No. _____

In the Supreme Court of the United States

October Term, 2018

MIGUEL MARTINEZ, Petitioner,

V.

THE STATE OF TEXAS

APPENDIX

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APPENDIX A

Findings Of Fact And Conclusions Of Law On Pretrial Writ Of Habeas Corpus
Ex parte Miguel Martinez, No. 2015-CR-4203-W1
(437th Judicial District Court, Bexar County Texas, April 5, 2017)

2015-CR-4203-W1

EX PARTE	**§**	**IN THE 437TH JUDICIAL**
	§	
MIGUEL MARTINEZ,	**§**	**DISTRICT COURT OF**
	§	
APPLICANT	**§**	**BEXAR COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PRETRIAL WRIT OF HABEAS CORPUS

Findings of Fact

1. In March 2015, Jason Goss, while working as the chief prosecutor of the 437th District Court for the Bexar County District Attorney's Office, received the prosecution guide and investigator's materials in *State of Texas vs. Miguel Martinez*. Mr. Goss provided the prosecution guide to the second chair prosecutor in the court. The parties have agreed not to name this female prosecutor. The Court will refer to her as the Unnamed Female Prosecutor (hereinafter "UFP").

2. The UFP recognized Gregory Dalton only by his nickname "Vegas" and his picture contained in the prosecution guide. She remembered him as someone she had a one-time sexual encounter with in approximately 2012.

3. According to Mr. Goss, the UFP had possession of the of the prosecution guide from late one day until she returned it early the next day, when she told Mr. Goss about her one-time contact with the witness.

4. The evidence is uncontradicted that the UFP was "firewalled", and she had no further involvement with the case. Specifically, the UFP had no part of the investigation, charging decision, or presentation to the grand jury. The UFP also had no interaction with any witnesses, including Gregory Dalton, and did not participate in plea negotiations, in trial strategy, or any other aspect of the case. Another prosecutor was given the second chair assignment until early in 2017 when Mr. LaHood, the elected criminal district attorney, decided to sit as second chair to Mr. Goss.

5. The evidence is uncontradicted that the UFP has had no contact with the witness, Gregory Dalton, since their one-time physical encounter.

6. Mr. Goss testified he believed that the issue was a "conflict" issue and not a *Brady* issue requiring disclosure to the Defendant.

7. Mr. Goss did not disclose the UFP's information to anyone else, even his supervisors, until he advised the criminal district attorney, Mr. LaHood, shortly before trial began.

8. After consultation in the district attorney's office, Mr. Goss made an *ex parte in camera* disclosure to the judge presiding on Wednesday, February 8, 2017, prior to the jury being sworn. Judge Valenzuela ordered Mr. Goss to reveal to the defense that a prosecutor and a witness on the case had a one-time sexual encounter, but did not order him to reveal the identity of the UFP at that time.

9. After meeting with Judge Valenzuela and prior to the jury being sworn, Mr. Goss advised Mr. Henricksen, a defense counsel for applicant, that a prosecutor in the office had a one-time sexual encounter with a witness to the case several years prior to the murder. The defense did not ask the Court for a continuance at this time.

10. After the jury was sworn, opening statements and testimony presented, the Court ordered Mr. Goss to disclose the name of the UFP to the defense. Mr. Goss advised both Mr. Gonzales and Mr. Henricksen of the UFP's name, the witness's name, and the nature of the one-time encounter. Mr. Goss advised the defense that he excluded the UFP from the case, and that she had no contact with the witness since their one-time encounter several years prior. The defense did not ask the Court for a continuance at this time.

11. On February 8, 2017, the trial proceeded.

12. On February 9, 2017, the court granted the defense request for a continuance in order to give them more time to investigate the disclosure made the day before. The State did not object to this request.

13. The defense attorneys initially had a five-day continuance to investigate and were set to have a twelve-day continuance to investigate.

14. On February 9, 2017, there was a heated discussion in the court's chambers between Mr. LaHood and Mr. Gonzales. The credible evidence shows that Mr. LaHood engaged what one witness properly called a "rant". Mr. LaHood said he would agree to a mistrial, would pick a better jury and be more prepared for trial. When Mr. Gonzales raised the issue of possible prosecutorial misconduct, Mr. LaHood became enraged and threatened to "shut down" the defense lawyers' practices, to go to the media and do whatever it took. He said he did not care what happened to him.

15. On Friday, February 10, 2017, Mr. Goss met with Mr. Gonzales and Mr. Henricksen again, and Mr. Gonzales discussed resolving the case through a plea bargain.

16. On February 13, 2017, Mr. Gonzales and Mr. Henricksen, along with a defense investigator, met with the UFP. They confirmed she had had no contact with Gregory Dalton since 2012. They also confirmed she did no work on the case and only read the prosecution guide once.

17. The attorneys who testified, both state and defense, all characterized the UFP as reliable and credible. None of the recounting of her statements was objected to, and the Court has considered the unobjected-to hearsay as evidence. The Court finds the UFP is credible.

18. Mr. Gonzales and Mr. Henricksen spoke with the witness, Gregory Dalton, over the phone, and Mr. Dalton did not remember the UFP's name and was unclear on her position with the district attorney's office.

19. The witness, Gregory Dalton, denied, through unobjected-to hearsay, that he had any contact with the UFP after 2012.

20. There is no evidence the witness, Gregory Dalton, used his 2012 encounter with the UFP to curry favor from the district attorney's office or any law enforcement agency.

21. At the request of Mr. Gonzales, on February 15, 2015, an assistant district attorney, Jay Norton, went to Mr. Gonzales and Mr. Henriksen's office to discuss the Miguel Martinez case. Mr. Gonzales mentioned the possibility of a plea bargain, but Mr. Norton said the plea offer Martinez wanted was not on the table. Mr. Gonzales asked Mr. Norton if he would talk to Mr. LaHood about agreeing to a mistrial. Mr. Norton agreed to discuss a mistrial with Mr. LaHood.

22. On February 16, 2017, Mr. LaHood initially refused to agree to a mistrial, but Mr. Norton was able to convince him to have the State agree to a mistrial.

23. The defense filed a motion for mistrial, and the State did not object. The defense motion for mistrial was granted by Judge Valenzuela.

24. Mr. Goss testified that he did not want to agree to a mistrial.

25. The State's attorneys testified they believed the State had a strong case. Mr. Gonzales referred to it as "a strong circumstantial case".

26. The State's attorneys and the defense attorneys all testified they approved of the jury seated and sworn.

27. The defense did not present any rational basis that the information about the UFP and the witness Dalton would be material, relevant or admissible in evidence before a jury.

Conclusions of Law

28. For a *Brady* violation to occur, the evidence withheld must be: a. undisclosed, b. favorable to the accused, and c. material.

29. Further, in order to cross-examine a witness regarding potential motive to lie or bias in their testimony, the defense is required to show a good faith basis for the questioning,

particularly for testimony as salacious and remote as contemplated here. Mere speculation regarding the testimony is insufficient to establish its materiality.

30. For retrial to be barred by jeopardy after a defense motion for mistrial, the evidence must show that the State committed misconduct with the intention of provoking a mistrial motion by the defendant or that State committed grave misconduct to avoid an acquittal. Barring retrial is an extreme remedy and difficult to obtain.

31. In this case, the evidence was not undisclosed because it was revealed to defense counsel before the jury was sworn albeit without the name of the UFP. Because the UFP had no involvement in the case (other than reading a portion of the prosecutor's guide), the name would not have added material information at that time. The defense requested no continuance and did not investigate further at that time.

32. There was no evidence of any connection between the 2012 encounter of the UFP and the witness and the involvement of the witness in the 2015 murder investigation. Therefore the information from the UFP was not favorable to the accused.

33. Since there was no *Brady* material in the information from the UFP, the State was under no obligation to disclose it.

34. The evidence from the UFP is not material. The defense did not provide any good faith basis, nor can the Court conceive of one, where the information from the UFP could be used as either direct evidence or impeachment.

35. Further the defense counsel did not avail themselves of the remedy of a continuance to determine if they could have put the information they learned to use at trial.

36. The State did not intentionally provoke or goad the defense into requesting a mistrial.

37. The defense requested the mistrial in the meeting with Jay Norton, and both Mr. LaHood and Mr. Goss testified they were initially reluctant to agree to it.

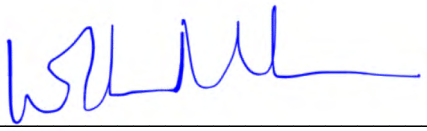
38. Mr. LaHood engaged in the unprofessional and uncalled-for "rant" referenced above, which may be subject to sanctions in another tribunal, but neither the intent nor the effect of his behavior was to force the defense to move for mistrial. The behavior, if done with any intent, was done to attempt to deter the claim by the defense of jeopardy attaching by reason of prosecutorial misconduct, an issue separate from the mistrial. The State did not object to the mistrial.

39. Retrial is not jeopardy barred for the reasons stated.

Order

The relief requested in the pretrial application for writ of habeas corpus is DENIED.

SIGNED and RENDERED on the 25th day of April 2017.



JUDGE W.C KIRKENDALL
Presiding Judge

APPENDIX B

Published decision from the Fourth Court of Appeals of Texas,
Ex parte Martinez, 560 S.W. 3d 681 (Tex. App.–San Antonio 2018, pet. ref'd)

gence was never rebutted. In its brief, the State agrees, acknowledging Timmins is entitled to have the judgment reformed because the presumption of indigence was never rebutted. The record shows the trial court determined Timmins was indigent, and did not make a finding that Timmins was able to repay any amount of the costs of court-appointed legal counsel. In such circumstances, the proper remedy is to delete the assessment of attorney's fees from the judgment. *See Cates v. State*, 402 S.W.3d 250, 251-52 (Tex. Crim. App. 2013).

Conclusion

There is legally sufficient evidence that Timmins was "released" from custody and failed to "appear" as contemplated by section 38.10(a). The facts of this case do not present a paradigmatic example of a failure to appear, and therefore may seem to be a "strange fit." *See In re B.P.C.*, 2004 WL 1171670 at *1. Nevertheless, considering the text and purpose of section 38.10, chapter 38 as a whole, other statutes on similar subjects, and the consequences of Timmins's constructions, we conclude the facts of this case fit within the fair, objective meaning of section 38.10. But because the trial court erred by assessing attorney's fees, we modify the judgment to delete the assessment of attorney's fees and affirm the judgment as modified. *See Cates*, 402 S.W.3d at 251-52; *see also* Tex. R. App. P. 43.2(b) (permitting our judgment on appeal to modify the trial court's judgment and affirm the judgment as modified).

EX PARTE Miguel MARTINEZ

No. 04-17-00280-CR

Court of Appeals of Texas,
San Antonio.

Delivered and Filed: July 31, 2018

Discretionary Review Refused
December 5, 2018

Background: Defendant, whose motion for a mistrial was granted during murder trial, filed application for writ of habeas corpus, claiming that any subsequent prosecution was barred under double jeopardy. The 437th Judicial District Court, Bexar County, No. 2015CR4203, W.C. Kirkendall, J., denied application. Defendant appealed.

Holding: The Court of Appeals, Marialyn Barnard, J., held that defendant failed to establish that prosecutors intended to goad him into moving for a mistrial or feared an acquittal, and thus, retrial was not barred by prohibition against double jeopardy.

Affirmed.

Rebeca C. Martinez, J., dissented with separate opinion.

1. Habeas Corpus ⚿714

In a habeas corpus proceeding, it is the burden of the applicant to prove his allegations by a preponderance of the evidence.

2. Habeas Corpus ⚿823

Appellate review of the habeas court's ruling may include the evidence adduced at the habeas hearing and the record as it existed before the habeas court at the time of the hearing.

3. Habeas Corpus ⚿843

The appellate court must review a habeas court's decision granting or denying relief requested in an application for writ

of habeas corpus under an abuse of discretion standard.

4. Habeas Corpus ⚿844

An appellate court reviewing the trial court's ruling on a habeas claim must review the record evidence in the light most favorable to the trial court's ruling.

5. Habeas Corpus ⚿845

In reviewing a trial court's denial of an application for writ of habeas corpus, the appellate court must afford great deference to the habeas court's findings and conclusions, especially when the resolution involves determinations of credibility and demeanor.

6. Double Jeopardy ⚿1

The state may not put defendants in criminal cases in jeopardy twice for the same offense. U.S. Const. Amend. 5; Tex. Const. art. 1, § 14.

7. Double Jeopardy ⚿96

Double jeopardy generally does not preclude the retrial of a criminal defendant if the defendant requested the mistrial. U.S. Const. Amend. 5; Tex. Const. art. 1, § 14.

8. Double Jeopardy ⚿97
Habeas Corpus ⚿466

When a defendant moves for a mistrial and subsequently claims retrial is barred by double jeopardy, the habeas court, and all subsequent reviewing courts, must determine whether: (1) the prosecutor engaged in conduct to goad or provoke the defense into requesting a mistrial, or (2) the prosecutor deliberately engaged in the conduct at issue with the intent to avoid an acquittal. U.S. Const. Amend. 5; Tex. Const. art. 1, § 14.

9. Double Jeopardy ⚿97

A list of non-exclusive objective factors is used to assist trial and reviewing courts in assessing the prosecutor's state of mind when it engaged in misconduct that resulted in the request for and grant of mistrial, as required to bar retrial on double jeopardy grounds, including: (1) whether the misconduct was a reaction to abort a trial that was going badly for the state, or in other words, at the time the prosecutor acted, whether it reasonably appeared that the defendant would likely obtain an acquittal; (2) whether the misconduct was repeated despite admonitions from the trial court; (3) whether the prosecutor provided a reasonable, good faith exception for the conduct; (4) whether the conduct was clearly erroneous; (5) whether there was a legally or factually plausible basis for the conduct, despite its ultimate impropriety; and (6) whether the prosecutor's actions leading up to the mistrial were consistent with inadvertence, lack of judgment, or negligence, or were consistent with intentional or reckless misconduct. U.S. Const. Amend. 5; Tex. Const. art. 1, § 14.

10. Criminal Law ⚿1992

"Exculpatory evidence," for *Brady* purposes, is evidence that may justify, clear, or excuse the defendant from alleged guilt. Tex. Crim. Proc. Code Ann. art. 39.14(h).

11. Double Jeopardy ⚿97

Murder defendant failed to establish that prosecutors intended to goad him into moving for a mistrial or feared an acquittal related to disclosure of prior one-time sexual encounter between second-chair prosecutor and state's key witness, and thus, retrial was not barred by prohibition against double jeopardy; evidence did not support appearance that during the time leading up to mistrial that defendant was likely to obtain an acquittal, lead prosecutor "fire walled" second-chair prosecutor from having contact with the case after she disclosed encounter with key witness,

there was nothing in the record to indicate that lead prosecutor continued to withhold information about encounter after being ordered to disclose it by trial judge, court did not order him to disclose until after jury was sworn and state began presenting its case, and he provided good faith explanation for failure to immediately disclose, including that he did not want to hurt second-chair prosecutor's reputation. U.S. Const. Amend. 5; Tex. Const. art. 1, § 14; Tex. Crim. Proc. Code Ann. art. 39.14(h).

From the 437th Judicial District Court, Bexar County, Texas, Trial Court No. 2015CR4203, Honorable W.C. Kirkendall, Judge Presiding [1]

Lauren Scott, Nicholas A. LaHood, for The State of Texas.

Joe D. Gonzales, Mark Stevens, San Antonio, Christian David Henricksen, for Appellant.

Sitting: Marialyn Barnard, Justice, Rebeca C. Martinez, Justice, Irene Rios, Justice

OPINION

Opinion by: Marialyn Barnard, Justice

This is an appeal from the habeas court's order denying appellant Miguel Martinez's application for writ of habeas corpus. On appeal, Martinez contends the habeas court erred in denying his application because double jeopardy bars any attempt by the State to retry him for murder following the trial court's grant of a mistrial. We affirm the trial court's order.

Background

Investigation, Pre-Indictment, Indictment Phases

On January 11, 2015, San Antonio police were dispatched to a scene following a report of "possible shots fired." Upon arrival, authorities found Laura Carter sitting in the driver's seat of her vehicle, a Honda Accord. She was sitting in the front seat with her hands in her pockets and her feet crossed. She was pronounced dead at the scene. It was later determined Carter died as a result of multiple gunshots to the head.

As a result of their investigation, law enforcement officials came to believe the murder had been committed by Martinez. Ultimately, authorities arrested Martinez for Carter's murder. Law enforcement authorities continued the murder investigation after Martinez's arrest. In March 2015, law enforcement completed the "prosecution guide," which was approximately fifty pages in length. The prosecution guide is prepared in its entirety by law enforcement; no part of the guide is prepared by the District Attorney's Office. The guide generally includes initial offense reports, witness statements, discs of interviews, etc. It is used by prosecutors "to figure out the nuts and bolts of the case."

The prosecution guide was turned over to Jason Goss, first-chair prosecutor in the 437th District Court, which had been assigned to handle the case. Goss testified that around the end of the work day on March 8, 2015, he gave the prosecution guide to the second-chair prosecutor in the 437th District Court to review. According to Goss, she was to review the guide to assist him in preparation for presenting the case to the grand jury. Goss did not

1. The Honorable Lori Valenzuela is the presiding judge of the 437th District Court, Bexar County Texas. The Honorable W.C. Kirkendall, retired, was sitting by assignment. Judge Kirkendall signed the order at issue in this matter.

believe she took the guide home with her, stating, "It would be unusual for her to do that." The next morning—sometime before 9:15 a.m.—the second-chair prosecutor returned the guide to Goss, informing him that she had read the guide and did not believe she could continue on the case. When Goss queried her as to why, she advised she had a "one-night stand" or "one-time sexual encounter" three years earlier with Gregory Dalton, who was listed in the prosecution guide as a witness. The second-chair prosecutor told Goss she did not even know the man's real name, but recognized him from his photograph and nickname, Vegas. Goss asked whether she had any contact with Dalton since the initial encounter and she said, "no, it was one night."

