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Fourth District Court
State of Utah
Utah County

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

DOUGLAS STEWART CARTER, Plaintiff, v. STATE OF UTAH, Respondent.	**RULING AND ORDER** **GRANTING PETITION FOR POST-CONVICTION RELIEF** Case No. 150400825 Judge Derek P. Pullan

THE MATTER IS BEFORE THE COURT on Petitioner Douglas Stewart Carter's Petition for Post-Conviction Relief ("the Petition"). The Court held a four-day evidentiary hearing in November 2021. Carter filed post-hearing briefing on January 31, 2022. (Dkt. 668). Respondent State of Utah filed an opposing brief on March 17, 2022, and Carter filed a reply on April 15, 2022.

The parties appeared for closing argument on June 9, 2022. At that hearing, the Court granted Carter leave to file a motion to amend the Petition to conform to the evidence presented at the evidentiary hearing. Because the motion to amend impacted the scope of the Petition, the Court delayed ruling on the merits of the Petition until after the motion to amend could be briefed and decided.

Carter moved to amend the Petition on June 13, 2022. The State filed its opposition memorandum on June 23, 2022. Carter replied on June 27, 2022. The Court granted the Motion to Amend on August 25, 2022. After this ruling issued, the Court took the Petition under advisement.

Having carefully considered the evidence and arguments presented, the Court now enters the following:

RULING

1. Claims for Relief

Carter argues that his conviction was obtained and his sentence imposed in violation of both the United States and Utah Constitutions. *See* § 78B-9-104(1)(a). His argument rests on four claims:

- The prosecutor violated *Brady v. Maryland* by failing to disclose material evidence that Carter could have used to impeach the testimony of Epifanio and Lucia Tovar, two key witnesses for the prosecution at trial. Specifically, the State failed to disclose evidence that police had (1) paid financial benefits to and on behalf of the Tovars prior to trial; and (2) threatened the Tovars with arrest, deportation, and loss of their child. *See* Petition, at 31.
- The prosecutor violated *Brady v. Maryland* by failing to disclose that police coached Epifanio to give false testimony at trial. Specifically, police instructed Epifanio (1) not to testify about the police having paid his living expenses prior to trial; and (2) to testify that immediately prior to the murder Carter said he was going to go "rape, break, and drive" when in fact Carter had never said this.
- The prosecutor violated *Napue v. Illinois*, by failing to correct false testimony from Epifanio about the financial benefits paid to him or on his behalf prior to trial.
- The prosecutor violated *Napue v. Illinois* by failing to correct false testimony from

Epifanio about Carter expressing intent to go "rape, break, and drive" before the murder.

2. Summary of the arguments made by the parties

a. Carter's Arguments

With respect to his *Brady* claims, Carter argues that the State suppressed evidence that the Tovars were threatened with arrest, deportation, and the loss of their son if they did not cooperate with the police. In addition, the State suppressed evidence that the Tovars were given financial benefits by the police.

Carter also argues that the State suppressed evidence that the police or the prosecutor coached Epifanio to testify falsely about the financial benefits he received and about Carter saying he was going to "rape, break, and drive" before the murder. Carter concedes that there was no direct quid pro quo—i.e. "testify falsely or you will be arrested, deported, and lose your son." Rather, the threats created an atmosphere in which the Tovars came to believe they must cooperate with the instruction to lie or suffer threatened consequences.

This atmosphere was aggravated when Lucia confided in Provo Police Officer Richard Mack ("Officer Mack") that she was afraid of being deported. Officer Mack responded, "As long as you're working with us, it's not going to happen." Officer Mack's response created an implicit *quid pro quo*: if the Tovars helped the police, the police would help the Tovars. *See* Pet. Memo., at 43.

Carter further argues that an "open file policy" is not enough to obviate the need for the prosecution to provide favorable evidence to the defense. *See* Pet. Memo., at 47 (citing *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801, 833 (10th Cir. 1995) ("[W]e once again reject

the prosecution's reliance on its 'open file' policy [to excuse its failure to properly disclose favorable information to the defense]."); *Strickler v. Green*, 527 U.S. 263, 282-85 (1995) (rejecting prosecution argument that disclosure was unnecessary because it maintained an open file policy)).

With respect to his *Napue* claims, Carter first argues police paid the Tovars thousands of dollars in financial benefits prior to trial, that the prosecutor Wayne Watson ("Watson") knew about the payments, that Epifanio lied when he told the jury the only benefit he received from the government was a check for $14, and that Watson failed to correct this false testimony. Second, Carter argues that either (1) Provo Police Lieutenant George Pierpont ("Lieutenant Pierpont"), in Watson's presence, told Epifanio to testify that Carter said he was going to go "rape, break, and drive" before the murder; or (2) Watson told Epifanio to say this. Either way, when Epifanio gave this false testimony at trial, Watson knew the testimony was false and failed to correct it.

Carter argues that these *Brady* and *Napue* violations were material. He contends that the violations were prejudicial because:

- Had Carter known the Tovars were threatened, given financial benefits, and had their testimonies coached by the police, he could have more effectively argued that the Tovars' testimonies were manufactured to curry favor with the government. Pet. Memo., at 46. According to Carter, no physical evidence connected him to the crime. Therefore, his conviction rested on two pillars of evidence, the Tovars' testimony and Lieutenant Pierpont's recitation of Carter's confession.
- Because evidence at the hearing shows Lieutenant Pierpont threatened Epifanio *before* he interviewed him, Carter could have argued at trial that Epifanio

fabricated Carter's confession to him to please Lieutenant Pierpont. Pet. Memo., at 55. Once he falsely implicated Carter, Epifanio maintained the lie because of the financial benefits he received from the police. *Id.* at 62. And as the payments cumulated, Epifanio's testimony evolved to become more favorable to the State. The most glaring example of this evolution is Epifanio's eleventh hour disclosure about the location of the gun. *Id.* at 63. Lucia's testimony also evolved over time to become more favorable to the State. By the time of trial, her account of the demonstration Carter performed in her home after the murder had become more detailed. *Id.* at 65.

- Had this evidence not been suppressed, the jury would have had grounds upon which to doubt not only the Tovars' testimony but that of Lieutenant Pierpont too. *Id.* Lieutenant Pierpont's involvement in the coaching of Epifanio's testimony would have rendered his testimony about Carter's confession suspect.
- Carter argues that the *Brady* and *Napue* violations are material, notwithstanding his confession to Lieutenant Pierpont. This is so because, without the Tovars' testimony, the confession may not have been able to stand on its own. *Id.* at 67, 71. Furthermore, while there is factual overlap between the narrative in Epifanio's testimony and the narrative in Carter's confession, each narrative contains unique facts. Carter's stated intent to "rape, break, and drive" and his direction for Epifanio to dispose of the gun derive solely from Epifanio's testimony, not the confession. And only the confession—not Epifanio's testimony—contained evidence that Carter stole $20 worth of bills from the victim's purse, tied the victim's hands behind her back, and murdered the victim in the television room of

the home. *Id.* at 74.

- Furthermore, Perla LaCayo's ("Perla") testimony would not have rehabilitated Epifanio's testimony. Carter asserts the State would not have called Perla to testify, even if Epifanio's testimony had been impeached with the suppressed evidence. According to Carter, Epifanio's trial testimony *was* attacked as being the product of improper motives—i.e. his motive to avoid arrest and prosecution for helping Carter escape to Wendover, and his motive to avoid deportation. The State could have called Perla to testify about Epifanio' consistent statements made to her before these motives to fabricate arose, but made a strategic decision not to. Given this decision, it is unlikely the State would have reversed course and called Perla to rebut the suggestion that Epifanio's testimony was the product of other improper motives (i.e. police threats or police payments). *Id.* at 75.
- If the State had called Perla for this purpose, she could have then been impeached with her prior inconsistent statements and been found not credible. She could also have been examined about how the police had threatened her with deportation and the loss of her children. This testimony would have hindered the State more than helped it. Finally, even if Perla was called, she would not have corroborated Epifanio's testimony about "rape, break, and drive" and about Carter directing him to dispose of the gun.
- With regard to the penalty phase specifically, Carter argues that Watson relied heavily on the statement "rape, break, and drive" when advocating for the death penalty.[1] Pet. Memo., at 40. All the evidence supporting Carter's premeditated

intent to rape and his laughing and relishing in the crime came from the Tovars. Because all that is necessary to avoid the death penalty is a "single doubting juror," any impeachment of the Tovars' credibility could have made the difference between life and death for Carter. This is especially true because the jurors were instructed that if they found that a witness had lied, they could disregard the testimony altogether.

- Finally, while not argued as a separate claim, Carter argues that had he known about the suppressed evidence, he could have argued that the Tovar transcripts should not have been admitted at the 1992 penalty phase. Specifically, he could have argued that admitting the transcripts was improper because he was denied the right to cross-examine the Tovars about the suppressed evidence.

b. The State's Opposing Arguments

At the outset, the State challenges the legal basis for two propositions underlying Carter's claims: (1) that admitting the suppressed evidence would have changed evidentiary *rulings* admitting the Tovars' testimony and Carter's confession to Lieutenant Pierpont; and (2) that PCRA review is limited to whether the suppressed evidence and false testimony undermine confidence in the verdict and sentence.

As to the first proposition, the State contends that the standards found in *Brady*, *Napue*, and the PCRA focus on what the *fact-finder* would have done with the undisclosed information, not whether judicial rulings would have changed. Furthermore, the mandate rule and the law of the case dictate that this court cannot disturb the admissibility of Carter's confession.

As to the second proposition, the State contends that "in evaluating [prejudice], it is

[1] This argument is not supported by the record. Watson did not reference the phrase "rape, break, and drive" during his closing argument in either the guilt or penalty phases of the 1985 trial. The second prosecutor in the 1992 penalty phase *did* rely on the phrase "rape, break, and drive."

necessary to consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). And under that inquiry, the Utah Supreme Court said, "[w]e look back to what would have happened at" the petitioner's "original trial, but we do it with the benefit of what we know thanks to the evidentiary hearing." *Ross v. State of Utah*, 2019 UT 48, ¶ 90. If prejudice were determined in light of the newly discovered evidence alone, the analysis "would improperly and artificially compartmentalize the inquiry." *Id.* ¶ 92.

In other words, "asking whether the Court can retain confidence in the outcome requires it to consider all the known evidence, not to simply ask how the litigants would have 'played [their] cards differently.'" Opp. Memo., at 100-101 (quoting *Ross*, 2019 UT 48, ¶ 93.). This ensures that PCRA review is "a search for the truth, not just a war game where the Court runs through the players' strategies to see who wins. Fairness and a reliable verdict, not the probable gamesmanship of idiosyncratic litigants, is the focus." *Id*.

Thus, when considering whether any *Brady* or *Napue* violation is material, the Court must view the violations in light of all relevant evidence in the record that would have been offered had the suppressed evidence been disclosed to and used by the defendant at trial and had the false testimony been corrected. This evidence would have encompassed a wide-range facts, whether presented at trial or not, including: (1) Carter's confession, (2) Epifanio's prior consistent statements to Perla, (3) Epifanio's statements to Pierpont that he was afraid of retaliation from Carter or Carter's family, (4) evidence that Carter had access to a .38 caliber Charter Arms, which could have fired the bullet that killed Eva Oleson; (5) evidence that Carter's wife, Anne, found blood on Carter's clothes, (6) evidence that Carter told Anne a story about the murder that put him at the scene. *Id.* at 117; and (7) the fact that neither Epifanio nor

Lucia recanted their testimony about Carter's conduct and statements on the night of the murder.

i. State's arguments on the Napue claims

The State argues that even if Watson knew Epifanio's "rape, break, and drive" testimony was false, Watson corrected the testimony at trial. After Epifanio testified that Carter told him he was going to "rape, break, and drive," Watson pushed Epifanio to clarify and to recount only the actual words Carter used. Epifanio then testified that Carter said he was going to "break into a house" because he "needed money." (Tr. Trans. pp. 1129-30).

In the alternative, the State argues Carter presented no evidence that Watson or the 1992 prosecutor knew "rape, break, and drive" was a fabrication. At most, Carter proved that Watson was in a room with Epifanio when the phrase "rape, break, and drive" came up.

The State argues that Carter was not prejudiced by Watson's failure to correct Epifanio's false testimony about only having received fourteen dollars from the police. The State contends that counterfactual evidence would have been offered to explain the false statement, and that this evidence would have hurt Carter more than helped him.

Correcting Epifanio's false testimony about financial benefits would have required Watson to disclose that police had in fact made payments to the Tovars for rent, food, and utilities. If this evidence had been disclosed, then Watson would have presented evidence about the reasons police made the payments. Epifanio told Lieutenant Pierpont he may leave the State. *See* Exhibit F at 78. The police knew that the Tovars were illegal residents subject to deportation and therefore a flight risk. And contrary to his testimony at the evidentiary hearing, Epifanio told police that he was afraid of Carter or that a member of Carter's family might retaliate against him. Police paid the Tovars to mitigate these fears and to ensure that they did not leave Utah before trial.

Similarly, disclosing police payments to Epifanio would have suggested to the jury that Epifanio's testimony was derived from an improper influence or motive. Therefore, the State could and would have called Perla to testify about Epifanio's consistent statements made before any payments were made to him. The State dismisses Carter's contention that no reasonable prosecutor would have called Perla for this purpose. The State argues that Perla's own inconsistent statements could be explained by her fear that she would be held to account for neglecting her children and for helping Carter escape to Wendover. Moreover, even if Perla turned out to be a recalcitrant witness—as she was at the 2021 evidentiary hearing—the State could rebut her claimed lack of memory by confronting her with statements she made to Officer Mack about what Epifanio told her.

Thus, even under the lower *Napue* standard, any correction of Epifanio's false testimony could not have in any "reasonable likelihood" affected the jury's verdict in either the guilt or the penalty phase of the trial. Evidence that the police provided financial assistance to Epifanio would only have led to further evidence of *why* financial aid was provided. It would have painted Carter as someone to be feared. It would not have undermined any of the substantive evidence about the elements of the crime of aggravated murder, especially because the financial assistance was not provided until *after* Epifanio implicated Carter in the crime. In the end, correction of the testimony would have hurt Carter, especially in the penalty phase of the trial. *Cf. Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (rejecting *Strickland* prejudice argument because admitting mitigation evidence counsel allegedly should have presented "would have triggered admission of the powerful [harmful character] evidence in rebuttal. This evidence would have made a difference, but in the wrong direction for [the defendant]" (emphasis added)).

ii. ***State's arguments on the Brady claims***

The State argues that Carter failed to prove by a preponderance of the evidence that the State suppressed any threats made to the Tovars. Epifanio testified there was no quid pro quo—meaning police did not threaten to arrest, deport, or separate him from his family if he did not lie as instructed. And even if Epifanio and Lucia "believed" the State would deport them or incarcerate them, their subjective belief is not evidence that the State had any duty or ability to provide to the defense.

The State points out that Pierpont called immigration, not to deport Epifanio, but rather to ask about placing a "hold" on him. This contact with immigration was disclosed to Carter. Moreover, any threats made during Pierpont's interrogation of Epifanio were a matter of court record and fully disclosed to Carter.

Similarly, Mack testified that he never threatened the Tovars and was actually very friendly with them. His statement that "as long as they are involved in a murder case[,] no agency would be sending them back to Mexico," is a promise, not a threat. *Id.* at 193. Moreover, it was Lucia who, unprompted, brought up the issue of deportation.

Finally, Carter's own attorneys admitted that they never went to the Utah County Attorney's Office to review the file. Therefore, Carter cannot prove by a preponderance of the evidence what information in the file was disclosed and what information was suppressed by the State.

In the alternative, the State argues that even if threats to arrest, deport, and separate the Tovars were made, those threats were cumulative of other threats disclosed to Carter. At trial, Epifanio testified that his charges were dismissed in exchange for his testimony. Carter knew then that Epifanio had been threatened with arrest and incarceration. Epifanio testified that he and Lucia were illegal residents. And Carter argued that Epifanio should not be believed because

he had been locked up and was desperate to stay in the United States. Finally, the loss of the Tovars' child would have been a collateral consequence of deportation and incarceration.

The State further argues that any threats had no effect on the substance of the Tovars' testimony. Epifanio made consistent statements to Perla prior to any contact with the police—before any threats *could* have been made. At the 2021 evidentiary hearing, Epifanio confirmed the truthfulness of his trial testimony that Carter confessed the murder to him. Lucia's testimony about Carter laughing while demonstrating the crime did not substantively change between her first statement and her testimony at trial. In fact, Lucia's testimony actually became *less* damaging at trial. At the preliminary hearing, she testified that Carter made a shooting motion with his hand, but did not testify to that action at trial.

Thus, while police threats may have been used to impeach the Tovars' trial testimonies, the threats would not have cast doubt on Carter's confession to Epifanio about the murder, or on Lucia's description of what she saw Carter do. In other words, the threats could not and would not have had any material impact on the outcome of either the guilt phase or penalty phase of Carter's trial.

Turning to the issue of coached testimony, the State first argues that Carter has failed to prove Epifanio's testimony was coached. Both Watson and Lieutenant Pierpont testified that the only thing they ever told the Tovars to say during their testimony was the truth.

The State contends that the phrase "rape, break, and drive," is "so syntactically clumsy in English that it strongly suggests a non-English origin." *Id.* at 209. Therefore, the Court should find that the phrase cannot plausibly reflect something the police, prosecutors, or even Carter would say. And when asked about the phrase, Epifanio could not at first remember saying it, and then could not remember who told him to say it.

As to coaching about financial benefits, the State argues that Watson disclosed the rent payments to Carter's lawyer, Duke McNeil ("McNeil) and that he in turn made a strategic decision not to impeach Epifanio about those payments. Had Watson intended to suppress evidence of the rent payments, he would not have put a handwritten note about the payments in a file that was open for defense counsel to inspect. Carter has not presented any evidence, and certainly not a preponderance of the evidence, that the note was not in the file at the time of trial. Indeed, Watson's note was in a box labeled five of eight, suggesting it was part of the case file open to the defense. *Id.* at 206 (citing *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (finding no *Brady* violation where the evidence was available to the defendant through the government's open file policy)). And just because a prosecutor in 2016 considered the note attorney work product, does not mean that Watson considered it work-product in 1985.

Finally, even if coaching occurred, Lucia's testimony became *less* damaging at trial compared to her testimony at the preliminary hearing. And any coaching of Epifanio would not have damaged his credibility in such a way that the jury would have disregarded the statements Carter made to him. At most, the jury may have believed that Epifanio lied about the money he received, but nothing else – especially because Watson corrected Epifanio's statement about Carter wanting to "rape, break, and drive."

iii. ***State's arguments on the penalty phase***

With regard to the penalty phase of the trial, the State poses the question: "was the Tovar's testimony so important to the jury's decision that undermining the Tovars' testimony would have tipped the scale against Carter's death sentence[?]" Opp. Memo., at 140. The State answers the question no. Carter's own confession established that this was a "night-time home invasion torture-murder with a sexual component." *Id.* at 143. Carter's confession established

that

> he entered Eva's house with a gun, demanded money, tied her hands behind her back, stabbed her ten times, left her "moaning" while he searched for valuables, before returning and shooting her in the head. . . . Carter told Pierpont that when he left Eva's house "he felt that she was still alive, that she was gurgling when he left." . . . Carter also told Pierpont that "he thought about raping her but that she was on her period." . . . This is corroborated by the physical evidence, which showed Eva's murdered body with her hands tied behind her back, her pants and pantyhose pulled down to her ankles, and a sanitary napkin at her feet. What's more, Carter confessed to going back to the Tovars' house and telling them what he did, and Epifanio and Lucia testified that Carter predicted about how they will see it on the news. And the jury saw photographs of the scene of the murder, showing Eva's body on the ground, tied up, pants and panty hose pulled down around her ankles, and sanitary napkin removed and left at her feet.

Id. at 143 (internal citations omitted). The medical examiner testified about the violent nature of the knife wounds, how deep and penetrating they were and the force needed to cause Ms. Olson's injuries. The medical examiner also testified about how Ms. Oleson may have still been alive after being stabbed 10 times and before she was shot.

According to the State, all this evidence would have been more compelling and horrifying to the jury in determining a sentence of death than Epifanio's statement of a pre-murder intent to rape or Lucia's testimony about Carter's laughter. Whether Carter intended to rape prior to entering the home or formed that intent after subduing the victim makes very little difference. Indeed, Carter told Lieutenant Pierpont that Ms. Oleson begged Carter not to rape her after Carter pulled her pants down at knifepoint. Carter "sexually degraded" Ms. Oleson in her own home, leaving her in fear of being raped "while she bled out and Carter rummaged through her house." *Id.* at 148.

Furthermore, it is unlikely the jury would have discounted the *entirety* of Epifanio and Lucia's testimony based upon the suppressed evidence. Their testimony about the substantive details of Carter's confession to them remained materially consistent over time. To this day, both

Epifanio and Lucia still stand by their trial testimony about what Carter did and said when he came back to their home on the night of the murder.

Finally, the State concedes that during argument at the 1992 sentencing the prosecutor relied on the phrase "rape, break, and drive" and emphasized Carter's laughter the night of the murder. However, the jury was instructed that arguments of counsel are not evidence. *Id.* at 158.

For these reasons, the State concludes that "the Tovars' allegations of prosecutorial coaching, payments, instructions to lie about the assistance, and threats of deportation—even if true and presented to Carter's resentencing jury—had no reasonable probability of affecting the jury's judgement at sentencing or undermining confidence in the death sentence." *Id.* at 161.

c. Carter's Reply

In response to the State's argument that disclosure of financial benefits paid to the Tovars would have resulted in the introduction of evidence damaging to the defense, Carter argues that he would have introduced evidence that Epifanio was afraid—not of Carter's retaliation—but of the police's threat to arrest and deport him. Carter would have also put on evidence that police themselves, particularly Officer Mack, did not believe the Tovars were in any danger. In addition, the jury would have heard evidence that the police were hiding the financial benefits and coaching witnesses.

This evidence of police misconduct would have called into question material parts of Lieutenant Pierpont's testimony about Carter's confession. At the 1992 penalty phase, Lieutenant Pierpont testified that Carter admitted to hearing Ms. Oleson "gurgling" and wanting to rape her. But the only evidence of these details was Lieutenant Pierpont's testimony. These details were not documented in the written statement Lieutenant Pierpont dictated and Carter signed.

