WHEN THINGS GO WRONG
(WHEN FACTUALLY INNOCENT DEFENDANTS
ARE CONVICTED OF CRIMES THEY DID NOT COMMIT)

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CHAPTER 9
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EDUCATION

University of Houston Law School – Houston, Texas
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University of Texas at Austin – Austin, Texas
B.A. in Philosophy, 1977
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EXPERIENCE

RESEARCH EDITOR
• TEXAS RULE OF EVIDENCE HANDBOOK, 1982
• HOUSTON LAW REVIEW, 1982 - 1983

LAW CLERK FOR THE HONORABLE DAVID O. BELEW, UNITED STATES DISTRICT JUDGE, 1983 – 1984

PRIVATE PRACTICE OF LAW, 1984 – JULY 2007, JUNE 2011 - PRESENT

FACULTY MEMBER CRIMINAL TRIAL ADVOCACY INSTITUTE, 1993 – 1996

COMMITTEE OF INSTITUTIONAL REVIEW BOARD FOR THE PROTECTION OF HUMAN SUBJETS (IRB), 2006 – 2007
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SPECIAL FIELDS BUREAU CHIEF FOR THE DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE, JULY 2007 – JUNE 2011

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ADJUNCT LAW PROFESSOR, 2006 - PRESENT
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RECOGNITIONS & PUBLICATIONS

• A-V Rating – Martindale Hubbell
• Selected in 2001 by the Best Lawyers in America to be included in the “Best Lawyers Consumer Guide”
• 2003 – 2010 Voted by his peers as Texas Super Lawyer
• 2007 Distinguished Adjunct Faculty Award
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WHEN THINGS GO WRONG

I. INTRODUCTION

"Wrongful conviction" as used in this article, refers to a factually innocent defendant who has been convicted and punished for a crime that was, in fact, committed by someone else; or who has been convicted and punished for a crime that never even occurred. An example of the first category of factually innocent defendants would be a defendant convicted of a murder that was, in fact, committed, but committed by someone other than the person convicted. See, e.g., Ex Parte Richard Ray Miles, 359 S.W.3d 647 (Tex.Crim.App. 2012); Ex Parte Michael W. Morton, 2011 WL 4827841 (Tex.Crim.App. Oct. 12, 2011). An example of the second category of factually innocent defendants would be a defendant convicted of the purported sexual assault of a child which never occurred at all, often evidenced, in part, by the alleged victim’s later recantation asserting that no sexual assault ever occurred. See, e.g., Ex Parte Elizondo, 947 S.W.2d 202 (Tex.Crim.App. 1996).

II. HOW OFTEN DO THINGS GO WRONG

(How often are factually innocent defendants convicted of crimes they did not commit?)

The most reliable source for this information is, Exonerations in the United States, 1989-2012 Report by the National Registry of Exonerations, Samuel R. Gross & Michael Schaffier, June 22, 2012, which can be found at exonerationregistry.org. The Registry is updated periodically.

The Registry contains an up-to-date list of known exonerations, with summaries of the cases and searchable data on each case.

According to the February, 2014 Report, there were eighty-seven known exonerations in the United States in 2013, more than any previous year. Texas led the nation in known exonerations in 2013 with 13. In addition:

* Twenty-seven (27) of the 87 known exonerations that occurred in 2013-almost one-third of the total number for the year-were in cases in which no crime in fact occurred, a record number.

* Fifteen (15) known exonerations in 2013 - 17 percent - occurred in cases in which the defendants were convicted after pleading guilty, also a record number. The rate of exonerations after a guilty plea has doubled since 2008 and the number continues to grow.

* Thirty-three (33) known exonerations in 2013 - 38 percent - were obtained at the initiative or with the cooperation of law
enforcement. This is the second highest annual total of
exonerations with law enforcement cooperation, down slightly
from 2012, but consistent with an upward trend in police and
prosecutors taking increasingly active roles in reinvestigating
possible false convictions.

III. WHAT ARE THE PROSECUTOR'S ETHICAL DUTIES, WHEN IT
APPEARS THAT THINGS MAY HAVE "GONE WRONG"?

ETHICAL CONSIDERATIONS FOR THE PROSECUTOR

A prosecutor has an affirmative duty to investigate credible post-conviction
claims of actual innocence.

A. "It shall be the primary duty of all prosecuting attorneys . . . not to convict, but
to see that justice is done. They shall not suppress facts or secrete witnesses capable
of establishing the innocence of the accused." Tex.Code Crim. Pro. Art. 2.01.

B. "A prosecutor has the responsibility to see that justice is done, and not simply
to be an advocate." Rule 3.09, comment 1, Texas Rules of Professional Conduct.

C. The American Bar Association Model Rules of Professional Conduct and
Comments include the following as to Rule 3.8:

(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,

   (A) promptly disclose that evidence to the defendant unless a court
       authorizes delay, and

   (B) 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.

Comments

[1] A prosecutor has the responsibility of a minister of justice and not simply that
of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor’s jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

IV. REMEDIES AND PROSECUTORIAL ACCOUNTABILITY

A. An Innocent Defendant’s Right to an Accurate Result.

The Texas Court of Criminal Appeals, unlike the United States Supreme

A judicial finding of actual innocence under the *Elizondo* standard does not bar a retrial of the same defendant for the same offense. In that respect, an *Elizondo/ “actual innocence”* reversal is unlike a reversal for legal insufficiency of the evidence which does bar a retrial.

The United States Supreme Court has not yet recognized a federal due process right of an innocent person not to be incarcerated or even executed for a crime they did not commit. As Chief Justice Roberts wrote in *District Attorney’s Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009):

As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of “actual innocence.” Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. [citations omitted]. Friendly, *Is Innocence Relevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 159, n. 87 (1970).

Even though the Supreme Court has not yet recognized a free-standing claim of actual innocence as a ground for federal habeas relief, in *Schlup v. Delo*, 513 U.S. 298 (1995), the Court recognized a “miscarriage of justice” exception to what would otherwise be a procedurally defaulted constitutional claim. If a defendant can establish that, in light of new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt,” then the defendant is allowed to pass through the procedural “gateway” and assert an otherwise procedurally barred or defaulted constitutional claim. Once through the “gateway”, however, the claim may still fail on the merits, notwithstanding the preponderance of the evidence establishing actual innocence. See, also, *House v. Bell*, 547 U.S. 518 (2006).

