No. 56406

Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas

CHARLES J. SEBESTA, JR.,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 08–2
No. 201400539

BRIEF OF AMICUS CURIAE ANTHONY CHARLES GRAVES

KATHRYN M. KASE
Texas Bar. No. 11104050
Email: kmkase@texasdefender.org
TEXAS DEFENDER SERVICE
1927 Blodgett
Houston, Texas 77004
Telephone: (713) 222–7788
Fax: (713) 222–0260

NEAL S. MANNE
Texas Bar No. 12937980
Email: nmanne@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 653–7827
Fax: (713) 654–6666

CHARLES R. ESKRIDGE III
Texas Bar No. 06666350
Email: charleseskridge@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN LLP
711 Louisiana Street, Suite 500
Houston, Texas 77002
Telephone: (713) 221–7000
Fax: (713) 221–7100

IDENTITY OF PARTIES AND COUNSEL

APPELLANT
CHARLES J. SEBESTA, JR.

COUNSEL FOR APPELLANT
STEPHEN E. MCCONNICO
Email: smcconnico@scottdoug.com
ROBYN HARGROVE
Email: rhargrove@scottdoug.com
KIMBERLY GUSTAFSON BUENO
Email: kbueno@scottdoug.com
SCOTT, DOUGLASS & MCCONNICO, L.L.P.
600 Congress Avenue, Suite 1500
Austin, Texas 78701
Telephone: (512) 495–6300
Fax: (512) 474–0731

APPELLEE
COMMISSION FOR LAWYER DISCIPLINE
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711

COUNSEL FOR APPELLEE
LINDA A. ACEVEDO
Chief Disciplinary Counsel

LAURA BAYOUTH POPPS
Deputy Counsel For Administration

CYNTHIA CANFIELD HAMILTON
Senior Appellate Counsel
Texas Bar No. 00790419
Email: cynthia.hamilton@texasbar.com

State Bar Of Texas
P.O. Box 12487
Austin, Texas 78711–2487
Telephone: (512) 427–1350; (877) 953–5535
Fax: (512) 427–4167

AMICUS CURIAE
ANTHONY CHARLES GRAVES

COUNSEL FOR AMICUS CURIAE
KATHRYN M. KASE
Texas Bar No. 11104050
Email: kmkase@texasdefender.org
TEXAS DEFENDER SERVICE
1927 Blodgett
Houston, Texas 77004
Telephone: (713) 222–7788
Fax: (713) 222–0260

NEAL S. MANNE
Texas Bar No. 12937980
Email: nmanne@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 653–7827
Fax: (713) 654–6666

CHARLES R. ESKRIDGE III
Texas Bar No. 06666350
Email: charleseskridge@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN LLP
711 Louisiana Street, Suite 500
Houston, Texas 77002
Telephone: (713) 221–7000
Fax: (713) 221–7100

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STATEMENT OF AMICUS INTEREST

Anthony C. Graves was wrongfully convicted, sentenced to death, and twice faced execution as a result of the unethical actions of Charles J. Sebesta, Jr. Although procedural rules do not provide a means for Graves to participate as a party at this juncture, he without question has a direct, substantial, and continuing interest in these proceedings. Graves seeks to vindicate his interest by participation as *amicus curiae*. And that term—*amicus curiae*, friend of the court—perhaps was never more true in its literal sense. Notwithstanding the illegal conduct to which Sebesta, acting on behalf of the State, wrongfully subjected him, Graves never lost faith in the courts of Texas and of the United States. He trusted those courts to vindicate him, and to do right and justice by him. Although it took nearly two decades, those courts ultimately rewarded his belief in due process under the law. Once fully exonerated, Graves extended that same faith and trust to the State Bar of Texas to determine that there was "just cause" to proceed on his grievance; to the Evidentiary Panel to hear all of the evidence, find that Sebesta engaged in grievous misconduct, and hand down the appropriate sanction; and now to this Board of Disciplinary Appeals to understand that Sebesta's reckless and wrongful conduct left genuine tragedy in its wake, and to affirm the decision of the Evidentiary Panel that heard all of the evidence.

In compliance with Rule 11 of the Texas Rules of Appellate Procedure, the undersigned counsel affirm that they act as *pro bono* counsel on behalf of Anthony Graves in seeking substantial justice and furtherance of the public good; that no fee has been paid for preparing this brief; that Anthony Graves is the sole person or entity on whose behalf we tender this brief; and that this brief complies with applicable briefing rules and shall be served on all parties.

INTRODUCTION

The facts of Anthony Graves' case are almost unprecedented in Texas history. Graves spent 18 and 1/2 years wrongfully imprisoned, with 12 and 1/2 years of it on death row. Graves twice came within days of execution. He was saved from lethal injection only because the United States Court of Appeals for the Fifth Circuit overturned his conviction and death sentence after finding that Charles Sebesta, the prosecutor, had hidden favorable and exculpatory evidence and presented false and misleading evidence against Graves in a court of law.

Sebesta has now been disbarred for his gross misconduct. Indeed, the evidence of this misconduct was so devastating and overwhelming that Sebesta does not even appeal from the factual findings of the Evidentiary Panel. Those factual findings are now final, conclusive, and indisputable. Instead, and in order to prevent a transcript of the evidence below from being transcribed and made public, Sebesta limits his appeal to purely legal issues of *res judicata* and quasi-estoppel. In this way, Sebesta seeks to conceal from the public the evidence of the harm he visited upon an innocent citizen of Texas; to absolve himself of the misconduct that is no longer even in dispute; and to maintain his license to practice law notwithstanding the undisputed finding that he intentionally tried to have an innocent man executed.

Graves participates as *amicus curiae* in order to personally address the issue of *res judicata* and quasi-estoppel since they relate directly to a prior grievance supposedly filed on Graves' behalf, but which he did not in any way authorize and in which he did not participate. In truth, Sebesta's is a particularly craven tactic. He seeks to foist on Graves the results of a prior grievance submitted without Graves' request, knowledge, or consent—and indeed, one that was submitted while Graves still languished in jail, long before the Texas Legislature accorded him the right to institute his grievance. Sebesta's argument for preclusion is without merit.

Graves also participates to remind this Board of the facts underlying Sebesta's misconduct; that the target of Sebesta's misconduct is a real person, with a name, a face, and a beating heart; that an entirely innocent fellow human being lost much of his liberty and nearly lost his life because of Sebesta's intentional misconduct; and that even now, more than five years after his exoneration, Graves and his family continue to suffer harm every day due to Sebesta's actions. Though Sebesta understandably wants this Board to avert its gaze from the actual record of his wrongdoing, the Board should not participate in a whitewash of that misconduct. To the contrary, Sebesta should be held to account for his ethical lapses. Sebesta cannot seek equity under the doctrine of quasi-estoppel without this Board directly reviewing the entire scope of Sebesta's prosecutorial misconduct, understanding the overwhelming and conclusive evidence in support of the findings of misconduct, and recognizing that Sebesta continues to express no shame, remorse, or contrition for the misconduct he does not even dispute in this appeal.

Anthony Graves submits that this Board should affirm the order of the Judgment of Disbarment signed by the Evidentiary Panel for State Bar District No. 08–2 on June 11, 20l5, and should affirm the Order on Respondent's Motion on Res Judicata and Estoppel, signed on December 17, 2014.

STATEMENT OF AMICUS POSITION

I. Anthony Graves did not authorize the prior grievance or participate in the proceedings that Sebesta asserts should insulate him from the disciplinary action that led to his disbarment.

Sebesta focuses his appeal on the Order of the panel below denying his Motion on Res Judicata and Estoppel. (2 CR 1014.) Sebesta's motion effectively sought dismissal of the instant grievance because the State Bar of Texas had dismissed a grievance, purportedly on similar facts, filed against Sebesta in 2007. Graves wishes to make certain this Board is fully aware—as he explained in the proceedings below—that he did not know of, authorize, or participate in any way in the filing of the 2007 grievance by attorney Robert S. "Bob" Bennett.

First, as Sebesta concedes, application of *res judicata* requires a finding of party identity or privity in the two actions. Appellant's Br. at 35–36. In this regard, the entirety of Sebesta's preclusion argument depends upon two assertions of fact, both of which are demonstrably false and contradicted by record evidence below. Sebesta states that the grievance filed by Graves in 2014 "was filed by the same party, raising the exact same allegations against Sebesta" as a grievance filed in 2007, and that Robert Bennett was Graves' attorney in 2007 and filed that grievance on behalf of Graves. *See* Appellant's Br. at 4, 6; *see also id*. at 36. Sebesta further concedes in reply that this is critical to his argument, because he flatly argues that "the Commission would be barred from proceeding on these claims ***because it stepped into the Complainant's shoes when it filed the Petition in this case***." Appellant's Reply Br. at 7 n.5 (emphasis added).

To the contrary, Graves filed his first and only grievance against Sebesta in early 2014 *after* the 83rd Texas Legislature passed the Michael Morton Act and amended the Texas Government Code to expressly extend the statute of limitations for the filing of grievances in innocence cases where the prosecutor withheld favorable evidence. Graves did not participate in

the prior grievance, nor was he in privity with, or a successor in interest to, any party to it. As Graves stated under oath in this proceeding:

> ***I had nothing to do with the 2007 bar grievance filed by attorney Bob Bennett against Charles J. Sebesta.*** I did not know about that filing, nor did I speak to, consult with or hire Mr. Bennett regarding the grievance. I never gave Mr. Bennett permission to file a grievance against Mr. Sebesta, nor did Mr. Bennett ever ask for my permission to file the 2007 grievance. An attorney-client relationship was never formed between us for the purposes of the 2007 grievance.

App. 1, Graves Affidavit, at 1 (emphasis added); *see also* App. 2, Graves Affidavit, at 5–6.[1] As such, that prior action has no bearing here. *See, e.g., Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 653 (Tex. 1996); *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 800 (Tex. 1992). Without the essential relationship of having been a party, in privity with a party, or a successor in interest, Graves cannot now be bound by the dismissal of the prior grievance.

In truth, Sebesta's own record undermines his argument that Graves was in any way deemed to have instituted the 2007 grievance. Sebesta's Appendices 1, 2, and 3 are State Bar letters, with the former two pertinent to the 2007 grievance, and the latter pertinent to the 2014 grievance. The "Re:" lines are telling. In Appendices 1 and 2, the State Bar notes them to regard "A0020710876 Robert Bennett—Charles J. Sebesta, Jr." In Appendix 3, the State Bar notes it to regard "201400539 Anthony Graves—Charles J. Sebesta, Jr." While such designation may not be controlling, it is clear evidence that the State Bar believed it was dealing in 2007 with a grievance initiated by Robert Bennett, not by Anthony Graves. *See* App. 2, Graves Affidavit, at 6 ("It is clear from the 2007 correspondence between the Bar and Mr. Sebesta that both the Bar

[1] Graves submitted two affidavits during the disbarment proceedings to assist the State Bar in reaching its "just cause" determination to proceed to the merits. Those affidavits are attached here as Appendices 1 and 2.

and Mr. Sebesta understood at the time that the grievance was brought by Mr. Bennett on his own behalf, not brought by or for me.").