Carter disagrees that Watson adequately corrected Epifanio's false testimony that Carter said he intended to "rape, break, and drive." Watson did not ask Epifanio to retract the statement. Watson did not make it clear that "rape, break, and drive" was false. Carter cites to several federal cases for the proposition that a prosecutor must do more than clarify and ask a witness to restate—rather, the prosecutor must affirmatively make clear that the testimony is false. *See United States v. Ramos-Carrillo*, 511 F. App'x. 739, 741 (10th Cir. 2013) (False testimony was corrected when the prosecutor immediately "press[ed] the witness until he confessed his false testimony."); *see also United States v. Islam*, 796 F. App'x. 343, 344-45 (9th Cir. 2018) (False testimony was corrected when the prosecutor investigated a witness he suspected of testifying falsely, provided an official report of the investigation to the court and defense counsel, and then participated in a bench conference to determine how to "inform the jury and correct the record."); *People v. Morales*, 112 Cal. App. 4th 1176, 1193, 5 Cal. Rptr. 3d 615 (2003), as modified (Nov. 6, 2006) (False testimony was corrected when the prosecutor fully disclosed that the witness' testimony was false early in his closing argument. "[I]f the prosecutor discloses fully the falsity of the testimony, there is no due process violation."); *United States v. LaPage*, 231 F.3d 488, 490 (9th Cir. 2000) (False testimony was not corrected when the prosecutor disclosed that the testimony was false during his rebuttal closing, which prevented defense counsel from contextualizing the importance of the false testimony for the jury.).

Watson never disclosed that "rape, break, and drive" was false. Had Watson done so clearly, the 1992 re-sentencing prosecutor would not have relied on the phrase in seeking the death penalty. It would have been clear to the later tribunal that the evidence was false.

3. Summary of Criminal Trial Record and Evidence Presented at the Evidentiary Hearing

a. 1985 Preliminary Hearing

i. Testimony of Epifanio Tovar

At the preliminary hearing, Epifanio testified that on February 27, 1985, Carter came to Epifanio's home "around seven, 7:30" and left about 10 minutes later. (PH Trans. p. 19). Before leaving, Carter said he was "going to break into a car or steal some money." (PH Trans. p. 20).

Epifanio testified that Carter returned to Epifanio's home two hours later. (PH Trans. pp. 20, 33). Carter announced that "he just killed a woman" by stabbing and shooting her. (PH Trans. p. 20). Carter explained that he knocked on the woman's door. She came to the door and "she looked at him prejudiced-like." (PH Tr. p. 22). This angered Carter so he went inside the house with a gun. The woman retrieved a knife. Carter pointed the gun at her and told her to drop the knife. He then told her to lie on the floor. *Id*. Epifanio testified that Carter said he then took a pillow, placed it on top of the woman's head, and shot her. (PH Tr. p. 22).

Carter lay on Epifanio's living room floor and "showed [Epifanio] how it was done." (PH. Tr. p. 21). When asked to describe the demonstration, Epifanio said "[Carter] laid on the floor and put his hand on the back" and this was done to "show me how he stabbed her, and I don't know." *Id*.

Epifanio testified that a few days later—perhaps at Perla Lacayo's home, although he is uncertain—he saw Carter again. Epifanio had read in the newspaper about the murder of Ms. Oleson. So informed, Epifanio asked Carter "if he had raped the woman." Carter said he did not because she was on her period. (PH Trans. p. 26).

Finally, when asked about whether he had ever seen Carter with a gun, Epifanio said "I seen the gun when he first purchased it." Epifanio did not know when that was because "it's been so long ago." Epifanio testified that the gun was a .38 caliber. (PH Tr. p. 27).

ii. Testimony of Lucia Tovar

Lucia testified that when Carter returned to her home at 9:30 p.m. on February 27, 1985, she was home with Epifanio and their son. Epifanio and Carter were talking and she understood "very little" of the conversation. (PH Trans. pp. 52, 56). According to Lucia, Carter "was talking with her husband for something that [Carter] did." (PH. Trans. p. 53). Carter was very nervous and Epifanio responded by saying, "You're crazy." Carter protested, saying "I'm not crazy." (PH Trans. p. 53).

Carter lay on the floor and was "giving someone's hand on the back, and he was just doing something like moving his hand back and forth." (PH Trans. p. 54). When asked to demonstrate for the Court what she saw Carter doing, Lucia did so explaining that "[Carter] got up where he was sitting and he lay down on the floor. . . . He bent a little bit and he put his hands on the back and he start moving his hand back and forth. He opened his legs and then he just bent more over." (PH Trans. p. 55). During Lucia's demonstration at trial, her feet were 1-2 feet apart, she was bent at the waist, and her hands were clasped together. *Id*.

At first, Lucia believed Carter was talking about himself. (PH Trans. pp. 53-54). But on cross examination, Lucia said "He was talking about himself but what [Lucia] thought is that he was talking also of what he did to someone else." (PH Trans. p. 56).

iii. Testimony of Lieutenant George Pierpont

Lieutenant Pierpont testified that he was a police officer for Provo City. (PH Trans. p. 59). He testified that he interviewed Carter in Nashville, Tennessee on June 12, 1985, for 30-40 minutes. (PH Trans. pp. 59, 69). At the time of the interview, Carter had been in custody for approximately 24 hours, having been arrested by Nashville police officers on the morning of June 11, 1985. (PH Trans. p. 65).

Lieutenant Pierpont testified that Carter gave an oral statement confessing to the murder. He testified that Carter told him the following:

> [Carter] was at the home of Epifanio Tovar on the day of the 27th of February,1985; that he had left that location to go out and steal some money; that he was eventually seen inside a Volkswagen in the area of 600 East on Third South. Some people scared him away.
>
> He told me 20 minutes later he ended up at the Oleson home. He knocked on the door. Mrs. Oleson came to the front door. At that time he indicated that the phone rang inside the Oleson home. Ms. Oleson left the door open, went to answer the phone, and Mr. Carter walked into the house. As Ms. Oleson returned to the living room area, he then confronted her with a gun, which he says that it was the gun that his wife had purchased approximately a year before; asked her for money, at which time she produced approximately $20 in various bills. At that point he asked her for more money. She said she didn't have any. He said he did not believe her, at which time she is—he says Mrs. Oleson attempted to flee the home through the east door, east rear door of the home. He stopped her in the kitchen area. Mrs. Oleson saw a butcher knife. It was sitting on the counter. She picked that up. He again pointed the gun at her, ordered her to put the knife down, which she did. He then picks up the knife and ordered her back into a small TV room, which is in the northwest portion of the home. He then indicated to me that he ordered her to take her pants down, which he said she said not to rape her. He told me that he said to her that he wasn't going to rape her, at which time he ordered her on the ground. He told me that he used the telephone cord that was in the room to bind her hands behind her, indicating that she was first laying on her side. He then used the butcher knife to cause a puncture wound to her abdominal area, at which time she rolled over to her stomach. He then indicated he stabbed her multiple times in the back, and she did not appear to die; that she was moaning.
>
> He then left her at that location and went into the living room, where he opened up a couple of drawers looking for more money, couldn't find any, returned to the small television room where the victim was located. She was still alive at that point. He said he then attempted to shoot Mrs. Oleson in the head with his gun. However, he first indicated that the bullets in the cylinder were not lined up properly and the cylinder in the weapon would not turn. He then says he fixed that, picks up a pillow off the couch that was in the room, placed the pillow over the top of the gun, pulled the trigger to the gun. However, the hammer to the revolver hit the pillow and would not discharge. He then says—then he—then lifted the pillow up higher and proceeded to fire one round in the back of Mrs. Oleson's head, and from there he indicated that he left the home through the east rear door.

(PH Trans. pp. 60-62).

Lieutenant Pierpont testified that after giving this oral statement, Carter agreed to give a written statement. Lieutenant Pierpont—not Carter himself—dictated the statement which was then typed. The typed statement was given to Carter who "had the opportunity to read that over, make any corrections or deletions that he wanted to make . . . and then he signed it." (PH Trans. p. 69).

Finally, Lieutenant Pierpont testified that he was present at the crime scene on February 27, 1985. Police discovered Ms. Oleson's body in the northwest bedroom of the Oleson home. Her hands had been bound with a white telephone cord. She had been "stabbed eight times to the back and once to the front." She had been shot in the back of the head. Her slacks were "partially off the body, down near her feet." (PH Trans. pp. 62-63).

iv. Testimony of Perla Lacayo

Perla Lacayo testified she had known Carter for four years. (PH Trans. p 35). About a month after the murder of Ms. Oleson, Carter told Perla he was a suspect and he gave her a whirlpool bath. *Id.* at 40-41. Eight days later, Perla looked in the bath and saw a gun. *Id.* at 43. Epifanio was with her. *Id.* at 44. On April 9, 1985, she and Epifanio drove Carter to Wendover in her car. *Id.* at 35-36. Carter told her he needed to leave Utah because he had "bitten a lady in her mouth." *Id.* at 39.

b. 1985 Criminal Trial[2]

i. Testimony of Epifanio Tovar

Epifanio Tovar testified that on February 27, 1985 Carter came to Epifanio's home around 8:30 p.m. (Tr. Trans. p 1128). They were outside and some friends were there, but

[2] The Court has reviewed the entire trial record and makes a summary of the testimony pertinent to Carter's claims. Testimony from the following witnesses is not summarized here: Martha Kerr, Officer J. Craig Geslison, and Raymond Cooper.

Epifanio could not remember the friends' names. (Tr. Trans. p. 1174). Carter had two beers with him and drank both. *Id.* at 1175. The prosecutor asked Epifanio "what, if anything, did [Carter] tell you he was going to do when he left the first time?" The following exchange then occurred:

> Epifanio: He was going to go rape, break and drive.
> Prosecutor: And did he tell you that?
> Epifanio: Yes.
> Prosecutor: What's your best recollection . . . of what [Carter] told you he was going to go do? Tell me what you remember him saying?
> Epifanio: That he was going to [go] break in a house.
> Prosecutor: And what, if any, purpose did he tell you why he was going to do that.
> Epifanio: Needed money.

(Tr. Trans. pp. 1129-30).

Epifanio testified that Carter returned to Epifanio's home around 9:30 or 9:45, claiming that "he had killed a woman" with a knife by stabbing her about eleven times. (Tr. Tr. pp. 1133, 1136, 1173). According to Carter, he went to the woman's home, knocked on the door, and the woman answered. Carter asked for a person, and the woman responded by saying the person did not live there. The woman then "looked at [Carter] differently because of his color, because he was a different individual in the area." (Tr. Trans. p. 1137). This angered Carter and he entered the house. The woman fled to the kitchen where she obtained a knife. Carter pursued and threatened the woman with the gun. Carter told the woman to put the knife down. She responded by throwing the knife to the floor. *Id.* at 1138.

Carter said he stabbed the woman about eleven times. Carter said that "after he had stabbed the woman, he took the gun and he took a nearby pillow. He put the pillow over the gun to muffle the sound. As he fired the gun to [the woman's] head, it misfired. He pulled the gun, it

misfired because the trigger apparently got caught in the pillow, he took the pillow away, took the gun back to the woman's head and fired it and killed her." (Tr. Trans. pp. 1136-37).

Carter lay on Epifanio's floor and put his hands behind his back to demonstrate "how he had laid her down, and how he had, what he had done to her." (Tr. Trans. p. 1137). Epifanio testified that when he expressed disbelief about Carter having killed a woman, Carter responded: "Watch the news tonight. You will see me on the news." (Tr. Trans. p. 1137). Carter stayed for a while, watching the news together with Epifanio, and then left. *Id.*

About a week later, Epifanio saw Carter again in Provo. Epifanio had read in the newspaper about the murder of Ms. Oleson and something about her being raped. (Tr. Trans. p. 1140). Epifanio asked Carter if he had raped Ms. Oleson. *Id.* Carter said that he had not because "she was on the rag" meaning on her period. (Tr. Trans. p. 1141). When asked why he did not go to the police to report what Carter had said, Epifanio testified "I was afraid of what might happen to me and my family." *Id.*

Epifanio testified that in March 1985 he was at the home of Perla Lacayo. *Id.* at 1143. Perla had a portable whirlpool bath machine. *Id.* Epifanio dismantled the machine and discovered a gun in it. Epifanio left the gun there and re-covered the machine. (Tr. Trans. pp. 1143-44). Around April 8, Carter brought the whirlpool bath machine to Epifanio's home and left it there. *Id.* at 1145. Epifanio was asleep when Carter did this. *Id.* Epifanio testified that the next day he had a conversation with Carter about the gun—although Epifanio could not remember where this conversation occurred. (Tr. Trans. pp. 1146-47). Carter told Epifanio to throw the gun away. *Id.* at 1147. Sometime after this conversation, Epifanio threw the gun in the river "down there near Lake Shore." (Tr. Trans. p. 1148). Epifanio testified that he told police about him disposing of the gun last week on Saturday. *Id.*

Sometime in early April 1985, Epifanio and Perla drove Carter to Wendover, Nevada in Perla's car. *Id.* When asked why he did this, Epifanio responded, "[Carter] asked me to take him, and so I did." *Id.*

On cross-examination, Epifanio testified that he was from Mexico, and had no legal status in the United States. (Tr. Trans. pp. 1156, 1164). Epifanio testified that he had an eighth grade education and that he was 19 years old on February 27, 1985. Epifanio testified that he worked for Anderson's Roofing and that is how he supported his wife and child.

On cross-examination, Defense counsel placed significant emphasis on Epifanio's recent disclosure that he had thrown the gun in the river at Carter's direction. Epifanio testified that police had "called him in" the Saturday before the trial, and he spoke to Lieutenant Pierpont. *Id.* at 1160. This was either their second or third meeting. *Id.*at 1161. It was in this conversation that Epifanio first said anything about the location of the gun. *Id.* Epifanio conceded that he had been asked about the gun by police and the prosecutor and had in each case told them "he didn't know anything about it . . . and didn't know where the gun is." (Tr. Trans. 1161-63). The following exchange then occurred:

> Defense Counsel: Well, were you lying or were you telling the truth there?
> Epifanio: I was lying.
> Defense Counsel: If I asked you right now as you sit there on the witness stand, how many other lies or how many other stories have you made up in this whole matter, that you could tell us, right in front of all of the Jury?
> Epifanio: Just one.
> Defense Counsel: Just one lie?
> Epifanio: Yes.

(Tr. Trans. p. 1163).

Almost immediately after this exchange, Defense Counsel turned to the question of

monetary payments. On this issue, the following exchange occurred:

> Defense Counsel: Mr. Tovar, did you and your family anytime between February and now receive money or support from Mr. Watson's office or from Mr. Pierpont, the police?
>
> Epifanio: Just, we just received fourteen dollars.
>
> Defense: Just fourteen dollars?
>
> Epifanio: Yes, a check from the City.
>
> Defense: Nothing else that they offered you or gave you to stay and be available because you had to be a witness in this case?
>
> Epifanio: No.
>
> Defense: What about your family, your wife?
>
> Epifanio: No.
>
> Defense: You are not on any kind of aid?
>
> Epifanio: No. They just gave us a check, one for each of us, since that last court.

(Tr. Trans. p. 1164).

Defense counsel concluded cross-examination by returning to Epifanio's recent meeting with Lieutenant Pierpont during which Epifanio disclosed for the first time that he had thrown the gun in the river.

> Defense Counsel: On Saturday, when you talked with Officer Pierpont about the new story, the gun in the river, how long were you at the police station with Officer Pierpont?
>
> Epifanio: An hour.
>
> Defense Counsel: Were there other officers talking to you at the time?
>
> Epifanio: Yes.
>
> Defense Counsel: Okay. Did they promise you that if you testified or told them something that you would be all right and you wouldn't have any problems?
>
> Epifanio: Right.
>
> Defense: They did tell you to come here and say what you were supposed to say today. Right?

Epifanio: They told me to come here and say the truth.
(Tr. Trans. pp. 1178-79).

On redirect, the prosecutor asked Epifanio "Has myself or anyone from my office or anyone from the police department, Mr. Tovar, ever told you to say anything but the truth?" Epifanio responded, "Just told me to come and say nothing but the truth." (Tr. Trans. p. 1179).

ii. Testimony of Lucia Tovar

Lucia Tovar testified that she and Epifanio were married and living together on February 27, 1985. *Id.* at 1255. On that night at approximately 9:30 p.m., Carter returned to her home. *Id.* at 1256. She watched as Carter and Epifanio had a conversation, part of which she understood. *Id.* at 1257. She testified that when Carter arrived, he told Epifanio that he (Carter) had done something. Lucia did not understand what he had done. *Id.* at 1257.

Lucia then watched Carter demonstrate as follows: "He laid himself to the floor showing us exactly how he had forced this individual to lay down, and then he put his hands behind his back to illustrate how he had tied her hands behind her back. . . . He demonstrated as if he had done something in this manner to the individual" (witness demonstrating holding up hand with fist clenched and moving it forward and backward). (Tr. Trans. p. 1258). When asked what else Carter did, Lucia answered: "He laughed and laughed about something he had done. And I do not know what it was because he was nervous or why. But he continued to laugh." (Tr. Trans. p. 1258). Finally, Lucia confirmed that when Epifanio told Carter he was crazy, Carter said: "I swear by my mother that that is true. . . . [W]atch the news." (Tr. Trans. p. 1259).

On cross-examination, Lucia testified that on February 27, 1985, Carter first came to her home "about 7:30, almost 8:00" in the evening, and that he left after about 15-20 minutes. *Id.* at 1261. He returned "about 9:25, 9:35" around there. (Tr. Trans. p. 1263). When he returned,

Carter and Epifanio sat down on the couch and Lucia sat across from them with her son. Carter asked Lucia, "Do you understand?" Lucia said, "No." However, she testified that she was "interested and wanted to know." (Tr. Trans. p. 1265). Lucia testified that she understood "some . . . but not all" of the conversation between Epifanio and Carter. She further testified: "But I was not sure, since he laughed and he seemed to be excited, I wasn't sure that he had done anything wrong." (Tr. Trans. p. 1261).

Regarding Carter's demonstration, Lucia testified: "He was there approximately about 30 minutes, because he kept repeating the same thing over and over again and he demonstrated about twice by laying down on the floor and explaining. And I wasn't sure that I was understanding what he was saying, but he did demonstrate." (Tr. Trans. p. 1266). Lucia testified that the television was on during the demonstration and "some type of a movie" or "The Jeffersons" was playing. *Id.* at 1266. When asked if this was what was on television during the demonstration, Lucia testified: "Yes. [Carter] was, during the time that he was there, I wasn't really watching the television because whenever an announcement came on I could notice [Carter] getting on the ground and demonstrating to my husband and laughing and giggling; and yet I did not understand what he was saying, but I kept thinking to myself he must be crazy." (Tr. Trans. p. 1267).

Lucia testified that on the day police came looking for Epifanio, she directed them to Epifanio's workplace. There, she told Epifanio "Tell them whatever it is you know so that they will leave you alone." (Tr. Trans. p. 1268). She testified that police interviewed her. She testified that Epifanio had never "threatened [her] or . . . pushed [her] into saying anything." (Tr Trans. p. 1269).

Finally, Lucia testified that she was aware Epifanio had met with the police the week

before trial started. She testified that she did not recall her husband ever owning or having a gun. However, "one Friday evening, [Carter] came to my house and gave me a box." (Tr. Trans. p. 1269). She did not know what was in the box. Carter asked her to keep it, and placed the box to the side of her bed. (Tr. Trans. at 1270).

iii. Testimony of Lieutenant George Pierpont

At trial, Lieutenant Pierpont testified again about Carter's oral confession in Tennessee, but Lieutenant Pierpont added several additional details. These new details included: (1) Carter said that before the murder he attempted to enter a vehicle at the Dean and Peay offices, located at 600 East 300 South, but was "confronted by . . . some men" and fled; (2) Carter said the gun he used "was a gun that he purchased with his wife at a local pawn shop here called Provo Finance;" (3) Carter said he stabbed Ms. Oleson "somewhere between eight to ten times in the back;" (4) Carter said that "he did not feel that Mrs. Oleson had died" from the stab wounds; (5) Carter went to "other areas" (plural) of the home looking for money; (6) Carter said he used the pillow to "muffle the sound of the blast;" (7) Carter said that after leaving the Oleson home through the back door, he "walked up the driveway to the street, proceeded to walk to his home where he says he washed his hands [which] had some blood on them. And from there he walked to his mother's home, which is located on Third South. She was not home;" (8) Carter said that from his mother's home, he went back to Epifanio's home where he "related the same account" of the murder; (9) Carter said he is left-handed. (Tr. Trans. pp. 1185-1188); and (10) Carter said he "thought about" raping Ms. Oleson. (Tr. Trans. p. 1216).

Lieutenant Pierpont provided a new detail about the "mechanism . . . [he] used in order to have [Carter's] confession reduced to a written statement." (Tr. Trans. p. 1189). According to Lieutenant Pierpont, Carter had not only been given the opportunity to review the dictated

statement after it had been typed, but Carter had also affirmed its truth every few sentences as Lieutenant Pierpont dictated it. (Tr. Trans. pp. 1189-90; 1210-12).

Lieutenant Pierpont testified that he did not threaten or attempt to coerce or induce Carter's oral or written confession in any manner. (Tr. Trans. pp. 1188-89; 1192). Lieutenant Pierpont denied that he or Nashville police had used the arrest of Carter's female companion, JoAnne Robbins, as leverage to procure Carter's confession. (Tr. Trans. p. 1189, 1199-1204).

But Lieutenant Pierpont conceded that Ms. Robbins had been arrested for either obstruction of justice or harboring a fugitive, and that he interviewed her before speaking with Carter. *Id.* at pp. 1201; 1204. He also admitted that on the morning of June 12, Sergeant Cunningham—the Nashville police officer who had been interrogating Carter the previous day—told Lieutenant Pierpont that Carter was "ready to confess." (Tr. Trans. p. 1203).

On cross-examination, Lieutenant Pierpont testified that Carter began confessing "almost immediately, within 3-4 minutes" of meeting Lieutenant Pierpont. *Id.* at 1205. In those three to four minutes, all Lieutenant Pierpont did was: (1) advise Carter of his *Miranda* rights; (2) say "Hi Doug, are you ready to go back home?"; and (3) in response to Carter's question "Who are you people?" answered that Lieutenant Pierpont was from the Provo Police Department and was there to extradite Carter back to Utah. (Tr. Trans. pp. 1205-1206). But on redirect, Lieutenant Pierpont testified that during this 3- to 4-minute interval, he also disclosed that he "had talked to several people that [Carter] had made comments to concerning this homicide case," including Epifanio Tovar, and by that means had "gained a great deal of knowledge of [Carter's] involvement." (Tr. Trans. pp. 1218-19).

Carter's typed and signed statement was admitted into evidence. On cross-examination,

Lieutenant Pierpont admitted that not everything Carter said to him was memorialized in the typed statement. (Tr. Trans. pp. 1209). When pressed on whether it would have been better for Carter to write out his own statement, Lieutenant Pierpont disagreed stating "That is our department policy to always dictate the statements ourselves." (Tr. Trans. pp. 1215-1216).

