IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JESUS RAMIREZ and ALBERTO SIFUENTES,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 5:09-CV-190-C
	§	(Consolidated with Civil Action
SALVADOR ABREO, et al.,	§	No. 5:09-CV-189-C) ECF
Defendants.	§	

DEFENDANTS MARK YARBROUGH AND LAMB COUNTY, TEXAS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON REMAINING CLAIMS

COME NOW, Defendants, Mark Yarbrough and Lamb County, Texas who, pursuant to Rule 56 of the Federal Rules of Civil Procedure, file this Memorandum of Law in support of their contemporaneously filed Motion for Summary Judgment.

Respectfully Submitted,

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I. SUMMARY

1. Defendants Mark Yarbrough and Lamb County seek summary judgment on all remaining claims asserted against them, summarized as follows:

42 U.S.C. § 1983 Claim Against Yarbrough

2. Plaintiffs' federal claim under 42 U.S.C. § 1983 for alleged "false" arrest and/or imprisonment remains against Yarbrough.[1] That claim requires Plaintiffs to prove deprivation of constitutional rights by an individual acting under color of state law, specifically an arrest and detention not supported by probable cause. As to this claim, Yarbrough seeks summary judgment on the grounds that:

1. Plaintiffs' claims are untimely under *Wallace v. Kato*;
2. Plaintiffs' Pre-indictment claims are barred by Yarbrough's immunity;
3. The Evidence proves probable cause existed at the time of Plaintiffs' arrest and Plaintiffs suffered no deprivation of constitutional rights;
4. Any conspiracy claim is barred for reasons 1 through 3; and
5. The evidence disproves Plaintiffs' conspiracy claim to violate the Plaintiffs' Constitutional rights.

Malicious Prosecution Claim Against Yarbrough

3. The common law claim of malicious prosecution requires a Plaintiff to prove (1) the initiation of a criminal prosecution against the plaintiff; (2) by the actions of the defendant; (3) termination of that prosecution in the plaintiff's favor; (4) the plaintiff's innocence; (5) the absence of probable cause for the prosecution; (6) malice in initiating the prosecution; and (7) damage to the plaintiff. Yarbrough seeks summary judgment on the grounds that:

1. The claim is barred by absolute prosecutorial immunity;

[1] The Court held that Yarbrough has absolute or qualified immunity from at least the indictment forward, with the exception of a state law defamation claim.

2. The claim is barred by limitations; and

3. The evidence disproves or Plaintiffs cannot establish competent evidence to support elements 3, 4, 5 and 6 of this claim

Defamation Claim Against Yarbrough

4. To prove common law defamation, a plaintiff must prove (1) the defendant published a statement of fact, (2) the statement was defamatory, (3) the statement was false, (4) the defendant acted negligently in publishing the false and defamatory statement, and (5) the plaintiff suffered damages as a result. The plaintiff must prove that the statements contained false, defamatory facts rather than opinions or characterizations. Yarbrough seeks summary judgment on the grounds that:

1. The claim is barred because Plaintiffs are limited purpose public figures, and there is no evidence of actual malice;

2. The claim is barred by absolute or official immunity; and

3. Plaintiffs cannot establish elements 1-5.

42 U.S.C. § 1983 Claim Against Lamb County

5. A claim under 42 U.S.C. § 1983 must show a custom or policy of the governmental entity which is the *moving force* behind the alleged constitutional violation. Lamb County seeks summary judgment on the grounds that:

1. Prosecutors in Texas act on behalf of the State, not the County, and their prosecutorial policies or alleged unconstitutional acts cannot be attributed to the County;

2. Plaintiffs cannot establish any violation of their constitutional rights as necessary to support liability under 42 U.S.C. § 1983.

3. Plaintiffs have failed to show any policy of Lamb County which is the moving force behind any deprivation of their constitutional rights; and

Collateral Estoppel and *Heck v. Humphrey*

6. Defendants renew their argument that the issues forming the bases of Plaintiffs remaining claims against these Defendants are barred from re-litigation under the doctrine of collateral estoppel, and/or by the doctrine of *Heck v. Humphrey* in light of the fact that the Plaintiffs' convictions were overturned solely on the ground of ineffective assistance of counsel and Plaintiffs' claims of unconstitutional prosecutorial misconduct seeks to invalidate judicial findings to the very contrary.

II. BACKGROUND

7. Plaintiffs Alberto Sifuentes and Jesus Ramirez were arrested on August 13, 1996 for the murder of Evangelina Cruz. An independent Magistrate Judge, James Cox, found probable cause and issued arrest warrants. A Texas grand jury issued an indictment against both men on October 31, 1996. More than a year after their arrest, each were tried for the murder and both convicted in separate trials, in April and July 1998. Both convictions were upheld on appeal. See, *Ramirez v. State*, 2001 WL 435073 (Tex.App. – Amarillo 2001, pet. ref'd) and *Sifuentes v. State*, 29 S.W.3d 238 (Tex.App. – Amarillo 2000, pet. ref'd) [Appx. GG, pp. 689-698].

8. Sifuentes and Ramirez both subsequently applied for writs of *habeas corpus* which were heard in 2005 and 2006 and granted solely on the basis of ineffective assistance of counsel. Despite being urged, other grounds including innocence and state misconduct were rejected. As recounted in the opinion of the Court of Criminal Appeals in the *Sifuentes* matter, Plaintiffs' counsel in the underlying criminal trial "failed to conduct an adequate investigation and effective witness examinations," which "constituted deficient performance that prejudiced [plaintiff]." See, *Ex Parte Sifuentes*, 2008 WL 151087 (Tex.Crim.App. 2008) [Appx. GG; p. 699]. As recounted in the opinion of the Court of Criminal Appeals in the *Ramirez* matter, Plaintiffs'

counsel in the underlying criminal trial "failed to investigate *known* alibi witnesses and *known* alternative suspects" which failure "constituted deficient performance that prejudiced [plaintiff]." (emphasis added). Accordingly, the Court vacated both convictions on January 16, 2008. See, *Ex Parte Ramirez*, 2008 WL 151128 (Tex.Crim.App. 2008) [Appx. GG p. 0700]. The Court's mandate issued February 12, 2008.

9. On April 27, 2009, Plaintiffs filed suit in the Western District of Texas in two approximately seventy page complaints which were virtually identical. Plaintiffs sued at least eleven different parties, including officers of the Texas Department of Public Safety and the City of Littlefield, Texas and state and local investigators and prosecutors involved in the investigation and prosecution of the crime. Inexplicably, Plaintiffs did not pursue claims against the parties whose acts or omissions they claimed and the courts affirmatively found constituted the actual basis for overturning their convictions; their undisputedly ineffective trial counsel in the criminal proceedings. The Court transferred venue to the Northern District [Doc. No. 1]. This Court consolidated the two cases [Doc. No. 28].

10. The Defendants filed motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On January 20, 2010, this Court granted in part and denied in part these motions. [Doc. No. 41]. On February 18, 2010, various Defendants, including Mark Yarbrough, moved for summary judgment. On May 27, 2010, the Court, ruling on the motions for summary judgment, dismissed additional parties and claims [Doc. No. 120]. At the same time, the Court entered a Rule 54(b) final judgment on the partial dismissal of various parties and claims properly dismissed [Doc. No. 121].[2]

[2] The Court's judgment was not appealed and thus became final.

III. UNDISPUTED FACTS

11. Facts which are established by evidence submitted herewith are set forth in further detail in this brief with citations to the Appendix. General facts which are believed to be undisputed are set forth here.

12. Plaintiffs were identified by independent third-party witnesses as possible suspects for the murder to law enforcement. After investigation, Texas Ranger Sal Abreo related to District Attorney Mark Yarbrough factual information supporting a reasonable belief of probable cause to arrest the Plaintiffs. Mr. Yarbrough agreed that the facts, as related to him by Abreo on the telephone, supported probable cause to arrest the Plaintiffs for the murder. At the time of the Plaintiffs arrest, Mr. Yarbrough had not seen any investigators' reports or witness statements, and Yarbrough was unaware of any alleged impropriety regarding the manner in which witness information had been obtained. The Plaintiffs were taken before an independent magistrate, Justice of the Peace James Cox. Mr. Yarbrough did not participate in this proceeding. Neither he nor his office provided any factual information to the Magistrate to support the Magistrate's determination of probable cause.

13. Mr. Yarbrough learned additional inculpatory information after the arrest and prior to the grand jury proceeding. Mr. Yarbrough presented witnesses but no false information to the grand jury. The grand jury issued an indictment for both Plaintiffs. Mr. Yarbrough learned additional inculpatory information after the grand jury issued their indictments of the Plaintiffs through their prosecutions and afterwards. Mr. Yarbrough prosecuted Plaintiff Ramirez and a jury convicted Mr. Ramirez. Following Mr. Yarbrough's recusal due to the possibility he might be a witness, Sandra Self was appointed to prosecute Plaintiff Sifuentes. A separate jury convicted Mr. Sifuentes. Both convictions were upheld on appeal. At all relevant times, in prosecuting the

Plaintiffs, the prosecutors acted as District Attorneys on behalf of and for the state of Texas, not Lamb County.

14. In approximately 2002, Plaintiffs moved for *habeas corpus* relief, alleging ineffective assistance of counsel, innocence and state malfeasance. After hearing the petition and receiving evidence, the trial court issued findings of fact and conclusions of law. The trial court found that Plaintiffs had shown ineffective assistance of counsel but that the evidence did not support claims of innocence or state malfeasance. Although they could have quietly pursued habeas relief, throughout the course of their *habeas corpus* proceedings, Plaintiffs and their counsel, lawyers of Haynes & Boone, thrust themselves into the public spotlight, soliciting public sentiment and assistance for their challenge to their convictions; they made numerous statements to the media declaring their innocence and both alleged injustice in the criminal investigations and prosecutions that resulted in their convictions. Both voluntarily made themselves public figures as it related to this heinous crime, their convictions and their challenges thereto.

15. Plaintiffs filed suit approximately thirteen years after their arrest and indictment, and ten years after their convictions. Both filed suit seven years after their *habeas corpus* challenge was filed.

16. Movants submit that the evidence attached in the contemporaneously filed Appendix, along with consistent evidence submitted by the Codefendants, unequivocally disproves any constitutional violation or tort under state law, and otherwise proves their affirmative defenses.

IV. SUMMARY JUDGMENT STANDARD

17. Rule 56(c) of the Federal Rules of Civil Procedure provides that: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

18. The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and identifying those portion of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1996). The moving party, however, need not negate the elements of the non-movant's case. *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994). Instead, the movant may simply point out to the court that the non-movant has no evidence to support an essential element of the alleged cause of action. *Celotex Corp*., 477 U.S. at 323.

19. When a motion for summary judgment is made, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. See *Anderson*, 477 U.S. at 250. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment. The non-moving party may not rest upon mere allegations or denials in the pleadings, but must present affirmative evidence, setting forth specific facts, to show the existence of a genuine issue for trial. See *Celotex Corp*., 477 U.S. at 322-23. Even though all evidence must be viewed in the light most favorable to the opposing party and all justifiable inferences are to be drawn in his favor, "only reasonable inferences can be drawn from the evidence in favor of the non-moving party." *Eastman Kodak Co. v. Imagetech Servs*., 504 U.S. 451, 469 n. 14 (1992) (emphasis in original).

20. The non-movant's burden is not satisfied by "some metaphysical doubt as to material facts," conclusory allegations, unsubstantiated assertions, speculation, the mere existence of some alleged factual dispute, or "only a scintilla of evidence." *Little*, 37 F.3d at 1075. "The non-

movant must do more…than demonstrate some factual disagreement between the parties; the issue must be 'material.' Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. The non-movant fails to demonstrate a genuine issue for trial, 'where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party…" *Logan v. Commercial Union Ins. Co*., 96 F.3d 971, 978 (7th Cir. 1996) (cite omitted). "When a defendant invokes [] immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002).

V. PLAINTIFF'S PRE-INDICTMENT FEDERAL CLAIMS ARE BARRED AS A MATTER OF LAW

A. Federal Claims For False Arrest and/or Imprisonment Under 42 U.S.C. § 1983 Are Barred by Limitations

21. Plaintiffs claim their right to be free from arrest without probable cause and/or detention under the Fourth Amendment to the United States Constitution was violated, and assert a claim under 42 U.S.C. § 1983. This claim fails on several grounds. The first is that it is untimely and barred by limitations.

22. Plaintiffs were arrested on August 13, 1996, and indicted on October 31, 1996, and then held pursuant to legal process [Appx. Z, p. 447; AA, pp. 448-452]. They were subsequently convicted in April and July 1998. [Appx. BB, p. 452; 453-457]. However, Plaintiffs did not file this lawsuit or any other complaint of an arrest without probable cause until nearly thirteen (13) years after their arrest and indictment, and eleven (11) years after their conviction, on April 27, 2009 [See Doc. No. 2]. Under the United States Supreme Court's controlling precedent in *Wallace v. Kato*, 127 S.Ct. 1091, 1097 (2007), plaintiffs claims for arrest without probable cause and detention are untimely and must be dismissed.[3]

[3] Indeed, Plaintiffs filed suit even more than two years after the *Wallace v. Kato* decision was rendered. The filed suit seven years after their habeas corpus application [Appx. FF, 624-687].

