COPY

May 12, 1997

BY TELECOPY & FEDERAL EXPRESS
Governor George W. Bush
P.O. Box 12428
Austin, Texas 78711

Re: Emergency Request for Reprieve of Death Sentence for Anthony Ray Westley

Dear Governor Bush:

Enclosed for your review and consideration is an emergency request for a reprieve of a death sentence that is scheduled to be carried out at 6:00 p.m. tomorrow, May 13, 1997. This request for a reprieve is based on newly-discovered evidence of Mr. Westley's innocence in the form of a confession by another person, who has admitted that *he* committed the murder for which Mr. Westley is scheduled to be executed tomorrow night. I sincerely implore you and your staff to give this request the thoughtful and serious consideration that it deserves.

Anthony Ray Westley, has been represented for the past nine years by volunteer lawyers from several respected Texas law firms who responded to the call of the State Bar of Texas to provide pro bono representation to indigent inmates facing the death penalty. Before his untimely death from Lou Gehrig's disease, the Honorable Thomas Gibbs Gee, the respected retired Fifth Circuit Judge, served as lead counsel for Mr. Westley.

Although his lawyers initially agreed to represent Mr. Westley out of a pure sense of professional obligation, our investigation uncovered the startling facts that Mr. Westley had both been denied effective assistance of counsel and the victim of prosecutorial misconduct. After a lengthy evidentiary hearing and the publication of more than one hundred pages of findings of fact and conclusions of law, the Judge of the court that originally convicted Mr. Westley of capital murder recommended that he be granted a new trial. Without discussion, the Texas Court of Criminal Appeals ignored that recommendation of the very court who had presided over his original trial.

Thereafter, the respected United States Circuit Judge, Hal DeMoss, concluded that if the binding state court findings in this case did not establish prejudicial constitutional error, "there is no such animal" and "we should stop talking as if there is." Westley v. Johnson, 83 F.3d 714, 729 (5th Cir. 1996)). The newly-discovered evidence of the confession by another

party demonstrates the profound "prejudice" that Westley suffered due to his counsel's failure to defend him adequately at trial and the "materiality" of the evidence suppressed by the State.

Although the Texas Court of Criminal Appeals has been presented with the newly-discovered evidence that someone other than Mr. Westley committed the murder for which he is about to be executed, that Court denied Mr. Westley's request for a stay at approximately 3:30 p.m. today -- *again without offering any explanation for why the newly-uncovered evidence of Mr. Westley's actual innocence should not first be aired and thoughtfully considered before his life is extinguished.*

Before the State of Texas takes the life of one of its citizens, it is of fundamental importance that all available procedures for reviewing the fairness of that action first be exhausted. To do less creates an unacceptable risk that innocent men and women will be put to death, without the ability to avail themselves of all of the Constitutional safeguards that the people of this great State have put in place.

Mr. Westley's case presents you with both the responsibility and opportunity to affirm one of the essential tenets of our legal system -- that no individual shall be put to death by the State, without first exhausting all legal avenues available to demonstrate his innocence. To uphold that cherished principle, I humbly request that you give the enclosed request your considered attention and grant Mr. Westley a thirty day reprieve.

Thank you in advance for your thoughtful consideration of this request.

Very truly yours,

Barry Abrams

HONORABLE GOVERNOR GEORGE BUSH

ANTHONY RAY WESTLEY,
Applicant

EMERGENCY REQUEST FOR REPRIEVE
OF DEATH SENTENCE

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2. State court findings of fact relating to "defense counsel's failure to object to the State's use of victim impact evidence at trial and during final argument" and corresponding table of supporting record references.

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RECORD REFERENCES AND ABBREVIATIONS

Three different evidentiary records are referenced in Westley's Emergency Request for Reprieve of his death sentence to life imprisonment: (1) the record of the state court evidentiary hearing that took place as part of his state court habeas corpus proceedings; (2) the record of Westley's original capital murder trial; and (3) the record of the trial of Westley's co-party, John Dale Henry. Reference is also made to the state court findings of fact made by the state habeas trial court.

True and correct copies of the state trial court's pertinent Findings of Fact, Conclusions of Law and Order of the Court ("Findings, Conclusion & Order") have been reproduced for the Governor and grouped behind separately labeled tabs corresponding to Westley's grounds for relief in Appendices 1-8. In each instance, a table has also been supplied that references portions of the state court record that support each finding. For ease of reference in these proceedings, the state trial court's findings of fact and conclusions of law were renumbered consecutively. State trial court findings are referenced as "F1," "F2," and so on; state trial court conclusions are referenced as "C1," "C2" and so on. Pertinent findings and conclusions also

The statement of facts from the state court evidentiary hearing shall be referred to by volume and page as "SF__, __". Petitioner-applicant's evidentiary hearing exhibits shall be referred to as "AX"; Court's exhibits as "CX"; and State's exhibits as "SX." The statement of facts from the Henry trial shall be referred to as "HSF ___, ___." The statement of facts from the Westley capital murder trial shall be referred to as Westley "WSF ___, ____."

HONORABLE GOVERNOR GEORGE BUSH

ANTHONY RAY WESTLEY,

Applicant

EMERGENCY REQUEST FOR REPRIEVE OF DEATH SENTENCE

Anthony Ray Westley ("Westley") is a Texas death row inmate whose **execution is set on May 13, 1997. If that execution is carried out, Westley will die for a murder he did not commit.** Another man, John Dale Henry ("Henry"), has recently confessed that *he*, and *not Westley*, actually committed the murder for which Westley will be executed at 6:00 p.m. tomorrow night.[1] **Westley respectfully prays that Governor Bush exercise his power under Tex. Const. art. IV, §11 to grant a thirty day reprieve, so that he may bring this newly-discovered evidence of his actual innocence before the Texas Board of Pardons & Paroles.** Absent such a reprieve, Westley will be executed by the State without any opportunity to bring the evidence of his actual innocence before that Board.

Henry's recent confession constitutes material, newly-discovered evidence of Westley's

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[1] *See* Appendix A for a true and correct copy of the Affidavit of Martha Walker-Dunbar, to whom Henry recently confessed, shortly after he was paroled from the Texas Department of Corrections. Dunbar is the mother of one of Henry's children and was pregnant with Henry's child at the time of the murder robbery for which Westley is scheduled to be executed on May 13, 1997.

innocence that was unavailable at the time of Westley's criminal trial, at the time his original application for habeas corpus relief was filed on October 12, 1989, and at the time that the Texas Board of Pardons & Paroles denied his earlier request that his death sentence be commuted. Even before the evidence of Henry's confession was uncovered, four different conscientious state and federal judicial officials concluded that Westley had been denied a fair trial due to both ineffective assistance of counsel and prosecutorial misconduct. Highly-respected United States Circuit Court Judge, Honorable Hal De Moss, succinctly summed up Westley's plight when he wrote that that if the facts of Westley's case did not establish prejudicial constitutional error, "there is no such animal" and we should stop talking as if there is." *Westley v. Johnson*, 83 F.3d 714, 729 (5th Cir. 1996).

* * *

Unless a reprieve is granted, the State of Texas will execute Westley without his having had the opportunity to present to the Board of Pardons & Paroles the substantial issues that bear directly on his innocence of the crime for which the State seeks to put him to death and on his eligibility for the death penalty. Accordingly, as set out in greater detail below, Westley respectfully requests that the Governor stay his execution so that the Texas Board of Pardons & Paroles may first take into account newly-discovered evidence establishing that Henry, not Westley, is guilty of the murder for which Westley is scheduled to die.

I.
STATEMENT OF THE CASE

The State of Texas indicted and convicted Westley of capital murder for allegedly shooting a bait store owner with a .22 caliber pistol during the course of an armed robbery. (F1, 4, 6, 59-60). In the earlier trial of another participant in the robbery, John Dale Henry ("Henry"), the

State had both argued and adduced evidence that Henry, rather than Westley, had been the triggerman during the robbery and that Westley had carried and fired a .38 or .357 pistol that could not have fired the fatal shot. (F60, 69-77, 91-102). Both the prosecutor in Westley's trial and his court-appointed defense counsel agreed that whether Westley was the "triggerman" who fired the fatal .22 bullet that killed the shop owner was the "life and death issue" in his trial, i.e., it determined whether Westley received a life or death sentence for his role in the robbery. (F78,79). The state habeas court who presided over Westley's criminal trial likewise agreed. Id.

Westley, a 23 year old Black man with an IQ of 73, who functioned at the level of the lowest five percent of the population, participated in a robbery of a bait store clerk in April, 1984. (AX54, 57, F179-80). During that robbery, the store owner was killed by a gunshot in the back with a .22 caliber bullet. (AX41). After being shot in the back, the store owner bled profusely from the mouth and collapsed before dying. (AX22,23). Both before, during and after the robbery, Westley was seen by eyewitnesses who reported that he carried a .357 caliber cowboy-style pistol. (AX24-26). A .357 caliber weapon cannot fire a .22 caliber bullet. Hence, if Westley had and fired a .357 weapon during the robbery, he could not have been the triggerman who shot the .22 bullet that killed the store owner. (F237).

After the robbery, Westley reportedly was overheard by some of his acquaintances as having said that he had shot a man in the face with his .357 pistol. (AX24-26). It was later learned, however, that although the victim had bled from the mouth after being shot, he had in fact been shot in the back with a .22 caliber bullet, not in the face with a .357 or .38 caliber bullet that could be fired from a .357 caliber weapon. (AX41). Thus, to the extent that Westley had believed that he had shot the store owner in the face with a .357 weapon, he had been mistaken.

(F240-41).

After the robbery and after he had heard that the police were looking for him, Westley went with his father to the police, turned himself in, was interviewed, and ultimately signed a written statement. (AX54, WSF DX6). When Westley gave his statement, the autopsy of the victim had not yet been completed and the caliber of the weapon that had shot the fatal bullet was unknown.(F240, AX41). In his statement, Westley admitted participating in the robbery, but did not admit shooting the store owner. (WSF DX6). While Westley acknowledged that he had participated in the robbery of the store clerk, he attributed the primary role in the robbery to Henry. (Id.) That account contradicted the eyewitness testimony of the store clerk, Debra Young, who said that Westley, rather than Henry, had played the lead role in confronting her. (HSF II, 28-57). In his statement, Westley also claimed that during the robbery he had carried a .22 caliber pistol that looked like a cowboy gun. (WSF DX6). This, too, contradicted the testimony of the eyewitness Young at the Henry trial, who stated that she had seen Westley with a large cowboy-style pistol that made a sound like a big boom when fired, shot fire out of the barrel, and appeared to be a .357 caliber weapon. (HSF II, 331-34, 50-51).

In other words, in his statement, Westley portrayed his role and weapon in the robbery contrary to the eyewitness' testimony. If one were to assume the truth of the eyewitness Young's testimony, in his statement Westley appeared to "switch places and switch guns" with his cohort, Henry. (F240-41). The State's investigators apparently agreed. At Westley's trial, the State affirmatively argued and adduced evidence that not everything that Westley had said in his statement to the police had been true. (F215-17, 219).

Westley reportedly gave conflicting accounts to his two defense counsel about the caliber

of the pistol he had carried during the robbery: he told one he had carried a .22 caliber pistol, as he had said in a statement to the police; he told another that he had carried a .357 pistol. (SFVI, 255-57, II, 104). Westley's claim to have carried a .22 contradicted the statements and testimony of all witnesses who had seen him with a weapon before or during the robbery. (HSF II, 331-34, 50-51; AX24-26; F240-41) His claim to have had a .357 caliber weapon was corroborated by all such evidence. Id.

Despite the fact that their client had given them two differing versions of events, one inculpatory and one exculpatory, Westley's counsel opted for the one that implied guilt and failed even to investigate the one that could establish his innocence of the charge that he had been the triggerman. In so doing, Westley's counsel forfeited the opportunity to present the crucial defense on the life and death issue of who the triggerman actually was, and did not act in accordance with nationally-recognized standards for criminal defense counsel. See ABA Standards of Criminal Justice (2d ed.), "The Defense Function," ¶4-4.1 & corresponding commentary, Duty to Investigate.

The best evidence of the utter failure of Westley's trial counsel to address in a meaningful fashion the crucial issue in the trial is their own testimony[2]:

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[2] The system for appointment of counsel for indigent capital defendants in Harris County at the time of Westley's trial did not impose any uniform minimum standards of competency for appointed counsel and did not impose any restrictions on the volume of cases counsel could handle. (F374). See Appendix 8 for pertinent findings. (Kyles, SF III, 54, 57; Schaffer, SF VII, 132-33). Instead, the appointment process allowed arbitrary and standardless appointment decisions by each criminal district judge. Id. As a consequence, the quality of counsel appointed in capital cases was an arbitrary function of whatever court a case was randomly assigned to and the individualized practice of each judge who made such

Question to Mr. Mock:

I'm asking you for an outline or a nutshell of your strategy to show that Anthony Ray Westley was not the shooter.

Answer:

I really didn't have one. The ballistics showed that the bullet came from the gun fired by Anthony Westley.[3]

(F82)(SF I, 126).

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an appointment. (F375). Moreover, under that system, appointed counsel were paid for court appearances and were not directly compensated for out of court time devoted to factual investigation of their case, legal research regarding the controlling issues, or consultation with experts. (F376). (Alvarez, SF II, 87).

Not surprisingly, but "[u]nfortunately, the justice system got only what it paid for." Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992). Westley's appointed trial counsel consisted of a lead lawyer engaged in a high-volume trade of appointed cases who had been cited five times during the period of Westley's representation for failing to meet required court deadlines, had been arrested for contempt of court during the jury selection in Westley's case, maintained no library regarding capital or criminal law legal developments, claimed to keep abreast of current legal developments by reading in the wee hours of the morning, failed to conduct any meaningful investigation into the key factual issues in the case, failed to consult any expert regarding key issues on which he was uninformed, and was well-known to drink daily after work on an "above-average" basis. (F208-14, 377-80). (Mock, SF I, 28, 30, 63, 65, 143; SF VI, 161-69, 249-50, 271-73; Kyles, SF III, 69, 71). Westley's second-chair lawyer had no capital litigation experience before or since his trial. (F86). (Alvarez, SF II, 77).

Against this backdrop, it is hardly surprising that the appointed counsel failed to perform their responsibility in capital litigation competently or, as Mr. Mock so colorfully put it when questioned about the number of times that the courts had found his legal representation lacking, "[S]hit happens; it just happens." (F380). (Mock, SF I, 63).

3 But see R. 256-71, which detail that: (i) the evidence adduced by the State at the Henry trial established that the bullet that killed Hall could not have come from the gun fired by Westley; and (ii) the gun the State claimed was like the one Westley fired, could not have fired the fatal bullet.

Question to Mr. Mock:

[T]ell me what evidence existed at the time Mr. Westley's case was tried that he did not fire the fatal shot.

Mr. Mock:

May I have a minute, your Honor?

The Court:

Yes, sir.

Answer:

None sir. None. I was just reenacting the scene in my mind and there is none.

(F84)(SF I, 144).

Question to Mr. Alvarez:

Did you or Mr. Mock, prior to the trial of Westley's case, talk about your strategy? Did you have a strategy, sort of an overall outline of how you were going to attack the defense of the case, how you were going to present evidence, the theme of the case, that sort of thing?

Answer:

I didn't have. I mean Mr. Mock never talked to me about a strategy. I wasn't experienced enough to have one. You know, I just -- we just started to trial.

Mr. Mock -- and again, I don't want to sound like I'm trying to put it all on him -- but the thing is that he was the experienced attorney. I didn't know what to do, to tell you the truth.

(SF II, at 115). See (F85-86).

Westley's counsel had no ballistics or firearms training or experience and sought no independent help from any expert in those fields. (F87). Westley's counsel made no attempt to familiarize themselves with the State's forensic testimony and argument at Henry's earlier trial that Henry, rather than Westley, had fired the fatal shot. (F65-68). Nor had the State informed

Westley's counsel of the evidence from the Henry trial that was favorable to Westley (F286-89). As a result, Westley's counsel neither knew of the fundamental inconsistency in the State's evidence and position nor were they in a position to reveal its incredulity to the jury. (F65-68, 104-05, 285-89). Westley's counsel have acknowledged that they were unaware of the available evidence that Westley had not been the triggerman and had no strategy for asserting that defense on his behalf. (F8-86; SF I, 144; II, at 115). The state habeas court, the same court that had presided over Westley's criminal trial, found that the resulting trial "strategy" of "confusion" and "speculation" was not in fact a sound trial strategy and was tantamount to no trial strategy at all. (F106).

After Henry's trial, but before Westley's trial, the State obtained and suppressed a sworn statement from the only eyewitness to the shooting, in which that eyewitness had identified a photograph of a cowboy-style pistol as being "just like" the one Westley had used and then testified under oath that she "knew [that the weapon used by Westley] was larger than a 22 caliber." (AX49). That statement constituted material, non-cumulative evidence because:

(i) in it the sole eyewitness to the shooting testified clearly and unequivocally that she "knew" that Westley's gun was a larger caliber weapon than the murder weapon -- at the very time the prosecution had created a photographic lineup for the sole purpose of establishing the type of weapon Westley had carried during the robbery;

(ii) in contrast to similar, more equivocal statements that witness had made shortly after the shooting indicating her belief that Westley had a .357 caliber pistol rather than a .22 caliber pistol, the prosecution could not successfully impeach this statement on the ground that it had been made while the witness was under the influence of the immediate emotional trauma of the incident;

(iii) the statement corroborated the State's own ballistics evidence as well as all of the statements the prosecution had earlier obtained from the witnesses who claimed to have seen the type of pistol Westley carried;

(iv) the witness's certainty that Westley had not carried a .22 caliber pistol clearly and

unambiguously highlighted the misleading nature of the photograph of a cowboy-style pistol that the State used at trial to try to convince the jury that Wesley had in fact had a .22 caliber weapon; and

(v) production of that statement should have dramatically impacted Westley's counsel's pretrial preparation of his defense by unambiguously highlighting both the available triggerman defense and the State's attempted use of a misleading photograph to suggest that Westley had carried a .22 caliber pistol, when all of the evidence was to the contrary.

After suppressing this important evidence, at Westley's trial the State presented the same misleading photograph it had used when it took the eyewitness' statement, and argued that Westley, rather than Henry, had fired the .22 caliber pistol that killed shop owner. (F267-337; C198-208).

As indicated in the state fact findings and in the record of Westley's trial, the State's theory at Westley's trial was that Westley had fired the fatal shot that killed the bait store owner. The State advanced that argument in the face of eyewitness testimony at the earlier Henry trial about the appearance and sound of the gun Westley carried, the State's own ballistics evidence and the State's own analysis of the rifling or markings on the fatal bullet, all of which demonstrated that Westley could not have fired that shot.

The Gun's Appearance:

> At the Henry trial the eyewitness Young had described Westley's weapon as a "big gun" that had "fire coming out of the barrel" when fired and that the other robbers had had "little bitty guns." (HSF II, 33-34, 37-38, 50; F76, 102). Young also had identified Westley's weapon as a cowboy-style .357 pistol immediately after the robbery. (F75-76).
>
> In fact, there is no such thing as a "little bitty .357" and a .22 caliber pistol would not emit "fire" from the barrel when fired. (F94, 102).

The Gun's Sound:

> At the Henry trial the eyewitness Young had described Westley's gun as having emitted a big boom when fired. (HSF II, 50).

In fact, a .22 caliber pistol does not "boom"; it pops. (F100).

State's Ballistics Evidence:

The trajectory of .38 caliber bullets found at the scene (which can be fired by a .357 caliber pistol but not a .22 caliber pistol) could be traced back to where Young said that Westley was standing.(AX61). The State argued and adduced evidence of that fact at the Henry trial. (HSF II, 5-6, 222-37).

State's Evidence of Rifling:

The fatal bullet was a .22 caliber bullet. (F77). The state's analysis revealed that that

bullet could not be fired by a .357 pistol. (F78-79). The markings on that bullet could not have been made by any commonly-available cowboy-style .22 caliber pistol.(AX56, F96, 98).

State's Opening Statement & Argument at Henry Trial:

At the Henry trial, the state prosecutor told the jury the following in her opening statement and closing argument:

> "The law provides me with this opportunity to tell you what I believe the evidence will show in this case. . . .One man, the biggest man, pulled out what Debra calls a cowboy-style gun. . . .Anthony Westley was standing next to Debra actually getting the money and actually with a gun at her, turned and fired at Frank Hall. I believe the evidence will show that ammunition was a .38. One bullet goes through the photographs and falls by the fish tank. Another bullet ricochets and is found in the back storeroom." (AX51)
>
> "Immediately after an offense, what's the first thing, what's everybody looking for? They are trying to figure out who did it and trying to catch them before they get away. She [Debra Young] told Detective Phillips at the scene, three robbers with three guns. She told Officer Dickey, the very first officer on the scene, there were three robbers with three guns. He said, what did they look like? She said a .357. He pulled his gun out. That's what it looked like. It was right in my face. What did the other ones look like? One had a .25 and the other one had a small caliber handgun.
>
> While this man is standing behind the counter robbing Debra Young, Frank Hall walks in and at that moment this man right here, Anthony Westley, fires a bullet which goes through the picture wall and lands by the bait tank. He fires a second shot, he misses Frank. He misses him. Otherwise, Frank would probably have been shot around the head or somewhere in his lower body by this man standing over to his right. He misses Frank. Second one hits this door and ricochets back into the back storeroom. Then everybody starts shooting.
>
> Who shoots Frank Hall? Somebody there with a .22. It wasn't his own gun that shot him. It was somebody there with a .22. That means that either this man, Anthony Westley, had a .22 besides the .38 he used with Debra Young or this man, our defendant [Henry], had a .22, one or the other. . . . Isn't it interesting that the defendant takes the stand and says, I never shoot a handgun. I don't even have a handgun. We know that's not true. His own niece and own sister saw him a few months before with a .22.

> What do we know from the ballistics? And Mr. Skelton keeps minimizing it. You know why ballistics are important? Because physical evidence doesn't lie.
>
> His [Henry's] story is absolutely incredible. It doesn't fit the ballistics evidence. He offers no explanation. . . . The problem with the defendant's story is that you know he's lying because the physical evidence doesn't match his story."
>
> (HSF IV, 619-20, 624-27, 629).

Given those uncontroverted facts, how did the State succeed in convincing a jury that Westley had fired the .22 caliber pistol that was the murder weapon? That result occurred due to both:

- The failure of Westley's counsel to conduct any investigation into the testimony at the prior trial of his co-defendant or to hire a ballistics or firearms expert to assist in presenting the physical evidence demonstrating that it was impossible for Westley to have fired the fatal .22 caliber bullet; and

- The State's suppression of exculpatory evidence regarding the murder weapon and its creation and use of a materially misleading photograph to persuade the jury that Westley had in fact carried a .22 caliber pistol.

At the prior trial of Henry, the State used the following photograph to depict the murder weapon and its ballistics and firearms expert testified that the cowboy-style pistol shown from the side could variously have been a .22, .357 or .38 caliber gun. (SX17;AX21).

At Westley's trial, the State had the eyewitness identify that photograph as depicting a

cowboy-style pistol like that Westley had carried. This time, however, the State's ballistics and firearms expert testified that the weapon shown was a .22 caliber pistol. The State then argued to the jury that Westley had carried a .22 caliber pistol like that shown in the photograph. What was wrong with that?

Westley's counsel neither knew nor did the State reveal the following:

a. The manufacturer of the cowboy-style gun depicted in SX17 makes .22, .357, .41 and .44 caliber pistols that are indistinguishable when viewed from the side. (AX43, F93).

Thus, identification of SX17 as a pistol that looked like Westley's gun was not a reliable identification of what caliber gun he had fired. (F93, 326, 332).

b. Various manufacturers produce cowboy-style guns of differing calibers that are indistinguishable when viewed from the side. (AX43, F93)

c. After the Henry trial, the State took a supplemental statement from the eyewitness Young in which, at the very same time that she selected SX17 as a photograph that looked like the gun Westley carried, she positively reaffirmed that Westley's gun was a large caliber weapon, either a .38 or .357 caliber and that she "knew it was larger than a 22 caliber." (AX49).

d. The pistol depicted in SX17 could not have fired the fatal .22 caliber bullet, because the State's analysis of the "lands and grooves" or markings on that bullet proved that it had eight such markings, while the pistol shown to the jury would produce only six such markings. Moreover, no commonly available cowboy-style .22 caliber pistol could have fired the murder bullet because each produces a different number of "lands and grooves" than were found on the fatal bullet. (AX56, F96, 97).

Therefore, the State improperly misled the jury at Westley's trial into believing that Westley had carried and fired a cowboy-style .22 pistol like that depicted in SX17 and that that weapon had fired the fatal shot. Both of those propositions were demonstrably false and were contradicted by all eyewitness testimony and all physical evidence. Nevertheless, neither the State or Westley's counsel brought those facts to the jury's attention. The special master, the state trial

court, the magistrate and Circuit Judge DeMoss all concluded that under these circumstances, the adversary process on which our system depends to assure a just result, failed. (R. 33-35, 543-601).

THE COURSE OF WESTLEY'S APPEAL & LATER HABEAS PROCEEDINGS

The Texas Court of Criminal Appeals affirmed Westley's conviction and death sentence on direct appeal. Westley v. State, 754 S.W.2d 224 (Tex. Crim. App. 1988), cert. denied, Westley v. Texas, 492 U.S. 911 (1989). (F5-6). Westley filed a state petition for habeas corpus with the trial court that presided over his criminal trial. (F7). The state court appointed a special master who conducted a lengthy evidentiary hearing on Westley's petition and submitted extensive proposed findings of fact and conclusions of law to the trial court. (R. 134). The state court adopted the master's findings and conclusions as its own in accordance with the Texas procedure set out in Tex. Code Crim. Proc. art. 11.07. (R.33-35). Like the special master, the state trial court recommended to the Texas Court of Criminal Appeals that Westley be granted relief and afforded a new trial because:

(a) Westley had been denied effective assistance of counsel at trial due to numerous, material deficiencies occurring during the pretrial investigation, guilt-innocence, and the punishment phases of the trial; and

(b) The State had engaged in prosecutorial misconduct violative of Westley's due process rights, by failing to disclose Brady material in response to a discovery order, and by the prosecution's creation and presentation of false and misleading testimony regarding the crucial issue of whether Westley fired the weapon that killed the decedent. (R.134, 34-36).

The Texas Court of Criminal Appeals denied Westley relief summarily without so much as addressing or taking exception with any of the numerous fact findings supportive of the trial court's recommendation that habeas relief be granted. (R. 31).

Westley then filed a request for relief in federal court.(R.294). Both Westley and the State moved for summary judgment in the district court. (R.350, 365, 372, 516, 535, 539). The

magistrate to whom the motions were referred recommended that Westley's motion for summary judgment be granted on the basis of constitutionally ineffective counsel and prosecutorial misconduct and that the State's motion for summary judgment should be denied. (R. 540, 601). The district court rejected the Magistrate's recommendation and instead granted the State's motion for summary judgment and denied Westley's motion. (R. 760, 761). Westley timely perfected his appeal to Court of Appeals and the district court issued a certificate of probable cause. (R. 763, 765).

Two of the three Fifth Circuit panel members concluded that: (i) although Westley's trial counsel had been deficient in failing to investigate evidence bearing on what the state court found to be the "life and death issue" of whether he fired the fatal shot and in failing to object to prejudicial victim impact evidence; and (ii) the prosecution had suppressed evidence favorable to Westley in the form of a sworn statement by the only eyewitness to the shooting, who stated that she "knew" that Westley did not carry a .22 caliber gun capable of firing the fatal bullet, that conduct was neither "prejudicial" to Westley nor was the suppressed evidence "material." Westley v. Johnson, 83 F.3d 714 (5th Cir. 1996)). The third panel member, Judge DeMoss, dissented, stating that if the binding state court findings in this case did not establish constitutional error, "there is no such animal" and "we should stop talking as if there is." Id. at 729.

The unusual aspect of this case is that after the state trial court conducted a state habeas evidentiary hearing (in which ten live witnesses testified and roughly 100 exhibits were introduced, resulting in a nine volume record consisting of 1500 pages) that court made 230 separate findings of fact, exclusive of conclusions of law, which supported its ultimate recommendation that Westley was entitled to habeas relief.

Westley's case therefore is the atypical instance where a state habeas court has made numerous fact findings that support, rather than oppose, the criminal defendant's request for habeas relief. Notwithstanding the binding nature of those extensive state fact findings and its conclusion that Westley's trial counsel had been deficient and that the prosecution had withheld favorable evidence bearing on the life and death issue whether Westley had been the triggerman responsible for a death, however, the Court of Criminal Appeals failed to even discuss those findings or suggest why, in light of those facts, Westley was not entitled to a new trial.

All told, eight state and federal judicial officials have concluded that Westley has been denied a fair trial due to both his counsel's failure to assert the life and death defense that he was not the triggerman in a fatal shooting and the State's improper suppression of sworn testimony from the only eyewitness to the shooting that clearly and unambiguously established that defense; eight other state and federal judicial officials have concluded to the contrary.[4] At a minimum, then, Westley's case presents one of those rare circumstances when at least "grave doubt" exists whether the deficiencies of Westley's counsel and the related prosecutorial misconduct had a substantial and injurious effect on the integrity of the fact finding process in his trial. O'Neal v. McAninch, 513 U.S. ___, 130 L.Ed.2d 947 (1995). Under those circumstances, modern concepts of justice and mercy require that Westley's life be spared and that the Board of Pardons & Paroles be afforded the opportunity to consider his commutation request in light of the newly-discovered evidence of his innocence.

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[4] The state special master, the state trial judge who presided over Westley's original criminal trial, four members of the Texas Court of Criminal Appeals, the United State Magistrate to whom this matter was referred below, and United States Circuit Judge DeMoss each concluded that Westley is entitled to habeas relief.

GROUNDS FOR RELIEF

A. Actual Innocence

When, as is true in Westley's case, another person admits against his interest that *he* committed the criminal offense for which the defendant has been sentenced to death -- it is hard to fathom that more compelling evidence of actual innocence could possibly be adduced. *See, e.g., Rodriguez v. Holmes*, 963 F.2d 799 (5th Cir.1992)(previously convicted murderer who earlier plead guilty granted new trial after another person confessed to the murder); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir.1985)(successive federal habeas petition granted, based on new evidence in form of post-trial confession by third party companion who admitted being triggerman); *New York v. Nicholson,* 222 A.2d 1055 (N.Y. App. Div. 1996)(convicted murderer entitled to evidentiary hearing in post-conviction proceedings to consider post-trial confession of third party who admitted being triggerman, based on affidavit relating admission by witness other than declarant); *Jackson v. Florida*, 646 So. 2d 792 (Fla. Dist. Ct. App. 1995)(co-defendant's confession constitutes newly-discovered evidence that may support post-conviction relief).

There is no dispute on the record in this case that Westley's triggerman status was in fact a life and death issue at his trial. F78, 79. Both the prosecutor and defense counsel agreed that if only one juror had a reasonable doubt about whether Westley had used a .22 caliber weapon, he would have received a life sentence. F281 Indeed, the prosecutor even acknowledged that exculpatory evidence bearing on that issue would have affected his charging decision and, in some circumstances, could have resulted in dismissal of certain charges. (Kyles, SF III, 73, 90).

Not only have the prosecutor, the defense lawyers and trial court with personal familiarity with Westley's prosecution each reached this conclusion as a matter of fact -- as a matter of law,

"triggerman status" is material to resolution of two of the crucial sentencing issues in a capital prosecution, the issues relating to deliberateness and the probability of future dangerousness. *See, e.g., Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Jacobs v. Scott*, 31 F.3d 1319, 1326 & n.13 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 771 (1995)(first and second punishment special issues under Texas statute allow the jury to give mitigating effect to claimed "nontriggerman" status); *Harris v. Collins*, 990 F.2d 185, 189 (5th Cir.), *cert. denied*, 125 L. Ed. 2d 746, 113 S. Ct. 3069 (1993)(if jury believes capital defendant did not strike the fatal blow, that fact could support a negative answer to both the first and second punishment issues). *See also Bridge v. Collins*, 963 F.2d 767, 770 (5th Cir. 1992)("If the jury members believed that Bridge's accomplice killed the victim, then they could have answered 'no' to the first question . . . . If the jury members believed that Bridge did not shoot the victim, then they could have concluded that Bridge would not be a future threat.").

Creation of a reasonable doubt in the mind of a single juror regarding whether Westley possessed a .357 or a .22 during the robbery in issue probably would have saved Westley's life. (F281; Mock, SF I, 88-89; Schaffer, SF VII, 77-80). Thus, the newly-discovered evidence that Henry has admitted that he, and not Westley, was the triggerman bears directly on the crucial, life and death issue in Westley's case, directly supports his claim that he was innocent of shooting the bait store owner and would have precluded any rational juror from answering the capital sentencing issues in a manner that would have resulted in his death sentence.

