Case No. 86-452-K26
Writ No. AP-76,663

THE STATE OF TEXAS	§	IN THE 26th JUDICIAL
	§	
	§	DISTRICT COURT OF
v.	§	
	§	WILLIAMSON COUNTY,
MICHAEL W. MORTON	§	TEXAS

REPORT TO COURT

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REPORT TO COURT

INTRODUCTION AND SUMMARY OF REPORT TO COURT

Background and Summary of Proposed Factual Findings

On October 3, 2011, Michael Morton was freed from State custody for the first time in nearly a quarter century, after new DNA tests revealed that he was factually innocent of a 1986 murder for which he had been sentenced to prison for life in 1987. That was a joyful day for a kind and gracious man, but the suffering he endured in the twenty-five years that preceded his release is virtually unimaginable. He not only went to prison for a crime he did not commit, but at the same time lost his beloved wife Christine. He suffered the shame and humiliation of having the world believe that he had bludgeoned Christine to death in their marital bed, and then went to work, leaving his three and a half year old son in the house with her dead body. He lost custody of his son – and, until recently, all contact with him – because his son falsely believed for over two decades that his father had killed his mother.

But this is not a case in which the truth could only have been uncovered by advanced DNA testing unavailable at trial. Michael Morton's wrongful conviction could have been prevented if the man who prosecuted him, Ken Anderson, had disclosed a series of exculpatory police reports to either the presiding judge or Mr. Morton's defense lawyers. He did not do so -- despite the fact that these documents were clearly *Brady* material and Mr. Anderson was under a court order to produce them. Mr. Anderson was at the time the District Attorney of Williamson County. He is now a judge.[1]

Equally troubling, the actions that brought about Mr. Morton's wrongful conviction may have also resulted in another family's loss of a wife and mother. For the same DNA tests that freed Mr. Morton have tied Mark Alan Norwood – the violent felon now charged with Christine Morton's death – to the scene of the murder of Debra Jan Baker, a mother of two young children who was (like Christine Morton) bludgeoned to death in her own bed during the course of a burglary, and who lived just three blocks from Norwood at the time of her death. Mrs. Baker's murder took place in April 1988, over a year after Michael Morton was sent to prison. If the exculpatory police reports in the Morton case had been timely disclosed to the defense – especially key documents that may have allowed the defense to trace the use of Christine Morton's stolen credit card and a check forged with her signature just days following her murder, and an eyewitness account of the murder describing a tall killer with a large moustache that corresponds to Norwood's appearance – Norwood could well have been apprehended in 1986, and Debra Baker would be alive today.

For his part, Mr. Anderson has produced no evidence – nor does he claim to have any recollection – that he actually disclosed any of these exculpatory documents to the trial court or defense counsel. Yet he refuses to taken any personal responsibility for

[1] Mr. Anderson indicated during his deposition that he prefers to be called "Mr." rather than "Judge" for purposes of this case.

Michael Morton's wrongful conviction and imprisonment. Last month, after being deposed in this matter, Mr. Anderson held a press conference where he proclaimed, "In my heart, I know there was no misconduct whatsoever," and concluded that the problem in the Morton cases was that "the system failed."[2]

In truth, as the evidence proffered in this Report demonstrates, the problem in the Morton case is not that "the system" failed, but that Judge Anderson did not play by the rules. The evidence shows he disobeyed a direct order from the trial court to produce the exculpatory police reports from the lead investigator, Sgt. Don Wood, for *in camera* review. He did not call Sgt. Wood as a witness at trial to avoid having to disclose the exculpatory reports after Sgt. Wood testified on direct. After the jury convicted Mr. Morton, and Mr. Anderson's co-counsel, then-assistant district attorney Mike Davis, revealed the existence of the exculpatory Wood documents to the defense for the first time (evidently under the belief that Mr. Anderson had previously produced them to the trial court for in camera review as ordered), and defense counsel filed a motion for a new trial, Mr. Anderson concealed from the trial court that he had not disclosed Sgt. Wood's complete reports and notes. He concealed his failure to disclose Sgt. Wood's complete reports and notes to the Court of Appeals, which explicitly affirmed Mr. Morton's conviction on the false assumption that Mr. Anderson had disclosed them. Even after he became a judge in Williamson County, the evidence shows that Mr. Anderson continued to advise and encourage his successor as District Attorney, John Bradley, to oppose all of Mr. Morton's post-conviction motions for DNA testing, and applications for parole, despite the fact that the Wood documents Mr. Anderson was concealing provided abundant support for Mr. Morton's contention that DNA testing could prove that an intruder had murdered his wife. Indeed, even after DNA testing of a bandana found

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[2] *See* Brandi Grissom, "Former Morton Prosecutor Denies Wrongdoing in Case," Texas Tribune, Nov. 16, 2011, available at http://www.texastribune.org/texas-newspaper/texas-news/ken-anderson/.

behind the Morton residence was determined to be stained with Christine Morton's blood and DNA from Norwood, and the exculpatory Wood documents finally came to light, Mr. Anderson still resisted Mr. Morton's efforts to overturn his conviction.

Ultimately, Mr. Bradley joined in Mr. Morton's request for post-conviction relief based on actual innocence pursuant to DNA testing (Claim 1 of Mr. Morton's writ). He also agreed with the undersigned that it was important and appropriate to pursue the fact-finding and discovery process Mr. Morton was entitled to use under Article 11.07(3)(d) of the Texas Code of Criminal Procedure to assess serious allegations of prosecutorial misconduct at the original trial (Claims 2 through 7 of the writ). This discovery agreement is directly due to Mr. Morton's courageous insistence that a full inquiry be conducted into the allegations of prosecutorial misconduct; he was willing to remain in prison for additional weeks or months if needed, to ensure that his right to conduct discovery under Article 11.07 would not be jeopardized by the entry of agreed findings on his innocence claim.

This Court and the Court of Criminal Appeals agreed that the discovery process was appropriate and lawful. Both courts quickly rejected Mr. Anderson's efforts to halt the discovery process and required Mr. Anderson, former assistant district attorney Mike Davis, and former Sgt. Don Wood to be deposed under oath pursuant to the parties' Discovery Agreement.[3] In addition, although they were not ordered to do so, the current District Attorney, John Bradley; the Assistant District Attorneys who handled this case

[3] The Parties' original agreement, adopted by this Court pursuant to an order dated October 3, 2011, called for these depositions to be conducted privately and under seal so as to avoid the potential circus-like atmosphere of a public hearing involving a sitting Judge. Mr. Anderson and Mr. Davis elected to make the agreement public by filing court challenges (not under seal) to try and halt the process. In addition, after his deposition (but, perhaps notably, before the transcript was filed with the Court and available to the media), Mr. Anderson called a press conference on the courthouse steps to generally deny any wrongdoing in this case on November 16, 2011. He also released an advance, draft copy of his deposition transcript to selected media outlets on November 29, 2011.

post-conviction, Kristen Jernigan and (now Judge) Doug Arnold; another former Assistant District Attorney, Kim Gardner; the State's chief expert witness at trial, Dr. Roberto Bayardo; and Mr. Morton's trial lawyers, Bill Allison and Bill White, voluntarily provided detailed statements on issues relevant to this inquiry.

In addition, on December 14, 2011, in anticipation of the filing of this Report, Mr. Anderson's counsel sent the undersigned a letter further elaborating upon the answers his client provided at his deposition, offering his counsel's interpretations of key portions of the Morton case record, and rebutting certain anticipated allegations of misconduct. That letter is also attached to this Report so that Mr. Anderson's current defense to the allegations of misconduct will be fully available to this Court and the public.

In October, Mr. Bradley also agreed to waive any arguable work product privilege with respect to the remainder of the State's files – including all of his office's internal communications regarding the case – thus ensuring that any and all original case documents which had been preserved over the last twenty-five years would be available as part of this inquiry.

The process has now yielded a reviewable factual record that would have otherwise been created through a public fact-finding hearing under Article 11.07(3)(d). Along those lines, it bears emphasizing that the Proposed Factual Findings in Part I of this Report, and the conclusions urged throughout the Report, constitute Mr. Morton's and his counsel's own interpretation of that record. While we submit that the evidence of Mr. Anderson's misconduct in this record is substantial, and is of such a serious nature as to warrant further proceedings against him, it will, of course, be up to this Court to make that determination. Similarly, while we believe that the record provides probable cause to believe that Mr. Anderson violated at least three laws of the State of Texas, and a strong factual basis for believing he violated professional disciplinary rules, whether those findings are ultimately made will be up to the courts and the disciplinary boards. And

while we vigorously maintain that the present record shows that Mr. Anderson intentionally denied Mr. Morton due process of law, we also strongly believe Mr. Anderson should be afforded the presumption of innocence and a full and fair opportunity to be heard as these inquiries proceed.

This Report follows. It is being submitted by Mr. Morton, through his counsel. Given the DNA evidence now appearing to link the perpetrator of Christine Morton's murder with the subsequent murder of Debra Baker, surviving members of the Baker family (represented by separate counsel) have also filed a supporting statement regarding relief requested pursuant to a Court of Inquiry.

Summary of Proposed Legal Findings, Relief Sought, and Recommendations

As set forth herein, the attached depositions, statements, and materials, viewed in light of the entire record in this case, provide a persuasive and credible basis to find Mr. Anderson committed serious acts of misconduct. The evidence shows he not only breached the ethical rules of the legal profession, but there is probable cause to believe he also violated criminal laws of the State of Texas.

Part I of this Report contains Proposed Factual Findings based upon the record that, Mr. Morton submits, support the conclusions and recommendations set forth in the remainder of the Report.

Part II of this Report sets forth Proposed Legal Findings for this Court's consideration. In light of the facts learned during this investigation, Morton submits there is probable cause to find that Mr. Anderson violated at least three criminal laws of the State of Texas.

First, there is probable cause to believe Mr. Anderson committed the crime of contempt under Tex. Gov't Code Section 21.002(a), in that the evidence supports a finding that he disobeyed Judge Lott's orders to produce Sgt. Wood's complete set of reports and field notes for *in camera Brady* review, and did so knowing that the

undisclosed Wood documents contained exculpatory evidence that should have been disclosed to the defense. Similarly, there is probable cause from the record evidence to believe that Mr. Anderson continued to disobey, disrespect, and evade the order to produce the complete set of Wood reports and field notes when the existence of those reports was revealed by his co-counsel after the verdict, including (a) when the defense filed a motion for a new trial specifically alleging the complete Wood reports and notes were not disclosed for *in camera* review, (b) on appeal, where the same issue was raised and Morton's conviction was affirmed on the explicitly-stated presumption by the Court of Appeals that Mr. Anderson had produced the complete set of Wood reports and notes for *in camera Brady* review, and the far more limited Wood documents that Mr. Anderson had actually produced were not exculpatory.

Finally, the record provides probable cause to believe that Mr. Anderson, even after his appointment to the bench, continued to urge his successor to fight the defense's efforts to reveal the truth about Mr. Morton's innocence, and thus to conceal Mr. Anderson's role in securing his wrongful conviction. He continued to act as an advisor on the Morton case to his successor, John Bradley, and encouraged opposition to post-conviction DNA testing motions even though Mr. Anderson knew his own disobedience of Judge Lott's order to produce the Wood reports and notes for *in camera Brady* review concealed from Mr. Bradley, the courts, and defense counsel, the fact that there existed undisclosed, exculpatory documents strongly supporting Mr. Morton's contention that DNA testing could prove a third party had killed his wife during the course of a burglary.

Similarly, based on concealment of the exculpatory Wood documents, there is probable cause to believe that Mr. Anderson violated Penal Code Section 37.09, "Tampering With or Fabricating Physical Evidence," and Penal Code Section 37.10, "Tampering With Government Records." A person violates Section 37.09 if, "knowing that an investigation or official proceeding is pending or in progress, he . . . alters,

destroys, or conceals any record, document, or thing with the intent to impair its verity, legibility, or availability as evidence." Tex. Penal Code § 37.09 (a), (d)(1) (2011). Section 37.10 is violated, in relevant part, when a person "intentionally . . . conceals . . . or otherwise impairs the . . . availability of a government record." Tex. Penal Code § 37.10(a)(3)(2009).

In this section of the Report, we will also address the anticipated affirmative defense that the statute of limitations has run on these offenses. It must be emphasized, however, that a potential statute of limitations defense is not a bar to probable cause findings that would be the basis for commencing a Court of Inquiry in the first instance, but is instead an affirmative defense that would be Mr. Anderson's burden to raise and prove if and when he is later prosecuted for these or other alleged crimes.

In Part III of this Report, Morton puts forward four requests for judicial relief.

First, Morton requests that pursuant to Texas Code of Criminal Procedure Art. 52.01(a) and (b), the Court of Inquiry statute, this court, acting in its capacity as a magistrate, enter findings that there is probable cause to believe Mr. Anderson has violated one or more laws of the State of Texas, and request that a Court of Inquiry be commenced. Ordinarily, this request, and the district court's supporting affidavit, is made to the administrative judge of the judicial district. However, given that Judge Stubblefield voluntarily recused himself from all proceedings in this matter (days after the limited file produced to Judge Lott was unsealed this past August and the inference of misconduct by Mr. Anderson's became more grave), counsel respectfully suggests that this request be made to Texas Supreme Court Chief Justice Wallace Jefferson, as was Judge Stubblefield's request for appointment of a new district judge.

Secondly, Mr. Morton requests the Court forward this Report and any additional factual or legal findings it may make to the Texas State Bar for consideration of disciplinary action. This Report identifies specific ethical rules that may have been

violated by Mr. Anderson based on the record, and addresses the statute of limitations issue as it arises in the disciplinary context.

Third, Mr. Morton requests the Court forward this Report and any factual or legal findings it may make to the State Commission on Judicial Conduct, so that the Commission may consider whether the record warrants Mr. Anderson's removal from the bench.

Fourth, Mr. Morton requests that the Court dismiss the pending indictment against him on the grounds of actual innocence.

Finally, in Part IV of this Report the undersigned propose public policy recommendations designed to prevent future miscarriages of justice arising from *Brady* violations, and to identify other miscarriages of justice that might have been attributable to Mr. Anderson when he served as Williamson County District Attorney. These recommendations call for action by other governmental agencies, and we recognize this Court does not have the authority to order that these actions be taken; we nonetheless thought it appropriate to identify the issues in the context of this extraordinary record.

First, the undersigned propose the Legislature hold interim hearings to determine how to meaningfully enforce the longstanding ethical obligation of prosecutors to make timely pretrial disclosure "of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense," an obligation recognized in Texas and across the country to be both independent of, and broader than, the constitutional standard of "materiality" that is necessary for reversing a conviction under *Brady*.[4] Proposals for more effective methods to enforce the broader pretrial Brady disclosure obligation have recently been made by the American Bar Association, the National Association of Criminal Defense Lawyers, the Federal Judicial Center, and joint

[4] *See* 48A Tex. Prac., Tex. Lawyer & Jud. Ethics Section 8:9 (2009-2010 ed.) commentary paragraph (d).

working groups of prosecutors, defense lawyers, judges, police, and academics. There is much that can be done.

Second, the undersigned recommend the interim hearings consider enactment of statewide "open file" discovery procedures, a practice, if properly implemented, that can simplify and potentially eliminate pretrial B*rady* disclosure violations like the ones that the evidence shows occurred in the Morton case, while still ensuring the safety of witnesses and protecting against the subornation of perjury.

Third, the undersigned recommend that the Texas Supreme Court and Court of Criminal Appeals adopt new ABA Model Rules of Professional Responsibility 3.8(g) and (h). These rules require a prosecutor who "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense" to disclose it promptly, and, if a prosecutor knows of "clear and convincing evidence" that a defendant did not commit a crime, to remedy the conviction.

Fourth, the undersigned recommend that the Williamson County District Attorney's office put a process in place to conduct an independent audit of past cases prosecuted by Mr. Anderson to determine if there were any other *Brady* violations similar to the instant matter that should be remedied.

Landmark post-conviction DNA exoneration cases have proven to be catalysts for criminal justice reform in Texas and across the country. The exoneration of Chris Ochoa and Richard Danziger in Travis County in 2000 led to the passage of statewide legislation authorizing post-conviction DNA testing, compensation for the wrongfully convicted, and the Fair Defense Act. The exoneration of George Rodriguez in Harris County helped lead to an historic audit of the Houston Police Department Crime Laboratory and legislation that created the Forensic Science Commission. We believe the unfair prosecution of Michael Morton is one of those iconic, catalytic cases that everyone understands: what

happened to Michael Morton could happen to any one of us, unless strong measures are taken to prevent it from happening again.

I. PROPOSED FACTUAL FINDINGS

A. Morton Case History

1. Charges, Conviction and DNA Testing

a. The history of Michael Morton's 1987 wrongful conviction for the murder of his wife, and the revelation of his actual innocence through DNA evidence in 2011, is by now well known to the courts of this State and the public at large. The specific facts concerning that history set forth in this subsection provide basic background for the issues that are the subject of this Report. Upon information and belief, the facts in this section (Part I.A.) are not in dispute by any party or witness whose testimony has been taken in this investigation, including Mr. Anderson.[5]

b. On August 13, 1986, Christine Morton was found bludgeoned to death in the home in Williamson County that she shared with her husband, Michael, and the couple's three-year-old son, Eric. Mr. Morton was convicted of the murder after a jury trial in February 1987.

c. Ken Anderson became District Attorney of Williamson County in 1985. He was lead counsel for the State in its prosecution of the Morton murder, and also

[5] The following court documents, already on record, provide support for and further detail the undisputed facts discussed in this section. *In Re Morton*, 326 S.W.3d 634 (Tex. App.-Austin) (Jan. 8, 2010) (summarizing trial evidence and Mr. Morton's defense that an unidentified third-party intruder committed the crime); Case No. 86-452-K26D, Agreed Findings of Fact and Conclusions of Law dated Oct. 3, 2011 (recommending adoption of parties' agreed findings of actual innocence based on new DNA evidence and grant of post-conviction relief); *Ex Parte Morton,* No. AP-76,663 (Tex. Crim. App. Oct. 12, 2011) (adopting this Court's findings of fact and conclusions of law and granting relief from conviction based upon actual innocence); Case No. 86-452-K26D, Defendant's Memorandum of Law in Support of Defendant's Application for a Writ of Habeas Corpus, filed Oct. 3, 2011.

personally prepared the State's brief and argued its case on direct appeal. At Mr. Morton's trial, Mr. Anderson was assisted by then-Assistant District Attorney Mike Davis, who had, at that time, been employed by the District Attorney's Office for close to two years.

d. Mr. Morton was represented at trial by Bill White and Bill Allison, experienced criminal defense attorneys who were, at that time, with the law firm of White and Allison, PC. District Attorney Anderson, Mr. White and Mr. Allison were well-acquainted prior to the Morton case; Mr. Anderson had, in fact, at one time been Mr. Allison's student at the University of Texas Law School. Mr. Allison also handled Mr. Morton's direct appeal from his conviction, and continued to represent Mr. Morton post-conviction on a *pro bono* basis until referring the case to the Innocence Project in approximately 2002.

e. At trial, Mr. Anderson argued to the jury that Mr. Morton had murdered his wife in a rage in the late evening of August 12, 1986, or the early morning hours of August 13, 1986, after she declined to have sexual intercourse with him. Mr. Morton asserted a trial defense of actual innocence, maintaining his wife was alive and asleep in their bed when he left for work at approximately 5:30 a.m., and that she must have been killed by an unknown intruder sometime thereafter.

f. DNA testing, in any form, was unavailable to either party at the time of Applicant's trial. In 2005, represented by undersigned *pro bono* co-counsel from the Innocence Project and the Houston-based law firm of Raley & Bowick LLP, Applicant filed a Motion for Post-Conviction DNA Testing under Chapter 64 of the Code of Criminal Procedure. The motion sought testing on, *inter alia*, a bandana that had been recovered by Christine Morton's brother on August 14, 1986, at the scene of a house under construction located approximately 100 yards away from the Mortons' home. The house under construction was adjacent to a dense, wooded area located directly behind

the Mortons' home, directly along the path that Mr. Morton's trial attorneys alleged the actual perpetrator may have fled after committing the crime.

g. The Office of the Williamson County District Attorney opposed the DNA testing motion in its entirety. Mr. Anderson had served as District Attorney until he was appointed by Governor Perry as a District Judge in Williamson County in 2001. John Bradley, then an Assistant District Attorney to Mr. Anderson, was appointed as District Attorney and continues to hold that position.

h. In 2010, after five years of litigation, the Court of Appeals at Austin overruled the State's objections to testing the bandana and the hair from the bandana, holding that the motion to test these items satisfied the requirements of Chapter 64. In May 2010, the District Court granted Applicant's request to have the bandana tested at Orchid Cellmark, an accredited, private DNA laboratory in Texas whose test results are eligible to be entered by DPS into the CODIS convicted-offender DNA database.

i. On June 30, 2011, the Orchid Cellmark laboratory issued its DNA testing report on the bandana to both parties. The report revealed that blood and hair found on the bandana came from Christine Morton. In addition, the report revealed that a partial, unidentified male DNA profile had been detected on the non-bloodstained side of the bandana (mixed with a "minor" profile consistent with Christine Morton), and concluded that Michael Morton was not the source.

j. In August 2011, the unknown male DNA profile from the bandana was uploaded into CODIS. A "hit" was made to a convicted felon, Mark Alan Norwood, whose sample had been entered into the national CODIS system through California's database. The parties were informed of the hit on August 9, 2011, and Norwood's name and criminal history were released to the parties on August 17. (Norwood is referred to in most court papers on record in this matter as "John Doe," as the parties agreed not to

release his name to the public until he was arrested and charged with Christine Morton's murder on November 9, 2011.)

k. On August 23, 2011, at a hearing before the then-presiding Judge of the 26th District Court in this matter (Hon. Billy Ray Stubblefield), Applicant's counsel informed the Court and the State – in a non-public portion of the proceedings occurring at the bench – that the defense had, in the five days since learning of Norwood's identity, conducted an initial investigation as to his criminal history (which included charges and/or convictions for burglary, illegal drug possession, and assault with intent to murder), as well as his whereabouts at the time of the Christine Morton murder. Counsel reported that the initial defense investigation had revealed that Norwood had in fact resided in the area at the time of Christine Morton's murder and was out of custody on the date she was killed.

l. Mr. Morton's counsel also reported a possible link uncovered between Norwood and an unsolved murder in Travis County. That murder, like the Morton case, involved a wife and mother in her early 30s named Debra Jan Baker, who was bludgeoned to death in her bed. It occurred after the date of Applicant's incarceration (on January 13, 1988), and, based on the information publicly available, bore numerous apparent similarities in *modus operandi* to the Morton case. Moreover, counsel had researched John Doe's address history and determined that he was not in custody, and lived just three blocks from the scene of the Baker murder, at the time of its commission.

m. Counsel met with the Travis County District Attorney's Office and Austin Police Department's cold case unit (collectively, "Travis County") the following day. Travis County immediately commenced an investigation into Norwood's potential culpability for the Baker murder. On September 26, 2011, the parties were informed that Travis County had provided this Court with initial DNA test results from its renewed

Baker investigation. The results indicated that Norwood was, in fact, the apparent source of a pubic hair recovered from the bed where Mrs. Baker was bludgeoned to death.

n. On September 28, 2011, the Travis County District Attorney's Office informed that DPS had analyzed a known sample from Norwood and confirmed the initial information provided by the CODIS system – *i.e.,* that Norwood's DNA profile is consistent with the DNA profile of the hair recovered from the Baker Murder crime scene. DPS further reported that the profile found on the pubic hair is shared by an estimated 1 in 983 million Caucasians.

o. On October 3, 2011, Mr. Morton filed an application for a writ of habeas corpus. The District Attorney's Office, after negotiations with Mr. Morton's counsel regarding what the State now agreed was his right to a new trial, concurred that Mr. Morton should be granted habeas relief and immediately released from custody based on the new evidence of his actual innocence contained in the foregoing DNA test results (Claim One of the writ). This Court entered Agreed Findings recommending that relief be granted on this ground, and Mr. Morton was freed from custody on a signature bond on October 4, 2011.

p. On October 12, 2011, the Texas Court of Criminal Appeals adopted this Court's proposed findings on Mr. Morton's innocence claim, and granted relief. That same day, the Williamson County District Attorney filed a Motion to Dismiss Mr. Morton's indictment on grounds of actual innocence.

q. Every attorney who has represented the State in the Morton matter over the last twenty-five years – including Mr. Anderson, Mr. Davis, Mr. Bradley, and Ms. Jernigan – now agrees that Mr. Morton is factually innocent of the 1986 murder of his wife. Exh. 2 (Deposition of Ken Anderson ("Anderson dep.")) at 67; Exh. 3 (Statement of Doug Arnold ("Arnold stmt.") at 147; Exh. 5 (Statement of John Bradley ("Bradley stmt.") at ¶ 32.

