COURT OF APPEALS FOR THE
FIFTH DISTRICT OF TEXAS

CASE NO.

05-05-00660 CR

MARK XXX
Defendant-Appellant

v.

STATE OF TEXAS
Plaintiff-Appellee.

APPEAL FROM THE 204th DISTRICT COURT
OF DALLAS COUNTY, TEXAS

FINAL OPENING BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT
REQUESTED

F. CLINTON BRODEN
Tex. Bar No. 24001495
Broden & Mickelsen
2707 Hibernia
Dallas, Texas 75204
(214) 720-9552
(214) 720-9527(facsimile)

Attorney for Defendant-Appellant
Mark XXX

IDENTITY OF PARTIES AND COUNSEL

Plaintiff-Appellee:	State of Texas
Trial Counsel:	Daniel K. Hagood David Lewis Fitzpatrick, Hagood, Smith & Uhl 2515 McKinney Avenue Dallas, Texas 75201
Appellate Counsel:	Dallas County District Attorney's Office 133 N. Industrial Blvd. Dallas, Texas
Defendant-Appellant:	Mark XXX
Trial Counsel:	Paul Coggins John Helms Fish & Richardson 1717 Main Street, Suite 5000 Dallas, Texas 75201 David Finn 2828 North Harwood Street, Suite 1950 Dallas, Texas 75201
Appellate Counsel:	F. Clinton Broden Broden & Mickelsen 2707 Hibernia Dallas, Texas 75204

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STATEMENT OF THE CASE

On August 27, 2004, Mark Anthony XXX was charged by indictment with tampering with physical evidence. *See* C.R. at I:2-3.[1] The indictment charged that he knowingly used a false search warrant affidavit on October 23, 2001 with the intent to affect the outcome of an official proceeding and investigation. *Id*. More specifically, it charged that, when he applied for a search warrant for 5972 Marine Way, Dallas, Texas, he submitted a false statement, to wit: that "the confidential informant was reliable and that in the past [he] had received information from the confidential informant about persons who traffic drugs in the Dallas County area and on each and every occasion [sic.] the informant had proven to be true, reliable and correct...." *Id*.

A trial was held on March 8, 2005-April 7, 2005. The jury found Mr. XXX guilty on March 21, 2005. *See* C.R. at III:781. On April 7, 2005, the jury sentenced Mr. XXX to five years imprisonment. *Id*. at III:793-94. The Court imposed sentence in accordance with the jury's verdict. *Id*. at III:795-798.

On April 7, 2005, Mr. XXX filed a timely Notice of Appeal from his conviction and sentence. *See* C.R. at III:801.

[1]Citations to the Clerk's Record are to C.R. at volume number:page number. Citations to the Reporter's Record are to R.R. at volume number:page number.

ISSUES PRESENTED

I. Whether a District Attorney can appoint what in essence is a *de facto* Attorney Pro Tem, in violation of Tex. Code Crim. P. Art. 2.07, and thereby give up responsibility for the prosecution, control and management of the case at issue.

II. Whether amending an indictment to allege an additional false statement other than the one charged in the original indictment, over a defendant's objection, violates Tex. Code Crim P. Art. 28.10.

III. Whether, in the case of an indictment that alleges two false statements, a defendant is entitled to a severance under Tex. Penal Code § 3.04 as a matter of right.

IV. Whether a motion requesting leave to amend an indictment, or an order granting such a motion, constitutes the filing of an amended indictment.

V. Whether the fact that Person A is afraid of Person B because Person A believes Person B had previously killed somebody is admissible under Tex. R. Evid. 803(3) and relevant because it shows the that it is unlikely that Person A would want to deal with Person B or be in Person B's presence.

VI. Whether, after the state introduces redacted public/business records before a jury, the defendant, under the rule of optional completeness or simply because the records are independently admissible as public/business records, can introduce unredacted versions of the records so that a jury is not given a false impression of what the records may represent.

VII. Whether a District Court illegally comments on the evidence by giving jury instructions that assume that a statement at issue *is* false and then only requires the jury to determine if the statement was made knowing it was false.

VIII. Whether the District Court, in this case, erred in not turning over *Brady* material to the defense which the Court reviewed *in camera*.

STATEMENT OF FACTS

The original indictment against Mark XXX read as follows:

> On about the 23rd day of October A.D., 2001 in the County of Dallas and said State, did then and there, knowing that an official proceeding and investigation was pending and in progress, to wit; a Dallas Police Department Narcotics Division Investigation, with intent to affect the outcome of the official proceeding and investigation, did make and present and use a document, to wit; an affidavit for a search warrant and arrest warrant, hereinafter "affidavit", dated the 23rd day of October, 2001 for the premises located at 5972 Marine Way, Dallas, Texas, with knowledge of its falsity in that the defendant knew that the affidavit contained defendant's false statement and false information that the confidential informant was reliable and that in the past defendant had received information from the confidential informant about persons who traffic drugs in the Dallas County area on each and every occasion the informant had proved to be true, reliable and correct, against the peace and dignity of the State.

C.R. at I:02. Nevertheless, on the day trial was scheduled, the state requested a continuance in order to allege that the false statement was that "Enrique M. Alonzo and Jose Ruiz" (instead of *a* confidential informant) "was [sic.] reliable and that in the past the Defendant had received information from an unnamed confidential informant, to wit: Enrique M. Alonzo and Jose Ruiz, about persons who traffic drugs in the Dallas County area and on each and every occasion and unnamed confidential informant, to wit: Enrique M. Alonzo and Jose Ruiz, had proven to be true, reliable and correct." *Id*. at II:651-52.

As discussed in the Argument section of this brief, there is a dispute as to whether such an amendment ever became effective because neither the original

indictment nor a copy of the indictment was every interlineated. Still, the question of the identity of the confidential informant that Mr. XXX was referring to in his October 23, 2001 search warrant affidavit became central to this case.

Indeed, there was no dispute that Mr. XXX obtained a search warrant from Dallas County Magistrate Victor Lander on October 23, 2001 based upon an affidavit in which he alleged that he had "received information from a reliable and confidential informant" and that he had "received information in the past from the said confidential and reliable informant about persons who traffic in the Dallas County area and on each and every occasion, said confidential informant has proven to be true, reliable and correct."[2] Therefore, the jury's first task would be to decide on the identity of the confidential informant who Mr. XXX was referring to and, once that was decided, to determine if Mr. XXX knowingly made a false statement with respect to that informant's past reliability.

The issue of the confidential informant's identity will be discussed at great length in subsection D below. Nevertheless, it is necessary to give the Court context before doing so.

A. Background

[2]Magistrate Lander testified at trial that he would not have authorized a search warrant based on an affidavit that did not indicate that an informant had proven to be true on every occasion he was used. *See* RR. at XX:100-01. Nevertheless, when confronted with some warrants he approved wherein the accompanying affidavit did *not* contain such language, he had to admit that he sometimes did so. *Id*. at XX:111, 114-15. Likewise, he admitted that the Court of Criminal Appeals did not require that language. *Id*. at XX:107-08.

As noted above, the search warrant affidavit in question is dated October 23, 2001 and was for authority to search 5972 Marine Way. It was undisputed at trial that this property belonged to Jose Mendoza.

As this Court is likely aware, this case relates to Dallas' "fake drug scandal" in which several informants used by Mr. XXX planted fake drugs on various persons and then provided Mr. XXX and other police officers information that lead to those persons' arrests. The state, at trial, introduced evidence related to several of these instances of fake drugs that occurred prior to October 23, 2001 in an attempt to show that the confidential informant referred to in the affidavit in question was *not* reliable. For the Court's ease, a chart is attached hereto as Figure A regarding these specific instances.

B. Drug Testing Results and Who Knew What When

The state also offered the testimony of Nancy Weber from Southwestern Institute of Forensic Sciences ("SWIFS") regarding the testing from the six seizures at issue in the trial. Ms. Weber testified that the Dallas County District Attorney's office had a policy not to test seized drugs unless a case was going to trial and that cases were indicted based upon field tests alone. *Id*. at XII:56-61. This was despite the fact that, on average, five percent of cases ultimately tested negative for drugs. *Id*. This was the only District Attorney's Office for whom Ms. Weber performed testing that had such a policy and Ms. Weber thought it was a "lousy" policy. *Id*. at 59, 64.

With regard to the Rosas seizure, Ms. Weaver testified that the wrapped packages that she had received at SWIFS were not wrapped as cocaine is typically wrapped but that she proceeded to examine them in any event. *Id*. at XI:123-25. Of the fifty-one packages in the Rosas case, fourteen contained cocaine that was insufficient to quantitate and thirty-seven did not contain a controlled substance. *Id*. at 129-30. She discovered most of the powder was gypsum and she then "coined the work 'Sheetrock'" to refer to the fake drugs. *Id*. at XI:131. The Rosas seizure was brought to SWIFS on August 9, 2001 and the testing was completed on September 4, 2001. *See* State's Exhibit 26. The results were sent to the Dallas Police Department on September 13, 2001. *Id*. at XI:57.

Mr. XXX brought Ms. Weber one of the packages from the Gwynn seizure on September 14, 2001- one day after the results of the Rosas analysis had been faxed to the Dallas Police Department. *See* R.R. at XI:137. Ms. Weber did a small "spot check," in Mr. XXX's presence, on the package and it tested positive for cocaine. *Id*. at XI:138. On September 17, 2001, Mr. XXX brought her the remaining twenty-eight packages from the Gwynn case. *Id*. at XI:149, 159. Despite the positive spot check, on September 28, 2001, Ms. Weber completed her test on the original package brought to her by Mr. XXX and the results were insufficient to quantitate. *Id*. at XI:148; State's Exhibit 42. On October 4, 2003 Ms. Weber issued her report in relation to the other twenty-eight

packages with the results being either insufficient to quantitate or without a trace of drugs. *Id*. at XI:149, 159; State's Exhibit 30.