Goss agreed and immediately removed her from the case, replacing her with the third-chair prosecutor. He instructed her to have nothing further to do with the case—specifically explaining she was not permitted to communicate with anyone about the case. She stated she understood. At her request, Goss agreed to avoid disclosing the details of her removal if possible.

Goss subsequently explained to the habeas court that he believed the second-chair prosecutor had a "conflict" that precluded her further participation in the matter. As a result of the "conflict," Goss removed her from the case, then went to the court advocate and without explaining the details, advised the advocate that the second-chair prosecutor was conflicted out of the case and there was to be no communication with her about it. Goss stated he constructed a "firewall" in the office to prevent the second-chair prosecutor from having anything to do with the case. Goss believed this action "ended" the matter and he did not think about it again. He explained he had the file the entire time and the second-chair prosecutor "didn't have anything to do with this case."

When asked what he felt the conflict was, Goss replied that he had come from a smaller county in which it seemed as if someone in the prosecutor's office always seemed to know a defendant or witness. In his former office, they would simply remove the conflicted person and wall them off from the matter. Goss admitted he would not want someone who knew a witness—like the second-chair prosecutor—questioning him or her because it might affect his or her objectivity. They might react favorably or unfavorably with the witness, and the existence of a personal relationship might have the appearance of impropriety. However, Goss specifically testified that at the time of the disclosure, he "knew that what she had told me was not—was not exculpatory, mitigating or relevant so—as far as—as far as to the facts of this case or to trying this case." Thus, he "felt like the issue had been dealt with on my level as the supervisor." Goss never spoke to the second-chair prosecutor again about the matter.

Goss, with the assistance of the third-chair prosecutor, presented the matter to the grand jury. On April 14, 2015, the grand jury indicted Martinez for the murder of Carter.

Pre-Trial Phase

In preparation for Martinez's February 7, 2017 trial, Goss and District Attorney Nicholas LaHood interviewed Gregory Dalton on January 31, 2017. During the interview, Dalton revealed additional information he had not previously disclosed to law enforcement. The revelations by Dalton prompted Goss to prepare an amended *Brady* notice in response to a motion previously filed by Martinez and granted by the trial court requesting disclosure of materials within the purview of *Brady v. Ma-*

ryland. *See* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In the amended notice, which was emailed to the defense on February 1, 2017, Goss fully disclosed the new information provided by Dalton. Goss explained at the habeas hearing that he filed the amended *Brady* notice because the information revealed by Dalton during the interview showed his willingness to participate in a sexual assault of the victim and in her subsequent murder. Goss stated this information fell within the confines of *Brady* because it could be used to impeach Dalton's credibility as a witness.

Goss did not disclose any information about the prior encounter between Dalton and the second-chair prosecutor. He explained he did not believe the "one-time sexual encounter" between the second-chair prosecutor and Dalton fell within the disclosure mandates of *Brady*. Goss maintained that position during the habeas hearing. However, Goss admitted he was sufficiently concerned to bring others from the District Attorney's Office into the loop. Goss explained that he "kind of [got] an idea of what the defensive theory might be" with regard to Dalton and his encounter with the second-chair prosecutor. Accordingly, Goss disclosed the encounter between the second-chair prosecutor and Dalton to LaHood. Goss testified at the habeas hearing that LaHood's initial reaction was the same as his—this was not mitigating, exculpatory, or impeachment evidence that needed to be disclosed to the defense.

LaHood contacted the chief of the appellate division, Enrico Valdez, that same evening. According to LaHood, Valdez advised that it did not seem "like information that needs to be disclosed," but he wanted an opportunity to research the issue and speak to Patrick Ballantyne, chief of the office's Ethical Disclosure Unit. A couple of days later—on February 2 or 3, 2017, Valdez informed LaHood that he and Ballantyne had researched the issue and believed the encounter between the second-chair prosecutor and Dalton "was not information that was required to be disclosed and that we did not have to disclose it." They suggested, however, that if Goss and LaHood wanted to take additional action with regard to the issue—"in an abundance of caution"—they might consider disclosing to the trial court in camera. LaHood could not remember if he spoke to Goss about what he learned from Valdez, but he assumed Goss was speaking to Valdez and Ballantyne too. He did not ask Goss to make an in camera disclosure to the trial court. LaHood stated he was not concerned about providing the information to Goss because "it wasn't like we thought this was a—you know, a critical point for the—for the trial."

On February 7, 2017, during pretrial motions just prior to voir dire, Goss signed a discovery acknowledgment pursuant to article 39.14(i) of the Texas Code of Criminal Procedure. Article 39.14(i) requires the State to "electronically record or otherwise document any document, item, or other information provided to the defendant" during discovery. TEX. CODE CRIM. PROC. ANN. art. 39.14(i) (West Supp. 2017). As Martinez points out, there was nothing in the disclosure about the one-time encounter between the second-chair prosecutor and Dalton, thereby establishing the State had not disclosed to the defense information regarding the encounter. Under article 39.14(i), the acknowledgment is merely a statement of what was provided by the State during discovery. As the one-time encounter had not been disclosed, it would not have been listed in the article 39.14(i) acknowledgment.

Trial Phase—Multiple In-Chambers Hearings

The parties began voir dire on the scheduled trial date—February 7, 2017. A

jury was selected, but not sworn. Proceedings were recessed and the jury left, instructed to return the next day. The next morning, before the jury was sworn, Goss filed a "Motion for Ex Parte Communication and In Camera Consideration of Potential Conflict Issue." The motion was presented to the trial court and a copy provided to Martinez's defense counsel. The trial court met in chambers with Goss. The only other person present was the court reporter, who recorded the proceedings.

Goss informed the trial court about the second-chair prosecutor's 2015 disclosure. In his conversation with the trial judge, the Honorable Lori Valenzuela, Goss used the second-chair prosecutor's name.[2] Goss described his actions—immediately removing the second-chair prosecutor and constructing a firewall "between her and the case." Goss advised the trial court that from that point forward, the second-chair prosecutor had nothing to do with the case. He stated he kept the file and no one spoke to her about the case. He assigned the task of assisting him with the case to the third-chair prosecutor. Goss told the trial court it was the third-chair prosecutor who helped him prepare for the grand jury.

Goss then described Dalton's role as a State's witness and his possible testimony. Goss then explained that the purpose of bringing the matter to the trial court's attention at this time was the possibility—raised by Ballantyne—that the defense might use the encounter between Dalton and the second-chair prosecutor to impeach Dalton. As Goss put it, the defense "could say you're testifying to this is [sic] because of the sexual relationship you had with one of the prosecutors." Goss believed the impeachment value of the encounter was "weak" given that to his knowledge the second-chair prosecutor and Dalton had not had any contact after that one encounter in 2011 or 2012. Goss testified at the habeas hearing that when the second-chair prosecutor first disclosed her encounter with Dalton, he asked her if she had any contact with him after that one night. According to Goss, she said "no, it was one night." Goss then noted that during his three-hour interview with Dalton, Dalton never mentioned the second-chair prosecutor.

Despite his belief that the information had little impeachment value, Goss advised the trial court that out of "an abundance of caution," the State wanted to make the court aware of the situation and have the court decide whether the one-time encounter should be disclosed. Goss then again expressed his belief that the information "would be of no value . . . to the defense," but disclosure could damage the second-chair prosecutor's reputation.

After Goss completed his statements, the trial court first asked whether the second-chair prosecutor "[did] the intake?" Goss told the trial court the second-chair prosecutor did not do the intake. The trial court then asked if there were any "agreements" with Dalton with regard to his testimony. Goss advised there were not. Goss explained it was understood that after Dalton came forward and his story matched the evidence—and the District Attorney's Office found it credible, he would not be charged with murder. Goss stated "there's never been a threat of a charge or an agreement not to charge." The trial court stated it did not believe that "the extent of their relationship"

2. Given that the second-chair prosecutor was assigned at the time of the disclosure to Judge Valenzuela's court, concealing her name was obviously unnecessary—Judge Valenzuela would know the prosecutors in her court.

should be disclosed at this point. However, the court pointed out that during voir dire, the attorneys discussed accomplices and the law of parties, suggesting that the defense could point the finger at Dalton "as being some kind of party to this, an accomplice to this, the getaway driver[,]" making him more of a star witness than he might otherwise be. Goss agreed, stating they talked about the law of parties during voir dire because that the defense might point to Dalton as the actual murderer given that: (1) he picked up Martinez near the murder scene; (2) a van like his was seen near the site of the murder; (3) his phone was near the scene; and (4) he had information about the murder that he could have known only if he committed the murder, was present at the murder, or was told about the murder by the perpetrator.

The trial court then stated it saw the matter as involving two discrete issues—one, whether the State should disclose the information, and two, whether the disclosure is admissible for purposes of impeachment. As to whether the State should disclose the existence of the one-time encounter, the trial court opined that "the disclosure may be necessary," but it would have to hear the testimony before deciding whether it was admissible for impeachment or any other purpose. The trial court expressed her concern for the second-chair prosecutor and her reputation, agreeing the matter had the potential to be much bigger than it was. Accordingly, the court agreed to "contemplate some remedies" to diminish potential harm to the second-chair prosecutor.

The trial judge then stated that, "My gut right now is that I would want it disclosed." Goss then asked that if he was being ordered to disclose the information to the defense, whether it should be disclosed before opening statements or just before Dalton takes the stand. The trial judge then stated:

> This is—this is not—I mean if I say disclose, you need to disclose, and you decide when you do it.
>
> But this is just my opinion for whatever it's worth ... if this is information you've had since 2014 ... [o]kay 2015 ... I wouldn't put yourself—that's my—I'm just giving you my advice ... I wouldn't wait any longer....

In response, Goss stated his concern about disclosing the information before the trial court had an opportunity to devise a remedy to reduce the effects to the reputation of the second-chair prosecutor. The trial judge responded by indicating that Goss should withhold the name of the second-chair prosecutor to give her time to consider a possible remedy. She then stated she would take "the responsibility for the delay in disclosure," advising she would "say I told you that I thought the disclosure was appropriate but to hold off so that I could make sure that I had an appropriate remedy." Judge Valenzuela subsequently explained at the habeas hearing that she meant she would take the responsibility for any delay in the disclosure of the second-chair prosecutor's name, but not any decision by Goss to delay disclosure about the encounter between Dalton and the second-chair prosecutor. The record does not show that at any time during the hearing the trial court *ordered* Goss to disclose to the defense the encounter between Dalton and the second-chair prosecutor. Rather, the trial judge's strongest statement during the entire ex parte hearing was "I mean if I say disclose, you need to disclose[.]" In fact, at the habeas hearing, Judge Valenzuela admitted she did not order Goss to do anything at that time, agreeing that she left it up to Goss to do whatever he wanted to do at that point.

Despite the absence of an actual order by the trial court, after the ex parte hearing, Goss disclosed the "one-time sexual encounter" to the defense, withholding the name and position of the prosecutor.[3] He also did not disclose that the prosecutor in question had reviewed the prosecution guide prior to indictment. In essence, he told one of Martinez's defense attorneys, Christian Henricksen, that in early 2015, a female prosecutor had informed him that she had a "one-night stand" with Dalton several years prior to the murder. Goss further advised that he would provide the name of the prosecutor once the trial court found a "remedy" with regard to protection of the prosecutor. Henricksen testified at the habeas hearing he was "not then overly concerned" by the disclosure. Henricksen passed the information to his co-counsel, Joe Gonzales, who testified he was focused on the trial at that point.

After the disclosure, the jurors were sworn and trial began. Goss made an opening statement during which, among other things, he described the testimony he expected Dalton would provide; the defense reserved its opening statement. The State then called its first witness, L.C., who was fourteen at the time of the murder. L.C. essentially testified that on the evening of the murder, he was inside when he heard his dog barking. He went outside to feed the dog and saw a Honda Accord pull up and stop under a street light in front of the empty house next door. L.C. testified he saw a Hispanic male in a dark hoodie get out of the passenger side of the car. The male was "messing with his pockets" as if he was removing something. L.C. went back inside and just a couple of minutes later heard "six gunshots go off." L.C.'s grandmother called 911 as he looked outside. After police arrived, L.C. told them he had seen a white Dodge van driving away from the Honda Accord a few minutes after the shooting. After the State's direct examination of the first witness, court recessed for lunch.

After lunch, the trial continued. At the habeas hearing, Judge Valenzuela testified that at some point that afternoon, an off-the-record conference was held in her chambers. Present at the conference were the judge, Goss, LaHood, and both defense attorneys. During the conference, according to Judge Valenzuela, she asked Goss if he had "told them everything." When Goss advised that he had not, Judge Valenzuela, for the first time, ordered Goss "[t]ell them now everything." [sic] Goss immediately disclosed the remaining details to the defense—the name of the prosecutor who had the encounter with Dalton, her position as second-chair prosecutor in the 437th District Court, and that she had reviewed the prosecution guide prior to indictment, which prompted her disclosure to Goss. Goss's remembrance of events was somewhat different. He testified that at this conference the trial court stated she was aware that Goss had told the defense "some parts of what we talked about," but had not disclosed the name at the judge's direction. She then stated she had devised a remedy and would like for Goss to now disclose the name of the prosecutor. Goss then made the disclosure.

3. Goss's decision to withhold the position of the prosecutor in addition to her name was logical. Martinez's defense attorneys are longtime Bexar County advocates. If Goss had advised them that "the second-chair prosecutor in the 437th District Court" disclosed to him in 2015 that she had an encounter with Dalton, the defense attorneys would surely have known—or could have easily discovered—the name of the prosecutor to whom Goss was referring, thereby negating any effect of withholding her name as mandated by Judge Valenzuela.

According to Henricksen, he was upset because the details made the encounter between the prosecutor and Dalton "a completely different thing." The defense was angry, believing Goss was "wrong" to withhold the information until after the jury was sworn and evidence was presented. Nevertheless, after the conference, the parties went back to the courtroom and trial resumed. The State called two additional witnesses, L.C.'s grandmother and the first responding officer.

L.C.'s grandmother confirmed L.C.'s statements about the barking dog and subsequent gunshots. She agreed that as her grandson looked outside, she called 911. The first responding officer from the San Antonio Police Department, Michael Wehe, testified that when he arrived he saw the Honda Accord with its passenger door open—the vehicle was running and the lights were on. Officer Wehe and his cover officer approached the vehicle and discovered a woman in the driver's seat. Officer Wehe testified she was slumped "over to her side, hands in her pockets, not moving." He noted her legs were crossed, making it appear she was relaxed before she was shot. The officer contacted dispatch, advising there was a "female down." Officer Wehe believed she had been shot, but could not determine how many times.

At the conclusion of Officer Wehe's testimony, court was recessed for the evening. As to the first day of trial, LaHood testified at the habeas hearing that he believed it was going well for the State. Goss echoed those feelings.

That evening, Henricksen sent a text to the trial court, Goss, and LaHood. Therein, he expressed his concerns over the disclosure made by Goss earlier that day. He advised the defense planned to move for a one-day continuance to give the attorneys time to consider the matter. The State agreed to the continuance and the trial court indicated its intent to grant it. On the morning of February 9, 2017, as previously indicated, the defense filed a motion for continuance. In that motion, the defense stated a continuance was necessary because after the jury was seated, the State disclosed "critical and sensitive information that is material to the defensive theory in this case." The State did not oppose the motion. The trial court granted the defense a continuance to February 14, 2017. Immediately thereafter, the attorneys and the trial court held an in-chambers, on-the-record, conference.

During this conference, defense counsel was permitted to express their concerns about the recent disclosure. They expressed the difficulty of the situation and the need to investigate the matter and speak to an appellate attorney.

Judge Valenzuela noted that once the second-chair prosecutor's name had been disclosed to the defense, she had instructed the defense and the State that she "did not want the person named in the disclosure to be disclosed beyond the people that needed to know[,]" i.e., an investigator for the defense. She also noted she told the prosecutors she did not want them telling the second-chair prosecutor that she was likely to be questioned about her encounter with Dalton. Rather, she instructed them to tell Ballantyne to tell the second-chair prosecutor "to anticipate that there would be some questions asked of her." The judge noted she "shouldn't be in this position" and that it was not her responsibility or problem. However, she advised that "everybody needs to use their best discretion," but she would not make decisions that could "hurt the defendant." To that end, she stated she was lifting "the gag order" that she had imposed the day before, stating that if the defense felt like disclosure of the prosecutor's name was necessary, that would be their decision.

She emphasized that the second-chair prosecutor did nothing wrong, disclosing her connection to Dalton "the moment she knew this information[.]"

The trial court also noted—as it had during the ex parte meeting with Goss—that although the encounter was discoverable, its ultimate admissibility was a different issue. Judge Valenzuela opined that even if the second-chair prosecutor had no influence in the case, the defense could assert a defensive theory in which Dalton was the actual perpetrator, and his encounter with the prosecutor could be fodder for impeachment based on bias or motive for testifying.

