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EX PARTE

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IN THE CRIMINAL DISTRICT

COURT NO. 1 OF DALLAS

JOYCE ANN BROWN

COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Applicant, JOYCE ANN BROWN, hereinafter referred to as JOYCE ANN BROWN and files this her Application for Writ of Habeas Corpus pursuant to Article 11.07, C.C.P., and in support of said Application shows the Court the following:

I.

This Writ is filed in behalf of JOYCE ANN BROWN, an innocent 42 year old woman who has been unjustly imprisoned for over 9 years.

JOYCE ANN BROWN'S conviction is the direct result of the illegal, unprofessional and unethical conduct of PROSECUTOR NORMAN KINNE, who, acting in concert with Martha Jean Bruce, and others, suppressed material evidence favorable to JOYCE ANN BROWN during her trial.

JOYCE ANN BROWN has set forth a summary of the relevant trial testimony in Exhibit 1, as a predicate to the allegations in this Application.

JOYCE ANN BROWN is currently confined in the Gatesville Unit pursuant to a judgment of conviction in Cause #F80-9798H, out of the Criminal District Court Number One of Dallas County, Texas, for the offense of aggravated robbery. JOYCE ANN BROWN received a sentence of confinement for life in the Texas Department of Corrections. Exhibit 2.

JOYCE ANN BROWN has become the victim of a tragic miscarriage of justice. An objective review of all facts and circumstances surrounding this case demand that she be granted a new trial.

II.

In summary, JOYCE ANN BROWN'S conviction in this cause was predicated upon and the direct result of the following acts and omissions:

- (1) PROSECUTOR NORMAN KINNE suppressed evidence favorable to JOYCE ANN BROWN;
- (2) PROSECUTOR NORMAN KINNE intentionally used testimony which he knew or reasonably should have known was false and perjurious;
- (3) PROSECUTOR NORMAN KINNE suppressed evidence which would have served to impeach and render unbelievable, a key prosecution witness, Martha Jean Bruce;
- (4) PROSECUTOR NORMAN KINNE acted in concert with Dallas Police Officer T.J. Barnes, to suppress evidence favorable to JOYCE ANN BROWN.

III.

In support of the allegations contained in paragraph II, JOYCE ANN BROWN shows the Court the following facts:

TESTIMONY OF MARTHA JEAN BRUCE:

- (1) PROSECUTOR NORMAN KINNE called Martha Jean Bruce as a rebuttal witness. PROSECUTOR NORMAN KINNE had caused a bench warrant to issue for Martha Jean Bruce to bring her from the Texas Department of Corrections to the Dallas County Jail to testify against JOYCE ANN BROWN. In doing so, PROSECUTOR NORMAN KINNE misrepresented to the Honorable Ron Chapman, Judge of the Criminal District Court Number One of Dallas County, Texas that

Martha Jean Bruce had been subpoenaed as a witness for the State in the case of State of Texas vs. Rene Taylor, Cause Number F80-6314-LH, in which Rene Taylor was charged with capital murder; and that the capital murder case was set for trial in the Criminal District Court Number One for September 26, 1980 at 9:00 a.m.. Pursuant to PROSECUTOR NORMAN KINNE'S misrepresentations, Judge Ron Chapman issued a bench warrant in order that the Sheriff of Dallas County would transport Martha Jean Bruce from Mountain View Unit at Gatesville, Texas to the Dallas County Jail in order that she may testify as a witness in the case involving Rene Taylor. Exhibit 3.

At the time PROSECUTOR NORMAN KINNE caused this bench warrant to be issued, Rene Taylor was a fugitive from justice and her case, while pending, had certainly not been set for trial on September 26, 1980 or any other date. PROSECUTOR NORMAN KINNE clearly utilized this unauthorized and improper subterfuge for his own devious reasons. PROSECUTOR NORMAN KINNE'S misrepresentations to the Court circumvented proper court procedure and the subpoena process and had to be designed to hide his intentions of calling this witness from the Court and from the defense in this case.

