

Appeal No. 55649

IN THE TEXAS BOARD OF DISCIPLINARY APPEALS

WILLIAM ALLEN SCHULTZ,

Respondent – Appellant

v.

COMMISSION FOR LAWYER DISCIPLINE,

Petitioners – Appellees

On Appeal from the Evidentiary Panel of District 14 Grievance Committee
No. D0121247202

BRIEF FOR APPELLANT

Attorneys for Appellant
Robert R. Smith, P.C.
Texas Bar No. 18752800
R. Ritch Roberts III
Texas Bar No. 24041794
Fitzpatrick Hagood Smith & Uhl, LLP
2515 McKinney Ave, Suite 1400
Dallas, Texas 75201
Tel: (214) 237-0900
Fax: (214) 237-0901
rsmith@fhsulaw.com

ORAL ARGUMENT REQUESTED



PARTY IDENTIFICATION

Evidentiary Panel:

Grievance Committee
District 14, Panel 3

Parties to this Proceeding:

Bill Schultz
c/o Denton County Criminal District Attorney's Office
Civil Division
P.O. Box 2850
Denton, TX 76202

Appellant

Commission for Lawyer Discipline
14651 Dallas Parkway
Suite 925
Dallas, TX 75254

Appellee

Counsel for the Parties:

Robert R. Smith
R. Ritch Roberts, III
Fitzpatrick Hagood Smith & Uhl LLP
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, TX 75201
(214) 239-0900
(214) 237-0901 fax

Counsel for Appellant

Linda Acevedo
Julie Liddell
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, TX 78711

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STATEMENT OF JURISDICTION

This action was brought by Appellee under Texas Rules of Professional Conduct 3.04(a) and 3.09(d) alleging that Appellant violated said rules. Appellant opted for an Evidentiary Hearing conducted by an Evidentiary Panel. Jurisdiction of the Evidentiary Panel is not at issue.

On October 15, 2014, the State Bar District 14 Grievance Committee Evidentiary Panel 14-3 conducted an Evidentiary Hearing in this matter. The Panel handed down a six month probated suspension. This judgment is a final and dispositive judgment. On November 21, 2014, Mr. Schultz filed a timely motion for new trial. On January 21, 2015, Mr. Schultz filed a timely notice of appeal. Appellate jurisdiction in this Board is sought Pursuant to Texas Rule of Disciplinary Procedure 7.08(d), authorizing appeals from final judgments of Evidentiary Panels, and under all other applicable jurisdictional provisions.

STATEMENT OF ORAL ARGUMENT

Appellant William Allen Schultz respectfully requests oral argument. Some issues raised in this case are matters of first impression and of considerable importance in that they involve the applicability of Texas Rules of Professional Conduct 3.04(a) and 3.09(d). Given the complexity of the issues in this case, Appellant believes that oral argument will be helpful for the Board. *See* Board of Disc. App. Internal Pro. R. 4.06.

STATEMENT OF ISSUES PRESENTED

1. Whether not turning over evidence is a violation of Texas rule of professional conduct 3.09(d) when that evidence tends to support a witness's identification of a defendant.
2. Whether not turning over evidence is a violation of Texas rule of professional conduct 3.09(d) when that evidence is neither unique, material, nor impeachment.
3. Whether Texas rule of professional conduct 3.09(d) is an incorporation or codification of the standard set forth in *Brady v. Maryland*.
4. Whether there was sufficient evidence introduced during the hearing to conclude Mr. Schultz violated both Texas Rule of Professional Conduct 3.04(a) and 3.09(d).
5. Whether an attorney has acted unlawfully for purposes of Texas Rule of Professional Conduct 3.04(a) when s/he does not have any intent to conceal documents or information from opposing counsel.
6. Whether an attorney obstructs another party's access to evidence for purposes of Texas Rule of Professional conduct when s/he did not disclose material that was not required to be disclosed by any rule or law.

7. Whether Texas Rule of Professional Conduct 3.04(a) is void on its face as being overly broad when the application of the rule does not establish a standard that provides attorneys guidance as to how to comply with the rule.

STATEMENT OF THE CASE

On February 13, 2012, Silvano Uriostegui pleaded guilty to the charge of aggravated assault with a deadly weapon, opting for the jury to assess punishment. Evid. Hr'g Tr. at 42-43. After clear and substantial admonishments, the defendant knowingly and voluntarily entered his plea of guilt. Partial Trial Tr. of Feb. 13 at 6-11. *The State of Texas v. Silvano Uriostegui*. That same day, after the plea was accepted by the court, the sentencing trial began. *Id.* The incident underlying this complaint occurred on the second day of the sentencing hearing, February 14, 2012, when the complainant, Mr. Uriostegui's wife, testified. Partial Trial Tr. of Feb. 13 at 1. According to the transcript, she said that she did not see her attacker's face and seemed to say that she could not positively identify the defendant as her assailant; that she thought it was the Defendant because of his smell and the boots that he was wearing. *Id.* at 27-29. In fact, according to the witness most familiar with Mrs. Uriostegui and her ordeal, she has always been certain Silvano was her attacker. Araceli Botello Aff. Of Fact.

During the chaos that followed Mrs. Uriostegui's purported failure to identify her attacker, the prosecution (Mr. Schultz) was not allowed to finish questioning her. Evid. Hr'g Tr. at 181. In response to the victim's testimony that she could not identify the defendant as her attacker, Mr. Amador moved for a mistrial on the ground that exculpatory evidence had been withheld from him by the District Attorney's Office. Partial Trial Tr. of Maria Uriostegui's Test. at 38-39. He claims that the victim's seeming inability to identify the defendant as her assailant was never provided to him, and thus Mr. Schultz and Mr. Beadle were in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and his client's due process rights. *Id.* Mr. Schultz admits that he knew part of the victim's process and method of her identification of

Silvano, and had not disclosed such information to the defense based on his belief that the information that he possessed was inculpatory, not exculpatory. Evid. Hr'g Tr. 141-42; Evid Hr'g Tr. at 155. Specifically, during a meeting with Mrs. Uriostegui prior to trial, Mr. Schultz received four factors that supported Mrs. Uriostegui's identification of her attacker. *Id.* at 140. Clear, simple questions to Mrs. Uriostegui would have eliminated all doubt that Silvano attacked her. Araceli Botello Aff. Of Fact.

After hearing arguments from both sides, the judge presiding over the case, Honorable Judge Steve Burgess, first denied, and eventually granted the Defendant's motion and declared a mistrial. Partial Trial Tr. of Maria Uriostegui's Test. at 43; Partial Trial Tr. of Maria Uriostegui's Test. at 61. While ruling on the motion for a mistrial, Judge Burgess stated that he did not believe the state had "been intentionally deceptive" and that in his opinion, "there hasn't been a Brady violation that I've heard." *Id.* at 59. However, during the ensuing Writ of Habeas Corpus hearing, the judge changed directions. Writ of Habeas Corpus Tr. 124-26. He determined that there may have been a *Brady* violation because, in light of the testimony, Mr. Schultz wished he had turned over the identifying factors, even though Mr. Schultz believed that this information was not legally required to be disclosed to the defense. *Id.* However, the judge believed that any punishment he doled out would be sufficient for any violation that may have occurred, which did not include a report to the State Bar as that would have been unwarranted.

Leading up to the trial, Mr. Schultz provided Mr. Amador with all information that he could. In September 2011, shortly after becoming the chief of the family violence section, Mr. Schultz requested that he and Mr. Amador meet in order to make sure that Mr. Amador had all the information and documents that Mr. Schultz possessed. Evid. Hr'g Tr. 39-40. During this meeting, Mr. Schultz provided Mr. Amador with numerous DVDs, police reports, medical

reports, the offense report, protective order transcript, among others, and including an interview with the Denton Fire Department where Mrs. Uriostegui stated she could not see her attacker's hair because it was dark in her apartment. *Id.* at 148 and 167-68. Additionally, Mr. Schultz supplemented Mr. Amador with information as he came into possession of it. *Id.* at 192-93. For instance, Mr. Schultz looked into a previous assailant of Mrs. Uriostegui to determine whether that person could have been the perpetrator of this assault. *Id.* When Mr. Schultz confirmed that the previous attacker could not have been the perpetrator because he was in jail at the time. Mr. Schultz emailed Mr. Amador to inform him. *Id.*

Months after the initial meeting occurred, Mr. Schultz met with Mrs. Uriostegui in order to hear from her what happened on the night of her attack. *Id.* at 136. Present at this meeting were Mrs. Uriostegui, her translator Ms. Araceli Botello, Mr. Schultz, Mr. Beadle, their intern Ashley Rittenmeyer, Cassidy Baker, and Veronica Brunner. *Id.* During this meeting, Mr. Schultz asked Mrs. Uriostegui various questions in order to facilitate her narrative of what happened on the night of her attack. *Id.* at 136-45. This series of questions included who attacked her. *Id.* She unwaveringly said it was her husband. *Id.* When Mr. Schultz asked how she knew, she provided four identifiers. *Id.* According to Ms. Botello, Mrs. Uriostegui stated that she could not see her attacker's face, a statement that none of the others present heard. *Id.* at 136-45; 267. After this meeting, Mrs. Uriostegui and Mr. Schultz met one other time before trial to discuss her relationship with the second victim.

There was never a doubt expressed that that her husband had assaulted her. For example, in the hearing for a protective order, which occurred on July 29, 2009, the victim stated that she knew her husband was the one that attacked her. Protective Order Tr. at 17. When asked by Silvano's then-lawyer, Fred Marsh, where she was when she first saw her husband that night she

answered, "I saw him when he attacked me only." *Id.* at 27. This identification of Silvano as the attacker by the victim was known to both Mr. Schultz and Mr. Amador prior to the punishment trial. Evid. Hr'g Tr. at 69. Additionally, there were numerous statements to police and medical personnel that Silvano was the attacker. *Id.* at 148 and 167-68. Mr. Marsh testified at the writ hearing that, "it appeared to me that she never wavered in that (in her identification of Silvano)." Writ of Habeas Corpus Hr'g Tr. 111. Even after the case was dismissed and Mr. Uriostegui was released, Mrs. Uriostegui has maintained that her attacker was her husband. Aff. Of Araceli Botello.

ARGUMENTS AND AUTHORITIES

I. TEXAS RULE OF PROFESSIONAL CONDUCT 3.09(D) CODIFIES THE STANDARD ILLUMINATED IN *BRADY V. MARYLAND*.

A threshold issue for the Board is to determine the scope of Texas Rule of Professional conduct 3.09(d). The Appellant can find no opinions expressly defining Rule 3.09(d)'s scope in Texas and so this appears to be an issue of first impression for the Board. Further, this is an important issue because it will fundamentally affect not only this matter's outcome, but will also affect prosecutor's daily actions and interactions with defense attorneys.

Rule 3.09(d) is only one rule that prosecutors follow when determining what evidence to disclose to defendants. Prosecutors also must consider the Constitutional requirements to disclose evidence that are defined by the Supreme Court's decision in *Brady v. Maryland* and its progeny. Rule 3.09(d) is taken from the model American Bar Association rules which tracks the standard set forth in *Brady*. Indeed, most courts in other states and federal circuits that have adopted the language of Rule 3.09(d) from the model rules have held that the rule codifies the *Brady* standard. Those courts reason that if the 3.09(d) standard is broader than *Brady*, it would create inconsistent standards that would be impossible for prosecutors to follow, and that would encourage gamesmanship by defense attorneys. Those cases present sound reasoning, and the Respondent submits the Board should join them.

jurisdictions,² codifies *Brady*. In *In re Attorney C*, the Colorado Supreme Court interpreted the language of Colorado Rule of Professional Conduct 3.8(d) and determined that the rule must incorporate *Brady* or else there would be a multitude of standards that a prosecutor would have to keep track of causing confusion and a greater possibility of a costly mistake. *In re Attorney C*, 47 P.3d 1167, 1171 (Col. 2002)(en banc). The court reasoned that because the language of *Brady*, Colorado Rule of Professional Conduct 3.8(d), and Colorado Rules of Criminal Procedure 16 all contain similar disclosure requirements, the court was “disinclined to impose inconsistent obligations upon prosecutors” in the pursuit of fairness and predictability.³ *Id.* Therefore, the court held that predictability and fairness would be achieved by having the three rules espouse the same standard, and that standard is *Brady*. *Id.*

In a similar case, the Supreme Court of Ohio addressed the scope of disclosure mandated by the Ohio Rules of Professional Conduct, which is essentially the same as Texas Professional Rule 3.09(d). *Disc. Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 127 (Ohio 2010). In that case, the Court held that their disciplinary rule “imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady v. Maryland*.” *Id.* at 130. To reach this conclusion, the Ohio Supreme Court declined to construe their disciplinary rule as requiring a scope of disclosure broader than that required under *Brady*, noting as a concern that expansion of the rule in this manner “would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not*

² Colorado, Wisconsin, and Ohio have all adopted ABA Model Rule 3.8 verbatim into their professional ethics codes.

³ Should the Board determine that 3.09(d) is broader than *Brady*, Texas prosecutors would have three disclosure requirements to abide by: *Brady*, Rule 3.09(d), and Texas Criminal Procedure article 39.14.

require disclosure.” *Id.* (emphasis in the original). As an additional basis for their decision, the Court noted that interpreting the rule in this broad manner “would in effect expand the scope of discovery currently required of prosecutors in criminal cases.” *Id.*

Most recently, the Supreme Court of Wisconsin had occasion to interpret their version of 3.09(d) in *In re Reik*, 834 N.W.2d 384 (Wis. 2013). The court concluded that if the rule was interpreted to be broader in nature than *Brady*, the rule would “impose inconsistent disclosure obligations on prosecutors,” and generate confusion regarding prosecutors’ obligations. *Id.* at 390. The Court also observed that there are many scenarios in which a prosecutor could be in full compliance with *Brady* and yet be in violation of the disciplinary rule. *Id.* Should these differing standards be the reality, noted the court, confusion for prosecutors would ensue, and may even “devolve into a trap for the unwary.” *Id.* In addition, the court points out that to interpret the disciplinary rule as requiring a broader scope of disclosure than the constitutional requirements set out by *Brady* “invites the use of the ethics rule as a tactical weapon in litigation.” *Id.* at 391. As the Court aptly notes, “[w]hat better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint?” *Id.*

C. The Board Should Find That Texas Rule 3.09(d) Codifies Brady.

The Texas Professional Rule 3.09(d) should be interpreted to codify *Brady* just as its counterparts in Colorado, Ohio, and Wisconsin have done. As the preamble to the Texas rules states, the Rules of Professional Conduct “presuppose a larger legal context shaping the lawyer’s role” – that legal context for rule 3.09(d) is *Brady*. See Tex. Disc. R. Prof. Conduct preamble ¶

A prosecutor should not be unduly punished and possibly lose his/her law license for merely committing negligence. As the Supreme Court of Colorado noted, a result that expands rule 3.09(d) beyond *Brady* would unfairly impose inconsistent requirements on prosecutors which would cause prosecutors to think they were following the rules, but, in reality, be committing prosecutorial misconduct, subjecting them to the possibility of losing their employment, or worse, their law license. See *In re Attorney C*, 47 P.3d at 1170. This predicament could then be used as a tactical weapon by defense attorneys, wielding it against prosecutors, and drastically interfering with the execution of justice. See *In re Reik*, 834 N.W.2d at 390. Essentially, an interpretation broader than *Brady* would allow defense attorneys to hold a grievance proceeding, and potential sanctions, over a prosecutor's head should the prosecutor withhold information that is not required to be disclosed to the prosecutor under any standard, such as *Brady*, citing that the defense attorney believed the information may have been useful to his case. See *Id.* Further, a defense attorney would be able to hold a grievance proceeding over a prosecutors head for merely making a mistake. See *Id.* The Wisconsin court found these scenarios unpalatable, determining it would not be fair to equate an act of negligence to an ethical violation with the possibility of the prosecutor losing his law license for merely making a mistake, and we urge the Board to agree. *Id.* at 392-93.

