

**CAUSE NO. 07-CR-0885**

**THE STATE OF TEXAS,**

**VS.**

**MELISSA E. LUCIO**

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§**

**IN THE DISTRICT COURT**

**138TH DISTRICT**

**CAMERON COUNTY,  
TEXAS**

**DEFENDANT'S MOTION TO DISQUALIFY  
OR RECUSE JUDGE GABRIELA GARCIA**

## TABLE OF CONTENTS

I.	Motion & Summary of Argument .....	1
II.	Relevant Background.....	3
III.	Points and Authorities Supporting Disqualification and Recusal....	4
	.....	4
A.	The Law Requires that Judge Garcia Disqualify Herself .....	4
	1. There is a conclusive presumption that Court Administrator Gilman shared with her employer, Judge Garcia, confidential information that Mrs. Gilman obtained through her work on Ms. Lucio’s case .....	4
	2. Judge Garcia’s disqualification nullifies the order and warrant setting Ms. Lucio’s execution date.....	7
B.	The Law Requires that Judge Garcia Recuse Herself.....	8
	1. Judge Garcia’s impartiality might reasonably be questioned based on her Court Administrator’s direct role in Ms. Lucio’s defense .....	9
	2. Judge Garcia’s impartiality might reasonably be questioned based on the role of her Court Administrator in current and anticipated proceedings.....	10
IV.	Conclusion .....	13

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>In re American Home Products Corp.</i> , 985 S.W.2d 68 (Tex. 1998).....	7
<i>Arnold v. State</i> , 853 S.W.2d 543 (Tex. Crim. App. 1993).....	1
<i>In re Barr</i> , 13 S.W.3d 525 (1998).....	7
<i>Ex parte Bower</i> , No. WR-21005-02, 2012 WL 2133701 (Tex. Crim. App. June 13, 2012).....	11
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....	11, 12
<i>Ex parte Brown</i> , No. WR-68,876-01, 2014 WL 5745499 (Tex. Crim. App. Nov. 5, 2014).....	11
<i>Ex parte Carty</i> , No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App. Feb. 25, 2015) .....	11
<i>In re Columbia Valley Healthcare Sys., L.P.</i> , 320 S.W.3d 819 (Tex. 2010).....	6
<i>In re Guar. Ins. Servs., Inc.</i> , 343 S.W.3d 130 (Tex. 2011).....	5, 6
<i>Ex parte Landor</i> , No. WR-81,579-02, 2020 WL 469979 (Tex. Crim. App. Jan. 29, 2020) .....	11
<i>Ex parte Lave</i> , Nos. WR-44564-03, WR 44564-04, 2013 WL 1449749 (Tex. Crim. App. April 10, 2013).....	11
<i>Ex parte Miles</i> , 359 S.W.3d 647 (Tex. Crim. App. 2012).....	11
<i>In re Murchison</i> , 349 U.S. 133 (1955) .....	8

<i>Ex parte Murphy</i> , No. WR-38,198-04, 2015 WL 5936938 (Tex. Crim. App. Oct. 12, 2015).....	11
<i>Offutt v. United States</i> , 348 U.S. 11 (1954) .....	8
<i>Patterson v. State</i> , 83 Tex. Crim. 169, 202 S.W. 88 (1918) .....	7
<i>Ex parte Reed</i> , No. WR-50,961-10, 2019 WL 6114891 (Tex. Crim. App. Nov. 15, 2019).....	11
<i>Sears v. Olivarez</i> , 28 S.W.3d 611 (Tex. 13 App. 2000).....	8
<i>Ex parte Settle</i> , No. AP-76591, 2011 WL 2586406 (Tex. Crim. App. June 29, 2011).....	11
<i>Ex parte Temple</i> , No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016).....	11
<i>Ex parte Tercero</i> , No. WR-62,592-04, 2015 WL 5157211 (Tex. Crim. App. Aug. 25, 2015).....	11
<i>Tesco Am., Inc. v. Strong Indus., Inc.</i> , 221 S.W.3d 550 (Tex. 2006).....	4
<i>Ex Parte Tiede</i> , 448 S.W.3d 456 (Tex. Crim. App. 2014).....	11
<i>In re Turner</i> , 542 S.W.3d 553 (Tex. 2017).....	5
<i>United States v. Jordan</i> , 49 F.3d 152 (5th Cir. 1995) .....	8, 9
<i>In re Wilhite</i> , 298 S.W.3d 754 (Tex. App.--Houston (1st Dist.) 2009) .....	4
<i>Williams v. Pennsylvania</i> , 579 U.S. ___, 136 S. Ct. 1899 (2016).....	8, 9

