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**BEFORE THE GOVERNOR OF THE STATE OF TEXAS**

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**In Re**

**JOSEPH STANLEY FAULDER,**

**Petitioner**

**APPLICATION FOR REPRIEVE  
AND PETITION FOR COMMUTATION OF DEATH SENTENCE  
TO LIFE IMPRISONMENT**

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**Submitted by:**

**Sandra L. Babcock  
Texas Bar No. 01481700  
317 Second Avenue South  
Suite 200  
Minneapolis, MN 55401  
(612) 348-6651  
FAX (612) 348-6179**

**ATTORNEY FOR APPLICANT**

### **Introduction**

Had it not been for the purchased testimony of a single witness – Lynda "Stormie Summers" McCann – Joseph Stanley Faulder would not have been convicted of capital murder. No physical evidence linked him to the crime; indeed, the physical evidence pointed to another, unidentified suspect. Police found fingerprints in the victim's home, but none belonged to Mr. Faulder. Police found hair follicles on the tape used to bind the victim, but these belonged neither to Mr. Faulder nor to the victim.

Mindful of these weaknesses, the district attorney's office nearly offered Mr. Faulder a plea in 1981 to burglary. Before they could extend the offer, however, the wealthy son of the murder victim hired two private lawyers to take over the prosecution. The private prosecutors quickly realized that to convict Mr. Faulder, they would need the testimony of McCann, a former prostitute and member of a neo-Nazi biker gang. McCann – who had previously denied all involvement in the crime when she was initially indicted for capital murder – now told prosecutors she had helped burglarize the victim's home, and claimed to have seen Mr. Faulder commit the murder. As an admitted accomplice, however, her testimony alone could not sustain a conviction under Texas law. The prosecutors therefore turned to her husband, Harold Ernest "Ernie" McCann. Their case rested on Ernie's ability to corroborate his wife's testimony, without admitting to involvement that would make him an accomplice.

Both McCanns, however, had their price. Husband and wife refused to testify unless they were paid several thousand dollars for the effort. Sworn testimony by Stormie

McCann's lawyer establishes she was promised up to \$15,000 for her testimony, along with immunity and a probated sentence – even though she was eligible for the death penalty. Ernie McCann was promised \$2,000.

At trial, Ernie and Lynda testified that Ernie had no involvement in the crime. In 1993, however, counsel for Mr. Faulder discovered a note in the file of private prosecutor Phil Bursleson, stating that Ernie was “in on” all of the planning. This statement flatly contradicted the testimony of both McCanns, but was withheld from the defense until 1993. Given the unknown origin of hairs discovered in the victim’s home, Ernie McCann’s role in the crime was critical to Mr. Faulder’s defense. As trial counsel for Mr. Faulder stated:

Stormie McCann's statement to Bursleson was highly exculpatory. If I had known that she had made that statement, I could have used it to impeach both Ernie and Lynda. I could have shown that both McCanns were lying under oath about the extent of Ernie's involvement. I could have argued that Stormie McCann was lying about Mr. Faulder's role in order to protect her husband. There were hairs of unknown origin discovered at the crime scene, and I could have argued they belonged to Ernie McCann. In short, I believe it would have changed my entire theory of defense.

App. at 14 (Affidavit of Vernard Solomon).

The jurors who convicted Mr. Faulder never learned of Ernie McCann's involvement, nor did they hear the truth regarding the private prosecutors' promise to pay Stormie McCann. Although the money was integral to her plea agreement, Stormie McCann testified she had received no such promise. When asked directly by trial counsel whether the prosecutors had offered to pay her, she claimed that the offer was "years ago" in a "different case." The documents counsel could have used to impeach her testimony

were withheld until 1993.

Were it not for the false testimony of the McCanns, Mr. Faulder would have been convicted of capital murder. There can be no question, however, that Mr. Faulder would not be appealing to the Governor today, were it not for the inaccurate and incomplete presentation of evidence at the sentencing phase of his trial. At sentencing, the jury based its decision on the notorious Dr. James Grigson – since expelled from the American Psychiatric Association for his testimony in capital murder cases.

