

TRIAL COURT CAUSE NO. 918022-A
COURT OF CRIMINAL APPEALS WRIT NO. WR-78,731-01

FILED
Chris Daniel
District Clerk
Time: DEC 01 2014
By: [Signature] Harris County, Texas
Deputy

EX PARTE § IN THE 228th DISTRICT
COURT §
KENNETH MICHAEL HEADLEY, § OF
Applicant § HARRIS COUNTY, TEXAS

p. 10

**APPLICANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Kenneth Michael Headley, Applicant in the above entitled and numbered case, by and through the undersigned counsel, presents the following proposed Findings of Fact & Conclusions of Law:

1. Findings of Fact that the State inadvertently withheld impeachment evidence from Applicant that the eyewitness Rebecca Broussard received a plea bargain from the State in exchange for her testimony, and Conclusions of Law.
2. Findings of Fact that the State purposely withheld impeachment evidence from Applicant that the eyewitness Rebecca Broussard received a plea bargain from the State in exchange for her testimony, and Conclusions of Law.
3. Findings of Fact that trial counsel for the Applicant was ineffective by failing to discover the witness Rebecca Broussard's testimony before the grand jury and her plea bargain with the state, and Conclusions of Law.

RECORDER'S MEMORANDUM
This instrument is of poor quality
at the time of imaging.

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am
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Respectfully submitted,

Natalie Schultz for Pat McCann
with permission

Patrick F. McCann

SBN: 00792680

909 Texas Avenue, #205

Houston, TX 77002

713-223-3805

Unofficial Copy Office of Chris Daniel District Clerk

No. 918022-A

EX PARTE

§

IN THE 228th DISTRICT COURT

§

OF

KENNETH MICHAEL HEADLEY,
Applicant

§

HARRIS COUNTY, TEXAS

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court now makes all findings necessary to the resolution of this case regarding the claims raised. The Court makes the following findings and conclusions, and recommends that relief be granted.

FINDINGS OF FACT

1. Applicant, Kenneth Michael Headley, was convicted by a jury of the offense of Murder in the 228th District Court of Harris County, Texas.
2. Rebecca Broussard was the only eyewitness to the offense.
3. The witness Rebecca Broussard did not appear in court to testify for the State in the applicant's first trial setting.
4. Assistant District Attorney Rob Freyer dismissed the murder case against Kenneth Michael Headley due to the missing witness.
5. The witness Rebecca Broussard was subsequently arrested for the offenses of Possession of a Controlled Substance Less than 1 Gram and Forgery.
6. Once the witness Rebecca Broussard was in custody, Assistant District Attorney Rob Freyer re-filed the murder charge against the applicant.
7. Witness Rebecca Broussard was held in custody on her criminal charges until she testified for the State in the murder trial against Kenneth Michael Headley.

8. To ensure her appearance at the applicant's murder trial, Rebecca Broussard was held at no bond on her charge of Possession of a Controlled Substance Less than a Gram and at a \$10,000 bond on her charge of Forgery.

9. The State's files containing Rebecca Broussard's charges reflect notations that the State was not to allow her to plea until she testified at the applicant's murder trial and until Assistant District Attorney Rob Freyer gave permission.

10. Assistant District Attorney Rob Freyer presented applicant's murder case to the Grand jury and called Witness Rebecca Broussard to testify before them.

11. Witness Rebecca Broussard testified to the Grand Jury that she and Assistant District Attorney Robert Freyer had spoken face to face about five times. She testified that she witnessed the applicant shoot the complainant, Gerald Dupree. She then testified that she spoke to Officer Connie Parks with the Houston Police Department about what she witnesses and picked the applicant out of a video line up. She stated in response to questioning by Assistant District Attorney Rob Freyer that she did not show up for the trial against the applicant and that it was subsequently dismissed. She admitted that Assistant District Attorney Rob Freyer and Officer Connie Parks had visited her in the Harris County Jail once she was arrested on her charges of Forgery and Possession of a Controlled Substance Less Than One Gram.

12. At the conclusion of Rebecca Broussard's testimony before the Grand Jury, Assistant District Attorney Rob Freyer stated that "we all know...that you will be given a sentence under 12.44A for two crimes that you have and...you'll get credit

for all the time that you get in." In response to this, Witness Rebecca Broussard replied that this was indeed her understanding.

13. The statement made by Assistant District Attorney Rob Freyer that Rebecca Broussard would be given time served constituted a plea agreement between the State and the witness.

14. Applicant's defense attorney, Ellis McCullough, was not given notice by Assistant District Attorney Rob Freyer of the plea agreement between the State and the witness prior to the trial.

15. Former Assistant District Attorney Vanessa Velasquez replaced Rob Freyer as the trial attorney shortly before trial upon discovering his personal relationship with Officer Connie Parks, the lead detective on the case.

16. Assistant District Attorney Rob Freyer stated that he "would have brought this out" during the direct examination of Rebecca Broussard if he had tried the case himself, referring to the agreement between him and Rebecca Broussard that she would receive 12.44A on her two pending cases.

17. Former Assistant District Attorney Vanessa Velasquez stated that she did not have knowledge of a plea agreement between Mr. Freyer and Rebecca Broussard.

