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Special Prosecutor, Harris County, Texas

June 4, 2019

Via Certified Mail, RRR #70190160000045309289
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 13287
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Re: Grievance against former Assistant District Attorney Daniel Rizzo

INTRODUCTION

Alfred Dewayne Brown was convicted of capital murder in Harris County and sentenced to death. The lead prosecutor in Brown's case was former Assistant District Attorney Daniel Rizzo. Nine years after Brown's conviction (twelve years after his original incarceration) an extra copy of never-before-produced telephone records pertaining to the case were found in a police officer's garage. The records were consistent with Brown's alibi that he was in his girlfriend's apartment around the time of the murders.

Brown was released from prison and the charges against him were dismissed. After an extensive review of the case, DA Kim Ogg recently declared Brown "actually innocent" and an amended judgment to that effect was signed by the district court. The concealed telephone records were crucial evidence of Brown's innocence.

The recent investigation into the Brown case uncovered irrefutable evidence that ADA Rizzo was fully aware of the exculpatory telephone records. Contemporaneous documents prove that Rizzo was specifically told by law enforcement of the existence of the telephone records and that they supported Brown's defense. Despite such knowledge, Rizzo pressed forward with the prosecution of Brown. He led and participated in an abusive grand jury, threatening witnesses that if they did not incriminate Brown they would be sent to prison. He pretended that the telephone records supporting Brown's alibi did not exist. He did not disclose the telephone records to the defense or the court, despite Constitutional law, the rules of ethics, and specific court orders. At trial, he argued in a way directly

inconsistent with the concealed exculpatory telephone records. Rizzo's unethical and illegal actions resulted in an innocent man being sent to death row. Fortunately, an extra copy of the records was found and produced before Brown was executed.

If our justice system is to work properly, the State Bar of Texas must hold prosecutors who hide evidence of innocence accountable for their conduct.

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I. BACKGROUND

I, John Wesley Raley, was appointed a Special Prosecutor by the Harris County District Attorney to investigate the role, if any, of former death row inmate Alfred Dewayne Brown in the April 3, 2003 murders of Ms. Alfredia Jones and Houston Police Officer Charles Clark. I was also requested to perform an independent analysis of Mr. Brown's claim of "actual innocence" regarding the specific crime for which he was convicted – the murder of Officer Clark – and present findings and recommendations based on available evidence. I completed these assigned tasks, and presented my findings in the "*Report of Special Prosecutor John Raley to District Attorney Kim Ogg Regarding Alfred Dewayne Brown* ("Report"), dated March 1, 2019. A true copy of the 179 page Report is being filed concurrently as Exhibit 1 to this Complaint.

The conclusions of the Report have been fully adopted by the Harris County District Attorney. The Report contains citations to official Harris County documents as evidence of the facts. When this Complaint cites to pages in the Report, it incorporates by reference all citations in the Report identified on those pages. The specific pages in the official HPD Offense Report cited the Report are attached hereto as Exhibit 2.

During my investigation into the Brown case, I uncovered significant prosecutorial misconduct on the part of Brown's chief prosecutor, ADA Daniel Rizzo. Mr. Rizzo's misconduct in the Brown case raises substantial questions regarding his honesty, trustworthiness, and fitness to be a lawyer. Under Rule 803(a) of the Texas Disciplinary Rules of Professional Conduct, I have an ethical duty to inform the State Bar Disciplinary Counsel of his actions.

This grievance is filed within the statute of limitations. Texas Rules of Disciplinary Procedure, § 17.06. First, this grievance is being filed "within four years after the date (June 8, 2015) on which the Wrongfully Imprisoned Person was released from a Penal Institution." *Id*. § C. Further, since ADA Rizzo's fraud and concealment are involved, the statutory time period does "not begin to run until the Complainant discovered, or in the exercise of reasonable diligence should have discovered, the Professional Misconduct." *Id*. § D. Rizzo's professional misconduct was discovered in 2018 during the investigation that led to the Report dated March 1, 2019.

The following Exhibits to this Complaint are attached and/or filed concurrently:

- Exhibit 1: Report of Special Prosecutor
- Exhibit 2: Pages of Offense Report cited in Exhibit 1
- Exhibit 3: Transcript of Pre-Trial Conference
- Exhibit 4: Transcript of Closing Argument
- Exhibit 5: Rizzo writ affidavit
- Exhibit 6: Rizzo prior grievance attorney's response
- Exhibit 7: Rizzo prior grievance personal statement

II. PRIOR GRIEVANCE AGAINST RIZZO

On March 9, 2018, prior to my appointment as Special Prosecutor, a grievance (#201801557) was filed against former ADA Rizzo by former judge David Mendoza, Bureau Chief, Professional Integrity, Harris County District Attorney. Mr. Mendoza's complaint focused on the discovery of an email dated April 22, 2003 from Houston Police Officer Breck McDaniel to Rizzo.[1] This email described landline phone records evidence consistent with Brown's alibi that he was at the apartment of his girlfriend at the time of the murders. These records were never produced to Brown's defense team, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The email describes the phone records as exculpatory evidence, which makes Rizzo's closing argument during Brown's trial, Rizzo's affidavit in response to Brown's writ of *habeas corpus,* and Rizzo's subsequent statement to the Houston Chronicle, all false.

[1] In 2016, the HCDAO IT department located a number of digital linear tapes thought to have been destroyed. The tapes were part of an inactive technology that was used sporadically from the 1990s to approximately 2008 to back up emails and documents saved to the network. Because the technology is outdated and no longer in use, the HCDAO no longer possessed the hardware or software to read the tapes. Initially, it was believed that email evidence in the Brown case had been disclosed or was long ago destroyed. Upon taking office, the Ogg administration authorized payment for "conversion" of that data. The search conducted in Brown's civil case called for production of all communications, and it was this data set that produced the April 22, 2003 email.

There were gaps in available information regarding certain issues at the time the prior grievance was filed. The Report of Special Prosecutor regarding the Brown case fills in those gaps. Specifically, as described below and in the Report, the evidence proves that Rizzo personally read the April 22, 2003 email describing the existence of the Dockery phone records, and personally participated in taking the specific action requested in the email. Thus, Rizzo was fully aware of the existence of the exculpatory evidence, decided not to produce it, and pretended that it did not exist. Additionally, the Report and this Complaint address in detail the importance of the fact that the key Dockery landline record was actually part of a three-way call that originated from another source. This evidence, in light of eyewitness testimony and known times and travel distances, is solid proof of Brown's actual innocence.

Rizzo, with the assistance of his counsel, responded to the prior grievance, denying that he ever saw the 2003 email, claiming that the phone records were actually inculpatory, and arguing that – at any rate – there was no harm in not disclosing the records because Brown was guilty. These and numerous other statements in Rizzo's response are demonstrably false, as discussed in detail below. When the Bar asked complainant Mendoza for a rebuttal to Rizzo's response, particularly regarding Rizzo' specific arguments about the landline phone records, Mr. Mendoza informed the Bar that I, the undersigned Special Prosecutor, was still in the process of investigating these matters and a Report of my findings would be issued in the near future. I was not aware of the Bar's inquiry to Mr. Mendoza, and was not requested by Mr. Mendoza or the Bar to participate in any way in the prior grievance process. The Bar summarily dismissed the prior grievance without prejudice. There was no litigation of the facts alleged and no ruling on the merits.

Although the current grievance deals with some of the issues raised previously, it contains significant new information which was not a part of the prior grievance, and responds to arguments made previously by Rizzo which were not responded to previously.

The prior grievance has no *res judicata* preclusive effect on this grievance. *Charles J. Sebesta Jr. v. Commission for Lawyer Discipline of the State Bar of Texas*, Cause No. 56406 before the Board of Disciplinary Appeals (Feb 8, 2016). In *Sebesta*, just like in the present case, a grievance against a former District Attorney accused of withholding evidence in a murder case was initially dismissed by a Summary Disposition Panel. *Id* at 5. The grievance was later re-filed and former District Attorney Sebesta was disbarred. *Id* at 2. On appeal, Sebesta claimed that the summary dismissal of the earlier grievance against him had a *res judicata* effect which precluded the second grievance. *Id*. The Board disagreed and affirmed the disbarment, specifically ruling that "a dismissal prior to the commencement of an

evidentiary proceeding can have no *res judicata* effect." *Id* at 8. The Board explained further:

> Even after commencement of an evidentiary proceeding, and during an evidentiary hearing up until the close of the Commission's case in chief, allegations of an attorney's professional misconduct can be voluntarily non-suited by the Chief Disciplinary Counsel. Such a non-suit is without prejudice and without any subsequent *res judicata* effect. There is no jurisprudential or public policy reason why a dismissal at a much earlier date should be given *res judicata* effect – at a time when a screening entity does not have the benefit of the investigatory tools available later in an evidentiary proceeding, such as the capacity to subpoena production of documents or evidentiary hearing, and the opportunity for cross-examination."

Id. at 8-9.