In 2013, the Texas legislature passed the “junk science bill”, codified as article 11.073, Texas Code of Criminal Procedure. Article 11.073 provides that a convicted defendant may receive a new trial if he or she can show, through a post-conviction writ that there is “relevant scientific evidence” that was either “not available to be offered by a convicted person at the convicted person’s trial;” or “contradicts scientific evidence relied on by the state at trial.” In order to grant relief, the court must find, inter alia, “that, had the [new or contradicting] scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.” Art. 11.073(b)(2). Note: the Robbins case, supra, has been resubmitted to the Court of Criminal Appeals under this new statute and, at the time of this writing, is pending decision.

C. Executive Remedy.

Texas Administrative Code

§143.2 Pardons for Innocence

(a) On the grounds of innocence of the offense for which convicted the board will consider applications for recommendation to the governor for a pardon for innocence upon receipt of:

(1) a written recommendation of at least two of the current trial officials of actual innocence; or

(2) a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence.

(b) Evidence submitted under subsection (a)(1) of this section shall include the results and analysis of pre-trial and post-trial DNA tests or other forensic tests, if any, and may also include affidavits of witnesses upon which the recommendation of actual innocence is based.

D. Civil Lawsuits

In Connick v. Thompson, 563 U.S. __, 131 S.Ct. 1350 (2011), the Orleans Parish District Attorney’s Office conceded that in prosecuting John Thompson for attempted armed robbery, prosecutors violated Brady v. Maryland, 373 U.S. 83, by failing to disclose an exculpatory crime lab report. Because of his resulting robbery conviction, Thompson elected not to testify at his later murder trial and was convicted and given the death penalty. A month before his scheduled execution, the lab report was discovered. A reviewing court vacated both convictions, and Thompson was found not guilty in a retrial on the murder charge. He had spent 14 years on death row.
He then filed suit against the district attorney's office under 42 U.S.C. § 1983, alleging, inter alia, that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations.

A jury awarded Thompson $14 million dollars in the district court and the award was affirmed in the Fifth Circuit.

In a 5-4 decision, the U.S. Supreme Court reversed and took away the award. Justice Thomas, writing for the 5-4 majority, held that a district attorney's office may not be held liable under § 1983 for failure to train its prosecutors based on a single *Brady* violation.


E. Courts of Inquiry

Texas Code of Criminal Procedure articles 52.01-52.09 sets out the procedure for creating and conducting a “Court of Inquiry”, such as that used in the Michael Morton case. This is an unusual procedure initiated by “a judge of any district court of this state,” who has “probable cause to believe that an offense has been committed against the laws of this state . . .” Art. 52.01(a), T.C.C.P. If a court of inquiry is convened and hearings are conducted, and:

If it appear from [that] Court of Inquiry or any testimony adduced therein, that an offense has been committed, the Judge shall issue a warrant for the arrest of the offender as if complaint has been made and filed.

Art. 52.08, T.C.C.P.

In Michael Morton’s case, the presiding judge of the Court of Inquiry, the Hon. Louis Sturns of Tarrant County, found that the prosecuting attorney’s failure to disclose exculpatory information and related misrepresentations to the trial court, constituted criminal contempt of court and other criminal violations. See Attached Appendix A (Probable Cause Order and Findings of Fact and Conclusions of Law, in the Michael Morton/Ken Anderson Court of Inquiry).

F. Bar Grievances

This year, the Texas Supreme Court extended the statute of limitations for
exonerated defendants to file bar grievances against prosecutors for disclosure violations.

Senate Bill 825 passed at the 2013 legislative session reads, as follows:

... the supreme court must ensure that the statute of limitations applicable to a grievance filed against a prosecutor that alleges a violation of the disclosure rule does not begin to run until the date on which a wrongfully imprisoned person is released from a penal institution.

(1) “Disclosure rule” means the disciplinary rule that requires a prosecutor to disclose to the defense all evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigates the offense, including Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct.


The initial rule change made by the Texas Supreme Court pursuant to Senate bill 825, applied the new tolling provision only if it could be shown that the prosecutor’s disclosure violation caused or “resulted in” the wrongful conviction. Otherwise, any disciplinary action for the prosecutorial ethical violation would be time barred just as before. See, Editorial San Antonio Express, “High Court undercuts Morton Act,” December 19, 2013.

After 10 public comments, all criticizing this requirement, including one by the author of the bill, Senator Whitmire of Houston and the house sponsor of the bill, Senfronia Thompson, also of Houston, the causation requirement was eliminated. See, “Texas Supreme Court Rewrites Disciplinary Procedure Rule on Tolling in Alleged ‘Brady’ Violations”, Angela Morris, Texas Lawyer, February 3, 2014.

The corrected, amended rule issued on January 15, 2014 and reads, in pertinent part, as follows:

... A prosecutor may be disciplined for a violation of Rule 3.09(d), Texas Rules of Professional Conduct, that occurred in a prosecution that resulted in the wrongful imprisonment of a person if a Grievance alleging the violation is received by the Chief Disciplinary Counsel within four years after the date on which the Wrongfully Imprisoned Person was released from a Penal Institution.

Rule 15.06, Texas Rules of Disciplinary Procedure.
Texas Civil Practice and Remedies Code § 103.001 et seq., establishes, with certain limitations, compensation for factually innocent defendants who have been exonerated in any of 3 ways:

(2) the person:

(A) has received a full pardon on the basis of innocence for the crime for which the person was sentenced;

(B) has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person was innocence; or

(C) has been granted relief in accordance with a writ of habeas corpus and:

(i) the state district court in which the charge against the person was pending has entered an order dismissing the charge; and

(ii) the district court’s dismissal order is based on a motion to dismiss in which the state’s attorney states that no credible evidence exists that inculpates the defendant and, either in the motion or in an affidavit, the state’s attorney states that the state’s attorney believes that the defendant is actually innocent of the crime for which the person was sentenced.