Defense attorney Gonzales advised that he considered the second-chair prosecutor "a friend and colleague" and would be respectful with how the defense proceeded. However, he could make no promises until the matter was fully investigated—the timing and chronology of events, whether the prosecutor had any part in the intake of the file, or had any influence on whether or not Dalton "was ever considered for indictment as a party to an offense." Gonzales asserted this would directly impact the defense's theory of the case, asserting that Dalton "smells like a codefendant." The defense attorneys explained their concern was not really about the second-chair prosecutor, but Dalton's potential feelings toward her that might have prompted him to "do what [he] can to help" the State.

Goss had previously denied the second-chair prosecutor had any part in the intake or any influence after she reviewed the prosecution guide and disclosed her encounter with Dalton. He subsequently reiterated this during the conference and then later at the habeas hearing. Goss further stated "for the record, so the Court knows, there was never a murder case that came in on Gregory Dalton." Gonzales stated the defense was not questioning the second-chair prosecutor's actions; rather, it was questioning Goss's decision not to disclose the encounter "in the timely fashion."

Goss stated, as he had before, that it was only after Dalton expounded on his previous statement the week before trial that he began to see a possible defensive theory based on impeachment due to the encounter between Dalton and the prosecutor. When he did, he took action, discussing possible disclosure with his colleagues and then requesting the ex parte hearing with the trial court. Goss advised that even the appellate chief—Valdez—and the disclosure integrity chief—Ballantyne—did not believe disclosure was necessary. The ex parte meeting with Judge Valenzuela was merely a suggestion in the event Goss felt it was necessary "out of an abundance of caution."

Goss also explained the intake process to the defense, noting as he had before that the second-chair prosecutor played no part in it. Rather, her only role was her review of the prosecution guide during which she discovered Dalton was a witness. After that, she was "firewalled" from the matter. Goss also stated it was and always had been the State's position that the defense had "to do everything [it] can for [the] client." To that end, Goss reiterated the State would provide any records concerning the second-chair prosecutor's assignments during her tenure in the office, and make anyone available for an interview, as well as for testifying. Goss again stated it was simply his desire "not to impugn [the prosecutor's] reputation unneed—needlessly."

Toward the end of the hearing, the parties discussed defense interviews with Dalton and the second-chair prosecutor, appointment of an investigator, and appointment of appellate counsel to assist the defense. The trial court agreed to appoint both an investigator and an appel-

late attorney. Ultimately, the trial court appointed James McKay as investigator for the defense and Mark Stevens as appellate counsel for the defense.

Later that same day, Goss requested that everyone meet in the trial court's chambers. The parties indicated no court reporter was present because the discussion was supposed to revolve around scheduling. The scope of the meeting far exceeded mere scheduling. Moreover, those who were present later provided conflicting accounts of what occurred. The accounts of what happened during this off-the-record meeting played out at the habeas hearing.

Henricksen and Gonzales testified the defense attorneys and trial court arrived first. Both testified LaHood walked in "aggressively," and "[h]e appeared angry." They discussed scheduling, but after that LaHood began talking about the defense's prior motion for continuance. Henricksen and Gonzales stated LaHood had been upset and confronted the defense attorneys that morning about the way they had filed the motion. Henricksen said he believed they had been "innocuous" with regard to the wording of the motion, but LaHood was still upset. Henricksen had considered the matter closed until LaHood raised it at the "scheduling meeting." According to Henricksen, LaHood called it "a shit show," and was unhappy that in the motion the defense had mentioned "a late disclosure of evidence." Henricksen claimed LaHood was angry because the media had picked up on the language and was asking Goss and LaHood about it. LaHood, believing it was an uncontested motion, questioned the necessity of including the language.

Henricksen then testified that after they finished talking about the motion for continuance, LaHood began to press Gonzales about their intentions with regard to the disclosure. According to Henricksen, it was at this point that the issue of a mistrial came up, raised by LaHood. Henricksen stated LaHood was still angry and advised that if the defense wanted a mistrial, the State would agree, stating "we will pick a better jury, we will be better prepared next time." Gonzales declined the offered mistrial, advising they still needed to look into the matter. Gonzales stated the defense was not worried about the second-chair prosecutor's actions, but "about Jason Goss and him sitting on this for two years." Henricksen said his co-counsel then stated it might come to a point where the defense might "have to file something about prosecutorial misconduct." Henricksen and Gonzales testified that in response to this statement, LaHood "lost it" and "went ballistic at that point." According to Henricksen, LaHood then "started screaming" at Gonzales, "I will destroy your practice . . . neither of you will get hired on another case in Bexar County[.]" Gonzales also testified about similar threats by LaHood. Henricksen claimed he was worried "this was going to get violent." Henricksen said this threat from the District Attorney shook him up. Both Henricksen and Gonzales stated they viewed LaHood's comments as a threat to their livelihood and believed he had the power and ability to make good on his threat. Gonzales said LaHood's threats had a "chilling effect on him" and his efforts in defending Martinez. Goss testified, however, that this was not Gonzales's only statement about the confrontation. Rather, he expounded on his "valuable friendship" with LaHood, stating he felt their disagreement may have hurt their friendship. Goss believed this is why Gonzales stated he could not sleep the night after the incident. Henricksen admitted that the next day Goss advised them LaHood later commented that "he didn't want to lose Joe's friendship over it." Judge Valenzuela

confirmed that Goss relayed this statement by LaHood.

LaHood's memory of what occurred at the in-chambers meeting was different, as was Goss's. LaHood testified at the habeas hearing that the contention he was mad the media was calling him after the motion for continuance was filed was "a gross mischaracterization." LaHood testified he fields media questions every day and does not "get mad over that." According to LaHood he had heard from Goss that Goss felt the defense put on a show for the media at the hearing on the motion for continuance. LaHood admitted he called it a "shit show."

With regard to raising the mistrial issue, LaHood testified he was trying to determine exactly what Gonzales wanted, pointing out that the State had agreed to a continuance, offered the defense "every resource from the DA's Office," access to Dalton and the second-chair prosecutor, as well as assistance from any number of investigators. Goss said the matter arose when Gonzales raised concerns about the length of time the jury would be out while the defense conducted an investigation into the encounter between Dalton and the prosecutor. In an effort to determine what Gonzales wanted, LaHood said he asked if Gonzales wanted a mistrial, describing the question as "more of a diagnostic." He waited for a response and when none was forthcoming, he stated, "Judge, give him a mistrial so we can pick a new jury." LaHood denied wanting a mistrial, believing that they had picked a "good jury" and was "happy with our jury." According to LaHood, the State had a strong case and intended to try it to a verdict. Goss echoed LaHood's impression about the trial, stating he felt it "was going very, very well[,]" exactly as he had prepared and planned.

LaHood claimed Gonzales advised the situation was not that simple, stating that if there was going to be a mistrial, he wanted further prosecution barred. LaHood said he scoffed at the notion. LaHood testified that in response, Gonzales threatened to file a motion for prosecutorial misconduct and call a press conference. Goss confirmed LaHood's testimony concerning Gonzales's threat to go to the media, testifying that when he made the threat, Gonzales's "voice was raised, his face was red and he was pointing in my face saying that he is going to go public, and accused me of prosecutorial misconduct." According to Goss, Gonzales was "the first person to scream" and "the first person to raise his voice and to be aggressive in my direction." Goss testified Gonzales's threat was in stark contrast to his previous statement that he believed Goss had not intended to do anything wrong. Gonzales admitted saying he had a problem with Goss and pointed at him. He also admitted the defense might have to allege prosecutorial misconduct, but denied he threatened to go to the media. Henricksen and Judge Valenzuela echoed Gonzales's testimony regarding the alleged threat to go to the press.

LaHood said he then suggested that Gonzales consult the attorney disciplinary rules before taking such action. According to LaHood, at that point appellate attorney Mark Stevens advised that LaHood should not be upset with Gonzales because it was actually Stevens who suggested the notion of prosecutorial misconduct. LaHood admitted that at this point—after Gonzales's threats—he said that if a mistrial was granted the State would pick a better jury and be more prepared for the next one. LaHood also denied threatening the practices of the defense attorneys, but stated that when Gonzales threatened to call a press conference and allege prosecutorial misconduct, he advised that "in the process of defending this office's honor, I will ex-

pose you as the unethical lawyer that you are, and let's see what happens to your law practice." Goss confirmed the gist of this statement. LaHood further stated that as District Attorney, it was his responsibility to defend the integrity and honor of his office.

Judge Valenzuela was subpoenaed to testify at the habeas hearing. With regard to the off-record scheduling hearing at which the issue of a mistrial first arose, she testified LaHood "expressed some concern about the motion for continuance." The judge testified LaHood "didn't seem happy about ... the motion for continuance being handled in open court where the media was present." She stated LaHood called it a "shit storm." Judge Valenzuela agreed LaHood was the first to mention a mistrial, stating he was willing "to get a new jury to start all over again, the evidence was what it was." She also agreed Gonzales said "he would possibly have to allege at some point prosecutorial misconduct." The judge testified that in response to this statement, LaHood said "he was going to shut down his practice," but she also recalled LaHood advising Gonzales that he had no right to file a motion in bad faith. She did not feel LaHood's response was warranted. Judge Valenzuela felt LaHood was "mad" and she was concerned about the escalation in volume and tone, fearing a possibility "that somebody would get hurt physically." However, there was never any physical violence, and afterward, the attorneys retired to another room to discuss further proceedings in the matter.

As a result of discussions between the attorneys, the defense was provided an opportunity to interview the second-chair prosecutor and Dalton. Henricksen testified that during the defense telephone interview of Dalton, the information provided "pretty much lined up with the initial disclosure that [Goss] had made to the Judge in chambers that—in terms of where the relationship happened, how it happened[.]" Dalton confirmed the one-time sexual encounter, but could not recall the name of the second-chair prosecutor and could only provide a basic description of her. Henricksen testified Dalton told the defense he had no contact with the second-chair prosecutor since their "one-time encounter" and he did not even recall her position in the District Attorney's Office. Both the second-chair prosecutor and Dalton denied having any contact regarding the case.

During the defense interview of the second-chair prosecutor, she advised that she recognized Dalton when she reviewed the prosecution guide based on his photo and nickname, "Vegas." She confirmed—as Goss had previously told the defense—she had no contact with Dalton since their encounter and had no contact with the case since her disclosure to Goss. Under questioning from the habeas court judge, Henricksen admitted the defense never uncovered any evidence to indicate the second-chair prosecutor directed the investigation by police or had any part in the charging decision. But Henricksen opined that it was his belief the prosecutor was "holding back on some things as far as admitting to the actual relationship." He also claimed there were discrepancies between what she allegedly told Goss and what she stated in the interview with regard to her encounter with Dalton.

According to Gonzales, after the interview, he contacted Jay Norton, Chief of the District Attorney's Conviction Integrity Unit. Gonzales wanted to speak with Norton to see if they could devise a solution to avoid a mistrial. A possible plea bargain was suggested, but Norton advised he had no authority to negotiate a plea agreement. Then, the issue of a mistrial arose. At the habeas hearing, the

testimony was conflicting when it came to who said what during this meeting. According to Gonzales, he told Norton LaHood suggested a mistrial, but neither he nor Henricksen agreed. Norton's testimony was in opposition. Norton testified it was Gonzales and Henricksen that wanted a mistrial, but Goss and LaHood were opposed to it. At Gonzales's request, Norton discussed the concept of a mistrial with LaHood the next day. Norton stated LaHood was initially opposed, but after a while, he agreed.

Mistrial and Habeas Phase

On February 16, 2017, just nine days after voir dire, and on the heels of the meeting between the defense and Norton, the defense moved for a mistrial in open court. The defense attorneys claimed they did not want a mistrial and the motion was made reluctantly based on the untimely disclosure of information that might constitute impeachment evidence under *Brady*. Although the State agreed to a mistrial, it denied any wrongdoing or that the defense was forced into requesting a mistrial based on any action by the State. The trial court granted the motion for mistrial and reset the trial for May 2017. Thereafter, Martinez filed his pretrial application for writ of habeas corpus. In his application, Martinez alleged further prosecution based on the murder indictment was barred based on double jeopardy.

A hearing on Martinez's habeas application was held in April 2017. The trial court denied the application, entering written findings of fact and conclusions of law in support of its decision. Thereafter, Martinez perfected this appeal.

Analysis

As noted above, Martinez contends in this appeal that the habeas court erred in denying his application for writ of habeas corpus. He argues retrial is barred by the Double Jeopardy Clause of the Fifth and Fourteenth Amendments [4] to the United States Constitution because: (1) the State goaded him into moving for a mistrial; (2) the State intentionally engaged in conduct—failure to disclose exculpatory evidence—with the intent to avoid an acquittal; and (3) the State intentionally failed to disclose exculpatory evidence with the intent to protect a colleague from personal embarrassment.[5]

4. Martinez does not challenge the habeas court's ruling based on the double jeopardy clause found within the Texas Constitution. *See* TEX. CONST. art. I, § 14. However, the language in both the state and federal double jeopardy clauses is markedly similar, and as numerous courts have held, the double jeopardy provision in the Texas Constitution provides substantially identical protection to that provided by the United States Constitution. *Compare* U.S. Const. amend. V *with* TEX. CONST. art. I, § 14; *e.g.*, *State v. Blackshere*, 344 S.W.3d 400, 405 n.8 (Tex. Crim. App. 2011); *Bien v. State*, 530 S.W.3d 177, 180 (Tex. App.—Eastland 2016), *aff'd*, Nos. PD-0365 & PD 0366, 550 S.W.3d 180, 2018 WL 2715380 (Tex. Crim. App. June 6, 2018); *Ex parte Hill*, 464 S.W.3d 444, 446 (Tex. App.—Dallas 2015, pet. ref'd); *State v. Almendarez*, 301 S.W.3d 886, 889 n.8 (Tex. App.—Corpus Christi 2009, no pet.). Thus, any analysis under the Texas Constitution would be the same.

5. Martinez has cited no specific authority, nor have we discovered any, holding that failure "to disclose exculpatory evidence with the specific intent to protect a colleague from personal embarrassment" is an independent ground for challenging a mistrial based on double jeopardy under *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) or *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). Accordingly, we will not consider this as a separate issue, but shall review the allegations within this issue as part of our review of Martinez's other complaints, i.e., whether the State's conduct in this matter was undertaken with the intent to goad Martinez into moving for a mistrial or to avoid the possibility of an acquittal.

Standard and Scope of Review

[1, 2] It is the burden of the habeas applicant to prove his allegations by a preponderance of the evidence. *Ex parte Coleman*, 350 S.W.3d 155, 160 (Tex. App.—San Antonio 2011, no pet.) (citing *Ex parte Chandler*, 182 S.W.3d 350, 353 n.2 (Tex. Crim. App. 2005)); *State v. Webb*, 244 S.W.3d 543, 547 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (same). The applicant must also provide the court with a sufficient record to prove his allegations. *Coleman*, 350 S.W.3d at 160. Our review of the habeas court's ruling may include the evidence adduced at the habeas hearing and the record as it existed before the habeas court at the time of the hearing. *Id.*

[3–5] We must review a habeas court's decision granting or denying relief requested in an application for writ of habeas corpus under an abuse of discretion standard. *Ex parte Baldez*, 510 S.W.3d 477, 478 (Tex. App.—San Antonio 2014, no pet.) (citing *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *Ex parte Cummins*, 169 S.W.3d 752, 755 (Tex. App.—Fort Worth, 2005, no pet.)); *see Ex parte Peralta*, 87 S.W.3d 642, 645 (Tex. App.—San Antonio 2002, no pet.) (holding abuse of discretion standard applies with respect to habeas court's ruling on habeas corpus petition based on double jeopardy). Notably, in applying this standard, i.e., we must "review the record evidence in the light most favorable to the trial court's ruling[.]" *Kniatt*, 206 S.W.3d at 664; *Ex parte Uribe*, 516 S.W.3d 658, 665 (Tex. App.—Fort Worth 2017, pet. ref'd). Moreover, we must afford great deference to the habeas court's findings and conclusions, especially when, as here, they involve determinations of credibility and demeanor. *See Ex parte Perusquia*, 336 S.W.3d 270, 274–75 (Tex. App.—San Antonio 2010, pet. ref'd) (citing *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds*, *Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007)); *Uribe*, 516 S.W.3d at 665. The mere fact that we might decide the matter differently is insufficient to constitute an abuse of discretion; rather, to overturn the habeas court's ruling on a petition for writ of habeas corpus, we must find the ruling was outside the zone of reasonable disagreement. *Manning v. State*, 114 S.W.3d 922, 926 (Tex. Crim. App. 2003); *Uribe*, 516 S.W.3d at 665.

Applicable Law

[6, 7] As a general rule, the State may not put defendants in criminal cases in jeopardy twice for the same offense. *Pierson v. State*, 426 S.W.3d 763, 769 (Tex. Crim. App. 2014); *see* U.S. CONST. amends. V, XIV; *see also* TEX. CONST. art. I, § 14. There are, however, exceptions to the general rule and such exceptions endure because there are situations in which a defendant's right to be tried before a particular tribunal should be subordinated "to the public interest in affording the prosecutor one full and fair opportunity to present [the State's] evidence to an impartial jury." *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). As is applicable here, double jeopardy generally does not preclude the retrial of a criminal defendant if the defendant requested the mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). There is however, a "narrow exception" to this general rule, the parameters of which were set out in *Kennedy*. *Id.* at 673–79, 102 S.Ct. 2083.

Prior to *Kennedy*, numerous Supreme Court cases indicated "that even where the defendant moves for a mistrial, there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial."

