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CAUSE NO. 1457957

THE STATE OF TEXAS

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IN THE DISTRICT COURT

V.

OF HARRIS COUNTY TEXAS

VERNON BROOKS

248TH JUDICIAL DISTRICT

DEFENDANT'S MOTION TO QUASH INDICTMENT

To the Honorable Katherine Cabaniss:

COMES NOW DEFENDANT Vernon Brooks, by and through his attorney, PAUL MORGAN, and files this *Motion to Quash Indictment and Brief in Support*. Defendant requests the Court to enter an order quashing the indictment because the indictment fails to meet the statutory requirements. In support of this request, Defendant would show the following:

I.

Defendant is charged with the alleged Murder of Sergio Saldana from September 25, 2015.

FILED
Chris Daniel
District Clerk

DEC - 4 2015

II.

Time: _____
Harris County, Texas
By _____
Deputy

This motion to quash is based upon three separate violations of Mr. Brook's constitutional rights to due process and equal protection:

- 1. Defendant's case has been irreparably damaged by ADA Seely's

prosecutorial misconduct;

2. Defendant has been selectively prosecuted by the Harris County District Attorney's Office; and
3. Defendant has been deprived of his right to a disinterested prosecutor.

Under Texas Code of Criminal Procedure Art. 28.10, Defendant specifically excepts to and objects to any attempt at correction of the errors and omissions enumerated in this Motion to Quash the indictment and/or at the hearing before the Court on this motion, by amendment of the indictment in the instant case. Any attempt at correction should be accomplished only with the consent of the Grand Jury, because such an amendment would be one of form and substance, and would charge Defendant with an additional and different offense, and would prejudice substantial rights of Defendant.

Accordingly, Defendant respectfully requests that the Court set aside the indictment.

Brief in Support

SUMMARY OF ARGUMENT

It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, 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. Crim. Proc. Code Ann. § art. 2.01 (West)

The prosecution in this case has violated her statutory duty to see that justice is done by not suppressing material facts and has also committed a *Brady* violation by her untimely disclosure of favorable evidence. The favorable evidence was secreted for eight months and was only discovered after the defense conducted its own extensive investigation using defense resources. This defense investigation revealed that ADA Sarah Seely, the original prosecutor on the case, intentionally concealed evidence, despite several evidentiary requests, and even concealed this evidence from ADA Overhuls, who took over the prosecution of the case after ADA Seely was promoted and moved to another court.

The evidence that was concealed in violation of *Brady* and the prosecutor's statutory duty is so pervasive and the deception runs so deep that it has tainted the entire investigation of Mr. Brooks's case. Furthermore, the untimely disclosure has irreparably prejudiced Mr. Brooks's constitutional right to effective representation, to a speedy trial, and to due process under the law. Additionally, Mr. Brooks has exhausted all of his investigative funding and has caused defense counsel to use his scarce trial resources and valuable trial preparation time by investigating and uncovering this pervasive pattern of continuous *Brady* violations.

This ongoing misconduct has generated even deeper issues regarding the prosecution of this case. On September 24, 2015, Defendant requested that the state recuse itself. The state did not do so, and Judge Cabaniss denied Mr. Brook's "Motion to Recuse

the Entire Harris County District Attorney's Office Due to a Conflict of Interest". Mr. Brook's is now faced with a prosecutorial agency who has a personal interest in the outcome of this case. The Harris County District Attorney's Office now must prosecute this case in order to save face and attempt to defend itself against allegations of prosecutorial misconduct.

It is also apparent that Mr. Brooks is being selectively prosecuted. Mr. Brooks is one out of two defendants who were indicted for the alleged 2012 shooting of Sergio Saldana. There are three other accomplices who are not facing prosecution. Based on the recent discovery of paid testimony, it is indisputably clear that the Harris County District Attorney's Office is interested in singling out Mr. Brooks and Mr. Bailey. This interest is so deep that the Harris County District Attorney's Office was willing to purchase testimony and conceal *Brady* evidence from Mr. Brooks in an effort to secure a conviction against him.

Dismissing the indictment is necessary to cure this prejudice and adequately sanction the State for its misconduct.

STATEMENT OF THE CASE

The State charged the Defendant, Vernon Brooks, by indictment with murder on February 13, 2015. The indictment alleged that he murdered Sergio Saldana on or about September 25, 2012. The state previously charged Joseph Bailey with the same murder, and a jury convicted Bailey and assessed 35 years in prison on February 24, 2015. The Defendant's case is now set for trial on January 11, 2016.

STATEMENT OF FACTS

I. Factual background

Mr. Brooks is accused of murdering Sergio Saldana. His co-defendant, Joseph Bailey, was convicted and sentenced to 35 years in the Texas Department of Criminal Justice – Institutional Division on February 24, 2015.

The investigation into this murder was conducted by a Houston Area FBI special agent Keith Koncir. Koncir testified during Bailey's trial as a gang expert, specifically an expert on the Aryan Brotherhood of Texas.

The main witnesses in this case are Rose Henderson, Stella Preece, Joseph Kazee, Tara Brown a/k/a/ Tara Cook, and Michael Hourshad.

Initially, Tara Brown was charged with the murder and Michael Hourshad was charged with aggravated assault based on this incident. After giving a statement to the police, however, both Cook's and Hourshad's charges were dismissed.

Michael Hourshad

On September 25, 2012 Michael Hourshad was arrested at the scene of the alleged shooting.¹ The shooting occurred in Mr. Hourshad's home at 1517 Oak Dr., Baytown, Texas.² After being arrested at the scene, Mr. Hourshad was brought to the Baytown Police Station.³ He gave a statement to the police and was subsequently charged with aggravated assault.⁴ He remained on bond for the charge for over a year.⁵ On January 14, 2014, Mr. Hourshad gave a statement regarding the 2012 shooting.⁶ This statement was reviewed by Mr. Hourshad's attorney and was submitted to the state.⁷ The statement resulted in Mr. Hourshad's charge being dismissed on January 24, 2015.⁸ He was granted probation on a drug charge.⁹ As part of his probation, Mr. Hourshad agreed to testify as a state's witness in the state's prosecution of the 2012 shooting of Sergio Saldana.¹⁰

¹ See Clerk's Record Cause Number 1451957

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Tara Brown aka Tara Cook

The state alleges that Tara Brown was physically present at the 1517 Oak Dr. and may have even coordinated the murder of Sergio Saldana.¹¹ On October 02, 2012, Tara Cook voluntarily gave a statement to Baytown investigator Jessica Cervantes.¹² After giving a second statement to Ms. Cervantes later in the evening, Ms. Cook was charged with murder in connection with the 2012 shooting.¹³ She remained in custody until September 27, 2013.¹⁴ She gave another statement to the state on this date implicating Mr. Brooks and Mr. Bailey.¹⁵ This statement resulted in her murder charge being dismissed.¹⁶ She then agreed to be a state's witness to the state's prosecution of the 2012 shooting of Sergio Saldana.¹⁷