<i>Ex parte Wyatt</i> , No. AP-76797, 2012 WL 1647004 (Tex. Crim. App. May 9, 2012).....	11
---	----

**Constitutional Provisions**

Tex. Const. art. V, § 11 .....	1, 2, 4
U.S. Const. amend. XIV.....	1

**Statutes and Rules**

28 U.S.C. § 455.....	8
Tex. Code Crim. Proc. art. 11.071, § 5(a) .....	2, 11
Tex. Code Crim. Proc. art. 30.01 .....	1, 2, 4
Tex. R. Civ. Proc. 18a.....	1
Tex. R. Civ. Proc. 18a(a)(1).....	1
Tex. R. Civ. Proc. 18a(f)(1)(B).....	13
Tex. R. Civ. Proc. 18a(f)(2).....	1, 13
Tex. R. Civ. Proc. 18b.....	1
Tex. R. Civ. Proc. 18b(a)(1).....	2, 4
Tex. R. Civ. Proc. 18b(b)(1).....	3, 8
Tex. R. Civ. Proc. 18b(b)(3).....	9
Tex. R. Civ. Proc. 18b(b)(4).....	9
Tex. R. Civ. Proc. 18b(b)(5).....	9
Tex. R. Civ. Proc. 18b(b)(7).....	9

## I. Motion & Summary of Argument

Melissa Lucio, through undersigned counsel, moves this Court pursuant to Article V, Section 11, of the Texas Constitution, Article 30.01 of the Texas Code of Criminal Procedure, Texas Rules of Civil Procedure 18a and 18b,<sup>1</sup> and the Due Process Clause of the Fourteenth Amendment, to disqualify or recuse Judge Gabriela Garcia from this case. This Motion is based on the files and records in this case, the attached exhibits, the accompanying points and authorities, and such other evidence and argument as this Court may permit during an evidentiary hearing.<sup>2</sup> Pursuant to Tex. R. Civ. Proc. 18a(a)(1), this Motion is verified by the attached declaration of counsel which is fully incorporated herein by this specific reference.

Judge Garcia's court administrator, Irma Gilman, worked on Ms. Lucio's defense in this case when Mrs. Gilman was the paralegal for Ms. Lucio's lead defense counsel, Peter Gilman. Mrs. Gilman participated in attorney-client conferences and learned other confidential information during her work on Ms. Lucio's case. Decl. ¶¶ 6-7. Today, Mrs. Gilman handles all inquiries about criminal matters before Judge Garcia. Accordingly, the law imputes Mrs. Gilman's actual knowledge of confidential information related to Ms. Lucio's defense to Judge Garcia. That extrajudicial information disqualifies Judge Garcia just if she had worked on Ms. Lucio's defense

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<sup>1</sup> These rules apply in criminal cases. *Arnold v. State*, 853 S.W.2d 543, 545 (Tex. Crim. App. 1993).

<sup>2</sup> Ms. Lucio files this motion as soon as practicable after learning that Irma Gilman has not been screened from work on this case. *See* Decl. Tivon Schardl, ¶ 9. Counsel learned that only after filing other motions. This Court should hold those matters in abeyance until a new judge can be assigned to this case. Tex. R. Civ. Proc. 18a(f)(2).

herself. Tex. Const. art. V, § 11; Tex. Code Crim. Proc. art. 30.01; Tex. R. Civ. Proc. 18b(a)(1).

Mrs. Gilman's work on Ms. Lucio's defense made her familiar with the files of defense counsel in Ms. Lucio's trial. Decl. ¶ 7. That knowledge makes Mrs. Gilman an important witness for Ms. Lucio as she investigates and presents grounds for seeking discovery, sanctions and other remedies for violations of the pretrial discovery order, and/or relief pursuant to Tex. Code Crim. Proc. art. 11.071, § 5(a). Decl. ¶ 8. For instance, § 5 requires a showing of why any new evidence could not be presented at the time of the initial state application. Mrs. Gilman's knowledge of Ms. Lucio's files at the time she made them available to state habeas counsel is relevant to that inquiry.

While District Attorney Luis V. Saenz remains on this case and Mr. Gilman is Mr. Saenz's at-will employee, Ms. Lucio cannot rely on Mr. Gilman to cooperate with her present counsel. *See* Decl. ¶¶ 10-17. Therefore, Mrs. Gilman currently is the *only* witness on whom Ms. Lucio could rely in this ongoing investigation. However, the Texas Code of Judicial Conduct, Canons 3(B) and 3(C), prohibit Mrs. Gilman from communicating *ex parte* with Ms. Lucio's counsel. Judge Garcia must disqualify or recuse herself in order to remove this obstruction to Ms. Lucio's access to vital information.