Finally, Lieutenant Pierpont testified about the efforts of Provo police officers to recover the gun from the river the weekend before trial began. He testified that a "team of [five] [scuba]-divers" searched in the river near Lake Shore from noon until 4:30 p.m. (Tr. Trans. pp. 1336-1337). On cross-examination, Lieutenant Pierpont testified that notwithstanding this unsuccessful search, he maintained "a great deal of belief in [Epifanio Tovar's] credibility" and still believed that "[the gun] is in the river." (Tr. Trans. pp. 1338-39).

iv. Testimony of Orla Oleson

Mr. Orla Oleson testified that on the night of February 27, 1985, he returned home approximately ten minutes before 9:00 p.m. *Id.* at 1081. He found his wife, Eva Oleson, "laying on the floor, face down, nude from the waist down, her hands tied behind her back with the telephone cord ripped from the wall, a knife from the kitchen laying on the floor next to her, evidence of stab wounds in her back." *Id.* at 1083.

v. Testimony of Lieutenant Bradley Leatham

Detective Leatham testified that he was called to respond to the Oleson home on February 27, 1985. He observed the body of Ms. Oleson, partially nude from the waist down. *Id.* at 1103. He also observed a knife and pillow. *Id.* at 1106. There were pants near her body. Ms. Oleson's pantyhose was gathered around her ankles and a sanitary napkin was on the ground to

the left of her feet. *Id.* at 1106-07.

vi. Testimony of Sergeant William Cunningham

Sergeant William Cunningham testified he is a police officer in Nashville, Tennessee. *Id.* at 1219. He assisted in the apprehension of Carter at JoAnne Robins' apartment, and he interviewed Carter prior to Lieutenant Pierpont's arrival. Carter expressed concerns about Robins' welfare. *Id.* at 1239. Robins was eventually arrested and charged with harboring a fugitive. *Id.* at 1237. According to Cunningham, at no time was Carter threatened with prosecution or incarceration if he did not confess, and at no time did Cunningham threaten to incarcerate Robins if Carter did not confess. *Id.* at 1229-30.

Cunningham was in and out of the room while Lieutenant Pierpont interviewed Carter. *Id.* at 1249. He was present while Lieutenant Pierpont interrogated Carter on June 12, 1985. *Id.* at 1233. He affirmed that Carter agreed to everything Lieutenant Pierpont asked the secretary to type when Lieutenant Pierpont was summarizing Carter's statement. *Id.* at 1234.

vii. Testimony of Sharon Schnittker, M.D.

Dr. Schnittker performed the autopsy of Eva Oleson. *Id.* at 1272. Ms. Oleson's back had eight stab wounds, and she was also stabbed in the neck and the abdomen. *Id.* at 1275, 1278. There was a contact gunshot wound to the back of her head. *Id.* at 1275-76, 1278. The gun was no farther than a half an inch away from the skin when it was fired. *Id.* at 1279. A bullet and a copper jacket were found in her skull. Dr. Schnittker testified that the manner of death was homicide, and both the stab wounds and the gunshot wound were fatal. *Id.* at 1281.

viii. Testimony of Officer Richard Mack

During the testimony of Officer Mack, the jury was excused and the parties argued about whether adequate discovery had been provided to the defense. Carter's counsel represented that

the prosecutor told him on two separate occasions that he would make discovery available, but that defense counsel did not receive anything. Watson represented that he told defense counsel that his files were available to be reviewed if defense counsel came to the County Attorney's office. *Id.* at 1303. Watson had no knowledge of defense counsel ever coming to review discovery for the case. *Id.*

After this legal argument concluded, Officer Mack testified that he executed a search warrant on Carter's residence and found .38 caliber bullets. *Id.* at 1305.

ix. Testimony of Edward Peterson

Edward Peterson is a firearms specialist with the Bureau of Alcohol, Tobacco, and Firearms. *Id.* at 1309. He testified that the bullet recovered from Eva Oleson's body was fired either from a .38 special or a .357 Magnum cartridge. *Id.* at 1310. The bullet had similarities to the bullets found in Carter's home. *Id.* at 1315-16.

x. Testimony of Denzil Harvey

Denzil Harvey operates a pawn shop in Provo, Utah, called Provo Finance. *Id.* at 1318. Carter came into the store on August 2, 1984. Carter looked at a .38 gun, but did not purchase it. *Id.* at 1319. He came back with his wife and they looked at the .38 special together. Ann Carter came back a second time and purchased the weapon. *Id.* at 1320-22.

xi. Testimony of Frank Lewis Belgarde, Jr.

Frank Belgard, Jr. runs a hotel desk at the State Line Hotel and Casino in Wendover, Nevada. On April 19, 1985, Carter purchased a bus ticket to Reno, Nevada. *Id.* at 1330-31.

xii. Testimony of Pamela Butler

Pamela Butler observed Carter with a "Spanish guy" and a female at the State Line Hotel and Casino on April 9, 1985. *Id.* at 1332.

xiii. 1985 Verdict and Sentence

The jury convicted Carter of one count of Murder in the First Degree.[3] After the 1985 sentencing trial, the jury concluded that the death penalty should be imposed. The Utah Supreme Court set aside Carter's death sentence in *State v. Carter*, 776 P.2d 886 (Utah 1989).

c. 1992 Sentencing Trial

A new sentencing trial was held in 1992 at which the following evidence was presented:

i. The State's Presentation

As part of the State's presentation, the State admitted Exhibit 31, which is a transcript of the entire 1985 trial, including the sentencing phase of that trial. The relevant parts of that transcript have already been summarized above except for the testimony of Cameron Forbes, who testified during the penalty phase of the 1985 trial.

Mr. Forbes is the Records Supervisor Officer at the Joliet Correctional Center, which is the main intake center for the Illinois Department of Corrections. Forbes detailed Carter's criminal history, as follows:

- December 22, 1974: Carter was convicted of Burglary to a Dwelling.
- February 7, 1975: Carter received probation for marijuana possession.
- May 17, 1977: Carter was convicted of two counts of Burglary and one violation of probation. He was sentenced to one year, one month, and one day. He served approximately four months.

(1985 Tr. Trans. pp. 1405-07).

In addition to testimony similar to what Dr. Schittker testified to at the 1985 trial, in 1992 Dr. Schittker testified about the "severe force" necessary to cause the stab wound to Eva

[3] In 1985, what is now considered Aggravated Murder under section 76-5-202 of the Utah Code was called "Murder in the First Degree."

Oleson's abdomen, and that the wound was from front to back. (1992 Tr. Trans. at 1008-1009). As to the stab wound to Ms. Oleson's neck, Dr. Schittker opined that it was possible the assailant could have been behind her with his arm around the front of her neck when the wound occurred. *Id.* at 1010. With regard to the stab wounds to Ms. Oleson's back, at least seven of the eight wounds would have been fatal without prompt medical attention. *Id.* at 1011. Although the doctor could not say for sure, it was likely the gunshot wound came after the stab wounds. *Id.* at 1019. It is likely the gunshot wound occurred between seconds and up to five or ten minutes after the stab wounds. *Id.* at 1022. Ms. Oleson may have been conscience after the stab wounds, but Dr. Schittker could not say how likely that was. *Id.* at 1023.

In addition to testimony substantially similar to what Bradley Leatham provided at the 1985 trial, Detective Leatham testified that the telephone cord was tied around each of Ms. Oleson's wrists individually. *Id.* at 1036.

In addition to testimony substantially similar to what Orla Oleson testified to at the 1985 trial, Mr. Oleson testified that his wife had a hard-working and graceful character. *Id.* at 1045. She was compassionate and spent time taking care of her neighbors. *Id.* at 1055. She was 57 at the time of her death. *Id.* at 1055. She had four children and was a very loving mother. *Id.* at 1057. Her death has had a traumatic impact on their family, in particular their youngest son. *Id.* at 1065. Ann Carter was Ms. Oleson's Avon lady and had visited their home on several occasions. *Id.* at 1066.

Outside the presence of the jury, defense counsel objected to the admissibility of the phrase "rape, break, and drive." *Id.* at 1095. Defense counsel argued that because the 1985 trial jury did not find the State proved Carter raped or attempted to rape Ms. Oleson, any reference to sexual circumstances of the crime should be excluded. *Id.* at 1096. In response, the prosecutor

argued that both evidence that Carter *intended* to "rape, break, and drive" and that the victim was "on the rag" demonstrate a calloused attitude and an intent to commit an assault. *Id.* at 1099. Evidence that Carter stripped the victim indicates his intent. *Id.* at 1100. According to the prosecutor, all the evidence about Carter's intent to commit a sexual act goes to the circumstances of the crime. *Id.* The trial court allowed the evidence to show the character of the defendant and his state of mind. *Id.* at 1103. No argument was made that the phrase "rape, break, and drive" was false testimony.

The State read portions of the 1985 trial transcript testimony of Epifanio Tovar into the record, including his testimony that Carter told him he was going to "rape, break, and drive." *Id.* at 1107, 1110. The State read the testimony of Lucia Tovar into the record. *Id.* at 1120.

In addition to testimony Lieutenant Pierpont offered at the 1985 trial, Lieutenant Pierpont testified that Carter told him that Carter believed Eva Oleson was still alive when he left the home because he could hear her gurgling. *Id*. at 1133.

The parties stipulated to a statement by the medical examiner that there was no evidence that Ms. Oleson was raped or that any sexual contact had taken place. *Id.* at 1140.

ii. Defendant's Presentation of Evidence

1. Evidence from the 1985 trial transcript

The 1992 sentencing jury had the transcript from the 1985 penalty phase, which included the reports of Dr. Richard B. Spencer and Dr. Lewis. Dr. Spencer's report is summarized as follows: Mr. Carter has denied any prior mental health problems. He has been examined twice prior to his incarceration by psychiatrists who provided no mental health diagnosis. He has used LSD or heroin daily for the past five years. He does not believe he is addicted and has had no

drug treatment. At the time of the alleged crime, Carter had asked his wife to divorce him and was struggling with racial prejudice at his workplace. Carter has two three-year-old children with different mothers and is trained in auto-body repair, woodworking, and custodial work. Carter maintains his innocence and has normal intelligence. Dr. Spencer concluded Carter does not have any psychiatric disorders or an anti-social personality. (1985 Tr. Trans. at 1411-1415).

The report from Dr. Lewis is summarized as follows: Carter denied any recollection of committing the homicide. Carter attended school in Chicago but dropped out in the eleventh grade. He joined the Job Corps and was sent to Kentucky and Indiana. He committed his first burglary when he was 19. He moved to Provo in 1981 to be with his mother. He married his wife in 1983 and divorced her in 1985. They had one child together. A deputy sheriff at the Utah County Jail opined that Carter is arrogant and did not get along with other prisoners. Carter's wife and sister-in-law did not note any strange behavior from Carter around the time of the homicide. Carter's mother stated that he was moody and quiet. Dr. Lewis administered several psychological tests and found that Carter had borderline intellectual functioning. His IQ score was within the fifth percentile, although other testing indicates that his score is under-estimated. He has no other psychological disorders. He knew the difference between right and wrong and had control of his actions. *Id.* at 1415-1429.

2. Testimony of Willa Lewis

Willa Lewis testified that she is Carter's mother. (1992 Tr. Trans. at 1145). Carter is the youngest of seven children. *Id.* 1146. He was born and raised in Chicago, Illinois. *Id.* In 1992, he was 36 years old. *Id.* Lewis and Carter's father separated when Carter was two or three years old. *Id.* He had no father figure in the home until Lewis remarried when Carter was fourteen. *Id.* Carter's step-father was an alcoholic. *Id.* at 1147.

Carter liked to play ball when he was growing up and interacted a lot with his brothers. *Id.* at 1148. He did not interact well at school. *Id.* at 1149. When Carter was a teenager, they moved from a predominately black neighborhood into a predominately Caucasian neighborhood. *Id.* at 1150. He was spat upon and chased by boys with chains. *Id.* When Carter was a youth, he fell out of a window and hit his head. *Id.* at 1151. When he was an adult, he fell and hit his head on a sink. *Id.* Carter dropped out of school in tenth or eleventh grade. *Id.* at 1152. He started to get in trouble with the law when he was in his early twenties. *Id.* He draws and writes poetry. *Id.* at 1153.

In 1981, the family moved to Utah. *Id.* at 1154. Carter graduated from Provo High. *Id.* at 1155. People made racial slurs toward him when he was at work. *Id.* at 1157. Carter married Anne in 1984. *Id.* at 1158. They had a child, who was adopted by another family. *Id.* at 1159. Carter was very hurt when he signed away his rights to his child. *Id.* at 1159-60.

Lewis speaks to Carter two or three times a month, and she believes he is doing well in prison. *Id.* at 1162-63.

3. Testimony of Jaqueline Stover

Jaqueline Stover is Carter's older sister. Carter was a shy child, and he was friends with kids in the neighborhood. *Id.* at 1166. He liked to dance, he liked music, and he participated in putting on plays that Jaqueline wrote. Carter loved children, and he babysat Jaqueline's children.

When Carter was in Utah, he complained to Jaqueline about racial issues happening at his work. *Id.* at 1168-1169. Carter writes her a lot of letters, and they communicate often. His communication skills have improved since he has been incarcerated. Jaqueline expressed the love she and all her family have for Carter. *Id.* at 1170-71.

4. Testimony of Brad Carter

Brad Carter is Carter's brother, who is only a year and two months older than Carter. *Id.* at 1172. Brad and Carter had the same circle of friends. *Id.* They spent their childhood playing sports, dancing, and going to parties. *Id.* at 1173. Sometime between seven to ten years of age, Carter fell about 15 to twenty feet off a roof. *Id.* at 1193, 1205.

After the family moved to a white neighborhood, Brad, Carter, and their friend Ray were attacked while playing ball. Ray was beaten with bats. *Id.* at 1175-76. Carter was a quiet child. *Id.* at 1178. Carter moved back to their old neighborhood to live with his grandma. *Id.*

Brad joined the Army when he was nineteen, and he remained in contact with Carter. *Id.* at 1180. Brad's and Carter's mutual friend, Steve, was murdered in 1977. *Id.* at 1183-84.

When Carter moved to Utah, he began working at Wright's Furniture, where he met his wife Anne. *Id.* at 1188. When their child was conceived, people would stare at them because African-Americans were an anomaly in Utah. *Id.* at 1190. When the child was born, Anne was trying to decide whether to keep the child or give him up for adoption. *Id.* at 1193-94. Carter became withdrawn, as was his character whenever there was contention. *Id.* at 1194. Carter felt powerless. *Id.*

Brad has had contact with Carter while Carter has been imprisoned. *Id.* at 1203. Carter reads a lot and has gained an understanding of the justice system. *Id.* Brad confessed his love for his brother. *Id.* at 1204.

5. Testimony of Dr. Robert Howell

Dr. Howell is a forensic and clinical psychologist. *Id.* at 1210. He examined Carter in August 1990 and made supplemental investigations in 1991. *Id.* at 1212. He administered IQ tests to Carter, which indicated Carter was in the average to slightly below-average range. *Id.* at

1214-16. These results were 20 points better than results from similar tests administered in 1985. Dr. Howell opined that the reason Carter's score increased so much is because in 1985 he was still feeling the effects of alcohol and drugs. But in 1990, those effects had subsided. *Id.* at 1217. One of the tests he gave to Carter showed indications of brain damage. *Id.* at 1219. Carter's scores improved over time. *Id.*

Dr. Howell found no indications of mental illness or personality disorders. But he did find evidence of organic cerebral dysfunction. *Id.* at 1234.

6. Carter's Statement of Allocution

Carter told the Oleson family and his own family that he was sorry. *Id.* at 1261. He told the jury that although he cannot imagine how the past seven years has been for the Olesons, he has not been very happy in prison. "But it's all I've got." *Id.* at 1261. He then asked the jury to spare his life. *Id.*

iii. References to "rape, break, and drive" during closing argument

The prosecutor made two references to the phrase "rape, break, and drive" in his closing argument. During his initial closing argument, the prosecutor asked the jury to "[c]onsider the intent of the Defendant." *Id.* at 1266. "He said why he was going out that night. He wanted money, he wanted to 'rape, break, and drive.' He wanted to hurt someone. He wanted to get something for himself. He went in there intending to do violence. And then he exposed and brutalized the woman." *Id.*

During rebuttal, the prosecutor argued that the killing was "not in retaliation to [Carter's wife] or anyone else. He decided to go out and 'rape and . . . break and drive.'" *Id.* at 1296.

4. Summary of the Evidentiary Hearing Record[4]

a. Hearing Deposition Testimony of Epifanio Tovar

On the first day of the evidentiary hearing, Carter introduced the transcript and video of Epifanio's deposition. (Exhibits 1, 26). Prior to his deposition, Epifanio spoke with Carter's attorneys and reviewed transcripts from the trial, transcripts from the preliminary hearing, a transcript of his interview with Lieutenant Pierpont, and his April and August declarations from 2011. Exhibit 1, at 46-47.

In his deposition, Epifanio acknowledged providing testimony in 1985 during the trial of Carter for murder. Epifanio testified that Carter had come to his house two times on February 27, 1985. *Id.* at 22-23. He testified that before leaving the house the first time, Carter never said he was going to go "rape, break, and drive." What Carter actually said was that he "was going to break into a car and steal from the car." *Id.* at 25-26. In fact, Carter did not know how to drive and did not have a driver's license. *Id.* at 26. Epifanio admitted that his imputing the "rape, break, and drive" statement to Carter was a lie. *Id.* at 28-29. When asked why he lied about Carter saying this, Epifanio explained "Because that's what they—that's what they wanted me to say." *Id.* at 26. When asked who "they" is, Epifanio responded: "The police department." *Id.* at 27. Upon further inquiry, Epifanio testified that it was either Detective Pierpont or the prosecutor who told him to say "rape, break, and drive." *Id.* at 28. Epifanio testified that before trial he met with Watson to discuss Epifanio's trial testimony. In this meeting, the term "rape, break, and drive" came up. *Id.*

Epifanio admitted that he had lied at trial when he testified to only receiving a $14 check from the City. *Id.* at 29. In fact, the police "would pay my rent. They would buy me food. They would pay my expenses, my services, like my phone, electricity, and water; gas." *Id.* at 29-30.

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[4] This is a summary of the evidence presented. These are not the Court's "findings of fact," which must be proven by a preponderance of the evidence. *See* Utah Code § 78B-9-105(1). The Court will make necessary findings as appropriate later in this Ruling.

Officer Richard Mack would give Epifanio money and then Epifanio would pay the landlord. *Id.* at 32. Officer Mack paid for Epifanio's phone bill and utilities directly. *Id.* at 32-33. Officer Mack gave Epifanio groceries. *Id.* at 29. He also gave Epifanio a Christmas tree and Christmas presents. *Id.* at 31. Epifanio thanked Officer Mack for the Christmas presents. *Id.* at 32. In Epifanio's view, this must have occurred before trial, because after trial Epifanio never spoke to Officer Mack again. *Id.* at 32.

Epifanio testified that at the time of trial, he was 20 years old and not a legal resident of the United States. When he was arrested, he saw an immigration officer at the Provo Police Department. *Id.* at 33-34. Epifanio's direct examination concluded with this exchange:

> Counsel: How did you feel—how did you feel when you testified at trial?
>
> Epifanio: I was scared.
>
> Counsel: And what did you think would happen to you, if you did not lie to the jury about the items you received like the police told you to do?
>
> Epifanio: I thought they would put me in jail and take my son away and deport my wife.
>
> . . . .
>
> Counsel: Why did you lie to the jury when you testified that Doug Carter said he was going to rape, break, and drive? . . . .
>
> Epifanio: Because they had told me they would accuse—they would accuse me of being an accomplice, and that they would put me in jail, and that they would deport my wife and that they would take away my son.

Id. at 34-35.

On cross examination, Epifanio affirmed essential elements of his trial testimony. Specifically, Epifanio testified that Carter told him he killed a woman and to watch the news to

confirm that what he was saying was true. *Id.* at 36, 73. Carter lay down on the living room floor and demonstrated how he killed her. *Id.* at 87. He started laughing from the moment he arrived at Epifanio's home because he was nervous. *Id.* at 87-88.

On cross examination, the State's counsel elicited from Epifanio consistent statements he made prior to having been threatened with deportation and prior to having received any money or benefits from the police. These consistent statements included: (1) that on the way home from Wendover after dropping Carter off there, Epifanio and Perla discussed the fact that Carter had confessed to killing a woman, *id.* at 39-42; and (2) Epifanio's post-arrest statements to Lieutenant Pierpont recounting what Carter had said to Epifanio and did at Epifanio's home on the night of the murder, *id.* at 80-88.

On cross examination, Epifanio testified that during his interrogation, Lieutenant Pierpont was trying to get Epifanio to say things that were not true. When asked what specifically, Epifanio responded "such as—such as the rape, break, and drive." *Id.* at 50. In fact, the transcript of the interrogation contains no reference to "rape, break, and drive." (Exhibits F and G).

On cross examination, Epifanio testified that he felt police had treated him as a suspect. For example, during his interrogation, Lieutenant Pierpont suggested Carter had waited in the car while Epifanio and another guy went into Ms. Oleson's home—something Epifanio denied. *Id.* at 53-54. But at the same time, Epifanio conceded that he had "helped [Carter] escape by driving him to Wendover" and "helped Carter by disposing of the gun." *Id.* at 55-56.

On cross examination, Epifanio testified that Officer Mack said the payments from the police were made for "witness protection." However, Epifanio believed that the payments were made to ensure that he did not leave the State. *Id.* at 56. Epifanio testified that he did not fear for

his safety in 1985. When asked if he ever requested not to be under witness protection, Epifanio answered: "I never believed I was in witness protection. I never believed I was. I believe I was actually—I don't know. I thought they were blaming me for something. . . . because I didn't think I was a protected witness." *Id.* at 61-62.

On cross examination, Epifanio testified that he thought it was Lieutenant Pierpont who told him not to say anything about the police paying his rent and other expenses. *Id.* at 57. When pressed about why he lied about the payments, Epifanio answered: "I was afraid and that's why I lied, because if they didn't catch the guy, they would arrest me as the murderer." *Id.* at 58.

On cross examination, Epifanio testified that he believed Watson knew about the payments from police. However, that belief was grounded in Epifanio's erroneous understanding that Watson was the "boss of the police" and the fact that the police were surveilling Epifanio's work and home "constantly, day and night." *Id.* at 61, 63. Epifanio conceded that Watson had never given him any money and had never been present when someone else gave Epifanio money, paid his rent, or gave him anything else. *Id.*

Epifanio conceded that there was never a quid-pro-quo—he was never threatened with arrest, deportation, or the loss of his son if he did not lie about the payments from the police. *Id.* at 57-59. Rather, Epifanio thought police were going to deport him when he was arrested, "but they didn't because they wanted me to help them." *Id.* at 58. When asked about police threatening him with the loss of his son, Epifanio testified: "I remember Pierpont threatened me about the case. He said I would end up in jail. My wife would be deported and my son would be taken away, I think by the City." *Id.* at 59. Later Epifanio testified that Lieutenant Pierpont threatened him with jail, deportation, and the loss of his son "because they wanted me to cooperate with them. They were pressuring me. I don't know. They were threatening me. I was

very young. . . . [W]hat I recall is that the police they were pressuring me and they were threatening me so that I would wouldn't leave, and they were surveilling me." *Id.* at 80.