2. Due Process Claims in Morton Writ, and Further Agreed Discovery

a. Mr. Morton's October 3, 2011 application for a writ of habeas corpus also included six additional claims for relief based upon what he alleged were gross violations of his due process rights at trial. Those claims turned on what he contends was the unlawful suppression of material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny.

b. In particular, Mr. Morton alleged in his writ that five separate categories of exculpatory documents prepared during the State's investigation of his wife's murder in 1986 were wrongfully withheld from him by the State at his 1987 trial. Mr. Morton's post-conviction counsel had obtained these documents (1) upon prevailing, in part, in a contested request for information under the Public Records Act filed with the Williamson County Sheriff's Office (WCSO) in 2008, and/or (2) upon prevailing in an August 31, 2011 motion to produce the remainder of the WCSO file in this case, as well as non-privileged portions of the District Attorney's file.

c. In addition, after the writ was filed and while discovery on these due process claims continued, Mr. Bradley agreed to make available to the undersigned the remainder of the entire WCDA file, including internal correspondence and notes, *i.e.,* including all material that would otherwise be shielded from discovery as work product.

d. The key documents at issue in Claims Two through Seven of the writ – the focus of the inquiry described in this Report – are the following:

i. A transcript of a taped interview by the Williamson County Sherriff's Office (WCSO)'s chief investigator in this matter, Sgt. Don Wood, dated August 24, 1986, conducted with the victim's mother, Rita Kirkpatrick ("the Unedited Kirkpatrick Transcript") (attached as Exhibit 7). In the Unedited Kirkpatrick Transcript, Mrs. Kirkpatrick reported that her grandson (Mr. Morton's

and the victim's son), Eric, had personally witnessed the murder, and that the child had provided a detailed, chilling account of how a man ("the monster") who was *not* his "Daddy" beat Christine to death, at a time when "Daddy" was "not there." Eric's account includes numerous objective details that precisely corroborate to the crime scene and the manner of Christine's death, including the fact that the perpetrator bludgeoned Christine to death in her bed; did so with a wood instrument; piled a blue suitcase on her body; and carried a wicker basket (also found on her body).

ii. A condensed version of the transcript of the interview referenced in Part I(A)(2)(d)(i) above ("the Kirkpatrick Memo," attached hereto as Exhibit 8), was also prepared by Sgt. Wood and dated August 24, 1986. This memo is addressed and copied to, *inter alia,* the District Attorney (Mr. Anderson) and the Williamson County Sheriff (Jim Boutwell, who is now deceased). In the Kirkpatrick Memo, Sgt. Wood he summarizes, quotes and highlights the most vivid aspects of Eric's description of the "monster" who murdered Christine, and specifically notes that Eric stated that his father was not present when the murder occurred.

iii. A handwritten telephone message to Sgt. Wood, dated August 15, 1986 (two days after the murder), reporting that what appeared to be Christine Morton's missing Visa credit card was recovered at the Jewel Box store in San Antonio, with a note further indicating that a police officer in San Antonio would be "able to ID" the woman who attempted to use the card, an unnamed prior offender with "$1000 in fraud on her." (Document attached hereto as Exhibit 9). There is no indication in the WCSO file or the WCDA's file that this lead was ever followed up by the WCSO. Nor is there any document in either file reflecting the outcome of any such follow up.

iv. A report by WCSO officer Randy Traylor, dated August 14, 1986, noting that during a canvass of the area immediately after the murder, a neighbor of

the Mortons reported having "on several occasions observed a male park a green van on the street behind [the Mortons'] address, then the subject would get out and walk into the wooded area off the road." The report also indicated that another neighbor may know where the suspicious person in question lives. This document (hereinafter, "the Green Van Report") is attached hereto as Exhibit 10.

v. An internal, typewritten WCSO message to Sgt. Wood (undated and unsigned), and follow up correspondence dated September 27, 1986, reporting that a check made out to Christine Morton by a man named John B. Cross prior to her death was cashed post-mortem, and that the signature on the back appeared to be a forgery of Christine's. The check containing Christine's forged signature was cashed on August 22, 1986, nine days after her murder. In addition, in the memo to Sgt. Wood, the WCSO officer conveying the message to Sgt. Wood disparaged the notion that the check might lead to apprehension of a third-party killer, by stating that the individuals who gave the information about the check forgery – a police officer in Arizona and his father in law, Mr. Cross – "seem to think that Chris' purse was stolen, course we know better[.]" These documents are attached hereto as Exhibit 11 (hereinafter, "the Cross Check Documents"); in addition, attached as Exhibit 12 are additional documents bearing Christine Morton's known signature, and which establish that the visibly different signature on the check from Mr. Cross was not, in fact, hers.

e. Each of the foregoing documents (Exhibits 7 through 11) was part of the WCSO file regarding the Christine Morton case when that file was produced to Mr. Morton's post-conviction counsel in 2008 and/or 2011. In addition, Exhibits 8 and 10 (the Kirkpatrick Memo and the Green Van Report) were not only in the WCSO file, but were specifically in the section of the WCDA file marked "Trial" when that file was produced to Mr. Morton's post-conviction counsel on September 26, 2011.

f. In the writ, Mr. Morton argued that these documents, both individually and collectively, constituted highly material, exculpatory evidence supporting his trial defense that a third party intruder was the real killer of his wife. These documents also would have been critical to his defense, he argued, by providing substantial impeachment material regarding the State's witnesses – in particular, the police witnesses, whom his trial counsel alleged had rushed to an early and flawed judgment against Mr. Morton, resulting in a missed opportunity to find the true perpetrator. That argument, Mr. Morton noted in his writ, would have been made exponentially more powerful and effective in the jury's eyes with the benefit of the suppressed materials, given the bias and lack of follow-up in the investigators' own reports.

g. The due process claims in the writ also cited the State's apparent failure to comply with direct orders of the trial court to produce the above materials for *in camera* review. As noted in the writ, both the pretrial and immediate post-trial record repeatedly demonstrate that Mr. Anderson was ordered by Judge Lott to produce all of Sgt. Wood's reports and notes for the Court's review, in conjunction with the defense's pending *Brady* motion, prior to trial; those documents were sealed by Judge Lott and forwarded to the Court of Appeals for review, where they remained for the next twenty-four years ("the Sealed Lott File").

h. After the DNA test results identifying Norwood as the source of male DNA on the bandana containing Christine's blood and hair were obtained in August 2011, the question of whether the State had also suppressed evidence at trial regarding a possible third-party intruder gained new urgency. Mr. Bradley's office consented to an order to open the *in camera* review file sealed by Judge Lott in 1987, and the unsealing was conducted on August 26, 2011, in the presence of designated representatives from both parties.

i. In addition to notations prepared by the trial court and the Court of Appeals concerning chain of custody, the Sealed Lott File turned out to consist of only two documents: a five page 'Supplementary Offense Report/Results of Investigation' prepared by Sgt. Wood dated August 13, 1986 (the same date that Christine Morton's body was discovered), and a copy of the one-page form Mr. Morton also signed on that date, consenting to a search of his home and vehicle. *See* Exh. 13 (entire contents of Sealed Lott File). None of the Wood reports described above (Exh's. 7 through 11) were part of the pretrial file produced to, and sealed by, Judge Lott.

j. In light of the powerful *prima* facie evidence of egregious due process violations, Mr. Morton had the right to a public evidentiary hearing under art. 11.07 § 3(d) – which also provides for pre-hearing depositions, affidavits, interrogatories, and other discovery. Given the disturbing evidence that Mr. Morton could well have been acquitted of the crime in 1987, even before the advent of forensic DNA testing, he was loath to abandon this inquiry merely because these due process claims might not ultimately prove necessary to vacate his conviction.

k. Mr. Bradley agreed that the request to continue discovery on the due process claims was appropriate under the extraordinary circumstances of this case, even if unusual. Thus, on October 3, 2011, the parties proposed, and this Court adopted, that a Discovery Agreement be appended to the Court's Agreed Findings on the writ. *See* Exh. 14 attached (Order and Agreement). Under the Agreement, depositions of the three persons most likely to have knowledge of the *Brady* material at issue (Mr. Anderson, Mr. Davis, and Mr. Wood) were ordered. Mr. Bradley also pledged his and his office's cooperation in the undersigned's other investigative efforts during that period.

l. Mr. Anderson and Mr. Davis filed motions to quash their deposition notices and subpoenas on October 19, 2011. After further briefing and a hearing held on October 24, 2011, this Court denied both motions to quash. Mr. Anderson (but not Mr.

Davis) asked the Court of Criminal Appeals to issue an emergency stay of discovery through the filing of an application for a writ of prohibition and a writ of mandamus. The CCA quickly denied Mr. Anderson's application, without written order. *See Anderson v. Harle,* Case No. WR-76,647-01, WR-76,647-02 and AP-76,663 (letter to counsel dated October 26, 2011).

m. Depositions of all three witnesses named in the Discovery Agreement were then taken in accordance with the Agreement's terms. Mr. Bradley's office consented to further orders of this Court for production of its entire file in the Morton case (to the extent not previously provided), including work product and internal communications. Finally, Mr. Bradley, Ms. Jernigan, Mr. Arnold, Mr. Allison, and Mr. White voluntarily provided detailed statements to the undersigned regarding any information they may have acquired regarding these issues through the present day, as did other individuals.

B. Evidence that Mr. Anderson Knowingly Suppressed the Exculpatory Material

1. <u>Evidence That the Exculpatory Material Was Never Provided to the Defense</u>

a. None of the documents attached as Exhibits 7 through 11 were introduced into evidence, discussed, or mentioned by the State, defense counsel, or any witnesses during Mr. Morton's trial. Nor were any of these documents introduced, discussed, or mentioned by the State, defense counsel, or any witness during pretrial proceedings or on direct appeal.

b. There is no document, transcript, or other record – either in the trial transcript, other court files, the WCSO file, or the District Attorney's file – indicating that Mr. Anderson or any other person acting on his behalf ever provided any of these documents to Mr. Morton's counsel prior to, during, or after trial. Nor is there any document, transcript, or other record establishing or indicating that Mr. Anderson or any

person acting on his behalf conveyed to Mr. Morton's counsel, either orally or in writing, the substance of the information contained in any of these documents.

c. Mr. Anderson, as the elected District Attorney and lead counsel appearing for the State in this particular case, was personally responsible for selecting the witnesses who would testify at trial. Exh. 2 (Anderson dep.) at 262, 264. He was also the attorney in charge of all discovery in this case, and as such, was responsible for ensuring that the defense had the documents and information to which they were entitled. Exh. 4 (Deposition of Mike Davis ("Davis dep.")) at 15; Exh. 2 (Anderson dep.) at 111-12.

d. This included responsibility for compliance with specific court orders entered in this case, and with the State's ongoing, constitutional *Brady* obligations. Consistent with this division of responsibility, Mr. Anderson appeared for the State at all three pretrial conferences held in the Morton case, but his assistant, Mr. Davis, did not attend those proceedings. Exh. 4 (Davis dep.) at 33.

e. Mr. Anderson has no present recollection of providing any of the documents attached as Exhibits 7 through 11 to the defense at any time.[6] Nor does he point to or recall any documentation outside the District Attorney's file and court records to establish that he did, in fact, disclose these materials. Exh. 2 (Anderson dep.) at 267-68.

f. Mr. Anderson also claims that he has no present recollection that he personally was aware that these documents even existed as part of the State's investigation into Christine Morton's murder. He concedes, however, that it is likely that he at least knew about the information contained in Exhibits 8 (the Kirkpatrick Memo, regarding Eric's sighting of the "monster" who murdered his mother) and 10 (the Green

[6] Throughout the deposition, Anderson reiterates, "I have no recollection," "I can't recall," etc. *See*, *e.g.,* Exh. 2 (Anderson dep.) at 264, 329 ("[T]here's no way I can figure out what my understanding was 25 years ago."), 338, 341, 342-43 ("I don't have any recollection of things that happened 25 years ago . . . .").

Van Report), because those documents were recently identified as part of the District Attorney's trial file. Exh. 2 (Anderson dep.) at 49, 143, 339.

g. Mr. Anderson also has no recollection as to whether he provided the defense with any of the information contained within Exhibits 7 through 11 in non-written form. For example, he has no specific recollection of any meetings, discussions, or conferences in which he claims he verbally summarized or discussed with defense counsel the information in any of these documents. He repeatedly asserted in his deposition, however, that *if* in fact he had been aware of the information contained in Exhibits 7 through 11, he "would have" personally ensured that the defense also had all of that that information – either by conveying it to them orally, or confirming that "we had already been talking about it." Exh. 2 (Anderson dep.) at 81, 97, 120, 173.

h. By contrast, as set forth in Part I(B)(3) *infra,* and in their affidavits attached as Exhibits 16 and 17, Mr. Allison and Mr. White are wholly certain that neither Mr. Anderson nor anyone acting on his behalf ever provided them with any of these materials. Nor did Mr. Anderson or anyone acting on his behalf ever convey the substance of the information contained in these materials to them orally. *Id.*

i. Despite the absence of *any* external support for his these hypothetical, outside-the-record disclosures, and despite being informed that Mr. White and Mr. Allison dispute that he did so, Mr. Anderson's insistence at his deposition that he "must have" ensured that all of this information was verbally communicated to Mr. Morton's trial attorneys was unwavering.[7]

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[7] *See, e.g.,* "There's no way on God's green earth either I didn't tell them about it or we all were talking about it." (referring to the Rita Kirkpatrick – Wood transcript of what Eric Saw, Exh. 2 (Anderson dep.) at 77); "There is no way on God's green earth, if that was in my file, I wouldn't have told them that Eric said that the monster killed his mother . . . unless we had been having conversations about that between the lawyers." *Id.* at 81; "[T]here is no way on God's green earth I wouldn't have told the defense about [Eric seeing the monster] unless we had already been talking about it." *Id.* at 97; "If that's in my file, there's no way in God's green earth I don't hand – not hand it – don't tell them." *Id.* at

j. As detailed in Proposed Findings of Fact (I)(B)(2), *infra*, Mr. Anderson has no recollection of what he actually did, and the facts do not support his speculation about what he did. Therefore, his position is simply not credible, especially in light of the other evidence. Instead, the record contains overwhelming evidence establishing that (a) Mr. Anderson had to know about, and did know about, each and every item of *Brady* material in the WCSO and District Attorney's files in advance of trial, but (b) concealed this material from Mr. Morton's trial attorneys, despite a well-settled constitutional obligation and direct court orders requiring their disclosure.

2. Evidence that Mr. Anderson Knew the Contents of Sgt. Wood's Complete Report and Field Notes in the Morton Case Well in Advance of Trial

a. Evidence Based on Routine, Custom and Legal Obligations

i. Former Sgt. Don Wood was the WCSO's lead investigator on the Morton case from the date of Christine Morton's murder (August 13, 1986) until the case went to trial in February 1987. Exh. 18. (Deposition of Don Wood ("Wood dep.") at 27.[8] For purposes of this case, he reported directly to then-Sheriff Jim Boutwell, who is now deceased. *Id.*; Exh. 19 (excerpts from *Crime in Texas)* at 13. He debriefed Sheriff Boutwell on the status of his investigation at least once per

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98; "If I had the information, I surely would have turned it over." *Id.* at 99. *See also, e.g.,* "The only reason I wouldn't have turned [the green van report] over is if somebody interviewed Joni St. Martin [the neighbor reported as having seen the man with the van]. And there's no report I've seen of that." *Id* at 185-86; "[I]f I was aware of [the credit card] information and it had not been run to ground and determined to be totally without merit, there's no way I wouldn't have turned it over." *Id.* at 138.

[8] In the last several years, Wood has had five to six strokes, the most recent one which was six months ago. They have primarily affected his short term memory. He still lives alone, drives, and handles his own finances. Exh. 18 (Wood dep.) at 6, 24, 59.

week, and often more frequently. *Id.* at 27. There was also considerable media attention regarding the Morton case during this period. *Id.* at 26.

ii. Sgt. Wood prepared a substantial number of reports and field notes regarding the Morton case – sometimes as many as four reports in a given day. He also prepared and retained "field notes" during the course of the investigation. He was careful to place both the typewritten reports and any field notes or other documents he received regarding the investigation into the WCSO's master file for the Morton case. He put those documents into the case file "immediately" after preparing them: either the day they were generated, or the following day. *Id.* at 27-28. (For clarity and brevity, all of Sgt. Wood's reports, notes, and other documents gathered as part of his investigation into Christine Morton's murder will be referred to in this Report (as they were in the depositions) as the "Complete Wood Report.")

iii. Each of the five sets of documents containing exculpatory material that are attached to this Report as Exhibits 7 through 11 were authored by, addressed to, and/or listed as copied to Sgt. Wood. *See* Exh's. 7 through 11.

iv. Each of these documents is dated August or September 1986, meaning that they were all generated several months in advance of Mr. Morton's February 1987 trial. *Id.*

v. Sgt. Wood has no present recollection regarding the content of any of these particular documents. However, he does not dispute that he would have, in keeping with his standard practice, immediately added any case reports he authored or received to his Morton case file. *Id.* at 32. Sgt. Wood also indicated that there may have been additional documents in his Complete Report beyond those presently in the file. At a meeting in the District Attorney's Office in 2011, he was asked to review what was presented to him as his complete set of reports and notes from the WCSO file. He was presented with a stack of documents approximately one inch thick;

however, he recalls that the documents he originally generated during the Morton investigation and placed in the case file were closer to four inches in total. *Id.* at 90-91.

vi. Sheriff Boutwell, Sgt. Wood's supervisor, was "on top of everything" in the Morton investigation. *Id.* at 163. He had an eye for detail and wanted to know the information gathered as soon as it was available. *Id.* For example, Sgt. Wood specifically recalls debriefing Sheriff Boutwell about the progress of his investigation in the case, and reviewing his handwritten notes with the Sheriff, before preparing his typewritten reports. *Id.* at 161-63.

vii. In his book *Crime in Texas*, written in 1997, Mr. Anderson describes his extraordinarily close working relationship with Sheriff Boutwell:

> Perhaps no sheriff and district attorney had a closer working relationship than Jim and I had. We talked on the phone daily, and more often than not, drank a cup of coffee together. . . . At the L&M Cafe in downtown Austin, Jim and I did some of our best work. We painstakingly pieced together circumstantial murder cases. We debated the next step of an investigation. . . . The downfall of more than one criminal doing life in the state prison system began with an investigation put together on a coffee-stained napkin at the L&M Cafe.

Exh. 19 (excerpts from *Crime in Texas,* 1997) at 17-18.

viii. Mr. Morton's was precisely the sort of "circumstantial murder case" that Mr. Anderson and Mr. Boutwell "painstakingly piece[d] together" in partnership with one another. Indeed, Mr. Morton's case is the *only* circumstantial murder case that Mr. Anderson recalls handling as District Attorney; even if there were others, they were few and far between. Exh. 2 (Anderson dep.) at 125.

ix. Thus, there is no reason to believe that any and all information Sheriff Boutwell learned about Sgt. Wood's investigation into the Christine Morton murder would not have been shared with Mr. Anderson immediately, whether in the

two men's daily telephone calls, coffee shop meetings, or through more formal channels.

x. In *Crime in Texas*, Mr. Anderson also went to great lengths to dispel the notion that a trial lawyer wins cases because he is "a star in the courtroom." Exh. 19 at 26. Instead, Mr. Anderson wrote, the key to success as a prosecutor is to fully immerse oneself in the details of the investigation itself:

> In reality, I don't see much brilliance in the courtroom. Trials are won and the truth is exposed because of detailed, painstaking preparation done before the first witness is sworn in. Someone has to visit the crime scene, interview the witnesses, retrace the steps of the victim or defendant, and examine the physical evidence. Someone has to master the hundreds of details.

Id.

xi. In *Crime in Texas*, Mr. Anderson illustrates his master-the-details approach by describing his pretrial investigation of the Morton case specifically. *See id.* at 27-28. He relates, for example, how he personally went to the City Grill restaurant, where the Mortons last dined together, to sort through produce crates in order to determine the precise contents of Christine Morton's last meal – a detailed investigation that, he explains, proved critical to the time-of-death estimate by the State's expert that would later seal Mr. Morton's conviction at trial. *Id.*

xii. By the time of Mr. Morton's 1987 trial, it had long been the rule in Texas criminal courts that if any testifying witness for the State had generated a report or made a prior statement regarding the case, the defendant is entitled to inspect the witness's complete reports or statements prior to cross-examination. *See Gaskin v. State*, 353 S.W.2d 457 (Tex.Crim.App. 1962) (op. on reh'g).

xiii. Sgt. Wood was on the State's original witness list for the Morton trial, which was transmitted to defense counsel on or about October 24, 2011. *See* Exh. 20 (witness list). Approximately two hours before trial commenced, however, he was informed by Sheriff Boutwell that Mr. Anderson would not call him to testify.

Exh. 18 (Wood dep.) at 153. Sgt. Wood recalls being fairly surprised by this decision, since he had handled "the biggest part" of the investigation and it was "a pretty famous case." *Id*. at 154-55.

xiv. District Attorney John Bradley, former Assistant District Attorney (now Judge) Doug Arnold (who worked for both Mr. Anderson and Mr. Bradley), Bill Allison, and Bill White all attest that it would have been highly unusual for a prosecutor in Mr. Anderson's position in 1986 not to have reviewed the Complete Wood Report and field notes prior to making a final decision whether or not to call Sgt. Wood to testify. Exh. 5 (Bradley stmt.) at ¶¶ 23. Mr. Anderson himself conceded at his deposition that when preparing a witness for trial, "My normal routine would be to sit down with somebody and say, 'Do I have all your reports?'" Exh. 2 (Anderson dep.) at 204; *see also id.* at 295 ("Any police officers who I was thinking about calling, I would have had their reports"). He claims, however, that he "cannot imagine [himself] sitting down with Sergeant Wood and asking him that question." *Id* at 204. If he had done so, he hypothesizes that it would have only been with Sheriff Boutwell. *Id.* at 204-205. However, he has no recollection as to whether he made that inquiry in this case, whether to Sgt. Wood, Sheriff Boutwell, *or any other* officer. *Id.* at 204-05.

b. <u>Evidence Based on the Pretrial Proceedings</u>

i. <u>The November 25-26, 1987 Pretrial Hearing</u>

A. On November 25 and 26, 1986, approximately two and one-half months before trial began, Judge Lott conducted a hearing on various pretrial matters. The hearing concerned, but was not limited to, Mr. Morton's motion to suppress certain statements allegedly made by him to investigators at the Mortons' home on August 13, 1986 (the date that Christine Morton's body was discovered),

as well as the fruits of the warrantless search of the Mortons' home on August 13 ("the November Pretrial Hearing") (excerpts attached as Exh. 21).

B. One week prior to the November Pretrial Hearing, on November 18, 1986, defense counsel filed a Motion for Production of Evidence Favorable to the Accused ("the *Brady* Motion"), seeking an order for production of, *inter alia,* "any evidence favorable to the accused on the issue of guilt or innocence" or "any evidence which is inconsistent with the guilt of the accused" in the State's possession, as required by *Brady*. *See* Exh. 22 attached.

C. Also on November 18, 1986, defense counsel filed a Motion for Discovery and Inspection, seeking, *inter alia*, all reports or other records in the files of the Williamson County Sheriff's Office or other law enforcement agencies, all statements and reports of witnesses who will be called to testify, as well as any and all documents in the prosecutor's file that may be material to the issue of Mr. Morton's guilt or innocence. *See* Exh. 23 attached at ¶ 4, 9, 16.

D. Sgt. Wood was called by the defense to testify at the November pretrial hearing regarding statements and evidence taken at the crime scene on August 13, 1986. Under the *Gaskin* rule, he was not required to turn over his Complete Report or notes as part of that pretrial testimony. But even assuming, *arguendo*, that Mr. Anderson was by November somehow unaware of the exculpatory material from August and September that were contained in the Complete Wood Report and field notes, he must have become aware of that material at the hearing or shortly thereafter. For the record of the November hearing demonstrates that Mr. Anderson had (a) already reviewed portions of Sgt. Wood's Report, and (b) was on notice that the Complete Wood Report was an "extensive" file, which Mr. Anderson was required to review pretrial for *Brady* and *Gaskin* purposes.

E. When questioned at the November 1986 hearing about the events of August 13, Sgt. Wood could not remember numerous details regarding the events of that date. He stated that he would need to refer to his complete Report – which he stated he had not brought to court with him – in order to refresh his recollection. *See* Exh. 21 (Nov. Pretrial Hr'g Tx.) at R.73-74, 91-92. He also testified that he had used and retained rough, handwritten "field notes" to prepare his Report. *Id.* at 73.

F. Sgt. Wood explained, in part, his inability to remember specific details occurring on August 13 while testifying at the November pretrial hearing because of the magnitude of the complete investigation. He explained that he conducted "quite an extensive investigation, and I talked to lots of people and I just, you know, I don't remember everything I said to everybody." *Id.* at 91-92 (emphasis supplied).

G. Mr. Anderson was present at counsel table when Sgt. Wood referenced his "extensive investigation" in the Morton case. Thus, if Mr. Anderson were not already aware of the details of that investigation, in keeping with his personal commitment to "master the hundreds of details" in a case (Exh. 19 at 26), after the hearing, he surely would have examined the full contents of the Complete Wood Report and field notes.

H. But there is also record evidence that Mr. Anderson had in fact reviewed Sgt. Wood's Complete Report prior to the November pretrial hearing, or had it sitting at counsel table with him. During the suppression hearing, defense counsel Bill Allison attempted to inquire whether the Mortons' neighbor, Elizabeth Gee, had talked to Sgt. Wood on August 13, 1986, about her view of the Mortons' relationship with one another. Mr. Anderson volunteered that, "No, the

reports don't indicate that she had that conversation with Sergeant Wood that day." Exh. 21 (Nov. Pretrial Hr'g Tx.) at R. 90 (emphasis supplied).

I. Thus, by the time of the November pretrial hearing, Mr. Anderson was sufficiently familiar with the contents of the Complete Wood Report to represent to the Court whether certain statements from Ms. Gee were obtained by Sgt. Wood and memorialized in his August 13 report, or whether they appeared in one of Wood's subsequent reports.

J. At his deposition, Mr. Anderson conceded that it is logical to conclude, from this portion of the record, that Mr. Anderson either had Sgt. Wood's reports with him at the hearing, or had reviewed the reports prior to the hearing. Exh. 2 (Anderson dep.) at 213-14.

K. Nor was the November hearing the first time that Mr. Anderson was put on notice that Sgt. Wood's investigative file in the case was "extensive." Sheriff Boutwell stated as much when lauding Sgt. Wood's work on the case after Mr. Morton's arrest in late September. *See* Exhibit 24 (*Victim's Husband Held in Murder Investigation,* HILL COUNTRY NEWS, Sept. 26, 1986) ("The case culminated in an extensive investigation that lasted one-and-one-half months," said Boutwell, "Several of our officers took part in the investigation, but Sgt. Wood was the primary investigator").

L. At the November hearing, Mr. Allison also expressed great frustration with the limited discovery provided by the State to date. He reminded the Court that he had pending both a *Brady* motion and an omnibus discovery motion. He then explained – in a revealing exchange – why he required the Court's assistance in enforcing the State's basic *Brady* obligations:

> MR. ALLISON: "[W]e have some other motions before the Court. And I think I need to put on the record right now that it's pretty obvious this is a major case, a major criminal prosecution. And we have received so far from

> the Prosecution a hundred and eight photographs taken from the Sheriff's Department.
>
> We have received no other discovery in this case at all. I think that is an important fact now since the Luther Adams case that needs to be put on the stand both for purposes for motions for discovery, for Brady motions, and for motions to quash.
>
> MR. ANDERSON: Judge, with all due respect to counsel, they had a copy of the autopsy report before I did. Their private investigators have been interviewing witnesses before I was even aware that there was anything more than what I'd seen in the newspaper. And to say that they haven't been given any discovery is not accurate.
>
> MR. ALLISON: Discovery, when we use it in a criminal courtroom, has a very particular meaning, Judge. It doesn't mean what I go out and discover on the street. It means what I discover through the Prosecutor's Office. When we talk about discovery, and when I file a Motion for Discovery, I don't file a motion to discover what I've already found out by hiring an investigator. I obviously file a motion to discover what he has in his files or in his records.
>
> I don't mean to be silly about this, but, I mean, let's not confuse what discovery is.

Exh. 21 (Nov. Pretrial Hr'g Tx.) at R. 60-61.

M. During Sgt. Wood's testimony at the hearing, Mr. Allison noted the difficulty he was having in conducting a meaningful hearing without having Sgt. Wood's report available, and that the report's unavailability would also prevent the Court from adequately considering the defense's constitutional claims. Mr. Anderson reiterated that he would not allow the defense to review the report, but volunteered to provide it to the Court for *in camera* review, "so that the Court can determine if it contains anything relevant to the voluntariness of the confession." *Id.* at 82-83.

N. Thereafter, Mr. Allison asked Sgt. Wood for more information about the content of his Report – including, for example, whether it contained information regarding follow-up investigation that Sgt. Wood subsequently may

have conducted after August 13 regarding statements Mr. Morton made to him at the crime scene. *Id.* at 95-96. He confirmed with Sgt. Wood that "[t]his report that is going to be given to Judge Lott in camera, this is a detailed report?" *Id.* at 96. He then inquired:

> MR. ALLISON: "Judge Lott, I need a clarification. Are we talking about <u>the report itself and the field notes so that you have everything?</u>"
>
> The Court (to Sgt. Wood): "Are the field notes available?"
>
> THE WITNESS: Yes, sir.
>
> THE COURT: That would be fine.

Id. (emphasis supplied).

O. At the conclusion of testimony, Mr. Allison reminded the Court that the defense still had several motions pending aside from the motion to suppress Mr. Morton's statements. This included the *Brady* Motion and the Motion to Discover Evidence. *Id.* at 118. The parties agreed to confer and attempt to resolve any remaining discovery issues, including *Brady* disclosures, before the February 9, 1987 trial date.[9] *Id.* at 118-23.

ii. <u>The February 6, 1987 Pretrial Hearing</u>

A. The next pretrial hearing was held on February 6, 1987 ("the Feb. Pretrial Hr'g"). That date was a Friday, and jury selection began on Monday, February 9. *See* Exh. 25 (excerpts from hearing).

B. At the hearing, defense counsel Bill White raised several *Brady* issues with the Court that were still outstanding. First, he disputed the State's contention that Mr. Morton's statements to law enforcement on August 13 do not

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[9] At Mr. Allison's request, the Court also agreed to schedule an additional pretrial hearing regarding the progress of discovery on December 18, 1986 (*id.* at 125), but it does not appear from the record that this December hearing took place.

qualify as *Brady* material, and renewed the defense's request to review those statements pretrial under *Brady*. Exh. 25 (Feb. Pretrial Hr'g Tx.) at R. 28.

C. Mr. White then separately requested, consistent with the defense's pending *Brady* motion, production not only of Mr. Morton's statements on August 13, 1986, but also production of "any other Brady material the state might have." *Id.* at 29. Judge Lott immediately turned to counsel for the State and asked, "Mr. Anderson, do you have anything that is favorable to the accused?" Mr. Anderson responded, "No, sir." *Id.*

D. Mr. Anderson proceeded to assure the Court that he was well aware of his *Brady* obligations in this case. *See id.* ("You know, I have made Brady material available to the Defense attorneys in the past. I haven't noticed the Court disagreeing with me, and I think I know what Brady material is.") *Id.* He also proceeded to argue about why Mr. Morton's statements on August 13 should not be discoverable under *Brady* or otherwise. *Id.*

E. Mr. White responded to Mr. Anderson by reminding the Court that neither the Motion to Suppress nor the outstanding *Brady* issues would be resolved until the Court reviewed the Complete Wood Report and field notes *in camera,* as previously ordered back in November:

> MR. WHITE: If I might reply. My understanding at the pretrial was that the State, that is, the Government, <u>was going to provide to the Court the reports of Officer Wood and Sheriff Boutwell</u>, <u>the complete reports</u>, to make a determination about the Defendant's statements, whether they were Brady material or not <u>or whether Brady material existed</u>, and also had to do, of course, the issue on the search and the Motion to Suppress. Has the State provided those to the Court with those in camera reports?
>
> THE COURT: No, I have a notation that a copy of the report was to be furnished. This is Wood, I believe.
>
> MR. WHITE: Should be one for Boutwell, too, I believe.

> THE COURT: To the Court for in camera inspection and they will be sealed for any appellate record and also the field notes leading to it.

Id. at 30 (emphasis added).