In addition, Ms. Lucio raised extensive claims of ineffectiveness against Mr. Gilman and her prior post-conviction counsel filed a bar grievance alleging that both Mr. and Mrs. Gilman obstructed Ms. Lucio's access to her files. Decl. ¶ 17. Mrs.

Gilman's involvement with Ms. Lucio's case would cause a reasonable person to believe she either harbors antipathy towards Ms. Lucio for the allegations raised against her and her husband. Either way, given the close working relationship between a trial court judge and her court administrator, Judge Garcia's impartiality might reasonably be questioned. Tex. R. Civ. Proc. 18b(b)(1).

## **II. Relevant Background**

A representative of Judge Garcia's chambers advised Ms. Lucio's counsel on February 16, 2022, that all inquiries about criminal cases should go to Mrs. Gilman. Decl. ¶ 9. After the District Attorney moved for an execution date, Ms. Lucio's counsel contacted the Court, both in writing, and through a telephone call that, pursuant to Mrs. Gilman's role in chambers, would have been directed to Mrs. Gilman. Ms. Lucio's counsel left a message informing the Court that Ms. Lucio would seek an opportunity to respond in opposition to the date-setting motion. Before Ms. Lucio could file a response, Judge Garcia signed the State's proposed order and warrant *even though the accompanying warrant was defective*. The State was forced to file an amended order and warrant. Again, Judge Garcia rubber-stamped the State's proposed order and warrant without hearing from the defense.

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### III. Points and Authorities Supporting Disqualification and Recusal

#### A. The Law Requires that Judge Garcia Disqualify Herself

1. *There is a conclusive presumption that Court Administrator Gilman shared with her employer, Judge Garcia, confidential information that Mrs. Gilman obtained through her work on Ms. Lucio's case*

Article V, Section 11 of the Texas Constitution provides that “[n]o judge shall sit in any case ... when the judge shall have been counsel in the case.” Article 30.01 of the Texas Code of Criminal Procedure clarifies that the disqualification applies regardless of whether the judge was “counsel for the State or the accused.” Texas Rule of Civil Procedure 18b(a)(1) also expounds the disqualification. *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 553 (Tex. 2006). Under Rule 18b(a)(1), a judge is disqualified if she “served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.” The Texas Constitution thus disqualifies a judge whenever “the record shows a judge or his prior law firm represented a party in the same matter in controversy ... even if he did not personally participate in the representation.” *In re Wilhite*, 298 S.W.3d 754, 758 (Tex. App.--Houston (1st Dist.) 2009) (citing *State ex rel. Routh v. Burks*, 82 Tex. 584, 585, 18 S.W. 662 (1891)).

A judge is disqualified even though she did not personally participate in the representation of a party because “[a]n attorney’s knowledge about a matter is ‘imputed by law to every other attorney in the law firm.’” *Wilhite*, 298 S.W.3d at 758

(quoting *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996)). The same rule of imputation applies to Mrs. Gilman.

“A *nonlawyer* who worked on a matter at a prior firm is also subject to a *conclusive* presumption that confidences were *obtained*.” *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d 130, 134 (Tex. 2011) (emphasis in original). *See also In re Turner*, 542 S.W.3d 553, 556 (Tex. 2017) (“the law presumes that the nonlawyer employee obtained confidential information about the matter if she actually worked on the matter at her former firm”). Mrs. Gilman worked on Ms. Lucio’s case: she participated numerous attorney-client conference, at least one meeting with an expert witness and sought assistance from co-counsel in arranging to speak to lay witness. Decl. ¶ 6. After the trial Mrs. Gilman was responsible for making Ms. Lucio’s files available to her post-conviction attorney. *Id.* at ¶ 7.