Regardless, nothing in the record suggests that the 2007 grievance was a merits-based decision, and to the contrary, the Brief of the Commission for Lawyer Discipline establishes precisely the opposite. *See* Appellee's Br. at 27–44. Beyond this, the record is crystal clear that Graves in no way participated in that 2007 grievance. Graves submitted the detailed affidavits described above, and Sebesta was free to seek discovery on that point if he did not believe Graves to be truthful. Yet Sebesta sought no discovery from either Graves or Bennett. As a consequence, he is unable to do anything now except offer innuendo and suspicion, which this Board should firmly reject as contrary to actual evidence of record. The bottom line is that Graves' sworn affidavits on this point are both undisputed and dispositive.

Second, Sebesta explicitly waived any argument that *res judicata* determines the outcome of the grievance for which he was disbarred. In his response to Graves' grievance, Sebesta himself personally stated:

> I believe wrongfully-convicted individuals ***should*** have the ability to bring grievances against prosecutors who engage in misconduct. ***Prosecutors should not be able to hide behind a statute of limitations to avoid sanctions for misconduct.*** The passage of SB 825 allows me to confront the allegations directly and to finally answer the spurious charges against me in the Graves case.

See Sebesta Response to Grievance, Letter dated April 2, 2014, at 2 (emphasis added) (1 CR 263). Sebesta stated this openly and knowingly during the "just cause" determination of the proceedings below, when he hoped to absolve himself of blame for ethical lapses dating back twenty years. Now—after attorneys with the Office of the Chief Disciplinary Counsel and three members of the Evidentiary Panel have devoted countless hours at tremendous personal sacrifice

to give Sebesta the substantive hearing he not only expressly argued above was just, *but suggested was owed to him as a matter of due process*—he should not be permitted to reverse his position. At the very least, the Board should confront his current argument with great skepticism since he vigorously argued for the exact opposite below.

Third, giving any legal effect to the 2007 grievance would undermine the entire purpose of a crucial public policy feature of the Michael Morton Act. As noted above, by amendment to the Government Code, the Legislature changed the statute of limitations with respect to ethical complaints against prosecutors for their official conduct, and provided that it does not begin to run until a "wrongfully imprisoned person is released from a penal institution." Acts 2013, 83rd Leg., ch. 450 (SB 825); *see also* Tex. Rules Disciplinary P. R. 15.06.[2] In short, the Texas Legislature itself told Anthony Graves that he was authorized to have his grievance against Sebesta considered so long as he instituted it within four years of his release from prison on October 27, 2010. He did so. This Board must, of course, follow the dictates of clear and express legislation.[3] To the contrary, Sebesta would have the Legislature's action be a nullity and of no use to the very exonerees our legislators intended to benefit.

On the above record of the actual facts, this Board must conclude that this is the one and only grievance presented by Graves to the State Bar of Texas seeking relief for the wrongful and

[2] The Michael Morton Act and amended Disciplinary Rule with respect to statute of limitations are attached as Appendices 3 and 4 to the Brief of Commission for Lawyer Discipline.

[3] Sebesta is not content merely to cast against the controlling dictates of legislative language and intent. Elsewhere, he takes issue with a decision of the Texas Supreme Court, *State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972), which he acknowledges to hold that a decision by a grievance committee not to take action is not a binding decision on the merits, but which he asks this Board to ignore because the "reasoning … no longer makes sense" in light of changes to the disciplinary regime. Appellant's Br. at 30. To the contrary, Graves submits that only the Texas Supreme Court—and not this Board—can overrule a prior and binding decision.

unethical action of Sebesta, his prosecutor. *See* App. 2, Graves Affidavit, at 6 ("This is the first and only time I have complained about Mr. Sebesta to this Board, and I decided to do so specifically because new legislation said I could do this even though what Mr. Sebesta did to me was so long ago."). This is not a juncture calling for gentle words: Charles Sebesta, among other things, hid exculpatory evidence, presented false testimony, and attempted—with great planning and deliberation—to have Anthony Graves put to death despite knowing, at the very least, that Graves could be innocent. He very nearly succeeded, but with time Graves was fully exonerated. Sebesta now appears before this Board in utter disgrace, disbarred for outrageous misconduct which is no longer in dispute. It would be an extraordinary miscarriage of justice, and bring enormous condemnation on the State Bar of Texas, if Sebesta were effectively absolved because someone else filed a grievance while Graves still languished in jail and before the State of Texas discovered the full scope of Sebesta's outrageous misconduct.

II. Charles Sebesta seeks no modification of the factual findings of the Evidentiary Panel, which this Board should consider to conclusively establish his misconduct.

In his appeal, Sebesta does not dispute the findings of his misconduct. The findings of the Evidentiary Panel are thus final and now beyond challenge. Rather, in his appeal Sebesta simply seeks to avoid there being any consequence for that misconduct. If his appeal is successful, someone who indisputably engaged in misconduct that put an innocent person in prison for over 18 years, and who attempted to have him executed, would remain a fully licensed lawyer in good standing with the Texas Bar. In considering whether to allow such an extraordinarily unjust outcome, Graves submits this Board must be cognizant of the following facts, none of which Sebesta disputes on appeal.

Anthony Graves was convicted of capital murder and sentenced to death in 1994 for the capital offense of murdering six people. On March 3, 2006, the United States Court of Appeals

for the Fifth Circuit overturned his conviction and death sentence and remanded the case for a new trial. *Graves v. Dretke*, 442 F.3d 334, 345 (5th Cir.), *cert. denied, sub nom. Quarterman v. Graves*, 549 U.S. 943 (2006) (attached as App. 3). The Fifth Circuit found that Sebesta had suppressed material, exculpatory evidence that Graves' co-defendant, Robert Carter, had at one point insisted that he had acted alone in killing the victims, and at other times insisted that Carter's wife, Theresa, also was involved in the murders. *Id*. at 340–42. The Court further found that Sebesta engaged in tactics designed to mislead the defense and result in the presentation of false and misleading evidence at trial.[4] *Id*. at 341–42.

Because of Sebesta's actions, Graves was sent to solitary confinement on Texas' death row for 12 and 1/2 years where he endured deprivations unimaginable to an innocent and law-abiding citizen of Texas. While there, he was twice set for execution and narrowly avoided dying only as a result of extraordinary efforts by his defense team. *See generally* App. 1, Graves Affidavit; App. 2, Graves Affidavit.

After the Fifth Circuit overturned Graves' conviction and death sentence, he was remanded to the Burleson County jail, where he remained for another four years. An experienced special prosecutor was hired to prosecute the case again for the State. To prepare for the retrial, the prosecutor, Kelly Siegler, again fully investigated the case, reviewing some 25

[4] At various points, Sebesta suggests that evidence favorable to him was somehow lost because supposed witnesses of statements or evidence inculpating Graves was lost after 2007 when those witnesses died. *See, e.g.*, Appellant's Br. at 10; Appellant's Reply Br. at 16–17. Left begging are answers to the obvious questions of where this evidence was during Graves' trial in 1994, or why Sebesta did not seek to preserve and offer it during habeas corpus proceedings leading to the Fifth Circuit's 2006 opinion or during Kelly Siegler's re-investigation. He was plainly involved in those proceedings. (*See, e.g.*, 1 CR 450–51.) Sebesta's claims are unsubstantiated fantasies, and the Evidentiary Panel recognized them as such.

boxes of case-related files and records and interviewing witnesses. She was assisted in this endeavor by investigator Otto Hanak. *See* App. 4, Siegler Affidavit.

In the course of her re-investigation of the case against Graves, Siegler discovered that "the actual facts were not as they had been previously represented …." *Id.* at 1. Specifically, Siegler concluded that:

- There was no credible evidence of Graves' guilt;
- Prosecutors suppressed evidence favorable to the defense at Graves' first trial;
- Prosecutors also had falsely produced other evidence at that first trial;
- There were credible alibi witnesses who confirmed that Graves had been nowhere near the murder scene;
- Some of these alibi witnesses elected not to testify at Graves' original trial because they had been threatened with prosecution if they did so;
- Graves was subjected to an improper prosecution and conviction in a death penalty case;
- Graves was actually innocent; and
- The charges against Graves should be dismissed.

Id. at 1–2. Siegler and Hanak then laid out these findings in a meeting with Burleson County District Attorney William Parham. He agreed that Graves was innocent and joined in the recommendation that all charges against Graves be dropped. *Id.* at 2.

On October 27, 2010, the Hon. Reva Towslee Corbett dismissed the capital murder charge against Anthony Graves on motion by Burleson County District Attorney William Parham, which definitively stated:

> ***We have found no credible evidence which inculpates this defendant.***

See App. 6, Motion and Order Dismissing Capital Murder Charge, *State v. Graves*, Cause No. 11,136 (21st Dist. Ct. Oct. 27, 2010) (emphasis added).

Graves was released from the Burleson County jail that same day. He subsequently was declared actually innocent when Siegler filed her original affidavit referenced above. Graves was later compensated by the State of Texas for his wrongful incarceration under a provision of law that allows such payment only if there is a conclusive determination of innocence. *See* Tex. Civ. Prac. & Rem. Code § 103.001 (setting out requirements for compensation in cases of innocence).

Graves initiated his grievance to the State Bar of Texas on January 29, 2014, which determined "just cause" to exist on June 2, 2014. (1 CR 177–260 & 481.) Siegler testified at the disbarment hearing and confirmed her prior conclusions, having noted during the course of these proceedings that she had considered and rejected Sebesta's explanations as "misleading and non-credible," and that nothing offered by Sebesta or his lawyers in the disbarment proceeding changed her conclusion that "unethical and illegal prosecutorial misconduct" had led to the conviction of Graves, who she affirmed "is actually innocent of the crimes for which Mr. Sebesta prosecuted him." *See* App. 5, Siegler Affidavit, at 2–3.[5]

Graves attended the evidentiary hearing conducted by the Evidentiary Panel, but will not burden this Board with his perception of the damning evidence brought to bear against Sebesta. (*See* 2 CR 1348 (order permitting Graves and counsel to attend evidentiary hearing)). It suffices that the Evidentiary Panel essentially confirmed all of the above, and the comprehensive brief by

[5] Graves submitted the Siegler Affidavit, attached as Appendix 5, to the State Bar during its consideration whether "just cause" warranted proceeding to the merits.

the Commission for Lawyer Discipline amply demonstrates that a robust evidentiary basis supports the Judgment of Disbarment. *See* Appellee's Br. at 16–19.

III. Charles Sebesta's misconduct exacted an enormous human toll which he has never acknowledged and for which he has in no way expressed remorse or contrition.