Moreover, at the very least, the newly-discovered evidence of Henry's admission that he and not Westley was the triggerman who shot the bait store owner should, when considered against the backdrop of the existing factual record, create sufficient additional doubt about his guilt to warrant reconsideration of the ineffectiveness and prosecutorial misconduct claims that were earlier found

meritorious by the state special master, the judge of the convicting court, the federal magistrate, and Circuit Judge Hal DeMoss. The factual bases for those grounds are summarized below.

B. Ineffective Assistance of Counsel

1. Counsel's failure to investigate and present evidence on a crucial line of defense in Westley's capital murder case -- whether or not Westley was the triggerman who killed the shop owner murdered in the course of an armed robbery.[5]

- The State prosecutor, defense counsel, and trial judge who presided over Westley's trial each concluded that whether or not Westley was the triggerman was a life and death issue that likely would have affected the outcome of his trial. F78-79, 232-33
- The State argued and adduced evidence during the *Henry* trial that Westley's co-party Henry, rather than Westley, was the triggerman. F69-77
- The available ballistics evidence, eyewitness accounts, and independent witness statements each corroborated that Westley had and fired a .357 weapon during the robbery, not a .22 capable of having shot the bullet that killed the shop owner. F70-79, 97-102
- Westley's trial counsel were unaware of the evidence reflecting that Westley had not in fact been the triggerman who shot the shop owner and had no trial strategy to advance that defense. F81-86, 234-36, 239
- Westley's trial counsel failed to investigate and adduce the available evidence at trial indicating that Westley was not the triggerman. F65-67
- In view of the failure of Westley's trial counsel adequately to investigate the facts of his case, their resulting trial strategy of "confusion" and "speculation" was not in fact a sound trial strategy and was tantamount to no trial strategy at all. F106
- Reasonably competent counsel would have investigated and taken steps to adduce the available evidence indicating that Westley was not the triggerman. F68
- Despite their lack of firearms and ballistics expertise, Westley's trial counsel did not seek to retain a competent expert in that field to assist them. F87-89
- Reasonably competent counsel would have taken steps to obtain or at least consult

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5 The pertinent fact findings are contained in Appendix 1.

with an independent ballistics expert and Westley's counsel were deficient in failing to do so. F90

- If Westley's trial counsel had consulted with a competent firearms and ballistics expert[6], they could have adduced evidence at Westley's trial that:

  (a) Based upon the testimony of the witnesses regarding the objective appearance, sound and firing characteristics of Westley's gun and the available ballistics evidence, it was "almost obvious" that Westley had fired a .357 pistol on the occasion in question, rather than the .22 that killed Hall (F90-102). (McDonald, SF III, 229, 247, 251-252);

  (b) The State's ballistics expert had previously testified that the photograph of the gun identified by the witnesses at the Westley trial as Westley's gun could variously have been a .38 caliber, .357 caliber or .22 caliber weapon, which would have rendered all of the witnesses' testimony consistent with the proposition that Westley had a .357 rather than a .22 during the robbery. (F93, 326-27). (See Krocker, SF VI, at 80 and Kyles, SF III, 134);

  (c) The available ballistics evidence and the eyewitness Young's testimony demonstrated that the trajectory of .38 caliber slugs found in the bait shop could be traced back to the gun Westley had fired. (F101-02). Since a .22 caliber weapon cannot fire .38 caliber bullets, this, too, evidenced the fact that Westley had fired a .357 caliber weapon rather than the .22 that killed Hall. (Kyles, SF III, 86);

  (d) The gun depicted in the photograph used at the Westley trial (SX 17 and AX 21) could not readily be identified from the side as a .22. (F70, 93, 310, 326). Indeed, virtually identical models of the same gun are manufactured in varying calibers, including a .357 model that looks identical to a .22 when viewed from the side. (F93). (McDonald SF III, 207-08, 210, 211, 212-15, AX 43);

  (e) The Ruger pistol depicted in SX 17 (AX 21) could not, as a matter of physical fact, have fired the bullet that killed Hall because the number of "lands and grooves" on that bullet do not match the number of lands and grooves created by a Ruger pistol. (F96-98, 308-09). (McDonald, SF VII,

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6 Floyd McDonald, former head of the Houston Police Department crime laboratory, gave uncontradicted expert testimony during Westley's state habeas evidentiary hearing on the subjects of firearms and ballistics.

11-12);

(f) The eyewitness Young had previously identified an actual .357 weapon minutes after the incident as the type of gun Westley had used during the robbery. (F95, 276, 322). (Kyles, SF III, at 114 and AX 19); and

(g) No commonly available cowboy-style .22 pistol could have fired the bullet that killed Hall. (F96-98).The commonly available .22 weapons that could have fired the murder bullet did not look like cowboy-style guns (F96-98). (McDonald, SF III, 231-32).

- Westley's trial counsel did not elicit testimony at his trial encompassing the areas addressed by the firearms and ballistics expert during the state habeas evidentiary hearing, which evidence would have been consistent with and supportive of the notion that reasonable doubt existed as to whether Westley fired the .22 caliber bullet that killed the shop owner shot during the robbery in which he participated. F103

- Without the assistance of an independent ballistics expert, Westley's defense counsel were wholly incapable of presenting evidence like that adduced by the expert McDonald at the state habeas evidentiary hearing, even though that evidence was otherwise available to them and was evidence reasonably calculated to create a reasonable doubt in the mind of at least one juror that Westley did not fire the .22 caliber bullet that killed the shop owner. F104

- Westley's trial counsel were professionally unreasonable in failing to investigate, retain or consult with a ballistics expert to assist them and present evidence on a crucial line of defense in his capital murder case -- whether or not Westley was the triggerman who killed the shop owner murdered in the course of an armed robbery. That evidence was likely to create a reasonable doubt regarding whether Westley fired the fatal shot in the primary case. Thus, Westley's counsel's purported investigation of the facts in the primary case was so inadequate as to be outside the wide range of professional competence. F105

- At the time Westley gave police investigators a written statement in which he claimed to have carried a .22 caliber pistol, neither he nor the investigators then knew the caliber of the bullet that killed the shop owner, Hall. F240

- It is reasonable to conclude that Westley more likely than not "switched places" and switched roles with his co-party Henry in his statement to police because Westley believed at that time that a bullet from his .357 pistol caused the shop owner's death. F241

- Reasonably competent counsel with the amount of experience of Westley's lead

counsel would have seen that a reasonably sound strategy for defending Westley's admission that he was armed with a .22 caliber firearm, was that he switched places with his co-defendant in his written statement to avoid being identified as the actor who he believed at that time had fired the fatal shot. F242

- The trial strategy and defense that Westley might have been a liar but was not the killer, was consistent with the physical evidence, legally and ethically supportable and could have been presented to the jury without the need to put Westley on the stand to testify. F243-45

2. Counsel's failure to attempt to prevent the admission of victim impact evidence and argument during the guilt\innocence phase of Westley's trial.[7]

- Although for more than ninety years the Texas courts have held improper the admission of victim impact testimony during the guilt\innocence phase like that proffered by the State in Westley's case, Westley's trial counsel did nothing to prevent or object to its introduction or argument based upon that evidence. F110, 124-35, 213, 223, C71-76

- The conduct of Westley's trial counsel in failing to object to the admission of victim impact testimony and argument at the guilt\innocence phase of the case was neither sound trial strategy nor consistent with the conduct of any reasonably competent defense counsel. F113-15, 120, 135, 228-29, C77-80

3. Counsel's failure timely to request an anti-parties charge.[8]

- During the guilt\innocence phase of trial, the jury was instructed on the law of parties. F188

- During the punishment phase of the trial, the court failed to instruct the jury not to consider the law of parties. F189

- Westley's counsel failed to object to the omission of an anti-parties instruction to the jury before the punishment issues were submitted to the jury. F190

- Westley's counsel untimely submitted an anti-parties instruction, by waiting until after the jury had reached its verdict before doing so. F191,193

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7 The pertinent fact findings are contained in Appendix 2.

8 The pertinent fact findings are contained in Appendix 3.

- No sound strategic purpose could have been served by defense counsel waiting until after the jury had returned its verdict before submitting a request for an anti-parties instruction. F193

4. Counsel's improper jury argument. [9]

- During final argument in the punishment phase of the trial, Westley's defense counsel told the jury that he "would not insult your intelligence by telling you that Anthony Westley will rehabilitate himself." F195

- In discussing Westley's prior criminal history, Westley's defense counsel told the jury that Westley had been given several prior chances but that he had "blown it." F196

- Westley's counsel thought that the strategic value of his argument was premised on the need to admit that Westley "was not a hero" and not to "vouch for the ability of somebody to rehabilitate themself." F197

- No sound trial strategy could have been served by making the foregoing arguments inasmuch as defense counsel's assertion that Westley would never rehabilitate himself could only serve to bolster the State's argument that he was a continuing threat to society. F198

- After arguing that Westley was not being tried "for a case of felony dumb ass," defense counsel told the jury that it was impossible to "erase the scars of a robbery" or "the memory of a gun pointed in your nose or to your head and someone telling you 'Give me your money, motherfucker,'" even though Westley did not use this type of language during the primary offense. F199

- Westley's counsel contended that the strategic value of making this type of argument was to make the jurors aware that being the victim of an aggravated robbery was not a "pleasant experience," and that this type of argument was calculated to make the jury more sympathetic to Westley. F200

- No sound trial strategy could have been served by making the foregoing type of argument as it could only serve to reinforce in the jurors' minds the gravity of the primary offense insofar as its deliberate nature was concerned and to bolster the State's argument that Westley was a continuing threat to society as well. F201

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9 The pertinent fact findings are contained in Appendix 4.

- During defense counsel's final argument in the punishment phase of Westley's trial, counsel continually bolstered the character of both the surviving victim and the decedent as well as the victims of the unadjudicated aggravated robberies. F202

- No sound trial strategy could have been served by defense counsel's argument inasmuch as it was not reasonably calculated to foster sympathy for Westley but instead opened the door for the State to respond with an otherwise improper victim-impact argument as well. F204

- During defense counsel's final argument in the punishment phase of Westley's trial, his counsel told the jury about a trip he allegedly took to the Fifth Ward section of Houston, where he stood an observed "all the Anthony Westleys" standing on the street corners drinking wine and "talking shit," wanting to see "who was in or out of the penitentiary, who was still hanging around on the corner." F205

- No sound trial strategy could have been served by making such an argument as it was not reasonably calculated to engender a sense of empathy for Westley in the eyes of the jury but instead fostered the message that he was a pariah on society who did little else but hang out on street corners "drinking wine and talking shit," assuming that he was not "still in the penitentiary." F207

C. Prosecutorial Misconduct

1. Suppression of the February 13, 1985 Supplementary Offense Report.[10]

- On January 23, 1985, Deborah Eubanks Young testified for the prosecution at the aggravated robbery trial of Westley's co-defendant, Henry. F299

- During Henry's trial, Young, the only living eyewitness to the offense, testified that she had prior experience and familiarity with firearms. F71

- Young testified during Henry's trial that the weapon Westley had fired during the robbery had emitted a big boom and that she had seen fire coming out of the barrel when his gun was fired. F72

- During the Henry trial, the State's ballistics expert testified that a .357 or a .38 caliber weapon usually makes more noise when fired than a .22. F73

- During final argument in the Henry trial, the prosecutor told the jury that the evidence showed that Westley possessed a .357 or .38 caliber weapon, as opposed

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10 The pertinent fact findings are contained in Appendix 5.

to a .22. F74

- During the Henry trial, Harris County Deputy Alton Harris testified that moments after the offense, Young had told him that the weapon Westley had thrust in her face "looked like a .357" and that Young had physically identified Harris' .357 service revolver as looking like the weapon Westley had brandished. F75

- During the Henry trial, Harris County Sheriff's Detective Ronnie Phillips testified that Young had told him that the weapon Westley had thrust in her face was a "big" weapon which she "thought" was a .357.F76

- Although multiple shots were fired during the offense in which the shop owner had been killed, his death was caused by a .22 caliber bullet. F77

- Both Westley's prosecutor and his defense counsel agreed that the issue whether Westley was the triggerman who fired the fatal .22 caliber bullet that killed the shop owner was a "life and death issue."F78

- On February 13, 1995, Young was summoned to the Harris County District Attorney's office to meet with prosecutor John Kyles and the District Attorney's investigator, Jim Jackson, as part of the prosecution's pre-trial preparation for Westley's trial. F300

- Kyles testified that one of the purposes of this meeting was to show Young a photographic array of firearms to determine if she would be able to identify the type of firearm that Westley "was known to carry."F301

- The photographic array put together by Jackson and shown to Young at their meeting consisted of six guns, including a cowboy-style .22 caliber weapon, a .357 caliber weapon, and a derringer. F302
- Although cowboy style guns come in a number of different calibers, the only cowboy style gun in the photographic array shown Young was the .22 caliber model. F304

- After viewing the photographic array, Young identified what was eventually admitted at Westley's trial as State's Exhibit 17 [AX21] as a photograph of a weapon "just like" the one Westley had used. F305

- When the State had previously offered and had admitted the same photograph at Henry's trial, the State's ballistics expert had identified the gun depicted in SX17 as being either a .357, a .38, or a .22 caliber firearm. F306

- During Westley's trial, the same State ballistics expert identified the gun depicted in the photograph as a .22 caliber Ruger style single action revolver. F307

- After examining the report of the State's ballistics expert from Westley's trial, Floyd McDonald, Westley's habeas expert on firearms and ballistics, concluded that the weapon depicted in SX17 could not have been the weapon that fired the fatal shot in Westley's case, because a Ruger style revolver has six "lands and grooves" and the bullet that killed the decedent had eight "lands and grooves." F308

- McDonald's conclusion is consistent with the fact that the computer search conducted by the State's ballistics expert to determine what weapon could have fired the fatal shot did not include the Ruger that expert had identified as SX17 at Westley's trial. F309

- Although he did not disagree with the testimony of the State's expert at Westley's trial, McDonald pointed out that it would be extremely difficult to determine from a side view alone whether SX17 was a .22 or a .357 caliber weapon. F310

- After Young picked SX17 out of the photographic array, she was asked by Kyles whether she knew the type and caliber of the weapon she had just identified as having been used by Westley. F311

- In response to Kyles' inquiry, Young stated that the weapon that Westley possessed during the commission of the primary offense was a "large caliber weapon, either a .38 or .357 caliber" and that she "knew it was larger than a .22 caliber." F312

- The statements Young made in the presence of Kyles and Jackson were memorialized in a document titled "Supplementary Offense Report," which was admitted into evidence at the state habeas evidentiary hearing as AX49. F313

- On February 25, 1985, the original trial court granted a portion of defense counsel's motion for discovery and ordered the production of "Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt." (emphasis added by state district court) F314

- At the state habeas evidentiary hearing, Westley's trial counsel initially testified that the prosecution never provided him with a copy of AX49 prior to Westley's trial. Westley's counsel later stated that he might have seen AX49 if it had been in the State's file. Westley's counsel then reaffirmed his earlier testimony that he had never seen the exhibit, while acknowledging that the passage of time made it possible that he was simply unable to remember if in fact he had ever seen it. F315, 318

- Westley's counsel testified at the state habeas evidentiary hearing that it would have been extremely helpful to have had AX49 at Westley's trial, since it not only would have been useful for impeaching Young, but also would have generally discredited

the State's theory of the case. That document also would have been helpful during the punishment phase of Westley's trial in convincing the jury that the third special issue should be answered in the negative. F316-17

- Whether or not Westley's trial counsel had seen AX49 before Westley's trial, the record of that trial reveals that his counsel never used it during his cross-examination of Young or at any other time. F319

- The record of Westley's trial neither reflects that his counsel asked for or was furnished a copy of AX49. F320

- Had the State furnished Westley's counsel with a copy of AX49 or had his counsel exercised due diligence to obtain it as a prior statement of the witness during his cross-examination of Young, he would have been able to elicit before the jury the fact that only one cowboy style gun had been included in the array as well as the difficulty in distinguishing between Ruger style .22 and .357 caliber weapons based solely on a side view in a photograph. F321

- Had Westley's trial counsel been furnished with the testimony from the *Henry* trial that moments after the primary offense, Young had identified Alton Dickey's .357 pistol as the type of weapon Westley had used, he would have been able to elicit before the jury that such an identification was infinitely more reliable than that obtained from the photographic array viewed by Young and memorialized in AX49. F322

- Had the State furnished Westley's counsel with a copy of AX49 or had his counsel exercised due diligence in obtaining it, he would have been able to use it to elicit before the jury, either through cross-examination of the State's ballistics expert or through his own expert, that the weapon portrayed in SX17 could not have fired the fatal .22 caliber shot, a critical fact that Westley's counsel never made the jury aware of during Westley's trial. F323

2. Creation and use of false and misleading testimony through a misleading photo identification. [11]

- In light of the State's expert's prior trial testimony that the gun depicted in SX17 could have been a .22, .357 or a .38 caliber handgun, the prosecutor admitted that it was somewhat misleading for the State to have informed the jury in Westley's case that the gun in the photograph was a .22 caliber weapon. F326

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11 The pertinent fact findings are contained in Appendix 6.

- The prosecutor admitted that in light of the State's expert's prior testimony that SX17 could have been any one of three different caliber handguns, every State's witness who identified SX17 as being like the weapon Westley possessed, might have been corroborating the earlier identification of Westley's gun as a .357. F327

- The prosecutor admitted that he used SX17 to make the point that Westley had a .22 caliber handgun and that he used the State's expert's testimony [that the gun depicted was a .22 caliber weapon] to drive home this point to the jury in Westley's case. F328

- No member of the prosecution team ever revealed to Westley's defense counsel that the photograph of the gun depicted in SX17, which was used to advance the contention that Westley fired the fatal .22 caliber bullet, was equally consistent with being a .357 caliber handgun. F329

- Even if he had been informed by the State's expert of the fact that the photograph he used to depict a gun like Westley's was equally consistent with both a .22 and .357 caliber pistol, the prosecutor testified that he would not have felt compelled to bring that fact to the attention of Westley's counsel, since he felt it was incumbent on those counsel to "investigate exactly what type of weapons those [in the photographic array] were." F330

- Nor did the prosecutor feel it was his responsibility to inform defense counsel of the prior testimony of the State's ballistics expert that SX17 could have been a .22, a .38, or a .357 caliber handgun, "[a]s long as they were aware that Mr. Anderson was going to be our expert, and as long as they had the opportunity to view our exhibits." F331

- The prosecutor admitted that the fact that the State's expert had previously testified during the *Henry* trial that SX17 could have been a 22, a .38, or a .357 caliber handgun should have been brought to the jury's attention in Westley's trial. F332

- The prosecutor admitted that although Young was never asked, and so did not testify whether Westley had a .22 caliber weapon, he had her describe Westley's firearm as a cowboy-style gun before getting her to commit that it looked like SX17. F333

- Although the ballistics report conducted by the State's expert and subsequently analyzed by Westley's habeas expert revealed that the Ruger .22 depicted in SX17 could not have fired the bullet that killed the decedent, the prosecutor stated that he would be "surprised" if this were correct. F334

- The prosecutor admitted that if it was true that the Ruger depicted in SX17 could not have fired the fatal shot, it would have been misleading to have told the jury that SX17 was in fact either the murder weapon or looked like the murder weapon. F335

- In urging the jury to find that Westley had fired the shot that killed the decedent, the prosecutor referred the jury to the testimony of the State's ballistics expert. F336

- The prosecutor also argued to the jury that Young had identified the gun Westley had threatened her with "as being a cowboy looking gun, a .22" F337

3. Failure to disclose inconsistent testimony from the *Henry* trial. [12]

- The State argued and adduced evidence at the *Henry* trial that Westley had used a .357 weapon during the armed robbery and that Henry had used and fired a .22 caliber weapon. F268-74, 276

- Even though the State called Harris County Deputy Alton Harris to testify at Westley's trial, it did not elicit from him the testimony he had earlier given during the *Henry* trial, when he reported that Young had told him immediately after the incident that Westley's gun looked like a .357 and that she had physically identified a .357 service revolver as looking like the gun Westley then had. F276-77

- Even though the State called Harris County Sheriff's Detective Ronnie Phillips to testify at Westley's trial, it did not elicit from him the testimony he had earlier given during the *Henry* trial, when he reported that Young had told him that Westley's gun was a "big" weapon that she "thought" was a .357. F278-79

- Both the prosecutor and defense counsel agreed that if only one juror had a reasonable doubt about whether Westley had used a .22 caliber weapon, he would have received a life sentence. F281

- During the *Henry* trial, Young had testified that both Henry and Westley had grabbed the decedent and scuffled with him at the back of the store near a fishtank. During Westley's trial, Young testified that Westley alone struggled with the decedent and claimed that she had observed Henry leaning against a counter. During Westley's trial, Young also claimed that Westley had hit the decedent's head against a fishtank, a claim she had not made during the *Henry* trial and one at odds with the medical examiners report. F282-85

- Westley's defense counsel was never apprised of any of the inconsistent testimony cited above from the *Henry* trial. F289

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12 The pertinent fact findings are contained in Appendix 7.

CONCLUSION

The prosecutor, defense counsel and state trial judge in Westley's capital murder trial each agreed that resolution of the triggerman issue in his case was determinative of whether Westley would live or die. A state special master, the state trial judge who presided over Westley's capital murder trial, a federal magistrate, and a distinguished federal appellate judge have each concluded that the integrity of that trial was irreparably compromised by the deficiencies of Westley's trial counsel and the accompanying misconduct by the state prosecution.

Westley's counsel implores the Governor to review the extensive state court fact findings from Westley's habeas corpus hearing and, if that review leaves the Governor with the same grave doubt about the fairness of Westley's trial that was experienced by eight of the state and federal judges who have previously reviewed Westley's case, then Westley requests that the Governor impart justice and exhibit mercy, by granting him a thirty day reprieve so that the Board of Pardons & Paroles may consider the newly-discovered of Westley's actual innocence.

Respectfully submitted,

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TEXAS BOARD OF PARDONS & PAROLES

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Applicant

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REQUEST FOR COMMUTATION OF DEATH SENTENCE
TO SENTENCE OF LIFE IMPRISONMENT

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TEXAS BOARD OF PARDONS & PAROLES

ANTHONY RAY WESTLEY,
Applicant

EMERGENCY SUPPLEMENT TO
REQUEST FOR COMMUTATION OF DEATH SENTENCE
TO SENTENCE OF LIFE IMPRISONMENT

Anthony Ray Westley ("Westley") is a Texas death row inmate whose execution is set on May 13, 1997. Westley has already requested that the Board of Pardons & Paroles recommend to the Governor of the State of Texas that his death sentence be commuted to life imprisonment without possibility of parole, for the reasons set forth in: (i) the detailed Findings of Fact, Conclusions of Law and Order of the State Criminal District Court that presided over his original capital murder trial; and (ii) the opinion of United States Circuit Judge Hal DeMoss, who has succinctly stated that "[i]f the state court findings in this case do not satisfy both the 'ineffectiveness' and 'prejudice' [requirements for ineffective assistance of counsel]. . . there is no such animal as an 'ineffective counsel' and we should quit talking as if there is." Westley v. Johnson, 83 F.3d 714, 729 (5th Cir. 1996)(DeMoss, J., dissenting).

Westley has now obtained sworn evidence establishing that he is innocent of the murder for which he is on the verge of being executed. Another participant in the 1984 armed robbery that resulted in Westley's capital murder conviction, John Dale Henry ("Henry"), has now confessed that *he*, and *not Westley*, actually fired the fatal .22 caliber bullet into the back of the

bait store owner who died during the robbery. *See* Appendix A for a true and correct copy of the Affidavit of Martha Dunbar, to whom Henry recently confessed, shortly after he was paroled from the Texas Department of Corrections.[1/] Henry's recent confession constitutes material, newly-discovered evidence of Westley's innocence that was unavailable at the time of Westley's criminal trial and at the time his original application for habeas corpus relief was considered by the judicial system.

When the newly-discovered evidence of Westley's actual innocence is reviewed along with the 101 pages of detailed findings of fact and conclusions of law that were made by the convicting court on October 14, 1991, after a lengthy evidentiary hearing, the Board of Pardons & Paroles should now conclude, as the special master, the convicting court, a federal magistrate, and Circuit Judge Hal DeMoss earlier did, that:

(a) Westley was denied effective assistance of counsel at trial due to numerous, material deficiencies occurring during the pretrial investigation, guilt-innocence, and the punishment phases of the trial.

(b) The State engaged in prosecutorial misconduct violative of Westley's due process rights, by failing to disclose *Brady* material in response to a discovery order, and by the prosecution's creation and presentation of false and misleading testimony regarding the crucial issue of whether Westley fired the weapon that killed the decedent, Frank Hall.

In light of the newly-discovered evidence that Westley did *not* shoot Mr. Hall, no rational juror could have found him guilty of capital murder beyond a reasonable doubt *and* no rational juror could have answered in the State's favor the special issues necessary to sentence him to death during

---

1 Martha Walker-Dunbar is the mother of one of Henry's children and was pregnant with Henry's child at the time of the murder robbery for which Westley is scheduled to be executed on May 13, 1997. See Appendix A.

the punishment phase. Westley's actual innocence of murdering Mr. Hall, when coupled with the profound procedural deficiencies in the conduct of both defense counsel and the prosecution, provide a compelling case for the Board to demonstrate that the commutation process in the State of Texas can in fact serve as a meaningful and final safeguard against the wrongful execution of innocent persons.

CONCLUSION

The prosecutor, defense counsel and state trial judge in Westley's capital murder trial each agreed that resolution of the triggerman issue in his case was determinative of whether Westley would live or die. A state special master, the state trial judge who presided over Westley's capital murder trial, a federal magistrate, and a distinguished federal appellate judge have each concluded that the integrity of that trial was irreparably compromised by the deficiencies of Westley's trial counsel and the accompanying misconduct by the state prosecution. Now, on the eve of Westley's execution, the actual guilty party has finally stepped forward and admitted that he, rather than Westley, was responsible for the murder for which Westley is about to be executed.

In light of the newly-discovered evidence that Westley was wrongfully convicted of shooting Mr. Hall, Westley's counsel implores the members of the Board of Pardons and Paroles to review that new evidence along with the extensive state court fact findings from Westley's habeas corpus hearing for yourselves and, if that review leaves you with the same grave doubt about the fairness of Westley's trial proceedings that was experienced by the state and federal judges who have previously reviewed Westley's case, then Westley requests that you impart justice and exhibit mercy, by recommending to the Governor that his death sentence be commuted to a life sentence without possibility of parole.

Respectfully submitted,

By:_____
Barry Abrams

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NO. 401695-A

EX PARTE	§	IN THE DISTRICT COURT OF
ANTHONY RAY WESTLEY,	§	HARRIS COUNTY, T E X A S
APPLICANT	§	339TH JUDICIAL DISTRICT

AFFIDAVIT OF MARTHA A. WALKER-DUNBAR

THE STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Martha A. Walker-Dunbar who, being by me duly sworn, deposed as follows:

1. My name is Martha A. Walker-Dunbar. I am over eighteen years old, of sound mind, capable of making this Affidavit, have personal knowledge of all of the facts stated in this Affidavit, and the facts are all true and correct.

2. In 1984 I knew Lee Edward ("Tyrone") Dunbar, John Dale Henry and Anthony Ray Westley. In 1984 I was married to Tyrone Dunbar. At the time of Tyrone's death in April 1984, I was pregnant with a child fathered by John Dale Henry. I then knew Anthony Ray Westley, because he was a friend of John Dale Henry's sister.

3. In April 1984, my husband Tyrone owned a .25 caliber automatic pistol, John Dale Henry owned a .22 caliber pistol and Anthony Ray Westley owned a .357 caliber pistol.

4. John Dale Henry has recently been released on parole from his earlier conviction for the aggravated robbery that took place in April 1984 when my husband, Tyrone, was killed. I understand that Anthony Ray Westley was convicted of capital murder for the death of a Mr. Frank Chester Hall, who was shot and killed during the April 1984 robbery in which my husband was killed.

5. Since being paroled in the last several months, John Dale Henry has gotten in touch with me with the request to visit his daughter -- the child that I was then pregnant with in April 1984. During our conversations since the time of his recent parole, John Dale Henry has told me several different times that he, not Anthony Ray Westley, shot Frank Chester Hall. John Dale Henry has said that he shot Frank Chester Hall in the back and that Mr. Hall then turned and shot him (Henry). John Dale Henry has specifically told me that he (Henry) killed Mr. Hall and that Anthony Ray Westley did not do so.

6. When I recently learned this information from John Dale Henry and then learned of Anthony Ray Westley's May 13, 1997 execution date, I contacted Anthony Ray Westley's lawyers a week and a half ago with this information, because I do not want to see an innocent man executed (Westley) for a murder he did not commit, while the guilty man walks free (Henry) -- even if that man (Henry) is the father of one of my children.

Further, Affiant saith not.

_____
Martha A. Walker-Dunbar

SUBSCRIBED AND SWORN TO BEFORE ME on April 10, 2001.

_____
Notary Public in and for The
State of T E X A S

HONORABLE GOVERNOR GEORGE BUSH

ANTHONY RAY WESTLEY,
Applicant

EMERGENCY REQUEST FOR REPRIEVE
OF DEATH SENTENCE

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Appendix A - Affidavit of Martha Ann Walker-Dunbar

1. State court findings of fact relating to "counsel's failure to investigate and present evidence on a crucial line of defense in Westley's capital murder case -- whether or not Westley was the triggerman who killed the shop owner murdered in the course of an armed robbery" and corresponding table of supporting record references.

2. State court findings of fact relating to "defense counsel's failure to object to the State's use of victim impact evidence at trial and during final argument" and corresponding table of supporting record references.

3. State court findings of fact relating to "defense counsel's failure to request an anti-parties charge" and corresponding table of supporting record references.

4. State court findings of fact relating to "defense counsel's final argument during the punishment phase of the applicant's trial" and corresponding table of supporting record references.

5. State court findings of fact relating to the "non-disclosure of the supplementary offense report" and corresponding table of supporting record references.

6. State court findings of fact relating to "the prosecution's misleading use of State's Exhibit 17" and corresponding table of supporting record references.

7. State court findings of fact relating to "the State's failure to disclose inconsistent testimony from the Henry trial" and corresponding table of supporting references.

8. State court findings of fact relating to "the unconstitutionality of the system for the appointment of counsel for indigent defendants in Harris County" and corresponding table of supporting record references.

RECORD REFERENCES AND ABBREVIATIONS

Three different evidentiary records are referenced in Westley's Emergency Request for Reprieve of his death sentence to life imprisonment: (1) the record of the state court evidentiary hearing that took place as part of his state court habeas corpus proceedings; (2) the record of Westley's original capital murder trial; and (3) the record of the trial of Westley's co-party, John Dale Henry. Reference is also made to the state court findings of fact made by the state habeas trial court.

True and correct copies of the state trial court's pertinent Findings of Fact, Conclusions of Law and Order of the Court ("Findings, Conclusion & Order") have been reproduced for the Governor and grouped behind separately labeled tabs corresponding to Westley's grounds for relief in Appendices 1-8. In each instance, a table has also been supplied that references portions of the state court record that support each finding. For ease of reference in these proceedings, the state trial court's findings of fact and conclusions of law were renumbered consecutively. State trial court findings are referenced as "F1," "F2," and so on; state trial court conclusions are referenced as "C1," "C2" and so on. Pertinent findings and conclusions also

The statement of facts from the state court evidentiary hearing shall be referred to by volume and page as "SF__, __". Petitioner-applicant's evidentiary hearing exhibits shall be referred to as "AX"; Court's exhibits as "CX"; and State's exhibits as "SX." The statement of facts from the Henry trial shall be referred to as "HSF ___, ___." The statement of facts from the Westley capital murder trial shall be referred to as Westley "WSF ___, ____."

HONORABLE GOVERNOR GEORGE BUSH

ANTHONY RAY WESTLEY,

Applicant

EMERGENCY REQUEST FOR REPRIEVE OF DEATH SENTENCE

Anthony Ray Westley ("Westley") is a Texas death row inmate whose **execution is set on May 13, 1997. If that execution is carried out, Westley will die for a murder he did not commit.** Another man, John Dale Henry ("Henry"), has recently confessed that *he*, and *not Westley*, actually committed the murder for which Westley will be executed at 6:00 p.m. tomorrow night.[1] **Westley respectfully prays that Governor Bush exercise his power under Tex. Const. art. IV, §11 to grant a thirty day reprieve, so that he may bring this newly-discovered evidence of his actual innocence before the Texas Board of Pardons & Paroles.** Absent such a reprieve, Westley will be executed by the State without any opportunity to bring the evidence of his actual innocence before that Board.