On cross examination, Epifanio testified that when he met with Watson before trial, Watson did not tell him to say anything that was not the truth. *Id.* at 60.

On cross examination, Epifanio testified that his first contact with Lieutenant Pierpont occurred days before his arrest. This contact concerned an unrelated incident involving Carter hitting a woman in the mouth with a two-by-four. Epifanio testified that he did not believe Lieutenant Pierpont threatened him during this contact or discussed the murder. *Id.* at 75-76.

On redirect, Epifanio testified that while there had been no quid-pro-quo—i.e. testify falsely or face arrest, deportation, and loss of your son—Epifanio remained fearful of what would happen if he did not lie about the financial benefits he received as directed by police. Epifanio further testified that he would not have lied had he not been directed by police to do so. *Id.* at 90-91, 100. His fear was grounded in the possibility that he would be charged for obstruction of justice or as an accomplice. *Id.* at 91.

On redirect, Carter's counsel asked Epifanio again why he lied about Carter saying "rape, break, and drive." Epifanio answered: "Because they pushed me to say that." *Id.* at 94. When asked if it was difficult to remember exactly how this happened, Epifanio responded: "I don't recall very well. But no, I don't recall that well because of the pressure they were putting on me was a lot. And at the time, they were also telling me they had witnesses against me. That I had been with Doug." *Id.* Some of this pressure included Lieutenant Pierpont's reference to Epifanio getting the death penalty if he was involved. Asked how that made him feel, Epifanio testified: "That tore me apart in thinking that I would spend my life in jail for something I did not do." *Id.* at 97.

On redirect, Epifanio conceded that he had told police he was afraid of Carter but testified he had never been threatened by Carter or Carter's family. *Id.* at 95.

On redirect, Epifanio testified that the Christmas tree and gifts from Officer Mack were not for Epifanio's protection, but rather "simply the Christmas spirit." *Id.* at 95-96. Epifanio could not recall whether the tree and gifts were provided to him before or after trial. However, Epifanio did thank Officer Mack for the gifts on the day they were given, and knows that he never spoke to Officer Mack after the trial. *Id.* at 101-102.

b. Testimony of Javier Armenta [hereinafter "Javier"]

Javier and Epifanio went to Jr. High School together and were best friends. Evid. H'rg Trans. 1, Nov. 15, 2021, at 43. He knows Lucia Tovar, Perla, and Carter. *Id.* at 43. One day, Epifanio came into Javier's kitchen and told him he was afraid for himself and for his family because the police had threatened to deport them. *Id.* at 55. Epifanio also told Javier that the police moved him to a new apartment and gave him financial assistance in exchange for him saying what the police wanted Epifanio to say. *Id.* at 56. Epifanio said that all he needed to do was to testify against Doug Carter and the police would leave him alone and continue to provide financial assistance. *Id.* Epifanio was also afraid of being arrested. *Id.* at 57.

Epifanio told Javier that he had helped Carter leave the state. *Id.* at 59. Epifanio was in the country illegally. *Id.* Javier did not know whether Epifanio asked the police for protection. *Id.* at 63.

Javier had spoken to Carter's investigators three times and met with Carter's attorneys prior to his testimony. *Id.* at 67. Javier has not spoken to Epifanio in 30 years. *Id.* at 68.

c. Testimony of Lucia Tovar[5]

On direct examination, Lucia Tovar testified that after she was identified as a witness in the Carter case, she and Epifanio moved apartments twice, each time at the direction of Officer Mack. (Evid. Hr'g. Trans. 2, November 16, 2021, pp. 6-7). She confirmed that Officer Mack provided money to Epifanio for rent, and that Officer Mack paid for utilities (included in rent) and for phone. *Id.* at 7.

Lucia affirmed that "when Christmas was approaching" Officer Mack gave her "$100, and toys for our children," but that "after everything was over" she never saw Officer Mack again. *Id.* at 8. Lucia could not remember if the gifts were delivered before or after the trial, only that they were delivered before Christmas. She testified that Officer Mack did not deliver the gifts personally, but that he called on the phone to ask whether she liked what they had brought to her. *Id.* at 60.

Lucia testified that Officer Mack threatened her and Epifanio with arrest, deportation, and loss of their son, and that this occurred three times. *Id.* at 8, 42. The first time Officer Mack made this threat was when he came to Lucia's house looking for Epifanio to arrest him. *Id*. at 42-43. He made the threat because he wanted to detain Epifanio so that he would talk about what he knew. *Id.*at 44-45. The second time Officer Mack made this threat was after Epifanio was arrested and Lucia asked to see him. *Id.* at 42. The third time Officer Mack made this threat was when he told Lucia "not to say anything regarding the assistance [the police] were giving us." *Id.* at 12-13, 34, 45, 63. This third threat was made in an office at the courthouse. The occupants of the office were Lucia, Epifanio, Officer Mack and a man sitting behind some furniture. *Id.* at 45-46. Lucia could not remember if this office meeting was before the preliminary hearing or before the trial. *Id.* Finally, Officer Mack may have threatened Lucia with deportation on more

[5] At the hearing, Lucia testified that in the United States her surname was Tovar, but in Mexico she used the name Lucia Espinoza Perena.

than three occasions—in Lucia's words he "was always telling things like, oh, they are going to deport you." *Id.* at 62.

Lucia believed these threats because she was not a legal resident of the United States. She believed that if she did not do what the police told her to do she would be deported. *Id.* at 15. Officer Mack's threats made Lucia fearful and she expressed that fear to Officer Mack. *Id.* at 61-62. Lucia told no one about the threats. *Id.*

Lucia confirmed that she saw Carter on the floor demonstrating something to Epifanio and that Carter was laughing and giggling. *Id.* at 14-15. However, Lucia testified that she did not know what Carter was demonstrating and that she did not understand anything Carter said to Epifanio. *Id.* at 14-15.

d. Testimony of Officer Richard Mack

Officer Mack was a peace officer with the Provo City Police Department at the time of the Carter murder case in 1985. He spoke Spanish and for that reason was assigned to be the primary contact with the Tovars. Evid. H'rg. Trans. Nov. 16, 2021, at 72. In Officer Mack's words, "it was my responsibility to make certain that the Tovars were happy." *Id.* at 75. After the Tovars were identified as witnesses, Officer Mack visited the Tovars "two to three times a week, maybe more." *Id.* at 121. His objective was to "mak[e] sure that—that they were taken care of to where they didn't leave town for employment, or—or that they didn't go back to Mexico or—or—that they were completely watched and taken care of." *Id.* at 121, 128-29.

As part of that effort, Officer Mack "provided the Tovars with items of financial value." *Id*. This financial support was given over a period of 8-9 months prior to trial and included money for rent, bills, and groceries. *Id.* at 75. Officer Mack conceded that the police "basically took care of [the Tovars'] daily living expenses" but not 100 percent because Epifanio worked

some too. *Id.* at 76. He remembers giving them cash, but not very often. *Id.* at 128. In Officer Mack's words, his responsibility was to "make sure if [the Tovars] did or did not [need money]" and "if they needed money, we—I took it. . . . If they needed anything, I was there to help them." *Id.*at 128-31.

Officer Mack first opined that the financial support "totaled a couple of a thousand" dollars. *Id.* But he also agreed that an amount of $400 for the Tovars' rent sounded right. *Id.*

Officer Mack testified that in making these payments to or on behalf of the Tovars he was "just following orders." *Id.* at 81. He testified that he was "sure" Lieutenant Pierpont knew about the payments; and in fact Lieutenant Pierpont told Officer Mack to pay the Tovars' rent. *Id.* at 193. When asked if other people in the police department knew about the payments, Officer Mack testified "Of course. I didn't do it on my own." *Id.* at 81. For this reason, in Officer Mack's view, it was reasonable to assume that prosecutor Watson knew too. Officer Mack emphatically denied ever telling the Tovars not to disclose at trial the payments made to them by police. *Id.* at 144-45; 182, 189. In his view, such coaching was criminal and unnecessary, given the corroborating confession. *Id.* at 145-46.

Officer Mack also arranged for Christmas gifts to be provided to the Tovars. In his deposition, Officer Mack agreed that he "didn't maintain contact with the Tovars after they testified at trial" in mid-December 1985. He further testified that he was certain that all the items of financial value, including the Christmas gifts, were provided to the Tovars between the time of Carter's arrest and the time the Tovars testified at trial. *Id.* at 79-80. In Officer Mack's words, "I am sure that was the case." *Id.* at 79.

At the evidentiary hearing, Officer Mack backtracked from his deposition testimony. At the hearing, he testified that he had contact with the Tovars one or two times after Christmas "in

case of appeals" and that after Christmas Lucia had thanked him for the gifts. *Id.* at 73, 77-78. Officer Mack reached this conclusion because it was his practice to deliver Christmas gifts anonymously to people close to Christmas Day, and in his experience, Christmas Eve is the most important day in Latin culture, so he would have arranged to deliver the gifts close to that day. *Id.*at 78-79, 113-14, 125.

Officer Mack further explained that at the time of his deposition he erroneously believed the Carter trial occurred after Christmas, when in fact the trial ended on December 19, 1985. With the trial date firmly in mind, Officer Mack concluded that he "definitely" delivered the gifts after Epifanio and Lucia testified, respectively on December 13 and 17. *Id.* at 112-14.

Officer Mack testified that he interviewed Lucia Tovar in Spanish on April 12, 1985. The interview was not recorded. Officer Mack summarized the interview in his written report. (Exhibit 10). The interview began with Officer Mack asking Lucia "if she knew anything about Doug Carter's involvement in the murder of a lady about a month and a half ago." (Exhibit 10). In this interview, Lucia stated that days before she learned of the murder, Carter came to her home at approximately 10:00 p.m. Carter spoke to Epifanio about something she could not understand. Lucia said "Doug was describing someone else and while doing so Doug put his hands behind his back with the back of the wrists touching together." *Id.* This was significant to Officer Mack because this was the position in which Mrs. Oleson's hands had been tied. *Id.* Lucia said that while Carter was speaking to Epifanio, Carter was laughing. *Id.*

Officer Mack conceded that in this initial statement, Lucia said nothing about Carter "moving his fists back and forth as if in a stabbing motion" or demonstrating with a gun. Evid. H'rg. Tran. Nov. 16, 2021, at 90, 198. Officer Mack agreed that if she had said these things, he would have documented it in his report. *Id.* at 91, 198. In August 1985, Officer Mack

"interviewed [Epifanio] once again regarding any possible knowledge he may have about the handgun" used in the murder of Mrs. Oleson. *Id.* at 96. Despite assurance from Officer Mack that Epifanio would not be in trouble if he had done something with the murder weapon, Epifanio was unwavering. *Id.* He reaffirmed that he had seen the gun twice—once after Carter's wife bought it, and a second time when he saw it in the whirlpool machine at Perla's home. *Id.* He also said that Carter had never given him the gun to get rid of it. *Id.*

Sometime during his work with the Tovars, Officer Mack learned that both Lucia and Epifanio were not legal residents of the United States. *Id.* at 91, 117, 139. On multiple occasions, Lucia told Officer Mack that she was afraid of being deported. She would talk about "somebody else making threats to them about deporting them." Lucia could not say the name of this person very well, and though he could not be sure, Officer Mack was "pretty sure she meant Pierpont." *Id.* at 140. In his deposition, Officer Mack testified that he told Lucia "as long as you're working with us, [deportation] was not going to happen." *Id.* at 93.

At the evidentiary hearing, Officer Mack retreated from his deposition testimony. At the hearing, he testified that he told Lucia "as long as [she and Epifanio] are involved in a murder case, . . . no agency would be sending her back to Mexico." *Id.* at 92. Officer Mack further testified that he could not speak for federal authorities as to why the Tovars were not deported, that he didn't even know if federal authorities were aware of the Tovars, and that he did not have authority to deport the Tovars. *Id.* at 93, 141.

Officer Mack testified that he never leveraged the Tovars' fear of deportation to "strong-arm" them into cooperating with police. *Id.* at 140-141. On several occasions, Lucia expressed to Officer Mack her fear that Carter would be released from jail and come after her. Epifanio expressed the same fear of Carter, but with less frequency. These fears increased

shortly before trial. *Id.* at 123-24, 134-35. But Officer Mack confirmed that the Tovars were never in an official witness protection program. *Id.* at 192.

Officer Mack signed a sworn declaration in May 2011. In that declaration, he stated that the Carter murder case was "one of the biggest cases in the history of the Provo Police Department because the victim was the aunt of [] Swen Nielsen, [the] chief of police." (Exhibit 27, ¶ 15). In Officer Mack's assessment: "We were all emotionally involved in the case." Officer Mack expressed concern that Chief Nielsen "was too close to this particular case" and "should have been more at arm's length." *Id.*, ¶ 16. Officer Mack stated that Chief Nielsen "gave briefings on the case, made assignments, and was intimately involved." *Id*. Chief Nielsen spoke at Ms. Oleson's funeral and said positive things about her husband, Orla Oleson. This concerned Officer Mack because, at the time, Orla Oleson was "the primary suspect." *Id.*, ¶ 17).

At the evidentiary hearing, Officer Mack backtracked from these sworn statements. He testified that: (1) any pressure on the police was "self-imposed" and did not come from Chief Nielsen; (2) Chief Nielsen did not give briefings to the media or to other police officers, or at least none that Officer Mack could remember in which Chief Nielsen took a major role; (3) Chief Nielsen "assigned the case out and the rest of us did the investigation;" (4) most of the assignments came from Lieutenant Pierpont; (5) he would not go so far as to say that Chief Nielsen was "too involved" and after the first night, Chief Nielsen was not involved in the day to day investigation; and (6) he only had concerns about Chief Nielsen's involvement a couple of times at the beginning of the case, particularly at the funeral. *Id.* at 69-72, 109-11.

e. Testimony of Lieutenant George Pierpont

Lieutenant Pierpont testified that he was the lead investigator of the major case squad assigned to investigate the murder of Ms. Oleson. Evid. Hr'g. Trans. Nov 18, 2021, at 6. In that

position, he directed the investigation and made assignments to others. *Id.* at 7. He reported to his direct supervisor, Captain Warren Grossgebauer. *Id.*

Either Lieutenant Pierpont or Captain Grossgebauer assigned Officer Mack "to keep track of [the Tovars] and to care for any of their needs that—that they were concerned about." *Id.* at 36. He was also required to provide extra patrols around the Tovar's residence. *Id.* at 37. Officer Mack was assigned to this role because the Tovars spoke Spanish and so did he. *Id.* at 36.

Lieutenant Pierpont testified that he does not remember ordering or intending that the Tovars receive any benefits, or whether benefits were actually provided to them. *Id.* at 54, 83. He testified that the police could have paid the for the Tovars' rent and groceries, but that he does not remember whether this happened or not. *Id.* at 84. Similarly, Lieutenant Pierpont could not say one way or the other as to whether he told prosecutor Watson about the Tovars' rent being paid, but stated either Officer Mack or Captain Grossgebauer could have done so. *Id.* at 89.

Lieutenant Pierpont's uncertain memory at the hearing about his ordering and the Tovars receiving financial benefits from the police stands in stark contrast to his memory at the time of his deposition. In his deposition, Lieutenant Pierpont was asked "Is it possible that the Tovars were provided with rent?" His answer was an unqualified "No." *Id.* at 88.

Lieutenant Pierpont testified that "our sole purpose" in assigning Officer Mack to care for the Tovar's needs was "to protect the Tovars." Lieutenant Pierpont testified that any payments to the Tovars would have been part of an informal witness protection program—a program not governed by any written policy or directive. *Id.* at 43.

Lieutenant Pierpont testified that cash disbursements to the Tovars for witness protection would have been paid from the "confidential expenditure" budget. This budget was also used for a wide range of purposes unrelated to witness protection, including to buy drugs, pay informants,

rent cars, and purchase meals for informants or crime victims. *Id.* at 43-45. He further testified that any cash disbursement would have been authorized by the Provo City finance department and a receipt issued. *Id.* at 87. This testimony conflicts with Lieutenant Pierpont's deposition testimony. In his deposition, he testified that cash disbursements to the Tovars would not have been documented at all. *Id.* at 85-87. When confronted with this inconsistent statement, Lieutenant Pierpont said that he meant not documented in a police report. *Id.*

Lieutenant Pierpont testified that he interviewed Epifanio Tovar in an interrogation room at the Provo Police Department. The interview occurred on April 12, 1985 and was recorded. Only Epifanio and Lieutenant Pierpont were present. *Id.* at 17-18. Lieutenant Pierpont agreed that he had spoken to Epifanio earlier than April 12, but that conversation had not been about the murder of Mrs. Oleson. *Id.* at 13, 19-20.

Lieutenant Pierpont testified that during the interrogation, he did not "go easy" on Epifanio. He testified that Epifanio knew "what I was going to talk to him about was serious" and "I think that probably my demeanor demonstrated that to him." *Id.* at 23.

Lieutenant Pierpont testified that twelve times during the interrogation, Epifanio expressed that he was fearful of Carter. *Id.* at 29. On cross-examination, counsel asked Pierpont, "You knew [Epifanio] was scared [during the interrogation] right?" *Id.* at 95-96. Lieutenant Pierpont answered "I don't think he feared me. He feared Mr. Carter." When pressed with the question, "You don't think he was scared with being charged with capital murder?" Lieutenant Pierpont doubled-down answering again, "he was afraid of Mr. Carter, not me." *Id.* at 96.

Lieutenant Pierpont falsely represented to Epifanio that Carter had implicated Epifanio in the murder, emphasizing that, if Epifanio was involved, now was his chance to "come on our

side" and that Lieutenant Pierpont "won't help him after this moment." *Id.* at 69-70; Exhibit G at 104-05. Lieutenant Pierpont told Epifanio if Carter implicated Epifanio in the murder and said Epifanio "did it," Epifanio would "get the death penalty." Exhibit G at 104. Lieutenant Pierpont then falsely stated that Carter had already implicated Epifanio and that police and prosecutorial authorities were wavering about who to believe. Evid. Hr'g. Trans. Nov. 18, 2021, at 104-122.

When asked about his statement that Epifanio would get the death penalty, Lieutenant Pierpont testified that he intended nothing more than to tell Epifanio that this was a death penalty case. Lieutenant Pierpont testified that Epifanio may not have felt pressured by Lieutenant Pierpont's reference to Epifanio "get[ting] the death penalty." Citing the death penalty reference, Carter's counsel asked Lieutenant Pierpont, "And that's the pressure you applied on him, correct?" Lieutenant Pierpont answered: "Well, you're—you're drawing a conclusion. I don't know that I—that he felt pressure of that. I don't know that. You're—you're—you're trying to tell me that that's a pressure thing. It may or may not have been to him." *Id.* at 105.

In context, the interrogation transcript indicates that Lieutenant Pierpont said Epifanio would "get the death penalty" if Carter "comes back here says, yes, I was there but I stayed out in the car and Epifanio and this other dude went in there and did it." *Id.* at 104. Then Lieutenant Pierpont falsely told Epifanio that Carter had already made this accusation. Exhibit G at 104-105, 107-109. He went on to say that police and prosecutorial authorities were wavering about who to believe. Evid. Hr'g. Trans. Nov. 18, 2021, at 104; Exhibit G at 115, 122-23. In the end, Lieutenant Pierpont admitted that Epifanio "most likely probably felt pressure." Evid. Hr'g. Trans. Nov. 18, 2021, at 106. When asked why he lied to Epifanio in the interrogation, Lieutenant Pierpont responded: "I guess—is it a lie? I—I told him that. You classify it as a lie. I

classify it as a form of soliciting information from him." *Id.* at 131.

In two instances, Lieutenant Pierpont disclosed new facts to Epifanio. In each instance, Epifanio crafted his narrative to conform to the newly disclosed facts. Lieutenant Pierpont asked Epifanio: "Did [Carter] say anything about that he didn't rape her because she was on her period?" Evid. Hr'g. Trans. Nov. 18, 2021, at 132; Exhibit F at 49. This was the first disclosure that Ms. Oleson was menstruating. Epifanio responded to this new information, answering: "Oh, yeah, yeah. Yeah. I just remembered. He said he pulled her pants down, and he said she was on the rag or something. That's what I—on the rag." Evid. Hr'g. Trans., Nov. 18, 2021, at 132-33; Exhibit F at 49.

When asked if Carter admitted to knowing the victim, Epifanio answered: "He did not know her." Evid. Hr'g. Trans. Nov. 18, 2021, at 130. Lieutenant Pierpont then asked, "He'd never been there before?" Epifanio answered, "No." *Id*. Lieutenant Pierpont then made the following misrepresentation: "[Carter] told me that he had [been there before]." Taking this cue, Epifanio said: "He told you he had? . . . . Wait a minute. Now he told me that. I don't know if it's—but if it's the same lady, he told me that she was the Avon lady because his wife sells Avon, and she was an Avon lady, and I don't know if he knew her because . . . he used to go out with his wife selling Avon." *Id.* at 130-31.

During the interrogation, Lieutenant Pierpont repeatedly pressed Epifanio on whether Carter said he was going to rape the victim. On this question, Epifanio stood firm—consistently denying that Carter ever said he was going to rape the victim. *Id*. at 133-40. At most Epifanio was led to speculate "I guess he was going to rape her." But when pressed further, Epifanio stated "I don't remember [Carter] telling me that he was going to rape her." *Id*. at 138, 140. Pierpont pressed on asking "But he certainly let you—did he give you an impression that if she

hadn't been [on her period] [Carter] would have raped her?" But again, Epifanio responded "No, he didn't give me any." *Id.* at 140.

Pierpont pressed further asking "I mean, he took her pants down for a reason." Id. Epifanio then speculates: "Yeah, because I guess he wanted to rape her because he, you know, would say that he's never going to turn down a woman, you know, like if I get it, you know, I'll take it. . . . So I think he might have. He would have raped her." *Id.*

Even though Carter never told Epifanio that Carter was "going to rape" Mrs. Oleson, Lieutenant Pierpont (1) attempted (albeit unsuccessfully) to insert that very admission into the statement he dictated on behalf of Epifanio during the interrogation; and (2) prepared a police report which reads: "[Carter] also told [Epifanio] that [Carter] was going to rape Mrs. Oleson but after he got her pants down he saw that she was having her period therefore he did not have any sexual contact with her." (Exhibit 15, p. 2).