This very result is at issue in the case at bar. Mr. Schultz earnestly believes he is not required to disclose information that is inculpatory to the defense attorney. See Tex. Disc. R. Prof. Conduct 3.09(d). However, if it is determined that he should have disclosed this information, the violation is a *Brady* violation, at best, due to an honest mistake. This honest mistake could cost Mr. Schultz his license should rule 3.09(d) be interpreted more broadly than a codification of *Brady*. See *In re Attorney C*, 47 P.3d at 1170. As the Wisconsin Court

concluded, “[m]ost courts and official ABA policy agree that a single instance of ‘ordinary negligence’ may trigger other adverse consequences and possible sanctions but does not usually constitute a disciplinary violation warranting public discipline.” *In re Reik*, 832 N.W.2d at 393. Granted, prosecutors should be diligent and conscientious of their disclosure obligations, “but the possibility of a grievance proceeding should not permeate every discovery dispute in criminal cases.” *Id.* And again, “[a] lawyer’s conduct should conform to the requirements of the law,” and that law is *Brady*. See Tex. Disc. R. Prof. Conduct preamble ¶ 4.

Texas Professional Rule 3.09(d) should be construed as a codification of the *Brady* requirements. In so doing, the disclosure requirements that a prosecutor must adhere to would be uniform, fair, and predictable. Further, there would not be the possibility for a prosecutor to be unfairly sanctioned when there was no constitutional, or other legal context, violation. It is sound policy and equitable that an attorney should not lose their license merely because they were negligent. Therefore, based on the above reasons, 3.09(d) should be interpreted as a codification of *Brady*, and Mr. Schultz should not be found to have violated Texas Rule of Professional Conduct 3.09(d).

II. *BRADY* DOES NOT REQUIRE DISCLOSURE OF THE INFORMATION AT ISSUE BECAUSE IT IS NOT EXCULPATORY, IT IS NOT MATERIAL, AND IT IS ONLY FOR IMPEACHMENT.

In this case, the Commission argued that certain pieces of inculpatory evidence should have been disclosed under Rule 3.09(d) because a defense attorney may have wanted to know it. Evid. Hr’g Tr. 231-34. Specifically, the victim gave the prosecutors several specific ways in which she identified her husband as her attacker. *Id.* Even though those specific ways supported her identification, the Commission apparently claims that they are exculpatory and should be

disclosed. That is not correct and the factors underlying identification were not required to be disclosed.

“There is no general constitutional right to discovery in a criminal case and *Brady* did not create one.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). However, *Brady* did impose a duty on the prosecution to disclose evidence in its possession that is both exculpatory and material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The due process clause sets the parameters for *Brady*: The *Brady* rule is based on the requirement of due process. *Id.* The Supreme Court of the United States illuminated the purpose of *Brady* in *United States v. Bagley*, 473 U.S. 667, 675 (1985), where it stated

[*Brady*’s] purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial....

In other words, a prosecutor has not violated his duty to disclose exculpatory information “unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *United States v. Agurs*, 427 U.S. 97, 108 (1976).

A. The Information Mr. Schultz Possessed Was Not Required To Be Disclosed Because It Was Not Expressly Exculpatory.

The government's obligation to disclose arises when the requested information is both favorable to the defendant and material. It has been determined that information is favorable, and, therefore, must be disclosed only if it is expressly exculpatory:

If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense. To hold otherwise would impose an insuperable burden on the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning.

United States v. Comosona, 848 F.2d 1110, 1115 (10th Cir.1988); see *United States v. Bagley*, 473 U.S. at 676 n. 7. Further, information is not exculpatory merely because it is not inculpatory. *United States v. Whitehorn*, 710 F.Supp. 803, 827 (D.D.C.1989), rev'd on other grounds, *United States v. Rosenberg*, 888 F.2d 1406 (D.C.Cir.1989).

The information the Commission believes should have been disclosed under 3.09(d) was not expressly exculpatory, and, therefore, not required to be disclosed by *Brady*. In *U.S. v. Comosona*, a prosecutor failed to turn over three statements made by the only eye witness to a murder. *Comosona*, 848 F.2d at 1115. The court, after an *in camera* review, determined that the statements were not exculpatory, and, therefore, no *Brady* violation had been committed. *Id.* The defendant believed the statements should have been disclosed because they may have contained information that pointed to the eye witness as a possible alternate murderer to the defendant. *Id.* The court reasoned that the information did not need to be disclosed because the prosecutor did not have an obligation to “disclose possible theories of the defense to the defendant.” *Id.* The court stated further, “If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense.” *Comosona* 848 F.2d at 1115. The court rounded out its reasoning by stating, “[i]f a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense.” *Id.* In fact, it is not the government’s responsibility to provide facially inculpatory evidence to the defense, even if that evidence could allow for an exculpatory inference. *Id.* This logic rings true in this case.

Mr. Schultz was not required to disclose the identification factors because they are not expressly exculpatory. It is important to note, information that establishes that a person was the person that committed a crime are inculpatory by definition. Black’s Law Dictionary 615 (7th

ed. 2000). Since these factors helped establish Mr. Uriostegui as the attacker they are inculpatory, and, therefore, according to *Brady*, the factors are not required to be disclosed to the defense. *See Id.* Granted, Mr. Schultz knew these factors, and he believed they bolstered the identification of the attacker, but they were not the sole means of identifying the attacker. *See Id.* In fact, there were many other pieces of evidence available to the state that proved that Mr. Usirostegui was the assailant, including, among others, testimony that put his truck at the scene of the crime and his own confession to his child that he just wanted to serve his time. Evid. Hr'g Tr. 161-168. Further, it is possible that Mr. Schultz could have deduced from these factors that Mrs. Uriostegui never saw the face of her attacker. However, Mr. Schultz was not required to share any deductions that he made from the evidence he possessed because the government has no responsibility to provide facially inculpatory evidence, to the defense, even if that evidence could allow for an exculpatory inference. *See Comosona*, 848 F.2d at 1115.

B. The Identification Factors Were Not Required To Be Disclosed Because They Were Not Material Nor Of Impeachment Value.

The Supreme Court of the United States held that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682. Quite simply, “the constitution does not grant criminal defendants the right to embark on a ‘broad or blind fishing expedition among documents possessed by the Government....’” *United States v. Mayes*, 917 F.2d 457, 461 (10th Cir.1990) (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)), *cert. denied*, 498 U.S. 1125 (1991).

Impeachment material is *Brady* material if the evidence calls into question the reliability of a given witness, and that witness may be determinative of the defendant's guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154 (1972). In other words, “[i]mpeachment evidence merits the same constitutional treatment as exculpatory evidence.” *United States v. Abello-Silva*, 948 F.2d 1168, 1179 (10th Cir.1991) (quoting *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986), *cert. denied*, 479 U.S. 962 (1986)), *cert. denied*, 113 S.Ct. 107 (1992). Further, impeachment evidence is material if it tends to undermine the credibility of an important government witness. *Bagley*, 473 U.S. at 673. However, a violation does not occur solely because evidence in the prosecutor’s file was found that could have possibly been useful to the defense. *Id.* at 677 (quoting *Giglio*, 405 U.S. at 154). The evidence must still be material, meaning the evidence must have, in any reasonable likelihood, affected the jury and changed their minds as to the verdict. *Bagley*, 473 U.S. at 676-77. Therefore, if the information would have been useful to the defense, but it would not have changed the fact finder’s mind because there was overwhelming evidence that bolstered the witness’s testimony, the information would not meet the *Brady* materiality standard. *Id.*

In the case at bar, there was no *Brady* violation because the information that the Appellee believes to be exculpatory was neither impeachment evidence nor was it material. *See Id.* at 676. The information was not impeachment material because knowing if the victim had seen her attacker’s face would not have been determinative of the defendant’s guilt or innocence in light of all the other evidence that implicated the defendant as the attacker: he plead guilty to the crime for the sole reason that he was guilty, he told his son that he just wanted to do his time, witnesses placed him at the scene. *See Id.* at 677. All of this other evidence made Mrs. Uriostegui’s identification superfluous. *See Id.* In fact, she could have answered the question

that her attacker was her husband and never stated how she knew, as she did in the hearing for her protective order. Thus, the information was not impeachment evidence required to be disclosed because the evidence would not have impeached a critical government witness as it was not unique. *See Id.* Additionally, the information was not material because the information, had it been disclosed, would not have affected the outcome of a trial. *See Bagley*, 473 U.S. at 682. Thus, because there was not a *Brady* violation by the information not being disclosed to the defense, Mr. Schultz did not violate Texas Rule of Professional Conduct 3.09(d).

III. MR. URIOSTEGUI'S GUILTY PLEA WAIVES ANY BRADY CHALLENGE AND THUS ANY CLAIM UNDER RULE 3.09(D).

Mr. Uriostegui's guilty plea foregoes the claim against Mr. Schultz as a matter of law. By pleading guilty, Mr. Uriostegui conclusively established his guilt. In fact, as the record will show, Mr. Uriostegui admitted during his guilty plea (and at the questioning of his own attorney) that he was pleading guilty because he was in fact guilty and for no other reason. That guilty plea raises two related issues that both negate the claim against Mr. Schultz here. First, Mr. Uriostegui is not entitled to impeachment evidence under *Brady* before making a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Second, Mr. Uriostegui's guilty plea waives all *Brady* challenges (should the panel find that the evidence in question goes beyond mere impeachment evidence) if the guilty verdict may stand independent of the alleged error. *Young v. State*, 8 S.W.3d 656, 667 (Tex. Crim. App. 2000). Here, given the legion of evidence establishing Mr. Uriostegui's identity as the attacker, the guilty verdict unquestionably stands independent of the impeachment factors the Commission claims should have been disclosed.

The Supreme Court has conclusively established that the *Brady* standard does not require prosecutors to disclose impeachment evidence before a defendant enters a guilty plea. In *U.S. v.*

Ruiz, the Supreme Court examined this exact question when a defendant claimed that her guilty plea was ineffective because the government was required to disclose “impeachment information relating to any informants or other witnesses” before she pled guilty. *Ruiz*, 536 U.S. 625. The Court first noted that “when a defendant pleads guilty he or she, of course, foregoes not only a fair trial, but also other accompanying constitutional guarantees.” *Id.* at 628-29. The Court further noted that the Constitution “does not require the prosecutor to share all useful information with the defendant” and that disclosing impeachment information during the plea bargaining process could “seriously interfere” with legitimate government interests (e.g. by disclosing the identity of cooperating informants, undercover agents, or other prospective witnesses). *Id.* at 629-632. And thus, “the Constitution [including *Brady*] does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” *Id.* at 633.

The Fifth Circuit has expanded the *Ruiz* decision to find that a guilty plea waives *all* Constitutional challenges (including *Brady* challenges). In *U.S. v. Conroy*, a defendant was accused of committing various offenses by misrepresenting that she lived in Mississippi following hurricane Katrina in an effort to obtain fraudulently money from the Federal Emergency Management Agency and the Mississippi Development Authority. *United States v. Conroy*, 567 F.3d 174, 176 (5th Cir. 2009). After pleading guilty to the charges, the defendant learned of an FBI report that was not disclosed to her and which she claimed was *Brady* material. *Id.* at 177. The Fifth Circuit did not reach the merits of the *Brady* claim because the guilty plea conclusively foreclosed it. *Id.* at 178. (“We do not need to reach the merits of her argument because it is foreclosed by our precedent holding that a guilty plea precludes the defendant from asserting a *Brady* violation.”). This waiver ultimately flows from the fact that *Brady* focuses on

the effect that undisclosed evidence may have on a judge or jury. *Id.* Thus, *Brady* cannot affect a criminal defendant pleading guilty because the defendant knows the actual facts.

Should the Panel find that the allegedly non-disclosed factors go beyond mere impeachment evidence; the guilty plea still waives any *Brady* challenge because of the abundant evidence of guilt. Texas law, like federal law, finds that a guilty plea generally waives any pre-plea defects such as *Brady*. The one exception, however, is where the alleged error is only evidence supporting guilt. *Young v. State*, 8 S.W.3d 656, 666-67 (Tex. Crim. App. 2000). Where there is an alleged *Brady* violation, a guilty plea will stand where there is other evidence of guilt beyond the allegedly non-disclosed information. *See, e.g. Lawler v. State*, 2013 Tex. App. LEXIS 9542, *5-6 (Tex. App.—Tyler, July 31, 2013, no pet.). This is a heavy burden. As Justice Cochran explained

In the context of a post-*Ruiz* guilty plea, the applicant for habeas corpus relief must show that the evidence is actually exculpatory (not merely mitigating or of impeaching value) because such evidence tends to support a claim of factual innocence. And the applicant must also show, by a preponderance of the evidence, that, had this material exculpatory evidence been divulged, he would not have entered a plea, but would have gone to trial because of the objective likelihood of being found not guilty.

Ex Parte Johnson, 2009 WL 1396807, No. AP-76,153 (Tex. Crim. App. 2009) (concurring opinion).