Henry's recent confession constitutes material, newly-discovered evidence of Westley's

[1] *See* Appendix A for a true and correct copy of the Affidavit of Martha Walker-Dunbar, to whom Henry recently confessed, shortly after he was paroled from the Texas Department of Corrections. Dunbar is the mother of one of Henry's children and was pregnant with Henry's child at the time of the murder robbery for which Westley is scheduled to be executed on May 13, 1997.

innocence that was unavailable at the time of Westley's criminal trial, at the time his original application for habeas corpus relief was filed on October 12, 1989, and at the time that the Texas Board of Pardons & Paroles denied his earlier request that his death sentence be commuted. Even before the evidence of Henry's confession was uncovered, four different conscientious state and federal judicial officials concluded that Westley had been denied a fair trial due to both ineffective assistance of counsel and prosecutorial misconduct. Highly-respected United States Circuit Court Judge, Honorable Hal De Moss, succinctly summed up Westley's plight when he wrote that that if the facts of Westley's case did not establish prejudicial constitutional error, "there is no such animal" and we should stop talking as if there is." *Westley v. Johnson*, 83 F.3d 714, 729 (5th Cir. 1996).

* * *

Unless a reprieve is granted, the State of Texas will execute Westley without his having had the opportunity to present to the Board of Pardons & Paroles the substantial issues that bear directly on his innocence of the crime for which the State seeks to put him to death and on his eligibility for the death penalty. Accordingly, as set out in greater detail below, Westley respectfully requests that the Governor stay his execution so that the Texas Board of Pardons & Paroles may first take into account newly-discovered evidence establishing that Henry, not Westley, is guilty of the murder for which Westley is scheduled to die.

I.
STATEMENT OF THE CASE

The State of Texas indicted and convicted Westley of capital murder for allegedly shooting a bait store owner with a .22 caliber pistol during the course of an armed robbery. (F1, 4, 6, 59-60). In the earlier trial of another participant in the robbery, John Dale Henry ("Henry"), the

State had both argued and adduced evidence that Henry, rather than Westley, had been the triggerman during the robbery and that Westley had carried and fired a .38 or .357 pistol that could not have fired the fatal shot. (F60, 69-77, 91-102). Both the prosecutor in Westley's trial and his court-appointed defense counsel agreed that whether Westley was the "triggerman" who fired the fatal .22 bullet that killed the shop owner was the "life and death issue" in his trial, i.e., it determined whether Westley received a life or death sentence for his role in the robbery. (F78,79). The state habeas court who presided over Westley's criminal trial likewise agreed. Id.

Westley, a 23 year old Black man with an IQ of 73, who functioned at the level of the lowest five percent of the population, participated in a robbery of a bait store clerk in April, 1984. (AX54, 57, F179-80). During that robbery, the store owner was killed by a gunshot in the back with a .22 caliber bullet. (AX41). After being shot in the back, the store owner bled profusely from the mouth and collapsed before dying. (AX22,23). Both before, during and after the robbery, Westley was seen by eyewitnesses who reported that he carried a .357 caliber cowboy-style pistol. (AX24-26). A .357 caliber weapon cannot fire a .22 caliber bullet. Hence, if Westley had and fired a .357 weapon during the robbery, he could not have been the triggerman who shot the .22 bullet that killed the store owner. (F237).

After the robbery, Westley reportedly was overheard by some of his acquaintances as having said that he had shot a man in the face with his .357 pistol. (AX24-26). It was later learned, however, that although the victim had bled from the mouth after being shot, he had in fact been shot in the back with a .22 caliber bullet, not in the face with a .357 or .38 caliber bullet that could be fired from a .357 caliber weapon. (AX41). Thus, to the extent that Westley had believed that he had shot the store owner in the face with a .357 weapon, he had been mistaken.

(F240-41).

After the robbery and after he had heard that the police were looking for him, Westley went with his father to the police, turned himself in, was interviewed, and ultimately signed a written statement. (AX54, WSF DX6). When Westley gave his statement, the autopsy of the victim had not yet been completed and the caliber of the weapon that had shot the fatal bullet was unknown.(F240, AX41). In his statement, Westley admitted participating in the robbery, but did not admit shooting the store owner. (WSF DX6). While Westley acknowledged that he had participated in the robbery of the store clerk, he attributed the primary role in the robbery to Henry. (Id.) That account contradicted the eyewitness testimony of the store clerk, Debra Young, who said that Westley, rather than Henry, had played the lead role in confronting her. (HSF II, 28-57). In his statement, Westley also claimed that during the robbery he had carried a .22 caliber pistol that looked like a cowboy gun. (WSF DX6). This, too, contradicted the testimony of the eyewitness Young at the Henry trial, who stated that she had seen Westley with a large cowboy-style pistol that made a sound like a big boom when fired, shot fire out of the barrel, and appeared to be a .357 caliber weapon. (HSF II, 331-34, 50-51).

In other words, in his statement, Westley portrayed his role and weapon in the robbery contrary to the eyewitness' testimony. If one were to assume the truth of the eyewitness Young's testimony, in his statement Westley appeared to "switch places and switch guns" with his cohort, Henry. (F240-41). The State's investigators apparently agreed. At Westley's trial, the State affirmatively argued and adduced evidence that not everything that Westley had said in his statement to the police had been true. (F215-17, 219).

Westley reportedly gave conflicting accounts to his two defense counsel about the caliber

of the pistol he had carried during the robbery: he told one he had carried a .22 caliber pistol, as he had said in a statement to the police; he told another that he had carried a .357 pistol. (SFVI, 255-57, II, 104). Westley's claim to have carried a .22 contradicted the statements and testimony of all witnesses who had seen him with a weapon before or during the robbery. (HSF II, 331-34, 50-51; AX24-26; F240-41) His claim to have had a .357 caliber weapon was corroborated by all such evidence. Id.

Despite the fact that their client had given them two differing versions of events, one inculpatory and one exculpatory, Westley's counsel opted for the one that implied guilt and failed even to investigate the one that could establish his innocence of the charge that he had been the triggerman. In so doing, Westley's counsel forfeited the opportunity to present the crucial defense on the life and death issue of who the triggerman actually was, and did not act in accordance with nationally-recognized standards for criminal defense counsel. See ABA Standards of Criminal Justice (2d ed.), "The Defense Function," ¶4-4.1 & corresponding commentary, Duty to Investigate.

The best evidence of the utter failure of Westley's trial counsel to address in a meaningful fashion the crucial issue in the trial is their own testimony[2]:

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[2] The system for appointment of counsel for indigent capital defendants in Harris County at the time of Westley's trial did not impose any uniform minimum standards of competency for appointed counsel and did not impose any restrictions on the volume of cases counsel could handle. (F374). See Appendix 8 for pertinent findings. (Kyles, SF III, 54, 57; Schaffer, SF VII, 132-33). Instead, the appointment process allowed arbitrary and standardless appointment decisions by each criminal district judge. Id. As a consequence, the quality of counsel appointed in capital cases was an arbitrary function of whatever court a case was randomly assigned to and the individualized practice of each judge who made such

Question to Mr. Mock:

I'm asking you for an outline or a nutshell of your strategy to show that Anthony Ray Westley was not the shooter.

Answer:

I really didn't have one. The ballistics showed that the bullet came from the gun fired by Anthony Westley.[3]

(F82)(SF I, 126).

---

an appointment. (F375). Moreover, under that system, appointed counsel were paid for court appearances and were not directly compensated for out of court time devoted to factual investigation of their case, legal research regarding the controlling issues, or consultation with experts. (F376). (Alvarez, SF II, 87).

Not surprisingly, but "[u]nfortunately, the justice system got only what it paid for." Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992). Westley's appointed trial counsel consisted of a lead lawyer engaged in a high-volume trade of appointed cases who had been cited five times during the period of Westley's representation for failing to meet required court deadlines, had been arrested for contempt of court during the jury selection in Westley's case, maintained no library regarding capital or criminal law legal developments, claimed to keep abreast of current legal developments by reading in the wee hours of the morning, failed to conduct any meaningful investigation into the key factual issues in the case, failed to consult any expert regarding key issues on which he was uninformed, and was well-known to drink daily after work on an "above-average" basis. (F208-14, 377-80). (Mock, SF I, 28, 30, 63, 65, 143; SF VI, 161-69, 249-50, 271-73; Kyles, SF III, 69, 71). Westley's second-chair lawyer had no capital litigation experience before or since his trial. (F86). (Alvarez, SF II, 77).

Against this backdrop, it is hardly surprising that the appointed counsel failed to perform their responsibility in capital litigation competently or, as Mr. Mock so colorfully put it when questioned about the number of times that the courts had found his legal representation lacking, "[S]hit happens; it just happens." (F380). (Mock, SF I, 63).

[3] But see R. 256-71, which detail that: (i) the evidence adduced by the State at the Henry trial established that the bullet that killed Hall could not have come from the gun fired by Westley; and (ii) the gun the State claimed was like the one Westley fired, could not have fired the fatal bullet.

Question to Mr. Mock:

[T]ell me what evidence existed at the time Mr. Westley's case was tried that he did not fire the fatal shot.

Mr. Mock:

May I have a minute, your Honor?

The Court:

Yes, sir.

Answer:

None sir. None. I was just reenacting the scene in my mind and there is none.

(F84)(SF I, 144).

Question to Mr. Alvarez:

Did you or Mr. Mock, prior to the trial of Westley's case, talk about your strategy? Did you have a strategy, sort of an overall outline of how you were going to attack the defense of the case, how you were going to present evidence, the theme of the case, that sort of thing?

Answer:

I didn't have. I mean Mr. Mock never talked to me about a strategy. I wasn't experienced enough to have one. You know, I just -- we just started to trial.

Mr. Mock -- and again, I don't want to sound like I'm trying to put it all on him -- but the thing is that he was the experienced attorney. I didn't know what to do, to tell you the truth.

(SF II, at 115). See (F85-86).

Westley's counsel had no ballistics or firearms training or experience and sought no independent help from any expert in those fields. (F87). Westley's counsel made no attempt to familiarize themselves with the State's forensic testimony and argument at Henry's earlier trial that Henry, rather than Westley, had fired the fatal shot. (F65-68). Nor had the State informed

Westley's counsel of the evidence from the Henry trial that was favorable to Westley (F286-89). As a result, Westley's counsel neither knew of the fundamental inconsistency in the State's evidence and position nor were they in a position to reveal its incredulity to the jury. (F65-68, 104-05, 285-89). Westley's counsel have acknowledged that they were unaware of the available evidence that Westley had not been the triggerman and had no strategy for asserting that defense on his behalf. (F8-86; SF I, 144; II, at 115). The state habeas court, the same court that had presided over Westley's criminal trial, found that the resulting trial "strategy" of "confusion" and "speculation" was not in fact a sound trial strategy and was tantamount to no trial strategy at all. (F106).

After Henry's trial, but before Westley's trial, the State obtained and suppressed a sworn statement from the only eyewitness to the shooting, in which that eyewitness had identified a photograph of a cowboy-style pistol as being "just like" the one Westley had used and then testified under oath that she "knew [that the weapon used by Westley] was larger than a 22 caliber." (AX49). That statement constituted material, non-cumulative evidence because:

(i) in it the sole eyewitness to the shooting testified clearly and unequivocally that she "knew" that Westley's gun was a larger caliber weapon than the murder weapon -- at the very time the prosecution had created a photographic lineup for the sole purpose of establishing the type of weapon Westley had carried during the robbery;

(ii) in contrast to similar, more equivocal statements that witness had made shortly after the shooting indicating her belief that Westley had a .357 caliber pistol rather than a .22 caliber pistol, the prosecution could not successfully impeach this statement on the ground that it had been made while the witness was under the influence of the immediate emotional trauma of the incident;

(iii) the statement corroborated the State's own ballistics evidence as well as all of the statements the prosecution had earlier obtained from the witnesses who claimed to have seen the type of pistol Westley carried;

(iv) the witness's certainty that Westley had not carried a .22 caliber pistol clearly and

unambiguously highlighted the misleading nature of the photograph of a cowboy-style pistol that the State used at trial to try to convince the jury that Wesley had in fact had a .22 caliber weapon; and

(v) production of that statement should have dramatically impacted Westley's counsel's pretrial preparation of his defense by unambiguously highlighting both the available triggerman defense and the State's attempted use of a misleading photograph to suggest that Westley had carried a .22 caliber pistol, when all of the evidence was to the contrary.

After suppressing this important evidence, at Westley's trial the State presented the same misleading photograph it had used when it took the eyewitness' statement, and argued that Westley, rather than Henry, had fired the .22 caliber pistol that killed shop owner. (F267-337; C198-208).

As indicated in the state fact findings and in the record of Westley's trial, the State's theory at Westley's trial was that Westley had fired the fatal shot that killed the bait store owner. The State advanced that argument in the face of eyewitness testimony at the earlier Henry trial about the appearance and sound of the gun Westley carried, the State's own ballistics evidence and the State's own analysis of the rifling or markings on the fatal bullet, all of which demonstrated that Westley could not have fired that shot.

The Gun's Appearance:

> At the Henry trial the eyewitness Young had described Westley's weapon as a "big gun" that had "fire coming out of the barrel" when fired and that the other robbers had had "little bitty guns." (HSF II, 33-34, 37-38, 50; F76, 102). Young also had identified Westley's weapon as a cowboy-style .357 pistol immediately after the robbery. (F75-76).
>
> In fact, there is no such thing as a "little bitty .357" and a .22 caliber pistol would not emit "fire" from the barrel when fired. (F94, 102).

The Gun's Sound:

> At the Henry trial the eyewitness Young had described Westley's gun as having emitted a big boom when fired. (HSF II, 50).

In fact, a .22 caliber pistol does not "boom"; it pops. (F100).

State's Ballistics Evidence:

The trajectory of .38 caliber bullets found at the scene (which can be fired by a .357 caliber pistol but not a .22 caliber pistol) could be traced back to where Young said that Westley was standing.(AX61). The State argued and adduced evidence of that fact at the Henry trial. (HSF II, 5-6, 222-37).

State's Evidence of Rifling:

The fatal bullet was a .22 caliber bullet. (F77). The state's analysis revealed that that

bullet could not be fired by a .357 pistol. (F78-79). The markings on that bullet could not have been made by any commonly-available cowboy-style .22 caliber pistol.(AX56, F96, 98).

State's Opening Statement & Argument at Henry Trial:

At the Henry trial, the state prosecutor told the jury the following in her opening statement and closing argument:

> "The law provides me with this opportunity to tell you what I believe the evidence will show in this case. . . .One man, the biggest man, pulled out what Debra calls a cowboy-style gun. . . .Anthony Westley was standing next to Debra actually getting the money and actually with a gun at her, turned and fired at Frank Hall. I believe the evidence will show that ammunition was a .38. One bullet goes through the photographs and falls by the fish tank. Another bullet ricochets and is found in the back storeroom." (AX51)
>
> "Immediately after an offense, what's the first thing, what's everybody looking for? They are trying to figure out who did it and trying to catch them before they get away. She [Debra Young] told Detective Phillips at the scene, three robbers with three guns. She told Officer Dickey, the very first officer on the scene, there were three robbers with three guns. He said, what did they look like? She said a .357. He pulled his gun out. That's what it looked like. It was right in my face. What did the other ones look like? One had a .25 and the other one had a small caliber handgun.
>
> While this man is standing behind the counter robbing Debra Young, Frank Hall walks in and at that moment this man right here, Anthony Westley, fires a bullet which goes through the picture wall and lands by the bait tank. He fires a second shot, he misses Frank. He misses him. Otherwise, Frank would probably have been shot around the head or somewhere in his lower body by this man standing over to his right. He misses Frank. Second one hits this door and ricochets back into the back storeroom. Then everybody starts shooting.
>
> Who shoots Frank Hall? Somebody there with a .22. It wasn't his own gun that shot him. It was somebody there with a .22. That means that either this man, Anthony Westley, had a .22 besides the .38 he used with Debra Young or this man, our defendant [Henry], had a .22, one or the other. . . . Isn't it interesting that the defendant takes the stand and says, I never shoot a handgun. I don't even have a handgun. We know that's not true. His own niece and own sister saw him a few months before with a .22.

> What do we know from the ballistics? And Mr. Skelton keeps minimizing it. You know why ballistics are important? Because physical evidence doesn't lie.
>
> His [Henry's] story is absolutely incredible. It doesn't fit the ballistics evidence. He offers no explanation. . . . The problem with the defendant's story is that you know he's lying because the physical evidence doesn't match his story."
>
> (HSF IV, 619-20, 624-27, 629).

Given those uncontroverted facts, how did the State succeed in convincing a jury that Westley had fired the .22 caliber pistol that was the murder weapon? That result occurred due to both:

- The failure of Westley's counsel to conduct any investigation into the testimony at the prior trial of his co-defendant or to hire a ballistics or firearms expert to assist in presenting the physical evidence demonstrating that it was impossible for Westley to have fired the fatal .22 caliber bullet; and

- The State's suppression of exculpatory evidence regarding the murder weapon and its creation and use of a materially misleading photograph to persuade the jury that Westley had in fact carried a .22 caliber pistol.

At the prior trial of Henry, the State used the following photograph to depict the murder weapon and its ballistics and firearms expert testified that the cowboy-style pistol shown from the side could variously have been a .22, .357 or .38 caliber gun. (SX17;AX21).

At Westley's trial, the State had the eyewitness identify that photograph as depicting a

cowboy-style pistol like that Westley had carried. This time, however, the State's ballistics and firearms expert testified that the weapon shown was a .22 caliber pistol. The State then argued to the jury that Westley had carried a .22 caliber pistol like that shown in the photograph. What was wrong with that?

Westley's counsel neither knew nor did the State reveal the following:

a. The manufacturer of the cowboy-style gun depicted in SX17 makes .22, .357, .41 and .44 caliber pistols that are indistinguishable when viewed from the side. (AX43, F93).

Thus, identification of SX17 as a pistol that looked like Westley's gun was not a reliable identification of what caliber gun he had fired. (F93, 326, 332).

b. Various manufacturers produce cowboy-style guns of differing calibers that are indistinguishable when viewed from the side. (AX43, F93)

c. After the Henry trial, the State took a supplemental statement from the eyewitness Young in which, at the very same time that she selected SX17 as a photograph that looked like the gun Westley carried, she positively reaffirmed that Westley's gun was a large caliber weapon, either a .38 or .357 caliber and that she "knew it was larger than a 22 caliber." (AX49).

d. The pistol depicted in SX17 could not have fired the fatal .22 caliber bullet, because the State's analysis of the "lands and grooves" or markings on that bullet proved that it had eight such markings, while the pistol shown to the jury would produce only six such markings. Moreover, no commonly available cowboy-style .22 caliber pistol could have fired the murder bullet because each produces a different number of "lands and grooves" than were found on the fatal bullet. (AX56, F96, 97).

Therefore, the State improperly misled the jury at Westley's trial into believing that Westley had carried and fired a cowboy-style .22 pistol like that depicted in SX17 and that that weapon had fired the fatal shot. Both of those propositions were demonstrably false and were contradicted by all eyewitness testimony and all physical evidence. Nevertheless, neither the State or Westley's counsel brought those facts to the jury's attention. The special master, the state trial

court, the magistrate and Circuit Judge DeMoss all concluded that under these circumstances, the adversary process on which our system depends to assure a just result, failed. (R. 33-35, 543-601).

THE COURSE OF WESTLEY'S APPEAL & LATER HABEAS PROCEEDINGS

The Texas Court of Criminal Appeals affirmed Westley's conviction and death sentence on direct appeal. Westley v. State, 754 S.W.2d 224 (Tex. Crim. App. 1988), cert. denied, Westley v. Texas, 492 U.S. 911 (1989). (F5-6). Westley filed a state petition for habeas corpus with the trial court that presided over his criminal trial. (F7). The state court appointed a special master who conducted a lengthy evidentiary hearing on Westley's petition and submitted extensive proposed findings of fact and conclusions of law to the trial court. (R. 134). The state court adopted the master's findings and conclusions as its own in accordance with the Texas procedure set out in Tex. Code Crim. Proc. art. 11.07. (R.33-35). Like the special master, the state trial court recommended to the Texas Court of Criminal Appeals that Westley be granted relief and afforded a new trial because:

(a) Westley had been denied effective assistance of counsel at trial due to numerous, material deficiencies occurring during the pretrial investigation, guilt-innocence, and the punishment phases of the trial; and

(b) The State had engaged in prosecutorial misconduct violative of Westley's due process rights, by failing to disclose Brady material in response to a discovery order, and by the prosecution's creation and presentation of false and misleading testimony regarding the crucial issue of whether Westley fired the weapon that killed the decedent. (R.134, 34-36).

The Texas Court of Criminal Appeals denied Westley relief summarily without so much as addressing or taking exception with any of the numerous fact findings supportive of the trial court's recommendation that habeas relief be granted. (R. 31).

Westley then filed a request for relief in federal court.(R.294). Both Westley and the State moved for summary judgment in the district court. (R.350, 365, 372, 516, 535, 539). The

magistrate to whom the motions were referred recommended that Westley's motion for summary judgment be granted on the basis of constitutionally ineffective counsel and prosecutorial misconduct and that the State's motion for summary judgment should be denied. (R. 540, 601). The district court rejected the Magistrate's recommendation and instead granted the State's motion for summary judgment and denied Westley's motion. (R. 760, 761). Westley timely perfected his appeal to Court of Appeals and the district court issued a certificate of probable cause. (R. 763, 765).

Two of the three Fifth Circuit panel members concluded that: (i) although Westley's trial counsel had been deficient in failing to investigate evidence bearing on what the state court found to be the "life and death issue" of whether he fired the fatal shot and in failing to object to prejudicial victim impact evidence; and (ii) the prosecution had suppressed evidence favorable to Westley in the form of a sworn statement by the only eyewitness to the shooting, who stated that she "knew" that Westley did not carry a .22 caliber gun capable of firing the fatal bullet, that conduct was neither "prejudicial" to Westley nor was the suppressed evidence "material." Westley v. Johnson, 83 F.3d 714 (5th Cir. 1996)). The third panel member, Judge DeMoss, dissented, stating that if the binding state court findings in this case did not establish constitutional error, "there is no such animal" and "we should stop talking as if there is." Id. at 729.

The unusual aspect of this case is that after the state trial court conducted a state habeas evidentiary hearing (in which ten live witnesses testified and roughly 100 exhibits were introduced, resulting in a nine volume record consisting of 1500 pages) that court made 230 separate findings of fact, exclusive of conclusions of law, which supported its ultimate recommendation that Westley was entitled to habeas relief.

Westley's case therefore is the atypical instance where a state habeas court has made numerous fact findings that support, rather than oppose, the criminal defendant's request for habeas relief. Notwithstanding the binding nature of those extensive state fact findings and its conclusion that Westley's trial counsel had been deficient and that the prosecution had withheld favorable evidence bearing on the life and death issue whether Westley had been the triggerman responsible for a death, however, the Court of Criminal Appeals failed to even discuss those findings or suggest why, in light of those facts, Westley was not entitled to a new trial.

All told, eight state and federal judicial officials have concluded that Westley has been denied a fair trial due to both his counsel's failure to assert the life and death defense that he was not the triggerman in a fatal shooting and the State's improper suppression of sworn testimony from the only eyewitness to the shooting that clearly and unambiguously established that defense; eight other state and federal judicial officials have concluded to the contrary.[4] At a minimum, then, Westley's case presents one of those rare circumstances when at least "grave doubt" exists whether the deficiencies of Westley's counsel and the related prosecutorial misconduct had a substantial and injurious effect on the integrity of the fact finding process in his trial. O'Neal v. McAninch, 513 U.S. ___, 130 L.Ed.2d 947 (1995). Under those circumstances, modern concepts of justice and mercy require that Westley's life be spared and that the Board of Pardons & Paroles be afforded the opportunity to consider his commutation request in light of the newly-discovered evidence of his innocence.

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[4] The state special master, the state trial judge who presided over Westley's original criminal trial, four members of the Texas Court of Criminal Appeals, the United State Magistrate to whom this matter was referred below, and United States Circuit Judge DeMoss each concluded that Westley is entitled to habeas relief.

GROUNDS FOR RELIEF

A. Actual Innocence

When, as is true in Westley's case, another person admits against his interest that *he* committed the criminal offense for which the defendant has been sentenced to death -- it is hard to fathom that more compelling evidence of actual innocence could possibly be adduced. *See, e.g., Rodriguez v. Holmes*, 963 F.2d 799 (5th Cir.1992)(previously convicted murderer who earlier plead guilty granted new trial after another person confessed to the murder); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir.1985)(successive federal habeas petition granted, based on new evidence in form of post-trial confession by third party companion who admitted being triggerman); *New York v. Nicholson,* 222 A.2d 1055 (N.Y. App. Div. 1996)(convicted murderer entitled to evidentiary hearing in post-conviction proceedings to consider post-trial confession of third party who admitted being triggerman, based on affidavit relating admission by witness other than declarant); *Jackson v. Florida*, 646 So. 2d 792 (Fla. Dist. Ct. App. 1995)(co-defendant's confession constitutes newly-discovered evidence that may support post-conviction relief).

There is no dispute on the record in this case that Westley's triggerman status was in fact a life and death issue at his trial. F78, 79. Both the prosecutor and defense counsel agreed that if only one juror had a reasonable doubt about whether Westley had used a .22 caliber weapon, he would have received a life sentence. F281 Indeed, the prosecutor even acknowledged that exculpatory evidence bearing on that issue would have affected his charging decision and, in some circumstances, could have resulted in dismissal of certain charges. (Kyles, SF III, 73, 90).

Not only have the prosecutor, the defense lawyers and trial court with personal familiarity with Westley's prosecution each reached this conclusion as a matter of fact -- as a matter of law,

"triggerman status" is material to resolution of two of the crucial sentencing issues in a capital prosecution, the issues relating to deliberateness and the probability of future dangerousness. *See, e.g., Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Jacobs v. Scott*, 31 F.3d 1319, 1326 & n.13 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 771 (1995)(first and second punishment special issues under Texas statute allow the jury to give mitigating effect to claimed "nontriggerman" status); *Harris v. Collins*, 990 F.2d 185, 189 (5th Cir.), *cert. denied*, 125 L. Ed. 2d 746, 113 S. Ct. 3069 (1993)(if jury believes capital defendant did not strike the fatal blow, that fact could support a negative answer to both the first and second punishment issues). *See also Bridge v. Collins*, 963 F.2d 767, 770 (5th Cir. 1992)("If the jury members believed that Bridge's accomplice killed the victim, then they could have answered 'no' to the first question . . . . If the jury members believed that Bridge did not shoot the victim, then they could have concluded that Bridge would not be a future threat.").

Creation of a reasonable doubt in the mind of a single juror regarding whether Westley possessed a .357 or a .22 during the robbery in issue probably would have saved Westley's life. (F281; Mock, SF I, 88-89; Schaffer, SF VII, 77-80). Thus, the newly-discovered evidence that Henry has admitted that he, and not Westley, was the triggerman bears directly on the crucial, life and death issue in Westley's case, directly supports his claim that he was innocent of shooting the bait store owner and would have precluded any rational juror from answering the capital sentencing issues in a manner that would have resulted in his death sentence.

Moreover, at the very least, the newly-discovered evidence of Henry's admission that he and not Westley was the triggerman who shot the bait store owner should, when considered against the backdrop of the existing factual record, create sufficient additional doubt about his guilt to warrant reconsideration of the ineffectiveness and prosecutorial misconduct claims that were earlier found meritorious by the state special master, the judge of the convicting court, the federal magistrate, and

Circuit Judge Hal DeMoss. The factual bases for those grounds are summarized below.

B. Ineffective Assistance of Counsel

1. Counsel's failure to investigate and present evidence on a crucial line of defense in Westley's capital murder case -- whether or not Westley was the triggerman who killed the shop owner murdered in the course of an armed robbery.[5]

- The State prosecutor, defense counsel, and trial judge who presided over Westley's trial each concluded that whether or not Westley was the triggerman was a life and death issue that likely would have affected the outcome of his trial. F78-79, 232-33

- The State argued and adduced evidence during the *Henry* trial that Westley's co-party Henry, rather than Westley, was the triggerman. F69-77

- The available ballistics evidence, eyewitness accounts, and independent witness statements each corroborated that Westley had and fired a .357 weapon during the robbery, not a .22 capable of having shot the bullet that killed the shop owner. F70-79, 97-102

- Westley's trial counsel were unaware of the evidence reflecting that Westley had not in fact been the triggerman who shot the shop owner and had no trial strategy to advance that defense. F81-86, 234-36, 239

- Westley's trial counsel failed to investigate and adduce the available evidence at trial indicating that Westley was not the triggerman. F65-67

- In view of the failure of Westley's trial counsel adequately to investigate the facts of his case, their resulting trial strategy of "confusion" and "speculation" was not in fact a sound trial strategy and was tantamount to no trial strategy at all. F106

- Reasonably competent counsel would have investigated and taken steps to adduce the available evidence indicating that Westley was not the triggerman. F68

- Despite their lack of firearms and ballistics expertise, Westley's trial counsel did not seek to retain a competent expert in that field to assist them. F87-89

- Reasonably competent counsel would have taken steps to obtain or at least consult

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5 The pertinent fact findings are contained in Appendix 1.

with an independent ballistics expert and Westley's counsel were deficient in failing to do so. F90

- If Westley's trial counsel had consulted with a competent firearms and ballistics expert[6], they could have adduced evidence at Westley's trial that:

  (a) Based upon the testimony of the witnesses regarding the objective appearance, sound and firing characteristics of Westley's gun and the available ballistics evidence, it was "almost obvious" that Westley had fired a .357 pistol on the occasion in question, rather than the .22 that killed Hall (F90-102). (McDonald, SF III, 229, 247, 251-252);

  (b) The State's ballistics expert had previously testified that the photograph of the gun identified by the witnesses at the Westley trial as Westley's gun could variously have been a .38 caliber, .357 caliber or .22 caliber weapon, which would have rendered all of the witnesses' testimony consistent with the proposition that Westley had a .357 rather than a .22 during the robbery. (F93, 326-27). (See Krocker, SF VI, at 80 and Kyles, SF III, 134);

  (c) The available ballistics evidence and the eyewitness Young's testimony demonstrated that the trajectory of .38 caliber slugs found in the bait shop could be traced back to the gun Westley had fired. (F101-02). Since a .22 caliber weapon cannot fire .38 caliber bullets, this, too, evidenced the fact that Westley had fired a .357 caliber weapon rather than the .22 that killed Hall. (Kyles, SF III, 86);

  (d) The gun depicted in the photograph used at the Westley trial (SX 17 and AX 21) could not readily be identified from the side as a .22. (F70, 93, 310, 326). Indeed, virtually identical models of the same gun are manufactured in varying calibers, including a .357 model that looks identical to a .22 when viewed from the side. (F93). (McDonald SF III, 207-08, 210, 211, 212-15, AX 43);

  (e) The Ruger pistol depicted in SX 17 (AX 21) could not, as a matter of physical fact, have fired the bullet that killed Hall because the number of "lands and grooves" on that bullet do not match the number of lands and grooves created by a Ruger pistol. (F96-98, 308-09). (McDonald, SF VII, 11-12);

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6 Floyd McDonald, former head of the Houston Police Department crime laboratory, gave uncontradicted expert testimony during Westley's state habeas evidentiary hearing on the subjects of firearms and ballistics.

(f) The eyewitness Young had previously identified an actual .357 weapon minutes after the incident as the type of gun Westley had used during the robbery. (F95, 276, 322). (Kyles, SF III, at 114 and AX 19); and

(g) No commonly available cowboy-style .22 pistol could have fired the bullet that killed Hall. (F96-98).The commonly available .22 weapons that could have fired the murder bullet did not look like cowboy-style guns (F96-98). (McDonald, SF III, 231-32).

