CAUSE NO. 07-CR-0885

THE STATE OF TEXAS,	**§**	**IN THE DISTRICT COURT**
	§	
VS.	**§**	**138TH DISTRICT**
	§	
MELISSA E. LUCIO	**§**	**CAMERON COUNTY,**
	§	**TEXAS**

DEFENDANT'S MOTION TO DISQUALIFY THE CAMERON COUNTY DISTRICT ATTORNEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes and Rules

Other Authorities

I. Motion

NOW COMES Defendant, Melissa Elizabeth Lucio ("Ms. Lucio"), who moves this Court pursuant to Tex. Code Crim. Proc. art. 2.01 and the Due Process Clause of the Fourteenth Amendment to disqualify, remove, and replace the Cameron County District Attorney ("CCDA"). 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.

II. Summary of Argument

Melissa Lucio, through undersigned counsel, moves this Court pursuant to Tex. Code Crim. Proc. art. 2.01 and the Due Process Clause of the Fourteenth Amendment to disqualify, remove, and replace the Cameron County District Attorney ("CCDA"). 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.

"A trial court has limited authority to disqualify an elected district attorney and [his] staff from the prosecution of a criminal case." *Buntion v. State*, 482 S.W.3d 58, 76 (Tex. Crim. App. 2016). The Court of Criminal Appeals has identified two situations in which a due-process violation requiring disqualification would arise: First, "i[f] a prosecution attorney has formerly represented the defendant in the 'same' criminal matter as that being currently prosecuted," he is "automatically disqualified" from prosecuting the defendant, "even without a specific showing of prejudice." *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008). Second, if a prosecuting attorney has previously represented the defendant in a different matter, he is

disqualified when the defendant can establish actual prejudice. *Id*. at 304-305. Both situations exist in Ms. Lucio's case.

(1) Two members of Ms. Lucio's trial defense team—her lead attorney, Peter Gilman, and his wife and then-paralegal, Irma Gilman—were hired by corrupt District Attorney Armando Villalobos shortly after Ms. Lucio was sentenced to death and while Ms. Lucio's post-conviction counsel was investigating whether Mr. Gilman was ineffective. (2) Despite the continuing duties of loyalty and cooperation that Mr. Gilman owes Ms. Lucio today, he continues to work as an at-will employee for current District Attorney Luis Saenz. That dual loyalty denies Ms. Lucio due process by preventing her from obtaining un-conflicted cooperation from Mr. Gilman as she investigates whether DA Villalobos suppressed exculpatory or mitigating evidence at the time of trial. Mr. Gilman has a duty to provide that information and cooperation.

III. Procedural & Factual Background

On February 17, 2007, Ms. Lucio was taken into police custody and subsequently arrested and indicted for the capital murder of her daughter Mariah. This Court appointed Peter Gilman to represent Ms. Lucio on May 31, 2007. Second-chair counsel Adolfo Cordova was appointed on June 28, 2007. Mr. Cordova was a family law attorney who had no criminal experience.

On February 18, 2007, "Cameron County Judge Luis V. Saenz arraigned Melissa Elizabeth Lucio and set her bond at two million dollars." Ex. A.

Peter Gilman was assisted by his wife and paralegal, Irma Gilman. For example, Irma Gilman attended a dinner meeting with another lawyer and an expert whom Peter Gilman later called as a witness at Ms. Lucio's trial. Ex. B. Irma Gilman

also attended attorney-client conferences and assisted in preparing evidence for trial. Ex. C at ¶ 6.

Peter Gilman completed and submitted an application for employment with Cameron County on October 19, 2009, and started work the same day. Ex D. That was four days *after* Mr. Gilman and corrupt Cameron County District Attorney Armando Villalobos agreed he would work there. *Id*.

Mr. Gilman has continued to work at the CCDA since October 19, 2009, and, on information and belief, today serves as the third highest-ranking assistant to District Attorney Luis V. Saenz.

On March 11, 2015, in response to a query from Ms. Lucio's prior counsel, the CCDAO stated that, because Gilman "was involved in defending" Ms. Lucio, he was excluded from any discussions on Ms. Lucio's case "post October 19, 2009." Ex. E. The CCDAO also stated that, "[a]t meetings whenever [Ms. Lucio]'s case arose, Mr. Gilman was asked to leave the room." *Id*.