Notwithstanding the liberty he has regained, Anthony Graves has not been made whole through his release from incarceration or the State's grant of compensation. Release from prison cannot return the 18 and 1/2 years that Sebesta's unethical actions stole from Graves. Nor can any amount of compensation eliminate the pain of being made to live in solitary confinement on Texas' death row for 12 and 1/2 years, or erase the trauma of twice being set for execution—to say nothing of the time removed from the love and comfort of his children, mother, and other family. To the contrary, justice will not truly have been done for Graves or his family if Sebesta continues to be a licensed member in good standing of the State Bar of Texas. This is particularly so given that Sebesta resolutely refuses even to acknowledge that what he did was unethical, much less that he should recognize it with the shame and contrition it deserves.

Long after Graves had been declared actually innocent by the State, Sebesta continued to torment him, grotesquely asserting that Graves committed capital murder, and attacking the motivations and integrity of the two prosecutors who exonerated him. *See* App. 2, Graves Affidavit, at 2–4.[6] And though by tactical choice Sebesta has chosen not to have the proceedings transcribed, the undersigned counsel who attended those hearings represent to this Board that a dominant theme of Sebesta's defense before the Evidentiary Panel—as if it were an excuse of

[6] *See also* Charles Sebesta: Setting the Record Straight, at charlessebesta.net (last visited Apr. 16, 2014), as referred to in Graves Affidavit, App. 2, at 2–5.

ethical misconduct by a prosecutor of the State of Texas—was that Graves is, in fact, guilty of the capital murders of which he has been completely exonerated.[7]

Sebesta's shameful promotion of this dishonest narrative continues to cause Graves and his family personal anguish and mental pain. As Graves has stated in the record:

> He continues to assassinate my character, and make me feel like I have to come out every day and prove myself, explain myself, and defend myself. I live in fear because of what he does to scandalize my name. What if someone harms me because of what he says? ***I've done nothing to him or to society that I need to apologize for, and yet he continues to attack and vilify me.*** Perhaps the hardest thing for me is to see what this does to my mother. She is 67 years old, and all the stress and anxiety of the last 20 years has taken a tremendous toll on her health. And she still has to hear this prosecutor from long ago continue to say her son is guilty of crimes he did not commit. That is not right.

App. 2, Graves Affidavit, at 4–5 (emphasis added).

To the extent Sebesta seeks a measure of "equity," as discussed next below, this Board must take full cognizance of these facts.

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[7] Even in his reply, Sebesta continues this dishonest narrative to the point of requiring vigorous response. He references an affidavit from "the trial court judge who presided over Graves' criminal trial," which asserted "that Graves had a fair trial and Sebesta's conduct in prosecuting Graves had been ethical." Appellant's Reply Br. at 15 n.10. Absent from this description is the fact that ***this trial judge testified before the Evidentiary Panel, which entirely rejected the testimony***, likely because that judge could not be aware that Sebesta—outside of his presence before and during trial—was hiding evidence and intimidating witnesses into not testifying on Graves' behalf. He also references Magistrate and District Court judges, *id*., whose conclusions were ***positively rejected*** by the Fifth Circuit as a matter of law. And he references his supposed "polygraph results in his response confirming that he did in fact disclose the exculpatory evidence to Graves' attorney." *Id*. ***That evidence, too, was presented to the Evidentiary Panel, which again entirely rejected it, likely because it lacked any indicia of credibility***. If Sebesta wanted to argue about such things here, he should have challenged those findings. But if he had, Graves would be detailing before this Board from an available transcription of testimony the inconsistencies and misrepresentations he believes Sebesta and certain witnesses on his behalf made, which cross-examination by attorneys with the Office of the Chief Disciplinary Counsel fully exposed, and which the Evidentiary Panel likely found quite influential. Instead, Sebesta chose a procedural tactic hoping to avoid a record that utterly rejects his self-delusion.

IV. Charles Sebesta cannot assert quasi-estoppel because he has not acted equitably and comes to equity with the dirtiest of hands.

Sebesta asserts an equitable bar of quasi-estoppel that, in his words, "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." Appellant's Br. at 38. He suggests that this equitable doctrine should be assessed with respect to the State Bar's conduct, rather than with respect to the conduct of Anthony Graves. As the Commission for Lawyer Discipline amply demonstrates, this fails because "it was not unconscionable for the Commission to pursue disciplinary action based on Sebesta's prosecutorial misconduct that resulted in a death sentence and the wrongful imprisonment of Anthony Graves for eighteen [and one-half] years." Appellee's Br. at 44.

But Sebesta's tactic also fails at the threshold. Sebesta concedes that Graves and his actions are the pertinent inquiry for "identity of parties or privies" under the *res judicata* analysis. *See* Appellant's Br. at 35–36. Accordingly, Graves remains the pertinent party for analysis of any equitable estoppel issue, and Sebesta's conduct must be measured only against Graves' conduct in seeking this disbarment.

Graves and his counsel will not belabor the equitable comparison, since any comparison of the respective equities of Graves' and Sebesta's conduct would make a mockery of this process. Instead, Graves refers this Board to the binding decision of the Fifth Circuit; to the binding determination of the actual innocence of Anthony Graves by the State of Texas; and to the factual findings of gross misconduct made by the Evidentiary Panel, which Sebesta does not challenge on appeal.

By asserting quasi-estoppel Sebesta seeks an equitable ruling. Graves reminds this Board of certain maxims of equity that Sebesta has either forgotten or, perhaps, never learned. First,

equity will not suffer a wrong to be without a remedy.[8] Second, equity delights to do justice and not by halves.[9] Third, one who seeks equity must do equity,[10] and conversely, he who comes into equity must come with clean hands.[11] Sebesta—his hands fouled by his own misconduct—can in no way support an appeal to equity. *See, e.g., Jackson Law Office, P.C. v. Chappell,* 37 S.W.3d 15, 27 (Tex. App.—Tyler 2000, pet. denied) ("unclean hands" doctrine "is applied to one whose own conduct in connection with the same matter or transaction has been unconscientious or unjust, or marked by a want of good faith, or has violated principles of equity and righteous dealing").

It is thus sad—and denigrates the importance of these proceedings—to see Sebesta in reply attempt to shift focus to the supposed "actual record of evidence" with respect to "the Bar's conduct in 2007" and try to "highlight the problems with its conduct." Appellant's Reply Br. at 2. He goes so far as to argue that "the Bar is attempting to play fast and loose with its governing rules and legal duties." *Id*. at 16. Where is his reckoning of his own conduct, which the phrase "fast and loose" does not even begin to capture? Where is his dispute with the record findings of the Fifth Circuit and the Evidentiary Panel, which lay bare his utter disdain for the "governing rules and legal duties" that were supposed to constrain him as a legal officer of the State of Texas in the exercise of his prosecutorial power against Anthony Graves?

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[8] *Alamo Title Co. v. San Antonio Bar Ass'n*, 360 S.W.2d 814, 817 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

[9] *O'Brien v. Perkins*, 276 S.W. 308, 314 (Tex. Civ. App.—Amarillo 1925), *aff'd sub nom. Shelton v. O'Brien*, 285 S.W. 260 (Tex. Com. App. 1926).

[10] *Jackson Law Office, P.C. v. Chappell,* 37 S.W.3d 15, 27 (Tex. App.—Tyler 2000, pet. denied); *see also Pan-American Petroleum & Transport Co*., 47 S.Ct. 416, 508 (1927); *Kiper v. BAC Home Loans Servicing, L.P.*, 884 F.Supp.2d 561, 574 (S.D. Tex. 2012), *aff'd*, 534 Fed.Appx. 266 (5th Cir. 2013).

[11] *Jackson Law Office, P.C. v. Chappell,* 37 S.W.3d 15, 27 (Tex. App.—Tyler 2000, pet. denied).

In this light, and to be precise, the sanction of disbarment handed down by the Evidentiary Panel is fully in accord with equitable principles.

CONCLUSION

For the foregoing reasons, Anthony C. Graves, as *amicus curiae*, submits that this Board should affirm the order of the Judgment of Disbarment signed by the Evidentiary Panel for State Bar District No. 08–2 on June 11, 20l5, and should affirm the Order on Respondent's Motion on Res Judicata and Estoppel, signed on December 17, 2014.

Dated: January 18, 2016

Respectfully submitted,

By: 

Kathryn M. Kase
Texas Bar No. 11104050
TEXAS DEFENDER SERVICE
1927 Blodgett
Houston, Texas 77004
Telephone: (713) 222–7788
Fax: (713) 222–0260
Email: kmkase@texasdefender.org

Neal S. Manne
Texas Bar No. 12937980
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 653–7827
Fax: (713) 654–6666
Email: nmanne@susmangodfrey.com

Charles R. Eskridge III
Texas Bar No. 06666350
QUINN EMANUEL
URQUHART & SULLIVAN LLP
711 Louisiana Street, Suite 500
Houston, Texas 77002
Telephone: (713) 221–7000
Fax: (713) 221–7100
Email: charleseskridge@quinnemanuel.com

Counsel to Anthony Charles Graves,
Amicus Curiae

CERTIFICATE OF SERVICE

A copy of this Brief of Amicus Curiae, including the attached Appendices 1 through 6, has been sent via email to counsel for Charles J. Sebesta, Jr.:

Steve McConnico
Email: Smmconnico@Scottdoug.Com
Robyn Hargrove
Email: Rhargrove@Scottdoug.Com
Kimberly Gustafson Bueno
Email: Kbueno@Scottdoug.Com
Scott, Douglas & McConnico, LLP
One American Center, 15th Floor
600 Congress Avenue
Austin, Texas 78701

A copy has also been sent via email to counsel for the State Bar of Texas Office of Chief Disciplinary Counsel:

Cynthia Canfield Hamilton
Email: Cynthia.Hamilton@Texasbar.Com
State Bar of Texas
Office of Chief Disciplinary Counsel
P.O. Box 12487
Austin, Texas 78711

Kathryn M. Kase

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Amicus Curiae was prepared using Microsoft Word 2010, and that, according to its word-count function, the sections of the foregoing brief covered by BODA Rule 4.05(d) contain 6,133 words in a 12-point font size and footnotes in a 12-point font size.