Mr. Faulder's case raises troubling questions, not only because of the false evidence that led to his conviction. Mr. Faulder is a Canadian citizen, a brain-damaged man who was held *incommunicado* on Texas' death row for fifteen years before current counsel notified him of his treaty-based right to assistance from the Canadian consulate. His trial counsel was court-appointed, and a federal district judge found, in 1993, that his performance had been deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). The Texas Attorney General's office has conceded that under the Vienna Convention on Consular Relations, an international treaty binding on the state of Texas, the State breached its duty to Mr. Faulder. Given the overwhelming disparity between the resources available to Mr. Faulder and the private prosecutors, and given the disparate treatment afforded Stormie McCann, an American citizen, early involvement of the Canadian government would have altered the outcome of this case. Moreover, with the assistance of the Canadian government, counsel has discovered a wealth of mitigating evidence that could have been presented at trial, and which would have resulted in a life

sentence for Mr. Faulder.

Although the defects in Mr. Faulder's trial were many, the courts have found no legal grounds to justify reversal of his conviction or death sentence. Much of this petition is devoted to a discussion of Mr. Faulder's character and the qualities that set him apart from the hundreds of men on death row. Nevertheless, a brief discussion of the facts of his case is in order.

### **Statement of the Case**

#### **I. The Guilt Phase**

In 1977, the State charged Mr. Faulder with the murder of Inez Phillips during a burglary of her home. The cause of death was a single stab wound to her chest and a blow to the back of her head.

At its core, the case against Mr. Faulder has always been weak and circumstantial. In 1977, the State overcame this evidentiary weakness by relying on an illegally obtained confession to obtain a conviction. In 1979, the Texas Court of Criminal Appeals overturned Mr. Faulder's conviction and threw out the tainted confession. In 1980, facing a retrial with little evidence to support a conviction, the State considered offering Mr. Faulder a plea to a lesser charge or the option of a life sentence. In response, the crime victim's son, Jack Phillips, hired two private lawyers and a private investigator to take over the prosecution. By the time Mr. Faulder's conviction was final, he had invested approximately \$100,000 in the case.

Due to the complete absence of any physical evidence connecting Mr. Faulder to the crime, the private prosecutors quickly realized they would need the testimony of Lynda "Stormy Summers" McCann, a former prostitute and member of a neo-Nazi biker gang. McCann told prosecutors that she had helped burglarize the victim's home, and claimed to have witnessed the murder. As an admitted accomplice, McCann's testimony alone was insufficient to sustain a conviction under Texas law. The prosecutors' case rested on Ernie's ability to corroborate his wife's testimony, without admitting to involvement that would make him an accomplice.

Both McCanns, however, had their price. Husband and wife refused to testify unless they were paid several thousand dollars for the effort. Sworn testimony by Lynda McCann's lawyer establishes that she was promised up to \$15,000 for her testimony, along with a ten year probated sentence. Ernie McCann was promised \$2,000.

Ernie and Lynda both swore, at trial, that Ernie had no involvement in the crime. In 1993, however, counsel for Mr. Faulder discovered a note in the file of private prosecutor Phil Burleson, stating that Ernie was "in on" all of the planning. This statement flatly contradicted the testimony of both McCanns, but was withheld from defense counsel until a federal district court ordered its disclosure in 1993. Given the unknown origin of hairs discovered in the victim's home, Ernie McCann's role in the crime was critical to Mr. Faulder's defense. As trial counsel for Mr. Faulder stated:

Lynda McCann's statement to Burleson was highly exculpatory. If I had known that she had made that statement, I could have used it to impeach both Ernie and Lynda. I could have shown that both McCanns were lying under oath about the extent of Ernie's involvement. I could have argued that Lynda

McCann was lying about Mr. Faulder's role in order to protect her husband. There were hairs of unknown origin discovered at the crime scene, and I could have argued they belonged to Ernie McCann.

Exhibit D(Affidavit of Vernard Solomon).

Based largely on the testimony of Lynda and Ernie McCann, the jury convicted Mr. Faulder and sentenced him to death.

In addition to the false testimony about Ernie, Lynda McCann testified falsely at trial regarding the terms of her plea agreement with the private prosecutors. First, McCann testified at trial there was no agreement to pay for her testimony. At a federal court evidentiary hearing, however, McCann's lawyer testified that the offer of cash payments up to \$15,000 was integral to the agreement between McCann and the private prosecutors. *See Exhibit E (Affidavit of Clifton Holmes)*. The private prosecutors have admitted that the payments were to be provided by the victim's son, Jack Phillips, as the state had no funds to pay McCann

The private prosecutors conducted every phase of the trial. A junior prosecutor assigned by the Gregg County District Attorney to assist the private attorneys examined no witnesses, and made no arguments. During the trial, he took off for an afternoon to play golf.

