NO. 2015-CR-4203

EX PARTE	)	IN THE DISTRICT COURT
	)	437TH JUDICIAL DISTRICT
MIGUEL MARTINEZ	)	BEXAR COUNTY, TEXAS

APPLICANT'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE W.C. KIRKENDALL, SENIOR JUDGE:

I.
Proposed Findings Of Fact

1. Miguel Martinez is charged by indictment with the offense of murder, alleged to have been committed on or about January 11, 2015. He is currently an inmate at the Bexar County Adult Detention Center where he has been continuously confined since his arrest on January 21, 2015 in lieu of bail set in the amount of $250,000.00.

2. In early March, 2015, Jason Goss, first-chair prosecutor in the 437th Judicial District Court instructed his second-chair prosecutor to read and familiarize herself with the approximately 50-page prosecution guide and other materials in the case file to help him prepare it for presentation to the Bexar County Grand Jury, and to assist him at trial.

3. The next day the second-chair prosecutor returned the file to his office, and shut the door, explaining that she was "embarrassed" and "mortified" because some three years before she had had a sexual encounter with Gregory Dalton, a witness whose name appeared in the file. The two prosecutors agreed that she could not continue on the case. [4RR–33] She asked that, if possible, no one else be notified, and Mr. Goss agreed. Acting unilaterally and motivated, he says, by a desire to protect his colleague, he constructed a "firewall" and had no further conversations with his colleague about the case. [2RR—4] "To [his] knowledge [she] has not contacted Dalton, and he has not contacted her." [2RR—5] To this day Mr. Goss has not questioned her further about her relationship with Dalton, or about anything she may or may not have had to do with this murder investigation.

4. Miguel Martinez retained attorneys Joe Gonzales and Christian Henricksen on or about January 26, 2015 and they have represented him continuously from that date to the present.

5. On July 29, 2015, the defense filed its Motion For Discovery Of Exculpatory And Mitigating Evidence that relied on *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); the Due Process of Law Clause of the Fourteenth Amendment to the United States Constitution; the Due Course of Law provisions of Article I, §§ 13 and 19 of the Texas Constitution; and Rule 309(d) of the Texas Disciplinary Rules of Professional Conduct. This motion was granted on January 19, 2017. [Defendant's Exhibit W3]

6. Mr. Martinez's case was set for trial to begin on February 7, 2017. District Attorney Nicholas LaHood expressed interest in sitting on the case, and about a month before the trial date, Mr. Goss dropped off a trial notebook for Mr. LaHood's use.

7. Mr. Goss and Mr. LaHood interviewed Gregory Dalton on Tuesday, January 31, 2017 for approximately three hours.

8. As his colleague had requested, Mr. Goss told no one else of her sexual relationship with Dalton for almost two years. Sometime during this interview Mr. Goss concluded that Dalton was a significant witness in the case, and that he needed to "talk to about with other people because I can see now how there can be an issue, and that's when we talked." [4RR–34-35]

9. Mr. Goss told District Attorney LaHood immediately after the interview, but did not tell anyone on the defense team at this time. District Attorney LaHood testified that he called Enrico Valdez, the chief of his appellate section, the night of the interview. According to Mr. LaHood, Mr. Valdez said that it did not sound like something that needed to be disclosed, but he would research it.

10. The January 31, 2017 meeting is the only meeting Mr. LaHood and Mr. Goss had with Mr. Dalton. They did not then question Mr. Dalton about the sexual encounter, nor have they done so since that interview. Nor has either man questioned the second-chair prosecutor, then or since.

11. On February 1, 2017, Mr. Goss delivered a written "Brady Notice for Defense," in which he advised that Dalton had disclosed information during the interview on the 31st that he had previously kept from the police. The notice made no

mention of the relationship between prosecutor and witness that Mr. Goss had known about for approximately two years. [Defendant's Exhibit W7]

12. When he received the written notice, defense lawyer Christian Henricksen asked Mr. Goss if he had any other exculpatory information to disclose. Mr. Goss said he did not.

13. Jury selection was to begin the following week, on February 7. According to Mr. LaHood, the matter was not urgent to him, but on either Thursday (February 2) or Friday (February 3), Mr. Valdez "tracked him down" and told him that he and Patrick Ballantyne, the Ethical Disclosure Division chief, had concluded that he did not need to disclose the information to the defense, but if he wanted to do something, he could disclose it in camera to Judge Valenzuela. Mr. LaHood did no research on his own, and he was not provided with anything in writing from Mr. Valdez or Mr. Ballantyne. Neither Mr. Valdez nor Mr. Ballantyne testified at the habeas hearing.

14. According to Mr. LaHood, Mr. Goss was the prosecution's point of contact with the defense. Mr. LaHood did not tell Mr. Goss what Mr. Valdez and Mr. Ballantyne had told him, but instead assumed that Mr. Goss himself was talking with them. Mr. LaHood did not tell Mr. Goss to make the disclosure to the defense. Mr. Goss did not do any research specific to the disclosure issue in this case.