Lieutenant Pierpont testified that three days before trial began either he or Officer Mack brought Epifanio in to question him about the gun. *Id.* at 106, 111-12. At that time, Epifanio "changed his story about the gun" disclosing for the first time that at Carter's direction he threw the gun in the river near Lake Shore. *Id.* at 111. Lieutenant Pierpont agreed that the gun was a very important part of the case and that both the police and the prosecutor wanted to find it. *Id.* at 106. Lieutenant Pierpont assumed that Epifanio's new statement about throwing away the gun would be documented in a police report, and was not aware that no such police report existed. *Id.* at 111-12.

Lieutenant Pierpont testified that it was not his purpose to harass or intimidate the Tovars by use of extra patrols or by making regular contact with them through Officer Mack. *Id.* at 49-

50. He further testified that he never threatened or made any promises to the Tovars, except for the promise to protect them. *Id.* at 67.

On direct examination, Lieutenant Pierpont denied threatening Epifanio with immigration-related consequences before or during Lieutenant Pierpont's interrogation of Epifanio. *Id.* at 33. Counsel then asked whether Lieutenant Pierpont had made such threats to Epifanio during the period after the interrogation on April 12, 1985, through the time of trial in December 1985. Lieutenant Pierpont answered this question with a question: "Directly to him?" Counsel for the State answered. "Yes." Lieutenant Pierpont then answered "No." *Id.* at 33.

Sometime during the three days following his interrogation with Epifanio on April 12, 1985, Lieutenant Pierpont learned that Epifanio was not a legal resident of the United States. On April 15, Lieutenant Pierpont contacted Investigator Paul James with the immigration department and asked whether an immigration hold could be placed on Epifanio. *Id.* at 92-93; Exhibit 16.

Investigator James explained that if a hold were placed on Epifanio, he could only be held in Utah for two or three days before being shipped to California and deported to Mexico. But Investigator James expressed willingness to "assist the police department in any way concerning [the Carter] investigation" and invited Lieutenant Pierpont to contact immigration authorities if needed. Evid. Hr'g. Tran. Nov. 18, 2021, at 93; Exhibit 16.

Lieutenant Pierpont denied ever telling Epifanio and Lucia to "lie about anything." *Id.* at 67. He denied telling the Tovars to say anything specific when they were called to testify. *Id.* He denied telling the Tovars to "deny receiving benefits from the police or anybody else if they were ever asked about it [at trial]." *Id.* Finally, as to the phrase "rape, break, and drive," Lieutenant Pierpont denied ever hearing the phrase before Epifanio said it at trial. *Id.* at 56.

Lieutenant Pierpont denied "giving" this phrase to Epifanio. *Id.*

Lieutenant Pierpont testified that on April 10, 1985, he and Officer Mock (an officer different from Officer Mack) conducted a stakeout of Perla Lacayo's apartment. The stakeout lasted from 9:00 a.m. to 1:30 p.m. *Id.* at 115-16, 122. During this time, Officer Mock approached the apartment and discovered Perla's three minor children unsupervised. The oldest child was nine. *Id.* at 58, 116-17. Lieutenant Pierpont called DCFS to take custody of the children. *Id.* at 59. Twenty minutes after Lieutenant Pierpont called DCFS, Perla arrived home and was detained. DCFS workers arrived shortly after Perla did. Perla was having difficulty communicating in English. *Id.* at 56. So Lieutenant Pierpont called Officer Mack to the scene because he spoke Spanish. *Id.* Perla was "pretty upset" and crying when Officer Mack arrived. *Id.* at 60-61, 121. A conversation ensued between the officers, the DCFS workers, and Perla. *Id.* at 118. After Officer Mack arrived and Perla was able to communicate with a Spanish speaker, she calmed down. *Id.* at 60-61. Her children were not removed from the home by the DCFS workers. *Id.* at 60. Perla was transported to the police department where Officer Mack interviewed her. *Id.* at 120.

Lieutenant Pierpont testified that calling DCFS workers to care for unattended minors was normal procedure. *Id.* at 59. He testified that in calling DCFS it was not his intent to "improve [his] bargaining position, so to speak" with Perla or to punish, threaten, or intimidate her. *Id.* at 59-60. Lieutenant Pierpont testified that he first learned Perla was not a legal resident of the United States "right about the same time" he spoke with her on April 10, but not before. *Id.* at 66, 124. Lieutenant Pierpont testified that he never threatened Perla. *Id.* at 67.

f. Testimony of Perla Bermudez (Lacayo)

Before summarizing Perla's testimony at the hearing, the Court notes that the purpose of her hearing testimony was narrow. During the 1985 trial, the State chose not to call Perla as a witness. The State made this choice even though defense counsel had suggested to the jury that Epifanio had a motive to fabricate (i.e. to avoid deportation from the United States). The State could have called Perla to rebut this suggestion. She might have testified about consistent statements made to her by Epifanio before any motive to fabricate arose. But the State elected not to introduce these statements through Perla.

At the hearing, the State called Perla to present counter-factual evidence—meaning evidence the State would have offered at the time of trial if the alleged *Brady* and *Napue* violations had not occurred. More specifically, the State called Perla to testify that: (1) Epifanio made statements to Perla about what Carter told him which were consistent with Epifanio's trial testimony; and (2) those consistent statements pre-dated any payments made to Epifanio by the Provo City Police Department, and any threats made by police to arrest, deport, and separate the Tovars from each other and their child.

Perla testified that Epifanio told her what Carter had said to him about the murder on two occasions. The first occurred in mid-March 1985, approximately one month before her April 10 interview with Officer Mack. At that time, she went to visit Epifanio. During the visit, Epifanio told Perla "I need to talk to you. I need to tell you something very important and it's bad." Evid. Hr'g. Tran. Nov. 17, 2021, at 150-51. Initially reluctant to disclose, Epifanio elicited from Perla a promise not to tell. He then told Perla that Carter had confessed to being "involved in the murder of that lady—that he had done it." *Id.* at 151. Epifanio told Perla that he did not know if he would tell the police because he was afraid. He asked, "Who is going to protect me. In case

something happens to me, or my wife, or my son?" *Id.* at 153. However, he did not say who it was he feared.

The second time Epifanio told Perla what Carter had said to him about the murder occurred on or about April 9, 1985. On that date, Perla and Epifanio drove Carter to Wendover. *Id.* at 84. After dropping Carter off in Wendover, Epifanio and Perla drove home together. On the way back home, Epifanio for the second time told Perla that Carter had confessed to killing a lady and this was the "real reason" Carter was leaving Utah. *Id.* at 112-13, 116-17, 121. It was during this drive back to Utah that Epifanio made the following pre-motive statements to Perla:

- On February 27, 1985, Carter was at Epifanio's home and had the gun with him. *Id.* at 113.
- Carter said he wanted money and was going to go steal. *Id.* at 114-15, 136-37. On cross-examination, Perla agreed that when asked by police what Carter had said he was going to steal, she had answered: "I don't know. I think he told [Epifanio] that he had broken into a car." *Id.* at 157.
- Carter left Epifanio's home around 8:00 or 8:30 p.m. *Id.* at 115.
- Carter returned and told Epifanio what he had done; when Epifanio expressed disbelief, Carter said "Well, you are going to hear it on the news." *Id.* at 115-16, 125.
- Specifically, Carter told Epifanio that Carter "went to the lady's house. He knocked on the door. The lady opened the door, and he said that he was looking for someone, that's what Doug told the lady. . . . He told the lady to lie down to the ground and he pulled her pants down. And that he then told the lady to get like that face down, and that she grabbed the—the lady grabbed the knife. So then he told the lady to let go of the knife, and then he put the gun on her. Doug told the lady to throw aside the knife. So then he

said that the lady left the knife. . . . She left it. And then . . . he told the lady to lay down on the ground and then he stabbed her like this. . . . In the back. And since he saw that the lady wasn't dying, he put the pillow on the lady and he shot her. [A pillow over the head] so that the—all the racket couldn't be heard from the gun. That's why he said he put the pillow and shot her." *Id.* at 122-25, 131-35, 140-42.

- Epifanio said Carter admitted to stabbing the lady eight times. *Id.* at 133-34.
- Epifanio did not witness the murder; his knowledge came "by word of mouth from Doug" and because Doug is a liar Epifanio did not believe him. *Id.* at 117.
- Epifanio wanted to tell the police what Carter had said, but was reluctant to be involved out of fear that Carter or his family "might do something against . . . my son and my wife." *Id.* at 117, 127-28, 140.
- Epifanio was afraid to tell the police what he knew because they would send him to prison. *Id.* at 128. Epifanio was "afraid because he doesn't want to be involved in anything." *Id.* at 117-18.

On cross-examination, Perla admitted that she first told police Epifanio "doesn't know anything" about the gun or Carter being a suspect in the murder. *Id.* at 156.

Perla testified that at the time police came to her home, she was not a legal resident but was in the process of securing a green card. *Id.* at 163. She testified that Officer Mack had threatened her with deportation and the loss of her children. *Id.* at 163, 167. She testified that after DCFS workers were called to her home, police told her if she did not cooperate "they would take [my] child away." *Id.* Perla testified that her signed written statement was in English and she did not know what she was signing. *Id.* at 166.

Perla testified that since 2006, she has maintained contact with Carter, exchanging letters

with him, speaking to him on the phone, and putting money on his commissary account. The last time she donated money to the commissary account was about two years ago. Her most recent telephone conversation with Carter occurred just two weeks before her testimony at the hearing. *Id.* at 73-74, 158.

At the hearing, Perla gave the answer "I don't remember" more than one hundred times. Perla claimed not to remember events both recent and distant in time. *Id.* at 160-61. (Hearing Tr. pp. 160-61). For example, Perla claimed not to remember (1) the last time she wrote to Carter; (2) the last time Carter wrote to her; (3) the last time she donated money to Carter's commissary account at the prison; and (4) whether she was served with a subpoena to appear at the hearing on October 30. *Id.* at 73, 160.

When pressed about the reasons for her lack of memory, Perla testified she currently suffers from and takes medication for anxiety, panic attacks, and depression. These conditions have persisted for a long time, exacerbated by her experiences during the Carter murder case.

Perla testified that she was "really scared" when interviewed by police. When asked whether she felt she had experienced trauma related to the Carter case, Perla articulated one deep-seeded memory:

> The trauma that I have, and I will always never forget, is—is when they—the police came into my house with the gun looking for Douglas, and the intimidation they're going to take my kids away. So I feel intimidated, and I got that trauma, and that's always have it in my mind.

Id. at 164. . Perla testified that this trauma does affect her memory, but only "a little bit." *Id.* at 164-65.

g. Testimony of Prosecutor Wayne Watson

The parties took Watson's deposition during discovery in this case. Between the time of his deposition and the hearing, Watson died. His deposition testimony was admitted into

evidence. (Exhibit 4).

Watson was the lead prosecutor in both the guilt and sentencing phases of the 1985 Carter murder trial. *Id.* at 8.

Watson testified that at the time of the trial he did not know that the Tovars were illegal residents of the United States. *Id.* at 9. At first, Watson had no memory of the Tovars and did not think he called them as witnesses. *Id.* at 10. After learning that in fact both Epifanio and Lucia were witnesses called by the State at trial, Watson testified that the State had not relied heavily on the Tovars' incriminating testimony. Watson testified that he "didn't even need [the Tovars]" and "might have thrown them in for extra source." *Id.* at 10-12.

Watson testified that Provo City paid the Tovars' rent "for a month or two." Watson knew about these payments because Lieutenant Pierpont told him about them. *Id.* at 31-32. Watson conceded that rent, utility, and cash payments made by the Provo police department for the Tovars should have been disclosed to defense counsel because the payments could have been used to impeach the Tovars. *Id.* at 35-39. Watson testified that "this stuff, the rent issue, this piece of paper, every one of them was talked to McNeill about." *Id.* at 39.

In Watson's view, he had no duty to correct Epifanio's false testimony about receiving only a $14 witness fee because (1) Watson did not know the exact amount that Provo police had paid for the Tovars' rent; and (2) Watson "probably would assume [the correction] is coming later" from defense counsel. *Id.* at 37-41.

Attached to Watson's deposition is Exhibit 3 which includes a copy of a page from a yellow legal pad. On that page, there appears a hand-written note which reads: "Epifanio / $ only deposit on apartment / deposit on phone." When asked about this note, Watson conceded that the handwriting was his own. Exhibit 4 at 55-56. He then testified that the Tovars must have

received these deposits, not the rent payments as he had first stated. *Id.* at 55-56. According to Watson, if Provo City was going to get the deposits back, then the money was not actually given to the Tovars. *Id.* at 56-57.

Watson testified that he did not ever give direction to law enforcement to "keep[] tabs on witnesses." *Id.* at 42. Watson agreed that because the Tovars could have been deported, Mack would have checked in on them once or twice a week. *Id.* at 48.

Watson disagreed with the idea that the Carter case was one of the biggest cases in the Provo Police Department. He disagreed that the police department was emotionally involved due to the victim's relation to the police chief. *Id.* at 48-49.

Watson indicated that based upon statements made by Anne Carter, Lieutenant Pierpont believed that three people went into Ms. Oleson's home the night of the murder. *Id.* at 51. Watson was prepared to charge anybody who went into the Oleson home, even if it was Epifanio. *Id.* at 51-52. But they never found any evidence that Epifanio was involved in the actual murder. *Id.* at 52.

Watson testified that—with the exceptions of children or elderly witnesses—the only thing he did to prepare witnesses for trial was to instruct them to tell the truth. *Id.* at 52-53. Watson believed that law enforcement did not ever go over testimony with witnesses. *Id.* at 53.

The only testimony Watson remembers the Tovars providing is that Carter came to their house and told them to watch the news. *Id.* at 54-55.

Watson testified that a hearsay statement from a Ms. Dahlquist that "Orla Oleson would kill Eva [Oleson]" would not have been something defense counsel would have investigated as potentially useful. *Id.* at 14-17.

When asked whether it was possible, even with an open file policy, for *Brady* material

(like Anne Carter's immunity agreement) to "slip through the cracks," Watson answered: "No. Anything's possible, but not in the death penalty cases and not in [the] Utah County attorney's office." *Id.* at 30-31, 73.

Watson was asked whether evidence that a defendant laughed when retelling how he committed murder would be "a powerful fact to use in obtaining a death sentence?" *Id.* at 61-62. Watson equivocated, but ultimately answered: "not in my book." *Id.*

When asked, Watson denied that a defendant's low IQ . . . that borders on intellectual disability, what we used to call mental retardation, might have an effect on how a jury views a confession" by the defendant. *Id.* at 67. (Watson Depos. p. 67).

If a doctor hired by the government told him a defendant was incompetent, Watson would not tell the defense, but would put the communication in the file for the defense to review. *Id.* at 71-71. "It all goes in the file." *Id.* at 72.

Watson testified that Carter's investigators were "very adept at putting words in these people's mouths" and stating that this was "obvious when you read this crap." *Id.* at 60. Watson stated to Carter's counsel: "Shame on you." *Id.* at 60.

When asked whether the mention of rape would be a powerful fact in a criminal case, Watson responded, "I think it's a powerful fact in this case because it's an element of the death penalty." *Id.* at 62.

When asked whether the mention of rape or attempted rape would have a great impact on the jury, Watson stated that he "had solid evidence to present the rape charge," recited the facts he observed at the crime scene, defended his decision to seek the death penalty, and concluded with the summary declaration: "And I filed the death penalty charge, and I pursued it, and we were successful doing it." *Id.* at 62-64.

Watson offered a diatribe against the Supreme Court and former Supreme Court Justice Christine Durham. He said: "I tell you, the Supreme Court ought to stick to what they know and not what they are guessing. Justice Durham was the worst of the bunch, to put on her prosecutor's hat and came in and told us what we should be doing in every case that I ever read by her." *Id.* at 74.

During the deposition, Watson would interrupt questioning with asides to counsel for the State. When pressed on issues he deemed improper subjects of inquiry, he (1) told counsel for the State: "You are not going to whisper to me, send me notes, nothing? Not even shut up?" *id.* at 68; (2) told counsel for the State: "Object to that. Will you please?" and then refused to answer on the basis of the objection he elicited, *id.* at 74-75; (3) told defense counsel: "And you think [my alleged contact with the police officer who arrested me for DUI] is relevant to the honesty and truthfulness of my deposition here today? . . . . I'm not going to answer any more questions. They are all bunk, and especially when you pull this crap out of the file," *id.* at 78.

One of the questions Watson refused to answer was whether he had ever been disciplined by the Utah State Bar. *Id.* at 75. Carter attached Exhibit 14, a Stipulation and Order signed by Judge Eyre that indicated Watson was suspended from the practice of law for nine months. Watson initially refused to answer whether he had ever been arrested for a DUI, but later denied the incident ever happened. *Id.* at 77-78.

h. Testimony of Paul Jones

Paul Jones is a deputy attorney employed in the civil division of the Utah County Attorney's Office. Evid. Hr'g. Trans. 3, Nov. 17, 2021, at 4-5. In response to a subpoena, Jones provided a handwritten note to Carter's counsel in October 2016. *Id.* at 6. The note read: "Epiphanio $ only deposit on apartment, deposit on phone." *Id.* at 6, Petitioner's Exhibit 3. Jones

found the note among the Utah County Attorney records on the Carter case. *Id.* at 6-7. The note was stapled to four other pages, which were disclosed on September 20, 2021. *Id.* at 8-9. The other four pages were not disclosed in 2016 because Jones determined they were work product. *Id.* at 18. All five stapled pages were in a box of what appeared to be attorney notes. *Id.* at 13-14. The box was labeled as number five, and there were eight total boxes pertaining to the Carter case. *Id.* at 13-14, 17.

i. Testimony of Bradley Rich

Bradley Rich is an attorney who represented Carter along with Jack Morgan in Carter's first post-conviction relief case. *Id.* at 21. The theory for Carter's post-conviction case was that the Tovars were compensated for their testimony and threatened with deportation and prosecution. *Id.* at 22. Counsel searched for the Tovars but could not locate them. *Id.* at 23. Rich familiarized himself with Carter's file and found no evidence that the Tovars were paid any money other than a $14.00 check or that they were threatened with deportation or the loss of their child. *Id.* at 26.

Had Rich seen the note admitted as Exhibit 3, he would have conducted further investigation and raised a claim of suppression of evidence. *Id.* at 27-28.

Rich knows Wayne Watson and believes Watson has a reputation for being an honest person. *Id.* at 29.

j. Testimony of Gary Weight

Gary Weight is a retired public defender who would have represented Carter had Carter not hired private counsel. *Id.* at 39-40. Weight assisted Carter's private counsel, Duke McNeil, during Carter's trial by lending him office space, materials, and assistance if needed. *Id.* at 39-40. Weight and his firm handled Carter's appeal. *Id.* at 42. Weight reviewed Carter's file and

found no evidence that the Tovars received any financial assistance from the government. *Id.* at 42. He also found no evidence the Tovars had been threatened with deportation or the loss of their child. *Id.* at 42. Had Weight seen the handwritten note identified as part of Exhibit 3, he would have inquired further about what it meant. *Id.* at 43.

Weight was aware that the Utah County Attorney's Office had an open file policy at the time of Carter's trial. *Id.* at 46.

k. **Testimony of Michael Esplin**

Michael Esplin is a retired attorney in the State of Utah who spent a considerable amount of his career working as a public defender in Utah County. He worked on a number of cases with Wayne Watson. *Id.* at 52-53. When asked about Watson's reputation for truthfulness, Esplin replied, "It's not good. It's a bad reputation. You can't – could not trust him." *Id.* at 53.

Esplin and his firm were appointed as local counsel to assist Duke McNeill on the Carter case. *Id.* at 54. He was unaware of any payments made to the Tovars besides a $14.00 witness fee, and he was unaware of whether the Tovars were threatened with deportation and the loss of their child. *Id.* at 56. Had he seen the note admitted as part of Exhibit 3, he would have sought to introduce it as evidence and challenged the veracity of testimony at trial. *Id.* at 56-57.

Esplin was aware that the Utah County Attorney's Office had an open-file policy, but he believed the policy to be a fallacy. *Id.* at 62. According to Esplin, the County Attorney's office often marked documents as work product that were actually discoverable. *Id.* at 62.

5. Findings of Fact[6]

Pursuant to the PCRA, Petitioner has the burden of proving the facts necessary for relief by a preponderance of the evidence. *See* Utah Code § 78B-9-105(1). "The court may not grant

[6]These judicial findings of fact are based on evidence presented in this civil action for post-conviction relief. If a new criminal trial is held, the jury will be tasked with making its own independent findings about the credibility of witness, the facts of the case, the guilt or innocence of Carter, and if necessary, what penalty should be imposed.

relief without determining that Petitioner is entitled to relief . . . in light of the entire record, including the record from the criminal case under review. Utah Code § 78B-9-105(1)(a).

Having considered the entire record, including the record from the criminal case under review, the Court finds by a preponderance of the evidence the following facts:

a. Credibility of Key Witnesses

In this case, the Court must resolve disputed issues of material fact. These disputed facts include: (1) Whether the police paid financial benefits to the Tovars and in what amounts?; (2) Whether police threatened the Tovars with arrest, deportation, and separation from each other and their son?; (3) Whether the police or prosecutor coached Epifanio to give false testimony at trial about financial benefits paid to him or on his behalf?; and (4) Whether the police or prosecutor coached Epifanio to give false trial testimony about Carter saying he was going to "rape, break, and drive" before the murder?

Resolving these disputed facts requires the Court to assess the credibility of key witnesses. To that end, the Court finds as follows:

Credibility of Lieutenant Pierpont

The Court finds that Lieutenant Pierpont was not a credible witness. The Court makes this finding for the following reasons:

- In his deposition, Lieutenant Pierpont was asked "Is it possible that the Tovars were provided with rent?" His answer was an unqualified "No." But between his deposition and the evidentiary hearing, Lieutenant Pierpont was provided with a copy of Officer Mack's deposition testimony. There, Officer Mack testified that he had paid the Tovars' rent and other expenses at the direction of Lieutenant Pierpont. Faced with this inconsistent evidence, Lieutenant Pierpont at the evidentiary hearing claimed for the first

time not to remember whether financial benefits had been paid to the Tovars. Evid. Hr'g. Trans. pp. 87-88.