Kathryn M. Kase

APPENDIX

App. 1: Affidavit of Anthony Charles Graves (Feb. 10, 2014) (1 CR 487–91)

App. 2: Affidavit of Anthony Charles Graves (Apr. 16, 2014) (1 CR 492–98)

App. 3: *Graves v. Dretke*, 442 F.3d 334, 345 (5th Cir.), *cert. denied, sub nom. Quarterman v. Graves*, 549 U.S. 943 (2006) (1 CR 578–89)

App. 4: Affidavit of Kelly Siegler (Nov. 15, 2010) (1 CR 485–86)

App. 5: Affidavit of Kelly Siegler (Apr. 11, 2014) (1 CR 482–86)

App. 6: Motion and Order Dismissing Capital Murder Charge, *State v. Graves*, Cause No. 11,136 (21st Dist. Ct. Oct. 27, 2010) (1 CR 481)

Appendix 1

Affidavit of Anthony Charles Graves (Feb. 10, 2014) (1 CR 487–91)

AFFIDAVIT OF ANTHONY CHARLES GRAVES

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned did personally appear Anthony Charles Graves, who upon my oath did say:

My name is Anthony Charles Graves. I am over the age of 18, and am fully competent to make this affidavit, which is submitted in support of the bar grievance I filed on January 20, 2014, against Charles J. Sebesta, Texas Bar No. 17970000. The facts contained in this affidavit are within my personal knowledge and are true and correct:

The First Grievance Against Charles J. Sebesta:

I had nothing to do with the 2007 bar grievance filed by attorney Bob Bennett against Charles J. Sebesta. I did not know about the filing, nor did I speak to, consult with or hire Mr. Bennett regarding the grievance. I never gave Mr. Bennett permission to file a grievance against Mr. Sebesta, nor did Mr. Bennett ever ask for my permission to file the 2007 grievance. An attorney-client relationship was never formed between us for the purposes of the 2007 grievance.

Mr. Bennett did testify on the defense's behalf in *State v. Anthony Graves,* Cause No. 11,136 (21st Dist. Ct., Burleson County), during a recusal hearing regarding the removal of Assistant District Attorney Joan Scroggins, who was on the original prosecution team. However, I never met Mr. Bennett until December 2013.

The only grievance I have ever filed against Mr. Sebesta was sent to Linda Acevedo on January 20, 2014 and officially filed on January 29, 2014. It is my understanding that Senate Bill 825, which the Legislature passed and became law, extends the statute of limitations for the filing of my grievance against Mr. Sebesta to October 2014.

My Time In Prison

I would like Disciplinary Counsel to understand why I have grieved Mr. Sebesta. For that reason, I want to tell the story of my wrongful arrest, prosecution and incarceration on Texas' death row.

I am death row exoneree #138. There are 12 more people like me from Texas. Twelve people who spent years of their lives locked alone in concrete cages waiting to die before they were set free, exonerated for their innocence.

I was 26 years old when I was arrested and charged with capital murder in 1992. Two years later, I was found guilty of capital murder and sentenced to death by lethal injection. I turned 45 when I was released, after serving 18 years in prison – 12 of them on death row.

My years in prison were traumatic and unforgettable because it was a living hell. Most of my prison term – from 1994 to 2006 was in solitary confinement. This meant I spent at least 22 hours a day locked alone in a small cell waiting to die – all for a crime I did not commit. For ten of those years, I had absolutely no contact with anyone other than prison guards, who touched me only to shackle and unshackle me. My mother, my son and my friends who came to visit me could not embrace me.

After I was finally exonerated, I was faced with the challenge of assimilating back into normal society after witnessing the horrors of solitary confinement. Today, I am one of the foremost supporters of the cause against solitary confinement. My own testimony from prison being my most useful weapon.

Like all death row inmates, I was confined in some of the worst conditions imaginable, amid filth and in a cell constructed to degrade my sense of dignity and self-worth. It was bad enough that I was house in a cell with a steel bunk bed with a thin, plastic mattress and a pillow

that could be traded out once a year. Worse were the steel sink and toilet that was positioned so that male and female officers could view my most private bodily functions.

The prison served unpalatable food and subjected us to constant sleep deprivation that drove some men out of their minds. No one cared that that thin plastic mattress gave me back problems that continue to this day because there is no real medical care in prison. I also had no television to divert myself nor access to a telephone. I lived behind a steel door that had two small slits in it, the space replaced with iron mesh wire, which was dirty and filthy. Those slits were cut out to communicate with the officers that were right outside your door. There was a slot that's called a pan hole, and that's how you would receive your food. I had to sit on my steel bunk like a trained dog while the officers would place a meal tray in my slot. Even though I was locked into the cell, I would be disciplined if I dared move off the bunk during meal delivery.

This is not to say that I looked forward to prison meals. The food lacks the proper nutrition because it's either dehydrated when served to you or because it's common to find contamination such as rat feces or a small piece of broken glass. When I was escorted to the infirmary one day, I walked past a food preparation area and noticed a guy sweating into the food he was preparing. That was the food they were going to bring me.

The cell contained a small shelf that I used to write on and eat on. At the top of the back wall, there was a very small window. In order to glimpse the sky, I would stand on my rolled, plastic mattress. And when I stood there, I could see that old paint on the concrete walls of my cell peeled at all levels all the way up to the ceiling.

I would watch men come to prison totally sane and within three years lose their grips on reality. One man would sit in the middle of the floor, rip up his sheet, wrap it around himself and light it on fire. Another would go out in the recreation yard, get naked, lie down and urinate

all over himself. He would take his feces and smear it all over his face as though he was in military combat. When this same man was executed, it was reported that he babbled incoherently to the officers, "I demand that you release me soldier, this is your captain speaking." Somehow, he had been determined competent to be executed.

My most agonizing pain came from watching my children grow up without me. I missed their first organized sporting events, their proms, their first girlfriends. I missed being a dad in the critical years of raising young African American males in today's society.

Some of the most searing pain that accompanied my incarceration came when my son nearly lost his life. My son has sickle cell anemia. When he was young and I was still free, I would stay with him while he endured blood transfusions and their aftermath. I would sleep next to his bed and hold his IV when he needed to use the bathroom. I felt I was his strength. When he was 15, my son had a stroke on one side of his brain. I am told that the doctors were set to pronounce him dead, but he managed to survive. However, today my son is legally blind. It hurts me no end to know I could not be there for my son when he nearly died.

My mother battled much emotional and physical pain as a result of the injustice that I experienced. In her community, people thought her son was a murderer. I was set for execution twice and each time, even though my lawyers ultimately got stays of execution, I came so close to having a needle put into my arm that it tortured the soul and spirit of my mother. It brought her to her knees as she begged the Lord to save her child.

Because I was deprived of physical contact for 18 years, today I have a hard time being around a group of people for long periods of time without feeling too crowded. No one can begin to imagine the psychological effects isolation has on another human being. I would hear the clanging of metal doors throughout the night, an officer walking the runs and shining his flash

light in your eyes, or an inmate kicking and screaming because he's losing his mind. Guys become paranoid, schizophrenic, and can't sleep because they are hearing voices. I was there when guys would attempt suicide by cutting themselves, trying to tie a sheet around their neck or overdosing on their medication. Then there were the guys who committed suicide. I was not disruptive; I was merely placed in solitary confinement and emotionally tortured before I was supposed to be put to death by the Texas government.

Despite the fact that I was able to remain alive, I still live everyday with the memory of my 18 years in jail and prison. While I was on death row, more than 300 men – men I knew from being imprisoned with them – were executed. Eleven men committed suicide. These and other vivid memories of solitary confinement will haunt me for the rest of my life.

When you're declared actually innocent of a crime that you didn't commit, you can't help but ask, "How did this happen?" In my case, I now know the answer: Charles Sebesta hid evidence that would have proven my innocence. He hid it from my original trial lawyers, he hid it from my direct appeal lawyers, and he continued to hide it until I very nearly was executed by the State of Texas for a crime I did not commit.

The State Bar of Texas must hold Mr. Sebesta responsible for his actions in hiding evidence in my case. If Texas is serious about fighting prosecutorial misconduct, it must start here, with his efforts to kill me for a crime I did not commit.

The above state is true and correct."

Anthony Graves

SWORN TO AND SUBSCRIBED before me by Anthony Charles Graves on this 10th day of February, 2014.

Appendix 2

Affidavit of Anthony Charles Graves (Apr. 16, 2014) (1 CR 492–98)

AFFIDAVIT OF ANTHONY CHARLES GRAVES

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

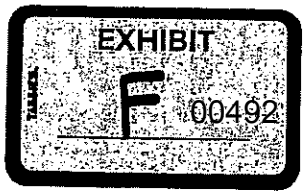
BEFORE ME, the undersigned did personally appear Anthony Charles Graves, who upon my oath did say:

My name is Anthony Charles Graves. I am over the age of 18, and am fully competent to make this affidavit, which is submitted in further support of the bar grievance I filed on January 20, 2014, against Charles J. Sebesta, Texas Bar No. 17970000. The facts contained in this affidavit are within my personal knowledge and are true and correct.

Incredibly, Mr. Sebesta tries to justify his misconduct by saying I'm actually guilty.

Mr. Sebesta's letter of April 2, 2014, only adds to the great pain and anxiety he has caused me over the last 20 years. He tries to defend his misconduct by saying I am actually guilty of murder. That is outrageous, cruel, and false.

I never should have been on death row, much less for 12 and ½ years of my life (in all, I was imprisoned for 18 and ½ years including the time before and after death row). I sought justice for a long time while imprisoned, having to trust the court system and the legal profession to care about justice, and to do the right thing. It was a long time coming, but in 2006 the 5th Circuit finally agreed that my trial had been unfair. That very conservative federal court considered all of the things that Mr. Sebesta had done, and all the excuses and explanations that he gave then (which he is giving again now), and the court said that Mr. Sebesta had concealed evidence, misled the jury, and caused witnesses testify to things that Mr. Sebesta knew were false. That's a fact, you can read it in the law books, and Mr. Sebesta can't dispute it.



But that did not end my fight for freedom. The 5th Circuit said that the State could decide whether to prosecute me again in a new trial. I went from one prison to a different one, while the State spent nearly 4 more years deciding what to do. That was a time of great stress for me, and I was only there because of what Mr. Sebesta had done, unethically and illegally, in the first trial. Thank God a fair and honest prosecutor named Kelly Seigler was hired to help re-prosecute me. After she looked at all the evidence, she saw that the charges against me never should have been brought in the first place. After I had spent 18 and ½ years in prison and twice been faced with execution dates, the new prosecutor told the State of Texas that I was completely innocent, and that Mr. Sebesta had engaged in unethical misconduct in order to try to have me killed. Instead of killing me as Mr. Sebesta had asked, the State of Texas agreed with the prosecutor that I was "actually innocent," set me free, and paid me compensation under a state law that allows payment only if the exonerated person was, like me, completely innocent of the crime. Those are facts, too, and Mr. Sebesta can't dispute them either. They have already been determined by the courts and the State of Texas.

Everybody has to abide by the rule of law and what the courts say in Texas and in the United States. Me abiding by the law meant I had to spend 18 and ½ years of my life in prison and 12 and ½ years of it on death row, waiting for justice to finally come. Mr. Sebesta doesn't think the same rules apply to him, so he violated the law when he tried me for murder. The federal courts have said so, and the new prosecutor has said so. I am an innocent man. The prosecutor has said so, the Burleson County court has said so, and the State of Texas has said so. Mr. Sebesta thinks he can just ignore the courts and the State of Texas and keep claiming that I am a murderer. So in his submission to the Bar, he rejects the federal court's conclusion that his

misconduct at trial violated my constitutional rights. And he rejects the State of Texas' absolute finding of actual innocence in my case, and continues to smear and slander me.