Joseph Kazee aka Worm

The state believes Joseph Kazee was physically present inside the 1517 Oak Dr. residence and witnessed the actual shooting of Sergio Saldana.¹⁸ Joseph Kazee was initially interviewed about the 2012 shooting of Sergio Saldana back on October 15, 2012 by Ms.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Cervantes.¹⁹ In his statement, Mr. Kazez denied being at the murder scene and gave Ms. Cervantes an alibi.²⁰ He was subsequently released and was not charged with any crime.²¹ On February 05, 2013, Mr. Kazez was arrested for a parole violation.²² During his arrest, he made a statement about the 2012 shooting implicating Mr. Brooks and Mr. Bailey.²³ His parole was not violated and Mr. Kazez becomes a state witness.²⁴ Significantly, Mr. Kazez admitted to being inside Mr. Hourshad's house and acting as a party to the murder.²⁵ Mr. Kazez is never charged with a crime in connection to the 2012 shooting.²⁶

Stella Preece and Rose Henderson

Stella Preece and Rose Henderson are both sisters.²⁷ The state believes that these two individuals witnessed material facts leading up to the alleged shooting of Sergio Saldana.²⁸ They both gave statements to the Baytown Police Department.²⁹ In their statements, each sister purports to give non-accomplice testimony, which allegedly corroborates the testimony of Mr. Hourshad, Ms. Cook, and Mr. Kazez.³⁰ Bizarrely, their

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

testimony makes them accomplice witness, as they become parties to the offense, but they are never charged with an offense in connection 2012 shooting.³¹

Mr. Bailey's indictment was filed on June 27, 2015. Mr. Brooks indictment was filed on February 13, 2015. Mr. Brooks and Mr. Bailey are the only two individuals charged with this murder.

II. Defense counsel Paul Morgan's investigation uncovers *Brady* evidence

On March 18, 2015, Attorney Paul Morgan filed a motion to substitute and appeared as counsel of record for Vernon Brooks.³² Initially, ADA Sarah Seely was the prosecutor for defendant Vernon Brooks.³³ ADA Seely had also prosecuted Mr. Brooks's co-defendant, Joseph Bailey. Mr. Brooks's initial discovery requests were served on ADA Seely.³⁴ Mr. Brooks was set for a jury trial on August 17, 2015. ADA Seely remained on Mr. Brooks's case until she was promoted shortly after the trial court granted defense's motion for continuance over her objections.

ADA Seely was served with a *Brady* request on June 23, 2015.³⁵ In addition, she was also served with a "Motion for Discovery of Corroborative Evidence to Accomplish

³¹ *Id.*

³² See Clerk's File Cause Number 1451957

³³ *Id.*

³⁴ See Appendix A.

³⁵ *Id.*

Testimony” on June 26, 2015 and “Defendant’s Motion to Require the Prosecution to Reveal Any Agreement with a Witness that Could Influence his Testimony” on May 5, 2015.³⁶ She did not respond with any information after being served with these requests.³⁷

ADA David Overhuls took over prosecution of Mr. Brooks’s case in July of 2015.³⁸ On July 22, 2015, ADA Overhuls asked Mr. Morgan if he had received all the discovery in this case.³⁹ Mr. Morgan responded that he had not been given a recorded statement of Tara Brown aka Tara Cook, which contained important *Brady* evidence.⁴⁰ ADA Overhuls made a copy of that recorded statement and gave it to Mr. Morgan that day.⁴¹

On July 22, 2015, Mr. Morgan sent an open records request to ADA Brian Rose, specifically requesting:

“Pursuant to the Texas Public Information Act, please provide a copy (or make available for inspection and copying) the Harris County District Attorney files regarding cause number 1367500 (State v. Hourshad), Cause Number 1363542 (State v. Cook), Cause Number 1455789 (State v. Preece), and Cause Number 1455788 (State v. Preece).”⁴²

Brian Rose responded to Mr. Morgan’s request:

“Thanks for talking to me this morning. I just talked to Sarah Seely. She confirmed for me she already tried Joseph Bailey out of this murder transaction. And she told me that

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Appendix B

she put on the record all the issues with the witnesses that you are working to confirm any Brady issues. So it's all covered on the record."⁴³

Although Mr. Morgan had repeatedly been assured that any and all *Brady* relevant issues had already been addressed, Stella Preece and Rose Henderson told his investigator, Daniel Velez, that they, along with Joseph Kazee, had been paid money by FBI Special Agent Keith Koncir to testify against Bailey.⁴⁴ Mr. Morgan then told ADA Overhuls that the witnesses had been paid to testify and that this agreement had never been disclosed to the defense.⁴⁵ ADA Overhuls was unaware of these payments and actually denied they existed.⁴⁶ However, ADA Overhuls assured Mr. Morgan that he would investigate whether or not these witnesses had, in fact, been paid.⁴⁷ The trial date was then moved to October 5, 2015.⁴⁸

On August 7, 2015, Mr. Morgan emailed a copy of his investigator's interviews to ADA Overhuls to assist the prosecution with the investigation into these payments.⁴⁹ Mr. Morgan's investigator was also attempting to locate eye-witnesses to the alleged transactions so that the defense could supplement the prosecution's investigation with whatever he found.⁵⁰ Mr. Morgan's investigator funds, which had been granted by the

⁴³ *Id.*

⁴⁴ See State's Appendix A & B

⁴⁵ See Appendix C.

⁴⁶ See Appendix D

⁴⁷ *Id.*

⁴⁸ See Clerk's file Cause Number 1451957

⁴⁹ See Appendix D

⁵⁰ *Id.*

Court, were quickly becoming depleted because of the prosecution's failure to disclose this crucial *Brady* material. In short, the defense had no choice but to investigate the claims that the witnesses had been paid – a fact that the State knew about and hid from the defense.⁵¹

III. Defense counsel's requests for any documentation of payment to witnesses

During his investigation, Mr. Morgan filed several different requests for any documentation of payment to these three witnesses.

1. On September 9, 2015, defense's request under the Freedom of Information Act to the Federal Bureau of Investigations came back unresponsive, meaning that no documentation regarding these payments existed.⁵²
2. On September 8, 2015, defense's public information act request directed to the Baytown Police Department came back responsive, indicating that over 300 pages of documents related to his inquiry existed.⁵³ In the request, Mr. Morgan asked for any proof of payment made to Joseph Kazee, Stella Preece, and Rose Henderson.⁵⁴ After being given a copy of this PIA request, ADA Overhuls called Baytown Police Department.⁵⁵ ADA Overhuls still could not find these

⁵¹ *Id.*

⁵² *See* Appendix E

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See* Appendix G

receipts.⁵⁶ He eventually discovered these receipts and gave them to Mr. Morgan on September 23, 2015.⁵⁷

IV. Relevant Court filings

Defense counsel filed a motion to dismiss the indictment in this case on September 24, 2015, alleging that prosecutorial misconduct has irreparably damaged this case.⁵⁸ The state filed its response on October 13, 2015.⁵⁹ In its response, the State argues that Defendant cannot meet its “heavy burden” and that Defendant’s motion should be dismissed.⁶⁰ To support its argument, the state produced several signed affidavits.⁶¹ The State’s response and affidavits assert that none of the witnesses knew they would receive a benefit for testifying; that ADA Seely had no knowledge that the witnesses had gotten paid; that the money given to these witnesses was for relocation witnesses; and that the State diligently investigated and provided defense with the evidence once requested.