23. While admitting that they were detained *pursuant to legal process* as of August 13, 1996, [Doc. No. 2 ¶ 76; Ramirez Complaint ¶ 75] more than ten years ago, Plaintiffs nonetheless make the very same argument the Plaintiff made which the Supreme Court clearly rejected in *Wallace*. Specifically, Plaintiffs contend that damages for their subsequent detention caused by a prior unlawful arrest affect the accrual date of their false arrest or false imprisonment claims but, as the Supreme Court has made clear, they do not. See, *Wallace*, at 1097 ("petitioner's false imprisonment did not end when he was released from custody after the State dropped the charges against him, but rather when he appeared before the examining magistrate and was bound over for trial."). Any false arrest, and any false imprisonment (*i.e*, imprisonment without legal process), *if they ever occurred*, occurred in 1996 and limitations on claims related to such incarceration ran two years later, in 1998. Accord, *Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008). [4]

24. In a claim based on 42 U.S.C. § 1983, to determine the length of the statute of limitations, "federal law looks to the law of the State in which the cause of action arose." *Kato*, 127 S.Ct. at 1094. It is "that which the State provides for personal-injury torts." *Id* (citations omitted). In Texas, a federal civil rights claim is subject to a two year limitation period. TEX.CIV.PRAC. & REM. CODE § 16.003(a) (Vernon 2009); *Ali v. Higgs*, 892 F.2d 438, 439 (5th Cir. 1990). The accrual date of a federal civil rights action is a question of federal law, not resolved by reference to state law. *Kato*, 127 S.Ct. at 1095. Because a plaintiff "could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary

[4] *See Kato*, 549 U.S. at 389 (being bound over by a magistrate or arraigned on charges is an ascertainable point of when judicial process has begun); See also, *Shanklin v. Fernald*, 539 F. Supp. 2d 878, 887 (W.D. Tex. 2008) (applying Texas Law) (where plaintiff was indicted on April 5, 2005 and Magistrate Judge ordered bench warrant, arrest was made, bond was set, and Plaintiff appeared before Magistrate on April 6, 2005, the Court held that the **latest** Plaintiff's false arrest and false imprisonment claim accrued was April 6, 2005).

detention…limitations would normally commence to run from that date." *Id*. The Supreme Court concluded and the holding applies with equal force to these Plaintiffs, that the

> "[c]ontention that his false imprisonment ended upon his release from custody, after the State dropped the charges against him must be rejected. It ended much earlier, when legal process was initiated against him, and the statute [of limitations] would have begun to run from that date."

Id, at 1096. It is beyond dispute that Plaintiffs failed to even bring suit within two years of their convictions, much less their arrests and indictments though they could have. See also, Plaintiffs' testimony [Appx. R, pp. 233-257; S, pp. 258-280]. In fact, they didn't file suit until more than ten (10) years later. Accordingly, all of the Plaintiff's allegations of false arrest or imprisonment and related claims must be dismissed based, at the very least on the fact that they are barred by limitations.

B. Evidence Establishes Probable Cause and Even if It Did Not, Qualified Immunity Further Bars Plaintiffs' Pre-Indictment Claims

25. "The Supreme Court has defined probable cause as the 'facts and circumstances within [an] officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Piazza v. Mayne*, 217 F.3d 239, 245-46 (5th Cir. 2000). "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *United States v. Mendez*, 27 F.3d 126, 129 (5th Cir. 1994). Plaintiffs' allegation that Yarbrough ordered their arrest before indictment, allegedly forming the basis for a claim of false arrest or imprisonment, is controverted by the evidence plainly barred by the application of qualified immunity.[5] The evidence, including the testimony of Movant Yarbrough and expert John Bradley disproves any assertion that no reasonable law enforcement

[5] Notably, Plaintiffs' Complaints fail to say *what* Abreo communicated to Yarbrough that supposedly caused Yarbrough to opine that probable cause for an arrest was appropriate.

official could have determined that probable cause for an arrest existed and advised Texas Ranger accordingly [Appx. A, 1-26 and MM]. Indeed, the record contains ample support for the existence of probable cause to arrest Ramirez and Sifuentes. [Appx. GG, pp. 688, 757; A, 1-26; MM].[6] Among other things, Movant Yarbrough was aware that two individuals matching the description of the assailants, by appearance and vehicle, were at the Jolly Roger store at the time in question, as confirmed by at least two witnesses. [Appx. O, pp. 192-217; P, pp. 218-221].[7] Movant Yarbrough was not advised of any impropriety related to the manner in which the evidence was obtained or reported, if there were any [Appx. MM].[8]

26. While the pre-indictment claim is plainly barred by limitations as discussed above, Mr. Yarbrough would be entitled to dismissal of this claim regardless. Movant Yarbrough, without waiving his assertion of absolute immunity previously adjudicated by the Court, further reasserts his qualified immunity defense to the allegation that he provided advice to Ranger Abreo, based on the evidence submitted herewith. "Public officials acting within the scope of their official duties are shielded from civil liability by the qualified immunity doctrine." *Kipps v. Caillier*, 197 F.3d 765, 768 (5th Cir.), *cert. denied*, 531 U.S. 816, 121 S.Ct. 52 (2000). Governmental officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800,

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[6] See also, *Ramirez v. State*, 2001 WL 435073 (Tex.App. – Amarillo 2001, pet. ref'd) and *Sifuentes v. State*, 29 S.W.3d 238 (Tex.App. – Amarillo 2000, pet. ref'd) referencing facts supporting probable cause [Appx. 688-757].

[7] Notably, Ranger Abreo testified at the habeas hearing that he called Yarbrough and told him Mary Davila Wood reported she was with the Plaintiffs *at the Jolly Roger* the evening of Cruz murder. Ranger Abreo provided other information to Yarbrough. [Appx. M].

[8] Again, there is no constitutional obligation, even for an officer, to "undertake a reasonable investigation" to try to refute apparent probable cause and surely not one imposed on a prosecutor in offering as opinion on this issue. See, *Shield v. Twiss*, 389 F.3d 142, 150-51 (5th Cir. 2004).

817-18, 102 S. Ct. 2727, 2738 (1982). To overcome an assertion of qualified immunity, a plaintiff must show that *no reasonable government official could have believed* the accused officials' alleged conduct was lawful in light of the information he possessed and clearly established law. *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000). If officials of reasonable competence could disagree as to whether the alleged conduct violated a plaintiff's rights, immunity remains intact. *See Malley v Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). Therefore, if a reasonable official, possessing the same information known to the individual Defendant at the time of the occurrence, could have believed his acts lawful in light of clearly established law, the official is entitled to dismissal of the claims against him, based upon his immunity. *Brown v. Lyford*, 243 F.3d 185, 190 (5th Cir. 2001).

27. Of course, even an official "who reasonably but mistakenly concludes that he has probable cause to arrest a suspect is entitled to qualified immunity." *Tarver v. Edna*, 410 F.3d 745, 750 (5th Cir. 2005).[9] Where officials of reasonable competence could disagree on the existence of probable cause, the actor is entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S.Ct. 1092 (1986). Put another way, to overcome qualified immunity on this issue, Plaintiffs must provide evidence to show that "[t]here must not even 'arguably' [] probable cause for the…arrest for immunity to be lost." *Brown v. Lyford*, 243 F.3d 185, 190 (5th Cir. 2001).

28. Of course, even if probable cause did not exist, is *arguably* did, and so qualified immunity bars suit. *Brown v. Lyford*, 243 F.3d at 190. Accordingly, qualified immunity bars Plaintiffs' claims against Yarbrough relating to allegedly "ordering" their arrests.

29.

[9] "Qualified immunity 'gives ample room for mistaken judgments,' protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Brown* at 190 (5th Cir. 2001).

C. **No Claim for Post-Arrest Pre-Indictment Acts or Omissions**

30. The Court was clear in its prior order [Doc. 120] specifying that "Plaintiffs' remaining claims against Yarbrough include a wrongful-arrest claim asserted against Yarbrough and for Yarbrough's alleged concealment of exculpatory material in the Sifuentes case after their recusal." [Doc. No. 120, at pp. 29-30]. The wrongful arrest claim is premised on Yarbrough's alleged advice to Texas Ranger Sal Abreo, that probable cause to arrest existed. Thus, the Court at least implicitly held that no cognizable claim related to alleged conduct post-arrest but pre-indictment. To be sure, Plaintiffs in their Complaints made no allegations of misconduct in that time period. However, in an abundance of caution, in light of the Court's reference to the indictment as opposed to the arrest Yarbrough submits that absolute immunity would plainly bar any claim during that time period, and even if such claim were made, it would not be tenable.

31. As set forth above, all pre-indictment claims asserted by Plaintiffs are untimely. Further, however, while Yarbrough previously asserted his absolute immunity for actions undertaken as prosecutor, which defense the Court sustained, Yarbrough reasserts his absolute immunity in conjunction with the any proceedings after Ranger Abreo arrested the Plaintiffs, including any alleged proceedings before the magistrate and subsequent grand jury proceedings. See, *Cousin v. Small*, 325 F.3d 627, 633 (5th Cir. 2003) (absolute immunity attached after suspects had been identified). Yarbrough submits that an appearance in court before a magistrate in support of a warrant have been held by the Supreme Court to be absolutely immune. See, *Burns v. Reed*, 500 U.S. 478, 492, 111 S.Ct. 1934, 1942-43 (1991) and that preparation for and participation in the grand jury process is entirely within the prosecutorial function. *Burns* at 490, 111 S.Ct. 1934, FN 6 (1991) ("There is widespread agreement among the Courts of Appeals that prosecutors are absolutely immune from liability under § 1983 for the conduct before grand juries."); See also,

Kalina v. Fletcher, 522 U.S. 118, 125-26, 118 S.Ct. 502, 507 (1997); *Pack v. Wood County, Texas*, 2009 WL 1922897 at *7 (E.D. Tex. 2009) (absolute immunity extends to grand jury proceedings); *Reynolds v. Strayhorn*, 2006 WL 3341030 (W.D. Tex. 2006) (unpublished, copy attached at Appx. 688-757) (presenting case to grand jury is advocatory function); *Buckley v. Fitzsimmons*, 509, U.S. 259, 273, 113 S.Ct. 2606 (1993); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980); *Smith v. Gribetz*, 958 F.Supp. 145, 150-51 (S.D. NY 1997); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 248 (5th Cir. 1985).

32. Even if here weren't absolutely immune, there is no allegation of a constitutional deprivation related to the post-arrest proceedings. Yarbrough never personally provided any factual information to support probable cause. [Appx. MM, and D, pp. 35-37]. To be sure, prosecutors have no duty to present exculpatory evidence to a grand jury. See, *e.g. United States v. Williams*, 504 U.S. 36, 51, 112 S.Ct. 1735 (1992); *In re Grand Jury Proceedings*, 129 S.W.3d 140, 143-44 (Tex.App. – San Antonio 2003, pet. denied). Finally, Yarbrough presented four witnesses who testified to the grand jury about their knowledge of relevant facts. [Appx. O, pp. 192-217, MM]. He did not offer any evidence of his own making. While no claim has been stated related to the grand jury proceedings, and immunity plainly would bar any such claim, there is in any event no evidence of any constitutional deprivation related thereto. For this additional reason, the untimely claims must be dismissed.

IV. PLAINTIFFS CONSPIRACY CLAIM FAILS AS A MATTER OF LAW

33. Plaintiffs cannot escape the effect of absolute immunity by claiming a conspiracy. "When the 'underlying activity at issue is covered by absolute immunity, the plaintiff derives no benefit from alleging a conspiracy.'" *Groom v. Fickes*, 966 F.Supp. 1466, 1477 (S.D. Tex. 1997), citing, *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1148 (2nd Cir. 1995); *Peay v. Ajello*,

470 F.3d 65, 68 (2nd Cir. 2006). "[P]rosecutorial immunity from section 1983 liability is broadly defined, covering 'virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." *Id*, citing, *Dory v. Ryan*, 25 F.3d 81, 83 (2nd Cir. 1994). "Therefore, when the underlying acts are protected by absolute immunity, mere allegations that the prosecutor performed these acts in the course of a conspiracy will not be sufficient to avoid absolute immunity." *Groom* at 1477, citing to *Holloway v. Walker*,765 F.2d 517, 522 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605 (1985). Plaintiffs cannot circumvent Yarbrough's absolute immunity by alleging a conspiracy.

34. "A conspiracy by itself…is not actionable under section 1983." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). "[A] conspiracy claim is not actionable without an actual violation of section 1983." *Id* (citations omitted). In order to prevail on a Section 1983 conspiracy claim, a plaintiff must establish (1) the existence of a conspiracy involving state action and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy." *Id*. A Plaintiff must show, at a minimum, that the alleged conspirators had "a unity of purpose, common design and understanding, or meeting of the minds *in an unlawful arrangement*." *Hale v. Townley*, 19 F.3d 1068, 1075 (5th Cir. 1994) (emphasis added). Plaintiffs must show an agreement to deprive them of their constitutional rights.

35. There is no evidence of any conspiracy to violate the Plaintiffs' rights. The evidence submitted herewith and by Codefendants, including declarations and affidavits of the parties, refutes any such notion [Appx. A, pp. 1-26, B, pp. 27-30, C, pp. 31-34 D, pp. 35-37 F pp. 41-42, MM, LL, pp. 787-800; S, pp. 258-80, R. pp. 232-257]. Accordingly, the conspiracy claim must be dismissed.

VII PLAINTIFFS' STATE LAW MALICIOUS PROSECUTION CLAIM FAILS AS A MATTER OF LAW

36. Plaintiffs have asserted a claim under Texas state law against the individual defendants, including Yarbrough, for malicious prosecution.[10] The claim against Yarbrough is barred for several reasons including absolute immunity, limitations and absence of the basic elements of the claim, and must be dismissed.

A. Elements of Malicious Prosecution

37. Texas courts have emphasized that "[a]ctions for malicious prosecution are not favored in the law." *Parker v. Dallas Hunting & Fishing Club,* 463 S.W.2d 496, 499 (Tex.Civ.App.-Dallas 1971, no writ). A plaintiff in a malicious prosecution case has the burden of proving "(1) the initiation of a criminal prosecution against the plaintiff; (2) by the actions of the defendant; (3) termination of that prosecution in the plaintiff's favor; (4) the plaintiff's innocence; (5) the absence of probable cause for the prosecution; (6) malice in initiating the prosecution; and (7) damage to the plaintiff." *Gunnels v. City of Brownfield*, 153 S.W.3d 452, 458 (Tex.App. – Amarillo 2003, pet. denied), citing, *Richey v. Brookshire Grocery Co*., 952 S.W.2d 515 (Tex. 1997) (citations omitted). "To encourage reporting of crimes, and to ensure that citizens who do so in good faith will not suffer for their actions, plaintiffs must present clear, positive, and satisfactory proof in order to succeed." *Id.* The failure of a plaintiff to prove any one of the above elements is fatal to his case. *Coniglio v. Snyder*, 756 S.W.2d 743, 744 (Tex.App. – Corpus Christi 1988, writ denied).