Precisely the same analysis applies in the current matter. At the time of the prior summary disposition, the undersigned was investigating whether Brown is "actually innocent" under the law regarding the crime for which he was convicted – capital murder. Additional evidence concerning Rizzo's misconduct in prosecuting Brown emerged during my research of the case. This grievance is being filed because the Bar has not had an opportunity to review the evidence, inquire about it further, and make a decision on the merits.

Having discussed the public policy issues, the *Sebesta* Board stated the applicable law, which applies precisely to the current grievance:

> "*Res judicata*" means "the matter has been adjudicated." There is no adjudication by a Summary Disposition Panel, but only a screening based upon the investigation by the Office of the Chief Disciplinary counsel without the formal tools later available in an evidentiary proceeding. The Summary Disposition Panel makes a determination of which matters warrant the commencement of evidentiary proceedings. It does not adjudicate the merits, nor does it yet have the tools to make any evidentiary findings by a preponderance of the evidence. Those findings are made at the conclusion of an evidentiary proceeding – either by an Evidentiary Panel or by a district court. Only then – after an adjudication – should principles of *res judicata* become applicable.

Id at. 9. The Board affirmed the disbarment of former District Attorney Sebesta for his misconduct in the prosecution of Anthony Graves. *Id*. at 11. Anthony Graves,

like Anthony Dewayne Brown, had been sentenced to death. Both Graves and Brown were, and are, innocent. The charges for both men were dismissed when the concealed evidence of their innocence was revealed.

If an extra copy of the exculpatory telephone records had not been found in a police officer's garage, Alfred Dewayne Brown might have been executed. Contemporaneous, documentary evidence proves that Rizzo was fully aware of the existence of the telephone records long before trial, knew that they supported Brown's alibi, chose not to disclose them, and pretended they did not exist. Such conduct cannot be tolerated by the State Bar.

III. MOTION TO TRANSFER

William G. "Bill" Moore, III is the Regional Counsel of the Houston Regional office of the Texas State Bar Chief Disciplinary Counsel. Mr. Moore worked as an Assistant District Attorney for Harris County for many years, including with Daniel Rizzo. Shortly before current DA Kim Ogg took office, she informed Mr. Moore that he would not be invited to return as an ADA with the new administration, and Mr. Moore resigned his position. Ms. Ogg's office filed the first grievance against Rizzo, and is DA Ogg is publicly supportive of this grievance.

To avoid the appearance of impropriety, Mr. Moore should be recused from any role in the current Rizzo grievance. Given his role as Regional Counsel for the Houston Region, this would be difficult to accomplish if the matter remains in Houston. Therefore, Complainant requests transfer to another Region. Since the Austin Regional Office has experience handling cases involving prosecutors who conceal evidence of innocence, Complainant requests a transfer to Austin.

IV. FACTS OF BROWN CASE

On April 3, 2003, between 9:39 a.m. and 9:46 a.m., Ms. Alfredia Jones and HPD Officer Charles Clark were fatally shot during an attempted armed robbery of ACE America's Cash Express, 7700 South Loop East, Houston, Texas 77003. According to the eyewitnesses, three men – driving one get-away car – committed the crimes. ADA Rizzo was involved in the investigation from the day of the murders, and served as lead prosecutor.

Dashan Glaspie and Elijah Joubert were quickly identified as suspects and admitted being present at the crime scene. Dashan Glaspie was the first to cooperate with authorities in hopes of obtaining a lighter sentence. Joubert's identity was

already known, but the name of the third accomplice was unknown. Glaspie was required to name a third man, and named Brown. Brown maintained his innocence, informing police that at the time of the crimes he was at his girlfriend Ericka Dockery's apartment. Brown added that Dockery's nephews were present and could confirm his presence there.

Whether Brown was at Dockery's apartment at the time of the murders was a critically important issue in the case pertaining to Brown. If he was in her apartment, he could not have been at the crime scene. On April 21, 2003, Ericka Dockery testified before the Harris County Grand Jury that Brown was asleep on her couch when she left for work in the morning shortly before the murders occurred. Dockery worked as a caretaker at the time for Ms. Alma Berry at Berry's house, 6201 Hartwick Street. Dockery said that around 10:00 a.m., while at work in Ms. Berry's home, she received a phone call from Brown who was at the time in her apartment. Dockery testified that Berry saw the call on Caller ID as coming from Dockery's apartment, answered the phone, and handed the phone to Dockery saying "Ericka, it's your house."

Rizzo took an active role in the Grand Jury's questioning of Dockery, the foreman of whom was a Houston Police Officer. Pages 59-74 of the Report contain key excerpts of Dockery's Grand Jury testimony. Together, Rizzo and the Grand Jury threatened Dockery with perjury prosecution if she did not change her story (to, according to them, "tell the truth"). The Grand Jury and Rizzo told Dockery that her current testimony would cause her to lose her children and spend up to ten years in prison. *Id*. at 66. *("Hey Dan* (Rizzo) *what are the punishments for Perjury and Aggravated Perjury? Up to ten years…in prison.") Id*. at 66. ("*Like we said, if you are – the evidence shows that you are perjuring yourself then you know the kids are going to be taken by Child Protective Services and you're going to the penitentiary and you won't see your kids for a long time*."); *Id*. at 68. ("*Erica. It's not worth it. If you're trying to protect this young man – it's not worth it."); Id* at 68. *("Think about your kids, darling…That's what we're concerned about here, is your kids…We're as much concerned about your kids as you are. So tell the truth. He was not in the house when you put your kids on the bus, was he? Tell the truth girl."* [In answer to this question, Dockery responded "Yes, he was there."*) Id.* at 70-71. ("*She's not going to change. That's it young lady…Next time it's going to be the cops and the Child Protective Services coming to take your children."*). *Id.* at 69. ("*You know the part about the attorney business that we read you in the beginning? You'd better go get you one. We're done... I think she was with them at the check cashing place*.") *Id*. at 74. [Another young woman witness whose testimony Rizzo's Grand Jury did not agree with was told by them that when they put her in "*the jail house*," because she was "*a beautiful lady*," when "*them hoochy mommas down*

there …get through with you…more than your nerves are going to be bad." Id. at 57-58.] Following her Grand Jury testimony, Dockery was jailed for seven weeks on perjury charges with the bail set too high for her to pay. Dockery was only released after she agreed to change her story to match Rizzo's theory of the case.

On the same day Dockery testified before the Grand Jury, April 21, 2003, Reginald Jones (then 18 year old nephew of Dockery) also testified. A description and excerpts of Jones's testimony are on pages 45-48 of the Report, and his entire testimony is summarized on pages 140-141 of the report. Jones told the Grand Jury that he was downstairs in Dockery's apartment playing video games before and after the approximate time of the murders. He had a clear view of the door to the apartment, and saw no one come in or out during that time. Later that morning, he saw Brown come downstairs and heard Brown say that he was feeling ill. The Grand Jury tried to pressure Jones to change his testimony to match their narrative, but he refused.

On or about April 22, 2003, Houston Police Officer Breck McDaniel met Deputy U.S. Marshall Richard Hunter at HPD headquarters. Hunter had obtained Ericka Dockery's landline phone records from Southwestern Bell without a subpoena under "exigent circumstances," and tendered the records to McDaniel. McDaniel, who was gathering land and cell phone records regarding the suspects, received the Dockery landline records from Hunter. McDaniel made a personal copy of the records for himself because he anticipated testifying about them during the case. After he made a personal copy, McDaniel immediately filed the original Dockery landline records in the official HPD file. Both Deputy Hunter and HPD Officer D.L. Robertson have confirmed that they personally saw McDaniel file the original Dockery landline records. *See* statement from McDaniel, page 19 of Report (confirmed by interview with the undersigned); sworn statement of Deputy U.S. Marshall Richard Hunter, page 20 of Report; and a summary of the undersigned's interview with D. L. Robertson, page 20-22 of Report.

On April 22, 2003, Officer McDaniel wrote an email to ADA Rizzo. No one else besides Rizzo was identified as a recipient of the email. In the email, McDaniel requested Rizzo to sign and file what was attached to the email: an Application and form of Order pertaining to the Dockery records. (Although these records had already been obtained and filed with the HPD, this process was to protect SW Bell for releasing private information to law enforcement.) Among other things, the Application contended that the Dockery landline records were "material to the investigation of a criminal offense." Copies of the McDaniel email to Rizzo, together with McDaniel's proposed Application and Order, are on pages 8-10 of the Report, Exhibit 1.

In his cover email, McDaniel referred to Brown by his nickname "Doby." He specifically described the content of Dockery's phone records as follows:

> **Regardless, I was hoping that it would clearly refute Erica's claim that she received a call at work (residence on Hartwick street) from Doby at about 10:00 a.m. or so from her apartment, thereby, putting him at the apartment as an alibi as the nephews claim. But, it looks like the call detail records from the apartment shows that the home phone dialed Erica's place of employment on Hartwick Street at about 8:30 a.m. and again at 10:08 a.m. Erica claimed that the caller identification at the Hartwick house showed the apartment.**

(Emphasis added).