V. Defense counsel’s investigation reveals blatant prosecutorial misconduct

⁵⁶ *Id.*

⁵⁷ *See* State’s File Cause Number 1457957

⁵⁸ *See* Clerk’s file cause number 1457957

⁵⁹ *Id.*

⁶⁰ *See generally* State’s Response to Defendant’s Motions

⁶¹ *Id.*

Defense counsel conducted his own investigation into the state's factual allegations contained in their supporting affidavits. This investigation began when Rose Henderson called attorney Morgan on October 13, 2015.⁶² Investigator Daniel Velez was also present during this phone call and spoke with Henderson and Morgan.⁶³ Henderson alerted Morgan and Velez that someone was threatening her sister, Stella Preece.⁶⁴ Henderson was afraid that someone was retaliating against her sister because of the information she had revealed about the payments they received from Koncir.⁶⁵ When asked who was threatening her sister, Henderson answered that she believed that it was either Keith Koncir or Ron Tarlton.⁶⁶ Morgan and Velez asked Henderson to come in and meet with them to discuss these allegations and she agreed, only if they both agreed to investigate the retaliation.⁶⁷ They agreed to these terms.⁶⁸

Morgan and Velez then went to 1200 Baker to speak to Stella Preece.⁶⁹ They introduced themselves and told Stella that they were conducting an investigation into the Koncir payments and into the alleged retaliation.⁷⁰ Stella agreed to speak to Morgan and

⁶² *Id.*

⁶³ Appendix H

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Velez.⁷¹ She was uncomfortable with the topic of discussion and did not want to answer their questions.⁷² Seeing that she was uncomfortable, Paul Morgan and Daniel Velez moved on and asked about the March 6, 2015 payment.⁷³ She was explicitly asked if this money was for relocation expenses.⁷⁴ She told them that the money was not for relocation purposes and that she had never needed to relocate.⁷⁵ She still lives in the same area she did when she received the payment.⁷⁶ Morgan then asked her what she spent the money on, and she answered “pinging”.⁷⁷ Daniel Velez then asked for her to elaborate, and Stella explained that pinging was a form of gambling.⁷⁸ She also admitted to using the money on methamphetamine.⁷⁹ They then asked her if she would sign an affidavit to this effect, she agreed and this concluded the interview.⁸⁰

On October 26, 2015, Henderson again met with Morgan and investigator Velez.⁸¹ Henderson told Morgan and Velez that Stella was not going to sign the affidavit because after they had visited Stella, someone had gone to visit Stella and threatened her with

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

retaliation if she signed the affidavit.⁸² Henderson claimed that it was either Keith Koncir or Ron Tarlton.⁸³

Henderson then went into explicit detail about her dealings with ADA Seely.⁸⁴ Henderson said that ADA Seely had set up a meeting with her and Preece.⁸⁵ Henderson and Preece were in different rooms.⁸⁶ ADA Seely said something to Preece that deeply upset her.⁸⁷ ADA Seely then ended the conversation with Preece and began to talk to Henderson.⁸⁸ ADA Seely said to Henderson:

“I do not know what I did to upset your sister, so I am going to try a different approach with you. What can we do for you in order to make you more comfortable with what we need you to say? This is off the record by the way.”⁸⁹

ADA Seely and Henderson then began talking about incentives for Henderson’s testimony.⁹⁰ Henderson told ADA Seely that “you cannot help me, because I not in any trouble, but you can help my sister out.” ADA Seely then replied with “Yes I understand

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See* Appendix I

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

that she has a possession case in Pasadena, but I cannot do anything with that case until the jury is pooled in Bailey's case".⁹¹

Henderson was upset because she wanted her sister's case dismissed immediately.⁹² Henderson asked ADA Seely why she could not help her sister out more quickly.⁹³ ADA Seely responded with "If I cut a deal with your sister before trial, I can get in trouble".⁹⁴ ADA Seely then tried to discuss Rose Henderson's pending CPS case.⁹⁵ Henderson did not want to discuss her pending CPS case and told ADA Seely "no, you cannot manipulate me, I know how to handle my business."⁹⁶ ADA Seely then understood that if Henderson was going to give state oriented testimony, she was going to do so in exchange for leniency on Preece's pending criminal charge.⁹⁷

ADA Seely coached Henderson to testify in a particular fashion.⁹⁸ ADA Seely told Henderson that she was going to ask Henderson a series of questions about promises of leniency.⁹⁹ ADA Seely asked Henderson to give perjured testimony on the stand and answer "no" when she was asked if she was promised anything.¹⁰⁰ Henderson said that she

⁹¹ *See Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

committed perjury on the stand because she loves her sister very much and wanted to make sure Preece received her leniency.¹⁰¹

Rose Henderson admitted to being a paid informant for the state.¹⁰² She said that she was paid for her testimony, but that she was unaware that the money was in exchange for testimony.¹⁰³ She said that when Koncir paid her, he only showed her one piece of paper, which was the receipt she signed.¹⁰⁴ Significantly, she expressly denied any intentions to relocate.¹⁰⁵ She denied being threatened by the Aryan Brotherhood.¹⁰⁶ She said “I was never told that this money was for relocation expenses. I had no idea that I was supposed to use the money to relocate, nor did I ever tell anyone that I wanted to relocate.”¹⁰⁷ She then went on to say “I have lived in the same area since the money was paid to me, and I do not plan on moving anytime soon.”¹⁰⁸ She denied using the money for relocation, and said that she instead “spent the money on personal items for me and my family”.¹⁰⁹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

After she was finished with her affidavit, Henderson went on to talk about Joseph Kazez. Henderson made it very clear that Joseph Kazez was lying in his affidavit that was filed with the state's response.¹¹⁰ Henderson claims that Kazez told her that the government forced him to sign that affidavit and that he was being hidden from Morgan and Velez.¹¹¹ Morgan and Velez have been unable to locate Kazez since the beginning of their investigation.¹¹² Henderson said that Kazez told her that his entire affidavit that Koncir forced him to sign was untrue.¹¹³ Joseph Kazez lives in Austin and he lived there before, during, and after Bailey's trial.¹¹⁴ According to Henderson, Kazez did not actually need to relocate, but instead needed to fix his car or buy a new one to get home.¹¹⁵ Kazez also told Henderson that he was never threatened by the Aryan Brotherhood.¹¹⁶ Henderson went on to say that Kazez was more scared of the government than the ABT, and that if Kazez spoke to us without Tarlton or Koncir being present, he would 'tell us the truth' about the payments.¹¹⁷ This concluded the interview.

¹¹⁰ See Appendix H

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Velez and Morgan then went to visit Stella Preece again at 1200 Baker.¹¹⁸ Even though she was initially cooperative, she ultimately refused to sign the affidavit.¹¹⁹ The last time Velez and Morgan visited Preece, they asked her about the alleged retaliation. Preece told attorney Morgan that she “was not going to talk about that”.¹²⁰ She then refused to sign the affidavit and terminated the interview.¹²¹ Since then, she has refused to visit with Morgan and Velez and told both of them that she would prefer to see Mr. Brooks go to trial.¹²²

MR. BROOK’S CASE HAS BEEN IRREPARABLY DAMAGED BY ONGOING PROSECUTORIAL MISCONDUCT

I. The State knowingly withheld *Brady* evidence from the defense

The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure “that ‘justice shall be done’” in all criminal prosecutions.¹²³

Brady is meant to protect defendants against prosecutors who conceal evidence in an effort to secure a conviction. *Brady* holds that “suppression by the prosecution of

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *United States v. Agurs*, 427 U.S. 97, 111, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.”¹²⁴ Evidence is favorable if it can be used for impeachment or mitigation purposes.¹²⁵ If favorable evidence is suppressed, the prosecution will be subject to sanctions.¹²⁶

There is a three prong test that the Court will use to determine whether a due process violation has occurred:

1. When there has been a failure to disclose evidence;
2. The evidence is favorable to the accused; and
3. The evidence would have created a probability sufficient to undermine the confidence of the outcome of the proceeding;¹²⁷

¹²⁴ *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 10 L.Ed.2d 215 (1963).