On February 26 or 27, 2019, while Ms. Lucio's counsel were scanning documents from the CCDA's files, Mr. Gilman took a moment to watch counsel work. Ex. C at ¶ 3.

On January 12, 2022, DA Saenz filed a motion seeking an execution date for Ms. Lucio.

Since DA Saenz sought an execution date, counsel for Ms. Lucio have asked DA Saenz or Assistant District Attorney Edward Sandoval to communicate with them. Those requests have all been ignored. Ex. C at ¶¶ 11-15.

The last such request was made on February 14, 2022, when undersigned counsel advised DA Saenz that his role in the case created a conflict of interest for Mr. Gilman. Ex. C at ¶ 15.

IV. Points and Authorities

A. The Gilmans' representation of Ms. Lucio in the same matter currently before this Court statutorily disqualifies the CCDA.

1. Peter Gilman's dual role as assistant district attorney and predecessor counsel for Ms. Lucio disqualifies the CCDA

"If a prosecuting attorney has formerly represented the defendant in the 'same' criminal matter as that currently being prosecuted, he is statutorily disqualified." *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008); Tex. Code Crim. Proc. art. 2.01. This has been called the "'hard and fast rule of disqualification,'" *ibid.* (quoting Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 Baylor L. Rev. 171, 177 (2002)), because when a prosecutor switches sides "in the same criminal case [there] is an actual conflict of interest [that] constitutes a due-process violation, even without a specific showing of prejudice." *Ibid*. Thus, prior representation of the defendant in the same criminal matter results in "automatic disqualification." *Ibid*.

DA Saenz did not switch sides in this case, but his long-time assistant, Mr. Gilman, did, and so did Irma Gilman, Mr. Gilman's wife and former paralegal who worked on Ms. Lucio's case then followed Mr. Gilman to the CCDA in November 2009. Under Texas rules of professional conduct, Mr. Gilman's disqualifying knowledge is imputed to the CCDA:

> If the *lawyer* works on a matter, there is an *irrebuttable* presumption that the lawyer *obtained* confidential information during the representation. When the lawyer moves to another firm and the second firm represents an opposing party to the lawyer's former client, a second *irrebuttable* presumption arises—that the lawyer has *shared* the client's confidences with members of the second firm. The effect of this second presumption is the mandatory disqualification of the second firm.

In re Guaranty Ins. Services, Inc., 343 S.W.3d 130, 134 (Tex. 2011) (emphasis in original) (internal citations omitted).[1]

The rationale of *Guaranty* is fully applicable here. The Court of Criminal Appeals has noted that successive representation creates a conflict that is "obvious and the integrity of the prosecutor's office suffers correspondingly." *See Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979). When applying the Constitution's Due Process Clauses, the United States Supreme Court, the Fifth Circuit and the Court of Criminal Appeals imputes knowledge between prosecutors, *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); *Ex parte Adams*, 768 S.W.2d 281, 291-292 (Tex. Crim. App. 1989), and between the police and prosecutors. *Strickler v. Greene*, 527 U.S. 263, 275 n.12 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Because, as demonstrated *infra*, DA Saenz's refusal to disqualify himself implicates Ms. Lucio's life and liberty interests in accessing the remedies available under Texas law, this Court must apply the same imputation rule here. *See Spain*, 589 S.W.2d at 134 (finding "very real danger that the district

[1] Although the Texas Disciplinary Rules distinguish between successive private and governmental employment, *compare* Tex. Disciplinary R. Prof. Conduct 1.09 *with* R. 1.10(e), Article 2.01's express prohibition on prosecuting attorneys successively representing a defendant and the State in the same matter overrides that distinction.

attorney would be prosecuting the defendant on the basis of facts acquired by him during the existence of his former professional relationship with the defendant").

Texas law holds that there is a presumption of shared confidences. *In re American Home Products,* 985 S.W.2d 68 (Tex. 1998). Even unequivocal testimony that no information or confidences were shared is no evidence to defeat the presumption of a disqualifying conflict. *American Home,* 985 S.W.2d at 75; *Grant v. Thirteenth Court of Appeals,* 888 S.W.2d 466, 467. (Tex. 1994).

Even if the presumption of shared information was not irrebuttable, DA Saenz could not rebut it because he was not the District Attorney at the time Mr. Gilman switched sides. Mr. Gilman was hired by the corrupt former District Attorney Armando Villalobos, two and a half years before Mr. Villalobos's arrest.