B. Plaintiff's Malicious Prosecution Claim Against Yarbrough is Barred by Absolute Immunity

38. Defendant Yarbrough is absolutely immune from Plaintiffs' claim for malicious

[10] No claim has been asserted against Lamb County, and any such claim would in any event plainly be barred under Texas Civil Practice & Remedies Code § 101.057(2).

prosecution. "Texas courts have followed federal courts and consistently held as a matter of law that absolute immunity extends to quasi-judicial officers, including prosecutors performing such typical prosecutorial functions as initiating criminal prosecution and presenting the State's case." *Brown v. Lubbock County Comm. Court*, 185 S.W.3d 499, 505 (Tex.App. – Amarillo 2005, no pet.), citing, *Oden v. Reader*, 935 S.W.2d 470, 474-75 (Tex.App. – Tyler 1996, no pet.). "Even allegations a prosecutor's decisions were the result of bribes are insufficient to destroy immunity." *Id*, citing, *Clawson v. Wharton County*, 941 S.W.2d 267, 271 (Tex.App. – Corpus Christi 1996, writ denied). "There has long been a common law immunity for prosecutors from civil actions for malicious prosecution…" *Miller v. Curry*, 625 S.W.2d 84, 86 (Tex.App. – Fort Worth 1981, writ ref'd n.r.e.). In *Brown*, the Court held that the Lubbock County District Attorney was absolutely immune from an inmate's claims that he was maliciously prosecuted. In *Oden*, where a plaintiff sued a county attorney for defamation, the Court noted the Supreme Court's ruling in *Imbler* wherein it held "prosecutors are cloaked with absolute immunity for actions taken in initiating a prosecution and in presenting the State's case." *Oden*, at 474, citing *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995 (1976). "Prosecutorial functions are those acts representing the government in filing and presenting criminal cases, as well as other acts that are 'intimately associated with the judicial process.'" *Charleston v. Pate*, 194 S.W.3d 89, 90-91 (Tex.App. – Texarkana 2006, no pet.) (citations omitted). "Absolute immunity protects a prosecutor even if the prosecutor acts in bad faith or with ulterior motives, so long as he or she acts within the scope of his or her prosecutorial functions." *Id*, at 91, citing *Clawson* at 272 and *Miller* at 86. Hence, the very elements of a malicious prosecution claim bring it within the realm of absolute immunity, and bar any such claim against a prosecutor. Accordingly, the malicious prosecution claim against Movant Yarbrough must be dismissed.

C. **Plaintiffs' Claim For Malicious Prosecution Under State Law Is Barred By the Statute of Limitations**.

39. Plaintiffs' malicious prosecution claim is further barred by limitations. A claim for malicious prosecution must be brought within one year. TEX. CIV. PRAC.& REM. CODE § 16.003(a). Under state law, the claim accrues upon the termination of a criminal prosecution. *Patrick v. Howard*, 904 S.W.2d at 944. In determining the nature of the termination necessary for the accrual, *Sullivan v. O'Brien*, 85 S.W.2d 1106, 1115 (Tex.App. – San Antonio 1935, writ ref'd) held:

> It seems well settled that termination contemplated does not mean the end of the purpose or intention to prosecute, or a final adjudication of the accused person's guilt or innocence, but means rather, the termination of the particular prosecution, or proceeding, complained of, so that, if the prosecutor intends to proceed further in his purpose, he must institute proceedings de novo, or, as sometimes said, is "put to a new proceeding."

40. The termination or disposition of an indictment is a termination of the prosecution in favor of the accused within the meaning of the rule relating to malicious prosecution. *Leal v. American Nat. Ins. Co*., 928 S.W.2d 592, 597 (Tex.App. – Corpus Christi 1996, pet. den.), citing AM.JUR.2D, MALICIOUS PROSECUTION § 32 at 207 (1970); *Millan v. Dean Witter Reynolds, Inc*., 90 S.W.3d 760, 764 (Tex.App. – San Antonio 2002, pet. den.) (cause of action for an intentional tort accrues when facts come into existence authorizing a claimant to seek a judicial remedy).

41. Plaintiff's murder conviction was vacated by the Texas Court of Criminal Appeals on January 16, 2008. Consequently, on January 16, 2008, Plaintiff's malicious prosecution claim accrues as facts came into existence authorizing him to seek a judicial remedy. The prosecution based on the indictment was terminated, and the one year limitations period began to run. The deadline for filing a malicious prosecution claim would have run on January 16, 2009. However, Plaintiff did not timely file his claim by that date, instead waiting until April 27, 2009. As the

malicious prosecution claim is untimely, it must be dismissed.

D. **Plaintiffs Cannot Adduce Evidence of Malicious Prosecution**

42. Finally, the only competent evidence disproves the elements of malicious prosecution, and in any event, does not meet the Plaintiffs' burden. The elements are listed above. First of all, the prosecution of Plaintiffs resulted in convictions, affirmed on appeal. Notwithstanding the fact that the habeas corpus proceeding resulted in a finding of ineffective assistance of counsel, Plaintiffs cannot show that the termination of the prosecution was in their favor. Plaintiffs must also establish their innocence. However, having pled and attempted to prove innocence, the habeas court found that they had not proven innocence. Plaintiffs must further show an absence of probable cause for their prosecution. Probable cause existed at the time of arrest, and was further established by Plaintiffs' indictments and convictions. The established existence of probable cause disproves the Plaintiffs' claim. Of course, Plaintiffs must also show malice. The evidence refutes any malice in the Plaintiffs' prosecution [Appx. MM]. Moreover, with respect to Plaintiff Sifuentes, Sandra Self prosecuted the case to a conviction, and she likewise, did not act out of malice. [Appx. B, pp. 27-30].

VIII. EVEN IF CONSTITUTIONAL DEPRIVATION WERE SHOWN, PLAINTIFF FAILS TO STATE A CLAIM AGAINST LAMB COUNTY

43. Plaintiffs seek to hold Lamb County liable for the alleged policies of the Lamb County District Attorney related to prosecutions on behalf of the State of Texas. Plaintiffs have failed to identify any policy which was the moving force behind their alleged constitutional violation, or deliberate indifference to a known need for policy. Perhaps more importantly, as discussed further in Section D below, the Fifth Circuit Court of Appeals has soundly and repeatedly rejected the notion that a Texas county, which has no control over a prosecutor's decisions, can be held liable for the same.

A. Governmental Liability Under 42 U.S.C. § 1983 Cannot Be Based on *Respondeat Superior*

44. First and foremost, as there has been no deprivation of constitutional of federal rights by any county actor, there can be no claim against Lamb County under 42 U.S.C. § 1983. However, even if there were such a deprivation, the County cannot be held liable under the Plaintiff's allegations, even if true. A governmental body "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018 (1978). Under § 1983, a governmental entity, like Lamb County, may only be held liable for those acts for which it is actually responsible. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298 (1986). The Supreme Court has recognized very narrow circumstances in which a County may be held liable for the conduct of its employees, even if such conduct is unconstitutional. *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037-38 (1978); *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998). As Plaintiff's allegations against Lamb County could only be premised on a misplaced theory of *respondeat superior* here, they fail and must be dismissed. As discussed further below, a Texas District Attorney prosecuting violations of state law acts as an agent of the state, not the county, and his/her acts or omissions cannot be attributable to the county as policy.

B. Plaintiff Must Establish That A Policymaker Promulgated An Official Policy Which Was the Moving Force Behind A Deprivation of His Constitutional Rights

45. "For a [County] to be liable under § 1983, there must be: (1) a policymaker;[11] (2) an official policy; and (3) a violation of constitutional rights whose 'moving force' is the policy or custom." *Monell*, 436 U.S. 658 at 694; *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). "These three elements 'are necessary to distinguish government employees from those

[11] "The burden is on Plaintiffs to establish the identity of the final policymaker on the part of the local government unit." *Bass v. Parkwood Hosp*., 180 F.3d 234, 244 (5th Cir. 1999).

that can be fairly identified as actions of the government itself.'" *Piotrowski*, 237 F.3d at 578. Furthermore, "[t]he existence of official policymaking authority is a question of law to be decided by the court." *Tharling v. City of Port of Lavaca*, 329 F.3d 422, 430-31 (5th Cir. 2003). In order to support a claim, the description of the alleged policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must be factually specific. *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir. 1997).

46. As the *Piotrowski* Court specifically discussed, "this is not an opaque requirement" and "[m]istakes in analyzing section 1983 [governmental] liability cases frequently begin with a failure to separate the three attribution principles and to consider each in light of relevant case law." *Piotrowski*, 237 F.3d at 578-79. Therefore, to hold a [County] liable under § 1983, a plaintiff must demonstrate a policy-making governmental official has knowledge of an alleged unconstitutional custom. *Pineda*, 291 F.3d at 330. However, "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the [governmental entity]. The plaintiff must also demonstrate that, through its deliberate conduct, the [governmental entity] was the moving force behind the injury alleged." *Brown,* 520 U.S. at 404, 117 S. Ct. at 1388. "[T]here must be a direct causal link between the County policy and the constitutional deprivation." *Piotrowski,* 237 F.3d at 579. It is crucial that the requirements of governmental culpability and governmental causation "not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, [governmental] liability collapses into *respondeat superior* liability." *Id*. (*quoting Snyder,* 142 F.3d at 791). Therefore, to be actionable, the custom or policy at issue must also be the *moving force* of the constitutional violation, or a *cause in fact* of a specific constitutional deprivation. *Spiller,* 130 F.3d at 167.

C. Plaintiffs Cannot Identify Any Unconstitutional Policy of Lamb County

47. Here, Plaintiffs have made conclusory allegations of policy and nothing more. To be sure, he has failed to identify *any* specific unconstitutional County policy or custom. Moreover, Plaintiff has failed to allege *any facts* showing any unconstitutional County policy, pattern or practice and his allegations are confined to what he contends occurred in relation to the investigation and prosecution of the Cruz homicide. They have neither alleged nor demonstrated that such a policy was the moving force behind an alleged constitutional deprivation. Conclusory assertions of a municipal policy fail to state claim upon which relief could be granted. *See Fernandez-Montes*, 987 F.2d at 284; *Spiller*, 130 F.3d at 167. Because Plaintiff does not even provide the type of vague allegations described within *Pineda,* fails to alleged the existence of an unconstitutional policy, attribute it to the County, or show that it was the moving force behind a constitutional violation, his claims under 42 U.S.C. § 1983 must be dismissed.

D. Plaintiff's Allegations of Malfeasance Against Prosecutors Acting As Agents of the *State* Cannot Establish A County Policy

48. As a matter of law, in Texas, a District Attorney is an elected official who prosecutes violations of state law as an agent of the State of Texas, not the county where his/her office is located. [See, A, pp. 1-26, MM, F, pp. 41-42]. *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997), *cert. denied*, 522 U.S. 828, 118 S.Ct. 91 (1997).[12] A County, such as Lamb County does not set or control the policies of the office of District Attorney.[13] [Appx. A, p. 1-26, F, pp. 41-42, MM]. Accordingly, the County cannot be held liable for the alleged conduct of the District

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[12] See, *Esteves* at 678, citing TEX. CODE CRIM.PROC. ANN. ART. 2.01 ("Each district attorney shall represent the *State* in all criminal cases in the district courts of his district and in appeals therefrom…"); and TEXAS CONSTITUTION ART. V, § 21 (same). The law is distinct, by state, which renders Louisiana cases decided in the Fifth Circuit, for example, inapposite.

[13] Whether they would be policies related to disclosure of evidence under *Brady* or *Giglio* or any other prosecution-RELATED policies.

Attorney in prosecuting a crime on behalf of the State of Texas. Mark Yarbrough is the District Attorney of Lamb County, Texas. His involvement in the prosecution of Messrs. Ramirez and Sifuentes[14] was done on behalf of the State of Texas, not Lamb County.

49. Plaintiffs allegations against Lamb County purport to arise exclusively out of the conduct of individuals acting on behalf of the State of Texas – the District Attorney, Assistant District Attorney and a Special Prosecutor with no employment relationship whatsoever to Lamb County, Sandra Self. Plaintiffs specifically alleged that Defendant Mark Yarbrough "[a]t all times relevant to this action…was the Lamb County District Attorney;" that Defendant Scott Say "[a]t all times relevant to this action…was the Assistant District Attorney in Lamb County, Texas," and that Defendant Sandra Self was "attorney *pro tem* for Lamb County with respect to the prosecution of Alberto Sifuentes." [Doc. No. 2, ¶¶ 11, 12 and 17, Ramirez Complaint ¶¶ 11-12]. It is undisputed or beyond dispute that Yarbrough, Say and Self prepared to prosecute and prosecuted the Plaintiffs on behalf of the *State of Texas* for the crime of capital murder.[15] Whether they allegedly failed to disclose exculpatory or impeachment evidence, or elicited false testimony in support of the State's case, the allegations inescapably relate to acts or omissions of agents of the State of Texas. As such they cannot establish or support any claim of an unconstitutional County policy.