F. In addition to confirming that Mr. Anderson had been ordered to provide the "complete reports" (plural) of Sgt. Wood for *in camera* review, the record from the February pretrial hearing reflects that he also promised to confer with Sgt. Wood and ensure that a complete set of Wood's "field notes" were also provided – even though Mr. Anderson professed ignorance about the content of those notes at that time:

> THE COURT: What about [Sgt. Wood's] field notes?
>
> MR. ANDERSON: Field notes, I had forgotten about those, Judge, and I need to get with Sergeant Wood today, obviously, to get those. I haven't seen them, myself, and I have no idea what they say.
>
> THE COURT: All right, get those to me so I can have an opportunity over the weekend to examine them. And check the record of the – on the Motion to Suppress and see if that also covered the Sheriff's.[10]

Id. at 31-32.

G. On the official court docket sheet for the February 6 hearing, Judge Lott memorialized the proceeding as follows: "Court to conduct in camera inspection of Report of Officer Don Wood in connection with D[efendant]'s Brady motion." Exh. 26 attached (docket sheet).

H. In his personal notes taken during the February 6 pretrial hearing (retrieved from court archives by the undersigned in October, 2011),

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[10] This references an earlier discussion at the February hearing as to whether the *in camera* review the Court had ordered in November also extended to all of Sheriff Boutwell's reports and notes, or only to Sgt. Wood's. Exh. 25 (Feb. Pretrial Hr'g Tx.) at R. 28, 30-33. The Boutwell issue was later rendered moot when he – unlike Wood – was called by the State at trial, and the limited notes he himself had prepared were given to the defense under *Gaskin*. R. at 722.

Judge Lott also discussed the production of the Complete Wood Report, in a portion of his notes marked "Brady motion – Rule Monday." The notes reflect that the state was ordered to provide him with "Don Wood's Records and Sheriff's Records" (plural) for that weekend's *in camera* review. Exh. 27 (Lott notes) at 1, bottom of page (emphasis in original).

I. Mr. Anderson stated in his deposition that he has no specific recollection of which portion(s) of Sgt. Wood's Report he produced to Judge Lott *in camera*. Exh. 2 (Anderson dep.) at 344, 348-49, 391. Nor can he recall whether, at that time, he interpreted Judge Lott's order the same way that Mr. White, Mr. Allison, and (according to his notes) Judge Lott did: to produce all of Sgt. Wood's reports and field notes for *in camera* review, for purposes of both the *Brady* motion and the motion to suppress. Exh. 2 (Anderson dep.) at 342-44.)

J. In preparation for his deposition, Mr. Anderson reviewed the transcripts of the November 1986 and February 1987 pretrial hearings. He now states that he interprets the pretrial record as not requiring him to provide Judge Lott with Sgt. Wood's Complete Report, but instead to produce only those Wood report(s) that concerned statements made by Mr. Morton when he was interviewed at his home on August 13, 1986. Exh. 2 (Anderson dep.) at 249-50, 328-29.

K. Mr. Anderson stands alone among prosecutors who represented the State in this case, and who also reviewed that same record in recent months, in his peculiar interpretation of the production order. *Cf.* Exh. 4 (Davis dep.) at 32, 34; Exh. 3 (Arnold stmt.) at 88-89; Exh. 5 (Bradley stmt.) at ¶ 20; Exh. 6 (Statement of Kristen Jernigan ("Jernigan stmt.") at ¶ 13. But even assuming that Mr. Anderson may have somehow interpreted Judge Lott's order in 1987 as requiring him not to produce the Complete Wood Report for *in camera* review the weekend before trial, at a minimum, he would have still acquired knowledge of

the file's entire contents – including the obvious *Brady* material contained in Exhibits 7 through 11 – in the course of preparing his production.

iii. Evidence Based on Specific Pretrial Statements by Mr. Anderson Regarding Eric Morton

A. Also at the February conference held three days before trial, Mr. Anderson specifically inquired about whether the defense might call to testify someone who was not even on their witness list: Eric Morton. Mr. Anderson stated that, if the defense did plan to have Eric testify, he would ask for a pretrial hearing *in limine* on the child's competency as a witness. But defense counsel – obviously unaware of the detailed eyewitness account of the murder that Eric had given his maternal grandmother sitting in Sgt. Wood's and the District Attorney's files – had no cause for concern about the State's request. Mr. White merely quipped in return that "we've been preparing him [to testify] for days now," and then assured the trial court that they were, in fact, "joking" and had no plans call Eric as a witness. Exh. 25 (Feb Pretrial Hr'g Tx.) at R. 66-67.

B. At no time during the February pretrial hearing, or in any other proceeding, did either defense counsel indicate that they had ever been informed by the State, or discussed with the State, any statements Eric had made about the murder – whether to his grandmother, Sgt. Wood, or any other person. *See* Exh. 16 (Affidavit of William Allison ("Allison aff.") at ¶6 (Eric's eyewitness account "was never once told to me by anyone . . . [n]or was it paraphrased or alluded to by Mr. Anderson or any other representative working for the prosecution"); Exh. 17 (Affidavit of William White ("White aff.") at ¶9 ("I had absolutely no idea at the time that Eric had made a very specific statement about witnessing the murder

in progress. I also had absolutely no idea that the detailed statement Eric gave was corroborated by physical evidence discovered at the crime scene and was communicated to the victim's mother, a credible source who was completely independent of the defense").

C. Indeed, had any such conversations occurred (as Mr. Anderson speculates they must have, *see, e.g.,* Exh. 2 (Anderson dep.) at 97, 120, 173), Mr. White and Mr. Allison would have made an extensive, contemporaneous record of what was told to them – a record that would have reflected the defense's extensive efforts to get Eric's account before the jury, had they known of its existence. Exh. 16 (Allison aff.) at ¶11; Exh. 17 (White aff.) at ¶7. That neither Mr. White nor Mr. Allison did so (in the same case in which the record shows they fought tooth and nail merely to obtain their own client's statements to law enforcement) is powerful evidence that Mr. Anderson, but not Mr. Allison or Mr. White, knew about Eric's account.

D. Nor did Mr. Morton himself have any knowledge whatsoever that Eric had given this detailed eyewitness account of the murder to his maternal grandmother and that a written report of that statement was in the State's files – that is, not until Mr. Morton had served more than two decades in prison and his counsel obtained a copy of the statement through public records. In these proceedings, Mr. Anderson has referenced a 1987 newspaper article, which quoted Mr. Morton as saying that his son told him, his mother, and a therapist that he "saw the murderer," but that the child's statement "couldn't be admitted as evidence due to hearsay." *See* Ed Allen, *Morton Maintains Innocence; Says Verdict Based on Emotion,* HILL COUNTRY NEWS, Feb. 26, 1987 (attached as Exhibit 28). Mr. Anderson, through his counsel, cites this as "evidence that the information contained in the [Kirkpatrick Transcript] was in fact known by trial

defense counsel." Exh. 1 (Letter from Mark Dietz to Barry Scheck et al., Dec. 14, 2011 ("Dietz letter") at 2.

E. That is incorrect. As Mr. Morton attests, he and his counsel believed only that (at most) Eric had gotten a brief glimpse of the killer, but had no idea of the detailed and highly exculpatory eyewitness account Eric gave his maternal grandmother, the full transcript of which was hidden in the State's files for more than two decades after he was sent to prison. *See* Affidavit of Michael Morton ("Morton aff."), attached as Exhibit 29.

F. A few weeks after the murder, Eric asked his father if he had seen "the man in the shower with his clothes on." *Id.* at ¶6. Mr. Morton was "stunned by the question." *Id.* He presumed that this meant his son had briefly seen the murderer that day, and was concerned that Eric may have seen more or even been harmed by the killer. Eric repeated his question about the "man in the shower" to his paternal grandmother, and to a child psychologist – but to Mr. Morton's great relief, Eric gave no further details to any of them, and they believed this was all he had witnessed. *Id.* at ¶¶9-10.

G. Certainly, at no time did Eric indicate to his father, or anyone else that Mr. Morton knew about, that he had seen a "monster" with a "big moustache" beat his mother to death. *Id.* at ¶¶10, 12-13. He certainly never provided his father with any description of the murder, much less one that corresponded to the crime scene and Christine's injuries in such significant detail as the one that was in the State's files even before Mr. Morton's arrest. *Id.* Nor was Mr. Morton aware, until recently, that Eric had provided an eyewitness statement of any kind to his mother-in-law; and for obvious reasons, he was "shocked and saddened" to belatedly learn, two decades after his conviction, that Mrs. Kirkpatrick was convinced that Eric had in fact seen an intruder murder his

mother (and that Michael was innocent), before the State manipulated and concealed this evidence to secure his conviction. *Id.* at ¶13.

H. Mr. Morton did discuss what he knew about Eric's sighting of the "man in the shower" with his trial counsel. *Id.* at ¶11. However, "[b]ecause Eric said so little and there was nothing to corroborate what he saw, I was told that his brief statement was not likely to be legally significant or helpful at my trial. Besides, it was explained to me that based on the hearsay rule, neither me, my mother or Jan Maclean would likely have been able to testify about what Eric asked us." *Id.* It is equally clear why his counsel would have recognized "the obvious challenges that the prosecution would have made to its credibility (because Michael was the source)" had they tried to get Eric's statement to his father admitted, and why counsel "would not have wanted to risk alienating the jury by having Michael testify about hearsay evidence that the jury could have seen as self-serving or even fabricated." Exh. 17 (White aff.) at ¶8.

I. The detailed Kirkpatrick Transcript and Memo in the State's files, however, would have been another matter altogether. Mr. Allison strongly believed in his client's innocence, and recalls that he had "never worked as hard on a case as I did on the Morton case." He is certain that Mr. Anderson never disclosed these reports or hinted at their content to him or Mr. White, because he knows what they would have made of it if that had occurred:

> Any scrap of evidence consistent with the unknown intruder defense of Mr. Morton would have been given the highest priority. Exculpatory evidence such as Eric's statement would have been invaluable to have and especially credible given the fact that 1) the statement was corroborated by physical evidence discovered at the crime scene; and 2) the source of that information came from Mrs. Kirkpatrick, a person not associated with our defense. In the transcript, Mrs. Kirkpatrick also offered her opinion in the conversation with Sgt. Wood that Sgt. Wood should as Eric's st … domestic thing now and look for the monster" because Eric's statement removed any suspicion she had that "Mike did it."

> Mr. White and I would have fought hard to have the jury hear this evidence because it would have powerfully supported our theory that the prosecution rushed to judgment against Mr. Morton and ignored evidence of his innocence. At a minimum, if we had been given this information in any form, we certainly would have made a record of our efforts to get the evidence out in front of the jury.

Exh. 16 (Allison aff.) at ¶¶10-11. *See also* Exh. 17 (White aff.) at 9 ("I had absolutely no idea at that time that Eric had made a very specific statement about witnessing the murder in progress. I also had absolutely no idea that the detailed statement Eric gave was corroborated by physical evidence discovered at the crime scene and was communicated to the victim's mother, a credible source who was completely independent of the defense").

J. That Mr. Anderson knew in advance of trial about the detailed statements Eric Morton had given to his maternal grandmother, as documented in the transcripts in the Complete Wood Report, is also supported by the testimony of former Assistant District Attorney Kim Gardner. Exh. 30 (Affidavit of Kimberly Gardner ("Gardner aff."). Ms. Gardner, now a lawyer in private practice, contacted the undersigned shortly after learning of Mr. Morton's release from prison in October. *See* Exh. 30 (Gardner aff.) at ¶ 1.

K. Ms. Gardner recalls that while employed as an ADA in Williamson County in 1986-87, she not only attended the Morton trial, but was present during certain pretrial strategy discussions between Mr. Anderson and Mr. Davis regarding the Morton case. *See* Exh. 30 (Gardner aff.) at ¶ 4.

L. Ms. Gardner specifically and clearly recalls being present for at least one discussion between Mr. Anderson and Mr. Davis concerning Eric Morton. *See* Exh. 30 (Gardner aff.) at ¶ 5. In that discussion, the two Morton prosecutors strategized about how they planned to reconcile their case against Mr. Morton with the eyewitness account of a "monster" committing the murder that

Eric Morton had provided to his maternal grandmother. *Id.* She specifically recalls Mr. Anderson and Mr. Davis discussing a possible rebuttal argument: that Mr. Morton still committed the murder, but his son did not recognize him (and described him as a "monster") because he wore a scuba diving suit as a disguise. *Id.* at ¶ 8.

M. Ms. Gardner does not recall either Mr. Anderson or Mr. Davis ever indicating that the defense was already aware of Eric's statements regarding the murder. *See* Exh. 30 (Gardner aff.) at ¶ 7. Rather, they appeared to be anticipating what they might argue in rebuttal if and when the defense subsequently learned of Eric's statements and succeeded in getting testimony about his account into evidence at trial. *Id.* at ¶¶ 5, 8.

N. Ms. Gardner's recollection is significant not only because it demonstrates that Mr. Anderson was aware of, and highly concerned about, the substance of Eric Morton's eyewitness account. It also is powerful evidence that he obtained that information specifically from Sgt. Wood's Complete Report – in particular, from the unedited version of the Kirkpatrick Transcript that Sgt. Wood prepared and put into his file on August 24, 1986 (Exh. 7). In that version – but not in the shorter, memorandum version that Sgt. Wood copied to the District Attorney (Exh. 8) – Sgt. Wood makes this very "scuba suit disguise" argument to Mrs. Kirkpatrick during their initial phone call. *See* Exh. 7 at ¶ 4.

O. It is highly unlikely that the District Attorney's Office would have come up with this "scuba suit" rebuttal independent of Sgt. Wood's reports. This is because Sgt. Wood's rank speculation that Mr. Morton may have worn his scuba suit was based upon his own misinformation about what was recovered from the crime scene. He told Mrs. Kirkpatrick that Mr. Morton's full-body scuba suit was, atypically, found in a bag in the garage on the day of the murder – but

that was not correct.[11] Thus, it is highly unlikely, if not impossible, that Mr. Anderson and Mr. Davis would have come up with this same factually-inaccurate rebuttal argument if they had not been provided with, and relied upon, Sgt. Wood's original misinformation and hypothesis as set forth in the Complete Wood Report.

P. In addition, if Mr. Anderson was familiar with the unedited Kirkpatrick Transcript (Exh. 7), which was in the WCSO file, it follows that he also reviewed, and was well aware of the contents of, other documents in the WCSO file that were not necessarily in the District Attorney's own file. This would include the highly exculpatory documents transmitted to Sgt. Wood regarding the post-mortem use of the victim's stolen credit card and the check forged with her signature (Exh's. 9 and 11). None of these documents were mentioned at the pretrial hearings, however, even when Mr. Anderson was asked by the Court whether he had any *Brady* material to provide.

c. <u>Evidence Based on Mr. Morton's Motion for New Trial and the Direct Appeal Proceedings</u>

i. Even assuming that Mr. Anderson was somehow unaware of the contents of the Complete Wood Report during the entire trial, a motion filed by the defense 30 days after the verdict put Mr. Anderson on specific notice that the Complete Report may have included substantial, undisclosed *Brady* material.

[11] Although Mr. Morton had gone scuba diving the previous day, he had not worn a scuba diving suit on his trip because he never wore one (for obvious reasons) in the August heat. He only took the necessary accessories for warm-weather diving itself (goggles, fins, diving knife, etc.), and after cleaning and drying that gear, returned these accessories to the duffel bag in which he always kept them – as depicted in the WCSO's own photos of the garage. No full-body scuba suit was recovered in the garage at all.

ii. On March 17, 1987, Mr. Allison filed a Motion for a New Trial, asking that the jury's verdict be thrown out based on new information indicating that the State had failed to comply with its *Brady* obligations and the Court's own orders. The Motion quoted statements made by ADA Mike Davis in Mr. Allison's and the jury's presence, which revealed that the State had failed to comply with the Court's order to produce the Complete Wood Report for *in camera* review – resulting in the suppression of *Brady* material in the Wood Report that would have strongly supported Mr. Morton's trial defense. *See* Exh. 31 (Motion for New Trial) at 1.

iii. Specifically, the Motion stated that when Mr. Davis and Mr. Allison were speaking with jurors (as was their practice and custom) following the verdict, Mr. Davis made what appeared to Mr. Allison to be a remarkable admission: "that Sgt. Wood's reports were sizable (he held up his hand and indicated about one inch between his fingers) and that if the defense had gotten them, we would have been able 'to raise even more doubt than we did'" about Mr. Morton's guilt. *Id.* Mr. Davis further told the jurors that the Complete Wood Report specifically contained "leads on unusual happenings or strange persons in the neighborhood" which, the Motion argued, would have been highly relevant to Mr. Morton's third-party intruder defense, and may have allowed the defense to uncover and present still further evidence to support that theory. *Id.* at 1-2.

iv. Mr. Davis does not presently recall this exchange in the jury room. However, he confirms it was his usual practice to speak with the jury after a verdict, and does not dispute that he made the statements regarding Sgt. Wood's Complete Report that Mr. Allison attributed to him in the contemporaneous Motion. Exh. 4 (Davis dep.) at 41-42.

v. For his part, Mr. Anderson says he also does not recall anything about the Motion or his response to its contents in 1987. However, he acknowledges

that he must have read the Motion when it was filed, because the word "File" written on the top of the District Attorney's Office copy (Exh. 31 (Motion for a New Trial) and 2 (Anderson dep.) at 251) is in his own handwriting.

vi. Mr. Anderson also described Mr. Allison, who filed the motion and attributed these highly charged statements to Mr. Davis, as an attorney whose "credibility" he has "never doubted." *Id.* at 378.

vii. After receiving the Motion, Mr. Anderson never asked Mr. Davis to clarify or explain to Mr. Anderson the statements that Mr. Davis had made in the jury room. The Morton case was the last case that Mr. Davis tried as an Assistant District Attorney in Williamson County, as he left that office to enter private practice shortly a few days after the verdict. Exh. 4 (Davis dep.) at 8. Mr. Davis never saw the Motion for a New Trial when it was filed in 1987; he only saw it when it became an issue in the Morton case in recent months. *Id.* at 37. He has no recollection of Mr. Anderson contacting him after the Motion was filed in 1987 and asking him to explain the statements attributed to him by Mr. Allison about Sgt. Wood's complete reports. *Id.* at 43.

viii. The fact that Mr. Davis made the statements to the jury that were attributed to him in the Motion for a New Trial is also specifically corroborated by what we now know (from public records requests and court orders issued between 2008-2011) are the <u>actual</u> contents of the Complete Wood Report.

ix. Each of the items of suppressed *Brady* material at issue here are remarkably consistent with Mr. Davis's characterization of the Wood Report in the jury room. For example, Officer Traylor's August 14, 1986 report (copied to Sgt. Wood) describes how one of the Mortons' neighbors had "on several occasions observed a male park a green van on the street behind [the Mortons'] address, then the subject would get out and walk into the wooded area off the road." This certainly

constitutes a "strange person in the neighborhood" and an "unusual happening" that would have supported the defense's third-party intruder theory, particularly in light of the fact that even at the time of trial, it was known that a bloody bandana was recovered from the wooded area behind the Mortons' home.

x. Even more dramatically, the Kirkpatrick Transcript regarding Eric Morton's witnessing a "monster" with a "big moustache" and "red gloves" murder his mother her bed, while "Daddy" was "not there," certainly qualifies as a "strange person" in the neighborhood by any definition. Similarly, the post-mortem forgery of the victim's signature on a check and fraudulent use of her credit card constitute highly "unusual happenings" after her murder.

xi. Mr. Anderson's silence after receiving the Motion for a New Trial is also critical evidence that he actively concealed the Complete Wood Report from the defense, as discussed *infra* at Parts I(B)(3)(d) through (e). As a threshold matter, however, his failure to question Mr. Davis about the contents of the Complete Wood Report after being served with the Motion is powerful proof that Mr. Anderson was fully aware of the documents in the Complete Wood Report, including these highly exculpatory reports of "unusual happenings" and "strange persons in the neighborhood." Put another way, Mr. Anderson never asked Mr. Davis, "what in the world were you talking about?", because he himself must have known exactly what was in Sgt. Wood's file – and knew that Mr. Davis had all too accurately described it to the jury.

3. Evidence Providing Probable Cause to Believe that Mr. Anderson Concealed the Exculpatory Contents of the Complete Wood Report from Defense Counsel, the Trial Court, and the Court of Appeals, Thereby Making Them Unavailable for Use at Mr. Morton's Trial or on Appeal

a. Mr. Anderson's Conduct During the Motion for a New Trial

i. As noted *supra*, defense counsel's Motion for a New Trial made highly specific allegations – corroborated by the Complete Wood Report's actual contents – that the State had withheld numerous items of highly exculpatory material from defense counsel and from Judge Lott himself. The withheld evidence from Sgt. Wood's file, Mr. Allison argued in his motion, may have been so material to Mr. Morton's third-party intruder defense as to warrant an order vacating the conviction and ordering a new trial under *Brady*.

ii. Mr. Anderson's reaction to the filing of this Motion is powerful "consciousness of guilt" evidence with respect to his knowing concealment of the Complete Wood Report.

iii. In his deposition, Mr. Anderson not only described the author of the Motion, Bill Allison, as a credible source, but also did not dispute that Mr. Allison filed this particular motion "in good faith." Exh. 2 (Anderson dep.) at 337.

iv. Despite the undisputed credibility and good faith of its source, however, Mr. Anderson now claims that – based, again, only on his review of the pretrial record today, and not any actual recollection of what he did or believed in 1987 – the Motion for a New Trial is "not accurate" in its characterization of Mr. Anderson's discovery obligations and what he was supposed to produce *in camera* with respect to the Wood Report. *Id.* at 334. After initially claiming that he has simply "no idea how I would have reacted to this motion for a new trial" at the time (*id.* at 334), he then stated that, consistent with his present reading of the record, he would have strongly disputed Mr. Allison's contentions. *See id.* at 335 ("when I saw this [motion], I would have thought this was a gross misrepresentation of what Judge Lott had ordered me to do").

v. The record is clear, however, that Mr. Anderson chose to do absolutely <u>nothing</u> to alert anyone to what he now claims was a "gross

misrepresentation" of the scope of Judge Lott's order – not his own co-counsel, his adversary, Judge Lott, nor the Court of Appeals. In hindsight, it is fair to conclude after Mr. Davis's frank admissions to the jury about the content of the Complete Wood Report, Mr. Anderson decided that standing mute about the fact that those complete contents had not been provided to either Judge Lott or the defense was his best chance of avoiding a fatal inquiry into this *Brady* time bomb – a strategy that nearly succeeded, for more than two decades thereafter.

vi. First, at no time did Mr. Anderson call Mr. Davis and ask him to confirm or deny whether he had made these statements. He did not ask Mr. Davis what "strange happenings" and "unusual persons" Mr. Davis was referring to when he told the jury about the Wood file. Nor did he call Mr. Davis to reassure him that the fact that there was no *Brady* violation issue, either because Mr. Anderson had turned them over to Judge Lott for *in camera* review or because he had otherwise disclosed them to the defense. And he certainly did not inform Mr. Davis that Judge Lott had never been given these materials for review at all, because the scope (according to Mr. Anderson) of the production order and the State's *Brady* obligations did not extend to the Complete Wood Report.

vii. Although Mr. Davis was no longer an ADA in Williamson County when the motion was filed, he was operating a private criminal defense practice in Williamson County, was regularly in the courthouse, and there is no question that Mr. Anderson could have easily reached him to have that discussion. There is also reason to believe that both men would have remembered such a conversation if, in fact, it had occurred. Mr. Anderson himself claims that he if were aware of the statements Mr. Davis made to the jury (which he later conceded he was, as his own handwriting is on the DA's file copy of the Motion), and those statements were inaccurate, "there

wouldn't have been a quiet conversation up in my office" when he confronted Mr. Davis about them. *Id.* at 251.[12]

viii. Second, at no time did Mr. Anderson contact Mr. Allison or Mr. White to clarify and resolve any "misunderstanding" among counsel about the scope of Judge Lott's order; remind them that he had verbally provided them with all of the information in Sgt. Wood's Report in any way tending to show that a third party had committed the crime (as he now claims he "must have" done). Nor did Mr. Anderson offer to make Sgt. Wood's Complete Report available to counsel to resolve any *Brady* disputes. Exh. 16 (Allison dep.) at ¶¶ 4,13; Exh. 17 (White dep.) at ¶ 10.

ix. Third, and most revealing, at no time did Mr. Anderson do the one thing that a prosecutor who knew he had acted properly would have done: file a response. It is hard to discern why a prosecutor in that position – that is, one who honestly believed that his adversary was confused about, or misrepresenting to the Court, the State's compliance with court orders and fundamental *Brady* obligations – would not have addressed those matters with the Court directly, whether in writing or after requesting a hearing. Such a response could have simply and directly stated (1) that he believed that Judge Lott's order to produce Sgt. Wood's file for *in camera*

[12] Conversely, Mr. Davis's post-verdict candor with respect to the contents of the Complete Wood Report appears to be "consciousness of innocence" on the issue of nondisclosure. His comments clearly indicate that he had specific knowledge of at least some of the exculpatory material that Sgt. Wood had in his file, and felt no need to hide that knowledge from the jury or his adversary. But it is clear that he was only confident enough to discuss those materials post-trial because at that time, he had no idea that they had not been presented to Judge Lott for *in camera* review as ordered. That is, at the time he spoke to the jury, Mr. Davis was clearly under the misimpression that Mr. Anderson had given the Complete Wood Report to Judge Lott as ordered, but that the State had somehow dodged the proverbial bullet when Judge Lott had ruled that the reports and notes pointing to a possible third-party intruder were not *Brady* material. Had Mr. Davis known about or participated in Mr. Anderson's decision to withhold those materials from the trial court, he surely would not have been boasting about that fact to the jury immediately after this hard-fought verdict, particularly in the presence of his adversary.

review was limited only to documents concerning Michael Morton's statements on August 13, 1986, (2) that he had verbally (or otherwise) provided defense counsel with all *Brady* material in the State's file in any event, and/or (3) that the State would now be willing to make Sgt. Wood's Complete Report available to the Court for review, in order to remove any concern that undisclosed *Brady* material existed.

x. Mr. Anderson was asked in his deposition why he did not make a contemporaneous record if this had, in fact, been his honest assessment of the trial court's order and Mr. Allison's "inaccurate" allegations. In response, Mr. Anderson made the remarkable assertion that at the time the motion for a new trial was filed, there was simply "no mechanism" available for him to correct or clarify the record. *Id.* at 335-36.

xi. Mr. Anderson then admitted that he could, in fact, have filed a written response to the motion for a new trial, but stated that this was not something he would "normally" do. *Id.* at 336. He proceeded to insist that a written response would have served no useful purpose in any event, because "[Judge Lott] would have known what he would have ordered [for review *in camera*] without me telling him what he had ordered." *Id.* at 337.

xii. While it is true that Judge Lott would have known the intended scope of his original order, he could <u>not</u> have known whether the State fully complied with that order. For if in fact Judge Lott believed – as is clear from the pretrial transcript and his own docket entries – that he was ordering the State to submit the Complete Wood Report for *Brady* review, he would have had no reason to know that it contained additional materials beyond those actually produced to him. That is, he could not have known that the Complete Wood Report did not in fact consist of only the six pages dated August 13, 1986 that were submitted to him *in camera*, but that

was in reality over an inch thick and detailed numerous other aspects of the ensuing investigation into Christine Morton's death.

xiii. Mr. Anderson ultimately was forced to concede this point in his deposition. *See id.* at 339 (agreeing that "a judge doesn't usually have knowledge of everything in everybody's file").

b. <u>Mr. Anderson's Conduct During the Direct Appeal</u>

i. Mr. Anderson prepared the State's brief and argued its case on direct appeal. Exh. 2 (Anderson dep.) at 279. In this phase of the proceedings, as well, his silence in response to the defense's *Brady*/due process claims, and in the wake of the Court of Appeals' own opinion addressing those claims, speaks volumes. As with the Motion for a New Trial, Mr. Anderson's failure to correct or clarify what the appeals court was led to believe was complete *in camera* disclosure is powerful evidence of his "consciousness of guilt."

ii. That the defense "smelled a rat," so to speak, regarding the nondisclosure of the Complete Wood Report and its exculpatory contents is obvious from Appellant's opening brief. In that brief, Mr. Allison clearly, and at some length, outlined the grounds for two potentially-dispositive legal claims arising from Mr. Davis's comments to the jury and the proceedings below. *See* Exh. 32 (excerpts from Appellant's Br. (Claim VI) filed Dec. 7, 1987) at 64-69. First, he submitted that the pre- and post-trial record below raised serious concerns as to whether "all of Sgt. Wood's reports were turned over to Judge Lott for his review" as ordered; he asked the Court of Appeals to take the unusual step of abating the appeal so that a full inquiry as to whether the State had complied with the Court's pretrial order to produce the Complete Wood Report could be conducted. *Id.* at 64. Second, Mr. Allison argued that even if the State had given the trial court all of Sgt. Wood's

materials, the fact that Mr. Davis had alluded to such a substantial and specific quantity of apparently exculpatory evidence raised a strong likelihood that the trial court had misapplied *Brady* in reviewing those materials. *Id*.

iii. Mr. Anderson's "response" on this issue may be charitably described as artful. *See* Exh. 33 (excerpts from Appellee's Br. (Claim VI) filed May 2, 1988) at 20-21. At no point in the brief did he deny that the State was, in fact, ordered to produce the Complete Wood Report for *in camera* review. And at no point did he deny that he had, consistent with that order, produced the Complete Wood Report to Judge Lott. Certainly he did not offer the contrary interpretation of Judge Lott's order that he raised for the first time in his deposition: that he was only required to produce limited portions of the Wood Report specifically pertaining to Mr. Morton's statements. Exh. 2 (Anderson dep.) at 324, 326.

iv. Notably, his brief also did not assert that Sgt. Wood's Complete Report (as opposed to what he produced for *in camera* review) contained no further *Brady* material. Mr. Anderson's brief did not affirm that he gave all *Brady* material to the defense; and did not mention (much less explain) the "unusual sightings" or "strange persons" to which Mr. Davis had referred in his post-verdict comments to the jury. *See* Exh. 33 (Appellee's Br. filed May 2, 1988).

v. But Mr. Anderson did not confess error, nor agree to the defense's suggestion that the appeal be abated to clarify the production issues related to Sgt. Wood. Instead, after giving a brief and incomplete recitation of the proceedings that led to the *in camera* production order, Mr. Anderson argued that the order itself was unlawful, and thus not enforceable. *See id.* at 20-21. He claimed that the *in camera* review only took place because he himself had "offered" to provide a copy of the Wood report when a question first arose about its contents in the context of the motion to suppress. (Here, Mr. Anderson made no mention of the *Brady* motion the

defense had pending, nor Judge Lott's docket entries and questions from the bench regarding that motion.) *Id.* Thus, Mr. Anderson argued, "[b]ecause there was no legal basis for the trial court to require that the report be turned over, there is no reason to now remand this case for a hearing to determine whether the trial court complied with its own ruling." *Id.* at 21 (emphasis supplied).

vi. Despite Mr. Anderson's attempt to reframe the issue on appeal as whether "the trial court complied with its own ruling," (*id.* at 21) (emphasis supplied), the claim actually pending before the Court of Appeals was, of course, the State's alleged non-compliance with Judge Lott's order. And on this critical issue, Mr. Anderson kept the Court of Appeals in the dark.

vii. The opinion denying relief makes clear that the Court of Appeals judges all interpreted the pretrial record in the same way as every prosecutor and defense attorney involved in this case – except Mr. Anderson himself: to mandate the *in camera* production of all of Sgt. Wood's reports and field notes. The Court denied relief on this claim, however, because there was no evidence in the record then establishing that the sealed file Mr. Anderson produced to Judge Lott consisted of anything less that the Complete Wood Report:

> Morton complains that there is a possibility that Sgt. Wood did not turn over all his notes [to Judge Lott]. According to Morton, the sheaf of notes appeared thicker at an earlier pretrial hearing than when finally produced to this court. However, there is no evidence in the record to support this contention. Because we have nothing more than a mere possibility raised by Morton, we reject this contention.