Id. at 673, 102 S.Ct. 2083 (citing *United States v. DiFrancesco*, 449 U.S. 117, 130, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *United States v. Tateo*, 377 U.S. 463, 468 n.3, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964)). In these earlier cases, the exception was described as applying to instances when a prosecutor intended to provoke a mistrial, but further suggested it also applied when there was "bad faith conduct" or "harassment" by the prosecutor. *Id.* at 674, 102 S.Ct. 2083 (quoting *Dinitz*, 424 U.S. at 611, 96 S.Ct. 1075). The *Kennedy* court rejected these latter notions, stating they offered "virtually no standards for their application" particularly given that every act by a rational prosecutor during a trial is designed to "prejudice" a defendant in order to secure a finding of guilt. *Id.* Thus, the Court held "prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 675-76, 102 S.Ct. 2083. Accordingly, the exception applies "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." Then and only then may a defendant assert double jeopardy in order to bar a retrial "after having succeeded in aborting the first on his own motion." *Id.* at 676, 102 S.Ct. 2083.

The Texas Court of Criminal Appeals adopted the *Kennedy* standard in *Ex parte Lewis*, rejecting prior precedent that held the double jeopardy clause of the Texas Constitution barred retrial if the prosecutor acted recklessly. 219 S.W.3d at 337, 371 (overruling *Ex parte Bauder*, 974 S.W.2d 729 (Tex. Crim. App. 1998)). Thus, under *Lewis*, a retrial is barred if a prosecutor engages in conduct with the intent to goad or provoke the defense into requesting a mistrial. *Id.* at 336. After *Lewis*, but in the same term of court, the court of criminal appeals was called upon to discuss the narrow *Kennedy* exception in the context of a prosecutor's failure to disclose exculpatory *Brady* material. *See Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007).

In *Masonheimer*, the defendant was charged with murder. *Id.* at 495. The defendant's first two trials ended in mistrials at the defendant's request, "provoked by the State's intentional failure to disclose exculpatory evidence with the specific intent to avoid an acquittal." [6] *Id.* Prior to his third trial, the defendant filed a pretrial application for writ of habeas corpus, which the trial court granted. *Id.* at 503, 505. The court of appeals reversed. *Id.* at 505. Upon review, the Texas Court of Criminal Appeals reviewed *Kennedy* and noted the Court had cited with approval several cases in which retrial had been barred when the prosecution deliberately engaged in conduct with the specific intent to avoid an acquittal. *Id.* at 507–08. Accordingly, after viewing the evidence in the light most favorable to the trial court's ruling, the Texas Court of Criminal Appeals held the record supported a finding that the defendant's two prior motions for mistrial were "necessitated" by the State's deliberate failure to disclose *Brady* material with the specific intent to avoid the possibility of an acquittal. *Id.* In sum, the court concluded that under *Kennedy*, such

6. Unlike this case, the defense, the State, the trial court, and the court of appeals in *Masonheimer* agreed the State failed to disclose exculpatory *Brady* material. *Masonheimer,* 220 S.W.3d at 494 n.1.

deliberate conduct, accompanied by specific intent to avoid the possibility of an acquittal, barred any retrial. *Id.*

[8–10] Thus, in Texas, when a defendant moves for a mistrial and subsequently claims retrial is barred by double jeopardy, the habeas court, and all subsequent reviewing courts, must determine whether: (1) the prosecutor engaged in conduct to goad or provoke the defense into requesting a mistrial; or (2) the prosecutor deliberately engaged in the conduct at issue with the intent to avoid an acquittal. *Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160. As applied to this case, the issue is whether, viewing the evidence in the light most favorable to the habeas court's ruling, the habeas court abused its discretion in concluding Martinez failed to prove by a preponderance of the evidence that the prosecutors engaged in conduct—withholding of potential impeachment evidence under *Brady* or Article 39.14(h)—with the intent to goad or provoke the defense into moving for a mistrial after jeopardy attached or to avoid a possible acquittal.[7] *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160. The Texas Court of Criminal Appeals set out non-exclusive factors in *Wheeler* to assist trial and appellate courts in determining whether the prosecutor had the requisite intent so as to bar any retrial based on double jeopardy: (1) Did it reasonably appear, at the time the prosecutor acted, that the defendant would likely obtain an acquittal?; (2) Was the alleged misconduct repeated after admonitions from the trial court?; (3) Did the prosecutor provide a "good faith" explanation for his conduct?; (4) Was the conduct "clearly erroneous"?; (5) Was there a plausible basis—factually or legally—for the conduct, despite any ultimate impropriety?; and (6) Were the prosecutor's actions leading up to the mistrial consistent with inadvertence, negligence, or lack of judgment, or were they consistent with intentional misconduct? 203 S.W.3d at 323–24.[8]

Application

[11] In determining whether the habeas court abused its discretion in denying Martinez's application, we consider the evidence in the light most favorable to the court denial using the *Wheeler* factors. We consider each factor in turn.

1. Did it Reasonably Appear at the Time of Prosecutors' Actions or Inactions Prior to the Mistrial that Martinez Would Likely Obtain an Acquittal?

By the time Goss had fully disclosed the details of the encounter between the second-chair prosecutor and Dalton, the parties had completed voir dire, the State had

7. *Brady* material includes evidence favorable to the defense, i.e., material, exculpatory evidence and impeachment evidence. *Pena v. State*, 353 S.W.3d 797, 811–12 (Tex. Crim. App. 2011). Exculpatory evidence is evidence that may justify, clear, or excuse the defendant. *Id.* Impeachment evidence is evidence that "disputes, disparages, denies, or contradicts other evidence." *Id.* However, in addressing the habeas petition in this case, the habeas court should not have concerned itself with the propriety of the trial court's *Brady* determination. *See Coleman*, 350 S.W.3d at 160. The granting of the mistrial cured any due process violation based upon *Brady*. *Id.* Thus, in this case, the habeas court's findings and conclusions relating to the nature and propriety of disclosure of the alleged *Brady* material are irrelevant. *See id.*

8. Courts have modified the *Wheeler* factors following the disavowment of *Bauder* by the court of criminal appeals in *Lewis* to exclude an original sixth factor—reckless misconduct by the prosecutor. *See, e.g.*, *State v. Yetman*, 516 S.W.3d 33, 36–37 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Ex parte Roberson*, 455 S.W.3d 257, 260 n.1 (Tex. App.—Fort Worth 2015, pet. ref'd).

presented its opening statement, and the State had presented and the defense had cross-examined three witnesses. At this point, Goss had, in his opening statement, advised the jury that he expected the evidence to show that Carter was purchasing heroin from Martinez, and on the night of her murder, Carter met Martinez for that purpose. Her cell phone records would show she received a call, shortly before her murder, from a TracFone. That phone was subsequently determined to have called Gregory Dalton just after the murder. Goss told jurors he expected Dalton would testify that:

- He drove a white van with decals;
- He knows Martinez;
- He picked up Martinez near the location of the murder, but he was unaware of the murder;
- He called Martinez the night of the murder when he was unable to locate him;
- Martinez paid him $400 or $500 for picking him up;
- Martinez told him he shot the girl featured in a news story;
- Martinez said he asked to borrow the victim's cell phone, the victim gave him her phone, he stepped out of her vehicle, and then shot her five times in the right side of the head.

According to the State, other evidence would confirm that a TracFone that had called Carter on the night of the murder called Dalton around the time Dalton stated Martinez called and asked Dalton to pick him up. In addition, the evidence would show Carter was shot five times in the right side of the head, just as Dalton was told by Martinez. Moreover, Carter's cell phone was missing, corroborating Dalton's claim that Martinez said he took her cell phone.

Also, L.C., the State's first witness, testified he saw a Honda Accord pull up and stop under a street light in front of the empty house next door. L.C. testified he saw a Hispanic male in a dark hoodie get out of the passenger side of the car. The male was "messing with his pockets" as if he was removing something. Just a couple of minutes later, L.C. heard multiple gunshots. L.C. testified he saw a white van—a van that matched the description of the one driven by Dalton—driving away from the Honda Accord a few minutes after the shooting. L.C.'s grandmother testified she also heard gunshots and called 911.

Officer Wehe, the first responding officer testified that when he arrived he saw the Honda Accord with its passenger door open. The victim—later identified as Carter—was dead in the driver's seat. Her feet were crossed and her hands were in her pockets, which according to the officer made it appear she was relaxed before she was shot. Officer Wehe believed she had been shot, but could not determine how many times.

Goss and LaHood testified at the habeas hearing that they believed the trial was going well. Although LaHood was the first person to mention a mistrial, he testified this was only in an attempt to determine what the defense wanted with regard to remedying the disclosure about the encounter between the second-chair prosecutor and Dalton. According to the defense, LaHood stated the State would agree to a mistrial and would "pick a better jury and be more prepared for trial" next time. However, LaHood specifically denied wanting a mistrial, stating his belief that he and Goss had picked a "good jury." He stated he was "happy with our jury" and the State intended to try the case to a verdict. Goss corroborated LaHood's statements about the status of the trial just prior to the mistrial, stating he felt the

prosecution of Martinez "was going very, very well[,]" just as he had prepared and planned.

Viewing the evidence in the light most favorable to the habeas court's ruling, *see Kniatt*, 206 S.W.3d at 664, we hold it does not support the appearance that during the time leading up to the mistrial that Martinez was likely to obtain an acquittal. *See Wheeler*, 203 S.W.3d at 324. Based on its opening statement, the State expected the evidence to show the same TracFone made telephone calls to Carter and Dalton around the time of the murder. Dalton would testify he received a call from Martinez near the time of the murder, he picked Martinez up near the site of the murder, and Martinez confessed to the murder—supplying Dalton with details only the perpetrator would know. The State believed Dalton's testimony would be confirmed by cell phone evidence, forensic evidence, and other witnesses. Both prosecutors testified at the habeas hearing that they felt they had a good jury and the case was going well. The habeas court, in its discretion, could have found that LaHood's decision to raise the specter of a mistrial was done for the reason he stated—to feel out the defense in an effort to "diagnose" what it wanted following the disclosure.

Accordingly, viewing the evidence in the light most favorable to the habeas court's ruling, the habeas court could have determined—as do we—that it did not reasonably appear in the time leading up to the mistrial that Martinez was likely to obtain an acquittal. *See id.* The evidence pertinent to the first *Wheeler* factor supports the habeas court's ruling. *See id.*

2. Did Goss Repeatedly Fail to Disclose All Information Relating to the Encounter Between the Second-Chair Prosecutor and Dalton After Admonitions from the Trial Court?

Despite Goss's apparent concerns after his full interview with Dalton, the evidence shows Valdez—chief of the appellate section—and Ballantyne—chief of the ethical disclosure unit—did not believe disclosure was necessary. However, they *suggested* Goss could, out of an abundance of caution, disclose the information about the encounter between the second-chair prosecutor and Dalton to the trial court. According to Goss, after speaking to Valdez and Ballantyne, the State requested an ex parte, in camera hearing with the trial court before the jury was sworn. During that hearing, Goss made a full disclosure to the trial court. Thereafter, the trial court stated it did not believe "the extent of their relationship" between the second-chair prosecutor and Dalton required immediate disclosure. The trial court also opined that "the disclosure may be necessary," but it might not be admissible. The trial court expressed its belief that "it would be in poor taste just to throw it out there," and agreed to consider remedies that might minimize any harm to the second-chair prosecutor.

The trial judge stated her "gut" told her she "would want it disclosed," when Goss asked if she was ordering him to disclose the information to the defense. However, Judge Valenzuela then stated:

> This is—this is not—I mean if I say disclose, you need to disclose, and you decide when you do it.
>
> But this is just my opinion for whatever it's worth ... if this is information you've had since 2014 ... [o]kay 2015 ... I wouldn't put yourself—that's my—I'm just giving you my advice ... I wouldn't wait any longer....

Moreover, Judge Valenzuela advised Goss to withhold the name of the second-chair prosecutor while she considered potential remedies, stating she would take "the responsibility for the delay in disclosure."

The trial judge told Goss, "say I told you that I thought the disclosure was appropriate but to hold off so that I could make sure that I had an appropriate remedy."

Thus, the record does not show that at any time during the ex parte hearing that Goss was *ordered* to disclose to the defense the encounter between Dalton and the second-chair prosecutor. Judge Valenzuela's strongest statement during the entire ex parte hearing was "I mean if I say disclose, you need to disclose[.]" Moreover, at the habeas hearing Judge Valenzuela testified she did not order Goss to do anything at that time, agreeing she left it up to Goss. Viewing the evidence in the light most favorable to the habeas court's ruling, we hold this does not constitute an *order* to disclose. *See Kniatt*, 206 S.W.3d at 664.

Even though he was not ordered to disclose the information—and was, in fact, advised to withhold certain information—immediately after the ex parte hearing and before the jury was sworn, Goss disclosed the "one-time sexual encounter" to the defense, withholding the name and position of the prosecutor. He also failed to disclose that she had reviewed the prosecution guide. However, as previously noted, if Goss had disclosed the position of the prosecutor or that she had reviewed the guide, he would have, in essence, violated Judge Valenzuela's admonishment not to disclose her name. To suggest that disclosing her position or her review of the guide would not have revealed her identity is farcical. The defense attorneys had worked in the courthouse for years and it would have taken no time at all for them to discover which female prosecutor in the 437th District Court had suddenly been removed from the Martinez case. And, who but a prosecutor in the prosecuting court would review the prosecution guide when it was first provided to the District Attorney's Office? Thus, the evidence shows Goss took the trial court's "advice" and disclosed the encounter between a yet-to-be-named female prosecutor and Dalton, withholding her name and any additional information that might have revealed her name, as instructed by the court.

The record shows it was only after the jury was sworn and the State had begun presenting its case that Goss was ordered to make a full disclosure to Martinez's defense team. The evidence of how this occurred was conflicting. According to Judge Valenzuela, during an "off-the-record" conference in chambers, she inquired as to whether Goss had told the defense "everything." Goss testified the trial judge stated she knew he had made certain disclosures, but had withheld information at her request. What is uncontested is at this point, and for the first time, the trial court ordered Goss to immediately make a full disclosure, which he did. Although Henricksen claimed he was upset that he was just learning the details, everyone returned to the courtroom and trial resumed.

When we view the evidence relating to the ex parte discussion and the subsequent order to disclose in the light most favorable to the habeas court's ruling, *see Kniatt*, 206 S.W.3d at 664, we hold there is no evidence that Goss—or any other prosecutor or member of the District Attorney's Office—continued to withhold information after being ordered to disclose it. *See Wheeler*, 203 S.W.3d at 324. Moreover, neither Valdez nor Ballantyne instructed or advised Goss to disclose the information to the defense or to the trial judge. Rather, they stated they did not believe disclosure was required, but if Goss wanted to disclose the information "in an abundance of caution," he might make an ex parte disclosure to the trial court to determine what the court believed he should do. Goss did as instructed by his colleagues and by

the trial court. There was no withholding of information, i.e., "repeated misconduct" after advice from other members of the office or admonitions by the trial court. *See Wheeler*, 203 S.W.3d at 324. The evidence shows the trial court never admonished Goss about his failure to disclose the details of the encounter between the Dalton and the second-chair prosecutor. *See id.* Nor did the trial court order him to disclose the information until after the jury was sworn and the State began presenting its case. *See id.* Goss immediately complied, as instructed, each time he was told to disclose. *See id.* Accordingly, this factor does not suggest an attempt to goad the defense into a mistrial or an attempt to avoid an acquittal. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160.

3. Did Goss Provide a "Good Faith" Explanation for His Lack of Disclosure?

The undisputed evidence shows that when Goss found out about the encounter between the second-chair prosecutor and Dalton, he immediately "firewalled" the prosecutor from the case. He questioned the prosecutor, asking her if she had additional contact with Dalton after their "one-time encounter." She advised she had not—Dalton later confirmed her statement and there was no evidence to the contrary. Goss testified he considered the second-chair prosecutor's encounter with Dalton a "conflict," and believed he took appropriate steps to deal with it. Subsequently, he stated numerous times that he withheld the information—until the week before trial when he learned Dalton knew far more than he originally disclosed—out of respect for his colleague, to protect her reputation. Then, though advised the information need not be disclosed, Goss chose to disclose the information to the trial court, and then upon order, to the defense in full.

The habeas court was entitled to find Goss's decision to withhold disclosure of the second-chair prosecutor's one-time encounter with Dalton was based on his good-faith desire to protect a colleague's reputation in the legal community and at the courthouse. *See Kniatt*, 206 S.W.3d at 664; *Perusquia*, 336 S.W.3d at 274–75. Viewing the evidence in the light most favorable to the habeas court's ruling, *see Kniatt*, 206 S.W.3d at 664, we cannot say it was an abuse of discretion to find Goss provided a good-faith explanation for his failure to disclose fully at an earlier point in time. *See Wheeler*, 203 S.W.3d at 324. The evidence relating to this third *Wheeler* factor does not suggest an attempt to force a mistrial or avoid an acquittal. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160.

4. Was Goss's Failure to Disclose "Clearly Erroneous"?

It is undisputed that until a week before trial, no one in the District Attorney's Office had any idea Dalton would be an important witness for the State. Thus, Dalton's encounter with a prosecutor seemed immaterial. *See Pena*, 353 S.W.3d 797, 811–12 (holding *Brady* material includes material, exculpatory evidence and impeachment evidence). It was only when Goss and LaHood interviewed Dalton the week before trial that they learned he had failed to provide law enforcement with all of the information he had relating to Martinez and the murder of Carter. Goss testified it was at this point that he began to see possible impeachment value in the information concerning the one-time encounter between the second-chair prosecutor and Dalton. *See id.* Concerned by the possibility, Goss consulted "experts"—Valdez and Ballantyne—who advised they did not believe the information had to be disclosed. Nevertheless, Goss disclosed the informa-

tion to the trial court, which advised him to make a partial disclosure. Goss complied and then fully disclosed when ordered to do so by the trial court.