50. "Texas law makes clear, [] that, when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted." *Esteves v. Brock*, 106 F.3d at 678. "A county official 'pursues his

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[14] As this Court is aware, Sandra Self prosecuted *State of Texas v. Alberto Sifuentes* to a conviction. The Court held that Movant Yarbrough ENJOYED qualified immunity as no evidence showed he deprived Sifentes of his civil rights, post-recusal. [Doc. No. 120, pp. 29-30]

[15] Throughout the entirety of the underlying criminal prosecutions, Plaintiffs' appeals and *habeas corpus* proceedings, the individual prosecutors appeared on behalf of the State of Texas, and were recognized by the respective Courts as "the State of Texas," without exception [Appx. JJ, pp. 762-782]

duties as a ***state agent*** when he is enforcing state law or policy.'" *Id*, citing, *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (emphasis added); See also, *Kruger v. Reimer*, 66 F.3d 75 (5th Cir. 1995) and *Quinn v. Roach*, 2009 WL 1181072 (5th Cir. 2009) (unpublished) ("This circuit has stated on numerous occasions that district attorneys and assistant district attorneys in Texas are agents of the state when acting in their prosecutorial capacities."); *Mowbray v. Cameron County*, 274 F.3d 269, 278 (5th Cir. 2001); See also, *Washington v. City of Arlington*, 2005 F.Supp.2d 1502150 at *3 (N.D. Tex. 2005) [Appx. GG, pp. 688-757] (decisions and actions of district attorney could not be attributed to county which had no authority to control district attorney in role as prosecutor); see also, *Thompson v. City of Galveston*, 979 F.Supp. 504, 511 (S.D. Tex. 1997), aff'd, 158 F.3d 583 (5th Cir. 1998) (District Attorney presenting witnesses to grand jury and denying accused access to her file acted in capacity as state rather than county official); *Pack v. Wood County*, 2009 WL 1922897 at *6 (E.D. Tex. 2009) (county district attorneys in Texas represent the State of Texas when prosecuting criminal cases). The same is true for an appointed special prosecutor. See *Brown v. Lyford*, 243 F.3d 185 (5th Cir. 2001). (prosecutor "pro tem" also acts for *state* in substituting for district attorney and cannot be considered a "policymaking official" whose alleged violation of Plaintiff's rights could provide a basis for imposing liability on the County).

51. As the Defendants "were acting not as county officers but as advocates for the state, prosecuting violations of Texas criminal law," the allegedly unconstitutional practices "are not fairly attributable to [Lamb] County because they are taken by agents of the state as part of the prosecutorial function." *Esteves*, at 677. The Fifth Circuit Court in *Esteves* considered allegations that the Harris County District Attorney's Office maintained "a persistent and widespread practice" of unconstitutional racially discriminatory peremptory strikes. The Fifth

Circuit was not constrained by the issue of whether a district attorney had attributes of a county officer because, quite simply, and as a matter of law, "when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted." *Esteves*, at 678. The Court noted, importantly, that the district attorney's actions could not fairly be attributed to the county "which has no affirmative control over the prosecutor's decisions in a particular case." *Id.* Accordingly, the Fifth Circuit held in no uncertain terms that "the county…should not be held liable when a prosecutor engages in unconstitutional conduct during a criminal proceeding." *Id.* Accordingly, Plaintiff's contention that Lamb County is liable for the alleged actions of Yarbrough, Say or Self, even if unconstitutional is completely without merit and wholly inapposite with well-settled constitutional authority. Plaintiff complains of their actions with respect to his prosecution under *state law*. Actions undertaken for a state prosecution cannot be attributable to Lamb County.

52. Plaintiffs fares no better by recasting their allegations as "deliberate indifference" or "failure to train and supervise." While their allegations are again entirely conclusory, they again inescapably arise out of the alleged acts undertaken on behalf of the State of Texas in the enforcement of state law by the individual prosecutors, not as a result of any county policy or lack thereof. Alleged failings in training or supervising agents of the *state* cannot be attributable to a County. *Esteves*, at 678. Similar allegations were made against Tarrant County in *Wooden v. State of Texas*, 2005 WL 1473854 (N.D. Tex. 2005) (unpublished) (copy attached). In *Wooden*, Judge McBryde, citing *Mowbray v. Cameron County*, held that "because [district attorneys] are state officers, a county cannot be held liable for a failure to train them." *Id*, at *2. He further appropriately held that the Plaintiffs claims, which were based on alleged actions taken in connection with his indictment and prosecution, were thus not related to duties that

could be considered "administrative or ministerial in nature." *Id.*[16]

53. As the Plaintiff's allegations, even if – indeed particularly if – assumed to be true, fail to state facts which would provide a basis for attribution of the alleged constitutional violations to Lamb County, the claims against Lamb County must be dismissed regardless of the Court's disposition of Plaintiff's claims against Defendant Yarbrough. Given Plaintiffs' failure to identify any County policy which was the moving force behind the alleged violation of his rights, his claim against Lamb County fails and must be dismissed. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001); *Esteves*, supra. The claim against Lamb County must be dismissed.

IX. DEFAMATION CLAIM AGAINST YARBROUGH FAILS AS A MATTER OF LAW

54. Plaintiffs have asserted a claim against Mark Yarbrough for defamation based upon statements he published in the media after their convictions were overturned and they were no-billed by the second grand jury. Specifically, they allege that on April 30, 2008, Yarbrough stated to a television station "[w]hat I believe happened back in 1996, I believe that the two defendants that were released yesterday killed Angie Cruz." [Doc. No. 2, ¶ 201]. They further allege that Yarbrough was interviewed for a newspaper article allegedly published in Al Dia on June 9, 2008, where they paraphrase him as telling a reporter "he is convinced that Sifuentes and Ramirez are guilty of the murder and that it would be a mistake to assume that the men are innocent." [Id].[17] Plaintiffs claim of defamation is barred as they are public figures who cannot establish malice, Yarbrough is entitled to immunity (at least official immunity), and Plaintiffs

[16] The Plaintiffs previously advanced the farcical notion, rejected by Judge McBryde in *Wooden*, that their allegations didn't relate to the prosecutorial function of the office, in an attempt to evade well established Fifth Circuit precedent.

[17] Any claim based on comments prior to April 27, 2008 would be barred by limitations.

have otherwise failed to establish the elements of a common law claim of defamation.

A. **Elements of Claim**

55. To prove defamation, a plaintiff must prove (1) the defendant published a statement of fact, (2) the statement was defamatory, (3) the statement was false, (4) the defendant acted negligently in publishing the false and defamatory statement, and (5) the plaintiff suffered damages as a result. *Brown v. Swett & Crawford of Texas, Inc*., 178 S.W.3d 373, 382 (Tex.App – Houston [1st Dist.] 2005).

B. **Because Sifuentes and Ramirez Were Limited-Purpose Public Figures And Cannot Prove Actual Malice by Yarbrough, Plaintiffs' Defamation Claim Must Be Dismissed**

1. *Standard for Limited-Purpose Public Figures*

56. Texas courts have adopted and consistently upheld a higher standard to prove defamation when the Plaintiffs are public officials or public figures. *Vice v. Kasprzak*, 318 S.W.3d 1, 15 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). The determination of "[w]hether a party is a public figure is a question of constitutional law for courts to decide." *New Times, Inc. v. Wamstad*, 106 S.W.3d 916, 921 (Tex. App.—Dallas 2003, pet. denied) citing *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). This higher standard requires that a "public official or public figure bear the burden of proving actual malice by clear and convincing evidence." *Id.* (citing *Sullivan*, 376, U.S. at 279-80; *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000); *HBO, A Division of Time Warner Entertainment Co., L.P. v. Harrison*, 938 S.W.2d 31, 35-36 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Actual malice means "the defendant made the statement knowing that it was false or with reckless disregard about whether the statement was false or not." *Id.* (quoting *Sullivan*, 376 U.S. at 279-80); *Cloud v. McKinney*, 228 S.W.3d 326,

339). "Reckless disregard" in this context means "a defamation plaintiff must prove that the publisher entertained serious doubts as to the truth of his publication." *Id.* at 925-26 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)) (internal quotations omitted). The Texas Supreme Court has opined that "[a] lack of care or an injurious motive in making a statement is not alone proof of actual malice[,]…an understandable misinterpretation of ambiguous facts does not show actual malice[,]…[and] a failure to investigate fully is not evidence of actual malice." *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002).

57. For this higher standard to apply, the "plaintiff must be a public official for the purpose of the published statements, and the alleged defamatory statements must related to the plaintiff's official conduct." *Id.* (quoting *HBO*, 983 S.W.2d at 36.); *Vice*, at 15. Not only does this higher standard of proof apply to public officials, but it also applies to what the courts have termed "limited-purpose public figures." *Id.* citing *Casso*, 776 S.W.2d at 554; *Einhorn v. LaChance*, 823 S.W.2d 405, 412-413 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.). As stated by the United States Supreme Court, "limited-purpose public figures are those persons who thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Id.* quoting *Einhorn*, 823 S.W.2d at 413 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

58. Texas has applied a three element test to determine whether a plaintiff is a limited-purpose public figure for purposes of a claim for defamation.

(1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;

(2) the plaintiff must have more than a trivial or tangential role in the controversy;

(3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Vice, at 15, citing *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). To determine whether a "controversy" existed "the judge must examine whether persons actually were discussing some specific question." *Wamstad*, 106 S.W.3d at 922. The court may look to whether the "press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment." *Id.* (quoting *McLemore*, 978 S.W.2d at 572.). In *Vice*, the court held the plaintiff to be a limited-purpose public figure when the controversy was reported in local and other circulated newspapers and in which the Plaintiff authored or was quoted within the articles in relation to the ongoing controversy. *Id.* at 16.

2. *Plaintiffs Ramirez and Sifuentes Are Limited Purpose Public Figures*

59. The Plaintiffs through their respective attorneys actively and relentlessly sought media attention for the controversy at issue in their habeas corpus proceeding. They vigorously propagandized the issue of their conviction, repeatedly claimed their innocence in the media, portrayed themselves as victims, and declared to the public that they were convicted as a result of false testimony from witnesses, and a "flawed investigation." Plaintiffs claimed misconduct by law enforcement including suppression of evidence, a failure of the justice system and further professed a need to "right" the "wrong" that resulted in their convictions. In countless instances, Plaintiffs attacked the integrity of the justice system and law enforcement, and notwithstanding their failure to prove innocence in the habeas proceeding (having been convicted), profoundly declared their innocence. There can be no doubt they intended to influence the public's view of their case, and promote a negative view of the criminal justice system in Texas which they claimed victimized them.

60. In fact, long before any alleged defamation they now claim, the Plaintiffs enlisted the public's help in their cause. Plaintiffs went as far established a website entitled "Innocent in

Texas" compiling newspaper articles and other media coverage, a downloadable version of the Habeas Applications, a powerpoint presentation claiming to depict "raw documentation proving Sifuentes and Ramirez could not have killed Evangelina Cruz", and a link entitled "How You Can Help." [Appx. U, pp. 289-293] Plaintiffs' campaign of propaganda began years before Yarbrough expressed his opinions and endured.

61. Not only does Plaintiffs' website provide information and thereby further spread the controversy to the general public, but it explicitly invites the general public to become involved in their cause by pleading for the public to write letters to the Texas Attorney General, Greg Abbott, "whose office is in charge of defending the conduct of police and prosecutors in this case." [Appx. U, pp. 289-293]. The website then provides three (3) sample letters for individuals or organizations "that can be customized and personalized, printed out and mailed" to Greg Abbott. *Id.* The website also pleads with the general public to "submit a letter to the editor of your local newspaper…[to] [m]ake your feelings known as a group." *Id.* [Id].

62. Additionally, during the years their habeas corpus challenge was pending, the Plaintiffs and their attorneys, are quoted in numerous widely circulated media outlets including, but not limited to LubbockOnline.com, ABC News, the Texas Lawyer, Prnewswire.com, KCBD News Channel 11, Chron.com, EverythingLubbock.com, the Houston Chronicle, the Dallas Morning News, Lubbock Avalanche Journal, KLBK 13 TV News in Lubbock, Texas, KRISTV.com, News Channel 11 in Lubbock, Texas, The Washington Times, KAMC28 Local News, Associated Press, the Lamb County Leader News, Al Dia, West Texas Hispanic News, and CBS Channel 11 TV. [Appx. Y, pp. 316-445]. Many of the articles are listed on http://innocentintexas.com/press.asp. [Appx. T, pp. 281-288].

63. In an article published by LubbockOnline, in response to the grand jury declining to

indict Sifuentes and Ramirez, Barry McNeil stated "[w]e knew this day would come because we believed their innocence from the first time we read the trial transcripts until today." *See* Logan G. Carver, Pair Convicted in '96 Littlefield Killing Go Free, But Innocence Still Disputed, [Appx. Y, pp. 316-445]. Barry McNeil was quoted by ABC News as stating Sifuentes and Ramirez "are totally innocent." *See* Stephanie Dahle, Who Killed Evangelina Cruz, [Appx. Y, pp. 316-445]. He continued, "[t]he government really had no case other than false testimony based on so-called eyewitnesses. If they [the government] had conducted a comprehensive investigation, these men would have never been convicted." *Id.* Sarah Teachout and Ashley Duffie were quoted in The Texas Lawyer declaring the innocence of Ramirez and Sifuentes. *See* Mary Alice Robbins, A Second Chance, The Texas Lawyer, Vol. 23, No. 47, January 28, 2008 [Appx. Y, pp. 316-445]. The Houston Chronicle, at its web site, Chron.com, reported McNeil stating "These two men have suffered far too long as victims of our legal system. They are innocent. There is not a shred of evidence against them, and they deserve to be freed." *See* Peggy Fikac, Court Tosses Out Verdicts in Store-Clerk Killing, [Appx. Y, pp. 316-445]. *See*, e.g. Texas Court of Criminal Appeals Orders New Trials for Two Men Convicted for 1996 Panhandle Murder, [Appx. X p. 299-315]. *See also* James Hohmann, Retrial in '96 Slaying, The Dallas Morning Sun, [Appx. Y, pp. 316-445]. McNeil further stated the "cases should never have been brought." *See* Lauren Murphy, New Trial for Two Men Convicted of Capital Murder, [Appx. Y, pp. 316-445]. On the main page of their website "Innocent in Texas", Barry McNeil stated "[t]his is a great day for these two unfortunate men. It's sad they were prosecuted in the first place." *See* Innocent in Texas, [Appx. X, pp. 299-315]. McNeil continued:

> "There was no physical evidence whatsoever linking Alberto and Jesus to the crime, and the prosecutor's case hinged on false testimony by a so-called eye witness who was not at the crime scene when she supposedly saw the killers," Mr. McNeil said. "How tragic it is that Alberto and Jesus have been deprived of their

> freedom for more than a decade. Our state and our country cannot afford mistakes like this. Each one is a horrible tragedy for both the victim's family and the wrongly accused."