15. On Tuesday, February 7, 2017, Court convened at 10:15 am to consider pretrial matters. Mr. Goss signed and presented the Discovery Acknowledgment required by article 39.14(i) of the Texas Code of Criminal Procedure to the Court. Although the acknowledgment is lengthy and detailed, it makes no mention of the sexual relationship between the prosecutor and Dalton. [Defendant's Exhibit W10]

16. Despite having now had a team of lawyers, including the District Attorney himself, considering the issue for a week, the prosecutors said nothing to the defense about their colleague's relationship with star witness Dalton. Jury selection commenced on February 7 at 11:44 am, and concluded at 7:48 pm, and still, no mention was made of the relationship.

17. The Court convened the next day, Wednesday, February 8, around 10:00 am. Prosecutor Goss came to Court with his colleague, Mr. Ballantyne, and they filed the *State's Motion For Ex Parte Communication And In Camera Consideration*

Of Potential Conflict Issue and provided a copy to Mr. Henricksen. [Defendant's Exhibit W4]

18. The motion was presented to Judge Valenzuela, and as it requested, an *ex parte* hearing was held, attended by the Judge and Mr. Goss. The hearing was transcribed and introduced at the habeas hearing as Defendant's W1-b.

19. One alternative eventually suggested by Mr. Goss was a "gag order" that would allow disclosure to the defense, but would also protect against the gratuitous disclosure of the identity of the second-chair prosecutor to "just random people." He admitted about Mr. Gonzales and Mr. Henricksen that,"I don't know that either one of them would do that. . . . I don't think that they would object if the Court does order something like that." [2RR–14-15] The Court agreed to contemplate that and other possible remedies, and also agreed that "I will take the responsibility for the delay in disclosure." Then the Court gave this advice to Mr. Goss: "I wouldn't put yourself -- that's my -- I'm just giving you my advice. I wouldn't wait any longer in a situation where you've already been -- or there's already a record out there where the defense has suggested stuff is just being turned over at the last minute." Mr. Goss agreed. [2RR-17-18]

20. Judge Valenzuela did not at this or any other time order Mr. Goss not to disclose the information to the defense.

21. After the *ex parte* hearing concluded Mr. Goss disclosed to the defense, for the very first time, that an unnamed person in the District Attorney's Office had formerly had a sexual relationship with its witness Gregory Dalton. Mr. Goss did not divulge the name of the prosecutor, or, despite its obvious relevance, that she had once prosecuted in the 437th, and that she had actually been given access to the prosecution's file in this case.

22. At the time of this partial disclosure, the defense was preoccupied with beginning a murder trial. Not knowing the name of the prosecutor, or that she had been assigned to the 437th and had access to the case file, the defense was not then overly concerned.

23. At 11:33 am the jury was sworn, and at 11:40 am, Mr. Goss commenced his lengthy, detailed opening statement. Among other things, Mr. Goss conceded that Mr. Dalton "has issues," and that even though there was evidence suggesting Dalton's involvement in this murder, that should not concern the jury because

whatever Dalton did, Mr. Martinez was still guilty under the law of parties. [3RR–26-31]

24. The defense did not make an opening statement. The state called its first witness, Luis Castillo, at 12:18 pm, and conducted direct examination until 12:42 pm, when the Court recessed for lunch. [3RR—45-73]

25. Judge Valenzuela regarded the prosecutor's "position in the Court [as] a necessary detail." [4RR–8] Accordingly, sometime after lunch, Judge Valenzuela ordered Mr. Goss to tell the defense everything, and for the first time, and only after being ordered to do so by the Court, the prosecution finally disclosed to the defense what it had known for almost two years: A certain prosecutor, formerly the second-chair prosecutor in this Court who had actually worked on the case for at least one day with full access to the file, had once been sexually involved with Gregory Dalton, a crucial witness for the state against Miguel Martinez.

26. The State called two more witnesses on February 8 – Cynthia Garza and San Antonio Police officer Mike Wehe – and then the Court recessed for the day at 4:10 pm. [3RR—98; 119-143]

27. At 8:40 pm, Mr. Henricksen sent an email to the Court and the prosecutors expressing "a lot of concerns with what was discussed in chambers today" and that the defense would file a motion for continuance the following day "requesting one day to figure out what we need to do to address this issue." The Court advised the parties that it was "going to grant that request." Mr. Goss responded: "Thank you. However you want to handle it is ok with us." Judge Valenzuela wrote that she would "see the parties tomorrow at 9:45-10 (as planned) to formally hear Motion." Mr. LaHood asked permission for Mr. Goss to handle the hearing without him since he had "a lot of office business to attend to." He closed by thanking Mr. Henricksen "for the heads up." [Defendant's Exhibit W11]