- Lieutenant Pierpont testified that "our sole purpose" in assigning Officer Mack to care for the Tovars' needs was to "protect the Tovars." He further testified that any payments to the Tovars would have been part of an informal witness protection program. Evid. Hr'g. Trans. Nov. 18, 2021, at 43. But the evidence demonstrated this explanation of the payments to be a recent fabrication. The Court makes this finding because:
    - Lieutenant Pierpont conceded that the "witness protection" program was not established by any written policy or directive. *Id.*
    - Lieutenant Pierpont testified that cash disbursements to the Tovars for witness protection would have been paid from the "confidential expenditure" budget. But he conceded that this budget was also used to fund a wide range of purposes unrelated to witness protection, including to buy drugs, pay informants, rent cars, and purchase meals for informants or crime victims. *Id.* at 43-45.
    - Lieutenant Pierpont testified that any cash disbursement to the Tovars would have been authorized by the Provo City finance department and a receipt issued. *Id.* at 87. But this testimony is inconsistent with what Lieutenant Pierpont first said in his deposition. There, he testified that cash disbursements to the Tovars would not be documented at all. Lieutenant Pierpont's later explanation that what he meant was "not be documented in a police report" is an unpersuasive after-thought.
    - Lieutenant Pierpont could recall only one other instance in which payments had been made to a trial witness. In 1982, Duane and Harley Willett committed a

homicide in Utah County. The police paid for a witness to travel from New York to Utah for the preliminary hearing and trial. While the witness was in Utah to testify, the police paid the witness's room and board. The police provided armed protection for the witness going to and from the courthouse. Later, the witness was relocated to a different State, although there is no evidence that police incurred the cost of relocation. These one-time payments for travel, accommodation, and protection of an out-of-state witness stand in sharp contrast to the police paying routine living expenses to the Tovars over a period of 8-9 months.

- Lieutenant Pierpont's unwillingness to concede the obvious damaged his credibility. The best examples of this come from Lieutenant Pierpont's testimony about his interrogation of Epifanio. Lieutenant Pierpont testified that (1) Epifanio feared Carter, not me; (2) Epifanio was not afraid of being charged with capital murder; and (3) Lieutenant Pierpont did not know whether references to the death penalty caused Epifanio to feel pressure or fear. These statements lack any credibility given the totality of the circumstances at the time of the interrogation.
- Lieutenant Pierpont's willingness to mischaracterize Epifanio's interrogation in official police reports damaged Lieutenant Pierpont's credibility. During the interrogation, Epifanio repeatedly denied that Carter said he was "going to rape the victim." Evid. Hr'g. Tr. pp. 133-140; Exhibit F. This was a material issue in the case. Nevertheless, Lieutenant Pierpont (1) attempted (albeit unsuccessfully) to attribute this statement to Carter in the written statement Lieutenant Pierpont dictated for Epifanio to sign; and (2) reported in his April 12, 1985 Supplementary Report: "[Carter] also told Tovar that he

was going to rape Ms. Oleson but after he got her pants down he saw that she was having her period therefore he did not have any sexual contact with her." (Exhibit 15, p. 2).

Credibility of Officer Mack

Officer Mack's testimony was credible on two points: (1) at the direction of Lieutenant Pierpont, Officer Mack paid financial benefits to the Tovars over a period of 8-9 months prior to trial—testimony corroborated by the Tovars; and (2) Officer Mack caused Christmas gifts to be delivered to the Tovars after Carter's murder trial, but before Christmas 1985—testimony consistent with the Mack family's routine practice.

But Officer Mack's inconsistent statements—all aimed at painting the police and his own conduct in a more favorable light—seriously undermined his credibility. The Court makes this finding because:

- At first, Officer Mack understated by half or more the total value of financial benefit paid by police to the Tovars.
- In May 2011, Officer Mack signed a sworn declaration. In that declaration, he stated that the Carter murder case was "one of the biggest cases in the history of the Provo Police Department because the victim was the aunt of [] Swen Nielsen, [the] chief of police." (Exhibit 27, ¶ 15). In Officer Mack's assessment: "We were all emotionally involved in the case." Officer Mack then expressed concern that Chief Nielsen "was too close to this particular case" and "should have been more at arm's length." (Exhibit 27, ¶ 16). Officer Mack stated that Chief Nielsen "gave briefings on the case, made assignments, and was intimately involved." *Id*. Of particular concern to Officer Mack was the fact that Chief Nielsen spoke at Ms. Oleson's funeral and said positive things about her

husband, Orla Oleson. This concerned Officer Mack because, at the time, Orla Oleson was "the primary suspect" in Mrs. Oleson's murder. (Exhibit 27, ¶ 17).

- But at the evidentiary hearing, Officer Mack backtracked from these sworn statements in his 2011 declaration. At the hearing he testified that: (1) any pressure on the police was "self-imposed" and did not come from Chief Nielsen; (2) Chief Nielsen did not give briefings to the media or to other police officers, or at least none that Officer Mack could remember in which Chief Nielsen took a major role; (3) Chief Nielsen "assigned the case out and the rest of us did the investigation;" (4) most of the assignments came from Lieutenant Pierpont; (5) he would not go so far as to say that Chief Nielsen was "too involved" and after the first night, Chief Nielsen was not involved in the day to day investigation; (6) he only had concerns about Chief Nielsen's involvement a couple of times at the beginning of the case, particularly at the funeral. Evid. Hr'g. Trans. Nov. 16, 2021, at 69-72, 109-11.
- The Court finds that Officer Mack's 2011 sworn declaration is more credible than his testimony at the evidentiary hearing. The declaration was made at a time when Officer Mack believed these PCRA proceedings to be—in his own words—"frivolous," "silly," "ridiculous," "unimportant" and "meaningless." With nothing at stake, Officer Mack was in his declaration free to speak with candor and he did. Later, when Carter's PCRA claims were litigated before this Court, Officer Mack realized his candor might result in Carter's conviction and sentence being set aside. Only then did Officer Mack come to view Chief Nielsen's conduct during the investigation with a less critical eye, and assert that any pressure on the police department was self-imposed, not Chief-imposed.
- Moreover, the trial record confirms that Chief Nielsen's shadow loomed large at trial.

That shadow was of such concern to defense counsel that he addressed it directly in closing argument: "[H]opefully, we could have this trial without the giant shadow of Chief Swen Nielsen. And I say that not negatively, my observation, the Chief is a very fine man. Not only have we had the shadow, forget about the shadow, he has been here everyday, and he has been here with his family. That's not a negative, he has a right to be here, he's concerned, they have a right to be here, and if I were in their situation, I would have been here everyday also. And so I hold it not against them. But I say, as you deliberate in this cause, on this charge, with this law, with the set of facts concerning Douglas Carter and us; no man is such a giant and no shadow is so big and broad, and the presence of all of us after you retire is secondary; you, the twelve people, who will deliberate and make decisions." (1985 Tr. Trans. at 1356).

Credibility of Wayne Watson

The Court finds that Wayne Watson was not a credible witness. The Court makes this finding because:

- Watson's willingness to simply guess at facts rather than admit to lack of memory significantly undermined his credibility. For example:
    - At first Watson testified that at the time of the trial he did not know that the Tovars were not legal residents of the United States. Exhibit 4 at 9.
    - Then, Watson said he had no memory of the Tovars and did not think he called them as witnesses. *Id.* at 10.
    - After learning from counsel that in fact he did call both Epifanio and Lucia as witnesses, Watson testified that the State had not relied heavily on the Tovars' incriminating testimony. In fact, Watson stated that he "didn't even need [the

Tovars]" and "might have thrown them in for extra source." *Id.* at 10-12.

- In fact, the record evidence demonstrates that the State needed the Tovars' testimony and relied heavily upon it to corroborate a confession that might not have stood on its own.

- Watson admitted to knowing about the rent payments made on behalf of the Tovars by police, but in his view he had no duty to correct Epifanio's false testimony about receiving only a $14 witness fee because: (1) Watson did not know the exact amount that Provo police had paid for the Tovars' rent; and (2) Watson "probably would assume [the correction] is coming later" from defense counsel. *Id.* at 37-41. This self-serving view is inconsistent with well-recognized law requiring a prosecutor to correct false testimony.
- During his deposition, Watson manifested a persistent unwillingness to concede the obvious. For example:
  - Watson was unwilling to admit that a hearsay statement from a Ms. Dahlquist that "Orla Oleson would kill Eva [Oleson]" would have been—aside from the question of admissibility—something defense counsel would have investigated as potentially useful. *Id.* at 14-17.
  - When asked whether it was possible, even with an open file policy, for *Brady* material (like Anne Carter's immunity agreement) to "slip through the cracks," Watson answered: "No. Anything's possible, but not in the death penalty cases and not in [the] Utah County attorney's office." *Id*. at 30-31, 73.
  - Watson was asked whether evidence that a defendant laughed when retelling how he committed murder would be "a powerful fact to use in obtaining a death

sentence." *Id.* at 61-62. Watson equivocated, but ultimately answered: "not in my book." *Id.* In fact, the record shows that in the 1985 penalty phase of Carter's trial, Watson emphasized this very fact. He asked the jury: "How did [Carter] feel about it while he did it? Perhaps the best evidence of that is how he was a few minutes later at the Tovar's home, as he over and over again· demonstrated to them what he had done. Was excited, was laughing, was giggling, telling them to watch television to see what he had done, 'look what I've done.' He wasn't sickened, he wasn't saddened, he wasn't even frightened. He was thrilled." (1985 Penalty Phase Trans. at 1266).

- Watson was unwilling to admit that expert testimony about a defendant's low IQ . . . that borders on intellectual disability, what we used to call mental retardation, might have an effect on how a jury views a confession" by the defendant. Evid. Hr'g. Tran. Nov. 18, 2021, at 67.

- Watson clearly took Carter's PCRA case as an affront to him personally. The deposition transcript is replete with evidence of this personal bias, a few include:
  - Watson accusing defense investigators of being "very adept at putting words in these people's mouths" and stating that this was "obvious when you read this crap." *Id.* at 60.
  - Watson telling Carter's counsel "Shame on you." *Id.* at 60.
  - Watson's non-responsive recitation of the facts he observed at the crime scene, defense of his decision to seek the death penalty, and self-focused declaration: "And I filed the death penalty charge, and I pursued it, and we were successful doing it." *Id.* at 62-64.

- Watson's diatribe against the Supreme Court and former Supreme Court Justice Christine Durham which reads: "I tell you, the Supreme Court ought to stick to what they know and not what they are guessing. Justice Durham was the worst of the bunch, to put on her prosecutor's hat and came in and told us what we should be doing in every case that I ever read by her." *Id.* at 74.

- Watson's asides to counsel for the State manifested a general disrespect for the deposition and these proceedings. When pressed on issues he deemed improper subjects of inquiry, he (1) told counsel for the State: "You are not going to whisper to me, send me notes, nothing? Not even shut up?" *id.* at 68; (2) told counsel for the State: "Object to that. Will you please?" and then refused to answer on the basis of the objection he elicited, *id.*at 74-75; (3) told defense counsel: "And you think [my alleged contact with the police officer who arrested me for DUI] is relevant to the honesty and truthfulness of my deposition her today? . . . . I'm not going to answer any more questions. They are all bunk, and especially when you pull this crap out of the file, *id*. at 78.
- Michael Esplin—a seasoned and well-respected defense lawyer in Utah County who tried a number of cases on the opposite side of Watson—opined that Watson's reputation for truthfulness was poor.

Credibility of Epifanio and Lucia Tovar

Like other witnesses, Epifanio and Lucia did not have a perfect memory of events occurring in 1985. But the Court finds Epifanio and Lucia to be credible witnesses. The Court makes this finding because:

- Their testimony about financial benefits being paid to them was corroborated by Officer Mack.

- Lucia's report that Lieutenant Pierpont threatened her with deportation was corroborated by Mack's testimony that Lucia had in fact reported this to him.
- The Tovars have nothing to gain by reporting that police paid them, threatened them, and coached their testimony in 1985. Indeed, reporting this information has proved personally distressing to them. They have been required to dredge up memories of what was clearly a dark time in their early married life together. And during these proceedings, both Epifanio and Lucia were cross-examined about the death of their son.
- The Tovars did not have any contact with Carter after his conviction and sentence in 1985. They have no incentive to offer testimony favorable to him.

Credibility of Perla Lacayo

The Court finds that the testimony given by Perla Lacayo at the evidentiary hearing was not credible. The Court makes this finding because:

- During her testimony at the hearing, Perla answered "I don't remember" more than one hundred times. Whether these claims not to remember are credible is difficult to determine.
- On the one hand, the claims lack credibility because (1) Perla claimed not to remember events both recent[7] and distant in time. Evid. Hr'g. Trans. Nov. 17, 2021, at 160-61; and (2) for the past 15 years Perla has maintained contact with Carter, exchanging letters with him, speaking to him on the phone, and putting money on his commissary account. She last deposited money on Carter's commissary account

[7] Recent events Perla claimed not to remember include (1) the last time she wrote to Carter; (2) the last time Carter wrote to her; (3) the last time she donated money to Carter's commissary account at the prison; and (4) whether she was served with a subpoena to appear at the hearing on October 30. Evid. Hr'g. Tran. Nov. 17, 2021, at 73, 160.

approximately two years ago. Her most recent telephone conversation with him occurred just two weeks before her testimony at the hearing. *Id.* at 73-74, 158.

- On the other hand, some of Perla's inability to remember can be attributed to other factors. These factors include:
    - The passage of more than 35 years since the murder of Ms. Oleson and the arrest and conviction of Carter;
    - Perla currently suffers from and takes medication for anxiety, panic attacks, and depression. These conditions have persisted for a long time, exacerbated by her experiences during the Carter murder case.
    - The trauma Perla experienced in connection with the case.
        - Perla testified that she was "really scared" when interviewed by police in 1985. When asked whether she felt she had experienced trauma related to the Carter case, Perla articulated one deep-seeded memory: "The trauma that I have, and I will always never forget, is—is when they—the police came into my house with the gun looking for Douglas, and the intimidation they're going to take my kids away. So I feel intimidated, and I got that trauma, and that's always have it in my mind." *Id.* at 164.
        - Perla testified that this trauma does affect her memory, but only "a little bit." *Id.* at 164-65.
- Some of Perla's inability to remember is a function of her trauma, her mental health conditions, and the passage of time. However, these factors do not plausibly account for the numerous times that Perla claimed not to remember.

- For these reasons, the Court finds that Perla's repeated claims "not to remember" are for the most part motivated by her friendship with Carter and her desire not to undermine his claims in this case.
- As a practical matter, because of Perla's repeated claims of no memory, much of her testimony at the evidentiary consisted of her prior inconsistent statements made in 1985.

b. Financial Benefits Paid to the Tovars

1. In February 1985, Lieutenant Pierpont was the lead investigator of the major case squad assigned to investigate the murder of Mrs. Oleson. Evid. Hr'g. Tran. Nov. 18, 2021, at 6. In that position, he directed the investigation and made assignments to others. *Id.* at 7. He reported to his direct supervisor, Captain Warren Grossgebauer. *Id.*
2. Either Lieutenant Pierpont or Captain Grossgebauer assigned Officer Mack "to keep track of [the Tovars] and to care for any of their needs that—that they were concerned about." *Id.* at 36. Officer Mack was also required to provide extra patrols around the Tovars' residence. *Id.* at 37.
3. Officer Mack was assigned to this role because the Tovars spoke Spanish and so did he. *Id.* at 36; Evid. Hr'g. Trans. Nov. 16, 2021, at 72.
4. In Officer Mack's words, "it was my responsibility to make certain that the Tovars were happy." Evid. Hr'g. Trans. Nov. 16, 2021, at 75.
5. After the Tovars were identified as witnesses, Officer Mack visited them "two to three times a week, maybe more." *Id.* at 121. His objective was to "mak[e] sure that—that they were taken care of to where they didn't leave town for employment, or—or that they didn't go back to Mexico or—or—that they were completely watched and taken care of."

Id. at 121, 128-29.

6. As part of that effort, Officer Mack "provided the Tovars with items of financial value." *Id.* This financial support was given over a period of 8-9 months prior to trial and included money for rent, bills, and groceries. *Id.* at 75.
7. The police "basically took care of [the Tovars'] daily living expenses" but not 100 percent because Epifanio worked some too. *Id.* at 76. Officer Mack remembered giving the Tovars cash, but not very often. *Id.* at 128.
8. Officer Mack's responsibility included providing money to the Tovars. In Officer Mack's words, he was to "make sure if [the Tovars] did or did not [need money]" and "if they needed money, we—I took it. . . . If they needed anything, I was there to help them." *Id.* at 128, 131.
9. Officer Mack first testified that the financial benefits "totaled a couple of a thousand" dollars. *Id.* The Court does not find this testimony credible.
10. Officer Mack agreed that an amount of $400 for the Tovars' rent sounded right, and that he paid the living expenses for the Tovars, including rent, for 8-9 months. *Id.*
11. Therefore, the total value of payments made to the Tovars for rent, utilities, phone and groceries by the police likely exceeded $4,000.
12. In making these payments to the Tovars, Officer Mack was "just following [the] orders" of Lieutenant Pierpont. *Id.* at 81. As Officer Mack stated, he was "sure" Lieutenant Pierpont knew about the payments. Indeed, it was Lieutenant Pierpont who told Officer Mack to pay the Tovars' rent. *Id.* at 193.
13. Other people in the police department knew about the payments. As Officer Mack testified "Of course. I didn't do it on my own." *Id.* at 81. (Tr. Trans. p. 81).

14. Lieutenant Pierpont was aware of the rent payments and other financial benefits that Officer Mack paid to or on behalf of the Tovars. The Court makes this finding because:
    a. As the lead investigator assigned to the Carter case, Lieutenant Pierpont was responsible for directing the investigation and making assignments;
    b. In the role of lead investigator, Lieutenant Pierpont knew about Officer Mack's assignment to care for the Tovars' monetary needs;
    c. While Lieutenant Pierpont had no direct day-to-day contact with the Tovars, he instructed them to check in regularly either with him or with Officer Mack. Evid. Hr'g. Tran. Nov. 18, 2021, at 37.
    d. Officer Mack reported directly to Lieutenant Pierpont regarding Officer Mack's work relating to the Carter case;
    e. Officer Mack has a clear memory of providing the financial benefits and doing so because he was "following orders."
    f. In the command structure, those orders would have come to Officer Mack from his direct supervisor and the lead investigator, Lieutenant Pierpont.
15. Like police investigators, Wayne Watson knew before trial about all of the financial benefits paid by police to or on behalf of the Tovars. The fact that the benefits were being paid was well-known among those working on the case. And as Officer Mack confirmed, it is reasonable to infer that Watson knew about the payments too.
16. But finding that Watson was aware of the financial benefits paid to the Tovars need not rest on inference alone. Watson himself testified that he knew about the rent payments because Lieutenant Pierpont told him about the payments.
17. Moreover, Watson's own hand-written notes confirm that he knew financial benefits had

been paid to the Tovars. The notes read: "Epifanio / $ only deposit on apartment / deposit on phone."

18. The Court finds by a preponderance of the evidence that these hand-written notes were prepared by Watson before Epifanio testified at trial. The Court makes this finding because:
    a. The fact that police were providing financial benefits to the Tovars was well-known to the investigative team prior to trial; and
    b. The notes document the payment of a deposit on an apartment. A deposit would be required upon the Tovars moving into a new apartment. This happened two times, both before trial.
    c. The notes were discovered in the middle of the Utah County Attorney's case records—box 5 of 8 related to the Carter murder trial.
    d. The note documenting cash payments to or on behalf of the Tovars is the third page of a five-page series of notes. The other four pages record in detail Epifanio's anticipated trial testimony. (Exhibit 3, pp. 1-5). The Court makes this finding because it is unlikely that Watson would have taken such detailed notes during his own direct examination of Epifanio at trial.
19. The State of Utah did not disclose to defense counsel any of the financial benefits paid by the police to or on behalf of the Tovars.
20. The reason police paid financial benefits to or on behalf of the Tovars is disputed. On this factual question, the Court finds that:
    a. The payments were not made to or on behalf of the Tovars as part of a "witness

protection program."

b. In 1985, no witness protection program existed under the policies or directives of the Provo City police department. Instead, money was distributed from a "confidential expenditures account" for a variety of purposes, unchecked by meaningful financial accounting controls or oversight. Monies from the confidential expenditures account could be used to protect a witness, but they were also used for a host of other reasons unrelated to witness protection.

c. Lieutenant Pierpont suggested that disbursements from the fund would be processed through the City financial department and documented with a receipt. But no such records were admitted into evidence.

d. Between April 12, 1985, when Epifanio was arrested, and June 11, 1985, when Carter was detained in Nashville, Tennessee, police in Provo knew Carter had been transported to Wendover to board a bus, but they did not know the precise whereabouts of Carter. *Id.* at 40. During this period, the reasons for moving the Tovars, paying their rent, and providing extra patrols around their residence may have included a protective component.

e. But this protective purpose was minimal given Carter's flight from Utah and had certainly dissipated after Carter's arrest in Nashville. After his detention in Nashville, Carter was held in custody through trial and sentencing. While in custody, Carter presented no threat of harm to the Tovars.

f. Nevertheless, from June 11, 1985, to trial, Officer Mack continued to make regular rent payments and other payments to or on behalf of the Tovars.

21. Thus, contrary to Lieutenant Pierpont's testimony, the "sole purpose" of paying the

Tovars was not to protect them. Whatever protective purpose the police may have had in making payments to or on behalf of the Tovars was nominal. The primary reason the police paid the Tovars' expenses was to ensure that the Tovars remained living in Utah until trial. The Court makes this finding because:

a. The Tovars were not residing legally in the United States and the police knew this.

b. In his interrogation with Lieutenant Pierpont, Epifanio had suggested that he and his family might leave Utah.

c. Lieutenant Pierpont learned from federal immigration authorities that an immigration hold on Epifanio would result in his swift transfer to California and deportation. Therefore, an immigration hold was counter-productive for the police.

22. In summary, the Court finds that police paid financial benefits to the Tovars to ensure their continued availability and cooperation as trial witnesses. The practical effect of those payments was to make the Tovars dependent upon and beholden to police as their benefactors.

23. In addition to the financial benefits described above, Officer Mack, acting in his personal capacity, arranged for a Christmas tree and gifts to be provided to the Tovars.

24. Officer Mack caused these gifts to be delivered anonymously. There is no evidence that Watson, Lieutenant Pierpont, or any other police officer was aware that the Tovars had received the Christmas tree and gifts, or that Officer Mack was the giver.

25. Officer Mack caused these gifts to be delivered in his personal capacity. After trial, he had no further contact with the Tovars in his official capacity as a peace officer. After

trial, he had no official duty to monitor the Tovars' whereabouts or their needs.