## II. The Penalty Phase

When the twelve members of Mr. Faulder's jury sentenced him to death in 1981, they heard only from three state-sponsored "experts" who predicted, based on

hypothetical questions, that Mr. Faulder would commit future crimes of violence. The most prominent of these “experts” was Dr. James P. Grigson, a psychiatrist who has since been expelled from the American Psychiatric Association for his unprofessional and unethical testimony in death penalty cases. The testimony of Dr. Grigson was crucial, because under Texas law, Mr. Faulder could not be sentenced to death unless the jury determined there was a “probability” that Mr. Faulder would commit criminal acts of violence in the future constituting a continuing threat to society.

Dr. Grigson testified that Mr. Faulder was a sociopath “of the severest kind.” S.F. vol. 5 at 929. Sociopaths, according to Grigson, are individuals “primarily interested in their own self gratification, their own self pleasure. They are calloused, they are impulsive, they are manipulative, they repeatedly break the rules. . .” S.F. vol. 5 at 919. On cross-examination, he assured Mr. Faulder’s jury that he had never been wrong in his diagnosis of severe sociopaths. *Id.* at 398. Grigson assured Mr. Faulder’s jury that he would certainly commit crimes of violence in the future, even if confined in prison. *Id.* at 941-42.

They have spent millions and millions of dollars research on [sociopaths] and there has never been any type of treatment in medicine, psychiatry or any other area that will change, modify the severe sociopath. There is nothing to indicate that any change is going to come about that [sic] this is just one of those states that occurs since the beginning of man and it’s not an illness so we can’t do anything about it in terms of curing it.

*Id.* at 941.

Since 1981, Dr. Grigson has been completely discredited. On July 9, 1995, the

American Psychiatric Association (APA) expelled Dr. Grigson "for arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, he could predict with 100% certainty that the individuals would engage in future violent acts." Exhibit F (News Release from American Psychiatric Association dated July 20, 1995). The APA concluded that the hypothetical questions on which Dr. Grigson based his diagnosis were "grossly inadequate to elucidate a competent medical, psychiatric differential diagnostic understanding adequate for diagnosing a mental illness according to current standards." *Id.*

In July 1988, Dallas County Assistant District Attorney Norm Kinne researched the prison and parole records of eleven former death row inmates, all of whom had been sentenced to death in Dallas County from 1974 to 1978. Exhibit G. The death sentences of all the inmates in Kinne's study [hereinafter referred to as the "Kinne Report"] had been commuted to life imprisonment or reduced to a term of years.

Grigson testified in ten of the cases cited in the Kinne Report. Despite Grigson's by now familiar and near identical predictions that each inmate would "beyond any doubt," "absolutely," and "without any question" commit acts of dangerousness in the future, the Kinne report reveals that *Dr. Grigson's predictions were wrong in 100 percent of those cases*. For example, in the case of Randall Dale Adams, Grigson testified that Adams was a "sociopathic personality disorder," Exhibit H at 1407, "at the very extreme, worse or severe end of the scale." *Id.* At 1409. According to Grigson, Adams would certainly kill

again. *Id.* at 1410. Contrary to Grigson's predictions, the Kinne Report revealed that Adams was an "ideal inmate." Exhibit G. In 1989, after twelve years in prison, Adams was completely exonerated of the murder for which he was convicted.<sup>1</sup>

In the 1974 capital murder trial of Howie Ray Robinson, Grigson testified that Robinson was "as severe a sociopath as you can have." Exhibit I at 918, 920. He predicted that Robinson would continue to exhibit destructive behavior, "no matter where he might be." *Id.* at 921. Fourteen years later, the Kinne Report noted that Robinson had been released on parole and that he "requires minimum supervision." Exhibit G at 4. At that time, Robinson was attending Rutledge Business College to study computers, and was on the "President's List for Academic Achievement." *Id.* Robinson's parole officer considered him "one of her better parolees." *Id.*

Similarly, in the case of Jessie Jones, Dr. Grigson testified that Jones was a "colored male" who had a "sociopathic personality disorder," and was "a very severe sociopath." Exhibit J at 2830, 2841, and 2843. He predicted that Jones would continue to commit the "worst type crimes." *Id.* at 2844-45. The Kinne Report reveals, however, that Jones caused no problems while in prison and received no disciplinary reports. Exhibit G at 2.