¹²⁵ *Id.* at 86-88 S.Ct. at 1195.

¹²⁶ See *Strickler v. Greene*, 527 U.S. 263, 288, 119 S.Ct. 1936, 1952 144 L.Ed 286 (1999) (prosecutor was unaware that interview notes were not included in state’s file, and these notes were disclosed to defense before trial); *Giglio v United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed 104 (1972) (prosecutors unaware that previous prosecutor assigned to the case had offered to dismiss charges against a key witness in exchange for testimony); *Ex parte Mitchell*, 853 S.W.2d 1, 4 (Tex.Crim.App. 1993) (police investigators failed to provide exculpatory material to district attorney); see also *Haygood v. State*, 127 S.W.3d 805, 809 (Tex.App.- San Antonio 2003, pet. ref’d) (deliberate concealment by the state or its agents is a due process violation if the concealed evidence is material).

¹²⁷ See *Banks v. Dretke*, 540 U.S. 668, 691; 124 S.Ct. 1256, 1272, 157 L.ed.2d (2004); *Strickler*, 527 U.S. at 280, 290, 119 S.Ct. at 1948, 1952, 144 L.Ed.2d 286 (1999); *Ex parte Reed*, 271 S.W.3d 698, 726 (Tex.Crim.App. 2008) *Ex parte Richardson*, 70 S.W.3d 865, 871 (Tex.Crim. App. 2002).

A. Anything that is known by a member of the prosecutor's team is imputed upon the state

The state has a duty to discover and disclose favorable evidence to the defendant. The prosecutor has the affirmative duty to seek favorable evidence out and deliver it to the defense.¹²⁸ Favorable evidence must be sought out and disclosed to the defense without request.¹²⁹ If evidence is known and is not disclosed, then the evidence is suppressed from the defense.¹³⁰

Knowledge held by a member of the prosecutor's team is imputed upon the state. When a prosecutor works with investigative or other prosecutorial personnel, any knowledge held by the team member is imputed upon the prosecutor.¹³¹ The state believes that federal actors cannot impute knowledge upon state prosecutors. This is a misstatement of law. Federal actors can form a prosecutorial team with state prosecutors.¹³² The Fifth Circuit held that "imposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process."¹³³ When determining whether or not

¹²⁸ *Id.* at 437-38, 115 S.Ct. at 1567-68; see also *Little v. Sate*, 991 S.W.2d 864, 866 (Tex.Crim.App. 1999) ("A prosecutor has an affirmative duty to turn over material, favorable evidence to the defense"); *Kyles v. Whitley*, 514 U.S. 419, 437-115, S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995).

¹²⁹ See *United States v. Agurs*, 427 U.S. 97, 106-07, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976).

¹³⁰ *Id.*

¹³¹ *Availa v. Quarterman*, 560 F.3d 299, 308 (2009).

¹³² See generally *US v. Antone*, 603 F.2d 566 (1979)

¹³³ See *Id.*

a federal actor is part of the prosecutor's team, the Court will analyze the extent of overlap between the state and federal government.¹³⁴ If there is extensive overlap between the federal actor and the state prosecutor, then knowledge of the federal actor is imputed upon the state prosecutor.¹³⁵

B. Keith Koncir is investigative personnel for the prosecution and thus his knowledge of the March 6, 2015 payments to Stella Preece, Rose Henderson, and Joseph Kazee is imputed upon the Harris County District Attorney's Office

Keith Koncir is investigative personnel for the prosecution. Koncir testified in Bailey's trial and will be testifying in Defendant's trial.¹³⁶ He investigated this case and co-defendant Bailey's case under direction of the Harris County District Attorney's Office.¹³⁷ He testified as a gang expert and even testified as to material issues in the Bailey case.¹³⁸ In addition, he also dispersed payments to Rose Henderson, Stella Preece, and Joseph Kazee under ADA Seely's direction.¹³⁹ Thus, there is a deep overlap between Koncir and the Harris County District Attorney's Office, which makes Koncir investigative personnel for the prosecution. When he dispersed three separate requests to Stella, Rose,

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Clerk's Record in Cause number 1441201; see also Clerk's file in Cause Number 1451957

¹³⁷ *See Id.*

¹³⁸ *See Id.*

¹³⁹ See State's Response to Defendant's Motion Appendix H

and Joseph on March 6, 2015, he gained actual knowledge of the payments.¹⁴⁰ Therefore, his knowledge of these payments is imputed upon the state.

C. The state's position that ADA Seely did not know about these payments is false and irrelevant

The state argues that ADA Seely did not know about these payments. For the reasons described above, this argument is irrelevant, as Koncir's knowledge is imputed upon the state. In addition to being irrelevant, the argument is factually incorrect. Koncir swore in an affidavit that:

"I cannot recall whether I called to tell Ms. Seely that I received approval. My emails do not indicate that I emailed her that information. I do not remember telling her that I disbursed the funds to the three witnesses".¹⁴¹

ADA Seely swore in her affidavit that:

¹⁴⁰ See Appendix B.

¹⁴¹ See State's Response to Defendant's Motion Appendix E.

*“Special Agent Koncir told me that he planned to request federal funds to assist Stella Preece, Rose Preece Henderson, and Joseph Kazee in relocating. I understood from Special Agent Koncir that he intended to seek approval from his superiors to release federal funds because the three witnesses had been threatened by ABT. I agreed Special Agent Koncir could give them money before Vernon Brooks case went to trial if he obtained the funds because the three witnesses were in danger. I did not receive any further communicate to indicate that Special Agent Koncir had successfully obtained the funds he requested to help the three witnesses relocate and change their contact information or that he had dispersed the money”.*¹⁴²

Both statements directly contradict a February 25-26, 2015 email exchange between ADA Seely and Koncir:

Koncir: Hey Sarah, now that the trial is over, is there anything y'all can do for Kazee? He's broke and trying to get out of town...

Seely: I will talk to my supervisor and Victim assistance about what we can provide.

¹⁴² See State's Response to Defendant's Motions Appendix D.

Koncir: OK. Please let me know what they say. I was going to request \$1000 for Stella and rose and \$2500 for worm unless you think that we should wait until after the dinky trial.

Seely: ~~Don't wait. You can give it to them now.~~ I've asked my victim witness coordinator and she is checking to see if we can use anything from crime victims compensation, which none of the technically fall under. My division chief said we don't have resources allocated for that.

Koncir: OK. Thanks.¹⁴³

This is direct evidence of ADA Seely's actual knowledge and approval of the payments made to Rose Henderson, Stella Preece, and Joseph Kazee. Furthermore, after this conversation occurred, Koncir noted in his federal request forms that ADA Seely "concurred" with these payments.¹⁴⁴ It does not matter that ADA Seely did not receive confirmation that these payments were actually dispersed, as she gave a direct and immediate command to Koncir to make the payment. Thus, contrary to what ADA Seely and Koncir mistakenly claim in their affidavits, the state had knowledge of these payments.