In this case, the evidence shows that the identification of Mr. Uriostegui is unequivocally established beyond merely the factors that the Commission claims should have been disclosed. For example, the evidence shows that the victim repeatedly and unequivocally identified Mr. Uriostegui as her attacker. The evidence shows that he was well known to her as her husband of twenty years and that she easily identified him by their physical struggle, his voice during the attack, his clothing with which she was intimately familiar, and the knife used in the attack

which he carried daily. The evidence shows that Mr. Uriostegui's vehicle was seen at the scene of the attack, that he avoided the police after the attack and that he admitted that he just wanted to do his time for the attack. Therefore, should the Board determine that Mr. Schultz had exculpatory evidence that was not disclosed, Mr. Schultz did not violate rule 3.09(d) because the evidence was not required to be disclosed since Mr. Uriostegui plead guilty to the charges.

IV. MR. SCHULTZ DID NOT VIOLATE RULE 3.04(A) OR 3.09(D) BECAUSE THERE IS NOT SUBSTANTIAL EVIDENCE TO SHOW THAT MR. SCHULTZ HEARD MRS. URIOSTEGUI SAY SHE COULD NOT SEE HER ATTACKERS FACE.

An appellate tribunal reviews a department's decision under the substantial-evidence standard. *Tex. Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006) (citing *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999)); see Tex. Gov't Code Ann. § 2001.174 (West 2008). Whether substantial evidence supports the department's order is a question of law. *Alford*, 209 S.W. at 103. Substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence; therefore, the evidence may preponderate against the agency's decision but still amount to substantial evidence. *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984). The dispositive issue for the reviewing court is not whether the department's order was correct, but whether the record demonstrates some reasonable basis for the department's action. *Mireles*, 9 S.W.3d at 131. A court conducting a substantial evidence review of a contested case must presume that the agency decision is valid and that substantial evidence supports it. See *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998).

The preponderance of the evidence shows that Mr. Schultz did not hear that Mrs. Uriostegui unequivocally stated she could not see her attackers face in any meeting that he had with her. On January 11, 2012, Mr. Schultz met with Mrs. Uriostegui to go over her story. Evid. Hr'g Tr. 142. Present at this meeting was Mrs. Uriostegui, Araceli Botello, Mr. Schultz, Ms. Brunner, Ms. Baker, Ms. Cassidy, Ms. Rittenmeyer, and Mr. Beadle. *Id.* at 136. Mrs. Uriostegui is a Spanish only speaker, Ms. Botello was the interpreter, and all other parties present are

English only speakers. *Id.* During this meeting none of the English speakers heard from the translator the unequivocal statement that Mrs. Uriostegui could not see her attacker's face. *Id.* at 144, 267, 275-78. At the hearing, joining Mr. Schultz's testimony that he never heard that Mrs. Uriostegui expressly stated that she could not see her attacker's face, were three disinterested parties, two of whom are attorneys: Mr. Beadle, Ms. Brunner, and Ms. Rittenmeyer. *Compare Id. with Evid. Hr'g Tr.* 210-12. Based on this testimony, there is not substantial evidence that the express statement from Mrs. Uriostegui that she could not see her attackers face was ever known by Mr. Schultz. Therefore, there is not substantial evidence to show that Mr. Schultz failed to turn over any exculpatory evidence that he had in his possession, and it should be determined that Mr. Schultz never possessed this piece of evidence.

V. MR. SCHULTZ DID NOT VIOLATE TEXAS RULE OF PROFESSIONAL CONDUCT 3.04(A) BECAUSE THE RULE CONTEMPLATES AN INTENT TO OBSTRUCT ANOTHER PARTY'S ACCESS TO INFORMATION.

Texas Rule of Professional Conduct 3.04(a) provides that an attorney "shall not unlawfully obstruct another party's access to evidence. . . ." Tex. R. Prof. Conduct 3.04(a). The comments for the rule state that "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like." Further, comment 2, which specifically addresses rule 3.04(a), cites to Texas Penal Code §§ 37.09(a)(1) and 37.10(a)(3), both of which have an element of intent in order for there to be a violation. Currently, this issue is a matter of first impression in Texas as there is zero guidance as to what actions taken by an attorney raise the attorney's conduct to the level of 'unlawfully,'

or as to what intent standard must be met for a violation to occur. Therefore, Appellant submits that in order for there to be a violation of rule 3.04(a) there must be an affirmative act with a knowing intent to obstruct access to unique information.

A. Mr. Schultz Did Not Violate Rule 3.04(a) Because He Did Not Have The Requisite Intent To Unlawfully Withhold Evidence From The Defense.

As a threshold matter, Mr. Schultz did not have any exculpatory information that was required to be disclosed to the defense as explained above. Assuming *arguendo* he did possess exculpatory information that was not disclosed, Mr. Schultz still did not violate rule 3.04(a) because he did not unlawfully obstruct another party's access to said information. According to Black's Law Dictionary unlawful means "not authorized by law; illegal" or "criminally punishable." Black's Law Dictionary 1246 (7th ed. 2000). Thus, there must be a law that the attorney breaks in order for there to be a violation. By looking at the comments, an attorney can glean that the laws that must be held sacrosanct are criminal laws that require an attorney to not destroy, alter, or conceal evidence. Tex. R. Prof. Conduct 3.04(a) cmt. 1; TEX. PENAL CODE §§ 37.09(a)(1) and 37.10(a)(3). In other words, in order for an attorney to violate rule 3.04(a) s/he must violate either TEXAS PENAL CODE §§ 37.09(a)(1) and 37.10(a)(3), as the comments suggest, or any other legal requirement to disclose evidence (i.e. *Brady*⁴).

An essential element to both §§ 37.09(a)(1) and 37.10(a)(3) is the intent element. This element is a part of rule 3.04(a) since the rule relies on these provisions to establish what actions it prohibits. Granted, these two provisions have different intent standards, § 37.09(a) (1)'s knowing versus § 37.10(a)(3)'s intentional standard. Thus, the standard for rule 3.04(a) should

⁴ *Brady* has been discussed above and does not require Mr. Schultz to disclose any more information than what he actually disclosed.

be the lessor of the two standards, and that is § 37.09(a)(1)'s knowing standard. Therefore, in order to establish an attorney violated rule 3.04(a), the State Bar must establish that the attorney knowingly violated the rule. This determination furthers the policy goals of the rule: to cultivate fair competition in litigation and eliminate gamesmanship. Tex. R. Prof. Conduct 3.04(a) cmt. 1. Further, by requiring the attorney to have intended to obstruct access to evidence, the rule permits current actions undertaken by civil attorneys daily, objections to discovery requests. Should the requirement be less than knowingly obstructing a party's access to evidence every civil attorney would be in violation of the rule upon sending an objection to a discovery request. This will put a halt on the attorney's ability to follow rule 1.01 thereby creating an inconsistency within the rules and eliminating the clear guidance required of punitive. *See* Tex. R. Prof. Conduct 1.01 cmt. 6; Tex. R. Prof. Conduct Preamble ¶¶ 2 and 3. In order to avoid this inconsistency the Board should adopt a knowing intent standard.

Mr. Schultz did not violate rule 3.04(a) because he did not have any additional information to disclose. However, assuming *arguendo*, Mr. Schultz did have additional information, the evidence shows his intent was merely negligent in his failure to disclose the information; he did not possess the requisite knowledge intent. He, in good faith, honestly believed that he did not have any information to disclose. This negligent intent falls well short of the requisite knowing intent. Thus, Mr. Schultz could not violate rule 3.04(a) because he did not have the requisite intent to commit a violation of the rule. Therefore, Mr. Schultz should be found to have not violated rule 3.04(a) because all elements of his alleged violation were not present.

B. Mr. Schultz Did Not Violate Rule 3.04(a) Because He Did Not Commit An Affirmative Act Or Omission In Order To Knowingly Obstruct A Party's Access To Evidence.

Another aspect of rule 3.04(a) and the provisions that establish what is meant by 'unlawful' is that an affirmative act or omission is required by the attorney. This is borne out through the definition of 'obstruct,' and by the comments which state, "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like." Tex. R. Pro. Conduct rule 3.04(a). In *Faile v. Zarich*, 2009 WL 3285986, at *3 (Conn. Super. Ct. 2009), a grievance was filed against an attorney licensed with the Connecticut Bar because of obstructive tactics used during a deposition. The court determined that the affirmative acts the attorney undertook during the deposition amounted to a violation of Connecticut Rules of Professional Conduct 3.4(1), which is identical to the Texas rule. Similarly in *Harlan v. Lewis* an attorney was deemed to have violated his state's version of 3.04(a) through his affirmative acts of witness tampering. *Harlan v. Lewis*, 141 F.R.D. 107, 113-15 (E.D. Ark. 1992). Further, in *In re Minitti*, the court concluded an attorney's affirmative actions of threatening sanctions on a third party if they turned over relevant evidence warranted sanctioning an attorney for violating the state's code of professional responsibility. *In re Minitti*, 2000 WL 275852 at *3 (Bankr. Pa. 2000).

Based on the rule and the above cases, an attorney would have to commit an affirmative action in conjunction with having the requisite intent to violate rule 3.04(a). In the case at bar, Mr. Schultz, at worst, was negligent in his duties. He does not believe that he had any unique information, as any information that he may have had was duplicative, and he had no intent to obstruct the defense's access to discovery as evidenced by his meeting with Mr. Amador and

following up with the possible alternate attacker. However, if the Evidentiary Panel's judgment is affirmed any time an attorney withholds evidence for any reason, whether purposeful or accidental, that attorney could be subjected to sanctions. This drastically affects attorneys across the state. For example, in most civil cases, attorneys purposefully withhold evidence during discovery through objecting to interrogatories and requests for production. Based on the Evidentiary Panel's judgment that a person unlawfully obstructs a party's access to evidence solely by not producing the evidence, regardless of intent, every time an attorney loses an objection to a discovery request they have violated rule 3.04(a), and could potentially lose their law license. This result is absurd and necessitates the Board to determine that in order to violate rule 3.04(a) an attorney must knowingly commit an affirmative act or omission. Further, it violates the policy that is furthered by the rule: elimination of gamesmanship. Tex. R. Prof. Conduct 3.04(a) cmt. 1. Based on this standard, Mr. Schultz did not violate rule 3.04(a).

VI. RULE 3.04(A) DOES NOT PROVIDE TEXAS ATTORNEY'S THE REQUISITE NOTICE OF WHAT ACTIONS ARE PROHIBITED, AND, THEREFORE, SHOULD BE DETERMINED TO BE VOID ON ITS FACE AS VAGUE.

A statute or regulation is vague on its face

not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). It is a basic principle of due process that a statute or regulation is void for vagueness if it does not sufficiently identify the conduct that it prohibits. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Unconstitutionally vague laws are void for three reasons: (1) to avoid punishing people for behavior that they could not have

known was forbidden; (2) to avoid subjective enforcement of laws based on arbitrary or discriminatory interpretations by government officials; and (3) to avoid any chilling effect on the exercise of free speech rights. *See Id.* at 108–09.

A statute, rule, regulation, or order is fatally vague only when it exposes a potential actor to some risk or detriment without giving fair warning of the nature of the proscribed conduct. *Tex. Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970). The traditional test for vagueness in regulatory prohibitions is whether the regulation is “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 579 (1973); *see also Howell v. State Bar*, 843 F.2d 205, 208 (5th Cir.1988)(reviewing the constitutionality of former Texas Disciplinary Rule 1-102(A)(5)); *Musslewhite v. State Bar*, 786 S.W.2d 437, 441 (Tex.App.—Houston [14th Dist.] 1990, writ denied) (reviewing the constitutionality of former Texas Disciplinary Rule 2-101). Also important is the particular context in which the regulation applies. *See Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991). Thus, when reviewing a disciplinary rule that only applies to attorneys, the “ordinary person” becomes the “ordinary lawyer.” *See Howell*, 843 F.2d at 208. The ordinary lawyer is different because lawyers have “the benefit of guidance provided by case law, court rules and the ‘lore of the profession.’” *Howell*, 843 F.2d at 208 (citing *In re Snyder*, 472 U.S. 634, 645 (1985)).

In analyzing statutes or rules, courts draw distinctions between civil and criminal statutes. In general, there is “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982). In Texas, disciplinary proceedings are civil in nature. See *State Bar v. Evans*, 774 S.W.2d 656, 657 n. 1 (Tex.1989).

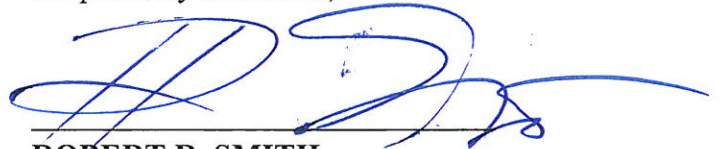
Rule 3.04(a) is void on its face because there are no applications that permit an ordinary lawyer to know what actions constitute an unlawful obstruction of a party's access to evidence. See *Tex. Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970). The term unlawful encompasses any action that is contrary to a law. Black's Law Dictionary 1246 (7th ed. 2000). However, the rule does not define what laws make an obstruction unlawful. There are no standards, guidelines, or criteria that permit an attorney to know what actions are unlawful. See *Tex. Liquor Control Bd.*, 457 S.W.2d at 45. Thus, the gamut of possibilities is available. On one hand, an attorney could believe that only criminal activity is unlawful and believe they are in compliance with the rule 3.04(a) unless they violate a criminal statute or doctrine that requires the disclosure of evidence to the opposing side. On the other hand, a civil attorney could be sanctioned with the loss of his law license because a judge found that his objection to a discovery request was without merit. And of course everything in between is conceivable as well. Thus, without a clear definition of what is unlawful, an ordinary attorney is unable to accurately know what actions are prohibited, and, therefore, rule 3.04(a) is void on its face because it is vague.

CONCLUSION AND PRAYER

Given the above, the Evidentiary Panel improperly sanctioned Mr. Schultz because he did not violate Texas Rules of Professional Conduct 304(a) and 3.09(d). Mr. Schultz did not violate rule 3.04(a) because (1) the rule is void because it is vague, (2) there was not sufficient evidence to establish that Mr. Schultz had any exculpatory evidence that he obstructed a party's access to, and (3) Mr. Schultz did not have the requisite intent to obstruct a party's access to exculpatory evidence. Because the failure of any of these issues is sufficient to dismiss the entire claim as to

rule 3.04(a), this Board must reverse the Evidentiary Panel's judgment. Further, Mr. Schultz did not violate rule 3.09(d) because (1) rule 3.09(d) codifies the *Brady* standard which does not require Mr. Schultz to disclose immaterial, non-impeachment evidence, (2) Mr. Schultz is not required to disclose purely inculpatory evidence to the defense, and (3) there was not sufficient evidence to establish Mr. Schultz had exculpatory evidence he failed to disclose to the defense. Again, because the failure of any of these issues is sufficient to dismiss the entire claim as to rule 3.09(d), this Board must reverse the Evidentiary Panel's judgment. For the aforementioned reasons, Appellant respectfully prays that this Board reverse in whole Evidentiary Panel's findings and render a judgment that there were no violations.