In 1989, Judge Teague of the Court of Criminal Appeals stated:

It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be

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<sup>1</sup> Randall Dale Adams was released from prison after the film "The Thin Blue Line" exposed massive prosecutorial misconduct in securing his conviction, and produced evidence that Adams' co-defendant was solely responsible for committing the crime.

the second coming of the almighty.

After having read many records of capital murder cases in which Dr. Grigson testified at the punishment stage of the trial, I have concluded that, as a general proposition, when Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a "severe" sociopath, which a defendant who has been convicted of capital murder always is in the eyes of Dr. Grigson, the defendant should stop what he is then doing and commence writing out his last will and testament -- because he will in all probability soon be ordered by the trial judge to suffer a premature death.

Bennett v. State, 766 S.W.2d 227 (Tex. Crim. App. 1989)(Teague, J., dissenting).

Similarly, Judge Odom of the Court of Criminal Appeals once characterized Grigson's testimony as "prejudicial beyond belief." Smith v. State, 534 S.W.2d 895 (Tex. Crim. App. 1981)(Odom, J., dissenting). Thus, in the words of former Judge Teague, "*to even conclude that Dr. Grigson's testimony may be harmless is ludicrous.*"

Like Adams, Robinson, and Jones, Mr. Faulder has an exemplary prison record. As described below, he has been a model prisoner for twenty years, and gets along well with guards and inmates alike. A psychologist has evaluated Mr. Faulder and concluded that Grigson's predictions with regard to Mr. Faulder were "completely wrong." Unfortunately, Grigson's false testimony provides no legal basis for reversal of Mr. Faulder's death sentence. Only the Governor and the Board of Pardons and Paroles can undo the damage caused by Grigson's baseless predictions.

#### **Procedural History and Statement of Legal Issues Raised in the Case**

In October 1977, a jury convicted Mr. Faulder of capital murder and sentenced him to death. The Texas Court of Criminal Appeals reversed his conviction in April 1979.

Prosecutors retried Mr. Faulder in July 1981, and the jury again convicted him of capital murder and sentenced him to death. The Texas Court of Criminal Appeals affirmed.

Mr. Faulder filed a state habeas petition November 12, 1991. On July 6, 1992, the trial court held an evidentiary hearing on Mr. Faulder's claim that trial counsel's performance was constitutionally ineffective. On November 23, 1992, the trial court entered findings of fact and conclusions of law recommending that Mr. Faulder's application for post-conviction relief be denied. On December 1, 1992, the Court of Criminal Appeals adopted the trial court's findings in a one-page order.

Mr. Faulder filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Texas, Lufkin Division, on December 2, 1992. On November 30 and December 1, 1993, the district court held an evidentiary hearing on Mr. Faulder's claim that private prosecutors unconstitutionally controlled his capital murder prosecution. On April 4, 1995, the district court denied relief, and granted respondent's motion for summary judgment. Mr. Faulder appealed.

A panel of the Fifth Circuit affirmed the district court's decision. On August 6, 1996, Mr. Faulder filed a petition for writ of certiorari in the United States Supreme Court. The Supreme Court denied Mr. Faulder's petition on November 18, 1996. On May 23, 1997, Mr. Faulder filed a second application for writ of habeas corpus in the Texas Court of Criminal Appeals.

On June 9, 1997, in response to the successive habeas application filed by Mr. Faulder, the Court of Criminal Appeals issued a stay of execution and remanded the case

to the lower court to make findings of fact and conclusions of law regarding Mr. Faulder's claims that paid, private prosecutors withheld exculpatory evidence and allowed two witnesses to testify falsely.

Despite the parties' prompt filing of papers in the lower court, the court did little to carry out the Court of Criminal Appeals' mandate for over a year. The lower court admitted there were unresolved issues of fact, but did not set the evidentiary hearing required by Tex. Code Crim. Proc. Art. 11.071 Sec. 9(a) in such circumstances. In response to the lower court's inaction, counsel filed motions for an evidentiary hearing and to depose a key witness. The court simply ignored them. After first attempting to send the case back to the Court of Criminal Appeals without taking any action whatsoever, the lower court finally issued cursory findings of fact and conclusions of law, adopted wholesale from the findings proposed by the state.<sup>2</sup> The court did not even attempt to reconcile the conflicting facts – indeed, it could not have done so on the written record – and ignored the additional evidence submitted by Mr. Faulder. In short, the lower court refused to undertake any meaningful review of the record and to make the independent factfindings required by law.