Exh. 34 (Court of Appeals decision, Dec. 14, 1988), at 11 (emphasis supplied).

viii. After receiving the Court of Appeals' decision, Mr. Anderson may well have breathed an enormous sigh of relief that he had again averted an inquiry into the actual scope of his Wood/*Brady* disclosures – and said nothing further. The Court of Appeals could not have more clearly put Mr. Anderson on notice that it

believed, and based its ruling upon the fact, that the sealed file reportedly contained "all" of Sgt. Wood's reports and notes. Having found no *Brady* material in that sparse, six-page file, the Court denied Mr. Morton's claim. But only Mr. Anderson knew in 1988 what it took until August 26, 2011, for every other party in the case to learn: that it was more than a "mere possibility," but a fact, that the Complete Wood Report consisted of far more than what the State had produced to Judge Lott.

ix. As with the Motion for a New Trial, we submit that there is a stark contrast between what an attorney with no misconduct to hide would have done at this juncture, and what Mr. Anderson actually did. Had Mr. Anderson then honestly believed in the interpretation of the record he outlined in his deposition – that he was only obligated to turn over a limited portion of Sgt. Wood's file, concerning statements made by Mr. Morton on the first day of the investigation – he would not have left uncorrected an opinion by the Court of Appeals that relied on the presumption that "all" of Sgt. Wood's reports and notes had been submitted. Instead, he would have alerted the Court to what he believed was the far more limited scope of the order; assured the Court that there was no *Brady* material in the remainder of Sgt. Wood's Report in any event; and with no concealed *Brady* material to hide, would have offered to make the complete file available for the Court's review. But he did none of those things.

x. Mr. Anderson now argues that he had no ability to correct the record before the Court of Appeals in this regard, because any such clarifying statements would have been "outside the record." *Id.* at 341-42. When it was pointed out to him that Mr. Allison's Motion for a New Trial addressed this issue in detail and was part of the record, Mr. Anderson demurred, "I can't reconstruct what I was thinking back in 1988 when I prepared an appellate brief." *Id.* at 342. Similarly, in his deposition he was asked whether, upon reviewing the opinion in which the Court

of Appeals clearly believed that it had the Complete Wood Report on file, "you did not feel you had any obligation to inform the court that the full set of reports had not been produced?" Mr. Anderson answered, "I – I don't know how I'm supposed to respond to these sorts of questions. I mean, I have no idea what I thought back in 1988." *Id.* at 344.

xi. Fortunately, on this record, Mr. Anderson's personal recollections are not needed to determine what actually transpired. He stood mute and allowed the Court of Appeals to rest its opinion on the fiction that the six pages worth of documents from August 13, 1986, were the sum total of "all [the] notes" that Sgt. Wood compiled as chief investigator in the Morton case. Like Judge Lott, the Court of Appeals had no way to know that the Sgt. Wood's work product was in fact far more substantial – because Mr. Anderson concealed that fact from them. Nor did the Court have any idea of the wealth of *Brady* material that the Complete Wood Report and notes actually contained – because the Court was never informed that those additional reports and notes existed, much less had the opportunity to review them for *Brady* purposes.

c. <u>Mr. Anderson's Last-Minute Decision Not to Call Sgt. Wood to Testify</u>

i. Sgt. Wood, the chief investigator for the WCSO on the Morton case, was on the prosecution's witness list, provided to the defense on October 24, 2011.

ii. On Friday, February 6, 1987, with trial set to begin the following Monday, defense counsel served a *subpoena duces tecum* on the three WCSO witnesses (Sgt. Wood, Sheriff Boutwell, and Det. Linda Bunte). *See* Exh. 35 (subpoena dated Feb. 6, 1987). The subpoena required each testifying WCSO witness to bring to court any and all of his or her reports, notes, tape recordings, and other

materials in the case – including, but expressly <u>not</u> limited to, any materials pertaining to statements made by Mr. Morton. *Id.*

iii. While the subpoena merely demanded that the witnesses bring to court the same materials that the State would have had to produce for each witness under *Gaskin*, Mr. Allison and Mr. White put the witnesses themselves on notice of this requirement in advance of trial. Mr. Anderson conceded in his deposition that such a comprehensive request directed to each witness was "not a typical subpoena." Exh. 2 (Anderson dep.) at 300.

iv. In his deposition, Mr. Anderson flatly denied that after receiving this subpoena, he made a tactical decision to prevent disclosure of Sgt. Wood's Complete Report under *Gaskin* by pulling him off the witness list in this case. *Id.* at 302-3. And he denied that he had ever decided not to call a police witness for this reason, in any case. Instead, Mr. Anderson averred that his practice was simply to "call the fewest witnesses I need." *Id.* at 264.

v. Doug Arnold, who assisted Mr. Bradley in representing the State as an Assistant District Attorney in this case, and is now an elected Judge in Williamson County, provides direct evidence to the contrary. Judge Arnold began working as an Assistant District Attorney in the trial division in 1998, under Mr. Anderson's supervision. Exh. 3 (Arnold stmt.) at 18. Judge Arnold has a clear recollection that early in his tenure as an ADA, in approximately 1998 or 1999, Mr. Anderson boasted about his own past practice of circumventing the *Gaskin* rule to avoid disclosures in a police witness's file that would harm the State's case. Specifically, Mr. Anderson told then-ADA Arnold that "in cases he had prosecuted in the past, he had deliberately, as a tactical decision, not called the investigating officer to testify . . . because by not calling the investigating officer to testify, he did not have to turn over their notes and reports, pursuant to a case called *Gaskin*." *Id.* at 138-39.

vi. The connection between Mr. Anderson's admissions as to his own practice, and the steps he took to conceal the Complete Wood Report in the Morton case, hardly needs explication. Indeed, it is so apparent that Mr. Anderson's statement immediately came to Judge Arnold's mind, for the first time in over a decade, when he first learned of the *Brady* allegations involving Sgt. Wood's file this fall. After news reports about the case described how certain exculpatory materials from Sgt. Wood's file were not part of the trial record, and how Sgt. Wood had not testified at trial, Judge Arnold immediately remembered Mr. Anderson's "strange" and "odd" description of his own *Gaskin*-avoidance tactics more than a decade ago. *Id.* at 139.

vii. Mr. Anderson did not specifically mention the Morton case (or any case) by name at that time. But considering Mr. Anderson's admission alongside the record evidence, Judge Arnold agrees that it is a "fair inference" that his fellow Judge, Mr. Anderson, engaged in precisely this tactic at Mr. Morton's trial. *Id.* at 141-42. Judge Arnold's concerns about Mr. Anderson's practices are also grounded in his own understanding of a prosecutor's fundamental disclosure obligations – including the principle that whether a witness testifies and his reports are provided under *Gaskin* does not relieve a prosecutor of the independent obligation he may have to produce those materials under *Brady*. *Id.* at 140.

d. Evidence of Concealment of Two *Brady* Documents in the District Attorney's Trial File

i. The evidence that Mr. Anderson's knowingly concealed exculpatory materials in the Wood Report is particularly strong with respect to two of the documents in question, which we now know were not just in the WCSO file, but were also in the District Attorney's trial file.

ii. On September 26, 2011, pursuant to an order of this Court, the District Attorney produced to the undersigned all non-privileged materials from the District Attorney's file in the Morton case, from the inception of the investigation until August23, 2011 (the date the State learned of the CODIS hit to Norwood and began to investigate his potential culpability for the murder).[13] The produced materials included a set of documents marked "trial," which were represented as being the original trial materials compiled by Mr. Anderson at the time of the Morton trial ("the DA's Trial File"). Within the DA's Trial File was a sheaf of police reports from the original WCSO investigation.

iii. Included in the DA's Trial File were two of the five reports at issue in this investigation: Exhibit 10 (the neighbor's report of a suspicious man parking a green van and surveying the area behind the Mortons' home on several occasions shortly prior to the murder) and Exhibit 8 (the Kirkpatrick Memo, alerting the DA and the Sheriff to the key details of Eric's eyewitness account of a tall "monster" with a "big moustache" murdering his mother when "Daddy wasn't there").

iv. Because these documents were both found in the DA's Trial File, Mr. Anderson has not tried to argue that he was unaware of their existence (although he claims to have no present recollection of reviewing them, much less disclosing them). But he nonetheless professed absolute certainty that he *must have* disclosed each of these documents to defense counsel – or, in his own phrasing, that there is "no way on God's green earth" he concealed the information – unless he somehow knew

[13] By subsequent agreed order dated October 26, 2011 the remainder of the WCDA's file, including its attorneys' own work product, was also produced.

that the defense already had the same information about Eric's account[14] or the neighbors' sighting of the green van.[15]

v. As detailed in Part I(B), *supra*, there is not a shred of evidence in the record to support Mr. Anderson's speculation that he disclosed or discussed the contents of either of these documents with Mr. Allison or Mr. White. Nor is there any evidence to support his conjecture that defense counsel somehow knew about the exculpatory information in these documents already.

vi. Indeed, both Mr. Allison and Mr. White unequivocally attest otherwise. *See* Exh. 16 (Allison aff.) at ¶5; *id.* at ¶ ("Mr. Anderson stated in his deposition if he did not share the Kirkpatrick information with me, he must have been informed I already had it. He is wrong. We never had any idea that Mrs. Kirkpatrick had given such powerful exculpatory information to Sgt. Wood eleven days after her daughter's murder"); Exh. 17 (White aff.) at ¶¶6-7.

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[14] *See* excerpts from Anderson dep. at note 6, *supra.*

[15] Mr. Anderson's claim that he would have also disclosed the green van report, unless there was a supplemental report disproving any connection between the strange man sighted and the crime (which, of course, does not exist in either the WCSO or DA's file) may be found, *inter alia*, in his deposition at 238 (answering "Green van testimony, sure" when asked whether this report is "the kind of exculpatory evidence that, if you had known about it, you would have disclosed"); *id.* at 386 (green van report is "the sort of stuff I routinely would give to defense attorneys"); *id.* at 388 (green van report "is the sort of stuff that you would typically turn over," although "my general practice was not to hand a physical document to anybody . . . I am guessing I would have summarized it"). Moreover, although Mr. Anderson stated that the green van report "cries out to be investigated" and that he presumed that the WCSO had done so, there is no evidence of any such follow-up in the file, or elsewhere. Undersigned co-counsel John Raley recently spoke with Mr. Traylor, the author of the report (who is now an investigator in the District Attorney's Office). Mr. Traylor reports that he was a young officer assigned to patrol duty that day, and he has no present memory of these events. He agrees that the information in the report is something that law enforcement should have pursued, but it would have typically been up to the investigators assigned to the homicide case. He also confirmed that if any follow up interviews or investigation had been conducted, there should have been a supplemental report in the WCSO file.

vii. Mr. Allison's and Mr. White's affidavits are not only credible because of their experience and reputations as defense attorneys, but because their statements are consistent with the manner in which both parties actually conducted discovery in this case. At the first pretrial hearing in November 1986 (months after the exculpatory documents in Sgt. Wood's file were generated), defense counsel alerted the Court to their grave concerns that they had received no meaningful discovery whatsoever from the State thus far – no offense reports, no notes, no witness statements – except copies of crime scene and autopsy photographs. They filed every discovery motion imaginable to secure the State's compliance, and on the eve of trial, confirmed that the Complete Wood Report – the contents of which they clearly were unaware – would at least be provided to the Court for *Brady* review in camera. For his part, Mr. Anderson fought the defense tooth and nail on such unremarkable requests as (1) pretrial access to their own client's statements to law enforcement, even though the circumstances in which the statements were taken were the subject of a pending motion to suppress, and (2) providing the defense with *Gaskin* materials the evening before a witness was due to testify, rather than forcing the defense to review them in a break between the witnesses' direct testimony and cross examination. Exh. 21 (Nov. Pretrial Hr'g Tx.) at R. 19-20 ("My thought on that is I don't intend to do that voluntarily."). And when asked by the Court, on the eve of trial in February 1987, if he had "anything favorable" to disclose to the defense, he answered with an unequivocal "No, sir," (*id.* at 29) – a far cry from, "Yes, but I already gave it to them when we sat down in my office last week and reviewed some of the offense reports."

viii. Surely, in light of the clear lines drawn in the sand over far more innocuous discovery issues, one cannot credit Mr. Anderson's claim that in the very same case, he must have voluntarily provided defense counsel, off the record, with

this remarkable array of exculpatory evidence. Mr. Anderson's claim would also require this Court to believe that after providing counsel with this material (or satisfying himself that they already possessed it), the defense simply ignored the information gathered by the State that directly supported its third-party-intruder defense – including a detailed eyewitness account of the murder told to the victim's own mother – and never offered, or even tried to offer, any of it at trial.

ix. Finally, it should be noted that Mr. Allison's Motion for a New Trial specifically references the fact that he only learned post-verdict (from Mr. Davis's comments to the jury) that the Complete Wood Report may contain information about "unusual happenings" and "strange persons" in the neighborhood about which the defense was unaware. *See* Exh. 31 at 1. Surely, if Mr. Anderson had, in fact, verbally or otherwise provided the defense with the information contained in Exhibits 7 and 11, Mr. Allison would have referenced that prior disclosure (and distinguished it from what the defense had newly learned about post-trial) in the Motion.

x. In sum, because Exhibits 7 and 11 were in the District Attorney's Trial File, and because there is no reason to credit (and every reason to discredit) Mr. Anderson's speculation that he "must have" disclosed the contents of those documents to the defense, the record evidence shows that he knowingly concealed these documents from the defense.

xi. If Mr. Anderson knowingly concealed these two Wood documents, a strong inference can be drawn that he also concealed from the defense the other exculpatory contents of the Complete Wood Report. *See also* Exh. 2 (Anderson dep.) at 143 ("I assume everything in the sheriff's file was also in my file"); Exh. 18 (Wood dep.) at 169 (Mr. Anderson "wanted a copy of everything, I know that").

xii. If Mr. Anderson knowingly concealed these two Wood documents, a strong inference can be drawn that he also concealed from the defense the other exculpatory contents of the Complete Wood Report. That only trial prosecutors, and not defense counsel, had access to the information in these materials is the only supportable inference one can draw from the record. Compare, e.g., Exh. 2 (Anderson dep.) at 143 ("I assume everything in the sheriff's file was also in my file") and Exh. 18 (Wood dep.) at 169 (Mr. Anderson "wanted a copy of everything, I know that") with Exh. 17 (White aff) at ¶7 (regarding all five exculpatory documents from Wood file now at issue: "I have absolutely no doubt that if any of that evidence had been disclosed to Mr. Allison or to me, we would have remembered it, investigated it, and used it at trial. If there was an issue regarding the evidence's admissibility, we would have made a detailed record of our efforts to present it to the jury. Every shred of that evidence would have strongly supported our theory that Christine was murdered by an intruder while Michael was at work") and Exh. 16 (Allison aff.) at ¶14 ("Bill White and I had a strong suspicion that there was far more to the contents of Sgt. Wood's complete report and 'field notes' than either we or Judge Lott were aware. I cannot describe how profoundly disturbed I was to learn that such a significant quantity of exculpatory evidence was concealed from all of us.").

e. <u>Evidence that Mr. Anderson Continued to Actively Conceal the Exculpatory Materials in the Complete Wood Report After Leaving the District Attorney's Office</u>

i. Even after being appointed to the bench, Mr. Anderson compounded the harm from his original concealment of the Complete Wood Report in his capacity as a consultant and "sounding board" for District Attorney John Bradley in the Morton case. *See* Exh. 5 (Bradley stmt.) at ¶ 5. While serving in that capacity, he repeatedly and falsely assured Mr. Bradley that there was no reasonable

possibility the DNA testing Mr. Morton sought would establish that a third-party intruder committed the crime – even while Mr. Anderson had to know that there was ample, undisclosed evidence in Sgt. Wood's files that strongly supported that theory. *Id.* at ¶ 7. Mr. Anderson's interactions with Mr. Bradley and his staff after the due process allegations regarding the Wood Report came to light this year provide further evidence that Mr. Anderson continued to actively and knowingly conceal his own misconduct from all parties to this litigation.

ii. After Mr. Anderson became a judge and John Bradley became District Attorney, Mr. Bradley would brief and consult with Mr. Anderson about developments in the post-conviction Morton litigation. *See* Exh. 5 (Bradley stmt.) at ¶ 3. Mr. Anderson had handled the trial and appeal of the Morton case so Mr. Bradley thought it appropriate and helpful to consult with Mr. Anderson about the facts of the case. *Id.* at ¶ 4.

iii. Over the years, particularly as litigation over DNA testing became more heated after 2005, Mr. Bradley relied on Mr. Anderson as a "sounding board" for feedback in the case. *See* Exh. 5 (Bradley stmt.) at ¶ 5. The ultimate decision on what positions to take in the case remained Mr. Bradley's, but he relied upon Mr. Anderson to be truthful and fully forthcoming about the facts and history of the Morton case. *Id.* at ¶ 7.

iv. Among the issues that Mr. Bradley and Mr. Anderson discussed during that time was their common belief in Mr. Morton's guilt. Both men expressed the view – based on the information each had available to him – that Mr. Morton's claim that his wife had been murdered by a third-party intruder was implausible. *See* Exh. 5 (Bradley stmt.) at ¶ 7.

v. Mr. Bradley's assessment on this issue of potential third-party guilt was a significant factor in leading him to oppose the DNA testing that Mr. Morton

requested under Chapter 64. *See* Exh. 5 (Bradley stmt.) at ¶ 7. He specifically relied on the assurances of Mr. Anderson, as the prosecutor who tried the case, that Mr. Morton was guilty and that there was no reasonable likelihood that DNA testing would identify a third party as the killer. *Id.*

vi. At no time during the post-conviction litigation, prior to the opening of sealed envelope by Judge Stubblefield on August 26, 2011, did Mr. Anderson tell Mr. Bradley that he had not produced the Complete Wood Report to Judge Lott for *in camera* review under *Brady*. *See* Exh. 5 (Bradley stmt.) at ¶ 8. Nor during this period did Mr. Anderson ever tell Mr. Bradley that he had interpreted the record as requiring him to turn over to Judge Lott only the limited subset of Wood reports and field notes that related to statements Michael Morton made to law enforcement on August 13 and 14, 1986, rather than the Complete Wood Report. *Id.*

vii. During the contested Chapter 64 DNA testing litigation in the Morton case (between 2005-10), Mr. Bradley consulted with Mr. Anderson and kept him up-to-date on the proceedings. *See* Exh. 5 (Bradley stmt.) at ¶ 11. He specifically recalls conversations with Mr. Anderson about the relative importance of each of the items of evidence from the Morton case on which DNA testing was being sought, particularly the bandana. *Id.*

viii. Prior to writing a letter to the Texas Parole Board dated September 6, 2006, protesting Mr. Morton receiving parole, Mr. Bradley consulted Mr. Anderson, consistent with Mr. Bradley's general practice of calling the prosecutor who actually tried the case before writing a parole protest letter on behalf of the office. *See* Exh. 5 (Bradley stmt.) at ¶ 12; Exh. 38 (parole board letters).

ix. Mr. Bradley generally recalls some discussion regarding the fact that it would be inappropriate for Mr. Anderson to write the parole protest letter given his judicial position. *See* Exh. 5 (Bradley stmt.) at ¶ 13. However, Mr. Bradley is

certain he would not have been comfortable making the strong personal statement contained in the parole protest letter without speaking about it with Mr. Anderson first. *Id.*

x. Mr. Anderson consistently expressed a high level of confidence in Mr. Morton's guilt during the post-conviction litigation and in discussions of the parole protest letters, despite Mr. Morton's continuing claim of innocence. *See* Exh. 5 (Bradley stmt.) at ¶ 14. Mr. Bradley relied on Mr. Anderson's high level of confidence in Mr. Morton's guilt when writing his September 6, 2006, parole protest letter and a second parole protest letter on October 19, 2009, and in litigating post-conviction applications by Mr. Morton. *Id. at* ¶ 7, 14.

xi. Mr. Morton filed a motion to recuse Mr. Bradley on August 17, 2011. In that motion, Mr. Morton alleged that Mr. Anderson had suppressed exculpatory evidence, including documents that were part of the Complete Wood Report which Mr. Morton's counsel had obtained in response to a 2008 Public Records Act request to the WCSO. The motion also made public DNA the test results on the bandana identifying Christine Morton as the source of blood and hair on the bandana, with a male DNA profile on the bandana excluding Michael Morton and producing a CODIS "hit" to Mark Alan Norwood, then referred to publicly as "John Doe." *See* Exh. 5 (Bradley stmt.) at ¶ 16.

xii. Mr. Bradley informed Mr. Anderson of the recusal motion while Mr. Anderson was vacationing in Colorado. They had two short phone calls in which Mr. Bradley conveyed his view that this was a serious matter that required Mr. Anderson's urgent attention. *See* Exh. 5 (Bradley stmt.) at ¶ 17.

xiii. On August 19, 2011, Mr. Bradley sent an email to Kristen Jernigan asking her to make sure that "Ken" reviewed the motion and underlying record as soon as possible so that he could provide a clear explanation and respond to the due

process violations alleged in Mr. Morton's recusal motion. *See* Exh. 5 (Bradley stmt.) at ¶ 18; Exh. 6 (Jernigan stmt.) at ¶ 9. Specifically, Mr. Bradley wrote, "He needs to understand that he will likely be the object of a claim that he committed a Brady violation at trial by not disclosing certain matters involving the interview of a grandmother. He needs to become familiar with the file and refresh his memory so that he can state with clarity whether he provided discovery of those matters and the circumstances surrounding discovery." *See* Exh. 39 (email). Ms. Jernigan assured Mr. Bradley that she would do so immediately. *See* Exh. 6 (Jernigan stmt.) at ¶¶ 9, 11.

xiv. From the time that Mr. Anderson returned from his vacation on Monday, August 22, 2011, through the time Judge Stubblefield opened the sealed envelope on August 26, 2011, Mr. Anderson never told Mr. Bradley that he, Mr. Anderson, interpreted the record in the Morton case to have required the production of only Sgt. Wood's reports and field notes concerning Mr. Morton's statements, and not the rest of Wood's investigative activities in the case. *See* Exh. 5 (Bradley stmt.) at ¶ 19.

xv. Mr. Bradley's own review of the trial and appellate record after the motion to recuse was filed on August 17, 2011, but prior to Judge Stubblefield opening the sealed envelope on August 26, 2011, led him to the conclusion that Judge Lott had ordered the complete report and field notes of Sgt. Wood to be produced for *in camera* Brady review. *See* Exh. 5 (Bradley stmt.) at ¶ 20. ADA Kristen Jernigan interpreted the record in a similar fashion. *See* Exh. 6 (Jernigan stmt.) at ¶ 13.

xvi. Based on this record and his consultations with Kristen Jernigan, Mr. Bradley expected that, when opened, the sealed file would contain many, if not all, of the Wood documents referenced in Mr. Morton's recusal motion. *See* Exh. 5 (Bradley stmt.) at ¶ 20. One of the reasons Mr. Bradley reached this conclusion is that if Mr. Anderson had produced only the Wood documents concerning Mr.