Respectfully submitted,



ROBERT R. SMITH

State Bar No. 18752800

R. RITCH ROBERTS III

State Bar No. 24041794

Fitzpatrick Hagood Smith & Uhl LLP

Chateau Plaza, Suite 1400

2515 McKinney Avenue

Dallas, TX 75201

(214) 239-0900

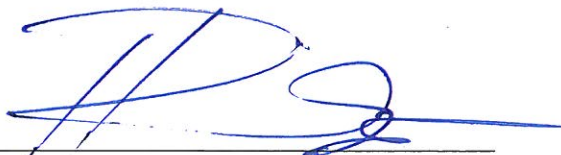
(214) 237-0901 fax

CERTIFICATE OF SERVICE

I hereby certify that, on April 3, 2015, I caused service of the above and foregoing instrument in accordance with the Texas Rules of Civil Procedure, as follows:

VIA FACSIMILE

Ms. Julie Liddell
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, TX 78711
Fax: (512) 427-4167



Robert R. Smith

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief meets the technical rules promulgated by the Board of Disciplinary Appeals. Appellant's brief is in 12-point Times New Roman font with one-inch margins on all sides. This brief conforms to all word limitations set by this tribunal as it contains a total of 6774 words in the applicable sections.



Robert R. Smith

Appendix A

1 charged for assaulting Maria Uriostegui.

2 Q. After obtaining discovery from the State and
3 conducting your own investigation, what plea did your
4 client enter at the time of trial?

5 A. On February 14th in the morning Mr. Uriostegui
6 entered a plea of guilty.

7 Q. I'm going to show you what's been marked as
8 Commission for Lawyer Discipline Exhibit No. 4. This is
9 a certified copy of a number of documents from the
10 criminal case.

11 MS. FARRIS: We would offer these into
12 evidence at this time.

13 MS. KERNAN: Any objections?

14 MR. ROBERTS: No objection.

15 MS. KERNAN: Commission's Exhibit 4
16 admitted.

17 (Commission's Exhibit No. 4 admitted.)

18 MR. ROBERTS: Hold on.

19 Never mind. Go ahead. I'm sorry.

20 Q. (BY MS. FARRIS) And would you look at the
21 first page of Exhibit 4. This shows on the first line
22 that defendant pled guilty as charged.

23 Do you see that?

24 A. Yes, ma'am.

25 Q. Okay. And is that what your client elected to

1 do?

2 A. Yes.

3 Q. Then on the side these words are written, "Slow
4 plea to the jury with no plea agreement on punishment."

5 A. I see that.

6 Q. Did I read that correctly?

7 A. Yes.

8 Q. And is that an accurate statement?

9 A. Yes.

10 Q. And what exactly does that mean?

11 A. Well, in Texas we have a two-part kind of a
12 trial. We have the guilt and innocence part where the
13 defendant is entitled to a jury trial for the jury to
14 determine whether a person is guilty or not based upon
15 the evidence. After that person, let's say, is
16 convicted, then it goes to the second part. The
17 punishment phase. It's typical of Texas -- we don't
18 have that in federal court in Texas or anywhere.

19 So what we did was -- a slow plea is
20 pleading guilty to the first part and then go to the
21 jury for punishment. So, basically, he waived the first
22 part, guilt or innocence, because he pled guilty. So we
23 were concentrated to defend Mr. Uriostegui and present
24 our evidence for the second part, which was the
25 punishment phase.

Appendix B

1 immediately -- in the trial it devolves into arguing
2 about the motion for mistrial, correct?

3 A. Correct.

4 Q. And there's some questioning by the Court or
5 the complainant. And questioning by Mr. Amador of the
6 complainant?

7 A. Yes.

8 Q. And then this -- what's been referred to as the
9 writ hearing is about two weeks later, correct?

10 A. Correct.

11 Q. And on the first occasion the judge initially
12 says, I don't see any Brady violation here. I don't see
13 any problem. Mr. Amador continues to argue. And
14 eventually says, okay, I'm granting a mistrial, correct?

15 A. Correct.

16 Q. And when he does that, what's your
17 understanding of what everybody understands that means?

18 A. We're going to come back a week or two later
19 and start over.

20 Q. Did you ever get a chance to go back on
21 direct -- or to continue your direct examination with
22 Maria?

23 A. No, I did not.

24 Q. Okay. So let me get the sequence here. You're
25 questioning her. Amador objects. All this blowup

Appendix C

1 Q. And so during this meeting, did you get into
2 any of the specifics of the crime?

3 A. No. I -- what I think and what I recall is
4 that by the time I was meeting with her, it was already
5 going to be continued to January, if you will. And it
6 was just a mere meet and greet. Introduce myself as a
7 new prosecutor working on her case.

8 Q. Okay. And so did you have another meeting with
9 her?

10 A. Yes.

11 Q. And when was that?

12 A. January of 2012.

13 Q. And do you recall who was present?

14 A. Yes. Of course myself, Maria. Maria is
15 Spanish speaking only. She had an interpreter, Araceli
16 Botello. And Veronica Brunner is a DA Office victim
17 assistant specialist. She's also bilingual and she was
18 present. Cassidy Baker was my -- was a victim advocate
19 and was present. I had a volunteer attorney intern,
20 Ashley Rittenmeyer. And Forrest Beadle was present for
21 most of the meeting. Oh, and Cassidy Baker had an
22 intern. All I remember is his name was Mike.

23 Q. And when you say "Araceli," do you mean Araceli
24 Botello?

25 A. Yes. Thank you for the last name.

1 Q. And was she the translator for that meeting?

2 A. Yes.

3 Q. And was your DA investigator also there for
4 part of that meeting?

5 A. Yes. I was going to say that. Christy Perry
6 was the family violence investigator at the time. Now,
7 when I mention her, she probably went in and gave Maria
8 a subpoena and then may have left.

9 Q. Okay. Did anybody else besides Christy not
10 stay for the entire meeting?

11 A. Forrest was there most of the meeting.
12 Everybody else it's safe to say the entire meeting.

13 Q. And what was discussed during this January 2012
14 meeting?

15 A. Well, you know, I already had the meet and
16 greet in September. But I still first talked about
17 their marriage, the kids, the relationship of 21 years
18 of marriage. And, you know, I'm a family violence
19 prosecutor. So we talked about -- there had been an
20 obvious pattern of violence through the offense reports.
21 So we talked about the history of abuse. And, keep in
22 mind, I'm doing this all through an interpreter.

23 And then -- so I talk about some of those
24 specific incidents. And then we talked about how she
25 went to the police department that day and filed a

1 harassment/stalking -- him following her report just
2 hours before the incident. And then we talked about the
3 incident.

4 Of course we're -- I'm having to talk to
5 her about Pedro, her new friend. She was -- we talked
6 about how she was fixing to get a divorce. She went to
7 Friends of the Family to get that divorce. And had
8 gotten her new apartment.

9 And so then we talked about how she met
10 with Pedro. Pedro and her went back to the apartment.
11 And then talked about the incident.

12 Q. Was this the first time you had heard firsthand
13 from Maria about what happened?

14 A. Yes.

15 Q. And did you ask Maria who attacked her on the
16 night of her assault?

17 A. Yes.

18 Q. And what did she say?

19 A. She said her husband, Silvano.

20 Q. And did you ask her how she knew it was him?

21 A. Yes.

22 Q. And what did she say?

23 A. She said, it looked like him by the way he
24 stood, his boots. That his boots -- you know, they were
25 kicking me. And I could tell by his smell.

1 Q. I'd like to show you what's been marked as
2 Commission for Lawyer Discipline Exhibit No. 8.

3 Can you tell me what these are?

4 A. This is my handwritten notes that I provided to
5 the State Bar when I interviewed Maria.

6 Q. Okay. And these are --

7 A. Work product.

8 Q. -- eight pages?

9 A. Correct.

10 Q. And they're all entirely in your handwriting?

11 A. Correct.

12 Q. And you took these notes when you were
13 interviewing Maria in January 2012?

14 A. Yes.

15 MS. FARRIS: Okay. I'd like to offer into
16 evidence Commission for Lawyer Discipline Exhibit No. 8.

17 MR. SMITH: No objection.

18 MS. KERNAN: Commission's Exhibit 8
19 admitted.

20 (Commission's Exhibit No. 8 admitted.)

21 Q. (BY MS. FARRIS) All right. So these are the
22 notes you took during your meeting you had with Maria
23 when you first questioned her about what happened the
24 night of the attack?

25 A. Correct.

1 Q. And would you look at the last page?

2 A. Okay.

3 Q. And would you read what's on this page starting
4 at the top?

5 A. "Window, runs, last stabbing-legs folded." I
6 believe that's "flying". "Doesn't remember landing.
7 ID; boots, stature, smell, looked like him. The way he
8 stands. Kicking her similar to work boots."

9 Q. Okay. When you say "kicking her similar to
10 work boots," those are the two lines that are a little
11 bit higher under "ID" but over to the right?

12 A. Sure. Yes.

13 Q. Okay. And what are these two symbols at the
14 end of "boots" and "statute"?

15 A. I'm just drawing arrows.

16 Are you talking about the arrows?

17 Q. Okay. And you said "statute" here?

18 A. Yes. I meant stature. I mean, I'm writing
19 frantically.

20 Q. Right. And when you use the letters "ID," did
21 you mean identification?

22 A. Yes. That's shorthand for identification.

23 Q. Okay. And then these words that you wrote
24 under the letters "ID," did you write these in response
25 to your question to Maria about how she knew it was her

1 husband who attacked her?

2 A. Yes. That's how I remember it.

3 Q. Okay. And these words that are written under
4 the letters "ID," are these the identifies Maria used to
5 identify her attacker?

6 A. Yes. It's how -- it's how she was maintaining
7 that it was him.

8 Q. Okay. And you wrote these down, because that's
9 what Maria told you?

10 A. Yes.

11 Q. And did Maria mention any other way she knew it
12 was her husband who attacked her?

13 A. I'm sorry. Could you repeat that?

14 Q. Did Maria mention any other way than these four
15 things that you have written here that she knew how it
16 was her husband?

17 A. I didn't take this to be as a limitation. I
18 took this as, I'm giving you examples of how I knew it
19 was him. If that's answers your question.

20 Q. Okay. But she didn't tell you any other way
21 than these that you wrote down?

22 A. Not right then and there.

23 Q. Okay. And it was these identifiers that you
24 wrote during this interview that you did not give to
25 defense counsel, correct?

1 A. As it's well established here, I did not tell
2 him the methods or the way she identified that Silvano
3 was her attacker.

4 Q. Okay. And it was these that you wrote down at
5 that meeting that you did not tell him?

6 A. Yes.

7 Q. Okay. Besides the meeting in September 2011
8 that you said is, basically, a meet and greet and the
9 January 2012 meeting where you took these notes, did you
10 have any other meetings with Maria?

11 A. Yes.

12 Q. And when was the next one after the one where
13 you took these notes?

14 A. I don't recall the exact day, but I can tell
15 you that it was after the January 11th meeting. And the
16 trial was February 13th. There was one, maybe two
17 meetings between those two dates.

18 Q. Okay. And when you say "January 11th," you're
19 talking January 11th, 2012 where you took these notes?

20 A. Yes.

21 Q. Okay. And so you had another one before trial
22 that was about a month later?

23 A. It was between January 11th and February 13th.
24 Yes.

25 Q. Okay. And what was the purpose of that

1 meeting?

2 A. The relationship Pedro -- I knew that in our
3 evidence we had texts between Pedro and Maria that
4 were -- for lack of a better word, they were flirtatious
5 texts. So I needed to review -- and they were in
6 Spanish.

7 Let me back up. I'm sorry. The police
8 confiscated from the apartment both Pedro and Maria's
9 phone. I turned that over to Victor. I knew because
10 this was going to be a punishment trial, you know,
11 they're going to bring up her extracurricular
12 activities, if you will, of what she was doing that
13 night. She was half naked. I mean, she was topless
14 when this attack happened.

15 So, nevertheless, Victor -- I considered it
16 was probably going to be fair game. He was going to
17 cross her about how she's moved on with this man. How
18 Silvano saw her with this man. So I needed to sit down
19 and, basically, talk to her about -- more about the
20 relationship with Pedro.

21 Q. Okay.

22 A. Is the quick answer.

23 Q. Okay. And did you discuss her identification
24 of her attacker at that meeting?

25 A. No.

1 Q. Okay. It was solely to go over these text
2 messages and her relationship with Pedro?

3 A. Yes. And there was other things, keeping in
4 mind this is a punishment trial. We talked about, like,
5 human factors, being a victim, her length of stay at the
6 hospital, her injuries, how this has impacted her today.
7 She's no longer working. Things like that.

8 Q. Okay. But you didn't discuss her
9 identification of her attacker?

10 A. No.

11 Q. Okay. So was it only at the January 11th
12 meeting where you took these notes marked as Exhibit 8
13 that you discussed Maria's identification of her
14 attacker?

15 A. Yes.

16 Q. Okay. Now, during any of these meetings that
17 you had with Maria, did she say she saw her attacker's
18 face?

19 A. I don't recall the face coming up.

20 Q. Okay. And did she ever say she did not see her
21 attacker's face?

22 A. That's what I mean. I don't remember -- I
23 don't remember her saying yes, up or down on that.

24 Q. Okay. And did you ever ask Maria if she saw
25 her attacker's face?

1 A. No, I did not.

2 Q. Okay. Now -- and these are the -- you just had
3 these three meetings with Maria before trial; is that
4 correct?

5 A. Yes. I -- you know, if the -- I -- just to be
6 clear, between January 11th and February 13th there was
7 at least one and maybe two. But that second one may
8 have been the same day of February 14th or, you know,
9 very soon after.

10 Q. Okay. So if you had another one, it would have
11 been right at the time of trial?

12 A. Yes.

13 Q. Okay.

14 A. Right. At our about.

15 Q. Okay. And during that meeting at or about
16 trial, did you talk about the identification of her
17 attacker?

18 A. No. But she did say something maintaining
19 identification.

20 Q. After you were assigned the case, did you talk
21 to defense counsel?

22 A. After I was assigned the case? Sure.
23 Absolutely.

24 Q. Okay. And that was Victor Amador?

25 A. Correct.

Appendix D

1 going to do what she did at trial.