Mr. Faulder appealed the lower court's findings of fact and conclusions of law to the Court of Criminal Appeals, and requested an opportunity for briefing and oral argument. His appeal and all of his motions were denied.

Although Mr. Faulder has presented numerous legal claims in his state and federal

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<sup>2</sup> The court made a few additions, primarily from the previous federal court

habeas corpus petitions, four deserve special mention. First, Mr. Faulder argued that role of the private prosecutors in his case violated his rights to due process and equal protection. Second, he argued that private prosecutors withheld information from his trial counsel, indicating that the state's chief witness had been offered cash payments of \$10,000 to \$15,000 in exchange for her testimony. Third, he argued that his trial lawyer was ineffective because he failed to present mitigating evidence on Mr. Faulder's behalf at the penalty phase of trial. Finally, he argued that the state violated his rights under the Vienna Convention on Consular Relations, an international treaty binding on the state of Texas. The Government of Canada has filed a brief on this issue with the Court of Criminal Appeals in support of Mr. Faulder's habeas corpus petition.

#### **Victim Impact Statement**

Inez Phillips was a prominent member of the town of Gladewater. She was a widow, and her former husband was once the town mayor. Her son, Jack Phillips, funded the 1981 prosecution of Mr. Faulder, investing approximately \$100,000 in the case.

Ms. Phillips' surviving family members are divided in their support of the death penalty. Although Jack Phillips favors the death penalty for Mr. Faulder, Ms. Phillips' granddaughter, Susan Scarle Phillips, is opposed to his execution.

#### **Request for Commutation or Reprieve**

The administration of justice by the courts is not always wise or certainly

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findings which were made without regard to controlling Texas law.

considerate of circumstances which may properly mitigate guilt.

Ex Parte Grossman, 267 U.S. 87, 120-21 (1925).

In this Application, counsel requests that the Board recommend commutation of Mr. Faulder's death sentence to life imprisonment. In the alternative, counsel requests that the Board grant a reprieve of at least 90 days, and convene a hearing at which Mr. Faulder may present live testimony and other evidence in support of his petition for commutation.

I. Mr. Faulder has lived twenty years on death row without any significant disciplinary infractions.

Joseph Stanley Faulder is a fifty-nine year old Canadian who has spent the last twenty years on death row. The jurors that sentenced him to death knew nothing of his character; nor could they foresee he would spend twenty peaceful years in prison without a single episode of violence. Instead, they relied on the predictions of the infamous Dr. Grigson – since expelled from the American Psychiatric Association – that Mr. Faulder was a killer who could not refrain from committing acts of violence, even if confined in prison.

Now, after twenty years, we have information that was unavailable to Mr. Faulder's jury: we know that Joseph Stanley Faulder is a quiet and calm man who spends his days carving delicate wooden boxes, who corresponds regularly with his loving and supportive family, and who is known on death row as the "old man" who can fix anything that is broken.

Mr. Faulder's prison record is remarkable for its brevity. In the two decades he has spent on death row, he has committed only three disciplinary infractions. In 1982, Mr. Faulder refused to shower. In 1988, he was found guilty of possession of contraband – an extra pair of boxer shorts, at a time when he was having intestinal problems. In 1990, Mr. Faulder refused to shave.

Dr. Faye Sultan, a psychologist who examined Mr. Faulder in 1992, found that Dr. Grigson's predictions "simply weren't true." Furthermore, she found that Mr. Faulder's prison record was inconsistent with a diagnosis of sociopathy.

If Mr. Faulder were a sociopath, he would not have produced a record in which there was not a single episode of violence or discourtesy or aggression toward any other inmate or any other officer for such a long period of time. I find his behavior and that record absolutely inconsistent with the diagnosis of sociopathy.

State Evidentiary Hearing Transcript [hereinafter "S.E.H."] at 175.

John Skelton, a former death row inmate released after his conviction was reversed, knew Mr. Faulder for seven years.

In the seven years that I knew him at Ellis I, Stanley Faulder was very easy to get along with. I wanted to make friends with Stanley because he appeared to have no enemies or disciplinary problems of any kind. In my opinion, he was one of the most respected individuals in the Ellis I Unit. I never saw Stanley Faulder harass anyone physically or verbally. I also never saw him be harassed by any of the other inmates.