28. On February 9, 2017 the defense filed a Motion For Continuance [Defendant's Exhibit W5]. The motion was granted without objection from the State, and the case was continued until the following Tuesday, February 14. Following the hearing on the 9th, there was a conference in chambers before Judge Valenzuela, attended by Mr. Gonzales, Mr. Henricksen, and Mr. Goss. [4RR—4]

29. At this conference, Mr. Gonzales and Mr. Henricksen explained to Judge Valenzuela that this was a unique event, and that they needed to consult with

appellate lawyers, and then to conduct a legal and factual investigation to determine how best to protect Mr. Martinez's rights. [4RR–6, 18] Had the information been disclosed earlier, the defense "would have conducted an independent investigation and may not even have -- had to have this discussion." [4RR—17] Judge Valenzuela offered to appoint an investigator to assist the defense's investigation. [4RR—25] Private investigator James McKay was later appointed.

30. Later that same day, Mr. Gonzales and Mr. Henricksen contacted Mark Stevens. A few minutes into their meeting, Mr. Goss texted Mr. Henricksen and requested a meeting in the Court's chambers. Mr. Gonzales, Mr. Henricksen, and Mr. Stevens were present for the defense; Mr. Goss, Mr. LaHood, Mr. Valdez, and Mr. Ballantyne were present for the State.

31. Mr. LaHood complained that the defense had created a "shit-show" by filing a motion for continuance and handling it in open court. He was unhappy because the media had been calling him about the continuance. Judge Valenzuela disagreed that the defense's handling of the motion for continuance was improper in any way.

32. District Attorney LaHood then announced that he would agree to a mistrial. He was the first person to mention mistrial in this case. He said he would pick a better jury and be more prepared for trial. Mr. Gonzales responded that a mistrial alone might not be enough, that the defense would have to investigate whether there had been prosecutorial misconduct involved with the untimely disclosure. Mr. Gonzales spoke in a normal tone of voice, professionally, courteously, and made no threats.

33. Immediately after Mr. Gonzales raised the possibility of "prosecutorial misconduct," District Attorney LaHood angrily threatened Mr. Gonzales and Mr. Henricksen, telling them, "I will shut down your practice."

34. District Attorney LaHood also said that he would destroy their practices and would make sure they never got hired on another case again in Bexar County. He said he would go to the media and do whatever it took, and that he did not care what happened to him.

35. This outburst was started by Mr. LaHood. Mr. Gonzales had merely announced his intention to investigate the need for pursuing a lawful remedy and made no threats at any time to Mr. LaHood, nor did he do anything to provoke the outburst. Mr. Gonzales did not threaten to file any pleading in bad faith, or to go

to the media.

36. Mr. Gonzales and Mr. Henricksen considered Mr. LaHood's remarks as direct and serious threats, both to their abilities to effectively represent Miguel Martinez and other clients in San Antonio, and to their economic well-being. They both believed then, and still do, that the District Attorney of Bexar County is capable of carrying out the threats that he made.

37. Judge Valenzuela feared that physical violence might erupt and did not believe that District Attorney LaHood had controlled his temper properly. The clerks assigned to the Court overheard Mr. LaHood's voice through the closed doors, and asked Judge Valenzuela if she was all right after the meeting had concluded.

38. On February 10, 2017, an off-the-record conference was held before Judge Valenzuela in chambers and was attended by Mr. Goss, Mr. Gonzales, and Mr. Henricksen. Mr. Gonzales told Mr. Goss that District Attorney LaHood's words had had a chilling effect on him. Judge Valenzuela said the words had had a chilling effect on her as well. She also told Mr. Goss that Mr. LaHood was lucky he had not awakened that morning to headlines saying that the DA had threatened local defense attorneys.

39. Mr. LaHood testified at the habeas hearing and unequivocally denied threatening to shut down the practice of Mr. Gonzales and Mr. Henricksen. Judge Valenzuela testified unequivocally that he did make the threat, and Mr. Gonzales and Mr. Henricksen agreed. Mr. Lahood testified that Mr. Gonzales threatened first, and that what he said thereafter was only because he "punched back." Judge Valenzuela, Mr. Gonzales, and Mr. Henricksen all denied that Mr. Gonzales threatened Mr. LaHood at all, or that he acted inappropriately. The Court finds that Mr. LaHood's testimony was not credible.

40. On February 13, 2017, the second chair prosecutor was interviewed at the District Attorney's office. Present at the interview were assistant district attorney Enrico Valdez, defense investigator James McKay, and defense counsel Gonzales and Henricksen. The second-chair prosecutor admitted that she had recognized Gregory Dalton by his nickname (Vegas) and by his picture, immediately upon reading the prosecution guide. She acknowledged meeting him on a dating site, and thought she may have gone out with him once or twice. She could not recall whether she had had sex with Dalton. She said she had had no contact with Dalton since their encounter, and that she had no contact with the file since reporting her relationship to prosecutor Goss in March of 2015. The defense believed her responses were somewhat deceptive,

primarily because she refused to unequivocally admit a sexual relationship with Dalton, and also because of other discrepancies between the version she gave, and that given them by Mr. Goss on February 8, 2017.