26. The Christmas tree and gifts were delivered sometime after the end of trial (December 19, 1985) and before Christmas Day. The Court makes this finding because:

    a. It was the Mack family's routine practice to deliver Christmas gifts anonymously to a family in need close to Christmas Day.

    b. Officer Mack had a personal belief that in Latin culture the most important day of the Christmas season is Christmas Eve. Therefore, he would have delivered the gifts close to that day.

    c. Admittedly, Officer Mack's recollection about when the gifts were delivered was uncertain. He testified to "struggling trying to figure it out" and only did so with the help of both his wife and counsel for the State. *Id.* at 73, 78. But the totality of the evidence preponderates in favor of a finding that the Christmas tree and Christmas gifts were delivered sometime after the last day of trial.

c. Threats to the Tovars of Arrest, Deportation, and Loss of Son

1. On February 27, 1985, Epifanio Tovar was 19 years old. He and his wife, Lucia, were the parents of an infant son. They were not legal residents of the United States.
2. Epifanio understood and spoke some English but was not proficient. During the Carter trial, Epifanio requested the assistance of an interpreter. Lucia spoke only Spanish and understood very little English.
3. Epifanio and Lucia were unsophisticated. Epifanio had only an eighth-grade education. Neither Epifanio nor Lucia had a working knowledge of the role police and prosecutors played in the state criminal justice system. For example, Epifanio believed that prosecutor Watson was "the boss" of the police. Exhibit 1 at 61, 63.

4. Both Epifanio and Lucia believed that Provo City police officers had authority to deport them from the United States. They believed this for two reasons.
    a. First, Epifanio saw an immigration officer at the Provo City Police Department immediately before he was interrogated by Lieutenant Pierpont. *Id.* at 33-34.
    b. Second, and by far the weightier reason, both Officer Mack and Lieutenant Pierpont had each at different times threatened to deport the Tovars.
5. Early in his work with the Tovars, Officer Mack learned that both Lucia and Epifanio were not legal residents of the United States. Evid. Hr'g. Trans. Nov. 16, 2021, at 91, 117, 139.
6. Lieutenant Pierpont learned that Epifanio Tovar was not a legal resident sometime in the three days following Epifanio's interrogation on April 12, 1985. Certainly, by April 15, 1985—the date Lieutenant Pierpont contacted the immigration department to inquire about placing an immigration hold on Epifanio—Lieutenant Pierpont was aware that both Epifanio and Lucia were not legal residents of the United States. Lieutenant Pierpont would have communicated this information to Officer Mack, the peace officer Lieutenant Pierpont assigned to care for the Tovars' needs.
7. Lucia testified that Officer Mack threated her and Epifanio with arrest, deportation, and loss of their son, and that this occurred at least three times. Evid. Hr'g. Tran. Nov. 16, 2021, at 8, 42. The Court finds this testimony credible.
8. The first time Officer Mack made this threat was when he came to Lucia's house looking for Epifanio to arrest him. *Id.* at 42-43. He made the threat because he wanted to detain Epifanio so that he would talk about what he knew. *Id.* at 44-45.
9. The second time Officer Mack made this threat was after Epifanio was arrested and Lucia

asked to see him. *Id.* at 42.

10. The third time Officer Mack made this threat was when he told Lucia "not to say anything regarding the assistance [the police] were giving us." *Id.* at 12-13, 34, 45, 63. This third threat was made in an office at the courthouse. The occupants of the office were Lucia, Epifanio, Officer Mack and a man sitting behind some furniture. *Id.* at 45-46. This meeting occurred before trial. *Id.*
11. The Court finds that these three instances were not the only times Officer Mack threatened Lucia with deportation. In Lucia's words, Officer Mack "was always telling things like, oh, they are going to deport you." *Id.* at 62.
12. Officer Mack's testimony corroborates Lucia's testimony about police threats of deportation. Officer Mack testified that on multiple occasions, Lucia told Officer Mack that she was afraid of being deported. She would talk about "somebody else making threats to them about deporting them." Lucia could not say the name of this person very well, and though he could not be sure, Officer Mack was "pretty sure she meant Pierpont." *Id.* at 140.
13. In his deposition, Officer Mack testified that he told Lucia "as long as you're working with us, [deportation] was not going to happen." *Id.* at 93. This was a threat that if the Tovars stopped cooperating with the police, deportation would ensue.
14. At the evidentiary hearing, Officer Mack backtracked from his deposition testimony. At the hearing, he testified that he told Lucia "as long as [she and Epifanio] are involved in a murder case, . . . no agency would be sending her back to Mexico." *Id.* at 92.
15. The Court finds that Officer Mack's deposition testimony about his response to Lucia is more credible than his evidentiary hearing testimony. The Court makes this finding

because:

a. The deposition testimony represents Officer Mack's first memory of his response to Lucia;

b. Officer Mack articulated that memory at a time when he still viewed these PCRA proceedings as "frivolous," "silly," and of no consequence. With apparently nothing at stake, Officer Mack was free to speak with candor and he did. *Id.* at 100-101.

c. By the time of the evidentiary hearing, Officer Mack's view of these proceedings as "frivolous" and "silly" had proved unfounded. Then, Officer Mack had a motive to be more circumspect—to tie Lucia's non-deportation to her mere "involvement" in the Carter case, not to her "cooperation" with the police.

d. For the reasons stated in section 5.a above, the Court finds Officer Mack not to be a credible witness on the question of whether police threatened the Tovars with arrest, deportation, and loss of their son.

16. The Court finds that Lieutenant Pierpont made at least one direct threat of deportation to Lucia, and that this was an indirect threat of deportation to Epifanio. The Court makes this finding because:

a. On direct examination, Lieutenant Pierpont denied threatening Epifanio with immigration-related consequences before or during Lieutenant Pierpont's interrogation of Epifanio. Evid. Hr'g. Tran. Nov. 18, 2021, at 33.

Counsel then asked whether Lieutenant Pierpont had made such threats to Epifanio during the period after the interrogation on April 12, 1985, through the time of trial in December 1985. Lieutenant Pierpont answered this question with a

question: "Directly to him?" Counsel answered. "Yes." Lieutenant Pierpont then answered "No." *Id.*

b. This evasive response was telling. By limiting his answer to a denial of "direct threats" to Epifanio only, Lieutenant Pierpont left open the obvious question of his ever having made indirect threats of deportation to Epifanio through Lucia or others.

c. By April 15, 1985, Lieutenant Pierpont knew the Tovars were not legal residents of the United States;

d. Lieutenant Pierpont instructed the Tovars to stay in contact with him or Officer Mack, giving Lieutenant Pierpont opportunity to threaten the Tovars;

e. On multiple occasions, Lucia told Officer Mack that she was afraid of being deported. She would talk about "somebody else making threats to them about deporting them." Evid. Hr'g. Trans. Nov. 16, 2021, at 140. Lucia could not say the name of this person threatening her very well, but Officer Mack was "pretty sure she meant Pierpont" *Id.*

f. For the reasons stated in section 5.a above, the Court finds that Lieutenant Pierpont is not a credible witness.

17. As a practical matter, these threats of deportation meant arrest of the Tovars and separation of their family. Lucia was from Nicaragua. Epifanio was from Mexico. Therefore, deportation would result in either Lucia or Epifanio losing their infant son.

18. Officer Mack and Lieutenant Pierpont both testified that as state police officers they lacked authority to deport the Tovars. But there is no evidence that they communicated this fact to the Tovars.

19. All the Tovars knew was that they were illegal residents of the United States, the Provo Police Department knew it, and two officers from that Department had made threats to deport them. The Tovars had no reason not to take Officer Mack and Lieutenant Pierpont at their word.
20. The State did not disclose to Carter's counsel that Officer Mack and Lieutenant Pierpont had threatened the Tovars with arrest, deportation, and the resulting loss of their son.

d. Coaching of the Tovars' Trial Testimony by Police

1. Officer Mack emphatically denied ever telling the Tovars not to disclose at trial the payments made to them by police. (Tr. Trans. 144-45; 182, 189). In his view, such coaching was criminal and unnecessary, given the corroborating confession. (Tr. Trans. pp. 145-46). The Court does not find this testimony credible.
2. Lieutenant Pierpont denied ever telling Epifanio and Lucia to "lie about anything." (Hearing Tr. p. 67). He denied telling the Tovars to say anything specific when they were called to testify. *Id.* He denied telling the Tovars to "deny receiving benefits from the police or anybody else if they were ever asked about it [at trial]." *Id.*
3. The Court finds by a preponderance of the evidence that Officer Mack instructed the Tovars to lie about receiving financial benefits from the police if asked about the benefits at trial. The Court makes this finding because:
    a. Officer Mack was responsible for paying the financial benefits on behalf of the Tovars. He knew that the payments to them had exceeded $4,000 over an 8 to 9 month period.
    b. After Epifanio's release from custody, Provo Police regularly patrolled near the Tovar residence. Officer Mack visited the Tovars multiple times each week and

developed what, in his view, was a friendly relationship with them.

c. In 1985, Epifanio understood and spoke English but was not proficient. During the Carter trial, he requested the assistance of an interpreter. Lucia spoke only Spanish and understood very little English. Officer Mack was the one police officer who spoke to the Tovars in Spanish.

d. For their part, the Tovars felt that they were under police surveillance. Whatever purpose this heightened police presence served in keeping the Tovars in Utah, it was also a persistent reminder of the power police had over the Tovars and their continued life together in the United States as a family. This fact could not have been lost upon Officer Mack and Lieutenant Pierpont.

e. Epifanio and Lucia were not legal residents of the United States and both Officer Mack and Lieutenant Pierpont knew it.

f. Epifanio and Lucia were unsophisticated. Neither of them had a working knowledge of the state criminal justice system. Both erroneously believed that the Provo Police Department had authority to deport them. And both Officer Mack and Lieutenant Pierpont had threatened deportation.

g. All these circumstances combined to create a significant imbalance of power in the relationship between Officer Mack and the Tovars. This would have given Officer Mack confidence in his ability to instruct the Tovars about what not to say at trial, and to do so with little risk of his misconduct being reported or discovered.

h. The Tovars had no reason to believe that Officer Mack's instruction not to disclose the financial benefits at trial was improper.

i. Absent an express instruction not to disclose the financial benefits paid to them or on their behalf, the Tovars had no reason to testify falsely about the benefits or to believe that the fact of the payments damaged the State's case in some way.

j. The Tovars had nothing to gain by disclosing the instruction not to testify about financial benefits paid to them. They have had no contact with Carter since his conviction in 1985 and have no incentive to offer testimony that is favorable to him.

k. Finally, Lucia remembers being instructed not to say anything about the financial benefits paid by police. The instruction was given to the Tovars in an office at the courthouse before trial. Lucia, Epifanio, Officer Mack, and a man seated behind some furniture were present.

l. The Court finds by a preponderance of the evidence that the man seated behind the furniture was Watson.

4. At the evidentiary hearing, Epifanio testified that immediately before trial, he was in an office at the courthouse. Lieutenant Pierpont and Watson were both present. In this meeting, the phrase "rape, break, and drive" came up.
5. When asked why he lied at trial about Carter saying he was going to "rape, break, and drive," Epifanio testified "because that's what they wanted me to say." When asked who wanted him to say this, Epifanio said it was either Watson or Lieutenant Pierpont.
6. The Court finds this testimony of Epifanio credible.
7. For his part, Lieutenant Pierpont denied ever hearing the phrase "rape, break, and drive" before Epifanio said it at trial. (Hearing Tr. p. 56). And Lieutenant Pierpont denied

"giving" this phrase to Epifanio. *Id*. The Court does not find this testimony credible. The reasons for this finding are:

a. In his interrogation of Epifanio, Lieutenant Pierpont demonstrated a strong motive to discover an admission that Carter had intended to rape Ms. Oleson.

b. Notwithstanding Epifanio's repeated assertions that Carter had never said he was "going to rape the victim," Lieutenant Pierpont (1) attempted (albeit unsuccessfully) to insert this very fact into the written statement he dictated for Epifanio to sign; and (2) prepared a supplementary report falsely stating that—according to Epifanio—Carter said he was going to rape the victim.

c. The State had charged Carter with aggravated murder. One of the alleged aggravating factors was that Carter had committed the murder in the course of committing or attempting to commit rape. The State's evidence of rape or attempted rape was not robust, a point conceded by Watson in his closing argument. (1985 Trial Tr. p 1349).

d. Epifanio's description of the meeting at which the phrase "rape, break, and drive" came up—in an office, at the courthouse, before trial, with a police officer and Watson present—is strikingly consistent with the meeting described by Lucia. Lucia testified to attending a meeting in an office at the courthouse before trial. The only difference is that Officer Mack—rather than Lieutenant Pierpont—was present at the meeting. This would make sense because Lucia, more than Epifanio, would have required Officer Mack as an interpreter.

e. These brief meetings with the Tovars at the courthouse shortly before trial are consistent with Watson's routine practice of doing little to prepare adult witnesses

to testify at trial.

f. The purpose of the meetings was to prepare the Tovars to testify at trial. In the meeting Lucia described, Officer Mack instructed the Tovars not to disclose the financial benefits paid to them by police.

g. The meeting with Epifanio presented a similar opportunity for Lieutenant Pierpont to instruct Epifanio about "rape, break, and drive." However, the Court finds that Lieutenant Pierpont had given the instruction at some time prior to the meeting—or at least prior to Watson joining the meeting. In Watson's presence, as trial preparation of Epifanio ensued, the phrase "rape, break, and drive" came up—and the reason it came up was because that is what Lieutenant Pierpont had previously told Epifanio to say. As Epifanio testified, Watson never told him to say anything that was not the truth.

h. The State argues that the English phrase "rape, break, and drive" is syntactically awkward and therefore more likely to be of Spanish origin.[8] The Court disagrees. The Court finds that the English phrase "rape, break, and drive" is a memorable one, made more powerful by (1) assonance—(the repetition of vowel sounds)—in the words "rape" and "break;" and (2) substantive meaning, in that the phrase succinctly imputes to Carter a pre-existing intent to rape someone, break her in the process, and then flee to avoid apprehension, The powerful and memorable character of the phrase "rape, break, and drive" was not lost upon the 1992 sentencing prosecutor who upon its persuasive force in seeking a death sentence for Carter. Finally, the English phrase "rape, break, and drive" appears no more syntactically awkward than the Spanish equivalent: "violar, romper y manejar."[9]

[8] The State presented no expert testimony about linguistics or the origin of English or Spanish words.

i. For the reasons set out previously, the imbalance of power in the relationship between Epifanio and Lieutenant Pierpont, created an environment in which Lieutenant Pierpont could instruct Epifanio to testify falsely, and to do so with little risk that his misconduct would be reported or discovered.

e. Failure to Correct False Testimony About Financial Benefits

1. As found above, prior to trial both Watson and Lieutenant Pierpont were aware of the financial benefits paid to and on behalf of the Tovars.
2. Watson and Lieutenant Pierpont sat together at counsel table during trial. Both men personally witnessed Epifanio testify falsely about financial benefits paid to him or on his behalf.
3. The trial transcript demonstrates that Epifanio lied about this not once, but five times.

> Q: Mr. Tovar, did you and or your family anytime between February and now receive money or support from Mr. Watson's office or from Mr. Pierpont, the police?
> A: Just, we just received fourteen dollars.
> Q: Just fourteen dollars?
> A: Yes, a check from the City.
> Q: Nothing else that they offered you or gave you to stay and be available because you had to be a witness in this case?
> A: No.
> Q: What about your family, your wife?
> A: No.
> Q: You are not on any kind of aid?
> A: No. They just gave us a check, one for each of us, since that last court.

(1985 Tr. Trans. at 1164).

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[9] Collins Beginners' Spanish Dictionary, https://www.collinsdictionary.com/us/translator (last visited on November 22, 2022).

4. Watson and Lieutenant Pierpont both knew that Epifanio had testified falsely.
5. Watson did nothing to correct this false testimony.

f. Failure to Correct False Testimony About "Rape, break, and Drive"

1. It is undisputed that Epifanio testified falsely about Carter saying "rape, break, and drive."
2. Lieutenant Pierpont instructed Epifanio to testify falsely that Carter said he was going to "rape, break, and drive" before the murder.
3. In the meeting in an office at the courthouse shortly before trial, Watson met with Epifanio and Lieutenant Pierpont. In that meeting, the phrase "rape, break, and drive" came up. And the reason it came up is because Lieutenant Pierpont had told Epifanio to say it.
4. But Carter has failed to prove that Watson personally knew "rape, break, and drive" was false testimony, or that Watson ever instructed Epifanio to impute this phrase to Carter. Epifanio testified that Watson never told him to testify to anything that was not the truth.
5. The trial transcript suggests Watson's surprise at the phrase "rape, break, and drive."

The trial transcript reads:

> Watson: What, if anything, did [Carter] tell you he was going to do when he left the first time?
>
> Epifanio: He was going to go rape, break, and drive.
>
> Watson: Did he tell you that?
>
> Epifanio: Yes.
>
> Watson: What's your best recollection, Mr. Tovar, of what [Carter] told you he was going to do? Tell me what you remember him saying?

Epifanio: That he was going to go break into a house.

Watson: And what, if any, purpose did he tell you why he was going to do that?

Epifanio: Needed money.

(Tr. Trans. pp. 1129-30).

6. Discussion of Claims 1 and 2: Violations of *Brady v. Maryland*

Petitioner claims the prosecutors failed to disclose material impeachment evidence. This evidence consisted of (1) the financial benefits paid by police to or on behalf of Epifanio and Lucia; (2) the threats made by police to arrest, deport, and separate Epifanio and Lucia from each other and their son; (3) the police coaching the Tovars not disclose at trial the financial benefits paid to them or on the their behalf by police; and (4) the police coaching Epifanio to say that Carter said he was going to go "rape, break, and drive" before the murder.

a. Legal Standard

"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87. "[T]he duty to disclose favorable evidence encompasses both exculpatory and impeachment evidence." *Tillman v. State*, 2005 UT 56, ¶ 27 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). And "[t]he duty to disclose favorable evidence is implicated even if the evidence is known only to police investigators and not the prosecutor regardless of whether the evidence has been requested by the accused." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)).

The Utah Supreme Court has recognized three components that a defendant must demonstrate to establish a *Brady* discovery violation: (a) "the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching;" (b) "the evidence was

suppressed by the State, either willfully or inadvertently;" and (c) "prejudice ensued." *Tillman v. State*, 2005 UT 56, ¶ 28 (internal quotations omitted). The court will examine each of these components to determine whether the State committed a *Brady* violation that justifies a new trial, a new sentencing trial, or both.

1. <u>The evidence is favorable to Carter</u>

Evidence that the police had paid more than $4,000 in financial benefits to or on behalf of the Tovars prior to trial is impeachment evidence favorable to Carter. Granted, if the payments had been disclosed, Lieutenant Pierpont would have testified that the payments were made as a part of a witness protection program. This would have suggested to the jury that Epifanio needed to be protected from Carter. *See United States v. Davis*, 609 F. 3d 663, 696 (5th Cir. 2010) (finding that information about witness protection is not favorable to a defendant because the jury may have assumed that the witness needed protection from the defendant). However, for the reasons stated above, the evidence that the payments were part of a witness protection program is paper thin. And Officer Mack—the police officer assigned to monitor the Tovars—would have testified that the Tovars were never in any real danger. For these reasons, the Court concludes that the payments made by police on behalf of the Tovars constituted evidence favorable to Carter.

Evidence that police threatened the Tovars with arrest, deportation, and separation from each other and their son is impeachment evidence favorable to Carter. The threats created in the Tovars a motive to misrepresent or slant their testimony in ways favorable to the State.

Evidence that police coached Epifanio to not disclose the financial benefits and to say that Carter said "rape, break, and drive" is impeachment evidence favorable to Carter. This is so because (1) in directing a specific witness to withhold damaging evidence or give false

testimony, the police interfered with the truth-seeking function of the criminal justice process; and (2) the specific instances of coaching call into question the integrity of the police investigators and their investigation generally.

2. The evidence was suppressed by the State

The State did not disclose to Carter the financial benefits paid on behalf of the Tovars, the threats to arrest, deport, and separate the Tovars from each other and their son, or the coaching of Epifanio's trial testimony.

3. Prejudice ensued

For the suppression of evidence "to be prejudicial for *Brady* purposes, the [suppressed evidence] must be material." *Tillman*, 2005 UT 56, ¶ 29. The materiality standard differs depending on the type of evidence suppressed.

If the prosecutor knowingly fails to disclose that testimony used to convict the defendant is false, "the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *United States v. Bagley*, 437 U.S. 667, 680. (1985). This is because "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.'" *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)). In other words, prejudice is presumed and is only rebutted if the State can show that failing to disclose the false testimony was harmless beyond a reasonable doubt.

For all other *Brady* violations—including when the defense makes no requests for discovery, makes only general requests for discovery, or makes specific requests for discovery that go unheeded—the materiality standard echoes that found in *Strickland v. Washington*: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed

to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. *But see Weary v. Cain*, 136 S.Ct. 1002, 1006 (2016) ("Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" (quoting *Giglio*, 405 U.S. 150, 154 (1972) (emphasis added) (internal quotations omitted))).

When determining the materiality of suppressed evidence, the Court considers three principles. First, "whether in [the evidence's] absence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Tillman*, 2005 UT 56, ¶ 30. Second, "materiality . . . is not a sufficiency of the evidence test" and "not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." *Id.* ¶ 31 (quoting *Strickler*, 527 U.S. 263, 290 (1999) (internal quotations omitted)). Third, "the materiality of suppressed evidence must be evaluated in the context of the entire record. . . Although a court may 'evaluate the tendency and force of the undisclosed evidence item by item,' it is the cumulative or collective effect of the evidence that is weighed when determining whether the disclosure would have created a reasonable probability of a different result. *Id.* ¶ 32 (internal citation omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 436 & n. 10 (1995)).

For purposes of *Brady,* prejudice must be proved as "a demonstrable reality," not as "a speculative matter." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (prejudice standard for ineffective assistance of counsel); *see also Banks v. Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995) ("Our materiality review does not include speculation. The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard.") (cleaned up). Courts "do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files

after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (emphasis added) (citation omitted).

The focus of *Brady* prejudice analysis encompasses the impact of the suppressed evidence would have had on trial strategy if disclosed. The Court must evaluate "how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact." *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1353 (11th Cir. 2011).

Finally, "In evaluating [prejudice], it is necessary to consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes,* 558 U.S. 15, 20 (2009) (per curiam). Thus, the Court is required to "look back to what would have happened" at the petitioner's "original trial, but . . . do it with the benefit of what we know thanks to the evidentiary hearing." *Ross*, 2019 UT 48, ¶ 90. Failing to evaluate prejudice in light of all the known evidence "would improperly and artificially compartmentalize the inquiry." *Id.* ¶ 92. Thus, the Court considers counter-factual proof the State would have offered at trial if the suppressed evidence had been disclosed. But the consideration of counterfactual proof is not an open door. The State is not permitted to scour its file for inculpatory evidence that is unrelated to the suppressed *Brady* material, and that the State never offered in the first instance at trial.

i. *Carter was prejudiced in the guilt phase of the trial*

Carter alleges four *Brady* violations: (1) failure to disclose the financial benefits paid to or on behalf of the Tovars by police; (2) failure to disclose police threats to arrest, deport, and

separate the Tovars from their son; (3) failure to disclose that police coached Epifanio to testify falsely about the financial benefits paid to or on behalf of the Tovars; and (4) failure to disclose that police coached Epifanio to testify falsely about Carter saying he was going to go "rape, break, and drive" before the murder. As to the first two violations, to prove materiality Carter must show a reasonable probability that if the evidence had been disclosed the result of the trial would have been different. As to the second two violations, materiality of undisclosed false testimony is presumed. The burden then shifts to the State to show that the failure to disclose is harmless beyond a reasonable doubt.