- Westley's trial counsel did not elicit testimony at his trial encompassing the areas addressed by the firearms and ballistics expert during the state habeas evidentiary hearing, which evidence would have been consistent with and supportive of the notion that reasonable doubt existed as to whether Westley fired the .22 caliber bullet that killed the shop owner shot during the robbery in which he participated. F103

- Without the assistance of an independent ballistics expert, Westley's defense counsel were wholly incapable of presenting evidence like that adduced by the expert McDonald at the state habeas evidentiary hearing, even though that evidence was otherwise available to them and was evidence reasonably calculated to create a reasonable doubt in the mind of at least one juror that Westley did not fire the .22 caliber bullet that killed the shop owner. F104

- Westley's trial counsel were professionally unreasonable in failing to investigate, retain or consult with a ballistics expert to assist them and present evidence on a crucial line of defense in his capital murder case -- whether or not Westley was the triggerman who killed the shop owner murdered in the course of an armed robbery. That evidence was likely to create a reasonable doubt regarding whether Westley fired the fatal shot in the primary case. Thus, Westley's counsel's purported investigation of the facts in the primary case was so inadequate as to be outside the wide range of professional competence. F105

- At the time Westley gave police investigators a written statement in which he claimed to have carried a .22 caliber pistol, neither he nor the investigators then knew the caliber of the bullet that killed the shop owner, Hall. F240

- It is reasonable to conclude that Westley more likely than not "switched places" and switched roles with his co-party Henry in his statement to police because Westley believed at that time that a bullet from his .357 pistol caused the shop owner's death. F241

- Reasonably competent counsel with the amount of experience of Westley's lead counsel would have seen that a reasonably sound strategy for defending Westley's admission that he was armed with a .22 caliber firearm, was that he switched places

with his co-defendant in his written statement to avoid being identified as the actor who he believed at that time had fired the fatal shot. F242

- The trial strategy and defense that Westley might have been a liar but was not the killer, was consistent with the physical evidence, legally and ethically supportable and could have been presented to the jury without the need to put Westley on the stand to testify. F243-45

2. Counsel's failure to attempt to prevent the admission of victim impact evidence and argument during the guilt\innocence phase of Westley's trial.[7]

- Although for more than ninety years the Texas courts have held improper the admission of victim impact testimony during the guilt\innocence phase like that proffered by the State in Westley's case, Westley's trial counsel did nothing to prevent or object to its introduction or argument based upon that evidence. F110, 124-35, 213, 223, C71-76

- The conduct of Westley's trial counsel in failing to object to the admission of victim impact testimony and argument at the guilt\innocence phase of the case was neither sound trial strategy nor consistent with the conduct of any reasonably competent defense counsel. F113-15, 120, 135, 228-29, C77-80

3. Counsel's failure timely to request an anti-parties charge.[8]

- During the guilt\innocence phase of trial, the jury was instructed on the law of parties. F188

- During the punishment phase of the trial, the court failed to instruct the jury not to consider the law of parties. F189

- Westley's counsel failed to object to the omission of an anti-parties instruction to the jury before the punishment issues were submitted to the jury. F190

- Westley's counsel untimely submitted an anti-parties instruction, by waiting until after the jury had reached its verdict before doing so. F191,193

- No sound strategic purpose could have been served by defense counsel waiting until

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7 The pertinent fact findings are contained in Appendix 2.

8 The pertinent fact findings are contained in Appendix 3.

after the jury had returned its verdict before submitting a request for an anti-parties instruction. F193

4. Counsel's improper jury argument. [9]

- During final argument in the punishment phase of the trial, Westley's defense counsel told the jury that he "would not insult your intelligence by telling you that Anthony Westley will rehabilitate himself." F195

- In discussing Westley's prior criminal history, Westley's defense counsel told the jury that Westley had been given several prior chances but that he had "blown it." F196

- Westley's counsel thought that the strategic value of his argument was premised on the need to admit that Westley "was not a hero" and not to "vouch for the ability of somebody to rehabilitate themself." F197

- No sound trial strategy could have been served by making the foregoing arguments inasmuch as defense counsel's assertion that Westley would never rehabilitate himself could only serve to bolster the State's argument that he was a continuing threat to society. F198

- After arguing that Westley was not being tried "for a case of felony dumb ass," defense counsel told the jury that it was impossible to "erase the scars of a robbery" or "the memory of a gun pointed in your nose or to your head and someone telling you 'Give me your money, motherfucker,'" even though Westley did not use this type of language during the primary offense. F199

- Westley's counsel contended that the strategic value of making this type of argument was to make the jurors aware that being the victim of an aggravated robbery was not a "pleasant experience," and that this type of argument was calculated to make the jury more sympathetic to Westley. F200

- No sound trial strategy could have been served by making the foregoing type of argument as it could only serve to reinforce in the jurors' minds the gravity of the primary offense insofar as its deliberate nature was concerned and to bolster the State's argument that Westley was a continuing threat to society as well. F201

- During defense counsel's final argument in the punishment phase of Westley's trial, counsel continually bolstered the character of both the surviving victim and the decedent as well as the victims of the unadjudicated aggravated robberies. F202

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9 The pertinent fact findings are contained in Appendix 4.

- No sound trial strategy could have been served by defense counsel's argument inasmuch as it was not reasonably calculated to foster sympathy for Westley but instead opened the door for the State to respond with an otherwise improper victim-impact argument as well. F204

- During defense counsel's final argument in the punishment phase of Westley's trial, his counsel told the jury about a trip he allegedly took to the Fifth Ward section of Houston, where he stood an observed "all the Anthony Westleys" standing on the street corners drinking wine and "talking shit," wanting to see "who was in or out of the penitentiary, who was still hanging around on the corner." F205

- No sound trial strategy could have been served by making such an argument as it was not reasonably calculated to engender a sense of empathy for Westley in the eyes of the jury but instead fostered the message that he was a pariah on society who did little else but hang out on street corners "drinking wine and talking shit," assuming that he was not "still in the penitentiary." F207

C. Prosecutorial Misconduct

1. Suppression of the February 13, 1985 Supplementary Offense Report.[10]

- On January 23, 1985, Deborah Eubanks Young testified for the prosecution at the aggravated robbery trial of Westley's co-defendant, Henry. F299

- During Henry's trial, Young, the only living eyewitness to the offense, testified that she had prior experience and familiarity with firearms. F71

- Young testified during Henry's trial that the weapon Westley had fired during the robbery had emitted a big boom and that she had seen fire coming out of the barrel when his gun was fired. F72

- During the Henry trial, the State's ballistics expert testified that a .357 or a .38 caliber weapon usually makes more noise when fired than a .22. F73

- During final argument in the Henry trial, the prosecutor told the jury that the evidence showed that Westley possessed a .357 or .38 caliber weapon, as opposed to a .22. F74

- During the Henry trial, Harris County Deputy Alton Harris testified that moments after the offense, Young had told him that the weapon Westley had thrust in her face

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10 The pertinent fact findings are contained in Appendix 5.

"looked like a .357" and that Young had physically identified Harris' .357 service revolver as looking like the weapon Westley had brandished. F75

- During the Henry trial, Harris County Sheriff's Detective Ronnie Phillips testified that Young had told him that the weapon Westley had thrust in her face was a "big" weapon which she "thought" was a .357.F76

- Although multiple shots were fired during the offense in which the shop owner had been killed, his death was caused by a .22 caliber bullet. F77

- Both Westley's prosecutor and his defense counsel agreed that the issue whether Westley was the triggerman who fired the fatal .22 caliber bullet that killed the shop owner was a "life and death issue."F78

- On February 13, 1995, Young was summoned to the Harris County District Attorney's office to meet with prosecutor John Kyles and the District Attorney's investigator, Jim Jackson, as part of the prosecution's pre-trial preparation for Westley's trial. F300

- Kyles testified that one of the purposes of this meeting was to show Young a photographic array of firearms to determine if she would be able to identify the type of firearm that Westley "was known to carry."F301

- The photographic array put together by Jackson and shown to Young at their meeting consisted of six guns, including a cowboy-style .22 caliber weapon, a .357 caliber weapon, and a derringer. F302
- Although cowboy style guns come in a number of different calibers, the only cowboy style gun in the photographic array shown Young was the .22 caliber model. F304

- After viewing the photographic array, Young identified what was eventually admitted at Westley's trial as State's Exhibit 17 [AX21] as a photograph of a weapon "just like" the one Westley had used. F305

- When the State had previously offered and had admitted the same photograph at Henry's trial, the State's ballistics expert had identified the gun depicted in SX17 as being either a .357, a .38, or a .22 caliber firearm. F306

- During Westley's trial, the same State ballistics expert identified the gun depicted in the photograph as a .22 caliber Ruger style single action revolver. F307

- After examining the report of the State's ballistics expert from Westley's trial, Floyd McDonald, Westley's habeas expert on firearms and ballistics, concluded that the weapon depicted in SX17 could not have been the weapon that fired the fatal shot in Westley's case, because a Ruger style revolver has six "lands and grooves" and the

bullet that killed the decedent had eight "lands and grooves." F308

- McDonald's conclusion is consistent with the fact that the computer search conducted by the State's ballistics expert to determine what weapon could have fired the fatal shot did not include the Ruger that expert had identified as SX17 at Westley's trial. F309

- Although he did not disagree with the testimony of the State's expert at Westley's trial, McDonald pointed out that it would be extremely difficult to determine from a side view alone whether SX17 was a .22 or a .357 caliber weapon. F310

- After Young picked SX17 out of the photographic array, she was asked by Kyles whether she knew the type and caliber of the weapon she had just identified as having been used by Westley. F311

- In response to Kyles' inquiry, Young stated that the weapon that Westley possessed during the commission of the primary offense was a "large caliber weapon, either a .38 or .357 caliber" and that she "knew it was larger than a .22 caliber." F312

- The statements Young made in the presence of Kyles and Jackson were memorialized in a document titled "Supplementary Offense Report," which was admitted into evidence at the state habeas evidentiary hearing as AX49. F313

- On February 25, 1985, the original trial court granted a portion of defense counsel's motion for discovery and ordered the production of "Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt." (emphasis added by state district court) F314

- At the state habeas evidentiary hearing, Westley's trial counsel initially testified that the prosecution never provided him with a copy of AX49 prior to Westley's trial. Westley's counsel later stated that he might have seen AX49 if it had been in the State's file. Westley's counsel then reaffirmed his earlier testimony that he had never seen the exhibit, while acknowledging that the passage of time made it possible that he was simply unable to remember if in fact he had ever seen it. F315, 318

- Westley's counsel testified at the state habeas evidentiary hearing that it would have been extremely helpful to have had AX49 at Westley's trial, since it not only would have been useful for impeaching Young, but also would have generally discredited the State's theory of the case. That document also would have been helpful during the punishment phase of Westley's trial in convincing the jury that the third special issue should be answered in the negative. F316-17

- Whether or not Westley's trial counsel had seen AX49 before Westley's trial, the record of that trial reveals that his counsel never used it during his cross-examination of Young or at any other time. F319

- The record of Westley's trial neither reflects that his counsel asked for or was furnished a copy of AX49. F320

- Had the State furnished Westley's counsel with a copy of AX49 or had his counsel exercised due diligence to obtain it as a prior statement of the witness during his cross-examination of Young, he would have been able to elicit before the jury the fact that only one cowboy style gun had been included in the array as well as the difficulty in distinguishing between Ruger style .22 and .357 caliber weapons based solely on a side view in a photograph. F321

- Had Westley's trial counsel been furnished with the testimony from the *Henry* trial that moments after the primary offense, Young had identified Alton Dickey's .357 pistol as the type of weapon Westley had used, he would have been able to elicit before the jury that such an identification was infinitely more reliable than that obtained from the photographic array viewed by Young and memorialized in AX49. F322

- Had the State furnished Westley's counsel with a copy of AX49 or had his counsel exercised due diligence in obtaining it, he would have been able to use it to elicit before the jury, either through cross-examination of the State's ballistics expert or through his own expert, that the weapon portrayed in SX17 could not have fired the fatal .22 caliber shot, a critical fact that Westley's counsel never made the jury aware of during Westley's trial. F323

2. Creation and use of false and misleading testimony through a misleading photo identification. [11]

- In light of the State's expert's prior trial testimony that the gun depicted in SX17 could have been a .22, .357 or a .38 caliber handgun, the prosecutor admitted that it was somewhat misleading for the State to have informed the jury in Westley's case that the gun in the photograph was a .22 caliber weapon. F326

- The prosecutor admitted that in light of the State's expert's prior testimony that SX17 could have been any one of three different caliber handguns, every State's witness who identified SX17 as being like the weapon Westley possessed, might have been corroborating the earlier identification of Westley's gun as a .357. F327

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11 The pertinent fact findings are contained in Appendix 6.

- The prosecutor admitted that he used SX17 to make the point that Westley had a .22 caliber handgun and that he used the State's expert's testimony [that the gun depicted was a .22 caliber weapon] to drive home this point to the jury in Westley's case. F328

- No member of the prosecution team ever revealed to Westley's defense counsel that the photograph of the gun depicted in SX17, which was used to advance the contention that Westley fired the fatal .22 caliber bullet, was equally consistent with being a .357 caliber handgun. F329

- Even if he had been informed by the State's expert of the fact that the photograph he used to depict a gun like Westley's was equally consistent with both a .22 and .357 caliber pistol, the prosecutor testified that he would not have felt compelled to bring that fact to the attention of Westley's counsel, since he felt it was incumbent on those counsel to "investigate exactly what type of weapons those [in the photographic array] were." F330

- Nor did the prosecutor feel it was his responsibility to inform defense counsel of the prior testimony of the State's ballistics expert that SX17 could have been a .22, a .38, or a .357 caliber handgun, "[a]s long as they were aware that Mr. Anderson was going to be our expert, and as long as they had the opportunity to view our exhibits." F331

- The prosecutor admitted that the fact that the State's expert had previously testified during the *Henry* trial that SX17 could have been a 22, a .38, or a .357 caliber handgun should have been brought to the jury's attention in Westley's trial. F332

- The prosecutor admitted that although Young was never asked, and so did not testify whether Westley had a .22 caliber weapon, he had her describe Westley's firearm as a cowboy-style gun before getting her to commit that it looked like SX17. F333

- Although the ballistics report conducted by the State's expert and subsequently analyzed by Westley's habeas expert revealed that the Ruger .22 depicted in SX17 could not have fired the bullet that killed the decedent, the prosecutor stated that he would be "surprised" if this were correct. F334

- The prosecutor admitted that if it was true that the Ruger depicted in SX17 could not have fired the fatal shot, it would have been misleading to have told the jury that SX17 was in fact either the murder weapon or looked like the murder weapon. F335

- In urging the jury to find that Westley had fired the shot that killed the decedent, the prosecutor referred the jury to the testimony of the State's ballistics expert. F336

- The prosecutor also argued to the jury that Young had identified the gun Westley had

threatened her with "as being a cowboy looking gun, a .22" F337

3. Failure to disclose inconsistent testimony from the *Henry* trial. [12]

- The State argued and adduced evidence at the *Henry* trial that Westley had used a .357 weapon during the armed robbery and that Henry had used and fired a .22 caliber weapon. F268-74, 276

- Even though the State called Harris County Deputy Alton Harris to testify at Westley's trial, it did not elicit from him the testimony he had earlier given during the *Henry* trial, when he reported that Young had told him immediately after the incident that Westley's gun looked like a .357 and that she had physically identified a .357 service revolver as looking like the gun Westley then had. F276-77

- Even though the State called Harris County Sheriff's Detective Ronnie Phillips to testify at Westley's trial, it did not elicit from him the testimony he had earlier given during the *Henry* trial, when he reported that Young had told him that Westley's gun was a "big" weapon that she "thought" was a .357. F278-79

- Both the prosecutor and defense counsel agreed that if only one juror had a reasonable doubt about whether Westley had used a .22 caliber weapon, he would have received a life sentence. F281

- During the *Henry* trial, Young had testified that both Henry and Westley had grabbed the decedent and scuffled with him at the back of the store near a fishtank. During Westley's trial, Young testified that Westley alone struggled with the decedent and claimed that she had observed Henry leaning against a counter. During Westley's trial, Young also claimed that Westley had hit the decedent's head against a fishtank, a claim she had not made during the *Henry* trial and one at odds with the medical examiners report. F282-85

- Westley's defense counsel was never apprised of any of the inconsistent testimony cited above from the *Henry* trial. F289

CONCLUSION

The prosecutor, defense counsel and state trial judge in Westley's capital murder trial each agreed that resolution of the triggerman issue in his case was determinative of whether Westley would live or die. A state special master, the state trial judge who presided over Westley's capital

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[12] The pertinent fact findings are contained in Appendix 7.

murder trial, a federal magistrate, and a distinguished federal appellate judge have each concluded that the integrity of that trial was irreparably compromised by the deficiencies of Westley's trial counsel and the accompanying misconduct by the state prosecution.

Westley's counsel implores the Governor to review the extensive state court fact findings from Westley's habeas corpus hearing and, if that review leaves the Governor with the same grave doubt about the fairness of Westley's trial that was experienced by eight of the state and federal judges who have previously reviewed Westley's case, then Westley requests that the Governor impart justice and exhibit mercy, by granting him a thirty day reprieve so that the Board of Pardons & Paroles may consider the newly-discovered of Westley's actual innocence.

Respectfully submitted,

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NO. 401695-A

EX PARTE	¶	IN THE DISTRICT COURT OF
	¶	HARRIS COUNTY, TEXAS
ANTHONY RAY WESTLEY, Applicant	¶	339TH JUDICIAL DISTRICT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE COURT

On November 2, 1990, the Honorable Brian W. Wice was appointed as a Special Master in the instant case by the Honorable Norman Lanford, Presiding Judge of the 339th Criminal District Court of Harris County, Texas, acting on the authority of Article 11.07, Section 2(d), V.A.C.C.P. At the evidentiary hearing held in November of 1990, the Special Master afforded both the Applicant and the State of Texas a full and fair opportunity to present all evidence each party felt pertinent to the Applicant's Post-Conviction Writ of Habeas Corpus. The Special Master heard the testimony of ten witnesses and considered almost one hundred exhibits during the course of an extensive hearing which generated a nine volume record consisting of almost 1500 pages.

The Applicant advances some thirty-two grounds to support his request for a new trial and contends, inter alia, that he was denied the effective assistance of counsel at trial and that the State failed to disclose evidence favorable to the defense. For those reasons set forth below, the Court concludes that these claims are meritorious and accordingly recommends to the Court of Criminal Appeals that the Applicant be afforded a new trial.

I. INTRODUCTION

A. THE PROCEDURES AND BURDEN OF PROOF EMBODIED IN ARTICLE 11.07

CONCLUSIONS OF LAW

C1 1. The procedure set forth in Article 11.07, V.A.C.C.P., is the exclusive State felony post-conviction remedy available in Texas. Ex parte Brown, 662 S.W.2d 3 (Tex.Crim.App. 1983).

C2 2. The purpose of the writ of habeas corpus is simple--it is a process utilized to determine the lawfulness of confinement. Ex parte McGowen, 645 S.W.2d 286 (Tex.Crim.App. 1983).

C3 3. Habeas corpus is available to review only jurisdictional defects, or a denial of one's fundamental or constitutional rights. Ex parte Russell, 738 S.W.2d 644 (Tex.Crim.App. 1986).

C4 4. In seeking habeas corpus relief, it is the Applicant who bears the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Griffin, 679 S.W.2d 15 (Tex.Crim.App. 1984).

C5 5. It is axiomatic that under the procedure authorized by Article 11.07, supra, that if the trial court convenes a hearing, elicits testimony and thereby develops facts, the Court of Criminal Appeals is not bound by the trial court's findings and conclusions of law. Ex parte Adams, 707 S.W.2d 646 (Tex.Crim.App. 1986).

C6 6. It is incumbent upon the Court of Criminal Appeals to determine if the record developed supports the trial court's findings. Ex parte Young, 479 S.W.2d 45 (Tex.Crim.App. 1972).

C7 7. Although the Court of Criminal Appeals has the ultimate power to decide matters of fact in habeas corpus proceedings, if the trial court's findings of fact are supported by the record, they should generally be accepted by the Court. Ex parte Turner, 545 S.W.2d 470 (Tex.Crim.App. 1977).

C8 8. Where the ruling of a trial judge in a habeas corpus proceeding depends upon the existence or non-existence of a certain fact and the evidence is conflicting, it becomes the trial judge's duty to resolve this issue and unless it appears to the Court of Criminal Appeals that his finding is without support in the evidence, the Court will not interfere with the trial court's findings in this regard. Ex parte Moore, 126 S.W.2d 27 (Tex.Crim.App. 1939).

B. THE PROCEDURAL HISTORY OF THE INSTANT CASE

FINDINGS OF FACT

F1 1. The Applicant was indicted for the felony offense of capital murder in cause no. 401695, hereinafter referred to as the primary case, alleged to have been committed on April 13, 1984.

F2 2. On April 17, 1984, the trial court appointed Ron Mock and Frank Alvarez to represent the Applicant in connection with the trial of the primary case.

F3 3. The State was represented at trial by John Kyles and George Lambright.

F4 4. On May 9, 1985, the Applicant was found guilty of capital murder and after the jury answered the special issues submitted pursuant to Article 37.071, Section (b), V.A.C.C.P. in the affirmative, the trial court assessed the Applicant's punishment at death on May 14, 1985.

F5 5. The Texas Court of Criminal Appeals affirmed the Applicant's conviction and death sentence on June 15, 1988. Westley v. State, 754 S.W.2d 224 (Tex.Crim.App. 1988).

F6 6. On June 26, 1989, the United States Supreme Court denied the Applicant's petition for certiorari. Westley v. Texas, 492 U.S. 912 (1989).

F7 7. The Applicant, represented by Barry Abrams, Robert Scott, and William P. Allison, filed his Original Application for a Writ of Habeas Corpus on October 12, 1989.

F8 8. The Respondent, represented by Roe Wilson, Shirley Cornelius, and Caprice Cosper, filed her Original Answer on December 12, 1989.

F9 9. With leave of the Special Master, the Applicant filed his Post-Hearing Supplement to his Application for Writ of Habeas Corpus on April 1, 1991.

F10 10. On June 3, 1991, both sides tendered their Proposed Findings of Fact and Conclusions of Law to the Special Master for his consideration and review.

F11 11. Having considered the pleadings, evidence and exhibits offered by the parties and after reviewing the record of these proceedings, the Court makes the following Findings of Fact and Conclusions of Law and enters the following Order:

II. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

A. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE STATE'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK VENIREMEMBERS

FINDINGS OF FACT

F12 1. The Applicant, a black man, is a member of a cognizable racial group.

F13 2. The State used eight of its thirteen peremptory challenges to exclude the following black veniremembers: Anthony Milligan; Brenda Jackson; Jacquelyn Johnson; Hilda Evans; David Vicks; Alfred Martin; Debra Ann George Shaw; and Fletcher Simpson.

F14 3. The State and the defense excused by agreement the following five black veniremembers: Carmita Edmond; Dwight Waldrup; Reginald Lavergne; George Newton; and James McGaffie.

F15 4. The State was successful in exercising challenges for cause on the the following four veniremembers: Rodney State; Louis Charles McDaniels; Gertie Fletcher; and Finis Skinner.

F16 5. The defense exercised one peremptory challenge on black veniremember Annette Keels.

F17 6. Of the ten black veniremembers who were neither excused by agreement nor challenged for cause, the State used peremptory challenges to remove eight.

F18 7. Jury selection in the primary case began on March 19, 1985 and ended on April 29, 1985.

F19 8. The United States Supreme Court granted certiorari in Batson v. Kentucky, 476 U.S. 79 (1986) on April 22, 1985.

F20 9. Although the United States Supreme Court did not hand down its decision in Batson v. Kentucky, supra, until April 30, 1986, appellate courts in a number of states had already held that the prosecution could not utilize its peremptory strikes to exclude black veniremembers solely on account of their race. See People v. Wheeler, 148 Cal.Rptr. 890 (Cal. 1978); People v. Thompson, 435 N.Y.S. 739 (App.Div. 1981); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); State v. Brown, 371 So.2d 751 (La. 1979).

F21 10. Ron Mock, lead counsel for the Applicant in the primary case, did not object to the State's use of eight of its thirteen peremptory challenges to exclude black veniremembers because he did not observe any purposeful discrimination in the State's use of its peremptory challenges in this regard.

F22 11. Mock believed that because one black actually served on the jury in the primary case that any challenge to the racial composition of the Applicant's jury would have been unfounded.

F23 12. Had Mock believed that the State had exercised eight of its thirteen peremptory challenges in an effort to exclude black veniremembers solely because of their race, he would "done something to demonstratively show the Court" that the State was violating the Applicant's constitutional rights in this regard.

F24 13. Frank Alvarez, co-counsel for the Applicant in the primary case was aware that Batson-type challenges were being raised by defense attorneys in Harris County even before the advent of the Supreme Court's decision in Batson v. Kentucky, supra.

F25 14. Although Alvarez wanted to use a peremptory challenge on Elmo Garrett, the only black veniremember who actually served on the jury in the primary case inasmuch as he appeared to Alvarez to be "very State-oriented", Mock insisted on not striking Garrett because the defense "need[ed] to get a nigger on the jury."

F26 15. After Garrett was accepted as a juror, Alvarez's worst suspicions that Garrett was "very State-oriented" were confirmed by John Kyles, one of the prosecutors, who told him in essence that Garrett was the kind of black person who "cowtows [sic] to white people."

F27 16. Alvarez felt that it was in the Applicant's best interest to get as many black people on the jury as possible because "[G]enerally, white people don't have a whole lot of trouble killing people of color," and that he "was sure that Mr. Mock agreed with [him]" in this regard.

F28 17. One of the reasons why Alvarez believed Mock did not strike veniremember Garrett was because as a black man, Garrett "might stop and think about it before he assessed the death penalty" against the Applicant.

F29 18. Mock's failure to either object to the State's use of its peremptory challenges to exclude black veniremembers or to call to the court's attention the racial composition of the jury

was a matter of trial strategy and not the result of his ignorance of or unfamiliarity with that concept which would later be embodied in the Supreme Court's decision in Batson v. Kentucky, supra.

19. To the extent that Mock's failure to lodge a challenge to the State's use of eight of its thirteen peremptory challenges to exclude black veniremembers in the primary case was the result of trial strategy, the Court finds that this was not a sound trial strategy, especially in view of Alvarez' testimony that it was clearly in the Applicant's interest to have as many blacks as possible on a jury which would be asked by the State to sentence him to death. F30

20. The Court finds that reasonably competent counsel would have voiced an objection to the State's pattern of exercising its peremptory challenges as it did in the primary case in a manner calculated to preserve this issue for appellate review. F31

21. George Lambright, one of the prosecutors in the primary case, did not have any independant recollection of why he opted to exercise peremptory strikes against veniremembers Anthony Milligan, Jacquelyn Johnson, or Hilda Evans in the primary case. F32

22. Lambright's explanations as to why he might have exercised peremptory strikes on these three black veniremembers was based solely upon his review of the statement of facts from the voir dire examination of these veniremembers and of those notes of provided to him by Roe Wilson, counsel for the Respondent. F33

23. One of Lambright's paramount concerns in selecting jurors in a capital murder case was the prospective juror's attitude and feelings toward the death penalty. F34

24. Another significant concern for Lambright in selecting jurors in a capital murder case was the prospective juror's ability to follow the law applicable to the facts of the case. F35

25. Based upon his review of the trial record, Lambright's recollection was that "the single reason" that he exercised a peremptory strike against Anthony Milligan was because he initially indicated that he had a conscientious objection to the death penalty. F36

26. Lambright also pointed to Milligan's tendency to hold the State to a higher burden of proof in a capital murder case and his difficulty in convicting on the testimony of one witness as other reasons why he might have peremptorily challenged Milligan. F37

27. Based upon his review of the trial record, Lambright's recollection was that he exercised a peremptory strike against Jacquelyn Johnson because she "had some problems" regarding the
F38 law of parties in a death penalty case as well with whether she could personally take part in a decision where a defendant would receive the death penalty.

28. Based upon his review of the trial record, Lambright's
F39 recollection was that he exercised a peremptory strike against Hilda Evans because she believed in the Biblical tenet that "Thou shalt not kill," she questioned why the State would want to "alter" a defendant's confession by whiting out portions that were exculpatory, that she would have trouble answering Special Issue 2 because she could not predict what someone might do in the future, and that while she would not hold the State to a higher burden of proof in a capital murder case, she would "push [the State] to the limit."

29. Based upon his review of the trial record, John Kyles' recollection was that he exercised a peremptory strike against
F40 Brenda Jackson because he was uncomfortable with the fact that while her husband had graduated from law school, he had worked for six years at a convenience store as well as the fact that she recognized Ron Mock's name.

31. Jackson, whose brother was a police officer and whose husband had been the victim of an aggravated robber, evinced a
F41 belief in the death penalty, expressed an ability to follow the law applicable to the facts of this case, and did not think that her familiarity with Ron Mock would influence her in any way.

32. Kyles acknowledged that the fact that Jackson's brother was a police officer and that her husband had been robbed were
F42 potentially positive factors that he would look for in a prospective juror.

33. Based upon his review of the trial record, Kyles' recollection was that he exercised a peremptory strike against
F43 David Vicks because he initially stated that he would be unable to predict the likelihood of a person engaging in future acts of criminal violence although he was later rehabilitated by defense counsel.

34. Vicks, who evinced a belief in the death penalty, initially stated that he could not disregard an illegally obtained
F44 confession and that he would automatically find that an intentional killing was a deliberate killing before being rehabilitated by defense counsel.

F45 35. Vicks was described by the trial judge in the notes that he made during the jury selection process as "surprisingly pro state."

F46 36. Based upon his review of the trial record, Kyles' recollection was that he exercised a peremptory strike against veniremember Alfred Martin because Martin did not want to be on a capital murder jury and that "he had problems" with answering the three special issues "yes" knowing that the Applicant would receive a death sentence.

F47 37. During his voir dire examination of Martin, Kyles asked the veniremember if he could ignore the fact that he and the Applicant were of the same age and race and reach a decision based solely on the evidence presented at trial.

F48 38. Kyles also asked Martin if his deliberations would be "affected" knowing that the Applicant, a black male, was charged with killing someone who was white.

F49 39. Based upon his review of the trial record, Kyles' recollection was that he exercised a peremptory strike against veniremember Debra Ann George Shaw because she could not ignore the fact that her deliberations might result in the Applicant being sentenced to death, his lack of rapport with Shaw as evinced by her one-word responses to his questions, and her apparent rapport with defense counsel.

F50 40. During her examination, Shaw stated that she had always believed in the death penalty and that she could set aside her knowledge that the Applicant might be sentenced to death and be totally objective during her deliberations.

F51 41. Based upon his review of the trial record, Kyles' recollection was that he exercised a peremptory strike against veniremember Fletcher Simpson was that he had one son who had been convicted of aggravated robbery and another who had been convicted of driving while intoxicated.

F52 42. Kyles did not recall Ron Mock ever stating during the jury selection process that Mock was delighted that the State was exercising their peremptory strikes against black veniremembers inasmuch as they would punish the Applicant harder than white veniremembers.

F53 43. Of the eight black veniremembers peremptorily stricken by the State, four were male, four female, and their ages ranged from from 21 years to 59 years.

F54 44. The educational levels of the eight black veniremembers peremptorily challenged by the State ranged from no college to college degrees and their occupations included secretary, medical technician, custodian, post office clerk, and drafting technician.

F55 45. While the ages of those black veniremembers who were peremptorily challenged by the State included those in their twenties, thirties, forties, and fifties, the ages of those white veniremembers who served on the Applicant's jury included those in their twenties, thirties, forties, and fifties.

F56 46. While the State exercised a peremptory challenge on Anthony Milligan, a black who was very active in his church and had participated in religious training, the State did not strike Tonya Parker, a white who was very active in her church and who had also participated in religious training.

F57 47. While the State exercised a peremptory challenge on Brenda Jackson, a black with a relative in law enforcement, the State did not strike Mark Alan Peterson, a white who also had a relative in law enforcement.

F58 48. While the State exercised a peremptory challenge on Hilda Evans, a black employed in the medical field, the State did not strike either Debra Cowley or Elizabeth Paulson, whites who were also employed in the medical fields.

CONCLUSIONS OF LAW

C9 1. The Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from utilizing their peremptory challenges to exclude veniremembers solely on account of their race. Batson v. Kentucky, supra.

C10 2. A prosecutor is authorized to peremptorily challenge minority jurors only if he or she can articulate a clear, specific, and legitimate reason for the challenge of each minority veniremember related to the facts of the case. Brooks v. State, 802 S.W.2d 692 (Tex.Crim.App. 1991).

C11 3. A defendant may establish a prima facie case of purposeful discrimination concerning the prosecutor's exercise of peremptory challenges by demonstrating that: (a) the defendant is a member of a cognizable racial group; (b) the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; and (c) these facts and circumstances raise an inference that the prosecutor used that practice to exclude the veniremember from jury service on account of their race. Salazar v. State, 795 S.W.2d 187 (Tex.Crim.App. 1990).

4. Once the defendant has made a prima facie showing that the prosecutor's strikes were racially motivated, the burden C12 shifts to the State to come forward with a neutral explanation for challenging the jurors of the defendant's race. Miller-El v. State, 748 S.W.2d 459 (Tex.Crim.App. 1988).

5. Although one black veniremember actually served on the Applicant's jury, this in and of itself would not deprive the C13 Applicant of his right to challenge the racially discriminating use of peremptory challenges by the State. Keeton v. State, 749 S.W.2d 861 (Tex.Crim.App. 1988).

6. The Court concludes that the Applicant has made a prima facie of showing that the prosecution's use of eight of its C14 thirteen peremptory challenges to exclude black veniremembers was racially motivated. Whitsey v. State, 796 S.W.2d 707 (Tex.Crim.App. 1990).

7. Since the Applicant's case was pending on direct appeal when the United States Supreme Court handed down its decision in C15 Batson v. Kentucky, supra, the Applicant's case is among those to which retroactivity would apply. Griffith v. Kentucky, 479 U.S. 314 (1987).