The habeas court found there was no evidence the second-chair prosecutor or Dalton had further contact beyond the single encounter. Rather, all of the evidence suggested there was no additional contact. Moreover, the evidence supports the habeas court's finding that the second-chair prosecutor was "firewalled" from the case by Goss, and she had no further involvement in the case after she told Goss about Dalton. She had no interaction with any witnesses and was not involved in charging decisions, plea negotiations, trial strategy, or any other aspect of the case. The habeas court further found there was no evidence Dalton attempted to use the one-time encounter "to curry favor from" the District Attorney's Office or law enforcement. This finding is supported by the evidence. Thus, the habeas court found the defense failed to establish the encounter between the prosecutor and Dalton was material, relevant, or admissible. Thus, with regard to *Brady*, we cannot say the failure to disclose prior to the trial court's order was "clearly erroneous." The habeas court failed to see—as do we—how the evidence would be material or admissible, even for impeachment purposes given the facts: (1) Dalton and the second-chair prosecutor had a one-time sexual encounter in 2011 or 2012—three or four years before the murder; (2) there was no further contact after the single encounter; (3) the second-chair prosecutor only recognized Dalton from his picture and nickname; (4) Dalton did not remember the second-chair prosecutor's position in the office and had only a vague recollection of what she looked like; (5) Dalton was never considered a suspect by law enforcement; (6) the second-chair prosecutor reviewed only the prosecution guide and had nothing else to do with the case after her disclosure; and (7) Dalton never attempted to use his encounter with the prosecutor to his advantage. Accordingly, we do not find the decision to withhold the evidence prior to the trial court's disclosure order to be "clearly erroneous" under *Brady*. *See Wheeler*, 203 S.W.3d at 324.

However, section 39.14(h) of the Texas Code of Criminal Procedure—known as The Michael Morton Act—does not require evidence to be material or admissible for purposes of disclosure. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(h). Rather it "creates a general, continuous duty of the State to disclose before, during, or after trial any discovery evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive." *Hart v. State*, Nos. 14-15-00468-CR & 14-15-00469-CR, 2016 WL 4533419, at *5 (Tex. App.—Houston [14th Dist.] Aug. 30, 2016, no pet.) (mem. op., not designated for publication (citing TEX. CODE CRIM. PROC. ANN. art. 38.14(h))). We hold—given the undisputed evidence as set out in (1) through (7) above—the habeas court could have concluded the failure to disclose the encounter prior to the trial court's order was not "clearly erroneous" even under Article 39.14(h). The one-time sexual encounter between the second-chair prosecutor, who was firewalled from the case prior to indictment, with Dalton, a potential "star witness," would not tend to negate Martinez's guilt or reduce his sentence under the facts as found by the habeas court in its discretion. *See Kniatt*, 206 S.W.3d at 664. Accordingly, we hold this *Wheeler* factor does not lend itself to a finding of goading or fear of an acquittal by prosecutors. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160.

5. Was There a Plausible Basis—Legally or Factually—for Goss's Failure to

Disclose Despite Any Ultimate Impropriety?

As discussed above, Goss's reasoning for not disclosing the encounter between Dalton and the second-chair prosecutor until ordered to do so by the trial court was based on his belief that this was nothing more than a conflict that could be resolved by way of a firewall and his concern for his colleague and her reputation. The first reason proffered by Goss falls within the legal realm. In the "clearly erroneous" analysis, we held that under the facts of this case, the habeas court did not err in finding the encounter—the information withheld—immaterial, irrelevant, or inadmissible. Nor, as we concluded, did it tend to negate Martinez's guilt given the second-chair prosecutor's complete lack of participation in the case, the absence of contact between the relevant individuals, and nonexistence of any agreement with Dalton for his testimony. Thus, even if it should ultimately be determined that disclosure was mandated under *Brady* or Article 39.14(h), we hold there was a legally plausible basis for Goss to withhold the information prior to the trial court's order to disclose.

There was also a plausible factual basis for Goss's decision to withhold the information—respect and concern for his colleague and her reputation. The trial court's subsequent order to disclose the encounter and its ultimate propriety, does not detract from the plausible factual basis for Goss's decision to withhold the information and "firewall" the prosecutor from the case. The trial court also expressed its deep concern about what would happen if the information was disclosed without some court-crafted remedy to minimize the harm to the second-chair prosecutor and her reputation. If the trial court was concerned about the disclosure in the absence of a remedy, how can it be argued that Goss's decision to withhold was less than plausible, even if later determined to be improper? Viewing the bases provided by Goss for withholding the information in the light most favorable to the habeas court's denial of Martinez's application, we cannot say the habeas court abused its discretion. *See Kniatt*, 206 S.W.3d at 664. Thus, this fifth *Wheeler* factor does not suggest prosecutors engaged in behavior in an effort to goad the defense into a mistrial or that they acted out of fear of an acquittal. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160.

6. Was the Prosecutors' Failure to Disclose the One-Time Encounter Consistent with Inadvertence, Negligence, or Lack of Judgment, or Was it Consistent with Intentional Misconduct?

As a whole, the prosecutors involved in this matter did not believe the information about the one-time encounter needed to be disclosed at all, especially prior to the full interview with Dalton a week before trial. Up until a week before trial, Goss firmly believed he had dealt with the disclosure by the second-chair prosecutor appropriately—he removed her from the case and created a firewall so that she would have no further contact with anyone involved. Thereafter, when he learned about the additional testimony Dalton intended to provide, he began to second-guess his decision. Accordingly, he brought his concerns to LaHood. Goss and LaHood both testified they did not believe the encounter fell within the purview of *Brady* or otherwise required disclosure. Nevertheless, they consulted the heads of the appellate and ethical integrity units. Neither Valdez or Ballantyne believed disclosure was mandated, but offered a solution in the event Goss and LaHood still had concerns. Goss decided to make a full disclosure to Judge Valenzuela and abided by her advice and subsequent order. The evidence shows

that before the jury was sworn—and in accord with the trial court's recommendation—Goss advised Martinez's defense counsel, Henricksen, that a prosecutor had a one-time sexual encounter with Dalton, a State's witness. Henricksen took no action at that time. Goss's failure to disclose the prosecutor's identity or other information that would have revealed her identity was based on the trial court's direction not to disclose her name. Then, when ordered to make a full disclosure, Goss fully complied. The decisions by Goss and LaHood to seek advice from the head of the appellate and ethical integrity units—and subsequently the trial court itself—belies any intent to engage in misconduct. If Goss or LaHood desired to intentionally withhold information from the defense—information they believed they should disclose—they could have simply said nothing. Goss could have kept the second-chair prosecutor's disclosure to himself, figuring it would never come out. LaHood and Goss could have decided between themselves disclosure was not mandated instead of seeking additional opinions. And once Valdez and Ballantyne told Goss they did not believe disclosure was mandated, he could have believed he had done his due diligence and moved on, but he did not. Rather, he went to the trial court with a full and complete disclosure.

Given the evidence of the actions taken by the prosecutors in this case and their testimony relating thereto, the trial court was within its discretion in finding their actions were inconsistent with intentional misconduct. *See Kniatt*, 206 S.W.3d at 664. After analyzing the final *Wheeler* factor, we hold the evidence does not suggest the actions or inactions of the prosecutors were undertaken out of fear of an acquittal or for the purpose of goading the defense into moving for a mistrial. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160.

7. Did LaHood's Threats to "Shut Down" the Practices of Defense Counsel Goad Martinez into Moving for a Mistrial or Were They Made Out of Fear of an Acquittal? (Non-Wheeler Consideration)

Although the *Wheeler* factors were designed to assist the courts in assessing whether prosecutors intended to goad a defendant into a mistrial or acted in an effort to avoid an acquittal, the factors are non-exclusive. *See Wheeler*, 203 S.W.3d at 323. Beyond the *Wheeler* factors, Martinez points to the threats by LaHood to shut down the practices of the defense attorneys as evidence of his intent to goad him into a mistrial.

As set out in detail above, during an off-the-record meeting in chambers, a heated discussion developed concerning Goss's actions in this case and the actions the defense would need to take in response. According to testimony from Henricksen and Gonzales, LaHood was angry and ranting, threatening to "shut down" the practices of both men. LaHood denied this, although Judge Valenzuela testified the threat was made. LaHood testified Gonzales threatened to allege prosecutorial misconduct and seek redress with the media. Goss confirmed Gonzales threatened to allege prosecutorial misconduct, pointing at him.

All those who were present agreed LaHood was the first to mention the specter of a mistrial. But he testified this was simply an effort to determine what it was the defense wanted in an effort to remedy the matter. Both LaHood and Goss testified they did not desire a mistrial. Martinez disagrees, arguing LaHood's behavior was nothing more than an attempt to induce the defense into requesting a mistrial. According to Martinez, the State needed to force the defense to move for a

mistrial to avoid double jeopardy given the jury had been empaneled and sworn.

The habeas court found LaHood "engaged [in] what one witness properly called a 'rant.' " The habeas court further found LaHood stated that he would agree to a mistrial and would pick a better jury and be more prepared for trial. According to the habeas court's finding, LaHood "became enraged and threatened to 'shut down' the defense lawyers' practices, to go to the media and do whatever it took." However, the habeas court concluded, that although LaHood behaved unprofessionally, "neither the intent nor the effect of his behavior was to force the defense to move for mistrial." Rather, the habeas court concluded that if done with any intent, LaHood's actions were taken "to attempt to deter the claim by the defense of jeopardy [attaching] by reason of prosecutorial misconduct, an issue separate from the mistrial." We agree.

Reviewing the evidence in the light most favorable to the habeas court's denial of Martinez's habeas application, *see Kniatt*, 206 S.W.3d at 664, we hold the habeas court did not err in accepting testimony by Goss and LaHood that the State did not desire a mistrial. Rather, LaHood's rant and threats were made only in an effort to deter the defense from alleging prosecutorial misconduct, not to force a mistrial. When the evidence is viewed in the proper light, the habeas court could certainly have concluded from the evidence, as do we, that LaHood's threats were related to the defense threats to allege prosecutorial misconduct, which was separate from the matter of a mistrial.

Conclusion

The ultimate issue for the habeas court was whether Martinez proved by a preponderance of the evidence that the actions of prosecutors were taken: (1) with the intent to goad or force him into requesting a mistrial in order to subvert double jeopardy protections; or (2) to avoid an acquittal. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160. The habeas court, after hearing testimony and reviewing evidence, found Martinez failed to meet his burden. Based on an examination of the evidence under the appropriate standard of review, and considering the *Wheeler* factors and LaHood's threats, we hold the habeas court was within its discretion in concluding Martinez failed to establish by a preponderance of the evidence that prosecutors intended to goad him into moving for a mistrial or feared an acquittal. *See Masonheimer*, 220 S.W.3d at 507–08; *Lewis*, 219 S.W.3d at 336; *Coleman*, 350 S.W.3d at 160. We therefore hold the habeas court did not abuse its discretion in denying Martinez's petition for writ of habeas corpus and affirm the habeas court's order.

Dissenting Opinion by: Rebeca C. Martinez, Justice

DISSENTING OPINION

Rebeca C. Martinez, Justice

Because I disagree with the majority's misguided analysis and review of the record to determine double jeopardy does not bar a retrial, I dissent.

Factual and Procedural Background

A chronological recitation of the relevant events leading up to the mistrial is set forth below.

March 2015 (Pre-Indictment) Martinez was arrested in January 2015 for the murder of Laura Carter. In March 2015, Jason Goss, the first-chair prosecutor in the district court to which the case was assigned, gave the prosecution guide to his second-chair prosecutor to review so she could

help him prepare the case for presentation to the grand jury. The next day, the second-chair prosecutor informed Goss that she "had a conflict" with the case because, three years earlier, she had a "one-time sexual encounter" with a man included in the prosecution guide as a State's witness, Gregory Dalton. Goss instructed the second-chair prosecutor to have nothing further to do with the case, and replaced her with the third-chair prosecutor. Goss also constructed a "firewall" within the District Attorney's office to exclude her from any contact with Martinez's case.

Goss later explained at the habeas hearing that he took that course of action because he believed the second-chair prosecutor had a "conflict," in that her past encounter with Dalton could have affected her objectivity, causing her to be either favorable or unfavorable to Dalton as a witness; Goss also stated her participation in the case could have created an appearance of impropriety. Goss testified he was satisfied the issue was resolved by the firewall, and he told no one else within the District Attorney's office; he also did not speak about it again with the second-chair prosecutor. Goss testified to his belief that, at the time, "what she had told me was not—was not exculpatory, mitigating or relevant ... as far as to the facts of this case...." On April 14, 2015, the grand jury returned an indictment against Martinez for the murder of Laura Carter by shooting her with a deadly weapon, namely a firearm. Dalton was not charged.

January 31 and February 1, 2017 (One Week Before Trial) Martinez's trial was scheduled to begin on February 7, 2017. In preparation for trial, Goss and Nicholas LaHood, the District Attorney, interviewed Dalton on January 31, 2017. Dalton revealed additional, detailed information he admitted withholding from the police; the new information led Goss to conclude that Dalton was a "significant witness." After the interview, Goss prepared an amended *Brady*[1] Notice describing the new evidence and emailed it to the defense attorneys the next day, February 1, 2017. The trial court had previously granted a *Brady* motion filed by the defense.

The State's amended *Brady* disclosure stated that Dalton told the prosecutors the following during the interview: one month before the murder, Martinez told him "there was a girl that was going to turn him in" and asked Dalton if he (Martinez) could take her to Dalton's house and kill her there; Dalton thought Martinez was joking; Dalton then asked Martinez, "If you're going to bring her here and kill her, can I f* *k her first?"; Martinez replied that "they could take her after he killed her in Dalton's van and dump her body and light it on fire;" Martinez told Dalton he would pay him $1,000 to help him kill the girl; Dalton said he would not do that and still thought Martinez was joking; on the night of the murder, Martinez called Dalton to pick him up from the murder location and Dalton did so; Martinez paid him $400, telling Dalton he was only getting half since Martinez had to do the actual work; Dalton stated he did not know a murder had occurred at the time he picked up Martinez; Martinez later told Dalton that he had killed a girl right before Dalton picked him up; Dalton believed it must be the same girl Martinez was talking about one month earlier.

The amended *Brady* notice did not, however, reveal any information to the defense about the former second-chair prosecutor's previous sexual encounter with Dalton and her initial role in the Martinez case. Defense attorney Christian Henricksen had expressly asked Goss whether he had any

1. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

other *Brady* information that needed to be disclosed before trial, and Goss replied there was none. Henricksen testified at the habeas hearing that, although Goss delivered a thumb drive with the State's file to the defense about one year before trial, during the week or so before trial the defense attorneys had received almost daily emails from Goss providing various supplemental discovery information. Goss explained at the habeas hearing that he sent the supplemental *Brady* notice to the defense because the new evidence revealed by Dalton during the pre-trial interview "directly stated his willingness to participate with the defendant in the sexual assault and the murder of the victim on trial" and was clearly *Brady* material which could be used to impeach Dalton's credibility as a State's witness. Goss also stated that the Dalton interview triggered his memory about the sexual encounter the former second-chair prosecutor had with Dalton. Goss reiterated, however, that he personally did not consider the prosecutor-witness relationship to fall under *Brady*, although he conceded he "understood that somebody else might have a different opinion."

Goss informed LaHood about the prosecutor-witness relationship after the Dalton interview and explained the firewall he had created within the District Attorney's office. LaHood's initial reaction was that the information was not required to be disclosed. LaHood called Enrico Valdez, Chief of the District Attorney's Appellate Section, that evening and asked Valdez whether the information needed to be disclosed to the defense. Valdez's initial opinion was that it did not sound like information that needed to be disclosed, but he agreed to research it further. Neither LaHood nor Goss, nor any other member of the District Attorney's office, questioned Dalton or the former second-chair prosecutor about the relationship until after the mistrial.

February 2-3, 2017 (Internal Advice to Goss and LaHood) In researching whether to disclose the prosecutor-witness relationship to defense counsel, Valdez consulted with Patrick Ballantyne, Chief of the District Attorney's Ethical Disclosure Unit. Valdez then verbally informed LaHood and Goss of their opinion that the information was not required to be disclosed to the defense, but suggested that, "in an abundance of caution," they could disclose it *in camera* to the trial judge.

February 7, 2017 (Pretrial and Voir Dire) On the morning of trial, the trial court heard pretrial motions. Goss signed the State's Discovery Acknowledgment under article 39.14(i) of the Texas Code of Criminal Procedure, documenting and representing that the State had disclosed all information relevant to the case. The document was detailed and lengthy, but made no mention of the prosecutor-witness relationship. Voir dire proceeded that day and the jury was selected, but not sworn. The State discussed the law concerning accomplices and parties during its voir dire. Trial recessed for the day after the jury was selected; the jury was not sworn in until the following day.