It is significant that when McDaniel asked Rizzo to review the attached Application and Order to make sure it "looks correct," McDaniel highlighted a certain citation for Rizzo's review: ***"I specifically want to ensure that the C.C.P. article quoted is the correct one for this order as I have never done one of these orders before."*** *Id*. (Emphasis added).

On April 24, 2003, an Application personally signed by Rizzo regarding the Dockery landline records and a proposed Order were filed with the 351st District Court. Copies of both of these items are on pages 13-15 of the Report. A comparison of these pages with the forms of Application and Order attached to McDaniel's email (pages 8-10 of the Report) is extremely important. The documents signed by Rizzo are exactly the same as the documents attached to McDaniel's email, including formatting – with one narrow exception. Rizzo deleted the references to the Code of Criminal Procedure ("C.C.P.") in both the Application and the Order – the *very thing* that McDaniel asked Rizzo to focus on. Otherwise, the two sets of documents are completely identical. Thus, Rizzo addressed the precise issue McDaniel referenced, and, after dealing with it on both of McDaniel's proposed documents, copied all the other words on each of the pages of the documents, signed the Application, and made sure the documents were filed. Rizzo's claim that he was unaware of the McDaniel email is patently false. Rizzo was fully aware of the email and the *content* of the email – including the description of the Dockery phone records as *consistent with Brown's alibi*.

On May 2, 2003, Officer McDaniel filed a Supplemental Offense Report in the murder investigation file. It is quoted on pages 16-17 of the Report. In the Offense Report, McDaniel noted that he had analyzed phone records, including

landlines. He said that court orders had been obtained as necessary, and that Rizzo was personally involved in this process. He said that Rizzo was personally made aware of the records and the parties revealed by them. McDaniel concluded as follows:

> IT SHOULD ALSO BE NOTED THAT OFFICER MCDANIEL NOTIFIED A.D.A. RIZZO OF THE AVAILABILITY OF THESE RECORDS AND THE VAST AMOUNT OF DATA THAT THEY REVEAL. FURTHER, OFFICER MCDANIEL AVAILED HIMSELF TO A.D.A. RIZZO FOR ANY FURTHER ANALYSIS OF THOSE RECORDS.

(All caps in original).

Thus, Rizzo was completely aware of the existence of the Dockery landline records and knew that they constituted evidence which was required to be disclosed to the defense under *Brady v. Maryland*. Rizzo was present during Dockery's Grand Jury testimony about receiving a call at Ms. Berry's from Brown, who was calling from her apartment, around 10:00 a.m. on the morning of the murders. Rizzo was the only named recipient of McDaniel's 4/22/2003 email describing the records as consistent with Brown's alibi. As discussed above, Rizzo took the direct action requested in McDaniel's email. The email and the records themselves reveal that the call occurred at 10:08 a.m. [Note: This call was the second leg of a three-way call which began at 10:07 a.m., as discussed below.] Rizzo knew that a call at this time was important because the time-stamped doors at the ACE murder scene established that the earliest the murderers could have left the scene was 9:46 a.m. Finally, Rizzo knew about the testimony of Reginald Jones that Brown was at Dockery's all that morning. Rizzo cannot claim with any credibility the he was unaware of the existence and importance to the defense of the Dockery records.

Glaspie agreed to cooperate with the State and was allowed by Rizzo to plea to a lighter charge (armed robbery rather than murder) in exchange for testimony against two other accused men. Glaspie testified against Elijah Joubert during Joubert's October, 2004 capital murder trial pertaining to the shooting of Alfredia Jones. Joubert, who admitted to authorities that he was present at the crime scene, was convicted and sentenced to death.

Alfred Dewayne Brown was called to trial in October, 2005, charged with capital murder regarding the shooting of Officer Clark. The principal witnesses against him were Glaspie and Ericka Dockery. Dockery's testimony changed dramatically during her seven weeks in jail on perjury charges, never proven,

prosecuted by Rizzo. (She later recanted her trial testimony.) These witnesses and other trial witnesses are discussed in detail in the Report. The undersigned directs the Bar's attention to Section H "How Brown was Indicted" (pages 57-74), and Section I "Can Brown be Prosecuted today?" (pages 75-81). Section VI "Witness Statements" details all statements and testimony from each witness in the case (pages 84-174), including witnesses called at trial.

It cannot be a coincidence that the one item of documentary evidence that a policeman told Rizzo is consistent with an accused's alibi is also the *same* evidence which was removed from the official files and never disclosed to the defense. The evidence proves that Rizzo was fully aware of the Dockery landline evidence, knew that it was exculpatory, and decided not to reveal it to Brown's lawyers and the court. This grievance focuses on Rizzo's illegal and unethical withholding of the Dockery landline evidence from Brown's defense lawyers and the court.

On August 23, 2005, the 351st District Court granted Brown's "Motion for Discovery and Inspection." I CR 23-32, 38-41. The evidence ADA Rizzo was required by Court order to produce included "[a]ny and all favorable evidence which is in the possession, custody, or control of the State, or investigating body of the State of Texas, or any police department or any of their agencies, including, but not limited to…[a]ny papers, objects or real evidence that is in the possession of the police, the District Attorney's Office or their employees or State agencies which may in any way be material to the guilt or innocence of this Defendant." Id. at 26-27. No valid argument can be made that the Dockery landline records to not apply to the above Court order.

On the same day, the Court granted a separate "Motion to Compel Disclosure of Evidence Favorable to the Defendant," ordering ADA Rizzo to produce "[a]ny and all evidence showing the Defendant's lack of culpability." *Id.* at 28-14. Since the Dockery landline records were admitted by law enforcement to be consistent with Brown's alibi that he was at his girlfriend's apartment around the time of the crime, they were required to be produced by this order as well.

The transcript of the pretrial motions hearing on August 23, 2005 is informative. II RR 7-16: Exhibit 3. When the motion for discovery was discussed, ADA Rizzo said:

> "[*T]he only thing that the State has objected to handing over to the Defense was the* ***Grand Jury testimony*** *which was – Defense and I have extensively talked about that.* ***Other than that, everything has been given to them."***

> Id. at 8. Regarding additional evidence, Rizzo added: "*And Judge, just for the purpose of the record* ***the only thing that…has not been made available to the Defense as of yet is the ballistic evidence****. That would be a .45 caliber as well as other ballistic evidence. We will…make that available to the Defense."*

Id. at 8, 11.

Both of these representations to the Court by Rizzo were intentionally false. Rizzo knew about the Dockery landline evidence, knew that the evidence was consistent with Brown's alibi, and knew that the evidence had *not* been produced. Making a false representation in Court is contemptuous. A prosecutor's contempt of court by making false representations about case dispositive evidence in *any* case – especially a *capital murder* case where the death penalty is being sought – cannot be countenanced by the Bar.

The trial presentation of Rizzo during Brown's case should also be analyzed in light of the facts about the Dockery landline evidence described above. On October 14, 2005, in the middle of Brown's trial, ADA Rizzo's co-counsel ADA Tommy LaFon called Officer McDaniel to the witness stand to testify about the cell phone records of Glaspie and Joubert. ADA LaFon asked Officer McDaniel: "And State's Exhibit No. 240, is that basically … a compilation of information that you acquired during your investigation…?" Officer McDaniel responded: "It is a compilation of ***those*** two sets of information." Trial Transcript (Brown) Vol. 32, pg. 82 (emphasis added). The State did not mention the *other* "set of information" – Ericka Dockery's unproduced landline records. The State skipped past the 10:08 a.m. phone call from Ericka Dockery's apartment to Alma Berry's house in its chronological phone record presentation, referencing an 8:45 a.m. phone call from Glaspie's cell phone, then stating that "*the next phone call we have*" is a 10:14 a.m. phone call to Glaspie's cell phone. *Id.* at 104. (Note: There is currently no evidence that either Officer McDaniel or ADA Rizzo discussed the existence and content of the Dockery records with ADA LaFon, who denies awareness of their existence.) Lead prosecutor Rizzo did not, as an officer of the Court, correct the false impression created in the record.

On Closing Argument, ADA Rizzo dealt with trial testimony that Alma Berry recognized Dockery's apartment's number on Caller ID as follows:

> ***And we know that she (Dockery) received a phone call at 10:00 a.m****. She was told to turn on the breaking news.* ***We know Ms. Berry said that she thought it was coming from her (Dockery's) house, which is***

> ***probably a mistake***. ***As you now know Ms. Berry has trouble seeing a little bit.*** *She knows the Defendant, but she kind of was looking over at – I thought she was going to pick one of you folks out, actually.* ***But she has trouble seeing. And, you know, her glasses – bless her heart, her glasses are pretty thick. <u>And she's just wrong about that…</u>***

Trial Transcript (Brown) Vol. 33, pg. 94; Exhibit 4.

Whether or not Berry's glasses are "pretty thick," the Dockery landline records prove that Ms. Berry did <u>not</u> make a "mistake." She was <u>not</u> "just wrong about" her identification of the source of the call – Ericka Dockery's "house." ADA Rizzo knew at the time he made the above false jury argument exactly what the Dockery landline records proved. He had been fully informed that the records were consistent with Brown's alibi that Brown was at Dockery's at the time. Thus, ADA Rizzo participated in (or, at a minimum, observed) incorrect witness presentations, and ADA Rizzo personally made fraudulent jury arguments which were directly inconsistent with material exculpatory evidence the documents prove he was aware of and chose not to produce.