I am not guilty. I am innocent. The courts and the State of Texas have spoken. This Board should not be listening to self-serving stories from Mr. Sebesta that have now been rejected as false by federal courts, honest prosecutors, a state court, and the State of Texas itself.

Mr. Sebesta maintains a website devoted to saying that I am actually guilty.

Mr. Sebesta to this very day maintains a website he calls "Setting the Record Straight." It exists only to slander me and others associated with my exoneration. At least his letter to this Board on April 2nd is confidential, and doesn't slander me in public. But his website is even worse, and he makes his lies available for the entire world to see.

On the home page, if you click through to that entire portion, Sebesta says:

> The 'then' sitting DA, **who didn't want to re-try the case to begin with,** seized the moment by moving to dismiss it and declaring himself an instant hero for freeing Graves. **His logic, or lack thereof, which he credits to his own "in-house" investigation, was: Graves is absolutely innocent because Carter said he did it!**
>
> . . .
>
> **But the 'anti-death penalty' coalition didn't stop there.** Led by a State Senator from Harris County, they turned to the Governor, who at the time was seeking the Republican nomination for President. And it's that Governor who is reported to have told his staff, "Just get him (Graves) his money!"
>
> **And that is exactly what a misinformed and 'politically correct' Legislature did.** They changed the law so that it no longer requires the District Judge hearing the case to make an affirmative finding of "absolute innocence." **As a result, Anthony Graves walked away with $1,457,828.79 of your tax dollars.**
>
> Even more disturbing, though, is the fact that **this ill-fated legislation has opened the State's vaults to just about any defendant who claims to have been wrongfully convicted,** because the "checks and balances" that once prevented raids of this type on the State Treasury have been eliminated.

> **The Black community** often says that they don't get a 'fair shake' in our courts; and in this case they are right. **The six victims: a 46-year old grandmother, her 16-year old daughter and four grandchildren between the ages of four and nine—all black—will forever be denied the justice they deserve because it was more important for a very left-leaning, liberal media to sacrifice the lives of these victims in exchange for an opportunity to use this case as justification for abolishing the death penalty!**

I take deep personal offense at his assertions about "the Black community" in that last paragraph. I take deep personal offense by his statement that the six murder victims "will forever be denied the justice they deserve because it was more important for a very left-leaning, liberal media to sacrifice the lives of these victims in exchange for an opportunity to use this case as justification for abolishing the death penalty." The person who admitted to these crimes was executed by the State. It did not honor the victims, or their community, for Mr. Sebesta to railroad me to death row through unethical prosecutorial misconduct, which is what the federal court and subsequent prosecutors say he did. Mr. Sebesta's own conduct is a stain on our justice system. It was not the media that freed me from the unjust imprisonment Mr. Sebesta caused me to suffer for 18 and ½ years. It was a very conservative federal court and a very tough, conservative prosecutor who has put 20 other people on death row.

Mr. Sebesta's conduct continues to subject me to mental anguish.

Mr. Sebesta's website and continued public accusations cause me great personal anguish and mental pain every day of my life. He continues to assassinate my character, and make me feel like I have to come out every day and prove myself, explain myself, and defend myself. I live in fear because of what he does to scandalize my name. What if someone harms me because of what he says? I've done nothing to him or to society that I need to apologize for, and yet he continues to attack and vilify me. Perhaps the hardest thing for me is to see what this does to my mother. She is 67 years old, and all the stress and anxiety of the last 20 years has taken a

tremendous toll on her health. And she still has to hear this prosecutor from long ago continue to say her son is guilty of crimes he did not commit. That is not right.

Mr. Sebesta's conduct 20 years ago, in 1994, was reprehensible. It has no place in any country that believes that every person is innocent until proven guilty. But his conduct is even more reprehensible today, because not only am I not guilty, the State of Texas has determined and announced that I am completely innocent. Like Mr. Sebesta did from the very first day he started prosecuting me, he is presuming I am guilty, and contorting everything he sees and hears to fit that one story.

I am not a lawyer. But any lawyer that doesn't believe in the presumption of innocence—much less an absolute and incontestable finding of innocence—doesn't deserve to be a lawyer. I trusted the legal system and the Bar for 18 and ½ years, and I was finally freed from a wrongful imprisonment. Now I trust in the State Bar of Texas to discipline Mr. Sebesta for his misconduct—as conclusively determined by the federal courts—and to do whatever it can to stop this lawyer from continuing to persecute an innocent man and bringing disrepute on the Bar and the legal profession. Twenty years of being victimized by Charles J. Sebesta, Jr. is enough.

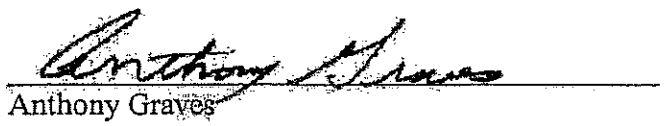
I have not filed any grievance against Mr. Sebesta before.

I previously submitted an affidavit to the State Bar of Texas on February 10, 2014, primarily to let this Board know what my life was like on death row for 12 and ½ years, and how it has affected me since. That was all the direct result of Mr. Sebesta's actions in hiding evidence and eliciting false testimony in my case (both of which the 5th Circuit has conclusively determined Mr. Sebesta did). I ask you to consider that when you read the letter submitted by Mr. Sebesta on April 2, 2014, in which he tries to justify and rationalize what he did to me.

It has come to my attention that the form filed by Bob Bennett to initiate this grievance has a mistake in it. The form, dated January 29, 2014, answers "yes" to a question asking whether I or a member of my family had ever filed a grievance in the past against Mr. Sebesta, and says it was denied in 2006. None of that form is in my handwriting. I don't know who filled it out, I did not participate in filling it out, and it does not have my signature. As I explained in my affidavit on February 10, that prior grievance against Mr. Sebesta was not filed with my consent or at my direction. I was still in jail at the time. I had never even met Mr. Bennett when he filed that previous grievance for himself. It is clear from the 2007 correspondence between the Bar and Mr. Sebesta that both the Bar and Mr. Sebesta understood at the time that the grievance was brought by Mr. Bennett on his own behalf, not brought by or for me.

This is the first and only time I have complained about Mr. Sebesta to this Board, and I decided to do so specifically because new legislation said I could do this even though what Mr. Sebesta did to me was so long ago. Indeed, Mr. Sebesta makes clear in his submission that he is not trying to avoid having the Bar address the merits of my grievance, saying that "The passage of SB 825 allows me to confront the allegations directly and finally answer the spurious charges against me in the Graves case." So on one and only one thing Mr. Sebesta and I agree: the Bar has the power to and should reach the merits of my grievance, and decide whether Mr. Sebesta should be disciplined based on the merits, without regard to how it resolved Mr. Bennett's own 2007 grievance.

The above statement is true and correct.



Anthony Graves

SWORN TO AND SUBSCRIBED before me, by Anthony Charles Graves,

On this 11th day of April, 2014.

Michelle Reeves

Notary Public in and for the State of Texas

3-17-2017

My Commission Expires

Appendix 3

Graves v. Dretke, 442 F.3d 334, 345 (5th Cir.), *cert. denied, sub nom. Quarterman v. Graves*, 549 U.S. 943 (2006) (1 CR 578–89)

442 F.3d 334
(Cite as: 442 F.3d 334)

▷

United States Court of Appeals,
Fifth Circuit.
Anthony GRAVES, Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

No. 05-70011.
March 3, 2006.

Background: Petitioner, convicted in state court of murder and sentenced to death, having exhausted state-court appeals and postconviction remedies, 70 S.W.3d 103, sought federal habeas relief. The United States District Court for the Southern District of Texas, Samuel B. Kent, J., denied relief, and the Court of Appeals, 351 F.3d 143, granted in part petitioner's request for certificate of appealability (COA) as to petitioner's *Brady* claims. On rehearing, the Court of Appeals, 351 F.3d 156, granted COA on additional claim. Following remand for evidentiary hearing, the District Court denied petitioner's claims, and petitioner appealed.

Holdings: The Court of Appeals, W. Eugene Davis, Circuit Judge, held that:
(1) petitioner exercised adequate due diligence to discover witness's out-of-court statement that witness's wife was active participant in murders;
(2) statement that witness's wife was active participant in murders was exculpatory; and
(3) witness's statement about his wife, and his separate statement that he committed murders alone, were, together, material to defendant's guilt or punishment, within meaning of *Brady*.

Writ granted; district court reversed; case remanded.

West Headnotes

[1] Habeas Corpus 197 ⚿842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases

Habeas Corpus 197 ⚿846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear Error. Most Cited Cases

In a federal habeas corpus appeal, Court of Appeals reviews the district court's findings of fact for clear error and its conclusions of law *de novo*.

[2] Criminal Law 110 ⚿735

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k735 k. Mixed Questions of Law and Fact. Most Cited Cases

Whether evidence is material under *Brady* is a mixed question of law and fact.

[3] Habeas Corpus 197 ⚿765.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k765.1 k. In General. Most Cited Cases

Heightened standard of review provided by the

Anti-Terrorism and Effective Death Penalty Act (AEDPA) did not apply to claims that were not adjudicated on the merits in state court, but were instead dismissed by state courts on procedural grounds. 28 U.S.C.A. § 2254(d).

[4] Criminal Law 110 ⟹1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))

Evidence is material for purpose of *Brady* disclosure requirement if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

[5] Criminal Law 110 ⟹1999

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1999 k. Impeaching Evidence. Most Cited Cases
(Formerly 110k700(4))

Brady disclosure requirement applies to evidence relevant to the credibility of a key witness in the state's case against a defendant.

[6] Criminal Law 110 ⟹1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))

A showing of materiality, for purpose of *Brady* disclosure requirement, does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant; the question is not whether the defendant would have received a different verdict with the disclosed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

[7] Criminal Law 110 ⟹1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))

A reasonable probability of a different result, for purpose of determining materiality of evidence suppressed by prosecution, in alleged violation of *Brady*, is shown when the suppression undermines confidence in the outcome of the trial.

[8] Criminal Law 110 ⟹1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))

Test for determining whether evidence suppressed by prosecution, in alleged violation of *Brady*, is material is not a test of the sufficiency of the evidence; the defendant need not demonstrate that after discounting the inculpatory evidence by

the undisclosed evidence there would not have been enough evidence to sustain the conviction, but, instead, a *Brady* violation is established by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

[9] Criminal Law 110 ⇐1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))

Harmless error analysis does not apply when determining materiality of evidence suppressed by prosecution in alleged violation of *Brady*..

[10] Criminal Law 110 ⇐1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))

Materiality of evidence suppressed by prosecution, in alleged violation of *Brady*, is viewed in terms of suppressed evidence considered collectively, not item by item.