V. TWO EXAMPLES OF CASES THAT WENT WRONG OUT OF DALLAS COUNTY, AND THE CORRECTIVE ACTION TAKEN

A. Thomas McGowen

In 1985 and again in 1986, Thomas McGowan was convicted of a brutal home invasion and sexual assault, which occurred in 1985. (One transaction, two crimes, two juries, two convictions, two life sentences-stacked.). Mr. McGowan’s photo was placed in a photo spread and his photo was selected by the victim. The only evidence against him was her eye-witness identification and testimony. It is not entirely clear why Mr. McGowan’s photo was placed in the photo spread to begin with. He had no similar offenses or allegations in his past.

Twenty-two years later, in September 2007, through his attorneys, Mr. McGowan requested that the Dallas County District Attorney’s Office agree to DNA testing of the original sexual assault kit. After reviewing the case, the DA’s office agreed. The test identified a full, unknown male profile that was not Mr. McGowan’s.
On April 16, 2008 the court of conviction, with the agreement of the District Attorney’s office, recommended that Mr. McGowan be exonerated. On June 11, 2008, the Texas Court of Criminal Appeals concurred.

In May 2008, DPS hit a match on the CODIS database for the profile of the unknown rapist. He was located in a Texas prison where he was serving a plea-bargained, thirty-year sentence for another brutal home invasion sexual assault in Dallas County. He committed that subsequent offense after Mr. McGowan had been wrongly identified, arrested, and charged for the previous offense. When confronted with the DNA evidence, the actual perpetrator gave a detailed, audiotaped confession. He also authored a hand-written apology to the victim.

A postmortem review of the McGowan case revealed that the actual perpetrator’s photo was included in the original photo spread along with Mr. McGowan’s. For whatever reason, Mr. McGowan was selected instead of him. Furthermore, every individual depicted in the photo spread was a “suspect”, although the reasons each were suspects are now unknown.

The statute of limitations had run and the actual perpetrator was not charged; however, the parole board was notified and in 2009, the Dallas District Attorney’s office successfully pushed legislation to address such situations. Specially, Texas Government Code, Sections 411.061, et seq, which provides a procedure for entering the information about an actual perpetrator’s involvement in an offense, into their criminal history, even when, as in McGowan’s case, the actual perpetrator would never be arrested, charged, or convicted of the offense. The information may only be entered if there is a DNA match. The statute also provides a right to request “notice of entry” and a right to review a decision to enter the information into the data base. Only law enforcement has access to the information.

B. Stephen Brodie

On September 20, 1990, a sleeping five year old girl was abducted from her bedroom in the North Dallas suburb of Richardson, Texas, at approximately five o’clock in the morning. The abductor covered the girl’s face, carried her outside, sexually assaulted her, and released her after verbally threatening her not to tell anyone. Later that morning, a crime scene investigator lifted an unidentified fingerprint from the window screen where the perpetrator entered.

The Richardson case was one of several similar offenses committed in northern Dallas County during the same time period. Police believed it was the same perpetrator in each case and dubbed him the "North Dallas Rapist". The victims were young girls abducted in the middle of the night, often while adults slept in the next room.

Two months later, in November 1990, Richardson police investigators stopped Stephen Brodie while he was walking one afternoon, in the general region of where
the September attack took place. Mr. Brodie was eighteen years old and a senior at Richardson High School. He had been deaf since infancy and put up for adoption by his biological mother.

When stopped by the police, Mr. Brodie attempted to answer their questions. The police obtained a fingerprint from Mr. Brodie, and later compared it to the print taken from the window screen.

He was not a match. 1 They also checked his school records which established that Brodie had attended school on the day of the attack. 2

In August 1991, the Richardson case, as well as the multiple similar "North Dallas Rapist" cases in the adjacent City of Dallas, were unsolved. On August 14, 1991 (ten months after the Richardson attack), Richardson Police arrested Mr. Brodie for burglary of a coin operated machine. He promptly confessed to the burglary of the machine. The police then spent approximately eighteen to nineteen hours over several days interrogating Mr. Brodie about the September 1990 sexual assault. At first, Mr. Brodie denied any involvement or knowledge. 3 He had no reason to recall the specific details of his life on the day the offense occurred eleven months prior. The police had no reason to believe he was involved. His prints did not match, and they had verified that he was in school that day.

Ultimately, Mr. Brodie began to make purported admissions about knowledge of the location, of the crime and of the victim. In fact, there was almost nothing Mr. Brodie communicated that established that he had any true independent knowledge about the offense. Videotapes and written notes from the interrogation showed that he had gotten almost all the facts wrong until prompted or led by the interrogator. He also recanted what admissions he did make.

After charging Mr. Brodie, Richardson Police tendered him to the Dallas Police Department for interrogation. During his interrogation, the Dallas detective asked Mr. Brodie about a crime the detective knew that Mr. Brodie did not commit. Mr. Brodie admitted to it anyway. The detective then invented a fantasy crime. Mr. Brodie admitted to the fantasy crime. When the detective asked Brodie about real

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1 Throughout the investigation, the police compared the unknown window screen fingerprint to at least twenty-five different men. In other words, everyone they believed could be a suspect.

2 Since the offense occurred at about five o’clock in the morning, Mr. Brodie could have committed the offense and still attended school, but investigators believed that it was important enough to check.

3 Since Brodie was deaf, about half of the eighteen or nineteen hours of interrogation was spent passing written notes back and forth. The second half was conducted through different interpreters. All of the interrogation was captured on video-tape. See Shawn P. Williams, Conviction Integrity Unit Paves Way for Release of Stephen Brodie. Dall. S.News (Sept. 28, 2010), http://www.dallassouthnews.org/2010/09/28/conviction-integrity-unit-paves-way-for-release-of-stephen-brodie.
unsolved cases, Mr. Brodie admitted to them, but knew no corroborating facts. The Dallas detective concluded that Mr. Brodie had no involvement in any of the offenses and tendered him back to Richardson police. After months of pretrial incarceration and a motion to suppress the confession, which was denied, Mr. Brodie pled guilty to the Richardson case and received five years in prison.

While Mr. Brodie was locked up, yet another, almost identical offense was committed in the City of Dallas, less than a mile from the location of the Richardson crime for which Mr. Brodie was charged. Dallas Police identified a suspect near the scene and that suspect was later positively tied to the abduction and sexual assault of the young girl through DNA. On April 18, 1994, he pled guilty. He was believed to be the "North Dallas Rapist" although he was not charged in any other cases.