The Esparanza case involved sixty-three packages received by SWIFS on August 9, 2001 and, in a report completed on September 20, 2001, only one tested positive and that was only for a small amount of powder on the surface. *Id*. at XI:142; State's Exhibit 27. Still, the Esparanza packages were stamped with a scorpion symbol that is often seen on cocaine packages. *Id*. at XV:140-41.

The Licea case was completed by Ms. Weber on September 26, 2001 after Mr. XXX brought her seventy-one packages of purported drugs from the case on September 17, 2001. *Id*. at XI:143. All the packages seized in the Licea case tested negative for drugs. *Id*.; State's Exhibit 28.

The Mejia test involved two lab reports. The first involved thirteen packages of purported cocaine with negative drug findings or insufficient to quantitate findings. The second involved two packages with negative drug findings. Despite the fact that there were two reports, all the purported drugs were received at SWIFS on August 22, 2001 and the testing was completed on October 5, 2001. *Id* at XI:150-52; State's Exhibits 24-25.

Ms. Weber testified that, when she was in Mr. XXX's presence or when she talked to Mr. XXX about her findings, he seemed surprised and concerned with the findings. *Id*. at XII:10-12. So much so that he tried to get Ms. Weber to do tests out of

turn for him. *Id*. at XII:10-11, 15, 33-34, 36-37. Indeed, records indicated nineteen calls made from Mr. XXX's cell phone to Ms. Weber from August 30, 2001-October 22, 2001 and this did not include any calls made from Mr. XXX's office phone or any other land line phone. *Id*. at XII:30-31. Moreover, there were positive field tests purportedly conducted on all the seizures and they were conducted by someone other than Mr. XXX. *Id*. at XII:30; XVII:85-89.[3] Nevertheless, the state introduced testimony from two witnesses, claiming expertise in trace evidence and laboratory drug testing, but not the properties of cellophane wrap over time, who did not find puncture holes in some of the drug packages thereby implying that field tests were, in fact, not done in all instances. *Id*. at XIX:8-18, 30, 32-41. Still, both witnesses admitted that field testing could have been done in a manner other than puncturing the plastic wrap especially if Dallas police officers were not properly trained in field testing. *Id*. at XIX:18-31, 54-72. Likewise, a Dallas officer testified at trial that he and others often field tested drugs by unwrapping the package or by sampling drugs in the creases of the packages rather than puncturing the packages. *Id*. at XXI:18-19.

Ann Weaver of SWIFS also testified. She testified that, on October 19, 2001, Mr. XXX personally brought her a submission containing one package of what was

[3]At a meeting at SWIFS on November 20, 2001, Ms. Weber discovered that Dallas police officers were incorrectly performing field tests resulting in false positives. *See* R.R. at XII:71-76; XVII:56-60 (Officer Woody performed a field test on some of the fake drugs during a meeting at SWIFS and, because he did it incorrectly, it initially appeared to test positive); XXI:60-62. *See also*, XVII:81-82 (Officers seen doing field tests incorrectly at the first formal training session which was not conducted until April 2002).

believed to be methamphetamine in the Estanislao Mendoza case. *Id*. at XIX:78-79. This was the morning after it was seized. *Id*. at XIX:86. Although the material was spot tested by Ms. Weaver and was positive for methamphetamine when brought to SWIFS, the material was fully tested on the same day, at the request of Mr. XXX, and it was found, in actuality, to contain less than one percent methamphetamine. *Id*. at XIX:80-81, 89. Ms. Weaver was later given twenty-four other packages from that case. *Id*. at XIX:84.

Christina Walker was a police officer in the case-filing unit of the Narcotics Division where she coordinated requests for drug analysis reports. *Id*. at XI:42. She received the various laboratory reports from SWIFS regarding the drugs in the cases at issue and provided those reports to Mr. XXX. *Id*. at XI:43, 6-49 She testified that "in passing" she asked Mr. XXX if he was keeping "[his] lieutenant updated on this" and Mr. XXX responded that he was. *Id*. at XI:49. On cross examination it was learned that the Dallas County District Attorney's Office received the reports at or around the same time they were received by Ms. Walker. *Id*. at XI:58-61.[4]

C. Background on Enrique Alonso and Jose Ruiz

Enrique Alonso ("Alonso") was Mr. XXX's "main confidential informant," however, Alonso also introduced Mr. XXX to other informants: Jose Ruiz, Luis Daniel

[4]Similarly, Nancy Weber from SWIFS also testified that she was in telephonic communication with various assistant district attorneys regarding the lab results beginning on October 2, 2001. *Id*. at XII:46-49.

Alonso (Enrique's brother), Daniel Cavasos, Roberto Gonzalez, and Robert Santos. *Id*. at IX:100-01, 116; State's Exhibit 2. Mr. XXX first met Alonso after he arrested him. *Id*. at X:69. Alonso became an informant for Mr. XXX in July of 1999 in order to work off his charges. *Id; Id.* at XV:114. Eventually, after his charges were worked off, he started operating as a confidential informant in exchange for payments. *Id.* X:72. Alonso, in total, was involved in approximately seventy-four transactions as a confidential informant. *Id*. at XV:116-19. Alonso was confidential informant number 2253. *Id*. at XIII:135.

Mr. XXX also first used Jose Ruiz as a confidential informant by allowing Ruiz to work off a case. *Id*. at X:71. Like Alonso, after Ruiz's case was worked off, he started operating as a confidential informant in exchange for payments. *Id*. at X:72. Ruiz, in total, was involved in approximately twenty-four transactions as a confidential informant. *Id*. at XV:119. Ruiz was confidential informant number 2344. *Id*. at XIII:134.

In 2001, Mr. XXX filed nineteen cases using Alonso and/or Ruiz as informants. *Id*. at XVI:18.

D. Who Was the Informant: Alonso or Ruiz?

As noted above, a great deal of controversy surrounded the identity of the confidential informant referred to in the search warrant affidavit that formed the basis for the indictment. The state argued repeatedly in its opening and closing statements that Enrique Alonso was the informant. *See* R.R. at IX:31-32; XXII:40-41. Likewise, the

state elicited testimony from "experts" who opined that, based upon their review of the case, Alonso was the relevant informant. *Id*. at XIII:81; XV:98; XVII:155; XX:39. The state also had several "expert" witnesses testify that they would not have signed the October 23, 2001 affidavit if Enrique Alonso was the informant and/or to testify that Alonso was "unreliable" when the affidavit was signed. *See, e.g.*, XII:158-59; XIII:79-80; XVI:98-100; XVII:155, XX:35.

On the other hand, one of the states "experts" testified that, from his review of the search warrant affidavit in question, the informant referred to therein was a single informant who went to 5972 Marine Way and purchased drugs on October 22, 2001. *Id*. at XVII:14-15. Moreover, it was undisputed that, generally, when a confidential informant buys drugs for purposes of obtaining a search or arrest warrant, a narcotics offer will simply put in the warrant affidavit that the targeted person was 'witnessed selling drugs' in order not to reveal the confidential informant's identity and put the confidential informant in danger. *Id*. at XVII-134-36.

Significantly, after the federal government began investigating the "fake drug" scandal, Alonso was interviewed by FBI Agent Marjorie Poche. *Id*. at X:79. He was questioned regarding the events surrounding the search of Jose Mendoza's property at 5972 Marine Way. He specifically told Agent Poche that he did *not* buy drugs from Mr. XXX at 5972 Marine Way. *Id*. at X:89. He further explained to Agent Poche how Jose Mendoza was ultimately set up. Jose Ruiz and Roberto Gonzalez went to the location

on October 23, 2001 and asked to get a Crown Victoria for a test drive. Ruiz and Gonzalez then drove the car from the location to where Alonso was waiting about three blocks away. Once there, the three loaded the car with fake methamphetamine and then Ruiz and Gonzalez returned the car. *Id*. at X:89-90. Alonso told Agent Poche that he did *not* go to the 5972 Marine Way address. *Id*. He did tell Agent Poche that he went and gave Mr. XXX the information about drugs being stored under a rug in the closet of the location. *Id*. at X:96. The state pointed out that Alonso allegedly told Agent Poche that he was paid only $500 *for the arrest and search warrant* for the information received because the methamphetamine turned out to be fake and that Mr. XXX told him it was a "loan." *Id*. at X:97.

Agent Poche also interviewed Ruiz after the "fake drug" investigation began. *Id*. at X:91-92. Ruiz told Agent Poche that *he* purchased a half pound of methamphetamine for between $2,500 and $2,800 at 5972 Marine Way on October 22, 2001- the day before the search warrant affidavit was presented. *Id*. at X:93. **Agent Poche ultimately admitted that "[b]oth Mr. Ruiz and Mr. Alonso said that Mr. Ruiz was the one who went to the location on [October 22, 2001] at 5972 Marine Way."** *Id*.

At trial, the following relevant exhibits were introduced in support of the state's argument that Alonso was the informant and in support of the defense's argument that Ruiz was the informant.

First, there was a payment receipt for $100 dated October 22, 2001 (the day before the search warrant was sought) to Jose Ruiz with the notation "C/B, 5972 Marine Way-244.3 g. meth" *Id* at XV:144-45; State's Exhibit 21; Defense Exhibit 163.