¹⁴³ See *Id.* at Appendix H.

¹⁴⁴ See Appendix O

D. ADA Seely and Koncir attempted to suppress these receipts over several requests from Defendant; they also actively tried to suppress the evidence from ADA Overhuls

ADA Seely intentionally concealed evidence while she was lead prosecutor on this case. In its response, the state made the extraordinarily offensive claim that the state diligently investigated these witness payments and produced them to the defense. This allegation is ridiculous and factually incorrect. ADA Seely did not file any *Brady* notices regarding these payments while she was lead prosecutor.¹⁴⁵ She was served with a *Brady* request on June 23, 2015.¹⁴⁶ In addition, she was also served with a “Motion for Discovery of Corroborative Evidence to Accomplice Testimony” on June 26, 2015 and “Defendant’s Motion to Require the Prosecution to Reveal Any Agreement with a Witness that Could Influence his Testimony” on May 5, 2015.¹⁴⁷ She did not respond with any information after being served with these requests.¹⁴⁸ Knowing that these payments were not disclosed, ADA Mickelson Seely tried to force Defendant to trial.¹⁴⁹ She openly opposed a continuance in front of Judge Cabaniss, which was subsequently granted over her opposition.¹⁵⁰

¹⁴⁵ See Clerk’s File Cause Number 1451957.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Appendix L

¹⁵⁰ *Id.*, See Clerk’s file 1451957.

ADA Seely continued to try to conceal these payments after she was transferred from the 248th District Court and promoted. In an email to Brian Rose, Defendant requested to view Michael Hourshad, Tara Brown aka Tara Cook, Stella Preece, Rose Henderson, and Joseph Kazee's files.¹⁵¹ Brian Rose's response to defense counsel request was:

*"Thanks for talking to me this morning. I just talked to Sarah Seely. She confirmed for me she already tried Joseph Bailey out of this murder transaction. And she told me that she put on the record all the issues with the witnesses that you are working to confirm any Brady issues. So it's all covered on the record."*¹⁵²

The record he was referring to was co-defendant Joseph Bailey's trial record. The March 6, 2015 payments were not covered on Bailey's record.¹⁵³ Furthermore, ADA Seely failed to make any notation on the file or inform ADA Overhuls that these payments were made.¹⁵⁴ She could have easily printed off the February 25-26 2015 email between her and Koncir and put it in the file for ADA Overhuls. As a result, ADA Overhuls was unaware that these payments were made, which is reflected in his July 28, 2015 *Brady* notices ADA Overhuls served on Defendant.¹⁵⁵

¹⁵¹ See Exhibit B

¹⁵² See *Id.*

¹⁵³ See Clerk's Record in Cause number 1441201.

¹⁵⁴ See State's file number 1451957.

¹⁵⁵ See *Id.* Brady Notices filed by ADA Overhuls (Notice did not include the witness payments).

The only reason the state disclosed this evidence was due to Defendant's independent investigation. The state denied the existence of these payments several times.¹⁵⁶ In fact, defense counsel, not ADA Seely or Koncir, was the first to tell ADA Overhuls that these payments existed.¹⁵⁷ ADA Overhuls was unable to locate the receipts, due to the fact that Koncir was concealing them.¹⁵⁸ Koncir had these receipts so deeply concealed that when Defendant requested them via a Freedom of Information Act request, the request came back nonresponsive.¹⁵⁹ After making ADA Overhuls aware of these payments, Defendant assisted ADA Overhuls for a lengthy period of time. Defendant submitted a PIA request for these documents and found that these records did actually exist.¹⁶⁰ Amanda Pell from the Baytown Police Department sent Defendant a responsive document on September 8, 2015.¹⁶¹ After sharing this document with ADA Overhuls, ADA Overhuls spoke with Koncir, who finally produced the documents to ADA Overhuls. On September 25, 2015 ADA Overhuls served Defendant with these receipts.¹⁶² Therefore, the only reason they were not concealed was due to the fact that Defendant discovered their existence through

¹⁵⁶ See Exhibit D & G

¹⁵⁷ See Exhibit C-G

¹⁵⁸ See Exhibit E

¹⁵⁹ See *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Exhibit F

¹⁶² See Clerk's File Cause Number 1451957.

submitting a Public Information Act request. ADA Overhuls had to uncover these deeply concealed receipts after Defendant showed him the response from Amanda Pell.

E. The payments made to Stella Preece, Rose Henderson, and Joseph Kazee are evidence favorable to Defendant

To require disclosure, the evidence must be favorable to the defendant. Evidence is favorable to the defendant if it could “make the difference between conviction and acquittal.”¹⁶³ Favorable evidence consists of either impeachment or exculpatory evidence.¹⁶⁴ Exculpatory evidence “tends to justify, excuse, or clear the defendant from alleged fault or guilt.”¹⁶⁵ Impeachment evidence will “dispute, disparage, deny, or contradict” the proposed claim or witness.¹⁶⁶ Evidence tending to show that a witness may be acting as a paid informant for the state is impeachment evidence.¹⁶⁷

F. The receipts prove that Rose Henderson, Stella Preece, and Joseph Kazee are informants who were paid for their testimony and investigative assistance

Rose Henderson, Stella Preece, and Joseph Kazee are paid informants for the state. A reading of the plain language of each receipt supports this factual position. Each receipt is

¹⁶³ *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006).

¹⁶⁴ *See Wyatt v. State*, 23 S.W.3d 18, 27 (Tex.Crim.App. 2000).

¹⁶⁵ *Little v. State*, 991 S.W.2d 684, 866-67 (Tex.Crim.App. 1999); *see also Harm*, 183 S.W.3d at 408;

¹⁶⁶ *Little*, 991 S.W.2d at 867; *Thomas v. State*, 841 S.W.2d 399, 404 (Tex.Crim. App. 1992).

¹⁶⁷ *See Exhibit O*

a form FD-794 federal funding request form.¹⁶⁸ Each one largely contains the same language.¹⁶⁹ The receipts conform with the Confidential Human Source Policy Manual (CHSPM), which allows for “one payment to be made to any individual who has provided information to the FBI.”¹⁷⁰ Rose Henderson and Stella Preece both received “a one time payment of \$1000; this balance is comprised of \$1000 for services and \$0 for Expenses.”¹⁷¹ Joseph Kazee received “a one time payment of \$3000; this balance is comprised of \$3000 for services and \$0 for Expenses.”¹⁷²

The service that these three paid informants provide was testimony and investigative assistance. Each receipt purports to compensate Rose Henderson, Stella Preece, and Joseph Kazee’s “services.”¹⁷³ Each receipt praises Joseph Kazee, Stella Preece, and Rose Henderson for their “substantial assistance to SA Keith Koncir and TFO Joshua Lyons.”¹⁷⁴ The reason that each person could provide this type of assistance was because they were believed to be witnesses to Saldana’s murder.¹⁷⁵ According to these receipts, each informant “met with investigators to provide a statement regarding the circumstances

¹⁶⁸ *See Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See Id.*

¹⁷¹ *See Id.*

¹⁷² *See Id.*

¹⁷³ *See Id.*

¹⁷⁴ *See Id.*

¹⁷⁵ *See Id.*

surrounding Saldana's death."¹⁷⁶ Most telling, each receipt contains the following statement:

"As a result of her [his] assistance in testifying against ABT member Joseph Bailey, he was found guilty and sentenced to 35 years incarceration."¹⁷⁷

There is absolutely no disputing that this service was provided to the prosecution. Each receipt states, in unambiguous language, that each witness agreed to meet with state investigators, provide investigative assistance, and "testify against Bailey".¹⁷⁸

The plain language of the receipts demonstrate that these three witnesses were paid informants for the government. Therefore, these receipts are favorable evidence, as they evidence the fact that Stella Preece, Rose Henderson, and Joseph Kazee are paid informants who gave assistance and testimony in exchange for cash payments.