2 Q. Okay. So you think you should have disclosed
3 that?

4 A. I wish I had, you know. And what I'm trying
5 to, I guess, explain to everybody here is that at the
6 writ hearing I was trying to maintain that I don't think
7 it was a Brady violation or that I -- I didn't
8 intentionally withhold evidence from Victor. I just had
9 no idea that what she did at trial was what she was
10 going to do.

11 And now I wish I did because, as we sit
12 here today, Maria didn't have her day in court.

13 Q. All right. And do you think you had a duty to
14 turn those identifiers over to defense counsel?

15 A. I think that's a determination for them to
16 make. And I did not intentionally conceal or hide
17 evidence from Victor, unlawfully obstruct evidence. She
18 was maintaining it was him.

19 MS. FARRIS: Objection. Nonresponsive.

20 Q. (BY MS. FARRIS) Do you think you had a duty to
21 turn that information over to defense counsel?

22 A. As a Brady violation, no.

23 Q. Okay. How about as any other rule that
24 requires you to turn over evidence?

25 A. To negate the guilt -- I don't think that

Appendix E

1 time he was assigned to that section. But I don't
2 recall talking to him in his office. Probably I passed
3 a case several times with him when he was in the
4 courtroom for announcement purposes.

5 Q. Did you meet with any other assistant district
6 attorneys on the case?

7 A. After Mr. Matt Shovlin was moved to another
8 section, Mr. William Schultz was assigned to be the head
9 chief of the family violence section. And I met with
10 Mr. Schultz.

11 Q. Okay. And Mr. Schultz is our Respondent today;
12 is that correct?

13 A. Yes, ma'am.

14 Q. And do you recall when you met with the
15 Respondent?

16 A. I believe I met with him late 2011. I believe
17 I met with him August, September once he was appointed.
18 I don't know whether he called me or I called him to
19 talk about Mr. Uriostegui's case. So I met with
20 Mr. Schultz several times.

21 Q. Okay. And what specific discovery did you
22 obtain?

23 A. Well, I -- it was in different stages. Because
24 I requested from Mr. J.T. Borah -- his last
25 court-appointed lawyer -- any discovery documents

1 related to that case that he may have. He provided me
2 some discovery. And then later -- I believe it was late
3 March 2011 -- I met with Mr. Shovlin. He gave me some
4 discovery CD's, medical records.

5 And then with Mr. Schultz, we sat down to
6 make sure that I received all the discovery. And he
7 provide me some discovery.

8 Q. Okay.

9 MS. KERNAN: Ms. Farris, can you hold just
10 a moment please. I'm sorry that I didn't make this
11 clear. I want the record to reflect that Mr. Amador is
12 here with his lawyer.

13 And will you go ahead and state your name.

14 MR. RAESZ: Chris Raesz. Last name is
15 spelled R-A-E-S-Z.

16 MS. KERNAN: Thank you. Sorry.

17 Q. (BY MS. FARRIS) Other than medical records,
18 what did you receive?

19 A. I received videos, photos, interviews of
20 witnesses, police reports. Basically that.

21 Q. From the discovery you received, what did you
22 learn about Maria Uriostegui's identification of her
23 assailant?

24 A. That she had clearly identified Silvano
25 Uriostegui as the person that assaulted her.

Appendix F

1 What documents did you give to Victor
2 Amador?

3 A. Well, when you say that -- he may have already
4 had the offense report, so he may not have taken it
5 twice, or he took it twice. I don't know. But what I
6 made available -- whether he had it or not -- was the
7 offense report, all the CD's. There was a 911 cassette
8 tape, protective order transcript. I can't remember
9 offhand if I gave him the affidavit for a protective
10 order, but that is in the -- that is filed in the 211th.
11 He testified already that it was in the 211th District
12 Court. That is in the file.

13 And I'm not trying to get off on a tangent
14 here. But as the protective order attorney, you serve
15 the respondent and the respondent's attorney that info.
16 But I just -- you know, to be clear, I either gave it to
17 him or he had that.

18 And then -- let's see. Medical records;
19 made sure he had those. Again, off the top of my head,
20 I think that's -- you know, within the CD's there's
21 pictures, there's audio, there's the texts that I
22 already described from the phones. So I gave him all
23 that or made sure he had it, even if he had it already.

24 Q. Is there anything in the police reports that
25 says Maria knew the attacker was her husband by his

Appendix G

1 MS. FARRIS: Objection. Asked and
2 answered.

3 MS. KERNAN: Overruled.

4 A. Well, what I'm holding right now is all the
5 CD's that were in the case and a cassette tape.

6 Q. (BY MR. SMITH) All right. So he took -- he
7 had all of those materials?

8 A. Yeah.

9 Q. In fact, was there discussion about how proud
10 he was of his computer capabilities to make copies and
11 so forth?

12 A. Yes. In our initial meetings I wanted to make
13 sure he had all the CD's or he was going to get all the
14 CD's. Set him up in the felony conference room. And I
15 was like, are we going to burn these CD's from disk to
16 disk? And he was like, no. I'm able to download them
17 and create a file. And he even said he had some sort of
18 software that could record a cassette tape.

19 Q. Okay. Let me go back with you to some of the
20 information that is in this material you're giving.
21 There's reference to two eyewitnesss that see a truck
22 similar to Silvano's leave the scene at the time of
23 the -- right after the attack?

24 A. Yes.

25 Q. That truck is found a short time later in

1 Silvano's backyard?

2 A. Correct.

3 Q. The little small car that we learned Pedro
4 Melgar, the other victim, ran away in takes off. And
5 that white truck seems to chase him?

6 MS. FARRIS: Objection. Relevance and
7 leading.

8 MS. KERNAN: Sustained, as to relevance.
9 Where are you going with that, as to
10 relevance?

11 MR. SMITH: Well, it goes to state of mind
12 both of him and of Victor Amador, all the material he's
13 trying to make sure he had, and all the material Amador
14 had and was aware of. And it won't take long. I'm
15 just --

16 MS. KERNAN: Overruled for now. Give you a
17 little latitude there to establish relevance.

18 MR. SMITH: Thank you.

19 Q. (BY MR. SMITH) So included in these CD's are
20 recorded statements of various people including his
21 daughter, Sandra, 16 at the time?

22 A. Samantha.

23 Q. Samantha. I'm sorry.

24 A. It's okay.

25 Q. Where he makes what we believe is an admission.

1 He says, I just want to do my time. Turn myself in?

2 A. Yes. That's part of my evaluation of the case.

3 Q. There's reports about -- and maybe a recording.
4 I'm not sure -- of a statement he made to well-known
5 friends and neighbors, Juanita and Oscar Rivera, where
6 he says --

7 MS. FARRIS: Objection. Relevance and
8 leading.

9 MR. SMITH: Again, I think it's important
10 what's in his mind and what's in Amador's mind.

11 MR. ROBERTS: There's been evidence that
12 Maria identified the defendant as her attacker. That's
13 not the issue before the panel. It's whether or not
14 these identifiers were turned over, and whether that is
15 professional misconduct on the part of the Respondent
16 for not turning it over.

17 MS. KERNAN: I'm going to sustain because
18 intent is not an element of the allegations.

19 MR. SMITH: No. But materiality is.

20 MS. FARRIS: Materiality is not mentioned
21 in 3.09 or 3.04.

22 MR. SMITH: Well, it's our position that
23 materiality is clearly an element, and it is very
24 important. And it goes to, again, to the complainant --
25 Victor Amador's state of mind and Bill Schultz' state of

1 mind. And, again, I won't be long with it. I just to
2 want to get out the materials that he had.

3 MS. KERNAN: Okay. So you're questioning
4 him as to the material he shared with Victor Amador?

5 MR. SMITH: Correct. And that's what he's
6 accused of. Not turning over things he should have
7 turned over. I think he's entitled to say what he did
8 turn over.

9 MS. FARRIS: I think he's already testified
10 as to what he turned over.

11 MS. KERNAN: And I think it's been
12 established by both Mr. Amador and Mr. Schultz. And I
13 don't think it's in dispute what he did turn over.

14 MR. SMITH: No. But I don't think it's
15 fully developed -- some of the items on that. But,
16 again, it's not going to take long.

17 MS. FARRIS: He testified in direct what he
18 turned over.

19 MS. KERNAN: I will overrule at this time.

20 Q. (BY MR. SMITH) All right. Okay.

21 Specifically, on those -- in that information, there's
22 information about the threats that the defendant made to
23 complainant, Maria Sandra Uriostegui?

24 A. Yes.

25 Q. And what were those?

1 MS. FARRIS: Objection. Relevance.

2 MS. KERNAN: Overruled.

3 A. The threats that night at the apartment?

4 Q. (BY MR. SMITH) Threats that come to your mind.

5 A. Okay. Wedding day; if you leave me, I'll kill
6 you. Also, display -- he was a construction worker. He
7 had a utility knife. And he displayed it to her and
8 said, if I ever catch you with a man, I'll cut you.
9 Something to that effect.

10 Those were -- and then all the way to the
11 day -- there were other threats. But all the way to the
12 day of her going to the police department the day of and
13 saying, he's stalking me. He's following me. He's
14 harassing me. I want to file a police report.

15 Q. And was there a specific statement that he made
16 in that threat?

17 A. I'd have to review the police report, but it
18 was --

19 Q. Did he tell her something to the effect of, you
20 better have money for a coffin?

21 A. Yes.

22 Q. And you've told us there's a history of abuse;
23 physical, emotional, and controlling. Was there a
24 conversation with Mr. Amador about the defendant saying
25 something to the victim -- being willing to say

1 something to the victim?

2 A. Yes. During plea negotiations he wanted to
3 bring Silvano up to the office to apologize to Maria.

4 Q. And then, as we heard, the defendant pled
5 guilty, correct?

6 A. That's correct.

7 Q. And you signed the plea papers, which are in
8 evidence?

9 A. Yes.

10 Q. And those plea papers follow the law and very
11 clearly set out the rights that the defendant in this
12 case, Uriostegui, has. And that he understands them.
13 And that he's waiving those rights and pleading guilty
14 knowingly and voluntarily. And they'll speak for
15 themselves, but you signed them.

16 And that's -- to your knowledge, all the
17 plea papers are in order, correct?

18 A. Correct.

19 He also prepared something that I had never
20 seen before.

21 Q. All right. What was that?

22 MS. FARRIS: Objection. Relevance.

23 MR. SMITH: I think, again, it goes to
24 state of mind for both of them, the accuser and accused
25 here.

1 MS. FARRIS: I don't think the state of
2 mind of Victor Amador is at issue.

3 MS. KERNAN: I'll overrule it at this time.

4 A. It was some document admonishing him, because
5 you're pleading guilty today you could get deported.
6 That's the cliff note.

7 Q. (BY MR. SMITH) That was something he came in
8 addition to?

9 A. Yes.

10 Q. And when he pled guilty did Mr. Amador,
11 personally, on the record, under oath admonish Silvano
12 about all the things he was giving up including having
13 him testify, you're pleading guilty because you are
14 guilty and for no other reason?

15 A. Yes. I was present during that pleading, and
16 those things were said.

17 Q. And then after he enters a plea, you proceed to
18 opening statements, correct?

19 A. That's correct.

20 Q. And in the opening statement do you recall
21 Victor Amador making reference to the state of the
22 lighting in the apartment?

23 A. Yes.

24 Q. Said it was dark?

25 A. Yes.

1 Q. He referred to only the light of the TV?

2 A. Yes.

3 Q. He had the recorded interviews where the --
4 where Pedro says it was dark. Only the light of the TV.
5 I couldn't see his hair, because it was dark.

6 I'm sorry. That was -- the first part was
7 Pedro. The second part was Maria says, I couldn't see
8 his hair. It was dark?

9 A. Yes.

10 Q. Specifically, Rachel Flemming of the Denton
11 Police Department asked her in the hospital with a
12 translator, can you tell us about his hair. And she
13 says -- and that's the conversation Amador testified
14 that he heard and is accurate. She says in some
15 substance, I couldn't see it. It was dark?

16 MS. FARRIS: Objection. Leading. The
17 document, also, is already in evidence and speaks for
18 itself.

19 MS. KERNAN: Sustained. And as to
20 relevance, as well. I think it's well established, his
21 frame of mind. And we understand about the lighting.

22 Q. (BY MR. SMITH) Now, you have been asked about
23 your testimony that said something to the effect of, I
24 should have turned over the identifiers, or I wish I
25 had?

Appendix H

1 MS. KERNAN: Sustained.

2 Counsel, do you have anymore questions of
3 him, as it pertains to the issues before this panel?

4 MR. SMITH: Well, I respectfully suggest
5 that I think they all pertain to the issues before this
6 panel, but I'll try to -- I don't have much more.

7 Q. (BY MR. SMITH) What would you do if Mr. Amador
8 came to you and said, Bill, I think we got the wrong
9 guy?

10 MS. FARRIS: Objection. Relevance.
11 Speculation.

12 MS. KERNAN: Sustained.

13 Q. (BY MR. SMITH) What can you do in a situation
14 where a defense lawyer says, I think we got the wrong
15 guy?

16 MS. FARRIS: Objection. Relevance.

17 MS. KERNAN: Sustained.

18 Q. (BY MR. SMITH) In this case was there specific
19 information which was arguably Brady that involved
20 another person who had assaulted Maria?

21 MS. FARRIS: Objection. Relevance.

22 MS. KERNAN: Overruled.

23 A. Yes.

24 Q. (BY MR. SMITH) Tell us about that.

25 A. Earlier -- prior to the attack, there was

1 another guy that assaulted Maria. And when I saw that
2 report in the file, I, you know, raised an eyebrow.

3 Q. So what did you do?

4 A. I provided it to Victor. And somewhere along
5 those lines -- oh, I wanted to see what happened with
6 that charge. And then that's when I was on the Denton
7 County software where I saw he was in jail when this
8 attack happened.

9 Q. Okay. By "he," you're talking about the other
10 assailant who a defense lawyer might try to argue, well,
11 maybe that guy did it?