Public records show DA Villalobos offered Mr. Gilman a job, or Mr. Gilman accepted an earlier offer, on October 15, 2009, four days *before* Mr. Gilman *applied* for the position, and that he applied the same day he started, October 19, 2009. Ex. D. DA Villalobos did not record the day he interviewed Mr. Gilman for his position. *Ibid*.

Mr. Gilman was in private practice before he joined the CCDA. It is implausible that a lawyer could wrap up his private practice in four days, and it is more implausible that Mr. Gilman could have decided to accept DA Villalobos's offer *and* wrap up his practice in four days' time. That means DA Villalobos began discussing employment with Mr. Gilman earlier than October 15, 2009, and Mr. Gilman accepted the job on that date.

DA Saenz has claimed that "Mr. Gilman was excluded from any discussions on the LUCIO case *post* October 19, 2009." Ex. E (emphasis added). DA Saenz is unlikely to have personal knowledge that DA Villalobos excluded Mr. Gilman from discussions of Ms. Lucio's case because DA Saenz was not sworn in until January 1, 2013. Even assuming DA Saenz had personal knowledge of whether DA Villalobos excluded Mr. Gilman from discussions of Ms. Lucio's case *after* October 19, 2009, there is no evidence DA Villalobos excluded Mr. Gilman from such discussions in the time between when DA Villalobos recruited him for the position (Mr. Gilman accepted the job before he applied), and when he started.

Regardless of DA Saenz's inability to rebut the presumption regarding Mr. Gilman's communications with DA Villalobos, excluding Mr. Gilman from discussions would be inadequate. Comment 3 to Texas Disciplinary Rule 1.10 provides that adequate screening measures must include steps to ensure that the lawyer "will not have access to the files pertaining to the matter." Mr. Gilman did have access to the CCDA's files on this case. Ex. C, ¶ 3. Excluding Mr. Gilman from preplanned discussions of Ms. Lucio's case did not and does prevent him from: communicating information by intra-office email; reading, either intentionally or unintentionally, memos to the file or handwritten notes on the case; leaving privileged material in a conference room or a colleague's office; overhearing and then joining impromptu discussion about the case; or countless other means other than oral communication during a preplanned discussion of Ms. Lucio's case.

2. Irma Gilman's dual role as a paralegal in the CCDA and former paralegal on Ms. Lucio's trial team disqualifies the CCDA

In addition to the CCDA's inability to rebut the presumption that dishonest DA Villalobos did not acquire privileged information from Mr. Gilman, there is the problem that Mrs. Gilman also acquired privileged information during her work on Ms. Lucio's trial case, and there is no evidence the CCDA took the necessary steps to prevent her from sharing it with her CCDA colleagues.

"A *nonlawyer* who worked on a matter at a prior firm is also subject to a *conclusive* presumption that confidences were *obtained*." *Guaranty*, 343 S.W.3d at 134 (emphasis in original). Where non-lawyers are concerned there is a presumption that confidences were shared with her new employer. *Ibid*. That presumption can be rebutted if the CCDA satisfied strict requirements. *Ibid*.

> The *only* way to rebut the rebuttable presumption is:
>
> (1) to instruct the legal assistant "not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation," and (2) to "take other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment, absent client consent."

Ibid. (emphasis added). The "simple, informal admonition to a nonlawyer employee not to work on a matter on which [s]he worked before," which is more than DA Saenz's administration did with Mr. Gilman, "is not enough." *Ibid*.

In sum, DA Saenz cannot vouch for the good faith and ethical conduct of corrupt DA Villalobos who negotiated the Gilmans' employment before they applied to work in the CCDA office. What evidence there is that DA Saenz's administration screened

the Gilmans from *receiving* confidential *governmental* information about Ms. Lucio did nothing to prevent the Gilmans from *providing* confidential information. Even if the exclusion of Mr. Gilman from preplanned discussions constitutes a screening measure, it was too little as a matter of fact and law, and came years too late, and there is no evidence it applied to Mrs. Gilman. The presumption of shared information cannot be rebutted in this case, and the CCDA is statutorily disqualified from representing the State in this cause after members of its staff previously represented Ms. Lucio in the same cause.

B. DA Saenz's refusal to recuse himself is in conflict with his statutory duty to see that justice is done and violates Ms. Lucio's right to due process of law.