G. Contrary to the State's mistaken and unfounded belief, the money was not for relocation purposes

The state argues that the money given to Henderson, Preece, and Kazee was for relocation expenses. A fairly large portion of its response is dedicated to the state's position that this money paid out to the witnesses so that they could relocate. To support this belief,

¹⁷⁶ See *Id.*

¹⁷⁷ See *Id.*

¹⁷⁸ See *Id.*

the State conducted its own investigation and produced several different affidavits from ADA Mickelson Seely, Paul Smithers, SA Keith Koncir, TFO Lyons, and Joseph Kazez.¹⁷⁹ Each one claims that the money was disbursed to each witness so that they could relocate.¹⁸⁰

The State's assertion is erroneous for several reasons. First, as described above, the receipts do not reference relocation expenses.¹⁸¹ Each receipt explicitly states that the money is for services and that zero dollars were allocated for expenses.¹⁸² Relocation is an expense, not a service. One does not provide a service by travelling to another area. Second, there is no supporting documentation that any of the witnesses actually relocated. Rose Henderson and Stella Preece never actually relocated.¹⁸³ They never intended, needed, or even desired to relocate.¹⁸⁴ Even more telling is the fact that they still live in the same area since the money was paid.¹⁸⁵ Instead of spending the money to relocate, Henderson spent her \$1000 cash payment on personal items.¹⁸⁶ Preece spent her \$1000 cash payment on gambling and methamphetamine.¹⁸⁷

¹⁷⁹ See State's Response to Defendant's Motion Appendix C-G.

¹⁸⁰ See *Id.*

¹⁸¹ See Appendix B.

¹⁸² See *Id.*

¹⁸³ See Exhibit H & I

¹⁸⁴ See *Id.*

¹⁸⁵ See Exhibit I

¹⁸⁶ See Exhibit H

¹⁸⁷ See *Id.*

Defendant alleges that Joseph Kazez's statement is a forced fabrication. According to Henderson, Joseph Kazez was forced to sign that affidavit because he feared governmental retaliation.¹⁸⁸ Joseph Kazez did not relocate; Joseph Kazez was experiencing car trouble and needed to buy a new car or fix his current one.¹⁸⁹ Joseph Kazez lives in Austin and did not need to "get out of town", but instead needed to go home.¹⁹⁰ Joseph Kazez told Rose Henderson that he gave false testimony during trial, and that the affidavit is a false statement.¹⁹¹ Without being able to cross examine Joseph Kazez in a hearing, the affidavit of Joseph Kazez should be dismissed and disregarded as a false and perjured statement.

H. The state's position that these payments were for relocation expenses should be disregarded, as the only evidence to support this position are several self-serving affidavits

The defense believes that the State, in order to cover up and hide this egregious *Brady* violation, is fabricating a legal position through a series of unbelievable affidavits by prosecutorial personnel. In its response, the state produced several different affidavits.¹⁹² The State's affidavits contradict themselves and other evidence filed by the State in its response.¹⁹³ These affidavits are a product of the State's own internal investigation in this

¹⁸⁸ *See Id.*

¹⁸⁹ *See Id.*

¹⁹⁰ *See Id.*

¹⁹¹ *See Id.*

¹⁹² *See generally* State's Response to Defendant's Motion Appendix C-G

¹⁹³ *See generally* State's Response to Defendant's Motion (Entire Appendix)

matter. This self-interested investigation is a farce. A plain language reading of the receipts renders the State's investigation completely pointless and incredible. The State did not address the language in the receipts, because their contents contradict the State's outrageous position that the witnesses were paid to relocate.

The State's affidavits do support Defendant's request for a hearing. Defendant alleges the state is covering from a hearing on this matter. Without a hearing, the state's own investigation into its own misconduct is worthless and the affidavits filed with the response lack credibility. Therefore, because the state's position that these funds are for relocation expenses is based upon self-serving affidavits, this position is inherently incredible and should be not be taken seriously.

II. Mr. Brooks has been prejudiced by the state's untimely disclosure of the FBI receipts

In order to prejudice the defense, the withheld evidence must be material. Evidence is material if it could change the outcome of a proceeding.¹⁹⁴ If the defendant needs the evidence to receive a fair trial, then the evidence is material.¹⁹⁵ When making this determination, the Court will use the reasonable probability standard.¹⁹⁶ Typically

¹⁹⁴ See *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (quoting from *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)); *Harm*, 183 S.W.3d at 409.

¹⁹⁵ *Id.*

¹⁹⁶ *Stickler*, 527 U.S. at 290, 119 S.Ct. at 1952 (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. at 1566); *Ex parte Reed*, 271 S.W.3d at 727 (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3375); See *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex.Crim.App. 2000). (quoting *Bagley*, 473 U.S. at 434-35, 115 S.Ct. at 1555)).

speaking, a *Brady* violation occurs if the Defendant is convicted and the conviction is based upon suppressed evidence; in addition, the state can also violate a Defendant's due process rights if they do not timely disclose exculpatory or impeachment evidence before trial.¹⁹⁷

A. There is a reasonable probability that the outcome of the trial has been completely sabotaged by the state's constant suppression of evidence in Defendant's pending case

Mr. Brooks has been irreparably prejudiced by this untimely disclosure. The State has completely depleted all of Defendant's resources. Defendant has no more investigative funding and has been denied any additional funding.¹⁹⁸ It is now impossible for Defendant to not only investigate the relevant issues of his pending murder case, but to investigate further allegations of misconduct. For example, Rose Henderson believes that the state may be retaliating against her sister, Stella Preece, because she revealed these payments to defense counsel.¹⁹⁹ Henderson also believes that the retaliation was an effort to prevent Stella Preece from signing an affidavit on this matter.²⁰⁰ In addition, Defendant has been unable to locate Joseph Kazee.²⁰¹ According to Henderson, Kazee was coerced by the government to sign a false statement and is now being hidden from the defense.²⁰²

¹⁹⁷ See *Hampton v State*, 86 S.W.3d 603 (Tex.Crim.App. 2002); *Little*, 991 S.W.2d at 866; 1. *State v. Wilson*, 7 S.W.3d 136 (Tex.Crim.App. 1999); *Shpikula*, 68 S.W.3d 212, 220 (Tex.App. —Houston [1 Dist.] 2002)

¹⁹⁸ See Clerk's File 1457957

¹⁹⁹ See Exhibit I

²⁰⁰ See *Id.*

²⁰¹ See Exhibit H

²⁰² See *Id.*

Mr. Brooks is unable to investigate these claims of misconduct and does not have the resources to continually uncover ongoing and never-ending egregious behavior. The State will surely secure a guilty verdict against Defendant by continuously suppressing evidence. Unfortunately, the State cannot be trusted to handle this case appropriately, as it was caught cheating and suppressing evidence. Tellingly, the State has denied any wrongdoing and is actually protecting its position. If the State continues to suppress evidence, forcing the defense to chase down every possible avenue of wrongdoing and deception, it will detract from the relevant issues at hand, which will ensure a wrongful conviction. There is absolutely no way ensure that Mr. Brooks will receive a speedy and fair trial and effective representation if he has to act as a constant watchdog of the Harris County District Attorney's Office ongoing misconduct.