A Richardson crime scene officer, having read about the arrest, was able to get the fingerprints of the Dallas arrestee and have them compared to the print on the window screen from the Richardson case. It was a match to the arrested man believed to be the "North Dallas Rapist." The officer was instructed by his superiors to have the FBI make a comparison. The FBI also called it a match. He was instructed to have the Drug Enforcement Agency (DEA) make a comparison. The DEA called it a match as well. But Mr. Brodie had already pled guilty.

The Richardson Police reinvestigated. The Dallas perpetrator who matched the print refused to talk to them. They explored the possibility that Mr. Brodie and the "North Dallas Rapist" had committed the offense together even though there was no evidence that more than one perpetrator was involved. Eventually, the Richardson Police decided, more or less, that it was just a coincidence that the fingerprint which they had originally believed key to their investigation, actually belonged to a person, not Brodie, who had committed an almost identical offense less than a mile away. They determined, notwithstanding the extraordinary new evidence pointing to the guilt of another individual, that their original investigation had reached the right result and that Mr. Brodie was solely guilty. They did, however, turn the information over to the District Attorney's office in 1994, which then turned it over to Brodie's last attorney who then filed a writ. The writ was denied in 1996.

Mr. Brodie served his five-year sentence but continued to be sent back to prison for refusing to register as a sex offender. In 2010, his father wrote the Dallas County District Attorney's Office, Conviction Integrity Unit (CIU). The CIU's paralegal, Jena Parker, first read the letter and was struck by a number of potential red flags: for example, eighteen to nineteen hours of interrogation of a nineteen-year old deaf person, about half of it without an interpreter. The CIU undertook an extensive investigation. In 2010, the CIU located the Dallas perpetrator whose fingerprint matched the one of the window screen. He again refused to be interviewed.

The CIU asked that Mr. Brodie be appointed an attorney; and the CIU obtained confession experts to analyze Brodie's "confession," which had been videotaped. All concluded that it was a completely unreliable confession for many reasons, and in
many ways not even a confession but the result of miscommunications between a deaf person and his interrogator.\(^4\) The original court of conviction heard evidence on September 27, 2010. Among other things, the Dallas offender was subpoenaed to the hearing and took the Fifth when asked if he had committed the offense for which Mr. Brodie was convicted. The confession experts testified. Former Richardson detectives testified. The court recommended exoneration. On November 10, 2010, the Texas Court of Criminal Appeals exonerated Mr. Brodie on all charges (including the failures to register).\(^5\)

The CIU discovered a list of unsolved Dallas cases from 1989 to 1992 which were believed to have been committed by the Dallas offender. The Dallas crime lab, SWIFS, still had biological evidence stored from two of the cases. At the CIU's request, SWIFS DNA tested the evidence. A new buccal swab was obtained from the Dallas offender, and DNA testing on his known buccal swab showed a match to those two unsolved cases. The Dallas offender was arrested and charged in those two cases. On January 19, 2012, a Dallas County jury sentenced Robert Waterfield to life imprisonment after finding him guilty of the 1989 aggravated sexual assault of a child.\(^6\) On December 7, 2012, Waterfield was convicted by a Collin County Jury on the second unsolved case, discovered during the Brodie investigation, and assessed a second life sentence.\(^7\)

VI. CONCLUSION

"After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent." United States Supreme Court Justice William Rehnquist writing for the Court in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, L.Ed.2d 203 (1993).

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\(^4\) Efforts to pass a bill to require the police to video or audio record all interrogations, H.B. 218, 82\(^{nd}\) Leg. (Tex.2011), failed in the 2011 legislative session. A similar bill again failed in the recent state legislative session. The biggest opponents of the bill were the police. See Scott Henson, *Police Arguments Against Recording Interrogations Allow Fear to Impede Self-Interest*, Grits for Breakfast (May. 4, 2011), 8:06 AM), http://gritsforbreakfast.blogspot.com/2011/03/police-arguments-against-recording.html.


\(^6\) Nomaan Merchant, *Suspect in Over a Dozen Sexual Assaults in Dallas Area Sentenced to Life in Prison*, Star Telegram (Jan. 19, 2012), http://www.star-telegram.com/2012/01/19/367500/suspect-in-over-a-dozen-sexual.html. Because the cases involved a child and because of changes in the law, the statute of limitations was not a bar.

APPENDIX

CAUSE NO. 12-0420-K26

IN RE § IN THE 26th JUDICIAL

HONORABLE KEN ANDERSON § DISTRICT COURT OF

(A COURT OF INQUIRY) § WILLIAMSON COUNTY, TEXAS

PROBABLE CAUSE ORDER

This Court FINDS AND CONCLUDES THAT PROBABLE CAUSE EXISTS to believe that:

1. Mr. Ken Anderson committed the offense of Criminal Contempt of Court by failing to comply with Judge Lott's order to produce Sgt. Don Wood's complete set of reports and notes ("the Complete Wood Report") for in camera review in Cause No. 86-452-K26; and

2. Mr. Ken Anderson committed the offense of Tampering With or Fabricating Physical Evidence 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 in Cause No. 86-452-K26; and

3. Mr. Ken Anderson committed the offense of Tampering With Government Records by failing to produce to Judge Lott the Complete Wood Report in Cause No. 86-452-K26.

THEREFORE, in accordance with to article 52.08 of the Code of Criminal Procedure and the Third Supplemental Order, dated November 30, 2012 in Cause No. 12-0420-K26, this Court issues WARRANTS for Ken Anderson's arrest on the charges of Tampering With or Fabricating Physical Evidence and Tampering With Government Records.

ALSO THEREFORE, an ORDER TO SHOW CAUSE will issue as to whether Ken Anderson should be held in contempt of court.

UPON ISSUANCE of the aforementioned warrants and order to show cause, the proceedings in this court of inquiry are concluded.

SIGNED AND ENTERED this 14th day of April, 2013.

