived together for approximately three years, from 1999 to 2001. The record contains evidence of multiple representations to others that they were married during the period of their cohabitation. For example, Corona attested that, during the period of their co-habitation, "I would introduce Linda as my wife, and she would introduce me as her husband." The difficult prong, as nearly always is the case, is the first: whether there was an agreement to be married. There is an indistinct record as to this prong. Carty has pointed the court to no direct evidence or statements that she and Corona agreed to be married. Yet, such an agreement can be inferred from the spouses' public statements and their cohabiting. *See Russell,* 865 S.W.2d at 932. The fact that both Carty and Corona assert that they had a common-law marriage, although not dispositive, lends credence to their claim-typically, the spouses dispute their status.

The evidence to the contrary, on which the district court relied, is not pertinent to the analysis in this case. While some statements show that they may not have always referred to themselves as being married, Texas law does not require that the purported spouses always refer to themselves as married-undertaking each requirement of informal marriage consummates the union and renders additional or contradictory statements superfluous. *See id.* Even if Carty may have been planning a wedding ceremony, the intention to have a formal proceeding does not automatically disprove the existence of a common-law marriage. *See Hinojos v. R.R. Ret. Bd.,* 323 F.2d 227, 231 (5th Cir. 1963) ("[T]here is nothing necessarily inconsistent with an agreement presently to enter into a common-law marriage and an intention later to have per-

formed a ceremonial marriage."); *Tompkins,* 774 S.W.2d at 209 ("The fact that they might have intended to go through a ceremonial marriage at sometime in the future does not necessarily negate the inference that they believed that they were married common law."). Nor, as the district court erroneously referenced, does a later separation, a statement by one or both spouses that no marriage exists, or the spouses' failure to otherwise authenticate their marriage disprove or dissolve an established common-law marriage. *See State v. Mireles,* 904 S.W.2d 885, 889 (Tex. App.—Corpus Christi 1995, pet. ref'd) ("[O]nce a common law marital status exists, it, like any other marriage, may be terminated only by death or a court decree; once the marriage exists, the spouses' subsequent denials of the marriage do not undo the marriage.").

On this record, considering Carty's and Corona's widely disseminated representations that they were married and the fact that during trial, even the prosecutors claimed that they were married,[13] Carty may well have established that she was married to Corona and that, but for her counsel's ineffective assistance, Corona would have exercised his marital privilege not to testify. Ultimately, however, we need not decide the question whether Carty and Corona were married because Carty fails on the prejudice prong of her ineffective assistance claim.

Carty bears the burden of showing a reasonable probability of a different result had Corona not testified. Although this is a close case, she has not made the requisite showing that his testimony rendered her conviction "fundamentally unfair or unreliable." *Ransom v. Johnson,*

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[13] It is difficult for the state to now complain that Carty's assertion is surprising.

126 F.3d 716, 721 (5th Cir. 1997) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). Corona's testimony was undoubtedly damaging to Carty's defense, but it did not render her conviction fundamentally unreliable. His testimony provided motive and context for the crime. He testified that Carty wanted to have a child and frequently lied about being pregnant. He provided the best evidence of their break up a mere two weeks before Rodriguez's murder, of her statements at that time that she was pregnant, and of his belief that she was lying about being pregnant. Corona also testified that Carty called him numerous times on May 15-the day prior to the kidnaping and murder-and on May 16-the day of the crimes-to inform him that she was having his baby boy. It is an obvious and no small inference that Carty kidnaped Rodriguez's baby and killed Rodriguez to prove to Corona that she had birthed his son and thereby reestablish their relationship.

The prosecutors emphasized Corona's testimony in their closing remarks, particularly "that every time [he] tried to end [their relationship], Carty announced she was pregnant" and that "[w]hat [Carty] wanted, . . . needed, was [the baby] because her life was falling apart and she needed the baby to bring it back together again." The state concedes that "Corona provided motive and context for what would otherwise be a wholly inexplicable crime"-it was the "evidence of what drove the defendant to commit such a brutal crime." As Guerinot summarized, Corona's testimony "hurt Linda's case." The district court thus appropriately concluded that Corona's testimony "would be persuasive to the jury" and "was obviously important to the prosecution."

Yet, while Corona's testimony may have been damaging to Carty's defense, the *Strickland* prejudice test car-

ries a higher standard. Trial counsel's failure to notify Corona that he did not need to testify must have "a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96. We affirm the district court's conclusion that Corona's testimony provided nuance to the case but did not alter the entire evidentiary picture. The evidence of Carty's guilt was overwhelming, even absent Corona's testimony, and his testimony, in most regards, only corroborated other sources. Corona's testimony was not necessary to prove, let alone relevant to, any of the elements of capital murder. More importantly, trial testimony from witnesses other than Corona revealed, *inter alia*, that in the days leading up to the kidnaping and murder, Carty told Mathis, Meyers, and Bancroft that she was pregnant. Neither Meyers nor Bancroft, however, thought she looked pregnant. Carty had also acquired baby items that she stored in her car, despite the fact that she was not pregnant. In addition, Carty masterminded the planned kidnaping-recruiting her accomplices, inviting them into her home to see the layout (which mirrored the target home), calling the kidnapers during the abduction, and then entering Rodriguez's home to take the baby, telling them repeatedly that she needed the baby, and directing them to tie up Rodriguez and put her in the trunk of the car-and killed Rodriguez by placing a bag over her head. While this other evidence may not have shown as directly *why* Carty wanted Rodriguez's baby, it nonetheless shows that she wanted the baby.[14] Although Corona's testimony

[14] In fact, trial counsel's unimpeached trial strategy was to challenge the evidence showing Carty's intent to kill, not her involvement in the kidnaping and murder. Corona's testimony was thus not relevant to the most prominently disputed element of Carty's case.

was obviously damaging to Carty's defense, we conclude, based on the totality of the evidence, that Carty has not shown that but for trial counsel's deficient failure to advise Corona of his marital privilege there was a reasonable probability that she would not have been convicted of capital murder.

2. Failure to investigate and present additional mitigation evidence

Carty also argues that trial counsel was ineffective because counsel failed to investigate or present significant mitigating evidence. In *Strickland,* the Supreme Court addressed an ineffective assistance claim based on an attorney's failure to investigate and present mitigation evidence. The Court "noted that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Sonnier,* 476 F.3d at 358 (citing *Strickland,* 466 U.S. at 691); *see also Miniel v. Cockrell,* 339 F.3d 331, 344 (5th Cir. 2003) ("[G]enerally accepted standards of competence require that counsel conduct an investigation regarding the accused's background and character."). "Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and in the ultimate determination of whether the death penalty is an appropriate punishment." *Riley,* 339 F.3d at 316. "[C]ounsel should consider presenting . . . [the defendant's] medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins v. Smith,* 539 U.S. 510, 524 (2003). Sometimes, however, "[i]nvestigations into mitigating circumstances may reasonably be limited where the defendant fails to call wit-

nesses to his lawyer's attention." *Wiley v. Puckett*, 969 F.2d 86, 99 (5th Cir. 1992). As the Supreme Court explained in *Strickland*,

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. . . .

466 U.S. at 691. Thus, although a defendant's obstreperousness will not justify a complete failure by appointed counsel to investigate and present mitigating evidence in all cases, *see Sonnier*, 476 F.3d at 358 ("[The defendant's] refusal to consent to their undertaking more extensive and in-depth discussions with his family and acquaintances to determine the nature and extent of the mitigation evidence available was not reasonable grounds for their failure to do so."), "[t]he scope of the attorney's duty to investigate may be limited by a defendant's lack of cooperation," *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir. 1995).

When considering *Strickland* prejudice, we review "the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-98, (2000); *see also Wiggins*, 539 U.S. at 534 ("[W]e reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Strickland*, 466 U.S. at 695

("[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."). In this re-weighing, the brutality of the crime is relevant but does not automatically trump additional mitigating evidence. *See Gardner v. Johnson,* 247 F.3d 551, 563 (5th Cir. 2001).

Carty asserts that trial counsel failed to investigate or present mitigating testimony from Corona, Mathis, Dr. Brown, Carty's family and friends, and acquaintances on St. Kitts and failed to investigate and present that Carty suffered from posttraumatic stress disorder after being the victim of a sexual assault, becoming pregnant, and giving her baby up for adoption.

The state habeas court ruled on some of these claims. In particular, in her initial state habeas application, Carty raised trial counsel's failure to investigate and present additional mitigating testimony from her family members who testified and any mitigating testimony from her other family members. The CCA concluded that trial counsel was not ineffective: "Trial counsel cannot be considered ineffective for an alleged failure to investigate and present mitigating evidence . . . in light of counsels' investigation and presentation of thorough punishment evidence, including testimony concerning [Carty's] family background and support, positive personal characteristics, positive activities, work ethic, and her parenting abilities. . . ." The court also concluded that Carty had not shown prejudice: "[Carty] fails to show harm, if any, so that the outcome of the proceedings would have been different if the witnesses proffered on habeas [[her] mother, daughter, two sisters, and brother]

had been presented at trial, based on the fact that three of the proffered witnesses [mother, daughter, sister] actually testified at trial and that the proffered testimony was essentially the same as evidence presented at trial." Bolstering its conclusion, the court weighed Carty's and her family's lack of cooperation: "[Carty] fails to show ineffective assistance of trial counsel based on the alleged failure to investigate and present mitigating evidence, especially in light of [her] repeated failure to cooperate with counsel, [her] refusal to give counsel the name of potential witnesses, [her] instruction not to contact her family, and the failure of [her] daughter to appear in court without the trial court issuing a writ of attachment for her appearance." As noted above, we review the state court's conclusions and the factual findings contained therein under AEDPA's deferential standard. *See* § 2254(d). For Carty's remaining claims, we review de novo. *See Henderson*, 333 F.3d at 598.

Carty asserts that trial counsel failed to investigate and present mitigation testimony from her family. Trial counsel presented some mitigating evidence, including the testimony of Carty's mother Enid, sister Isalyn, and daughter Jovelle. Carty offers that, with better preparation, these witnesses would have presented a more vivid picture of Carty as a generous and caring human being. *See Walbey v. Quarterman*, 309 Fed. Appx. 795, 804 (5th Cir. 2009) ("[T]he mitigating evidence omitted by [trial counsel] during [the applicant's] sentencing overwhelms the 'scant' evidence, 'bereft in scope and detail,' that was presented."). Although trial counsel did not conduct extensive interviews with these witnesses, they obtained a writ of attachment to secure Jovelle's testimony, and, moreover, Carty's complaint about trial counsel's preparation of these witnesses boils down to a matter of de-

grees-she wanted these witnesses to testify in greater detail about similar events and traits. We agree with the district court that Carty has not shown any deficiency in trial counsel's preparation of Enid, Isalyn, and Jovelle. *See Dowthitt,* 230 F.3d at 743.

Carty also asserts that trial counsel performed ineffectively by not contacting Carty's other family members, including Sonia Carty Jackson, Verna Connor, Yvette Jacqueline Carty-Innes, Boyce Carty, and Clarence Eugene Carty-all of whom now attest that they were willing to testify about Carty's dynamic life, intelligence, and generosity. Such testimony would have overlapped considerably with the testimonies of Enid, Isalyn, and Jovelle. Carty's claim is again that trial counsel did not present enough mitigating evidence. We agree with the district court that Carty has not shown any deficiency related to her proffer of cumulative evidence. *See id.* In addition, with the exception of Verna, Carty refused to notify trial counsel about her relatives: Guerinot attested that "Ms. Carty did not provide me with names of people who would testify on her behalf. Ms. Carty did not even want her family to testify but I approached them anyway because I thought their testimony was important." Carty's own actions and statements undermine her claim of ineffective assistance related to mitigating testimony from other family members. *See Randle,* 43 F.3d at 225; *Wiley,* 969 F.2d at 99. The CCA's conclusion-that trial counsel's handling of the witnesses who testified and failure to contact Carty's other relatives, who would have testified similarly, did not prejudice Carty's mitigation defense-was not an unreasonable determination of the facts in light of the evidence presented in the punishment phase and was not an unreasonable application of or contrary to clearly established, Supreme Court-determined

federal law. *See Neal v. Puckett*, 286 F.3d 230, 247 (5th Cir. 2002) (deferring to state habeas court determination that "the additional evidence was not substantial enough to outweigh the overwhelming aggravating circumstances" where "[a]lthough the additional mitigating evidence was of a significantly better quality than that actually presented, much of it was similar in nature to the original evidence").

For the remainder of Carty's claim of ineffective assistance of counsel based on failure to investigate and present mitigating evidence, which we review de novo, we conclude that Carty has failed to show *Strickland* prejudice. The omission of Corona's and Mathis's proffered punishment-phase testimony was not prejudicial. Neither trial counsel nor the state has offered sufficient justification for trial counsel's failure to interview Corona or Mathis or to place them on the stand for purposes of mitigation. Corona undisputedly resided with Carty for three years prior to the kidnaping and murder and was Carty's common-law husband, while Mathis was Carty's DEA agent with direct knowledge of her work for the government. Corona attests that he would have testified to the jury that Carty "did not deserve the death penalty" and that he did not "believe she is an aggressive person or a threat to society." Mathis attests that "[t]he Linda I know is not a violent person, let alone a cold-blooded murderer." Mathis would also have provided some favorable if mixed testimony about her performance as an informant for the DEA. Based on the totality of the evidence, and weighing the relatively unpersuasive nature of Corona's and Mathis's testimony, some of which would have been cumulative,[15] against the circum-

[15] Mathis's testimony would have been largely cumulative of his trial testimony. For example, Mathis testified during the guilt/innocence

stances of the crime and other evidence, Carty has failed to show that their testimony would have resulted in a life sentence.

Carty next asserts that trial counsel rendered ineffective assistance by failing to investigate or procure testimony from her friends and acquaintances on St. Kitts. The state does not dispute that these witnesses could show that Carty was "well-liked and well-known," "involved in church and politics," a "good teacher," and not "violent or aggressive or even rowdy" while growing up and working in St. Kitts.[16] Indeed, these witnesses would have provided a much more nuanced and detailed vision of Carty's life and contributions to the St. Kitts community. *See Riley,* 339 F.3d at 316. Yet, most, although not all, of Carty's supporters on St. Kitts had little contact with Carty in the two decades since she left there-as the district court noted, the affidavits "have been prepared by people removed both in time and geographic location from her life at the commission of the capital murders." *Carty Federal Habeas,* No. 06-614, slip op. at 112. In fact, their proffered testimonies of her good character appear "weak and stale" when compared to the person she had become-a person who stole cars; organized drug deals, burglaries, and kidnapings; and committed mur-

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phase of trial that "I've known Linda for a long time and I did not believe that she could do something like this."

[16] Each of the potential witnesses attested that, if asked, he or she would have traveled to Texas to testify during Carty's trial. The St. Kitts consulate stated that it would have assisted with visas and travel. Thus, we assume that the witnesses would have testified if called. *See Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985) ("In order for the appellant to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.").

der. *Id.* Furthermore, the testimonies of Enid, Isalyn, and Jovelle—based on more recent observations and interactions with Carty in Texas—presented at least some of the proffered information to the jury. And, again, Carty's obfuscation contributed to trial counsel's alleged deficiency; she did not inform trial counsel that she was a foreign national or provide counsel with her contacts in St. Kitts. Although the proffered testimonies would have given more detail and more focus to the mitigating evidence, in light of the totality of the evidence presented at trial, they were not of sufficient quality and force to establish a reasonable probability that, had the jury heard them, it would have elected to impose a life sentence.