[11] Criminal Law 110 ⇐1998

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1998 k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases
(Formerly 110k700(4))

Defendant exercised adequate due diligence to discover witness's out-of-court statement that witness's wife was active participant in charged murders, for purpose of defendant's claim that state's suppression of statement violated *Brady*, although defense counsel did not make additional inquiry when district attorney stated in court that witness had failed a polygraph regarding wife's involvement; district attorney's statement did not reveal or imply that witness had named wife as a participant, and state had provided no information about wife in response to defendant's request for information about parties alleged to be involved in the murders.

[12] Criminal Law 110 ⇐1998

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1998 k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases
(Formerly 110k700(4))

Witness's out-of-court statement that witness's wife was active participant in charged murders was exculpatory, for purpose of defendant's claim that state's suppression of statement violated *Brady*, even if statement implicated defendant based on government's theory that three people were involved in the crimes and contradicted testimony of one of defendant's witnesses; it was unclear how many perpetrators were involved, defense viewed indictment of wife as tool to pressure witness into testifying rather than belief on part of state that wife was involved, and statement cast different light on witness's deal with state to testify only on condition that witness not be questioned about wife's involvement.

[13] Criminal Law 110 ⇐1998

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1998 k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases
(Formerly 110k700(4))

Witness's out-of-court statement that witness committed charged murders alone, and separate statement that witness's wife was active participant in charged crimes, were, together, material to murder prosecution, for purpose of defendant's claim that state's suppression of statements violated *Brady*; statements were favorable to defendant, witness's credibility was key element of state's case, and state presented false, misleading testimony at trial that was inconsistent with the suppressed statements.

***336** Roy E. Greenwood, Jr. (argued), Austin, TX, Jay William Burnett, Houston, TX, for Graves.

Kelli L. Weaver (argued), Austin, TX, for Dretke.

Appeal from the United States District Court for the Southern District of Texas.

Before DAVIS, WIENER, and GARZA, Circuit Judges:

W. EUGENE DAVIS, Circuit Judge:

Petitioner Anthony Graves appeals the district court's denial of his writ of habeas corpus. Because we conclude that the statements suppressed from the defense were both exculpatory and material, we reverse the judgment of the district court with instructions to grant Graves' writ of habeas corpus.

I.

Anthony Graves was convicted of capital murder and sentenced to death in 1994 for the capital offense of murdering six people in the same transaction. The procedural history of Graves' conviction, post-conviction appeals and writ petitions is presented in our previous opinions addressing Graves' application for certificate of appealability. This court originally granted COA only on Graves' *Brady* claim that the state failed to disclose to Graves that key prosecution witness and Graves' co-defendant Robert Earl Carter informed the district attorney that Graves was not involved in the charged crime on the day before he testified to the contrary at Graves' trial. *Graves v. Cockrell,* 351 F.3d 143 (5th Cir.2003) ("*Graves I*"). On rehearing, this court modified its order and also granted COA on Graves' claim that the state's failure to disclose Carter's alleged statement implicating his wife in the crimes violated Graves' rights under *Brady. Graves v. Cockrell,* 351 F.3d 156 (5th Cir.2003) ("*Graves II*"). The case was remanded to the district court

> for an evidentiary hearing to determine: (1) the substance of the alleged statement described above, along with Carter's statement allegedly exonerating Graves; (2) whether Graves was aware of these statements or exercised due diligence to discover these statements; (3) whether the state's failure to disclose these statements was material to Graves' defense under Brady; and (4) for a determination of whether Graves is entitled to relief on these claims.

Graves II, 351 F.3d at 159. COA was denied on all other claims.

On remand, an evidentiary hearing was held before Magistrate Judge Froeschner who, after reviewing briefly the facts of the crime, made the following factual findings in his report and recommendation.

> Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and obtained only in order to pressure

Carter to testify against Graves. Evidentiary Hearing Transcript ("EHT") at 129, 168. Nevertheless,*337 Burleson Country District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed to the involvement of three people. Id. at 57, 98. Indeed, the State's theory from the beginning of the trial was that at least three people had acted together in the murders. Id. at 174.[FN1] Texas Ranger Coffman testified at trial that his investigation showed "at least three and possibly four" perpetrators were in the Davis home when the murders occurred. Trial Transcript ("TT"), vol. 38 at 3728.

FN1. This theory appears to be based on the number of victims, six, and the number of murder weapons, three (a gun, knife and hammer), not on any specific physical evidence.

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. Id. at 51. The early discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders. Id. at 54.

Sebesta met with Carter in the early evening of October 21, 1994.[FN2] According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." Id. at 60. When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." Id. at 61, 94, 95. Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa Carter may have been known by that nickname. Petitioner's Ex. 9 at 24. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam. EHT at 95.

FN2. This was the evening of the second day of the guilt/innocence phase of the trial.

Since the polygraph examiner had been out sick that day, he was called to come in to administer the exam. Id. at 96. The report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." Petitioner's Ex.9 at tab 4. The interviewer then posed the following questions to Carter: (1) "[W]as your wife, Theresa, with you [at the time of the murders]?" and (2) "[W]hen you refer to 'Red' in your statement, are you taking about your wife, Theresa?" Id. Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. Id. When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." Id. When Sebesta asked him if Theresa had used the hammer in the murders, Carter answered "yes." EHT at 96.

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the *338 State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed in appeal. This required Carter to testify against both Graves and Cookie. Id. at 67. By the time the October 21 meeting concluded, he had tentatively assented to do so,

though no final agreement was reached. Id. at 62, 103, 105. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for his testimony.

At the evidentiary hearing, Garvie denied that he knew before, or at any time during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned the statement to Garvie on the morning Carter testified. Id. at 149. The Court accepts Garvie's version of this event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the morning of October 22 when he told the trial judge: "last night at 8:30 Mr. Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." TT, vol. 35 at 3360. Garvie asked no questions about what the polygraph involved. Garvie's co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. EHT at 134. Nor did it fit the defense's theory of the case. According to Ms. Clay-Jackson, the defense thought that at least two people were involved in the killings but that Cookie was not one of them. Id. at 122. The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife. TT, vol. 35 at 3429.

Graves' habeas attorneys appear to have first learned of Carter's statement, "I did it all myself," in 1998. On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. *Ex parte Graves,* No. 40,812-01 at 97 ff. That statement was excluded from the record by the state court as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter again recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel. Sebesta later appeared on the Geraldo Rivera show *Deadly Justice* on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that." Petitioner's Ex. 1.

The magistrate judge found that Sebesta did not reveal Carter's statement that he committed the murders alone to the defense and that because Graves' attorneys had no way of knowing about the statement, they had no reason to exercise due diligence to discover it. The magistrate also found that this statement was not material because Carter's claim that he acted alone contradicted the evidence and because the jury already had considerable evidence of Carter's multiple inconsistencies and credibility issues.

As to the statement linking Carter's wife Cookie as a direct participant in the crimes, the magistrate found that the defense did not exercise due diligence to discover the statement after Sebesta told ***339** them about the polygraph results. He also found that the statement is not exculpatory because it implicated Graves based on the government's three person theory. The statement would also have contradicted the testimony of one of Graves' witnesses who testified that Cookie and Graves were not close and that Cookie was home at the time of the murders.

Considering the effect of the statements together, the magistrate found that the same conclusion would be reached. The three person version of the crime, which implicated Cookie, was most consistent with the State's versions of events and would have reinforced prior statements by Carter also implicating Graves.

The district court considered Graves' objections

to the magistrate's report and recommendation, dismissed them all and accepted the magistrate's report, denying Graves' *Brady* claims. The district court also denied Graves' Motion to Abate, which is not raised as an issue in this appeal. Graves appeals.

II.

[1][2] In a federal habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo*. *Valdez v. Cockrell,* 274 F.3d 941, 946 (5th Cir.2001). Whether evidence is material under *Brady* is a mixed question of law and fact. *Summers v. Dretke,* 431 F.3d 861 (5th Cir.2005), citing *Trevino v. Johnson,* 168 F.3d 173, 185 (5th Cir.1999).

[3] Both of Graves' *Brady* claims were dismissed by the Texas courts as abuses of the writ, i.e. on procedural grounds.[FN3] Because these claims were not adjudicated on the merits in State court, a prerequisite for the applicability of 28 U.S.C. 2254(d), the heightened standard of review provided by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") does not apply. *Id.* at 946-47; *Jones v. Jones,* 163 F.3d 285, 299-300 (5th Cir.1998); *Fisher v. Texas,* 169 F.3d 295, 299-300 (5th Cir.1999), citing Larry W. Yackle, *A Primer on the New Habeas Corpus Statute,* 44 BUFF. L. REV. 381, 420-21 & n. 129 (1996)(stating that state court decision that claim was procedurally barred cannot be adjudication on the merits, for purposes of AEDPA).

> FN3. In our decisions granting COA, we concluded that Graves had established cause for the procedural default because the state did not disclose the statements until after Graves filed his initial habeas petition. See *Graves I,* 351 F.3d at 154; *Graves II,* 351 F.3d at 158. Graves' petition was remanded to the federal district court for an evidentiary hearing and a decision on the merits of his *Brady* claims, from which Graves now appeals.

III.

[4][5] In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant. *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[6][7] The *Kyles* decision emphasizes four aspects of materiality. First, "a showing of materiality does not require demonstration by a preponderance that ***340** disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." 514 U.S. at 434, 115 S.Ct. 1555. The question is not whether the defendant would have received a different verdict with the disclosed evidence, but "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* A "reasonable probability of a different result" is shown when the suppression "undermines confidence in the outcome of the trial." *Id.*

[8][9][10] Second, the materiality test is not a test of the sufficiency of the evidence. The defendant need not demonstrate that after discounting the inculpatory evidence by the undisclosed evidence that there would not have been enough evidence to sustain the conviction. Rather, a *Brady* violation is established by showing "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in

the verdict." *Id.* at 435, 115 S.Ct. 1555. Third, harmless error analysis does not apply. *Id.* Fourth, "materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." *Id.* at 436, 115 S.Ct. 1555.

Graves bases his *Brady* claims on two suppressed statements the state admits Carter made on the evening before Carter testified at Graves' trial-first, that Carter committed the crimes alone, and second, that Carter's wife Cookie was an active participant in the murders.

No one disputes that Carter was the state's star witness. Graves made no self-incriminating statements to the police before his trial. He testified before the grand jury denying all involvement and explaining his whereabouts on the night of the murders. The only potentially incriminating statements allegedly made by Graves were heard over the jailhouse intercom system. The persons reporting these statements were effectively cross-examined on the reliability of the intercom system, their ability to recognize Graves' voice since his cell could not be seen from their listening post, and their failure to make contemporaneous reports of the comments.

The only physical evidence tied to Graves that was marginally linked to the crimes was a switchblade knife brought forward by Graves' former boss that was identical to one that he had given to Graves as a gift. The medical examiner testified that the knife wounds on the victims were consistent with that knife *or* a knife with a similar blade. Graves' medical expert testified that a wide range of knives with similar dimensions to the switchblade were also consistent with the victims' wounds including holes in skull caps of some of the victims. None of the murder weapons were recovered. Thus, it is obvious from the record that the state relied on Carter's testimony to achieve Graves' conviction. It is in this context that the materiality of the suppressed statements must be examined.

a. The suppressed statement by Carter that he committed the crimes alone.