Although Brown's motion for new trial was denied, and his conviction was affirmed on appeal, he continued to maintain his innocence. On October 27, 2007, Brown filed a post-conviction writ of *habeas corpus* petition alleging that the State violated its duty to disclose exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83 (1963) and failed to admit into evidence the complete cell phone records used at trial.

In 2008, during its *habeas* investigation, the State confirmed that some of the records used during HPD Officer Breck McDaniel's testimony regarding cell phones were not admitted into evidence. The State's file did not contain the complete records. The *habeas* prosecutor obtained, by subpoena, the cell phone records of Glaspie and Joubert.

On July 11, 2008, ADA Rizzo signed an affidavit for use in responding to Brown's writ, attached as Exhibit 5. The affidavit is interesting because it responds to allegations being made by Brown at the time. Rizzo swore that he "never pressured, threatened or coerced any witness to either identify the defendant (Brown) or change their identification to inculpate the defendant." *Id* at 2. He mentioned four witnesses that he specifically denied pressuring or influencing to obtain false testimony: Alisha Hubbard, Sharonda Simon, Lamarcus Colar, and Erica Dockery. As detailed in the Report, three of the four witnesses reported that they <u>were</u>

pressured by Rizzo, and told by him that they would be charged with perjury if they did not testify the way he desired. (Hubbard on pages 126-130; Simon on page 159, Dockery on pages 107-110, *see also* Dockery's Grand Jury testimony on pages 59-74, which speaks for itself). The other witness, Colar, was threatened by police with prosecution in his initial interview on 4/4/2003. Report at 98. At the time, Rizzo was actively involved in the investigation. *Id.* at 111.

Rizzo's writ affidavit of July 11, 2008, Exhibit 5 attached, contains a haunting statement in light of information then publicly unknown but later revealed. Rizzo swore under oath the following: ***"I did not suppress knowledge of or information about a land-line* [sic] *call from Ericka Dockery's apartment to Alma Berry's house.*** *The record will reflect that there was testimony about the call during the defendant's trial."* Exhibit 2 at 3. The second sentence is true – the testimony came from Ericka Dockery herself during cross-examination by the defense. Report at 107. However, the first sentence is a false statement under oath by Rizzo. As described above, Rizzo knew about certain documentary "information about a landline call from Ericka Dockery's apartment to Alma Berry's house." Since this crucial evidence – which lead prosecutor Rizzo was told by law enforcement is directly consistent with Brown's alibi – was never produced, Rizzo certainly "suppressed" both "knowledge of" and "information about" the phone call.

An evidentiary hearing on Brown's *habeas* petition was scheduled for the spring of 2013. Brown's counsel announced they would call an expert regarding cell phones. While preparing for the hearing, ADA Lynn Hardaway spoke to Officer Breck McDaniel on several occasions. McDaniel was subpoenaed to testify regarding phone records at the upcoming hearing.

During one of his conversations with Hardaway, McDaniel volunteered that he might have some materials from the Brown case in a box stored in his home garage. McDaniel searched, located a box of materials from the case, and brought the box to Hardaway on April 9, 2013. A copy was immediately produced to Brown's counsel. The records in the box included Ericka Dockery's landline phone records, never before produced, which proved that at 10:08 a.m. on 4/3/2003 a call was made from Dockery's apartment to Dockery's place of employment, the home of Ms. Alma Berry.

A search confirmed that Dockery's landline records were not located in either the prosecution file or the HPD homicide file. They had not been seen by the *habeas* prosecutors prior to their production by McDaniel. The defense trial counsel stated

that they had never seen them before. In light of these facts, the State agreed that Brown was entitled to a new trial based on *Brady v. Maryland.*

Agreed Findings of Fact and Conclusions of Law, signed by Judge Ellis of 351st District Court on May 28, 2013, stated that the State's withholding of the Dockery landline records from production to the defense was not intentional. The Findings of Fact stated the following:

> 31. The State's *inadvertent* failure to disclose Dockery's phone records to the defense at the time of trial was not a matter of bad faith.
>
> * * *
>
> 34. Although the State's failure to disclose the Dockery phone records to trial counsel was *inadvertent* and *not in bad faith*, the applicant's claim meets the requirements of *Brady.*

(Emphasis added).

Similarly, the Agreed Conclusions of Law stated the following:

> 1. Based on the State's *inadvertent* failure to provide trial counsel with the Dockery phone records, the applicant satisfies the tenets of Brady…

(Emphasis added). Regardless of the "inadvertent" qualifiers, the Agreed Findings concluded that the State had withheld exculpatory material evidence in violation of Brown's constitutional rights.

It is fully understandable why Brown's counsel would agree to the "inadvertent" language. They wanted their client out of prison, and at the time had no way of knowing whether the failure to disclose the Dockery records was intentional. The language was proposed by the State, perhaps because of the above-described affidavit signed by ADA Daniel Rizzo before the discovery of the copy of the Dockery records in Officer Breck McDaniel's garage. At this time, the prosecutors who were working on the Brown case, including ADA Lynn Hardaway, were unaware of the April 22, 2003 email from McDaniel to Rizzo.

On November 5, 2014, the Texas Court of Criminal Appeals issued an order vacating Brown's conviction and sentence, and remanding the case to the trial court. As part of its Opinion, the appellate court ruled: "Based on the habeas court's

findings and conclusions and our own review, we hold that the State withheld evidence that was both favorable and material to applicant's case in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)" (emphasis added). Thus, the State's highest criminal court held that the State violated Brown's constitutional rights by failing to turn over evidence supporting Brown's alibi.

The Houston Police Department and Harris County District Attorney's Office conducted a re-investigation of the crime. On June 8, 2015, the 351st District Court of Harris County, Texas granted the State's motion to dismiss the case against Brown. Later that day, Brown was released from custody after over 12 years behind bars, including more than 9 years on death row. Devon Anderson, Harris County District Attorney at the time, said: "*We cannot prove this case beyond a reasonable doubt, therefore the law demands that I dismiss this case and release Mr. Brown*." Houston Chronicle, June 8, 2015. Although that is very close to the legal standard for "actual innocence," DA Anderson did not use those express words.

On March 1, 2019, DA Kim Ogg accepted the conclusion of the Special Prosecutor's Report that based on clear and convincing evidence, no reasonable juror would find Brown guilty of the crime for which he was convicted, capital murder, and therefore Brown is <u>actually innocent</u> as a matter of law. On May 3, 2019, Judge George Powell of the 351st District Court, Harris County, Texas, signed an Amended Judgment dismissing the case against Brown on the basis of <u>actual innocence</u>.

V. RIZZO'S VIOLATIONS OF TEXAS DISCIPLINARY RULES

The Texas Disciplinary Rules of Professional Conduct state the following:

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;
…
(5) offer or use evidence that the lawyer knows to be false.

Rule 3.09 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offices, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 8.04 Misconduct

(a) A lawyer shall not:

…

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Rizzo's multiple violations of the above Rules are described at length above and below. Among other things:

- Rizzo violated Rule 3.03(a)(1) by telling the jury that Alma Berry was, due to her poor vision, "just wrong about" her identification of the 10:08 a.m. phone call as coming from Erick Dockery's apartment. Rizzo was aware at the time he made the false argument that phone records existed which confirmed that Berry's identification was absolutely correct.

- Rizzo violated Rule 3.03(a)(5) by pretending at trial that the phone records of the 10:08 a.m. call did not exist, and by calling to the witness stand numerous witnesses (many detailed below in rebuttal to Rizzo's prior grievance Response) who had changed their initial testimonies only after having been personally threatened by Rizzo with prosecution if they did not testify the way he wanted them to.

- Rizzo violated Rule 3.09(d) by failing to disclose the Dockery landline phone records after he had been told by a police officer in writing that the records were consistent with Brown's alibi that Brown was at Dockery's apartment on the morning of the murders.

- Rizzo violated Rule 8.04 for all of the above reasons, as well as the other reasons outlined in this grievance.

VI. RIZZO'S ATTORNEY'S RESPONSE

Rizzo's attorney filed a Response ("Rizzo's Response") to the prior grievance, attached as Exhibit 6. The Response is not dated. The prior Complainant, Mr. Mendoza, filed no reply or rebuttal to Rizzo's response other than to inform the Bar that the undersigned Special Prosecutor was investigating the matter and would prepare a Report.

Many statements in Rizzo's Response are inaccurate, and others are demonstrably false. Often, Rizzo's Response quoted a witness, but failed to inform the Bar that the witness recanted that very statement. Rizzo also failed to inform that Bar that several witnesses, at the time of the recantation, said that their earlier statements were only made because Rizzo threatened perjury prosecution if they did not testify the way Rizzo wanted.

Because the untrue statements in Rizzo's Response create a false impression regarding the Brown case, it is important to deal with them. In the interest of efficiency, this grievance will only present the evidence rebutting some of the most egregious statements in Rizzo's Response. Statements from Rizzo's response are in italics, with factual rebuttals below them.