Second, there was an expense report connected with Ruiz in which one of the entries indicated a payment of $100 on 10/22/01 for the reason "CB." *See* State's Exhibit 21.

Third there was also a "Drug Buy Report" reflecting 2344's (Ruiz's) purchase of 268.2 grams of methamphetamine from Jose Mendoza on October 22, 2001 at 5972 Marine Way." *See* Defense Exhibit 153.

As to Alonso, there was a $500 payment receipt dated October 25, 2001 to Enrique Alonso that read as follows:

> 5972 Marine Way-Search Warrant seized $4,661.00 currency and 4 guns on 10-23-01

See State's Exhibit 22-A; Defense Exhibit 201. Nevertheless, over vehement objection, it was redacted by the state so the receipt, when introduced at trial, simply read: "5972 Marine Way- Search Warrant 10/23/01." *See* R.R. at XV:147; State's Exhibits 22, 22A, 77; Defense Exhibit 201.

There was also an expense report connected with Alonso in which one of the entries indicates a payment of $500 on 10/25/01 for the reason "SW." *See* State's Exhibit 22; Defense Exhibit 201. Nevertheless, when it was put before the jury, over

objection, the "results" portion of the exhibit which referred to "4661.00 cash 4 guns" was redacted. *See* State's Exhibit 22, 22A, 78; Defense Exhibit 202.

Finally there was a CI Payment Summary which reflected a $100 payment to Ruiz on 10/21 for "Making C/Buy(s) and/or Checking Complaint(2) and to Alonso for $500 on 10/25/2001 for "results of Operation(s) Conducted Seized 4661,00 Currency and 4 Guns on 10-23." Nevertheless, like before, when this exhibit was placed for the jury, the portion related to Alonso simply read "results of Operation(s) Conducted Seized on 10-23." *See* State's Exhibits 23A, 79; Defense Exhibit 203.[5]

In addition to the exhibits, it was established at trial that, on October 22, 2001, there were nineteen calls between Mr. XXX's cell phone and Alonso and one call between his cell phone and Ruiz. *Id*. at XVI:27. On October 23, 2001, prior to the time the search warrant was issued, there were fourteen calls to Alonso from Mr. XXX's cell phone and none to Ruiz. *Id*. at XIX:161-62. Of course, as a state's witness conceded, that could simply have meant that Mr. XXX was with Ruiz. *Id*. at XX:84.[6]

E. Chain of Command

Up until October 19, 2001, Lieutenant Bill Turnage was the lieutenant over five narcotic street squads. Lt. Turnage reported to Deputy Chief John Martinez. *Id*. at

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[5]The six relevant documents, in *unredacted* form, are attached hereto as Attachment A.

[6]Alonso and Ruiz did not testify at trial because the state refused to immunize their testimony. *See, e.g.*, R.R. at X:35-36.

XIII:19-20, 36. Sergeant Jack Gouge was the Sergeant over Mr. XXX's street squad and reported to Lt. Turnage. *Id*. at XIII:20.

Lt. Turnage claims that, in early September, he told Mr. XXX that he did not trust Alonso and asked Mr. XXX to "check him out again." Mr. XXX reported back that Alonso "checked out fine." *Id*. at XIII:23. Nevertheless, Lt. Turnage claims he ordered Mr. XXX not to use Alonso. *Id*. at XIII:25. Then, on or about September 13, 2003, Lt. Turnage learned of the negative SWIFS test in the Rosas case. *Id*. Lt. Turnage, in contradictory testimony, claims that, upon learning of the Rosas report, he then ordered Mr. XXX to stop using Alonso, despite the fact that he earlier testified that he ordered Mr. XXX to stop using Alonso before he learned of the report. *Id.* XIII:25-26.

Lt. Turnage testified that he next learned about the negative drug tests in the Licea case. *Id*. at XIII:26-27. Nevertheless, because they did not have definitive proof that Alonso "was scamming [DPD] for money, he ordered Mr. XXX to have Alonso polygraphed. *Id*. at XIII:27. Even though Alonso passed the polygraph, Lt. Turnage claimed that he ordered, on October 12, 2001, that Alonso still not be used. *Id*. at XIII:31-32.[7]

Lt. Turnage testified that, on October 18, 2001, Mr. XXX came to him and said that Alonso wanted to do a methamphetamine case. Lt. Turnage testified that he

[7]Of course, this then begs the question of why he ordered Alonso polygraphed in the first place.

okayed it with the proviso that nobody be arrested, nobody be paid and that any seizure be tested by the lab immediately. *Id*. at XIII:33. When Mr. XXX informed him later that they completed the Estanislao Mendoza deal and the drug tests came back negative, Lt. Turnage told Mr. XXX emphatically not to use Alonso any further. *Id*. at XIII:35. On October 19, 2001, Lt. Turnage left his position after being appointed to a Deputy Chief position and Lt. Craig Miller took over his position, but Lt. Turnage admitted that he neglected to make Lt. Miller aware of *any* CI problem. *Id*. at XIII:35-37.

Lt. Turnage also testified that he did not realize that Ruiz was an "ally" of Alonso. *Id*. at XIII:41. Nevertheless, he acknowledged that, in keeping with his order, no payments were made to Alonso between September 7, 2001 and October 25, 2001. *Id*. at XIII:44. None of Lt. Miller's alleged orders were in writing. *Id*. at XIII:86-87, 89.

When Lt. Miller took over for Lt. Turnage and heard that Alonso had to be polygraphed, he told Sgt. Gouge not to use Alonso right away. *Id*. at XVII:30-33. He had not realized that Lt. Turnage had allegedly issued a similar order. *Id*. at XVII:35. Nevertheless, when reviewing the October expense reports he noticed that Alonso was still being been used and questioned Sgt. Gouge. Sgt. Gouge told him that it was a "misunderstanding" and it was thought that Alonso could be used to "check locations." *Id*. at XVII:33-35. Like Lt. Turnage, Lt. Miller testified that he did not realize the relationship between Alonso and Ruiz. *Id*. at XVII:55.

Lt. Miller did admit that, in early November 2001, he told an Assistant District Attorney that he had still not determined that Alonso was unreliable. *Id*. at XVII:140-41. Likewise, he admitted that neither he nor Lt. Turnage put Alonso or Ruiz on the undesirable informant list pursuant to the Dallas Police Department's Standard Operating Procedure. *Id*. at XVII:144-47.

Sgt. Gouge testified for the defense. He testified that he was aware of the connection between Alonso and Ruiz. *Id*. at XXI:53-54. He also testified that, after Alonso passed the polygraph, Lt. Turnage told him and Mr. XXX that Alonso could be "put back to work" but not paid until he "made up" for the bad deals and any drugs were tested. *Id*. at XXI:57-58.

F. The Alonso Polygraph

James Gallager is a polygrapher with the Dallas Police Department. *Id*. at XIV:28-30. On October 12, 2001, he performed a polygraph examination on Enrique Alonso. *Id*. at XIV:31. Mr. XXX and Sgt. Gouge accompanied Alonso to the polygraph test and observed the test. *Id*. at XIV:32. The polygraph focused on the transaction involving Daniel Licea and whether Alonso knew the drugs involved in that transaction were fake. *Id*. at XIV:35.

Mr. Alonso passed Officer Gallager's test and he showed no deception when asked if he knew the Licea drugs were fake. *Id*. at XIV:50; State's Exhibit 80. Nevertheless, Officer Gallager testified that the comparison and relevant questions were

thrown off because of false information given to him by Mr. XXX. First, he claimed that Mr. XXX told him that Alonso was a United States citizen. *Id*. at XIV:36.[8] Second, he claimed that Mr. XXX told him he did not know Alonso "that well" and that Mr. XXX did not mention other specific cases involving Alonso other than the Licea case. *Id*. at XIV:36-37. Finally, and most importantly, Gallager claimed that he asked Alonso the question, "Did you know the dope at the Jack in the Box had *Sheetrock* in it?" only because Mr. XXX told him that the fake drugs were Sheetrock. *Id*. at XIV:42. The state drew the distinction between billiard chalk and Sheetrock. *Id*. at XIV:43.

This last distinction reflects the state's win at all costs attitude. First, as noted above, it was the SWIFS' Nancy Weber that coined the term "Sheetrock." Second, the Dallas Police Department regularly used this term to refer to the fake drugs in its memos. *Id*. at XXV:32 ("Recently our officers seized what appears to be large amount of cocaine. Seizures were actually *Sheetrock*" (emphasis added)). Finally, the state itself referred to the fake drugs as "sheetrock" and not "billiard chalk" throughout the trial. *See, e.g., Id* at XI:142, 155; XII:57, XV:88-89; XIX:129. Nevertheless, prosecutors felt no compunction about implying that Mr. XXX called the fake drugs "Sheetrock" in order to throw the polygraph test off.

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[8]Although Alonso's confidential informant file reflected he was a Mexican citizen, (*see* R.R. at XIV:40), when he was arrested by the FBI a social security card bearing his name was found in his vehicle. *Id*. at X:67. Likewise, DPS files had a social security number on Alonso. *Id*. at XII:167. Most importantly, Alonso's confidential informant file contained an NCIC report listing Texas as his birthplace. *Id*. at XIV:64.

Sgt. Gouge, during his testimony, stated that *he*, not Mr. XXX, picked the "fact" question for the polygraph. *Id*. at XXI:55.