The district court found that Graves was not aware of Carter's statement that he committed the crime by himself but found that the statement was not material.[FN4] Our ***341** original assessment of this statement was that it "was extremely favorable to Graves and would have provided powerful ammunition for counsel to use in cross-examining Carter." *Graves I,* 351 F.3d at 155. Although we did not have a completely accurate version of the events surrounding the statement at the time of our original opinion, under the facts as found by the district court on remand we reach the same conclusion.

> FN4. District Attorney Sebesta contradicted Graves' counsel and testified at the habeas hearing that he told Graves' defense counsel Garvie of this statement outside the courtroom the morning after Carter made the statement. The district court did not find Sebesta credible on this point.

Carter's statement that he acted alone in committing the murders is particularly significant because it was the first statement Carter made that implicated himself without also implicating Graves. The only other statement Carter made pre-trial exculpating Graves was before the grand jury. In that statement Carter claimed that neither he nor Graves was involved in the murders. At trial the state recognized that its case depended on the credibility of Carter and the prosecutor emphasized Carter's consistency in his various statements in naming Graves as an accomplice. In Carter's grand jury testimony Carter testified that he only gave Graves' name to investigators because he was coerced.[FN5] The prosecutor explained Carter's grand jury testimony by pointing out that Carter's testimony, that neither he nor Graves was involved, followed threats by Graves.[FN6] Carter's suppressed mid-trial statement exculpating Graves was not coerced and would have undercut the state's argument that Carter did not implicate Graves before the grand jury because Graves threatened him. The state's case depended

on the jury accepting Carter's testimony. Given the number of inconsistent statements Carter had given, the state faced a difficult job of persuading the jury that Carter was a credible witness, even without the suppressed statement. Had the defense been able to cross-examine Carter on the suppressed statement, this may well have swayed one or more jurors to reject Carter's trial version of the events.

FN5. Before the grand jury, Carter testified as follows:

> I couldn't harm anybody, but during interrogation, between seven and eight hours or so, I was told that they got enough evidence on me to give me the death penalty. I know I haven't done anything wrong. I know I wasn't in Somerville like they say I was. They say they know that I didn't do it, but I know who did it and they wanted me to give a name so I tried to tell them that I don't know anybody.
>
> And by being pressured, being hurt, confused and didn't know what to think, I said Anthony Graves off the top of my head.

FN6. After eliciting testimony from Carter that Graves had threatened him physically and verbally while they were housed in the Burleson County Jail, the following exchange took place between Sebesta and Carter as Carter testified at Graves' trial:

> Sebesta: What did you do when you went to the Burleson County grand jury?
>
> Carter: Lied.
>
> Sebesta: Why did you lie?
>
> Carter: Because I was afraid.
>
> Sebesta: How did you go about lying to them?
>
> Carter: Saying that I made up the whole story, that it didn't take place.

Perhaps even more egregious than District Attorney Sebesta's failure to disclose Carter's most recent statement is his deliberate trial tactic of eliciting testimony from Carter and the chief investigating officer, Ranger Coffman, that the D.A. knew was false and designed affirmatively to lead the jury to believe that Carter made no additional statement tending to exculpate Graves. District Attorney Sebesta asked Carter to confirm that, with the exception of his grand jury testimony where he denied everything, he had always implicated Graves as being with him in ***342** committing the murders. Carter answered in the affirmative. Sebesta also asked Ranger Coffman, after Carter testified, to confirm that all of Carter's statements except the grand jury testimony implicated Graves. Sebesta also confirmed through Ranger Coffman that he understood his obligation to bring to the prosecutor's attention any evidence favorable to the defense. Although there is no factual finding regarding whether Ranger Coffman knew of Carter's statement that he committed the crimes alone, Sebesta clearly knew of the statement and used Ranger Coffman as well as Carter to present a picture of Carter's consistency in naming Graves that Sebesta clearly knew was false.

b. The suppressed statement by Carter that Cookie was an active participant in the murders.

The state stipulated that Carter told Sebesta, "Yes, Cookie was there; yes Cookie had the hammer." This statement was also made the night before Carter testified in Graves' trial. Sebesta did not inform Graves' counsel of this statement. He did disclose to the court and counsel that Carter had failed a polygraph regarding Cookie's involvement.[FN7] The district court found that after hearing about the polygraph, Graves did not exercise due diligence to discover the substance of the statement. The district court also found that the statement was not exculpatory because it did not exculpate Graves. Rather it was consistent with the state's

three person theory, that the crime was committed by Carter, Cookie and Graves. We disagree on all points.

> FN7. Sebesta made the following statement: "There is something I need to put on the record from a[sic] exculpatory standpoint. It cannot be used, but last night at 8:30 Mr. Carter took a polygraph and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think Counsel is certainly entitled to know that."

Due Diligence?

[11] The district court found that Sebesta's in-court statement "was not so vague in light of the surrounding circumstances that they should not have inquired about it further." However, Sebesta's statement did not reveal or even imply that Carter gave a statement affirmatively naming Cookie as an active participant in the murders. The defense had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime. They had no evidence that Cookie was involved in the crime and viewed her indictment as a tool to get Carter to testify. This assumption was confirmed by Sebesta's discovery response. Sebesta's response to the defense's discovery request was that "there were some names that were given" to the State, but that "[t]hey're not necessarily parties to the crime but they are people who may have-may possibly have some information on those." Sebesta's questioning of Carter at Graves' trial about Cookie's involvement also reinforced defense counsel's belief that she was involved, if at all, after the crimes were committed. In Sebesta's questioning of Carter, Sebesta asked Carter to confirm their agreement that he would not ask any questions about his wife and to confirm that he had "not asked [him] any question about what she may or may not know about it." When the defense cross-examined Carter, they asked about Cookie's whereabouts and who possessed the hammer. Carter's testimony was obviously different than the statement he gave Sebesta the previous night that Cookie was there and Cookie had the hammer.

***343** We disagree with the district court's conclusion that the defense did not exercise due diligence to discover the statement regarding Cookie's involvement in the crimes. Graves' counsel had specifically requested the information disclosed in the statement. We view Sebesta's statement regarding the polygraph, his discovery responses and questioning of Carter as misleading and a deliberate attempt to avoid disclosure of evidence of Cookie's direct involvement. At a minimum, Sebesta's minimal disclosure was insufficient to put the defense on notice to inquire further, particularly in light of the state's discovery disclosure.

Exculpatory?

[12] Graves next challenges the district court's conclusion that the statement regarding Cookie's involvement is not exculpatory because the statement implicated Graves as well.[FN8] The district court found that the statement is not exculpatory because it implicated Graves based on the government's three person theory. It also found that the statement would have contradicted the testimony of one of Graves' witnesses, Tametra Ray, who testified that Cookie was home at the time of the murders. Again, we disagree.

> FN8. Graves also argues that the district court erred in concluding that in this suppressed statement, Carter named both Cookie and Graves as participants in the murders. Graves views this suppressed statement as one in which Carter named only his wife Cookie as a participant in the crimes. The district court found that after the polygraph examination Carter admitted that Cookie was involved in the murders with him and Graves. Based on our review of the record of the habeas hearing, that factual finding is not clearly erroneous.

The statement regarding Cookie's direct involvement in the crime is exculpatory for several reasons. First, each party's theory about how many people were actively involved in the crime is just a theory based on the number of people killed and the number of weapons used. The defense had submitted that two people were probably involved and had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime. Although Cookie had been indicted, the defense viewed the indictment as a tool to pressure Carter into testifying. As we noted in our prior opinion, "if Graves had been furnished with Carter's statement, it could have provided him with an argument that those two persons were Carter and his wife rather than Carter and Graves." *Graves II,* 351 F.3d at 159. Also, Carter's statement, placing Cookie directly at the scene and actively involved in the murders, puts his deal with the state to testify only on the condition that he not be questioned about Cookie's involvement in a different light. It provides a stronger argument to Graves that Carter was lying about Graves involvement to save Cookie.

The district court did not reach the issue of materiality of the statement. That issue will be discussed in the following section regarding the effect of the two statements considered together.

c. The statements considered together?

[13] The sole remaining issue under Graves' *Brady* claim is whether, considered together, the two statements-Carter's claim that he did it himself and Carter's statement directly implicating his wife Cookie in the murders-are material. We conclude that they are. If both statements had been timely furnished to Graves, he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he *344 acted alone was not believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie.

The state argues that the combined statements are not material because they are inconsistent and could have been damaging to Graves if the jury believed that the most credible account of the murders involved three killers, Carter, Cookie and Graves. The problem with the state's argument is that it analyzes the significance of the suppressed evidence against a backdrop of how the defense presented its case at trial without the suppressed statements. If the two statements had been revealed, the defense's approach could have been much different (as set forth above) and probably highly effective.

Case law from the Supreme Court is supportive of a finding of materiality on these facts-particularly because the case against Graves rests almost entirely on Carter's testimony and because the state presented testimony inconsistent with the two suppressed statements. In *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court reversed the defendant's judgment of conviction and remanded for a new trial because the prosecutor failed to disclose a promise of leniency to a key witness. The court concluded that the suppression affected the co-conspirator's credibility which was an important issue in the case and therefore material.

In *Banks v. Dretke,* 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court reversed this court's denial of COA to the defendant on his *Brady* claim. The state withheld evidence that would have allowed defendant to show that two essential prosecution witnesses had been coached by police and prosecutors before they testified and also that they were paid informants. In addition, prosecutors allowed testimony that they were not coached to stand uncorrected at trial. In *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the defendant's conviction was reversed and remanded for a new trial. The prosecution had suppressed statements of key witnesses and an informant who were not called to testify resulting in a *Brady* violation because their statements had significant impeachment value. Graves' case presents a cumulation of the elements found violative of a de-

fendant's right to exculpatory evidence in the above cases.

IV.

Because the state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material. Carter made several inconsistent statements throughout the investigation and pretrial period. In some he denied all involvement, in some he implicated himself and Graves, and then, just before he testified against Graves, he gave the statements at issue in this appeal accepting full responsibility as the sole murderer and another statement placing his wife Cookie as an active participant in the murders. If the defense had known about the statement placing Cookie at the scene and given Carter's continuing condition that he would only testify if he were not asked about Cookie's involvement, the defense could have explained every statement implicating Graves as a means of protecting Cookie. As indicated above, these statements are particularly important in this case because Graves' conviction rests almost entirely on Carter's testimony and there is no direct evidence linking him with Carter ***345** or with the murder scene other than Carter's testimony. In addition, Carter's statement that he committed the crimes alone is important as the only statement he made exculpating Graves while implicating himself. The combination of these facts leads us to conclude "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435, 115 S.Ct. 1555. Stated differently, disclosure of the statements "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Id.* at 441, 115 S.Ct. 1555.