Stanley Faulder was one of the few inmates who had black and white inmate friends. Everyone liked Stanley, and everyone knew that Stanley was a very talented mechanic, and he was always being asked to fix things that had been broken by both black and white inmates.

Exhibit K (Affidavit of John Skelton).

II. Mr. Faulder's family, friends, and employers know him as a kind and decent person who had never before committed a crime of violence.

On January 3, 1965, Jeannine Janusz was driving through Jasper National Park in a blinding blizzard. In temperatures of -30 degrees Farenheit, her car collided with another traveling on the road. One person died at the scene. Ms. Janusz was knocked unconscious, bleeding severely from her face and head.

A few minutes after the accident, Mr. Faulder arrived. He helped Ms. Janusz into his car, and drove her to the hospital. She was hospitalized one week for her injuries, and eventually underwent plastic surgery. In an affidavit attached to this petition, she writes:

I believe I would have bled to death on the highway that night if Stanley hadn't stopped. Since that incident, I've always felt that I owe Stanley my life.

Exhibit L (Affidavit of Jeannine Janusz).

The kindness Mr. Faulder showed Jeannine Janusz was no aberration. Family members and friends uniformly describe Mr. Faulder as warm, loving, and kind. The testimony of Jim Winter at an evidentiary hearing in state court is illustrative:

He had feelings. He had great desires. . . And like I said, he was a hard worker and dedicated. . .

[S]till I trust him 100 percent. He has always proven himself right to me. He has always been good – like I said, good with his children. I'd trust him with my children. He would be welcome in my house tomorrow. That's how much I trust him.

S.E.H. at 233, 237.

Mr. Faulder had never been accused of committing a crime of violence, prior to the

charges that led to his death sentence. Mr. Faulder's family and friends find it impossible to believe Mr. Faulder committed murder:

I was absolutely stunned when a friend of mine told me that she had read a newspaper article about Stan's case. I couldn't imagine that such a gentle boy would ever be involved in this kind of trouble.

Exhibit M (Affidavit of Dora May Doyle).

Around town, everyone knew Stanley as a good guy. He had the reputation for being the kind of guy who would help a friend who was in trouble. He was not a violent man, he was a kind man who was fun to be around.

Exhibit N (Affidavit of Wallace Mastrie).

He was a very good and kind-hearted person. I never saw him display any violent behavior. . . . Stanley was a very trustworthy and generous man. He was the kind of guy that, if he had a dollar, and you needed a dollar, he would give it to you.

Exhibit O (Affidavit of Vince Desjardins).

When I finally heard about what happened in Texas, I was in shock. In all of the years that I knew Stanley, I never saw or heard about any incidents of violence or outbursts of temper.

Exhibit P (Affidavit of Geraldine Faulder).

Stanley Faulder was one of the finest mechanics I have ever employed. . . . I never witnessed or even heard about any outbursts of violence or temper by Stanley, even when provoked. While he was in my employ, Stanley enjoyed great respect and affection from his co-workers, peers, and customers.

Exhibit Q (Affidavit of Dwight Jones).

When I heard about what they said Stanley did, I was shocked. From what I knew about Stanley, such a thing was totally uncharacteristic.

Exhibit R (Affidavit of DeMonte Bachand).

As a man, I think an awful lot of Stan. . . . When I heard about [the murder], it

The picture of Joseph Stanley Faulder that emerges from the statements above is plainly inconsistent with the profile of a sociopathic killer. Yet the jury never heard this mitigating evidence – in part because his lawyer had never before tried a capital case. During an evidentiary hearing in state court, trial counsel candidly admitted that “as far as developing mitigating evidence to punishment, I was not centered on that, and I don’t think I ever did anything in that regard.” In 1994, a federal district court concluded that trial counsel’s representation was substandard.

### III. The Vienna Convention on Consular Relations

In 1963, the United States and several other nations agreed that foreign nationals facing criminal prosecution outside their native land deserved the protection of consular assistance. This agreement was codified in Article 36 of the Vienna Convention on Consular Relations. The United States Senate ratified the treaty in 1969; as a result, it became binding on the states under the Supremacy Clause of the United States Constitution.