There has been a Brady violation in this case. The State knew about these receipts and they suppressed this evidence for an extremely long period of time. This suppression was finally uncovered because defense counsel, depleting all his investigative funding resources, had to chase down the evidence that he is Constitutionally entitled to receive through the State. The evidence that defense counsel uncovered is favorable, material, and shocking. Not only did the defense uncover evidence that Joseph Kazee, Stella Preece, and Rose Henderson are paid informants; the defense also uncovered evidence suggesting that ADA Seely coerced and coached witnesses to give false testimony. To this day, the Harris

County District Attorney's Office has not taken any action to try to fix this blatant and horrendous violation of law. Instead, they argue that Defendant's motion should be denied and not heard by the Court. Defendant's resources have been completely depleted and now the state has unfettered and total power to commit even more acts of suppression without ever getting caught. If the state secures a conviction in this case, it will be through their misconduct, as it is ongoing and protected by the administration. Defendant's ability to effectively defend himself and his right to a speedy trial has been violently sabotaged. Mr. Brooks has been severely prejudiced by the State's untimely disclosure of suppressed evidence which is favorable to Defendant.

III. The Court's ability to dismiss a case due to prosecutorial misconduct

This Court has the authority to dismiss this indictment if it finds that Defendant's Sixth Amendment rights have been violated.²⁰³ When a Sixth Amendment violation has occurred, the trial court "must identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant effective assistance of counsel and a fair trial."²⁰⁴ A dismissal may be proper when "a defendant suffers demonstrable prejudice, or a substantial threat thereof, and where the trial court is unable to identify and

²⁰³ *State v. Frye*, 897 S.W.2d 324, 330-31 (Tex. Crim. App. 1995)

²⁰⁴ *United States v. Morrison*, 449 U.S. 361, 365 101 S.Ct. 665, 668 66 L.Ed.2d 564, 568 (1981) *Cook v. State*, 940 s.W.2d 623, 625-28 (Tex. Crim. App. 1996); *State v. Terrazas*, 962 S.W.2d 38, 40 (Tex. Crim. App. 1998).

neutralize the taint by other means.” However, dismissal of an indictment may be an appropriate remedy to rectify flagrant prosecutorial abuse even in the absence of prejudice to the defendant.²⁰⁵

A. The state violated Defendant’s right to effective representation of counsel by concealing these payments

ADA Seely’s intentional concealment has denied Defendant his rights under the Sixth Amendment. Defendant, by reference, incorporates the above *Brady* argument to this section. In addition to concealing payments, the State has also concealed other evidence. While she was the lead prosecutor on this case, ADA Seely tendered discovery to Defendant. Unbeknownst to him, the tendered discovery was incomplete, even though ADA Mickelson Seely led Defendant to believe that discovery was complete several times.²⁰⁶

For example, ADA Seely intentionally concealed several video stills, which are extremely material to the case. After reading the co-defendant’s transcript, Defendant realized he was not in possession of these stills. Upon request, ADA Seely produced these stills in an email dated April 22, 2015; the email included the stills along with ADA Seely’s statement that “this concludes all outstanding discovery requested in this case set for Jury

²⁰⁵ *Alejandro v. State*, 725 S.W.2d 510, 513 (Tex. App. –Houston [1st Dist.] 1987, no writ).

²⁰⁶ See Exhibit M; See also Clerk’s file Cause Number 1457957.

trial 7/27/15".²⁰⁷ It is important to note that she made this statement before the receipts were disclosed by ADA Overhuls, as it is further evidence of her intentional concealment of evidence and malicious attempt to secure a conviction against Defendant by violating his Due Process rights.

ADA Seely not only attempted to conceal these stills and the receipts, but also a recorded conversation of Tara Brown aka Tara Cook. During his cross examination of Jessica Cervantes, co-counsel Michael Trent discovered that there was a recorded statement of Tara Brown aka Tara Cook.²⁰⁸ This recorded statement was never given to the defense.²⁰⁹ Under oath, ADA Seely denied that the State was in possession of this recorded statement.²¹⁰ Michael Trent was forced to continue representing Joseph Bailey during the live trial without this evidence.²¹¹ When ADA Seely tendered discovery to Defendant, she did not include the recorded statement of Tara Brown aka Tara Cook. When ADA Overhuls came onto the case, he realized Defendant did not have a copy of Tara Brown aka Tara Cook's statement.²¹² He made a copy of the recorded statement and tendered to Defendant

²⁰⁷ See Exhibit M

²⁰⁸ See Exhibit J

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Exhibit A

that day.²¹³ Again, ADA Seely tried to conceal evidence in this case in an attempt to wrongfully secure a conviction and deny Defendant his due process rights.

The state has grossly violated Defendant's right to effective representation of counsel. Defendant has dedicated an offensively disproportionate amount of time to discovery. Defendant does not have an affirmative duty under *Brady* to discover favorable evidence. Nevertheless, Defendant had to fulfill that duty for the state and assist ADA Overhuls with uncovering ADA Seely's concealment. This has severely prejudiced Mr. Brooks. Instead of focusing on developing his defense, the defense has been spending its time, resources, and energy trying to uncover the State's egregious misconduct. Because the State failed to disclose and deliver favorable evidence in a timely manner, Defendant had to incur the cost of investigating the state's misconduct and has been unable to develop a defense to his case. The state has violated Defendant's right to effective representation of counsel by suppressing and untimely disclosing favorable evidence.

B. The State's misconduct is so wildly flagrant that dismissal is appropriate in this case even without a finding of harm

²¹³ *Id.*

The State's behavior is indisputably wild and flagrant. In addition to the above described unethical behavior, ADA Seely suborned perjury with Rose Henderson.²¹⁴ Rose Henderson is a paid informant for the state.²¹⁵ She admitted to this fact in her affidavit. She also claims that ADA Seely crafted her testimony. According to her affidavit, ADA Seely promised to grant Henderson's sister leniency in exchange for Henderson's testimony.²¹⁶ ADA Seely was very careful to make sure Rose knew that this leniency would only be executed after the Joseph Bailey's trial.²¹⁷ Much like the three payments made to Stella Preece, Rose Henderson, and Joseph Kazee, ADA Seely structured this promise as an unexecuted, contingent, future promise.²¹⁸ Henderson gave testimony under the impression her sister would receive leniency in her pending criminal case.²¹⁹ Rose Henderson said nothing about this when asked on the stand, because ADA Seely instructed her to commit perjury and answer untruthfully.²²⁰ Rose Henderson said that "I deeply love my sister and I wanted to make sure her case was helped, so I compiled and answered 'no' on the stand".²²¹ This is truly wild and flagrant behavior by the State.