FILED

JUDGE PRESIDING

APR 19 2013

Lisa Daniel
District Clerk, Williamson Co., TX.
APPENDIX

CAUSE NO. 12-0420-K26

IN RE § IN THE 26th JUDICIAL

HONORABLE KEN ANDERSON § DISTRICT COURT OF

(A COURT OF INQUIRY) § WILLIAMSON COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 4, 2013 through February 8, 2013, this Court conducted an evidentiary hearing on a court of inquiry in the above-captioned matter. The hearing included live testimony from witnesses, the admission of testimony by deposition and affidavits, and documentary evidence. Subsequent to the hearing, additional written testimony was filed in accordance with TEX. CODE CRIM. PROC. art. 52.02. The Court has also considered the written pleadings and arguments of counsel, including the respective proposed findings of facts and conclusions of law submitted in this matter. Moreover, the Court has reviewed and considered the law applicable to the conduct of a court of inquiry and the law relating to the allegations of criminal conduct made in the report that led to this court of inquiry.

History of the Case Leading up to the Present Court of Inquiry

1. Christine Morton was brutally murdered in her Williamson County home on August 13, 1986.

2. Michael Morton was arrested on September 25, 1986 by the Williamson County Sheriff’s Office, pursuant to an arrest warrant and a sworn complaint charging him with Ms. Morton’s murder.

3. A Williamson County grand jury indicted Mr. Morton on October 15, 1986, charging him with first-degree felony murder.

4. Then-Williamson County District Attorney Ken Anderson led the prosecution of Mr. Morton as the attorney for the State in the resulting criminal case, State of Texas v. Michael W. Morton, Cause No. 86-452-K26.

5. On February 17, 1987, following a two-week trial, a jury convicted Mr. Morton of Ms. Morton’s murder, and assessed a punishment verdict of life in the Texas Department of Criminal Justice – Institutional Division.
6. Mr. Morton spent nearly 25 years in prison following his conviction.


8. Following the grant of relief, Judge Harle entered an order dismissing the indictment against Mr. Morton, on December 19, 2011. APT Ex. 73.

9. Mr. Morton’s exoneration was based on the results of DNA testing obtained in June and August 2011 on biological material taken from a bandana recovered by a member of Ms. Morton’s family, shortly after Ms. Morton’s murder, from a construction site located near the Morton home.

10. In entering findings of fact and conclusions of law on the habeas petition leading to Mr. Morton’s exoneration, Judge Harle made no findings with respect to allegations of the State’s failure to disclose exculpatory evidence to Mr. Morton’s defense counsel prior to the trial. Resp. Ex. 20; RR, Vol. 4, pp. 118-19, 168-69 (testimony of Ms. Jernigan).

**The Instant Court of Inquiry**

On December 19, 2011, Mr. Morton filed a Report to Court with Judge Harle seeking a court of inquiry under TEX. CODE CRIM. PROC. art. 52.01 et seq. Specifically, the report alleges that Mr. Anderson committed Texas criminal law violations as follows:

- “Criminal Contempt of Court”: The report alleges that Mr. Anderson committed contempt, under TEX. GOV’T 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.”

- “Tampering With or Fabricating Physical Evidence”: The report alleges that Mr. Anderson violated TEX. PENAL CODE § 37.09(a)(1), 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.”
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- "Tampering With Government Records": The report alleges that Mr. Anderson violated TEX. PENAL CODE § 37.10(a)(3), by "failing to produce to Judge Lott the Complete Wood Report."

Findings of Fact

The Court enters the following findings of fact and conclusions of law with respect to the court of inquiry.

1. Mr. Ken Anderson served as the District Attorney of Williamson County, Texas from 1985 through 2001.

2. Mr. Anderson served as the lead prosecutor in the investigation of Christine Morton's murder in 1986.

3. As the lead prosecutor and District Attorney, Mr. Anderson had the authority to request that the sheriff's department follow up on leads in the murder investigation.

4. Mr. Anderson worked closely with the Williamson County Sheriff's Department during this investigation, including almost daily calls with Sheriff Boutwell, and received a steady stream of reports from the chief investigator Sgt. Don Wood.

5. Mr. Anderson knew that Sgt. Wood had conducted "quite an extensive investigation" and had talked to "lots of people" other than Mr. Morton.

6. Sgt. Wood compiled evidence during the investigation that suggested Mr. Morton did not murder his wife, including the "Green Van Report" (ATP Ex. 5) which provided a lead about a stranger's repeated appearances in the wooded area behind the Mortons' home in the days preceding Mrs. Morton's murder.

7. The Green Van Report was prepared by another deputy and copied to Sgt. Wood the day after Mrs. Morton's body was discovered in her home.

8. Sgt. Wood copied Mr. Anderson as the "DA" on offense reports and supplements he prepared, including the abridged version of the "Kirkpatrick Transcript" created on August 24, 1986.

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1 The transcript prepared from the recorded telephone conversation between Sgt. Wood and Eric Morton's maternal grandmother Rita Kirkpatrick regarding Eric observing a "monster" who was not his father and who hurt his mother, Christine Morton. ATP Exs. 6, 7.
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9. Once Mr. Anderson was apprised of the abridged version of the Kirkpatrick Transcript, it is not credible that Mr. Anderson would not have immediately wanted to listen to the full recording and to read the full transcript.

10. The Kirkpatrick Transcript was evidence that showed Mr. Morton did not murder his wife.

11. No one from the Williamson County Sheriff's Office acting on his or her own initiative or at the request of Mr. Anderson ever followed up on the Kirkpatrick Transcript or the Green Van Report.

12. The sheriff’s department and Mr. Anderson quickly concluded Mr. Morton was responsible for killing his wife, and so curtailed further investigation of the murder.

13. Mr. Anderson and the sheriff's department based this conclusion on circumstantial evidence about the time of death while ignoring or substantially discounting circumstantial evidence that pointed to Mr. Morton’s innocence.

14. Among other things, Mr. Anderson was aware of the "Kirkpatrick Transcript" and discussed it openly in the District Attorney’s Office before Mr. Morton’s trial.

15. Mr. Anderson continued to act as lead prosecutor after Mr. Morton was arrested and charged with murder just over a month after Mrs. Morton’s body was discovered.

16. As the lead prosecutor, Mr. Anderson was in charge of the prosecution’s file and decided what information and evidence would be disclosed to the Court and Mr. Morton’s attorneys before and during trial.

17. Copies of the Green Van Report and the abridged version the “Kirkpatrick Transcript” were present in his trial file at the district attorney’s office and in a notebook prepared for him by the Williamson County Sheriff’s Office.

18. Mr. Anderson was familiar with the contents of his trial file and the notebook prepared for him by the Williamson County Sheriff’s Office.