Rizzo's Response statements pertaining to the withheld Dockery landline records:

1. "*ADA Tommy Lafon, among other responsibilities, was in charge of all phone records and other duties as assigned and needed.*" Rizzo's Response at 2.

   REBUTTAL:

   Rizzo was the only prosecutor copied on Officer McDaniel's 4/22/2003 email describing the Dockery landline records as consistent with Brown's alibi. Report at 8. Rizzo, *not* Lafon, was specifically mentioned in McDaniel's 5/2/2003 Supplemental Offense Report as participating in obtaining the phone records and as having the meaning of the phone records explained to him (with an offer for further explanation upon request) by McDaniel himself. *Id.* at 16-17.)

2. *"We know today…that Brown did in fact originate the call from the VA through three way call." "…the Dockery phone records are not exculpatory*

– they are inculpatory…" "Once reviewed...the Dockery phone records…conclusively proved that Brown, while at the VA, called Dockery's apartment and then that call was forwarded to Dockery's employer's phone number." Rizzo's Response at 5, 7-8. (Similar arguments on 16).

REBUTTAL:

This argument is central to Rizzo's Response. It is dealt with in detail in the Report on pages 39-44.

Importantly, even if the call was not a three-way call (if it was only a 10:08 a.m. call from Dockery's to Berry's), it would still be Brady evidence because it would be consistent with Brown's alibi. Rizzo would still be unethical in failing to disclose the evidence.

We now know it was a three-way call. Regarding this fact, Rizzo makes false assumptions and reaches a backwards conclusion. As described below and detailed in the Report, the fact that the call was a three-way call – when combined with eyewitness testimony – is absolutely exculpatory toward Brown. It is particularly harmful, then, that Rizzo knew about the existence of the landline phone evidence and failed to disclose the evidence. If the defense had an opportunity to present the facts surrounding the three-way call during trial, Brown would likely have been acquitted.

Critical to an analysis of this issue are known times, known distances, and the necessary times to drive those distances.

The ACE Check Cash electronic door time stamp evidence shows that the earliest Glaspie, Joubert, and the third perpetrator could have left the crime scene was **9:46 a.m**. Report at 39.

The ACE office address was 5700 South Loop East Freeway. Glaspie, Joubert, and eyewitness tow truck driver James Wheat agree that only one get-away car was used. Glaspie and Joubert agree that they drove directly to the Villa Americana apartments. *Id.*

The next absolutely known time is a landline phone call starting at **10:07 a.m**. from Patricia Williams's apartment #244 at the VA apartments, 5901 Selinsky Road, to Ericka Dockery's apartment #406 at Plum Creek Apartments, 6969 South Loop Freeway.

From 9:46 a.m. to 10:07 a.m. is **twenty-one minutes**. That is the maximum time the suspects had to leave the crime scene, get in the car, drive to the VA, meet with Patricia Williams, request permission to go into her apartment, enter and turn on the TV news (as they described), before using her landline to make the call. A 15 minute drive, (confirmed by Google Maps) with a 10:01 a.m. arrival gave them sufficient time to accomplish these activities. *Id.* [Note: the actual arrival time was probably a few minutes later, as Glaspie said they were slowed by construction on the 610 Feeder. Still, they were able to make the call by 10:07 a.m.].

There was absolutely insufficient time for the single get-away car to drive from the crime scene to Dockery's apartment to drop off Brown, then drive to Williams's apartment at the VA to make a 10:07 a.m. phone call. That route would put them at the VA after 10:07 a.m. *Id.*

The only solution that satisfies the known times of events and the known distances and travel times is that the suspects drove directly to the VA apartments, just as Glaspie and Joubert said. They could not possibly have driven Brown to Dockery's first, nor did they claim they did.

I have personally interviewed the expert witness retained by Harris County, Ben Levitan, who has 30 years of experience in the telecommunications industry. In Mr. Levitan's opinion, the records show that a landline call beginning at 10:07:13 a.m. was made from Williams's apartment to Dockery's apartment. At 10:08:19 a.m. this call was linked with a new landline call made from Dockery's apartment to Alma Berry's home. The calls were then linked together as a three-way call, according to the service code ("010") used during such calls. The calls were linked until 10:10:35 a.m., when the second leg of the call (Dockery to Berry) ended. After that, the first leg of the call (Williams to Dockery) continued until 10:10:49 a.m.

Unlike Rizzo, Mr. Levitan's written report is careful not to speculate about who placed each call or what was said during them. During my interview, Mr. Levitan reiterated that the numerical, coded records tell an investigator absolutely nothing about the identity of the people on the phones or the content of their conversations. Answers to such questions must be based on the testimony of eyewitnesses.

It is undisputed that Brown was on the phone when it was answered at Berry's home. Therefore, he had to be either at Dockery's apartment or at Williams's apartment.

Brown has always maintained that he was at Dockery's apartment at this time. Brown's story is backed up by Reginald Jones, Dockery's nephew, who was at Dockery's apartment at the entire morning in question.

As described above, Patricia Williams has consistently maintained every time she has been interviewed since 2003 that only Glaspie and Joubert were in her apartment at the time of the 10:07 a.m. call. She did not know Brown, did not recognize his picture, and was absolutely certain he was not in her apartment on the morning of the murders. Her statement has never changed from the first time she gave it to police (only six days after the murders). She was interviewed four more times over the next twelve years, and reported each time that only Glaspie and Joubert were in her apartment on the morning of the murders, *not* Brown. She has no known bias either for or against Brown.

The consistent statements of neutral eyewitness Williams are proof that Brown was not in her apartment at the time of the three-way phone call. The only other possible location for Brown at the time is Dockery's. Brown said he was at Dockery's, and Reginald Jones corroborated that Brown was at Dockery's. The only evidence that Brown was not at Dockery's is the uncorroborated testimony of Glaspie made while Glaspie was making a deal with Rizzo to avoid the death penalty.

Since, according to the overwhelming evidence, Brown was at Dockery's during the three-way phone call, he could not have been the third man at the murder scene. As described above and in detail in the Report on pages 39-44, the known distances and times required to drive the single get-away car make it impossible for Brown to have been at ACE Check Cash with Glaspie and Rizzo between 9:39 a.m. and 9:46 a.m., and also be at Dockery's apartment for the 10:07 a.m. call between Williams's apartment and Dockery's apartment linked to the call to Berry's house at 10:08 a.m. The fact that the call in question was a three-way call is solid proof of Brown's innocence.

It was significant misconduct for Rizzo to withhold from the court and defense counsel evidence likely to acquit Brown and then press forward in seeking the death penalty. If Officer McDaniel had not found his personal copy of the Dockery records (which he made before he filed the original copy in HPD files), an innocent man might have been executed. The undersigned cannot imagine anything in the practice of law more horrible than executing an innocent man. That is the reason this case is so serious.

3. *"Rizzo never saw the phone records."* Rizzo's Response at 8.

REBUTTAL:

The 3/22/2003 email that Rizzo plainly read and acted on described the phone records as exculpatory evidence. Any ethical prosecutor who was remotely curious would have reviewed the records personally. A decision by a prosecutor to ignore known Brady evidence would be serious misconduct.

4. "*Evidence such as phone record [sic] would not be merely turned over to the DA or kept in your own garage. It is against HSP SOP rules to maintain any files at your residence." "Breck McDaniel suppressed what he clearly thought was exculpatory evidence, after all it was in* ***HIS GARAGE****." "There is no reason for McDaniel, who worked long enough as a professional law enforcement officer, to know better than to keep evidence, out of the chain of evidence, and in your garage." "…Breck McDaniel is where the break down in the Alfred Brown case occurred, not Dan Rizzo." "If anyone dropped the ball or hid the evidence in the Alfred Brown matter, it was Breck McDaniel, not Dan Rizzo." "Never turning it over to HPD, the DA's office and keeping in his garage was criminal."* Rizzo's Response at 8-9 (Emphasis in original.) [Note – this theme is repeated many times, in many forms, in Rizzo's Response]

REBUTTAL:

The facts are a matter of record, as described fully in the Report on pages 2-24. Before making a copy of the Dockery landline for his personal use as a phone records witness (the copy stored in his garage), McDaniel filed the original copy of the records in the official HPD file. Report at 17-18. This was confirmed by (1) McDaniel himself, (2) Officer D.L. Robertson, who was at the time collecting the case records and specifically remembers the Dockery records being filed, and (3)

Deputy U.S. Marshal Richard Hunter, who personally obtained the Dockery records, delivered to them McDaniel at HPD, and observed McDaniel filing them. Report at 18-22. The HPD Internal Affairs Division investigated the matter of the Dockery records and, given the evidence described above, cleared McDaniel completely. *Id.*

Rizzo has no basis whatsoever for his allegations against McDaniel, a retired Houston Police Officer who served our community with honor. McDaniel's conduct throughout supports his character of integrity. He filed the original Dockery records while retaining a personal copy for his own use in the investigation. Years later, when the original records could not be located, he volunteered that he may have a personal copy in his garage. He looked for his personal copy, found it, and turned it over to the new prosecutor in the case. McDaniel's ethical actions in this case stand in stark contrast to Rizzo's unethical actions.