²¹⁴ See Exhibit I

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

ADA Seely's behavior has been supported, promoted, and even covered up by the Harris County District Attorney's Office. ADA Seely was not reprimanded or disciplined; in fact, she was promoted. This leads Defendant to the logical conclusion that District Attorney Devon Anderson supports this egregious prosecutorial misconduct. The current administration cannot be trusted to fix the issues that deeply affect this case, as is evidenced by their response and attached affidavits.

The Harris County District Attorney's Office staunchly refuses to take responsibility for their egregious behavior. Any reasonable person would believe that the District Attorney's Office thinks they have done nothing wrong. That sentiment is terrifying and must be stopped. This administration cannot be allowed to cheat, get caught cheating, and carry on like nothing happened. Defendant alleges that this administration will continue to foster misconduct if their behavior goes unchecked. Once anyone loses trust, they cannot regain it, especially if that person is caught cheating.

Even if a reasonable person believed that no threat of misconduct still exists, this behavior is so flagrantly abusive that dismissal of the indictment is a proper remedy. What has transpired in this case is nothing short of a mockery to the concept of justice and to Mr. Brooks's life. There was no diligent investigation. There is no claim to ignorance. There is only a blatant violation of the law. Dismissal is the only remedy appropriate to cure the state's egregious and ongoing horrendous course of criminal conduct.

IV. Mr. Brooks is being selectively prosecuted.

To establish a claim of selective prosecution, a defendant must make a *prima facie* showing that: (1) although others similarly situated have not generally been prosecuted because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) the government's discriminatory selection of him has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations, or the desire to prevent his constitutional rights.²²²

Mr. Brooks was one out of six potential defendants to this case.²²³ Ms. Cook and Mr. Hourshad were initially charged in connection to the 2012 shooting, but their charges have since been dismissed. Mr. Kazee has never been charged in connection with this crime, nor has Ms. Hederson or Ms. Preece. The Harris County District Attorney's Office promised leniency and immunity from prosecution to these five witnesses. The Office even paid three of the witnesses to testify. The state could have tried to charge everyone involved, but has chosen to only prosecute Mr. Brooks and Mr. Bailey. Thus, the state has singled out Mr. Brooks as a defendant.

Not only has Mr. Brooks been singled out, but the prosecution has tried to prevent Mr. Brooks from exercising his constitutional rights. As noted above, Mr. Brooks's due

²²² Hall v. State, 137 S.W.3d 847, 855 (Tex. App. – Houston [1st Dist.] 2004, pet. ref'd) (citation omitted); Garcia v. State, 172 S.W.3d 270, 273–74 (Tex. App. – El Paso 2005).

²²³ Defendant incorporates the above prosecutorial misconduct argument into this section

process rights have been inexcusably violated. The state has sought to prosecute Mr. Brooks by purchasing testimony and concealing evidence from his counsel. For reasons unknown, the state has selected Mr. Brooks as a target for malicious and egregious prosecution. Therefore, Mr. Brooks is being selectively prosecuted.

V. Mr. Brook's right to a disinterested prosecutor has been violated.

"[T]he due process rights of a criminal defendant are violated when a prosecuting attorney who has a conflict of interest relevant to the defendant's case," such as a personal interest or "a financial stake in the outcome of a prosecution," prosecutes the defendant.²²⁴ To demonstrate a due process violation, a defendant must show either that the conflict interfered or there is a substantial threat that it could interfere with the fairness of the proceedings.²²⁵ If a prosecutor has any interest that is inconsistent with a prosecutor's duty "not to convict, but to see that justice is done", a due process violation will occur.²²⁶

The Harris County District Attorney's Office is now an interested party in Mr. Brook's case. Every prosecutor in the office is effected by overall perception of the administration. As noted above, this office firmly believes that no misconduct has occurred

²²⁴ See *In re Guerra*, 235 S.W.3d 392, 429-431 (Tex. App. - Corpus Christi 2007, orig. proceeding) (a violation occurs where the "potential for misconduct is deemed intolerable").

²²⁵ *State v. Terrazas*, 962 S.W.2d 38, 41-42 (Tex. Crim. App. 1998) ("substantial threat" of prejudice is sufficient); see also *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 n.18, 811 (1987) ("actual conflict" exists where the "potential for misconduct is deemed intolerable," regardless of "whether that conflict resulted in any actual misconduct.")

²²⁶ See *In re Guerra*, 235 S.W.3d at 430.

and has even lied to try to cover up ADA Seely's misconduct. Thus, the entire office, and any prosecutor on this case, will strive to cover up the misconduct by over-zealously prosecuting Mr. Brooks. The interest of defending ADA Seely egregiously interferes with the prosecutor's primary duty "not to convict, but to see that justice is done". This office will use a conviction to try to justify ADA Seely's misconduct. Therefore, there exists a conflict of interest that violates Mr. Brooks due process rights.

VI. Mr. Brooks is entitled to an evidentiary hearing to investigate the claims of prosecutorial misconduct

The Fifth Circuit has held that a trial court is constitutionally required to hold evidentiary hearings to investigate claims of prosecutorial misconduct if the defendant has "presented facts sufficient to create reasonable doubt about the constitutionality of his prosecution[.]"²²⁷ Texas courts have follow this law and even require prosecutors to testify at the hearing.²²⁸

²²⁷ *United States v. Webster*, 162 F.3d 308, 334 (5th Cir. 1999); see also *Goldberg v. Kelly*, 339 U.S. 254, 269-70 (1970) (In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses")

²²⁸ See, e.g., *Terrazas*, 970 S.W.2d at 160 (Tex. App. – El Paso 1998), *aff'd*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (prosecutor testified at evidentiary hearing on motion alleging prosecutorial misconduct); *Frye*, 897 S.W.2d at 331 (Tex. Crim. App. 1995) (same); *Landers v. State*, 256 S.W.3d 295, 300–01 (Tex. Crim. App. 2008) (same); *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals at Texarkana*, 236 S.W.3d 207, 209 (Tex. Crim. App. 2007) (same); *Eleby v. State*, 172 S.W.3d 247, 249 (Tex. App. – Beaumont 2005, pet. ref'd) (same).

Mr. Brooks has made a prima facie showing of prosecutorial misconduct with his first motion. Defendant incorporates all arguments and factual allegations made in his response. The facts presented his answer to the state's response demonstrate a reasonable doubt as to the prosecution of this case. Thus, Mr. Brooks respectfully requests this Court to set this matter for a hearing.

CONCLUSION

The *Brady* violations and prosecutorial misconduct in this case are egregious. For eight months, the State intentionally concealed evidence and misled the defense by asserting that all discovery had been turned over. Their untimely disclosure has irreparably prejudiced Mr. Brooks' right to effective representation and to a speedy and fair trial. Defense counsel has exhausted all of its resources and spent valuable trial preparation time investigating and uncovering *Brady* evidence and evidence that the prosecution presented perjured testimony.

The State has done great violence to Mr. Brooks's constitutional rights. Even if there is no finding of harm, the State's wild and flagrant behavior is so incredulous that dismissal of the indictment with prejudice is the appropriate remedy. In the event that the indictment

is not dismissed, the court must seek to protect and preserve the administration of justice. The State's behavior is indisputably unethical and must be stopped. This administration cannot be trusted to handle this case appropriately.

Mr. Brooks respectfully requests that this Court grant his motion and dismiss this indictment with prejudice.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this motion was served on a lawful representative of the Harris County District Attorney by hand delivery on December 4, 2015.



Paul Morgan