Morton's statements, and not the complete report and field notes concerning all of Wood's investigative activities, to Judge Lott for *in camera* Brady review, then Mr. Anderson would have made that known to Judge Lott in response to Bill Allison's motion for a new trial. *Id.* at ¶ 21. Mr. Bradley also believed that Mr. Anderson would have made this limited production known to the Court of Appeals in response to Mr. Allison's allegations that the complete Wood report and field notes had not been produced to Judge Lott and that they may have contained exculpatory evidence. *Id.*

xvii. Mr. Bradley also would have expected any prosecutor in Mr. Anderson's position to have reviewed Wood's complete set of reports and field notes prior to the trial. *See* Exh. 5 (Bradley stmt.) at ¶ 23.

xviii. Ms. Jernigan separately reviewed the pretrial and post-conviction record and reached the same conclusion: that Judge Lott appeared to have ordered Mr. Anderson to turn over the Complete Wood Report for *in camera* review pretrial. *See* Exh. 6 (Jernigan stmt.) at ¶ 13. Ms. Jernigan discussed this conclusion with Mr. Bradley. *Id.* at 13. Both of them expected that when the sealed envelope reviewed by Judge Lott and the Court of Appeals was opened it would contain the Wood documents characterized in Mr. Morton's recusal motion as undisclosed exculpatory evidence. *See* Exh. 5 (Bradley stmt.) at ¶ 20; Exh. 6 (Jernigan stmt.) at ¶ 13.

xix. Presuming that the complete Wood report and field notes documents would be in the envelope sealed by Judge Lott, at the hearing on the recusal motion on August 23, 2011, Ms. Jernigan did not object to the defense's request to unseal the file and examine its contents. *See* Exh. 5 (Bradley stmt.) at ¶ 22; Exh. 6 (Jernigan stmt.) at ¶ 15. I n fact, she strongly supported that request, telling Judge Stubblefield, "There's nothing to suggest that this transcript wasn't in that Court of Appeals file" and suggesting that "we simply go to the Court of Appeals,

open up the file, and see if the notes are in there" *See* Hr'g on Motion to Recuse, Aug. 23, 2011, at 20.

xx. Mr. Bradley was "surprised and troubled" when Judge Stubblefield opened the sealed envelope on August 26, 2011, and discovered that it did not contain the Complete Wood Report, but only a limited set of documents relating to Mr. Morton's statements on August 13, 1986. *See* Exh. 5 (Bradley stmt.) at ¶ 24.

xxi. From the time the motion to recuse was filed on August 17, 2011, through the time the prosecution filed a motion to designate issues for the Chapter 64 hearing on September 26, 2011, Mr. Bradley had a number of conversations with Mr. Anderson, in person or by telephone, about the Morton case. *See* Exh. 5 (Bradley stmt.) at ¶ 25.

xxii. During this period, Mr. Bradley became "increasingly frustrated" that Mr. Anderson was not responding to specific requests from the District Attorney's Office to provide an affidavit regarding the discovery issues raised by Mr. Morton's counsel. *See* Exh. 5 (Bradley stmt.) at ¶ 26. Mr. Bradley was also frustrated that Mr. Anderson "was not doing enough to familiarize himself with the record" and refresh his recollection about the pretrial discovery he did or did not provide. *Id.* Mr. Bradley "could not get a straight answer or innocent explanation" from Mr. Anderson in response to the serious allegations that Mr. Anderson had knowingly suppressed exculpatory evidence. *Id.*

xxiii. During this period, whenever Mr. Bradley asked Mr. Anderson to discuss the due process allegations, Mr. Anderson would instead focus on possible arguments that the State might make to minimize the significance of the DNA testing on the bandana, ranging from questions about the use of "touch DNA" analysis to possible objections to the chain of custody. *See* Exh. 5 (Bradley stmt.) at ¶ 27.

xxiv. Mr. Bradley conveyed to Mr. Anderson that Anderson had to take the due process allegations "more seriously" because Anderson would be a witness at a Chapter 64 hearing. *See* Exh. 5 (Bradley stmt.) at ¶ 28. Mr. Bradley explained to Mr. Anderson that if the prosecution could not produce a "clear, credible answer" as to why the Complete Wood Report was not produced to Judge Lott for *in camera* review, Mr. Morton's conviction could well be vacated on due process grounds. *Id.*

xxv. Between August 22 and September 26, 2011, Ms. Jernigan also made several unsuccessful attempts to get Mr. Anderson to execute a sworn affidavit regarding the due process issues in the case. In one such conversation, which took place at some point after the file was unsealed on August 26, Mr. Anderson said that he did not remember the Kirkpatrick transcript, but that Judge Lott was very detail-oriented and would have followed up to ensure that whatever he ordered was done. *See* Exh. 6 (Jernigan stmt.) at ¶ 18. Mr. Anderson speculated that Judge Lott may have "taken care of" the Wood reports off the record. *Id.* Mr. Anderson went on to tell Ms. Jernigan that his general policy was to read all of the offense reports aloud to defense attorneys, but that he did not remember whether he had done so in this case specifically. *Id.* She told him again that she would need to get an affidavit from him giving a plausible explanation as to why the complete Wood report and field notes were not in the sealed file, and he again said that he did not remember much about the case. *Id.*

xxvi. In another conversation, occurring in mid- to late September, Ms. Jernigan told Mr. Anderson yet again that she needed an affidavit from him. *See* Exh. 6 (Jernigan stmt.) at ¶ 19. At that point, she told him she expected that a writ would be filed in the Morton case raising these *Brady* claims and that there would be a hearing at which Mr. Anderson would have to testify. *Id.* Mr. Anderson repeated that

he did not remember the case and he became "short" with Ms. Jernigan over the course of their conversation. *Id.*

xxvii. At first, Mr. Bradley thought that Mr. Anderson's failure to respond appropriately to the seriousness of the allegations against him was the behavior of someone "in denial" or someone who needed to refresh his memory through documents. *See* Exh. 5 (Bradley stmt.) at ¶ 29. However, as Mr. Bradley's concerns began to grow about Mr. Anderson being unable to give a straight answer to or provide an innocent explanation for the due process allegations against him, Mr. Bradley became more self-conscious and careful about what he said to Mr. Anderson regarding the allegations, in order to prevent Mr. Anderson from believing that Mr. Bradley was sending signals as to what Mr. Bradley thought Mr. Anderson should say. *Id.* In October, after Mr. Morton's release from prison, Ms. Jernigan also began to limit her interactions with Mr. Anderson regarding the case. *See* Exh. 6 (Jernigan stmt.) at ¶ 31.

xxviii. On September 26, 2011, Mr. Bradley was informed by Ms. Jernigan and ADA Lindsey Roberts that Judge Harle had informed the parties that day during an *in camera* proceeding that the Travis County District Attorney's office had tested the root of a pubic hair found at the scene of the Debra Baker homicide and that initial DNA results were consistent with Mark Alan Norwood, then referred to in public documents as "John Doe." *See* Exh. 5 (Bradley stmt.) at ¶ 30; Exh. 6 (Jernigan stmt.) at ¶ 23. On September 28, 2011, the Travis County DA's Office reported to the parties that the Texas Department of Public Safety estimated the frequency of the profile derived from the pubic hair to be 1 in 983 million among Caucasians. *See* Exh. 5 (Bradley stmt.) at ¶ 31.

xxix. On September 30, 2011, after consultations with ADAs Jernigan and Roberts, Mr. Bradley concluded that, based on the DNA evidence, he would

consent to a new trial and an immediate release from prison for Mr. Morton. *See* Exh. 5 (Bradley stmt.) at ¶ 32. At that time, with the investigation into Norwood ongoing, he was not yet ready to declare publicly that Mr. Morton was innocent, that he would not re-try Mr. Morton, or that Mr. Morton was entitled to statutory compensation on the grounds of actual innocence. *Id.* Mr. Bradley ultimately did reach the conclusion that Mr. Morton was, in fact, innocent. *Id.*

xxx. After reaching the conclusion that Mr. Morton was entitled to a new trial, Mr. Bradley called Barry Scheck, one of Mr. Morton's lawyers, to inform him of the new position of the Williamson County District Attorney's Office. *See* Exh. 5 (Bradley stmt.) at ¶ 33. Mr. Scheck told Mr. Bradley that as part of the writ proceedings, Mr. Morton sought an evidentiary hearing on the due process allegations at which Mr. Anderson, Mike Davis, and Sgt. Wood would have to testify under oath. *Id.* at ¶ 34. The agreement reached between the parties, attached as Exhibit 1 to Morton's writ application, allowed for that discovery to proceed by way of depositions and was adopted by this Court at the writ hearing on October 3, 2011. *Id.* at ¶¶ 35-36.

xxxi. Mr. Bradley invited Ken Anderson, Mike Davis, Sheriff James Wilson, Don Wood, and Don Wood's son to meet with him on October 10, 2011, in the Williamson County grand jury room for the narrow purpose of explaining the agreement he had reached with Mr. Morton's lawyers and laying out how the depositions would proceed. *See* Exh. 5 (Bradley stmt.) at ¶ 39. That meeting took place on October 10, 2011. Shawn Dick, an attorney representing Mike Davis, appeared on Mr. Davis's behalf. *Id.* at ¶ 40. Mr. Bradley explained at the meeting that, at that point, he was personally convinced that Mr. Morton was innocent; he went on to describe how the discovery process would proceed. *Id.* at ¶ 41.

xxxii. On October 12, 2011, the day that the Court of Criminal Appeals granted the writ. Mr. Bradley held another meeting with Mr. Davis and Mr. Anderson in the Williamson County courthouse. *See* Exh. 5 (Bradley stmt.) at ¶¶ 42, 45. At this meeting, Mr. Bradley notified Mr. Anderson and Mr. Davis that the CCA had acted. *Id.* at ¶ 45. After this short discussion, Mr. Anderson asked to meet with Mr. Bradley alone in his chambers. *Id.*

xxxiii. At their private meeting, Mr. Anderson asked Mr. Bradley, "John, do you think I did anything wrong?" *See* Exh. 5 (Bradley stmt.) at ¶ 46. Mr. Bradley replied that he was unable to form an opinion without additional information, including an explanation from Mr. Anderson as to what happened during pretrial discovery. *Id*. at ¶ 46.

f. <u>Evidence that Mr. Anderson's Deposition Testimony and Other Explanations for his Conduct are Not Credible, and Do Not Provide a Plausible Defense to the Allegation that He Knowingly Concealed the Complete Wood Report from the Defense and the Trial Court</u>

i. <u>Deposition Testimony</u>

A. Out of all the prosecuting attorneys who have represented the State in the Morton matter over the last twenty-five years, Mr. Anderson is the <u>only</u> one who interprets Judge Lott's orders at the pretrial hearings in November 1986 and February 1986 as requiring anything but *in camera* production of the Complete Wood Report. *Compare* Exh. 2 (Anderson dep.) at 328-29 (claiming that "there's no way I can figure out what my understanding [of the scope of Judge Lott's order] was 25 years ago," but stating that "the best of my understanding from the transcript" is that the Court only required him to produce the limited portion of Sgt. Wood's file that pertained to Mr. Morton's statements) *with* Exh. 3 (Arnold stmt.) at 88 (pretrial transcript "reads very clear to me . . . that

the State is supposed to turn over all the reports and notes of Don Wood"); Exh. 4 (Davis dep.) at 33-34 (record at November pretrial hearing "was real clear" that State was to produce Complete Wood Report); Exh. 5 (Bradley stmt.) at ¶ ¶ 9, 20 (after reviewing pretrial record, he concluded that State had been ordered to produce Complete Wood Report to Judge Lott, and presumed that Mr. Anderson had complied with that order; had he known that Mr. Anderson had not done so, he would have been obligated to correct the record); Exh. 6 (Jernigan stmt.) at ¶ 13 (same).

B. Mr. Anderson is also the only current or former prosecutor for the State in this matter who has expressed any hesitation in determining that Exhibits 7 through 11 are, on their face, *Brady* material favorable to Mr. Morton's claim of innocence and which should have been disclosed to Mr. Morton's trial counsel. *Compare, e.g.,* Exh. 2 (Anderson dep.) at 229-30 ("Q: Are you saying what Eric told Rita Kirkpatrick and the transcript is not Brady? A: "The answer is any Brady determination is a mixed question of law and facts. It requires a professional judgment to be made. It requires you to know exactly what facts there are and how they're perceived by the prosecutor at the time in question. . . . I'm not agreeing the transcript is Brady material. That's a legal conclusion.") *and id.* at 383-84 ("Q: Is [the green van report] Brady material you should have disclosed? A: You know, I have already gone into why I can't respond to a question about Brady . . . I'd have to know what I knew back in 1986") *with* Exh. 4 (Davis dep.) at 53 (Kirkpatrick transcript is clearly *Brady* material that "should have been produced" at trial); *id.* at 45 ("it would have been horrible" if State had failed to produce Kirkpatrick transcript to Judge Lott); Exh. 5 (Bradley stmt.) at ¶ 28 (Mr. Morton entitled to relief on due process grounds if Mr. Anderson could

not give "a clear, credible answer" to allegations that materials from Wood file were suppressed); Exh. 6 (Jernigan stmt.) at ¶ 14 (same).

C. Mr. Anderson has offered only an all-encompassing claim to remember absolutely nothing about the discovery he provided to the defense and the trial court in this case. But that does not – as Mr. Bradley recognized, when trying to defend Mr. Anderson against these *Brady* allegations – explain the stark absence of the exculpatory Wood materials from the Sealed Lott File or the trial record. *See* Exh. Exh. 5 (Bradley stmt.) at ¶26 (in recent months, Mr. Bradley became "increasingly frustrated" with Mr. Anderson's failure to "provide a straight answer or innocent explanation to the allegations that Mr. Anderson had deliberately suppressed exculpatory evidence").

D. Mr. Anderson also attempted to downplay his involvement in the Christine Morton investigation – and, by consequence, the likelihood that he would have known the contents of the Complete Wood Report well in advance of trial. But these statements are inconsistent with the record, and therefore not credible. First, he attempted to disavow his own practice of "mastering the hundreds of details in a case" before trial that he wrote about so unequivocally in his book *Crime in Texas*. This included his very specific practice of conferring with Sheriff Boutwell daily while the two men were "painstakingly piec[ing] together" the details of homicide investigations. All of these descriptions, he claimed, were "hyperbole based on fact" and the product of "literary license." Exh. 2 (Anderson dep.) at 129, 205.

E. Second, and more disturbing, Mr. Anderson claimed that he had but a short window of time to become familiar with the Morton investigation before trial. While he again stated he had no specific recollection of when (or whether) he learned of the contents of Sgt. Wood's file, he stated that in the

ordinary case, he typically only had a week prior to trial to review the investigative file and prepare his case. And even though the Morton case was more complex than the ordinary murder prosecution (and was, in fact, the only circumstantial murder case he can ever recall prosecuting), he does not believe he had more than "two weeks," at most, in which to familiarize himself with the investigation, speak with Sheriff Boutwell about the case, and prepare for trial. *Id.* at 126, 133-34 (emphasis supplied).

F. This is squarely contradicted by the record. For the WCSO file shows that Mr. Anderson personally traveled with Sheriff Boutwell to the City Grill restaurant to interview witnesses and learn the contents of Christine Morton's last meal on September 9, 1986 (the same investigative trip that Mr. Anderson wrote about in *Crime in Texas* to illustrate his commitment to mastering a case's details). *See* City Grill Investigative Documents dated 9/9/86 (Exhibit 40). Thus, Mr. Anderson's immersion in the investigation into Christine Morton's murder began at least five months before trial, and even before Mr. Morton was charged.

G. It is not unreasonable to conclude that Mr. Anderson tried to narrow the window of time in which he prepared for trial because to acknowledge his personal involvement in the investigation from the outset makes it all but impossible to believe that he did not know the contents of the Complete Wood Report as soon as, or shortly after, those materials were generated by Sgt. Wood.

H. Mr. Anderson's current testimony regarding important past events and practices, which is based largely on his own speculation, also cannot be reconciled with other witnesses' accounts. For example, as noted earlier, his insistence that he must have verbally disclosed the contents of the Complete Wood Report to trial counsel is directly contradicted by Mr. Allison and Mr.

White's detailed, sworn affidavits. *See supra* Parts I(B)(1) and I(B)(2)(b) through (c). Similarly, Mr. Anderson's claim that his decision not to call a police officer (including Sgt. Wood) as a witness would never be motivated by an intent to conceal that officer's file materials is contradicted by Judge Arnold's sworn statement that Mr. Anderson, as District Attorney, in fact spoke freely to his subordinates about his past use of that very tactic. *See supra* Part I(B)(3)(c).

I. Even Mr. Anderson's answers to questions regarding very recent events are contradicted by other witnesses in the case:

1. For example, he claimed he cannot recall anyone from the District Attorney's Office asked him to provide an affidavit regarding the due process allegations in recent months. Yet ADA Jernigan stated that she <u>repeatedly</u> asked him to provide an affidavit addressing Mr. Morton's anticipated *Brady* claims in August and September of this year. *See* Exh. 2 (Anderson dep.) at 354-55; Exh. 6 (Jernigan stmt.) at ¶¶12, 19-20.

2. Mr. Anderson denied that Mr. Bradley ever expressed any frustration with him about his professed inability to remember any of the details concerning the discovery issues in this case. *See* Exh. 2 (Anderson dep.) at 353, 355-57. Yet Mr. Bradley recalls that he in fact became "increasingly frustrated" with Mr. Anderson's apparently deliberate refusal to refresh his recollection regarding these issues, and stated to Mr. Anderson that he needed to take the allegations "more seriously," when the State was preparing for an anticipated evidentiary hearing. *See* Exh. 5 (Bradley stmt.) at ¶ 26.

3. Mr. Bradley also clearly recalls that two months ago, on the date the Court of Criminal Appeals granted the writ, Mr. Anderson asked to meet with Mr. Bradley privately in his chambers, at which point Mr. Anderson

asked Mr. Bradley, "John, do you think I've done anything wrong?" *See* Exh. 5 (Bradley stmt.) at ¶ 46. Just one month later, at his deposition, Mr. Anderson claimed he could not "recall the specifics of that conversation." Exh. 2 (Anderson dep.) at 352-53.

J. The undersigned also submit that the deposition transcript alone does not fully convey what we believe to be evasiveness the answers to many basic questions posed to him. This Court may wish to review portions of the videotape of the deposition to independently evaluate Mr. Anderson's credibility and demeanor, particularly when he is asked – and has obvious difficulty answering – whether any of his self-described "sick" feelings about the case may arise from the fact that he knowingly concealed exculpatory documents that would otherwise have led to Mr. Morton's acquittal. Exh. 2 (Anderson dep.) at 390, 392.

ii. Statement of Roberto Bayardo

A. Without any specific recollection as to whether or not he suppressed *Brady* material from Mr. Morton's defense counsel, nor whether he violated Judge Lott's order, Mr. Anderson has offered his personal belief that such due process violations would be inconsistent with his practice and character. *See* Exh. 2 (Anderson dep.) at 390 ("I can't imagine I did that"); *supra* n.2 (Anderson press conference) ("In my heart, I know there was no misconduct whatsoever").

B. But the credibility of these assurances are undermined by Mr. Anderson's other actions in Mr. Morton's trial. For Mr. Anderson went to great lengths to distort scientific testimony to secure Mr. Morton's conviction. For example, he called Travis County Medical Examiner Roberto Bayardo to testify that, based solely on an examination of the victim's stomach contents at autopsy, Christine was most likely killed no later than 1:15 a.m. – *i.e.,* when Michael and

Christine were alone together at home. However, Dr. Bayardo stressed to the jury that his estimation was "not a scientific statement," and cautioned that "there is no scientific precise method to determine the time of death." R. at 681-82.

C. Mr. Anderson grossly mischaracterized this testimony in his final argument to the jury. He argued that based solely on Dr. Bayardo's analysis, "[M]edical science shows this Defendant killed his wife." R. 1147:8-10. He proceeded to make numerous other equally false characterizations of Dr. Bayardo's conclusions and opinions. *See, e.g.,* R. 1144:1-1145:3 (arguing that stomach contents analysis by Dr. Bayardo "makes Michael Morton scientifically proved as the killer of his wife"); R. 1145:17-19 (stomach contents analysis "makes the Defendant the killer and proved that way by medical science"); R. 1162:8-10 ("we brought you scientific evidence that shows that she was dead before he went to work that morning"); 1147: 14-16 (Dr. Bayardo's estimation is "the best medical science can bring us – shows this Defendant is a killer. Time of death").

D. Dr. Bayardo was, until recently, unaware of exactly how Mr. Anderson had utilized his testimony to secure Mr. Morton's conviction. When given the opportunity to read Mr. Anderson's closing argument, Dr. Bayardo was "very much disturbed" by how Mr. Anderson distorted his words. *See* Exh. 37 (Statement of Roberto Bayardo ("Bayardo stmt."), at 10. Dr. Bayardo emphasized that "my testimony was that this was not a scientific way to make a determination of time of death." *Id.* at 14. He is also of the view that Mr. Anderson's statements did not reflect "in any way a reasonable inference" from his testimony. *Id.* at 9-10. *Cf. Wesbrook v. State,* 29 S.W.3d 103, 115 (Tex.Crim.App. 2000) (while a prosecutor's summation may argue "reasonable deduction[s] from the

evidence," he or she may not "inject[] new facts harmful to the accused into the trial proceeding" at that juncture).

E. That the record shows that Mr. Anderson was willing to so wholly misstate the scientific evidence in this case significantly undermines his claim that it was not in his character or practice to otherwise violate due process, *i.e.,* to credit his "belief" that he did not conceal documents from Sgt. Wood's file that were favorable to the defense.

iii. <u>Letter from Mr. Anderson's Counsel</u>

A. Perhaps recognizing that his client's deposition testimony failed to provide a persuasive explanation to account for the fact that there is no evidence that Mr. Anderson ever disclosed the exculpatory contents of the Complete Wood Report, Mr. Anderson's counsel sent the undersigned a letter on December 14, 2011, to clarify his client's current position. *See* Exh. 1 (Dietz letter). The central argument of the letter appears to be that Mr. Anderson should be excused from his failure to make timely disclosure of the Complete Wood Report, either because (a) the Wood documents cited by Mr. Morton are not exculpatory (*i.e.,* somehow do not qualify as *Brady* material), or (b) defense counsel was already aware of the information in those materials. These excuses are not credible because they misstate both the applicable law and the factual record.

B. More than two decades before Mr. Morton's trial, the Supreme Court held that trial prosecutors have an affirmative obligation to timely disclose all "evidence favorable to an accused," whether it pertains to the issue of guilt or to punishment. *Brady v. Maryland*, 373 U.S. at 87 (1963). At the time of Mr. Morton's trial, it was also well-settled law that favorable material subject to mandatory disclosure under *Brady* also includes evidence that may be used to

impeach the State's case. *See Giglio v. U.S.*, 405 U.S. 150, 154 (1972); *see also United States v. Bagley*, 473 U.S. 667, 675-76 (1985) (no distinction between impeachment evidence and other favorable evidence for *Brady* purposes). The pretrial *Brady* disclosure obligation is a broad one, requiring production of all favorable evidence "irrespective of the good or bad faith of the prosecution." 373 U.S. at 87; *see also* R. Cary et al., FEDERAL CRIMINAL DISCOVERY (2011 ed.) §1.B at 29-30 (demonstrating that evidence is "favorable or exculpatory to the defendant" under *Brady* "is not a difficult hurdle to overcome. The court need only find that the information would have aided the defendant's case in some way.")

C. The Dietz Letter tries to remove each of the suppressed Wood materials from the broad ambit of *Brady* by tackling them individually. With respect to three of the items – the two Kirkpatrick transcripts regarding Eric's sighting of the "monster," and the Green Van report – the favorable content of these items is so apparent (given the powerful and direct support they would have provided for Mr. Morton's third-party-intruder defense) that the letter does not try to argue they are not *Brady* material. Instead, the letter appears to argue that Mr. Anderson was excused from his obligation to disclose these documents to the defense because the underlying information in the reports may have somehow already been already known to defense counsel. *See* Exh. 1 at 2 ("we also have evidence that the information contained in these [Eric] reports was in fact known to defense counsel," citing Mr. Morton's comment to newspaper that Eric "saw the murderer"), *id.* at 3 ("We know from the trial transcript the defense investigator Ken Bates *sought additional information* about activities identified in the Traylor [Green Van] report") (emphasis supplied).

D. That Mr. Anderson (not only a longtime prosecutor, but a sitting district judge who regularly presides over *Brady* disclosure issues pre- and post-trial) and his counsel would try to excuse non-disclosure of these materials on this basis is troubling. A trial prosecutor's affirmative obligation to provide the defense with all exculpatory information in his own files does not depend on the thoroughness of the defense's own investigative efforts. We are aware of no authority – and Mr. Anderson and his counsel have provided none – to support the notion that a trial prosecutor is relieved of his or her *Brady* obligation if he believes that the defense may already possess the favorable information in question. And Mr. Anderson's argument is particularly troubling in that it echoes his efforts to evade discovery (before being sharply corrected by his adversary) in pretrial hearings in this very case twenty-five years ago. *See* Part I(B)(1)(2)(b)(i), *supra* (Mr. Allison: "Discovery, when we use it in a criminal courtroom, has a very particular meaning, Judge. It doesn't mean what I go out and discover on the street. It means what I discover through the Prosecutor's Office").

E. More fundamentally, as a factual matter, there is simply no evidence to support Mr. Anderson's contention that the defense did, in fact, have the explosive information in the Kirkpatrick or Green Van documents. *See supra* Part I(B)(1) (discussing affidavits of defense counsel, Mr. Morton, and other record evidence establishing defense's lack of knowledge, and why Mr. Anderson's speculation that he "must have" provided the information verbally is not supportable). Notably, Mr. Dietz's letter does not explain why, if in fact the defense possessed the information in any of these documents (whose favorability to Mr. Morton's defense he does not appear to dispute), Mr. Morton's able counsel would have made no visible effort whatsoever to present any of it to the jury.

F. The letter takes a different approach with respect to the Credit Card and Cross Check reports (Exhibits 9 and 11). Rather than suggest that the defense must have known about this information, Mr. Anderson argues, in essence, that the record does not clearly show that these items were in fact connected to the Morton murder. *See* Exh. 1 at p.3, ¶¶ 3-4.

G. Regarding the stolen credit card report in the WCSO's Morton file, the Dietz letter notes that the handwritten report does not specifically mention Christine Morton by name or list the number of the recovered credit card; thus, one cannot now know with certainty whether or not the credit card was in fact from Christine Morton's stolen purse. *Id.* at p.3 ¶4. That is technically correct, although the inference that this was, in fact, Christine's stolen card is hardly unreasonable.[16] But plain defect in this argument is that it actually brings into clearer focus the harm caused by late discovery of these materials because twenty-five years later, any conclusive evidence of a connection between the theft and the murder that might well have been generated *had the information been timely disclosed pretrial* is now going to be very difficult to find. For example, the undersigned were able to confirm that Bill de la Verne, the identified in the report as being able to "ID the woman" who fraudulently tried to use the card, was in

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[16] The credit card report was recently located in the WCSO's Morton case file; that voluminous file does not appear to have any other documents from the "wrong" case, indicating the likelihood of a mix-up here is low. In addition, the card report is dated two days after Christine Morton's murder, and is directed to Sgt. Wood, who was then the chief investigator on the Morton case.

Moreover, as Mr. Dietz himself notes in his letter, in his deposition, Sgt. Wood testified to having some recollection (albeit a far less specific one than described in the letter) of receiving this report in connection with his investigation of Christine's murder. *See* Exh. 18 (Wood dep.) at 130 ("You know, now that you jolted my memory, I remember something about it, but I don't remember what it was. . . . I think I called the guy [who recovered the card]"). If Sgt. Wood's recollection is correct, that would seem to provide the link between the original Morton investigation and the credit card report that Mr. Anderson now claims is lacking.

fact a San Antonio police officer at the time, but he is now deceased. The "Jewel Box" store where the card was used no longer exists. And neither the San Antonio Police Department nor the WCSO has, at this time, any police reports or documents to provide any additional leads to the fraudulent user of the card.

H. By contrast, had the defense been given the credit card report and the other exculpatory information in the State's file in 1986, any number of links between the card and the real killer might have been developed at that time – and even if that investigation did not lead to Norwood's identification, it might have created sufficiently compelling support for the third-party-killer theory as to result in Mr. Morton's acquittal. For example, if the defense had been able to interview the woman who used the stolen card, she might have provided a description of the man from whom she obtained the card – which may have corresponded to Norwood's actual appearance and been consistent with Eric's description of the killer (*i.e.,* the tall man with a "big moustache," which fits Norwood's appearance then and now). *See* Chuck Lindell, *Morton Attacker Described as 'Big Monster with Big Moustache,'* Austin-American Statesman, Nov. 10, 2011 (article and photo) (attached as Exh. 41). Armed with that lead, a defense team armed with the concealed Green Van report might also have been able to obtain a more precise description of a man with a "big moustache" from the neighbor who saw the suspicious man canvass the area behind the Mortons' home.

I. Similarly, with respect to the check report, the Dietz letter argues that the State was not clearly obligated to disclose it because it may have been unconnected to the murder. The trouble with this argument is the same as with the credit card: the fact that these documents only came to light twenty-five years after the fact precludes any reliable, retrospective determination of their

significance. After the filing of the writ, the undersigned received a copy of the back of the check – which shows that the signature is not Christine's, but also that it was deposited into the Mortons' joint bank account nine days after her death. But because the defense only received a copy of the check in 2011, and because the WCSO file does not reveal what, if anything, the State actually did to investigate this issue in 1986, one simply cannot know with certainty whether the check was innocently deposited by Mr. Morton or another a family member,[17] or whether someone connected to the killer used Christine's ID and bank book to make a fraudulent deposit (and a corresponding withdrawal) that day. But the record lacks the contemporaneous bank records, video footage of the transaction, and interviews with bank personnel that the defense otherwise could have easily obtained had the original report been timely disclosed.

J. In addition, Mr. Anderson's counsel does not acknowledge in his discussion of the check issue what we already know to be the extraordinary utility to the defense of the check report itself: its impeachment value. The reporting officer brazenly told Sgt. Wood that the family members who called in the forged check "seem to think that Chris' purse was stolen, course we know better[.]" The bias this statement demonstrates against Mr. Morton, particularly coming so early in the investigation into Christine's death, is so plain as to hardly merit discussion. Surely the defense would have seized on this statement to prove its theory of the case: "that the prosecution rushed to judgment against Mr. Morton and ignored evidence of his innocence." Exh. 16 (Allison aff.) at ¶11.

[17] Mr. Morton has no recollection of depositing the check himself. It is also reasonable to infer that, if the State had checked with the Mortons' bank and discovered that Mr. Morton made this deposit, Mr. Anderson would have tried to offer this fact as further evidence of Mr. Morton's allegedly "cold blooded" conduct following his wife's murder, similar to how he characterized so many other aspects of Mr. Morton's behavior (arguing that sleeping in the couple's bed, removing dead flowers in the yard that Christine had originally planted, etc., was evidence of his lack of grief or remorse).

