

CAUSE NO. 86-452-K26

THE STATE OF TEXAS § IN THE DISTRICT COURT
VS. § 26TH JUDICIAL DISTRICT OF
MICHAEL MORTON § WILLIAMSON COUNTY, TEXAS

**SPECIAL APPEARANCE OF KEN ANDERSON,
MOTION TO QUASH DEPOSITION AND
MOTION FOR PROTECTIVE ORDER**

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW Ken Anderson (“Movant”) and files this his Special Appearance, Motion to Quash the Notice To Take The Oral and Videotaped Deposition of Judge Ken Anderson, and Motion for Protective Order purportedly noticed in this cause. By filing this special appearance and motions, Movant does not intend to trivialize the experiences endured by Mr. Morton nor the importance of Mr. Morton’s rights of redress. However, Movant would respectfully show the Court as follows:

I.

SPECIAL APPEARANCE OF KEN ANDERSON

The Notice of Deposition and Subpoena Duces Tecum was served on Ken Anderson on Saturday, October 14, 2011 (see Exhibit A attached hereto) for a deposition to occur on October 26, 2011. Ken Anderson first specially appears to show this Court lacks jurisdiction to allow discovery proceedings. This deposition as noticed in the above styled and numbered cause is a currently closed case. The only pending matter is Cause No. 86-452-D, which is a writ of habeas corpus filed under Article 11.07 of the Texas Code of Criminal Procedure and is currently

FILED
at 4:01 o'clock
OCT 19 2011

Lisa David
District Clerk, Williamson Co., TX.

pending in the Court of Criminal Appeals. This deposition notice was apparently issued without authorization from any Court, which is required by applicable law.

This Court is without jurisdiction to authorize the notice of the deposition. The deposition notice was issued pursuant to Texas Rules of Civil Procedure 176, 199, and 205. There is no pending civil case. The only matter before this Court was the determination of facts relating to the Writ of Habeas Corpus filed by Michael Morton, which was accepted by the Texas Court of Criminal Appeals. The writ at issue was granted by the Court of Criminal Appeals in an Opinion dated October 12, 2011 (see Exhibit B attached hereto), but no mandate has issued and this matter remains pending in the Court of Criminal Appeals. Pursuant to the Texas Constitution, Article V, Section 5 jurisdiction vested in the Court of Criminal Appeals upon acceptance of the Writ of Habeas Corpus. The Court of Criminal Appeals maintains sole jurisdiction until the judgment, order and mandate issues.

Additionally, the notice and subpoena were not issued with proper authority. The notice and subpoena are not issued pursuant to the Texas Code of Criminal Procedure Section 11.07. The Court has not ordered any such deposition, as is required by the clear and unequivocal language of Section 11.07. Nor, are the notice and subpoena issued pursuant to the requirements of Chapter 39 Texas Code of Criminal Procedure. In fact, the requirements of Chapter 39 are in conflict with the notice and subpoena issued to Movant pursuant to Texas Rules of Civil Procedure 205, 199, and 176.

II.

MOTION TO QUASH DEPOSITION

Movant objects to the Notice of Deposition pursuant to Rule 199.4 of the Texas Rules of

Civil Procedure. By the timely filing of this Motion to Quash the Notice of Deposition by the third business day after service of the Notice of Deposition of Ken Anderson, Rule 199.4 automatically stays this oral deposition until this motion can be determined. Counsel for Mr. Morton did not confer with Movant regarding the date of the deposition. Movant, as a sitting District Judge, has a docket of 43 previously set matters pending before his court on October 26, 2011. The undersigned counsel is scheduled for a medical procedure on October 26, 2011. A proper time and place for this deposition can only be determined after the Court's jurisdiction or authority over this discovery process has been fully established.

III.