[Id]. McNeil further explicitly placed fault on the prosecution by stating the "real faults was the prosecution instigating the case in the first place when they didn't have the eyewitness they thought they had." *See* Mark Babinek, Judge Wants Convicted Killers Retried: He Says That Men Found Guilty of Capital Murder Had Ineffective Counsel, The Houston Chronicle, August 24, 2007. [Appx.Y, pp. 316-445]. He continues by stating the "prosecution from the outset has refused to look at the evidence, and if he did he would come to believe, as we have, that these two men are innocent." *See* Betsy Blaney, Judge Recommends New Trial for Mexican Nationals in Murder Case, originally published in the Lubbock Avalanche Journal, republished on the Innocent in Texas Website.

64. McNeil further stated "[t]he problem here was that there was a flawed investigation by the state from the outset." *See* P. Christine Mills, Claims of New Evidence Win Convicted Killers Court Hearing, originally published in Avalanche-Journal [Appx. Y, p. 316-445]. KRISTV.com reports that the "[d]efense attorneys say prosecutors knew about the lies and suppressed evidence." *See* originally published by KRISTV.com, Judge Hears Final Arguments in 1996 Murder Case Appeal, [Appx. Y, pp. 316-445]. McNeil further commended the Texas Attorney General's Office for "helping to right a terrible wrong that has stolen ten years from the lives of two innocent men." *See* State Admits Error in 10-Year-Old Murder Case [Appx. X, pp. 299-315].

65. Plaintiffs' attorney Ron Breaux has been quoted numerous times proclaiming the innocence of Sifuentes and Ramirez as well as criticizing the prosecution. *See* Mark Babinek, West Texas Murder Revisited: Defense Claims That Mistaken IDs Led to Conviction, originally

published by the Houston Chronicle [Appx. Y, pp. 316-445]. Isabel Rojas, Family of Convicted Man Moves Away to Avoid Harassment, originally published in Al Dia [Appx. Y, pp. 316-445]. Isabel Rojas, Mexican Consulate Seeks New Trial in '96 Slaying, originally published in Al Dia [Appx. Appx. Y, pp. 316-445]. Plaintiffs list approximately forty articles on their web site reflecting the publicity they generated. Articles, in addition to those listed above, are contained within the Appendix [See, Appx. X, Y]. All the attached articles predate the allegedly defamatory statements.

66. The conclusion that Plaintiffs created a public controversy about the prosecution and conviction is indisputable. As to the second-prong of the limited-purpose public figure analysis, the Plaintiffs not only have more than a trivial or tangential role, the Plaintiffs are the *central* role of the entire controversy and are the two key players upon which the entire controversy centers. The court in *Wamstad* provided the court may look to several inquiries for determining a Plaintiff's "role" in a controversy: "(1) whether the plaintiff sought publicity surrounding the controversy, (2) whether the plaintiff had access to the media, and (3) whether the plaintiff voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation." *Wamstad*, 106 S.W.3d at 922 (quoting *McLemore*, 978 S.W.2d at 572-73). The *Wamstad* Court held that "[b]y publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition in the marketplace." *Id.* (quoting *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996). Thus the "contours of the controversy requirement are at least partly defined by the notion that public-figure status attaches to those who invite attention and comment because they have thrust themselves to the forefront of public controversy to influence the resolution of the issue involved." *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351

(1974)) (internal quotations omitted).

67. The context of the claim is remarkable. Plaintiffs, having succeed only in establishing that their criminal defense counsel was constitutionally ineffective, and having failed to establish their innocence after being convicted, have vigorously and publicly attacked, not their ineffective criminal defense counsel, but the prosecution and investigators. Having done so, they now sue the District Attorney for stating his belief. At any rate, the Plaintiffs have intentionally thrust themselves into the media on a controversial issue in order to influence the resolution. It is clear, not only by the numerous newspaper articles which feature the controversy and quotations of the Plaintiffs and the Plaintiffs' attorneys, but also the Innocent in Texas website directly requesting public participation. Additionally, the alleged defamatory statements made by Yarbrough stating his belief that Sifuentes and Ramirez were guilty are obviously germane to the Plaintiffs role in the controversy. Plaintiffs are clearly public figures.

3. *Plaintiffs Cannot Show Actual Malice*

68. Plaintiffs have failed to establish actual malice. The court in *Casso* held that "[i]n in a public-figure defamation case, a libel defendant is entitled to summary judgment . . . by negating actual malice as a matter of law." *Wamstad*, 106 S.W.3d at 926 (citing *Casso*, 776 S.W.2d at 555). In order to prove "actual malice" the Plaintiffs must establish that Mr. Yarbrough made the statement knowing that it was false or with reckless disregard about whether the statement was false or not. *New Times, Inc. v. Wamstad*, 106 S.W.3d at 921(quoting *Sullivan*, 376 U.S. at 279-80); *McKinney*, 228 S.W.3d at 339. Here, the evidence proves the contrary [Yarbrough Declaration, Appx. MM].

69. It is important to note, again, that Plaintiffs were not mere suspects; they were indicted and subsequently convicted of murder by two separate juries, which convictions were upheld on

appeal. Witnesses placed them at the scene of the crime at the time of the crime. Other witnesses testified that the Plaintiffs made highly inculpatory statements, indeed admissions of guilt. The ineffective assistance of counsel certainly did not establish their innocence. Yarbrough's stated belief was quite reasonable, appropriate and consistent with his duty to keep the public informed. To be sure, it was not made out of "actual malice" as required to support a defamation claim in this context.

70. Again, Plaintiffs must show that Yarbrough acted out of actual malice. See, e.g., *Vice* at 15. Even if Plaintiffs are able to establish the statements were false, Texas courts have held that "falsity alone is not probative of actual malice." *Wamstad*, 106 S.W.3d at 929 (citing *San Antonio Exp. News v. Dracos*, 922 S.W.2d 242, 255 (Tex. App.—San Antonio 1996, no writ). In *Fort Worth Star-Telegram v. Street*, 61 S.W.3d 704, 713-14 (Tex. App.—Fort Worth 2001, pet denied), the court held there was a "plausible basis for professing belief in the truth of publication, thus negating actual malice even if the publication was not substantially correct." The standard is clearly subjective as it goes to the individual's state of mind at the time the statements were made. *Wamstad*, 106 S.W.3d at 926. Yarbrough did not act out of malice [Appx. MM]. Having met with witnesses, reviewed evidence, and assessing in his mind virtually thousands of bits of evidence, Yarbrough had a good faith belief that the Plaintiffs perpetrated the crime. Plaintiffs multi-million dollar effort to challenge their conviction resulting solely in a finding of ineffective assistance does not require Yarbrough to change his beliefs.[18] Yarbrough's submission of the case to a second grand jury, or agreement to submit materials supplied by Defendants' counsel surely does not show malice.

[18] Indeed, this civil case has highlighted many shortcomings of the habeas case. For instance, testimony elicited by investigator Reyna has been undermined. Witness Wood testified she was never coerced by Defendant Abreo as alleged, and confirmed her recollection that the trio was at the Jolly Roger on the night of the murder. Witness Ayala has remained steadfast in her testimony that she was at the Jolly Roger on the day in question at 2:00 a.m.

71. The Plaintiffs have clearly failed to provide any evidence of Yarbrough's subjective knowledge that the statements he made to the media were false. The Plaintiffs cannot establish actual malice in this case and the evidence controverts such claim. As such, Plaintiffs' claim for defamation must be dismissed.

4. *Plaintiffs Cannot Show Statement(s) Was False*

72. As the Plaintiffs are clearly limited purpose public figures, it is their burden to prove by a preponderance of the evidence that any alleged defamatory statements made about them in the media were false. *Bentley v. Bunton*, 94 S.W.3d 561, 586 (Tex. 2002), citing *Sullivan*, 376 U.S. at 279-280 (requiring that public officials or public figures prove falsity of an alleged defamatory statement); *Turner*, 38 S.W.3d at 117-30. No court has ever declared Sifuentes or Ramirez innocent for the crimes of which they were accused. As limited purpose public figures, in order for Plaintiffs to prevail on a claim for defamation against Yarbrough, the Plaintiffs must not only prove that Yarbrough acted with actual malice, they must prove by a preponderance of the evidence that Yarbrough's statement was false thereby requiring proof that Sifuentes and Ramirez are in fact innocent of the crimes for which they were accused.

73. In order to recover for defamation against a limited-purpose public figure, the Plaintiffs must prove that the statements Yarbrough made to the media were false. Plaintiffs have failed to meet this requirement. The statement made by Yarbrough stating "[n]obody has said these men are innocent," is in fact a truthful statement. *See* Logan G. Carver, Pair Convicted in '96 Littlefield Killing Go Free, But Innocence Still Disputed,[19] [Appx. Y, pp. 316-445]. Additionally, Plaintiffs have failed to establish that any statements indicating Yarbrough's belief in the guilt of Sifuentes and Ramirez were false. To be sure, no court has ever found Sifuentes

[19] [Appx. Y, pp. 316-445].

or Ramirez innocent for the crimes for which they were accused. In fact, the habeas Court found that Plaintiffs failed to prove this contention. There has been no order or binding declaration of innocence made by the court in this regard. Without competent proof that Yarbrough's statement was false, the Plaintiffs' claim for defamation fails as a matter of law and must be dismissed.

B. Plaintiffs' State Law Claims For Defamation Are Barred By Official Immunity

74. Movant Yarbrough reurges official immunity based on his declaration, the declaration of Expert John Bradley and other evidence in the Appendix.[20] Official immunity would further bar any defamation claim against Yarbrough. Texas law of official immunity is substantially the same as the federal law of qualified immunity. *Haggerty v. Texas Southern Univ.*, 391 F.3d 653, 658 (5th Cir. 2004). A public official or government employee is entitled to official immunity if he was (1) acting within the scope of his authority; (2) in performing a discretionary duty; (3) in good faith. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex. 2004).

75. The fact that a specific act that forms the basis of the civil suit may have been wrongly or negligently performed does not take it outside the scope of authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994). To defeat a defendant's assertion of good faith, a Plaintiff must establish that no officer in the defendant's position could have believed the facts justified his conduct. *Telthorster v. Tennell*, 92 S.W.3d 457, 460 (Tex. 2002). The standard of good faith as an element of official immunity is not a test of carelessness or negligence or a measure of an official's motivation. *Id.*

76. A reasonable official could have believed that he was justified in speaking with the

[20] The Court previously discussed this defense in its prior Order [Doc. 120, pp. 39-41], finding that Yarbrough was performing discretionary duties within the general scope of his authority, and noted that with the lower court findings "a reasonable officer could have maintained a belief that Plaintiffs were guilty of the crime despite the grand jury's subsequent return of a no-bill." However, the Court denied the motion at that time.

media, as addressed further below. Accordingly, official immunity bars any state law claims against Defendants. Plaintiffs alleged that Yarbrough defamed them by stating his belief to the media that they were guilty. [Doc. No. 2, ¶ 201]. Here, a reasonable official under similar circumstances could have believed that the facts were such that they justified the disputed conduct [See, Appx. A, p. 1-26; MM]; *Tennell*, 92 S.W.3d at 460. Accordingly, Yarbrough is entitled to official immunity. Indeed, the official immunity is further underscored by the fact that Plaintiffs are public figures.

77. The Fifth Circuit and Texas Courts have long held that statements made to the media by a prosecutor are entitled to, at least, qualified immunity. "[O]ur court has recognized a prosecutor's *obligation* to communicate with the public and has held that public comments by a prosecutor are entitled at least to a qualified immunity defense." *Geter v. Fortenberry*, 849 F.2d 1550, 1556 (5th Cir. 1988), citing, *Marrero v. City of Hialeah*, 625 F.2d 499, 511 (5th Cir. 1980) (emphasis added). "Texas law authorizes county attorneys to speak to the press regarding criminal prosecutions as part of their discretionary duties for the purpose of keeping the public informed." *Oden v. Reader*, 935 S.W.2d 470, 476 (Tex.App. – Tyler 1996, no pet.), citing, TEX.CODE CRIM.PROC.ANN. art. 2.03(b). Thus statements made to the press in connection within Yarbrough's discretionary duties entitle him to assert, at the very least, official immunity. *Id* (citations omitted). The Court in *Oden* noted that the county attorney was authorized under Texas law to investigate and prosecute violations of criminal laws, and authorized under Texas law to speak to the press regarding prosecutions. *Id*, at 477, citing, TEX.CONST. ART. 5, § 21; TEX.CODE CRIM.PROC. ARTS. 2.02 and 2.03(b). This left only the question of good faith, as measured by "objective legal reasonableness." *Id*, at 477. Bearing in mind that the Plaintiffs have never been found innocent of the crime, but rather that their counsel was constitutionally

ineffective, and that two juries believed they were guilty and convicted them, both convictions were upheld on appeal, Yarbrough's comments to the media were well within the realm of objective reasonableness in stating his *belief* that the Plaintiffs were guilty of the crime, notwithstanding their deficient counsel [Appx. A, pp. 1-26].

C. **Yarbrough's Expression of Opinion Cannot Support a Defamation Claim**

78. "Slander is a false statement about an ascertainable person that is published to a third person without legal excuse." *Robertson v. Southwestern Bell Yellow Pages*, 190 S.W.3d 899, 902 (Tex.App. – Dallas 2006, no pet.). "A plaintiff suing for a defamatory statement must establish the defendant published a false, defamatory statement of fact, rather than an opinion." *Id*. "All assertions of opinion are protected by the first amendment of the United States Constitution and Article I, Section 8 of the Texas Constitution." *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 426 (Tex.App. – Waco 1997, pet. denied), citing, *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). "Whether a statement is an opinion or an assertion of fact is a question of law." *Norris*, at 426. "Whether words are capable of the defamatory meaning the plaintiff attributes to them is also a question of law." *Norris*, at 426, citing, *Musser v. Smith Protective Serv., Inc*., 723 S.W.2d 653, 654-55 (Tex. 1987). The law protects opinions, as distinguished from false statements, and the former are simply not actionable. *Brown v. Swett & Crawford of Texas, Inc*., 178 S.W.3d 373, 382 (Tex.App. – Houston [1st Dist.] 2005, no pet.). Moreover, the rule of 'fair comment' provides for "legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002).