8. Because defense counsel neither lodged an objection to the State's use of its peremptory challenges to exclude black C16 veniremembers nor called the trial court's attention to the racial composition of the jury, the Applicant would ordinarily be barred from advancing this contention for the first time on collateral review. Matthews v. State, 768 S.W.2d 731 (Tex.Crim.App. 1989).

9. If defense counsel's failure to object to the prosecutor's racially motivated use of its peremptory challenges C17 in this case was the result of ineffective assistance of counsel, trial counsel's deficient performance supplies the "cause" for excusing the Applicant's procedural default. Murray v. Carrier, 477 U.S. 478 (1986).

10. To successfully advance the contention that his trial counsel were ineffective, the Applicant must demonstrate that C18 counsel's failure to lodge an objection to the State's use of its peremptory challenges was deficient in that that this failure neither fell within the wide range of reasonable professional assistance nor was it the basis of a sound trial strategy. Strickland v. Washington, 466 U.S. 668 (1984).

11. While the Applicant must overcome the strong C19 presumption that under the facts and circumstances of this case,

defense counsel did not object because he did not believe that the State's pattern of exercising its peremptory strikes evidenced any purposeful discrimination might be considered sound trial strategy, the Court concludes that defense counsel's failure to lodge an objection cannot be considered sound trial strategy. Ex parte Welborn, 785 S.W.2d 391 (Tex.Crim.App. 1990).

C20 12. Inasmuch as the Court concludes that defense counsel's failure to object to the State's use of its peremptory challenges was not sound trial strategy and that this conduct fell outside of the wide range of professionally competent assistance, Strickland v. Washington, supra, this Court similarly concludes that "cause" exists to excuse the Applicant's procedural default. Murray v. Carrier, supra.

C21 13. Based upon veniremember Anthony Milligan's initial indication that he had a conscientious objection to the death penalty, as well as his tendency to hold the State to a higher burden of proof in a capital murder case, the Court concludes that the prosecution's explanation for exercising a peremptory strike on Milligan was racially neutral. Tennard v. State, 802 S.W.2d 678 (Tex.Crim.App. 1990).

C22 14. Based upon veniremember Jacquelyn Johnson's responses that she "had some problems" regarding the law of parties in a death penalty case and her initial reservations as to whether she could personally take part in a decision where a defendant would receive the death penalty, the Court concludes that the prosecution's explanation for exercising a peremptory strike on Johnson was racially neutral. Tennard v. State, supra.

C23 15. Based upon veniremember Hilda Evans' responses indicating that she would want to know why the State would "alter" a defendant's redacted confession and her difficulty in answering Special Issue 2 because she could not predict what somoene might do in the future, the Court concludes that the prosecution's explanation for exercising a peremptory strike on Evans was racially neutral. Tennard v. State, supra.

C24 16. Based upon veniremember David Vicks' initial indication that he would be unable to predict the likelihood of a person engaging in future acts of criminal violence, his initial inability to disregard an inadmissible confession, and his initial indication that he would automatically find that an intentional killing was a deliberate killing, the Court concludes that the prosecution's explanation for exercising a peremptory strike on Vicks was racially neutral. Tompkins v. State, 774 S.W.2d 195 (Tex.Crim.App. 1987).

C25 17. Based upon veniremember Fletcher Simpson's responses that one of his sons had been convicted of aggravated robbery and sent to prison and another son who had been convicted of driving while intoxicated, the Court concludes that the State's explanation for exercising a peremptory strike on Simpson was racially neutral. Keeton v. State, supra.

C26 18. Based upon veniremember Alfred Martin's initial response that he did not want to be on a capital murder jury and his inital indication that he would have problems answering the three special issues "yes" knowing that the Applicant would be sentenced to death, the Court concludes that the State's explanation for exercising a peremptory strike against Martin was racially neutral. Tennard v. State, supra.

C27 19. Based upon veniremember Debra Ann George Shaw's initial indication that she could not ignore the fact that her deliberations might result in the Applicant being sentenced to death, her apparent rapport with defense counsel, and her purported lack of rapport with the prosecutor, the Court concludes that the State's explanation for exercising a peremptory strike against Shaw was racially neutral. Tompkins v. State, supra.

C28 20. Where, as in the case of veniremember Brenda Jackson, the prosecution advances multiple reasons why a peremptory strike was exercised on a minority veniremember, the Court is obligated to examine every reason given by the prosecutor within the circumstances of a particular case to determine whether the "neutral explanation" for the strike is really a pretext for a racially-motivated peremptory challenge. Whitsey v. State, supra.

C29 21. A prosecutor's racially neutral explanation for exercising a peremptory strike against a minority veniremember may be evidence of a sham or pretext if the stated reason or reasons bear no relation to the facts of the case. Keeton v. State, supra.

C30 22. To the extent that the prosecutor premised his exercise of a peremptory strike on veniremember Jackson on the fact that he thought it to be an "extraordinary circumstance that is difficult to reconcile" that Jackson's husband had graduated from law school but had worked for six years at a convenience store and that this was something the prosecutor "felt uncomfortable with," the Court concludes that this reason bore no relation to the facts of this case and was merely a pretext for a racially-motivated challenge. Whitsey v. State, supra; Keeton v. State, supra; Vann v. State, 788 S.W.2d 899 (Tex.App.--Dallas, 1990); Miller-El v. State, 790 S.W.2d 351 (Tex.App.--Dallas, 1990).

C31 23. Although the prosecutor expressed some concern that veniremember Jackson and Ron Mock might be acquainted with one another or that she might "identify" with Mock, given the prosecutor's failure to explore "any favorable attitudes" she might have had towards Mock with any "meaningful questioning" which could have served to support his eventual explanation, the Court concludes that the prosecutor's speculative explanation was pretextural and insufficient to rebut the presumption of racial discrimination. Keeton v. State, supra; Lewis v. State, 779 S.W.2d 449 (Tex.App.--Tyler, 1989); Sloan v. State, 809 S.W.d 234 (Tex.App.--Tyler, 1988); Wiese v. State, ___ S.W.2d ___, Tex.App. No. 02-90-062-CR (Delivered June 26, 1991).

C32 24. To the extent that the evidentiary hearing may be viewed as a retrospective Batson hearing, see Chambers v. State, 784 S.W.2d 29 (Tex.Crim.App. 1989), this Court's findings of fact as to whether or not the prosecution's explanations for exercising peremptory challenges on minority veniremembers were racially neutral are entitled to great deference and they may not be disturbed on appeal unless they are clearly erroneous. Whitsey v. State, supra.

C33 25. The exclusion of even one member of the Applicant's race from the jury panel for reasons pertaining solely to race, as is the case with veniremember Jackson in the case at bar, invalidates the entire jury selection process and if this issue had been properly preserved for appellate review by defense counsel, the Applicant would have been entitled to a reversal of his conviction on direct appeal. Keeton v. State, supra; Whitsey v. State, supra; Vann v. State, supra.

C34 26. Although this Court has heretofore concluded that the defense counsel's failure to lodge an objection to the State's use of its peremptory challenges so as to preserve this issue for appellate review was deficient performance, the Applicant is not entitled to relief in this case unless he can also demonstrate that there was a reasonable probability that, but for defense counsel's unprofessional error, the result of the proceedings would have been different. Strickland v. Washington, supra. (Emphasis added).

C35 27. While neither the United States Supreme Court nor the Court of Criminal Appeals have yet defined the term "proceedings" as it is used within the context of Strickland v. Washington, supra, the Court hereby adopts the definition of "proceeding" as set forth in Black's Law Dictionary as "[T]he form and manner of conducting judicial business before a court or judicial officer including all possible steps in an action from its commencement to the execution of judgment." Id. at 1368. (Emphasis added).

C36 28. Because the term "proceedings" has not been statutorily defined, the term is to be understood in light of common usage. James v. State, 772 S.W.2d 84 (Tex.Crim.App. 1989).

C37 29. To the extent that the term "proceedings" is not statutorily defined in the Code of Criminal Procedure, the Court is free to look to the common law definition in understanding this term. Bloss v. State, 75 S.W.2d 694 (Tex.Crim.App. 1934).

C38 30. Consistent with these doctrines, the Court concludes that "proceeding" would necessarily encompass the automatic appeal of the Applicant's conviction, cf. Article 37.071, Section (h), V.A.C.C.P., and in view of the fact that the Applicant has demonstrated that there was a reasonable probability that the results of his direct appeal would have been different but for defense counsel's unprofessional error in failing to lodge an objection to the State's racially-motivated exclusion of veniremember Brenda Jackson, the Court concludes that the Applicant has shouldered the two-fold burden embodied by the United States Supreme Court in Strickland v. Washington, supra, and adopted by the Court of Criminal Appeals in Hernandez v. State, 726 S.W.2d 53 (Tex.Crim.App. 1986).

C39 31. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, 660 S.W.2d 97 (Tex.Crim.App. 1983).

C40 32. Because the Applicant has demonstrated by a preponderance of the evidence that he was denied the effective assistance of counsel for those reasons set forth above, the Court recommends that habeas corpus relief as to this ground be GRANTED.

B. DEFENSE COUNSEL'S FAILURE TO OBTAIN CRITICAL PORTIONS OF THE STATEMENT OF FACTS FROM THE CO-DEFENDANT'S TRIAL AND TO CONSULT AN INDEPENDENT BALLISTICS EXPERT

FINDINGS OF FACT

F59 1. On June 1, 1984, John Dale Henry was indicted for the felony offenses of murder and aggravated robbery alleged to have been committed on or about April 13, 1984.

F60 2. The State alleged that Henry's victim in the murder case was Chester Hill and that his victim in the aggravated robbery case was Debra Young.

F61 3. On July 11, 1984, the Applicant was indicted for the felony offense of capital murder alleged to have been committed on or about April 13, 1984, arising out of the same transaction for which John Dale Henry had already been indicted.

F62 4. John Dale Henry's trial for the offense of aggravated robbery began in the 177th Criminal District Court of Harris County, Texas, on January 23, 1985, and concluded on January 24, 1985.

F63 5. John Dale Henry was represented by Jim Skelton and the State was represented by Jan Krocker.

F64 6. Testimony in the Applicant's trial in the primary case did not begin until May 6, 1985.

F65 7. Neither Ron Mock nor Frank Alvarez made any attempt to either personally attend the Henry trial so that they could acquaint themselves with the testimony of the same witnesses who would eventually testify at the Applicant's trial in the primary case.

F66 8. Neither Mock nor Alvarez made accomodations for someone else to attend the trial in their absence so that notes could be taken of the testimony of those witnesses at the Henry trial.

F67 9. Neither Mock nor Alvarez filed a motion with the trial judge in the primary case requesting a copy of the transcript of the testimony of the State's witnesses at the Henry trial so that they could utilize it during the Applicant's trial.

F68 10. The Court finds that reasonably competent counsel would have taken those steps necessary to have either personally attended the Henry trial, made accomodations for someone to have done so in their absence, or to obtained a transcript of the testimony of the State's witnesses at the Henry trial by filing a request for same with the trial judge in the primary case.

F69 11. In her opening statement to the jury in the Henry trial, Jan Krocker told the jury that she believed the evidence would show that the Applicant fired .38 caliber bullets at Frank Hall, the decedent.

F70 12. During the Henry trial, firearms expert C.E. Anderson testified for the State that the gun referred to at the Applicant's trial as State's Exhibit 17 could have either been a .357, a .38, or a .22.

F71 13. During the Henry trial, Debra Young, the only living eyewitness to testify for the State in both the Henry trial and the Applicant's trial, testified that she had prior experience and familiarity with firearms.

F72 14. Young testified during the Henry trial that the weapon fired by the Applicant emitted a big boom and that she had seen fire coming out of the barrel when his gun was fired.

F73 15. C.E. Anderson testified during the Henry trial that a .357 or a .38 caliber weapon usually makes more of a noise when it is fired than a .22.

F74 16. During her final argument, Krocker told the jury that the evidence showed that the Applicant possessed a .357 or .38 caliber weapon as opposed to a .22.

F75 17. During the Henry trial, Harris County Sheriff's Deputy Alton Harris testified that moments after this offense, Debra Young had told him that the weapon that the Applicant had thrust in her face "looked like a .357" and that Young had physically identified Harris' .357 service revolver as looing like the weapon that the Applicant had brandished.

F76 18. During the Henry trial, Harris County Sheriff's Detective Ronnie Phillips testified that Young had told him that the weapon which the Applicant had thrust in her face was a "big" weapon which she "thought" was a .357.

F77 19. Testimony at both the Henry trial and the Applicant's trial revealed that although there were multiple shots fired by the Applicant, John Dale Henry, and a third co-defendant, Tyrone Dunbar, who was killed during the commission of this offense, the death of Frank Hall was the result of a .22 bullet.

F78 20. Both the prosecutor and defense counsel in the primary case agreed that the issue of whether the Applicant was the "trigger man" who fired the fatal .22 caliber bullet which killed Hall was a "life and death issue."

F79 21. Creation of a reasonable doubt in the mind of a single juror as to whether the Applicant possessed a .357 or a .22 caliber weapon during the commission of this offense would in all probability have saved the Applicant's life.

F80 22. The Applicant gave authorities a written statement, admitted in evidence at the trial of the primary case, in which he admitted, inter alia, that he had a .22 caliber pistol that looked

like a cowboy's gun and that John Dale Henry had what appeared to be a .38 caliber weapon during the commission of this offense.

F81 23. In any criminal case but particularly in a death penalty prosecution, it is incumbent upon defense counsel to develop a cohesive and plausible trial strategy which at the very least is reasonably calculated to obtain a negative answer to one of the special issues so as to save the defendant's life.

F82 24. When asked to briefly describe his trial strategy insofar as advancing the contention that the Applicant did not the fatal shot, Mock noted that "I really didn't have one."

F83 25. Mock then described his trial strategy in advancing the contention that the Applicant did not fire the fatal shot as being premised on "confusion" and "total[] speculation."

F84 26. When asked to recall at the evidentiary hearing what evidence existed at the time of the Applicant's trial what eveidence existed that the Applicant did not fire the fatal shot, Mock replied, "None."

F85 27. Frank Alvarez admitted that Mock never talked to him about what their trial strategy would be in attempting to present the Applicant's defense in the primary case and that he and Mock "just started to trial."

F86 28. Because Alvarez had absolutely no experience in defending capital murder cases and looked to Mock to formulate whatever trial strategy the defense would advance, Alvarez noted that whatever trial strategy Mock seemed to possess "unraveled as we went along."

F87 29. Although neither Mock nor Alvarez had any expertise or training in ballistics or the use of firearms, defense counsel did not make any effort to obtain the assistance of an independant expert in the firearms and ballistics.

F88 30. Although Mock noted that he did not seek the assistance of such an expert because the defense had already used up the $500.00 allotted to them to hire an investigator, Mock made no effort to even attempt to ask the trial judge for additional funds to hire a ballistics expert either informally or by written motion.

F89 31. The need for the defense to hire an independant expert in the field of ballistics and firearms was underscored by Mock's testimony at the evidentiary hearing that he considered C.E.

Anderson, the State's firearms and ballistics expert as "the wizard" and that when it came time to cross-examine Anderson at the Applicant's trial, Mock did not "want to mess with the wizard."

32. In light of Mock's testimony that his ability to save the Applicant's life hinged upon creating a reasonable doubt in at least one juror's mind that the Applicant did not fire the fatal shot and his decided unwillingness or inability to adequately cross-examine C.E. Anderson, the Court finds that reasonably competent counsel would have taken steps to obtain or at least consult an independant ballistics expert, and that Mock's failure to do so was deficient performance on his part. F90

33. After reviewing portions of the statement of facts from both the Henry trial and the Applicant's trial as well as a number of witness statements and reports from both trials, Floyd McDonald, an expert in the area of firearms and ballistics who helped train C.E. Anderson, testified at the evidentiary hearing as to a number of facts which he or any other firearms examiner would have testified to at the Applicant's trial. F91

34. McDonald noted that based upon the testimony from both the Applicant's trial and the Henry trial as to the the objective appearance, sound and firing characteristics of the Applicant's gun, it was "almost obvious" that the Applicant had fired a .357 pistol during the commission of the primary offense as opposed to the .22 caliber weapon that killed the decedent. F92

35. McDonald pointed out that the weapon depicted in the photograph admitted at the Applicant's trial as State Exhibit 17 could not be readily identified from the side as a .22 and that virtually identical models of the same weapon are manufactured in varying calibers, including a .357 model that looks identical to a .22 when viewed from the side. F93

36. McDonald stated that Debra Young's testimony at the Henry trial that the weapon fired by the Applicant emitted a big boom and that she had seen fire coming out of the barrel when the weapon was fired was objectively inconsistent with the Applicant's weapon having been a .22. F94

37. McDonald noted that Deputy Dickey showing his .357 revolver to Debra Young moments after this offense, a weapon which Young told Dickey looked like the weapon the Applicant had fired, was a more accurate means of identifying the weapon than Young merely observing a side view of the weapon in a photographic array. F95

F96 38. McDonald examined C.E. Anderson's report concerning the physical characteristics of the bullet that killed the decedent and used that information in conjunction with the CLIS Manual regarding firearms measurements to determine the type or type of weapons which could have fired the fatal bullet.

F97 39. As a result of his research, McDonald concluded that the Ruger .22 depicted in State's Exhibit 17 at the Applicant's trial could not have fired the bullet that killed the decedent because the number of lands and grooves on that bullet did not match the number of lands and groves created by a Ruger .22 pistol.

F98 40. As a result of his research, McDonald concluded that no cowboy-style pistol commonly available in the Houston area could have fired the bullet that killed the decedent inasmuch as the commonly available .22 weapons that could have fired the murder bullet did not look like cowboy-style weapons.

F99 41. McDonald noted that notwithstanding the fact that the Applicant admitted having a cowboy-style .22 caliber weapon in his written statement, he was nonethless convinced that the Applicant in fact had a .357 in light of the uncontroverted physical evidence buttressing this conclusion.

F100 42. McDonald premised this belief initially on the sound that Debra Young attributed to the weapon the Applicant fired inasmuch as the sound of a .357 is "many degress of magnitude louder than a .22.

F101 43. McDonald also premised this belief on the fact that the trajectory of the .38 caliber slugs found at the scene could be traced back to the point where Debra Young testified the Applicant was standing.

F102 44. McDonald also premised this belief on Young's testimony that the weapons used by Dunbar and Henry were "little bitty guns" while the weapon fired by the Applicant was a "big" gun and that as McDonald noted, "There is no such thing as a little bitty .357."

F103 45. The statement of facts from the Applicant's trial on the primary case reflects that Mock only asked C.E. Anderson four questions on cross-examination and did not encompass any of the areas touched upon by McDonald at the evidentiary hearing that would have been consistent with and supportive of the notion that reasonable doubt existed as to whether the Applicant did not fire the .22 bullet that killed the decedent.

46. The Court finds that absent the assistance of an independent ballistics expert, defense counsel were wholly incapable of presenting the jury with that evidence alluded to by
F104 Floyd McDonald at the evidentiary hearing, evidence which was otherwise available to them and evidence that was reasonably calculated to create a reasonable doubt in the minds of at least one juror that the Applicant did not fire the .22 bullet that killed the decedent.

47. The Court further finds that in view of defense counsel's failure to monitor the trial of John Dale Henry so as to familiarize themselves with the testimony of the State's witnesses
F105 or to otherwise obtain a transcript of their testimony for use at the Applicant's trial, and given defense counsel's failure to obtain the assistance of an independent ballistics expert to adequately assist them in presenting that evidence before the jury which was altogether likely to create a reasonable doubt that the Applicant fired the fatal shot in the primary case, defense counsel's purported investigation of the facts in the primary case was so inadequate as to be outside the wide range of profesionally competent assistance.

48. In view of their failure to adequately investigate the facts of the primary case, defense counsel's resultant trial
F106 strategy of "confusion" and "speculation" was not, in fact, sound trial strategy and was tantamount to no trial strategy at all.

CONCLUSIONS OF LAW

1. It is well settled that a criminal defense attorney must have a firm command of the facts of the case before he can
C41 render reasonably effective assistance of counsel. Butler v. State, 716 S.W.2d 48 (Tex.Crim.App. 1986).

2. Defense counsel has the responsibility of conducting an independant investigation of the facts of his client's case and
C42 this burden may not be delegated to an investigator. Ex parte Ewing, 570 S.W.2d 941 (Tex.Crim.App. 1978).

3. A natural consequence of this notion is that defense counsel has a responsibility to seek out and interview potential
C43 witnesses and the failure to do so will result in a finding that counsel has been ineffective where a viable defense available to the accused has not been advanced. Ex parte Duffy, 607 S.W.2d 507 (Tex.Crim.App. 1980).

4. Defense counsel has a professional duty to present all
C44 available testimony and other evidence calculated to support the

defense of his client. Thomas v. State, 550 S.W.2d 64 (Tex.Crim.App. 1977).

C45 5. To successfully advance the contention that his trial counsel were ineffective, the Applicant must demonstrate that counsel's failure to adequately investigate the facts of his case as well as their failure to obtain the assistance of an independant ballistics expert to assist them in presenting their defensive theory to the jury was deficient in that these failures neither fell within the wide range of reasonable professional assistance nor were they part of a sound trial strategy. Strickland v. Washington, supra.

C46 6. Strategic choices made by defense counsel after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Strickland v. Washington, supra. (Emphasis added).

C47 7. Consistent with these notions, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Strickland v. Washington, supra.

C48 8. While the Applicant must overcome the strong presumption that under the facts and circumstances of this case, defense counsel's conduct as set forth above might be considered sound trial strategy, Strickland v. Washington, supra, it may not be argued that a given course of conduct was within the realm of trial strategy unless and until defense counsel has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision. Ex parte Welborn, supra.

C49 9. Because defense counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reliable adversarial testing process," Strickland v. Washington, supra, the Court concludes that defense counsel's failure to adequately investigate the facts of the primary case and their concomitant failure to obtain the assistance of an independant ballistics expert to assist them in presenting their defensive theory to the jury fell outside of the wide range of professionally competent assistance, Butler v. State, supra, and cannot be fairly viewed as sound trial strategy. Ex parte Duffy, supra.

C50 10. The Supreme Court has long recognized that when a State brings its judicial power to bear in a criminal proceeding, it

must take steps to asure that the defendant has a fair opportunity to present his defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

C51 9. Consistent with this notion, the Supreme Court has held that when an indigent defendant makes a preliminary showing that his sanity at the time of the offense is to be a significant factor at trial, the State must assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. Ake v. Oklahoma, supra.

C52 10. While the appointment of an expert witness under Article 26.05, V.A.C.C.P., rests within the sound discretion of the trial court, Quin v. State, 608 S.W.2d 937 (Tex.Crim.App. 1980), the trial court abuses its discretion in failing to appoint such an expert when the defendant has made a showing that he will be harmed by the trial court's refusal to do so. Stoker v. State, 788 S.W.2d 1 (Tex.Crim.App. 1989).

C53 11. Although reasonably competent defense counsel would have readily seen the need for the appointment of an independant ballistics expert to assist them in presenting their defensive theory, defense counsel in the primary case made no effort all to request the appointment of such an expert or to otherwise present and preserve evidence in the record as to the harm or injury the Applicant would suffer in the absence of such an appointment. See Barney v. State, 698 S.W.2d 114 (Tex.Crim.App. 1985).

C54 12. The Court concludes that reasonably competent defense counsel would have taken those steps necessary to timely apprise the trial judge of their need for expert assistance in the area of ballistics, see Green v. State, 682 S.W.2d 271 (Tex.Crim.App. 1984), and in the event of an adverse ruling, presented evidence in the record of harm and injury so as to preserve this issue for appellate review, see Phillips v. State, 701 S.W.2d 875 (Tex.Crim.App. 1985).

C55 13. While defense counsel might well have believed that any request for the appointment of a ballistics expert to assist them in presenting their defensive theory of the case might have been fruitless, they nonetheless had the professional obligation to bring this request to the attention of the trial court as their fear of having the trial court overrule their request did not justify their failure to obtain an adverse ruling, or any ruling at all, on their request. See Mitchell v. State, 762 S.W.2d 916 (Tex.App.--San Antonio, 1988).

C56 14. The Court concludes that as a result of defense counsel's failure to adequately investigate the facts of the primary case and their concomitant failure to obtain the assistance of an independant ballistics expert, defense counsel was limited to defending the Applicant through cross-examination rather than presenting a cohesive and plausible defensive theory. Ex parte Ybarra, 629 S.W.2d 943 (Tex.Crim.App. 1982).

C57 15. The Applicant's contention that defense counsel's failure to adequately investigate the facts of the primary case and to obtain the assistance of an independant ballistics expert resulted in his being denied the effective assistance of counsel may be sustained only if he can demonstrate that a reasonable probability exists that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, supra; Hernandez v. State, supra.

C58 16. While the Court is not convinced that a reasonable probability exists that the outcome of the guilt or innocence stage of the proceedings would have been different, the Court concludes that, but for defense counsel's deficient performance as set forth above, a reasonable probability does exist that the outcome of the proceedings at the punishment stage of the proceedings would have been different. Ex parte Guzmon, 730 S.W.2d 724 (Tex.Crim.App. 1987).

C59 17. When a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent defense counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland v. Washington, supra.

C60 18. The benchmark for judging any claim of ineffectiveness must be whether defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial--at either stage of the proceedings--cannot be relied on as having produced a just result. Strickland v. Washington, supra.

C61 19. If defense counsel's presentation of the Applicant's defensive theory had been premised on a thorough factual investigation including the retention of an independant ballistics expert, the Court concludes that any lingering "residual doubt" that the jury might have had that the Applicant had not been responsible for firing the fatal shot would have clearly operated in his favor at the punishment stage of the trial. See Lockhart v. McCree, 476 U.S. 172 (1986).

C62 20. The Court concludes that defense counsel's failure to adequately investigate the facts as reflected in their wholesale failure to monitor the trial of the Applicant's co-defendant or to otherwise obtain critical portions of the statement of facts from the co-defendant's trial, their concomitant failure to obtain the assistance of an independent ballistics expert to assist them in advancing the Applicant's defensive theory caused a breakdown in the adversarial process that our system counts on to produce just results, a breakdown sufficient to undermine confidence in the outcome of the punishment stage of the primary case. Strickland v. Washington, supra; Ex parte Guzmon, supra; Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987).

C63 21. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Griffin, 679 S.W.2d 15 (Tex.Crim.App. 1984).

C64 22. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation, Ex parte Welborn, supra, is viewed in conjunction with those other failings of counsel set forth in Sections C, G, H, and I, infra, see Weath[illegible]y v. State, 627 S.W.2d 729 (Tex.Crim.App. 1982), he was denied the effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

C. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE STATE'S USE OF VICTIM IMPACT EVIDENCE AT TRIAL AND DURING FINAL ARGUMENT

FINDINGS OF FACT

F107 1. During the guilt or innocence stage of the Applicant's trial, Eileen Hall, the widow of the decedent, was permitted to testify without objection that the decedent had performed "community service-type work" as a volunteer fireman who drove an ambulance for the fire department as well.

F108 2. Hall was also permitted to testify without objection that the week after the decedent's death, he was slated to begin work with the Liberty County Sheriff's Department.

F109 3. Hall was also permitted to testify that the decedent had taken in her two boys from a previous marriage to live with them after she married the decedent.

F110 4. Lead defense counsel Ron Mock noted that evidence as to the impact of crime on the victims of crime, so-called "victim-impact testimony," was inadmissible and that it had been his policy for many years to never let the State elicit this type of testimony inasmuch as it "irreparably" prejudiced the accused.

5. Mock stated that he did not object to Hall's testimony regarding the decedent's work as a volunteer fireman or other good
F111 works because this testimony "did not go to character as character is in its overall capacity conceived," and that this testimony was not harmful to the Applicant's case.

6. Mock noted that he did not file a pre-trial motion in limine to preclude the State from eliciting victim-impact evidence because he did not think that sound trial strategy required that
F112 he do so.

7. The Court finds that reasonably competent defense counsel would have filed a pre-trial motion in limine to preclude
F113 the State from eliciting the very type of victim-impact evidence to which Mock failed to object.

8. The Court finds that reasonably competent defense counsel would have objected to Hall's testimony regarding the
F114 decedent's employment as a volunteer fireman, sheriff's deputy, and his other good works.

9. To the extent that Mock believed that his failure to object to Hall's testimony was sound trial strategy, the Court
F115 finds that it was not.

10. During the guilt or innocence stage of the Applicant's trial, Debra Young, the State's only eyewitness in the primary
F116 case, testfied without objection that at the time the Applicant put a gun to her head, she was thinking about her three children and that there would be no one to take care of them.

11. Young also testified without objection that when the Applicant knocked her against the wall during the primary offense,
F117 she kept wondering who was going to take care of her children.

12. Mock stated that he did not object to Young's testimony as to who would take care of her children because he did not think
F118 that "it had any bearing on this case" or that it was harmful to the Applicant's case.

13. Mock stated that he did not object to Young's testimony as to what was going through her mind at the time the Applicant
F119 knocked her against the wall because he felt this testimony was admissible as "go[ing] to her state of mind."

14. The Court finds that reasonably competent counsel would have objected to Young's testimony about her concerns as to who
F120 would take care of children and that no sound trial strategy could have been served by failing to object to it.

F121 15. During his final argument in the guilt or innocence stage of the Applicant's trial, Mock argued to the jury that he was sure that Debra Young "[W]as terrified. I don't suppose anybody can imagine the terror she went through. On top of that, she lost a good friend ... and certainly wants to see somebody pay for what happened."

F122 16. Mock stated that the strategic value in reminding the jury that Young had been terrified and angry was in a lawyer gaining credibility with the jury by "admit[ing] that those things did happen."

F123 17. The Court finds that contrary to Mock's assertions, there was no basis in a sound trial strategy for making this type of argument to the jury in the Applicant's case.

F124 18. During his final argument in the guilt or innocence stage of the trial, John Kyles, lead counsel for the prosecution, argued without objection that Debra Young gave of herself, that she was a volunteer ambulance driver, and that she was a straight-forward woman who gave of herself.

F125 19. Mock noted that he did not object to Kyles' argument in this regard because he believe that it was a reasonable deduction from "facts in evidence" and that this argument did not prejudice the Applicant's case.

F126 20. The Court finds that had reasonably competent defense counsel properly objected to Young's testimony, this argument would not have been permissible as a reasonable deduction from the evidence, and that regardless of this earlier waiver, reasonably competent counsel would have nonetheless objected to Kyles' final argument.

F127 21. During his final argument in the guilt or innocence stage of the Applicant's trial, Kyles reminded the jury without objection that Young thought she was going to die and that she was concerned about who was going to take care of her children.

F128 22. Mock stated that he did not object to Kyles' argument in this regard because it was a reasonable deduction from those facts already in evidence.

F129 23. The Court finds that had reasonably competent counsel properly objected to Young's testimony, this argument would not have been a reasonable deduction from the evidence, and that regardless of this earlier waiver, reasonably competent counsel would have nonetheless objected to Kyles' argument.

24. During his final argument in the guilt or innocence state of the Applicant's trial, Kyles argued without objection that the decedent was a man who gave of himself and to his family, had three jobs, and had time to act as a volunteer ambulance
F130 driver.

25. Mock stated that he did not object to this argument because he did not feel that he could make "a legal objection" to
F131 it.

26. Mock admitted that he did not believe that the issue of the decedent's good works in the community were relevant to any issue material to the jury's deliberations at the guilt or
F132 innocence stage of the Applicant's trial.

27. Mock did not believe that evidence and argument as to the decedent's good works and his loss to the community was either "victim-impact evidence" nor prejudicial to the Applicant's
F133 defense.

28. The Court finds that had reasonably competent counsel objected to Eileen Hall's testimony, this arument would not have been permissible, and that regardless of this earlier waiver, reasonably competent counsel would have nonetheless objected to
F134 Kyles' argument.

29. The Court finds that contrary to Mock's assertions, there was no basis in a sound trial strategy for permitting the
F135 State to engage in this type of final argument.

30. During his final argument in the punishment stage of the Applicant's trial, Mock argued to the jury that the Applicant was not being tried for a "case of felony dumb ass," and that, "The people who do robberies are not nice people ... I know you can't erase the scars of a robbery. You can't erase the memory of a gun pointed in your nose or to your head and somebody telling
F136 you give me your money, motherfucker. You can't do that."

31. Mock stated that the strategic value in making this decidedly profane argument was to make the jurors aware that
F137 robbery was not a pleasant experience.

32. Even though the language Mock used had not been used by the Applicant during the commission of this offense, Mock nonetheless believed that there was strategic value in and that the Applicant's defense was helped by showing the jurors the way
F138 "real robbers" operate.

33. The Court finds that contrary to Mock's assertions, no strategic purpose calculated to assist the Applicant's defense
F139 could have been served by Mock's argument.

34. During his final argument in the punishment stage of the Applicant's trial, Mock argued to the jury that the decedent worked three jobs and that all that he had worked hard to build up
F140 over the years had been taken away by the Applicant.