MOTION FOR PROTECTIVE ORDER

If the Court acquires jurisdiction, Movant is entitled to a protective order from the requested attendance and production of documents. The subpoena duces tecum directs Ken Anderson to produce and permit inspection and copying of documents and other tangible things on October 26, 2011. Pursuant to Rule 205.2 of the Texas Rules of Civil Procedure, a non-party is entitled to a 10 day notice prior to the date of service of the subpoena. No such notice was provided. The requests contained in the subpoena are overly broad and requests information that is privileged and immune from discovery. If the mandate from the Court of Criminal Appeals issues in this matter, then this Court may not consider issues made moot as a matter of law. Assuming the mandate, when issued, follows the current Opinion of the Court of Criminal Appeals then all issues are resolved in this proceeding based on the determination of the innocence of Mr. Morton. No further legal basis would exist for taking the deposition in this case in that no case or controversy remains.

IV.

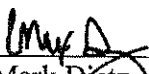
Therefore, Movant urges that the Court determine the notice and subpoena is of no effect or alternatively, quash the notice of deposition of Ken Anderson and enter a protective order releasing Ken Anderson from the subpoena. By filing this motion, Movant is in no way minimizing the importance of these proceedings. This relief is not sought solely for the purpose of delay.

V.

WHEREFORE, PREMISED CONSIDERED, Movant respectfully request that this Court determine the notice and subpoena is naught or in the alternative enter an order quashing the notice of deposition and subpoena of Ken Anderson, and for such other and further relief to which Movant is entitled, either at law or in equity.

Respectfully submitted,

DIETZ & JARRARD, P.C.
106 Fannin Avenue East
Round Rock, Texas 78664
Telephone (512) 244-9314
Facsimile (512) 244-3766

By: 

R. Mark Dietz
State Bar No. 05857200

ATTORNEY FOR MOVANT, KEN ANDERSON

CERTIFICATE OF SERVICE

This is to certify that on this date a true and accurate copy of the foregoing has been served via facsimile and certified mail return receipt requested on the following counsel of record on this the 19th day of October, 2011:

John Wesley Raley
RALEY & BOWICK
1800 Augusta Drive, Suite 300
Houston, Texas 77057
Facsimile: (713) 429-8050

and

John Bradley, District Attorney
Williamson County Justice Center
District Attorney's Office
405 M.L.K. Street, Suite 265
Georgetown, TX 78626
Facsimile: (512) 943-1255



R. Mark Dietz


VERIFICATION

STATE OF TEXAS

§
§
§
§

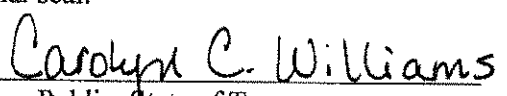
COUNTY OF WILLIAMSON

BEFORE ME, the undersigned Notary Public, on this day personally appeared R. Mark Dietz, attorney for Movant, Ken Anderson, who being by me duly sworn on his oath deposed and states that I have reviewed the files in the above referenced cause and Writ of Habeas Corpus maintained by the Williamson County District Clerk. As to the statements made in Paragraph I, the facts contained therein are within my personal knowledge and are true and correct.



R. Mark Dietz

SUBSCRIBED AND SWORN TO BEFORE ME on October 19th, 2011, by R. Mark Dietz, to certify which witness my hand and official seal.



Notary Public, State of Texas



THE STATE OF TEXAS

DEPOSITION SUBPOENA

PURSUANT TO TEXAS RULES OF CIVIL PROCEDURE 176, 199 & 205

To: Any Sheriff Or Constable Of The State Of Texas Or Other Person Authorized
To Serve Subpoenas Under Rule 176.5 T.R.C.P.

YOU ARE HEREBY COMMANDED TO SUMMON:

JUDGE KEN ANDERSON
Williamson County Courthouse
405 Martin Luther King Street
Georgetown, TX 78626
(or wherever said witness may be found)

to appear before me, Jan Newman Carter Certified Shorthand Reporter in and for the State of Texas, or before a Certified Shorthand Reporter designated by me, in the offices of:

GRAND JURY CONFERENCE ROOM
WILLIAMSON COUNTY COURTHOUSE
405 MARTIN LUTHER KING STREET
GEORGETOWN, TEXAS 78626

on 10/26/2011@ 10:00AM, and there to testify under oath to certain *oral* questions to be propounded at the instance of the Defendant, Michael Morton, represented by John Raley, Attorney of Record, in that Certain Cause No. 86-452-K26, pending on the docket of the District Court of the 26TH Judicial District of WILLIAMSON County, Texas.