For the foregoing reasons, the judgment of the District Court is reversed and the case is remanded with instructions to grant the writ of habeas corpus unless the state proceeds to retry petitioner within a reasonable time.

WRIT GRANTED. REMANDED.

C.A.5 (Tex.),2006.
Graves v. Dretke
442 F.3d 334

END OF DOCUMENT

Appendix 4

Affidavit of Kelly Siegler (Nov. 15, 2010) (1 CR 485–86)

CAUSE NO. 11136

STATE OF TEXAS	*	IN THE DISTRICT COURT
	*	
VS.	*	OF BURLESON COUNTY
	*	
ANTHONY CHARLES GRAVES	*	21ST JUDICIAL DISTRICT

STATE OF TEXAS

Before me the undersigned authority appeared KELLY SIEGLER who after being duly sworn stated the following:

My name is KELLY SIEGLER. I am over the age of 18 years and am competent to make this affidavit. I have personal knowledge of the following facts and they are true and correct:

I am an attorney licensed to practice law in the State of Texas, I am experienced in the trial of major felony cases, including the prosecution of death eligible criminal cases. I was retained to assist the prosecution in the retrial of the State of Texas vs Anthony Graves. The conviction had been previously set aside because of prosecutorial misconduct.

When I began my preparation for trial I found that the actual facts were not as they had been previously represented to Bill Parham and myself. I was assigned an experienced investigator, Otto Hanak. We went through twenty-five boxes of records, statements, investigation reports and previous interviews. It became apparent to me that the State had a weak case if any case at all. More witnesses were interviewed and additional documents were found that indicated that favorable evidence to the defense had been suppressed and that other evidence had been falsely produced by previous

Jimmy Phillips, Jr.
Drawer 29
Angleton, Tx 77516
Tele: (979) 849-8511

prosecutors in securing the first conviction of Anthony Graves. There appeared to be no credible evidence indicating his guilt. For the first time, Otto Hanak, and myself interviewed the defense alibi witnesses. Some indicated that they had not testified at trial because of threatened prosecution. Both, myself and Otto Hanak found them to be credible and truthful.

Taking into consideration my entire investigation the facts of the case it is my opinion that Anthony Graves is an innocent man who had been subjected to an improper prosecution and conviction in a death penalty case. Otto Hanak concurred with me.

Then we took the results of our detached investigation to the elected prosecuting attorney, Bill Parham. He was not willing to agree with my conclusions without a detailed review of why I was convinced that Anthony Graves was innocent. Otto and I detailed everything we had done and the things that we had discovered. When we finished, Mr. Parham became convinced and agreed with us that Anthony Graves is an innocent man and the charges should be dismissed.

As of the date of this Affidavit, I am of the opinion that Anthony Graves is innocent of the charges filed against him in the above stated cause number and that it should be dismissed because of his actual innocence.

Witness my signature this 15 day of November, 2010.

Affiant, Kelly Siegler

Sworn to and subscribed before me the undersigned notary public this 15 day of November, 2010.

Notary Public in and for the
State of Texas

LOURDES HAGET
My Commission Expires
October 26, 2014

Jimmy Phillips, Jr.
Drawer 29
Angleton, Tx 77516
Tele: (979) 849-8511

Appendix 5

Affidavit of Kelly Siegler (Apr. 11, 2014) (1 CR 482–86)

AFFIDAVIT OF KELLY SIEGLER
REGARDING STATE BAR OF TEXAS GRIEVANCE NO. 201400539
ANTHONY GRAVES -- CHARLES J. SEBESTA, JR.

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Kelly Siegler, after first being duly sworn upon her oath, makes this affidavit and states the following:

1. My name is Kelly Siegler. I am over the age of twenty-one (21) years, am competent to testify to the matters stated herein, have personal knowledge of the facts and statements in this affidavit, and each of the facts and statements is true and correct.

2. I am an attorney licensed to practice in the state of Texas since 1987.

3. I am experienced in the trial of major felony cases, including murders. I have tried approximately 200 cases to jury verdict, including 68 murder cases. None of the murder cases resulted in an acquittal. Twenty of them were capital cases, and in 19 of those the defendant was sentenced to death.

4. Because of my experience in capital murder cases, I was hired as a special prosecutor to assist in the planned retrial of Anthony Graves in Burleson County, after the U.S. Court of Appeals for the 5th Circuit, in 2006, reversed his conviction and death sentence because of prosecutorial misconduct.

5. As described in my November 15, 2010 affidavit, a copy of which is attached as Exhibit A, I discovered during my investigation and preparation of the case that facts were not as they had been represented; that evidence favorable to the defendant had been suppressed; and that false evidence had been produced. As indicated in my prior affidavit, I concluded that there was no credible evidence indicating guilt, that Mr. Graves had been subjected to an improper prosecution and conviction, and that Mr. Graves was "actually innocent" of the crimes with

which he had been charged. I so stated, under oath, to the 21st state judicial district court of Burleson County, and asked that the State's prosecution be dismissed, which it was.

6. At the request of Neal Manne, counsel for Mr. Graves in a grievance proceeding before the State Bar of Texas against Charles J. Sebesta, Jr., the prosecutor in Mr. Graves' original 1994 trial, I have read Mr. Sebesta's April 2, 2014 submission to the Bar. I understand the confidential nature of Bar disciplinary proceedings.

7. The factual contentions made by Mr. Sebesta in his submission to the Bar were made at the time of Mr. Graves' habeas proceedings, and carefully considered by me at the time I served as special prosecutor. I rejected the arguments as misleading and non-credible, as had the courts that had considered them during Mr. Graves' successful habeas proceedings.

8. Nothing in Mr. Sebesta's submission to the Bar causes me to change my conclusion that Mr. Graves' conviction was obtained through unethical and illegal prosecutorial misconduct, and that Mr. Graves is actually innocent of the crimes for which Mr. Sebesta prosecuted him.

9. As an experienced prosecutor dedicated to the rule of law and respect for the judicial system, I deeply regret that Mr. Sebesta continues to accuse Mr. Graves of murder in his public web page statements even after Mr. Graves has been conclusively determined by the state of Texas to be innocent.

FURTHER, AFFIANT SAITH NOT.

KELLY SIEGLER

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, by KELLY SIEGLER, on this 11 day of April 2014, to certify which witness my hand and seal of office.

KARINA REYES
My Commission Expires
March 4, 2018

Notary Public in and for the State of Texas
My Commission Expires: March 4, 2018

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EXHIBIT A

CAUSE NO. 11136

STATE OF TEXAS	*	IN THE DISTRICT COURT
	*	
VS.	*	OF BURLESON COUNTY
	*	
ANTHONY CHARLES GRAVES	*	21ST JUDICIAL DISTRICT

STATE OF TEXAS

Before me the undersigned authority appeared KELLY SIEGLER who after being duly sworn stated the following:

My name is KELLY SIEGLER. I am over the age of 18 years and am competent to make this affidavit. I have personal knowledge of the following facts and they are true and correct:

I am an attorney licensed to practice law in the State of Texas, I am experienced in the trial of major felony cases, including the prosecution of death eligible criminal cases. I was retained to assist the prosecution in the retrial of the State of Texas vs Anthony Graves. The conviction had been previously set aside because of prosecutorial misconduct.

When I began my preparation for trial I found that the actual facts were not as they had been previously represented to Bill Parham and myself. I was assigned an experienced investigator, Otto Hanak. We went through twenty-five boxes of records, statements, investigation reports and previous interviews. It became apparent to me that the State had a weak case if any case at all. More witnesses were interviewed and additional documents were found that indicated that favorable evidence to the defense had been suppressed and that other evidence had been falsely produced by previous

Jimmy Phillips, Jr.
Drawer 29
Angleton, Tx 77516
Tele: (979) 849-8511

prosecutors in securing the first conviction of Anthony Graves. There appeared to be no credible evidence indicating his guilt. For the first time, Otto Hanak, and myself interviewed the defense alibi witnesses. Some indicated that they had not testified at trial because of threatened prosecution. Both, myself and Otto Hanak found them to be credible and truthful.

Taking into consideration my entire investigation the facts of the case it is my opinion that Anthony Graves is an innocent man who had been subjected to an improper prosecution and conviction in a death penalty case. Otto Hanak concurred with me.

Then we took the results of our detached investigation to the elected prosecuting attorney, Bill Parham. He was not willing to agree with my conclusions without a detailed review of why I was convinced that Anthony Graves was innocent. Otto and I detailed everything we had done and the things that we had discovered. When we finished, Mr. Parham became convinced and agreed with us that Anthony Graves is an innocent man and the charges should be dismissed.

As of the date of this Affidavit, I am of the opinion that Anthony Graves is innocent of the charges filed against him in the above stated cause number and that it should be dismissed because of his actual innocence.

Witness my signature this 15 day of November, 2010.

Affiant, Kelly Siegler

Sworn to and subscribed before me the undersigned notary public this 15 day of November, 2010.

Notary Public in and for the
State of Texas

LOURDES HAGET
My Commission Expires
October 26, 2014

Jimmy Phillips, Jr.
Drawer 29
Angleton, Tx 77516
Tele: (979) 849-8511

Appendix 6

Motion and Order Dismissing Capital Murder Charge, *State v. Graves*, Cause No. 11,136 (21st Dist. Ct. Oct. 27, 2010) (1 CR 481)

CAUSE NO. 11,136 (452)

THE STATE OF TEXAS	§	IN THE 21ST DISTRICT COURT
VS:	§	OF
ANTHONY CHARLES GRAVES	§	BURLESON COUNTY, TEXAS

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her Attorney, and respectfully requests the Court to dismiss the above entitled and numbered criminal action in which the defendant is charged with the offense of CAPITAL MURDER.

FOR THE REASON:

_____ The evidence is insufficient;
_____ The defendant was convicted in another case;
_____ The complaining witness has requested dismissal;
_____ The case has been refiled;
_____ The defendant is unapprehended;
_____ The defendant is deceased;
_____ The defendant has been granted immunity in light of his/her testimony;
_____ The arresting officer is no longer with the department;
X Other: WE HAVE FOUND NO CREDIBLE EVIDENCE WHICH INCULPATES THIS DEFENDANT.

and for cause would show the court the following:_____

WHEREFORE, it is prayed that the above entitled and numbered cause be dismissed, and the arrest warrant or capias, if any, be returned.

Signed this the 27 day of October, 2010.

ASSISTANT/DISTRICT ATTORNEY

ORDER

The foregoing motion having been presented to me on this the 27th day of October, 2010 and the same having been considered, it is therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed and the arrest warrant or capias, if any, be returned and the Clerk of the Court is ORDERED to furnish a copy of this order to the Sheriff of Burleson County.

PRESIDING JUDGE

FILED 3:57 PM
DATE 10-27-2010
Joy Brymer
District Clerk, Burleson County
By Joy Brymer

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