G. Other

At the request of Mr. XXX, the transaction with Daniel Licea was videotaped by the Dallas Police Department. *Id*. at XI:76-82. Mr. XXX was wired for sound when he and the confidential informant met with Mr. Mejia. *Id*. at XI:83. Based upon the videotape, there were several contrasting opinions offered at trial by various police officers as to whether it appeared to be a real drug deal.[9] Nevertheless, none of the twelve officers who actually observed the transaction in real time appeared to think it was unusual. *Id*. at XVIII:6-7.

The state also presented testimony from State Trooper Kelly North. Trooper North stated that Mr. XXX tried to get the Department of Public Safety to also use Alonso as an informant. *Id*. at XII:136-7. Trooper North was present during the Esparanza deal on July 19, 2001. *Id*. at XII:143-50. After the deal, Mr. XXX attempted to get DPS money for Alonso, but Trooper North wanted to debrief Alonso first. Ultimately, Mr. XXX told Trooper Kelly that Alonso did not want to get paid by DPS

[9]*Compare* XI:93-94 (Dallas Detective Monteymayor, the videographer of the tape, testifies it definitely "looks like the real thing."); XXI:53 (DPD Sgt. Gouge testified it looked like a real drug deal) *with* XV:65-75 (DPS Sgt. Jeoff Williams points out inconsistencies between what he observed on the videotape and what he has seen in actual cocaine deals and opines it does not have "any indica of a real dope deal."); XVI:96-98 (DPD Officer Kim Sanders testifies that things from the video "did not look right for a transaction of that magnitude."); XVIII:21-32 (DPS Sgt. Frank Salvidar testifies as to discrepancies between what he observed in the videotape and Officer XXX's report on the incident).

which he found to be very unusual. *Id*. at XII:153-55. On cross examination, Trooper Kelly testified that, although the seized cocaine did not look real, the "dope deal" did appear to him to be real. *Id*. at XII:181.

SUMMARY OF THE ARGUMENT

I. A District Attorney cannot appoint what in essence is a *de facto* Attorney Pro Tem in violation of Tex. Code Crim. P. Art. 2.07, and thereby give up responsibility for the prosecution, control and management of the case at issue.

In the instant case, the District Attorney purported to appoint his friend and campaign contributor, Daniel Hagood, as a Special Prosecutor given the various conflicts of interest Hill's office would have in prosecuting the case. Nevertheless, in appointing Hagood, Hill essentially gave up responsibility for the prosecution, control and management of the case and walked away. Hill told Hagood, "Although you will be appointed by me, you will be independent of my office and will report to no one in this office, *including me*.....All prosecutorial decisions that you make *will be yours to make* consistent with the law and scope of this appointment." Thus, Hagood's appointment was akin to an appointment of a *de facto* Attorney Pro Tem rather than an appointment as a Special Prosecutor; however, an Attorney Pro Tem must be appointed by the District Court.

II. Amending an indictment to allege an additional false statement other than the one charged in the original indictment, over a defendant's objection, violates Tex. Code Crim P. Art. 28.10.

On the date this case was set for trial and only after the trial court informed the state that it would limit the state's evidence to a single confidential informant's unreliability, the state was permitted a continuance in order to file a motion to amend the indictment in order to specify that the confidential informant at issue was Enrique

Alonso or Jose Ruiz. By the proposed amendment, the state wanted the option of having the jury convict Mr. XXX for two different, allegedly false, statements. It was impermissible, under Tex. Code Crim. P. Art. 28.10 to grant the state permission to amend the indictment to charge an additional offense.

III. In the case of an indictment that alleges two false statements, a defendant is entitled to a severance under Tex. Penal Code § 3.04 as a matter of right.

When the state was granted permission to amend the indictment to charge an additional offense, Tex. Penal Code § 3.04 gave Mr. XXX an *absolute right* to a severance of the offenses.

IV. A motion requesting leave to amend an indictment, or an order granting such a motion does *not* constitute the filing of an amended indictment.

After the District Court granted the state's motion to amend, it *never* interlineated the original indictment or filed a photocopy of the indictment with interlineations or the new language. The Court of Criminal Appeals recently made it explicitly clear that neither the motion to amend itself nor the trial judge's grating thereof qualifies as an amendment; rather the two comprise only the authorization for the eventual amendment of the charging instrument pursuant to Article 28.10. Therefore, the District Court in this case erred in allowing the state to arraign Mr. XXX on a non-existent, amended indictment. Likewise, it erred in charging the jury in accordance with a non-existent amended indictment.

V. After the state introduces redacted public/business records before a jury, the defendant, under the rule of optional completeness or simply because the records are independently admissible as public/business records, is permitted to introduce unredacted versions of the records so that a jury is not given a false impression of what the records represent.

As noted above, the state introduced three business/public documents reflecting that Enrique Alonso got paid for a search warrant at 5972 Marine Way, but it redacted notations, over Mr. XXX's repeated objections, that the payment was actually for the seizure of $4,661.00 currency and 4 guns on 10-23-01 resulting from the fact that Alonso introduced Ruiz to Mendoza (the person in control of 3972 Marine Way). The unredacted copies were business/public records procured *by the state* with a business records affidavit and, therefore, were admissible under Tex. R. Evid. 803(6) and/or 803(8). *See* State's Exhibits 22 and 73. Second, they were clearly admissible under Tex. R. Evid. 106 and 107 under the rule of optional completeness. Important information was withheld from the jury that would have indicated that Alonso was *not* paid for being the confidential informant, but was paid, instead, based upon an earlier introduction between Ruiz and Mendoza which lead to the seizure of guns and cash and, by introducing redacted copies of the documents at issue, the state mislead the jury.

VI. The fact that Person A is afraid of Person B because Person A believes Person B had previously killed somebody is admissible under Tex. R. Evid. 803(3) and relevant because it shows the that it is unlikely that Person A would want to deal with Person B or be in Person B's presence.

The fact that Enrique Alonso was afraid that he might be killed by Mendoza would clearly be relevant in determining whether Alonso was willing to go to Mendoza's home and/or whether he was willing to be a confidential informant on a case in which his identity might have been revealed. Moreover, cases from the Court of Criminal Appeals as well as federal courts make clear that an expression of fear is admissible under Tex. R. Evid. 803(3) as evidence of a person's mental state.

VII. A District Court illegally comments on the evidence by giving jury instructions that assume that a statement at issue *is* false and then only requires the jury to determine if the statement was made knowing it was false.

A jury charge that assumes the truth of a controverted issue is a comment on the weight of the evidence and is erroneous. Here, the Court instructed the jury that it was to convict Mr. XXX if "the defendant knew that the affidavit contained defendant's false statement" and denied Mr. XXX's request that the jury charge refer to an "alleged false statement." Consequently, the charge assumed the statement at issue was false and only required the jury to determine if the statement was made by Mr. XXX knowing it was false.

VIII. Mr. XXX suspects that the District Court erred in not turning over *Brady* material to the defense which the Court reviewed *in camera*.

Mr. XXX suspects that information indicating that members of the District Attorney's Office believed that search warrants could be obtained and/or prosecutions pursued based upon the reliability of the informants was contained in documents

reviewed *in camera* by the District Court and placed under seal for the appellate record. He further believes that these documents would show that he was candid and honest with prosecutors at all times. Therefore, the documents would constitute exculpatory evidence on the issue of whether Mr. XXX, with no legal training, should have "known" more than the prosecutors and on the issue of whether he intentionally made a false statement. Mr. XXX requests this Court review the material placed under seal.

ARGUMENT

I. THE DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE APPOINTED A *DE FACTO* ATTORNEY PRO TEM TO PROSECUTE THIS CASE IN VIOLATION OF TEX. CODE CRIM. P. ART. 2.07

Dallas County District Attorney, Bill Hill, purported to appoint Daniel Hagood (a personal friend and campaign contributor to Hill) as a "Special Prosecutor" in this case. It is likely that Hill's purported appointment of Hagood was based upon several concerns. First, the grand jury investigation of the "fake drug scandal" included an investigation of Hill's office and staff. *See* C.R. at I:149, I:163. In fact, the grand jury issued a statement that the allegations it considered involved "the elected District Attorney of Dallas County, his first assistant, his chief investigator, and a senior investigator in his office...." *Id*. Second, numerous newspaper articles questioned the role of Hill's office and staff in the "fake drug scandal." *Id*. at I:131-48. Indeed, Hill was quoted in one newspaper article as stating that his office would not participate in a "blue ribbon" panel investigation of the scandal because his office would have a conflict of interest in such an investigation. *Id*. at I:148. Third, Hill, in violation of Tex. R. Disc. Conduct 3.07, publicly opined that Mr. XXX was guilty of the crime with which he was ultimately charged long before the grand jury even heard evidence. *Id*. at I:150. Finally, it was possible that Hill and/or members of his staff could have been witnesses at any trial involving the "fake drug scandal."

Mr. XXX moved to set aside the various indictments against him as a result of Hill's appointment of Hagood as a *de facto* Attorney Pro Tem. *Id*. at I:005-11. Likewise, Mr. XXX requested a hearing on the motion in order to question Hill regarding Hagood's appointment. *Id*. at I:158-246. Nevertheless, the trial judge denied Mr. XXX such a hearing and denied Mr. XXX's motion to set aside the indictment on these grounds. *Id*. at I:85.