This Subpoena is issued under and by virtue of Rule 199 and Notice of Deposition on file with the above named court, styled
THE STATE OF TEXAS

VS.

MICHAEL MORTON
and there remain from day to day and time to time until discharged according to law.

WITNESS IS FURTHER COMMANDED to appear and produce, at the time and place set forth herein, any and all file(s), documents, books, papers and other tangible items following to wit:

SEE ATTACHED EXHIBIT A

DO NOT FAIL to return this writ to said Court, with return thereon, showing the manner of execution.

WITNESS MY HAND, on this day, Friday, October 14, 2011

Jan Newman Carter
Certified Shorthand Reporter
Texas Certification No.: 6062

176.8 Enforcement of Subpoena. (a) *Contempt*. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

DELIVERED:

ON 10/15/11
BY [Signature]

EXHIBIT

A

tabbies

OFFICER'S RETURN

Came to hand this _____ day of _____, 20____, and executed by delivering a copy of this Subpoena and attachments to the within named witness: _____ this the _____ day of _____, 20____, at _____ o'clock ____ M. in person at _____ in _____ County, Texas, and tendered a fee of **\$10.00** to the witness in cash.

NOT EXECUTED to the within named witness for the following reason(s):

PROCESS SERVER

ACCEPTANCE OF SERVICE OF SUBPOENA
BY WITNESS UNDER RULE 176.5 T.R.C.P.
I hereby accept service of the attached subpoena and will appear as instructed on said date and produce all documents as requested in the subpoena

Service Fees:
Travel: _____/miles
Service: _____
Preparation Fee: _____
Witness Fee Tendered: **\$10.00**
Miscellaneous: _____

WITNESS

TOTAL: _____

ATTORNEY REQUESTING SUBPOENA:

John Wesley Raley
RALEY & BOWICK, L.L.P.
1800 Augusta Drive, Suite 300
Houston, TX 77057
713.429-8050 Fax 713/429-8045
Attorney for Defendant
SBA #

Order No. 11269.002

Case No. 86-452-K26

THE STATE OF TEXAS	§	IN THE 26th JUDICIAL
	§	
	§	DISTRICT COURT OF
v.	§	
	§	
MICHAEL MORTON	§	WILLIAMSON COUNTY, TEXAS

**NOTICE OF ORAL AND VIDEOTAPED
DEPOSITION OF JUDGE KEN ANDERSON
AND SUBPOENA DUCES TECUM**


TO: Judge Ken Anderson, 277th District Court Judge, Former District Attorney of Williamson County, Texas, at the Williamson County Courthouse, 405 Martin Luther King St, Georgetown, Texas 78626.

Please take notice that Michael Morton by and through his attorneys of record, will take the oral and videotaped deposition of Judge Ken Anderson, former District Attorney of Williamson County, Texas, in the above-entitled cause, on **Wednesday, October 26, 2011**, beginning at 10:00 a.m. in the Grand Jury Conference Room, Williamson County Courthouse, 405 Martin Luther King St, Georgetown, Texas 78626. Said oral and videotaped deposition will be taken upon oral examination before a court reporter.

Michael Morton requests that Judge Ken Anderson produce at the deposition, the documents and tangible things described in Exhibit "A" attached.

Respectfully submitted,

RALEY & BOWICK, LLP

By: 
JOHN WESLEY RALEY
State Bar No. 16488400
1800 Augusta Drive, Suite 300
Houston, Texas 77057
Telephone: (713) 429-8050
Facsimile: (713) 429-8045
JRaley@raleymbowick.com

INNOCENCE PROJECT, INC.