41. On February 14, 2017, the Court convened and established that all jurors would be able to continue on with the trial even though it might now last longer than originally contemplated. [Defendant's Exhibit W1-e]

42. On February 15, 2017, Mr. Gonzales invited assistant district attorney Jay Norton to his office to discuss possible solutions for resolving this case that might be satisfactory to all. No solutions were reached.

43. On February 16, 2017, Court convened again, and the defense moved for a mistrial. Counsel for Mr. Martinez made it clear that they did not want to move for a mistrial, but felt forced to do so, to protect Mr. Martinez's constitutional rights to effective assistance of counsel, in light of the prosecution's untimely disclosure of exculpatory evidence. The defense informed the Court that, "depending on the Court's ruling, of course, and whatever the State decides to do next, we may well have to come back to Court with further motions that are meant and are necessary to protect further rights of Miguel Martinez, including his right to be free from double jeopardy." [6RR—5] The prosecution refused to agree that it had done anything to force the defense to move for a mistrial, but it agreed with and did not oppose the motion for mistrial. [6RR—6] The motion was granted [6RR—6] and later the trial was scheduled for May 15, 2017.

44. From the time of his appointment, Defense Investigator James McKay made numerous efforts to set up a meeting with Gregory Dalton. Finally Mr. McKay was able to speak with Mr. Dalton's attorney. Although this lawyer would not agree to a face-to-face meeting between the defense and her client, a telephone conference was held on April 11, 2017. Mr. Dalton admitted to having had sex several years previously with a woman who met the description of the second-chair prosecutor. He said they met on a dating website, that it was a one-time encounter in the backseat of her car, and that he had had no contact with her since that time.

45. Prosecutors Goss and LaHood both testified at the habeas hearing that they liked the jury they had chosen, they believed their case against Mr. Martinez was strong and that they never wanted a mistrial.

46. Defense lawyers Gonzales and Henricksen both testified that they liked the jury

they picked, before learning of the sexual relationship between the second-chair prosecutor and Dalton, and that they did not initially want a mistrial, because they had geared up for trial, and Mr. Martinez had already spent two years in custody. They did not move for a mistrial until February 16, 2017 and only did so then because, after investigating the facts and the law, they believed it was the only remedy adequate to protect their client's rights to effective assistance of counsel.

47. Among other things, they explained that they would have had different questions of the venire, and would have exercised their cause and peremptory challenges differently, had they known about the relationship before the jury was selected. And they would have investigated further the relationship between the prosecutor and the witness beyond what those two disclosed during their interviews.

48. On March 6, 2017, Miguel Martinez filed a Pretrial Application For Writ Of Habeas Corpus pursuant to articles 11.01, 11.05, 11.08 and 11.23 of the Texas Code of Criminal Procedure, and Article V, § 8 of the Texas Constitution, and moved to bar trial on this indictment because it is prohibited by the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 14 of the Texas Constitutions.

49. The Honorable Lori I. Valenzuela, Presiding Judge in the 437th Judicial District of Bexar County, Texas voluntarily recused herself, and the Honorable W.C. Kirkendall was appointed to preside over this case.

50. Evidentiary hearings were had on the Pretrial Application For Writ Of Habeas Corpus on April 12 and April 17, 2017. Among other things, a record of all proceedings transcribed by the official court reporter was admitted into evidence, and the Court took Judicial Notice of its file.

51. Gregory Dalton is a critically important witness for the prosecution. His importance to the case is what spurred Mr. Goss to tell Mr. LaHood about the relationship on January 31, 2017. [4RR–34] The very next day Mr. Goss advised the defense that Dalton would testify that Mr. Martinez had told him of his plan to murder the complainant a month before her death, that he offered Dalton money to help, and that he later confessed the murder and paid him money for his limited assistance. [Defendant's Exhibit W7] Mr. Goss spent at least six pages in his opening statement talking about Dalton, explaining how Mr. Martinez chose him to help with the murder; that, "right after the gunshot," eyewitness Luis Castillo saw a vehicle matching the description of a

distinctively decorated van driven by Dalton; that Mr. Martinez had admitted shooting the complainant five times in the head; that Dalton was paid $400.00 for his assistance; that Dalton had lied to the police; and that it would be of no concern to the jury, because whether he himself committed the murder or merely helped commit it, Mr. Martinez was still guilty under the law of parties. [3RR25-31] Judge Valenzuela correctly characterized him as a "star witness" and prosecutor Goss agreed with her, calling him a "very strange person" who "has information about the murder that no one else could know unless Dalton committed the murder, was present for the murder or was told by the defendant after the murder. And that's the State's theory." [2RR—11] Mr. Goss agreed that the defense would certainly be entitled to a jury instruction on accomplice as a matter of fact, and probably as a matter of law. Mr. Gonzales and Mr. Henricksen testified that conviction of Mr. Martinez would not be possible without Dalton's testimony.