35. Mock noted that his trial strategy in making this argument was to show that the decedent provoked the Applicant into shooting him and that this argument helped rather than hurt the
F141 Applicant's defense.

36. The Court finds that no sound trial strategy could have been served by this argument and that this argument was clearly calculated to and did, in fact, enable the State to respond to
F142 and enlarge upon the good qualities of the decedent.

37. During his final argument in the punishment stage of the Applicant's trial, Mock argued to the jury that nothing could be done to bring the decedent back to life and that his wife had
F143 suffered a terrible loss.

38. Mock explained that this argument was essential if
F144 the jury was to think that he had any credibility.

39. To the extent that this argument was not at all calculated to convince the jury that the answers to any of the special issues should have been resolved in the Applicant's favor, the Court finds that no strategic value could have been served as
F145 a result of this argument.

40. During his final argument to the jury during the punishment stage of the Applicant's trial, Kyles argued to the jury without objection that, "[T]he problem that I have with this kind of case is that you have had an opportunity to focus on the Defendant, but you have never had a chance to know the victim.
F146 What do you know about Frank Hall?"

41. Kyles then reminded the jury without objection that the decedent was a good man who provided not only for his family but for his wife's sons by her first marriage, that he worked three
F147 jobs, and that he was a volunteer fireman and ambulance driver.

42. Kyles than reminded the jury at length without objection to think about the grief of the decedent's family, the tears that they shed upon learning of the decedent's death, every
F148 night before they, the jurors, went to bed.

43. Kyles then told the jury without objection that, "[I]f there is some focus of attention on some person, think about Frank Hall. Think about his good works. Don't focus on the face of
F149 this killer [Applicant]."

44. Mock stated that he did not object to Kyles' argument recounting the decedent's good works and the impact of his death on his family because he did not believe that this argument was either helpful to the State or prejudicial to the Applicant's
F150 defense.

45. Mock also noted that he did not object to Kyles' argument, which he had "probably" heard Kyles use in other cases, because he did not want the jury to be mad at him and that he could not think of any procedural vehicle or tactic to keep this
F151 argument out without alienating the jury.

46. Mock did not remember which of the special issues to which Kyles' argument was relevant and it was not Mock's belief that the special issues were designed to focus the jury's
F152 attention on the conduct of the defendant.

47. The Court finds that there was no sound strategic
F153 reason for Mock not to have objected to Kyles' argument, and that reasonably competent defense counsel would have objected to it.

48. The Court finds that Mock's failure to file a pre-trial motion in limine, particularly where he acknowledged hearing Kyles make this same type of final argument in other cases, designed to preclude Kyles from making this type of victim-impact argument, and his subsequent failure to object to Kyles' argument so as to
F154 preserve the matter for appellate review, was clearly deficient performance.

49. The Court finds that Mock's general trial strategy of not objecting to the State's use of either patently inadmissible victim-impact evidence or final argument for fear of making the jury mad at him within the context of a death penalty case was
F155 fundamentally unsound.

50. The Court finds that one year prior to the Applicant's trial, the "victim-impact" final argument which John Kyles delivered in Bennett v. State, 677 S.W.2d 121 (Tex.App.--Houston [14th Dist.], 1984), compelled a reversal of the defendant's conviction after it was described by Justice Junell as "[C]learly speculative, and [was] calculated to inflame and prejudice [the jury] against the appellant [and was] outside the record and
F156 expressions of [Kyles'] personal opinion. Id. at 125-126.

CONCLUSIONS OF LAW

C65 1. Because the penalty of death is qualitatively different from a sentence of imprisonment, however long, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280 (1976).

C66 2. The qualititative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S. 992 (1983).

C67 3. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349 (1977).

C68 4. Many of the limits that the United States Supreme Court has placed on the imposition of capital punishment are rooted in concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, supra.

C69 5. A jury must make an "individualized determination" whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862 (1983)(Emphasis in original).

C70 6. The United States Supreme Court has consistently recognized that for purposes of imposing the death penalty, the defendant's punishment must be tailored to his personal responsibility and moral guilt. Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

C71 7. As long ago as 1901, the Court of Criminal Appeals had held that the admission of testimony as to the number and ages of the decedent's children was reversible error since this testimony was solely intended to excite the sympathy of the of the jury and to prejudice them against the defendant. Faulkner v. State, 65 S.W. 1093 (Tex.Crim.App. 1901).

C72 8. For the last ninety years, the Court of Criminal Appeals has consistently held that the type of testimony elicited by the State at the guilt or innocence state of the Applicant's trial without objection by defense counsel and exploited during the final argument at the punishment stage of the Applicant's

trial by the State without objection by defense counsel is both wholly improper and patently inadmissible. See e.g. Allen v. State, 278 S.W. 201 (Tex.Crim.App. 1925)(Admission of testimony that decedent left behind wife and five children aged six to sixteen irrelevant and immaterial as tending only to arouse jury's sympathy and prejudice them against the defendant); Goolsby v. State, 15 S.W.2d 1052 (Tex.Crim.App. 1929)(Testimony that decedent's wife and baby left without support as a result of defendant's bad acts inadmissible); Ainsworth v. State, 56 S.W.2d 457 (Tex.Crim.App. 1933)(Reversible error to permit son of decedent to testify that his mother was left with eight children and that they were poverty-stricken); Elizondo v. State, 94 S.W.2d 457 (Tex.Crim.App. 1936)(Reversible error for prosecutor to ask defendant how many children he made orphans of when he killed the decedent); Eckels v. State, 220 S.W.2d 175 (Tex.Crim.App. 1949)(Error to admit testimony that decedent had a wife and five children); Cavarrubio v. State, 267 S.W.2d 417 (Tex.Crim.App. 1954)(Error to admit testimony as to number of children decedent's widow had); Cadenhead v. State, 369 S.W.2d 44 (Tex.Crim.App. 1963)(Reversible error to admit testimony by mother of decedent that he was the sole support of her and her husband).

9. The Court of Criminal Appeals has held that testimony from the decedent's widow in a capital murder case that he was a peaceful, hardworking man, who had been married for twenty-two years and left behind five children was not relevant to any of the special issues presented to the jury and because it was elicited for no other purpose than to inflame the jury and to arose their sympathy, the defendant's death sentence had to be set aside.
C73 Armstrong v. State, 718 S.W.2d 686 (Tex.Crim.App. 1985).

10. While the Court of Criminal Appeals has held that it was error to admit testimony virtually identical to that introduced without objection in the Applicant's trial because it "had no bearing whatsoever on any material issue in the case and its sole purpose was to inflame the minds of the jury," the Court also held that defense counsel's failure to lodge a timely and specific objection to this testimony waived the error. Vela v.
C74 State, 516 S.W.2d 176 (Tex.Crim.App. 1974).

11. But the Fifth Circuit Court of Appeals later set aside the defendant's conviction on ineffective assistance of counsel grounds given defense counsel's failure to lodge a timely and specific objection to this testimony, an error it described as "fundamental, revealing ignorance of one of the most basic rules of Texas procedure." Vela v. Estelle, 708 F.2d 954 (5th Cir.
C75 1983).

12. The Fifth Circuit held that defense counsel's failure to lodge a timely and specific objection to the State's patently inadmissible evidence "fell below the range of competency demanded of attorneys in criminal cases" and "resulted in actual and substantial disadvantage to the cause of [the defendant's] C76 defense." Vela v. Estelle, supra.

13. To the extent that Mock did not object to either the State's introduction of victim-impact evidence at the guilt or innocence stage of the Applicant's trial or its victim-impact based final argument during the punishment stage of the trial on the grounds that he did not believe he could lodge a "valid legal objection" thereto, the Court concludes that Mock's ignorance of over ninety years of well-settled Texas precedent did not fall within the "wide range of professional assistance." Strickland v. C77 Washington, supra; Vela v. Estelle, supra.

14. To the extent that Mock premised his failure to object to the State's use of victim-impact evidence and final argument at both stages of the Applicant's trial on what he believed to be trial strategy, the Court concludes that Mock's "trial strategy" to admit this evidence and argument was fundamentally unsound inasmuch as there could have been no sound strategic value in Mock having passed over the admission of prejudicial and clearly inadmissible evidence and final argument. Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985); Ex parte Welborn, 785 S.W.2d 391 (Tex.Crim.App. 1990); Miller v. State, 728 S.W.2d 133 C78 (Tex.App.--Houston [14th Dist.], 1987).

15. To the extent that Mock's premised his failure to object to the victim-impact evidence and argument at both stages of the Applicant's trial on trial strategy, the Court concludes that this explanation was clearly at odds with what he had earlier noted at the evidentiary hearing was his long-standing policy never to let the State elicit this type of testimony and argument because it "irreparably" damaged the accused. See Long v. State, 764 S.W.2d 30 (Tex.App.--San Antonio, 1989)(The knowing admission of evidence that is at odds with defense counsel's "trial strategy" is "objectively unreasonable" and constitutes C79 "objectively deficient" performance.).

16. Because no reasonably competent attorney exercising professional judgment could have failed to object to the State's use of victim-impact evidence and argument at both stages of the Applicant's trial, Lyons v. McCotter, supra, Vela v. Estelle, supra, the Court concludes that Mock's conduct was both deficient and prejudicial to the Applicant. Strickland v. Washington, supra; Perkins v. State, 771 S.W.2d 195 (Tex.App.--Houston [1st C80 Dist.], 1989), affirmed, 812 S.W.2d 326 (Tex.Crim.App. 1991).

17. A capital sentencing proceeding is sufficiently like a trial in its adversarial format and in the existence of standards for decision that defense counsel's role in the proceeding is comparable to defense counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under the standards governing decision. Strickland v. Washington, supra; Lankford v. Idaho, ___ U.S. ___, 111 S.Ct. 1723 (1991). C81

18. In view of defense counsel's wholesale failure to object to the State's use of victim-impact evidence and argument as set forth above, the Court concludes that but for defense counsel's deficient performance, a reasonable probability exists that the outcome of the proceedings at the punishment stage of the Applicant's trial would have been different. Ex parte Guzmon, 730 S.W.2d 724 (Tex.Crim.App. 1987); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). C82

19. The Court concludes that defense counsel's failure to object to the State's use of victim-impact evidence and argument as set forth above caused a breakdown in the adversarial process that our system counts upon to produce just results, a breakdown sufficient to undermine confidence in the outcome of the proceedings, Strickland v. Washington, supra, so as to call into question the reliability of the jury's verdict at the punishment stage of the Applicant's trial. See Woodson v. North Carolina, supra. C83

20. Although the Respondent contends that the prosecution's victim-impact argument at the punishment stage of the Applicant's trial was both a proper response to defense counsel's earlier argument, inter alia, that the decedent was a good man who was a value to the community or permissible under the "invited argument" doctrine, the Court concludes that both contentions are untenable simply because it was defense counsel's own deficient performance which placed the prosecution in a position to either respond to defense counsel's earlier argument or to avail itself of the "invited argument" doctrine. See Ex parte Guzmon, supra. ("Defense 'evidence' that applicant was a 'wet-back' whose future behavior was unpredictable and who refused to take responsibility for his actions seems to have buttressed the State's case on punishment rather than refuting it."). C84

20. Although the United States Supreme Court had held that the Eighth Amendment barred the admission of victim-impact evidence during the punishment stage of a capital murder trial, Booth v. Maryland, 482 U.S. 496 (1987) as well as the State's use of victim-impact argument during the punishment stage of a capital murder trial, South Carolina v. Gathers, 490 U.S. 805 (1989), the Supreme Court overruled both of these holdings in Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597 (1991). C85

21. In overruling both Gathers and Booth, however, the Supreme Court did not hold that victim-impact evidence must be admitted or even that it should be admitted but merely held that
C86 if a State decides to permit consideration of that evidence, the Eighth Amendment erects no per se bar. Payne v. Tennessee, supra.

22. In view of over 90 years of precedent from the Court of Criminal Appeals holding this type of evidence and argument inadmissible, the Court concludes that the holding of the United States Supreme Court in Payne v. Tennessee, supra, does not require the admission of victim-impact evidence during the punishment stage of a capital murder case in Texas and that this Court and the Court of Criminal Appeals are free to interpret Article I, Section 13 of the Texas Constitution in a manner
C87 consistent with this line of cases. Heitman v. State, ___ S.W.2d ___, Tex.Crim.App. No. 1380-89 (Delivered June 26, 1991).

23. Although the Respondent contends that the prosecution's use of victim-impact evidence and argument at the punishment stage of the Applicant's trial was permissible as "circumstances of the offense," see Miller-El v. State, 782 S.W.2d 892 (Tex.Crim.App. 1990), the Court rejects this contention and concludes that the victim-impact evidence and argument adduced by the State had no bearing on the Applicant's personal responsibility and moral guilt, see Stavinoha v. State, 808 S.W.2d 76 (Tex.Crim.App. 1991), so as to render it admissible during the punishment stage of the
C88 Applicant's trial. Armstrong v. State, supra.

24. Because the victim-impact evidence and argument utilized by the State created far too great a risk that the death sentence imposed upon the Applicant was based upon caprice and emotion rather than reason, Gardner v. Florida, supra, and was the type of evidence which did not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not," Godfrey v. Georgia, 446 U.S. 420 (1980), the Court concludes that defense counsel's failure to object to this evidence and argument denied the Applicant the effective assistance of counsel during the punishment stage of his
C89 trial. Ex parte Guzmon, supra.

25. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance
C90 of the evidence. Ex parte Salinas, supra.

26. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation is viewed in conjunction with those other failings of counsel as set forth in Section B, supra, and in Sections G, H, and I, infra, he was denied the effective assistance of counsel, the Court recommends that habeas corpus
C91 relief in this regard be GRANTED.

D. DEFENSE COUNSEL'S FAILURE TO REQUEST A PENRY INSTRUCTION

FINDINGS OF FACT

F157 1. During the punishment stage of the primary case, the Applicant presented testimony from Pamela Lenox that the Applicant was a "fun" person whom she never knew to be violent.

F158 2. The Applicant also presented testimony from Ruthie Rivas that his reputation in the community for being a peaceful and law-abiding citizen was good.

F159 3. The Applicant also presented testimony from Tinnie Joffrion that he was always respecful and submitted to authority.

F160 4. The Applicant also presented testimony from Ellis Miller, that the Applicant surrendered when he became aware that he was wanted by law enforcement for his involvement in the primary case.

F161 5. Miller also testified that the Applicant's mother died when he was four, that he had been reared by his grandparents, and that the Applicant had come from a poor background.

F162 6. Miller also testified that the Applicant had the benefit of his guidance while he was growing up and that the Applicant was sorry for what he had done insofar as his involvement in the primary case was concerned.

F163 7. The Applicant also presented testimony from Harry Williams that he had raised the Applicant since he had been a baby and that the Applicant had always minded him.

F164 8. The Court finds that the Applicant did not present any evidence during the trial of the primary case tending to show that he was mentally retarded or abused as a child, either by his parents, grandparents or any other relatives.

F165 9. The Court finds that the Applicant did not present any evidence during the trial of the primary case tending to show that his mental or emotional condition had been abnormal either growing up or during the time frame prior to or during the commission of the primary offense.

F166 10. The Court finds that the Applicant did not present any evidence during the trial of the primary case tending to show that the death of his mother when he was a small child or his poor socio-economic background prompted him to commit the primary offense or otherwise reduced his moral culpability insofar as the commission of the primary offense was concerned.

11. At the conclusion of the punishment hearing in the primary case, defense counsel did not request a jury instruction of the type later sanctioned by the United States Court in Penry v. Lynaugh, 492 U.S. 302 (1989). F167

12. In an affidavit attached as an exhibit to his application for writ of habeas corpus, and admitted at the evidentiary hearing, the Applicant has included the results of a psychological evaluation in which Dr. J. Ray Hays concludes, inter alia, that while the Applicant "does not carry the label of 'retarded' he is nevertheless functioning at the level of the lowest five percent of the population." F168

CONCLUSIONS OF LAW

1. Although defense counsel made no request that the jury in the primary case be given a Penry instruction and this issue was not otherwise raised on direct appeal, this contention may be raised for the first time in a post-conviction writ of habeas corpus. Ex parte Ellis, 810 S.W.2d 208 (Tex.Crim.App. 1991). C92

2. The Eighth and Fourteenth Amendments require that the sentencer in a capital murder case not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). C93

3. The three special issues contained in Article 37.071, Section (b), V.A.C.C.P., which comprise the Texas capital sentencing scheme do not invariably operate in such a way as to violate the Eighth Amendment. Franklin v. Lynaugh, 487 U.S. 164 (1988). C94

4. But in the absence of instructions informing the jury that it may consider and give effect to the mitigating evidence of a defendant's mental retardation and abused background by declining to impose the death penalty, the inability of the jury to be provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision violates the Eighth Amendment to the United States Constitution. Penry v. Lynaugh, supra. C95

5. A jury instruction such as the one recognized in Penry is required whenever that mitigating evidence proferred by the defendant is not relevant to the special issues or has relevance to the defendant's moral culpability beyond the scope of the special issues. Gribble v. State, 808 S.W.2d 65 (Tex.Crim.App. 1990). C96

6. Unlike the evidence of mental retardation and abused childhood introduced by the defendant in Penry v. Lynaugh, supra, or the evidence of a traumatic childhood and resultant abnormal
C97 mental and emotional conditions introduced by the defendant in Gribble v. State, supra, the Court concludes that the evidence introduced by the Applicant during the punishment stage of the primary case was not a "double-edged sword" as to Special Issue Two, see Franklin v. Lynaugh, supra, inasmuch as it did not tend to ameliorate the Applicant's blameworthiness for the crime while simultaneously indicating that he was likely to be a continuing threat to society. Boggess v. State, ___ S.W.2d __, Tex.Crim.App. No. 69,990 (Delivered May 29, 1991).

7. Because the evidence offered in mitigation by the Applicant during the punishment stage of the primary case was not relevant beyond the scope of the special issues and was instead directly relevant to Special Issue Two, the Court concludes that
C98 no further jury instruction was needed to give effect to this evidence. Ex parte Baldree, 810 S.W.2d 213 (Tex.Crim.App. 1991).

8. To the extent that the affidavit of Dr. Hays is offered by the Applicant to support his contention that additional evidence in mitigation existed beyond that which was actually
C99 introduced during the punishment stage of the primary case but was not presented by defense counsel, this Court may not consider it. Ex parte Goodman, ____ S.W.2d ____, Tex.Crim.App. No. 70,887 (Delivered May 29, 1981).

9. For the Applicant to be entitled to habeas corpus relief on the ground that defense counsel's failure to request a Penry-type jury charge during the punishment stage of the primary
C100 case was ineffective assistance of counsel, he must not only demonstrate that defense counsel's failure to request such a charge was deficient performnace, he must also demonstrate by a preponderance of the evidence that, but for defense counsel's dereliction, a reasonable probability exists that the outcome of the proceedings would have been different. Strickland v. Washington, supra; Hernandez v. State, supra.

10. Even if defense counsel's failure to request a Penry-type jury instruction may be viewed as deficient conduct, in light of this Court's conclusion that such an instruction was not necessary for the jury to give effect to the mitigating evidence
C101 presented by the Applicant, the Applicant is unable to demonstrate that defense counsel's deficient performance was prejudicial to his defense. Black v. State, ___ S.W.2d ___, Tex.Crim.App. No. 69,648 (Delivered May 29, 1991).

C102 11. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C103 12. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to request a Penry-type jury instruction denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

E. DEFENSE COUNSEL'S FAILURE TO INTRODUCE EVIDENCE OF THE APPLICANT'S GOOD CONDUCT IN AND PAROLE FROM PRISON AND OTHER MITIGATING EVIDENCE DURING THE PUNISHMENT STAGE

FINDINGS OF FACT

F169 1. During the punishment stage of the primary case, the State introduced evidence that the Applicant had pled guilty in February of 1978 to the felony offense of burglary of a habitation and received five years probation but that in May of 1978, his probation was revoked after he was found guilty of the felony offense of burglary with intent to commit theft.

F170 2. As a result of this probation revocation, the Applicant received concurrrent terms of five years and three years in the Texas Department of Corrections.

F171 3. During the punishment stage of the primary case, the Applicant's trial counsel did not seek to introduce evidence as to the Applicant's good conduct while he was incarcerated in the Texas Department of Corrections.

F172 4. In his affidavit, Ron Mock, lead counsel for the Applicant, stated that he opted not to present evidence as to the Applicant's good conduct during his prior incarceration in prison as mitigating evidence because he believed that "[T]he State would then refute such evidence by introducing evidence of all infractions, no matter how minor, from the [Applicant's] prior TDC records."

F173 5. At the evidentiary hearing, however, Mock acknowledged that not only was he was aware that the Applicant's conduct record had been good, he was unaware that the Applicant had committed any infractions while incarcerated in the penitentiary.

F174 6. Although Mock testified at the evidentiary hearing that he argued to the jury that if the Applicant had been a threat to anyone while incarcerated, "[the State] would have brought it to you," the record from the Applicant's trial does not reveal that Mock ever made any such argument.

7. Although in his affidavit, Mock had attributed his decision not to present that evidence of the Applicant's good conduct record while in prison as the result of trial strategy, when asked at the evidentiary hearing why he had not attempted to
F175 bring before the jury that evidence tending to show that the Applicant had behaved well while incarcerated in prison, Mock's response was, "I don't know."

8. Regardless of which explanation Mock tendered was correct, the Court finds that Mock's failure to make any effort at all to determine the extent of the Applicant's good conduct while
F176 incarcerated in prison and the extent to which the State might have rebutted such evidence with evidence of their own as to those infractions, if any, the Applicant committed while in prison, was not the result of a conscious tactical decision, let alone, a sound trial strategy.

9. Prior to trial and at defense counsel's request, the Applicant was examined by Drs. Nottingham and Brown who determined that the Applicant's intelligence quotient was between 80 and 90
F177 and that the Applicant was competent to stand trial.

10. No other psychiatric or psychological examinations were requested by defense counsel or performed on the Applicant and no
F178 psychiatric or psychological evidence was adduced on the Applicant's behalf during either stage of the proceedings below.

11. A psychological evaluation performed on the Applicant in October of 1989 by Dr. James Ray Hays in which Dr. Hays
F179 concluded, inter alia, that the Applicant was functioning intellectually in the low end of the borderline range of intelligence with a full-scale intelligence quotient of 73.

12. Dr. Hays concluded that while the Applicant did not carry the label of "retarded," he was functioning at the level of the lowest five percent of the population and that he tended to be
F180 easily influenced by his companions and not to be a leader.

13. Based upon his review of the earlier psychological evaluation performed by Drs. Nottingham and Brown, Dr. Hays also concluded that the Applicant "was deprived of a thorough and
F181 complete assessment of his mental functioning" and that the Applicant's trial counsel were "not made aware of the full range of defenses and factors which could mitigate the [Applicant's] actions."

14. Ron Mock acknowledged that it would have been helpful to the defense to have had the funds with which to have hired a qualified psychiatrist or psychologist to have assisted him in the
F182 preparation and presentation of the Applicant's case.

F183 15. Mock also acknowledged that it would have been useful to the defense to have presented evidence before the jury that the Applicant functioned at the level of the lowest five percent of the population and that he was easily led by others.

F184 16. Mock noted that this type of evidence would have been valuable to the defense as mitigating evidence to present to the jury during the punishment stage of the trial and would have also been valuable insofar as the trial court's consideration of whether the Applicant's written statement had been knowingly and voluntarily given was concerned.

F185 17. Based upon their personal observation of the Applicant prior to and during the trial of the primary case, they concluded that although the the Applicant was not particularly bright, he was able to understand the nature and consequences of both his actions and the resultant criminal proceedings.

F186 17. To the extent that defense counsel sought the appointment of Drs. Nottingham and Brown to examine the Applicant in an effort to ensure that the Applicant was competent to stand trial, the Court finds that defense counsel's eventual decision not to seek the appointment of an additional psychiatrist or psychologist to conduct a further examination of the Applicant was, at least under the facts and circumstances of this case, a reasonable strategic decision.

F187 18. Based upon the evidence adduced during the both stages of the Applicant's trial including that evidence of the Applicant's involvement in the two unadjudicated aggravated robberies, the Court finds that in spite of Dr. Hays' findings, the Applicant was capable of taking charge and not being led by others while engaging in criminal conduct.

CONCLUSIONS OF LAW

C104 1. It is well settled that a criminal defense attorney must have a firm command of the facts of the case before he can render reasonably effective assistance of counsel. Butler v. State, supra.

C105 2. Defense counsel has the responsibility of conducting an independant investigation of the facts of his client's case and this burden may not be delegated to an investigator. Ex parte Ewing, supra.

C106 3. Defense counsel has a professional duty to present all available testimony and other evidence calculated to support the defense of his client. Thomas v. State, supra.

4. To successfully advance the contention that his trial counsel were ineffective, the Applicant must demonstrate that
C107 counsel's failure to present evidence of his good conduct while incarcerated in prison or other mitigating evidence such as his borderline intelligence range was deficient in that these failures neither fell within the wide range of professional assistance nor were they the result of a sound trial strategy. Strickland v. Washington, supra.

5. Strategic choices made by defense counsel after thorough investigation of law and facts relevant to plausible
C108 options are virtually unchallengeable and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Strickland v. Washington, supra.

6. Consistent with these notions, defense counsel has a
C109 duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Strickland v. Washington, supra.

7. While the Applicant must overcome the strong presumption that under the facts and circumstances of this case,
C110 defense counsel's conduct as set forth above might be considered sound trial strategy, Strickland v. Washington, supra, it may not be argued that a given course of conduct was within the realm of trial strategy unless and until defense counsel has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision. Ex parte Welborn, supra.

8. To the extent that defense counsel's failure to
C111 investigate and present evidence as to the Applicant's good conduct record while incarcerated in the Texas Department of Corrections as evidence in mitigation of punishment, see Skipper v. South Carolina, 476 U.S. 1 (1986), was either the result of a poorly-reasoned trial strategy or no trial strategy at all, see Ex parte Duffy, supra, the Court concludes that defense counsel's conduct in this regard fell outside of the wide range of professionally competent assistance. Butler v. State, supra; Doherty v. State, 781 S.W.2d 439 (Tex.App.--Houston [1st Dist.], 1989).

9. While the Applicant has demonstrated that defense
C112 counsel's conduct was deficient, the Court concludes that the Applicant has failed to demonstrate that defense counsel's failure to present evidence as to his good conduct record while incarcerated in the Texas Department of Corrections prison was prejudicial to his defense. Black v. State, ___ S.W.2d ___, Tex.Crim.App. No. 69,648 (Delivered May 29, 1991).

C113 10. Because defense counsel's decision not to seek the appointment of an additional psychiatrist or psychologist to conduct a further examination of the Applicant was, under the facts and circumstances of this case, a reasonable strategic decision, the Court concludes that defense counsel's conduct in this regard was not deficient performance. Stafford v. State, ___ S.W.2d ___, Tex.Crim.App. No. 1085-88 (Delivered July 3, 1991).

C114 11. While that testimony set forth in Dr. Hays' affidavit as to the Applicant's limited intellect might have been beneficial to the defense, the Court concludes that it was not, in and of itself, of such character as would have likely have altered the jury's sentencing decision during the punishment stage of the Applicant's trial had it been admitted. Hernandez v. State, supra; Black v. State, supra.

C115 12. Regardless of defense counsel's failure to request a Penry-type jury instruction, see infra, the Court concludes that defense counsel were not "chilled" or otherwise precluded from introducing whatever evidence they believed to be mitigating in nature. Ex parte Ellis, 810 S.W.2d 208 (Tex.Crim.App. 1991).

C116 13. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C117 14. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to introduce evidence during the punishment stage of his trial as to his good conduct during his incarceration in the penitentiary or other evidence in mitigation such as his limited intellect denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

F. DEFENSE COUNSEL'S FAILURE TO REQUEST AN ANTI-PARTIES CHARGE

FINDINGS OF FACT

F188 1. During the guilt or innocence stage of the Applicant's trial, the jury was instructed on the law of parties and the law of criminal responsibility for the conduct of another pursuant to V.T.C.A. Penal Code, Sections 7.01 & 7.02, respectively.

F189 2. During the punishment stage of the trial, the court failed to instruct the jury not to consider the law of parties and the law of criminal responsibility for the conduct of another in answering the three special issues. See Green v. State, 682 S.W.2d 271 (Tex.Crim.App. 1984).

F190 3. Although defense counsel submitted a specially requested charge telling the jury that they could not consider the law of parties in answering the three special issues, the Court of Criminal Appeals found on direct appeal that that defense counsel "failed to object to the exclusion of a Green instruction from the charge." Westley v. State, 754 S.W.2d 224 (Tex.Crim.App. 1988).

F191 4. The Court of Criminal Appeals held that defense counsel's request for a Green instruction was not timely and failed to apprise the court to the defect in its charge to the jury and that pursuant to Almanza v. State, 686 S.W.2d 157 (Tex.Crim.App. 1985), defense counsel's failure to timely object waived all but fundamental error. Westley v. State, supra.

F192 5. The Court of Criminal Appeals held that the Applicant was not egregiously harmed by the absence of a Green instruction to the jury during the punishment stage of his trial inasmuch as the evidence at trial showed that the Applicant's conduct was directly responsible for the death of the decedent. Westley v. State, supra. See also Nichols v. State, 754 S.W.2d 185 (Tex.Crim.App. 1988).

F193 6. The Court finds that no sound strategic purpose could have been served by defense counsel waiting until after the jury had reached a verdict as to punishment before submitting their request for a Green instruction and that reasonably competent counsel would have ensured that such a charge was timely sought.

F194 7. The Court finds that the prosecution did not invite the jury during its final argument in the punishment stage of the Applicant's to apply the law of parties in answering the special issues but argued instead that the Applicant should be judged as the principal actor in determining his punishment. See Westley v. State, supra.

CONCLUSIONS OF LAW

C118 1. To establish ineffective assistance of counsel during the punishment stage of a capital murder trial, the Applicant must not only demonstrate that trial counsel's performance was deficient, he must also show that this deficient performance prejudiced the defense so as to deprive the Applicant of a fair trial. Strickland v. Washington, supra; Black v. State, supra.

C119 2. The Court concludes that defense counsel's failure to timely request a Green jury instruction during the punishment stage of the Applicant's trial was not the result of reasonable professional judgment so as to constitute deficient performance. Black v. State, supra; Ex parte Welborn, supra.

C120 3. To establish that he was prejudiced by defense counsel's deficient performance, the Applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, supra.

C121 4. While the Applicant was entitled to an anti-parties instruction, the trial court's failure to sua sponte charge the jury that the law of parties may not be applied to the special issues does not constitute fundamental error. Nichols v. State, supra.

C122 5. Given the Court of Criminal Appeals' disposition of this contention on direct appeal, the Court concludes that the Applicant did not suffer egregious harm as a result of the trial court's failure to sua sponte charge the jury that the law of parties could not be applied to the special issues. Westley v. State, supra; Nichols v. State, supra.

C123 6. In view of the fact that the trial court correctly charged the jury on the law applicable to the facts of this case and that the prosecution did not urge the jury to consider the law of parties in answering the special issues and in view of the presumption that the jury followed the court's instructions as set forth in its charge, the Court concludes that the Applicant was not prejudiced by defense counsel's failure to timely request an anti-parties jury instruction. Black v. State, supra.

C124 7. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, 598 S.W.2d 308 (Tex.Crim.App. 1980).

C125 8. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to timely request an anti-parties charge during the punishment stage of his trial denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

G. DEFENSE COUNSEL'S FINAL ARGUMENT DURING THE PUNISHMENT STAGE OF THE APPLICANT'S TRIAL

FINDINGS OF FACT

F195 1. During his final argument in the punishment stage of the Applicant's trial, lead defense counsel Ron Mock told the jury that he "would not insult your intelligence by telling you that Anthony Westley will rehabilitate himself."

F196 2. In discussing the Applicant's prior criminal history, Mock told the jury that the Applicant had been given several chances but that he had "blown it."

F197 3. Mock felt that the strategic value of this argument was premsed on the need to admit that the Applicant "was not a hero" and not to "vouch for the ability of somebody to rehabilitate themself."

F198 4. The Court finds that no sound trial strategy could have been served by making this argument inasmuch as Mock's assertion that the Applicant would never rehabilitate himself could only have served to bolster the State's argument that the Applicant was in fact a continuing threat to society.

F199 5. After arguing that the Applicant was not being tried "for a case of felony dumb ass," Mock told the jury that it was impossible to "erase the scars of a robbery" or "the memory of a gun pointed in your nose or to your head and someone telling you 'Give me your money, motherfucker,'" even though the Applicant did not use this type of language during the primary offense.

F200 6. Mock noted that the strategic value of making this type of argument was to make the jurors aware that being the victim of an aggravated robbery was not "a pleasant experience," and that this type of argument was calculated to make the jury more sympathetic to the Applicant.