In the context of lawyer disqualification, “the law presumes that a nonlawyer employee who obtained confidential information at her former firm shared that information with her new firm,” *Turner*, 542 S.W.3d at 556, or, in this case, her judge. Although that presumption is “generally rebuttable, ... some circumstances will cause the presumption to become irrebuttable.” *Ibid.* One such circumstance is when “the nonlawyer has actually performed work, *including clerical work*, on the matter at the lawyer’s directive if the lawyer reasonably should know about the conflict of interest.” *Id.* at 557 n.3 (quoting *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 828 (Tex. 2010)) (emphasis added). “When a nonlawyer employee is given *any* work to perform on a forbidden matter, and the employer reasonably should know about

the conflict of interest, disqualification is required.” *Columbia Valley*, 320 S.W.3d at 828 (emphasis added). The Texas Supreme Court has clarified the requirement of employer knowledge: “if the nonlawyer has actually worked on the matter, the presumption of shared confidences is *not rebuttable unless* the assigning lawyer should *not* have known of the conflict. *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d at 135 (emphasis in original).

The facts of this case create an irrebuttable presumption that Court Administrator Irma Gilman shared confidential information with her employer, Judge Garcia. Mrs. Gilman performed her job in this case. A representative from Judge Garcia’s chambers advised Ms. Lucio’s counsel on February 16, 2022, that all inquiries about criminal cases should be directed to Mrs. Gilman. The representative did not ask whether counsel was calling about Ms. Lucio’s case, so there was no effort to screen inquiries about the case from Mrs. Gilman. Decl. ¶ 9. After the State moved Judge Garcia to order Ms. Lucio’s execution, Ms. Lucio’s counsel called the Court to advise Judge Garcia that he would be filing an opposition to the motion and requesting an opportunity to be heard before any order was made. That call, like all others involving criminal matters before Judge Garcia, would have been received by Mrs. Gilman.

Judge Garcia should have known that Mrs. Gilman worked on Ms. Lucio’s defense alongside her husband. Judge Garcia had an affirmative duty to ensure that her “staff, court officials and others subject to the judge’s direction and control ... observe the standards of fidelity and diligence that apply to the judge.” Tex. Code Jud. Conduct, Canon 3(C). Judge Garcia could not comply with Canon 3(C) without

knowing the employment history of her Court Administrator, including what firms and matters she worked on that could come before her Court. Moreover, Mr. Gilman's name is in the trial record and the post-conviction record in this case.

There is no question that under less serious circumstances, any law firm employing Mrs. Gilman would be disqualified. For example, in *In re American Home Products Corp.*, 985 S.W.2d 68 (Tex. 1998), the Texas Supreme Court held a law firm was disqualified from a case because a temporary legal secretary who worked on the case worked on the same matter while working as a temporary secretary for the firm representing the opposing party. 985 S.W.2d at 76.

If a law firm would be disqualified under the circumstances of this case, it follows that Judge Garcia is disqualified. “[M]embers of the judiciary are significant public figures,” and “serve as the collective guidon of the banner representing fairness and impartiality in our state.” *In re Barr*, 13 S.W.3d 525, 532 (1998). Consequently, “The Texas jurist must be held to the highest standards of integrity and ethical conduct.” *Ibid.*

## ***2. Judge Garcia’s disqualification nullifies the order and warrant setting Ms. Lucio’s execution date***

“The action of a disqualified judge with reference to an order such a judge cannot make is void.” *Patterson v. State*, 83 Tex. Crim. 169, 171–72, 202 S.W. 88, 89 (1918). Judge Garcia was disqualified from entering any order setting Ms. Lucio’s execution date. Before the order issued, the Court Administrator had performed her duties in this case despite having worked on the case at the time of trial, and Judge Garcia should have known of that disqualifying conflict. Certainly, by the time the

amended order and warrant issued, Judge Garcia had ample time and opportunity to fulfill her responsibility under Canon 3(C) and learn of Mrs. Gilman’s prior work on the case. Accordingly, the order and warrant for Ms. Lucio’s execution are void.

### **B. The Law Requires that Judge Garcia Recuse Herself**

“A judge must recuse in any proceeding in which [] the judge’s impartiality might reasonably be questioned.” Tex. R. Civ. Proc. 18b(b)(1). Because “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954), recusal is required even of “judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *In re Murchison*, 349 U.S. 133, 136 (1955). *See also Sears v. Olivarez*, 28 S.W.3d 611, 615 (Tex. 13 App. 2000) (“Judicial decisions rendered under circumstances that suggest bias, prejudice, or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based.”).