52. Judge Valenzuela immediately recognized that the information at issue here – that a prosecutor who had worked on this case once had a sexual relationship with a crucial witness – was favorable evidence material to the guilt or innocence of Miguel Martinez. Accordingly, she ordered its disclosure soon after it was brought to her attention. Prosecutor Jason Goss repeatedly agreed during the two recorded chambers hearings that the information was exculpatory: "So there is impeachment value. . . . the defendant has the right, as the Court has pointed out, to impeach a witness for that relationship." [2RR–12-13]; "It's never been our position -- it's always been our position . . . that it has a possibility for impeachment"; "we understand, based upon *Brady*, based upon Michael Morton that there is the possibility of impeachment"; "It's never been our position that it's not possible to impeach." [4RR–12]; "I understand that you guys have an issue with the disclosure and I'm not going to argue with that. I understand it. If I can do it over again, I might have disclosed it earlier because -- because of all of this." [4RR–34].

II.
Proposed Findings Of
Law

1. This Court finds that the prosecution was constitutionally obligated to timely disclose to the defense the information it knew about the relationship between the second-chair prosecutor and the witnss Gregory Dalton. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675-78 (1985)(impeachment evidence falls under *Brady*).

2. Impeachment evidence is that which is offered "... to dispute, disparage, deny, or contradict...." *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

3. As Judge Valenzuela found, the defense could have used this information to impeach Gregory Dalton because the relationship was probative of his bias and motive for testifying for the State. "I can't ignore what Mr. Dalton is coming to the table with. And he's coming, in my mind, with some pretty good information for the State. So just kind of know where I'm coming from also with regards to why I feel like it's so important that this gets explored and investigated. And I think even the State agrees with that." [4RR–23-24] Indeed, the state did not disagree then, and it should not be heard to do so now. Under the Sixth Amendment, "[t]he partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Rule 613(b) of the Texas Rules of Evidence also allows parties to impeach witnesses for bias and interest. *Hammer v. State*, 296 555, 563 (Tex. Crim. App. 2009) ("generally speaking, the Texas Rules of Evidence permit the defendant to cross-examine a witness for his purported bias, interest, and motive without undue limitation or arbitrary prohibition"); *see also Daywood v. State*, 248 S.W. 2d 479, 484 (Tex. Crim. App. 1952)(prosecutor was properly allowed to show the personal relationship between the witness and the appellant because "it was relevant for the purpose of showing her bias and friendship and close relationship to appellant, and her interest in testifying in his behalf, and consequently, as touching her credibility").

4. In addition to its impeachment potential, evidence that a prosecutor who had worked on the case had once had a sexual relationship with a critical state's witness in the case is exculpatory for its tendency to raise substantial and legitimate questions about the integrity of the investigation. As prosecutor Goss conceded to Judge Valenzuela, and as he advised the jury during his opening statement, there was evidence in the case to support the prosecution of Gregory Dalton for murder either as a party or principal. [2RR.—11-12; 3RR—30-31] Mr. Henricksen testified at the habeas hearing that even before learning of the relationship, he could not understand why Dalton had not been charged, given the evidence against him. And contrary to Mr. Goss's suggestion in his opening statement that Dalton's guilt was "not your concern," a

reasonable jury might well have had the same question that Mr. Henricksen had. Evidence that Dalton had once had a relationship with one of the prosecutors on the case may have caused legitimate concern over the integrity of the investigation and prosecution of Miguel Martinez. *See Kyles v. Whitley*, 514 U.S. 419, 448 (1995)(considering the potential of undisclosed evidence "to undermine the ostensible integrity of the investigation"). And denials of impropriety by both the prosecutor and Dalton would not impair the defense's right to ask questions before the jury. It is not for the Court to "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." *Davis v. Alaska*, 415 U.S. 308, 317 (1974). Indeed, "[a]n unbelievable denial of the existence of a fact can be even more probative as to lack of credibility than an affirmative admission of the fact." *Spain v. State*, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979).

5. Disclosure was also required under TEX. CODE CRIM. PROC. ANN. art. 39.14(h), which went into effect before this case arose, and is even more comprehensive than *Brady*, because it requires the State to disclose any exculpatory, impeachment, or mitigating information that tends to negate the guilt of the defendant, without regard to materiality or the "the anticipated impact of the information on the outcome of a trial." *Schultz v. Commission For Lawyer Discipline Of The State Bar Of Texas*, 2015 WL 9855916 *10-11 (State Board of Disciplinary Appeals 2015).