Carty adds that trial counsel was ineffective for failing to investigate and present mitigating evidence showing that she was the victim of a rape and that she became pregnant as a result of that rape, birthed a child, gave it up for adoption, and now suffers from chronic post-traumatic stress disorder as a result. Carty did not present this mitigation argument to the district court. *See Carty Federal Habeas,* No. 06-614, slip op. at 88. At most, she argued that her rape was a justification for why she was uncooperative with trial counsel. Thus, Carty has abandoned this line of argument. *See Johnson v. Puckett,* 176 F.3d 809, 814 (5th Cir. 1999) ("We have repeatedly held that a contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief.").[17]

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[17] Even if Carty did not abandon this claim, she has not shown either deficient performance or prejudice. Carty did not inform trial counsel that she gave birth to a child that was conceived as a result of rape. And, the jury heard testimony and argument about her rape and resulting child birth, even as it related to mitigation. For exam-

Finally, Carty argues that trial counsel ineffectively prepared Dr. Brown for testimony and cross-examination about Carty's future dangerousness during the punishment phase. Because neither we nor the district court granted Carty a COA on this issue, we lack jurisdiction to consider this claim. *See* 28 U.S.C. § 2253(c); *Sonnier v. Johnson,* 161 F.3d 941, 946 (5th Cir. 1998) ("Compliance with the COA requirement of 28 U.S.C. § 2253(c) is jurisdictional. . . .").

3. C. Denial of An Evidentiary Hearing

Lastly, Carty argues that the district court abused its discretion by denying her request for an evidentiary hearing on the exhaustion issue. Having considered Carty's proffer in connection with that request, we perceive no abuse of discretion in the district court's ruling. *See Schriro v. Landrigan,* 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.").

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ple, after Dr. Brown testified that she informed him about the rape, trial counsel stated during closing arguments:

> Linda Carty, according to the report by Dr. Brown-you may say, as far as mitigating goes, you may ask yourself, "You know what, I wonder if the fact that she reported that she gave birth to a child that was the result of a sexual assault and gave that up for adoption, if that may have triggered something to cause her to do what she did?" I mean, it could be anything from any source whatsoever. And the law does not require that you leave your common sense out there on the courthouse steps.

IV. CONCLUSION

For the above-stated reasons, we AFFIRM the district court's judgment.

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-61,055-02

EX PARTE LINDA CARTY

On Application for Writ of Habeas Corpus
Cause No. 877592 In The 177th Judicial District Court
Harris County

(February 25, 2015)

***Per curiam*. KELLER, P.J., filed a dissenting opinion. *NEWELL, J., not participating*.**

ORDER

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

In February 2002, Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set 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). 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). Applicant's instant post-conviction application for writ of habeas corpus was filed in the trial court on September 10, 2014.

Applicant presents six allegations. We have reviewed the application and find that Allegations A, B, and C satisfy the requirements of Texas Code of Criminal Procedure Article 11.071, § 5(a). Accordingly, we find that the requirements for consideration of a subsequent application have been met and the cause is remanded to the trial court for consideration of Allegations A, B, and C.

IT IS SO ORDERED THIS THE 25th DAY OF FEBRUARY, 2015.

Do Not Publish

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KELLER, P.J., filed a dissenting opinion.

Applicant was convicted of capital murder and sentenced to death in February 2002. She filed her first habeas application in 2003, and we denied relief on that application in 2005. In a subsequent habeas application filed in 2014, applicant now contends, *inter alia*, that newly discovered evidence shows that the State knowingly used false testimony and suppressed exculpatory evidence. The Court finds that these claims satisfy an exception to the bar against subsequent applications and remands these claims for consideration of their merits.[1] I disagree and would dismiss the habeas application as barred under Article 11.071, § 5.

[1] *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a).

A. § 5

A court may not consider the merits of a subsequent habeas application unless "the application contains sufficient specific facts" establishing one of the following exceptions:

> 1. the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> 2. by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> 3. by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.[2]

To be considered on the merits, then, a claim in a subsequent application must be based upon previously unavailable facts or law, or else it must satisfy the innocence or innocence-of-the-death penalty gateway standards. Applicant alleges all of these exceptions, but she satisfies none of them.

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[2] *Id.*

B. Previously Unavailable Facts

1. The Alleged Factual Bases

Applicant presents affidavits obtained in 2014 from Christopher Robinson, Marvin Caston, Gerald Anderson, and former DEA Agent Charlie Mathis. Robinson and Caston's affidavits allege that the prosecutors coerced them into giving false testimony at trial about applicant's conduct that incriminated applicant. Applicant additionally contends that Caston's affidavit shows that some sort of deal was struck between him and the State that was not disclosed to the defense[3]. Gerald Anderson's[4] affidavit alleges that the prosecutors attempted to coerce him into testifying falsely at applicant's trial but that he declined to do so and was ultimately assessed a life sentence. Mathis's affidavit alleges that the prosecutors engaged in coercive conduct when they interrogated applicant and alleges, based on his experience with her as an informant, that applicant was not the sort of person who would have committed capital murder.

2. Diligence in General

Under Article 11.071, § 5, the factual basis of a claim is unavailable if "the factual basis was not ascertainable through the exercise of reasonable diligence on or before" the date the application was filed.[5] None of the affi-

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[3] In his affidavit, Caston alleges that the prosecutors repeated the same threat in various meetings: "that I would be sentenced to thirty years unless Linda Carty got the death penalty and Chris Robinson got thirty to forty years." Caston further stated that the prosecutors "essentially promised me that if Linda *did* get the death penalty, and if Chris did get thirty or forty years, then I would *not* get thirty years myself." (Emphasis in original)

[4] Because a person named Josie Anderson was also involved in this case, I refer to Gerald Anderson throughout by both his first and last names.

5 *Id.* § 5(e).

davits offered by applicant satisfies this reasonable diligence standard. Although the affidavits were obtained in 2014, applicant does not claim that these witnesses stepped forward on their own. The question arises why applicant could not have obtained this information by the time she filed her first habeas application.

Applicant contends that she was entitled to rely upon a presumption that the State would disclose exculpatory materials and inform the defense of any false testimony. But almost all of the alleged false and exculpatory evidence relates to applicant's own conduct. Applicant had knowledge of her own conduct on the day of the incident. If Robinson and Caston had lied about applicant's conduct in their testimony, applicant would have known, at trial, that they had lied. She also had knowledge of how the prosecutors interrogated her and of her own relationship as an informant with Mathis. She did not need the State to inform her of her various interactions with the State's witnesses. She would need to discover whether the witnesses would admit to the truth (if in fact they had lied or did possess exculpatory information about her) and whether the State was behind a particular witness's failure to convey complete and truthful information. To discover that, all her defense team needed to do was interview the witnesses, if the witnesses would talk.

Gerald Anderson did not testify, and so the value of his affidavit relates primarily to information applicant would not have been privy to: the prosecutors' alleged attempts to coerce him to commit perjury. But because he did not testify against her, she would have reason to believe that he would be sympathetic to her, especially after he received his life sentence for aggravated kidnapping, imposed on November 22, 2002. He could have been que-

ried at that time about his interactions with the State, if he were willing to talk.

3. Caston and Gerald Anderson

Applicant claims only that Robinson and Mathis had declined to talk earlier about the case. She does not claim that there was ever any impediment to talking with Caston and Gerald Anderson, and, so, she has failed to show that Caston and Gerald Anderson's affidavits could not have been procured for use in her first habeas application.

4. Robinson

To show that Robinson refused until now to disclose the information in his affidavit, applicant relies upon the following statement in that affidavit: "For years I just didn't want to talk about this case; but this is the truth of what happened." But not wanting to discuss something is not the same as refusing to discuss it. There is no allegation that Applicant ever tried to talk to Robinson about her case, so we do not know whether he would have discussed the case if applicant had asked. Moreover, Robinson says he was scared "at Linda Carty's trial" because of the State's threats, but once he had pled guilty to aggravated kidnapping and received a life-without-parole sentence, he had no reason to be scared of the State's threats. Applicant has failed to establish that Robinson's testimony was previously unavailable.

5. Mathis

Applicant's claim of unavailability with respect to Mathis's affidavit rests on a foundation of sand. Applicant relies upon the following statement: "Since my last affidavit, I have attempted to avoid speaking to Linda Carty's defense team because I have serious on-going health complications and because this case is a source of

stress and difficulty for me." Mathis says only that he attempted to avoid contact with the defense team *after* his prior affidavit. The prior affidavit was signed in October 2005. Even if Mathis's statement were taken as evidence that he refused to talk to the defense team after October 2005, applicant has alleged no facts to suggest that she could not have contacted Mathis in 2003, when her first habeas application was filed. And the fact that an affidavit was obtained in 2005 suggests that Mathis was indeed willing to talk to the defense.

C. Previously Unavailable Law

Applicant also claims that *Ex parte Chabot*[6] provides a previously unavailable legal basis because it was the first time this Court recognized that the prosecution's *unknowing* use of false testimony could be a due process violation. But the Court does *not* remand on applicant's "unknowing use" claim, and I agree with the Court's decision in that regard. The law regarding the *knowing* use of false evidence has long been well established,[7] as is the case with the law regarding the suppression of exculpatory evidence[8].

D. Innocence and Innocence of the Death Penalty

Applicant contends that no rational juror could have found her guilty or assessed the death penalty absent the alleged constitutional violations. To support this contention, she asserts that the violations "go to the heart of Carty's capital murder trial and undermine the State's theory of the case" and that "the suppressed evidence and misleading testimony went to whether Carty acted intentionally in killing Rodriguez and whether her ac-

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[6] 300 S.W.3d 768 (Tex. Crim. App. 2009).
[7] *See Ex parte Fierro*, 934 S.W.2d 370 (Tex. Crim. App. 1996).
[8] *See Brady v. Maryland*, 373 U.S. 83 (1963).

tions (if true) actually killed Rodriguez." Even if we accepted these assertions, that would not show that no rational juror could have found her guilty or assessed a death sentence. The evidence at trial included testimony not only from Robinson and Caston, but also from alleged accomplices Josie Anderson and Zebediah Combs, as well as a significant amount of non-accomplice evidence connecting applicant to the murder.[9]

Applicant also relies upon affidavits submitted by four jurors who claim that, had they known about certain allegedly exculpatory facts contained in the affidavits in the habeas record, they would not have found applicant guilty of capital murder or would not have assessed the death penalty. These affidavits are inadmissible under Texas Rule of Evidence 606(b) and cannot be considered.[10] Even if they could be considered, evidence that jurors who served in a defendant's trial would not have found a defendant guilty or assessed the death penalty does not establish that *no rational juror* would have done so.

I respectfully dissent.

Filed: February 25, 2015

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[9] *Carty v. State*, No. 74,295, slip op. (Tex. Crim. App. April 7, 2004) (not designated for publication).

[10] *See* TEX. R. EVID. 606(b).

APPENDIX E

IN THE 177TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS AND THE COURT OF CRIMINAL APPEALS OF TEXAS AUSTIN, TEXAS

EX PARTE LINDA ANITA CARTY, APPLICANT

(September 10, 2014)

APPLICATION FOR POST CONVICTION WRIT OF HABEAS CORPUS

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PRO BONO ATTORNEYS FOR THE APPLICANT LINDA ANITA CARTY

APPLICATION FOR POST CONVICTION WRIT OF HABEAS CORPUS

Applicant, Linda Anita Carty, respectfully requests that this Court issue a writ of habeas corpus and grant her relief from her unconstitutional conviction.[1] Carty's initial habeas proceedings resulted in an uncontested finding. Appeals for the Fifth Circuit that her trial counsel performed "objectively unreasonably," but it was a "close case" as to whether her trial was "fundamentally unfair or unreliable." With her case already a "close case," Carty now asks this Court to consider new evidence that the State threatened and coerced witnesses into presenting false and misleading testimony during the guilt phase of the trial and intentionally suppressed exculpatory evidence within the meaning of *Brady v. Maryland,* 373 U.S. 83 (1963). Both the false and misleading evidence and the undisclosed *Brady* material, on their own and in the greater context of the "close case" established in her initial habeas proceedings, clearly

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[1] This is not Carty's first application for post-conviction writ of habeas corpus. Pursuant to Article 11.071, Carty is filing this application with the convicting court for transmittal to the Court of Criminal Appeals. Article 11.071 directs the clerk of the convicting court to (1) attach a notation that the application is a subsequent application; (2) assign to the case a file number that is ancillary to that of the conviction being challenged; and (3) immediately send to the Court of Criminal Appeals a copy of the application, the notation, the order [if any] scheduling the applicant's execution, and any order the judge of the convicting court directs to be attached to the application. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(b). Upon receipt of the above documents from the clerk of the convicting court, the Court of Criminal Appeals determines whether the requirements of Art. 11.071, Sec. 5(a), have been met. *See* TEX. CODE CRIM. PROC. art. 11.071, Sec. 5(c). Carty will provide the Court of Criminal Appeals with courtesy copies of this application after the convicting court has transmitted the required documents to the Court of Appeals.

mandate that she be granted this subsequent writ and, in turn, a new trial.

Carty requests that this Court find that her claims meet the requirements of Section 5(a)(1) and 5(a)(2) of Article 11.071 of the Texas Code of Criminal Procedure and remand the case to the trial court for further consideration. The factual and legal basis of the claims herein presented were unavailable to Carty until Carty's attorneys were informed of the false and misleading testimony. As shown by the affidavits of a number of jurors, but for the State's presentation of false and misleading evidence and its suppression of exculpatory evidence, Carty would not have been found guilty of capital murder and even if found guilty, a death sentence would not have resulted. *See Ex parte Hood,* 211 S.W.3d 767 (Tex. Crim. App. 2011). Carty requests that this Court file and set the case for submission, full briefing and oral argument on whether Carty's due process rights have been violated.

I. INTRODUCTION

In February 2002, a jury convicted Carty of capital murder on the basis that (1) she killed Joana Rodriguez by intentionally placing a bag over Rodriguez's head causing her to suffocate and (2) she was the ringleader orchestrating the kidnapping of Rodriguez and her infant son, Ray. Neither forensic evidence nor non-conspirators' testimony establish her direct involvement in the crime.

Chris Robinson, a co-conspirator, provided the only testimony that Carty placed a bag over Rodriguez's head. This testimony was false, and the prosecution knew it. The testimony that Carty was the ringleader, provided by Robinson and Marvin Caston, another co-conspirator, was also false and the prosecution knew it. As evidenced by the declarations of four jurors and by any measure of

common sense, false testimony affected the outcome of Carty's capital murder trial.

Moreover, without Robinson's and Caston's false testimony, the State would have been left with a hodgepodge of testimony indicating that Carty was having problems with her husband, told others she was going to have a baby, and that she knew the admitted perpetrators of the crime to the extent she lent them her car.

The impact of the State's misconduct in Carty's case is amplified by its failure to disclose critical *Brady* evidence. In particular, Carty has never been provided with notes or recordings made during interviews of key witnesses conducted by the prosecution prior to trial, as outlined in Part V(C)(3). The State also failed to disclose to Carty critical exculpatory statements made to the prosecution including that Carty was not the ringleader, that she did not place the bag over Rodriguez's head, and that Rodriguez's death was an accident. These exculpatory statements were made by Robinson, Caston, and Gerald Anderson, as well as by Charles Mathis, the DEA officer who was one of the State's leading witnesses.

In short, without the State's misconduct, there was no evidence linking Carty to Rodriguez's suffocation. Further, the jury would have learned that (1) Rodriguez was not dead when the bag was torn, (2) Robinson and Caston did not believe Carty was the ringleader, (3) Robinson and Caston believed Rodriguez's death was an accident, and (4) the DEA officer called by the State did not believe Carty committed murder and believed she had been improperly questioned in violation of her Miranda rights. In addition to Robinson and Caston's affidavits, recent affidavits from Mathis, Rosalind Caston, and Gerald Anderson corroborate that the State actively shaped the evidence to obtain the death penalty for Carty—without

regard for the truth. Carty urges this Court to consider not only whether her constitutional rights were violated by the State's misconduct outlined in this writ, but also whether she should have been convicted of capital murder at all.

II. BRIEF STATEMENT OF FACTS

In the early hours of May 16, 2001, three men entered the apartment of Raymundo Cabrera, his wife Joana Rodriguez, their newborn son Ray, and Cabrera's cousin Rigoberto Cardenas. Cabrera was asleep in his bedroom with his wife and four-day old son when two armed men woke him. Tr. Vol. 20 at 28-31. The men demanded money, proceeded to duct tape Cabrera's mouth, nose and eyes, and tied him up with a phone cord. *Id.* at 37-38, 40. Cabrera testified that he heard one of the men say "[w]e are going to take the baby and the mother." *Id.* at 39. Cabrera's wife and newborn son then left with the men. *Id.* at 40.