Nina Morrison
Barry Scheck
40 Worth St., Suite 701
New York, NY 10013
Telephone: (212) 364-5340
Facsimile: (212) 364-5357

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Oral and Videotaped Deposition Judge Ken Anderson and Subpoena Duces Tecum was served on counsel as indicated below on October 14, 2011:

VIA FACSIMILE AND EMAIL:

John Bradley, District Attorney
Kristin Jernigan, Assistant District Attorney
Williamson County Justice Center
District Attorney's Office
405 M.L.K. Street, Suite 265
Georgetown, TX 78626
Facsimile: (512) 943-1255
kiernigan@wilco.org


JOHN WESLEY RALEY

EXHIBIT "A"

As used in this *Duces Tecum*, the term "you" or "your" refers to Judge Ken Anderson:

1. All documents in your possession or control regarding, related to, or in any way involving Michael Morton, including but not limited to letters, notes, facsimiles and e-mails.¹
2. Copies of all recorded statements (including text messages) or phone conversations in your possession or control regarding, related to, or in any way involving Michael Morton, including but not limited to voice-mail messages.
3. All notes, diaries, journals, calendars, messages, cards, charts, memoranda, copies of phone messages, or emails kept by you and in your possession or control regarding, related to, or in any way involving Michael Morton (Cause No. 86-452-K26, *The State of Texas v. Michael Morton*).
4. All documents, not privileged under the Texas Rules of Civil Procedure, that show the date, location and content of each conversation or communication between you and any person, in your possession or control regarding, related to, or in any way involving Michael Morton.

¹ As used in this *Duces Tecum*, the words "document" or "documents" are defined to include, but are by no means limited to, any and all manner of written, typed, printed, reproduced, filmed or recorded material, and all photographs, pictures, plans, drawings or other representation of any kind of anything pertaining, describing, referring or relating, directly or indirectly, in whole or in part, to the subject matter of each document, and the terms include, but without limitation,

a. Papers, books, e-mails, journals, ledgers, statements, memoranda, reports, invoices, worksheets, work papers, notes, transcription of notes, letters, correspondence, abstracts, diagrams, plans, blueprints, specifications, pictures, drawings, films, photographs, graphic representations, diaries, calendars, desk calendars, lists, logs, publications, advertisements, instructions, minutes, orders, messages, resumes, summaries, agreements, contracts, telegrams, telexes, cables, recordings, audio tapes, transcriptions of tapes or recordings, text messages or any other writings or tangible thing in which any forms of communications are recorded or reproduced, as well as all notations on the foregoing;

b. original and all other copies not absolutely identical; and

c. all drafts and notes (whether typed or handwritten or otherwise) made or prepared in connection with each such document, whether used or not.



IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-76,663

EX PARTE MICHAEL W. MORTON, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 86-452-K IN THE 26TH JUDICIAL DISTRICT COURT
FROM WILLIAMSON COUNTY

Per curiam. Womack, J. not participating. Womack, J. statement filed.

O P I N I O N

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of murder and sentenced to life imprisonment. The Third Court of Appeals affirmed his conviction. *Morton v. State*, 761 S.W.2d 876 (Tex. App.—Austin 1988).

This application for writ of habeas corpus is non-compliant with the appellate rules because it contains more than one ground per page. TEX. R. APP. P. 73.1. However, because it is apparent from the face of the record that Applicant is entitled to relief, the State has not moved to dismiss the



application as non-compliant, and the State agrees with the recommendation to grant relief, this Court will exercise our inherent jurisdiction in this matter and address the application on its merits. *Ex parte Golden*, 991 S.W.2d 859 (Tex. Crim. App. 1999).

Applicant contends that he has newly discovered evidence that he is actually innocent of this offense. The trial court has determined that no rational jury would have convicted Applicant in light of the new evidence, which was previously unavailable to Applicant. The evidence, obtained pursuant to post-conviction DNA testing and investigation, indicates that there may have been another individual, and not Applicant, who committed this offense. After an independent review of the record, we determine that Applicant is entitled to relief on his actual innocence claim. *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

Relief is granted. The judgment in Cause No. 86-452-K in the 26th Judicial District Court of Williamson County is set aside, and Applicant is remanded to the custody of the Sheriff of Williamson County to answer the charge against him. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice-Correctional Institutions Division and Parole Division.

Delivered: October 12, 2011
Do Not Publish