F201 7. The Court finds that no sound trial strategy could have been served by making this type of argument as it only could have served to not only reinforce in the minds of the jurors the gravity of the primary offense insofar as its deliberate nature was concerned but to bolster the State's argument that the Applicant was in fact a continuing threat to society as well.

F202 8. During his final argument in the punishment stage of the Applicant's trial, Mock continually bolstered the character of both the surviving victim and the decedent in the primary case but the victims of the unadjudicated aggravated robberies as well.

F203 9. Mock noted that the strategic value of making this argument lay in his belief that the more positive things that the jury knew about the victim, the more sympathetic they would feel towards the Applicant.

F204 10. The Court finds that no sound trial strategy could have been served by this type of argument inasmuch as it was not only not reasonably calculated to foster sympathy for the Applicant but it opened the door for the State to respond with an otherwise improper victim-impact argument as well.

F205 11. During his final argument in the punishment stage of the Applicant's trial, Mock told the jury about a trip he allegedly took to the Fifth Ward section of Houston where he stood and observed "all the Anthony Westleys" standing on the street corners drinking wine and "talking shit," wanting to see "who was in or out of the penitentiary, who was still hanging around on the corner."

F206 12. Mock noted that his trial strategy in making this argument was to create some emphathy for the Applicant in the eyes of the jury.

F207 13. The Court finds that no sound trial strategy could have been served by making this argument as it was not only not reasonably calculated to engender a sense of empathy for the Applicant in the eyes of the jury but instead fostered the message that the Applicant was a pariah on society who did little else but hang out on street corners "drinking wine and talking shit" assuming that he was not "still in the penitentiary."

CONCLUSIONS OF LAW

C126 1. Defense counsel has a professional responsibility to present all available testimony and other evidence calculated to support the defense of his client. Thomas v. State, 550 S.W.2d 64 (Tex.Crim.App. 1977).

C127 2. To successfully advance the contention that his trial counsel was ineffective, the Applicant must demonstrate that those portions of counsel's final argument during the punishment stage of his trial as set forth above neither fell within the wide range of professional assistance nor was part of a sound trial strategy. Strickland v. Washington, supra.

C128 3. While the Applicant must overcome the strong presumption that under the facts and circumstances of this case, those portions of defense counsel's final argument as set forth above were part of a sound trial strategy, Strickland v. Washington, supra, final argument that is clearly calculated to and does in fact buttress the State's case even as it irreparably harms the defendant's cannot be considered a reasonable trial strategy. Ex parte Guzmon, supra; Miller v. State, 728 S.W.2d 133 (Tex.App.--Houston [14th Dist.], 1987).

C129 4. The Court concludes that those portions of defense counsel's final argument alluded to above were not the result of reasonable professional judgment or of a reasonable trial strategy and constituted deficient performance. Black v. State, supra; Riascos v. State, 792 S.W.2d 754 (Tex.App.--Houston [14th Dist.], 1990); Craig v. State, 783 S.W.2d 620 (Tex.App.--El Paso, 1989).

C130 5. In light of the totality of the representation afforded the Applicant during the punishment stage of this case, the Court concludes that the Applicant's defense was prejudiced by counsel's deficient performance during final argument. Cf. Ex parte Guzmon, supra. (Counsel's final argument highlighting defendant's refusal to take responsibility for his actions "as likely to have led to the jury's answering special issue number two in the affirmative as anything the State offered."); Miller v. State, supra. (Counsel's final argument was "clearly calculated to damage appellant's cause" and "cannot be considered a reasonable trial strategy."); Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989)(Counsel's "rambling discourse may have actually strengthened the jury's resolve to impose a death sentence.").

C131 6. The Court concludes that in light of the totality of the representation afforded to the Applicant during the punishment stage of his trial, defense counsel's performance during final argument caused a breakdown in the adversarial process that our system counts upon to produce just results, a breakdown sufficient to undermine confidence in the outcome of the proceedings, Strickland v. Washington, supra, so as to call into question the reliability of the jury's verdict at the punishment stage of the Applicant's trial. Cf. Woodson v. North Carolina, supra.

C132 7. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, supra.

C133 8. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation, Ex parte Welborn, supra, is viewed in conjunction with those other failings of counsel set forth in Sections B, C, supra, and Sections H and I, infra, see Weathersby v. State, supra, he was denied the effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

H. DEFENSE COUNSEL'S FAILURE TO BECOME FAMILIAR WITH THOSE CRITICAL LEGAL ISSUES INVOLVED IN THE APPLICANT'S CASE SO AS TO PRESERVE THEM FOR APPELLATE REVIEW

FINDINGS OF FACT

F208 1. Lead defense counsel Ron Mock noted that he tried some 30 to 40 cases in 1985, the year in which the Applicant stood trial in connection with the primary case.

F209 2. During the time that he represented the Applicant, Mock did not maintain a set of Supreme Court Reporter, Southwestern Reporter, or Federal Reporter in his law office.

F210 3. At the time of the Applicant's trial, Mock did not employ a law clerk, a paralegal or an associate to perform legal research for him or to assist him in such legal research.

F211 4. Mock maintained that if he kept abreast of significant legal developments in the field of criminal law, he did so by reading slip opinions in the wee hours of the morning, usually from 2:00 a.m. to 5:00 a.m.

F212 5. Mock recounted that his approach insofar as preserving legal complaints for appellate review was concerned was to "make an objection wherever legally available" to maximize the possibility that the Applicant's conviction would be reversed on appeal given the virtual certainty that he would be convicted.

F213 6. Mock did not file any pre-trial motions in limine to keep the State from getting into otherwise objectionable matters because he did not think it was a necessary part of his trial strategy.

F214 7. Mock was either unable to remember, unfamiliar with, or had no present understanding of the holdings of the following decisions from the United States States Supreme Court, all of which were capital cases: Woodson v. North Carolina, supra; Roberts v. Louisiana, 428 U.S. 325 (1976); Lockett v. Ohio, supra; Beck v. Alabama, 447 U.S. 625 (1980); Eddings v. Oklahoma, 455 U.S. 104 (1982); Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987); Skipper v. South Carolina, supra; Hitchcock v. Dugger, 481 U.S. 393 (1987); Franklin v. Lynaugh, supra; and Penry v. Lynaugh, supra.

F215 8. During the State's cross-examination of Detective Bockel, defense counsel did not object to Bockel's testimony that investigators did not believe the Applicant when he told them he was being "completely truthful" at the time he gave investigators a written statement.

F216 9. When the prosecutor asked Bockel whether, as a result of his investigation, he found certain things which the Applicant had told investigators in his written statement to be untrue, defense counsel interposed an objection that this matter was for the jury's determination.

F217 10. Without objection from defense counsel and in the presence of the jury, the prosecutor responded to defense counsel's objection by noting that it was his belief that, "[S]ome portions [of the Applicant's written statement] are not accurate, and that the detective made those determinations during his investigation," and that the prosecutor was "just asking whether or not [Bockel] found those representations to be true."

F218 11. Although the trial court sustained defense counsel's objection, defense counsel failed to request that the trial court instruct the jury to disregard both the prosecutor's question and his response and failed to move for a mistrial.

F219 12. The prosecutor then asked Bockel whether, in his opinion, the Applicant had been "completely straightforward, or was he giving self-serving information during this investigation?"

F220 13. Although defense counsel's objection was sustained, defense counsel failed to either request that the jury be instructed to disregard the prosecutor's question or ask for a mistrial.

F221 14. As a result of defense counsel's failure in this regard, the Court finds that defense counsel did not preserve for appellate review the prosecutor's wholly impermissible effort at eliciting from Bockel that he believed that certain portions of the Applicant's written statement were untrue and that Bockel believed that the the information the Applicant's had furnished investigators was self-serving.

F222 15. The Court finds that Mock did not preserve for appellate review the State's systematic use of its peremptory challenges to exclude black veniremembers from jury service.

F223 16. The Court finds that Mock did not preserve for appellate review the State's use of victim-impact evidence during the guilt or innocence stage of the Applicant's trial.

F224 17. The Court finds that Mock did not preserve for appellate review the State's use of victim-impact argument during the punishment stage of the Applicant's trial.

F225 18. The Court finds that Mock did not request a Penry-type jury instruction during the punishment stage of the Applicant's trial.

F226 19. The Court finds that Mock failed to timely request that an anti-parties charge be given to the jury during the punishment stage of the Applicant's trial.

F227 20. The Court finds that no sound trial strategy could have been served by Mock's failure to adequately familiarize himself with those critical legal issues involved in the trial of the Applicant's case.

F228 21. The Court further finds that no sound tral strategy could have been served given Mock's concomitant failure to

adequately preserve for appellate review the following issues: (a) the State's systematic use of its peremptory challenges to exclude black veniremembers from jury service; (b) the State's use of victim-impact evidence during the guilt or innocence stage of the Applicant's trial; (c) the improper admission of the opinion of Detective Bockle that investigators did not believe that certain portions of the Applicant's confession were true and that the Applicant's responses to investigators who took his statement were self-serving; (d) the State's use of victim-impact argument during the punishment stage of the Applicant's trial; (e) the failure of the trial court to furnish the jury with a Penry-type jury instruction during the punishment stage of the Applicant's trial; and (f) the failure of the trial court to give the jury an anti-parties charge during the punishment stage of the Applicant's trial.

F229 22. To the extent that Mock premised his failure to object to otherwise inadmissible victim-impact evidence and argument because he did not want to anger the members of the jury, the Court finds that such a strategy, within the context of any trial but particularly within the context of a death penalty case, is simply not a sound trial strategy in light of those prophylactic measures which could have been taken by Mock either by filing a motion in limine or by simply apprising the jurors during voir dire that it was incumbent upon him to object to matters which he deemed to be improper.

F230 23. The Court finds that if Mock in fact engaged in any pre-trial preparation inasofar as familiarizing himself with that body of case law impacting upon and those legal issues likely to be present during the course of the Applicant's trial, it is simply not borne out by this record given his wholesale failure to preserve any one of those critical legal issues alluded to above for appellate review.

CONCLUSIONS OF LAW

C134 1. It is axiomatic that a criminal defense attorney must have a firm command of the governing law applicable to the facts of his client's case before he can render reasonably effective assistance of counsel. Ex parte Raborn, 658 S.W.2d 602 (Tex.Crim.App. 1983); Ex parte Lilly, 656 S.W.2d 490 (Tex.Crim.App. 1983).

C135 2. It may not be argued that a given course of conduct was within the realm of trial strategy unless and until trial counsel has conducted the requisite legal and factual investigation which would enable him to make an informed rational decision. Ex parte Duffy, supra; Ex parte Welborn, supra.

C136 3. The Court concludes that Mock's failure to adequately familiarize himself with that body of case law impacting upon and those legal issues likely to occur during the course of the Applicant's trial and his concomitant failure to preserve for appellate review those critical legal issues set forth above was not the result of a reasonable professional judgment and constituted deficient performance. Ex parte Guzmon, supra; Ex parte Walker, 777 S.W.2d 427 (Tex.Crim.App. 1989).

C137 4. While the Applicant must overcome the strong presumption that Mock's failures to familiarize himself with applicable case law prior to the Applicant's trial and to preserve for appellate review those critical legal issues alluded to above was the result of trial strategy, the Court concludes that Mock's conduct represented the "[A]bdication of a basic threshold responsibility [which] is the antithesis of a considered strategy." Ex parte Dunham, 650 S.W.2d 825 (Tex.Crim.App. 1983).

C138 5. The Court expressly adopts the conclusion of the Court of Criminal Appeals that: "[A]t some point, 'tactic' becomes an unsatisfactory justification for ineptness. And where silence which results in waiver of potentially reversible error in almost all respects cannot be explained by the practitioner, we are not warranted in excusing his major derelictions. The justifications advanced by the State--in its own hindsight--must be rejected. Ineffectiveness disguised as strategy ultimately unmasks itself." Ex parte Duffy, supra. (Emphasis added).

C139 6. The Court concludes that reasonably competent counsel would have known that Bockel's testimony that he did not believe certain portions of the Applicant's statement were true was not only inadmissible as hearsay to the extent that it was necessarily founded on what officers had done or learned, cf. Schaffer v. State, 777 S.W.2d 111 (Tex.Crim.App. 1989), but that it was also improper as calling for one witness to give his opinion as to the truth or falsity of the Applicant's written statement. Ayala v. State, 352 S.W.2d 955 (Tex.Crim.App. 1962); Celeste v. State, 805 S.W.2d 579 (Tex.App.--Tyler, 1991).

C140 7. The Court concludes that given the hotly-contested question of whether the Applicant fired the fatal shot, defense counsel's deficient performance in failing to object to Bockel's testimony that he and the other investigators did not believe the Applicant's version of events as set out in his written statement could only have served to prejudice the Applicant and could reasonably have contributed to the jury answering the three special issues in the affirmative. Cf. Deeb v. State, ___ S.W.2d ___, Tex.Crim.App. No. 69,551 (Delivered June 26, 1991); Garcia v. State, 712 S.W.2d 249 (Tex.App.--El Paso, 1986).

C141 8. Because the term "proceeding" necessarily encompassed the automatic appeal of the Applicant's conviction, cf. Article 37.071, Section (h), supra, the Court concludes that but for counsel's inadequate efforts to familiarize himself with that body of case law governing the trial of the Applicant's case and his concomitant failure to adequately preserve for appellate review those critical legal issues and otherwise reversible error set forth above, a reasonable probability exists that the outcome at some point during the course of these "procedings" would have been different. Ex parte Guzmon, supra; Ex parte Duffy, supra; Cooke v. State, 735 S.W.2d 928 (Tex.App.--Houston [14th Dist.], 1987); Williamson v. State, 771 S.W.2d 601 (Tex.App.--San Antonio, 1989); Thomas v. State, 812 S.W.2d 346 (Tex.App.--Dallas, 1991).

C142 9. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C143 10. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation is viewed in conjunction with those other failings of counsel set forth in Sections B, C, G, supra, and Section I, infra, he was denied the effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

I. DEFENSE COUNSEL'S FAILURE TO FORMULATE A SOUND TRIAL STRATEGY FOR DEFUSING THE APPLICANT'S ADMISSION THAT HE WAS ARMED WITH A .22 CALIBER FIREARM

FINDINGS OF FACT

F231 1. In the interest of judicial economy, the Court hereby incorporates by reference those Findings of Fact which appear in Section B, supra.

F232 2. Counsel for both sides in the primary case agreed that the issue of whether the Applicant fired the fatal .22 caliber bullet which killed the decedent was a "life or death issue."

F233 3. Defense counsel readily acknowledged and the Court finds that the creation of a reasonable doubt in the mind of a single juror as to whether the Applicant possessed a .357 or .22 caliber weapon during the commission of this offense would in all probability have saved the Applicant's life.

F234 4. When asked to describe the trial strategy that he had formulated insofar as convincing the jury that the Applicant did not fire the fatal .22 caliber bullet was concerned, lead defense counsel Ron Mock replied that, "I really didn't have one."

F235 5. Mock, however, later described the trial strategy that he had formulated to convince the jury that the Applicant had not fired the fatal .22 caliber bullet as being premised on "confusion" and "total[] speculation."

F236 6. When asked at the evidentiary hearing to recall what evidence existed at the time of the Applicant's trial that he did not fire the fatal .22 caliber bullet, Mock replied, "None."

F237 7. During his final argument in the punishment stage of the Applicant's trial, defense co-counsel Frank Alvarez argued to the jury that, "[T]here is some evidence perhaps that [the Applicant] may have had a .357 magnum instead of a .22. Of course, in the [Applicant's] statement, it says he had a .22. I can't explain that. I can't get around that. I'm going to be honest with you. It's not beyond the realm of possibility, however, that the Sheriff's people may have put the wrong caliber down for their purposes. There is no proof of that, but if [the Applicant] had a .357 magnum, then he wasn't the person who pulled the trigger that killed Mr. Hall." (Emphasis added).

F238 8. To the extent that this argument may be viewed as a last-minute attempt to formulate a trial strategy calculated to defuse the Applicant's admission in his written statement that he was armed with a .22 caliber firearm, the Court finds that it cannot be fairly described as a sound trial strategy.

F239 9. Viewed against the backdrop of Mock's testimony at the evidentiary hearing, Alvarez' final argument at the punishment stage of the Applicant's trial, and the physical evidence which defense counsel was aware of or should have reasonably been aware of, the Court finds that defense counsel had no sound trial strategy to defuse the Applicant's admission that he was armed with a .22 caliber firearm.

F240 10. During the evidentiary hearing, Randy Schaffer, the Applicant's expert witness on the area of ineffective assistance of counsel noted that at the time the Applicant gave investigators his written statement in which he admitted that he was armed with a .22 caliber firearm, neither the Applicant nor the investigators knew that the decedent had been killed with a .22 caliber bullet.

F241 11. Schaffer pointed out that because it was his experience in criminal cases involving co-defendants that, "[E]ach one claims the other one did it," it was reasonable to conclude that the Applicant more than likely switched places with John Dale Henry in terms of both the weapons they possessed and their places during the commission of the primary offense because the Applicant believed at the time that a bullet from his .357 magnum had caused the death of the decedent.

F242 12. The Court finds that reasonably competent counsel, particularly one with the amount of trial experence in both capital and non-capital cases that Mock possessed at the time of the Applicant's trial, would have seen that a sound trial strategy--perhaps the only sound trial strategy--in defusing the Applicant's admission that he was armed with a .22 caliber firearm, was that the Applicant switched places with his co-defendant in his written statement to avoid being identified as the actor whom he believed at the time had fired the fatal shot.

F243 13. The Court finds that the trial strategy alluded to by Schaffer at the evidentiary hearing, a strategy certainly not beyond the intellectual grasp of reasonably competent counsel, that the Applicant might have been a liar but not a killer, was not only consistent with the physical evidence in the Applicant's case but was infinitely more sound than the trial strategy premised on "confusion", "total[] speculation", and "no proof" advanced by defense counsel.

F244 14. The Court finds that based on the physical evidence of which defense counsel was either aware of or should have reasonably been aware of, that the trial strategy alluded to by Schaffer was not only plausible but was legally and ethically supportable as well.

F244 15. To the extent that this trial strategy could have been developed by defense counsel through the cross-examination of the homicide detectives, the Court finds that it would not have been necessary for defense counsel to have put the Applicant on the stand to expressly admit that he had switched places in his written statement with his co-defendant.

CONCLUSIONS OF LAW

C144 1. It is well settled that a criminal defense attorney must have a firm command of the facts of the case before he can render reasonably effective assistance of counsel. Butler v. State, supra.

C145 2. Defense counsel has the responsibility of conducting an independant investigation of the facts of his client's case and he may not rely exclusively upon his client's version to discharge this responsibility. Ex parte Ewing, supra.

C146 3. Defense counsel has a professional duty to present all available evidence and arguments in support of his client's positions and to contest with vigor all adverse evidence and views. Thomas v. State, supra. (Emphasis added).

C147 4. While the Applicant must overcome the strong presumption that defense counsel's conduct as set forth above might be considered sound trial strategy, it may not be argued that a given course of conduct constituted trial strategy unless and until defense counsel has conducted the necessary legal and factual investigation. Ex parte Welborn, supra.

C148 5. Because defense counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reliable adversarial testing process," Strickland v. Washington, supra, the Court concludes that defense counsel's failure to formulate and advance a sound trial strategy for defusing the Applicant's admission that he was armed with a .22 caliber firearm fell outside of the wide range of professionally competent assistance, Butler v. State, supra, so as to constitute deficient performance. Black v. State, supra.

C149 6. In light of the physical evidence available to them at the Applicant's trial, the Court concludes that defense counsel's trial strategy of "confusion" and "total[] speculation" in attempting to convince the jury that the Applicant did not fire the fatal .22 caliber bullet, when contrasted with that legally and ethically plausible trial strategy alluded to above, cannot be fairly viewed as a sound trial strategy. Ex parte Guzmon, supra; Riascos v. State, supra; Miller v. State, supra.

C150 7. Claims of ineffectiveness must be judged on whether defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial, at either stage of the proceedings, cannot be relied upon as having produced a just result. Strickland v. Washington, supra; Ex parte Welborn, supra.

C151 8. If defense counsel's presentation of the Applicant's defensive theory had been premised, inter alia, on the sound trial strategy that the Applicant switched places in his written statement with his co-defendant, the Court concludes that any lingering "residual doubt" that the jury might have had that the Applicant had not fired the fatal .22 caliber bullet would have clearly operated in his favor at the punishment stage of the trial. See Lockhart v. McCree, supra.

C152 9. Because the jury's resolution of whether the Applicant fired the fatal shot was literally a matter of life and death to the Applicant, the Court concludes that the Applicant was prejudiced by defense counsel's conduct and that a reasonable probability exists that the outcome of the proceedings at the punishment stage of the Applicant's trial would have been different but for defense counsel's deficient performance. Ex parte Guzmon, supra; Boyington v. State, 738 S.W.2d 704 (Tex.App.--Houston [1st Dist.], 1985).

C153 10. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, supra.

C154 11. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation is viewed in conjunction with those other failings of counsel set forth in Sections B, C, G, and H, supra, he was denied the effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

J. APPLYING THE "TOTALITY OF THE REPRESENTATION" TEST TO THE FACTS AND CIRCUMSTANCES OF THE APPLICANT'S CASE

FINDINGS OF FACT

F246 1. In the interest of judicial economy, the Court hereby incorporates by reference those Findings of Fact which appear in Sections A, B, C, G, H, and I, supra.

CONCLUSIONS OF LAW

C155 1. The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution entitle the accused in a criminal case to the reasonably effective assistance of counsel. Ex parte Duffy, supra.

C156 2. The adequacy of counsel's assistance is tested by the totality of the representation, rather than by isolated acts or omissions of trial counsel or by isolating or separating out one portion of trial counsel's performance for examination. Bridge v. State, 726 S.W.2d 558 (Tex.Crim.App. 1986).

C157 3. While the Court of Criminal Appeals has held that some isolated omissions may so affect the outcome of a particular case as to undermine the reliability of the proceedings, see May v. State, 722 S.W.2d 699 (Tex.Crim.App. 1984), the Applicant has demonstrated numerous errors and omissions on trial counsel's part during every stage of his trial as set forth above, the cumulative effect of which clearly prejudiced the Applicant so as to lead this Court to conclude that he was denied the reasonably effective assistance of counsel. Cf. Weathersby v. State, supra. ("The impact in this case of the numerous such defaults" compels a finding that counsel was ineffective.); Williamson v. State, supra. ("We cannot overlook the number and seriousness of counsel's deficiencies."); Riascos v. State, supra. ("The cumulative effect of [counsel's] errors is outrageous..."); Miller v. State, supra. ("[W]ithout trial counsel's many errors, a reasonable probability exists that the outcome could have been different.").

C158 4. As in all post-conviction writ matters, Ex parte Salinas, supra, the Applicant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. Moore v. State, 694 S.W.2d 528 (Tex.Crim.App. 1985).

C159 5. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation as set forth above is examined, the number and seriousness of counsel's deficiencies and the concomitant prejudice the Applicant suffered thereby denied him the reasonably effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

FINDINGS OF FACT

F247 1. On May 14, 1985, the trial court appointed Floyd Freed to represent the Applicant on the automatic appeal of his conviction and death sentence to the Texas Court of Criminal Appeals.

F248 2. The appellate brief that Freed filed on the Applicant's behalf in the Court of Criminal Appeals raised four grounds [now points] of error and challenged: the admission of the Applicant's confession at trial; the sufficiency of the evidence as to the first and third special issues submitted at the punishment stage of the trial pursuant to Article 37.071, V.A.C.C.P.; and the failure of the trial court to submit an "anti-parties" charge to the jury during the punishment stage of the trial.

F249 3. Although the trial court overruled defense counsel's request that the jury be instructed on the lesser included offense of murder, Freed did not raise this appellate contention in the brief that he filed on the Applicant's behalf in the Court of Criminal Appeals.

F250 4. At the time that he prepared the Applicant's brief, Freed had yet to handle a death penalty appeal.

F251 5. Freed did not raise an appellate challenge to the State's use of its peremptory challenges to exclude black veniremembers because the issue had not been properly preserved by defense counsel at trial.

F252 6. Freed did not raise an appellate challenge to the State's use of victim impact evidence at trial and during final argument because the issues had not been properly preserved by defense counsel at trial.

F253 7. Freed did not raise an appellate challenge to the failure of Article 37.071, supra, to provide a vehicle for the jury to adequately consider and give effect to that mitigating evidence, if any, raised by the accused because the issue had not been properly preserved by defense counsel at trial and because the Supreme Court of the United States had yet to hand down its opinion in Penry v. Lynaugh, 492 U.S. 302 (1989).

F254 8. Freed did not raise an appellate challenge to the trial court's refusal to submit a jury instruction on the lesser included offense of murder because he did not believe there was any evidence that the Applicant "had not participated in the robbery to take it out of capital murder to ordinary murder."

F255 9. Freed did not feel that it was part of his responsibility as the Applicant's counsel on appeal to advance those appellate contentions that he believed to be frivolous or which he otherwise believed to be devoid of merit.

F256 10. Freed did not raise the issue of trial counsel's effectiveness on direct appeal because he did not feel that the appellate record adequately reflected defense counsel's trial strategy so as to warrant the raising of this appellate complaint.

F257 11. The Applicant was tried and convicted of capital murder pursuant to V.T.C.A. Penal Code, Section 19.03(2), which required the jury to find that he "intentionally" caused the death of Chester Frank Hall by shooting him with a gun while in the course of committing and attempting to commit the robbery of Debra Young.

F258 12. V.T.C.A. Penal Code, Section 19.02(a)(1), provides that a person commits the offense of murder if he "intentionally or knowingly" causes the death of an individual.

F259 13. The Applicant did not testify nor offer any evidence as part of his case-in-chief which might reasonably have raised an inference that he was guilty only of "knowingly" causing the death of Hall while in the course of committing and attempting to commit the robbery of Debra Young.

F260 14. If any evidence at all existed to support the Applicant's contention that he was only guilty of "knowingly" causing the death of Hall, it necessarily had to be found in either the Applicant's written statement or through the cross-examination of the State's witnesses.

F261 15. After reviewing the Applicant's written statement, the Court finds that there is no evidence which might have led a rational fact-finder to conclude that if guilty, the Applicant was guilty only of "knowingly" causing Hall's death.

F262 16. Viewed in the light most favorable to the verdict below, the Court finds that the State's evidence reflected that the Applicant, Tyrone Dunbar, and John Dale Henry were all armed when the entered the bait shop fully intending to commit the offense of aggravated robbery.

F263 17. Viewed in the evidence most favorable to the verdict below, the Court finds that after the Applicant threatened Debra Young and took the proceeds from the bait shop, the decedent entered the shop in a futile effort to thwart the aggravated robbery.

F264 18. Viewed in the light most favorable to the verdict below, the Court finds that at some point during a struggle with the decedent, the Applicant fired his weapon in the direction of the decedent, and fled the scene before bragging that he had "waste[d] a white man."

F265 19. Viewed in the light most favorable to the verdict below, the Court finds that at some point during the course of the aggravated robbery, John Dale Henry fired his weapon in the direction of the decedent before he, too, fled from the scene.

F266 20. The jury was charged on the law of parties pursuant to V.T.C.A. Penal Code, Sections 7.01 & 7.02.

CONCLUSIONS OF LAW

C160 1. The United States Supreme Court has held that due process requires that a defendant be afforded the effective assistance of counsel on his first appeal of right. Evitts v. Lucey, 469 U.S. 387 (1985).

C161 2. An indigent defendant has no constitutional right to require his appellate lawyer to argue all nonfrivolous issues that he wants advanced but which his lawyer, in the exercise of his professional judgment, decides not to present on appeal. Jones v. Barnes, 463 U.S. 745 (1983).

C162 3. A defendant is entitled to a jury instruction on every defensive theory or lesser included offense fairly raised by the evidence. Moon v. State, 607 S.W.2d 569 (Tex.Crim.App. 1980), regardless of whether such evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial judge may think about the credibility of the evidence. Hayes v. State, 728 S.W.2d 804 (Tex.Crim.App. 1987).

C163 4. A jury instruction on a lesser included offense must be submitted if the lesser included is within the proof necessary to

establish the charged offense and if there is any evidence from any source that the accused, if guilty, is guilty only of the lesser included offense and not the greater offense. Creel v. State, 754 S.W.2d 205 (Tex.Crim.App. 1988).

C164 5. A jury charge on a lesser included offense is not required to be given merely because a lesser crime is included within the proof of the greater violation. Royster v. State, 622 S.W.2d 442 (Tex.Crim.App. 1981).

C165 6. An offense is a lesser included offense if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. Livingston v. State, 739 S.W.2d 311 (Tex.Crim.App. 1987).

C166 7. Whether an offense bears such a relationship to the offense charged so as to constitute a lesser included offense must be determined on a case-by-case basis according to the particular facts involved. Broussard v. State, 642 S.W.2d 171 (Tex.Crim.App. 1982).

C167 8. Because the only difference between capital murder as defined by Section 19.03(2), supra, and murder as defined by Section 19.02(a)(1), supra, is the culpable mental state of the actor, the Court concludes that insofar as the facts of the primary case are concerned, murder was a lesser included offense of capital murder. Thomas v. State, 701 S.W.2d 653 (Tex.Crim.App. 1985).

C168 9. For those reasons set forth above, however, the Court concludes that the record of the Applicant's trial in the primary case does not reveal any evidence from which a rational fact finder could have concluded that the Applicant "knowingly" caused the death of Hall while in the course of committing or attempting to commit the robbery of Young. Santana v. State, 714 S.W.2d 1 (Tex.Crim.App. 1986).

C169 10. Even if the Applicant was not responsible for firing the fatal shot, a rational fact finder could have concluded that the Applicant was guilty as a party in "intentionally" causing the death of Hall during the course of the robbery of Young. Perillo v. State, 758 S.W.2d 567 (Tex.Crim.App. 1988).

C170 11. To the extent that the Applicant relies upon the federal standard regarding the submission of a lesser included offense in a capital murder case, see Beck v. Alabama, 447 U.S. 625 (1980), Keeble v. United States, 412 U.S. 205 (1973), and Cabana v. Bullock, 474 U.S. 376 (1986), the Court concludes that these cases are distinguishable from the primary case given the Applicant's failure to testify or otherwise present evidence from

any source that he did not "intentionally" cause the death of Hall. Tompkins v. State, 774 S.W.2d 195 (Tex.Crim.App. 1987).

12. While appellate counsel might have misunderstood the proper legal standard for determining whether a charge on the C171 lesser included offense of murder was required in the primary case, appellate counsel may not be deemed ineffective for failing to raise an appellate contention that is ultimately belied by the trial record. Stafford v. State, ___ S.W.2d ___, Tex.Crim.App. No. 1085-88 (Delivered July 3, 1991).

13. The Court concludes that the Applicant has not demonstrated that appellate counsel's failure to raise the C172 appellate contention that the trial court erred in failing to instruct the jury on the lesser included offense of murder fell outside the wide range of reasonable professional assistance so as to constitute deficient performance. Strickland v. Washington, supra.

14. In seeking habeas corpus relief, the Applicant bears C173 the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

15. Because the Applicant has not demonstrated by a C174 preponderance of the evidence that he was denied the effective assistance of counsel on appeal, the Court recommends that habeas corpus relief as to this ground be DENIED.

IV. PROSECUTORIAL MISCONDUCT

A. THE STATE'S FAILURE TO DISCLOSE INCONSISTENT TESTIMONY FROM THE HENRY TRIAL

FINDINGS OF FACT

1. The aggravated robbery trial of John Dale Henry, the F267 Applicant's co-defendant, began in the 177th Criminal District Court of Harris County, Texas, on January 23, 1985, and concluded on January 24, 1985.

2. In her opening statement to the jury, prosecutor Jan F268 Krocker told the jury that she believed the evidence would show that the Applicant fired .38 caliber bullets at Frank Hall, the decedent.

3. During the Henry trial, firearms expert C.E. Anderson F269 testified for the State that the gun referred to at the Applicant's trial as State's Exhibit 17 could have either been a .357, a .38, or a .22 caliber model.

F270 4. During the Applicant's trial, Anderson testified that the firearm depicted in State's Exhibit 17 was a .22 caliber Ruger-style single action revolver.

F271 5. During the Henry trial, Deborah Eubanks Young testified that the firearm the Applicant possessed was a large caliber weapon that emitted a big boom, that fire shot out of the gun barrel, and that the gun was louder than any of the other weapons which were discharged.

F272 6. During the Henry trial, C.E. Anderson testified that a .357 or a .38 caliber weapon usually makes more of a noise when it is fired than a .22 caliber weapon.

F273 7. During the Applicant's trial, defense counsel did not ask Anderson whether a .357 or .38 caliber weapon makes more of a noise when it is fired than a .22 caliber weapon.

F274 8. During her final argument in the Henry trial, Krocker told the jury that the evidence had shown that the Applicant's gun had been a .357 or .38 caliber weapon as opposed to a .22 caliber.