At the same time, Cabrera's cousin, Rigoberto Cardenas, was sleeping downstairs in the living room and awoke to the sound of the front door breaking. *Id.* at 54-55. Cardenas was hogtied with telephone and lamp cords then covered with an overturned couch. *Id.* at 58, 61. Cardenas testified that he heard one of the men in the apartment yell "she was outside and for them to leave" after receiving a call.[2] *Id.*

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[2] The State also presented evidence that Carty's phone records showed a call to Precious Monique Gardner around the time of the kidnapping. Tr. Vol. 21 at 66-69. Gardner led the officers to Gerald Anderson who was eventually arrested and charged with capital murder. *Id.* at 69-70. Carty maintains that she loaned her car to the men and her cell phone was in the car, thus not in her possession at the time of the call. *See* Tr. Vol. 21 at 110.

Neither Cabrera nor Cardenas ever saw Carty or even ever heard her name. *Id.* at 48, 63-64. Baby Ray was found wrapped in a blanket in the front seat of a black Chevy Cavalier in the Van Zandt yard. Tr. Vol. 21 at 125-27. Rodriguez was found dead in the trunk of a Pontiac Sunfire[3] having suffocated. *Id.* at 162.

In connection with Rodriguez's death, Chris Robinson pled guilty to aggravated kidnapping and was sentenced to 45 years. Since Gerald Anderson refused to lie for the State, he was not called as a witness. He pled guilty to aggravated kidnapping and was sentenced to life. Carliss Williams was convicted of kidnapping and sentenced to twenty years. Josie Anderson and Marvin Caston, involved in the planning of the crime, testified for the State and were not tried or convicted or even pled to a crime related to this case.

Carty has always maintained her innocence. Without any forensic evidence linking her to the crime and without being in the apartment when the kidnapping occurred, she was convicted of capital murder.

III. PROCEDURAL HISTORY

A jury convicted Carty of the capital murder of Rodriguez on February 19, 2002, and sentenced her to death on February 21, 2002, in the 177th District Court of Harris County, Texas, in Cause No. 877592. Tr. Vol. 27 at 13839, 143. Carty was represented at trial by appointed counsel, Gerard W. Guerinot and Windi Akins. Tr. Vol. 2 at 4-5. On direct appeal, Matt Hennessy represented

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[3] Carty does not dispute that the Pontiac Sunfire was her car. However, as Mathis testified, Carty told him that she had given her car to someone. Tr. Vol. 21 at 110. Mathis further testified that when originally questioned, Carty openly told Mathis that she believed these people were involved in the kidnapping and told the police where she believed they would be (the Van Zandt location). *Id.*

Carty. The Court of Criminal Appeals denied her direct appeal on April 7, 2004. *Linda Carty v. State,* No. 74,295 (Tex. Crim. App. April 7, 2004) (unpublished).

Kurt Wentz filed Carty's first application for habeas corpus on August 6, 2003. The British Consulate (the "Consulate") then learned of Carty's case, a British national sentenced to death, after the filing period under Sections 4(a) and 4(b) of Article 11.071 of the Texas Code of Criminal Procedure. On February 9, 2004, the Consulate filed a motion to suspend the proceedings to allow a reasonable time for Carty to receive effective consular assistance. This motion was denied for want of jurisdiction.

In April 2004, Baker Botts L.L.P. ("Baker Botts") agreed to represent Carty on a *pro bono* basis. The State and the Court agreed then to allow Carty's new counsel, Baker Botts, six months to further investigate Carty's claims before filing a further response. On November 1, 2004, Carty filed her "Additional Further Response to Respondent's Original Answer"[4] (hereafter, "Additional Further Response") (attached as Ex. 1) raising numerous new claims and evidence. The State filed its proposed findings of fact and conclusions of law. On November 30, 2004, the trial court held a hearing regarding Carty's writ of habeas corpus and heard argument from Baker Botts on her Additional Further Response. The State did not object. On December 2, 2004, the trial court adopted all of the State's 93 proposed findings of fact and conclusions of law without change and recommended that the Court of Criminal Appeals deny her claims. *Ex parte Carty,* No. 877592-A, order (Tex. Dist. Ct. Dec. 2, 2004).

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[4] Carty is requesting that the Court remain cognizant of the totality of the State's and trial counsel's performance in her trial in assessing the cumulative effect of those errors.

The Court of Criminal Appeals adopted the trial court's recommendation on March 2, 2005. *Ex parte Carty,* No. WR-61,055-01 (Tex. Crim. App. 2005) (unpublished). Despite the trial court's entertaining argument on Carty's Additional Further Response, neither the trial court nor the Court of Criminal Appeals considered, or even mentioned, the additional claims raised in her Additional Further Response.[5] *Carty v. Thaler,* 583 F.3d 244, 252 (5th Cir. Sept. 17, 2009).

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. 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. 06-614, 2008 WL 8097280 at *2 (S.D. Tex. Dec. 16, 2008). The Fifth Circuit found that "trial counsel performed objectively unreasonably by failing to interview Corona to determine if he would assert a marital privilege" and recognized that the State did not disagree. *Carty v. Thaler,* 583 F.3d 244, 259 (5th Cir. 2009). Despite the unquestion-

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[5] The trial court never submitted the Additional Further Response to the Court of Criminal Appeals, as a subsequent writ. The trial court and Court of Criminal Appeals simply ignored it. Carty maintains that if the Additional Further Response was not considered because it was held to be a subsequent writ, the trial court should submit the Additional Further Response to the Court of Criminal Appeals for consideration as a subsequent writ.

ably deficient performance of her trial counsel, 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. On January 25, 2010, Carty filed a petition for writ to be a subsequent writ, the trial court should submit the Additional Further Response to the Court of Criminal Appeals for consideration as a subsequent writ. of certiorari in the U.S. Supreme Court, which was denied on May 3, 2010. *Carty v. Thaler,* 559 U.S. 1106 (2010).

IV. THE STATE'S THEORY AND WHAT THE JURY DID NOT KNOW

The State's central theory was that Carty was obsessed with her husband and desperate to keep him by having a child. Tr. Vol. 24 at 144-45. As a result, the State argued that Carty orchestrated the kidnapping of Rodriguez and baby Ray and killed Rodriguez by placing a bag over her head so that Carty could be "the sole mother of Baby Ray." *Id.* at 153.

As there was no forensic or non-co-conspirator eyewitness testimony linking Carty to the crime, the state offered two categories of witnesses to support this theory: people to whom Carty told she was having a baby and having problems with her husband, and co-conspirators who were involved in the planning of the crime and/or its execution.[6] As detailed below, the first category of witnesses had no evidence which linked her to the crime scene, or involvement in the murder. As detailed below, a

[6] The State also offered police officers as a means to introduce certain documents and evidence and Dr. Shrode testified as to the possible causes of Rodriguez's suffocation.

significant part of the co-conspirators testimony was invented by the State, tendered through the use of coercion, and false.

A. The State's "baby" evidence.

As Cabrera and Cardenas could not place Carty at the scene of the crime,[7] the State sought to establish a motive through testimony that Carty told others she was going to have a baby and was having problems with her husband. Four witnesses—Florence Meyers, Sherry Bancroft, Jose Corona, and Charles Mathis—and several key items a baby tub, stethoscope, scissors, and scrubs—were offered to support the State's theory of the case.

1. The trial testimony of Florence Meyers and Sherry Bancroft.

Florence Meyers lived in the same apartment complex as Carty and Rodriguez. Tr. Vol. 20 at 139-41. Meyers was an unemployed taxi driver who in exchange for her tip on Carty received one thousand dollars from Crime Stoppers. *Id.* at 158, 162-63. Meyers testified that

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[7] Cabrera recounted being awoken by two masked armed men in his bedroom demanding money, duct taping him, and tying him up with phone cords. Tr. Vol. 20 at 30-31, 34, 36-38. The men then said that they were going to "take the baby and the mother," and took Rodriguez and her four-day old son Ray. *Id.* at 39-40. On cross- examination, Cabrera stated Carty was not in his bedroom. *Id.* at 51-52. In fact, he did not know her and had never seen her at the apartment complex. *Id.* at 48.

The other eyewitness to the kidnapping, Cabrera's cousin Rigoberto Cardenas testified about awakening to masked men in the apartment asking for money and drugs. *Id.* at 55-56. He was hog-tied with telephone cords and covered with an overturned couch. *Id.* at 58, 62. During this time, he testified that he heard one of the men answer a phone, ask "Do you want it" and then yell that she was outside and for the other men to leave. *Id.* at 60-61. Mr. Cardenas was unable to identify anyone involved in the crime and did not know anyone by the name Linda Carty or recognize Carty in the courtroom. *Id.* at 64.

around 7:00 pm on May 15, 2001, Carty was sitting in a rental car in their apartment complex and beckoned her to come over. *Id.* at 147, 150. According to Meyers, Carty asked if Meyers had seen Carty's husband and then said that she was going to be having a baby the following day. *Id.* at 151. Carty continued that she was upset over her husband's attitude because her husband knew the baby was coming. *Id.* at 152. Meyers saw a baby seat in the back of Carty's car. *Id.* at 154. Meyers never saw Carty at the apartment complex again. *Id.* at 185.

Sherry Bancroft, a Public Storage employee where Carty had a unit, similarly testified that on May 12, 2001, Carty said she was in labor and expecting a boy. Tr. 21 at 44-45. Carty also said that she was having problems with the baby's father. *Id.* at 51. Bancroft saw Carty again on May 15, 2001 between 6:30 and 7:30 in the evening. *Id.* at 48-49. Carty said the baby was at home with the father and left with a baby blanket and two sets of clothes. *Id.* at 49, 51-52.

Both testified that Carty said she would have a baby and was having problems with her husband. Most importantly, however, neither Meyers nor Bancroft could place Carty at the scene of the kidnapping. They could not connect Carty to Rodriguez, or any of the perpetrators of the kidnapping. In short, they had no knowledge of Carty being involved in the crime or Rodriguez's death.

2. Jose Corona's testimony was procured by deception.

Carty's husband Jose Corona testified after Florence Meyers and continued the theme that Carty wanted to have a baby to save her marriage. Corona "did not want to get involved in the trial or to testify against Linda." Affidavit by Jose Javier Corona, Sept. 10, 2004, at page 1

("Corona Aff.") (original and translation attached as Ex. 2). After talking to the prosecutors, "[he] thought that [he] had to testify and that [he] had no other choice." *Id.* The prosecutors did not inform him of marital privilege.[8] As a result, not only was Corona never informed of his right not to testify—a right that he would have exercised but, the State improperly made him believe that he had to testify. (Ex. 2, Corona Aff. at page 1). Had he exercised his right not to testify, this additional baby motive testimony would not exist. Nevertheless, even if the testimony was appropriate, as with Meyers and Bancroft, Corona had no knowledge of Carty being involved in the crime or Rodriguez's death.

3. The items.

Throughout the trial, the State focused on Carty's possession of baby items and purchase of nurse's scrubs, scissors, and a stethoscope as evidence of her intent to "cut the baby out" of Rodriguez and raise baby Ray as her own.[9] Tr. Vol. 24 at 145-147. For example, Denise Tillman testified that on May 12, 2001, Carty purchased a pair of scissors, scrubs, stethoscope and nurse's ID tag. Tr. Vol. 23 at 179-81. In closing arguments, the State relied on this purchase as evidence that Carty was putting

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[8] This error was compounded when trial counsel never contacted Jose Corona, Carty's common-law husband, prior to trial. Gerard W. Guerinot Aff., Oct. 29, 2004, at 3 ("Guerinot Aff") (attached as Ex. 3) It is uncontested that failing to inform Corona of the marital privilege amounted to "objectively unreasonable" performance by trial counsel and a "close case" on *Strickland* prejudice. *Carty v. Thaler,* 583 F.3d 244, 259 (5th Cir. 2009).

[9] The State introduced a pair of bandage scissors, which the State knew could not even be used to cut skin, to dramatically argue that Carty intended to cut the baby out of Rodriguez. *See e.g.,* Tr. Vol. 24 at 107-09 (discussing the use of the scissors); Additional Further Response at Part II(A)(4).

her plan into motion. Tr. Vol. 24 at 148. Once again, these items have nothing to do with putting Linda Carty at the scene, with Carty being involved in a crime and certainly not with Carty murdering Rodriguez.[10]

B. The co-conspirator evidence.

The State's only evidence tying Carty to this crime came from co- defendants and others connected to the planning and execution of the crime.

1. The Testimony.

Josie Anderson—Josie Anderson testified to introducing Carty"[11] to Marvin "Junebug" Caston and Chris Robinson on May 13, 2001, three days prior to the kidnapping, to allegedly help Carty carry out a home invasion, or lick, of the apartment. Tr. Vol. 21 at 209-10, 215;

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[10] Although in this motion only relevant for the cumulative aspect, the jury was never told why Carty had purchased those items. Jovelle Carty (now Joubert), Linda Carty's daughter, was only asked "did you or your mother or anyone that you know purchase gifts of baby items for the babies that your mother had been expecting in the last three years," to which she responded yes. Tr. Vol. 24 at 44. Had the State or trial counsel asked Jovelle she:

> . . . would have explained why my mother had the nurses' scrubs, scissors, and stethoscope in her car. These items [were] purchased as a gift for my aunt, Juditha Francis (my mother's brother's wife). She had worked in various nursing homes for years and had recently returned to school for additional training.
>
> Had I been asked, I would have also explained that the Safety First boxed baby tub found at the Hampton Inn was a gift intended for one of my mom's friends.

Affidavit of Jovelle Joubert, Sept. 24, 2004, at ¶¶ 33-34 (attached as Ex. 4). Neither trial counsel nor the State ever asked Jovelle these questions and, thus, the jury could only conclude Carty had nefarious motives for these items.

[11] Carty has always maintained her innocence and continues to maintain her innocence, and she denies any involvement in the underlying kidnapping.

accord Vol. 22 at 56-57 (testimony offered by Caston regarding Josie Anderson's role). Josie Anderson admitted to staking out the apartment, intended to take part in the lick and allegedly knew of Carty's intent to kidnap Rodriguez. Tr. Vol. 21 at 221-23, 229, 231-36. She also helped collect materials to carry out the lick. Tr. Vol. 22 at 148-49. Curiously, despite these admissions, Josie was never tried or convicted or even pled to a crime relating to this case.

Marvin "Junebug" Caston—Caston never took part in the lick, but admitted to staking out the apartment and intending to take part in the lick. Tr. Vol. 22 at 60-61, 64-74. He testified that Carty discussed kidnapping "the lady" and some baby, and planned to go into the apartment and drag "the lady" out of the apartment. *Id.* at 64, 74. Despite this involvement, Caston was never tried or convicted of a crime relating to this case. As will be discussed herein, the newly discovered evidence reveals his testimony was false and the result of the State's improper coercion and invention.

Chris Robinson—Robinson was the only witness at trial to take part in the actual kidnapping. He admitted to breaking into the apartment with Carliss "Twin" Williams and Gerald "Baby G" Anderson and kidnapping Rodriguez and her baby Ray. Tr. Vol. 22 at 176-204. Robinson provided the only testimony tying Carty to the bag over Rodriguez's head and stated that Rodriguez was dead when he ripped open the bag. *Id.* at 234-35. The State relied on this testimony as the evidence of Carty's "intentionally caus[ing] the death" of Rodriguez. Tr. Vol. 24 at 152-53. As will be discussed herein, the newly discovered evidence reveals his testimony was false and the result of the State's coercion and invention. Robinson was charged with capital murder, pled to aggravated kidnap-

ing, and received life without parole. Robinson Judgment on Plea of Guilty, Nov. 22, 2002 ("Robinson Judgment") (attached as Ex. 5).