(2) Martha Jean Bruce testified that she was currently serving a 5 year prison term for attempted murder, having pled guilty before the Court on June 30, 1980. In 1975 Bruce was convicted of attempted burglary and received a 3 year sentence; In 1971 Bruce was convicted for shoplifting and given a 2 year probated sentence; and prior to that had received a 30 day jail term for misdemeanor shoplifting.

(3) Bruce testified that she was arrested on the attempted murder case on May 6, 1980 and met JOYCE ANN BROWN in the city jail on that date.

(4) Bruce testified that she had a conversation with JOYCE ANN BROWN concerning this aggravated robbery, and that JOYCE ANN BROWN told her she worked at a furrier store to learn which furs were valuable and that she planned this robbery; That JOYCE ANN BROWN went to Denver and rented a car; That JOYCE ANN BROWN had left a dress to be cleaned and intended to commit the robbery when they went to pick it up; That after the robbery the furs were placed in plastic garbage bags and transferred to a truck belonging to a fellow named Jerry; And that JOYCE ANN BROWN then went back to work; That if JOYCE ANN BROWN was convicted, she would tell on the others involved; That during the robbery she wore a blue dress and a black wig.

(5) On cross-examination of Martha Jean Bruce, Bruce was specifically asked if these were the only offenses for which she had been convicted. PROSECUTOR NORMAN KINNE interrupted and gave to defense counsel a Texas Department of Public Safety "RAP sheet" on Martha Jean Bruce. Defense counsel again asked the question and Martha Jean Bruce responded that these were her only convictions on her record.

(6) It has now been discovered that Martha Jean Bruce was arrested July 15, 1979 for making a false report to a police officer. On March 13, 1980 Martha Jean Bruce pled guilty before the Court to charges that she intentionally and knowingly made a report to J.D. Philpott, a peace officer, of an incident within the officer's concern, namely a theft, knowing the incident did

not occur. Punishment was assessed by the Court at confinement in the Dallas County Jail for 10 days with no fine. The conviction occurred in Dallas County. Exhibit 4.

(7) Martha Jean Bruce testified in this case within 6 months of the date of this false statement conviction. Martha Jean Bruce clearly perjured herself by failing and refusing to reveal this very relevant and material conviction for lying to the police to the defense.

(8) Had Martha Jean Bruce not testified falsely and not perjured herself, defense counsel could have utilized the conviction for making a false report to a peace officer to impeach Martha Jean Bruce. Her credibility as a witness before the jury was a critical issue.

(9) This type of conviction would certainly have effectively impeached Martha Jean Bruce on two bases.

First, Martha Jean Bruce lied to the Court and to the jury by failing to divulge this recent conviction.

Second, the nature of this conviction would have been extremely beneficial to the defense, as it involved the conscious and deliberate lying and fabrication to the police.

(10) Thus, the jury in this case was deprived of knowing that Martha Jean Bruce had previously lied to the police on at least one prior occasion.

(11) PROSECUTOR NORMAN KINNE knew or should have known about this prior conviction. PROSECUTOR NORMAN KINNE is certainly charged with the responsibility of obtaining current information concerning prior convictions of a prosecution

witness, just as PROSECUTOR NORMAN KINNE would have done if the witness had been a defense witness. This is particularly true in view of specific written and verbal requests by defense counsel for this information.

(12) PROSECUTOR NORMAN KINNE is certainly charged with the knowledge and responsibility of knowing of the existence of this prior conviction because it occurred in Dallas County and because the prosecution of Martha Jean Bruce was done by a fellow prosecutor with the Dallas County District Attorney's Office who was assigned to the Martha Jean Bruce case.

(13) Because of the acts and omissions of Martha Jean Bruce and of PROSECUTOR NORMAN KINNE, the jury in this cause was totally deprived of essential, relevant and material evidence to impeach Martha Jean Bruce which would certainly have assisted the jury in carrying out the jury's responsibility in judging the credibility and believability of Martha Jean Bruce in this case.

(14) Several members of the jury in this case, after learning of this false statement conviction of Martha Jean Bruce, have stated that each would have voted not guilty had they known of this prior conviction. Exhibits 5 and 6 signed by Craig Mark Hoernke and Daniel W. Peeler respectively.