Indeed, even Mr. Anderson himself professed shock at this portion of the document, describing it as "the most unprofessional statement I can recall ever seeing in a police report." Exh. 2 (Anderson dep.) at 389.

K. The credibility of Mr. Anderson's current position is further undermined by the claim in his counsel's letter that undersigned counsel Barry Scheck actually shares Mr. Anderson's singular interpretation of the pretrial record with respect to the scope of the *in camera* review order. *See* Exh. 1 (Dietz ltr.) at p.2 ¶1 ("Based upon your deposition inquiry, it was apparent you did not believe those [complete Wood] reports were sought by Judge Lott nor should they have been expected to be in the envelope Judge Lott sealed after in camera inspection") (emphasis in original). Mr. Scheck neither believes nor suggested anything of the kind; how Mr. Dietz or his client could interpret his deposition inquiry in that regard is simply baffling. Throughout the deposition, Mr. Scheck made clear that he interpreted the pretrial record to have required production of the Complete Wood Report (as has every other attorney in the case who has reviewed it, save Mr. Anderson, *see supra* Part I(A)(1)(q). The questions he posed to Mr. Anderson that concerned a potentially more limited scope of the Lott order (requiring production only of Mr. Morton's statements) were made only to (a) confirm that this was *Mr. Anderson's interpretation* of the record, (b) question Mr. Anderson as to the actions that he would or would not have taken, consistent with having held that view, in 1987.[18] It could not be more apparent from the

[18] *See, e.g.,* Exh. 2 (Anderson dep.) at 331 ("assuming that you acted based on your current understanding of the record and only turned over Wood's report about Michael Morton's statements and field notes, and you didn't turn over the rest of the report about his other investigative activities. . . .") (emphasis supplied); *id.* at 381 ("You are telling us, as you sit here today, that you believe you were only obligated to turn over Wood's reports about the Morton statement, yes?") (emphasis supplied). *See also id.* at 333 ("assuming" that Mr. Anderson had acted in accordance with "your current understanding of the record" in 1987, then "why wouldn't you, when you saw

record of this deposition that Mr. Scheck did not share that interpretation of Judge Lott's order – nor, frankly, does he or any other member of Mr. Morton's legal team believe that *Mr. Anderson himself* actually thought the production order was so limited. This is because, as previously discussed at length, Mr. Anderson's conduct during and after trial was utterly inconsistent with one who honestly held that belief.

iv. <u>Mr. Anderson's Press Conference</u>

A. Finally, the record includes a troubling comment made by Mr. Anderson after his deposition that calls his credibility and integrity into further doubt. Before the deposition transcripts were released to the public, Mr. Anderson called a press conference on the steps of the Williamson County Justice Center, purportedly to apologize to Mr. Morton for the fact of his wrongful conviction (but not to admit any wrongdoing in securing that conviction). During the press conference, Mr. Anderson claimed that during the deposition, he and Mr. Morton did not speak directly, but that Mr. Morton "did pass a word to me through my attorney, and frankly, his words were kind and gracious."

B. Mr. Morton is an uncommonly gracious man. But after listening to Mr. Anderson's statements at the press conference, he informed the undersigned that Mr. Anderson had wholly mischaracterized their brief exchange. In truth, the exchange to which Mr. Anderson referred resulted from Mr. Morton's anger and frustration at Mr. Anderson's evasive responses to basic questions posed to him about the exculpatory contents of the State's trial file. After becoming visibly agitated and needing to step outside for a few minutes (*see* Exh.

[the defense's] motion for a new trial, say to Judge Lott that in fact you had not turned over the complete set of documents by Sgt. Wood?"); *id.* at 335 (after motion was filed alleging that additional exculpatory information was in the Wood file, "Did you not have an obligation to disclose to the judge that the full set of reports had not been turned over [for in camera *Brady* review]?").

2 (Anderson dep.) at 194-95), Mr. Morton returned and quietly reassured Mr. Anderson's counsel that he would be able to control his emotions. Mr. Morton did not, and does not, have any "kind" words to offer Mr. Anderson. That Mr. Anderson would suggest to the public that this moment in any way constituted an expression of forgiveness or absolution on Mr. Morton's part is deeply disturbing.

II. PROPOSED LEGAL FINDINGS

A. Probable Cause Exists That Mr. Anderson Committed Specific Offenses Against the Laws of Texas

The evidentiary record, as described in the proposed factual findings detailed above, establish probable cause that Mr. Anderson committed the following specific offenses against the laws of this state: (1) Contempt of Court, Texas Government Code § 21.002(a); (2) Tampering With or Fabricating Physical Evidence, Texas Penal Code § 37.09; and (3) Tampering with Government Records, Texas Penal Code § 37.10.

To establish probable cause, the evidence must show that "the facts and circumstances . . . were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense." *Parker v. State*, 206 S.W.3d 593, 596 (Tex. Crim. App. 2006) (quoting *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002). In the context of search warrants, the Court of Criminal Appeals has defined the necessary showing as a "fair probability." *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007).

1. Criminal Contempt of Court, Texas Government Code § 21.002(a)

The evidentiary record and the proposed factual findings establish probable cause that Mr. Anderson committed criminal contempt of court in violation of Texas Government Code § 21.002 (a) by failing to comply with Judge Lott's order to produce

Sgt. Wood's complete set of reports and notes ("the Complete Wood Report") for *in camera* review.

Section 21.002 (a) of the Texas Government Code provides courts with authority to "punish for contempt." In addition to this statutory mandate, Texas courts have inherent power to punish by contempt for violation of orders. *See Ex parte Hughes*, 759 S.W.2d 118, 120 (Tex. 1988); *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976). Contempt of court is broadly defined as "disobedience to or disrespect of a court by acting in opposition to its authority." *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (internal quotation marks and citation omitted).

Criminal contempt can manifest in one of two ways. Contempt that occurs within the presence of a court is referred to as "direct contempt," *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979), and contempt that occurs outside the court's presence is known as "constructive contempt," *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995). As here, violating a court order in a criminal matter can qualify as contemptuous behavior. *See* 13 Tex. Jur. 3d Contempt § 11; *see also Ex parte Holmes*, 754 S.W.2d 676, 678 (Tex. Crim. App. 1988) (district attorney's violation of court order in criminal case). Because the contemptuous nature of Mr. Anderson's conduct – that is, his failure to include Sgt. Wood's Complete Report in the sealed envelope produced to Judge Lott – occurred outside the court's presence, Mr. Anderson's conduct should be analyzed as constructive contempt.

To constitute constructive criminal contempt for violation of a court order, there must be proof of: "(1) a reasonably specific order; (2) violation of the order; and (3) the willful intent to violate the order." *Ex parte Chambers*, 898 S.W.2d at 260. Additionally, conduct must "impede, embarrass, or obstruct the court in the discharge of its duties in order to constitute constructive contempt." *In re Reece*, 341 S.W.3d at 366.

a. <u>Reasonably Specific Order</u>

While the Texas Supreme Court has suggested that a written order is necessary for one to be held in constructive contempt, *see Ex parte Guetersloh*, 935 S.W.2d 110, 111 (Tex. 1996) (per curiam) ("An alleged contemnor cannot be held in constructive contempt of court for actions taken before the court reduces its order to writing."); *Ex parte Wilkins*, 665 S.W.2d 760, 761 (Tex. 1984) (determining that oral order resulting in contempt did not meet specificity requirement),[19] other Texas courts have determined that constructive contempt can be based on an oral pronouncement from the bench so long as the order is "clear and sufficiently specific," *Ex parte Barnes*, 581 S.W.2d 812, 814 (Tex. Civ. App.—Fort Worth 1979) (ultimately concluding that order in question did not meet specificity requirements); *see also Ex parte Wilkins*, 665 S.W.2d at 761 (agreeing with the holding but disagreeing "to the extent that [it] implies that an oral order can never satisfy [the specificity requirement]") (Spears, J., concurring); *see also Ex parte Weldrep*, 932 S.W.2d 739, 742-43 (Tex. App.—Waco 1996) (arguing same) (Vance, J., dissenting).

Here, Mr. Anderson was subject both to a written order to produce the Complete Wood Report for *Brady* review in the form of Judge Lott's docket entry, and to a series of pronouncements from the bench that were clear and specific.

Judge Lott's docket sheet entry regarding the production of Sgt. Wood's report constitutes a written order. On the official docket sheet for the February 1987 pretrial hearing, Judge Lott wrote: "Court to conduct in camera inspection of Report of Officer Don Wood in connection with D[efendant]'s Brady motion." *See supra* p. 35. The docket entry memorialized Judge Lott's order to Mr. Anderson and provided Mr.

[19] In many cases, the reference to a written rather than an oral order can be misleading. Courts have often stated that an individual cannot be held in constructive contempt of court for actions taken "before the court reduces its order to writing" where a written order punishes someone retroactively for actions that took place before the final order was entered. *See, e.g.*, *Ex parte Guetersloh*, 935 S.W.2d at 111; *Ex parte Chambers*, 898 S.W.2d at 262. That is not the case here. Judge Lott's docket entry did not attempt to punish Mr. Anderson retroactively; rather, it memorialized the order that Mr. Anderson subsequently violated.

Anderson with a writing to consult in complying with that order, eliminating the main concern behind the possible requirement of a written order for constructive contempt. *See, e.g.*, *Ex parte Price*, 741 S.W.2d 366, 367 (Tex. 1987); *Ex parte Padron*, 565 S.W.2d 921, 924 (Tex. 1978) (same). On its face, the docket entry unambiguously encompasses *all* of Sgt. Wood's Report; it contains no caveats or qualifications. *See Ex parte Durham*, 921 S.W.2d 482, 486 (Tex. App.—Corpus Christi 1996) (judge ordered contemnor "to produce 'all of his business records from January 1, 1992 to the present.' This is unambiguous.").

That the docket entry constituted an unambiguous order is reinforced by the circumstances surrounding the entry. On November 18, 1986, defense counsel filed the *Brady* Motion seeking "any evidence favorable to the accused on the issue of guilt or innocence" or "any evidence which is inconsistent with the guilt of the accused" in the possession of the State. *See supra* p. 29. During the November 1986 pretrial hearing on that motion, Judge Lott agreed with Mr. Allison's request that Sgt. Wood's "report itself and the field notes so that you have everything" be produced. *See supra* p. 33. Again during the February 1987 pre-trial hearing, Judge Lott confirmed, this time with respect to a question from Mr. White, that the *in camera* inspection would include "the complete reports" of Sgt. Wood and Sheriff Boutwell. *See supra* p. 34. In this context, the docket entry in which Judge Lott memorialized his order immediately after the February hearing must be interpreted to include the Complete Wood Report.

Even if the docket entry does not qualify as a written order for purposes of constructive contempt, however, the proceedings on the record regarding this issue were sufficiently clear and specific to give notice to Mr. Anderson of exactly what was required of him. Twice in open court – during the November 1986 and the February 1987 pretrial hearings – Judge Lott clearly confirmed the scope of the production order to

include Sgt. Wood's "report itself and the field notes" and "the complete report[]" of Sgt. Wood. *See supra* pp. 33, 34.

Indeed, everyone else involved in the proceedings understood the scope of the order. Judge Lott's personal notes demonstrate that he viewed the order as encompassing the Complete Report of Sgt. Wood, and not some portion thereof. *See supra* p. 35. The two pretrial colloquies show that defense counsel well understood the scope of the order. *See supra* pp. 33, 34. And Assistant District Attorney Mike Davis's comments to the jury post-trial, the subject of defense counsel's Motion for a New Trial, are powerful evidence that Mr. Davis believed the Complete Wood Report had been turned over in accordance with the order, but that Judge Lott had determined that they did not contain additional exculpatory material and did not provide them to the defense. *See supra* pp. 43-45. The Motion for a New Trial was predicated on this understanding, *see id.*, as was defense counsel's brief on appeal (which specifically asked for a court-supervised inquiry, in light of Mr. Davis's comments, into whether the Complete Wood Report had in fact been turned over for review as ordered), *see supra* pp. 51-52. The Court of Appeals also shared this interpretation and based its dismissal of Mr. Morton's appeal on the assumption that the sealed file contained "all" of Sgt. Wood's reports and notes. *See supra* p. 53.

Mr. Anderson claimed in his deposition that he has no contemporaneous recollection of how he interpreted the order. *See supra* pp. 36-37, 55. But his statements and actions suggest that he, like everyone else involved, knew exactly what the order required. Tellingly, when Judge Lott asked Mr. Anderson about the field notes during the February 1987 pretrial hearing, Mr. Anderson claimed that he "had forgotten about those," *see supra* p. 35, *not* that he had misunderstood the order or that he did not previously believe himself to be required to turn over the field notes. Mr. Anderson then accepted responsibility for producing the field notes, saying, "I need to get with Sergeant

Wood today, obviously, to get those." *See id.* Mr. Anderson never once stated during the trial, the motion for a new trial, or on direct appeal, privately or on the record, that he believed the order covered only those portions of Sgt. Wood's report that dealt with Mr. Morton's statements. *See supra* pp. 48-51. Nor did Mr. Anderson do so this year in the period of time between the announcement of the DNA testing results and the opening of the sealed envelope, despite being repeatedly asked by counsel for the State to provide a "clear, credible answer" to the defense's allegations that he had failed to produce the Complete Wood Report. *See supra* pp. 65-68. Instead, Mr. Anderson raised his purported view of Judge Lott's order as requiring only the disclosure of reports concerning Mr. Morton's statements for the very first time during his recent deposition, and only after the twenty-four-year-old envelope was unsealed and its paltry contents revealed. *See supra* pp. 54-55.

Finally, lest there be any doubt as to the clarity of Judge Lott's order, it is notable that Mr. Anderson is the only attorney who has handled the Morton matter over the last twenty-five years (either for the State, or the defense) who did not interpret the order as clearly requiring production of the Complete Wood Report. *See supra* p. 73. Indeed, even when current counsel for the State was not yet prepared to concede Mr. Morton's innocence after the initial DNA results were obtained in August 2011, having read the pretrial record, ADA Jernigan came into court and expressed confidence that when the file was unsealed, it would reveal that Mr. Anderson had in fact complied with Judge Lott's order and turned over the Complete Wood Report. *See supra* p. 67.

b. <u>Violation of the Order</u>

Judge Lott's order was more than reasonably clear. It permitted Mr. Anderson only one way to comply: to turn over in the sealed envelope all of Sgt. Wood's report and field notes. Mr. Anderson did not do so and thereby violated the order.

Responsibility for that failure falls with Mr. Anderson. Mr. Anderson was lead counsel for the State and was in charge of all discovery in Mr. Morton's case. *See supra* p. 22. Mr. Davis's statement to the jury post-trial – evidencing his belief that the entire report and field notes had been produced – is strong evidence that Mr. Davis was not involved with the production of the Wood documents, because he was clearly under the misimpression that the Complete Wood Report had been produced for *in camera* review as required. *See supra* pp. 44-45.

Mr. Anderson remained in violation of that order despite repeated opportunities, both during the trial and direct appeal and during post-conviction litigation, to produce the complete report and field notes. When defense counsel filed a Motion for a New Trial after the verdict against Mr. Morton, alleging that the entire report had not been produced in the sealed envelope, Mr. Anderson pointedly did not respond. *See supra* pp. 43-45. Nor did he ask Mr. Davis to explain his comments to the jury, or inform Mr. Davis that he did not believe that they were obligated to turn over the Complete Wood Report. When the defense raised the same allegation on appeal, Mr. Anderson once again failed to respond, instead arguing that Judge Lott may not have had the authority to enter the order in the first place. *See supra* p. 52. And when the Court of Appeals predicated its order dismissing Mr. Morton's appeal on its belief that "all" of Sgt. Wood's files had been produced, Mr. Anderson stood silent. *See supra* pp. 53-54. Each time that Mr. Anderson was reminded of his violation of the order, he chose not to correct that violation.

Mr. Anderson's failure to comply with Judge Lott's order did not end there. Mr. Anderson advised Mr. Bradley during post-conviction litigation that Mr. Morton was guilty and that DNA testing would not exonerate Mr. Morton, even though Mr. Anderson knew that a wealth of evidence directly supporting Mr. Morton's third-party-intruder defense (which he was seeking DNA testing to corroborate) had never been produced for

in camera review as required. *See supra* pp. 62-65. Despite those continued opportunities to correct the record and ensure that defense counsel had all *Brady* material in Sgt. Wood's Complete Report, Mr. Anderson never did so. Indeed, had Mr. Anderson told Mr. Bradley at any time during the post-conviction litigation that Mr. Anderson did not turn over Sgt. Wood's report and field notes for *in camera* review, Mr. Bradley would have reviewed those materials. *See* Exh. 5 (Bradley stmt.) at ¶ 9. Given the exculpatory nature of the materials, Mr. Bradley would have corrected the record and provided the report and notes to defense counsel. *See id.*

c. <u>Willful Intent to Violate the Order</u>

"A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a) (West 2011). There is probable cause that Mr. Anderson acted intentionally in violating Judge Lott's order.

As noted above, it was made clear to Mr. Anderson on several occasions what was required; everyone else involved in the proceeding understood the scope of the order; and Mr. Anderson never expressed any confusion about his obligations. During the trial and direct appeal, Mr. Anderson had at least three opportunities to explain that he understood the order differently, but failed to do so in each instance. First, the Motion for a New Trial alleged that the Complete Wood Report may not have been produced to the court, because Mr. Davis referenced additional, exculpatory Wood materials in his comments to the jury. *See supra* pp. 43-45. Despite claiming in his recent deposition that he strongly disagrees with the statements in the Motion, Mr. Anderson never filed a response or made any attempt to rectify the discrepancy between the allegations and what he allegedly believed to be the limited scope of the order. *See supra* 43-45. Second, in the State's appellate brief, Mr. Anderson, facing the same allegation and a direct request for an inquiry into whether he had in fact produced the Complete Wood Report, did not state

that he had in fact done so, nor did he dispute the defense's interpretation of the order. *See supra* pp. 52-53. Rather, Mr. Anderson argued, in essence, that the order itself was unlawful. *See supra* p. 53.[20] Third, the Court of Appeal's order clearly indicated that the court's decision was predicated on its understanding that the full report and field notes had been provided for *in camera* review. *See supra* pp. 53-54. But Mr. Anderson chose not to inform the Court of Appeals that he had turned over only a subset of Sgt. Wood's Report, rather than "all" the Wood materials. *See supra* p. 53.

The record provides probable cause to believe that Mr. Anderson intentionally violated the order because he did not want Judge Lott to review the Complete Wood Report for *Brady* purposes – because he feared that Judge Lott would have proceeded to provide Mr. Morton's counsel with the wealth of materials in Sgt. Wood's file that supported his third-party-intruder defense. Mr. Anderson exposed this motivation at the February 1987 pretrial hearing, held on the Friday before trial was to commence. At that point in time, Sgt. Wood still appeared on the State's witness list, and Mr. Anderson was required, under *Gaskin*, to have Sgt. Wood's Complete Report available for production to the defense at the close of his direct testimony. Nevertheless, asked by Judge Lott whether the State had "anything that is favorable to the accused," Mr. Anderson unequivocally answered, "No, sir." *See supra* p. 34. Yet documents like the Kirkpatrick Memo and the Green Van Report, which were in the District Attorney's trial file, were not merely favorable to Mr. Morton; those documents *directly* supported Mr. Morton's defense that an intruder had killed his wife. *See supra* pp. 57-58. Similarly, there is also a wealth of evidence in the present record that Mr. Anderson (who took pride in his practice of "master[ing] the hundreds of details in a case" before trial) must have known about the other exculpatory documents in the Complete Wood Report well in advance of

[20] The Court of Appeals did not consider this argument. *See* Exh. 34.

the final pretrial conference, whether or not those documents are physically in the District Attorney's file. *See supra* pp. 24-46.

d. <u>**Impede, Embarrass or Obstruct**</u>

Conduct must "impede, embarrass, or obstruct the court in the discharge of its duties in order to constitute constructive contempt." *In re Reece*, 341 S.W.3d at 366. Flagrant disregard of a court order *per se* satisfies this standard. *Id.* n.10. Mr. Anderson's violation of Judge Lott's order therefore meets this standard. Were that not enough, however, Mr. Anderson's conduct impeded or obstructed Judge Lott from discharging his duty to review *in camera* the full report and notes of Sgt. Wood to determine whether they contained information favorable to the accused. Had Judge Lott not been impeded in performing this review, the highly exculpatory evidence in Sgt. Wood's report would likely have been provided to defense counsel, and Mr. Morton would likely have never been convicted.

In sum, there is probable cause to believe that Mr. Anderson's conduct satisfies all four elements of the offense of criminal contempt of court.

2. <u>**Tampering With or Fabricating Physical Evidence, Texas Penal Code § 37.09**</u>

The evidentiary record and the proposed factual findings establish probable cause that Mr. Anderson tampered with or fabricated physical evidence in violation of Texas Penal Code § 37.09, by failing to turn over to Judge Lott the Complete Wood Report in order to keep those materials from Mr. Morton's defense and thereby impair the materials' availability as evidence.

Section 37.09(a)(1) of the Texas Penal Code provides in pertinent part: "A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he . . . alters, destroys, <u>or conceals</u> any record<u>, document</u>, or thing with intent to impair its verity, legibility, <u>or availability as evidence</u> in the investigation or official

proceeding" (emphasis supplied).[21] The statute has three elements: the act of alteration, destruction or concealment; and two mental-state requirements, "the knowledge of an investigation [or official proceeding] and the intent – the conscious objective – to impair a thing's availability as evidence in the investigation." *See Williams v. State*, 270 S.W.3d 140, 144 (Tex. Crim. App. 2008). Because section 37.09 is intended to "maintain the honesty, integrity, and reliability of the justice system," and not merely to prevent individuals from defrauding the government, anyone – including government officials – can violate the statute. *Wilson v. State*, 311 S.W.3d 452, 460-61 (Tex. Crim. App. 2010).

a. <u>Knowledge of an Investigation of Proceeding</u>

"A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist." TEX. PENAL CODE ANN. § 6.03(b) (West 2011). The knowledge element of section 37.09 is satisfied if the defendant had knowledge of either a "pending" investigation or official proceeding, or one that is "in progress." Courts have concluded that, although not defined in the statute, "pending" means "about to take place; impending." *See Barrow v. State*, 241 S.W.3d 919, 923 (Tex. App.—Eastland 2007) (quoting *Lumpkin v. State*, 129 S.W.3d 659, 663 (Tex. App.—Houston [1st Dist.] 2004)). As defined in section 1.07(a)(33) of the Texas Penal Code, an "official proceeding" is "any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant."

Mr. Anderson's concealment of the Complete Wood Report took place during the pretrial proceedings – that is, while an official proceeding (the prosecution of Mr. Morton) was pending or ongoing. His acts of concealment continued during Mr. Morton's trial and post-conviction proceedings. There is no dispute that, as a lawyer who represented the State at trial and on direct appeal, and who advised the present District

[21] Although the statute has undergone revision since 1987, section 37.09(a)(1) has remained the same since the pretrial proceedings in Mr. Morton's prosecution.

Attorney during several years of post-conviction proceedings in Mr. Morton's case, Mr. Anderson clearly had knowledge of those proceedings.

b. <u>Intent to Impair a Thing's Availability as Evidence</u>

The intent element requires that "impairing the [thing's] availability as evidence must have been [the defendant's] conscious objective or desire." *Stewart v. State*, 240 S.W.3d 872, 874 (Tex. Crim. App. 2007). "It is not enough that [a defendant] *knew* that his action would impair the availability of the [thing] as evidence." *Id.* (emphasis in original). In short, Mr. Anderson's conduct satisfies this element if he intended to prevent or diminish the availability of Sgt. Wood's Complete Report as evidence in the defense's investigation or the trial of Mr. Morton.

The proposed factual findings demonstrate probable cause that Mr. Anderson intended to do just that. Mr. Anderson's speculation in his deposition that he "would have" disclosed or discussed the contents of favorable documents with Mr. Allison or Mr. White should not be credited. *See supra* p. 23. No evidence suggests that defense counsel was aware of this material. *See supra* p. 22. Indeed, Mr. Allison and Mr. White have attested, and described in detail, how they would have used such evidence at trial – directly supporting Mr. Morton's theory of the case – had they been aware of its existence. *See supra* p. 21-22. At the very least, they would have made an extensive record of what they had been provided and their efforts to have it admitted as trial evidence, as they did at the November pretrial hearing when they made a substantial record as to the *lack* of discovery the State had provided to date. *See supra* p. 38. Moreover, at the time when Mr. Anderson answered "No, sir" to the Court's direct question whether he had any *Brady* material to disclose to the defense, neither party made any reference to earlier, off-the-record disclosures (verbal or otherwise) that Mr. Anderson now speculates must have taken place. Therefore, keeping Sgt. Wood's report

and notes from the court and from defense counsel meant that the exculpatory information contained therein would not be used during Mr. Morton's trial.

Mr. Anderson's conduct at many points during the proceeding demonstrates that he was concerned with the defense accessing or presenting favorable evidence. Mr. Anderson contested several relatively routine discovery requests, such as allowing defense counsel pretrial access to their own client's statements to law enforcement and providing defense counsel with a State witness's complete reports or statements as required by *Gaskin v. State*, 353 S.W.2d 467 (Tex. Crim. App. 1962) (op. on reh'g), the evening before a witness was due to testify rather than during the break between direct and cross examination. *See supra* p. 28.

Most notable, however, is Mr. Anderson's decision not to call Sgt. Wood as a witness. Sgt. Wood appeared on the State's pretrial witness list, including as late as February 6 (the Friday before trial), when Mr. Anderson told the Court that he had "forgotten about" the court's order that he obtain Sgt. Wood's field notes and promised to produce the Complete Report that day. Yet the following week, approximately two hours before trial began, Sgt. Wood was informed that he would not be testifying after all. *See supra* p. 27. Had Sgt. Wood testified, the State would have been required to disclose to the defense his Complete Report under *Gaskin*. *See id.* The subpoena that the defense had just issued to Sgt. Wood, requiring him to bring his complete file to court with him, made clear that counsel would be focused on the contents of Sgt. Wood's file as soon as it was produced. *See supra* pp. 55-56. And of course, approximately two hours before the State began putting on its case, it would be highly unusual for a prosecutor like Mr. Anderson not to be familiar with the report and notes of one of his witnesses. *See supra* pp. 27-28. This is especially true of Mr. Anderson, who wrote in his book *Crime in Texas* that he and Sheriff Boutwell "painstakingly pieced together circumstantial murder cases." *See supra* p. 26. Mr. Anderson also conceded that his practice was to sit down

with each police witness prior to trial to ensure that he had all of that individual's reports. *See supra* p. 28.

The evidence that Mr. Anderson elected not to call Sgt. Wood as a witness for the specific objective of concealing the Complete Wood Report from the defense is also supported by Mr. Anderson's own admitted use of just this tactic in prior cases. Judge Doug Arnold, a former Assistant District Attorney, distinctly recalls Mr. Anderson telling him, in 1998 or 1999, that Mr. Anderson "had deliberately, as a tactical decision, not called the investigating officer to testify [in a prosecution] . . . because by not calling the investigating officer to testify, he did not have to turn over their notes and reports [under] *Gaskin*." *See supra* pp. 56-57. There is probable cause that Mr. Anderson employed that tactic in Mr. Morton's prosecution, and that Mr. Anderson's failure to include Complete Wood Report in the sealed envelope or to otherwise disclose it under *Brady* was an effort to avoid that material being used by the defense at trial.

c. Concealment

"Conceal" is not defined within the Texas Penal Code. The recent Court of Appeals decision of *Rotenberry v. State* held that "conceal" for purposes of section 37.09 means "[t]he act of removing from sight or notice," not "[t]he act of refraining from disclosure." 245 S.W.3d 583, 588 (Tex. App.—Fort Worth 2007) (quoting *Black's Law Dictionary* 1494 (8th ed. 2004)) (distinguishing between act of hiding dead body in septic tank, which constitutes tampering, and act of lying to police about whereabouts of body, which does not). *Cf. Carrion v. State*, 926 S.W.2d 625, 628 (Tex. App.—Eastland 1996) ("An oral statement is not physical evidence" for purposes of fabricating physical evidence under section 37.09(a)(2); false statement to police officer did not support conviction for tampering).