Zebediah "Zeb" Comb—Comb resided at the Van Zandt location where Rodriguez's body was found. Comb testified that he was present for conversations about the lick on May 13, 2001, helped recruit Carliss "Twin" Williams on May 15, 2001, and was present when Rodriguez was brought to the Van Zandt location. Tr. Vol. 23 at 55-61, 72, 78-83. He also testified that Carty wanted to kidnap Rodriguez. *Id.* at 59. Curiously, like Josie Anderson and Caston, Comb was never tried or convicted of a crime related to this case.

2. The false evidence created by the State and the truth which the State hid.

Robinson's and Caston's testimony in Carty's trial—the State's key evidence connecting Carty to the crime was the result of extensive rehearsal and construction by the prosecution, along with threats of harsh sentences for truthful statements inconsistent with the State's manufactured theory.

Robinson testified against Carty under the threat "[he] would get the death penalty [himself] if Linda Carty did not get the death penalty." Affidavit of Christopher Anthony Robinson, Sept. 3, 2014, at ¶ 13 ("Robinson Aff.") (attached as Ex. 6). Not only did Robinson have to testify to avoid the death penalty, the prosecution "made it clear what it was [he] had to say." *Id.* Robinson had to testify and make sure his testimony resulted in the death penalty for Carty. *Id.*

Robinson recounts that he had "eight or nine interviews with Connie Spence and Craig Goodhart [the prosecutors] where they made it really clear what I had to say

in Linda Carty's trial." *Id.* at ¶ 8. These interviews occurred when the prosecutors took Robinson from his cell in county jail to a room upstairs with a big window and would buy him drinks and snacks from the vending machine.[12] *Id.* at ¶ 9. During these interviews, the prosecution "both edited out things they did not want me to say, and edited in things they did." *Id.* at ¶ 14. The "editing" resulted in Robinson:

- Not telling the jury that he "did not see Carty place the bag over Rodriguez's head." *Id.* at ¶ 15.
- "[A]dding a detail that Linda had instructed us to kill all the guys in the apartment during the lick" when she did not. *Id.* at ¶ 18.
- Adding that Linda instructed them to tape up Rodriguez when she did not. *Id.* at ¶ 19.
- Inventing that he saw Carty bathe the baby when he did not. *Id.* at ¶ 20.
- Not telling the jury that he believed, and still believes, that Josie Anderson was the ringleader. *Id.* at ¶ 21.
- Testifying that Rodriguez was dead when he ripped open the bag when she was not. *Id.* at ¶¶ 28-31.
- Not telling the jury that "[t]here never was a plan to kill anyone." *Id.* at ¶ 32.

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[12] Gerald Anderson, a co-defendant who did not testify against Carty, corroborates this treatment. Anderson states that he was taken to "a room upstairs with a vending machine outside of it." Affidavit of Gerald Jerome Anderson, Sept. 2, 2014, at ¶ 9 ("Anderson Aff.") (attached as Ex. 7). During these meetings, Anderson was told "what I needed to go on the stand and say" by the prosecution. *Id.* at ¶ 11.

- Not telling the jury that he believed Rodriguez's death was an accident. *Id.*

Critically, this "editing" process went to the very heart of the testimony Robinson provided to the jury.

Similarly, the prosecution crafted Caston's testimony by threatening Caston that he "would be sentenced to thirty years unless Linda Carty got the death penalty and Chris Robinson got thirty to forty years." Affidavit of Marvin Caston, Feb. 20, 2014 at ¶ 6 ("Caston Aff.") (attached as Ex. 8). Marvin Caston's sister, Rosalind, also heard the threats Caston received from the prosecution. She was present at the meeting at Martha Caston's house and remembers "very clearly Connie [Spence] saying to my brother that if Linda Carty didn't get the death penalty then he would get 45 years to life." Affidavit of Rosalind Shantell Caston, September 5, 2014, at ¶ 4 ("Rosalind Caston Aff.") (attached as Ex. 9). She also corroborates Caston's account that he was pushed to say more under the same threat:

> I remember my brother saying "That's all I know" and Connie saying, "You know more than what you're saying." Every time he said "no", Connie said: "Alright, you're going to get that time, you're going to get 45 years."

Id. at 5. After testifying, Caston was never prosecuted for his participation in this crime.

Through the State's threats to Caston that he must testify and testify in such a way to ensure Carty received the death penalty, the State presented the following carefully crafted, *yet false,* testimony from Caston:

- Carty brought up the lick first, when Josie Anderson was in fact the ringleader. (Ex. 8, Caston Aff. at ¶ 10).

- There was a plan to take Rodriguez, when the plan was only to take the marijuana and money from the apartment. *Id.* at ¶ 11.
- The plan was Carty would take Rodriguez out of the house, when there was never any plan that Rodriguez or her baby would be taken. *Id.* at ¶ 11.
- Caston met Connie Spence and Craig Goodhart for the first time in Spence's office in January 2002, when he had met them at his sister's apartment in the summer of 2001 and on several more occasions. *Id.* at ¶ 4-5.
- Caston was not threatened or promised anything in return for his testimony, when he was threatened with 30 years if Carty did not receive the death penalty and Robinson did not receive thirty or forty years. *Id.* at ¶ 8.

Carty and the jury never heard that Caston told the prosecution "Josie Anderson was the main person in this . . . Josie was the ringleader," and that there never was any plan to take Rodriguez and the baby. *Id.* at ¶ 10.

The jury and Carty also never heard from Gerald Anderson, a participant in the kidnapping, that "there was never any plan to take the lady and the baby." (Ex. 7, Anderson Aff. at ¶ 12). Gerald Anderson "never heard anyone not Chris Robinson, nor Linda Carty, nor Carliss Williams talking about taking a lady or a baby." *Id.* While Gerald Anderson never testified at Carty's trial, these statements were made to the State, never disclosed by the State, and thus never before the jury.

One of the State's key witnesses, former DEA Agent Charles Mathis, confirms the accounts of the State's threats and suppression of evidence inconsistent with its

theory of the case. Agent Mathis testified[13] because the prosecution "threatened [him] with an invented affair that I was supposed to have had with [Carty]." Affidavit of Charles Mathis, Sept. 8, 2014, at ¶ 19 ("Mathis Aff.") (attached as Ex. 10). The prosecutor told him "you don't want me to cross examine you about any inappropriate relationship with Linda Carty do you?" to threaten and blackmail him into testifying. *Id.* at ¶¶ 20, 23.

Moreover, once forced to testify, Mathis "wanted to testify about the misconduct during the investigation and the fact that Linda was not read her Miranda rights." *Id.* at ¶ 26. This testimony would have included that Carty was not advised of her Miranda rights to avoid her "lawyer[ing] up" *(id.* at ¶ 12), that the "officers were shouting at [Carty], screaming at her face just a few inches away from it," *(id.* at ¶ 15), and that despite being a DEA agent for a long time, he "had never seen anything like this" referring to Carty's interrogation *(id.).*

In addition to the misconduct during the investigation, the jury was never allowed to hear that:

- Carty was still actively providing tips to the DEA. *Id.* at ¶ 118.

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[13] Mathis testified that he knew Carty for eight to ten years as a confidential informant. Tr. Vol. 21 at 90-91. Mathis testified that he closed her out as a confidential informant in 1994 or 1995 and did not use her after that. *Id.* at 95-96, 119. Mathis went on to recount two instances in the past when Carty said that she was pregnant. First, in 2000, she said she was expecting a child then later said that she had given birth to a boy. *Id.* at 101-03. Next, in January 2001, Carty told Mathis that she was expecting and placed Mathis on a three-way call with her husband. *Id.* at 103-04. Mathis recounted that Corona laughed when he mentioned Linda's pregnancy. *Id.* at 105.

- Carty's mental issues regarding pregnancies "explained her strange statements about babies." *Id.* at ¶ 27.
- Carty was afraid of the other men involved in this case. *Id.* at ¶ 28.
- Mathis, based on his 29 years of experience in the DEA, believed "it would be very difficult for [Carty] to convince men such as Christopher Robinson to do something as risky and dangerous as stealing a lady and a baby" and "put their lives on the line purely on the word of someone they did not know." *Id.* at ¶¶ 28-29.
- Mathis believed Carty was "not a violent person, let alone a cold-blooded murderer." *Id.* at ¶ 30.
- Mathis did not believe Carty was capable of killing another human being. *Id.* at ¶ 32.

The jury never heard this testimony because the prosecution "seemed to care very little about the truth… and was far more interested in her story for trial." *Id.* at 24. As such, Mathis was limited to testifying about "a very tight set of facts." *Id.* at ¶ 26.

C. Without these errors, the jury would have little left to consider.

The case before the jury would change dramatically without the prosecution's use of false testimony, omissions of exculpatory evidence, *Brady* violations, and importantly, threats to witnesses. In particular, the jury would never have heard, among other things:

- Corona's testimony, which as recognized by the Fifth Circuit "provided motive and context for what would otherwise be a wholly inexplicable crime." *Carty v. Thaler,* 583 F.3d 244, 261 (5th Cir. 2009).

- Caston's testimony that there was a plan to take Rodriguez and her baby.
- Robinson's testimony that he saw Carty place the bag over Rodriguez's head and that Rodriguez was dead immediately thereafter.
- Robinson's testimony that Carty instructed them to kill the men in the apartment or that she instructed them to tape up Rodriguez.

Instead, the jury would have heard that:

- Caston and Robinson's testimony was the result of extensive rehearsals and coaching from the prosecution.
- Caston and Robinson believed Rodriguez's death was an accident.
- Carty did not kill Rodriguez by placing a bag over Rodriguez's head.
- Rodriguez was alive when Robinson ripped the bag off her head.
- Josie Anderson, not Carty, was the ringleader.
- Carty continued to provide Mathis with tips and he would have put her back on the books if a tip warranted it.
- There was misconduct during the investigation, as recounted by Mathis.
- Mathis did not believe Carty could have convinced the men to do something as risky as stealing a lady and a baby.
- Mathis did not believe the men would have put their lives on the line to take a mother and baby purely on the word of someone they did not know.

- Mathis did not believe that Carty deserved the death penalty and that she was not a violent person, not a cold blooded murderer, not a compulsive liar, not a danger to society.

The cumulative effect of what the jury should never have heard and what the jury should have but never heard due to the State's misconduct is undeniable—it caused the jury to wrongfully convict Carty and heightened her moral culpability at the punishment stage.

V. CLAIMS FOR RELIEF

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.*

Carty's conviction was obtained through the State's use of false and misleading testimony in violation of her right to due process of law and due course of law.[14] U.S. CONST. Am. XIV; *Giglio v. United States,* 405 U.S. 150 (1972); *Napue v. Illinois,* 360 U.S. 264 (1959).

Chris Robinson, at the urging of the State—who was the only State's witness to directly connect Carty to the victim's death testified falsely throughout his trial testimony. In particular, the State knew that the following testimony from Robinson was false and a result of coaching by the assistant district attorneys:

- Linda, not Josie Anderson, was the ringleader. (Ex. 6, Robinson Aff. at ¶ 21).
- Robinson saw Linda put the bag over the victim's head. *Id.* at ¶ 17.

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[14] Carty asserts her state law claims under *Chabot* and *Chavez* in Part V(B) below.

- Robinson saw Rodriguez dead in the car after removing the bag. *Id.* at ¶¶ 28-30.
- Linda instructed them to kill all the guys in the apartment. *Id.* at ¶ 18.
- Linda instructed them to tape up the victim. *Id.* at ¶ 19.
- Robinson saw Linda bathing the baby. *Id.* at ¶ 20.

This testimony was elicited to conform to the assistant district attorneys' version of events for the crime. *Id.* at ¶¶ 16-27. The pattern of coaching and false testimony was repeated with another key State's witness, Marvin Caston, who presented the following false testimony at trial:

- Linda brought up the lick first, when Josie Anderson was the ringleader. (Ex. 8, Caston Aff. at ¶ 10).
- There was a plan to take the victim, when the plan was only to take the marijuana and the money. *Id.* at ¶ 11 .
- The plan was Carty would take the victim out of the house, when there was never any plan that the victim or her child would be taken. *Id.*
- Caston met Connie Spence and Craig Goodhart for the first time in Spence's office in January 2002, when he had met them at his sister's apartment in the summer of 2001 and on several more occasions. *(Id.* at ¶¶ 4-5.)
- Caston was not threatened or promised anything in return for his testimony, when he was threatened with 30 years if Carty did not receive the death penalty and Robinson did not receive thirty or forty years. *(Id.* at ¶ 8.)

The false testimony elicited from Robinson and Caston provided crucial support for the State's theory of the case. This testimony, taken as a whole, gave the jury a false impression of Carty's involvement in the crime and was in violation of her right to due process of law.

1. The *Giglio/Napue* standard.

Under *Giglio v. United States,* 405 U.S. 150 (1972), and its progeny, a state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Faulder v. Johnson,* 81 F.3d 515, 519 (5th Cir. 1996) (citing *Giglio v. United States,* 405 U.S. 150 (1972); *Napue v. Illinois,* 360 U.S. 264 (1959); and *Cordova v. Collins,* 953 F.2d 167 (5th Cir. 1992). It does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence. *United States v. Agurs,* 427 U.S. 97, 103 (1976); *Giglio,* 405 U.S. 150, 154 (1972). Nor, does it matter that the falsehood goes to an issue of credibility. *Napue,* 360 U.S. at 270. As recognized in *United States v. Agurs,* "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. 97, 103 (1976).

2. The State coerced the witnesses to submit false testimony.

In preparation for trial, the prosecution met separately with Chris Robinson and Marvin Caston to prepare their respective trial testimony. When asked about these meetings, Robinson recounted that:

> I had eight or nine interviews with Connie Spence and Craig Goodhart where they made it really clear what I had to say at Linda Carty's trial.
>
> [They] would come and get me from my cell and take me in the elevator to a room upstairs with a big window looking onto the outside. They'd buy me drinks and snacks from the vending machine.
>
> 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] had [their] version of events in their minds and they were alternating between coaching me and threatening me to get me to say their version. My testimony had to satisfy what they wanted; and what they wanted was Linda to get the death penalty. They both edited out things they did not want me to say and edited in things they did. . . .
>
> Craig Goodhart and Connie Spence spent a lot of time rehearsing my testimony with me. They consistently told me what they believed happened i.e., Linda Carty killed Johanna Rodriguez by putting a bag over her head. It didn't seem to matter what my eyes had actually seen, they were always pushing me to change things around and add more.

(Ex. 6, Robinson Aff, at ¶¶ 8-9, 13-14, 16). Marvin Caston recounted similar treatment from the prosecution:

> I remember talking to Spence and Goodhart [during the summer of 2001] at my sister's house very clearly. We were sitting at the kitchen table; Connie was on my left, Craig was on my right. They'd tell me something and say "this is right" or "this is what happened." But it wasn't. And I would tell

> them it wasn't, and I would keep saying it wasn't true. . . . After this first meeting with Connie Spence and Craig Goodhart, I met with them again on a number of other occasions. . . .
>
> Although I told Goodhart and Spence over and over that I did not know enough to help them, they would not hear it. They had a story in their heads, and although it was not true, they kept saying it to me, insisting it was the right version. . . .
>
> Despite whatever I said to Connie Spence and Craig Goodhart, they kept pushing their own version of the story. And their story just was not true. . . .

(Ex. 8, Caston Aff. at TT 5-6, 9-13). The State pushed Caston to testify under the threat that he "would be sentenced to thirty years unless Linda Carty got the death penalty and Chris Robinson got thirty to forty years." *Id.* at ¶ 6. Caston's sister Rosalind heard this threat. (Ex. 9, Rosalind Caston Aff. at ¶ 4).

This treatment is also confirmed by Gerald Anderson, the co-defendant who refused to testify and was sentenced to life in prison rather than testify for the prosecution:

> Connie Spence went through a whole story of what she said happened and what I was supposed to know. Connie Spence was constantly talking. She kept saying: "you need to get on the stand and say this," but a lot of what she said was either not true, or at least, I had no knowledge of it.
>
> Connie Spence had given me a horrible choice. Either I had to lie on the witness stand or face the high likelihood of being sentenced to death. While I would tell Connie that she could not convict me

> of something I did not do, the fact is I was quite worried that Connie could build a case against me and get me convicted off my priors alone. I felt there was no way to beat her.