79. Yarbrough's "beliefs" about whether the overturn of the Plaintiffs' conviction equates to innocence, or even if he suggested a belief in the guilt of the Plaintiffs, is his opinion, which is

protected by Texas law and the First Amendment.

D. Yarbrough's Statements Were Not False

80. Of course, it was quite true that the overturn of the Plaintiffs' convictions on the sole ground of ineffective assistance of counsel was not a finding of innocence. Plaintiffs had not established their innocence by virtue of the granting of their habeas corpus petition or decision of the grand jury not to reindict. Notably, Plaintiffs do not even quote Yarbrough's alleged statement to Al Dia, which was no more than an accurate explanation of these developments. To be defamatory, the alleged statements must be false. Plaintiffs cannot establish this critical element which is further fatal to their claim.

X. PLAINTIFFS CANNOT ESTABLISH A POST-INDICTMENT DEPRIVATION OF CONSTITUTIONAL RIGHTS

A. Claims Against Yarbrough Dismissed

81. The Court appropriately dismissed all post-indictment federal claims by Plaintiff Ramirez against Yarbrough based on his absolute immunity and dismissed all post-indictment federal claims by Plaintiff Sifuentes against Yarbrough based on his absolute immunity, and post-recusal claims based on qualified immunity. In finding qualified immunity, the Court held that Plaintiff Sifuentes failed to meet his burden to establish any deprivation of constitutional rights post-recusal, which dismissal is final. [See, Doc. No. 120, p. 29-30; Doc. No. 121]. The claims against Lamb County must be dismissed for the reasons set forth in detail above. However, in addition, the lack of any constitutional violation stands as another reason for dismissal.

B. Plaintiffs' Hodgepodge of State Misconduct Allegations Are Unsupported Distortions of the Record

82. Plaintiffs allegations of state misconduct, whether it be withholding exculpatory evidence or impeachment material, fabricating or destroying evidence or the like, began as and remains a "moving target." The habeas corpus court appropriately rejected these hollow claims. In this

civil lawsuit one notion of impropriety is dispelled, another is conjured up. At bottom they are *all* based on or confusion on the part of Plaintiffs, distortion of the record, or intellectual dishonesty. Again, the various allegations are moot in light of the grounds for dismissal set forth above. However, as they are unsupported and unsupportable, they fail for this additional reason as discussed below.[21]

C. Plaintiffs Generally Cannot Show a Violation of *Brady* or *Giglio* Actionable Under 42 U.S.C. § 1983

1. *Texas Courts Have Held That Failure to File A Motion for Continuance Waives Any Claims for* Brady *or* Giglio *Violations*

83. Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), due process generally requires the prosecution in a criminal case to turn over evidence that is favorable to the accused when the evidence is material to guilt or punishment. Movants note at the outset that Plaintiffs *Brady* or *Giglio* claims relate to information known to Plaintiffs at trial, for instance, that related to witness Medrano. To be sure, the evidence clearly establishes that Plaintiff Ramirez' counsel David Martinez specifically knew and used information regarding witness Medrano *at trial*, inquiring about, in his words, Medrano's "deal with the State," Medrano's letter in the Court's file raising the spectre that he feared prison, and his prior convictions [Appx. K, pp. 129-156; L, pp. 157-179]. Martinez did not seek a continuance based on non-disclosure or inadequate disclosure of criminal convictions, plea agreement or other materials found in Medrano's Court file or elsewhere. In fact, Mr. Martinez not only used the convictions and the letter, he specifically advised the Court, on the record, in response to the Court's inquiry, that the defense did *not* need more time to prepare after obtaining the additional information [Appx. K, pp. 129-156].

84. Texas Courts have addressed such circumstances under *Brady*. When previously

[21] The Court need not reach any of these reasons in order to dismiss all remaining claims against Movants, but they serve as additional, independent grounds for dismissal.

withheld evidence is disclosed by the State at trial, failure to request a continuance waives any *Brady* violation and indicates the evidence was, in fact, not material. *Smith v. State*, 314 S.W.3d 576 (Tex. App.--Texarkana 2010, no pet.). Texas courts have consistently upheld that where a Defendant fails to request a continuance, the Defendant waives any claims for *Brady* violations by indicating that the evidence was, in fact, immaterial. *Smith v. State*, 314 S.W.3d 576 (Tex. App.--Texarkana 2010, no pet.). Where a mid-trial *Brady* violation occurs, "a defendant must first request a continuance in order to investigate the previously undisclosed evidence favorable to the defense." *Cohen v. State*, 966 S.W.2d 756, 763-64 (Tex. App.--Beaumont 1998, pet. ref'd). "A defendant who fails to avail himself of this less drastic remedy waives any error resulting from the *Brady* violation." *Cohen v. State*, 966 S.W.2d 756, 763-64 (Tex. App.--Beaumont 1998, pet. ref'd). "The disclosure of *Brady* material at trial gives the accused an opportunity to request a continuance to review the evidence." *Yates v. State*, 941 S.W.2d 357, 364 (Tex. App.--Waco 1997, pet. ref'd). "This opportunity adequately satisfies [the] due process requirements of *Brady.*" *Yates v. State*, 941 S.W.2d 357, 364 (Tex. App.--Waco 1997, pet. ref'd) (internal quotations omitted)(quoting *Payne v. State,* 516 S.W.2d 675, 677 (Tex.Crim.App.1974); *accord Aguirre v. State,* 683 S.W.2d 502, 516 (Tex.App.-San Antonio 1984, pet. ref'd)). "The failure to request a continuance waives any *Brady* violation." *See Zule v. State,* 802 S.W.2d 28, 33 (Tex.App.-Corpus Christi 1990, pet. ref'd). With respect to Medrano, Plaintiffs' criminal defense counsel not only had the opportunity to request more time, it was offered by the Court and expressly rejected. Plaintiffs cannot now assert a *Brady* claim and such failure bars the claim wholesale for that additional reason.

2. *Plaintiffs'* Brady *and* Giglio *1983 Claims Fail As Mark Yarbrough Did Not Intentionally Withhold Any Allegedly Required Material*

85. The purported due process claims fail for the additional reason that a Section 1983 civil

claim cannot rest on negligence. For a claim brought against state officials under §1983, the Supreme Court, when "addressing the question of 'when tortuous conduct by state officials rises to the level of a constitutional tort' for purpose of an alleged due process violation, held in *Daniels v. Williams*, that the Due Process Clause is simply ***not implicated by a negligent act*** of an official causing unintended loss of or injury to life, liberty, or property." *Porter v. White*, 483 F.3d 1294, 1307 (11th Cir. 2007) (internal quotation omitted) (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). In its analysis, the Supreme Court "noted that the word 'deprive' in the Due Process Clause connote[s] more than a negligent act, which the Court stated, explains why the guarantee of due process has historically been applies to ***deliberate*** decisions of government officials." *Id.* (internal quotation omitted) (emphasis added) (quoting *Daniel*, 474 U.S. at 330). The Court in *Porter* further held that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). In *Porter*, the Court held that the "no-fault" standard articulated in *Brady v. Maryland* that is imposed on prosecutors in criminal trials has no place in a §1983 action for damages for the alleged withholding of material exculpatory evidence. *Id.* at 1305-06.[22] Plaintiffs have failed to establish or provide any evidence that would even suggest Mark Yarbrough acted with an intent to withhold any alleged *Brady* material. The evidence, including Yarbrough's declaration, establishes only the contrary [Appx. MM].

3. Brady *Doesn't Apply to Evidence Which Is Not Constitutionally Material or Known To Defendants*

86. In order for Plaintiffs to establish a *Brady* claim, the Plaintiffs must show: "(1) the prosecutor suppressed evidence, (2) favorable to the defense, and (3) material to guilt or

[22] Thus, the Court distinguished between a criminal defendant's potential rights in a habeas corpus proceeding to overturn their conviction from a civil case seeking to impose liability under 42 U.S.C. § 1983.

punishment." *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005) (citing *Brady*, 373 U.S. at 87; *Miller v. Dretke*, 404 F.3d 908 (5th Cir. 2005)). For evidence to be material there must be a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The question of "materiality" is whether in the absence of the alleged exculpatory evidence, the Plaintiffs "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles* at 433 (1995).

87. However, the "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The Courts have "never held that the Constitution demands an open file policy . . ., and the rule in *Bagley* . . . requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

88. The Supreme Court has held that [t]he purpose of *Brady* is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Menefee v. State*, 211 S.W.3d 893, 903-04 (Tex. App.--Texarkana 2006, pet. ref'd) (internal quotation omitted) (quoting *United States v. Bagley,* 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). The Court in *Bagley* continued by stating that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs,* 427 U.S. 97, 109-10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

89. Moreover, with regards to *Brady* violations, Texas Courts have held that "if the defendant actually knows the facts which are withheld, he is not entitled to relief based upon the State's

failure to disclose the same facts." *Smith v. State*, 314 S.W.3d 576, 585 (Tex. App.--Texarkana 2010, no pet.) (citing *Williams v. State,* 995 S.W.2d 754, 761 (Tex.App.-San Antonio 1999, no pet.); *State v. DeLeon,* 971 S.W.2d 701, 706 (Tex.App.-Amarillo 1998, pet. ref'd)).

4. *Where Evidence Is Available to the Defense Through the Exercise of Due Diligence, There Can Be No Brady Violation.*

90. A prosecutor has no obligation "to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997); *See*, *e.g.*, *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005); *Bigby v. Dretke*, 402 F.3d 551, 574-75 (5th Cir. 2005); *Westley v. Johnson,* 83 F.3d 714, 726 (5th Cir.1996); *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996); *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994). The Fifth Circuit has relentlessly upheld that where evidence "is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim." *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005) (quoting *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980); *see, e.g., Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 513 U.S. 1137 (1995).

91. As stated by the United States Supreme Court in *United States v. Agurs*, 427 U.S. 97, 109 (1976), "there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Additionally, it is the responsibility of the defendant to "conduct a diligent investigation when the exculpatory evidence is available to both [the] defense and prosecution." *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005) (internal quotations omitted) (quoting *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002)); *see, e.g., Duff-Smith v. Collins*, 973 F.2d 560, 564-65 (5th Cir.), *cert. denied*, 507 U.S. 1056 (1990)

D.. **Plaintiffs' Specific *Brady* Allegations Fail**

1. *The "Witness Profiles" ["Lie" Memo] Is Not Brady Material*

92. Plaintiff Sifuentes allege Yarbrough was obligated under *Brady* to produce to their criminal defense counsel a memorandum prepared by District Attorney Mark Yarbrough, containing his internal notes regarding his impressions of a witnesses' appearance or credibility.[23] In other words, Plaintiffs contend that the Defendant was obligated to turn over prosecutorial *work product*, what even they describe as Yarbrough's written personal assessment of the witnesses. To the extent the law is clearly established under *Brady*, it clearly establishes that a prosecutor ***need not*** turn over opinion work product, particularly a prosecutor's impressions of other evidence which has been disclosed. Historically, the United States Supreme Court has protected from disclosure attorney's mental impressions and other work product. See, *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947); *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 (1975); *Goldberg v. United States*, 425 U.S. 94, 96 S.Ct. 1338 (1976). The circuit courts directly considering the issue have unequivocally held that opinion work product is not subject to *Brady*. *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006); *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000). To be sure, neither the Fifth Circuit, the United States Supreme Court or for that matter any other circuit court has held that a prosecutor must disclose the prosecutor's mental impressions of witnesses, particularly in circumstances even remotely similar to these.

93. The evidence here supports non-application of Brady to witness assessments [Appx. A, pp. 1-26; MM]. Here, as Yarbrough explains, the impression was from evidence independently

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[23] Plaintiffs allege that the document was an internal memorandum entitled "Witness Profiles." [Sifuentes Complaint, Doc. No. 2¶ 75].

disclosed, the statements of Mary Wood.[24] Further, As Judge Klein noted in his habeas findings, the State had provided to the Plaintiffs the report from investigator Sal Abreo and statements of witness Mary Wood, the documents which gave rise to the work-product impression, and Plaintiffs' counsel had the benefit of and used any inconsistency between the two at trial. Moreover, the impression itself was not evidence covered by *Brady*, was not admissible evidence, and was not material.

