CAUSE NO. 12-0420-K26

IN RE	§	**IN THE 26th JUDICIAL**
HONORABLE KEN ANDERSON	§	**DISTRICT COURT OF**
(A COURT OF INQUIRY)	§	**WILLIAMSON COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

5. On February 17, 1987, following a two-week trial, a jury convicted Mr. Morton of Ms. Morton's murder, and assessed a punishment verdict of life in the Texas Department of Criminal Justice – Institutional Division.

6. Mr. Morton spent nearly 25 years in prison following his conviction.

7. On October 12, 2011, the Court of Criminal Appeals granted relief on a petition, filed pursuant to TEX. CODE CRIM. PROC. art. 11.07, to vacate Mr. Morton's conviction and sentence. The Court of Criminal Appeals granted relief in favor of Mr. Morton based on the findings of actual innocence entered by the Hon. Sid Harle, who sat by assignment in the post-conviction proceedings. *Ex parte Morton*, 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011.

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

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

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

The Instant Court of Inquiry

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

- "Criminal Contempt of Court": The report alleges that Mr. Anderson committed contempt, under TEX. GOV'T CODE § 21.002(a), by "failing to comply with Judge Lott's order to produce Sgt. Wood's complete set of reports and notes ('the Complete Wood Report') for *in camera* review."

- "Tampering With or Fabricating Physical Evidence": The report alleges that Mr. Anderson violated TEX. PENAL CODE § 37.09(a)(1), by "failing to turn over to Judge Lott the Complete Wood Report in order to keep those materials from Mr. Morton's defense and thereby impair the materials' availability as evidence."

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

Findings of Fact

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

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

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

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

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

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

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

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

8. Sgt. Wood copied Mr. Anderson as the "DA" on offense reports and supplements he prepared, including the abridged version of the "Kirkpatrick Transcript" created on August 24, 1986.[1]

[1] The transcript prepared from the recorded telephone conversation between Sgt. Wood and Eric Morton's maternal grandmother Rita Kirkpatrick regarding Eric observing a "monster" who was not his father and who hurt his mother, Christine Morton. ATP Exs. 6, 7.

9. Once Mr. Anderson was apprised of the abridged version of the Kirkpatrick Transcript, it is not credible that Mr. Anderson would not have immediately wanted to listen to the full recording and to read the full transcript.

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

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

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

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

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

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

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

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

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

19. Mr. Anderson refused to provide Mr. Morton's attorneys with information about Mr. Morton's voluntary statements to the sheriff's department, other

evidence favorable to Mr. Morton, and the written statements of witnesses who testified in pre-trial hearings.

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

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

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

Conclusions of Law

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

- Section 21.002 of the Texas Government Code Criminal, which details the offense of contempt of court;
- Section 37.09 of the Texas Penal Code, which details the charge of tampering with Physical Evidence; and,
- Section 37.10 of the Texas Penal Code, which details the charge of tampering with a Governmental Record.

A. Contempt of Court

1. The Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Thereafter the Court held that such disclosure is mandatory regardless of whether a defendant requests it, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that impeachment evidence must also be disclosed, *see Bagley*, 473 U.S. at 676; *Giglio*, 405 U.S. at 154.

2. As a threshold matter, it is clear to this Court that both the Green Van Report and the Kirkpatrick Transcript are *Brady* material. The information should have been provided to the defense, with or without the existence of a court order.

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

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

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

6. The issue, therefore, is whether Mr. Anderson's representation to the court, during the February 6, 1987 pretrial hearing that he had no information favorable to the accused, when in fact Mr. Anderson did have such information, supports a finding of constructive criminal contempt.

7. Texas courts enjoy broad authority to control the proceedings over which they preside. This power is set forth in both Texas common law and in various state legislative enactments.

8. By statute, a Texas court has "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction." TEX. GOV. CODE § 21.001(a).

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

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

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

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

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

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

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

behavior constituting contempt. *In re Bell*, 894 S.W.2d 119, 127 (Tex. Spec. Ct. Rev. 1995).

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

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

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

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

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

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

22. However, in this case, the court specifically asked Mr. Anderson during a pretrial hearing on the defendant's *Brady* Motion if Mr. Anderson had

"anything favorable to the accused," to which Anderson replied "No, sir." (ATP Ex. 20, RR 7:8838 at 8867). When he made this representation to the court, Mr. Anderson knew the State possessed the Green Van Report and the Kirkpatrick Transcript, and he knew that this evidence was favorable to the accused. Therefore, this Court finds that Mr. Anderson's statement is an intentional false representation to the trial court.

23. Unlike *Reece*, which involved a false representation during an out of court deposition, the false representation here occurred during a pretrial hearing. Moreover, that pretrial hearing sought to ferret out exactly what the court inquired of Mr. Anderson—whether the state possessed *Brady* material. Mr. Anderson's intentional false representation to the court, therefore, clearly obstructed the court in its consideration of the defense's motion for evidence favorable to Mr. Morton, which was presently before the court.

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

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

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

27. Further, even though federal contempt standards are more stringent than Texas standards, federal courts have held that "[l]ying to a judge is

certainly misbehavior in the court's presence and therefore punishable under [the federal contempt statute]. *U.S. v. Temple*, 349 F.2d 116, 117-18 (4th Cir. 1965).