6. The prosecutors were also obligated to disclose the information under Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct, which requires "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."

7. The Court finds that the disclosure of impeachment and exculpatory evidence was not made in time for the defense "to put it to effective use at trial." *Little v. State*, 991 S.W.2d 864, 867 (Tex. Crim. App. 1999). Here the State intentionally failed to disclose impeachment evidence to the Court until after the jury had been selected, and because of this delay, full disclosure was not made until the jury was sworn, opening statements had been made and deferred, and at least one witness had testified. *See O'Rarden v.* State, 777 S.W. 2d 455, 459 (Tex. App.—Dallas 1989, pet. ref'd)(Brady evidence disclosed during trial was untimely where the defense made a showing that the timing adversely affected its strategy in preparation and presentation of the

case").

8. Judge Valenzuela correctly recognized another problem with the timing that put "defense counsel in a very unique position. . . . It's very difficult to tell your client after a jury has been sworn in, look, this was just disclosed right now to us and this is what we are going to do because now your client is kind of feeling like, whoa, whoa, whoa, are y'all in cahoots with the State; because now you're just telling me about this and we've been -- I'm guessing, you know, kind of blaming Dalton all along or at least including him as an unindicted codefendant. So the Court appreciates -- and this is just a snippet of what I appreciate from the defense perspective. There is an ally in the room for Mr. Martinez right here, because I acknowledge there are so many things that are now going to impact this case because of the late disclosure. [4RR–22]

9. Finally, the State is in no position now to complain either that the evidence was not exculpatory or impeaching, or that the disclosure was timely. As he admitted at the habeas hearing, District Attorney LaHood was the first person in this case to suggest a mistrial. Later, when the motion for mistrial was made in open court, the State did not object, but in fact agreed that a mistrial should be granted, even though it was given express notice at the time that the defense was still investigating a challenge to retrial based on double jeopardy. [6RR—5-6] The State's actions – and inactions – at the times it would most be expected to act, constitute a concession that its earlier failure to disclose was untimely, and also estop the State from arguing otherwise now. *Cf. Druery v. State*, 225 S.W.3d 491, 506 (Tex. Crim. App.), *cert. denied*, 552 U.S. 1028 (2007)(" [i]f a party affirmatively seeks action by the trial court, that party cannot later contend that the action was error").

10. The Fifth Amendment's Double Jeopardy Clause says that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The double jeopardy prohibition of the Fifth Amendment "represents a fundamental ideal in our constitutional heritage," that applies to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

11. The Double Jeopardy Clause protects defendants from repeated prosecutions for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606 (1976). Part of the protection guaranteed to a defendant against multiple prosecutions, is the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

12. In *Oregon v. Kennedy*, 456 U.S. 667 (1982), after the state's witness testified that

he had never done business with the defendant, the prosecutor asked: "Is that because he is a crook?" The defense then moved for and received a mistrial. *Id*. at 669. When the state sought to retry him, Kennedy objected, asserting that retrial was barred under the Double Jeopardy Clause. The trial court denied the motion, finding that the prosecutor had not intended to cause a mistrial. The Oregon Court of Appeals reversed. A sharply divided decision by the United States Supreme Court reversed the Oregon court, holding that the Double Jeopardy Clause does not bar retrial in the absence of evidence of prosecutorial intent to goad the defense into moving for a mistrial. *Id*. at 679.

13. *Kennedy* turned on the intent of the prosecutor. "Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Oregon v. Kennedy*, 456 U.S. at 675. In this case, in contrast to *Kennedy*, it cannot be denied that the prosecution intentionally failed to disclose the evidence in question, and there is ample evidence of a specific intent to cause a mistrial.

14. In *Kennedy*, there was a single instance of misconduct that happened in the middle of a trial. "[T]here was no sequence of overreaching prior to the single prejudicial question. . . . Moreover, it is evident from a colloquy between counsel and the court, out of the presence of the jury, that the prosecutor not only resisted, but also was surprised by, the defendant's motion for a mistrial." *Oregon v. Kennedy*, 456 U.S. at 680 (Powell, J., concurring).

15. In the present case, the misconduct was much more than a single prejudicial question asked in the heat of trial. Instead, it comprised an undeniably intentional course of conduct extending for some two years prior to trial, and involved multiple members and specialized units of the Bexar County District Attorney's Office, – including the District Attorney himself – who consciously and deliberately decided not to disclose clearly exculpatory evidence for reasons having nothing whatsoever to do with the rights of the defendant.