In his statement, Mr. Peeler emphasized that had he been informed about Martha Jean Bruce's prior conviction for lying, his decision would have been a vote of "not guilty" in the JOYCE ANN BROWN case, as it was the testimony of Martha Jean Bruce that influenced him to vote "guilty" in the first place.

(15) At least one other juror, Charles Henry Miller, has stated publicly to the news media that the conviction of Martha

Jean Bruce for lying would have affected his judgment had he known about said conviction at the trial of JOYCE ANN BROWN.

ALBUQUERQUE, NEW MEXICO ARMED ROBBERY

(16) Prior to and during the trial of this case, a criminal investigation was ongoing concerning a number of armed robberies of furriers and thefts of furs from furriers in the midwest. The investigation involved law enforcement authorities in Denver, Colorado and Albuquerque, New Mexico. Law enforcement authorities in Dallas, Texas and PROSECUTOR NORMAN KINNE knew or should have known about this criminal investigation, which involved a number of individuals including Rene Taylor.

(17) On March 11, 1978 two Negro females entered Lloyd's Furrier store in Albuquerque, New Mexico. They discussed the purchase of various furs with the two employees and then robbed the two employees at gunpoint and stole at least 35 furs by placing them in four plastic garbage bags similar to the bags used in this case. Exhibit 7.

(18) A nearby neighbor of the Lloyd's Furrier store noted and gave the license plate number of the getaway car which bore Colorado plates to the Albuquerque law enforcement authorities who in turn contacted Denver, Colorado law enforcement authorities on the next day, March 12, 1978. The car was registered to Debra Gail Allen, also known as Rene Taylor.

(19) Subsequently, on March 12, 1978, the Denver Police Department sent the photograph of Rene Taylor to Detective Quintana in Albuquerque, but sent Rene Taylor's RAP sheet under separate cover. The two employees/victims identified Rene

Taylor's photograph as that of the robber with the gun. This occurred on March 16, 1978.

(20) At least one fur taken from Rene Taylor's Denver motel room by the Denver police on March 15, 1978 was later identified as having been stolen in this Lloyd's Furrier armed robbery.

(21) Denver Police Department records showed that Lorraine Germany was a known associate of Rene Taylor and therefore a photograph of Lorraine Germany was forwarded to the Albuquerque, New Mexico law enforcement authorities on April 4, 1978. One of the victims in the Lloyd's Furrier armed robbery, that is, the lady who waited on Lorraine Germany for about 20 minutes prior to the robbery, identified Lorraine Germany's photograph as the second robber who had worn navy blue pants during the commission of the robbery.

(22) In June of 1979, Lorraine Germany pled not guilty to the aggravated robbery offense, and a jury subsequently found her not guilty of that offense.

(23) In February of 1989, James McCloskey and Richard Reyna interviewed Lorraine Germany in prison concerning the JOYCE ANN BROWN case. At this time Lorraine Germany frankly admitted that she had in fact participated in the armed robbery of the Lloyd's Furrier store in Albuquerque, New Mexico and admitted that she had worn navy blue pants during the robbery. She made further incriminating statements, realizing that once she had been acquitted she was further immune from any prosecution for that offense.

(24) James McCloskey interviewed Rene Taylor in February of 1989, in the Texas Department of Corrections. Rene Taylor stated

to him that she and Lorraine Germany had committed the Albuquerque fur store armed robbery together and that after that robbery Lorraine Germany had flown back to Denver, Colorado to establish an alibi and that Rene Taylor had driven back to Denver, Colorado with the fur coats.

(25) During the process of this investigation, on April 4, 1978, Denver police authorities sent a Memorandum to the Albuquerque, New Mexico authorities. The Memorandum stated in part that Lorraine Germany was a known associate with Rene Taylor (Debra Allen) who was selling the coats in Denver and that the police saw her the day that the police took the fur coat from Rene Taylor's (Debra Allen's) Denver motel room.

(26) Court records show that on March 28, 1975 Rene Taylor (Debra Gail Allen) was caught stealing a fur coat from Stanley Furs in Denver. For the commission of this offense she had rented a car in her own name from Dollar Rent-A-Car. Exhibit 8.