Court and litigants have often confused the terms "Special Prosecutor" and "Attorney Pro Tem" or have used the terms interchangeably. *See generally State v. Rosenbaum*, 852 S.W.2d 525, 529 (Tex. Crim. App. 1993) (Clinton, J.); *Stephens v. State*, 978 S.W.2d 728, 731 (Tex. App.--Austin 1998). Nevertheless, an Attorney Pro Tem is different from a Special Prosecutor. An Attorney Pro Tem is appointed by the district court in accordance with the provisions of Article 2.07 of the Texas Code of Criminal Procedure upon a showing of absence or disqualification of the elected district attorney. *See Stephens*, 978 S.W.2d at 731. In contrast, a Special Prosecutor is an attorney enlisted by the district attorney to assist in a particular case, but the *district attorney* remains responsible for the prosecution, control and management of the case. *See Stephens*, 852 S.W.2d at 731, *citing*, *Rosenbaum*, 852 S.W.2d at 592 n.2 (Clinton, J.

concurring). A Special Prosecutor need not take an oath of office. *See Powell v. State*, 898 S.W.2d 821, 832 (Tex. Crim. App. 1994), *cert. denied*, 551 U.S. 991 (1995).[10]

The key distinction between an Attorney Pro Tem and a Special Prosecutor is whether the District Attorney has ceeded control of the prosecution to the outside attorney:

> A district attorney may appoint any duly licensed attorney [as a Special Prosecutor] to assist him in prosecuting a criminal case "as long as the district or county attorney does not relinquish control of or responsibility for such prosecution. Control over the prosecution logically includes the presence of the district or county attorney or an assistant district or assistant county attorney, respectively, in the courtroom during all phases of the trial." *Pirtle*, 887 S.W.2d at 932-33 (Maloney, J., concurring)

Gaitan v. State, 905 S.W.2d 703, 707 (Tx. Ct. App.--Houston [14th Dist. 1995]). Indeed, cases distinguishing between an Attorney Pro Tem and a Special Prosecutor routinely point out that, in the case of a Special Prosecutor, the elected district attorney does *not*

[10]The requirement of filing an oath of office by a non-elected prosecutor applies only when the elected district attorney is absent or disqualified. *See Ballard v. State*, 519 S.W.2d 426, 428 (Tex. Crim. App. 1975); *Davis v. State*, 840 S.W.2d 480, 487 (Tex. App.--Tyler 1992).

cede control.[11] Indeed, in *Pirtle*, in upholding the appointment of a Special Prosecutor, the Court of Criminal Appeals took pains to note:

> Relator [the elected district attorney] also proved at the hearing that he and the permanent members of his staff were involved in conducting the prosecutions. Evidence at the hearing showed that relator had not turned these criminal prosecutions over to Else and Boyles, and then walked away.

Pirtle, 887 S.W.2d at 924.

In this case, there is no doubt that Hill ceeded control to Hagood. Indeed, Hill's letter of appointment to Hagood states: "Although you will be appointed by me, you will be independent of my office and will report to no one in this office, *including me*.....All prosecutorial decisions that you make *will be yours to make* consistent with the law and scope of this appointment." C.R.at I:151 (emphasis added). Moreover, the trial transcripts from the case do *not* note the presence of Hill or any of his staff at *any*

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[11] *See, e,.g., State ex. rel. Hill v. Pirtle*, 887 S.W.2d 921, 924, 925 n.1 (Tex. Crim. App. 1994); *id.* at 922 (Maloney, J., concurring) ("[N]othing prohibits the district or county attorney from seeking the assistance of the attorney general and/or his assistants, or any other duly licensed attorney, in the prosecution of a criminal case *as long as the district or county attorney does not relinquish control of or responsibility for such prosecution*." (emphasis added)); *Veteo v. State*, 8 S.W.3d 805, 817 (Tex. App.--Waco 2000) (Noting that the District Attorney maintained control by cross examining half the witnesses and gave closing arguments); *Scarborough v. State*, 54 S.W.2d 419, 421 (Tex. App.--Waco 2001); *Davis,* 840 S.W2d at 487-88 ("[I]n cases where the elected district attorney participates in trial with a Special Prosecutor, grounds for complaint exist only if the elected district attorney fails to retain management and control of the case. Even though Mr. Ratcliff had an active role in the trial, the district attorney herein always retained management and control of the case.").

of the thirty-four days of trial in this case. Indeed, Hill turned this investigation over to Hagood and then "walked away."

In short, Hill tried to have it both ways. He recognized his conflict of interest and purported to recognize the public's need for an independent investigation. Nevertheless, Hill did *not* seek the appointment of an Attorney Pro Tem under the procedures set forth in Tex. Code Crim. P. Art. 2.07 where an independent district court would appoint the Attorney Pro Tem so that the Attorney Pro Tem would be *truly* independent. Instead, Hill selected his friend and campaign contributor, for reasons known only to him since the District Court did not permit a hearing in this case, and purported to make him a "Special Prosecutor." Nevertheless, as part of that appointment Hill gave up all control over Hagood. Consequently, Hagood was actually a *de facto* Attorney Pro Tem and not a Special Prosecutor because Hill ceeded complete control to Hagood. Nevertheless, it is undisputed that Hagood was not appointed an Attorney Pro Tem in accordance with Tex. Code Crim. P. Art. 2.07.

As a result of Hill's unlawful attempt to appoint Hagood as a *de facto* Attorney Pro Tem, there was a clear violation of the Separation of Powers clause of the Texas Constitution set forth in Article 2 § 1. Indeed, Hill's end run around the Attorney Pro Tem procedure resulted in the executive branch of government interfering with the powers delegated to the judicial branch of government under Art. 2.07. *Cf. Pirtle*, 887 S.W.2d at 928. In addition, because Hagood was left in a no-man's land between

Special Prosecutor and Attorney Pro Tem the result was that the indictment in this case was procured by a person not authorized by law to be present before the grand jury. *See* Tex. Code Crim. P. 27.03(2).

The District Court erred in denying Mr. XXX an evidentiary hearing in relation to this issue and, ultimately, in denying his motion to dismiss the indictment.

II. THE STATE WAS PERMITTED TO AMEND THE INDICTMENT IN VIOLATION OF TEX. CODE CRIM. ART. P. 28.10 TO CHARGE AN ADDITIONAL OFFENSE

III. IF THE STATE WAS PERMITTED TO AMEND THE INDICTMENT TO ALLEGE A SECOND OFFENSE, THE OFFENSES SHOULD HAVE BEEN SEVERED PURSUANT TO TEX. PENAL CODE § 3.04

A. AMENDMENT

As noted above, on the date this case was set for trial, the state was permitted a continuance in order to file a motion to amend the indictment in order to specify that the confidential informant at issue was Enrique Alonso or Jose Ruiz. The state requested permission to amend the indictment only after the trial court informed the state, in a pre-trial conference, that it would limit the state's evidence to a single confidential informant's unreliability. *See, e.g.*, VI:32 (Court: "Well I am of the opinion you're bound and once you decide that you're presenting evidence from an individual, that's the individual that you would then be required to prove was unreliable."). Mr. XXX's objection to granting the motion to amend was overruled by the Court. *Id*. at V:36, VI:5-11. Consequently, the jury was permitted to convict Mr. XXX if it determined

that (1) A false statement was made that Enrique Alonso was reliable *or* (2) A false statement was made that Jose Ruiz was reliable. Similarly, at trial, the state was also permitted to introduce earlier transactions under Tex. R. Evid. 404(b) just not as to one informant but as to both Alonso *and* Ruiz.

Article 28.10(c) of the Texas Code of Criminal Procedure provides that an indictment "may not be amended over the defendant's objection as to form or substance if (i) the amended indictment...charges the defendant with an additional or different offense, or (ii) the substantial rights of the defendant are prejudiced." Tex. Code Crim. Proc. Art. 28.10(c). Under Article 28.10(c), "[a]" defendant is charged with an *additional* offense if the amended indictment alleges commission of the offense charged in the original indictment and commission of *another, additional offense which was not charged in the original indictment. Sonnier v. State*, 764 S.W.2d 348, 351 (Tex. App.--Beaumont 1989) (emphasis added).

For example, in *Midence v. State*, the indictment charged the defendant with assaulting two correctional officers, conjunctively, stemming from a single incident of assault by the defendant. *Midence v. State*, 108 S.W.3d 564 (Tex. App.--Houston [14th Distr.] 2003). Over the defendant's objection, the court's charge instructed the jury to convict the defendant if they found that the State had proven either of two mutually-exclusive, alternative theories-- namely, whether *either* of the officers was assaulted. *Id.* at 565. The appellate court reversed, holding that the indictment alleged conduct

constituting *a different offense*. *Id.* ("The assault on Jesse Rodriguez was *a different offense* from the assault on Charles Nance...[t]he trial court's charge allowed the possibility of six jurors convicting the appellant of the assault on Jesse Rodriguez and six jurors convicting the appellant of the assault on Charles Nance." (emphasis added))

Likewise, in a case with facts similar to the instant case, a defendant was charged with multiple counts of perjury, each involving multiple false statements. *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991). Each perjury count in *Holley* was composed of several alleged false statements made during one of two depositions given by the defendant. *Id.* at 921-922. The Fifth Circuit rejected the Government's contention that the individual false statements were simply alternative means to committing the same offense, instead of noting that each false statement constituted a *separate offense,* albeit violations of the same statute on the same date. *Id.* at 927.

Texas Courts have analyzed and followed the reasoning of the *Holley* Court. In *Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000), the Texas Court of Criminal Appeals agreed that the Fifth Circuit rightly rejected the government's argument that each false statement was merely an alternative manner of committing the same offense. The *Francis* court agreed that each false statement in *Holley* constituted *a separate offense*. *Id*. (Emphasizing the problem that "in *Holley*, a single count encompassed two or more separate offenses").