February 8, 2017, A.M. (*Ex parte* Conference and Partial Disclosure to Defense) The next morning, before the jury was sworn, Goss filed a "State's Motion for Ex Parte Communication and In Camera Consideration of Potential Conflict Issue" and gave a copy of the motion to defense attorney Henricksen. The motion was presented to the trial judge, and she met with Goss in her chambers, with only the court reporter present. Goss informed the trial judge that the second-chair prosecutor (whom he named) formerly assigned to the 437th district court read the Martinez prosecution guide in January 2015; that

she informed him the next day that she had a "one-night stand" with Dalton in 2011, three years before the murder occurred; and that Goss immediately removed the second-chair prosecutor from the Martinez case and created a firewall within the office to separate her from any further involvement in the case. In explaining Dalton's role in the State's case, Goss proffered that the evidence would show Dalton picked up Martinez from the murder scene; cell phone tower data placed Dalton's phone at the murder scene; a witness saw Dalton's white van leaving the murder scene; and Martinez told Dalton "how" and "what" he did to the victim. In discussing the second-chair prosecutor's sexual encounter with Dalton, Goss stated, "the one issue that we wanted to bring to the Court's attention that could possibly be raised, is a possible impeachment issue of Dalton." Goss went on to characterize the impeachment value of the information, from the State's perspective, as "weak." Goss then asked the trial judge to make the decision "whether or not to disclose to the defense."

After clarifying the chronology of events and inquiring whether there were any agreements between the State and Dalton,[2] the trial judge expressed her opinion that disclosure to the defense was necessary because Dalton was "sort of the star witness" and it was possible the relationship information might come in during the trial as impeachment evidence. The trial judge recalled the voir dire discussion of accomplices and law of parties, stating, "Mr. Dalton could get the finger pointed at him as being some kind of party to this, an accomplice to this, the getaway driver, then he becomes even more of a star witness ... He's possibly who the defense is going to be pointing the finger at."

At that point, Goss explained the State's theory of the case to the trial court, stating that the State believed Dalton

> picked the defendant up from the murder scene. His phone is at the murder scene. His van is seen at the murder scene. The defendant told him what he did and how he did it. Dalton has information about the murder that no one else could know unless Dalton committed the murder, was present for the murder or was told by the defendant after the murder.

Goss continued,

> the reason we talked about parties is we anticipate that the defense will be that Dalton committed the murder because of these—because of these things that point to him. And so ... with those facts, yes, it is not wrong to say that Dalton is a star witness either—from our perspective we are going to talk about the fact that the things he says is [sic] verified by other things. But from their perspective I can see that they will try to implicate Dalton as one of the parties committing the murder.

Goss again acknowledged the "impeachment value" of the relationship information and agreed that the defendant had the right to review the information, but sought to balance its disclosure against the possible damage to the prosecutor's reputation.

The trial court explained that in its analysis there were two different issues: (1) whether or not the State should disclose the relationship information to the defense; and (2) whether that disclosure is "usable information, whether it's impeachment or

2. Goss told the trial court the State had made no express agreement not to charge Dalton with Carter's murder; however, he stated it was understood from the beginning that, if Dalton's testimony matched the evidence and was credible, he was not going to be charged with the murder.

otherwise[,] during the course of the trial." As to the first issue, the judge stated that, "objectively, I think the disclosure may be necessary." As to the second issue, the judge stated she would need to hear Dalton's testimony, "or at least get a better proffer," before she could make a decision on the admissibility of the relationship evidence. The trial judge shared Goss's concern about the information becoming courthouse gossip, and agreed to consider possible remedies to minimize any harmful effects on the second-chair prosecutor's reputation.

At the conclusion of the *ex parte* conference, the trial judge instructed Goss that the relationship information needed to be disclosed to the defense because of how important Dalton was to the State's case. Although the judge informed Goss that it was his decision when to make the disclosure, she advised Goss not to wait any longer because he had the information since 2015 and "there's already a record out there where the defense has suggested stuff is just being turned over at the last minute." The trial judge also stated that she would take a few minutes to look into possible remedies to minimize any harmful effects on the prosecutor's reputation, and indicated that Goss should not yet disclose the prosecutor's name. The court further stated that if that amount of time proved insufficient to find a remedy, the court would "take the responsibility for the delay in disclosure." At the habeas hearing, the trial judge testified that she meant only that she would take responsibility for the delay in revealing the prosecutor's name, not for the delay in disclosing the other details. After the *ex parte* conference concluded, Goss informed LaHood that he had disclosed the prosecutor-witness relationship to the trial judge *in camera.*

Following the *ex parte* conference, Goss disclosed the existence of the prosecutor-witness relationship for the first time to defense attorney Henricksen. Goss stated only that an unnamed prosecutor in the District Attorney's office had a one-time sexual encounter with Dalton three years ago. Goss did not inform Henricksen that the prosecutor at issue was the second-chair prosecutor in the 437th District Court at the time of Martinez's indictment, or that she had reviewed the Martinez case in the pre-indictment phase. Not knowing these undisclosed details, Henricksen testified at the habeas hearing he was "not then overly concerned." Henricksen passed the information along to his co-counsel Joe Gonzales, who testified his focus at the time was on reviewing "voluminous cell tower records" that he had just received during the lunch hour. Trial proceeded, with the jury being sworn and the State giving its opening statement.

During his opening statement to the jury, Goss highlighted Dalton's role as an important witness in the State's case. Goss explained that the police tracked down Dalton because his phone number was called by the same phone that also called Carter on the night of her murder. Goss then detailed Dalton's statement to police, reciting that Dalton told police that he drives a "white van with decals" for work and that matched the description of a van seen by a witness [Luis Castillo] driving down the street right after the gunshots. Dalton also told the police that he picked up a guy, Miguel Martinez, from that street but did not know that Martinez had committed a murder. Dalton admitted calling Martinez's phone that night when he had trouble locating him. Dalton also told police that Martinez paid him $400 or $500 later that evening for picking him up. Finally, Dalton knew certain details about the murder scene that he could only know if he was there or was told about them. Dalton told police that Martinez told him the next day that he had shot the girl on

the news. Martinez explained to Dalton that he asked to borrow the girl's cell phone; she handed it to him inside the car; he stepped outside the passenger side of the car; and he shot her five times in the right side of the head. Dalton's description of the murder matched details from the scene in that Carter did not have her cell phone even though calls had been made from it that evening, and her wounds showed that she was shot in the head from right to left from the passenger side of the car. Goss described Dalton to the jury as a witness who "has his issues," but told them that, even though there was evidence suggesting Dalton's involvement in the murder, the jury could still find Martinez guilty as well under the law of parties.

The defense waived its right to make an opening statement, and the State presented the testimony of their first witness, Luis Castillo, before the lunch recess. Castillo, 17 years old at the time of trial, testified he lived with his grandmother on the street where the murder occurred and he heard the gunshots, saw a Hispanic male wearing a dark hoodie standing outside the car, and saw a white van driving away shortly afterward.

February 8, 2017, P.M. (Full Disclosure)

According to the habeas record, another in-chambers conference was held off the record during an afternoon break between witnesses. The trial judge testified that she inquired whether Goss had "told them everything?" When he indicated he had not, the judge ordered him to "tell them everything now." Goss then disclosed the rest of the details to defense counsel, including the prosecutor's name and assignment to that trial court when the Martinez case came in, her statement that she had a one-time sexual encounter with Dalton three years before, and that she had reviewed the file in the Martinez case during the pre-indictment stage. At the habeas hearing, Goss stated the trial judge did not couch her order in terms of a *Brady* disclosure, but Goss assumed from the trial court's perspective that it was an order under *Brady*. Henricksen testified at the habeas hearing that, upon hearing the additional details, he was upset because he felt like the disclosure was now "a completely different thing" which could affect the defense case in many ways, particularly the fact that the prosecutor had been involved in the Martinez case before indictment. Henricksen stated he had been under the impression that Goss recently learned about the prosecutor-witness relationship, and he was angry that Goss had instead known about the information for two years. Gonzales also testified that he was angry and felt that Goss had been "wrong" to withhold the full information until after the jury was sworn and the evidence had begun. Both defense attorneys stressed that they were placed at a disadvantage by learning the information in the middle of the murder trial.

The attorneys present in chambers, LaHood, Goss, Henricksen, and Gonzales, briefly discussed how to proceed and how to handle the disclosed information. All the attorneys agreed that public disclosure of the prosecutor's name was not preferable or necessary at that stage of trial. LaHood offered to make the District Attorney investigators available to assist the defense attorneys and help them "feel comfortable," and also offered to set up a meeting between the defense attorneys and the second-chair prosecutor and an interview with Dalton. No specific resolution or plan of action was agreed on during the break, and trial resumed.

The State presented two more witnesses, Cynthia Garza, the grandmother of Castillo, and San Antonio Police Officer Mike Wehe. The appellate record does not contain the transcript of their testimony,

but the briefs state that Garza testified she also heard the gunshots on her street that night and called 911, and that Officer Wehe described the murder scene he observed as the first responder, stating the victim was found inside her car with a hand in her pocket and her feet crossed, indicating she was not expecting the gunshots and probably knew the shooter; she was shot five times in the head. At the habeas hearing, LaHood testified that, at the end of the first day of testimony, he felt the trial was going "very well" based on the evidence presented so far. Goss also testified that he was happy because everything was going "just as he prepared and planned."

Later that evening, after conferring at length with Gonzales about the disclosed information, defense counsel Henricksen sent a text to the trial judge, LaHood, and Goss expressing "a lot of concerns with what was discussed in chambers today." In his text, Henricksen stated that the defense intended to file a motion for a one-day continuance in the morning so they could "figure out what we need to do to address this issue." LaHood and Goss agreed to the continuance, and the trial judge indicated she would grant the continuance in the morning at a hearing with the court reporter present.

February 9, 2017, A.M. (Motion for Continuance) In the morning, defense counsel filed a one-page motion for continuance stating, "[a]fter the jury was seated in this case, the state of Texas disclosed to the defense critical and sensitive information that is material to the defensive theory in this case. Due to the late nature of this disclosure, the defendant respectfully requests a continuance of this case in order to investigate this matter." Following a brief hearing on the record, at which the State raised no objections, the trial was continued to the next Tuesday, February 14, 2017.

Following the ruling, an on-the-record discussion was held in chambers between the trial judge, Goss, Henricksen, and Gonzales concerning how the defense's legal and factual investigation into the newly disclosed information would proceed. Defense counsel expressed that the late disclosure during trial had put them in an awkward position, and asserted their duty to investigate the matter in pursuit of their ethical and professional obligations to Martinez, particularly, to investigate the timing and the chronology of events, whether the second-chair prosecutor had any part in the progression of the case and/or any influence over whether to seek an indictment against Dalton as a party to the murder. Defense counsel also opined that the recently disclosed information "directly impacts on our theory of the case," later adding that "Mr. Dalton at least smells like a codefendant."

After noting that it had already ruled that the information was "discoverable" by the defense, the trial court stated that a second issue was whether the information would be admissible at trial. The trial court explained,

> I think that there's this sort of notion out there from the State that, well, if [the second-chair prosecutor] didn't do anything wrong, there's no way this can come in. And I don't—I don't agree with that actually ... they may learn that nothing—that she had no part in the intake. She had no part in how it was charged, no part in decision-making on who the codefendants were, if any ... there's still that possibility the defense can use some of this information.

The trial court agreed that the timing of the disclosure after the jury was sworn was "concerning," given that the State had the information for two years prior to trial.

The court also recognized that a possible defense theory would be to place blame on Dalton for the murder, or at least consider him as an unindicted co-defendant. The trial court further acknowledged that, from Dalton's perspective, the past sexual encounter with the second-chair prosecutor could give rise to a bias or motive on his part.

Goss replied, "we understand, based upon Brady, based upon Michael Morton that there is the possibility of impeachment . . . It's never been our position that it's not possible to impeach." Goss explained his opinion that "the extrinsic evidence of the impeachment based upon rule 613 is not going to be allowed," but continued by stating, "as far [as] being able to impeach Mr. Dalton about . . . it is a possibility, and we will have an argument for that." [3] Goss explained that it was not until he interviewed Dalton the week before trial, and learned more details about his involvement the night of the murder, that he got "an idea of what the defensive theory might be" with respect to Dalton, and that is when Goss began discussing with his fellow prosecutors whether the prosecutor's relationship should be disclosed to the defense. Goss stated, "If I can do it over again, I might have disclosed it earlier because—because of all this."

The parties discussed scheduling interviews by defense counsel with Dalton and the former second-chair prosecutor, the defense's request for appointment of an independent investigator, and for appointment of appellate counsel to assist in the investigation. At the end of the conference, the trial court appointed an investigator and appellate counsel, Mark Stevens, to assist Martinez.

February 9, 2017, P.M. (Off the Record Meeting in Chambers) Later that afternoon, Goss texted Henricksen and requested the parties meet in the trial court's chambers. In addition to the trial judge, present for the State were Goss, Valdez, and LaHood, and the defense attorneys present were Henricksen, Gonzales, and Stevens. No court reporter attended because the conference was supposed to involve only scheduling. However, the meeting became heated. Henricksen and Gonzales testified that LaHood entered the meeting already "mad" and "upset." LaHood told them he objected to the "nondisclosure" language used in their written motion for continuance and he was getting inquiries about it from the media. The trial judge also testified that, at the beginning of the meeting, LaHood "expressed that he was not happy about the motion for continuance being handled in open court where the media was present," and LaHood stated he was sorry he sent Goss to handle the motion because he had not realized the hearing would be such a "shit storm." Although he denied that he entered the meeting angry, LaHood confirmed at the habeas hearing that he felt the defense team put on a "shit show" for the media at the continuance hearing that morning, even though the continuance was agreed.

After the topic of the continuance was dropped, the attorneys discussed scheduling a date for trial to resume. LaHood expressed concern about a longer delay because he had other obligations that presented a scheduling conflict. LaHood inquired of Gonzales what the defense intended to do about the late disclosure of the prosecutor-witness relationship. Henricksen testified LaHood was pushing Gonzales to say the defense would drop the

3. TEX. R. EVID. 613(b) (impeachment of a witness for bias or interest).

issue and just proceed with the trial. But, Gonzales would not agree to do that because their investigation was not yet complete.

At the habeas hearing, all the witnesses, including the trial judge, testified that LaHood mentioned the granting of a mistrial before anyone else. The trial judge stated that, "Mr. LaHood had indicated that he was willing to get a new jury, to start all over again, the evidence was what it was . . . but that he would be fine with that, with starting over again." LaHood testified at the habeas hearing that he asked Gonzales "Joe, what do you want?" LaHood stated, "we've agreed to a continuance" and "I've offered you every resource from the DA's office." LaHood testified he then said, "[d]o you want a mistrial? Judge, give him a mistrial so we can pick a new jury." At the habeas hearing, LaHood denied that he wanted a mistrial, but confirmed that he was the first person to mention a "mistrial" as a "diagnostic" to find out what Gonzales wanted. LaHood testified that, later in the conversation, he had stated he "would agree to a mistrial" and he "would pick a better jury and be more prepared for trial" next time.

Gonzales responded that, "it was not that simple," and stated that, if the defense investigation revealed any kind of prosecutorial misconduct, they would have to allege it. Gonzales stated he "had a problem" with the way Goss had handled the disclosure and he pointed his finger at Goss. Henricksen and Gonzales later testified that LaHood then "lost it" and went "ballistic." According to Gonzales and Henricksen, LaHood responded to the defense attorneys' comment about possibly raising prosecutorial misconduct by stating, "If you do that, I will shut your practice down." Gonzales testified that LaHood was screaming that he would "destroy" their law practice and "make sure you never get hired on another case in Bexar County." LaHood also stated that he did not care what happened to him because he could always go back to private practice. Both defense attorneys testified at the habeas hearing that they viewed LaHood's comments as a threat to their livelihood and believed that he had the ability and power as the elected DA to follow through on his threat.

At the habeas hearing, LaHood unequivocally denied threatening to "shut down" Gonzales's law practice. LaHood testified that, instead, he replied to Gonzales's "unethical threat" to allege prosecutorial misconduct and go to the media,[4] by saying, "Do me the f* * *g favor. Because in the process of defending this office's honor, I will expose you as the unethical lawyer that you are, and let's see what happens to your law practice." LaHood admitted he was "angry" at that point, but insisted he "did not lose control." Goss testified he did not recall hearing LaHood say "those words," with reference to a threat to "shut down your practice."

The trial judge testified at the habeas hearing that after Gonzales stated in a normal, non-threatening tone of voice that he "would possibly have to allege at some point prosecutorial misconduct," LaHood replied that, "he was going to shut down his [Gonzales's] practice." The trial judge testified that Gonzales's tone was not discourteous and his voice was not raised. The trial judge described LaHood's de-

4. LaHood testified that when Gonzalez stated he might file a motion alleging prosecutorial misconduct, he also threatened to "go to the media" with the allegation of misconduct. Goss's testimony matched LaHood's on that issue. However, the trial judge and Henricksen testified that Gonzalez did not make any reference to "going public" or going to the media with a prosecutorial misconduct allegation.

meanor as "mad" with a raised voice and threatening body language when he made the threat. The judge was concerned about potential physical violence based on the escalating tone and volume of the discussion and ended the meeting.

At the trial judge's suggestion, the prosecutors and defense attorneys walked to a conference room outside of chambers to discuss how to proceed. They had a "civil" yet "tense" meeting in a nearby conference room; prosecutorial misconduct was not mentioned. No firm resolution was reached.

February 10, 2017 (In-Chambers Conference Off the Record) The next day, an off-the-record conference was held between Goss, Gonzales, and Henricksen in the trial court's chambers. Gonzales stated that LaHood's threat to shut down his law practice had a "chilling effect on him" and on the defense effort. The trial judge stated the words had a "chilling effect" on her as well.