12 A. Right. Alvero Malagon.

13 And Victor didn't have that report when I
14 gave it to him in September of 2011.

15 Q. And did you let him know when you established
16 conclusively that guy was in jail and couldn't have done
17 it?

18 A. Yeah. I showed him the screen and printed out
19 jail dates.

20 Q. Did you ever tell Victor Amador that Maria can
21 visually identify the defendant?

22 A. Can you repeat that?

23 Q. Did you ever tell Victor Amador that Maria can
24 visually identify the defendant?

25 A. I guess through offense reports. Yes.

Appendix I

1 A. Bill Schultz was there. I was there. I want
2 to say Forrest might have been in and out. Araceli, I
3 think, was there. I can't remember who else was in that
4 room. I think there were various people kind of in and
5 out.

6 Q. Okay. Anytime during that meeting did the
7 complainant, Ms. Uriostegui, say, I didn't see the
8 attacker's face?

9 A. Not that I remember.

10 Q. If she'd said that, would you have noticed, do
11 you think?

12 A. I would think so.

13 Q. Was that meeting on or about January 11th of
14 2011, or maybe January 17th of 2011?

15 A. It would have been 2012.

16 Q. I'm sorry.

17 A. That's okay.

18 Q. Is that --

19 A. Yes.

20 Q. Is that when it was?

21 A. Yes.

22 Q. You personally helped Mr. Amador with his
23 computer and the disks and so forth?

24 A. Yes.

25 Q. Including at trial?

Appendix J

1 to compare any discovery. I requested the discovery. I
2 talked to Mr. Borah, obtained some discovery. And all
3 further discussions regarding discovery was with
4 Mr. Shovlin and Mr. Schultz.

5 Q. Did you -- were you aware that Mr. Marsh
6 handled a protective order hearing in this case?

7 A. I read that from a transcript. I did not know
8 until I read the transcript.

9 Q. So you were aware that Mr. Marsh handled a
10 protective order hearing in this case?

11 A. Based on my reading of the transcript, Mr.
12 Marsh was on the record as Mr. Uriostegui's attorney.

13 Q. So is that a yes?

14 A. When I read that transcript.

15 Q. Do you believe the transcript to be incorrect?

16 A. I didn't say that.

17 Q. Well, then why are you avoiding the question or
18 evading the question that Mr. Marsh handled the hearing?

19 A. I'm not evading the question, sir. I became
20 aware that Mr. Marsh had represented Mr. Uriostegui at
21 the protective order when I obtained a transcript
22 showing him as his lawyer.

23 Q. Okay. So when you became aware that Mr. Marsh
24 handled the protective order hearing, did you think to
25 discuss the hearing with Mr. Marsh?

Appendix K

1 Q. And do defense attorneys often question a
2 victim's identity of the defendant at trial?

3 A. Yes.

4 Q. And what's the purpose of those questions?

5 A. Well, to establish whether they have the right
6 person sitting in the hot seat, so to speak. Whether
7 they have the right person in court, or whether they can
8 prove the identity of the person beyond a reasonable
9 doubt as being the one who committed the crime.

10 Q. Have you read the transcripts from the hearings
11 in the Silvano Uriostegui case?

12 A. Yes.

13 Q. And do you recall reading that the victim
14 identified her husband as her attacker by means other
15 than his face?

16 A. Yes.

17 Q. And do you recall the victim testified she
18 recognized her husband's smell and boots as he was
19 attacking her?

20 A. Yes.

21 Q. And did you read the prosecutor's statement to
22 the Court that the victim identified her husband as her
23 attacker, also, by his silhouette and stature?

24 A. Yes.

25 Q. How could a defense attorney use the

1 information about the attacker's smell to the benefit of
2 his client?

3 A. Well, this case never got that far. But,
4 obviously, I would think the questions very easily could
5 be asked of, what is this smell? And cross-examine on
6 that. What is it? Is it something unique or not? I
7 think the statement was, if I remember correctly, that
8 it was something -- a chemical from work that would have
9 been on his clothes or something. Obviously, if that
10 was a point of identification, you would go back and
11 find out, does that person have any chemicals that he or
12 she would work with at work? Things like that.

13 The other thing that's important, I guess,
14 on cross-examination if it's limited to boots and smell
15 and silhouette is, when did these perceptions come in?
16 Because at some point in this case this lady is going to
17 have massive blood loss, and her perceptions of when she
18 noticed this may be when she's in a state of shock and,
19 therefore, probably not reliable or could be seen as not
20 reliable. Or maybe it came early on when she had her
21 full capacity.

22 But, obviously, that's something to be
23 explored. And you could go after any one of those by
24 testing them through cross-examination to see if they're
25 reasonable. And maybe putting on other evidence to show

1 that they're not true.

2 Q. If a defense attorney had that type of
3 information prior to trial, there's some investigation
4 that could be done before trial?

5 A. Yes.

6 Q. Okay. Would the fact that the victim did not
7 see the defendant's face factor into a defendant's
8 decision on an plea?

9 A. Whether to plead guilty or not guilty?

10 Q. Yes.

11 A. I would think so. Yes.

12 Q. If a defendant thought a victim could not
13 positively identify him, might the defendant plead not
14 guilty and force the State to prove its entire case?

15 A. Yes.

16 Q. And, of course, pleading not guilty is a right
17 a defendant has?

18 A. Yes.

19 Q. Okay. If a victim could not positively
20 identify the defendant, might that fact put the
21 defendant in a better position for plea negotiations?

22 A. It could. Yes.

23 Q. In the Uriostegui case, had the defense
24 attorney known that the victim identified her attacker
25 by smell, boots, stature, and silhouette, could that

1 fact have impacted a strategy other than pleading
2 guilty?

3 A. Yes, it could.

4 Q. And what could the -- what could the other
5 options have been?

6 A. Well, obviously, if you're a defense attorney
7 and the State has indicated to you that there's problems
8 with identity, there are a number of avenues you could
9 pursue on it. You could perhaps ask for a plea bargain
10 of much less than what was offered, and depending on
11 whether they're open to it or not -- but you could start
12 with that. Start with some type of other offense to
13 plead guilty to that has a lesser punishment range. Or
14 go to trial and test it in front of a jury.

15 If you feel that they can't cross the
16 threshold of identity, obviously, that would be a not
17 guilty, or, certainly, cast enough doubt in a case to
18 cause one or more people to not vote guilty on the case.
19 And that, in and of itself, is a strategy. A hung jury
20 is a strategy.

21 MS. FARRIS: Pass the witness.

22 **CROSS-EXAMINATION**

23 **BY MR. SMITH:**

24 Q. Judge Creuzot, you're not a judge now, right?

25 A. That's okay.

Appendix L

1 MR. SMITH: That's all I have.

2 MS. KERNAN: Okay. Thank you.

3 MR. SMITH: I'm sorry. Is Respondent's
4 Exhibit 50 admitted?

5 MS. KERNAN: No.

6 You have other witnesses. Is there two
7 more, I think you said, and is their testimony going to
8 be, basically, the same?

9 MR. SMITH: Yes.

10 MS. KERNAN: Do you want to --

11 MR. SMITH: Actually, three. But --

12 MS. KERNAN: Okay. Do you want to offer
13 those names to the court reporter? Do you want to make
14 a proffer -- are you okay with making a proffer of their
15 names and that their testimony is basically the same?

16 Do you want a chance to cross-examine?

17 MS. FARRIS: I'd like to hear what the
18 proffer is before I answer that, if that's okay.

19 MS. KERNAN: If they don't have anything
20 different to say, then let's just put their names on the
21 record of who those witnesses would be.

22 MR. SMITH: Veronica Brunner -- spelled
23 with two N's, B-R-U-N-N-E-R. Cassidy Baker -- these are
24 employees or were employees of the District Attorney's
25 Office at the time. Forrest Beadle. And then other

1 witnesses go to the other meeting that Mona Muro was in.

2 MS. KERNAN: Okay. The other meeting?

3 MR. SMITH: The two prior prosecutors.

4 MS. KERNAN: Okay. And is --

5 MR. SMITH: And all of them would say, we
6 never heard her say she didn't see his face.

7 MS. KERNAN: Okay. Is Forrest Beadle here?

8 MR. SMITH: Yes. Well, he was.

9 MS. KERNAN: Did you have something?

10 MS. FARRIS: Yes. Veronica Brunner
11 testified at the writ hearing, her testimony is on
12 page 23. She specifically testifies that she was not
13 present for the January 11th meeting where Respondent
14 says the identification was specifically discussed.

15 MS. KERNAN: Okay.

16 MS. FARRIS: That might cut down on her
17 having to testify.

18 MS. KERNAN: Then the panel -- based on
19 that -- and that's already in evidence. Then the panel
20 doesn't need to hear from that witness.

21 MS. FARRIS: Then I would also point out
22 that Forrest Beadle testified at the writ hearing. His
23 testimony is on page 92.

24 And on page 94 he specifically answers the
25 question, "When did you know, sir, that Maria Uriostegui

1 could not identify Silvano by the face"?

2 He answers, "By the face was during the
3 course of that meeting.

4 "Of course, you don't speak Spanish, right?

5 "Correct.

6 Question: "And you heard that from the
7 translator that was doing the translation for Maria?

8 Answer: "Yes."

9 That's on page 94.

10 MS. KERNAN: Okay. We've made notes of
11 that, and that's already in evidence before this panel.

12 MS. FARRIS: Yes.

13 MS. KERNAN: Any other witnesses?

14 MR. SMITH: Well, I think Forrest Beadle
15 would say, in addition, she, in my presence, didn't say,
16 I didn't see his face. Notwithstanding what's in the
17 transcript.

18 MS. KERNAN: Okay.

19 MR. SMITH: Other witness -- Donna Bloom
20 can testify to a year's long relationship with the
21 complainant and her expressed surprise that the court
22 reporter said she -- what she said she said.

23 MS. KERNAN: Okay. The complainant being?

24 MR. SMITH: Maria Uriostegui.

25 MS. KERNAN: Okay. Just making sure.

1 Anything further, counsel?

2 MR. SMITH: And I'm assuming that with
3 regard to Cassidy Baker -- who would say she was in that
4 meeting -- your determination is the same. You don't
5 need to hear from her?

6 MS. KERNAN: Yes, sir, it is.

7 Do you have any other witnesses?

8 MR. SMITH: Well, one other thing about
9 Donna Bloom. She would say that Mr. Amador could
10 interview her if he wanted to or notice her for
11 deposition -- Maria, I'm sorry.

12 MS. WOLFRAM: Does Donna Bloom have any
13 information about what was disclosed or not disclosed to
14 the DA's Office?

15 MR. SMITH: No. She was not in any
16 meetings.

17 MS. KERNAN: Okay. Anything further?

18 MR. SMITH: She would speak to her opinion
19 of Bill's character.

20 MS. KERNAN: The panel -- we feel like we
21 have enough. We've heard enough.

22 So are there closing arguments?

23 MS. FARRIS: I can make real brief
24 arguments. You know, if you've heard enough on the
25 evidence. That's fine. I would like to put some real

Appendix M

1 Q. Is that the Respondent in this case, Bill
2 Schultz? The same Bill Schultz?

3 A. Yes.

4 Q. Okay.

5 A. And we had a couple of meetings. So it's
6 really hard to really remember. Because my focus was
7 more translating. So I can't really, like, recall,
8 specifically. I know during those meetings there were
9 several people from the DA there.

10 Q. Do you recall if Forrest Beadle was present at
11 any of the meetings in which she discussed not having
12 seen the face of the attacker?

13 A. I think he was not present, but he would come
14 in and out. So I don't specifically remember if he was
15 there, specifically, for that part.

16 Q. There were three meetings that you attended
17 with Maria?

18 A. Uh-huh.

19 Q. Was Bill Schultz at all three of those
20 meetings, to your recollection?

21 A. Yes.

22 Q. Okay. And at each meeting did she say, I
23 didn't see the face of the attacker, or could you tell
24 us at how many meetings she made that comment?

25 A. If I remember correctly, it was maybe once.

1 Q. She said it once.

2 Did she also mention how she knew it was
3 Silvano who attacked her?

4 A. She went on to describe details. I know I put
5 it on my affidavit. I would have to look back to go
6 into probably detail, if that's okay.

7 Q. If it will help you -- I don't know if it will
8 help you to look at your affidavit to refresh your
9 memory on how she knew it might have been him.

10 A. I know some items, but I don't want to put
11 things in that I can't remember right now. I know it
12 was regarding body scent, also, the boots. There was
13 other things that she described.

14 Q. Did she -- were you able to attend the
15 punishment trial when Maria was testifying?

16 A. Yes.

17 Q. Did you hear her testimony during that trial?

18 A. Yes.

19 Q. Did you hear her say she couldn't see the face
20 of her attacker at that trial?

21 A. Yes.

22 Q. Was her testimony at trial consistent with what
23 she had mentioned in one of these meetings with the
24 prosecutors in which she had said, I didn't see his
25 face?

1 A. Yes.

2 MS. GUERRA: Pass the witness.

3 MS. KERNAN: You may proceed.

4 MR. SMITH: Thank you.

5 CROSS-EXAMINATION

6 BY MR. SMITH:

7 Q. Ms. Botello, just a few questions.

8 First of all, I'm the one that got this
9 affidavit from you, correct?

10 A. Correct.

11 Q. And provided it to the State Bar?

12 A. Yes.

13 Q. And I told you to tell the truth as you recall
14 it?

15 A. Yes.

16 Q. And you've told us about a piece of a
17 conversation. And, specifically with regard to that
18 conversation, I'll ask you, first of all, you're
19 translating -- or she's speaking in Spanish -- Maria --
20 right?

21 A. Correct.

22 Q. You're translating?

23 A. Yes.

24 Q. You're not a certified translator, are you?

25 A. No, sir.

Appendix N

1 that the time you went to the lobby and the time that
2 you talked to Samantha on the phone was before
3 7:19 p.m.?

4 A. Correct.

5 Q. And it was May 7th, 2009?

6 A. That's correct.

7 Q. So you already said that you documented
8 Samantha's information. You entered this into the
9 computer. Incident reports get a log number; is that a
10 fair statement?

11 A. They get a call number, yes, sir.

12 Q. A call number, thank you. Do they also -- are
13 they also coded as to the type of investigation or
14 crime?

15 A. Correct.

16 Q. What did you code this as as far as crime?

17 A. Harassment.

18 Q. Anything else?

19 A. No, sir.

20 Q. In your investigation, were there any other
21 crime words, if you will, such as stalking, following?

22 A. I did not see enough to list anything else.

23 Q. So you coded it as harassment?

24 A. Correct.

25 Q. And would that be harassment from the suspect?

1 A. Correct.

2 Q. The husband?

3 A. Correct.

4 Q. And the alleged victim at this point is the
5 wife, Maria?

6 MR. AMADOR: Objection, Your Honor,
7 leading. He's been leading.

8 THE COURT: Sustained.

9 Q. (BY MR. SCHULTZ) Who was the victim in this
10 harassment report?

11 A. Maria.

12 Q. You entered that into the system; is that
13 correct?

14 A. Yes, sir.

15 Q. Did you immediately make an arrest on anybody?

16 A. No, sir.

17 Q. Did you give Samantha any information or
18 instructions on behalf of you? What did you tell
19 Samantha? How did you end the phone call?