5. *"**While Dan Rizzo does not deny that it is his signature on the application,** he has no recollection of appearing before Judge Collins and getting the application signed." That Goodhart faxed it makes it more likely than not that it was Goodhart who in fact went before the judge…" "The only evidence that the committee has before it now is Mr. Rizzo's recollection that he never saw the email."* Rizzo's Response at 10, 13.

REBUTTAL:

Whether Rizzo has a memory now of going to Court on an application is irrelevant. Whether Craig Goodhart faxed the application is irrelevant. Rizzo is the only named recipient of the McDaniel email which described in detail the exculpatory evidence. The application and order which were filed were verbatim copies of the forms attached to the McDaniel email, except for the deletion of the citation to the Code of Criminal Procedure – the *very thing* McDaniel requested in his email for Rizzo to check. Rizzo *admits* he personally signed the form of application which was requested by McDaniel's email. McDaniel later noted in the official HPD Offense Report that Rizzo was involved in obtaining the records. McDaniel also noted that he explained the meaning of the records that had been obtained to Rizzo.

6. *"…the application in and of itself has no information on it that would or could lead anyone, especially in 2003 to know that the records would lead to the discovery of land line records like the ones at issue now."* Rizzo's Response at 10.

REBUTTAL:

The McDaniel email addressed solely to Rizzo, which was attached to the application copied by Rizzo and signed by Rizzo, says:

> **"Here is a copy of the application and order on Dobie's girlfriend's apartment's home phone...SWB has already provided the records...I was hoping that it would clearly refute Erica's claim that she received a call at work (residence on Hartwick street) from Dobie at about 10:00 a.m. or so from her apartment, thereby putting him at the apartment as an alibi as the nephews claim. But, it looks like the call detail records from the apartment shows that the home phone dialed Erica's place of employment on Hartwick Street at about 8:30 A.M. and again at 10:08 A.M. Erica claimed that the caller identification at the Hartwick house showed the apartment."**

These are words addressed directly, and only, to Rizzo. They are words Rizzo read and understood, as proven by the fact that Rizzo took the precise action requested in the email. Rizzo (1) checked the Code of Criminal Procedure cite as requested (he deleted it), and (2) signed the application, making sure it was filed.

The email points out that the Dockery phone records had already been obtained. Rizzo knew that under standard operating procedures they were already in the HPD files. There was no valid reason for Rizzo to refuse to sign the application. Southwestern Bell would have insisted on it.

How the original Dockery landline records were later removed from the HPD files will require further investigation. However, the evidence shows that lead prosecutor Rizzo was fully aware of the existence of the Dockery records and knew they were exculpatory. It

is undisputed that the Dockery records were never produced to the defense. Since Rizzo made arguments at trial completely inconsistent with the Dockery records, he surely knew by then that they were no longer in the official file.

Rizzo Response statements regarding the Brown case generally:

7. *"Although Rizzo "made the scene of the murders," he "did not speak to any witnesses."* Rizzo "*did not assist in the investigation."* Rizzo's Response at 1-2.

REBUTTAL:

Rizzo interviewed key witness Jero Dorty on April 3, 2003, the day of the murders and offered him a deal to wear a wire and obtain murder evidence. Rizzo was actively involved in the investigation. Report at 111.

8. *"A crime stoppers tip was made by three women who saw Alfred DeWayne Brown (Brown), Elijah Joubert (Joubert) and Dashan Glaspie (Glaspie) on the day of the murders."* Rizzo's Response at 1.

REBUTTAL:

The only "three women" Rizzo could be referencing are LaTonya Hubbard, Latisha Price, and Alisha Hubbard.

a. LaTonya Hubbard originally reported seeing Joubert, Glaspie, and Ernest "Deuce" Matthews (*not* Brown) on the morning of the murders, in the car used during the crimes, at the scene of the first attempted robbery. Report at 132. She later named Brown instead of Matthews as the third man because Rizzo told her to do so. *Id*. at 133.

b. Latisha Price was with LaTonya Hubbard at the time, but could not identify the third man with Glaspie and Joubert. *Id.* at 156.

c. Alisha Hubbard originally reported seeing Glaspie, Joubert, and Ernest "Deuce" Matthews (*not* Brown) on the morning of the murders in the car used during the crimes, at the Villa Americana ("the VA") apartments. *Id*. at 126. Later she changed the identity of the third person to Brown. Later she said she tried to explain to Rizzo that Brown was *not* involved, but he told her if she changed

(the second version of) her story Rizzo would charge her with perjury and theft of crime stoppers reward money. *Id.* at 128.

9. "*The post arrest investigation was extensive due to the fact that it was a double homicide and an HPD officer killed in the line of duty. The investigation revealed the following:"* Rizzo's Response at 2.

REBUTTAL:

Many witnesses were interviewed, but the investigation quickly jumped to incorrect conclusions and failed to consider obvious leads. As described in the Report pages 48-51, Ernest "Deuce" Matthews, Jero Dorty, and Alfred Dewayne Brown's half-brother Aaron "AB" Brown were all very close in friendship and proximity to Glaspie and Joubert on the day of the murders and, unlike Alfred Dewayne Brown, each of the three men match the height description of third murder suspect made by three different eyewitnesses at three different times and places. Report at 45-51. Further, two other eyewitness identified Ernest "Deuce" Matthews, *not* Alfred Dewayne Brown, as being with Glaspie and Joubert in the car used in the crime shortly before the murders. *Id.* at 50. For reasons law enforcement cannot explain to this day, none of these three men were placed in lineups as suspects.

The "extensive" investigation Rizzo helped lead merely accepted, in whole cloth, the story told by Glaspie to avoid a death penalty for murder. Glaspie's story is source of the version of events on the bottom of page 2 and the top of page 3 of Rizzo's Response after "the investigation revealed." Included in Rizzo's total acceptance of Glaspie's story is Glaspie's absurd claim that he loaned his prized custom .45 caliber pistol to Joubert, and then he (Glaspie) walked into an armed robbery unarmed. Rizzo allowed Glaspie to tell that story during Brown's trial. Report at 120.

10. *"Lamarcus Colar gave a statement that Brown, Joubert and Glaspie were in apartment #253 at the VA directly after the killings."* Rizzo's Response at 3.

REBUTTAL:

Colar told police during the early morning of 4/4/2003 that he saw Glaspie and Joubert in his apartment the day of the murders, and heard Glaspie admit shooting the "bitch" (Alfredia Jones) who "got out of line" during the robbery. He also reported that "there was a third

dude, some fat shit I don't know his name Doby or some shit like that." Colar added that the third man was a "little dude." Report at 98. [Note: Brown's nickname is indeed "Doby," but Brown is 6'2'' and in no way a "little dude."]. Although Colar weeks later said he thought the third man was Brown, he later recanted that story and told law enforcement that the third man was likely Jero Dorty. *Id.* at 99.

11. *"Sharonda Simon, the mother of Brown's child, identified Brown in the vehicle that was used to drive to and from the murder scene and stated she saw Brown at the VA apartments at approximately 10:30 a.m."* Rizzo's Response at 3.

REBUTTAL:

Rizzo quoted the police summary of Simon's initial statement, but Rizzo failed to inform the Bar that at trial Simon testified that her initial statement was *not true*, and that she did *not* see Brown in the car that morning. Report at 159. After Brown's trial, she signed an affidavit stating that she had been pressured by Rizzo to say Brown was in the car, and that she initially went along with Rizzo because she didn't want to go to jail or lose her children. *Id.* at 160.

12. *"Both Glaspie and Joubert placed Brown at the VA apartments after the murders…Both Glaspie and Joubert stated Brown participated in the robbery of the Ace* [sic] *store and killed Officer Clarke."* Rizzo's Response at 3.

REBUTTAL:

Glaspie, in his effort to avoid the death penalty, told the version of events that was used in prosecuting Brown. Joubert, after he heard the details of Glaspie's confession, mirrored Glaspie's story (substituting Glaspie for Joubert as the gunman who killed Alfredia Jones). Report at 144. However, Joubert later recanted and gave a detailed account to law enforcement naming Jero Dorty – *not* Brown – as the third man involved in the crimes. Report at 144-148.

13. *"Brown paid Wilbert Green (Cowboy Will) five dollars to drive him to his girlfriend's apartment."* Rizzo's Response at 3.

REBUTTAL:

Green originally said that sometime after 11:00 a.m. he gave Brown a ride from the VA to Dockery's apartment. [Note: This would not place Brown any more at the scene of the murders than Green or anyone else.] However, Green later signed an affidavit where twice (on a one page document) he swore that his ride to Brown occurred "not on the day of the crime, but on the next day." He later went back to his original version of the story in meetings with law enforcement, but would be subject to cross-examination regarding his affidavit in any future proceeding. Report at 81, 123-124.