February 13, 2017 (Interviews of 2nd-Chair Prosecutor and Dalton) As part of their investigation into the late disclosure, defense counsel interviewed the former second-chair prosecutor about her relationship with Dalton in the presence of her supervisor, Valdez. The prosecutor stated that she met Dalton on a dating service and "may have gone out with him once or twice." She could not recall for certain whether they had sex, but stated it may have occurred. She confirmed that she had no other contact with Dalton. She recognized Dalton as a witness in the Martinez case file by his photo and nickname "Vegas." She also confirmed having no contact with the Martinez case file since reporting the matter to Goss in March 2015. The defense attorneys later testified to their impression that she was "holding back" some information based on discrepancies between her statements and the version of a "one-night stand" conveyed by Goss and Dalton.

After refusing to meet with the defense attorneys or their investigator, Dalton was finally interviewed by telephone in April 2017. Dalton confirmed having had a sexual encounter with the prosecutor, but did not recall her name and could only give a basic description that generally matched the prosecutor's appearance. Dalton did not recall what her position was in the District Attorney's office. He also confirmed having no contact with her since the encounter.

February 15-16, 2017 (Plea Bargain & Mistrial Discussions) Gonzales requested an off-the-record meeting with Jay Norton, Chief of the District Attorney's Conviction Integrity Unit, to discuss possible solutions in the Martinez case. Henricksen and Gonzales testified their motive in meeting with Norton was to determine whether he could suggest a new, "out of the box" solution to the problem which could avoid the need for a mistrial. Both Gonzales and Henricksen testified they wanted to avoid having to file a motion for mistrial and habeas corpus writ that would lead to a public hearing about the events. At the meeting, Gonzales and Norton discussed various solutions, including a plea bargain; Norton stated he was not authorized to negotiate a plea. Gonzales testified he told Norton that LaHood had suggested a mistrial, but he and Henricksen did not want a mistrial. Norton testified at the habeas hearing that both Gonzales and Henricksen wanted a mistrial, but that LaHood and Goss did not. At the conclusion of the meeting, with no novel solutions found, Gonzales testified he asked Norton if he would talk to LaHood about the State agreeing to a mistrial. Norton discussed the idea with LaHood the next day. According to Norton, LaHood initially re-

fused the idea, but after further discussions LaHood agreed to a mistrial.

February 16, 2017 (Mistrial Granted) After the parties arrived, defense counsel moved for a mistrial in open court. Present for the State were Goss, Valdez, Ballantyne, and Norton. LaHood was not present, but testified at the habeas hearing that he had consulted with Valdez and Norton. Martinez's attorneys stated on the record that they "did not want" a mistrial and were "reluctantly" moving for one because they felt forced to do so to protect Martinez's right to effective assistance of counsel based on the late disclosure of the potentially impeaching *Brady* information. Defense counsel also informed the court that, depending on the State's next move, they might file a motion to protect Martinez's double jeopardy rights based on prosecutorial misconduct. The State agreed to the mistrial, but refused to agree that it did anything wrong with respect to the late disclosure or that the defense was being forced into a mistrial because of the State's conduct. Trial was reset to May 15, 2017. Before that date, Martinez filed a pre-trial application for writ of habeas corpus based on double jeopardy seeking to bar a retrial.

April 2017 (Habeas Corpus Hearing & Ruling) The Honorable W.C. Kirkendall presided over an evidentiary hearing on Martinez's application for habeas corpus. After considering the trial transcript, taking judicial notice of the trial court's file, and hearing the testimony of LaHood, Goss, Gonzales, Henricksen, and the trial court judge, the habeas court denied Martinez's request to bar retrial. The habeas court entered lengthy written findings of fact and conclusions of law in support of its ruling. Martinez now appeals the order denying him habeas corpus relief.

Discussion

Habeas Corpus Standard of Review

"An applicant seeking habeas corpus relief must prove his claim by a preponderance of the evidence." *Ex parte Cruz*, 350 S.W.3d 166, 167 (Tex. App.—San Antonio 2011, orig. proceeding). When reviewing a trial court's ruling on an application for habeas corpus, an appellate court reviews the evidence in the light most favorable to the trial court's ruling, and upholds the ruling absent an abuse of discretion. *Id.*

Applicable Double Jeopardy Law

Generally, a defendant in a criminal case may not be put in jeopardy by the State twice for the same offense. U.S. Const. amends. V, XIV; Tex. Const. art. I, § 14; *see also Pierson v. State*, 426 S.W.3d 763, 769 (Tex. Crim. App. 2014). Because a defendant has a right to have the jury empaneled and sworn in his case to decide it, the protection provided to defendants under the Double Jeopardy Clause attaches after the jury is sworn. *Pierson*, 426 S.W.3d at 769. Absent exceptional circumstances showing the prosecutor intentionally provoked a mistrial, the Double Jeopardy Clause is not violated if the trial ends prematurely. *Id.* at 770. The United States Supreme Court has explained that when the defendant is the party requesting the mistrial, the Double Jeopardy Clause generally does not bar the State from trying the defendant again. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). A retrial may be barred by double jeopardy, however, if the defendant presents objective facts and circumstances to demonstrate that the prosecutor's actions giving rise to the defendant's motion for mistrial were done with the intent "to 'goad' the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 676, 102 S.Ct. 2083.

The standard announced in *Oregon v. Kennedy* for review of double jeopardy claims after a defense-requested mistrial applies to Martinez's claims raised under both the United States and Texas Constitutions. *Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007). Thus, regardless of whether the double jeopardy claim is raised as a federal or state claim, a reviewing court must determine whether a defendant successfully moved for a mistrial because the prosecutor "engaged in conduct that was 'intended to provoke' the defendant into moving for a mistrial." *Id.* at 336 (citing *Kennedy*, 456 U.S. at 679, 102 S.Ct. 2083). In *Kennedy*, the Supreme Court stressed that such a degree of prosecutorial misconduct presents a narrow exception to the general rule that retrial is not barred when the mistrial was granted at the defendant's request. *Kennedy*, 456 U.S. at 673, 102 S.Ct. 2083. The Supreme Court explained, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 675-76, 102 S.Ct. 2083. In adopting the *Kennedy* standard, the Texas Court of Criminal Appeals overruled its prior precedent interpreting the Texas constitution's double jeopardy provision to also cover "reckless" conduct by the prosecution. *Ex parte Lewis*, 219 S.W.3d at 337, 371 (overruling *Ex parte Bauder*, 974 S.W.2d 729 (Tex. Crim. App. 1998), and remanding to trial court for consideration under *Kennedy* standard).

In *Ex parte Masonheimer*, decided during the same term as *Ex parte Lewis*, the Texas Court of Criminal Appeals discussed the *Kennedy* standard in the context of nondisclosure of *Brady* material. *See Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007). In that case, the defendant was granted a mistrial in his two previous trials based on the prosecution's failure to disclose *Brady* material. Before the third trial setting, the defendant filed a pre-trial habeas corpus application claiming double jeopardy barred the retrial. The trial court granted habeas relief, finding that jeopardy had attached in the prior trials and retrial was barred by double jeopardy; however, the trial court made no finding as to whether the prosecution intended to provoke a mistrial. *Id.* at 505. On review, the Court of Criminal Appeals looked to cases cited with approval in *Kennedy* in which habeas relief had been granted because the prosecution acted with intent to avoid a probable acquittal. *See id.* at 507-08. Applying that analysis to the facts before it, the Court of Criminal Appeals held that, viewing the evidence in the light most favorable to the trial court's ruling, the record supported a finding that the defendant's two motions for mistrial were "necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence that was available prior to appellee's first trial with the specific intent to avoid the possibility of an acquittal." *Id.* The court concluded, "[u]nder *Oregon v. Kennedy*, this deliberate conduct, accompanied by this specific mens rea, bars a retrial." *Id.*

Based on the Court of Criminal Appeals's application of the *Kennedy* standard in *Ex parte Lewis* and on *Ex parte Masonheimer*, we have described the double jeopardy analysis as follows, "[a] retrial is not barred by double jeopardy unless the prosecutor engaged in the conduct with the intent to provoke the defense to request a mistrial or the prosecutor intentionally engaged in the conduct with the intent to avoid an acquittal." *Ex parte Coleman*, 350 S.W.3d 155, 160 (Tex. App.—San Antonio 2011, orig. proceeding) (internal citations omitted).

The habeas applicant has the burden to provide the court with a record sufficient to prove his allegations by a preponderance of the evidence. *Ex parte Coleman*, 350 S.W.3d at 160; *Ex parte Chandler*, 182 S.W.3d 350, 353 n.2 (Tex. Crim. App. 2005). "Appellate review of the [trial] court's ruling is not limited to the evidence adduced at the habeas hearing, but may include the record as it existed before the trial court at the time of the hearing." *Ex parte Coleman*, 350 S.W.3d at 160. The appellate court will reverse the ruling only if the record shows the trial court abused its discretion based on the decision it made when ruling on the defendant's application seeking habeas relief. *Ex parte Wheeler*, 203 S.W.3d 317, 319-20 (Tex. Crim. App. 2006).

Findings of Fact

"When a trial court makes explicit findings of fact, the appellate court determines whether the evidence (viewed in the light most favorable to the trial court's ruling) supports these fact findings." *State v. Yetman*, 516 S.W.3d 33, 36 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The habeas court made the following findings of fact:

1. In March 2015, Jason Goss, while working as the chief prosecutor of the 437th District Court for the Bexar County District Attorney's Office, received the prosecution guide and investigator's materials in *State of Texas v. Miguel Martinez.* Mr. Goss provided the prosecution guide to the second chair prosecutor in the court. The parties have agreed not to name this female prosecutor. The Court will refer to her as the Unnamed Female Prosecutor (hereinafter "UFP").

2. The UFP recognized Gregory Dalton only by his nickname "Vegas" and his picture contained in the prosecution guide. She remembered him as someone she had a one-time sexual encounter with in approximately 2012.

3. According to Mr. Goss, the UFP had possession of the prosecution guide from late one day until she returned it early the next day, when she told Mr. Goss about her one-time contact with the witness.

4. The evidence is uncontradicted that the UFP was "firewalled", and she had no further involvement with the case. Specifically, the UFP had no part of the investigation, charging decision, or presentation to the grand jury. The UFP also had no interaction with any witnesses, including Gregory Dalton, and did not participate in plea negotiations, in trial strategy, or any other aspect of the case. Another prosecutor was given the second chair assignment until early in 2017 when Mr. LaHood, the elected criminal district attorney, decided to sit as second chair to Mr. Goss.

5. The evidence is uncontradicted that the UFP has had no contact with the witness, Gregory Dalton, since their one-time physical encounter.

6. Mr. Goss testified he believed that the issue was a "conflict" issue and not a *Brady* issue requiring disclosure to the Defendant.

7. Mr. Goss did not disclose the UFP's information to anyone else, even his supervisors, until he advised the criminal district attorney, Mr. LaHood, shortly before trial began.

8. After consultation in the district attorney's office, Mr. Goss made an *ex parte in camera* disclosure to the judge presiding on Wednesday, February 8, 2017, prior to the jury being sworn. Judge Valenzuela ordered Mr. Goss to reveal to the defense that a prosecutor and a witness on the case had a one-time sexual encounter, but did not order him

to reveal the identity of the UFP at that time.

9. After meeting with Judge Valenzuela and prior to the jury being sworn, Mr. Goss advised Mr. Henricksen, a defense counsel for applicant, that a prosecutor in the office had a one-time sexual encounter with a witness to the case several years prior to the murder. The defense did not ask the Court for a continuance at this time.

10. After the jury was sworn, opening statements and testimony presented, the Court ordered Mr. Goss to disclose the name of the UFP to the defense. Mr. Goss advised both Mr. Gonzales and Mr. Henricksen of the UFP's name, the witness's name, and the nature of the one-time encounter. Mr. Goss advised the defense that he excluded the UFP from the case, and that she had no contact with the witness since their one-time encounter several years prior. The defense did not ask the Court for a continuance at this time.

11. On February 8, 2017, the trial proceeded.

12. On February 9, 2017, the court granted the defense request for a continuance in order to give them more time to investigate the disclosure made the day before. The State did not object to this request.

13. The defense attorneys initially had a five-day continuance to investigate and were set to have a twelve-day continuance to investigate.

14. On February 9, 2017, there was a heated discussion in the court's chambers between Mr. LaHood and Mr. Gonzales. The credible evidence shows that Mr. LaHood engaged [in] what one witness properly called a "rant." Mr. LaHood said he would agree to a mistrial, would pick a better jury and be more prepared for trial. When Mr. Gonzales raised the issue of possible prosecutorial misconduct, Mr. LaHood became enraged and threatened to "shut down" the defense lawyers' practices, to go to the media and do whatever it took. He said he did not care what happened to him.

15. On Friday, February 10, 2017, Mr. Goss met with Mr. Gonzales and Mr. Henricksen again, and Mr. Gonzales [sic] discussed resolving the case through a plea bargain.

16. On February 13, 2017, Mr. Gonzales and Mr. Henricksen, along with a defense investigator, met with the UFP. They confirmed she had had no contact with Gregory Dalton since 2012. They also confirmed she did no work on the case and only read the prosecution guide once.

17. The attorneys who testified, both state and defense, all characterized the UFP as reliable and credible. None of the recounting of her statements was objected to, and the Court has considered the unobjected-to hearsay as evidence. The Court finds the UFP is credible.

18. Mr. Gonzales and Mr. Henricksen spoke with the witness, Gregory Dalton, over the phone, and Mr. Dalton did not remember the UFP's name and was unclear on her position with the district attorney's office.

19. The witness, Gregory Dalton, denied, through unobjected-to hearsay, that he had any contact with the UFP after 2012.

20. There is no evidence the witness, Gregory Dalton, used his 2012 encounter with the UFP to curry favor from the district attorney's office or any law enforcement agency.

21. At the request of Mr. Gonzales, on February 15, 2015 [sic], an assistant district attorney, Jay Norton, went to Mr.

Gonzales and Mr. Henricksen's office to discuss the Miguel Martinez case. Mr. Gonzales mentioned the possibility of a plea bargain, but Mr. Norton said the plea offer Martinez wanted was not on the table. Mr. Gonzales asked Mr. Norton if he would talk to Mr. LaHood about agreeing to a mistrial. Mr. Norton agreed to discuss a mistrial with Mr. LaHood.

22. On February 16, 2017, Mr. LaHood initially refused to agree to a mistrial, but Mr. Norton was able to convince him to have the State agree to a mistrial.

23. The defense filed a motion for mistrial, and the State did not object. The defense motion for mistrial was granted by Judge Valenzuela.

24. Mr. Goss testified that he did not want to agree to a mistrial.

25. The State's attorneys testified they believed the State had a strong case. Mr. Gonzales referred to it as "a strong circumstantial case".

26. The State's attorneys and the defense attorneys all testified they approved of the jury.

27. The defense did not present any rational basis that the information about the UFP and the witness Dalton would be material, relevant or admissible in evidence before a jury.

While these findings of fact are generally supported by the record, the findings omit, or disregard, certain relevant facts from the record. Specifically, Finding of Fact #6 correctly states that in March 2015 Goss believed the prosecutor-witness relationship was a "conflict" issue and not a *Brady* issue, but completely disregards Goss's multiple statements on the record later acknowledging the potential impeachment value of the information to the defense after Goss realized Dalton was a "significant witness" for the State and a person the defense would seek to blame as an accomplice or unindicted co-defendant. At one point, Goss stated that the State had "never denied the impeachment value" of the information and agreed that the defendant had a right to review the information. The record shows the trial judge also recognized the importance of Dalton as the State's "star witness," both from the State and defense perspectives, had opined to Goss that disclosure to the defense was necessary, and had stated the relationship information might be admissible at trial.

Further, Finding of Fact #8 misstates that the trial court "ordered Mr. Goss to reveal to the defense that *a prosecutor* and *a witness* on the case had a one-time sexual encounter" but did not order Goss to reveal the "identity" of the UFP at the end of the *ex parte* meeting before the jury was sworn. The record shows Goss was advised a week before trial to disclose the information to the trial court *in camera.* On the second day of trial, after pretrial motions and voir dire, Goss filed a motion for ex parte communication with the trial judge asking whether to disclose the relationship information to the defense, seeking to balance its disclosure against possible damage to the UFP's reputation. The trial court instructed Goss to make the relationship disclosure to the defense and to withhold only the name of the UFP, and stated she herself would take "a few minutes" to consider possible remedies to minimize harm to the UFP's reputation. The trial court left for Goss the decision when to make the disclosure. The record does not support a finding that the trial court ordered Goss to withhold disclosure of anything more than simply the name of the UFP, including her assignment as the second chair prosecutor at the time the Martinez prosecution guide came into the court at the pre-indictment stage.

In addition, Finding of Fact #10 correctly states that, after the jury was

sworn, the trial court ordered Goss to disclose to the defense the name of the prosecutor who had the relationship with Dalton. But, the finding omits the fact that the trial court, having determined during a break between witness testimony that Goss had failed to make full disclosure as advised, ordered Goss to disclose "everything." Goss only then disclosed the additional details revealing the prosecutor's involvement in the Martinez case—that the prosecutor was assigned to the trial court at the time the Martinez case came in and that she reviewed the prosecution guide during the pre-indictment stage. In other words, Finding of Fact #10 does not make clear that the defense did not receive a full disclosure of the relevant details showing the prosecutor's connection to the case until after the jury was sworn.