19. Mr. Anderson refused to provide Mr. Morton’s attorneys with information about Mr. Morton’s voluntary statements to the sheriff’s department, other
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evidence favorable to Mr. Morton, and the written statements of witnesses who testified in pre-trial hearings.

20. During trial, Mr. Anderson decided not to call Sgt. Wood as a witness, despite having subpoenaed him, and despite his status as the chief investigator of Mrs. Morton's murder.

21. Mr. Anderson never discussed this decision with Sgt. Wood who was surprised by his absence from the trial.

22. Despite his knowledge and awareness of the Kirkpatrick Transcript and the Green Van Report, Mr. Anderson never provided this information to Mr. Morton's attorney before, during, or after trial knowing that the defense had requested, through a written motion and pre-trial hearing requests, information favorable to Mr. Morton under Brady.

Conclusions of Law

Pursuant to article 52.08 of the Code of Criminal Procedure and the Third Supplemental Order, dated November 30, 2012 in Cause No. 12-0420-K26, this Court is charged with considering whether Mr. Anderson committed the following criminal offenses:

- Section 21.002 of the Texas Government Code Criminal, which details the offense of contempt of court;

- Section 37.09 of the Texas Penal Code, which details the charge of tampering with Physical Evidence; and,

- Section 37.10 of the Texas Penal Code, which details the charge of tampering with a Governmental Record.

A. Contempt of Court

1. The Supreme Court held in Brady that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Thereafter the Court held that such disclosure is mandatory regardless of whether a defendant requests it, United States v. Agurs, 427 U.S. 97, 107 (1976), and that impeachment evidence must also be disclosed, see Bagley, 473 U.S. at 676; Giglio, 405 U.S. at 154.
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2. As a threshold matter, it is clear to this Court that both the Green Van Report and the Kirkpatrick Transcript are *Brady* material. The information should have been provided to the defense, with or without the existence of a court order.

3. Additionally, prior to trial, counsel for Mr. Morton filed pretrial motions that specifically sought the production of evidence favorable to the accused. (ATP Ex. 12, RR 7:8655). The detailed motions asked for all exculpatory statements and material. It is also clear from the February 6, 1987 pretrial hearing transcript that while much of the hearing dealt with Mr. Morton’s statements to law enforcement, the defense’s various pre-trial motions covered all *Brady* evidence held by the State. To be sure, Mr. White stated to the court during the hearing, “So, the main thing we have asked for both in the Motion for Discovery and part of this *Brady* material is we get the statements, that is, the longhand written statements, tape recordings, oral statements, offense report notes by Don Wood and Sheriff Boutwell of any statement that this Defendant made. We want them prior to trial under *Brady*... And any other *Brady* material the State might have.” (ATP Ex. 20, RR 7:8838 at 8866, emphasis added).

4. As stated above in the Findings of Fact section, Mr. Anderson testified that he understood that this *Brady* request of Mr. Morton’s counsel was about more than just Mr. Morton’s statements to law enforcement on the day of the murder—it was seeking all information favorable to the accused. (ATP Ex. 59, RR 7:10943 at 11000).

5. During the trial court’s February 6, 1987 pretrial hearing, Judge Lott specifically asked Mr. Anderson if he had any information “favorable to the accused,” to which Mr. Anderson replied, “No, sir.” Any argument that the Green Van Report and the Kirkpatrick Transcript were not favorable to the accused is not credible. Indeed, during the Court of Inquiry hearing, Mr. Anderson testified that the Kirkpatrick Transcript was favorable to the accused. (RR 6:193:3). He also testified that he “routinely and customarily would give [to defense attorneys]” items such as the Transcript and the Green Van Report. (RR 6:196:6-6:197:17).

6. The issue, therefore, is whether Mr. Anderson’s representation to the court, during the February 6, 1987 pretrial hearing that he had no information favorable to the accused, when in fact Mr. Anderson did have such information, supports a finding of constructive criminal contempt.
Texas courts enjoy broad authority to control the proceedings over which they preside. This power is set forth in both Texas common law and in various state legislative enactments.

By statute, a Texas 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. CODE § 21.001(a).

Additionally, Texas courts "shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done." Id. § 21.001(b).

To aid in the administration of proceedings and justice, courts have the express statutory power to punish for contempt. Id. § 21.002(a).

The punishment for contempt of a criminal district court is a fine of not more than $500 and/or confinement in the county jail for not more than six months. Id. § 21.002(b).

In one of its most often cited contempt cases, the Supreme Court of Texas described contempt of court broadly as "disobedience to or disrespect of a court by acting in opposition to its authority." Ex parte Chambers, 898 S.W.2d 257, 259 (Tex. 1995).

Texas common law characterizes contempt as either civil or criminal. Civil contempt is said to be "coercive in nature," designed to encourage the contemnor to obey an order of the court by confining that individual until he or she capitulates. Criminal contempt, on the other hand, is punitive in nature, designed to punish the contemnor for "some completed act which affronted the dignity and authority of the court." Ex Parte Werblud, 536 S.W.2d 542, 545 (Tex. 1976); Ex parte Chambers, 898 S.W.2d 257, 259 (Tex. 1995).

Because this matter involves the potential to punish Mr. Anderson for past conduct, this matter involves an allegation of criminal contempt. See also Third Supplemental Order, November 30, 2012, Cause No. 12-0420-K26.

Criminal contempt may be either "direct" or "constructive." "Direct contempt is the type of disobedience or disrespect which occurs within the presence of the court, while constructive contempt occurs outside the court's presence." Ex parte Chambers, 898 S.W.2d 257, 259 (Tex. 1995). In direct contempt cases, the court must have direct knowledge of all the

16. Because at least some of the alleged conduct at issue in this case occurred outside the court's presence, this matter involves an allegation of constructive criminal contempt.

17. The majority of Texas cases concerning criminal contempt issues have dealt with alleged violations of written court orders. *See, e.g., Ex parte Chambers*, 898 S.W.2d 257 (Tex. 1995).

18. *Ex parte Chambers*, however, while instructive, was concerned with the alleged violation of a written court order, which is not the situation here because there was no written court order requiring Mr. Anderson to turn over Brady material to the defense. *Id.*

19. Thus, the issue here is whether a written court order is a necessary prerequisite to a constructive criminal contempt finding.