16. Additionally – and crucially – unlike in *Kennedy*, there is no evidence that the prosecution was "surprised by" the motion for mistrial, or that the motion was "resisted." To the contrary, the District Attorney told the Court and the defense on February 9 that he welcomed a mistrial, predicted that he would pick a better jury next time, and promised that he would be more prepared for trial at that time. The State of Texas may not, consistently with the Constitution, intentionally withhold evidence that is obviously exculpatory for almost two years, select a jury, begin a trial, and then make an untimely disclosure of the evidence, thereby forcing the defense to move for a mistrial, with an end-result that "afford[s] the prosecution a

more favorable opportunity to convict." *Cf., Downum v. United States*, 372 U.S. 734, 736 (1963). But the only reasonable inference from the totality of facts and circumstances is that this is exactly what happened in Miguel Martinez's case. Should there be any doubt that this is in fact what happened, the doubt must be resolved "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Downum v. United States*, 372 U.S. at 738.

17. Retrying Miguel Martinez would violate the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution. *See State v. Yetman*, 2016 WL 7436645 *6 (Tex. App.–Houston [1st Dist.] 2016, no pet.)(not yet published)(affirming the trial court's decision to bar defendant's retrial where the evidence supported the trial court's findings that the prosecutor intended to goad the defense into moving for a mistrial).

18. Article I, § 14 of the Texas Constitution provides: "No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." Retrial is also barred in this case under Article I, § 14 of the Texas Constitution because the prosecution intentionally failed to timely disclose exculpatory evidence, thereby goading Mr. Martinez into moving for a mistrial.

19. *Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007), recognized the test established in *Oregon v. Kennedy* — that retrial is jeopardy-barred following a mistrial if the prosecutor goaded the defense into moving for a mistrial. The Court went on to find that *Kennedy* established an additional bar:

> [W]e are constrained to decide that the extensive portions of the record set out in this opinion support a finding that appellee's mistrial motions were necessitated primarily by the State's "intentional" failure to disclose exculpatory evidence that was available prior to appellee's first *trial with the specific intent to avoid the possibility of an acquittal.* Under *Oregon v. Kennedy*, this deliberate conduct, accompanied by this specific mens rea, bars a retrial. We are persuaded that, in a case like this, a defendant suffers the same harm as when the State intentionally 'goads' or provokes the defendant into moving for a mistrial.

Id. at 507-09 (citations omitted)(emphasis supplied).

20. The Court went on to find that the facts supported the trial court's finding that

Masonheimer's mistrial motions were necessitated primarily by the state's intentional failure to disclose exculpatory evidence with the specific intent to avoid the possibility of an acquittal. "Under *Oregon v. Kennedy*, this deliberate conduct, accompanied by this specific mens rea, bars a retrial. *Id*. at 507-08.

21. The parallels between *Masonheimer* and this case are strong and undeniable:

22. Here, as in *Masonheimer*, the defense sought exculpatory evidence well in advance of trial (July, 29, 2015), and the trial Court ordered disclosure on January 19, 2017, several weeks before the trial began. Furthermore, unlike *Masonheimer*, this case arose after January 1, 2014, and was governed by TEX. CODE CRIM. PROC. art. 39.14(h), which is even more demanding than the constitutional standard, requiring disclosure of "exculpatory, impeachment, or mitigating" evidence, without request, and without regard to its materiality or admissibility.

23. Here, as in *Masonheimer*, there is no dispute that the prosecutors intentionally failed to disclose the evidence in question. Mr. Goss admits that he became aware that his prosecutor had a sexual relationship with Dalton two years ago, and that he initially decided on his own that it did not need to be disclosed. When he finally told others in the office – namely, Mr. LaHood, Mr. Valdez, and Mr. Ballantyne – they apparently agreed, and they sat on the evidence for a week before disclosing it, not to the defense, but to the Court, and only then after the jury had been selected. Whatever motivated this failure to disclose, there can be no question that it was done intentionally, and after conscious deliberation and discussion. *See also Ex parte Masonheimer*, 220 S.W.3d 494, 509-10 (Tex. Crim. App. 2007)(Meyers, J., concurring)("The prosecutors may say that they did not want a mistrial, but if their actions were intentional rather than accidental or careless, and they should have known that a mistrial would be granted, then the *Oregon v. Kennedy* standard is met and retrial is jeopardy-barred. Rather than trying to determine the subjective intent of the prosecutor, we can objectively look at the actions of the State to determine if the actions were intentional.").

24. And, as in *Masonheimer*, there can be no legitimate question about the exculpatory value of the evidence in question, as this Court has already found. Mr. Goss himself seems to have recognized his error by the time of the in chambers hearing: "I understand that you guys have an issue with - with the disclosure and I'm not going to argue with that. I understand it. If I can do it over again, I might have disclosed it earlier because -- because of all of this."

[4RR—34] Unfortunately the prosecutor's belated realization comes too late to cure the constitutional errors in this case.