14. "*Brown told Dockery to tell the grand jury that he was home at 8:30 a.m. on the day of the murders." "As instructed, Dockery testified to the grand jury that Brown was asleep on her couch when she left home at 8:30 a.m.…*" Rizzo's Response at 3.

REBUTTAL:

Dockery told the Grand Jury that Brown was asleep on her couch, and she stuck to her testimony that day despite repeated threats from Rizzo and the Grand Jury. See Transcript excerpts pages 59-74 of Report. However, after spending 7 weeks in jail on perjury charges filed by Rizzo, with bail set too high for her to pay, she changed her story to match Rizzo's narrative. Report at 103-104. She testified against Brown at trial, wearing the ankle bracelet required by Rizzo as part of her release from jail.

After trial Dockery recanted her trial testimony, telling law enforcement that she only changed her original Grand Jury testimony because the State said they were going to take away her children. Report at 108. She said whenever the Grand Jury would take a break, Rizzo would take her into another room and threaten her and her children. *Id*. In her latest statement to HPD investigators, she reiterated that she originally told the truth to the Grand Jury, but Rizzo pressured her to change her statements. Report at 109.

15. "…the large number of witnesses that placed Brown at the VA apartments…." Rizzo's Response at 4.

REBUTTAL:

With the possible exception of Wilbert Green (discussed in number 8 above), who has himself told different versions, no witnesses remain in the case who place Brown at the VA apartments shortly before or shortly after the murders. The statements of all major witnesses in the case are on pages 84-175 of the Report.

16. *"While in jail, Dockery met Shondo, AKA Patricia Williams." "Shondo said that she saw Brown, Joubert, and Glaspie at the VA on the day of the murders. Shondo described them as 'her homeboys.'" Dockery told police that after speaking with Shondo in the jail, she put it together who she was and that it was her apartment that Dewayne [Brown] called from on the day of the robbery and murder." "At approximately 10.00 Brown called and told Dockery that he was at Shondo's house."* Rizzo's Response at 4, 5.

REBUTTAL:

Brown has never strayed from his original statement to investigators that he was at Ericka Dockery's house on the morning in question. Report at 94. This is confirmed by the testimony of Erica Dockery's then 18 year old nephew Reginald Jones, who was playing video games downstairs that morning with a clear view of the door and saw no one enter or leave, and saw Brown come downstairs later in the morning. Report at 45-46; 140-141.

Williams (who denies her nickname is "Shondo") was interviewed five times over a twelve year period. Report at 45, 171-174. Four of those five times were law enforcement interviews. In each interview, Williams consistently maintained that two men, and only two men, were in her apartment at the time of the crucial 10:07 a.m. phone call to Erica Dockery's apartment: Glaspie and Joubert. She knew both men personally, and they had used her phone before. She did not know Alfred Dewayne Brown, and did not recognize his photograph. She did not see the man police identified as Brown at the VA that day.

Dockery was desperate to find a way out of jail (after 7 weeks on unproven "perjury" charges) and back into Rizzo's favor. In none of her prior meetings with law enforcement, with Rizzo, and with the

Grand Jury did Dockery *ever* mention *any* memory of Brown saying he called her on the morning in question from "Shondo's house." If she said anything like that earlier it would have been hugely important to law enforcement (inconsistent with Brown's alibi) and they certainly would have made a note of it. Her first mention of this alleged "memory" was on December 18, 2003 – nine months after the crimes.

When Patricia Williams was asked about mentioning her "homeboys" to Dockery while they were both in jail, she said she was talking *only* about Glaspie and Joubert, *not* Brown. Report at 172-173. This is consistent with Williams's prior statements.

17. "*When she (Dockery) visited him (Brown) in jail, he admitted to her "he was there."* Rizzo's Response at 5.

REBUTTAL:

Dockery's testimony is detailed in the Report pages 59-78 and 103-110. This particular statement referenced by Rizzo was never alleged by Dockery until after she spent 7 weeks in jail on perjury charges Rizzo filed against her. Later she recanted this statement and said Brown did *not* tell her he was at the crime scene. *Id.* at 107-108.

18. "…*George Powell (JuJu) who placed Brown at the VA apartments at approximately 8:30 on the morning of the [sic] April 3, 2003*…" Rizzo's Response at 6.

REBUTTAL:

George "Ju-Ju" Powell's statements and testimony are detailed in the Report on pages 150-155. The police summary of their interview of Powell at 1:20 a.m. on April 4, 2003 is consistent with Rizzo's statement above. However, Powell told a different story the very next day, saying he did not see Brown until later. During Joubert's trial, Powell testified he was taking "handlebars" (Xanax) on the day in question – while drinking alcohol. He said he did not see Brown until sometime later, and denied memory of his initial statement. During Brown's trial, Powell said that he did not see Brown at all on the *morning* of the murders. He added that he was up until 4:00 a.m. on the morning of the crime, high on Xanax and alcohol, and that he was stoned at the time of his initial police interview. In his latest police

interview, Powell said he did not see Brown at all the *entire day* of the murders.

19. *"Just to the matter one step further, assume that someone has communicated with Kim Ogg or the Harris County District Attorney's Office stating that Brown 'told me that he did not make the call to his Girlfriend's work it was the (2) boys that were there at the house…'." "…it does appear that these (communications) have never been investigated…"* Rizzo's Response at 17.

REBUTTAL:

The author of these "communications" is jailhouse "Witness A." The investigation of Witness A is described on pages 175-179 of the Report, and the undersigned personally interviewed Witness A with Detectives from HPD homicide in the Polunsky Unit in Livingston, Texas. Witness A is on death row for capital murder. Because Brown and Witness A were not in the same pod or section during the time Witness A claims Brown spoke to him, the conversation could not have occurred as Witness A reported.

Witness A started writing letters about Brown and the three-way call a few days after Harris County filed a motion to dismiss Brown's civil suit on that basis. The County's motion included the argument that Dockery's nephews may have patched in the second leg of the three-way call. (As discussed above, the County's motion does not comport with the evidence in this case and has now been rejected by the District Attorney). The County's motion was widely reported in the media at the time, both in the Houston Chronicle and local TV news stations. Witness A claims to do "legal work" for the other inmates.

Witness A has written many letters to local authorities claiming insider knowledge, and containing various threats as well as demands for compensation. When I met with him with HPD Detectives, he was highly irrational, with rapid, deeply emotional mood swings. He did not provide any useful information about the Brown case.

20. "If the District Attorney wants to set a cop killer free they can do so without laying it on the back of a 27-year public servant." Rizzo's Response at 23.

REBUTTAL:

Brown has been free since June 8, 2015. On that day, the 351st District Court granted the State's motion to dismiss the case against

Brown. DA Devon Anderson, Harris County District Attorney at that time, said "*We cannot prove this case beyond a reasonable doubt, therefore the law demands that I dismiss this case and release Mr. Brown*." On March 1, 2019, Harris County District Attorney Kim Ogg accepted the conclusion of the Report on page 83: "By clear and convincing evidence, no reasonable juror would fail to have a reasonable doubt about whether Brown is guilty of murder. Therefore, his case meets the legal definition of 'actual innocence.'" On May 3, 2019, Judge George Powell of the 351st Judicial District signed an Amended Judgment declaring Brown "actually innocent" as a matter of law.

For Rizzo to call Brown a "cop killer" at this stage reveals both his desperation and his bias. That is the mindset that likely made him feel it was somehow appropriate to withhold crucial Brady evidence from the defense, in violation of the U.S. Constitution and a prosecutor's ethical duty to justice.

Before June 8, 2015 – due to Rizzo's misconduct – Brown spent nearly twelve years in prison, nearly nine of which he was awaiting execution by lethal injection. This is a serious matter which merits the Bar's careful consideration.

VII RIZZO'S PERSONAL STATEMENT

Concurrent with Rizzo's attorney's response ("Rizzo's Response") described above in Section VI and attached hereto as Exhibit 6, Rizzo himself signed a nine page personal statement dated September 17, 2018 concerning the prior grievance ("Rizzo's Statement"). A copy of Rizzo's Statement is attached as Exhibit 7. Rizzo's statement was not signed under oath.

Much of Rizzo's Statement overlaps Rizzo's Response – it contains many of the same inaccuracies - and the same rebuttal points described in Section VI above apply. However, it does contains some additional claims, which are addressed as follows.

Statements pertaining to the withheld Dockery landline records:

1. *"We maintain an open file." "…I gave all the defense attorneys involved in the Jones/Clark murder cases a room to read the whole file and examine all of the evidence in the case."* Rizzo's Statement at 1.

REBUTTAL:

This is irrelevant to the grievance. Rizzo is not accused of failing to provide pre-trial file DA access to defense counsel. According to him, he did so. By that time it is highly unlikely the Dockery landline phone records were in the DA's file (if, indeed, they were ever there in the first place.) As explained in the Report, pages 17-22, the original Dockery landline records were filed in the HPD file in spring 2003 by Officer Breck McDaniel, as observed by two other witnesses. At some point, the HPD file was copied for the DA's use. In 2013 the records were in neither the HPD file nor the DA file. It defies credulity to think that the one item of evidence described by police to ADA Rizzo as consistent with Brown's alibi "accidentally" became missing later. The landline records had to have been removed from the HPD file before it was copied for the DA, or from both files later. Either way, Rizzo knew about the existence of the evidence, knew that it was Brady, and decided not to disclose it to the defense and the court.