(27) The Denver Police Department's warrant for Rene Taylor's arrest dated May 15, 1988⁹ shows that the detective involved believed that "subject wanted for capital murder in Dallas and aggravated robbery in Albuquerque. Subject involved in armed robberies of furrier stores through midwest. Subject commits robberies with another black female accomplice". Exhibit 9.

(28) Police records show that Lorraine Germany has been in prison since September 17, 1986 under a 16 year sentence for the armed robbery of a Wendy's restaurant in Boulder, Colorado.

(29) As in the Danziger armed robbery, a scarf was found in the abandoned getaway vehicle behind the driver's seat on the backseat floor.

(30) JOYCE ANN BROWN has reason to believe that Lorraine Germany has had a number of contacts with law enforcement authorities in Houston and Dallas between 1982 and 1986.

(31) In November of 1988 Rene Taylor told Richard Reyna and James McCloskey that her New Mexico associate was the same as her associate at the Danziger robbery, although she would not reveal the name.

(32) Rene Taylor (Debra Gail Allen) was never prosecuted for the Albuquerque, New Mexico robbery as the New Mexico District Attorney's Office dismissed the case in view of her life sentence which she received in Dallas, Texas as a result of the Danziger armed robbery, in October of 1981. Exhibit 10.

(33) PROSECUTOR NORMAN KINNE and Officer Barnes knew that Rene Taylor was involved in the Danziger armed robbery, particularly because her fingerprints were found in the getaway car and elsewhere.

(34) Officer Barnes traveled to Denver, Colorado shortly after the Danziger armed robbery in order to investigate the Dallas armed robbery and to track down leads and confer with law enforcement authorities concerning Rene Taylor and JOYCE ANN BROWN.

(35) PROSECUTOR NORMAN KINNE and Officer Barnes knew or should have known concerning the ongoing criminal investigation described above, and specifically involving Rene Taylor, in Albuquerque, New Mexico and Denver, Colorado.

(36) At no time did PROSECUTOR NORMAN KINNE or Officer Barnes prior to trial or during the trial communicate to defense counsel or to JOYCE ANN BROWN any of the information concerning this ongoing criminal investigation involving Rene Taylor and Lorraine Germany.

(37) Had any of this factual information been conveyed to defense, JOYCE ANN BROWN would have been able to cross-examine the Complainant Danziger by using the photograph of Lorraine Germany and demonstrating to the Complainant and to the jury its striking likeness to the appearance of JOYCE ANN BROWN.

(38) The defense and JOYCE ANN BROWN, in addition, would have been able to bench warrant Lorraine Germany to Dallas, Texas and present her to the Complainant and to the jury in person and thus showed that another known Negro female very similar in physical appearance (and who had previously worn navy blue pants) was the real perpetrator of the Danziger armed robbery; or at least demonstrate the striking similarity such as to further prove to the jury that at least a reasonable doubt existed as to the guilt of JOYCE ANN BROWN.

(39) The photograph of Lorraine Germany by itself demonstrates the striking similarity between the likeness of Lorraine Germany (now in prison for armed robbery) and the likeness of JOYCE ANN BROWN. This striking similarity would further have demonstrated to the jury that a mistake had been made when the Complainant Danziger identified JOYCE ANN BROWN as one of the robbers in this case.

(40) JOYCE ANN BROWN respectfully submits that PROSECUTOR

NORMAN KINNE and Officer Barnes have suppressed material favorable evidence which could have exonerated JOYCE ANN BROWN at her trial and which certainly could have affected the outcome of this trial in a substantial way.

MARTHA JEAN BRUCE'S "DEAL"

(41) Subsequent to the trial of this case, PROSECUTOR NORMAN KINNE secured a commutation of sentence which resulted in the release of Martha Jean Bruce from the Dallas County Jail in the early part of 1981.

(42) Prior to and during the trial of this cause, PROSECUTOR NORMAN KINNE failed and refused to disclose the true extent of the arrangement or deal offered to Martha Jean Bruce and failed to fairly and candidly disclose the extent of his intentions to help Martha Jean Bruce after she testified in this cause.