94. 2. *Prior Convictions and Arrests of Prosecution Witness Jose ("Joe") Medrano*

[24] While Abreo's assertion to Yarbrough that Woods stated on August 12, 1996 that Plaintiffs were at the Jolly Roger did not necessarily comport with the Woods' statement given to another Ranger on August 13, 1996

a. Information of Jose Medrano's Prior Arrests and Convictions were Available to and Used By the Defense

95. Where, as here, potentially exculpatory evidence is either "in the possession of the defendant or can be discovered by the defendant by exercising due diligence" there can be no *Brady* violation. *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997); *See*, *e.g.*, *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005); *Bigby v. Dretke*, 402 F.3d 551, 574-75 (5th Cir. 2005). Additionally, "[a] claim that is largely speculative with respect to the effect of the allegedly exculpatory evidence on the jury's ultimate determination of guilt or innocence cannot support a *Brady* violation." *Pippin v. Dretke*, 434 F.3d 782 at fn. 7 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004); *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir. 1999)). Not only was the information of Jose Medrano's prior arrests and convictions available to the Defendants through the exercise of due diligence, the Defense actually used and presented evidence of these arrests and convictions in the trial of *State v. Ramirez*. *See* [Appx. K,129-156].[25]

96. Additionally, Martinez clearly admits he was privy to copy of Joe Medrano's criminal history or at the very least a summary of that criminal history. [Appx. K,129-156 (Martinez cross-examination: 209:14—210:5)]. Vince Gonzalez admitted during his testimony at the Habeas Proceeding that "We [defense counsel] were aware there was a conviction, I think it was simply based on a sheet that the district attorney's office provided us. Just like, it would say, "Conviction in such and such county, 1971," or whatever the case may be."[26] [Appx. I, pp. 120-128] Gonzalez further admits that a synopsis of what should appear on a TCIC or NCIC was

[25] [Appx. I]. Ramirez Trial: Examination of Medrano: 164:13—164:17; 165:1—165:2; 165:8—165:12; 165:21—166:1; 166:12—166:15; 167:16—167:21; 173:20—173:24; 184:5—184:25

[26] [Appx. I]. Ramirez Habeas: Examination of Vince Gonzalez: Volume 12: 38:16—38:20; Ramirez Habeas: Examination of Martinez ; Volume 10: 210:19—210:21.

provided to defense counsel pretrial.[27] [Appx. I, 120-123.] Martinez also admits he was aware that it was Judge Klein's policy to have the prosecution supply defense counsel with a summary of criminal history of any testifying witnesses. [Appx. I, MM (Martinez Cross 209:2—210:1)] (also Yarbrough Declaration; Say Declaration)]

97. Martinez further admits that he was aware of the marijuana conviction and the conviction in Hidalgo County for a sentence of five years for aggravated sexual assault and unauthorized use of a motor vehicle before trial.[28] [Appx. 66-119] In fact, Martinez used this information against Medrano during the trial of Ramirez.[29] [Appx. K, pp. 129-156]. He admitted he would presumably been aware of the only other convictions known to Yarbrough [Appx.—Medrano testimony; Yarbrough controverting affidavit]. To the extent Defense was unaware of any convictions or arrests at trial, this information was equally available to defendants through the exercise of due diligence. [Appx. A, pp. 1-26]

b Defense Counsel Introduced The Letter Written By Jose Medrano To The Jury.

98. Defense counsel all but read the allegedly undisclosed entire letter to the jury written by Jose Medrano to, among others, Mark Yarbrough. [Appx. K, 129-156][30]. Among the statements introduced by Defense counsel that were made by Medrano in the above referenced letter included: "please help me, please help me" and "I'm so tired of being locked up." [Appx. K 129-156] [31]. The statements presented to the jury by defense counsel also clearly indicated

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27 [Appx. H] Ramirez Habeas: Examination of Vince Gonzalez: Volume 12: 38:16—38:23.

28 [Appx. K]. Ramirez Habeas: Examination of Martinez ; Volume 10: 211:14—211:15; 217:3—217:23.

29 [Appx. K]. Ramirez Trial: Examination of Medrano: 164:13—164:17; 165:1—165:2; 165:8—165:12; 165:21—166:1; 166:12—166:15; 167:16—167:21; 173:20—173:24; 184:5—184:25.

30 [Appx. K Ramirez Trial: Examination of Medrano: 168:8—175:25

31 [App. K]. Ramirez Trial: Examination of Medrano: 175:14—175:21

Medrano's fear for his life and safety and his plea to the State for protection. These statements were exposed and presented to the jury. [Appx. 129-156][32].

99. Finally, and perhaps most telling is Defense Counsel's response to the Court's inquiry at trial: "And you [the defense] have had adequate time to read that document and prepare?" [Appx. 129-156].[33] To which lead defense counsel quickly responded: "For the record, I'll say we have, Your Honor." [Appx. 129-156][34]. Furthermore, Vince Gonzalez admits that the Defense Counsel in *State v. Ramirez*, cross-examined Medrano about the letter. [Appx. Pp. 120-123].[35]

100. As the Jury was privy to the contents of the letter, the withholding of the letter by prosecutors prior to trial could clearly not constitute a *Brady* violation because Plaintiffs cannot establish the "materiality" requirement necessary to uphold a *Brady* violation. The test for reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different" is moot as the evidence was brought before the jury by the defense and the defense stated they had "adequate time to read that [the letter] and prepare." [Appx. Pp. 129-156].[36]

c. Jose Medrano's Plea Agreement Was Brought Before the Jury

101. Mark Yarbrough specifically elicited testimony from Medrano of a deal Medrano made with the Lubbock District Attorney's Office in which he plead guilty to charge of aggravated

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[32] [Appx. ___]. Ramirez Trial: Examination of Medrano: 175:1—175:25

[33] Ramirez Trial: Examination of Medrano: 183:3—183:4

[34] Ramirez Trial: Examination of Medrano: 183:7—183:8

[35] Ramirez Trial: Examination of Gonzalez: Volume 12: 38:1—38:2

[36] Ramirez Trial: Examination of Medrano: Volume 10: 183:3—183:8

sexual assualt to receive the minimum penalty of five years in exchange for testifying at the trial of Ramirez. [Appx. K, pp. 129-156].[37] Defense Counsel Martinez reiterated the potential for bias in his cross-examination of Medrano by not only developing the possibility of potential bias or motive of Medrano, but by highlighting details of the deal:

Q (Martinez):	Made a deal for the State that you would testify in return for them offering minimum amount of time on the aggravated sexual assault case; is that correct?
A (Medrano):	It went something like that, to that nature.

Q:	And you were facing from five to ninety-nine years or life in the penitentiary; isn't that true?
A:	I plead guilty to it.

Q:	But you know you got a heck of a deal, do you not?
A:	I don't know.
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[37] Q (Yarbrough): Joe, in fact you just plead guilty the other day to the offense that you were in jail for; is that right?

A (Medrano): That's correct.

Q: And how many years did you receive for pleading guilty?

A: Five.

Q: But part of the reason for you pleading guilty was that you would go ahead and testify here today; is that your understanding?

A: Yeah, I guess – yes.

Q: And you have every reason, every motive in the world to make up the story you made because you don't want to go back to prison, do you?

A: That's not true.[38] [Appx. 129-156]

102. In the habeas proceeding, Martinez further admitted that the defense knew of the plea agreement and that Medrano was "cutting a deal" with the prosecutors to secure his testimony. [Appx. H, pp. 66-119] Yarbrough had no knowledge of a handwritten plea agreement when Medrano testified,[39] but Martinez fully cross-examined Medrano on all the substance of the agreement anyway. As such, any claims that Mark Yarbrough withheld evidence of the State's promise to protect are without merit.

103. As information relating to the deal made between the District Attorney's Office and Jose Medrano, in which Medrano agreed to testify against Ramirez in exchange for a minimum sentence, was made known to the jury, any motive or bias Medrano had in testifying were exposed to the jury. Additionally, any other conviction or arrest that did not relate to the deal struck in exchange for Medrano's testimony has no relation to proving bias or motive. As such, the only purpose defense counsel could have in eliciting testimony of other convictions or arrests go directly to the character of Jose Medrano and are thus subject to the strict limitations set forth in Texas Rules of Evidence Rule 609.

104. Additionally, as to Plaintiffs' claim that the withholding of the results of a polygraph test constituted a *Brady* violation, the Supreme Court has held that a "State's failure to disclose that witness had failed polygraph test did not deprive defendant of “material” evidence under *Brady* rule, in light of inadmissibility of polygraph results . . . even for impeachment purposes [and] pure speculation that knowledge of polygraph results might have affected trial defense counsel's

[38] Ramirez Trial Examination of Medrano: 176:13—176:16

[39] [Appx. II, Plea agreement signed by Matt Powell and Kregg Hukill].

preparation…" *Wood v. Bartholomew*, 516 U.S. 1 (1995). However, the record shows Martinez was plainly aware of the polygraph of Medrano before Medrano testified.

d. Prior Arrests Are Inadmissible to Show Untruthful Character Under Texas Rules of Evidence and Admissibility of Prior Convictions Are Narrowly Tailored

105. Texas Rules of Evidence Rule 609 governs the admissibility of evidence of convictions and arrest of witnesses to show credibility of a witness. It states:

> (a) General Rule. For the purpose of attacking the credibility of a witness, *evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.* [40]

106. A conviction must be **final** to be admissible under Texas Rules of Evidence for purposes of showing untruthful character. *See* Tex. R. of Evid. Rule 609(a), Rule 608. As such, arrests are not admissible to show credibility or truthworthiness of a witness. *See* Tex. R. of Evid. Rule 609(a). As the arrests were not admissible at trial and, therefore, could not be brought before the jury under the applicable and binding rules of the Texas Rules of Evidence, Plaintiffs clearly are incapable of establishing the "materiality" requirement to uphold a *Brady* violation.

Additionally, the only two convictions possibly subject to admittance before the jury were, in fact, introduced to the jury by Martinez. [Appx. K, pp. 129-156].

3. *The Laboratory Tests on Shoes Belonging to Ramirez*

107. In *Pippin v. Dretke*, 434 F.3d 782 (5th Cir. 2005), the defendant alleged a *Brady* violation where the prosecution failed to release information relating to a discrepancy in a ballistic report discussed solely with the prosecutor. The Court in *Pippin* opined that "[b]ecause the defense ballistics expert Floyd McDonald had full access to the ballistics evidence and an opportunity to

[40] Tex. R. of Evid. Rule 609(a)-(c).

conduct his own tests before trial, we [the Court] conclude that the district court's resolution of Pippin's *Brady* claim is not debatable among jurists of reason." *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005).

108. Similar to the issues discussed in *Pippin*, Plaintiffs' claim that Yarbrough's failure to turn over information of a lab test conducted on a pair of shoes belonging to Ramirez constitutes a *Brady* violation fails as a matter of law where the information was (1) Ramirez denied he even owned tennis shoes; (2) any lab testing was unknown to Yarbrough at the time of trial; (3) Yarbrough made no mention of shoes at the trial; (3) Ramirez and defense counsel knew Ramirez' personal items were confiscated, and (4) defense counsel knew footprints of a Nike Cortez brand of shoe were found on the counter at the scene of crime. *See Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005).

109. While Ramirez at deposition denied owning such shoes [Appx. R, pp. 232-257] he would certainly know if he owned Nike Cortez shoes. Thus, he wouldn't need a lab test to confirm that information. Applying the Court's reasoning in *Pippin*, Defendant had the opportunity to conduct his own tests before trial and was privy to information regarding what shoes were confiscated from Ramirez and that the footprints found at the scene of crime were matched to the a brand of Nike shoes called Nike Cortez. The defense did not need the investigators or prosecutors to tell Ramirez what kind of shoes he owned.

4. Plaintiffs Own Investigator, Vince Gonzalez, Provided Evidence to Martinez Prior to Trial of Information Obtained at the Paradise Club

110. The Fifth Circuit has consistently held that it is the responsibility of the defendant to "conduct a diligent investigation when the exculpatory evidence is available to both [the] defense and prosecution." *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005) (internal quotations omitted) (quoting *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002)). As here, defense

counsel hired Vince Gonzalez to conduct its investigation. [Appx. H, pp. 66-119 (Martinez cross-examination: 206:15—206:17; (207:9—207:12)]. During the course of his investigation, Vince Gonzalez went to Paradise Club to interview witnesses. [Appx, Id, Martinez cross-examination: 207:19—207:23)]. Martinez admits that Vince Gonzalez reported back to him that someone has seen Ramirez and Sifuentes at the Paradise Club the night of the murder at roughly 10:00 p.m.. [Appx., Id, (Martinez cross-examination: (208:6—208:8)]. However, there is no indication that Defense Counsel requested further information, sought to obtain the name of the person who saw Plaintiffs at the Paradise Club, or inquired further about information relating to the Paradise Club. As held by the Fifth Circuit, where information is available to both the defense and the prosecution, it is the responsibility and obligation **of the defense** to conduct a diligent investigation in pursuit of evidence. *See Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005).

5. *Defense Counsel Martinez Received The Statements from Mary Davila Wood Prior to Trial and Other Information Relating to Mary Wood Was Easily Discoverable By Plaintiffs' Defense Counsel.*

111. In the habeas proceeding, Martinez admitted that he received or at the very least seen a statement by Mary Davila Wood in which she stated that "she couldn't really remember if it was a Jolly Roger, but she remembered seeing the lights or something like that which made her think that was the Jolly Roger Store."[41] [Appx. H, pp. 66-119]. Martinez further admitted that he saw this statement prior to the trial of Jesus Ramirez and was thus privy to the allegedly exculpatory information at the trial of Jesus Ramirez.[42] [Id]. Additionally, Plaintiffs now claim that Defendants should have disclosed that there were other convenience stores along the route from Lubbock to Muleshoe that had yellow lights. Clearly this is information that is easily obtainable

[41] [Appx. H]. Ramirez Habeas: Examination of Martinez; Volume 10: 222:2—222:11.

[42] [Appx. H]. Ramirez Habeas: Examination of Martinez; Volume 10: 222:2—222:11.

by Plaintiffs' defense counsel through due diligence, or more accurately a simple drive.

112. Plaintiffs' claims that Defendants should have also disclosed Wood's use of alcohol is also without merit as Ramirez and Sifuentes were with Mary Wood the night of murder and were capable of easily identifying that Mary Wood was under the influence of alcohol that evening. [Appx. R, pp. 232-257; S, 258-280]. Additionally, Sifuentes, in his deposition testimony, admits that he knew Mary Wood was "drunk" that evening [Appx. S, pp. 258-280].[43]

6. *Prosecution Does Not Have An Obligation to Investigate Alternate Leads*

113. The Supreme Court has held that the Due Process Clause is not violated by a prosecutor's negligent, or even grossly negligent, failure to investigate other leads. *See Daniels v. Williams,* 474 U.S. 327, 334, 106 S.Ct. 662 (1986) (holding that protections of the Due Process Clause are not triggered by negligence); *Baker v. McCollan,* 443 U.S. 137, 144, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (finding no cognizable constitutional claim where defendant's actions in detaining plaintiff for three days despite his protestations of innocence, without investigating those protests, amounted to no more than negligence); *Myers v. Morris,* 810 F.2d 1437, 1468 (8th Cir.1987) (stating that gross negligence is generally not sufficient to state a procedural or substantive due process violation), *overruled on other grounds, Burns v. Reed,* 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

114. Additionally, a "State's failure to develop evidence that might have been exculpatory or that might have supported a reasonable hypothesis of another's guilt [does] not constitute a *Brady* violation . . . as [the] state [has] no duty to do such investigation or analysis." *Menefee v. State*, 211 S.W.3d 893 (Tex. App.--Texarkana 2006, pet. ref'd). To be sure *Brady* does not afford the State a "duty to seek out exculpatory information independently on the defendant's behalf."