In *Francis*, the defendant was charged in a single count paragraph indictment with touching the breasts *and* the genitals of a child. Although the indictment charged the two indecent acts in the conjunctive, the State argued they were merely alternative means of committing a single offense, and, therefore, the court's charge to the jury could be in the disjunctive. The Texas Court of Criminal Appeals disagreed and reversed the conviction, holding that the two acts "constitute *two separate offenses*." *Id.* at 124 (emphasis added).

Up until the day the trial was scheduled, the state repeatedly took the position that the informant referred to in the October 23, 2001 search warrant affidavit was Enrique Alonso. *See* R.R. at V:13-18. In other words, the state was alleging that Mr. XXX knowingly made a false statement that a confidential informant- Enrique Alonso- had been true, reliable, and correct on each and every occasion. Nevertheless, when the District Court properly informed the state that it would hold the state to that proof, the state then attempted to ride two horses.

By the proposed amendment, the state wanted the option of having the jury convict Mr. XXX for a completely different, allegedly false, statement. In addition to the allegation that Mr. XXX knowingly made a false statement that a confidential informant- Enrique Alonso- had been true, reliable, and correct on each and every occasion, it proposed to allege that Mr. XXX knowingly made a false statement that a confidential informant- Jose Ruiz- had been true, reliable, and correct on each and every

occasion. In sum, under the cases cited above, the amendment proposed the charging of an additional offense. Consequently, the indictment could not be amended over Mr. XXX's objection and the District Court erred by permitting the amendment. *See* Tex. Code Crim. P. 28.10(c).

B. Severance

Even if it could somehow be argued that granting the motion to amend was somehow permissible under Tex. Code Crim. P. 28.10(c), the Court should have granted Mr. XXX's motion to sever the two offenses. *See* C.R. at 661. It is undisputed that a defendant has a statutory right to sever offenses of this nature and to require a separate trial on each offense. Tex. Penal Code § 3.04(a). Indeed, "where the State...joins two offenses for trial..., the defendant, upon timely motion, has an *absolute right* to a severance of the offenses." *Graham v. Texas*, 19 S.W.3d 851, 852 n.2 (Tex. Crim. App. 2000) (emphasis added). Moreover, Mr. XXX was clearly prejudiced by the joinder because, under Tex. R. Evid. 404(b), the joinder allowed the state to put evidence before the jury relating to prior fake drug transactions related to *both* Alonso or Ruiz whereas under the original indictment it would have only been permitted 404(b) evidence regarding the one informant it chose to allege was the confidential informant in the false statement charged in the indictment.

IV. ASSUMING THE STATE'S LAST MINUTE MOTION TO AMEND THE INDICTMENT WAS PROPERLY GRANTED, THE AMENDMENT WAS NEVER PROPERLY FILED.

As noted above, the state moved to amend the indictment on March 3, 2005. C.R. at II:651-52. It did so by filing a motion which requested permission to "[d]elete all words between 'did' in line 6 [of the indictment] and 'against the peace and dignity of the State.' and add the words" set forth in the motion. *Id*. The motion did not attach the original indictment in any form nor did it attach a proposed indictment with the changes requested.

The motion contained a place for a judicial fiat on the same page as the motion's certificate of service allowing the District Court to check "granted" or "denied" in relation to the motion. *Id*. at II:652. The Court "granted" the motion on March 3, 2005 by checking the appropriate line on the fiat. Mr. XXX later objected to the use of the amended indictment because no amendment was ever actually filed after the granting of the motion. *Id*. at II:726-31.

It is well established that "[n]either the motion [to amend] itself nor the trial judge's grating thereof is an amendment; rather the two comprise the authorization for the eventual amendment of the charging instrument pursuant to Article 28.10." *Riney v. State*, 28 S.W.3d 561, 566 (Tex. Crim. App. 2000).[12] The Court of Criminal Appeals, in *Riney*, overruled prior holdings that stated that the only effective means of

[12]It is also clear that the ten days provided for in Article 28.10(a) runs from the actual amendment of the indictment and not the granting of a motion to amend. *Rent v. State*, 838 S.W.2d 548 (Tex. Crim. App. 1992).

accomplishing an amendment is by interlineation of the original indictment. *Id*. at 556. Nevertheless, it noted:

> [R]equiring physical interlineation of the original as the only means to accomplish an amendment is unwarranted. Physical interlineation of the original indictment is an acceptable but not the exclusive means of effecting an amendment to the indictment. A plain and common sense reading of Articles 28.10 and 28.11 supports this determination..... Neither statute can be interpreted to direct that amendment be performed *only* by physical interlineation. It is acceptable for the State to proffer, for the trial court's approval, its amended version of a photocopy of the original indictment. If approved, the amended photocopy of the original indictment need only be incorporated into the record under the direction of the court, pursuant to Article 28.11, with the knowledge and affirmative assent of the defense. This version of the indictment would then become the "official" indictment in the case, and it would continue to state, presumably in "plain and intelligible" language, the nature and cause of the accusation. Such steps comply with all statutory requisites and faithfully preserve the functions of an indictment, i.e., the trial court retains its jurisdiction, and the defendant is still kept abreast of the charges against him/her and has adequate information to prepare an appropriate defense.

Id. at 565-66 (citations omitted). Ultimately, the *Riney* Court upheld the procedure used by the state in that case where a photocopy of the original indictment with interlineations reflecting the amendments were incorporated into the clerk's file because it held that this photocopy then became the "'official' indictment in the case." *Id*. at 566. The Court noted, "[t]his was the indictment appellant knew he could reference, from that point, to provide notice of the specific charge that would enable him to properly prepare his defense." *Id*.

Here, the original indictment in the clerk's file is free of any interlineations. C.R. at I:2-3. Moreover, unlike in *Riney*, there is no photocopy of the indictment with any interlineated amendments. Indeed, the only thing that represents the proposed amendments to the indictment is the state's motion itself which does not set forth (in its text or in an attachment) either the full original indictment or the indictment with the amendments that the state was permitted to make.[13] Of course, the Court in *Riney* made clear that the state's motion is *not* the amended indictment. In short there was no "official" indictment in this case containing the state's proposed amendments that the District Court, Mr. XXX or this Court could/can reference.

In sum, the District Court erred in allowing the state to arraign Mr. XXX on an non-existent, amended indictment. Likewise, it erred in charging the jury in accordance with a non-existent amended indictment. Mr. XXX is entitled to a new trial on the proper indictment.

V. THERE WAS NO BASIS FOR THE DISTRICT COURT NOT TO ALLOW THE JURY TO HEAR THAT ENRIQUE ALONSO RECEIVED HIS $500 PAYMENT FOR THE RECOVERY OF GUNS AND MONEY AS A RESULT OF HIS PRIOR INTRODUCTION OF RUIZ TO MENDOZA AND, INSTEAD, TO ALLOW THE

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[13] While it is true that the Court could "extrapolate what the amended indictment would have looked like, based on the transcript of the trial" along with the state's motion to amend, "this is insufficient to satisfy the requirements of Article I, section 10 of the Texas Constitution." *Serna v. State*, 69 S.W.3d 377, 380 (Tex. App.--El Paso, 2002), *citing*, *Benoit v. State*, 561 S.W.2d 810, 813 (Tex. Crim. App. 1977) ("It is the intent of Article I, § 10 of the Texas Constitution . . . that the accused in a particular case be given information upon which he may prepare his defense, and this information must come from the face of the indictment.").

STATE TO LEAVE THE JURY WITH A FALSE IMPRESSION AS TO THE REASON FOR THE PAYMENT.

As discussed above at great length, the identity of the confidential informant in this case was the focus of a great deal of dispute. Moreover, the jury was instructed that it must unanimously agree as to the identity of the informant before it could determine whether Mr. XXX's statement in the search warrant affidavit was false. *See* C.R. at II:775. Therefore, anything that helped the jury make this determination was extremely relevant evidence.

As set forth in the Statement of Facts, there were six documents that were very relevant to the question of the informant's identity:

> •A payment receipt for $100 dated October 22, 2001 (the day before the search warrant was sought) to Jose Ruiz with the notation "C/B, 5972 Marine Way-244.3 g. meth" *See* R.R. at XV:144-45; State's Exhibit 21; Defense Exhibit 163.
>
> •An expense report connected with Ruiz in which one of the entries indicated a payment of $100 on 10/22/01 for the reason "CB." *See* State's Exhibit 21.
>
> •A "Drug Buy Report" reflecting 2344's (Ruiz's) purchase of 268.2 grams of methamphetamine from Jose Mendoza on October 22, 2001 at 5972 Marine Way." *See* Defense Exhibit 153.
>
> •A $500 payment receipt dated October 25, 2001 to Enrique Alonso that read: 5972 Marine Way-Search Warrant seized $4,661.00 currency and 4 guns on 10-23-01. *See* State's Exhibit 22-A; Defense Exhibit 201.
>
> •An expense report connected with Alonso in which one of the entries indicates a payment of $500 on 10/25/01 for the reason "SW" and

> which the "results" portion referred to "4661.00 cash 4 guns" was redacted. *See* State's Exhibit 22; Defense Exhibit 201.
> •A CI Payment Summary which reflected a $100 payment to Ruiz on 10/21 for "Making C/Buy(s) and/or Checking Complaint(2) and to Alonso for $500 on 10/25/2001 for "results of Operation(s) Conducted Seized 4661,00 Currency and 4 Guns on 10-23."