(43) In addition, Martha Jean Bruce, deliberately again committed perjury in testifying that she had never been promised anything in the way of assistance by any law enforcement officer or any prosecutor.

(44) During the trial of this case, on direct examination PROSECUTOR NORMAN KINNE asked Martha Jean Bruce, as his final question, "I ask you whether I have promised anything or forced you to or threatened or coerced you in any way to testify to the facts that you have told this jury"?. Martha Jean Bruce responded: "No, you haven't done nothing".

(45) On cross-examination by the defense, Martha Jean Bruce testified that the police and the District Attorney's Office did not encourage her to talk or cooperate by promising anything and

she did not expect a time cut or even a letter written by the District Attorney's Office to the Board of Pardons and Paroles recommending early parole; and that she expected nothing for her testimony.

(46) On redirect examination by PROSECUTOR NORMAN KINNE, Martha Jean Bruce testified that she did not talk to the Dallas County District Attorney's Office Investigator Mr. Christian or PROSECUTOR NORMAN KINNE about her testimony until she was returned to Dallas County and placed in the Dallas County Jail immediately prior to this trial.

(47) The trial testimony shows that the State rested its case in rebuttal.

(48) The defense presented its Brady Motion asking for any favorable and exculpatory evidence in behalf of JOYCE ANN BROWN. PROSECUTOR NORMAN KINNE responded that there was none that had not already been given. The defense asked PROSECUTOR NORMAN KINNE to state into the record whether in fact there were any promises or inducements offered or suggestions of benefit or reward to Martha Jean Bruce made at any time prior to the time she testified in the case.

(49) FOR THE FIRST TIME, PROSECUTOR NORMAN KINNE stated: "I told her that I couldn't promise her anything, but that I would try to help her if she told the truth".

(50) The defense recalled Martha Jean Bruce and specifically asked her whether PROSECUTOR NORMAN KINNE had told her "that he would try to help (her) or might try to help (her) if (she) would tell the truth". Martha Jean Bruce said no.

(51) In rebuttal, the defense called Delores Plant, a Dallas County Deputy Sheriff. She testified that she heard PROSECUTOR NORMAN KINNE advise the Court that prosecutor NORMAN KINNE "would try to help (Martha Jean Bruce) if she would tell me the truth" and that she had had custody of Martha Jean Bruce and had had occasion to overhear a portion of the conversation as to promises made by PROSECUTOR NORMAN KINNE to Martha Jean Bruce and in fact this statement was overheard being made by PROSECUTOR NORMAN KINNE to Martha Jean Bruce.

(52) Immediately after the trial, PROSECUTOR NORMAN KINNE drafted a letter for the signature of Judge John Mead, who presided over the trial of Martha Jean Bruce at the time she entered her plea of guilty in return for a negotiated sentence of 5 years for attempted murder. Exhibits 11 and 12.

(53) PROSECUTOR NORMAN KINNE drafted a second letter for the signature of Criminal District Attorney Henry Wade, which likewise asked for a commutation of sentence. Exhibit 13.

(54) The statement of the Chairperson of the Texas Board of Pardons and Paroles clearly indicates that these two letters caused the Texas Board of Pardons and Paroles to commute the sentence of Martha Jean Bruce immediately. Exhibit 14.

(55) It is clear from the content of these two letters that PROSECUTOR NORMAN KINNE gave substantial assistance to Martha Jean Bruce immediately after the trial of JOYCE ANN BROWN by virtue of the fact that he asked for a full and complete commutation of sentence in order to secure her almost immediate release.

(56) Even more significant is the fact that each of the letters contains substantially FALSE STATEMENTS without which a commutation of sentence for Martha Jean Bruce would not have been legally possible. PROSECUTOR NORMAN KINNE stated in each of the letters that at the time Martha Jean Bruce entered her plea of guilty to attempted murder and received a 5 year sentence, that the prosecution was not aware that the Complainant had a weapon. Now that the prosecution has learned that the Complainant had a weapon at the time of the commission of the offense, the 5 year sentence was excessive and should be immediately commuted.