(Ex. 7, Anderson Aff. at TT 10, 18). Gerald Anderson also refused to lie and never testified against Carty. Anderson pled to aggravated kidnapping and was sentenced to life in prison. Anderson Judgment on Plea of Guilty, Nov. 22, 2002 ("Anderson Judgment") (attached as Ex. 11). For refusing to lie, he received the second harshest sentence for this crime after Carty.

The prosecution's threats to either force false testimony or hide the truth are also confirmed by the DEA agent that the State vouched for by calling as a witness. Agent Mathis reveals that assistant district attorney Connie Spence "seemed to care very little about the truth and what I had actually seen and heard and was far more interested in her story for trial" when meeting with Mathis. (Ex. 10, Mathis Aff. at ¶ 24). In Mathis's opinion, "Spence wanted a death sentence *at any cost"* and viewed it as "a feather in her cap." (emphasis added) *Id.* at ¶ 27. Spence "was far more interested in a death conviction than the truth." *Id.* To obtain a death conviction, the prosecution "threatened [him] with an invented affair that I was supposed to have had with [Carty]." *Id.* at ¶ 19. The prosecutor told him "you don't want me to cross-examine you about any inappropriate relationship with Linda Carty do you?" to threaten and blackmail him into testifying. *Id.* at ¶¶ 20, 23. Moreover, the prosecution limited Mathis to "a very tight set of facts," *(id.* at ¶ 26), and used the threat to keep out that:

- Carty was still actively providing tips to the DEA. *Id.* at ¶ 18.

- Carty's mental issues regarding pregnancies "explained her strange statements about babies." *Id.* at ¶ 27.
- Carty was afraid of the other men involved in this case. *Id.* at 1128.
- Mathis, based on his 29 years of experience in the DEA, believed "it would be very difficult for [Carty] to convince men such as Christopher Robinson to do something as risky and dangerous as stealing a lady and a baby" and "put their lives on the line purely on the word of someone they did not know." *Id.* at ¶¶ 28-29.
- Carty was "not a violent person, let alone a cold-blooded murderer." *Id.* at ¶ 30.
- Carty should not have gotten the death penalty. *Id.* at ¶¶ 30, 32.
- Mathis did not believe Carty was capable of killing another human being. *Id.* at ¶ 32.

Taken as a whole, the affidavits of Robinson, Caston, Caston's sister, Gerald Anderson and Mathis reveal a consistent pattern of conduct by the prosecution to threaten witnesses, create testimony, knowingly present false testimony, and hide evidence favorable to Carty.

3. The State knowingly presented false testimony portraying Carty as the ringleader.

The prosecution focused on Linda Carty, rather than Josie Anderson, as the ringleader. The theme of Spence's closing argument was "Linda puts her plan in progress" as Spence recounted the State's theory of the case. *See e.g.,* Tr. Vol. 24 at 146, 148. This is despite the fact that both Robinson and Caston told the prosecutor that Josie Anderson was the ringleader. (Ex. 8, Caston Aff. at ¶ 10); (Ex. 6, Robinson Aff. at ¶ 21). Robinson recounted that

the prosecution wanted him to testify that Carty, not Josie Anderson, was the ringleader despite it being Josie Anderson's plan:

> The District Attorney really wanted me to testify that Linda Carty was the ringleader, but I couldn't really do that truthfully. It was Josie Anderson who was the one who put everything together. It was Josie who sold the idea to us and she was the one who was buddies with everyone. It was her plan and if the plan had fallen like she said it would, she would have got a cut of the money and the drugs.

(Ex. 6, Robinson Aff. at ¶ 21). At trial, Robinson testified that Carty knew the people in the apartment, that her husband was friends with them, and that Carty had seen marijuana being brought into the apartment. Tr. Vol. 22 at 144-45. Although Robinson never uttered the words "ringleader," he gave the impression that Carty was.

Similarly, the prosecution ignored Caston's statements that Josie Anderson was the ringleader. (Ex. 8, Caston Aff. at ¶ 10). Describing his conversations with the prosecution regarding the "ringleader," Caston stated:

> I understood from the preparation sessions I had with Goodhart and Spence that I was to keep my main focus on Linda I understood from the preparation Carty and that Linda was the person they were interested in. *Every time I spoke to Goodhart and Spence I would tell them that Josie Anderson was the main person in this, but they would not listen to that.* ***In fact, Josie was the ringleader****. Josie was the one who knew everything but Spence and Goodhart never seemed to*

> *want me to point the finger at her, in fact,* ***they positively worked their version of the story away from her****.*

Id. at ¶ 10 (emphasis added). As a result of these conversations, Caston testified that Carty, not Josie Anderson, first brought up the lick and described it to him. Tr. Vol. 22 at 60-63. This was false:

> Josie Anderson had brought up the lick first. I testified that it was Linda because Goodhart and Spence were not interested in going after Josie Anderson.

(Ex. 8, Caston Aff. at ¶ 10). In light of the conversation with the prosecution, Caston minimized Josie Anderson's role and only testified:

- He drove in the car with Linda and Josie, and later Robinson. Tr. Vol. 22 at 59, 66.
- Josie and Linda were in a car together at the apartment complex on Mother's Day. *Id.* at 70.
- Josie said that "it ain't right" on the Mother's Day trip to the apartment complex. *Id.* at 76.
- Josie and Linda came to his house on the following Tuesday. *Id.* at 84.

This testimony obviously falls short of establishing that Josie Anderson, the person who knew everyone, was the ringleader. At most, this testimony raises the inference that Josie Anderson was a tag-a-long to Carty's plan, according to the State's theory. This testimony is misleading and intentionally gives a false impression, given that both Caston and Robinson told the State that Josie was the ringleader of the lick.

4. The State knowingly presented false evidence of a plan to kidnap Rodriguez and baby Ray.

The State elicited testimony from Caston that Carty planned to kidnap Rodriguez and baby Ray. He testified that Carty was going to drag Rodriguez out of the apartment. *Id.* at 64. The testimony was false and the state knew it was false:

> At first I was trying to testify clearly that there was never any plan to pull or drag Johanna Rodriguez out of the house. But because of the rehearsals I had with Spence and Goodhart I knew what I had to say at this point, so I said that Linda was going to be the one to take the lady from the house. ***The truth, though, is that no one was going to take the lady or the baby from the house because there was never any plan or agreement that the lady or the baby would be taken from the house.***

(Ex. 8, Caston Aff. at ¶ 11 (emphasis added). Similarly, Robinson has also recanted key testimony that Carty instructed them to kill Cabrera and Mr. Cardenas:

> 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.

(Ex. 6, Robinson Aff. at ¶ 18).

Moreover, rather than recounting a carefully orchestrated plan by Carty to kidnap and murder Rodriguez, in truth both Caston and Robinson believed and still believe that her death was an accident. Caston, while not present, recounted that "I told Spence and Goodhart many times that Johanna Rodriguez's death was an accident. . . . Neither she nor Goodhart wanted to hear it."

(Ex. 8, Caston Aff. at ¶ 13). Robinson states "No-one ever intended for Johanna Rodriguez to die. ... I think this was an accident." (Ex. 6, Robinson Aff. at ¶ 32). The accident theory was never presented to Carty or the jury.

5. The State's key evidence linking Carty to Rodriguez's death—that Robinson saw Carty placing the bag over Rodriguez's head and that she stopped breathing—is false.

Now discredited assistant medical examiner Dr. Paul Shrode[15] testified that Rodriguez was found with a bag over her head, which Shrode believed bore the impression of her face. Tr. Vol. 23 at 219-20, 240. Shrode testified that Rodriguez's suffocation could have been caused by any of the following: "the bag or to the obstruction of the airways by virtue of the tape and the bag and the positioning of the body in car." *Id.* at 243. The State offered evidence that Gerald Anderson placed Rodriguez in the trunk and that Williams taped Rodriguez's mouth, hands,

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[15] Dr. Paul Shrode was an assistant medical examiner with the Harris County Medical Examiners Officer and performed the autopsy on Rodriguez. Tr. Vol. 23 at 221-222. He testified that Rodriguez's death could have been caused by any of the following: "the bag or to the obstruction of the airways by virtue of the tape [on her face] and the bag and the positioning of the body in car." *Id.* at 243.

In the years following Carty's trial, Dr. Shrode became the Chief Medical Examiner in El Paso. *County Fires Chief Medical Examiner Paul Shrode: Ohio Parole Board's Ruling Spurs Decision,* EL PASO TIMES (May 25, 2010), http://www.elpasotimes.com/ci_15155274?source=pkg (attached as Ex. 12). He was fired from this position due to lying about a "degree in law" on resumes submitted to Harris and El Paso County. *Id.* Moreover, concerns about his testimony have resulted in at least one capital sentence in Ohio being commuted to life in prison based on his testimony in 1997. *Id.* While this evidence was unavailable at the time of Carty's trial, it undoubtedly raises questions about the forensic work in Carty's case and undermines Shrode's credibility.

and feet. Tr. Vol. 22 at 207, 216, 223-24. Robinson, however, provided the *only* testimony linking Carty to Rodriguez's death, by stating that he saw "half [Carty's] body was in the trunk, like, one leg on the ground and one leg in the trunk" and that when he went over to the trunk, he saw that Rodriguez had a bag over her head. *Id.* at 234-35. Robinson then testified that he ripped the bag off Rodriguez's head and she was not breathing. *Id.* at 236-37. The prosecution utilized this testimony to argue in closing that "You heard what Chris said as to who did this, who was responsible for putting the bag over Joana's head, and you think about who wanted Joana Rodriguez dead?" referring to Carty. Tr. Vol. 24 at 153.

In actuality, Robinson:

> told Craig Goodhart and Connie Spence that I had not seen Linda Carty putting a bag over Johanna Rodriguez's head but they were persistent in telling me that the jury must think that Linda Carty killed Johanna Rodriguez.

(Ex. 6, Robinson Aff. at ¶ 15). More importantly, he did not see Carty with half her body in the trunk. *Id.* at ¶ 26. He adds that: "It didn't seem to matter what my eyes had actually seen, [Spence and Goodhart] were always pushing me to change things around and add more." *Id. at* ¶ 16. The State's knowledge of Robinson's false testimony is evident:

> Goodhart kept telling me the story needed to be that I had seen Linda putting a bag over Johanna Rodriguez's head and that immediately afterwards I observed Rodriguez dead, not breathing and motionless in the car.
>
> At trial I testified that I saw Linda Carty killing Johanna Rodriguez with a bag over her head. In

> fact, I did not see Linda Carty putting the trash bag over Johanna Rodriguez's head.

Id. at ¶ 24-25.

The State also constructed and forced Robinson's false testimony that immediately after Robinson saw Carty place the bag over Rodriguez's head, Rodriguez was dead:

> Finally, because Spence and Goodhart were adamant that I say that immediately after I had seen Linda putting a bag over Johanna Rodriguez's head I observed Rodriguez dead, not breathing and motionless in the car, I testified to this at trial.
>
> At trial, I said that when I ripped the bag open "she wasn't breathing". Goodhart asked me "[d]id you see her begin to breathe when you ripped the bag off her head?", and I answered "no Sir". Goodhart asked me "[s]he didn't move, did she?" and I answered "no, Sir". But this was not true and Goodhart knew that it was not true.
>
> The truth is, I did see Rodriguez in the trunk of the car on the night of Tuesday May 15, 2001 or the early hours of Wednesday May 16, 2001. But, she was definitely alive.
>
> At some point in the night, I cannot say for sure at what point exactly, I opened the trunk and saw Rodriguez with a bag over her head. I ripped the bag open and off her head. When I ripped the bag I saw Rodriguez visibly do a big inhale. She was definitely breathing.

Id. at ¶¶ 27-30. This testimony, which the State knew and hid from Carty and the jury, *directly* contradicts the State's theory that Carty killed Rodriguez by placing the bag over her head.

The combined effect of Robinson's false testimony used by the State to place both the murder weapon the bag and the murder—suffocating Rodriguez in Carty's hands was unquestionably damning to Carty and her defense.

6. There exists a reasonable likelihood that the State's presentation of Chris Robinson's and Marvin Caston's false and misleading testimony and its failure to correct the false impression it created affected the verdict at both stages.

Robinson and Caston's testimony was not peripheral or circumstantial evidence. The testimony established the State's theory of the case only Robinson testified that Carty intentionally killed Rodriguez. Their false testimony could have affected (and indeed did) the verdict at either phase of the trial.

The false testimony of Robinson was the only direct link between Carty and Rodriguez's death. The State argued Carty "put[] a bag over this lady's head, [had] her mouth taped, [had] her hands taped, [had] her legs taped, and stuffed in the trunk." Tr. Vol. 24 at 153. This tied to the medical examiner's explanation Rodriguez died either because she had a bag over her head, because she had tape over her mouth, or because of being in the trunk. Tr. Vol. 24 at 116.

The testimony establishing this theory was false and the direct result of the prosecution creating Robinson's testimony. Robinson testified at trial that Carty "wanted somebody to tape the lady up, tape the lady up." Tr. Vol. 22 at 217. This was false. (Ex. 6, Robinson Aff. at ¶ 19). Robinson testified about Carty and the bag. Tr. Vol. 22 at 234-35. This was false. Without this testimony, the jury would be left with the fact that Gerald Anderson put Rodriguez in the trunk *(id.* at 207), Carliss Williams taped

up Rodriguez *(id.* at 216, 223-24), and that Robinson ripped the bag off Rodriguez's head *(id.* at 235). More importantly, the jury would have known that when Robinson ripped the bag off, Rodriguez was still alive. (Ex. 6, Robinson Aff. at ¶¶ 27-30). Thus, not only was Carty not linked to the bag, the bag was not the cause of Rodriguez's death. Instead, as Dr. Shrode testified, the cause of death was likely taping and positioning of the body actions for which Carty bears no responsibility. The harm from Robinson's false testimony about the bag and taping Rodriguez the only testimony that Carty committed the murder of Rodriguez is undeniable. The State had no evidence that Carty herself committed the murder other than the false testimony created by the prosecution.

Without evidence that Carty committed the murder, the State is left with its "ringleader" theory to establish Carty's guilt of capital murder. Throughout closing, the State's theme was "Linda's plan." *See e.g.,* Tr. Vol. 24 at 146-49. This theory was established through misleading and false testimony. Robinson and Caston both believed that Josie Anderson, not Carty, was the ringleader. (Ex. 8, Caston Aff. at ¶ 10); (Ex. 6, Robinson Aff. at ¶ 21). The prosecution, however, forced their testimony away from Josie Anderson as the ringleader. *Id.* As a result, Carty's only evidence that Josie Anderson were the ringleader was accusations from Sergeant Novak in Josie Anderson's interrogation that she "set this thing up." Tr. Vol. 22 at 28. [16]

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[16] Moreover, even if Carty was the "ringleader," which she denies, there was no plan to take Rodriguez or baby Ray and kill Rodriguez. (Ex. 8, Caston Aff. at ¶ 11). This was the State's central theory. jury verdict was affected—without it the State lacked evidence that Carty committed or orchestrated the capital murder of Rodriguez.

Taken together, Caston and Robinson's false testimony established that:

- Carty planned to take Rodriguez and baby Ray.
- Carty was the ringleader and instructed others to kill Cabrera and Cardenas, as well as tape up Rodriguez.
- Carty was in the trunk of the car where Rodriguez was.
- Carty placed a bag over Rodriguez's head causing Rodriguez's death.
- Rodriguez died after Carty placed a bag over her face.

The false testimony on each point above is individually sufficient to demonstrate prejudice under *Napue* and *Giglio.* There is no doubt that considered together the jury verdict was affected—without it the State lacked evidence that Carty committed or orchestrated the capital murder of Rodriguez.