Indeed, during its deliberations, the jury specifically requested to review the **"documentation...for Alonzo & Ruiz."** *See* C.R. at 783.

At trial, the state repeatedly argued that *Alonso* was the relevant informant because of the three documents that reflected he was paid $500 on October 25, 2001 for a search warrant (or "SW") of 5972 Marine Way. *See, e.g.*, R.R. at XXII:43, 66-67. Nevertheless, as discussed above, when the state introduced the three documents reflecting this information at trial it redacted notations that the payment was actually for the seizure of $4,661.00 currency and 4 guns on 10-23-01.

The defense repeatedly argued, but to no avail, that the redaction was improper because the redacted information helped establish that Alonso was not the confidential informant noted in the search warrant affidavit (in other words he was not paid *because* he was the one informant referred to in the affidavit), but, rather, Alonso was paid, in accordance with DPD policy, because he initially introduced Ruiz to Mendoza and Ruiz's information ultimately lead to the recovery of guns and cash in Mendoza's residence. *See* C.R. at 605-11,764-68; R.R. at V:12; X:121-24, 100-02; XI:39; XIII:56-59, 163; 17:52, 162-66; XIX: 48, 149.

It is completely unclear why the District Court did not allow the unredacted copies of the three relevant documents to be presented to the jury but, instead, allowed the jury to be mislead by redacted copies. First, the unredacted copies were business/public records procured *by the state* with a business records affidavit and, therefore, were admissible under Tex. R. Evid. 803(6) and/or 803(8). *See* State's Exhibits 22 and 73. Second, they were clearly admissible under Tex. R. Evid. 106 and 107 under the rule of optional completeness.

The principles set for Tex. R. Evid. 106 and 107 comprise the rule of optional completeness, which was designed to "guard against the possibility of confusion, distortion, or false impression that could rise from use of an act, writing, conversation, declaration, or transaction out of proper context." *Livingston v. State*, 739 S.W.2d 311, 331 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1210 (1998). This is *exactly* what occurred in the instant case. The state used the three documents in question to repeatedly attempt to lead the jury to believe that Alonso was the relevant confidential informant because he was paid for a search warrant at 5972 Marine Way. Nevertheless, information was withheld from the jury that would have indicated that Alonso was *not* paid for being the confidential informant, but was paid based upon an earlier introduction between Ruiz and Mendoza which lead to the seizure of guns and cash.

The importance of these six documents to the determination of this case cannot be emphasized enough. The jury had to determine the confidential informant. Alonso

was much more connected with the fake drug case than Ruiz and, therefore, if the jury determined Ruiz was the informant it would be less likely it would find that Mr. XXX's affidavit was false. The government argued repeatedly from the documents. The jury specifically requested the documents during its deliberations. Nevertheless, the jury was continually mislead by redacted copies of the documents without any basis under the Rules of Evidence. Mr. XXX should be given a new trial where the state will not be allowed to mislead the jury.

VI. IT WAS IMPERATIVE THAT THE JURY UNDERSTAND ALONSO'S STATE OF MIND IN ORDER TO DETERMINE WHO THE RELEVANT INFORMANT WAS IN THE WARRANT AFFIDAVIT.

Just as the jury should have found out what the documents had to say regarding exactly *why* Alonso got paid in relation to the search of 5972 Marine Way, so too should it have heard yet another reason why it was highly unlikely that Alonso was the informant referenced in the search warrant affidavit at issue. During an interview, Alonso told FBI Agent Poche that he was afraid to deal with Jose Mendoza because Mendoza had killed a man. Whether Alonso would have even been willing to be an active informant against Mendoza given that his identity might ultimately have been required to be revealed to Mendoza is highly probative.[14] However, the District Court, over objection, only allowed the watered down testimony that Alonso was "reluctant" to deal with Mendoza and not that he was afraid to deal with Mendoza because he knew

[14] *See Roviaro v. United States*, 353 U.S. 53 (1957)

Mendoza had killed a man. *See* R.R. at 42-45, 88-89; Defense Exhibit 200. Obviously, if the jury had heard that Alonso would have feared for his life had he been an informant against Mendoza, it would be more likely that the jury would have concluded that *Ruiz* was the confidential informant referred to in the Mendoza affidavit.

There are a legion of cases that establish error in not allowing this type of testimony. As argued by the defense at trial, the fact that Poche would have told the jury that Alonso said he was "afraid" of Mendoza would have been admissible under Tex. R. Evid. 803(3) as it reflects Alonso's state of mind. *Id*. at X:20, 25, 31-32, 42-45.[15] For example, in *Martinez v. Texas*, 17 S.W.3d 677, 689 (Tex. Crim. App. 2000), the Court of Criminal Appeals made perfectly clear that a hearsay declarant's statement that they are "afraid of a person" is admissible under Rule 803(3):

> There are two aspects of Graves' testimony: (1) Veronica's statement that she was afraid of appellant, and (2) Veronica's plea to Graves to call the sheriff if anyone saw appellant. Veronica's statement that she was afraid of appellant was a statement of the declarant's then existing state of mind, and therefore fell within the Rule 803(3) hearsay exception

Likewise, the jury was entitled to know the reason for Alonso's fear of Mendoza. Indeed, the statement that Alonso was afraid because he knew a man that

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[15] Mr. XXX's trial counsel argues: "This is evidence -- it shows why he didn't go there. That's proof, that's proof of why he didn't go. He's afraid. The issue is the search-warrant affidavit refers to one informant who went to the location. Alonso is saying, 'I know the guy. I bought drugs from him before. I'm afraid of him because I think he killed a guy. I'm not goona go there when a bust happens.' Apparently, Mendoza doesn't know Ruiz. He's willing to go there. Alonso knows him. He's afraid and stays away. That's extremely probative of why it's Ruiz and not Alonso." R.R. AT X:31-32.

Mendoza killed was admittedly *not* admissible for the purposes of establishing that Mendoza killed a man, but it *was* certainly admissible to show Alonso's state of mind and support Mr. XXX' argument that Alonso would not have been the informant. There are at least two federal cases, dealing with the identical hearsay exception under the Federal Rules of Evidence, that are almost directly on point.

In *United States v. Blanton*, 793 F.2d 1553, 1563 n.4 (11th Cir. 1986), the appellant complained on appeal as follows: "'During the course of the trial when permitting a witness to testify as to his or her state of mind there have been instances where references made to defendant Blanton's alleged criminal past, as well as the threatening or intimidating techniques allegedly used during the labor unions [sic] organizing campaigns....'" The Court quickly rejected that argument:

> There is no error. Whether or not the organizers actually engaged in the alleged conduct is not to the point; the testimony did not come in for the truth of the matter asserted, as the court explained in that instruction. Rather the question is whether the rumors and allegations of such conduct had an effect on the witness's state of mind. Mr. Argenbright recounted that he had been made aware of a number of instances of threatening conduct by appellants and by other union partisans during the IBOSS organizational drive at Hartsdale. Mr. Argenbright testified that the techniques resorted to were unusual and threatening and that this prompted him to order a background check on Blanton. This in turn provided the evidence of Blanton's past convictions, which caused Mr. Argenbright to fear dealing with him. This was all relevant to Mr. Argenbright's state of mind.

Id. at 1563.

Similarly, in *United States v. Grassi*, 783 F.2d 1572, 1577-78 (11th Cir. 1986), the United States Court of Appeals for the Eleventh Circuit upheld the following testimony:

> The district court admitted over objection out-of-court statements by Wilson concerning his fear of appellants in his belief that they were "loan sharks" and connected with the mob or Mafia. Appellants contend that there was no evidence of threats or exploitation. These statements were introduced through the testimony of Williams and Tritt, on the theory that they showed the alleged victims' state of mind and thus were not hearsay but were admissible under Rule 803(3) F.R.Evid.

Also instructive is *Williams v. State*, 798 S.W.2d 368 (Tex. App.--Beaumont 1990). There a Sheriff's Deputy testified, "While I was interviewing Ms. Carlisle, she was crying and she was shaking. She appeared really scared. She kept telling me, you know, [the Appellant] is going to come back to the house; he is going to kill me. He is going to kill my kids because he told me that's what he was going to do and she was very disturbed, to me, over the whole incident." *Id*. at 371. The Court of Appeals found this testimony was admissible under Tex. R. Evid. 803(3). *Id*. at 371 ("Thus, Deputy Young's answer described the victim's then existing state of mind. It was not offered for the truth that, indeed, appellant was going to kill the victim and her children. Rule 803(3) allows for the admissibility of the victim's statement to Deputy Young.").[16]

[16] At one point, the District Court seems to suggest the evidence that Alonso was afraid of Mendoza was irrelevant. *See* R.R. X:37. It is almost impossible to understand how this evidence does not make it "less probable" that Alonso and "more probable" that Ruiz was the confidential informant in question. *See* Tex. R. Evid. 401. "In deciding whether a particular piece of evidence is relevant, a trial judge should ask 'would a reasonable person, with some experience in the real world believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit.'" *Montgomery v. State*, 810, S.W.2d 372, 376 (Tex. Crim. App. 1990). Certainly the fact that Alonso is afraid that he might be killed by Mendoza

In sum, Mr. XXX submits that, if the jury had believed Ruiz was the relevant informant, and not Alonso, it would have been much less likely to have returned a conviction. Nevertheless, the defense was hamstrung at every turn and not allowed to give the jury a full picture as to the true identify of the informant. Certainly the jury could have concluded, had it been permitted to hear the evidence, (Alonso's statements that he was afraid of Mendoza and/or why he was so afraid) that Alonso was *not* the relevant informant. The failure of the District Court, alone or combination with the error discussed in subsection V above, warrants a new trial in this case.