18. The jury did not hear about Rebecca Broussard's plea agreement with the State on her pending cases.

19. Once Rebecca Broussard testified for the State in Kenneth Michael Headley's murder trial, former Assistant District Attorney Sylvia Escobedo made a

notation on the State's files that Rebecca Broussard had testified and that she could now dispose of the cases.

20. After testifying against the applicant, Rebecca Broussard pleaded guilty to both her Forgery and Possession of a Controlled Substance charges, was sentenced under 12.44A, and received 131 days in the Harris County jail.

21. The Witness Rebecca Broussard's plea agreement with the State would likely have had an effect on the jury's opinion of her truthfulness.

CONCLUSIONS OF LAW

22. It is the duty of the State to disclose evidence favorable to an accused "where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963.)

23. This plea agreement with Rebecca Broussard was favorable impeachment evidence, and its suppression by the State (though not voluntary) was a violation of the applicant's due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963.)

24. Exposing a witness' motivation in their testimony for or against the accused is an important purpose of cross-examination and goes directly to the veracity of the witness' testimony. *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex.Crim.App.1998.)

25. Because the defense was not given an opportunity to cross-examine Rebecca Broussard "rigorously" on the plea agreement that she made with the State beforehand, the applicant was deprived of his right to due process. *See United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir.1987.

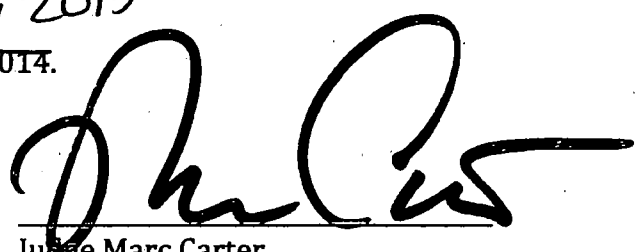
26. The jury should have heard instructions from the trial court that Rebecca Broussard's credibility was suspect, having been compensated by the State for her testimony. *United States v. Beard*, 761 F.2d 1477, 1481 (11th Cir. 1985.)

27. The jury should have been given the facts from which they could "appropriately draw inferences relating to the reliability of the witness." *United States v. Restivo*, 8F.3d 274, 278 (5th Cir. 1993.)

28. Applicant's Sixth Amendment right to confrontation was violated when he was denied the right to cross-examine Rebecca Broussard on the plea agreement she made with the State prior to her testimony. See *United States v. Davis*, 393 F.3d 540 (5th Cir. 2004.) and *Davis v. Alaska*, 415 U.S. 308, 318 (1974.)

29. It is therefore the recommendation of this Court that relief be GRANTED, and that the Court of Criminal Appeals remand this matter for a new trial so that a Harris County jury may hear the testimony of Rebecca Broussard, the only eye witness to the offense, including full cross-examination on her suppressed plea agreement, and determine its veracity.

Signed this 30 day of JANUARY 2015 (J19) December, 2014.



Judge Marc Carter
Judge, 228th Judicial District Court
Houston, Texas
The clerk shall transmit a copy of this finding to the CCA upon the date of this order.

HAVING RECOMMENDED THAT RELIEF BE GRANTED THE COURT ORDERS:

- I. The Clerk shall prepare and certify herewithin the writ record, including the pleadings, factual supplements, findings, applications and responses, all exhibits, and prepare the record along with a certified copy of the hearing testimony from the court reporter and forward this to the Court of Criminal Appeals within 15 days of the date of this order.
- II. The court reporter shall provide a certified copy of the transcript for filing with the Court of Criminal Appeals.
- III. The Clerk shall transmit a copy of these findings instanter to the Court of Criminal Appeals and as part of the certified clerks record listed above.
- IV. Applicant, having been present for the testimony and arguments, may now be returned on his bench warrant to the Texas Department of Criminal Justice to wait decision by the Court of Criminal Appeals.

So Ordered

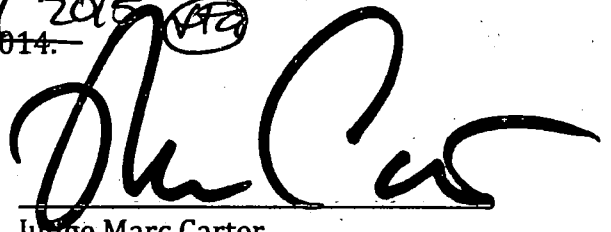
Signed this

30

day of ~~December, 2014.~~

JANUARY 2015

(VAT)



Judge Marc Carter
Judge, 228th Judicial District Court
Houston, Texas

The clerk shall transmit a copy of this finding to the CCA upon the date of this order.



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

February 4, 2015

DEVON ANDERSON
DISTRICT ATTORNEY
HARRIS COUNTY, TX

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 918022-A in the 228th District Court.

- State's Original Answer Filed
- Affidavit
- Court Order Dated
- Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.
- Respondent's Proposed Findings of Fact and Order
- Other

Sincerely,


Brenda McNeil, Deputy
Criminal Post Trial

Enclosure(s) – Applicant's Proposed Findings Of Fact And Conclusions Of Law



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

February 4, 2015

PATRICK F. MCCANN
ATTORNEY FOR APPLICANT
909 TEXAS AVENUE, #205
HOUSTON, TX 77002

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Sincerely,


Brenda McNeil, Deputy
Criminal Post-Trial

Enclosure(s) – Applicant's Proposed Findings Of Fact And Conclusions Of Law.