Because the issue is one of perception, “the inquiry [under Rule 18b(b)(1)] should be ‘whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge’s conduct, would have a reasonable doubt that the judge is actually impartial.’” *Olivarez*, 28 S.W.3d at 615 (quoting *Rogers v. Bradley*, 909 S.W.2d 872, 881 (Tex. 1995) (Enoch, J.)). Because the Rule’s purpose is “developing *public* confidence in our judicial system,” *United States v. Jordan*, 49 F.3d 152, 155-56 (5th Cir. 1995) (discussing 28 U.S.C. § 455) (emphasis added),<sup>3</sup> that

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<sup>3</sup> *See also Williams v. Pennsylvania*, 579 U.S. \_\_\_, 136 S. Ct. 1899, 1909 (2016) (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”).

member of the public stands outside the judiciary. Thus, a judge presented with a motion like this one must be “mindful that an observer of our judicial system is less likely to credit judges’ impartiality than the judiciary.”<sup>4</sup> *Id.* at 157.

***1. Judge Garcia’s impartiality might reasonably be questioned based on her Court Administrator’s direct role in Ms. Lucio’s defense***

Ms. Lucio restates and incorporates everything in Section III.A, *supra*, as if fully set forth herein. Even if Mrs. Gilman’s personal knowledge of confidential information about this case does not constitute grounds for disqualifying Judge Garcia, a reasonable person informed about the norm of imputed knowledge and the close relationship of trust and confidence between a judge and court administrator would question Judge Garcia’s ability to decide issues without considering extrajudicial information. *Cf.* Tex. R. Civ. Proc. 18b(b)(3), (4), (5), and (7).

The facts provide reasonable members of the public multiple grounds for questioning Judge Garcia’s ability to be impartial. To know “all the facts” relevant to this case, members of the public must understand that because judges work in isolation, literally behind the scenes of the courtroom, judicial chambers foster professional and collegial intimacy. Only a few people enter chambers every day. Those people work closely together. Their work is sensitive and highly confidential, and those qualities enhances the bonds of familiarity and trust between members of chambers, including the judge and her staff.

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<sup>4</sup> *See also Williams*, 136 S. Ct. at 1906 (“Bias is easy to see in others and difficult to discern in oneself.”).

Management of a trial court's criminal docket requires extensive communication and trust between the judge and her staff. Judge Garcia has authorized Mrs. Gilman to speak on behalf of the court in relation to all criminal cases. That demonstrates a high degree of confidence in Mrs. Gilman's judgment by designating her Court Administrator responsible for all inquiries related to the court's criminal docket. Judge Garcia's relationship of trust and confidence in Mrs. Gilman would lead any reasonable person to question her ability to be impartial based on Mrs. Gilman's roles in Ms. Lucio's case.

An informed member of the public would be aware that Mrs. Gilman also has grounds for antipathy towards Ms. Lucio that could influence Judge Garcia. Ms. Lucio's state and federal habeas petitions raised numerous allegations of ineffectiveness against Mr. Gilman. Before filing those claims, Ms. Lucio's counsel filed a bar grievance against Mr. Gilman in which she asserted that Mrs. Gilman assisted her husband in violating the Disciplinary Rules of Professional Conduct by failing to turn over Ms. Lucio's files. *See Decl.* ¶ 17. Prior counsel singled out Mrs. Gilman for refusing to ship the files and insisting that counsel drive from Austin to Brownsville to retrieve them. *See Decl.* ¶ 9.

***2. Judge Garcia's impartiality might reasonably be questioned based on the role of her Court Administrator in current and anticipated proceedings***

Mrs. Gilman's role in Ms. Lucio's defense makes her a potentially important witness for Ms. Lucio's counsel. In 2019, the Cameron County District Attorney's Office made its files on this case available to Ms. Lucio's counsel. Review of those files and other investigation enabled Ms. Lucio's counsel to identify exculpatory evidence

that appears to have been suppressed at the time of trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Decl. ¶¶ 3, 5. Newly discovered exculpatory evidence is a basis for a stay of execution and subsequent habeas corpus review under Tex. Code Crim. Proc. art. 11.071, § 5(a).<sup>5</sup> If the recently discovered evidence was not suppressed, it might have been discoverable by the Gilmans and other counsel for Ms. Lucio. The failure of the Gilmans and/or other prior counsel to discover and use that evidence could give rise to additional grounds for relief or clemency.