Mr. Anderson concealed the Complete Wood Report by placing only selected portions of these materials in the sealed envelope produced to Judge Lott, thereby

misrepresenting the actual contents of the sealed envelope. This was not a mere act of refraining from disclosure. Mr. Anderson hid the key exculpatory documents in the Wood Report from the court (and by extension, defense counsel) by physically omitting them from the sealed envelope, with full knowledge that only the materials in that envelope would be reviewed for *Brady* purposes. Mr. Anderson's actions would have been no different had Judge Lott gone to the District Attorney's office to view the documents and Mr. Anderson hid the bulk of Sgt. Wood's reports and notes elsewhere while pulling out only a few pages. Moreover, separate and apart from his duty to produce these documents to Judge Lott, Mr. Anderson also falsely represented to the Court, on the eve of trial, that the State possessed no material whatsoever that was favorable to the defense.

There is probable cause to believe that Mr. Anderson's concealment of this *Brady* material was knowing and intentional, because the record establishes that Mr. Anderson had full access to and knowledge of the exculpatory documents before trial. Two of the favorable documents in the full report and notes were found in the District Attorney's trial file (the Green Van Report and the Kirkpartick Memo). *See supra* pp. 57-58. There is also powerful record evidence that Mr. Anderson was familiar with and had access to the other documents. Mr. Anderson had been personally involved in the investigation since at least September 1986, before Mr. Morton had even been arrested, when Mr. Anderson went with Sheriff Boutwell to the City Grill in Austin to interview witnesses as part of their efforts to "painstakingly piece[] together" the case. *See supra* p. 26. The Kirkpatrick Transcript and Memo, the Green Van Report and the report concerning Christine Morton's credit card all date from mid- to late August. *See supra* pp. 16-18. Sgt. Wood stated in his deposition that he placed documents in the Sheriff's Office file either the day they were created or the following day, and that Sheriff Boutwell reviewed his investigation even before the reports were prepared. *See supra* p. 25. Particularly given Mr. Anderson's unusually close relationship with Sheriff Boutwell, the inference is

overwhelming that the two would have discussed these key documents at around this time. Moreover, the detailed conversation between Mr. Anderson and Mr. Davis about Eric Morton's statements, witnessed by former ADA Gardner, is evidence that Mr. Anderson was specifically aware of the unedited version of the Kirkpatrick Transcript in the WCSO file. *See supra* pp. 41-42.

Finally, concealment does not require ultimate success, only the intent to conceal. *See Lewis v. State*, 56 S.W.3d 617, 625 (Tex. App.—Texarkana 2001); *see also Evanoff v. State*, Nos. 11-09-00317-CR, 11-09-00318-CR, 2011 WL 1431520, at *4 (Tex. App.—Eastland April 14, 2011) (citing *Lewis*, 56 S.W.3d at 625); *Lujan v. State*, No. 07-09-0036-CR, 2009 WL 2878092, at *2 (Tex. App.—Amarillo Sept. 9, 2009) (same). Accordingly, that the full report and field notes of Sgt. Wood ultimately came to the attention of the court and defense counsel (just this year) does not place Mr. Anderson's conduct outside section 37.09.

In sum, there is probable cause to believe that Mr. Anderson's conduct satisfies all three elements of the offense of tampering with or fabricating physical evidence.

3. <u>Tampering With Government Records, Texas Penal Code § 37.10</u>

The evidentiary record establishes probable cause that Mr. Anderson tampered with government records in violation of Texas Penal Code § 37.10 by failing to produce to Judge Lott the Complete Wood Report. There is probable cause to find that Mr. Anderson committed a misdemeanor offense because he intended to impair the availability of Sgt. Wood's report and notes to Judge Lott and to Mr. Morton's defense counsel, and that Mr. Anderson committed a felony offense because he intended Judge Lott and defense counsel to believe that the few documents disclosed were the Complete Wood Report, and because he intended to harm Mr. Morton's defense by depriving him of exculpatory evidence.

Section 37.10 of the Texas Penal Code, in relevant part, prohibits "intentionally . . . conceal[ing] . . . or otherwise impair[ing] the . . . availability of a governmental record." TEX. PENAL CODE ANN. § 37.10(a)(3) (West 2011).[22] These are the three elements of a misdemeanor offense; "intent to defraud or harm another" elevates the offense to a felony. *Id.* § 37.10(c)(1).

a. <u>"Governmental Record"</u>

"Governmental record" is broadly defined as including "anything belonging to, received by, or kept by government[23] for information" and "anything required by law to be kept by others for information of government." TEX. PENAL CODE § 37.01(2)(A)-(B) (West 2011); *see also Magee v. State*, No. 01-02-00578-CR, 2003 WL 22862644, at *1 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003) (holding that a police offense report is a "governmental record" under the Texas Penal Code). Sgt. Wood's report and field notes therefore qualify as "governmental records" for purposes of section 37.10.

b. <u>"Concealment" or "Impairment of Availability"</u>

The terms "concealment" and "impairment of availability" are not specifically defined in the Texas Penal Code, nor have they been defined by Texas courts construing section 37.10. However, Mr. Anderson's failure to include the Complete Wood Report in the envelope produced to Judge Lott is analogous to conduct that Texas courts have found to be "concealment" or "impairment of availability" under section 37.10. For example, in *Perez v. State*, the Court of Criminal Appeals affirmed a conviction under section 37.10 of an employee of a county tax assessor's office who withheld receipts that she was required to produce to the state comptroller. 590 S.W.2d 474, 476-77 (Tex. Crim. App. 1979), *superseded by statute on other grounds*, Texas Rules of Criminal Evidence, eff.

[22] Although the statute has undergone revision since 1987, this provision has remained the same since the pretrial proceedings in Mr. Morton's prosecution.

[23] Pursuant to section 1.07 of the Penal Code, for the purposes of section 37.10, "government" encompasses "any branch or agency of the state, a county, municipality, or political subdivision." TEX. PENAL CODE ANN. § 1.07(a)(24) (West 2011).

Sept. 1, 1986, Acts 1985, 69th Leg., ch. 685, § 9(b), *as recognized in Burks v. State*, 876 S.W.2d 877, 904 (Tex. Crim. App. 1994). Similarly, in *Mills v. State*, the Court of Appeals affirmed that a sheriff violated section 37.10 by improperly disposing of a prison commissary ledger that would have been subject to oversight by a county auditor. *See* 941 S.W.2d 204, 206-08 (Tex. App.—Corpus Christi 1996). Finally, in *Carpenter v. State*, the Court of Appeals affirmed a conviction under section 37.10 of a former county judge who hid a box of criminal complaints from a county attorney before they could be prosecuted. *See* 952 S.W.2d 1, 2 (Tex. App.—San Antonio 1997).

Mr. Anderson's conduct falls squarely within the scope of the statute. As explained above, Mr. Anderson concealed and impaired the availability of the Complete Wood Report by placing only selected portions of the material in the sealed envelope produced to Judge Lott. In other words, Mr. Anderson withheld governmental records that he was required to produce, *cf. Perez*, 590 S.W.2d at 476-77, and he hid the remainder of the Report from the notice of the court and defense counsel, *cf. Carpenter*, 952 S.W.2d at 2. In addition, in 1987 (as today), Mr. Anderson had an independent duty to produce all favorable evidence to the defense under *Brady* and the rules of attorney ethics, but deliberately did not do so.

c. Intent to Conceal or Impair (Misdemeanor Offense)

Under the Texas Penal Code, a person "acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a) (West 2011). A person commits a misdemeanor offense under section 37.10(a)(3) by "intentionally . . . conceal[ing] . . . or otherwise impair[ing] the . . . availability of a governmental record."

The record supports a showing of probable cause that Mr. Anderson intended to impair the availability of Sgt. Wood's Complete Report. As explained above (Part

II(A)(2)(c)), Mr. Anderson knew about and had access to the Report, but did not include these documents in the sealed envelope in violation of Judge Lott's order. Mr. Anderson never expressed any confusion about the scope of the order, nor did anyone else involved with the case. Moreover, Mr. Anderson repeatedly assured the Court and the defense that he fully understood his *Brady* obligations and had fully complied with them, even though the record evidence is overwhelming that Mr. Anderson knew about the *Brady* materials in Sgt. Wood's Report, but the defense did not. *Cf. Perez*, 590 S.W.2d at 477-78 (holding that where employee "intentionally failed to turn in" receipt to state comptroller, she intentionally impaired the availability of that governmental record, independent of an assessment of intent to defraud or harm the state with respect to that action).

d. <u>Intent to Defraud or Harm Another (Felony Offense)</u>

A person commits a felony offense under section 37.10(c)(1) if "the actor's intent is to defraud or harm another . . . ." For purposes of section 37.10(c)(1), "intent to defraud or harm" may be established by circumstantial evidence. *Wingo v. State*, 143 S.W.3d 178, 187 (Tex. App.—San Antonio 2004), *aff'd*, 189 S.W.3d 270 (Tex. Crim. App. 2006). "Harm" includes "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." *Id*. "Intent to defraud" is defined as "a conscious objective or desire to cause another to rely upon the falsity of the representation, such that the other person is 'induced to act' or 'is induced to refrain from acting.'" *See id.* (citing 41 Tex. Jur. 3d, *Fraud and Deceit* § 9 (1998)).

In *Perez*, the Court of Criminal Appeals found that the tax assessor employee's continuing action of withholding other receipts ("governmental records" under section 37.10), and submitting checks to cover those receipts when confronted, constituted "intent to harm the State." 590 S.W.2d at 477-78. The court noted that "[a]ppellant's

behavior is simply not consistent with innocent or unintentional action." *Id.* at 478. In *Mills*, the Court of Appeals held that evidence that appellant submitted false receipts in place of receipts he had destroyed and ordered his secretary to manipulate the prison commissary records at issue was sufficient to sustain his conviction for a felony violation. 941 S.W.2d at 210.

There is probable cause that Mr. Anderson acted both with intent to deceive and with intent to harm. As in *Perez,* Mr. Anderson's conduct is "simply not consistent with innocent or unintentional action." If Mr. Anderson had honestly disagreed with defense counsel's explicit interpretation (prior to and after trial) about the scope of Judge Lott's order, he would have had every reason to clarify the record. The record indicates, instead, that Mr. Anderson intended for the court and defense counsel to rely on his silence as confirmation that the Complete Wood Report, and any other *Brady* material in Sgt. Wood's file, had in fact been turned over. His actions gave no reason for the court or defense counsel to believe otherwise. Indeed, not until Mr. Davis's comment to the jury regarding the thickness and exculpatory contents of Sgt. Wood's Report was defense counsel put on notice that the Complete Report may not have been produced. *See supra* pp. 43-45. Mr. Anderson did not respond to the Motion for a New Trial; nor did he state in his appellate brief that he failed to produce the Complete Report to Judge Lott; nor did he correct the Court of Appeal's understanding that the file it had received from Judge Lott included the full set of Sgt. Wood's reports and notes. *See supra* pp. 43-45, 52-54. Each of these actions or inactions supports the conclusion that Mr. Anderson intended to foster and perpetuate the mistaken belief that the sealed envelope contained the Complete Wood Report. His efforts were remarkably successful: not only did every other attorney who has worked on the case interpret the record accordingly, but current Assistant District Attorney Kristen Jernigan relied upon it in court, stating at an August 2011

hearing, "There's nothing to suggest that [the Kirkpatrick] transcript wasn't in that Court of Appeals file." *See supra* p. 67.

Mr. Anderson's actions also evidence an intent to harm Mr. Morton by hindering Mr. Morton's defense and making his conviction more likely. Mr. Anderson's actions appeared driven by a desire to convict Mr. Morton rather than to discharge his duty as a prosecutor to ensure that justice was achieved. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09 cmt. 1 ("A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate."). In addition to Mr. Anderson's conduct relating to Sgt. Wood's report and Judge Lott's order, his actions post-conviction corroborate an intent to harm Mr. Morton. After John Bradley became District Attorney, Mr. Anderson on multiple occasions assured Mr. Bradley that DNA testing would not establish that Mr. Morton was innocent. *See supra* pp. 62-65. Mr. Anderson's confidence in Mr. Morton's guilt helped prompt Mr. Bradley to write two parole protest letters against Mr. Morton. *See id.* This conduct suggests an animus against Mr. Morton on the part of Mr. Anderson and a corresponding intent to harm Mr. Morton.

In sum, there is probable cause to believe that Mr. Anderson's conduct satisfies all three elements of the offense of tampering with government records for both a misdemeanor and a felony offense.

B. Potential Statute of Limitations Defenses Do Not Prevent a Finding of Probable Cause in a Court of Inquiry or In a Criminal Prosecution

1. The Statute of Limitations Does Not De-Criminalize Mr. Anderson's Conduct or Bar Charges Being Brought Against Him

The three-year, catch-all statute of limitations for unspecified felonies applies to Texas Penal Code § 37.09. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(7) (West 2006);

Rotenberry, 245 S.W.3d at 586.[24] A felony under Texas Penal Code § 37.10 would be subject to the same three-year statute of limitations, *see* TEX. CODE CRIM. PROC. ANN. § 12.01(7) (West 2006), while a misdemeanor under section 37.10 would be subject to a two-year statute of limitations, *see id.* § 12.02. If the Texas Code of Criminal Procedure applies to contempt of court (which may well not be the case, *see infra* Part II (B) (2)), that offense would be subject to the two-year statute of limitations for misdemeanors. *See id.*[25] Accordingly, Mr. Anderson may ultimately assert that he has an affirmative defense based on the statute of limitations for his violations of these statutes occurring in 1987.

However, the "statute of limitations . . . does not bar prosecution for violation of a statute." *In re Kasschau*, 11 S.W.3d 305, 313 (Tex. App.—Houston [14th Dist.] 1999) (citing *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998)). As the court in *Proctor v. State* explained, "the statute of limitations has little to do with the truth-finding function of the criminal justice system." 867 S.W.2d 840, 844 (Tex. Crim. App. 1998). Indeed, "a defendant may have compelling reasons in his own best interest to forego the statute of limitations defense," such as the desire "to vindicate his good name in the face of a serious and publicly known charge otherwise barred by limitations." *Id.* As a result, the burden is on the defendant to affirmatively plead and prove the statute of limitations.

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[24] Prior to 1991, violation of section 37.09 was a misdemeanor, *see* 1991 Tex. Sess. Law Serv. 565, and was therefore subject to a two-year statute of limitations, s*ee* TEX. CODE CRIM. PROC. ANN. art. 12.02 (West 2006).

[25] A "felony" is defined by statute as "an offense so designated by law or punishable by death or confinement in a penitentiary." TEX. PENAL CODE ANN. § 1.07(23) (West 2011). A "misdemeanor," on the other hand, is defined as "an offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail." *Id.* § 1.07(31). Contempt is punishable by both fine and

Id.; *but see Ex parte Smith*, 178 S.W.3d 797, 801-02 (Tex. Crim. App. 2005). This makes sense, for "[a]n act prohibited by § 37.09[] does not magically become legal upon the expiration of the statute of limitations." *In re Kasschau*, 11 S.W.3d at 313.

Moreover, article 52.01 of the Texas Code of Civil Procedure authorizes the convening of a Court of Inquiry to "determine if an offense has been committed" against the laws of the state of Texas. TEX. CODE CRIM. PROC. ANN. art. 52.01(a) and (c) (West 2006). The prerequisite for a Court of Inquiry is the determination that there is probable cause that an offense has been committed. *Id.* art. 52.01(a) & (b)(2). Yet that statute does not mention the statute of limitations and does not require that the offense in question be capable of successful prosecution. *See generally id.*

Thus, whether there is probable cause to believe that a crime was committed is distinct from and unaffected by a possible affirmative statute of limitations defense. Here, the evidentiary record and the proposed findings of fact support a finding of probable cause that Mr. Anderson violated Texas Government Code § 21.002(a), Texas Penal Code § 37.09 and Texas Penal Code § 37.10. Mr. Anderson can be charged with those crimes and, in light of the circumstances of this case, may even choose to waive any limitations defense.

2. The Statute of Limitations May Not Even Apply To Mr. Anderson's Criminal Contempt Violations

An affirmative defense based on the statute of limitations having run is not only irrelevant to a finding of probable cause for any offense, but may not even lie at all in contempt prosecutions.

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confinement in jail, *see* TEX. GOV'T CODE ANN. § 21.002(b)-(c) (West 2004), and is

a. There May Be No Statute of Limitations for Contempt Proceedings

There may be no statute of limitations applicable to criminal contempt proceedings. The general contempt statute itself contains no limitations period, *see* TEX. GOV'T CODE ANN. § 21.002 (West 2004), and Texas courts have not adopted a particular limitations period for criminal contempt proceedings initiated under this statute.

Contempt is not a "prosecution" within the ordinary meaning of that term, and contempt proceedings are "*sui generis*, falling somewhere between civil and criminal classification." *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983); *see also* 17 C.J.S. *Contempt* § 88 (2011) ("Contempt proceedings are *sui generis*, being neither civil actions nor criminal prosecutions."). Contempt therefore presents an "exception" to the ordinarily clear line between civil and criminal proceedings. *See* 40 *Tex. Prac., Crim. Prac. & Proc.* § 6.36 (3d ed.) (distinguishing contempt for purposes of criminal statute of limitations). The Court of Criminal Appeals has determined that the limitations periods contained in the Texas Code of Criminal Procedure apply only to criminal prosecutions, *see, e.g.*, *Cotton v. State*, 523 S.W.2d 673, 674-75 (Tex. Crim. App. 1975), while the Supreme Court of Texas has specifically held that a civil catch-all period is inapplicable to contempt proceedings initiated under section 14.09(a) of the Texas Family Code (recodified at Texas Family Code § 157.005) to enforce a final divorce decree setting child-support obligations, *see Huff v. Huff*, 648 S.W.2d 286, 289 (Tex. 1983). This may make contempt not subject to a statute of limitations of any kind.

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therefore a misdemeanor.

Insofar as the Supreme Court of Texas treats contempt as a court's ability to enforce its prior orders, and not an independent cause of action subject to the statute of limitations, the question becomes whether a court retains jurisdiction to enforce its order through contempt proceedings after disposing of the case. While a court cannot punish for contempt where the order violated was itself entered after the court lost jurisdiction over the case, *see Ex parte Olivares*, 662 S.W.2d 594, 595 (Tex. 1983); *cf. State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995), a court retains the power to punish over orders entered before losing jurisdiction where the violation comes to light only after jurisdiction is lost. For example, in *Sutphin v. Tom Arnold Drilling Contractor, Inc.*, 17 S.W.3d 765 (Tex. App.—Austin 2000), the Court of Appeals affirmed the entry of a contempt order for conduct that took place during the pendency of an action but was not discovered until the case was closed for over 10 months. In that case, a party submitted a sworn statement concerning its business contacts and the case was dismissed with prejudice as a result. *Id.* at 767. The adverse party learned through documentary evidence obtained in another litigation that those statements were false and moved for an order to show cause why the party should not be held in criminal contempt. *Id.* The appeals court affirmed on the basis of the court's "inherent power" to "investigate . . . the veracity of . . . sworn statements" that were dispositive to the case in order to preserve the "dignity, independence and integrity" of the Texas judiciary. *Id.* at 773. As in *Sutphin*, Mr. Anderson's contemptuous conduct occurred during the original proceedings in the trial court, but was discovered long after those proceedings had concluded.[26]

[26] By "trial court" we refer to Judge Lott, who issued the original order in 1986-87. With respect to the post-conviction courts, Mr. Anderson has previously argued that this

That Mr. Anderson can still be punished for contempt is consistent with the principle that, absent an express temporal limitation on the court's power, "[a] court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction." TEX. GOV'T CODE ANN. § 21.001(a) (West 2004). This view is consistent with the decisions of courts in several other states that impose no statute of limitations on contempt violations on the basis that contempt is a *sui generis* proceeding inherent to the court. *See, e.g.*, *State ex rel. Payne v. Empire Life Ins. Co of Am.*, 351 So. 2d 538, 544 (Ala. 1977); *People ex rel. Chicago Bar Ass'n v. Barash*, 173 N.E.2d 417, 420 (Ill. 1961); *Osborne v. Owsley*, 264 S.W.2d 332, 333-34 (Mo. 1954); *In re Friedman*, 572 S.E.2d 48, 50-51 (Ga. Ct. App. 2002).

b. Ongoing Fraudulent Concealment May Defeat Affirmative Statute of Limitation Defenses

The question of whether Mr. Anderson engaged in ongoing acts of fraudulent concealment that would defeat affirmative statute of limitation defenses for any of the three criminal offenses at issue is plainly a question for another day, assuming this Court enters probable cause findings and a Court of Inquiry is ultimately convened. It is worth noting, however, that even if the catch-all, four-year statute of limitations for unspecified civil proceedings is deemed to apply to criminal contempt proceedings, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 2008), Mr. Anderson's ongoing "fraudulent concealment" with respect to his contemptuous behavior would toll the statute of

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Court's jurisdiction to enter any further orders in the case ended when the State agreed to Mr. Morton's claim for relief in his writ; that argument was rejected by this Court and by the Court of Criminal Appeals.

limitations until that behavior was discovered. *See Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008) (fraudulent concealment suspends the running of limitations until aggrieved party learned of, or should have discovered, the claim through the exercise of "reasonable diligence"). *Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008). Here, Mr. Anderson successfully concealed his violation of Judge Lott's order until this August, when the sealed envelope was finally opened. It was only at that point that the four-year civil statute of limitations would have begun to run. Accordingly, it has not expired.

III. REQUESTS FOR RELIEF

In Part III of this Report, Mr. Morton puts forward four requests for relief.

A. <u>This Court Should Request That a Court of Inquiry Into Mr. Anderson's Conduct be Commenced</u>

First, Mr. Morton requests, pursuant to Texas Code of Criminal Procedure art. 52.01(a) and (b)(1), the Court of Inquiry statute, that this Court, acting in its capacity as a magistrate and based on the evidentiary record and the proposed factual findings detailed above and incorporated herein, enter into the minutes and file with the district clerk a sworn affidavit stating that substantial facts establish probable cause that Mr. Anderson has committed specific offenses against the laws of this state.

Mr. Morton further requests that this Court request that a district judge be appointed to commence a Court of Inquiry. Ordinarily this Court would petition the presiding judge of this administrative judicial district. TEX. CODE CRIM. PROC. ANN. art. 52.01(b)(2) (West 2006). However, the presiding judge of this administrative judicial district, Judge Stubblefield, already recused himself from this matter in August, and a Court of Inquiry proceeding would concern the same due process and contempt allegations against Mr. Anderson, that were pending when Judge Stubblefield voluntarily

recused himself.[27] Accordingly, counsel for Mr. Morton respectfully suggests that this request for a Court of Inquiry appointment initially be made to Texas Supreme Court Chief Justice Wallace Jefferson instead, as was the procedure followed when Judge Stubblefield recused himself. *See* TEX. R. JUDICIAL ADMIN. 8d ("In addition to the assignment of judges by the Presiding Judges as authorized by Chapter 74 of the Texas Government Code, the Chief Judge may assign judges of one or more administrative regions for service in other administrative regions when he considers the assignment necessary for the prompt and efficient administration of justice.").

1. **The Court of Inquiry Mechanism Was Intended for Cases of Wide Public Interest, Like This One**

"[H]istory shows that the Court of Inquiry procedure has been availed of in cases of wide public interest, as when the conduct of some public agency or official is called in question, and irrespective of the question of criminality." *In re McClelland*, 260 F. Supp. 182, 184 (S.D. Tex. 1966). The Court of Inquiry procedure serves its purpose when it brings to light important issues affecting the people of the State of Texas. Accordingly, "the Court of Inquiry is purely a fact finding proceeding. It may issue subpoenas, take testimony, and do nothing else. There are no parties. There is no accused. No trial is conducted." *Id.*

The purpose of a Court of Inquiry proceeding against Mr. Anderson would be to determine the facts behind his conduct in connection with the prosecution of Mr. Morton,

[27] Although Judge Stubblefield did not give a reason for his recusal, his decision to recuse himself (after six years presiding over Mr. Morton's Chapter 64 proceedings) came just days after the Sealed Lott File was opened and it was revealed that the Complete Wood Report was not inside the envelope, at which time the undersigned filed a motion renewing our due process concerns with respect to Mr. Anderson and seeking production of the entire State file in the case. This indicates that Judge Stubblefield elected to recuse himself because he concluded that it would not be appropriate for him to preside over any matter in which alleged misconduct by a fellow judge in Williamson County was at issue.

to determine whether any wrongdoing on his part may have contributed to Mr. Morton's wrongful conviction and incarceration, and to call attention to his fitness and character to be a judge in this state – matters of wide public interest bearing on the integrity of the criminal-justice system and on the integrity of an elected public official.

2. Potential Statute of Limitations Defenses Do Not Bar a Request for a Court of Inquiry

a. The Only Requirement for Requesting a Court of Inquiry Is a Showing of Probable Cause

It is of no moment that Mr. Anderson's conduct occurred in 1987 and that Mr. Anderson may have an affirmative defense to prosecution based on the statute of limitations. Article 52.01(a) states that a district court judge may request a Court of Inquiry proceeding where there is "probable cause to believe that an offense has been committed against the laws of this state." The purpose of the proceeding, as described in the statute, is "to determine if an offense has been committed." See TEX. CODE CRIM. PROC. ANN. art. 52.01(c) (West 2006). Thus, the statute itself is silent with regard to whether criminal liability lies for the offense. This is consistent with the rationale behind the Court of Inquiry proceeding, which is to gather evidence and find facts, *not* to adjudicate liability or impose penalty. *See In re McClelland*, 260 F. Supp. at 184.

b. The Statute of Limitations May Not Apply and Does Not Bar Charges Being Brought Against Mr. Anderson

As explained more fully above (Part II(B)(2)) even were a possible affirmative defense based on the statute of limitations relevant to convening a Court of Inquiry – which is not the case – Mr. Anderson could be subject to prosecution for his contempt of court offense without recourse to a statute of limitations defense. And, in any event, the statute of limitations does not bar charges being brought against Mr. Anderson; a

defendant must plead and prove the statute of limitations and may choose to waive the affirmative defense. *See supra* Part II(B)(1).

A proposed Application for a Court of Inquiry, and proposed Order convening the Court of Inquiry, are being filed with this Report.

B. **<u>This Court Should Forward This Report to the Office of the General Counsel of the State Bar of Texas for Consideration of Disciplinary Action Against Mr. Anderson</u>**

Second, Morton requests the Court forward this Report and any factual or legal findings it may make to the Office of the General Counsel of the State Bar of Texas for consideration in its pending inquiry into whether Mr. Anderson violated attorney disciplinary rules.[28]

Pursuant to Texas Code of Judicial Conduct Canon 3(D), this Court should, and may in fact be required, to report Mr. Anderson's conduct to the Office of the General Counsel of the State Bar of Texas. Canon 3(D)(2) states:

> A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

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[28] Two weeks after Mr. Morton's release from prison, the State Bar announced that it had taken the rare step of *sua sponte* commencing an investigation into whether prosecutorial misconduct had occurred in Mr. Morton's case. *See* Chuck Lindell, *State Bar of Texas, in rare move, launches Morton investigation*, AUSTIN AMERICAN STATESMAN, Oct. 19, 2011.

"Not only does the Bar encourage the active participation of the judiciary in monitoring attorney conduct, the Code of Judicial Conduct mandates action." *In re J.B.K.*, 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996). Mr. Anderson's conduct may have violated several provisions of the Texas Disciplinary Rules of Professional Conduct. That conduct may call into question Mr. Anderson's honesty, trustworthiness and fitness both as a lawyer and as a judge.

1. <u>Mr. Anderson May Have Violated Several Provisions of the Texas Disciplinary Rules of Professional Conduct</u>

a. <u>Candor Toward the Tribunal, Texas Disciplinary Rule 3.03</u>

Texas Disciplinary Rule of Professional Conduct 3.03 provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal . . .
>
> (b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

As a prosecutor, Mr. Anderson was subject to a more expansive duty to correct false testimony than other lawyers. Texas courts recognize that "[t]he duty to correct known false evidence is not only a prosecutorial ethic, but a constitutional requirement." *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) (*en banc*) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935), and progeny). As the court in *Duggan* explained:

> This overriding duty falls upon the prosecutor in his capacity as the State's representative in criminal matters. As a trustee of the State's interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and jury may properly render

> justice. Thus the prosecutor is more than a mere advocate, but a fiduciary to fundamental principles of fairness.

Id. The *Duggan* court further noted that "[i]t does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence." *Id.*; *accord Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (*en banc*). Accordingly, this requirement extends past straightforwardly false evidence to include misleading evidence. *See Duggan*, 778 S.W.2d at 467-68; *Kahmann v. State*, No. 03-95-00681, 1997 WL 304185, at *6 (Tex. App.—Austin June 5, 1997); *see also Burkhalter v. State*, 493 S.W.2d 214, 215, 218 (Tex. Crim. App. 1973).