Article 36 of the Vienna Convention requires that when a foreign national is arrested, the country detaining him must give him immediate notice of his right to see and communicate with his consular representative. If the prisoner requests, Article 36 further requires arresting authorities to notify the consular post, and forward any communications

blew me away. I just can't visualize Stan doing anything like that.

from the detainee. Vienna Convention, art. 36(1).

The United States Department of State has recognized that

The Vienna Convention contains obligations of the highest order and should not be dealt with lightly. Article 26, paragraph 1(b), requires the authorities of the receiving state to notify the consular post of the sending state without delay of the arrest or commitment of a national of the sending state, if that national so requests.

While there is no precise definition of delay, *it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days.*<sup>3</sup>

The State has admitted it violated the Vienna Convention in Mr. Faulder's case.

See *Faulder v. Johnson*, 81 F.3d 515, 520 (5<sup>th</sup> Cir. 1996). Mr. Faulder was never informed of his rights under the Convention. In 1992, fifteen years after his arrest, the Canadian government first learned that Mr. Faulder had been charged, convicted, and sentenced to death.

Although the state has conceded its violation of the Vienna Convention in Mr. Faulder's case, the courts have concluded that the error was "harmless." Implicit in Article 36, however, is the recognition that aliens detained in a foreign country, who face an unfamiliar legal system, are particularly vulnerable. In a criminal prosecution with co-defendants, one native-born and one foreign, the foreigner faces the possibility of discrimination based on national origin. This risk is perhaps greatest in the pretrial stage of the prosecution, when prosecutors consider the option of extending plea bargains to defendants. In Mr. Faulder's case, for example, his American co-defendant, Lynda

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<sup>3</sup> Ruiz-Bravo, Hernan, *Suspicious Capital Punishment*, 3 San Diego Just. J. 396-97 (1995)(quoting Department of State File L/M/SCA: Department of State Digest,

McCann, was offered probation, transactional and use immunity, and "expenses" of up to \$10,000 - \$15,000. Mr. Faulder received a death sentence.

Had they been informed as required, Canadian consular officials could have influenced the state's willingness to plea bargain, as well as the quality of the defense asserted at trial. They would have helped Mr. Faulder to make informed choices about how to proceed, both by explaining the intricacies of local criminal procedure and by providing information necessary to help prepare his defense. They could have assisted defense counsel in obtaining mitigating information from Mr. Faulder's family and friends, and could have retrieved Canadian prison records documenting the effects of the head injury Mr. Faulder received as a child.

The Vienna Convention makes clear that the burden of notifying the arrestee of his rights rests with the state. In Mr. Faulder's case, in particular, there can be no suggestion that he was capable of independently asserting this right, given his particular vulnerability. It is undisputed that Mr. Faulder suffers from brain damage in his right and left temporal lobes, as well as to the hippocampal function. (The hippocampus is a part of the brain that helps individuals make appropriate behavioral decisions.)

Just before his fourth birthday, Stanley Faulder suffered a brain injury when he fell out of a moving car. He was hospitalized for two weeks, and the injury left permanent scars on his head. After the accident, his family noticed certain behavioral changes. Stanley appeared to suffer periodic blackouts, which family members described as "spells."

When he was nine years old, Stanley's family took him to see a neurosurgeon at the University Hospital in Alberta, Canada. They informed the surgeon that Stanley suffered from periodic blackouts. The neurosurgeon diagnosed the blackouts as epileptic seizures, and an electroencephalogram revealed that Mr. Faulder had erratic brain wave patterns.

Many years ago, his mother attempted to get help for Stanley:

I do hope that Stanley can be given some very serious attention by a psychiatrist there, for I am sure beyond all doubt that he is the victim of a mental condition caused by terrific head injuries when he was a small boy. You can see the scars of it on his head still. But in all this time, I have not found anyone who could do anything for him. . . We are at our wits ends to know what to do with him. But I'm sure he is more to be pitied than condemned. . .

Exhibit T. Mr. Faulder continued to suffer blackouts for the rest of his life. Nevertheless, he became a talented mechanic, and was a steady worker.

If Mr. Faulder had been informed of his rights under the Convention, however, he would have sought assistance from his Government. See Exhibit U (Affidavit of Agnes Black); Exhibit V (Affidavit of Joseph Stanley Faulder). Moreover, the absence of Canadian consul in Mr. Faulder's case substantially prejudiced Mr. Faulder's defense.