Two things obstruct Ms. Lucio's access to evidence of *Brady* violations or ineffective defense representation. One is Mr. Gilman's at-will employment with the

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<sup>5</sup> See, e.g., *Ex parte Landor*, No. WR-81,579-02, 2020 WL 469979, (Tex. Crim. App. Jan. 29, 2020) (unpublished) (authorizing successive proceedings on claim that State withheld *Brady* evidence); *Ex parte Reed*, No. WR-50,961-10, 2019 WL 6114891, (Tex. Crim. App. Nov. 15, 2019) (unpublished) (authorizing successive proceedings on *Brady*, false testimony, and actual innocence claims); *Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016) (unpublished) (granting relief on basis that State's failure to timely disclose police reports to defendant constituted *Brady* violation); *Ex parte Murphy*, No. WR-38,198-04, 2015 WL 5936938 (Tex. Crim. App. Oct. 12, 2015) (unpublished) (staying applicant's execution to consider authorization of successive proceedings on *Brady* claim that State failed to disclose threats of prosecution and promises of leniency to its two main witnesses and on claim that State unknowingly presented false testimony through one witness); *Ex parte Tercero*, No. WR-62,592-04, 2015 WL 5157211 (Tex. Crim. App. Aug. 25, 2015) (unpublished) (authorizing successive proceedings on claim that State presented false testimony); *Ex parte Carty*, No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App. Feb. 25, 2015) (unpublished) (authorizing successive proceedings on claim that State coerced witnesses into providing false testimony and that State did not disclose deal with co-defendant); *Ex parte Brown*, No. WR-68,876-01, 2014 WL 5745499, Tex. Crim. App. Nov. 5, 2014) (unpublished) (vacating applicant's conviction and sentence on basis that the State withheld *Brady* evidence); *Ex Parte Tiede*, 448 S.W.3d 456 (Mem.) (Tex. Crim. App. 2014) (granting applicant relief on basis of the State's use of false evidence); *Ex parte Lave*, Nos. WR-44564-03, WR 44564-04, 2013 WL 1449749 (Tex. Crim. App. April 10, 2013) (unpublished) (authorizing successive proceedings on claim that State presented false expert testimony); *Ex parte Bower*, No. WR-21005-02, 2012 WL 2133701 (Tex. Crim. App. June 13, 2012) (unpublished) (authorizing subsequent habeas application following forensic testing on *Brady* claim); *Ex parte Wyatt*, No. AP-76797, 2012 WL 1647004 (Tex. Crim. App. May 9, 2012) (unpublished) (authorizing successive petition and granting relief on four items of exculpatory evidence suppressed by the State that would have supported the defense's theory of misidentification); *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (authorizing subsequent petition and granting relief on *Brady* claim that State failed to produce police reports which identified other potential suspects); *Ex parte Settle*, No. AP-76591, 2011 WL 2586406 (Tex. Crim. App. June 29, 2011) (unpublished) (authorizing successive petition and granting relief on *Brady* claim).



Cameron County District Attorney's Office. As explained in Ms. Lucio's motion to disqualify the District Attorney, which she fully incorporates herein by this specific reference, Mr. Gilman's interest in retaining his standing with the District Attorney conflicts with the ongoing duties of loyalty and cooperation that he owes Ms. Lucio. One effect of that conflict is Ms. Lucio's inability to obtain from Mr. Gilman candid, reliable information about the Cameron County District Attorney's Office's pretrial disclosures.

The other thing obstructing Ms. Lucio's access to evidence is Mrs. Gilman's employment in Judge Garcia's chambers. Canon 3(B)(8) of the Texas Code of Judicial Conduct prohibits members of a judge's staff from communicating *ex parte* with counsel for a party. The same canon requires that a "judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." In this case, Judge Garcia cannot accord Ms. Lucio the opportunity to be heard regarding potential *Brady* or other claims without violating the requirement that she prohibit Mrs. Gilman from communicating *ex parte* about those potential claims.

A reasonable person who recognizes that a judge has a duty to sit in any case in which she is not disqualified also would recognize that ensuring access to justice for a person facing imminent execution is more important. Judges serve to promote justice, not obstruct it. If Judge Garcia does not recuse or disqualify herself, it would leave in place a barrier to Ms. Lucio's access to evidence and would raise reasonable questions regarding Judge Garcia's ability to be impartial in this case.

#### IV. Conclusion

For the foregoing reasons, Judge Garcia should take no further action in this cause, Tex. R. Civ. Proc. 18a(f)(2), other than to enter the attached proposed order disqualifying her and voiding the order and warrant for Ms. Lucio's execution. Failing that, this Court should "sign and file with the clerk an order referring the motion to the regional presiding judge." Tex. R. Civ. Proc. 18a(f)(1)(B).

Respectfully Submitted,

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DATED: February 18, 2022

*Certificate of Service*

I certify that on February 18, 2022, I served a true and correct copy of Defendant's Motion to Disqualify or Recuse Judge Gabriela Garcia on counsel for the State by eFile.

*/s/ Timothy Gumkowski*  
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