

CAUSE NO. CR- [REDACTED] -16-G

STATE OF TEXAS

* IN THE DISTRICT COURT

*

v.

* 370th JUDICIAL DISTRICT

*

[REDACTED]

* HIDALGO COUNTY, TEXAS

BRADY REQUEST Re: 10/19/16 CPS Letter

TO THE HONORABLE JUDGE OF SAID COURT:

The above DEFENDANT requests pursuant to *Brady v. Maryland*, 373 US 83 (1963) and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), for the court to order the state's prosecutor to disclose to defense following exculpatory, impeaching and/of mitigating evidence about the probable witnesses in this case:

1. produce a copy of ALL materials created or in possession of the State (documents, affidavits, police reports, CPS reports, etc.) pertaining to the 10/19/16 'ruled out' accusation mentioned in the 11/30/16 CPS Letter, attached hereto as Exhibit 1.
2. disclose to defense, pertaining to Exhibit 1, who the accuser is/was, to whom the accuser made the alleged outcry or outcries, the content of the accusation(s), any SANE which was performed as a result of the accusation, all persons to whom the accuser made disclosures.
3. all evidence of false statements by any witness to any person then employed by this prosecution's investigating law enforcement agency concerning anything related to the alleged matters in question herein.
4. all evidence of false statements by any witness to any person then employed by this Child Protective Services concerning anything related to the alleged matters in question herein.
5. all evidence of a favorable nature about the defendant being not guilty of the alleged charge from each witness who has information or knowledge about the facts underlying or making up the alleged crime described in the charging instrument in the above cause
7. all evidence which tends to justify, excuse, be exculpatory of or tend to clear the defendant from alleged guilt by tending to show that defendant was not intoxicated; and
8. all evidence that will dispute, disparage, deny, contradict or impeach any testimony or evidence, which the State intends to or will offer for admission during its case in chief.

9. which tends to justify, excuse, be exculpatory of or tend to clear the defendant from alleged guilt by tending to show that defendant's conduct herein was: the result of a mistake of fact that defendant did not intentionally possess a controlled substance at the time and place in question; and

10. that will dispute, disparage, deny, contradict or impeach any testimony or evidence, which the State intends to or will offer for admission during its case in chief; and

ARGUMENT: THREE DUTIES OF PROSECUTOR

Generally, a prosecutor has three distinct legal obligations under the due process clause of the United States Constitution. First, the prosecution must disclose all exculpatory evidence in its possession. See, e.g., *Brady v. Maryland*, 373 US 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Second, the prosecution must preserve and make available to the defendant any exculpatory physical evidence which the accused cannot otherwise obtain and which may be material to his defense. See, e.g., *California v. Trombetta*, 467 US 479, 488-89, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). Third, a prosecutor has a duty not to knowingly proffer perjured testimony and to correct any perjury of which he may become aware during trial. See, e.g., *Alcorta v. Texas*, 355 US 28, 31, 78 S.Ct. 103, 105, 2 L.Ed.2d 9 (1957).

The nature and scope of the prosecutor's ethical duties to disclose or preserve evidence under the Disciplinary Rules differ from the nature and scope of the same duties under the Due Process Clause. Moreover, the penalties for violations differ dramatically.

The Duty to Disclose Favorable Evidence: Due Process

1. In General

- ° The Due Process Clause of the Fourteenth Amendment is violated when a prosecutor fails to disclose evidence that is favorable to the accused which creates a probability sufficient to undermine confidence in the outcome of the proceeding. See, e.g., *Thomas v. State*, 841 SW2d 399, 404 (Tex.Cr.App. 1992).
- ° A defendant need not specifically request exculpatory evidence in order to trigger the prosecutor's obligation to disclose it, and a specific request does not alter the test for whether the prosecution has a duty to disclose it. See, e.g., *Thomas v. State*, 841 SW2d 399, 404 (Tex.Cr.App. 1992).
- ° The prosecutor's duty to disclose evidence is on-going. See, *Granviel v. State*, 552 SW2d 107, 119, (Tex.Cr.App. 1976), *cert. denied*, 431 US 933, 114 S.Ct. 2642, 53 L.Ed.2d 250 (1977); *Flores v. State*, 940 SW2d 189, 191 (Tex.App.--San Antonio 1996, no pet.).

2. The Three Part Test for Failing to Disclose Evidence

- The following three part test is used to determine when a prosecutor has violated the Due Process Clause by failing to disclose evidence. See, e.g., *Ex Parte Mitchell*, 853 SW2d 1, 4 (Tex.Cr.App. 1993), *cert. denied*, 114 S.Ct. 183 (1993).
- A defendant must prove all three prongs of the test in order to establish a due process violation. See, e.g., *Lagrone v. State*, 942 SW2d 602, 615 (Tex.Cr.App. 1997), *cert.denied*, 118 S.Ct. 305 (1997).