2. "*…Breck McDaniel…states that he received court orders from both me and Craig Goodhart. This supports my belief that Goodhart actually wrote the application and order for the 10:08 record."* Rizzo's Statement at 1.

REBUTTAL:

Rizzo' Statement completely ignores the 3/22/2003 email from McDaniel – addressed only to Rizzo – describing the 10:08 phone call and attaching the application and order. Goodhart was not cc'd on the email, and there would have been no reason for McDaniel to blind carbon copy him. If Goodhart copied McDaniel's attached application and order (deleting only the "CCP" cite that McDaniel inquired about), and filed them, he had to have done so at Rizzo's request. Rizzo does not deny that the signature on the documents is his. He read the email and was fully aware of its contents. Report at 6-15.

Rizzo's Statement also ignores the express language of McDaniel's 5/2/2003 Supplemental Offense Report: "IT SHOULD ALSO BE NOTED THAT OFFICER MCDANIEL NOTIFIED A.D.A. RIZZO OF THE AVAILABILITY OF THESE RECORDS AND THE VAST AMOUNT OF DATA THAT THEY REVEAL. FURTHER, OFFICER MCDANIEL AVAILED HIMSELF TO A.D.A RIZZO FOR ANY FURTHER ANALYSIS OF THOSE RECORDS." (Emphasis in original). Report at 16-17.

McDaniel stated in the Supplemental Offense Report that he analyzed "LAND LINES" as well as cellular phones. A.D.A. Goodhart was not mentioned by McDaniel as being a recipient of McDaniel's explanation of the records and McDaniel's offer of future availability to discuss them. Only Rizzo was mentioned. Rizzo's efforts to shift the blame to Goodhart and others are without merit.

Statements pertaining to the Brown case generally:

3. "*Alfred Brown was identified by 6 people, including both co-defendants, as having been at the VA before and afterward…Lamarcus Colar…George Powell (JuJu)…Sharonda Simon…Wilbert Green…*" Rizzo's Statement at 2.

REBUTTAL:

This is incorrect, particularly to the degree that Rizzo implies that any such evidence currently exists. The Report details on pages 84-179 every statement of each of the 38 major witnesses. No witnesses currently place Brown at the Villas Americana apartments during the morning before the murders (except uncorroborated alleged accomplice Glaspie, who said whatever he needed to say to avoid the death penalty). (Note: in a lengthy interview with law enforcement, Joubert identified Jero Dorty as the third man. Since then, he has never re-implicated Brown.) No witness except Wilbert Green places Brown at the Villa Americana after the murders, and Green signed a statement saying that he actually only saw Brown there the next day. (He later went back to the original version). Several other witnesses recanted, saying that they reported seeing Brown that day only because Rizzo threatened them with prosecution if they did not do so. For further detail, Complainant refers the Office of Disciplinary Counsel to the

pages of the report describing each witness, particularly each of the witnesses identified by Rizzo above.

4. "*Brown was also identified by Sheikah Afzal, a man who worked the furniture store next door to the murder scene, as Mr. Afzal put it 'almost 100%.' The defendants wandered around the furniture store prior to the murder waiting for Ms. Jones to arrive for work.*" Rizzo's Statement at 2.

REBUTTAL:

This is a false statement. Afzal's chronological statements and testimony are summarized on pages 79-80 and 84-86 of the Report, Exhibit 1. He told law enforcement that two black men entered his store shortly before the murders, that one man was tall and the other was shorter, and that he talked only to the tall man. Glaspie is 6'5'' and told law enforcement that he is the (tall) man who talked to Afzal.

In a 4/5/2003 line-up two days after the murders, Afzal was unable to identify the shorter man (who he did not talk to), but tried to identify the taller man he did talk to. Afzal failed to identify Glaspie, even though Glaspie was admittedly the tall man who talked to him. Instead, Afzal gave only a "*possible* ID" of 6'2" Brown, saying that Brown "*might* be" the tall man. Plainly, Afzal confused the two men, which is why he said "possible," and "might be." His story is directly inconsistent with the State's chief witness Glaspie.

During Joubert's trial in October 2004, Afzal's identification of Brown was even weaker. He said that he was not sure of the identity of the tall man he talked to. It "*seemed*" like Brown, but he was quick to point out "*I didn't have much time to talk to him, only a few words*."

One year later, after working with Rizzo to prepare for Brown's October 2005 trial, Afzal's memory somehow improved, and he said he was "pretty sure" the (tall) man he talked to was Brown, and said it was "80-85%" sure. This, of course, makes no sense. Rizzo's case rested largely on the testimony of Glaspie, who said <u>he</u> was the (tall) man who talked to Afzal.

5. *"According to the trial testimony, Joubert 'walked Ms. Jones in' with a gun. The two co-defendants then followed them in to the check cashing store…The computerized records matched Glaspie's testimony almost exactly."* Rizzo's Statement at 2.

REBUTTAL:

The only "trial testimony" Rizzo can possibly be referring to is from Glaspie, who swung a deal to avoid murder charges by testifying as Rizzo requested. As described in the Report pages 36-44, 79, and 116-122, his story wholly lacks credibility. The "computerized records" (including phone records and time-stamping of electronic doors, together with known distances and the necessary time to travel those distances) are key facts in proving Brown's actual innocence, as described in the Report on pages 36-44. They do not prove Brown was present at the crime scene. Indeed, they are solid proof that he was <u>not there</u>.

6. *"It should be noted that Brown never gave a statement when arrested nor did he attempt to give an alibi as has been widely reported in the media, to the best of my knowledge."* Rizzo Statement at 3.

REBUTTAL:

This is a false statement. On 4/4/2003, shortly after his arrest, Brown told law enforcement that he was in Ericka Dockery's apartment at the time of the murders, and that Erica Dockery's nephews (Reginald Jones and Rubin Jones) could verify his story.

7. "*All copies of phone records…were to be logged into the case file…" Breck McDaniel did not do this with respect to the phone records at issue in this matter."* Rizzo Statement at 3. "*None of the detectives at HPD Homicide were made aware of the 10:08 a.m. phone record." Id*. at 6. "*The lead Homicide detectives were not aware of this record, or aware such a record could be obtained back in 2003." Id*. at 7.

REBUTTAL:

This are false statements. Officer McDaniel put the original copy of the Dockery landline phone records in the official HPD file, as

attested by Officer D.L. Robertson (identified by Rizzo on page 3 of his statement as a lead homicide detective, Deputy U.S. Marshall Richard Hunter, and McDaniel himself. Report at 17-22.

CONCLUSION

Governor Rick Perry, in publicly addressing the Alfred Dewayne Brown case, had the following thoughts:

> *You could say this story has a happy ending, because Alfred was released. But his life was almost ruined because of an overzealous prosecutor who concealed exonerating evidence. And Ericka's* (Ericka Dockery's) *children were put in harm's way because of a grand jury that acted as the arm of the prosecution, rather than as an independent check on government power…Anyone wielding the power of the state faces the temptation to abuse it. And when it comes to prosecutors, there are clearly bad apples in the system who care more about indicting someone – anyone – than they care about convicting the right person.*

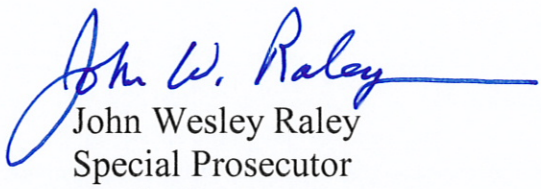
Remarks to American Legislative Exchange Council, July 27, 2016.

The evidence is overwhelming that former ADA Rizzo was personally made aware of the existence of documentary evidence consistent with the alibi of an accused man, decided not to reveal the evidence to the defense and the court, and argued around it at trial. Because of Rizzo's misconduct, an innocent man was sent to death row. The concealed Brady evidence was crucial. The rediscovery of the evidence after nearly 12 years of Brown's incarceration led to Brown's release, the dismissal of the charges against Brown, and a finding by the DA, entered by the District Court, that Brown is "actually innocent" as a matter of law.

This grievance is of significant public importance. *Brady v Maryland* and the rules enforcing it were designed to promote an accused's Constitutional right to a fair trial and reduce the possibility that innocent people will be convicted. When facts come to light showing that a prosecutor was aware of exculpatory evidence, chose not to reveal it to the defense and Court, and presented arguments at trial as if it did not exist, there must be consequences if the rule of law is to be preserved. ADA Daniel Rizzo, like DA Charles Sebesta in the Anthony Graves case, and DA Ken Anderson in the Michael Morton case, should be held accountable for his misconduct. As Michael Morton once said: "Accountability works. It is what

balances... it is social glue. Because if you're not accountable, you can do anything." "Evidence of Innocence – The Michael Morton Story," CBS *60 Minutes,* March 25, 2012.

Very truly yours,



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