The harm to Carty is confirmed by the declarations of Schelli Bettega, Thomas Seiter, Robert Bone and Roy Jackson, Jr.—jurors who presided over Carty's trial. Bettega states that "[i]f [Carty] was not presented as the person who placed a bag over the victim's head, [Carty] would not have received the death penalty." Declaration of Schelli V. Bettega, Sept. 6, 2014 at ¶ 7 (attached as Ex. 13). Similarly, for juror Thomas Seiter, if presented with Robinson's new testimony "regarding the event leading to Ms. Rodriguez's death" he "would have found her not guilty of the offense of capital murder." Declaration of Thomas J. Seiter, Sept. 7, 2014 at ¶ 6 (attached as Ex. 14). Juror Robert Ward Bone, Sr. likewise would not have sentenced her to the death penalty. Declaration of Robert Ward Bone, Sr., Sept. 7, 2014 at ¶¶ 8-9 (attached

as Ex. 15). Likewise, juror Roy Jackson, Jr. states "[h]ad Christopher Robinson testified at trial to the facts as he now states them in his recent affidavit, I, as a juror would have most likely not have voted for capital murder at the guilt stage or for the death penalty at sentencing." Declaration of Roy Jackson, Jr, Sept. 8, 2014 at ¶ 5 (attached as Ex. 16).

B. Carty'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 *Chabot* and *Chavez.*

In addition to her *Napue/Giglio* claim, Carty asserts that her right to due process and due course of law was violated under this Court's holdings in *Chabot* and *Chavez.*

1. The *Chabot/Chavez* standard.

The Due Process Cause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. *Ex parte Robbins,* 360 S.W.3d 446 at 459 (Tex. Crim. App. 2011). An applicant need not show that one of the State's witnesses committed "perjury" rather, "it is sufficient that the testimony was 'false.'" *Chavez* 371 S.W.3d at 208 (quoting *Robbins,* 360 S.W.3d at 459). "[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." *Chavez,* 371 S.W.3d at 208 (citing *Robbins,* 360 S.W.3d 459). A *Chabot* claim thus has two essential elements: "the testimony used by the State must have been false, and it must have been material to the defendant's conviction." *Robbins,* 360 S.W.3d at 459.

The Court of Criminal Appeals has held that whether testimony is false for purposes of a Chabot claim turns on "whether the testimony, taken as a whole, gives the jury a false impression." *Chavez,* 371 S.W.3d at 208 (emphasis added) (citing *Ex parte Ghahremani,* 332 S.W.3d 470 at 447 (Tex. Crim. App. 2011); *Alcorta v. Texas,* 355 U.S. 28, 31 (1957)); *cf id.* (equating "false" testimony with "inaccurate" testimony). Testimony typically presents a "false impression" when a "witness omitted or glossed over pertinent facts." *Robbins,* 360 S.W.3d at 462. As such, an applicant need not prove that the testimony was literally not true:

> We have explained that "'[t]estimony that is untrue' is one of many ways jurists define false testimony [and the] Supreme Court has indicated that *'improper suggestions, insinuations and, especially, assertions of personal knowledge constitute false testimony."*

Robbins, 360 S.W.3d at 460 (emphasis added).

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." *Chabot,* 300 S.W.3d at 771 (quoting *Ex parte Fierro,* 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996)). This is done by a showing of a "'reasonable likelihood that the false testimony affected the applicant's' conviction or sentence." *Chavez,* 371 S.W.3d at 207. The standard of materiality is the same for knowing and unknowing use of false testimony. *Id.* This is a relaxed materiality standard, one "more likely to result in a finding of error than the standard that requires the applicant to show a reasonable probability that the error affected the outcome." *Id.* (internal quotations omitted); *accord Estrada v. State,* 313 S.W.3d 274,

287 (Tex. Crim. App. 2010) (appellant was entitled to relief by showing *"a fair probability* that appellant's death sentence was based upon . . . incorrect testimony") (emphasis added)).

2. The State coerced witnesses to submit false testimony.

Carty incorporates Part V(A)(2) of this application herein.

3. The State knowingly presented false testimony on Carty's role as the ringleader.

Carty incorporates Part V(A)(3) of this application herein.

4. The State knowingly presented false testimony that the plan was to kidnap Rodriguez and baby Ray.

Carty incorporates Part V(A)(4) of this application herein.

5. The State's key evidence linking Carty to Rodriguez's death—that Robinson saw Carty placing the bag over Rodriguez's head and that she stopped breathing—is false.

Carty incorporates Part V(A)(5) of this application herein.

6. Carty can show a fair probability that her conviction was based on incorrect testimony as required under the relaxed materiality standard.

Carty incorporates Part V(A)(6) above as though fully set forth herein. Moreover, while Carty can demonstrate the State knowingly presented false evidence, this is not required for her *Chabot* and *Chavez* claim. Carty merely must show that the testimony was false and harmful.

The false testimony went to the heart of the State's theory of the case. In closing, the prosecution argued that Linda orchestrated the crime "[W]ho gets to cast this drama? Who gets to pick who participates in this? This lady here [Carty]. And she's a master at it." Tr. Vol. 24 at 146. Newly discovered evidence from Robinson and Caston, which the State hid, shows that Josie was the ringleader and contradicts this. The prosecution argued that Linda wanted the lady taken from the apartment. *Id.* at 147. Newly discovered evidence from Robinson, Caston and Anderson, which the State hid, contradicts that the plan was to take Rodriguez or the baby. The prosecution relied on the bag as evidence that Carty intentionally killed Rodriguez and argued "You heard what Chris said as to who did this, who was responsible for putting the bag over Joana's head, and you think about who wanted Joana Rodriguez dead" referring to Carty. *Id.* at 153. Newly discovered evidence from Robinson, which the State hid, shows that this was false. Robinson did not see Carty put the bag over Joana's head.

The unmistakable conclusion is there is *at least* a reasonable probability that the false testimony affected the outcome in fact, the juror affidavits set forth in Part V(A)(6) above establish that it did.

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.*

The prosecution in Carty's case suppressed material evidence that was favorable to Carty, in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny. The suppressed evidence includes, but is not limited to, statements that:

- Robinson never saw Carty put the bag over Rodriguez's head. (Ex. 6, Robinson Aff. at ¶¶ 23-26).

- Robinson never saw Carty with half her body in the trunk. *Id.* at 26.
- There was not a plan to take the victim, and the plan was only to take the marijuana and money. (Ex. 8, Caston Aff. at ¶ 11; Ex. 7, Anderson Aff. at ¶ 12).
- Carty did not instruct them to kill Cabrera and Cardenas, or tape up Rodriguez. (Ex. 6, Robinson Aff. at ¶¶ 18-19).
- Robinson never saw Carty bathe baby Ray. *Id.* at ¶ 20.
- Robinson saw that Rodriguez was breathing when he ripped open the bag. *Id.* at ¶¶ 29-30.
- Both Caston and Robinson stated that Rodriguez's death was an accident. *Id.* at ¶ 32; (Ex. 8, Caston Aff. at ¶13).

These statements amount to critical impeachment evidence of two of the State's key witnesses' testimony on the State's central theory of the crime as well as critical exculpatory evidence. Moreover, the State failed to disclose key statements from Mathis, which among other things include that:

- Mathis provided the prosecution with a detailed account of Carty's mistreatment during her initial interrogation, including that she was not advised of her Miranda rights, as that would cause her to "lawyer up", and was subjected to officers screaming at her in a manner that Mathis had "never seen anything like [it]" in his years as a DEA agent. (Ex. 10, Mathis Aff. at ¶¶ 12-16, 26).
- Instead of going to the probable location, the police continued to interrogate Carty after she pro-

vided them with a probable location, and "instead insisted on riding Linda and attempting to extract a confession from her." *Id.* at ¶ 15.

- Mathis believed Carty was afraid of the men involved in the case. *Id.* at ¶ 28.
- Mathis 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. *Id.* at ¶¶ 28-29.
- Mathis did not believe Carty would have been able to persuade the men to put their lives on the line based on the word of someone they did not know. *Id.* at ¶ 29.
- Mathis believed Carty's mental issues regarding pregnancies explained her strange statements about babies. *Id.* at ¶ 27.
- Mathis did not believe Carty was a danger to society. *Id.*

The State also failed to disclose notes and tape recordings of interviews with Caston, Robinson and Mathis, and likely others, before trial to the Defense. (Ex. 8, Caston Aff. at ¶ 2); (Ex. 6, Robinson Aff. at ¶ 5), (Ex. 10, Mathis Aff. at ¶ 25). The State also withheld from the defense the details of a deal with Marvin Caston that he would be sentenced to thirty years unless Carty received the death penalty and Chris Robinson got thirty to forty years. (Ex. 8, Caston Aff. at ¶ 6).

1. Substantive law under *Brady* and *Giglio*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the

prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Due process is violated *irrespective* of whether:

- The defense requested the favorable evidence. *See United States v. Bagley,* 473 U.S. 667, 682 (1985) (holding materiality prong "sufficiently flexible to cover the 'no request,' 'general request,' and `specific request' cases of prosecutorial failure to disclose evidence favorable to the accused.").
- The evidence is impeachment or exculpatory evidence. *Id.* at 677; *Giglio v. United States,* 405 U.S. 150, 154 (1972).
- The evidence would be admissible in its present form. *United States v. Gil,* 297 F.3d 93, 104 (2d Cir. 2002) (holding even if no part of the memorandum at issue was admissible as evidence, the Government was nonetheless required to turn the memorandum over under *Brady* because it could lead to admissible evidence).
- The statements at issue were memorialized in a document or recording. *United States v. Rodriguez,* 426 F.3d 221, 226 (2d Cir. 2007). "The obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form." *Id.*

The determinative inquiry under *Brady* and its progeny is whether (1) the prosecution suppressed favorable evidence and (2) the evidence was material to either guilt or punishment and thus, rendered the proceeding fundamentally unfair. *Brady v. Maryland,* 373 U.S. 83, 87 (1963); *see also Kyles v. Whitley,* 514 U.S. 419, 432 (1995); *United States v. Bagley,* 473 U.S. 667, 683 (1985); *Ex parte Adams,* 768 S.W.2d 281, 290 (Tex. Crim. App.

1989); *Thomas v. State,* 841 S.W.2d 399 (Tex. Crim. App. 1992).

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Kyles*, 514 U.S. 419 at 433; *Bagley*, 473 U.S. at 682; *Adams*, 768 S.W.2d at 291. The *Kyles* decision clarifies four significant aspects of materiality analysis under Brady.

First, to demonstrate materiality, Carty is not required to demonstrate by a preponderance of the evidence that the suppressed evidence, if known to the defense, would have ultimately resulted in an acquittal or a life sentence. *Kyles*, 514 U.S. 419 at 434-436. The inquiry is more properly whether the suppressed evidence undermines confidence in the jury's decision. *Id.* at 434.

Second, materiality analysis "is not a sufficiency of the evidence test." *Id.* (emphasis added). "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 [or return a sentence of death]." *Id.* at 434-35. Rather, a *Brady* violation is established 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." *Id.* at 435 (footnote omitted); *see also Lindsey v. King,* 769 F.2d 1034, 1042 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness's testimony).

Third, harmless error analysis is not applicable to *Brady* violations. *Kyles,* 514 U.S. 419 at 435. The *Kyles* Court stated, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review." *Id.*

Fourth, materiality must be assessed "in terms of suppressed evidence considered collectively, not item by item." *Kyles,* 514 U.S. 419 at 436. As discussed herein, when the suppressed evidence in Carty's case is considered collectively, as it must be under *Kyles,* there is a reasonable probability that the result of her conviction proceedings would have been different.

2. In addition to presenting false testimony, the State never disclosed Robinson, Caston, Gerald Anderson, and Charles Mathis's statements to prosecution.

In the twelve years since Carty's conviction for capital murder, the State has never disclosed to the Defense the following statements made to the assistant district attorneys:

- Robinson never saw Carty put the bag over Rodriguez's head. (Ex. 6, Robinson Aff. at ¶¶ 23-26).
- Robinson never saw Carty with half her body in the trunk. *Id.* at 26.
- Caston's statement that there was not a plan to take the victim, and the plan was only to take the marijuana and money. (Ex. 8, Caston Aff. at ¶ 11).
- Robinson's statement that Carty did not instruct them to kill Cabrera and Mr. Cardenas, or tape up Rodriguez. (Ex. 6, Robinson Aff. at ¶¶ 18-19).
- Robinson's statement that he never saw Carty bathe Baby Ray. *Id.* at ¶ 20 .
- Robinson's statement that Rodriguez was breathing when he ripped open the bag. *Id.* at ¶¶ 29-30.
- Both Robinson and Caston's statements that they believed Rodriguez's death was an accident. *Id.* at ¶ 32; (Ex. 8, Caston Aff. at ¶13).

- Anderson's statement that there never was a plan to take Rodriguez or her baby. (Ex. 7, Anderson Aff. at ¶ 12).

As outlined in Part V(A) and V(B) above, each of these statements made directly to Assistant District Attorneys Connie Spence and Craig Goodhart contradict the State's central theory of the case that Carty orchestrated Rodriguez and baby Ray's kidnapping and intended to kill Rodriguez.

In addition, the State failed to disclose key statements from Mathis that:

- Mathis provided the prosecution with a detailed account of Carty's mistreatment during her initial interrogation, including that she was not advised of her Miranda rights, as that would cause her to "lawyer up", and was subjected to officers screaming at her in a manner that Mathis had "never seen anything like [it]" in his years as a DEA agent. (Ex. 10, Mathis Aff. at ¶¶ 12-16, 26).
- Instead of going to the probable location, the police continued to interrogate Carty after she provided them with a probable location, and "instead insisted on riding Linda and attempting to extract a confession from her." *Id.* at ¶ 15.
- Mathis believed Carty was afraid of the men involved in the case. *Id.* at ¶ 28.
- Mathis 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. *Id.* at ¶¶ 28-29.
- Mathis did not believe Carty would have been able to persuade the men to put their lives on the line based on the word of someone they did not know. *Id.* at ¶ 29.

- Mathis believed Carty's mental issues regarding pregnancies explained her strange statements about babies. *Id.* at ¶ 27.
- Mathis did not believe Carty was a danger to society. *Id.*

These statements would have alerted Carty's trial counsel to Mathis's potential value as a witness, as well as potential defenses relating to Carty's statements about babies and the police delay in going to the Van Zandt location.

3. The State never disclosed notes and recorded interviews with Robinson, Mathis, or any others.

Robinson recalled that the prosecutors "took a lot of notes during the meetings" on a yellow legal pad. (Ex. 6, Robinson Aff. at IN 10-12). In addition to notes, the prosecutors used "a little silver recording device about 3-4 inches long" during some of the meetings, which was switched on and off as they spoke. *Id.* at ¶ 11. Mathis also recalls notes and, potentially, recordings during his meetings. (Ex. 10, Mathis Aff. at ¶ 25). To date, these notes and recording of interviews with Robinson and Mathis have never been provided to Carty. Carty believes that there are also notes and recordings of other witnesses based on Robinson and Mathis's consistent account of the prosecution's practice. Carty respectfully requests that this Court, at a minimum, order the State to produce all notes and recordings of interviews with witnesses, and to reveal which notes and recordings have been discarded or destroyed.

4. The State failed to disclose preferential treatment to Marvin Caston in exchange for his testimony against Carty.

Marvin Caston was never convicted of a crime stemming from the death of Rodriguez despite being involved in the preparations for the lick. At trial, Goodhart elicited the following testimony from Caston:

> Q: During the period of time that we talked, did I not tell you that I was making you no promises in exchange for your testimony, correct?
>
> A: Yes, sir.
>
> Q: I told you that, depending upon what you had to say, you may be implicated in some type of crime but not the actual kidnapping of Joana Rodriguez; is that correct?
>
> A. Yes.

Tr. Vol. 22 at 54. In actuality, Caston was told that he "would be sentenced to thirty years unless Linda Carty got the death penalty and Chris Robinson got thirty to forty years." (Ex. 8, Caston Aff. at ¶ 6). Caston felt that "[t]hey essentially promised me that if Linda *did* get the death penalty, and if Chris did get thirty or forty years, then I would *not* get thirty years myself." *Id.* at ¶8 (emphasis in orig.).