B. Texas Penal Code § 37.09

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

29. The crime contains two different mental states—knowledge and intent. *Williams v. State*, 270 S.W.3d 140, 142 (Tex. Ct. Crim. App. 2008). An individual must know of an ongoing investigation or official State proceeding. *Id.* And, the statute requires "intent as to a particular result, namely, impairing a thing's availability as evidence." *Stewart v. State*, 240 S.W.3d 872, 873 (Tex. Crim. App. 2007). An individual acts with intent if it is his conscious objective or desire to cause the result of his conduct. *Id.* at 874. Alternatively, one intends to conceal physical evidence when an individual purposely acts "to affect the course or outcome" of an official proceeding. *Waldorp v. State*, 219 S.W.3d 531, 535-36 (Tex. Ct. App.—Texarkana 2007).

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

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

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

33. Under section 37.09, the term "conceal" means to hide, keep from disclosure, or to keep secret. *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000); *see also Lujan v. State*, 2009 WL 2878092, *2 (Tex. App.—Amarillo 2009)(unpublished).

34. Mr. Anderson had a Constitutional duty to disclose, whether or not defense counsel requested such items, exculpatory evidence or evidence that could be used to impeach witnesses. *See Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. at 676; *Giglio*, 405 U.S. at 154.

35. Defense counsel moved in writing, and orally, for the State to produce any and all interview statements and police reports favorable to Mr. Morton. (ATP Ex. 12; RR 7:86:55). If the State had items that could fall within the defense's broad request, but which Mr. Anderson did not think were exculpatory, defense counsel specifically moved for Mr. Anderson to provide those items to the court so Judge Lott could determine whether the items were mitigating evidence. (ATP Ex. 12; ATP Ex. 20, RR 7:8838 at 8866).

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

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

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

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

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

41. As a prosecutor of six years, Mr. Anderson knew his failure to disclose this evidence would impact the defense. Namely, he knew that without this exculpatory evidence Mr. Morton's defense had to proceed under a significant handicap and that a jury would likely convict Mr. Morton as the

case had no other suspects and no physical evidence pointed to other individuals.

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

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

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

C. Texas Penal Code § 37.10

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

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

47. The Green Van Report and the Kirkpatrick Transcript unquestionably fall within the statute's definition of "government records."

48. This statute, like section 37.09, requires the *mens rea* of intent. TEX. PENAL CODE ANN. § 6.03(a). Thus, an individual must have a conscious objective, or a desire, to conceal the availability of a governmental record. For an individual to be convicted of the felony version of this crime, the State must prove an additional *mens rea* requirement: that the defendant acted with the conscious objective to harm or defraud another by concealing the government record.

49. As evidenced by his singular focus upon Mr. Morton during the investigative and prosecutorial phase of the case, Mr. Anderson sought to convict Mr. Morton of murder. To achieve this goal, Mr. Anderson concealed government records to prevent defense counsel from using the exculpatory evidence during trial. Evidence of this appears in Mr. Anderson's testimony during the Court of Inquiry in which he admitted that while he knew of his requirements under *Brady*, as a prosecutor he had concerns about the pre-trial disclosure of exculpatory evidence to defense counsel as he did not want opposing counsel to "massage" evidence. (RR 6:116:18-6:117:4). Nor did Mr. Anderson want exculpatory evidence to lead to the release of a defendant in a case where other evidence demonstrated the defendant's guilt. (RR 6:94:4-24).

50. Circumstantial evidence may establish whether an individual acted with the intent to defraud or harm another. *Wingo v. State*, 143 S.W.3d 178, 187 (Tex. App. – San Antonio 2004), *aff'd* 189 S.W.3d 270 (Tex. Crim. App. 2006).

51. The Texas Penal Code defines the term harm as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." TEX. PENAL CODE ANN. § 1.07(A)(25). The Penal Code defines the phrase "intent to defraud" as the "'conscious objective or desire to cause another to rely upon the falsity of the representation, such that the other person is 'induced to act' or 'is induced to refrain from acting.'" *Wingo*, 143 S.W.3d at 187 (quoting jury charge and 41 TEX. JUR.3D FRAUD AND DECEIT § 9 (1998)).

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

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

54. Mr. Anderson's intent to defraud the court and defense counsel is demonstrated in Mr. Anderson's response to the trial court's inquiry as to whether he had any *Brady* evidence. Mr. Anderson answered, "No." His answer prevented the trial court from considering whether the Green Van Report and Kirkpatrick Transcript constituted exculpatory evidence and whether they were responsive to defense counsel's motion. Additionally,

Mr. Anderson's response prevented opposing counsel from reviewing and using the mitigating evidence during their defense of Mr. Morton.

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

D. Statute of Limitations Issue

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

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

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

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

Summary and Conclusion

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

1. Mr. Ken Anderson committed the offense of **Criminal Contempt of Court** by failing to comply with Judge Lott's order to produce Sgt. Wood's complete set of reports and notes ("the Complete Wood Report") for *in camera* review; and

2. Mr. Ken Anderson committed the offense of **Tampering With or Fabricating Physical Evidence** by failing to turn over to Judge Lott the Complete Wood Report in order to keep those materials from Mr. Morton's defense and thereby impair the materials' availability as evidence; and

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

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

JUDGE PRESIDING