In Texas, the "primary duty of all prosecuting attorneys" is "to see that justice is done." Tex. Code Crim. Proc. art. 2.01. To that end, Texas law provides that a District Attorney "shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused." *Ibid*. In this case, DA Saenz is unable to perform his primary duty. By refusing to recuse himself from this case CCDA Saenz is obstructing justice and effectively suppressing facts and preventing a witness—one of DA Saenz's assistants—from carrying out his ethical duties to provide information to Ms. Lucio that is necessary for her to invoke statutory and constitutional remedies.

While DA Saenz remains on this case, Mr. Gilman faces a conflict between his personal and professional interests in remaining on good terms with his employer, and his ongoing ethical duties to maintain confidences, to remain loyal, and to cooperate with Ms. Lucio's current counsel. Mr. Gilman's personal interest precludes fulfilment of his ethical duties and, therefore, prevents Ms. Lucio from obtaining

information that is necessary for her to make use of statutory and constitutional remedies including subsequent habeas proceedings and clemency. That is, Mr. Gilman's conflict of interest denies Ms. Lucio due process of law.

This Court has authority to disqualify the CCDA based on the statutory requirements of Article 2.01 and the Court's duty to protect Ms. Lucio's constitutional due-process rights. *See*, *e.g.*, *Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981). Ms. Lucio is prejudiced by the CCDA's refusal to recuse itself:

> [I]n the context of a conflict-of-interest claim that does not involve prior representation in the same criminal matter, … a due-process violation occurs only when the defendant can establish "actual prejudice," not just the threat of possible prejudice to his rights by virtue of the district attorney's prior representation.

Landers, 256 S.W.3d at 304-305. Ms. Lucio easily satisfies this test. Mr. Gilman's *present* conflict of interest prevents him from fulfilling his *current* obligations to Ms. Lucio.

Mr. Gilman is subject to the Texas Disciplinary Rules of Professional Conduct. Texas courts have often looked to the disciplinary rules to decide disqualification issues. *See*, *e.g.*, *Lander*, 256 S.W.3d at 305 nn.27 & 28 (relying on Disciplinary Rules 1.09(A)(3) and 1.05, respectively); *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998); *In re Works*, 118 S.W.3d 906, 908–09 (Tex. App.-Texarkana 2003, orig. proceeding). While the disciplinary rules are merely guidelines for court-ordered disqualification (rather than controlling standards), these rules do provide reasonable guidance—even in cases where an attorney may not have clearly violated one of the disciplinary rules. *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998); *Meador*, 968 S.W.2d at 351; *see also Gonzalez v. State*, 117 S.W.3d 831, 837–38 (Tex. Crim. App. 2003)

(using Tex. Disciplinary R. Prof. Conduct 3.08 as guideline); *House v. State*, 947 S.W.2d 251, 252–53 (Tex. Crim. App. 1997) (citing Rule 3.08, cmt. 10, which states: "this rule may furnish some guidance"); *Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996); *Works*, 118 S.W.3d at 908–09; *In re Bahn*, 13 S.W.3d 865, 872 (Tex. App.-Fort Worth 2000, orig. proceeding).

The disciplinary rules impose on Mr. Gilman ongoing duties to his former client, Ms. Lucio. As discussed above, Mr. Gilman has a duty not to use "confidential information of a former client to the disadvantage of the former client after the representation is concluded." Tex. Disciplinary R. Prof. Conduct 1.05(b)(3). As discussed above, the only screening measure allegedly taken by the CCDA could prevent the CCDA from conveying information to Mr. Gilman, but it poses no barrier to Mr. Gilman providing confidential information to the CCDA.

Mr. Gilman also owes Ms. Lucio a continuing duty of loyalty. He has a present duty to avoid conflicts between his own interests and the interests of his former client. Tex. Disciplinary R. Prof. Conduct 1.06(b). As the Texas Bar explained in the 2006 *Guidelines and Standards for Texas Capital Counsel*, in the specific context of capital representation, the ongoing duty of loyalty means

> all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel.

Guideline 11.8. That duty includes "[p]roviding … information regarding all aspects of the representation[] to successor counsel," Guideline 11.8(A)(2), and "[s]haring *potential* further areas of … factual research with successor counsel." Guideline 11.8(A)(3). *See also* Guideline 12.2(F) ("Trial counsel should cooperate with successor

… habeas and clemency counsel in providing relevant information to successor counsel").