Marvin Caston's sister, Rosalind, also heard the threats Caston received from the prosecution. She was present at the meeting at Martha Caston's house and remembers "very clearly Connie [Spence] saying to my brother that if Linda Carty didn't get the death penalty then he would get 45 years to life." (Ex. 9, Rosalind Caston Aff. at ¶ 4). She also corroborates Caston's account that he was pushed to say more under the same threat:

> I remember my brother saying "That's all I know" and Connie saying, "You know more than what you're saying." Every time he said "no", Connie said: "Alright, you're going to get that time, you're going to get 45 years."

Id. at ¶ 5.

The failure to disclose an agreement for leniency or immunity with a material witness can warrant habeas relief. *See United States v. Valera,* 845 F.2d 923, 926 (11th Cir. 1988) (noting that *Giglio* requires disclosure of promises of leniency or immunity). As recognized in *Duggan v. State,* there is no distinction between "express agreements between the State and a testifying accomplice from those agreements which are merely implied, suggested, insinuated or inferred." 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). Rather, Texas has adopted the standard articulated in *Giglio v. United States* "to determine whether such an agreement exists, *viz:* whether the evidence, newly discovered or otherwise, 'tends to confirm rather than refute the existence of some understanding for leniency.'" *Id.* (quoting *Burkhalter v. State,* 493 S.W.2d 214, 217 n. 1 (Tex. Crim. App. 1973); *accord Giglio v. United States,* 405 U.S. 150, 153 (1972). "It makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal." *Id.* As recognized in *Duggan,* there is no distinction between when the State "take[s] [a witness's testimony] into consideration" and when a formal deal is

struck. 778 S.W.2d at 467. The State's deals with Robinson and Caston[17] are of the former category.

5. Taken together, the State's failure to disclose *Brady* material creates a reasonable probability that had the material been disclosed, the outcome would have been different.

Under *Brady* and its progeny as articulated above, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles,* 514 U.S. 419 at 433. "[The] suppressed evidence [must be] considered collectively, not item by item." *Id.* at 436.

Part V(A) and V(B) sets forth the State's sponsoring of false testimony by Robinson and Caston, testimony it knew was false because Robinson and Caston told the prosecutors as much. At a minimum, the statements including that Robinson never saw Carty place the bag over Rodriguez's head and that Josie Anderson was the ringleader would have provided critical impeachment evidence of the State's central theory. Notice of these statements, whether in recordings of interviews with Robinson and Caston or not, would have allowed trial counsel to develop new defenses and theories of the case. Trial counsel could have mounted a viable alternative theory of the crime that Josie Anderson orchestrated the crime. Moreover, the statements exculpate Carty from causing Rodriguez's death as the State maintained. Withholding these statements allowed the State to argue that Carty was the ringleader of the crime and

[17] Carty also calls the Court's attention to the fact that Combs and Josie Anderson both admitted to a role in this crime and were never convicted or plead to any charges related to this offense.

caused Rodriguez's death by her own hands. The harm is undeniable to Carty.

Moreover, knowledge of these statements and the prosecution's meetings with Robinson would have allowed trial counsel to present a more convincing theory than "they [had] eight months to have put together their stor[ies]" to challenge Robinson and Caston's testimony. Tr. Vol. 24 at 121. In actuality, the prosecution, not the witnesses, had eight months to create the stories. Both recounted repeated meetings with the prosecution, far more than the one meeting Caston testified to. Tr. Vol. 22 at 53; (Ex. 8, Caston Aff. at ¶¶ 4-6); (Ex. 6, Robinson Aff. at ¶¶ 8-11). Moreover, the prosecution put together their stories under the threat of death for Robinson, and 30 years for Caston. This information, if disclosed at the time would have allowed trial counsel to argue that the testimony was not the work of witnesses coming up with a story, but rather the State creating the story.

The failure to disclose exculpatory and impeachment statements alone undoubtedly harmed Carty as she was unable to challenge the key evidence against her. Coupled with the prosecution's pattern of threats and coercion in creating the State's story of the case, there should be no doubt that the prosecution's failure to disclose *Brady* evidence harmed Carty.

D. The cumulative impact of the constitutional errors in Carty's proceedings violated Carty's right to due process under the United States Constitution.

The accumulation of constitutional errors that occur in a state proceeding may be found to independently violate due process. *Derden v. McNeel,* 978 F.2d 1453, 1454 (5th Cir. 1992). Cumulative error is found where (1) individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the er-

rors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process." *Id.* (citing *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). Although the standard applied in the case was modified after rehearing, Judge Garza's descriptive explanation of cumulative error is instructive:

> At the beginning of trial, we had an entire cloth sheet. As trial progressed and the conduct from the judge and the prosecutor worsened, a tear developed down the middle of the sheet. With each improper remark the tear lengthened until at the end of trial what was one sheet is now two . . . The two sheets are symbolic of a due process violation.

Derden v. McNeel, 938 F.2d 605, 618 (5th Cir. 1991), rev'd en banc, 978 F.2d 1453 (5th Cir. 1992) (only cognizable error can create cumulative error); see *Nichols v. Collins,* 802 F. Supp. 66, 78 (S.D. Tex. 1992) (J. Hittner), rev'd, 69 F.3d 1255 (5th Cir. 1995). Viewing due process in Carty's case as Judge Garza's hypothetical sheet, the State's presentation of false testimony and failure to disclose *Brady* materials acted as forces pulling the sheet in two.

As detailed in Parts V(A) and V(B) the fundamental fairness of Carty's trial was impacted by the State knowingly sponsoring false testimony and using coercion to exclude evidence. Fundamental fairness was further undermined by the State's withholding material and exculpatory evidence from Carty, as detailed in Part V(C). Taken together, the cumulative constitutional errors violate due process, and mandate granting Carty's writ.

While Carty recognizes that her original claims raised, including those in her Additional Further Response, are typically not considered for purposes of cu-

mulative error under the Federal *Derden* standard, she urges this Court to consider her original claims which amount to a "close case" in considering her claim for cumulative error based on the newly discovered evidence. The claims are outlined in Part V(E)(1) of this application. But even ignoring the ineffective assistance and other claims brought previously, the newly discovered evidence is clearly sufficient to mandate the requested relief.

E. The cumulative impact of the constitutional errors in Carty's proceedings robbed Carty of due course of law under the Texas Constitution.

Distinct from Carty's right to due process under the Fourteenth Amendment to the United States Constitution, the Texas Constitution affords Carty the right to due course of law "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. Whether the due course of law provision provides a greater level of protection than the due process clause of Fourteenth Amendment is a novel and unaddressed question. *Pena v. State,* 285 S.W.3d 459, 466 (Tex. Crim. App. 2009) ("We recognized that whether the due course of law provision grants more protection than the Due Process Clause is a novel state constitutional question and therefore requires careful deliberation by an appellate court."). This is especially true for claim of cumulative error.

A separate due course of law analysis for a claim of cumulative error is warranted because of the differences between Texas and federal law. As recognized in *Ex parte Ghahremani,* Texas allows applicants to prevail on false testimony claims when the State unknowingly used false testimony in opposition to the federal requirement

of that the State must knowingly use false testimony. 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). Texas also differs from federal law by recognizing that a habeas application may not be a "cognizable writ application" and permitting applicants to file another initial application. *See Ex parte Medina,* 361 S.W.3d 633, 643 (Tex. Crim. App. 2011). Lastly, and crucially, Texas courts have never addressed whether procedurally defaulted errors can be considered in analyzing whether cumulative error occurred. Instead, Texas courts have long reiterated that "a number of errors may be found harmful in their cumulative effect," even if each error, considered separately, would be harmless. *Linney v. State,* 413 S.W.3d 766, 767 (Tex. Crim. App. 2013). Carty urges that in addition to considering the newly discovered claims raised in this application, the Court should consider the claims raised in her Additional Further Response, which were heard but never considered by a Texas court. *Carty v. Thaler,* 583 F.3d 244, 252 (5th Cir. Sept. 17, 2009).

1. Carty's additional claims raised in the Additional Further Response should be considered in evaluating her due course of law cumulative error claim.

On November 1, 2004, Carty filed her Additional Further Response to Respondent's Original Answer. The hearing took place on November 30, 2004. The State's 93 findings of fact and conclusions of law were adopted verbatim on December 2, 2004.[18] The trial court or the Court

[18] In countless cases, courts have strongly criticized the practice of adopting findings of facts and conclusions of law verbatim. There has been profound concern for the integrity of the fact-finding process. In *Roberts v. Ross,* 344 F.2d 747 (3d Cir. 1965), the Third Circuit Court of Appeals explained in compelling terms this threat to the integrity and reliability of the fact finding process:

of Criminal Appeals never considered the additional issues raised in Carty's Additional Further Response. *Carty v. Thaler,* 583 F.3d 244, 252 (5th Cir. Sept. 17, 2009).

> [C]ounsel who is called upon to articulate and write out the findings and conclusions must do so without any knowledge of the fact findings and reasoning processes through which the judge has actually gone in reaching his decision.
>
> We strongly disapprove this practice. For it not only imposes a wellnigh impossible task upon counsel but also flies in the face of the spirit and purpose, if not the letter, of Rule 52(a). The purpose of that rule is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made. Findings and conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule. At most they provide the judge with an opportunity to reconsider the bases of his original decision but without affording the parties any information as to what those bases were or which of them are being reconsidered. At worst they are likely to convict the judge of error because, as here, they are inadequate to support his decision or because, as we have observed in other cases, they are loaded down with argumentative overdetailed partisan matter much of which is likely to be of doubtful validity or even wholly without support in the record.

Id. at 751-52. Given that the findings of fact and conclusions of law were drafted *before* the State had the opportunity to review Carty's Additional Further Response to Respondent's Original Answer, Carty urges that this Court cautiously review any reliance on the findings of fact and conclusions of law in the initial habeas proceeding.

The most telling of all errors outlined in her Additional Further Response was her trial counsel's repeated failure to investigate and develop facts independent of the State's case in chief in support of Carty's defense at both phases of trial. At the guilt stage, trial counsel failed to interview Jose Corona who would not have testified—and Charles Mathis who would have provided helpful evidence. Trial counsel also failed to develop Carty's daughter's testimony to explain Carty's possession of key pieces of evidence.

At the punishment stage, trial counsel's failure to develop the case became more acute and damning to Carty. As a result of not contacting Agent Mathis, Mathis was never able to testify on Carty's behalf. This error is glaring when presented with the testimony Mathis would have offered:

> I would have been willing to testify that Linda should not have gotten the death penalty and also would have been willing to testify that I do not believe her to be a future danger. I would also have testified that she is not a violent person, let alone a cold-blooded murderer and that she is not a compulsive liar. Additionally, I would have testified that I do not believe that Linda is capable of killing another human being.

(Ex. 10, Mathis Aff. at ¶ 32). Coming from one of the State's key witnesses and an officer with the DEA, this testimony unquestionably would have benefited Linda.

Moreover, trial counsel never contacted "anybody from St. Kitts" despite being aware of Carty's St. Kitts background and being given funds from the trial court to investigate. (Ex. 3, Guerinot Aff. at ¶ 6). Had trial counsel done so, over a dozen friends and colleagues would have

testified on her behalf at punishment. This included testimony that:

- She was "one of the most outstanding people in her area" from the former *Prime Minister of St. Kitts,* Dr. Kennedy Simmonds. Statement of Dr. Kennedy Simmonds, Nov. 3, 2005, page 1 (attached as Ex. 17).
- She was "very courageous and believed strongly in what she was doing" for the political movement from the former *Deputy Prime Minister of St. Kitts,* Michael Powell. Statement of Michael Powell, Mar. 15, 2006, page 10 (attached as Ex. 18).
- She was an "effective" teacher "loved by her students" who raised money to keep her school running. Statement of Sidney Morris, Oct. 23, 2005, page 1 (attached as Ex. 19).

Countless other witnesses would have attested to her strong church involvement and leadership in social justice. *See* Collected Affidavits (attached as Ex. 20). All the jury was presented with was testimony from her mother, daughter, and sister.

In addition to trial counsel's failure to develop Carty's case outside the courtroom, Carty also presented the following issues in her Additional Further Response.

- The Court improperly instructed the jury on "felony murder" instead of capital murder;
- The Court improperly instructed the jury on accomplice witnesses and the prosecution misstated the law on accomplice testimony and corroboration during closing argument;
- The prosecution's opening statements about "all sorts of baby items" found in Carty's room at the

Hampton Inn was a flagrant misstatement of evidence;

- The prosecution failed to inform Carty's husband Jose Corona that he had the right to invoke spousal immunity to avoid testifying at trial; and
- Carty's Sixth Amendment rights were violated when the prosecution secretly obtained an affidavit from Carty's trial counsel in opposition to her request for habeas relief.

The issues also included multiple claims for ineffective assistance of counsel:

- During *voir dire* through inadequate and inflammatory questioning of potential jurors;
- By failing to object to the prosecution's opening statements that were subject to a motion to suppress and not supported by the evidence;
- By failing to interview Jose Corona and to inform him of his right to invoke spousal immunity from testifying at trial;
- By failing to object to the prosecution's misstatement of law on accomplice testimony and corroboration during closing argument;
- By only eliciting testimony from defense expert witness Dr. Jerome Brown in the punishment stage and ignoring potential exculpatory facts;
- By not offering evidence of Carty's lack of future dangerousness through expert testimony other than Dr. Brown.

Carty also raised claims relating to the State's failure to inform her of her right to confer with the consulate and to notify her home country of St. Kitts and the United

Kingdom of her arrest in violation of the Vienna Convention and the U.K. Bilateral Treaty.

Several of these claims, such as the improper instruction on felony murder instead of capital murder, take on a new dimension given Robinson's new statements. As the statements remove any evidence that Carty committed the murder herself, the distinction between felony and capital murder is especially critical. This error is outlined more fully in Part V(F) below.

Carty respectfully urges this Court to consider these claims for the first time under Texas law in considering Carty's claim for cumulative error. However, even if the Court excludes the evidence discussed in this section, the cumulative effect of just the newly discovered evidence mandates the relief requested.

F. Carty is actually innocent and her conviction and death sentence therefore violate the Eight and Fourteenth Amendments to the United States Constitution.

Carty did not kill Joana Rodriguez. As outlined in Parts V(A) and V(B), the State's key witness connecting Carty to the death of Rodriguez has recanted his testimony that Carty placed the bag over Rodriguez's head. The remainder of this application will be devoted to Carty's innocence in light of newly discovered evidence.

1. The legal standard.

In *State ex rel. Holmes v. Court of Appeals,* 885 S.W.2d 389, 397 (Tex. Crim. App. 1994), the Court of Criminal Appeals held that the *execution* of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and announced that the Court would begin to entertain post-conviction applications for the writ of habeas corpus al-

leging actual innocence as an independent ground for relief. To be entitled to relief from a death sentence on a claim of factual innocence, the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond reasonable doubt. *Id. at* 398.

In *Ex parte Elizondo,* 947 S.W.2d 202 (Tex. Crim. App. 1996), the Texas Court of Criminal Appeals held that the *incarceration* of an innocent person is also a violation of the Due Process Clause of the 14th Amendment and that claims of actual innocence based on newly discovered evidence are cognizable in state post-conviction habeas corpus proceedings. *Id. at* 205. In asserting such claims, as in *Holmes,* the applicant must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. *Id.* at 209. In evaluating the claim, the Court must assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, and must necessarily weigh such exculpatory evidence against the evidence of guilt adduced at trial. *Id.* at 206.