VII. THE JURY CHARGE IN THIS CASE WAS INSTRUCTED TO ASSUME THE TRUTH OF ONE OF THE STATE'S ALLEGATIONS.

Prior to the guilt/innocence deliberations in this case, the jury was instructed as follows:

> Now bearing in mind that foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of October, 2001, in Dallas County, Texas, the defendant, MARK ANTHONY DE LA PAZ, did then and there, knowing that an official proceeding or investigation was pending or in progress, to wit: a Dallas Police Department Narcotics Division Investigation, with intent to affect the outcome of the official proceeding or investigation, did make or present or use a document, to wit: an affidavit for search warrant or arrest warrant, hereinafter "affidavit," dated the 23rd of day of October, 2001, for the premises located at 5972 Marine Way, Dallas, Texas, with knowledge of its falsity in that the defendant knew that the affidavit contained defendant's false statement or false information

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would be helpful to a reasonable person in determining whether Alonso was willing to go to Mendoza's home and/or whether he was willing to be a confidential informant on a case in which his identity might have been revealed under *Roviaro.*

> that the confidential informant was reliable, or that in the past defendant had received information from the confidential informant about persons who traffic drugs in the Dallas County area and on each and every occasion the informant had proven to be true, reliable or correct, then you will find the defendant guilty as charged in the indictment.

C.R. III:774. Mr. XXX objected to this charge and instead requested that the portion of the charge that stated "with knowledge of its falsity in that the defendant knew that the affidavit contained defendant's false statement" be changed to read "with knowledge of it falsity in that the defendant knew that the affidavit contained *an alleged* false statement." *See* R.R. at XXII:36 and Def. Exhibits 242 and 243. The District Court refused the request. *See* R.R. at XXII:36.

It is well established and it has long been established that a jury charge "that assumes the truth of a controverted issue is a comment on the weight of the evidence and is erroneous." *Whaley v. State*, 717 S.W.2d 26, 32 (Tex. Crim. App. 1986). *See also*, *Coffee v. State*, 184 S.W.2d 278 (Tex. Crim. App. 1944). For example, in *Andrews v. State*, 652 S.W.2d 370, 373 (Tex. Crim. App. 1983), the Court of Criminal Appeals confronted the following charge:

> [I]f you believe from the evidence beyond a reasonable doubt that the defendant, William Andrews, in Harris County, Texas, on or about the 7th day of August, 1980, did, knowing the content and character of the material, intentionally sell to O. W. Farrell obscene material, namely one magazine entitled 'Swedish Erotica No. 25' which depicts and describes patently offensive representations of actual or simulated sexual intercourse, anal intercourse and oral sodomy, then you will find the defendant guilty of the alleged offense.

The Court agreed with the intermediate court of appeals that the charge was defective "because it 'in effect, assume[d] as established two essential facts: (1) that the magazine in question is obscene material, and (2) that it depicts and describes 'patently offensive' representations of actual or simulated sexual intercourse, anal intercourse and oral sodomy.'" *Id*. In reversing the defendant's conviction, the *Andrews* Court wrote:

> The application paragraph of the charge should be carefully and properly structured because it is usually the one paragraph of the charge which determines the guilt or innocence of the accused for committing the offense for which he is on trial. The general rule is that it is usually permissible to track the pertinent part of the charging instrument when preparing the application paragraph. However, such general rule is not absolute, especially where, as here, the application paragraph of the charge assumes certain disputed facts. *Cf. Grady v. State*, 634 S.W.2d 316 (Tex.Cr.App. 1982). A trial court in its charge to a jury should never give the jury an instruction which constitutes a comment by the court on the elements of the alleged offense, or assumes a disputed fact, unless such fact comes within an exception to the general rule of prohibition that is set out in *Marlow v. State*, 537 S.W.2d 8 (Tex.Cr.App. 1976).

Id. at 374.

The defect in the charge in the instant case is similar to the defect in *Andrews.* The instant charge assumes that Mr. XXX's statement was, in fact, false and that the jury's sole responsibility was to determine whether Mr. XXX made the statement with knowledge of its falsity. In other words, Mr. XXX should have been found not guilty of the offense if (1) He did not make the statement in question *or* (2) He made the statement but he did not know the statement was false when, in fact, it was false *or* (3)

He made the statement but it was true. Nevertheless, the District Court, by assuming the truth of a controverted issue, suggested to the jury that option 3 was *not* an option because it believed the statement to be false.

Based upon the District Court's improper comment on the evidence by assuming the truth of a controverted issue in the jury charge, Mr. XXX is entitled to a new trial.

VIII. THE COURT SHOULD REVIEW THE DOCUMENTS FILED *IN CAMERA* FOR *BRADY* MATERIAL

It goes almost without saying that a criminal defendant is entitled to any exculpatory evidence that is in the possession of the prosecutorial authority. *See generally Brady v. Maryland*, 373 U.S. 83 (1963).

In the instant case, the state was required to prove to the jury, beyond a reasonable doubt, that Mr. XXX's statements regarding the reliability of the informant in order to obtain a search warrant were made knowing that they were false. Clearly, if representatives of the District Attorney's Office believed that search warrants could be obtained and prosecutions pursued based upon the reliability of the informants, it would be strong evidence that Mr. XXX, with no legal training, did not knowingly make a false statement in the search warrant affidavit. Indeed, the trial transcript of this case is replete with arguments advanced by Mr. XXX in this vein. *See, e.g.,* R.R. at IX:82-83, 87; XVI:150-53; XX:64-66; XXII:78-79, 94, 103. Consequently, information indicating

that members of the District Attorney's Office believed that search warrants could be obtained and/or prosecutions pursued based upon the reliability of the informants would be exculpatory evidence to which Mr. XXX was entitled.

Likewise, the state, in this case, repeatedly attempted to paint Mr. XXX as somebody who lied in order to pull the wool over the eyes of his superiors and others in authority related to "fake drugs." Therefore, evidence that Mr. XXX was honest with his superior or those in authority relating to the confidential informants would have undermined the state's argument and been exculpatory.

Consequently, prior to trial in this case, Mr. XXX requested the state to produce documents in the possession of Assistant District Attorney Steve Tokoly as well as what has been described as "seven boxes" of files from the district attorney's office and, ultimately, moved to compel the production of this material. *See* C.R. I:290-96; I:299-314 I:336-56.[17] Mr. XXX has some idea of what the material contained based upon the state's inadvertent disclosure of a minimal amount of similar material. *See* R.R. at III:4-32. For example, the state inadvertently disclosed material containing examples of situations regarding the issue of fake drugs where Mr. XXX readily admitted to assistant district attorneys that some of the drug deals in question were not corroborated beyond the confidential informants involved. *See* R.R. at III:6-8. There

[17] Although some of the material might have arguably been privileged, such privilege would be trumped by *Brady*. *See, e.,g., Navarro v. State*, 810 S.W.2d 432, 436 (Tex. App.--San Antonio 1991).

was also a memo from an Assistant District Attorney regarding "Problem Drug Cases" which implicitly suggested that some of the falsely arrested persons might have been responsible for simulated controlled substances which would mean that they intended to commit illegal acts with the confidential informants. *See* R.R. at III:12-14.[18] In other words, the material suggested that prosecutors believed the informants reliable for the purpose of pursuing prosecutions and that, contrary to the state's assertion, Mr. XXX was candid with prosecutors.

The District Court apparently reviewed this material *in camera* and refused to compel its production. *See* C.R. at I:358, II:427; R.R. at II:16-17. Nevertheless, the District Court did order the documents (at least the "seven boxes") sealed and that they be made "available for appellate review should they be required." *Id*. at I:358. The District Court was correct to review these materials *in camera* for *Brady* material. *See, e.g., Ealoms v. State*, 983 S.W.2d 853, 860 (Tex. App.-- Waco 1998). Nevertheless, Mr. XXX was not privy to the standard the District Court used in reviewing this material and finds it difficult to believe that it does not contain information of an exculpatory nature as outlined above. Therefore, Mr. XXX requests this Court to make an independent review of the sealed material for *Brady* information. *See id*. ("We have independently reviewed the file *in camera* and believe that it contains evidence which

[18]The Special Prosecutor denied that the materials contained *Brady* information, instead suggesting that "this is a classic example what happens when civil litigators show up in a criminal courthouse." R.R. at III:27.

might have been used to impeach Doles."); *Macias v. Texas*, 2002 Tex. App. LEXIS 8185 (Tex. App.--Dallas 2002) (unpublished) (conducting independent review of sealed records for *Brady* material).

In the event *Brady* material is discovered, as Mr. XXX believes will be the case, he submits that such material would support the granting of a new trial.

PRAYER

In accordance with foregoing argument, this Court should reverse the conviction and order a new trial.

Respectfully submitted,

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F. CLINTON BRODEN
Tex. Bar No. 24001495
Broden & Mickelsen
2707 Hibernia
Dallas, Texas 75204
(214) 720-9552
(214) 720-9594 (facsimile)

Attorney for Appellant
Mark XXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this __th day of December, 2005, I caused a copy of the foregoing document to be served on the Dallas County District Attorney's Office, 133 North Industrial Blvd., Dallas, Texas 75207.

_____

F. Clinton Broden