(57) In actuality, the counsel for Martha Jean Bruce was able to negotiate the plea bargain of 5 years imprisonment in return for a plea of guilty only because defense counsel for Martha Jean Bruce was able to demonstrate to the prosecutor prior to the plea of guilty that the Complainant had a weapon. Otherwise, because of her extensive prior criminal record, the plea recommendation by the prosecutor would have been substantially more. Exhibit 15.

(58) Because of these false representations by PROSECUTOR NORMAN KINNE, Martha Jean Bruce received a commutation of sentence and was released significantly earlier than she otherwise would have been. Exhibit 16.

(59) PROSECUTOR NORMAN KINNE not only gave significant and substantial assistance to Martha Jean Bruce which resulted in a time cut, but PROSECUTOR NORMAN KINNE also resorted to false statements to support the letters to the Texas Board of Pardons and Paroles in order to accomplish what otherwise would have been legally impossible.

(60) The rules of the Texas Board of Pardons and Paroles specifically provide that a commutation of sentence for a person convicted of a felony can be granted under certain prescribed circumstances. The convicted person needs the recommendation of at least two of the trial officials, which may be the trial judge and the District Attorney.

In addition, the requirements of a recommendation of trial officials for commutation of sentence must include:

(1) a statement that the penalty now appears to be excessive.

(2) a recommendation of a definite term now considered by the officials as just and proper, and

(3) a statement of the reasons for the recommendation based upon facts directly related to the facts of the case and in existence but not available to the Court or jury at the time of the trial.

(61) PROSECUTOR NORMAN KINNE directly circumvented the Rules and Regulations of the Texas Board of Pardons and Paroles, and suppressed from the defense and concealed from the jury the real arrangement or deal between PROSECUTOR NORMAN KINNE and Martha Jean Bruce at trial.

(62) In essence, PROSECUTOR NORMAN KINNE subverted the proper operation of the criminal justice system, thus depriving JOYCE ANN BROWN of any semblance of due process and a fair trial in this case.

(63) JOYCE ANN BROWN intends to show a minimum of at least one other situation in which PROSECUTOR NORMAN KINNE has engaged in a pattern of prosecutorial misconduct by failing and refusing

to divulge exculpatory evidence and/or evidence properly discoverable and useable by defense counsel to impeach.

THE OTHER FINGERPRINTS

(64) That several months ago, after the Dallas Morning News published assertions by Mr. James McCloskey that a comparison of Ms. Lorraine Germany's prints with prints from the robbery might clear JOYCE ANN BROWN, PROSECUTOR NORMAN KINNE apparently requested that the Dallas Police Department make such a comparison. PROSECUTOR NORMAN KINNE subsequently verbally advised the media that Lorraine Germany's prints did not match any of the 25 unidentified prints found on items connected with the robbery.

(65) JOYCE ANN BROWN respectfully submits that an expert fingerprint consultant of her own choice, such as Mr. George J. Bonebrake be allowed access to and an opportunity to make an independent examination of all of the fingerprints lifted by the law enforcement authorities in this case and to compare them with the prints of Lorraine Germany.

(66) Further, all of the prints lifted should be examined to determine whose fingerprints they actually are. It is believed that the facilities available to law enforcement authorities in Colorado are such that such a comparison can be conducted and such a determination made. For some reason, no such efforts have been attempted in this case as of this date.

IV. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Applicant JOYCE ANN BROWN prays that this Honorable Court order Respondent to show cause

why this Writ should not be granted and order production by the State of such papers, transcripts, statement of facts and order other records of the proceedings as may be necessary for proper determination of the issues involved in this cause; and to conduct a plenary hearing for determination of the issues in this cause; and after a determination of the facts, that Applicant's Application for a Writ of Habeas Corpus be granted and that Respondent be ordered to release Applicant from any further confinement pursuant to the conviction in Cause Number F80-9798H in the Criminal District Court Number One of Dallas County, Texas.

Respectfully submitted,



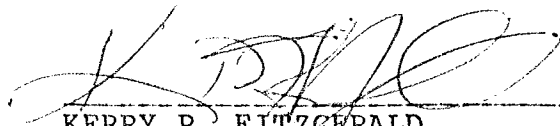
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CERTIFICATE OF SERVICE

I, Kerry P. FitzGerald, Counsel for Applicant JOYCE ANN BROWN, hereby certify that a true and correct copy of this Application for Writ of Habeas Corpus was hand delivered to John Vance, Criminal District Attorney, on the _____ day of

August, 1989.