(a) **Has there been a failure to disclose evidence?**

- The duty to disclose extends to evidence in the possession of any member of the “prosecution team.” See, e.g., *Kyles v. Whitley*, 514 US 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995)[“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”].
- The state has an affirmative duty to seek out any favorable, material evidence in the possession of any member of the prosecution team and to deliver it to the defense. See, e.g., *Kyles v. Whitley*, 514 US 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).
- There is no “good faith” exception to the duty to disclose, so that a prosecutor may not later claim mere negligence or inadvertance in failing to disclose exculpatory evidence. See, e.g., *Kyles v. Whitley*, 514 US 419, 437-438 (1995).
- The state is not required to to disclose exculpatory evidence that the prosecution team does not have in its possession and that is not known to exist. See *Hafdahl v. State*, 805 SW2d 396, 399 (Tex.Cr.App. 1990) *cert. denied*, 500 US 948 (1991).
- The state is not required to disclose evidence that the State is not aware may benefit the defendant’s theory of the case, for the obvious reason that the State is usually not cognizant before trial of what the defense theory may be. See *Ragan v. State*, 887 SW2d 471. 473 (Tex.App.--San Antonio 1994, *pet. ref’d*).
- The State is not obligated to produce material that is in the public domain or otherwise available to the defendant. See, e.g., *Havard v. State*, 800 SW2d 195, 204-205 (Tex.Cr.App. 1989) [no duty to disclose where defendant was aware of his own prior statement to police]; *Jackson v. State*, 552 SW2d 798, 803-804 (Tex.Cr.App. 1977); *cert. denied*, 434 US 1047 (1978) [no duty to disclose where defense counsel had equal access to evidence]; *U.S. v. Newman*, 849 F2d 156, 161 (CA5 1988) [government

not obligated to produce witness's probation worksheet where document was part of public record].

(b) Is the evidence favorable to the accused?

- The test for favorability is whether the evidence, if disclosed and used effectively by defense counsel, may make the difference between conviction and acquittal. See *Mitchell* 853 SW2d at 4.
- “Favorable evidence” includes both “exculpatory” and “impeachment” evidence. See *Bagley*, 473 US at 676, 105 S.Ct. at 3380; *Thomas*, 841 SW2d at 404.
- “Exculpatory evidence” is testimony or evidence which “tends to justify, excuse, or clear the defendant from alleged fault or guilt.” See, *Thomas*, 841 SW2d at 403.
- “Impeachment evidence” is that which is offered “to dispute, disparage, deny, or contradict.” See *Thomas*, 841 SW2d at 404.

(c) Does the evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding, i.e., was the evidence “material”?

- Evidence withheld by a prosecutor is “material” if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. See *Lagrone v. State*, 942 SW2d 602, 615 (Tex.Cr.App.), *cert. denied*, 118 S.Ct. 305 (1997), (quoting *Ex Parte Kimes*, 872 SW2d 700, 702 (Tex.Cr.App. 1993)).
- The standard is that of “a ‘reasonable probability’ of a different result,” so that the issue “is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” See *Kyles*, 514 US at 434, 115 S.Ct. at 1566 (1995). A ‘reasonable probability,’ then, is a probability “sufficient to undermine confidence in the outcome of the trial.” See, *id.*, at 434, 115 S.Ct. at 1566.
- The test for materiality is *not* a test for sufficiency of evidence. See *Kyles*, 514 US at 434-435, 115 S.Ct. at 1566 (1995). [A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” Rather, he must simply show “that the favorable evidence could

reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict”].

- Materiality is determined by examining the alleged error in the context of the entire record and the overall strength of the State’s case. See *Lagrone*, 942 SW2d at 615-616; *Thomas*, 841 SW2d at 404-405.
- The suppressed evidence must be considered collectively, not item-by-item. See *Kyles*, 514 US at 436, 115 S.Ct. at 1567 (1995).
- Harmless error analysis is not applicable.

Respectfully submitted,

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By: _____
Lennard K. Whittaker
SBT 24008274
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Certificate of Service

I, Lennard K. Whittaker, affirm that a true and correct copy of the foregoing instrument has been delivered to:

Hidalgo County District Attorney

100 E. Cano

Edinburg, TX 78539

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Lennard K. Whittaker

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ORDER ON BRADY REQUEST Re: 10/19/16 CPS Letter

After consideration, it is ordered, adjudged and decreed by the Court that the State through this above case's prosecutor shall within 14 days of today both provide defense counsel with all the production requested by each of the above motion's paragraph nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Signed this ____ day of _____, 2016.

Judge Presiding

cc:

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