20. The Supreme Court of Texas recently addressed this issue squarely. *In re Coy Reece*, 341 S.W.3d 360 (Tex. 2011), involved a litigant who was held in criminal contempt by the trial court for lying under oath during a deposition. Reece argued on appeal that he could not be held in contempt because "he did not violate a court order." *Id.* at 365. The Supreme Court rejected Reece's "overly narrow definition" of contempt. *Id.* at 365. "While our case law suggests constructive contempt generally arises from the violation of a court order, there are situations where a party or attorney to a suit could engage in behavior that may warrant a judgment of constructive contempt." *Id.* at 365-66.

21. Although the Court in *Reece* held that a written court order is not a prerequisite to a finding of contempt, the Court did hold that "perjury alone is not a ground for contempt unless the conduct also obstructs the court in the performance of its duties." *Id.* at 367. The Court further warned that "[w]e are loath to contemplate a system where litigants and their attorneys scour transcripts, searching for any misstatements for the sole purpose of accusing the opponent of contempt and ultimately securing the opponent's confinement." *Id.* at 368. The Court concluded that "while we agree that Reece's perjury undoubtedly may have caused SB difficulty in the discovery process, we cannot say, on this record, that it obstructed the court in the performance of its duties." *Id.* at 367.

22. However, in this case, the court specifically asked Mr. Anderson during a pretrial hearing on the defendant's *Brady* Motion if Mr. Anderson had
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“anything favorable to the accused,” to which Anderson replied “No, sir.” (ATP Ex. 20, RR 7:8838 at 8867). When he made this representation to the court, Mr. Anderson knew the State possessed the Green Van Report and the Kirkpatrick Transcript, and he knew that this evidence was favorable to the accused. Therefore, this Court finds that Mr. Anderson’s statement is an intentional false representation to the trial court.

23. Unlike 

24. Additionally, Mr. Morton’s defense counsel filed a very detailed pretrial motion, which requested any and all exculpatory police interviews, witness statements, and police reports. The Motion also requested that any materials requested under the Motion that existed, but that Mr. Anderson did not consider exculpatory under Brady and its progeny, be given to the court for an in camera review by Judge Lott. Defense’s request for Brady evidence clearly included materials such as the Kirkpatrick Transcript and the Green Van Report, which, at the very least, Mr. Anderson should have provided to Judge Lott for an in camera review and consideration of whether the items qualified as Brady evidence.

25. In light of this, the court finds that Mr. Anderson’s conduct supports a finding of constructive criminal contempt.

26. Other Texas cases lend support to this conclusion. For example, in Sutphin v. Tom Arnold Drilling Contractor, Inc., 17 S.W.3d 765 (Tex. App.—Austin 2000, no pet.), the Court held that filing a false declaration with the court constitutes criminal contempt and that the court retains inherent power to conduct an investigation and sanction counsel, even after that court’s “plenary power” has ended and the underlying case dismissed. The Court based its decision upon the court’s “inherent power” to investigate and punish counsel who present false and fraudulent affidavits and/or testimony upon which the court has relied. Id. at 772-73; see also Eichlberger v. Eichelberger, 582 S.W.2d 395, 399 (Tex. 1979).

27. Further, even though federal contempt standards are more stringent than Texas standards, federal courts have held that “[l]ying to a judge is
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B. Texas Penal Code § 37.09

28. Tampering with Physical Evidence under section 37.09 of the Texas Penal Code requires a showing that the defendant: (1) knew an investigation or official proceeding was in progress or pending; (2) altered, destroyed, or concealed any record, document, or thing; and, (3) did so with the intent impair the physical evidence’s availability in the investigation or official proceeding.


30. The statute’s term “official proceeding” includes both criminal proceedings and judicial proceedings before a public servant such as a district court judge. *Ahmad v. State*, 295 S.W.3d 731, 740 (Tex. App—Ft. Worth 2009).

31. The State’s prosecution of Mr. Morton for murder constituted an official proceeding. *Ahmad*, 295 S.W.3d at 740.

32. When he prosecuted Mr. Morton, Mr. Anderson knew that an official proceeding was in progress.


34. Mr. Anderson had a Constitutional duty to disclose, whether or not defense counsel requested such items, exculpatory evidence or evidence that could be used to impeach witnesses. *See Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. at 676; *Giglio*, 405 U.S. at 154.
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35. Defense counsel moved in writing, and orally, for the State to produce any and all interview statements and police reports favorable to Mr. Morton. (ATP Ex. 12; RR 7:86:55). If the State had items that could fall within the defense’s broad request, but which Mr. Anderson did not think were exculpatory, defense counsel specifically moved for Mr. Anderson to provide those items to the court so Judge Lott could determine whether the items were mitigating evidence. (ATP Ex. 12; ATP Ex. 20, RR 7:8838 at 8866).

36. Additionally, Judge Lott specifically asked Mr. Anderson in open court whether the State had any evidence that was favorable to the accused. (ATP Ex. 20, RR 7:8838 at 8867)

37. Mr. Anderson’s trial preparation notes indicate that he reviewed a Williamson County Sheriff’s Office binder that contained the Kirkpatrick Transcript and Green Van Report. Sergeant Wood distributed a copy of the abridged Kirkpatrick Transcript to Mr. Anderson in 1986. Testimony during the Court of Inquiry from former assistant district attorney Kimberly Gardner also indicated that Mr. Anderson reviewed the Kirkpatrick Transcript.

38. Mr. Anderson knew of his constitutional evidentiary obligations under Brady, according to the February 1987 pre-trial hearing transcript. Additionally, Mr. Anderson knew of requests for evidence by defense counsel and the court.

39. Mr. Anderson’s failure to provide the Kirkpatrick Transcript and the Green Van Report to Judge Lott or the defense, despite defense and court requests and a constitutional obligation to do so, constituted concealment of records because Mr. Anderson’s actions kept the police records secret for more than twenty-five years. Hollingsworth, 15 S.W.3d at 595.

40. Mr. Anderson’s failure to release the police records in question was no mistake. Rather, Mr. Anderson’s hiding of the records constituted a conscious choice to prevent disclosure of the Kirkpatrick Transcript and Green Van Report to the court and defense. This intent is demonstrated by circumstantial evidence in the record such as Mr. Anderson’s trial preparation notes, which demonstrate a thorough review of evidence from the sheriff’s department.