A handwritten signature in dark ink, appearing to read 'K. P. Fitzgerald', is written over a horizontal line.

KERRY P. FITZGERALD
ATTORNEY AT LAW

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, appeared JOYCE ANN BROWN, Applicant, on the 4 day of August, 1989, and who being by me duly sworn did depose and state on her oath the following:

"My name is JOYCE ANN BROWN and I am the Applicant in the above styled and numbered Application for Writ of Habeas Corpus. I have read the above and foregoing Application, and I hereby swear that the facts contained therein are true and correct."

Joyce A. Brown
JOYCE ANN BROWN

SUBSCRIBED AND SWORN TO BEFORE ME THIS THE 4th DAY OF August, 1989.



Patsy J. Thompson
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

Typed/Printed Name of Notary:

PATSY J. THOMPSON

My Commission Expires:

01-28-92

NO. _____

EX PARTE

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IN THE CRIMINAL DISTRICT

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COURT NO. 1 OF DALLAS

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JOYCE ANN BROWN

*

COUNTY, TEXAS

MEMORANDUM OF LAW IN SUPPORT OF JOYCE ANN BROWN'S
APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE RON CHAPMAN, JUDGE, CRIMINAL DISTRICT COURT
NUMBER ONE, DALLAS COUNTY, TEXAS

COMES NOW the Applicant, JOYCE ANN BROWN, and submits this
Memorandum of Law in Support of her Application for Writ of
Habeas Corpus.

I.

Applicant JOYCE ANN BROWN'S Application for Writ of Habeas
Corpus is substantially based upon PROSECUTOR NORMAN KINNE'S duty
to disclose information and evidence to the defense prior to and
during the trial and his complete failure to do so. The evidence
and information takes the form of both exculpatory evidence and
impeachment evidence and the use of perjured testimony.

The prosecutor's duty to disclose originated in the Supreme
Court's opinion in Mooney v. Halahan, 294 U.S. 103 (1935). In
Mooney, supra, the Court enunciated the rule that the
prosecutor's knowing and intentional use of perjured testimony in
obtaining a conviction violated the Defendant's due process
rights and denied him a fair trial. Ex Parte Randall Dale Adams,
768 S.W.2d 281 (Tex. Cr. App. 1989).

In Alcorta v. Texas, 355 U.S. 28 (1957), this rule was
enlarged to prevent and prohibit the prosecutor's passive use of
perjurious testimony. The Court ultimately held that the
prosecutor's knowing failure to correct inculpatory, perjured

testimony also violated due process. In Napue v. Illinois, 360 U.S. 264 (1959), the Court further held that the prosecutor's knowing failure to correct perjured testimony, even if it relates only to the credibility of the witness, constitutes a violation of due process. United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980).

In Brady v. Maryland, 373 U.S. 83 (1963), the Court held that the suppression by the prosecution of evidence favorable to the accused upon request violated due process where the evidence was material either to guilt or to punishment, regardless of the good faith or bad faith of the prosecution.

In Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963), the Supreme Court stated 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 to punishment, irrespective of the good faith or bad faith of the prosecution".

"* * * Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts'. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile', to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169".

The three elements of a Brady violation are "(a) suppression by the prosecution after a request by the defense, (b) the

evidence's favorable character for the defense, and (c) the materiality of the evidence. Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972).

The disclosure required by Brady v. Maryland, supra is not a rule of discovery. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Rather, it is a rule of fairness and a constitutionally minimal prosecutorial obligation.

In Giglio v. United States, 405 U.S. 150 (1972), the Court found that the government's failure to disclose impeachment evidence was a violation of due process. In Giglio, the Court enunciated the standard for materiality by stating that if the false testimony could in any reasonable likelihood have affected the judgment of the jury, then it was sufficiently material to require a new trial.

In other words, if the evidence was disclosed and used affectively, would it make the difference between a conviction and an acquittal.

In this respect, the Court in Napue, supra stated that the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors "as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend".