Finding of Fact #23 correctly states that the defense filed a motion for mistrial, but states that the State "did not object," rather than that the State "agreed to the mistrial." The record is undisputed that the State ultimately did "agree" to the trial court granting a mistrial. What the State did not agree to was that the mistrial was the result of prosecutorial misconduct, or that the mistrial was forced or provoked by its conduct. The finding also omits the fact, apparent from the record, that at the time the defense moved for a mistrial, counsel stated that Martinez "did not want a mistrial" but felt "forced" into moving for a mistrial by the State's conduct.

Finally, the court's findings that Martinez's counsel did not attempt to investigate the information or seek to avail themselves of a continuance are directly rebutted by the record.

Conclusions of Law

Based on its fact findings, the habeas court made the following Conclusions of Law:

28. For a *Brady* violation to occur, the evidence withheld must be: a. undisclosed, b. favorable to the accused, and c. material.

29. Further, in order to cross-examine a witness regarding potential motive to lie or bias in their testimony, the defense is required to show a good faith basis for the questioning, particularly, for testimony as salacious and remote as contemplated here. Mere speculation regarding the testimony is insufficient to establish its materiality.

30. For retrial to be barred by jeopardy after a defense motion for mistrial, the evidence must show that the State committed misconduct with the intention of provoking a mistrial motion by the defendant or that State committed grave misconduct to avoid an acquittal. Barring retrial is an extreme remedy and difficult to obtain.

31. In this case, the evidence was not undisclosed because it was revealed to defense counsel before the jury was sworn albeit without the name of the UFP. Because the UFP had no involvement in the case (other than reading a portion of the prosecutor's guide), the name would not have added material information at that time. The defense requested no continuance and did not investigate further at that time.

32. There was no evidence of any connection between the 2012 encounter of the UFP and the witness and the involvement of the witness in the 2015 murder investigation. Therefore the information from the UFP was not favorable to the accused.

33. Since there was no *Brady* material in the information from the UFP, the State was under no obligation to disclose it.

34. The evidence from the UFP is not material. The defense did not provide

any good faith basis, nor can the Court conceive of one, where the information from the UFP could be used as either direct evidence or impeachment.

35. Further the defense counsel did not avail themselves of the remedy of a continuance to determine if they could have put the information they learned to use at trial.

36. The State did not intentionally provoke or goad the defense into requesting a mistrial.

37. The defense requested the mistrial in the meeting with Jay Norton, and both Mr. LaHood and Mr. Goss testified they were initially reluctant to agree to it.

38. Mr. LaHood engaged in the unprofessional and uncalled-for "rant" referenced above, which may be subject to sanctions in another tribunal, but neither the intent nor the effect of his behavior was to force the defense to move for mistrial. The behavior, if done with any intent, was done to attempt to deter the claim by the defense of jeopardy [attaching . . . sic] by reason of prosecutorial misconduct, an issue separate from the mistrial. The State did not object to the mistrial.

39. Retrial is not jeopardy barred for the reasons stated.

Analysis

The habeas court's conclusions of law focus on whether or not the information qualified as undisclosed *Brady* material, i.e., "favorable to the accused" and "material." Conclusions of Law #28-29, 31-34 analyze the *Brady* issue and conclude the information was "not undisclosed," "not favorable," and "not material," and therefore the State had "no obligation to disclose it." In Fact Finding #27, the court also finds that Martinez failed to present "any rational basis that the information about the UFP and the witness Dalton would be material, relevant or admissible in evidence before a jury." While the court states the correct double jeopardy test in Conclusion of Law #30, and recites in Conclusion of Law #36 that the State "did not intentionally provoke or goad the defense into requesting a mistrial," its ultimate conclusion that retrial is not barred by double jeopardy stems from its Conclusion of Law #33 that "there was no *Brady* material." Based on that conclusion, the court states the prosecutors were "under no obligation to disclose" the information; therefore, there was no prosecutorial misconduct.

The habeas court's focus, as is the focus of the authoring justice, on the character of the withheld information is misplaced in the context of the habeas petition where the pertinent issue is whether the State acted with the requisite intent to goad or provoke the mistrial request by the defense. As this Court noted in *Ex parte Coleman*, in addressing the habeas petition the court must distinguish between (i) the prosecutor's intentional act or omission (in this case the decision not to fully disclose the relevant information before the jury was selected and sworn) which led to the remedy of a mistrial, and (ii) whether the prosecutor's act or omission was accompanied by the specific intent necessary to bar a retrial, i.e., intent to goad or provoke a mistrial to subvert the defendant's double jeopardy protections or to avoid a possible acquittal. *See Ex parte Coleman*, 350 S.W.3d at 160-61. The trial court's granting of the mistrial in Martinez's case cured the due process violation stemming from the State's failure to timely disclose the information. *See id.* at 160 (the impropriety of the prosecutor's action was "remedied by the mistrial"). In addressing the habeas petition and determining whether

retrial is barred, the court does not retry the issue that led to the mistrial. *Id.*

Instead, the relevant issue at this stage is whether Martinez met his burden to prove by a preponderance of the evidence that the State's conduct was done with the specific intent to goad or provoke Martinez into moving for a mistrial in order to subvert his double jeopardy rights and retry him, or to avoid the possibility of an acquittal. *Id.* The habeas court found to the contrary, and we must determine whether it abused its discretion in reaching that conclusion based on the habeas evidence and the trial record, viewed in favor of the court's findings. *Id.* In making this determination, we consider the following list of non-exclusive objective factors provided by the court in *Ex parte Wheeler* to assist trial courts and reviewing courts in assessing whether the prosecutor had the required state of mind:

1) Was the misconduct a reaction to abort a trial that was "going badly for the State?" In other words, at the time that the prosecutor acted, did it reasonably appear that the defendant would likely obtain an acquittal?

2) Was the misconduct repeated despite admonitions from the trial court?

3) Did the prosecutor provide a reasonable, "good faith" explanation for the conduct?

4) Was the conduct "clearly erroneous"?

5) Was there a legally or factually plausible basis for the conduct, despite its ultimate impropriety?

6) Were the prosecutor's actions leading up to the mistrial consistent with inadvertence, lack of judgment, or negligence, or were they consistent with intentional . . . misconduct?

Ex parte Wheeler, 203 S.W.3d at 323-24 (modified to delete "reckless misconduct" from the sixth factor per *Ex parte Lewis*).

We initially consider whether the prosecutors' actions leading up to the mistrial were a reaction to avoid a possible acquittal under the first *Wheeler* factor. *Id.* The record shows that LaHood was the first person to suggest a mistrial as the remedy for the problematic late disclosure, stating, "Judge, give him a mistrial so we can pick a new jury," and representing that the State "would agree to a mistrial" and would "pick a better jury and be more prepared for trial" next time. Those statements by the District Attorney, on their face, indicate an intent to avoid the possibility of an acquittal (based on lack of preparation or a "bad jury") through an offer to agree to a defense-requested mistrial based on the late disclosure. Although these statements weigh in favor of finding that LaHood believed the trial could be going better, both Goss and LaHood also testified they were happy with the jury and felt the State's case against Martinez was strong as stated in the trial court's Findings of Fact #25 and #26. Therefore, I cannot conclude the record establishes that the prosecutors had the required state of mind under the first *Wheeler* factor. *See id.*

Turning to the second *Wheeler* factor, although advised a week before trial by the Chief of the Ethical Disclosure Unit to disclose the relationship information to the trial court, Goss revealed the full information to the trial judge *ex parte* at the beginning of the second day of trial, before the jury was sworn and thus before jeopardy attached. Even though the trial court instructed him the information needed to be disclosed to the defense and "not to wait any longer," Goss made a conscious decision to make only a vague, partial disclosure to the defense which omitted the

critical details that the court's second-chair prosecutor reviewed the Martinez case file before indictment. Not until after the jury was sworn and the State's first witness had finished testifying, did Goss finally make a full disclosure to the defense attorneys, and that full disclosure occurred only after the trial court ordered disclosure for a second time. Despite Dalton's significance in the case, the State through its prosecutors repeatedly made deliberate decisions not to fully disclose the information to the defense up to and leading into the trial. Thus, I would conclude the second *Wheeler* factor concerning repeated misconduct despite admonitions from the trial court is satisfied. *Id.*

With respect to Goss's proffered explanation for not disclosing the information sooner and the plausibility of the basis for his conduct (*Wheeler* factors three and five), Goss stated his main concern was to protect his fellow prosecutor's reputation. While that motivation is a plausible basis for the nondisclosure during the two years before trial, Goss stated he realized Dalton's significant role in the case for both the State and the defense, and recalled the prosecutor's relationship with Dalton, during the week before trial. At that time, the desire to protect a colleague's reputation, while understandable, was no longer a reasonable explanation for failing to comply with the State's continuing duty of disclosure under *Brady* and article 39.14, not to mention the trial court's specific instructions. Importantly, Goss was told by the trial court *in camera* before the jury was sworn that she would take responsibility for the delay in disclosing the name of the prosecutor and advised Goss to make full disclosure to the defense, omitting only the actual name of the prosecutor. Any concern for his fellow prosecutor's reputation was immediately remedied.[5] The trial court specified that the decision when to make the disclosure was up to Goss and advised him "not to wait any longer." Goss deliberately withheld the details that made the UFP's relationship to the state's star witness significant to the defense until after Goss had begun his case-in-chief, and he made full disclosure only after the trial court ordered him to do so a second time. Therefore, under the third and fifth *Wheeler* factors, Goss failed to provide a reasonable, "good faith" explanation for the conduct and his conduct lacked a legally or factually plausible basis. *Id.*

Regarding the fourth *Wheeler* factor, I note the record unequivocally shows the trial court considered the prior sexual relationship and the second-chair prosecutor's initial role in the Martinez case to be the type of information that falls within *Brady* and Code of Criminal Procedure art. 39.14(h), and ruled that the State had a duty to disclose it to the defense. The Michael Morton Act, which was effective on January 1, 2014 and applies to this case, does not contain a requirement that the information be material or admissible at trial in order for the State to have a duty to disclose. TEX. CODE CRIM. PROC. ANN. art. 39.14(h) (West 2018); *Schultz v. Commission for Lawyer Discipline of the State Bar of Texas*, No. 55649, 2015 WL 9855916, at *10-11 (State Board of Disciplinary Appeals 2015) (discussing the State's duty of disclosure under Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d)

5. It is indecorous for the majority to suggest that the required disclosure of facts to Martinez's defense counsel would inevitably result in the dissemination of those facts as gossip "like wildfire through the courthouse." Nothing in the record invites the majority author's groundless implication against the integrity of defense counsel. Most disturbing is the author's invitation to a prosecutor to withhold information from proper disclosure when he subjectively determines a "plausible" basis to do so.

which was codified in article 39.14). The trial court recognized the significance of Dalton as a witness in the case—characterizing him as the "star witness" for the State, and an "unindicted co-defendant" whom the defense would seek to blame for the murder. The record shows the trial court cautioned Goss during their *ex parte* conference about complaints from the defense against repeated disclosures made "at the last minute." The trial court repeatedly characterized the undisclosed information as having impeachment value to the defense, a fact which Goss also acknowledged, as well as the potential to be admissible at trial. I would conclude that the information was required to be disclosed by the State at the earliest opportunity, whether under *Brady* or Code of Criminal Procedure article 34.19(h), and whether expressly ordered by the trial court or pursuant to the State's continuing duty of disclosure.[6] Therefore, the State's failure to timely and fully disclose the information to the defense was a due process violation which was "clearly erroneous" under the fourth *Wheeler* factor. *See Wheeler*, 203 S.W.3d at 323-24.

With regard to the sixth *Wheeler* factor, the evidence is undisputed that Goss and several other prosecutors in the District Attorney's office made a series of deliberate decisions not to make a full disclosure of the information until after the jury was sworn and after the trial court ordered it. Goss acknowledged that the significance of Dalton to the defense became apparent to him after the pre-trial interview with Dalton; however, Goss made a conscious decision not to disclose that information to the defense at that time—the week before trial—and withheld it from his amended *Brady* disclosures. In addition, Goss signed a pretrial discovery acknowledgement representing that all information had been disclosed to the defense and verbally assured Henricksen that the State had no additional information that needed to be disclosed. During the week prior to trial, several discussions occurred among the members of the State's prosecution team about whether to disclose the relationship evidence; a recommendation was made to seek instruction from the trial court *in camera* which was made at the last minute and then ignored; and conscious decisions were repeatedly made not to disclose it to the defense prior to trial. Based on the foregoing, I would hold that the sixth *Wheeler* factor concerning intentional actions, rather than inadvertence, lack of judgment, or negligence, is met. *Id.*

Finally, LaHood's threats to "shut down" the defense lawyers' practices if they alleged prosecutorial misconduct must be considered. In its Conclusion of Law #38, the habeas court discounted the importance of LaHood's threats to defense counsel, stating that, "neither the intent nor the effect" of LaHood's threats was to force the defense to move for a mistrial; instead, "if done with any intent," the threats were an "attempt to deter the claim by the defense of jeopardy attaching by reason of prosecutorial misconduct." The court concluded that was "an issue separate from the mistrial." I disagree. The threats were intertwined with the suggestion of a mistrial by the State. The defense attorneys testified they considered LaHood's comments a "serious threat" to both their ability to effectively represent their client Martinez and their personal ability to practice law in Bexar County,

6. In characterizing Goss's obligation to disclose as arising only upon the trial court's (second) order to disclose "everything," including the UFP's name, the majority ignores the effect of the pretrial *Brady* order and the State's continuing duty of disclosure under *Brady* and article 39.14(h).

and they believed that, as the elected District Attorney, LaHood had the power and ability to follow through on the threats. The defense attorneys, as well as the trial judge, characterized the effect of LaHood's threats as having a "chilling effect" on them and their representation of Martinez. Viewed objectively, the District Attorney's threats to "shut down" the law practice of the attorneys representing Martinez if they alleged prosecutorial misconduct based on the late disclosure showed an intent to force the defense to accept a mistrial and subsequent retrial in lieu of pursuing a legal remedy which could bar retrial.

Weighing the objective, but non-exclusive, *Wheeler* factors along with the unique occurrence of the District Attorney's threats to defense counsel, I would conclude that the preponderance of the evidence establishes the State acted with the intent to goad or force the defense into moving for a mistrial to subvert Martinez's double jeopardy protections. *See Ex parte Coleman*, 350 S.W.3d at 160; *see also Ex parte Masonheimer*, 220 S.W.3d at 506.

Conclusion

Based on the foregoing reasons, I would hold that the habeas court abused its discretion in denying Martinez's petition for habeas corpus relief. Because the majority concludes otherwise, I must dissent. I would reverse the habeas court's order, grant Martinez's petition for habeas corpus relief, and render judgment that retrial is barred.

Kerry GITTENS, Appellant

v.

The STATE of Texas, Appellee

No. 04-17-00230-CR

Court of Appeals of Texas,
San Antonio.

Delivered and Filed: July 31, 2018

Background: Defendant was convicted in the 226th District Court, Bexar County, No. 2015cr11181, Dick Alcala, J., of murder. Defendant appealed.

Holdings: The Court of Appeals, Patricia O. Alvarez, J., held that:

(1) trial court acted within its discretion in determining that evidence of firearms, ammunition, and narcotics seized from safe in defendant's hotel room was not unduly prejudicial;

(2) evidence was sufficient to convict defendant of murder as an accomplice or as a conspirator; and

(3) trial court acted within its discretion in proceeding with trial despite defendant's absence after state rested its case.

Affirmed.

1. Criminal Law ⚿1153.1

An appellate court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard.

2. Criminal Law ⚿1153.1

As long as the trial court's evidentiary ruling was within the zone of reasonable disagreement, there is no abuse of discretion, and the trial court's ruling will be upheld.

3. Criminal Law ⚿1134.60

If the trial court's evidentiary ruling is correct on any theory of law applicable to

APPENDIX C

Order from the Fourth Court of Appeals of Texas denying
Motion For En Banc Reconsideration
Ex parte Martinez (No. 04-17-00280-CR, September 27, 2018)

Fourth Court of Appeals
San Antonio, Texas

September 27, 2018

No. 04-17-00280-CR

EX PARTE Miguel **MARTINEZ**

From the 437th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR4203
Honorable W.C. Kirkendall, Judge Presiding

ORDER ON APPELLANT'S MOTION FOR EN BANC RECONSIDERATION

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice[1]
Patricia O. Alvarez, Justice[1]
Luz Elena D. Chapa, Justice[2]
Irene Rios, Justice

Appellant's motion for en banc reconsideration is DENIED.

Marialyn Barnard
Marialyn Barnard, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 27th day of September, 2018.

Keith E. Hottle
Clerk of Court

[1] Justice Martinez and Justice Alvarez would request a response.
[2] Justice Chapa is not participating.

APPENDIX D

Order Of The Texas Court of Criminal Appeals
refusing the petition for discretionary review
Ex parte Martinez, No. PD-1190-18 (Tex. Crim. App. December 5, 2018)

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

12/5/2018 **COA No. 04-17-00280-CR**
MARTINEZ, EX PARTE MIGUEL Tr. Ct. No. 2015CR4203 PD-1190-18

On this day, the Appellant's petition for discretionary review has been refused.
JUDGE RICHARDSON DID NOT PARTICIPATE

Deana Williamson, Clerk

MARK STEVENS
LAW OFFICE OF MARK STEVENS
310 S SAINT MARYS ST STE 1920
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* DELIVERED VIA E-MAIL *