[43] [Appx. S]. Sifuentes Depo: 140:3—140:10; 157:18—158:10.

Palmer v. State, 902 S.W.2d 561, 563 (Tex.App.-Houston [1st Dist.] 1995, no writ) ("purpose [of *Brady* rule] is not to displace the adversary system") (quoting *Bagley,* 473 U.S. at 675, 105 S.Ct. 3375). The Fifth Circuit has held that *Brady* "does not extend due process to require that the prosecution pursue every possible avenue of investigation or present the defendant's case for him." *Johnston v. Pittman*, 731 F.2d 1231, 1234 (5th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985). *Cf. Moore v. Illinois,* 408 U.S. 786, 795 (1972).

115. Accordingly, Plaintiffs' apparent contention that their rights were violated by some failure to investigate other leads must be dismissed for this additional reason.

7. *Wood Was Not Hypnotized Nor Sent to a' Witch Doctor'*

116. Witness Mary Wood apparently requested that she be hypnotized. Hypnosis is a technique that can be used legitimately to recover lost memories. Apparently, someone other than Movants attempted to facilitate the request, but Ms. Wood was not successfully hypnotized. Though at deposition Ms. Wood fancifully stated she went to a 'witch doctor' with $50 supplied by Scott Say prior to grand jury in October 1996, Mr. Say did not even work for the Lamb County District Attorneys' Office at that time (not for another year), rendering it not only improbable, but impossible.[44]

8. *Frazier Had No Plea Agreement*

117. Eight months ago, the Court dismissed the claim that Yarbrough withheld information related to Tracy Frazier [Doc. No. 120, pp. 29-30]. The claim was frivolous. Plaintiffs' suggest a *Brady* violation occurred when Yarbrough failed to disclose evidence of a plea agreement between Tracey Frazier and the State that provided Frazier with leniency in exchange for his testimony against Sifuentes. However, Plaintiffs are clearly grasping for any

[44] Woods claimed that the session was unsuccessful, *the witch doctor returned her money* and she returned it to Scott Say.

remote possibility of a violation because a plea agreement simply did not exist. [Appx. MM]. In fact, under the applicable State Jail Felony Rule instituted at the time of the trial, Frazier received the maximum sentence he could receive under the law. [*See* Appx. MM.] Plaintiffs have failed to provide even a scintilla of evidence that would suggest that Frazier received a plea agreement because simply there was not one.

9. *Plaintiffs' Defense Counsel Read The Letter from Frazier to Yarbrough to the Jury.*

118. During Frazier's testimony at the trial of Sifuentes, Plaintiffs' defense counsel read the letter from Frazier to Yarbrough to the jury in which Frazier indicates that discussions were held with New Mexico authorities to drop charges against Frazier, Frazier was scared for his life, and Frazier's plea with Yarbrough to arrange for Frazier to fulfill his sentence in Lamb County. [Appx. MM]. Clearly, as this information was presented to the jury, the question of "materiality" required to uphold a claim under *Brady* cannot be upheld.

10. *Adam Casas Never Testified In Front of the Jury and Had No Plea Agreement So Evidence of Bias or Motive is Irrelevant to the Determination and Outcome of the Case*

119. Plaintiffs' suggest a *Brady* violation occurred when Yarbrough failed to disclose evidence of a plea agreement between Adam Casas and the State that provided Casas with leniency in exchange for his testimony against Sifuentes. However, no plea agreement related to this case ever existed. [Appx. MM]. As with Frazier, Plaintiffs fail to provide even a scintilla of evidence that would suggest that Casas received a plea agreement. The reason simply being: there was not one.

120. Further, in order for a *Brady* violation to occur, the Plaintiffs must prove by a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The cornerstone of

materiality considers whether in the absence of the alleged exculpatory evidence, the Plaintiffs "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citations omitted). Clearly, information pertaining to whether Adam Casas received leniency is exchange for his testimony is moot as Casas never testified in front of the jury. Therefore, any allegations of bias or motive would be moot and clearly irrelevant to the outcome of the criminal case. In addition, contrary to Plaintiffs' allegation, Casas was not a "jailhouse informant" when he gave a statement in April 1998. He wasn't even in jail at the time and had no case pending [Appx. MM].

11. *Coercion of Witnesses Is Not a Constitutional Violation of a Suspect's Rights. (ACS)*

121. There is no evidence any witnesses were coerced into giving false testimony. Courts examining the issue have concluded that witness coercion or intimidation is not a violation of a *criminal defendant's* rights. See, *Buckley v. Fitzsimmons*, 20 F.3d 789, 794-95 (7th Cir. 1994) (on remand); *Michaels v. State of New Jersey*, 222 F.3d 118, 121-23 (3rd Cir. 2000). Indeed, "coercing witnesses to speak" or using other "overbearing tactics" might constitute a violation of the *witnesses'* constitutional rights, but not the rights of the third-party criminal defendant. *Buckley v. Fitzsimmons*, at 794-95. In any event, there is no evidence of any coercion related in any way to Movants.

XI. PLAINTIFF'S CLAIMS BARRED BY COLLATERAL ESTOPPEL AND *HECK V. HUMPHREY*

122. Movants reurge their contention that the Plaintiffs' claims are barred by the doctrine of collateral estoppel and *Heck v. Humphrey*.[45]

[45] Movants are mindful that these arguments had previously been advanced to the Court.

A. **Collateral Estoppel Bars Plaintiffs' Claims of State Malfeasance**

123. Again, the allegations made by the Plaintiffs that the prosecutors violated his constitutional rights under *Brady* or some other basis, were raised before as grounds for his petition for writ of *habeas corpus*. Judge Felix Klein of the 154th Judicial District Court of Lamb County, Texas reviewed the grounds, accepted evidence and on July 26, 2007 issued detailed Findings of Fact and Conclusions of Law. [Appx. EE, pp. 497-623]. Judge Klein held that the prosecutors acting for the State did not in any instance violate the constitutional rights of the Plaintiff, although the Plaintiff's constitutionally ineffective assistance of counsel provided a basis for granting habeas corpus relief. In fact, ineffective assistance of counsel was the *sole* basis for Judge Klein's findings and recommendation to the Court of Criminal Appeals for the granting of the habeas petition. Judge Klein specifically **rejected** the following grounds, among others:

- Actual Innocence of Plaintiffs [Ramirez, Sifuentes Grounds No. 1]
- That the State knowingly sponsored false testimony regarding Mary Davila Wood [Sifuentes Ground No. 5];
- That the use of Wood's Testimony violated due process [Sifuentes Ground No. 9; Ramirez Ground No. 20]
- That the State sponsored false testimony of Brenda Ayala [Sifuentes Ground No. 10; Ramirez Ground Nos. 4,5]
- That the State failed to disclose information about Brenda Ayala [Sifuentes Ground No.11; Ramirez Ground No. 7]
- That the State sponsored false evidence of witnesses who allegedly had contacted Crimestoppers [Sifuentes Ground No. 14; Ramirez Grounds 21 and 22];
- That the State suppressed exculpatory evidence about favorable treatment/leniency to witnesses Frazier and Medrano and false testimony from such witnesses [Sifuentes Ground No. 16, 18];

- That the State sponsored false testimony regarding Mary Wood's identification of the Jolly Roger Store, and failed to investigate and present other evidence [Ramirez Grounds 18, 19];

- That the State sponsored false and misleading testimony concerning the adequacy and quality of the investigation and the competency and integrity of the lead investigator, Texas Ranger Sal Abreo [Ramirez, Ground No. 32];

- That the State failed to disclose the "lie" memorandum [Sifuentes Ground Nos. 32, 33; Ramirez Ground No. 31];

- That the State failed to disclose that tennis shoes did not match prints from the counter and sponsored false testimony concerning the shoes [Ramirez Ground No. 33];

124. However, the Court found that Plaintiffs' counsel was constitutionally ineffective in both cases. Ramirez Ground Nos. 2,3; Sifuentes Ground Nos. 2,3,4,6,7,8,17,20]. Their counsel failed to adequately investigate, cross-examine witnesses and make appropriate objections [Id.]. The Judge made numerous significant other findings which debunk or provide context to the allegations in this case, for instance that the reliability of the accuracy of the time/date stamp on the videotape showing Ayala was in question, and that Plaintiffs' criminal defense counsel was well aware of the tape. [See, e.g., Ramirez Ground No. 8]. In short, Judge Klein reviewed and carefully considered the contentions made in this case, at the habeas proceeding, and rejected the allegations of State misconduct.

125. “Under the doctrine of collateral estoppel, ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Spillers v. Webb*, 979 F.Supp. 494, 498 (S.D. Tex. 1997). State law applies in determining the preclusive effect of a prior state court judgment. See, *Amica Mutual Ins. Co. v. Moak*, 55 F.3d 1093, 1096 (5th Cir. 1995) (applying Texas collateral estoppel law to state probate determination). "In seeking to invoke the doctrine of collateral estoppel, a party must establish three elements: (1) the facts sought to be litigated in the second action were

fully and fairly litigated, (2) those facts were essential to the judgment in the prior action, (3) the issue is identical to an issue in the prior action." *Goldstein v. Commission for Lawyer Discipline*, 109 S.W.3d 810, 812 (Tex.App. – Dallas 2003), citing, *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001). In *Spillers*, the Court noted that the state trial court had set forth reasoned opinion regarding whether Plaintiff's injury was a pre-existing condition and that such finding was binding on Plaintiff in a subsequent ERISA action in federal court.

126. "Texas courts have maintained that collateral estoppel applies even if the second proceeding is based upon a different cause of action." *Spillers*, at 499, citing, *Root v. Brodhead*, 854 S.W.2d 706, 708 (Tex.App. – Austin 1993, no writ). Further, issue preclusion applies irrespective of whether the relief sought in the prior action is different than the relief sought in the instant action. See, *Schuster v. Martin*, 861 F.2d 1369, 1372 (5th Cir. 1988) (determination in prior Chancery proceeding seeking injunction, that no due process violation occurred, should have been given binding effect in federal civil rights lawsuit). The issues decided in the *habeas* proceeding are the grounds presented as the basis for the Complaints. The Court conducted a rigorous examination of the law and evidence, and made extensive and thorough findings of fact and conclusions of law. After the matter was subsequently presented to the Court of Criminal Appeals, Judge Klein's findings were not reversed. Hence, Plaintiffs are precluded from now re-litigating these issues in this proceeding.

127. The Court of Criminal Appeals does not receive evidence and, rather, relies upon the trial court to make findings of fact and conclusions of law in *habeas* proceedings. See, e.g., *Ex parte Carrio*, 992 S.W.2d 486, 489 (Tex.Crim.App. 1999); *Ex parte Reed*, 271 S.W.3d 698, 753 (Tex.Crim.App. 2008) (concurring opinion) ("it seems clear now that this Court is 'bound' by the trial court's fact-findings if they are supported by the record"). The principles underlying the

doctrine of collateral estoppel bar such relitigation here. The claims of prosecutorial misconduct should be dismissed for this additional reason.

B. Ineffective Assistance, As Sole Ground for Overturning Conviction, Plaintiff Cannot Attack Conviction Under *Heck* and Progeny

128. But for the State District Court's determination that Plaintiffs' counsel was constitutionally ineffective, their convictions would remain intact. Further, and notably, Plaintiffs' *habeas* counsel specifically challenged their conviction on alternative grounds – that they were innocent or that their conviction resulted from malfeasance of the State in denying the Plaintiff due process. However, the Court specifically rejected those alternative grounds. Thus, had the alleged malfeasance of the State been the only ground raised, Plaintiffs would certainly have no basis for asserting a claim for deprivation of constitutional rights. As presented, the Plaintiffs' ability to bring this action under the requisites of *Heck* and its progeny, hinge exclusively on a review in the *habeas* proceeding of the performance of their criminal defense counsel. Perversely, a criminal defense lawyer could fall on the proverbial sword for his/her client in *habeas* proceedings brought long after representation, and thereby create rights to pursue civil litigation where they would not otherwise exist.

129. With the Court having rejected Plaintiffs' alternate grounds, Plaintiffs nevertheless through this action seek results that would be inconsistent with the determinations of the *habeas* Court. For example, where that Court specifically determined that Plaintiffs' rights under *Brady* were not violated, the Plaintiffs seek an opposite ruling on the same issue here. The rationale behind *Heck* is that an individual should not be permitted to obtain in a civil action, a ruling inherently inconsistent with the determinations of a criminal court. See, *e.g.*, *Clay v. Allen*, 242 F.3d 679, 680 (5th Cir. 2001); *Bush v. Strain*, 513 F.3d 492, 497 (5th Cir. 2008).

130. *Heck* does not countenance that a party who unsuccessfully challenges a conviction on

grounds of prosecutorial conduct and succeeds only in showing ineffective assistance of counsel can then pursue a civil action, requesting inconsistent rulings. Such a party would, as here, not only be challenging a finding of guilty where he has not been exonerated, but where he has specifically challenged his conviction based on innocence and alleged State misconduct, and failed. Thus, *Heck* bars the Plaintiffs' claims based on the same issues raised in their habeas proceeding, and Movants pray that the Court dismiss them for this additional reason.

XII. CONCLUSION

131. Based on the foregoing reasons and cited evidence, Movants Mark Yarbrough and Lamb County pray that the Court dismiss all remaining claims asserted against them with prejudice as to refiling.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the all counsel of record in accordance with the Federal Rules of Civil Procedure on this 14th day of January, 2011.

/s/ William S. Helfand