There is substantial record evidence to support a finding that Mr. Anderson violated this Rule on several occasions, namely:

i. Mr. Anderson told Judge Lott at the February 1987 pretrial hearing that the State had no information "that is favorable to the accused," despite the fact that Sgt. Wood's report and notes contained several pieces of information manifestly favorable to Mr. Morton and Mr. Anderson knew about at least two of those pieces of information, if not all of them. *See supra* p. 34.

ii. Mr. Anderson failed, despite being presented with several discrete opportunities, to correct the misleading nature of the sealed envelope that he submitted to Judge Lott as well as his representation that the sealed envelope complied with Judge Lott's order. Mr. Anderson did not respond to the Motion for a New Trial, *see supra* pp. 43-45; Mr. Anderson did not state in the State's appellate brief whether the sealed envelope contained the complete report of Sgt. Wood, *see supra* p. 52; and Mr. Anderson did not correct the Court of Appeal's written presumption that the complete report had been disclosed to Judge Lott, *see supra* pp. 53-54.

b. <u>Fairness in Adjudicatory Proceedings, Texas Disciplinary Rule 3.04</u>

Texas Disciplinary Rule of Professional Conduct 3.04 provides in relevant part:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence . . .
>
> (d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the clients willingness to accept any sanctions arising from such disobedience.

There is substantial record evidence to support a finding that Mr. Anderson violated section (a) of this Rule by obstructing the defense's access to the full report and notes of Sgt. Wood in violation of Texas Government Code § 21.002(a) and Texas Penal Code §§ 37.09 and 37.10, as explained more fully above (Part II(A)).

There is substantial record evidence to support a finding that Mr. Anderson violated section (d) of this Rule by knowingly disobeying Judge Lott's order regarding the production of Sgt. Wood's report and notes, as explained more fully above (Part II(A)(1)).

c. <u>Special Responsibilities of a Prosecutor, Texas Disciplinary Rule 3.09</u>

Texas Disciplinary Rules of Professional Conduct 3.09 provides in relevant part:

> The prosecutor in a criminal case shall . . .
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the

> prosecutor is relieved of this responsibility by a protective order of the tribunal . . .

There is substantial record evidence to support a finding that Mr. Anderson violated this Rule by failing to disclose to the defense evidence and information in his possession or accessible by him that tended to negate the guilt of Mr. Morton, specifically the exculpatory information in Sgt. Wood's complete report and notes.

d. **Misconduct, Texas Disciplinary Rule 8.04**

Texas Disciplinary Rule of Professional Conduct 8.04 provides in relevant part:

> (a) A lawyer shall not: . . .
>
> (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (4) engage in conduct constituting obstruction of justice

There is substantial record evidence to support a finding that Mr. Anderson violated section (a)(2) of this Rule by committing offenses under Texas Government Code § 21.002(a) and under Texas Penal Code §§ 37.09 and 37.10, as explained more fully above (Part II(A)), which offenses reflect adversely on his honesty, trustworthiness or fitness as a lawyer.

There is substantial record evidence to support a finding that Mr. Anderson violated section (a)(3) of this Rule on several occasions, namely:

i. Mr. Anderson told Judge Lott at the February 1987 pretrial hearing that the State had no information "that is favorable to the accused," despite the fact that Sgt. Wood's report and notes contained several pieces of information

favorable to Mr. Morton, and the evidence shows that Mr. Anderson had reason to know about all of them. *See supra* p. 34.

ii. Mr. Anderson failed, despite being presented with several discrete opportunities, to correct the misleading nature of the sealed envelope that he submitted to Judge Lott as well as his representation that the sealed envelope complied with Judge Lott's order. Mr. Anderson did not respond to the Motion for a New Trial, *see supra* pp. 43-45; Mr. Anderson did not state in the State's appellate brief whether the sealed envelope contained the complete report of Sgt. Wood, *see supra* p. 52; and Mr. Anderson did not correct the Court of Appeal's understanding that the complete report had been disclosed to Judge Lott, *see supra* pp. 53-54.

iii. Mr. Anderson, during the post-conviction litigation, continued to assure Mr. Bradley that Mr. Morton was guilty and that DNA testing would not exonerate Mr. Morton. *See supra* pp. 62-65. Mr. Anderson's post-conviction actions demonstrate a continuing intent to deceive the courts that adjudicated Mr. Morton's prosecution and appeal as well as defense counsel and Mr. Morton himself by concealing evidence that was both exculpatory and highly relevant to his pending claims for DNA testing.

Mr. Anderson may have violated section (a)(4) of this Rule on several occasions, namely:

i. Mr. Anderson failed to disclose to the defense evidence and information favorable to Mr. Morton. *See supra* pp. 21-24.

ii. Mr. Anderson failed to comply with Judge Lott's order that the entire report and notes of Sgt. Wood be turned over for *in camera* review. *See supra* Part II(A)(1).

iii. Mr. Anderson, during the post-conviction litigation, continued to assure Mr. Bradley that Mr. Morton was definitively guilty and that DNA testing would not exonerate Mr. Morton. *See supra* pp. 62-65. At no time during his years of consultations with Mr. Bradley about the case did Mr. Anderson disclose that he had not provided the complete, exculpatory contents of the Wood Report to Judge Lott or to the defense. By contrast, had Mr. Anderson told Mr. Bradley at any time during the post-conviction litigation that Mr. Anderson did not turn over Sgt. Wood's report and field notes for *in camera* review, Mr. Bradley would have reviewed those materials, corrected the record, and provided the Complete Report to defense counsel. *See* Exh. 5 (Bradley stmt.) at ¶ 9.

2. <u>Disciplinary Proceedings Against Mr. Anderson Are Not Time-Barred</u>

There is a four-year statute of limitations for disciplinary proceedings; however, this statute is modified by a discovery rule in cases of fraud or concealment. *See* TEX. R. DISCIPLINARY P. 15.06 ("No attorney licensed to practice law in Texas may be disciplined for Professional Misconduct occurring more than four years before the time when the allegation of Professional Misconduct is brought to the attention of the Office of Chief Disciplinary Counsel, except in cases in which disbarment or suspension is compulsory. *The statute will not begin to run where fraud or concealment is involved until such Professional Misconduct is discovered or should have been discovered in the exercise or reasonable diligence by the Complainant*.") (emphasis added). It is the burden of the attorney subject to disciplinary proceedings to show that the disciplinary counsel did not receive the allegation within the four-year limitations period. *See State Bar of Texas v. Tinning*, 875 S.W.2d 402, 406-07 (Tex. App.—Corpus Christi 1994).

The discovery rule embodied in the last sentence of Rule 15.06 does not require a complainant to show "fraudulent concealment," but only fraud or concealment. *See Delhomme v. Comm'n for Lawyer Discipline*, 113 S.W.3d 616, 620 (Tex. App.—Dallas 2003). Concealment in this context includes the failure to disclose information rather than only physical acts of hiding. *See id.* (discovery rule properly invoked where it took several months to discover that attorney failed to notify complainant about receipt of funds).

There is substantial record evidence to show that Mr. Anderson's conduct constitutes fraud and/or concealment. This would delaying the running of the statute of limitations until this past August, 2011, when the predicate act upon which all of Mr. Anderson's misconduct was based (his failure to comply with Judge Lott's order) came to light.

Moreover, there is substantial evidence in the record that defense counsel made highly diligent efforts to uncover Mr. Anderson's misconduct between 1987-2011. Defense counsel filed pretrial *Brady* motions; made an extensive in-court record of the State's failure to provide discovery; repeatedly confirmed that the Court's order was to produce the "complete reports" of Sgt. Wood for *in camera* review; filed a Motion for a New Trial and appellate brief alleging they had not been fully disclosed; and asked the Court of Appeals to supervise a renewed inquiry into whether Mr. Anderson had in fact complied with Judge Lott's order or otherwise disclosed all *Brady* material in Sgt. Wood's reports. Accordingly, there is substantial basis for the Bar to find that the four-year limitations period did not start running until August 26, 2011, when the Lott File was unsealed. Additionally, the Bar may find on this record that Mr. Anderson's representations to Mr. Bradley within the last four years constitute further acts of misconduct.

With respect to Mr. Anderson's potentially criminal conduct, which may be subject to the affirmative defense of statute of limitations (*see supra* Part II(B)(1)), disciplinary actions for that conduct would not necessarily be subject to the same defense. This is consistent with the fact that disciplinary actions are civil, not criminal, in nature. TEX. R. DISCIPLINARY P. 3.08. As a result, many of the procedural protections applicable in criminal prosecutions are not available in disciplinary proceedings, including the speedy trial requirement under the Texas Constitution, *see Risker v. Comm'n for Lawyer Discipline*, 94 S.W.3d 625, 630 (Tex. App.—Houston [14th Dist.] 2002), as well as the rights to be free from unreasonable searches and seizures, not to be subjected to double jeopardy and not to be subjected to cruel and unusual punishment, *see Favaloro v. Comm'n for Lawyer Discipline*, 994 S.W.2d 815, 822 (Tex. App.—Dallas 1999). Moreover, disciplinary and criminal actions are not mutually exclusive: "attorneys may be subject to criminal prosecution and disciplinary action for the same conduct." *Capps v. State*, 265 S.W.3d 44, 50 (Tex. App.—Houston [1st Dist.] 2008); *see also* TEX. R. DISCIPLINARY P. 15.02 ("The processing of a Grievance, Complaint, Disciplinary Proceeding, or Disciplinary Action is not, except for good cause, to be delayed or abated because of substantial similarity to the material allegations in pending civil or criminal litigation").

In *Granek v. Texas State Board of Medical Examiners*, 172 S.W.3d 761, 772 (Tex. App.—Austin 2005), the Court of Appeals noted that due process considerations can foreclose disciplinary proceedings even where no statute of limitations applies. The court determined that the appropriate standard for assessing such a claim is whether the delay caused "actual prejudice." *Id.* at 773. In *Granek*, no statute of limitations applied to disciplinary sanctions brought by the Board of Medical Examiners against a doctor. Applying due process concerns, the court distinguished between the prosecutions of two separate complaints, both of which arose from thirteen-year-old allegations. The court

concluded that one prosecution violated due process because the doctor had no contemporaneous notice of the allegations, implicating serious concerns of staleness (no evidence memorialized the incidents and the court credited the doctor's assertion that he could not recall the incidents); the other prosecution, however, did not violate due process because the doctor had contemporaneous notice, including a letter from the complainant. *Id.* at 774-75.

Mr. Anderson's due process rights would not be violated by the institution of disciplinary proceedings based on his conduct during trial and on direct appeal. Mr. Anderson had notice of the possibility that a complaint would be filed, if and when the true contents of the envelope were revealed, based on the Motion for a New Trial and the defense's arguments on appeal regarding the sealed envelope. Much of Mr. Anderson's conduct is documented in official court records, the clear interpretation of which virtually every party to this case (save Mr. Anderson himself) appears to agree upon. And although Mr. Anderson claimed to have a very limited memory of any of the underlying events at his recent deposition, other actors with knowledge of the situation – including Mr. Allison, Mr. White, Mr. Morton, and Mr. Bradley – have been able to provide far more detailed statements as to their own recollections.

C. <u>This Court Should Forward This Report to the State Commission on Judicial Conduct of Disciplinary Action Against Mr. Anderson</u>

Second, Morton requests that the Court forward this Report and any factual or legal findings it may make to the State Commission on Judicial Conduct for consideration of disciplinary action.

Pursuant to Texas Code of Judicial Conduct Canon 3(D), this Court should, and may in fact be required, to report Mr. Anderson's conduct to the State Commission on Judicial Conduct. Canon 3(D)(1) states:

> A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

"Not only does the Bar encourage the active participation of the judiciary in monitoring attorney conduct, the Code of Judicial Conduct mandates action." *In re J.B.K.*, 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996). There is substantial record evidence to support a finding that Mr. Anderson's conduct violated Texas Code of Judicial Conduct Canon 2A. The Commission may find that the evidence on this record calls into question his honesty, trustworthiness and fitness both as a lawyer and as a judge.

Texas Code of Judicial Conduct Canon 2A states: "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." There is substantial record evidence to support a finding that Mr. Anderson violated this Canon by continuing, after he became a District Judge, to affirm to Mr. Bradley that Mr. Morton was guilty and that DNA testing would not exonerate him. *See supra* pp. 62-65. In light of his conduct during the trial and direct appeal, his statements to Mr. Bradley may support a finding that he intended to harm Mr. Morton and continued to deceive the courts that adjudicated Mr. Morton's prosecution and appeal, as well as defense counsel and Mr. Morton himself. Mr. Bradley and Ms. Jernigan have also indicated that Mr. Anderson appeared unwilling or unable to assist the State's review of Mr. Morton's due process allegations earlier this year, by failing to provide a "clear, credible answer" to those allegations, or even to take steps to refresh his recollection by reviewing the file at the District Attorney's request. Indeed, Mr. Anderson did not provide counsel for the State or the defense with his present position – that he interprets the pretrial record to require him only to have produced Mr. Morton's statements to Judge Lott, not the Complete Wood Report – until his deposition,

which occurred two months after the Lott File was unsealed. These actions, taken while Mr. Anderson was a sitting district judge, could undermine the public's confidence in the integrity and impartiality of the judiciary.

D. Dismissal of the Indictment

Last, but certainly not least, Mr. Morton and his counsel respectfully request that this Court grant the Motion to Dismiss Indictment filed by District Attorney John Bradley on October 12, 2008. Mr. Morton would ask that the dismissal be predicated on a finding that the record as a whole, including -- but not limited to -- the DNA evidence tested from the Morton and Baker crime scenes, provides conclusive evidence that Mr. Morton is actually innocent of the murder of his wife, Christine.

IV. PUBLIC POLICY RECOMMENDATIONS

It is important to stress that the undersigned do not believe there is an epidemic of prosecutorial misconduct in Texas or the United States, or that what happened to Michael Morton is an everyday occurrence in our criminal justice system. Nonetheless, as highlighted by the Supreme Court's recent decisions in *Connick v. Thompson*, 131 S. Ct. 1350 (2011), and *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), its pending consideration of *Brady*'s application in *Smith v. Cain*, No. 10-845, as well as the investigation arising out of the prosecution of Senator Ted Stevens by the U.S. Department of Justice, *see* Charlie Savage, *Court-Appointed Investigator Offers Scathing Report on Prosecution of Senator Stevens*, N.Y. TIMES, Nov. 21, 2011, Mr. Morton's exoneration comes at a moment in time in which there are serious, systemic questions about prosecutorial misconduct that need to be addressed.

It is a complex problem. It is not easy to develop internal systems within district attorney's offices that effectively distinguish between error and misconduct, or

independent institutions that can adequately investigate and sanction acts of misconduct when they are identified. The *Thompson* and *Van de Camp* cases make it clear that civil suits by the wrongly convicted are not available as a remedy for misconduct by a prosecutor, such as we allege occurred in the Morton case, when it is related in any way to the adversarial function – the scope of absolute immunity for such conduct is plainly expanding. So internal supervision, bar discipline and, in the most egregious cases, criminal prosecution, are the remedies most often cited to deal with the problem.

However, as demonstrated by recent studies from the Veritas Initiative, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009 (2011)*, and Yale Law School, Keenan, et. al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct,* 123 YALE L. J. ONLINE 203 (2011), the bar discipline process has not been effective in sanctioning clearly identified acts of misconduct, and criminal prosecutions are so rare they do not serve as a deterrent.

Mr. Morton's exoneration and the troubling evidence in this Report should provoke a serious, thoughtful discussion about effective remedies for official misconduct during and after criminal trials. This discussion should involve prosecutors, defense lawyers, judges, and the public, and should be conducted without posturing or finger pointing. It is in that spirit that we offer these recommendations.

A. The Texas Legislature Should Hold Interim Hearings on the Adoption of Effective Mechanisms to Enforce the Longstanding Ethical Obligation of Prosecutors to Make Timely Pretrial Disclosure "of All Evidence or Information Known to the Prosecutor That Tends to Negate the Guilt of the Accused or Mitigates the Offense," an Obligation Both Independent of and Broader Than the Constitutional Standard of "Materiality" That is Necessary for Reversing a Conviction Under *Brady v. Maryland*.

In 1986, when Mr. Anderson prosecuted Michael Morton, Texas Disciplinary Rule 7 – 103(B) required a prosecutor to make timely disclose pretrial of evidence

"known to the prosecutor… that tends to negate the guilt of the accused, mitigates the degree of the offense, or reduce punishment." *See* 48A Tex. Prac., Tex. Lawyer & Jud. Ethics §8:9, commentary paragraph (d) (2009-2010 ed.) (noting that the former Disciplinary Rule 7-103 was supplanted in 1989 by Ethics Rule §8:9, with the relevant language intact) Identical or substantially similar ethical mandates have been adopted in 49 states, the District of Columbia, the Virgin Islands, and Guam. *See Smith v. Cain*, Case No. 10-8145, Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner, at 10.[29] Yet, as the record in this matter and in the *Smith* case illustrate, this clear obligation to disclose evidence that "tends to negate guilt," an obligation both independent and broader than the constitutional standard of "materiality" is not being effectively enforced.

One enforcement mechanism recently proposed by the ABA involves the use of formal pretrial compliance conferences, in which where trial courts ensure that parties are fully aware of their respective disclosure obligations, ethical rules, statutes, and specific orders can be memorialized and documented, as well as the use of written checklists "delineating in detail the general disclosure obligations of the prosecution" and standing committees of "local prosecutors and criminal defense lawyers to assist the court in formulating and updating the checklists." *Id.* at 16 n. 21. The potential deterrent value of such compliance conferences where specific orders are issued is, ironically, underscored by the present record in the Morton case. Criminal prosecutions and bar discipline are most likely to lie when there is a record that prosecutors, or defense lawyers, have violated specific court orders by concealing or failing to produce documents.

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[29] *Smith* is a case from Louisiana, recently argued and now pending in the United States Supreme Court, in which the defense has alleged that serious *Brady* violations were committed at Mr. Smith's capital trial. Many commentators expect it to be the Court's next major decision in the *Brady* line of cases.

Last year, following both a public and non-public conference at Cardozo Law School that brought together from across the country prosecutors, defense lawyers, police practice experts, judges, cognitive scientists, experts on detecting error in the delivery of health care services, a Symposium issue of the Cardozo Law Review was published. It included the compliance conference proposal the ABA recently adopted, and set forth many other concrete measures that could be used to resolve Brady disclosure problems. *See*, Ellen Yaroshefsky, *Forward: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

The National Association of Criminal Defense Lawyers has just issued a report regarding an amendment to 18 U.S.C. § 3014 which would include a Duty to Disclose Favorable Evidence. *See* National Association of Criminal Defense Lawyers, *Commentary to Proposed 18 U.S.C. § 3014, Duty to Disclose* (available at http://www.nacdl.org/discoveryreform/). This Report and Commentary is similar to recommendations put forward by the Federal Judicial Center. *See Brady v. Maryland Material in the United States District Courts: Rules, Orders, and Policies*, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (Federal Judicial Center, May 31, 2007). Following the template put forward in these reports, it might be advisable to amend Texas Code of Criminal Procedure art. 39.14 to make sure that Texas's ethical rules mandating disclosure of evidence that tends to negate guilt or mitigates punishment is enforced, as well as to enforce prosecutors' affirmative obligations to search for exculpatory and impeachment evidence in the files of police or other relevant government agencies.

These are just a few sources and suggestions that could help focus discussion at an interim hearing. There are surely many others. The important point is to find solutions that will make sure the existing pretrial disclosure obligation is fully enforced.

B. The Texas Legislature Should Hold Hearings Toward Enacting Uniform Open File Discovery Rules

A statewide open file discovery law is a very attractive remedy. It does not solve the problem of undisclosed exculpatory documents or information (oral statements not reduced to writing) in the possession of or known to law enforcement officials, but it certainly can ensure that any documents containing exculpatory material in the prosecutor's file are disclosed. It is important that the rules be uniform across the state and practical.

Questions that the Legislature might consider regarding "open file" policies include: when does the open file "close," and are there assurances that non-work product documents and information are discoverable after the file is "closed?" In this increasingly electronic age, how can we ensure that prosecutors preserve and disclose exculpatory information that may be contained in their electronic files, such as emails and other documents that may not have been added to the hard file? Can accused citizens in every jurisdiction be assured of fair treatment? Are there workable procedures in place for prosecutors to control the timing of disclosure in cases where harassment of or harm to witnesses is a real concern? Are there sensible rules in place for reciprocal discovery from the defendant that do not violate a defendant's fundamental right to effective legal representation? Should there be additional and broader open file rules post-conviction, particularly in capital cases, such as disclosure of a trial prosecutor's notes now that there is no longer a future "trial strategy" to shield from discovery? Are there clear methods in place to document what was disclosed and when?

Open file legislation has been proposed before but foundered on some of these questions. Hopefully, the Morton case will provide impetus to break the gridlock. In this regard, it is worth considering the North Carolina case of Alan Gell. After Mr. Gell was convicted of capital murder and sentenced to death, North Carolina passed a law that made the prosecution's entire file in capital cases discoverable post-conviction. Post-

conviction examination of the file revealed that there were statements from seventeen witnesses that they had seen the deceased alive days after the time of death medical experts had estimated (a forensic problem similar to the one in this case) and during a period when Mr. Gell was in a local jail. After these witness statements were discovered, Mr. Gell's conviction was reversed, and he was acquitted at retrial. North Carolina proceeded to pass an open file statute extending to pretrial discovery, which the Texas Legislature may wish to review as a model. *See* North Carolina General Statutes §§ 15A-903-08. Ohio also recently passed an open file discovery statute, *see* revision to Ohio Rules of Criminal Procedure Rule 16 (revised July, 2010).

There are also many examples of individual prosecutors' offices, including in Milwaukee, Wisconsin; Portland, Oregon; and Brooklyn, New York, whose open file policies have been lauded by the defense bar as well as staff in the office itself. *See* Cardozo Brady Symposium, *Voices from the Field: An Inter-Professional Approach to Managing Critical Information,* 31 CARDOZO L. REV. 1943, 1951 (2010).

1. <u>The Texas Supreme Court and Court of Criminal Appeals Should Adopt ABA Model Rule of Professional Conduct 3.8(g) and (h)</u>

There can be no doubt that prosecutors have well-established ethical obligations when they discover evidence supporting a convicted defendant's claim of innocence. The United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that cases doubt upon the correctness of the conviction."[30] Further, when a prosecutor concludes upon investigation

[30] Other courts and commentators have echoed this understanding. *See, e.g.*, *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice.

Until 2007, these obligations were not codified as ethical obligations in Texas or any other state, nor in the ABA Model Rules of Professional Conduct 3.8 – the Rule concerning "Special Responsibilities of a Prosecutor." ABA Model Rule of Professional Conduct 3.8(g) and (h) rectified that omission.

> Model Rule 3.8(g) and (h) states:
> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>> (1) promptly disclose that evidence to an appropriate court or authority, and
>> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>>> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>>> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

The commentary to the Rule 3.8(g) and (h) proposal well stated the grounds for including these provisions in the enforceable Rules of Professional Conduct:

> It is important to codify prosecutorial duties upon learning of possible false convictions. The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct, rather than only in the provisions of the ABA Standards Relating to the Administration of Justice, which are not intended to be enforced, would express the vital importance that the profession places on this obligation. Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction. Prosecutors' offices have

institutional disincentives to comport with these obligations[31] and, as courts have recognized, their failures are not self-correcting by the criminal justice process.[32] Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives.

The Rule was carefully and thoroughly examined and refined by prosecutors, defense lawyers, legal academics and judges from around the country. Its goal was to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities, with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. *See, e.g.*, Michele K. Mulhausen, *A Second Chance at Justice: Why States Should Adopt Rule 3.8(g) and (h)*, 81 U. COLO. L. REV. 309 (2010).

The commentary to Model Rule 3.8(g) and (h) addresses potential concerns about the scope and application of this rule. For example, it states: "In many instances, a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation and will be called upon to decide whether that information is nevertheless sufficient to require some investigation. The quality and specificity of the information received by a prosecutor often will vary dramatically, and it is expected that a prosecutor will decide whether and how to investigate based upon a good faith assessment of the information received. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant." These, and related issues, are and will continue to be examined through post conviction prosecutorial practice in jurisdictions around the country. *See also* Bruce A. Green and Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009).

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[31] *See generally* Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 8 B.U. L. REV. 125 (2004).

[32] *See, e.g.*, *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

Understanding that prosecutors should be presumed to take their ethical and professional obligations seriously, the Commentary to Rule 3.8(g) and (h) specifically notes that good faith exercises of judgment are not disciplinary violations under the proposed provisions.

After the ABA adopted Rules 3.8(g) and (h), prosecutors in Wisconsin spearheaded the adoption of a comparable Rule in that state. Tennessee, Idaho, Delaware, Colorado, and most recently the State of Washington have adopted the rule or variations of Rule 3.8(g) and (h).

Texas should follow suit. Indeed, Texas could easily become a national leader in the practical implementation of Rule 3.8(g) and (h), because District Attorneys in Dallas and Houston have already pioneered the development of "Conviction Integrity Units" which have endeavored to work closely with the undersigned and with the Innocence Project of Texas, private defense lawyers, and public defenders, voluntarily abiding by the principles of Rule 3.8(g) and (h). The Legislature should consider applying these rules to the entire state.

Finally, it must be noted that in the instant matter, Mr. Bradley acknowledges he would have acted in accordance with the principles embodied in ABA Rule 3.8(g) and (h). Specifically, paragraph 9 of Mr. Bradley's statement reads: "If Mr. Anderson were to have told Mr. Bradley, at any time during the post-conviction litigation, that he had not in fact turned over the complete report of Sgt. Wood and his field notes to Judge Lott for *in camera Brady* review, Mr. Bradley would have reviewed those materials. Given the exculpatory nature of all the undisclosed Wood documents, Mr. Bradley would have corrected the record and provided the undisclosed documents to Morton's defense counsel."

2. There Should Be An Independent Audit of Williamson County Cases Prosecuted by Ken Anderson

One critical concept being accepted by many District Attorneys across the country as they consider implementing Conviction and Professional Integrity programs is the need to conduct audits when the office discovers a line prosecutor and/or a supervisor engaged in actions that constitute serious negligence or misconduct and affect the integrity of an investigation or judicial proceeding. *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2105-06 (discussing discovery audits); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2247 (2010) (documenting the need for audits and other procedures to improve the functioning of criminal justice systems). It is a widely accepted principle in business, medicine, and other areas of government that an audit should be conducted when someone is seriously negligent, or engages in misconduct in one case, because they might have acted the same way in other past cases.

Indeed, this principle applies to crime laboratories in Texas, as Mr. Bradley himself knows well from his work at the Texas Forensic Science Commission. The Commission is charged with investigating "in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity," which could include "retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct." Tex. Code Crim. Proc. Chapter 38.01, Sec. 4 (a)(3) and (b)(2)(A).

The evidence presented in this Report, we submit, contains sufficiently serious indications of intentional misconduct on Mr. Anderson's part to trigger an investigation and audit of other cases prosecuted by him while in the Williamson County District Attorney's office, to determine whether he may have withheld key exculpatory evidence from other defendants. We recognize the difficulty and potential expense of such an

audit, the need to focus only on those cases in which re-examination is likely to be productive, and the need to assure the public that the audit is being conducted independently and without bias. One way to proceed, as the Forensic Science Commission authorizing legislation provides, is for the County to contract with and delegate some of the auditing responsibilities to a qualified third party. *Pro bono* assistance from the private bar or the State's academic institutions may also be available. Again, in this regard the undersigned are encouraged by the fact that, despite his longstanding professional relationship with Mr. Anderson, Mr. Bradley ultimately co-operated with the discovery process that led to this Report to the Court, and additionally requested the outside assistance of the Attorney General's Office in prosecuting the new suspect in Christine Morton's murder.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing, Mr. Morton, by and through undersigned counsel, respectfully requests that this Court:

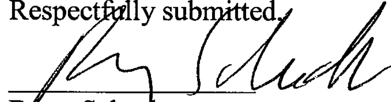
1. Enter findings, pursuant to Texas Code of Criminal Procedure Art. 52.01(a) and (b), that there is probable cause to believe that Ken Anderson has violated one or more laws of the State of Texas, by executing a sworn Affidavit specified in the Court of Inquiry statute, in which this Court may set forth its own factual findings or adopt by reference the Proposed Factual and Legal Findings in this Report;

2. Submit the attached Application and proposed Order regarding a Court of Inquiry to the Texas Supreme Court;

3. Forward this Report to the State Bar of Texas and the Commission on Judicial Conduct so those agencies may consider whether disciplinary action against Mr. Anderson is appropriate; and

4. Enter an order granting the State's Motion to Dismiss the Indictment against Mr. Morton on grounds of actual innocence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Report to the Court was served on counsel as indicated below on December 19, 2011:

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