25. Key in *Masonheimer* was the prosecutor's specific intent to avoid the possibility of an acquittal. Such intent must always be proven circumstantially, and here two facts are particularly compelling. First, the timing of the disclosure, coming as it did, after the meeting with Dalton, and after the jury had been selected, is telling. The prosecutors were unable to give any plausible reason why they sat on the *Brady* information for a week and allowed the trial to start before disclosing it to the Court, *in camera*, and after the jury had been selected. One entirely logical explanation is that, despite their protestations to the contrary, they lacked faith in either their case or the jury, perhaps both, and made the disclosure when they did, after considering how that particular jury might react to their evidence, and to Dalton, with the specific intent to avoid the possibility of acquittal.

26. Second, when attempting to discover the intent of the prosecutors, it is relevant to consider the in-chambers threat made by the District Attorney. As Judge Valenzuela, Mr. Gonzales, Mr. Henricksen, and even Mr. LaHood testified, Mr. LaHood was completely agreeable to the mistrial, and indeed, he suggested it before anyone else did. But when Mr. Gonzales brought up prosecutorial misconduct, the District Attorney became enraged and made an outrageous threat against the defense team – to shut down their practices. In other words, Mr. LaHood was agreeable to, and even welcomed a mistrial, so that he could pick a better jury the next time and be more prepared. But when the defense suggested an investigation that might inevitably lead to dismissal with prejudice, Mr. LaHood felt it necessary to threaten the defense for pursuing this lawful remedy. A dismissal for prosecutorial misconduct coupled with a bar to retrial is the functional equivalent to an acquittal. That the elected District Attorney of Bexar County Texas would go to the extremes that he did in chambers on February 9 is strong evidence of his intent to avoid the possibility of acquittal.

27. Based on similar, but less egregious, facts, the Texas Court of Criminal Appeals barred retrial in *Masonheimer*, concluding that the motions for mistrial had been necessitated by the state's intentional failure to disclose exculpatory evidence, done with the specific intent to avoid the possibility of an acquittal. This Court makes the same finding in Miguel Martinez's case. Retrial is barred by the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution, and the indictment should be dismissed with prejudice.

28. Retrial is also barred in this case under Article I, § 14 of the Texas Constitution because the prosecution intentionally failed to timely disclose exculpatory evidence, with the specific intent to avoid the possibility of an acquittal. *Ex parte Masonheimer*, 220 S.W. 3d 494, 509 (Tex. Crim. App. 2007).

29. There is an additional reason why retrial is constitutionally barred in this case, based on facts unique to it, and not found in either *Kennedy*, or *Masonheimer*.

30. Prosecutor Goss told Judge Valenzuela that he believed disclosure of the information "could cause damage to [her] reputation . . . could harm her personally," and that he was "trying to avoid her reputation being impugned. . . ." [2RR—6, 12-13] However noble their intent – if it was noble – an intent to protect the reputation and standing of a friend and colleague demonstrably has absolutely nothing whatsoever to do with either the constitutional right of an accused to be free from multiple prosecutions, or a Texas prosecutor's duty to "see that justice is done." TEX. CODE CRIM. PROC. ANN. art. 2.01. This statute concludes by reminding us all that prosecutors "shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused."

31. Prosecutors may not avoid the consequences of their intentional failure to timely disclose exculpatory evidence by claiming that they did it, not to goad the defendant into moving for a mistrial, and not to avoid an acquittal, but to protect a colleague. In *Masonheimer*, the Court barred retrial believing, not that the prosecutor intended to goad the defense into moving for a mistrial, but instead that he specifically intended to avoid the possibility of an acquittal. To the Court, this was a distinction without a difference. "We are persuaded that, in a case like this, a defendant suffers the same harm as when the State intentionally "goads" or provokes the defendant into moving for a mistrial." 220 S.W.3d at 508-09.

32. The same reasoning also applies here. Whatever the prosecutors's motivations, Miguel Martinez suffers the same harm. The "State with all its resources and power," should not be permitted, in the name of protecting one of its own, to intentionally withhold exculpatory evidence until after the first jury is selected, and then get another opportunity to pick a better jury, and get more prepared, and in that improved posture make another attempt "to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *See Green v. United States*, 355 U.S. 184, 187-88 (1957).

33. Relief is granted, and the indictment against Miguel Martinez is dismissed with prejudice pursuant to the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution because the prosecution intentionally failed to timely disclose exculpatory evidence, with the specific intent to protect a fellow prosecutor.

34. Retrial is also barred in this case under Article I, § 14 of the Texas Constitution because the prosecution intentionally failed to timely disclose exculpatory evidence, with the specific intent to protect a fellow prosecutor.

Respectfully submitted:

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CERTIFICATE OFSERVICE

I certify that a copy of these Proposed Findings Of Fact And Conclusions Of Law has been delivered to the Bexar County District Attorney's Office in San Antonio, Texas, on this the 21st day of April, 2017.

/s/
MARK STEVENS