In *Ex parte Franklin,* 72 S.W.3d 671 (Tex. Crim. App. 2002), the Court of Criminal Appeals stressed that the "'extraordinarily high' standard of review" in *Elizondo* requiring clear and convincing evidence that no reasonable juror would have convicted the defendant in light of the new evidence is premised on and applies to constitutionally error-free trials. *Id. at* 676. It distinguished this standard from the *"Schlup* standard" used in cases in which the defendant is attempting to overcome a procedural obstacle to have the merits of otherwise barred constitutional claims considered. *Id.* There, a petitioner need only demonstrate that it is more likely than not that

no reasonable juror would have convicted him in light of the new evidence. *Id.*

The present case presents neither of these two extremes. Rather, Carty asserts an actual innocence claim as a basis for relief in a constitutionally deficient trial. Such a trial, unlike a constitutionally error-free trial, is not "entitled to the greatest respect." *Id.* at 677-78. As such, Carty asks that this court apply the lesser *Schlup* standard to evaluate her actual innocence claim because the rationale underlying the high *Elizondo* standard is lacking in this case. Carty, however, meets even the more onerous standard of relief.

The new evidence on which Carty bases her actual innocence claim consists of newly discovered statements from the State's key witness who falsely testified that he saw Carty place the bag over the victim's head. (Ex. 6, Robinson Aff. at ¶¶ 8, 10).

2. Because of the newly discovered evidence on Carty's role in Rodriguez's death, the incorrect instruction to the jury becomes critical.

The jury was presented with three options for Carty not guilty, guilty of capital murder, and guilty of felony murder. *See* Tr. Vol. 24 at 107. In her Additional Further Response, Carty raised for the first time that the trial court improperly instructed the jury on the meaning of "capital murder" and "felony murder." *See* Additional Further Response A.1.a and A.1.b. (Ex. 1). Mainly, Judge Shaver instructed the potential juror's during voir dire that:

> if you murder someone while you're in the course of committing a burglary or a robbery or a sexual assault, kidnapping, arson, then these murders become capital murders.

E.g., Tr. Vol. 5 at 24. This error was compounded when Goodhart summarily dismissed felony murder in his closing statement. He instructed the jury that felony murder was "a waste of [their] time" and thus, discouraged the jury from grappling with the distinction between capital and felony murder. *See* Tr. Vol. 24 at 113.

The distinguishing feature between felony murder and capital murder is the intent to commit murder. *See* TEX. PENAL CODE ANN. § 19.02(3); *Fuentes v. State,* 991 S.W.2d 267 (Tex. Crim. App. 1999). In *Morrow v. State,* the Court of Criminal Appeals found that such a misstatement dilutes the State's burden of proof and violates due process:

> [The inaccurate depiction in *Morrow]* amounted to misstatements about the elements of capital murder allowing the jury to find mere intentional conduct, rather than intentional *killing,* sufficient to prove capital murder. . .. Relieving the State of the burden of proving an intentional killing at the guilt stage implicates at least two constitutional guarantees: a due process or due course of law right not be convicted on proof less than the elements of a crime and the right to a jury trial on all elements of the crime.

Taylor v. State, 109 S.W.3d 443, 451 (Tex. Crim. App. 2003) (explaining decision in *Morrow v. State,* 753 S.W.2d 372 (Tex. Crim. App. 1988)). The confusion between capital murder and felony murder remained in Goodhart's closing statement. Tr. Vol. 24 at 115. The focus yet again was on intentional conduct, rather than Carty's specific intent.

3. The newly discovered evidence showing Carty did not kill or plan to kill Rodriguez.

Assistant medical examiner, Dr. Shrode testified that Rodriguez could have suffocated as a result of "the bag or to the obstruction of the airways by virtue of the tape and the bag and the positioning of the body in car." Tr. Vol. 23 at 243. The State presented uncontested testimony that Gerald Anderson placed Rodriguez in the trunk and that Williams taped Rodriguez's mouth, hands, and feet. Tr. Vol. 22 at 207, 216, 223-24. Thus, in the event that Rodriguez's death was caused by her position in the trunk or the tape, without any further actions Anderson or William's actions caused Rodriguez's death. Robinson provided the sole link between Carty's alleged intentional actions and a possible cause of Rodriguez's death by testifying that he saw Carty place the bag over Rodriguez's head. *Id.* at 234-37. Chris Robinson's recantation that he saw Carty place the bag over Rodriguez's head and that Rodriguez was dead when he removed the bag negates the State's only evidence that Carty's intentional conduct caused Rodriguez's death. *See* Part V(A), *infra.* Critically, it negates that the bag was even the cause of Rodriguez's death.

Thus, as the jury was instructed that specific intent to commit murder equates to intentional conduct, without Robinson's false testimony about Carty placing the bag over Rodriguez's head, the jury should not have convicted Carty of intentionally killing Rodriguez.

Carty's innocence claim does not end with the bag. The jury also never heard statements from Robinson, Caston and Gerald Anderson that negated capital murder. As outlined more fully in Parts V(A) and V(B), both Caston and Robinson believed that Josie Anderson, not Carty, was the ringleader of the crime. (Ex. 8, Caston

Aff. at ¶ 10); (Ex. 6, Robinson Aff. at ¶ 21). Moreover, the "plan" for the lick was never that Rodriguez or baby Ray would be taken from the apartment. (Ex. 8, Caston Aff. at ¶ 11). Instead, "[t]here was a plan to do the lick and take the money and weed, but there was no plan to let Linda be a part of the lick." *Id.* at 12. Additionally, both men stated that they believed Rodriguez's death was an accident. (Ex. 8, Caston Aff. at ¶ 13); (Ex. 6, Robinson Aff. at ¶ 32).

The jury also never heard from Mathis that based on his experience as a DEA agent, he believed it would be difficult for Carty to convince the men to take a lady and a baby, as well as put their lives on the line for her. (Ex. 10, Mathis Aff. at ¶¶ 28-29).

4. Conclusion

Considering the newly discovered evidence from Robinson and Caston, Carty urges this Court to find that it is more likely than not that no reasonable juror would have convicted her in light of the newly discovered evidence—mainly that Carty did not kill Rodriguez by placing a bag over her head, there was no plan to kidnap, let alone kill, Rodriguez, and that Rodriguez's death was an accident.

G. The Claims Presented in this Application Satisfy Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure.

Relevant to Carty's claims, Section 5(a) of the Texas Code of Criminal Procedure provides that a court may not consider the merits of or grant relief based on the subsequent application for writ of habeas corpus unless the application contains sufficient facts establishing that (1) the current claims and issues have not been and could not have been presented previously in a timely initial application filed under the article or Article 11.07 because

the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or (2) but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or (3) but for a violation of the United States Constitution no rational juror could have imposed the death penalty. TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1)-(3). With respect to the first prong, it requires a showing that (1) the factual or legal basis of an applicant's current claims were unavailable as to her previous application, and (2) the specific facts alleged, if proved, would constitute a constitutional violation. *Ex parte Campbell,* 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Carty's claims satisfy all three prongs.

1. The current claims could not have been raised in a previously filed application because the factual basis for the claims was unavailable at the time the previous application was filed.

Carty could not present her current claims and issues in her initial application because the factual basis for the claims was unavailable at the time her initial petition was filed. Robinson refused until now to disclose this information to Carty because he refused to talk about this case. (Ex. 6, Robinson Aff. at ¶ 34). Mathis avoided Carty's defense counsel's attempts to discuss the new information because of serious ongoing health issues and the stress caused by this case. (Ex. 10, Mathis Aff. at ¶ 4). The statements by Robinson led to the discovery of Carty's other newly discovered evidence.[19]

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[19] As outlined in Part V(H) below, any factual disputes concerning whether evidence could have been discovered at the time of Carty's initial filing should be resolved by the trial court.

Moreover, the State has an independent constitutional duty to correct false testimony. *Duggan,* 778 S.W.2d at 468. Prosecutors are presumed to fully perform their duties to make required disclosures. *See Strickler v. Greene,* 527 U.S. 263, 284 (1999). Carty is entitled to rely on the presumption that the State has complied with these disclosure obligations both during her trial and post-conviction proceedings. *Id.* ("If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable."); *also Banks v. Dretke,* 540 U.S. 668, 693 (2004) (holding state habeas counsel's reliance on presumption of prosecution's compliance with constitutional disclosure obligations is good cause to excuse failure to investigate claim in state habeas proceeding).

For purposes of a Section 5(a)(1) inquiry, it is immaterial whether the State knew at the time of the false testimony or learned of it after the fact. The State has a continuing duty to apprise Carty of the false nature of evidence presented or relied on by the State and to correct it "whenever it comes to the State's attention." *Estrada v. State,* 313 S.W.3d 274, 288 (Tex. Crim. App. 2010). Carty was entitled to presume from the State's silence that no false testimony was given in her case. *See Strickler,* 527 U.S. at 284; *Banks,* 540 U.S. at 693. Because this presumption exists, reasonable diligence does not require that Carty "scavenge for hints" of uncorrected false testimony relied upon by the prosecution during her trial. *Banks,* 540 U.S. at 695. As a result, the factual basis for

Carty's claims was not ascertainable through the exercise of reasonable diligence prior to the filing of her last considered application.

2. The current *Chabot*/*Chavez* false testimony claim was unavailable as of Carty's previous application.

In addition to satisfying the newly discovered evidence requirement, Carty's claims are also based on new law. In *Ex parte Chabot,* 300 S.W.3d 768 (Tex. Crim. App. 2009), the Court of Criminal Appeals held for the first time that the unknowing reliance on false evidence by the prosecution is a due process violation. In *Ex parte Chavez,* 371 S.W.3d 200, 205-207 (Tex. Crim. App. 2012), the Court ruled that *Chabot* could serve as a previously unavailable legal basis under Section 5(a)(1). *Chabot* was decided on December 9, 2009 over six years after Carty filed her initial state habeas petition and over three years after she filed her federal habeas petition. Carty has not filed any additional habeas applications in state or federal court.

3. But for the United States Constitutional violation, no rational juror would have found Carty guilty beyond a reasonable doubt, and but for a violation of the United States Constitution, no rational juror would have supported the death sentence.

In addition, Carty is asserting that but for the violations of the United States Constitution, no rational juror could have found both her guilty and sentenced her to the death penalty. The violations presented in this application go to the heart of Carty's capital murder trial and undermine the State's theory of the case. As the suppressed evidence and misleading testimony went to whether Carty acted intentionally in killing Rodriguez, and whether her actions (if true) actually killed Rodri-

guez, a grave miscarriage of justice will result if the allegations in this application are not addressed, and, ultimately, remedied by this Court. The affidavits of four jurors, outlined in Part V(A)(6), confirm this obvious fact.

H. Any factual disputes must be resolved by the trial court.

It is well established that "[t]rial courts are the traditional finders of fact." *Manzi v. State,* 88 S.W.3d 240, 244 (Tex. Crim. App. 2002). This is because the Court of Criminal Appeals is "not equipped, let alone inclined, to hold evidentiary hearings," it is the trial court that has "the power and responsibility 'to ascertain the facts necessary for proper construction of the issues involved.'" *Ex parte Reiner,* 734 S.W.2d 349, 358-59 (Tex. Crim. App. 1987) (Teague, J., dissenting) (discussed in *Ex parte Reed,* 271 S.W.3d 698 at 754-55 (Tex. Crim. App. 2008) (Price, J., concurring)).

To the extent that the State may seek to challenge the credibility or extrinsic weight of any of Carty's particular allegations that inquiry should be done on remand, not when considering whether Carty has met the threshold showing required in Article 11.071, § 5(a) of the Texas Code of Criminal Procedure. As the Court of Criminal Appeals explained in *Ex parte Blue,* "if we were to require that the subsequent application actually *convince* us . . . there would be no need to return the application to the convicting court for further proceedings." 230 S.W.3d 151, 163 (Tex. Crim. App. 2007). As endorsed in *Ex parte Riveria,* the applicant must present "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." No. 27,065-02, 2003 WL 21752841, at *1 (Tex. Crim. App. July 25, 2003) (per curium) (quoting *Reyes-Requena v. United States,* 243 F.3d 893, 898-99 (5th Cir. 2001)). If the application "appears reasonably

likely" to meet this showing, the application should be remanded to the trial court. *Id.*

Claims based on newly discovered *Brady* evidence of the sort at issue in this case meet the requirements of §5 and thus should be considered on the merits in state court. Indeed, the Texas Court of Criminal Appeals has repeatedly permitted successive petitions under §5 in cases where such claims have been raised. *See, e.g., Ex Parte Newton,* No. 54,073-02 (Tex. Crim. App. 2009) (authorizing successive proceedings on, *inter alia, Brady* claim); *Ex Parte Young;* No. 65,137-03 (Tex. Crim. App. 2009) (authorizing successive proceedings on *Brady* and on *Giglio* claims); *Ex Parte Reed,* No. 50,961-03 (Tex. Crim. App. 2005) (authorizing successive proceedings on *Brady* allegations); *Ex parte Rousseau,* No. 43, 534-02 (Tex. Crim. App. 2002) (authorizing successive proceedings on a claim that the State withheld impeachment evidence of eyewitness and evidence of innocence); *Ex parte Washington,* No. 35, 410-02 (Tex Crim. App. 2002) (authorizing successive proceedings on claim that the State withheld information regarding criminal records of punishment phase witnesses and presented false and misleading testimony); *Ex parte Murphy,* No. 30.035-02 (Tex. Crim. App. Sept. 13, 2000) (authorizing successive proceedings on a claim that prosecutors relied on perjured testimony); *Ex parte Faulder;* No. 10,395-03 (Tex. Crim. App. June 9, 1997) (authorizing successive proceedings on a claim that prosecutors allowed witnesses to testify falsely and withheld exculpatory evidence); *Ex parte Nichols,* No. 21,253-02 (Tex. Crim. App. Apr. 16, 1997) (authorizing successive proceedings on a claim that prosecutors withheld the correct name address of a witness with exculpatory information); *cf. Ex Parte Speer,* No. 59,101-02 (remanding case raising *Brady* and *Giglio*

allegations to district court for further proceedings and evidence on the §5 issue itself).

Moreover, any dispute as to whether Carty's evidence was previously available through the exercise of reasonable diligence involves a factual inquiry, which must be resolved by a trial court on remand. *See Campbell,* 226 S.W.3d at 422 (holding to warrant remand, applicant must have *"facially* surmounted the 'unavailability' hurdle" (emphasis added)).

VI. CONCLUSION

Carty's case presents an especially troubling issue for this Court how to respond to a conviction based on testimony that was false. This case goes beyond that though and asks the Court to examine, not only false testimony, but testimony created by the prosecution in order to obtain the death penalty for Carty. Just as egregious as the use of false testimony, the failure to disclose the truth in witnesses' exculpatory statements and other *Brady* material resulted in the truth being hidden from Carty, and most importantly the jury. Carty urges this Court to grant her relief and provide a clear message to the world that Texas does not stand for convictions based on false testimony created by the State.

VII. PRAYER FOR RELIEF

WHEREFORE, Carty respectfully requests that this Court:

1) Remand the claims to the trial court with instructions to permit Carty to engage in discovery to further develop her claims and to hold an evidentiary hearing;

2) After the evidentiary hearing, enter findings that Carty has met her burden of proof on one or all claims;

3) Grant Carty a new trial; and

4) Grant any other relief as law and justice requires.

Respectfully submitted,

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PRO BONO ATTORNEYS FOR THE APPLICANT LINDA ANITA CARTY

VERIFICATION

STATE OF TEXAS)

)

COUNTY OF HARRIS)

Affidavit of Michael S. Goldberg

BEFORE ME, the undersigned authority, on this day personally appeared Michael S. Goldberg, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.

2. I am the duly authorized attorney for Linda Anita Carty and have the authority to prepare and verify her Application for Post Conviction Writ of Habeas Corpus.

3. I have prepared and read the foregoing Application for Post Conviction Writ of Habeas Corpus, and I believe that all the allegations therein to be true and correct.

4. I am signing this verification on behalf of my client, Linda Anita Carty.

/s/Michael S. Goldberg
Michael S. Goldberg

Subscribed and sworn to me this 10th day of September, 2014.

/s/Yvonne Rager
Notary Public

My commission expires:
5/17/15

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application For a Writ of Habeas Corpus and all exhibits, have been served via certified mail, return receipt requested on the Harris County District Attorney on the 10th day of September, 2014.

/s/Michael S. Goldberg
Michael S. Goldberg