20 A. What I told her was that a report would be made
21 and they would be contacted for follow-up, and that if
22 there was any situation that came up with Mr.
23 Uriostegui, for them to call the police immediately and
24 we'll deal with it as appropriate.

25 Q. So you entered this as an incident report and

Appendix O

1 THE COURT: Okay. You can go about your
2 business. Thank you.

3 MR. SCHULTZ: State calls Maude David.

4 THE COURT: Ma'am, I'll have you raise
5 your right hand.

6 (Witness sworn by the Court)

7 THE COURT: Thank you.

8 MR. SCHULTZ: Thank you, Your Honor.

9 MAUDE DAVID,

10 having been first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. SCHULTZ:

13 Q. Would you please introduce yourself to this
14 jury?

15 A. My name is Maude David.

16 Q. And what city do you live in, Maude?

17 A. Denton.

18 Q. Denton, Texas?

19 A. Yes, sir.

20 Q. And are you married?

21 A. Yes.

22 Q. Do you have children?

23 A. Yes.

24 Q. And are you now retired?

25 A. Yes.

1 something like this. We have got some cups up here also
2 for coffee if you need them. But you can bring those
3 into the courtroom. Thank you.

4 (Open court, defendant present, no jury)

5 MR. AMADOR: We would invoke the Rule to
6 make sure no witnesses are in the courtroom.

7 THE COURT: And just explain to your
8 witnesses and you explain to yours.

9 MR. BEADLE: We've got some here, Your
10 Honor, if you want me to go ahead and bring them out.

11 THE COURT: Okay. Yeah, bring them on
12 out.

13 MR. SCHULTZ: In fact, we need to order
14 one back.

15 THE COURT: I'll have y'all raise your
16 right hand.

17 (Witnesses sworn by the Court)

18 THE COURT: Thank you. And the defense
19 has invoked the Rule. The state can explain it to you,
20 but basically it means you can't talk about the case
21 amongst each other or with anyone else, other than the
22 attorneys in the case, and that you cannot be present
23 while testimony is going on. So that's why you'll have
24 to stay outside the courtroom unless you're in here to
25 testify. Thank you.

Appendix P

1 went to the car?

2 A. Correct.

3 MR. SCHULTZ: I'll pass this witness. And
4 we have provided discovery to defense, including the
5 statement, but I'm tendering same to the defense since I
6 was asking questions about it. But that's all I have
7 for this witness.

8 MR. AMADOR: Judge, may I have two minutes
9 to read the statement?

10 CROSS-EXAMINATION

11 BY MR. AMADOR:

12 Q. Ms. David, the person that you saw running,
13 five-five, was a young man, correct?

14 A. Yes.

15 Q. So it's not this gentleman right here?

16 A. No, sir.

17 Q. Someone else?

18 A. Yes, sir.

19 Q. That you have not seen before in that complex?

20 A. I have never seen either person.

21 Q. So that person that you saw running and getting
22 into the sedan was a stranger to your community,
23 correct? You had not seen him before?

24 A. Correct.

25 Q. And he was running pretty fast?

Appendix Q

1 was scared. The people in the house could tell that the
2 defendant had no business being there. They were so
3 concerned about this escalated situation that they
4 called the police. The police came out and ended up
5 arresting him for public intoxication and for criminal
6 trespass, gave him a public intoxication citation
7 because as soon as he -- since he wasn't allowed to be
8 there in the first place and as soon as he was out into
9 the street for this criminal trespass, they couldn't
10 just allow him back in the car because of his
11 intoxication; they couldn't just let him walk down the
12 street because of his intoxication, so they arrested
13 him, nevertheless. But it was still a domestic violence
14 situation that was going on with what he would
15 have/could have done to her inside that residence had
16 they not called the police and taken care of that.

17 So it will show -- and I know I talked
18 about that last -- but it will show the escalation of
19 how this happened, and that when she finally decided
20 enough's enough, I am leaving this man, he wanted no
21 part of it. And what he did to her was really bad,
22 which that's what you're going to see throughout this
23 week.

24 So when we're done with all this evidence,
25 presentation, we're going to come back and ask you that

1 he serve some serious prison time because of what he
2 did. Thank you.

3 MR. AMADOR: Thank you.

4 Counsel.

5 MR. SCHULTZ: Counsel.

6 OPENING STATEMENT

7 MR. AMADOR: On May 7th, 2009, a married
8 man, Silvano, was looking for his wife, went to the
9 apartment that she had rented a few days before and
10 found her wearing panties and a black gown -- nightgown.
11 The room was dark. He was -- she was with a man that
12 she had met in a chat room Internet days before. She
13 was almost nude. Silvano walked in, here you are.
14 There was a struggle. He pulled out his cutter from
15 work and cut his wife and Pedro, the chat room lover
16 that Maria had, 17 years younger than her, the mother of
17 four good kids, the younger 11 today. That's what
18 Silvano watched. Dark room, his wife wearing panties,
19 black nightgown, next to a stranger, online friend, that
20 she had been communicating through her cell phone.
21 Married woman, married man.

22 She got injured, absolutely. He pled
23 guilty for that, you heard. Silvano, Jr., you're going
24 to listen to his testimony, went out with his father
25 looking for his mother. They didn't know where she was.

1 Days before May 7th, 2009, she was texting and sending
2 photos of her to other people, other men asking about
3 dancing, a married woman that was found in panties in a
4 dark room, black robe, no lights, only the TV playing.

5 She was taken to the hospital, Pedro as
6 well. They both survived. Silvano, the next day,
7 turned himself in to the police. Here I am. Posted
8 bond, Burgess Bail Bond Company here in Denton, and
9 since then, Silvano has been on bond. And the owner of
10 that bond company who is going to testify will tell you
11 that he has been reporting weekly to that bond company
12 as required. You're going to listen from the owner that
13 he has been on bond. He has called them when he was
14 required.

15 Silvano is a 50-year-old man, a
16 naturalized U.S. citizen. Sixteen years ago, 1996 -- I
17 don't know, my math is not very good -- but he got a
18 DWI, was placed on probation. He succeeded in his
19 probation. In fact, he was allowed to go to Mexico and
20 visit some relatives in Durango. He was granted
21 permission by a court of law to go to Mexico and he came
22 back.

23 The man is a hard working man. His son,
24 Silvano, Jr., and Charlie are going to say my father is
25 the best father. A committed husband, a committed

Appendix R

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. F-2009-1447-B

THE STATE OF TEXAS { } IN THE DISTRICT COURT
VS. { } DENTON COUNTY, TEXAS
SILVANO URIOSTEGUI { } 158TH JUDICIAL DISTRICT

PARTIAL TRANSCRIPT OF JURY TRIAL

On the 13th & 14th days of February, 2012, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Steve Burgess, Judge Presiding, held in Denton, Denton County, Texas.

Proceedings reported by machine shorthand.

Appendix S

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And you're pleading guilty in
3 Cause No. F-2009-1447-B?

4 THE DEFENDANT: Yes, sir.

5 MR. SCHULTZ: Without plea agreement, Your
6 Honor.

7 THE COURT: Okay. I will go ahead and
8 accept your plea. And you're going to the jury for
9 punishment?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And if the state would please
12 go ahead and just read the indictment and we'll have him
13 formally plead.

14 (Indictment read in F-2009-1447-B)

15 THE COURT: How do you plead, sir?

16 THE DEFENDANT: Guilty, sir.

17 THE COURT: The court will accept your
18 guilty plea. And we'll go ahead and proceed.

19 MR. AMADOR: Judge, may I admonish the
20 defendant? For the record, Victor Amador, attorney for
21 Silvano Uriostegui.

22 SILVANO URIOSTEGUI,
23 having been previously duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. AMADOR:

1 Q. Mr. Uriostegui --

2 A. Yes, sir.

3 Q. -- I have been working as a court-appointed
4 lawyer for you for the last year and a half; is that
5 correct? And we have met --

6 A. Yes, sir.

7 Q. -- on many occasions to talk about your case?

8 A. Yes, sir.

9 Q. And I have discussed with you the different
10 options that you have concerning these pending cases,
11 correct?

12 A. Yes, sir.

13 Q. And I analyzed for you the discovery that I
14 obtained from the District Attorney's Office concerning
15 the facts and the allegations in this case?

16 A. Yes, sir.

17 Q. And I have shown you exhibits, documents that I
18 have been provided by the District Attorney's Office,
19 correct?

20 A. Yes, sir.

21 Q. Sir, initially the offer in this case was for
22 you to do 30 years in the Texas Department of Criminal
23 Justice, correct?

24 A. Yes, sir.

25 Q. And recently, probably about a month ago, I

1 related to you an offer that I received from the DA's
2 Office for you to -- in exchange for your plea of
3 guilty, a recommendation of 15 years --

4 A. Yes, sir.

5 Q. -- in the Department of Criminal Justice,
6 correct?

7 A. Yes, sir.

8 Q. And same as you did with the 30 years, you
9 rejected the offer of 15 years that the DA's Office
10 offered to you, correct?

11 A. Yes, sir.

12 Q. And I explained to you, Mr. Uriostegui, that
13 you had the right to a jury trial for the
14 guilt/innocence phase under Texas law?

15 A. Yes, sir.

16 Q. And I explained also to you the pros and cons
17 of a slow plea?

18 A. Yes, sir.

19 Q. And you decided to tell me that you wanted to
20 do a slow plea before the court as you did this morning?

21 A. Yes, sir.

22 Q. So right now you are standing guilty before the
23 judge because you pled guilty to the case that ends in
24 47; is that correct?

25 A. Yes, sir.

1 Q. Regarding Maria Uriostegui, your wife?

2 A. Yes, sir.

3 Q. Are you pleading guilty because in fact you are
4 guilty and for no other reason?

5 A. Yes, sir.

6 Q. Did I force you to take this plea of guilty
7 today?

8 A. No, sir.

9 Q. Has anyone promised you anything for you to
10 plead guilty here today?

11 A. No, sir.

12 Q. You're not under the influence of drugs,
13 alcohol, at all?

14 A. No, sir.

15 Q. Have I done everything that you wanted me to do
16 for you regarding this case? Have I done everything
17 that you asked me to do for you?

18 A. That's all.

19 Q. Do you have any complaint against me for doing
20 my job with you?

21 A. No, sir.

22 Q. Do you have any complaint against the DA's
23 Office, the district attorneys handling this case?

24 A. No, sir.

25 Q. Do you have any complaint against this

1 presiding judge about your pending cases?

2 A. No, sir.

3 Q. And you are a U.S. citizen, correct?

4 A. Yes, sir.

5 Q. I believe that you are a naturalized citizen?

6 A. Yes, sir.

7 Q. And you know that the second part of this trial
8 is for the jury to assess punishment in your case?

9 A. Yes, sir.

10 Q. You are facing the possibility of imprisonment
11 from five years to 99 years or life for you pleading
12 guilty?

13 A. Yes, sir.

14 MR. AMADOR: May I briefly confer with the
15 district attorney?

16 (Discussion off the record)

17 Q. (BY MR. AMADOR) Mr. Uriostegui, there is a
18 companion case that ends in 48 regarding aggravated
19 assault with a deadly weapon against the person Pedro
20 Melgar, M-E-L-G-A-R, correct?

21 A. Yes, sir.

22 Q. And in conversation and negotiation with the
23 DA's Office, with your approval, by you pleading guilty
24 to the case number 47 -- that ends in 47 regarding Maria
25 Uriostegui, once the jury in this case regarding Maria

1 Uriostegui make a final recommendation as to the
2 sentence of this case, either probation or pen time, the
3 agreement is that the state, with your approval, is
4 going to move this court for the dismissal of the case
5 pending against you that ends in 48 for aggravated
6 assault with a deadly weapon on the person Pedro Melgar;
7 you know that?

8 A. Yes, sir.

9 Q. And you are fully aware of this agreement?

10 A. Yes, sir.

11 Q. So you are clear about the consequences of
12 pleading guilty to the case ending in 47 today and going
13 for punishment to the jury in this case?

14 A. Yes, sir.

15 Q. And you are aware that if you are convicted in
16 this case ending in 47, this judge can order you
17 detained and be sleeping in the jail until the jury
18 decides your fate in this case?

19 A. Yes, sir.

20 Q. Do you want me to explain anything else to you
21 or do you understand all the parameters of the plea that
22 you are entering today?

23 A. I do understand, sir. Thank you very much.

24 MR. AMADOR: That's all, Your Honor.

25 MR. SCHULTZ: I have some additional

Appendix T

1 THE COURT: For appellate purposes, go
2 ahead and do so.
3 Q. (BY MR. AMADOR) Ms. Alexander, you have been
4 practicing law over what, 10, 15 years?
5 A. Ten years.
6 Q. You had a conversation with Mr. Schultz last
7 week concerning his views about disclosing Brady
8 material, correct?
9 A. I believe it was Monday of this week.
10 Q. This week. What did he tell you about the
11 disclosure of Brady material?
12 A. Specifically to the --
13 MS. MILLER: And, Your Honor, may we have
14 a running objection to all this?
15 THE COURT: Absolutely. You're granted a
16 running objection.
17 Q. (BY MR. AMADOR) Go ahead, Ms. Alexander.
18 A. Specifically to my case, he stated that he did
19 not believe it was Brady, that if it was Brady, that he
20 did not believe that the prosecutor didn't turn it over
21 intentionally, and that I would not be able to prove
22 that it was intentional.
23 Q. How did you take that remark?
24 A. That I would not ever be able to prove that a
25 Brady violation was done intentionally by the state.

1 Q. So in your view, his statement said basically,
2 based on the violation, you're not going to get me on
3 that; is that true?
4 A. That's how I took the statement, yes.
5 MR. AMADOR: Pass the witness.
6 CROSS-EXAMINATION
7 BY MR. ORBISON:
8 Q. Ms. Alexander, did Mr. Schultz goad you into a
9 mistrial?
10 A. No. The case hasn't been tried that I was
11 speaking with him on.
12 Q. So you did not request a mistrial in any case
13 in which Bill Schultz said he did not believe he
14 intentionally goaded you into a mistrial?
15 A. No, I did not.
16 MR. ORBISON: Pass the witness, Your
17 Honor.
18 MR. AMADOR: No questions, Judge.
19 THE COURT: Okay. And I'll make it clear
20 for the record, I'm disregarding the testimony, but it
21 is a record for appellate purposes at the request of,
22 originally, defense counsel, Victor.
23 All right. May she be excused?
24 MR. AMADOR: Yes. Yes, please.
25 THE COURT: You get to go home.