F275 9. During the Applicant's trial, the only reference Young made during the State's direct examination to the weapon the Applicant possessed was that it appeared to be the weapon displayed in State's Exhibit 17.

F276 10. During the Henry trial, Harris County Sheriff's Deputy Alton Harris testified that moments after the primary offense, Young had told him that the weapon the Applicant had thrust in her face "looked like a .357" and that Young had physically identified Harris' .357 service revolver as looking like the weapon that the Applicant had displayed.

F277 11. Although Harris was called as a witness by the State at the Applicant's trial, neither the prosecutor nor defense counsel elicited from that testimony he had given at the Henry trial as to Young's identification of the Applicant's weapon as a .357.

F278 12. During the Henry trial, Harris County Sheriff's Detective Ronnie Phillips testified that Young had told him that the weapon which the Applicant had thrust in her face was a "big" weapon which she "thought" was a .357.

F279 13. Although Phillips was called as a witness by the State at the Applicant's trial, neither the prosecutor nor defense counsel elicited from him that testimony he had given at the Henry trial as to Young's identification of the Applicant's weapon as a .357.

F280 14. The Court finds that defense counsel's impeachment of Young during the Applicant's trial as to what caliber weapon the Applicant possessed was limited to Young's admissions that the Applicant's gun was "real big" and that she remembered telling the officers that she thought it was a .357 magnum.

F281 15. Both the prosecutor and defense counsel agreed that if only one juror had a reasonable doubt that the Applicant used a .22 caliber weapon during the commission of the primary offense, the Applicant would have received a life sentence.

F282 16. During the Henry trial, Young testified that both Henry and the Applicant grabbed the decedent and "scuffled" with him at the back of the store near the catfish tank.

F283 17. During the Applicant's trial, Young testified that the Applicant alone had struggled with the decedent and that during this struggle, she observed Henry leaning against a counter.

F284 18. During the Henry trial, Young never testified that either Henry or the Applicant had hit the decedent's head against the catfish tank, a fact consistent with both her prior statement and the medical examiner's report reflecting that there had been no bruises or contusions on the decedent's head or face.

F285 19. During the Applicant's trial, Young testified that the "scuffle" which she had described in the Henry trial as being between the Applicant, Henry, and the decedent, actually consisted of the Applicant alone attacking the decedent.

F286 20. On February 25, 1985, the trial court granted that portion of defense counsel's Motion for Discovery and Inspection which sought, inter alia, "Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt."

F287 21. John Kyles, the assistant district attorney assigned to prosecute the Applicant, first learned that John Dale Henry had been tried and convicted at some point during the jury selection phase of the Applicant's trial prior to the initiation of the trial on the merits.

F288 22. Kyles did not make any "specific effort" to obtain any portion of the statement of facts from the Henry trial or to otherwise review that evidence adduced at the Henry trial "with a mind towards identifying exculpatory evidence" within the meaning of the trial court's order of February 25, 1985.

23. Because Kyles did not "concern" himself with what had transpired at the Henry trial in preparing for the Applicant's trial, defense counsel was never apprised of any of that testimony F289 from the Henry trial which was, as set forth above, inconsistent with that testimony actually adduced at the Applicant's trial.

24. Detective Ronnie Phillips prepared Applicant's Exhibit F290 54, an offense report in which he noted, inter alia, that Young had described the Applicant's firearm as a "large caliber weapon."

25. Although Mock did not have an independent recollection that the prosecution tendered Phillips' offense report to him, he F291 noted that if this report were in the file, it would have been available to him under the State's open-file policy.

26. Regardless of whether this report was actually made available to Mock by the prosecution, the Court finds that Mock did not attempt to utilize Phillips' report for impeachment F292 purposes during his cross-examination of Young.

27. Chrischilla Cousan gave the prosecution a statement which was reduced to writing as reflected in Applicant's Exhibit F293 55, in which she noted that the Applicant left the house on the day of the primary offense with a .357 magnum and that John Dale Henry left the house with a .22 caliber pistol.

28. Although Mock recounted that it was his practice to begin his cross-examination by asking the State for any prior F294 statement the witness had made, the record in the Applicant's trial does not reflect that he made such a request prior to his cross-examination of Cousan.

29. Although Cousan did admit during the Applicant's trial that she had told police that the Applicant carried a .357 magnum, F295 defense counsel eventually elicited from her the fact that she really did not know what type of gun the Applicant had on the day of the primary offense.

30. Mock admitted that it would have been extremely helpful for impeachment purposes if he had known of Cousan's statement to F296 the prosecution as reflected in Applicant's Exhibit 55.

31. Mock recounted that Applicant's Exhibit 56, a computer generated printout of the rifling characteristics of certain .22 F297 caliber weapons, which was found by the Court during its in camera inspection of the State's file, was never tendered to him by the prosecution at any time during the course of the Applicant's trial.

F298 32. To the extent that Applicant's Exhibit 55 could have been used during the cross-examination of C.E. Anderson, the State's firearm's expert, to show that the Ruger-style .22 caliber handgun Anderson had identified in State's Exhibit 17 could not have fired the fatal shot, Mock felt that this exhibit would have been helpful to the Applicant's defense.

CONCLUSIONS OF LAW

C175 1. The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83 (1963).

C176 2. The prosecution is not required to deliver its entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. United States v. Bagley, 473 U.S. 667 (1985).

C177 3. Impeachment material is evidence "favorable to the accused," within the meaning of the Brady rule and must be disclosed to the defense. Giglio v. United States, 405 U.S. 150 (1972).

C178 4. Withheld evidence favorable to the accused 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." United States v. Bagley, supra.

C179 5. That the accused has made a specific request for the pretrial disclosure of Brady material is an important factor that reviewing court may take into account in assessing the materiality of the withheld evidence. United States v. Bagley, supra.

C180 6. In determining materiality, a reviewing court must evaluate the undisclosed evidence in the context of the entire record, and error is committed only if the undisclosed evidence would have created a reasonable doubt that did not otherwise exist. Quinones v. State, 592 S.W.2d 933 (Tex.Crim.App. 1980).

C181 7. Because the evidence adduced during the guilt or innocence stage of the trial supports the jury's finding that the Applicant was guilty of capital murder as a party regardless of whether he fired the fatal shot, Perillo v. State, 758 S.W.2d 567 (Tex.Crim.App. 1988), the Court concludes that there is not a reasonable probability that the results of the guilt or innocence stage of the Applicant's trial would have been different had the evidence alluded to above been disclosed to the defense. United States v. Bagley, supra.

C182 8. Had that evidence from the Henry trial "tend[ing] to ameliorate the punishment of the Defendant in the event of a finding of guilt" been tendered to the defense as the trial court had ordered, it would have provided a secure basis for the impeachment of both Young and C.E Anderson, insofar as the State's claim that the Applicant fired the fatal .22 caliber bullet was concerned. Ex parte Adams, 768 S.W.2d 281 (Tex.Crim.App. 1989).

C183 9. Because the issue of whether the Applicant fired the fatal shot directly impacted upon the jury's resolution of the third special issue, the Court concludes that the impeachment evidence set forth above from the Henry trial which the State failed to disclose was material to the Applicant's punishment. United States v. Bagley, supra; United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989).

C184 10. Having evaluated the undisclosed evidence in the context of the entire record, the Court concludes that the State's failure to disclose that impeachment evidence alluded to above was sufficient to undermine confidence in the outcome of the proceedings at the punishment stage of the Applicant's trial. United States v. Bagley, supra; Ex parte Brandley, 781 S.W.2d 886 (Tex.Crim.App. 1989); Ex parte Adams, supra.

C185 11. Although prosecutor Kyles may not have had actual knowledge of that evidence at the Henry trial set forth above, this fact is irrelevant inasmuch as the knowledge that prosecutor Krocker, as a member of "the prosecution team" had of this testimony, is imputed to Kyles. Ex parte Adams, supra; O'Rarden v. State, 777 S.W.2d 455 (Tex.App.--Dallas, 1989).

C186 12. While the Court has earlier concluded that defense counsel was ineffective for failing to obtain those critical portions of testimony from the Henry trial which mirror that evidence which the prosecution failed to disclose, the prosecution's duty to disclose this testimony continues to exist even in the face of defense counsel's lack of due diligence in preparing for trial. Means v. State, 429 S.W.2d 490 (Tex.Crim.App., 1968).

C187 13. Because the constitutional principle requiring the disclosure of evidence favorable to the accused is mandated by both state and federal due process considerations, the recommendation of this Court in enforcing these rights "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Brady v. Maryland, supra.

C188 14. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Griffin, supra.

C189 15. Because the Applicant has demonstrated by a preponderance of the evidence that the State's failure to disclose evidence material to the jury's resolution of the third special issue during the punishment stage of his trial violated the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution, the Court recommends that habeas corpus relief as to this ground be **GRANTED.**

B. NON-DISCLOSURE OF THE SUPPLEMENTARY OFFENSE REPORT

FINDINGS OF FACT

F299 1. On January 23, 1985, Deborah Eubanks Young testified for the prosecution in the aggravated robbery trial of John Dale Henry, the Applicant's co-defendant.

F300 2. On February 13, 1985, Young was summoned to the Harris County District Attorney's Office to meet with prosecutor John Kyles and District Attorney's Investigator Jim Jackson as part of the prosecution's pre-trial preparation for the Applicant's trial.

F301 3. Kyles recounted that one of the purposes of this meeting was to show a photographic array of firearms to Young to determine if she would be able to identify the type of firearm that the Applicant "was known to carry."

F302 4. The photographic array Jackson put together and which was shown to Young at this meeting contained six guns including a .22 caliber cowboy style gun, a .357 caliber weapon, and a Derringer.

F303 5. Kyles believed that a photographic array was the fairest opportunity to test Young's ability to identify the weapon the Applicant had possessed.

F304 5. Although cowboy style guns come in a number of different calibers, the only cowboy style gun in the photographic array Young viewed was the .22 caliber model.

F305 6. After viewing the photographic array, Young identified what was eventually admitted at the Applicant's trial as State's Exhibit 17 [Applicant's Exhibit 21] as a photograph of a weapon "just like" the one the Applicant had used.

F306 7. When State's Exhibit 17 had been previously offered and admitted at the trial of John Dale Henry, C.E. Anderson had identified it as being either a .357, a .38, or a .22 caliber firearm.

F307 8. During the Applicant's trial, Anderson testified that the firearm depicted in State's Exhibit 17 was a .22 caliber Ruger style single action revolver.

F308 9. After examining Anderson's ballistics report, Floyd McDonald, the Applicant's expert witness on firearms and ballistics concluded that the weapon depicted in State's Exhibit 17 could not have been the weapon that fired the fatal shot in this case because a Ruger style revolver has six "lands and grooves" and the bullet that killed the decedent had eight "lands and grooves."

F309 10. McDonald's conclusion is consistent with the fact that Anderson's computer search to determine what weapons could have fired the fatal shot did not include the Ruger he had identified as State's Exhibit 17 at the Applicant's trial.

F310 11. Although he ultimately agreed with Anderson's testimony at the Applicant's trial, McDonald pointed out that it would be extremely difficult to determine from a side view alone whether State's Exhibit 17 was a .22 or a .357 caliber weapon.

F311 12. After Young picked State's Exhibit 17 out of the photographic array, she was asked by Kyles if she knew the type and caliber of the weapon she had just identified as having been used by the Applicant.

F312 13. In response to Kyles' inquiry, Young stated that the weapon the Applicant possessed during the commission of the primary offense was a "large caliber weapon, either a .38 or .357 caliber," and that she "knew it was larger than a .22 caliber."

F313 14. The statements Young made in the presence of Kyles and Jackson were memorialized in a document styled "Supplementary Offense Report" and which was admitted at the evidentiary hearing as Applicant's Exhibit 49.

F314 15. On February 25, 1985, the trial court granted that portion of defense counsel's Motion for Discovery and Inspection which sought, inter alia, "Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt." (Emphasis added).

F315 16. At the evidentiary hearing, Ron Mock initially testified that the prosecution never provided him with a copy of Applicant's Exhibit 49 prior to trial.

F316 17. Mock noted that it would have been extremely helpful to have had Applicant's Exhibit 49 at the Applicant's trial as it not only would have useful for purposes of impeaching Young, but to generally discredit the State's theory of the case.

F317 18. Mock also noted that the contents of Applicant's Exhibit 49 would have been helpful during the punishment stage of the Applicant's trial in convincing the jury that the third special issue should be answered in the negative.

F318 19. After testifying that he might have seen Applicant's Exhibit 49 if it was in the State's file, Mock again reaffirmed his earlier testimony that he had never seen the exhibit before admitting that the passage of time made it possible that he was simply unable to remember if in fact he had ever seen it.

F319 20. Regardless of whether or not Mock had seen Applicant's Exhibit 49, the record of the Applicant's trial reveals that Mock never made use of it during his cross-examination of Young or at any other time during the proceedings

F320 21. Neither does the record at the Applicant's trial affirmatively reflect that Mock either asked for or was furnished with a copy of Applicant's Exhibit 49.

F321 22. Had the State furnished Mock with a copy of Applicant's Exhibit 49 or had Mock obtained due diligence to obtain it as a prior statement of the witness during his cross-examination of Young, he would have been able to elicit before the jury the fact that only one cowboy style gun had been included in the array as well as the difficulty in distinguishing between Ruger style .22 and .357 caliber weapons based solely on a side view in a photograph.

F322 23. Had Mock been furnished with that testimony from the Henry trial that moments after the primary offense, Young had identified Alton Dickey's .357 pistol as the type of weapon the Applicant had used, he would have been able to elicit before the jury that such an identification was infinitely more reliable than that obtained from the photographic array viewed by Young and memorialized in Applicant's Exhibit 49.

F323 24. Had the State furnished Mock with a copy of Applicant's Exhibit 49 or had Mock exercised due diligence in obtaining it, he would have been able to use it to elicit before the jury, either through cross-examination of Anderson or through his own expert witness, that the weapon portrayed in State's Exhibit 17 could not have fired the fatal .22 caliber shot, a critical fact that Mock never made the jury aware of during the Applicant's trial.

CONCLUSIONS OF LAW

C190 1. In the interest of judicial economy, the Court hereby incorporates by reference those Conclusions of Law which appear in Section A, supra.

C191 2. Had Applicant's Exhibit 49 been tendered to defense counsel as the trial court had ordered, it would have provided a secure basis for the impeachment of both Young and Anderson since it reflected that three weeks after Young had testified at the John Dale Henry trial that the Applicant had possessed a .357 caliber firearm, she reaffirmed her belief that the Applicant's gun was a large caliber weapon, either a .357 or a .38, and that she "knew" that it was larger than a .22 caliber weapon. Ex parte Adams, supra; Crutcher v. State, 481 S.W.2d 113 (Tex.Crim.App. 1972).

C192 3. Because the issue of whether the Applicant fired the fatal shot directly impacted upon the jury's resolution of the third special issue, the Court concludes that the impeachment evidence contained in Applicant's Exhibit 49 was material to the Applicant's punishment. United States v. Bagley, supra; United States v. Weintraub, supra.

C193 4. Having evaluated the impeachment material contained in Applicant's Exhibit 49, the Court concludes that it was not cumulative of that impeachment material actually made available to defense counsel and that its non-disclosure was sufficient to undermine confidence in the outcome of the proceedings at the punishment stage of the Applicant's trial. United States v. Bagley, supra; Ex parte Brandley, supra; Ex parte Adams, supra.

C194 5. Assuming without deciding that Applicant's Exhibit 49 was actually tendered to defense counsel, the Court concludes that defense counsel's failure to utilize it for impeachment purposes as set forth above clearly constituted deficient performance inasmuch as no sound trial strategy could have been served by defense counsel's failure in this regard. Black v. State, supra; Ex parte Guzmon, supra; Ex parte Walker, supra.

C195 6. Assuming without deciding that Applicant's Exhibit 49 was actually tendered to defense counsel, the Court concludes that but for defense counsel's deficient performance in failing to utilize it for impeachment purposes, a reasonable probability exists that the outcome of the proceedings at the punishment stage of the Applicant's trial would have been different. Ex parte Guzmon, supra; Ex parte Walker, supra; Cooper v. State, 769 S.W.2d 301 (Tex.App.--Houston [1st Dist.], 1989).

F329 6. Kyles acknowledged that neither he nor any other member of the prosecution team ever revealed to defense counsel that the photograph embodied in State's Exhibit 17 that he used to advance the contention that the Applicant fired the fatal .22 caliber bullet was equally consistent with being a .357 caliber handgun.

F330 7. Even if he been informed of this fact by C.E. Anderson, Kyles would not have felt compelled to bring this fact to the attention of defense counsel as he felt it was incumbent upon defense counsel "to investigate exactly what type of weapons those [in the photographic array] were."

F331 8. Neither did Kyles feel that it was his responsibility to inform defense counsel of Anderson's prior testimony during the Henry trial that State's Exhibit 17 could have been a .22, a .38, or a .357 caliber handgun "[a]s long as they were aware that Mr. Anderson was going to be out expert, and as long as they had the opportunity to view our exhibits."

F332 9. Kyles admitted that the fact that Anderson had previously testified during the Henry trial that State's Exhibit 17 could have been a .22, a .38, or a .357 caliber handgun should have been brought to the jury's attention during the Applicant's trial.

F333 10. Kyles admitted that although Young was never asked, and so did not testify whether the Applicant had a .22 caliber weapon, he had her describe his firearm as a cowboy style gun before getting her to commit that it looked like State's Exhibit 17.

F334 11. Although the ballistics report conducted by C.E. Anderson and subsequently analyzed by Floyd McDonald revealed that the Ruger .22 depicted in State's Exhibit 17 could not have fired the bullet that killed the decedent, Kyles stated that he would be "surprised" if this finding were in fact correct.

F335 12. If, however, it was true that the Ruger could not have fired the fatal shot, Kyles admitted that it would have been misleading to have told the jury that State's Exhibit 17 either was in fact the murder weapon or looked like the murder weapon.

F336 13. In urging the jury to find that the Applicant had fired the shot that killed the decedent, Kyles referred the jury during his final argument, inter alia, to the testimony of C.E. Anderson.

F337 14. Kyles also argued to the jury that Young had identified the gun the Applicant had threatened her with "as being a cowboy looking gun, a .22."

CONCLUSIONS OF LAW

C198 1. In the interest of judicial economy, the Court hereby incorporates by reference those Conclusions of Law which appear in Sections A and B, supra.

C199 2. It is axiomatic that the Fourteenth Amendment requires that a defendant's conviction be set aside when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears." Giles v. Maryland, 386 U.S. 66 (1967).

C200 3. Reversible error is also committed where the prosecutor negligently or inadvertently fails to disclose evidence which may exonerate the accused or which may be of material importance to the defense, even though it is not offered as testimony at trial and even though defense counsel is not diligent in his preparation for trial. Crutcher v. State, supra; Means v. State, supra.

C201 4. That Kyles professed an unawareness that the .22 caliber Ruger depicted in State's Exhibit 17 was virtually indistinguishable from a .357 when viewed merely from a photographic side view is irrelevant as this knowledge that C.E. Anderson, as a member of "the prosecution team" had of this evidence is imputed to Kyles. Ex parte Adams, supra; O'Rarden v. State, supra.

C202 5. That Kyles was unaware that Anderson had previously testified at the Henry trial that State's Exhibit 17 could have been a .22, .357, or .38 caliber handgun is irrelevant as the knowledge of both Krocker and Anderson of this evidence is imputed to Kyles. Ex parte Adams, supra; O'Rarden v. State, supra.

C203 6. If the prosecution's use of false or misleading testimony could "in any reasonable likelihood have affected the judgment of the jury" at either stage of the proceedings, due process requires the granting of a new trial. Giglio v. United States, supra; Ex parte Adams, supra.

C204 7. In view of that other evidence from both the Henry trial and the Applicant's trial tending to show that the Applicant possessed a .357 caliber weapon, the Court concludes that the jury would have found the State's case as to punishment "significantly less persuasive," cf. Schneble v. Florida, 405 U.S. 427 (1972), had the prosecution not made use of State's Exhibit 17 as set forth above to convince the jury that the Applicant in fact possessed the .22 caliber weapon capable of firing shot that killed the decedent. Ex parte Adams, supra; Crutcher v. State, supra; Ex parte Turner, 545 S.W.2d 470 (Tex.Crim.App. 1977).

C205 8. Having evaluated the circumstances surrounding the prosecution's use of State's Exhibit 17 during the Applicant's trial in the context of the entire record, the Court concludes that the cumulative effect of the prosecution's misleading use of State's Exhibit 17 during both the presentation of its case as well as during final argument was egregious enough to undermine confidence in the outcome of the proceedings at the punishment stage of the Applicant's trial. United States v. Bagley, supra; Ex parte Adams, supra; Ex parte Brandley, supra.

C206 9. Because the constitutional principle requiring the reversal of a defendant's conviction where the prosecution, although not soliciting false evidence, permits it to go uncorrected when it appears, is mandated by both state and federal constitutional due process considerations, the recommendation of this Court is enforcing these rights "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial for the accused." Brady v. Maryland, supra; Ex parte Adams, supra.

C207 10. In seeking habeas corpus relief, the Applicant bears the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Griffin, supra.

C208 11. Because the Applicant has demonstrated by a preponderance of the evidence that the circumstances surrounding the prosecution's use of State's Exhibit 17 throughout the course of the Applicant's trial as set forth above violated those due process considerations embodied in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution, the Court recomends that habeas corpus relief as to this ground be GRANTED.

V. SUFFICIENCY OF THE EVIDENCE

FINDINGS OF FACT

F338 1. The Applicant did not raise the contention on direct appeal to the Court of Criminal Appeals that the evidence was insufficient to support the jury's verdict that he "intentionally" caused the death of the decedent while in the course of committing or attempting to commit the offense of robbery.

CONCLUSIONS OF LAW

C209 1. To the extent that this ground represents a collateral attack on the sufficiency of the evidence adduced at trial, the Court concludes that such a challenge may not be raised via a post-conviction writ of habeas corpus. Ex parte Brown, 757 S.W.2d 367 (Tex.Crim.App. 1988).

final argument in the punishment stage of the Applicant's trial, the trial court sustained defense counsel's objection and instructed the jury not to consider the unadjudicated aggravated robberies as evidence of the Applicant's deliberateness.

F352 8. The prosecutor also alluded to the two unadjudicacted aggravated robberies as evidence of the Applicant's future dangerousness within the meaning of Special Issue Two.

F353 9. When called upon to explain why he did not seek a jury instruction on the State's burden of proof insofar as the Applicant's involvement in the two unadjudicated aggravated robberies was concerned, defense counsel noted that such an instruction "was not available" and that "You cannot request it."

F354 10. When called upon to explain why he did not request a jury instruction limiting the circumstances under which the jury could consider the two unadjudicated aggravated robberies, defense counsel noted that such a limiting instruction was "not available to us" and was "only available on [sic] a trial of a case which is not a capital murder case."

F355 11. The Court finds that reasonably competent counsel was not obligated to seek jury instructions either limiting the circumstances under which the jury could consider evidence of the two unadjudicated aggravated robberies or instructing the jury that they could not consider this evidence unless they believed beyond a reasonable doubt that the Applicant committed the unadjudicated offenses.

F356 12. In light of the fact that defense counsel's explanation as to why he did not seek jury instructions as to either the circumstances under which the jury could consider evidence of the Applicant's involvement in the unadjudicated offenses or the State's burden of proof as to the unadjudicated offenses finds support in controlling case law, the Court finds that defense counsel's failure was the result of a sound trial strategy.

CONCLUSIONS OF LAW

C214 1. The Court of Criminal Appeals has consistently held that unadjudicated extraneous offenses may be properly admitted at the punishment stage of a capital murder trial, and that such admission does not deprive the accused of due process and equal protection under the law. McCoy v. State, 713 S.W.2d 940 (Tex.Crim.App. 1986). See also Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984).

C215 2. The Court of Criminal Appeals has also held that evidence of unadjudicated extraneous offenses is relevant to the

issue of the accused's future dangerousness and that Article 37.071, V.A.C.C.P., authorizing the admission of such evidence is constitutional even though such offenses may not be admitted in non-capital trials, Paster v. State, 701 S.W.2d 843 (Tex.Crim.App. 1985).

C216 3. In light of the fact that long-standing precedent as well as Article 37.071, supra, authorized the admission of the unadjudicated aggravated robberies, the Court concludes that defense counsel's failure to object to their admission did not constitute deficient performance. Stafford v. State, ___ S.W.2d ___, Tex.Crim.App. No. 1085-88 (Delivered July 3, 1991).

C217 4. The Court of Criminal Appeals has held that a capital murder defendant is not entitled to either of the two jury charges which the Applicant now contends that defense counsel was obligated to ask for. Marquez v. State, 725 S.W.2d 217 (Tex.Crim.App. 1987).

C218 5. Because defense counsel's failure to have requested those jury instructions alluded to above was not deficient performance, the Court concludes that it need not determine whether trial counsel's conduct prejudiced the Applicant's defense. Strickland v. Washington, supra.

C219 6. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C220 7. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to request those jury instructions alluded to above denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

VIII. ARTICLE 37.071, V.A.C.C.P., AND THE DIMINISHING OF THE JURY'S RESPONSIBILITY AT THE PUNISHMENT STAGE

FINDINGS OF FACT

F357 1. In their only pre-trial attack on the constitutionality of Article 37.071, V.A.C.C.P., defense counsel contended that the statute violated the Applicant's federally secured right to be free from the imposition of cruel and unusual punishment as well as his rights to due process of law given the vague and indefinite nature of those terms employed in the special issues.

F358 2. The trial court rejected defense counsel's void for vagueness challenge to the constitutionality of Article 37.071, supra, on February 25, 1985.

Applicant's trial, the Court concludes that the Applicant is procedurally barred from advancing this contention. Ex parte Truong, 770 S.W.2d 810 (Tex.Crim.App. 1989).

C225 4. Although Article 37.071, supra, requires the trial court to sentence the defendant to death after the jury has returned affirmative answers to the special issues, the contention that this sentencing scheme is unconstitutional has been rejected by both the United States Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976) and the Texas Court of Criminal Appeals in Smith v. State, 683 S.W.2d 393 (Tex.Crim.App. 1984).

C226 5. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C227 6. Because the Applicant has not demonstrated by a preponderance of the evidence that either the trial court's charge, the prosecutor's final argument, or the application of Article 37.071, supra, unconstitutionally diminshed the jury's role during the punishment stage of the Applicant's trial, the Court recommends that habeas corpus relief as to this ground be DENIED.

IX. THE FAILURE OF THE TRIAL COURT TO DEFINE SIGNIFICANT TERMS CONTAINED IN THE THREE SPECIAL ISSUES

FINDINGS OF FACT

F364 1. At the conclusion of the punishment stage of the Applicant's trial, defense counsel did not request the trial court to define the term "deliberately," as it was used in connection with Special Issue One.

F365 2. Defense counsel did not request the trial court to define the terms "probability," "continuing threat," "acts of violence," or "society" as they were used in connection with Special Issue Two.

F366 3. Defense counsel did not request the trial court to define the terms "provocation" or "reasonable" as they were used in connection with Special Issue Three.

CONCLUSIONS OF LAW

C228 1. To the extent that defense counsel neither objected to the trial court's failure to define those terms alluded to above nor requested that the trial court define these terms, the Applicant is procedurally barred from advancing this contention. Ex parte Truong, supra.

C229 2. If a word, term, or phrase has not been statutorily defined at the time of trial, the trial court's charge to the jury need not include a definition. Mosley v. State, 686 S.W.2d 180 (Tex.Crim.App. 1985).

C230 3. A word, term, or phrase which is not defined by statute is to be taken and understood in its usual acceptance in common and ordinary language and speech. Andrews v. State, 652 S.W.2d 370 (Tex.Crim.App. 1983).

C231 4. The Court of Criminal Appeals has consistently held that those terms employed in the three special issues are not so vague that persons of ordinary meaning would have to necessarily guess at their meaning. Lewis v. State, ___ S.W.2d ___, Tex.Crim.App. 69,854 (Delivered May 15, 1991).

C232 5. Accordingly, it is not error for the the trial court to fail to define terms such as "deliberately," Tucker v. State, 771 S.W.2d 523 (Tex.Crim.App. 1988), "probability," Wicker v. State, 667 S.W.2d 137 (Tex.Crim.App. 1984), "society," Rougeau v. State, 738 S.W.2d 651 (Tex.Crim.App. 1987), or "criminal acts of violence." Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984).

C233 6. Consistent with these holdings, the Court concludes that the trial court did not err in failing to define the terms "provocation" or "reasonable" as they were used in connection with Special Issue Three. Russell v. State, 665 S.W.2d 771 (Tex.Crim.App. 1983).

C234 7. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C235 8. Because the Applicant has not demonstrated by a preponderance of the evidence that the trial court's failure to define those significant terms contained in the three special issues violated the Fifth, Sixth, Eighth, or Fourteenth Amendments to the United States Constitution, the Court recommends that habeas corpus relief as to this ground be DENIED.

X. THE TRIAL COURT'S FAILURE TO DEFINE THE MEANING OF A LIFE SENTENCE AND TO PROVIDE THE JURY WITH THE ALTERNATIVE PUNISHMENT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

FINDINGS OF FACT

F367 1. At the conclusion of the punishment stage of the Applicant's trial, defense counsel did not ask for a jury instruction as to the effect of the parole laws on a defendant sentenced to life in the penitentiary.

F368 2. Defense counsel did not level a challenge to the constitutionality of Article 37.071, V.A.C.C.P., on the grounds that it failed to provide the jury with the sentencing alternative of life in prison without parole.

CONCLUSIONS OF LAW

C236 1. To the extent that defense counsel did not object to the trial court's charge to the or submit a specially requested jury charge regarding the implications of the parole laws on a defendant assessed a life sentence in the penitentiary, the Applicant is procedurally barred from advancing this contention. Ex parte Coleman, 599 S.W.2d 305 (Tex.Crim.App. 1979).

C237 2. To the extent that defense counsel did not challenge the constitutionality of Article 37.071, supra, during the Applicant's trial given the statute's failure to provide the jury with the sentencing alternative of life in prison without parole, the Applicant is procedurally barred from advancing this contention. Ex parte Robinson, 639 S.W.2d 953 (Tex.Crim.App. 1982).

C238 3. Regardless of defense counsel's failure to request a jury instruction on the meaning of a life sentence, the Court of Criminal Appeals has held that the matter of parole is not and has never been a proper consideration in a jury's deliberations in a capital murder trial. Felder v. State, 758 S.W.2d 760 (Tex.Crim.App. 1988). See also O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983).

C239 4. Neither the Eighth Amendment nor any other state or federal constitutional provision requires the enactment of a particular punishment for a particular crime so as to mandate the establishment of a sentencing alternative in a capital murder case such as life without parole. Andrade v. McCotter, 805 F.2d 1190 (5th Cir. 1986).

C240 5. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Castaneda, 697 S.W.2d 617 (Tex.Crim.App. 1985).

C241 6. Because the Applicant has not demonstrated by a preponderance of the evidence that the trial court's failure to submit a jury instruction as to the meaning of a life sentence or the failure of Article 37.071, supra, to provide the jury with the sentencing alternative of life in prison without parole offends any state or federal consitutional guaranteees, the Court recommends that habeas corpus relief as to this ground be DENIED.

XI. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO THE EFFECT OF A SINGLE NO VOTE ON ANY OF THE SPECIAL ISSUES

FINDINGS OF FACT

F369 1. Defense counsel neither raised a pre-trial attack to the constitutionality of Article 37.071, Section (g), V.A.C.C.P., nor requested the trial court to intstruct the jury that the effect of a single no answer to any of the special issues would result in a life sentence for the Applicant.

CONCLUSIONS OF LAW

C242 1. Because defense counsel failed to challenge the constitutionality of Article 37.071(g), supra, during the Applicant's trial, the Applicant is procedurally barred from advancing this contention. Ex parte Robinson, supra.

C243 2. Because defense counsel failed to request that the trial court instruct the jury that the effect of a single no answer to any of the special issues would result in a life sentence for the Applicant, the Applicant is procedurally barred from advancing this contention. Ex parte Coleman, supra.

C244 3. Regardless of the procedural bar alluded to above, the Court concludes that the Texas Court of Criminal Appeals has only recently rejected the very contention now advanced by the Applicant in holding that the prohibition embodied in Article 37.071(g), supra, precluding the litigants or the trial court from informing the jury that a life sentence will result in the event they are unable to agree on the answers to any of the special issues, is constitutional. Davis v. State, 782 S.W.2d 211 (Tex.Crim.App. 1989).

C245 4. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Castaneda, supra.

C246 5. Because the Applicant has not demonstrated by a preponderance of the evidence that the trial court's failure to instruct the jury that the effect of a single no answer to any of the special issues would result in a life sentence for the Applicant offends any state or federal constitutional guarantees, the Court recommends that habeas corpus relief as to this ground be DENIED.