Mr. Gilman's ongoing duty to safeguard Ms. Lucio's interests is in conflict with his personal interest in maintaining the favor of his at-will employer, DA Saenz. Fulfillment of his duty to safeguard Ms. Lucio's interests requires that Mr. Gilman review documents obtained by her current counsel and provide candid and confidential information regarding whether those documents were disclosed by the CCDA at the time of trial or were otherwise known to trial counsel. Providing candid, confidential cooperation with Ms. Lucio's present counsel conflicts with Mr. Gilman's interest in maintaining his professional standing with his employer, DA Saenz, who is actively, personally, and aggressively engaged in seeking Ms. Lucio's execution.

Since moving to set the execution date, DA Saenz has pursued a policy or strategy of total non-cooperation with Ms. Lucio's counsel. Although DA Saenz has an ethical duty to "be courteous, civil, and prompt in oral and written communications," Texas Lawyer's Creed, Part III, ¶ 1, he has refused to acknowledge or respond to communications from opposing counsel. Ex. C, ¶¶ 11-15. Although DA Saenz has an ethical duty to "attempt to resolve by agreement [his] objections to matters contained in pleadings," Texas Lawyer's Creed, Part III, ¶ 8, he has refused even to communicate that he is unable to agree. Although DA Saenz has an ethical duty to avoid "concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, *and the like*," Tex. Disciplinary R. Prof. Conduct 3.04 & cmt. 1

(emphasis added), he has taken no action to remove the conflict created by Mr. Gilman's dual role as DA Saenz's employee and Ms. Lucio's former counsel.

At the same time Mr. Gilman has a continuing duty of loyalty and cooperation with Ms. Lucio's current counsel, his employer has a policy or strategy of non-cooperation with the same attorneys. Anything Mr. Gilman might do to fulfill his duty to Ms. Lucio, will be averse to his employer's strategy of non-cooperation. Where an attorney's "struggle to serve two masters cannot seriously be doubted," there is a conflict that the court must resolve. *Glasser v. United States*, 315 U.S. 60, 75 (1942).

Although Mr. Gilman's status as an at-will employee of DA Saenz is sufficient to create a disqualifying conflict with his duty to cooperate with Ms. Lucio's current counsel in opposing DA Saenz, there are additional facts that show the conflict to be acute and severe. A district attorney has a duty to recuse himself where there is a conflict of interest or appearance of impropriety. *Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008). Ms. Lucio's counsel apprised DA Saenz of the facts set out in this motion and asked him to recuse himself. Ex. C, ¶ 15.

In addition, Ms. Lucio's current counsel advised DA Saenz that as a judge, he arraigned Ms. Lucio in this ongoing case and set her bond. That participation in the case "personally and substantially as an adjudicatory official," Tex. Disciplinary R. Prof. Conduct 1.11(a), disqualifies DA Saenz from representing the State in this case, or, at a minimum, creates an appearance of impropriety. At a minimum, DA Saenz's refusal to recuse himself despite the ongoing violation of Disciplinary Rule 1.11(a) reflects a personal connection to Ms. Lucio's case that Mr. Gilman must be aware of,

and that he must take into account in deciding whether to fulfill his ongoing duty to cooperate with Mr. Lucio's present counsel.

DA Saenz personal investment in this case is further demonstrated by his use of false statements to justify his conduct in Ms. Lucio's case. According to media reports, DA "Saenz said Lucio has filed at least six different appeals and all were dismissed or denied by the courts." Ex. F. That is misleading. In the context of rationalizing DA Saenz's rush to set an execution date, and on its face, the statement conveys that none of Ms. Lucio's appeals was successful because she raised no meritorious issues. But she did. On July 29, 2019, the Fifth Circuit Court of Appeals held that Ms. Lucio's right to present a complete defense was violated and she was entitled to a new trial. *Lucio v. Davis*, No. 16-70027, 783 Fed. App'x 313, *vacated by*, *Lucio v. Davis*, Order filed Jan. 20, 2020. When the Fifth Circuit reheard the case *en banc* seven judges voted to deny relief, and seven voted to grant Ms. Lucio a new trial because the exclusion of evidence at trial violated her right to present a defense. *See generally Lucio v. Lumpkin*, 987 F.3d 451 (5th Cir. 2021). Three judges broke the tie, writing that Ms. Lucio's case is "a clear example that justice to a defendant may necessitate a more comprehensive review of state-court evidentiary rulings than is presently permissible." 987 F.3d at 490 (Southwick, J., concurring). Disciplinary Rule 4.01(a) prohibits attorneys from "knowingly [] mak[ing] a false statement of material fact or law to a third person." If DA Saenz's misleading statement did not violate the letter of the rule, it certainly violated its spirit.