Evaluating the first two *Brady* violations in isolation and separate from each other, it would seem that Carter has failed to show a reasonable probability that disclosure of the financial benefits and threats would have resulted in a different verdict. At the evidentiary hearing, the Tovars testified about the financial benefits and threats, but nevertheless stood by their testimony that Carter had returned to their home and confessed to murdering the victim. The Tovars do not claim to have lied because of the financial benefits paid to them or because of the threats of arrest, deportation, and separation from their son. Moreover, the jury was aware that the Tovars were not legal residents of the United States. And Carter's defense lawyer argued to the jury that Epifanio was not a citizen and was "desperate about staying in this country." (1985 Trial Tr. pp. 1362, 1376).

But the Court does not determine the materiality of *Brady* violations as if the failures to disclose occurred in a vacuum. Rather, the materiality of suppressed evidence must be "evaluated in the context of the entire record. . . Although a court may 'evaluate the tendency and force of the undisclosed evidence item by item,' it is the cumulative or collective effect of the evidence that is weighed when determining whether the disclosure would have created a

reasonable probability of a different result." *Tillman,* 2005 UT 56, ¶ 32 (internal citation omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 436 & n. 10 (1995)). Thus, the State's failure to disclose the financial benefits and threats must be evaluated cumulatively with each other and in light of the other two *Brady* violations with which they are intertwined.

The other two *Brady* violations relate to the police coaching Epifanio to testify falsely about (1) having only received a $14 witness fee prior to trial; and (2) Carter saying he was going to go "rape, break, and drive" before the murder. Both Watson and Lieutenant Pierpont knew that Epifanio's testimony about only receiving a $14 check from the City was false. Lieutenant Pierpont knew that Epifanio's testimony about "rape, break and drive" was false, and his knowledge is imputed to Watson. The State knowingly failed to disclose that the testimony was false and coached by police. Carter's conviction was secured—at least in part—on the basis of this false testimony. Therefore, the materiality of these non-disclosures is presumed and the burden shifts to the State to show that the failures to disclose were "harmless beyond a reasonable doubt." The State has failed to meet this burden.

The State had no physical evidence placing Carter at the scene of the crime. The Tovars provided critical testimony about Carter's whereabouts before and after the murder. Epifanio alone testified about what Carter admitted to him immediately after the murder. Together, the Tovars described for the jury Carter's demonstration of what he had done. Importantly, this testimony corroborated Carter's oral and dictated confession to Lieutenant Pierpont—a confession that, for the reasons stated by the Utah Supreme Court, may not have been able to stand on its own. *See Carter v. State*, 2019 UT 12, ¶ 95. Thus, the Tovars' testimony was central to the State's case against Carter.

Not surprisingly, Carter's defense focused on Epifanio not being a credible witness.

Carter's counsel attacked Epifanio as a false witness on cross-examination, focusing on Epifanio's admitted lie about the location of the gun. Defense counsel returned to this theme in closing argument. Clearly, the persuasive quality of this defense strategy would have been significantly reinforced if the prosecutor had disclosed Epifanio's false testimony to Carter. The jury would have been informed that—contrary to his claim to have only lied one time (i.e. about the gun)—Epifanio had lied multiple times right there on the witness stand, under oath and before the jury, about facts material to his own bias and Carter's stated intent prior to the murder.

More damaging still, the jury would have learned that Epifanio perjured himself at the express direction of police. This would have undermined the integrity of both the police investigators and their investigation generally. Because Epifanio's coached false testimony was not disclosed, the jury was deprived of the opportunity to evaluate the credibility of Lieutenant Pierpont in light of his motive and apparent willingness to build a case against Carter by eliciting false testimony from a key witness for the prosecution. This suppressed evidence would certainly have called into question Lieutenant Pierpont's testimony about Carter's unrecorded oral confession, and the somewhat inconsistent written confession Lieutenant Pierpont dictated in his own words for Carter to sign.

The State argues that disclosure of the threats, financial benefits, and related coaching by police would have resulted in the introduction of damaging counter-factual proof. This argument is not persuasive. If evidence of the financial benefits and threats had been introduced, the State could have (1) introduced evidence about why police made the payments; and (2) introduced evidence of Epifanio's consistent statements made before any threats or payments were made to him. But the strategic decision to introduce this counter-factual proof would have come at significant cost.

Testimony about why the payments were made would have come from Lieutenant Pierpont. He would testify that the Tovars were part of a witness protection program. But this testimony would then have been revealed for what it was—a recent fabrication to explain away the payments. Lieutenant Pierpont's claim that the payments had a legitimate protective purpose would have been further undermined by the fact that police had coached Epifanio not to disclose the payments. The State might have put on evidence that police paid for the Tovars to move to protect them from Carter. But at worst for Carter, this would have resulted in a dispute about who Epifanio feared more—Carter or the police. Evidence that Epifanio feared Carter would have been counter-balanced by persuasive evidence that Epifanio feared the police more. Evidence of Officer Mack's and Lieutenant Pierpont's specific threats of deportation—both to Epifanio and Perla—would have been introduced. And this would have further tarnished the integrity of the police investigators and their investigation generally.

Introducing Epifanio's pre-motive consistent statements to Perla would have mitigated the argument that the financial benefits or threats caused Epifanio to fabricate his testimony. Many of these statements to Perla were generally consistent with Epifanio's trial testimony implicating Carter. But again, introducing counter-factual proof through Perla would have come at a cost. Perla is an inconsistent, recalcitrant witness with a strong bias in favor of Carter. Her lack of memory—whether legitimate or feigned—and the cause of that memory loss would be placed in issue, as would the motives for her first statements to police. One reason Perla claims to lack memory is the trauma she experienced when police threatened to deport her and take her children away. Evidence of specific threats made to her by Lieutenant Pierpont and Officer Mack would be admitted, further tarnishing the police investigators and their investigation generally. These down-sides of presenting counter-factual proof raise serious questions about whether a

reasonable prosecutor would make the strategic choice to call Perla as a witness for this purpose.

Even if a prosecutor did make the strategic choice to call Perla, Epifanio's consistent pre-motive statements do not change the fact that the Tovars' testimony became more favorable to the State over time as payments were received, threats made, and coaching accomplished. Carter could have used the undisclosed financial benefits, threats, and coached false testimony to show that the Tovars' testimony was a work in progress, evolving over time to strengthen the State's case. *Cf. State v. Tillman*, 2005 UT 56, ¶ 87 (finding that undisclosed transcripts of interviews of the State's key witness would have shown that the witness's trial testimony was a "work in progress, carefully honed by the prosecution over the course of many months, and which only took its final shape mere days before trial" and that the defendant could have argued the witness's testimony was "forged in the heat of [the police] interrogations and was motivated by a desire to please the people who had granted her complete immunity").

Epifanio's testimony evolved over time to become more favorable to the State. Just days before trial he disclosed for the first time the location of the gun and Carter's directive to dispose of it in the river. At trial, notwithstanding the fact that more than $4,000 had been paid on his behalf by police, Epifanio testified that he had only received a $14 witness fee for his testimony. Finally, Epifanio testified at trial for the first time that Carter had expressed a desire to "rape, break, and drive" before the murder.

Lucia's testimony also evolved. Her preliminary testimony about Carter's demonstration included little detail. She testified that Carter lay on the floor and was "giving someone's hand on the back, and he was just doing something like moving his hand back and forth." (PH Trans. p. 54). When asked to demonstrate for the Court what she saw Carter doing, Lucia did so explaining that "[Carter] got up where he was sitting and he lay down on the floor. . . . He bent a

little bit and he put his hands on the back and he start moving his hand back and forth. He opened his legs and then he just bent more over." (PH Trans. p. 55). In contrast, her trial testimony painted a far more sinister picture. At trial she testified that Carter "laid himself to the floor showing us exactly how he had forced this individual to lay down, and then he put his hands behind his back to illustrate how he had tied her hands behind her back." (Tr. Trans. p. 1258). According to Lucia, Carter was "laughing and giggling" during the demonstration, which he gave not once but twice.[10]

The State's argument that Watson corrected "rape, break, and drive" is also not persuasive. Watson's questioning on direct elicited "rape, break, and drive" from Epifanio. Rather than confronting Epifanio with the falsity of the statement, Watson asked "And did [Carter] tell you that?" Epifanio then affirmed the false testimony answering, "Yes." Watson in turn asked: "What's your best recollection, Mr. Tovar, of what the defendant told you he was going to go do? Tell me what you remember him saying?" To this question, Epifanio answered "That he was going to break in a house."

Eliciting this second statement about Carter's intent to "break in a house" did not "remove any lingering misapprehension" the jury may have had about whether Carter actually said he was going to go "rape, break, and drive" before the murder. *See State v. Gordon,* 886 P.2d 112, 116 (Utah Ct. App. 1994). Indeed, jurors might have reasonably concluded that Carter made both statements. To correct false testimony, a prosecutor must take affirmative steps to remove any lingering doubts about whether the testimony is false. *Id.* at 117. (prosecutor who elicited false testimony about the time period during which victim saw defendant "removed any

[10] In her first interview with Officer Mack on April 15, 1985, Lucia said that "while Carter spoke with her husband he was laughing." (Exhibit 10, p. 1). At trial, Lucia testified that Carter was laughing during the demonstration. The nature and extent of that laughter had evolved too. By trial, Lucia reported that Carter had "laughed and laughed" and was "giggling" during the demonstration.

lingering misapprehension" about the false testimony by re-examining the witness and allowing him to clarify the correct time period); *United States v. Ramos-Carillo*, 511 F. App'x. 739, 741 (10thCir. 2013) (prosecutor corrected false testimony of witness by "pressing the witness until he confessed his false testimony"); *United States v. Islam*, 786 F. App'x. 343, 344-45 (9th Cir. 2018) (prosecutor corrected false testimony by investigating the perjured testimony, providing a report of the investigation to the court, and participating in a bench conference to determine how the to inform the jury and correct the record). Finally, the best indication that Watson failed to remove lingering doubt about whether Carter actually said "rape, break, and drive" is the 1992 sentencing prosecutor's reliance on "rape, break, and drive" to secure Carter's death sentence.

As explained above, prejudice to Carter must be evaluated in light of the fact that no physical evidence tied Carter to the crime scene. The State's case rested on the confession, and the Tovars' corroborating testimony. Carter's theory was that Epifanio was lying and that Carter's confession was coerced by unscrupulous police officers. In this context the failure to disclose that Epifanio lied about material facts under oath during trial and that he did so at the direction of the police was prejudicial to Carter's defense.

In summary, the State has not shown that its failure to disclose Epifanio's coached false testimony would have been "harmless beyond a reasonable doubt." *United States v. Bagley*, 437 U.S. 667, 680. (1985). The State's failure to disclose Epifanio's false testimony and the coaching of that testimony by police was harmful to Carter. Carter's defense turned on the theory that Epifanio was not a credible witness and a coerced confession. Evidence that police coached Epifanio to testify falsely would have significantly reinforced this theory, calling into question the credibility of Epifanio and the integrity of both the police investigators and their investigation.

When viewed cumulatively in the context of these failures to disclose false testimony, there is a reasonable probability that the State's failure to disclose the financial benefits and threats would result in a different outcome. Taken together and in light or the entire record, the four failures to disclose proved by Carter undermine this Court's confidence in the verdict.

For these reasons, the Court concludes that Carter has proved his conviction was obtained in violation of *Brady.*

ii. *Carter was prejudiced in the sentencing phase of the trial*

In determining whether the State's alleged *Brady* violations were prejudicial to Carter in the sentencing phase of the trial, the Court finds the case of *State v. Tillman*, 2005 UT 56, another death penalty case, particularly instructive.

In *Tillman*, the key witness against the defendant was his girlfriend, Carla Sagers, who was with him when he murdered the victim. At trial, Sagers' testified that Tillman bludgeoned the victim twice with an axe and then set his bed on fire while he was still alive. Her testimony was the only evidence inculpating Tillman. Tillman was found guilty of the murder and sentenced to death. *Id.* ¶ 4.

Almost twenty years after the trial, Tillman discovered two partial transcripts of police interviews with Sagers. The interviews had been conducted prior to Tillman's trial and had never been disclosed to the defense. *Id.* ¶ 5. Although the transcripts contained evidence that was merely cumulative of evidence the defense possessed at the time of trial, the transcripts contained evidence not previously disclosed to Tillman. First, contrary to her trial testimony in which she expressed confidence about the timeline of events, the undisclosed transcripts showed that Sagers was unsure about the timeline of the murder mere days prior to trial. Second, in the undisclosed transcripts, Sagers mentioned that Tillman was feeling depressed and

suicidal—evidence that Tillman could have presented during the penalty phase of the trial as mitigation. Third, the undisclosed transcripts provide some evidence that the police officer interviewing Sagers coached her to tell a more believable story. Fourth, the undisclosed transcripts contained notations that Sagers laughed inappropriately throughout the interview.

The Utah Supreme Court evaluated the evidence cumulatively and determined that the suppressed evidence undermined its confidence in the jury's death penalty verdict.[11] During the penalty phase of the trial, the State attempted to diminish Sagers' moral culpability in the crime and argued that Sagers was one of Tillman's victims. The undisclosed transcripts could have been used to undermine Sagers' credibility by showing she exhibited inappropriate levity toward the crime, that her memory improved dramatically in a short period of time, and that a police officer encouraged her to craft a more believable narrative. "Tillman could have utilized this evidence to portray Sagers's testimony as a work in progress, carefully honed by the prosecution over the course of many months, and which only took its final shape mere days before trial. The information contained in the suppressed transcripts would have helped Tillman advance the argument that Sagers's testimony was forged in the heat of [the police] interrogations and was motivated by a desire to please the people who had granted her complete immunity." *Id.* ¶ 87. In addition, Tillman could have taken advantage of evidence in the transcripts that he was depressed and suicidal to mitigate his penalty.

To support its evaluation, the Supreme Court noted that "the sentencing phase of a capital trial is not a scientific process, but rather requires the weighing of a multitude of both aggravating and mitigating factors." *Id.* ¶ 91. Furthermore,

[11] In the district court, Tillman argued that his conviction and sentence should be vacated and he should be granted a new trial. The district court upheld his conviction but granted a new sentencing hearing. The State appealed the district court's decision to grant a new sentencing hearing, but Tillman did not appeal the district court's determination upholding his conviction.

> imposing the death penalty on Tillman required a unanimous decision on the part of the jury. . . . Consequently, all that was necessary for Tillman to avoid the death penalty was a single doubting juror. If just one juror, while considering the aggravating and mitigating factors, had concluded that the death penalty was inappropriate under the circumstances, a punishment of life imprisonment would have been imposed. If the suppressed transcripts had been available to Tillman, he could have more effectively countered the prosecution's attempts to add Sagers to the list of his victims. That ability may very well have been the difference between life and death. . . . While the suppressed transcripts do not contain any earthshattering revelations, they do contain significant evidence that damages the credibility of the prosecution's star witness and undermines critical aspects of the prosecution's theory as to why the death penalty was justified in this case. We are not certain that the disclosure of the transcripts prior to Tillman's trial would have resulted in a different sentence. We are, however, compelled to conclude that there exists a significant possibility that Tillman would have achieved a more favorable sentence had the State fully complied with its constitutionally mandated disclosure obligations. That possibility undermines our confidence in the sentence imposed."

Id. ¶ 92.

Here, the State failed to disclose that police coached Epifanio to testify falsely about Carter saying he was going to go "rape, break, and drive." Lieutenant Pierpont knew this testimony was false, and his knowledge is imputed to the prosecutor. Watson failed to correct this false testimony. And the 1992 sentencing prosecutor relied heavily upon the statement in seeking a death sentence. In his closing arguments, the prosecutor made two references to the phrase "rape, break, and drive." During his initial closing, he asked the jury to "[c]onsider the intent of the Defendant." *Id.* at 1266. "He said why he was going out that night. He wanted money, he wanted to 'rape, break, and drive.' He wanted to hurt someone. He wanted to get something for himself. He went in there intending to do violence. And then he exposed and brutalized the woman." *Id.* During rebuttal, the prosecutor returned to this theme, arguing that the killing was "not in retaliation to [Carter's wife] or anyone else. He decided to go out and 'rape and . . . break and drive.'" *Id.* at 1296.

Evidence that Carter, shortly before the murder, expressed a wanton desire to rape

someone, break someone or something, and flee may well have persuaded the jury that Carter was so culpable and dangerous as to require imposition of the death penalty. Said differently, had "rape, break, and drive" been excluded from the penalty phase, at least one juror may have been persuaded that Carter was less morally culpable and did not deserve to die for his crime.

The State has failed to prove that its failure to disclose this false testimony was harmless beyond a reasonable doubt. For this reason, the Court concludes that Carter's death sentence was obtained in violation of *Brady*.

b. Relief under the Post-conviction Remedies Act

In most cases, the PCRA requires that the person challenging his conviction or sentence prove that "there would be a reasonable likelihood of a more favorable outcome, in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing." Utah Code § 78B-9-104(2)(a). Unless this standard is met, the Court "may not grant relief from [the] conviction or sentence." *Id*. This is the legal standard that applies when the petition alleges the failure to disclose *Brady* material.

For the reasons stated above, the Court concludes that—had the State disclosed to Carter the financial benefits paid on behalf of the Tovars, the police threats of arrest, deportation, and separation, and the coaching of Epifanio's false testimony by police—there would have been a reasonable probability of a different verdict in both the guilt phase and the sentencing phase of Carter's trial. The Court's confidence is undermined in both Carter's conviction and sentence.

7. Discussion of Claims 3 and 4: Violations of *Napue v. Illinois*

a. The State's failure to correct Epifanio's false testimony violated *Napue.*

"[D]eliberate deception of a court and jurors by the presentation of known false evidence

is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959).

"When a prosecutor is aware that testimony is false, he or she has a duty to correct the false impression; failure to do so requires reversal 'if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.'" *State v. Gordon*, 886 P.2d 112, 115-16 (Utah Ct. App 1994 (quoting *State v. Walker*, 624 P.2d at 690)). This applies "even where the false evidence goes only to the credibility of the witness." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This is because the jury's "estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id*.

To prove a *Napue* violation, Carter must show that the prosecutor knowingly failed to correct false testimony, and that this failure could have resulted in a different outcome. This standard is less demanding than the materiality standard for *Brady* violations, and there is a good reason for that. *See United States v. Garcia*, 793 F.3d 1194, 1207-08 (10th Cir. 2015). "A prosecutor's knowing use of perjured testimony is misconduct that goes beyond the denial of a fair trial, which is the focus of *Brady*. It is misconduct that undermines fundamental expectations for a 'just' criminal-justice system." *Id.*

During the cross-examination of Epifanio, defense counsel asked, "[D]id you and or your family anytime between February and now receive any money or support from [the prosecutor's] office or from Mr. Pierpont, the police?" Epifanio responded that he and his wife had received

checks for $14. In the questioning that followed, Epifanio doubled-down, lying four more times about not receiving any other financial benefits. Watson and Lieutenant Pierpont both knew that this testimony was false and Watson did nothing to correct it.

Lieutenant Pierpont coached Epifanio to falsely testify that Carter expressed intent to go "rape, break, and drive" prior to the murder. Lieutenant Pierpont knew this testimony was false. Because Lieutenant Pierpont was a member of the prosecution team, his knowledge of false testimony is imputed to Watson, the prosecutor.[12] *See Tillman*, 2005 UT 56, ¶ 27 (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). As explained above, Watson's subsequent questioning of Epifanio did not correct this false testimony.

For the reasons stated above, the Court concludes that the State's failure to correct Epifanio's coached false testimony could have resulted in a different outcome both in the guilt phase and sentencing phase of Carter's trial. The Court's confidence in both the conviction and the sentence has been undermined.

b. Relief Under the Post-Conviction Remedies Act.

Where a person "challenges [his] conviction or the sentence on grounds that the prosecutor knowingly failed to correct false testimony at trial or at sentencing," the person must "establish[] that the false testimony, in any reasonable likelihood, could have affected the judgment of the fact finder." Utah Code § 78B-9-104(2)(b).

Watson knowingly failed to correct Epifanio's false testimony—both as to the financial benefits paid on behalf of the Tovars and the assertion that Carter expressed intent to go "rape,

[12] For purposes of *Brady,* a police investigator's knowledge of exculpatory evidence is imputed to the prosecutor. *See Tillman*, 2005 UT 56, ¶ 27. There is no reason why this same principle should not apply when a police investigator coaches a prosecution witness to testify falsely. The investigator is a member of the prosecution team, and his knowledge of the false testimony is properly imputed to the prosecutor. To rule otherwise would permit the State to obtain a conviction based on false testimony elicited by a member of the prosecution team, and then avoid reversal by asserting the prosecutor's ignorance. Such willful ignorance is no defense in the context of *Brady*, and it should have no traction in the context of *Napue,* where the misconduct of State actors is intentional and undermines the truth-seeking function of trial.

break, and drive" before the murder. For the reasons stated above, there is a reasonable likelihood that this false testimony could have affected the judgment of the jury in the guilt phase of the trial. For the reasons stated above, there is a reasonable probability that the State's failure to correct Epifanio's false testimony about "rape, break, and drive" could have affected the judgment of the jury in the penalty phase. For these reasons, the Court's confidence is undermined in both Carter's conviction and sentence.

8. Remaining Arguments Presented

The Court has considered all remaining substantive and procedural arguments presented by the State and concludes that they are without merit.

ORDER

For the forgoing reasons, the Petition for Post-Conviction Relief is GRANTED. Carter's conviction and death sentence are vacated in the matter of *State v. Carter,* Fourth District Court Case No. 851497071.

Pursuant to section 78B-9-108(3)(a), this ORDER is STAYED for 5 days. During that time, the State shall give written notice to the Court and to Petitioner whether it will appeal the order or take no action. If the State fails to respond, the Court will lift the STAY and set the matter for the appointment of counsel in the criminal case. If the State appeals the Court's decision, the STAY will remain in place during the pendency of the appeal.

This is the FINAL ORDER of the court for the matters addressed herein. No further order is required.

DATED this 23nd day of November, 2022.

/s/ Derek P. Pullan

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JUDGE DEREK P. PULLAN

Fourth District Court