41. As a prosecutor of six years, Mr. Anderson knew his failure to disclose this evidence would impact the defense. Namely, he knew that without this exculpatory evidence Mr. Morton’s defense had to proceed under a significant handicap and that a jury would likely convict Mr. Morton as the
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case had no other suspects and no physical evidence pointed to other individuals.

42. Additionally, as Mr. Anderson explained during the Court of Inquiry, although Brady requires prosecutors to release exculpatory evidence to the defense, as an attorney and former prosecutor, he does not believe in the release of such evidence if it may result in freeing an individual that he believes is guilty. (RR 6:116:18-6:117:4 and RR 6:94:4-24).

43. Mr. Anderson consciously chose to impair the availability of the exculpatory evidence so that he could obtain the conviction of Mr. Morton for murder.

44. Thus, Mr. Anderson intended to prevent defense counsel from relying upon the Green Van Report and Kirkpatrick Transcript and his concealment of such evidence during the prosecution of Mr. Morton constitutes a violation of section 37.09 of the Texas Penal Code.

C. Texas Penal Code § 37.10

45. Tampering with a government record under section 37.10 of the Texas Penal Code requires a showing that he defendant intentionally destroyed or concealed a governmental record. The crime is a Class A misdemeanor, TEX. PENAL CODE ANN. § 37.10(c) (1986), unless it is shown that the defendant intended to defraud or harm another individual, in which case the crime is a third degree felony. TEX. PENAL CODE ANN. § 37.10(c) (1986).

46. The term governmental record includes “anything belonging to, received by, or kept by government for information, including a court record.” TEX. PENAL CODE § 37.10(2)(A). The term “governmental record” also encompasses “anything required by law to be kept by others for information of government.” TEX. PENAL CODE § 37.10(2)(B)

47. The Green Van Report and the Kirkpatrick Transcript unquestionably fall within the statute’s definition of “government records.”

48. This statute, like section 37.09, requires the mens rea of intent. TEX. PENAL CODE ANN. § 6.03(a). Thus, an individual must have a conscious objective, or a desire, to conceal the availability of a governmental record. For an individual to be convicted of the felony version of this crime, the State must prove an additional mens rea requirement: that the defendant acted with the conscious objective to harm or defraud another by concealing the government record.
As evidenced by his singular focus upon Mr. Morton during the investigative and prosecutorial phase of the case, Mr. Anderson sought to convict Mr. Morton of murder. To achieve this goal, Mr. Anderson concealed government records to prevent defense counsel from using the exculpatory evidence during trial. Evidence of this appears in Mr. Anderson’s testimony during the Court of Inquiry in which he admitted that while he knew of his requirements under Brady, as a prosecutor he had concerns about the pre-trial disclosure of exculpatory evidence to defense counsel as he did not want opposing counsel to “massage” evidence. (RR 6:116:18-6:117:4). Nor did Mr. Anderson want exculpatory evidence to lead to the release of a defendant in a case where other evidence demonstrated the defendant’s guilt. (RR 6:94:4-24).

Circumstantial evidence may establish whether an individual acted with the intent to defraud or harm another. 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).

The Texas Penal Code defines the term harm as “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.” TEX. PENAL CODE ANN. § 1.07(A)(25). The Penal Code defines the phrase “intent to defraud” as the “‘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.’” Wingo, 143 S.W.3d at 187 (quoting jury charge and 41 TEX. JUR.3D FRAUD AND DECEIT § 9 (1998)).

Evidence shows that Mr. Anderson knew the State’s files contained the Green Van Report and the Kirkpatrick Transcript and that both items mitigated Mr. Morton’s guilt.

This Court cannot think of a more intentionally harmful act than a prosecutor’s conscious choice to hide mitigating evidence so as to create an uneven playing field for a defendant facing a murder charge and life sentence:

Mr. Anderson’s intent to defraud the court and defense counsel is demonstrated in Mr. Anderson’s response to the trial court’s inquiry as to whether he had any Brady evidence. Mr. Anderson answered, "No." His answer prevented the trial court from considering whether the Green Van Report and Kirkpatrick Transcript constituted exculpatory evidence and whether they were responsive to defense counsel’s motion. Additionally,
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Mr. Anderson’s response prevented opposing counsel from reviewing and using the mitigating evidence during their defense of Mr. Morton.

55. Mr. Anderson’s hiding of the Kirkpatrick Transcript and the Green Van Report with the intent to deprive Mr. Morton of his constitutional due process rights constituted a felonious violation of section 37.10 of the Texas Penal Code.

D. Statute of Limitations Issue

56. The Court of Inquiry statute does not contemplate an examination of the applicability of the statute of limitations to the crimes under consideration. Rather, the act simply states that “if it appear from a Court of Inquiry or any testimony adduced therein, that an offense has been committed, the Judge shall issue a warrant for the arrest of the offender as if complaint had been made and filed.” TEX. CODE OF CRIM. PROC. ART. 52.08.

57. The Court understands, however, that a statute of limitations issue is an affirmative defense that must be raised by the defendant or waived, and that a defendant facing a time-barred charge need not wait to raise such a defect during trial and may move to dismiss the charge pre-trial—even through a writ of habeas corpus. Ex parte Tamez, 38 S.W.3d 159, 160 (Tex. Crim. App. 2001).

58. It appears to the Court that the time for an affirmative defense to be asserted is not during the instant court of inquiry proceeding.

59. Accordingly, the Court concludes that, because the Court of Inquiry statute does not in any way contemplate statute of limitations issues, this Court should issue an arrest warrant, and respectively, a show cause order for Mr. Anderson based on the aforementioned criminal violations for which there is probable cause.
Summary and Conclusion

In light of the forgoing, and by way of summary, this Court CONCLUDES THAT PROBABLE CAUSE EXISTS to believe that:

1. Mr. Ken Anderson committed the offense of Criminal Contempt of Court 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; and

2. Mr. Ken Anderson committed the offense of Tampering With or Fabricating Physical Evidence 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; and

3. Mr. Ken Anderson committed the offense of Tampering With Government Records by failing to produce to Judge Lott the Complete Wood Report.

SIGNED AND ENTERED this 19th day of April, 2013.

JUDGE PRESIDING