First, consular officials could have advised Mr. Faulder regarding the need for experienced defense counsel and helped him to obtain such counsel at the outset. See Exhibit W (Affidavit of Scott Atlas). At minimum, the involvement of the consular post would have expanded the resources available to defense counsel. In a case fueled by the wealth of the victim's family, the involvement of the Canadian consular officers would have helped equalize the disparity between the defense and the prosecution.

presentation of mitigating evidence at the punishment phase of Mr. Faulder's trial. Exhibit U (Affidavit of Agnes Black); X (Affidavit of Susan Dougherty). Canadian prison records

would have alerted defense counsel to Mr. Faulder's brain damage. Testimony of Mr. Faulder's family and friends would have demonstrated that Mr. Faulder was nonviolent. Jeannine Janusz would have been available to testify that Mr. Faulder had saved her life after her friend was killed in an automobile accident.

Fourteen witnesses provided mitigating evidence in support of Mr. Faulder at a state court evidentiary hearing in 1992. Had Canadian consular authorities been involved in Mr. Faulder's defense, the vast majority of these witnesses would have been available to rebut the state's evidence at the penalty phase. On this record, it is likely Mr. Faulder would have received a life sentence.

Despite the State's admitted violation of the treaty, the courts have been unwilling or unable to provide a remedy to Mr. Faulder. This Board has the power to provide a remedy: it can recommend that Mr. Faulder's death sentence be commuted to one of life imprisonment.

Moreover, Canadian consular officers would have assisted in the development and

### **Conclusion**

The case of Mr. Faulder demonstrates that fatal miscarriages of justice may escape even the most exhaustive judicial review. No less an authority than the United States Supreme Court has conceded this indisputable fact. "Clemency," the Court said, "is the historic remedy for preventing miscarriages of justice where judicial review has been exhausted. . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 113 S. Ct. 853, 868 (1993).

Mr. Faulder's conviction rests on unreliable testimony procured by the promise of financial remuneration. He was sentenced to death because the State of Texas abdicated its duties under international law, and because the state presented the false testimony of a psychiatrist who has since been expelled from the American Psychiatric Association. Under these circumstances, the Board has a duty, at minimum, to grant a reprieve to more closely examine the circumstances of his case. Given what we know of Mr. Faulder's case, the Governor should do what the jury was prevented from doing: recognize the intrinsic worth of Joseph Stanley Faulder's life, correct the injustice that occurred during his trial, and spare him from the penalty of death.

**Request for Relief**

On behalf of Joseph Stanley Faulder, counsel respectfully petitions the Governor to grant him a thirty day reprieve, and to request that the Board of Pardons and Paroles convene a hearing on Mr. Faulder's request for commutation of his death sentence.

Respectfully submitted:

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Sandra L. Babcock  
Texas Bar No. 01481700  
317 Second Avenue South  
Suite 200  
Minneapolis, MN 55401  
(612) 348-6651  
FAX (612) 348-6179

ATTORNEY FOR PETITIONER

**Exhibit D**

**Affidavit of Vernard Solomon**

**Exhibit E**

**Affidavit of Clifton Holmes**

This document is housed in the Capital Punishment Clemency Petitions (APAP-214) collection in the M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, SUNY.

**Exhibit F**

**Press Release From American Psychiatric Association**

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**Exhibit G**

**Kinne Report**

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**Exhibit H**

**Excerpt from *State v. Adams***

Exhibit I

Excerpt from *State v. Robinson*

Exhibit J

Excerpt from *State v. Jones*

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**Exhibit K**

**Affidavit of John Clifford Skelton**

**Exhibit L**

**Affidavit of Jeannine Janusz**

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**Exhibit M**

**Affidavit of Dora May Doyle**

**Exhibit N**

**Affidavit of Wallace Mastrie**

**Exhibit O**

**Affidavit of Vince Desjardins**

**Exhibit P**

**Affidavit of Geraldine Faulder**

**Exhibit Q**

**Affidavit of Dwight Jones**

**Exhibit R**

**Affidavit of DeMonte Bachand**

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**Exhibit S**

**Affidavit of David Worsfold**

**Exhibit T**

**Letter**

**Exhibit U**

**Affidavit of Agnes Black**

**Exhibit V**

**Affidavit of Joseph Stanley Faulder**

**Exhibit W**

**Affidavit of Scott Atlas**

**Exhibit X**

**Affidavit of Susan Dougherty**

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**Exhibit Y**

**Photos of Joseph Stanley Faulder**