DA Saenz's antipathy towards Ms. Lucio also is reflected in his refusal to communicate with her counsel. Texas lawyers have a duty to be "courteous, civil, and prompt in oral and written communications" with opposing counsel, and a duty to "attempt to resolve by agreement" disputed issues. Texas Lawyer's Creed, Part III, ¶¶ 1 & 8. Although Ms. Lucio's counsel have communicated, and attempted to communicate, with Mr. Saenz by telephone and email, he has not ~~even~~ acknowledged these communications. In particular, as of this date ~~of filing~~, DA Saenz has not responded to counsel's communication regarding the issues raised here.

The foregoing circumstances demonstrate an actual conflict for both DA Saenz and Mr. Gilman. DA Saenz's willingness to remain on this case despite the appearance of impropriety created by his prior role as judge and Mr. Gilman's prior role as defense counsel, and his failure to communicate with opposing counsel, convey that compliance with ethical responsibilities is less important than the pursuit of Ms. Lucio's execution. Under those circumstances, Mr. Gilman faces an actual conflict between his personal interest in remaining DA Saenz's at-will employee and his duties to Ms. Lucio.

This Court's authority to disqualify a prosecutor comes from the Court's duty to protect Ms. Lucio's constitutional due-process rights. *Morgan*, 616 S.W.2d at 626. Ms. Lucio has a statutory right to pursue habeas corpus relief based on newly discovered evidence, Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), and evidence of innocence or ineligibility for the death penalty, *id*. at §§ 5(a)(2) & (3). She also has the right to pursue clemency. When a State chooses to make such procedures available, it must

ensure that they comport with due process. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-69 (2009); *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998).

As stated above, Ms. Lucio's current counsel have obtained favorable evidence that does not appear to have been disclosed to the defense at the time of trial. Ex. C, ¶¶ 3-5. However, due to the condition of Ms. Lucio's files when they were turned over to present counsel, trial counsel must review the materials and advise present counsel regarding whether they were disclosed. *Id.* at ¶¶ 4-5. That is, Mr. Gilman is an important witness regarding whether the documents were suppressed. *See Strickler*, 527 U.S. at 276 n.13.

Many death-sentenced men in Texas have been authorized to proceed under § 5(a)(1) based on claimed violations of *Brady v. Maryland*, 373 U.S. 83 (1963), that arose after initial state habeas proceedings.[2] It would be completely arbitrary to deny

[2] *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)

Ms. Lucio access to that remedy because DA Saenz refuses to recuse himself and thereby deters his assistant, Mr. Gilman, from fulfilling his duty to cooperate with successor counsel. DA Saenz's continued role in the case renders § 5(a) "fundamentally inadequate to vindicate the substantive rights provided," *Osborne*, 557 U.S. at 69, for subsequent habeas review of *Brady* claims.

V. Conclusion

The foregoing evidence and argument presents at least a *prima facie* case for disqualifying the CCDA from this case. If this Court is in doubt about whether to grant this Motion, Ms. Lucio requests an opportunity to present evidence and argument at a hearing.

When this Court is satisfied that the grounds presented here require disqualification, Ms. Lucio prays this Court will enter the attached proposed order removing the CCDA from this case, locate a qualified attorney pro tem, and appointed un-conflicted counsel for the State.

Respectfully Submitted,

(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).

/s/ Richard Ellis
A. RICHARD ELLIS
75 Magee Ave.
Mill Valley, CA 94941
(415) 389-6771
a.r.ellis@att.net

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas

/s/ Tivon Schardl
TIVON SCHARDL
CHIEF, CAPITAL HABEAS UNIT
Texas Bar No. 24127495
TIMOTHY GUMKOWSKI
Assistant Federal Public Defender
919 Congress, Suite 950
Austin, Texas 78701
(737) 207-3008
(512) 499-1584 (fax)

Counsel for Defendant

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 the Cameron County District Attorney on counsel for the State by eFile.

/s/ Timothy Gumkowski
Timothy Gumkowski