1 THE WITNESS: Thank you, Judge.
2 THE COURT: All right. Thank you.
3 MR. AMADOR: That's all of our witnesses,
4 Your Honor.
5 THE COURT: Okay. The state may call
6 their first witness.
7 MS. MILLER: Could we have just a moment,
8 Your Honor?
9 THE COURT: Sure.
10 (Discussion off the record)
11 MS. MILLER: State would rest, Your Honor.
12 THE COURT: Okay. And the parties have
13 already agreed as to what the law is on this case, and
14 based on that agreement --
15 MR. AMADOR: Can we do a closing argument,
16 Your Honor?
17 THE COURT: No.
18 I'm granting defense's motion. And I'll
19 base that upon my recollection of what originally
20 occurred in this case, the way the questions were
21 originally asked, what questions were asked, the obvious
22 evasiveness of one witness in particular, the awareness
23 stated on the record.
24 I can't fathom how they do not understand
25 this is a Brady violation only in retrospect. My jaw

1 dropped to the ground when Mrs. Uriostegui testified the
2 way that she did. I was shocked. And for the state to
3 actually know this and not disclose it, the only good
4 thing I can say from this miserable hearing is at least
5 Forrest Beadle told the truth and was not evasive and
6 was straightforward. I don't particularly like his
7 answers, but he at least was honest.
8 I can't fathom how somebody who's been to
9 law school, let alone practiced law for this period of
10 time, doesn't understand Brady, doesn't understand the
11 law. And based upon their answers, the way they were
12 answered -- the questions were answered, the original
13 conduct in trial, I can only find that they
14 intentionally goaded the defense into having to make a
15 motion for mistrial, that they purposefully withheld
16 Brady material.
17 And how disingenuous it is to get up here
18 and testify that you don't think that it's Brady that
19 the victim can't identify by face or by anything other
20 than smell and a boot who the attacker is, to indicate,
21 as I heard indicated in the original trial, that the
22 state even had some doubt as to who the attacker was
23 because she -- because the victim could not identify the
24 face, because she had previously been assaulted, but
25 that individual was in prison at the time that this

Appendix U

State of Texas

County of Denton

ARACELI BOTELLO personally appeared before me and took an oath that the following is true and correct:

AFFIDAVIT OF FACT

My name is Araceli Botello. I have worked for Denton County Friends of the Family for six years. I have held positions as a Crisis Intervention Specialist, Bilingual Residential Advocate, and Proyecto Seguro Coordinator, leading our agency's effort to provide services to Spanish-speaking victims in our community. I have worked directly through the years with victims of domestic violence and sexual assault. My experience has included working with victims from an initial crisis call to providing case management and advocacy.

Maria Sandra Uriostegui first came into our agency to seek services as a victim of domestic violence on April 8, 2009. Ms. Uriostegui disclosed being verbally, emotionally, and physically abused throughout the relationship by her husband, Silvano Uriostegui.

Ms. Uriostegui was later assaulted on May 7, 2009 by her husband Silvano. She was stabbed many times and fell out of her second floor apartment window as a result of the attack. This situation led Ms. Uriostegui to seek a Protective Order on May 14, 2009 against her husband. She was granted a two year protective order after an adversarial hearing in which Mr. Uriostegui was represented by counsel on July 29, 2009.

I first came in contact with Ms. Uriostegui in August 24, 2009, while proving her transportation to a medical appointment. While I was not Ms. Uriostegui's primary advocate, I provided her services of case management, information and referral when her victim advocate was not available.

In January 11, 2012, I first accompanied Ms. Uriostegui to meet with the Denton District Attorney's Office Prosecutors regarding the criminal case against her husband, Silvano Uriostegui for charges of the assault of May 7, 2009. More recently, on January 17, 2012 and February 9, 2012 I provided Ms. Uriostegui accompaniment and assistance in translating while meeting with the prosecutors, Bill Schultz and Forrest Beadle in preparation for the trial set for the week of February 13, 2012. During each meeting I provided translation services between Ms. Uriostegui and Bill Schultz and Forrest Beadle. Also present at the 2012 meetings were Cassidy Baker, Veronica Bruner and a

female intern. During those meetings, Ms. Uriostegui was questioned about her relationship with her husband, events leading up to the assault, the night of the assault, evidence police had collected, and other people of interest.

During those meetings Ms. Uriostegui was asked about the night of the assault on May 7, 2009. Ms. Uriostegui described what happened and at one point she described that she could not see Silvano's face when she was attacked. Mr. Schultz then asked her how she knew it was her husband and she went on to describe that she remembered his body scent, his boots, and the outline of his body that night. She described that she knew his scent from the chemicals he used for his line of work and the type of boots he wore and she had cleaned for the past 20 years of their marriage. She also disclosed that he used to work for apartment properties and he knew how to easily get into the apartments without damaging the doors. She also mentioned the threat that Silvano made against her life earlier on the day of the attack.

During those interviews Ms. Uriostegui never gave any indication that she had questions about the identity of her attacker. She was always consistent and clear that it was her husband, Silvano Uriostegui who had assaulted her that night on May 7, 2009. As far as I know, Ms. Uriostegui has never said or implied that she did not know or did not believe it was her husband who had assaulted her. The prosecutors continued to question Ms. Uriostegui about the assault and the impact of the assault on her life today. Ms. Uriostegui disclosed the distress she experiences being apart from her children, especially her oldest sons harassing and blaming her for the charges against their father. Bill Schultz kindly offered to speak to her older children and explain to them the process of the case in the hope they would leave her alone. Mr. Schultz informed Ms. Uriostegui that it was difficult to speak in court, but she needed to tell her story and just to tell the truth.

On February 14, 2012, I accompanied Ms. Uriostegui to court for the criminal case against her husband. Ms. Uriostegui was called to testify. Mr. Schultz began to question Ms. Uriostegui but there began a miscommunication in the translation. Ms. Uriostegui was asked about the details of that assault and her attacker. In Ms. Uriostegui response she acknowledged that she did not see her attacker's face, using a gender neutral word when referring to her attacker. The translator then translated from Spanish to English that Ms. Uriostegui had referred to her attacker as "he or she". Ms. Uriostegui did not say "he or she" when she referred to her attacker. Commotion began in the courtroom at the response and Ms. Uriostegui looked nervous and confused as many conversations were occurring in the courtroom and there was only one translator to facilitate. During the questioning many of the questions were not

clear or the context of the questions was lost in translation. There was no opportunity to clear the confusion or the ability to explain to Ms. Uriostegui if she understood what she was being asked or for her to know that the translator was translating inaccurately on her behalf. The judge declared a mistrial of the case and Ms. Uriostegui was accompanied out of the courtroom without understanding what had happened.

On February 27, 2012, I met with Ms. Uriostegui and the agency staff attorney to discuss with her the outcome of the hearing of February 14, 2012. Ms. Uriostegui had no understanding what had happened at the hearing and had stated that she had no intention to mislead in her response that she did not believe it was her husband who had attacked her on May 7, 2009. She disclosed that she was certain her husband had attacked her that night. She was very disappointed that Silvano had walked free and not convicted for assaulting her.

On March 2, 2012, I was subpoenaed to testify by the Denton County District Attorney's Office regarding the criminal case and the interviews that had taken place between prosecutors Bill Schultz and Forrest Beadle and Ms. Uriostegui leading up to the trial. On the date of the writ hearing I waited to be called to testify, but was informed later in the day that my testimony was no longer needed as the judge had made a ruling dismissing the case against Silvano Uriostegui for the aggravated assault with a deadly weapon against our client, Maria Sandra Uriostegui.

Ms. Uriostegui has been made aware of this affidavit and the circumstance surrounding its purpose. She has willingly provided her consent in writing to allow me to release this information.

Signed this 22 day of February, 2013.



Araceli Botello

STATE OF TEXAS

COUNTY OF DENTON

BEFORE ME, the undersigned authority, on this day personally appeared ARACELI BOTELLO, and being first duly sworn, declared that she signed the

Appendix V

1 don't recall any extensive cross-examination of her.
 2 MS. MILLER: May I approach, Your Honor?
 3 THE COURT: You may, but let me -- let's
 4 go off the record for just a moment.
 5 (off the record)
 6 THE COURT: We'll go ahead and also
 7 additionally, Chad, if you want to see if the folks
 8 outside, those that are waiting around, want their
 9 phones, that's fine.
 10 THE BAILIFF: Okay.
 11 THE COURT: State may proceed.
 12 Q. (BY MS. MILLER) I'm going to show you and ask
 13 you to look through that transcript and see if that
 14 appears to be a copy of a transcript of the proceedings
 15 from the protective order hearing in which you
 16 represented the defendant, Silvano Uriostegui?
 17 A. Yes, that appears to be the transcript.
 18 Q. And that's where Maria was testifying in
 19 regards -- including the attack where she was stabbed?
 20 A. That's correct.
 21 Q. And she did identify the defendant as the
 22 attacker, isn't that correct?
 23 A. That is correct.
 24 Q. And she never wavered on that, isn't that
 25 correct?

1 A. It appeared to me that she never wavered in
 2 that.
 3 MS. MILLER: Your Honor, we'd like to have
 4 this marked as State's Exhibit Number 1, the copy of the
 5 transcript from the protective order hearing.
 6 THE COURT: Okay. And did you need to
 7 substitute that?
 8 MS. MILLER: He just gave us a clean copy
 9 of it.
 10 THE COURT: Okay.
 11 MS. MILLER: All right. Judge, just so
 12 the record is clear, we're offering State's Exhibit
 13 Number 1, a true and correct copy of the transcript from
 14 the protective order hearing --
 15 MR. AMADOR: No objection, Your Honor.
 16 MS. MILLER: -- that we had just had
 17 Mr. Marsh look at.
 18 MR. AMADOR: No objection.
 19 THE COURT: State's Exhibit 1 is admitted.
 20 MS. MILLER: No further questions.
 21 THE COURT: And, Fred, you can go ahead
 22 and step down. Thank you.
 23 THE WITNESS: Thank you, Judge.
 24 MR. AMADOR: A couple of questions of
 25 Fred?

1 THE COURT: All right.
 2 Go ahead and have a seat again.
 3 THE WITNESS: All right.
 4 REDIRECT EXAMINATION
 5 BY MR. AMADOR:
 6 Q. I appreciate that you drove from East Texas.
 7 Would you be surprised, sir, that on February 14, to
 8 questions to the presiding judge, Maria Uriostegui said
 9 that when she made that statement in that protective
 10 order in July of 2009, she was making an assumption that
 11 it was Silvano the attacker? Would you be surprised?
 12 A. I would be shocked.
 13 MR. AMADOR: Pass the witness.
 14 RECROSS-EXAMINATION
 15 BY MS. MILLER:
 16 Q. Mr. Marsh, you also represented the defendant
 17 during his divorce; is that correct?
 18 A. No, I did not.
 19 Q. You did not? During a protective order
 20 hearing?
 21 A. That was the only part of that that I --
 22 Q. Okay. Protective order hearing that was part
 23 of the divorce?
 24 A. Yes.
 25 Q. So you also had the opportunity to question her

1 then regarding any identification or misidentification
 2 of her attacker, isn't that correct?
 3 A. The only -- the only opportunity that I had to
 4 cross-examine her was in that transcript at that
 5 hearing. That was the only hearing that I represented
 6 him on on the civil side of this case, is my
 7 recollection.
 8 Q. So you don't recall representing him where
 9 Tiffani Lohmann was present regarding the protective
 10 order that was part of the divorce proceeding?
 11 A. Well, that may well have been Tiffani that
 12 represented him in that, I don't know. I don't recall.
 13 MS. MILLER: Nothing further.
 14 THE WITNESS: I have slept since then.
 15 MR. AMADOR: No questions.
 16 THE COURT: Okay. Now you can step down
 17 THE WITNESS: Thank you, Judge.
 18 THE COURT: Thank you.
 19 THE WITNESS: May I be excused?
 20 MR. AMADOR: Please, please. Have a good
 21 day.
 22 THE COURT: And does the state excuse this
 23 witness?
 24 MS. MILLER: Yes, Your Honor.
 25 MR. AMADOR: J.T. Borah, please. And we

Appendix W

1 you that I had seen him on the street.

2 Q. I'm talking about that night.

3 A. I saw him when he attacked me only.

4 Q. Okay. And where were you when that occurred?

5 A. I was in the bedroom plugging my cell phone.

6 Q. Okay. And were you standing up?

7 A. No. I was like sitting down.

8 Q. All right. And where were you sitting?

9 A. On the floor because I didn't have a bed.

10 Q. Okay. And what was your state of dress at that time?

11 How were you dressed?

12 A. I had a gown.

13 Q. Did you have anything else on besides the gown?

14 MS. QUALLS: Your Honor, I'm going to object to
15 relevance.

16 THE COURT: Overruled.

17 A. I had my underwear.

18 MS. MUNERA: Your Honor, may the interpreter
19 clarify?

20 THE COURT: Yes.

21 (Ms. Munera conferred with the witness.)

22 A. Only my -- with my underwear.

23 Q. (BY MR. MARSH) So you had your gown and your underwear
24 on?

25 A. Yes.

Appendix X

1 Q. Okay. Now, did you close the bedroom door?

2 A. No.

3 Q. Okay. So the two of you are in the bedroom?

4 A. Uh-huh.

5 Q. And you heard a noise?

6 A. Yes.

7 Q. What noise? What noise did you hear?

8 A. It was a noise like someone came in just out of the
9 sudden.

10 Q. So was it like a banging of the door or. . .

11 A. It was like -- it was like suddenly he came in and he
12 hurt -- hit the door or something like that.

13 Q. Okay. Did you and your friend leave the bedroom?

14 A. We didn't have time because he attacked both of us.

15 Q. Okay. Who attacked both of you?

16 A. Silvano.

17 Q. And that's your husband?

18 A. Yes.

19 Q. Did he suddenly appear in the bedroom door?

20 A. Yes.

21 Q. Okay. Did he say anything?

22 A. I don't remember because it was so fast.

23 Q. Okay. Did he attack your friend first?

24 A. He attacked both of us. First I felt like he hit me on
25 the chest and then he went over him, to him.