In United States v. Bagley, 473 U.S. 667 (1985), the Supreme Court replaced the multiple materiality standards of Brady v. Maryland, supra and United States v. Agurs, 427 U.S. 97 (1976) and adopted a single materiality standard. No longer was the

Court to distinguish between specific requests for exculpatory or impeachment evidence and lack of requests for such evidence.

In Bagley, the government responded to a defense Discovery Motion by not disclosing any deals, promises or inducements to a witness. Years after the Defendant was convicted, it was discovered that the government's only witnesses had executed contracts to provide to the Bureau of Alcohol, Tobacco and Firearms information concerning his activities, collect evidence against him and testify against him in Court. The witnesses were promised monetary payments upon the accomplishment of this work.

Thus, the question presented in such situations is whether the evidence was "material in the sense that its suppression undermines confidence in the outcome of the trial". United States v. Bagley, supra at 3381; Ex Parte Adams, supra at page 20.

In United States v. Bagley, supra, the Supreme Court has provided the most current analysis concerning materiality and the Brady exculpatory evidence disclosure requirement. The Court stated:

"The Court has relied on and reformulated the Agurs standard for the materiality of undisclosed evidence in two subsequent cases arising outside the Brady context. In neither case did the Court's discussion of the Agurs standard distinguish among the three situations described in Agurs. In United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by government deportation of witnesses 'only if there is a reasonable likelihood that the testimony would have affected the judgment of the trier of fact'. And in Strickland v. Washington, _____ U.S. _____ (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'. Id., at _____

(slip op. 24). The Strickland Court defined a 'reasonable probability' as 'a probability sufficient to undermine confidence in the outcome'. Ibid.

We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the 'no request', 'general request', and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome".

In Ex Parte Adams, former prosecutor Mulder testified that he did not know one of the State's witnesses had identified someone other than the Appellant in a lineup, nor did he know that the officer in charge of the lineup had told this witness whom she should have identified. The Court in Ex Parte Adams found that this testimony was not sufficient to remove the taint of the prosecution's "knowing use of perjured testimony". The unanimous opinion emphasized:

"Further, whether the prosecutor had actual knowledge of the falsity of the testimony is irrelevant. If the prosecutor should have known is sufficient. Giglio v. United States, supra. Thus, the Supreme Court has endorsed the imputation of knowledge, at least from one prosecutor to another. Id. However, the extent of this imputation of knowledge has been expanded. In Williams v. Griswold, 743 F.2d 1533 (Fifth Cir. 1984), the Court of Appeals stated: 'It is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge will be imputed to State prosecutors'. Id., at 1542. In United States v. Antone, 603 F.2d 566 (Fifth Cir. 1979), the Court of Appeals observed that it has 'declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel'".

Thus, the Court in Ex Parte Adams found that the officer in charge of the lineup was part of the investigating team and that officer's knowledge of the State's witness' lack of

JOYCE ANN BROWN, is entitled to receive a fair trial and due process of law. However, in this case, the nature and extent of the evidence and testimony referred to in this Application for Writ of Habeas Corpus are such that the beneficial results "inured to the State at the expense of due process" and at the expense of JOYCE ANN BROWN. Thus, JOYCE ANN BROWN'S rights under the United States Constitution and the Constitution of the State of Texas have been seriously infringed upon, ignored and violated. See the Fourteenth Amendment to the United States Constitution; Article I, Section 19 of the Texas Constitution.

The Court of Criminal Appeals has the power and authority to prevent the enforcement of a judgment of conviction which has been obtained under circumstances constituting a denial of due process. JOYCE ANN BROWN respectfully submits that the judgment of conviction in this case should be set aside and that she should be ordered released to the custody of the Sheriff of Dallas County to answer the indictment in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kerry P. FitzGerald, Counsel for Applicant JOYCE ANN BROWN, hereby certify that a true and correct copy of the foregoing Memorandum Of Law In Support of JOYCE ANN BROWN'S Application for Writ of Habeas Corpus was hand delivered to John Vance, Criminal District Attorney, on the _____ day of August, 1989.

KERRY P. FITZGERALD
ATTORNEY AT LAW