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No. 42,969

In the 400th District Court of Fort Bend County, Texas
(Court of Criminal Appeals No. 75,654)

Ex parte Thomas Bartlett Whitaker

Original Application for Post-Conviction Writ of *Habeas Corpus*

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Grounds for Relief

1. Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Investigate and/or Prepare a Case in Mitigation of the Death Penalty and/or Any Real Defensive Punishment Theory.

2. Applicant Was Denied the Due Process of Law When the State's Attorney Failed to Negotiate in Good Faith, Causing the Defense Attorney to Produce the Defendant's Version of the Events Which the State Rejected as the Basis for Negotiations Then Used to Prepare For Trial.

3. Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Raise Objection of Any Kind to the State's Attorney Bad Faith Actions.

   Note: Ground 3 is being submitted conditionally.

4. Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Properly Object During the Punishment Phase of Trial When the State Improperly Used Applicant's Statement Which Had Been Proffered During the Plea Bargain Process.

5. Applicant Was Denied the Due Process of Law By the Operation of Rule 606(b), Tex.R.Evid.,Which Prevents the Full Investigation of Ineffective Assistance of Counsel, a Constitutional Violation.

6. Intentional References by the Prosecutor to Matters Contained in the Plea Bargaining Process Was Improper and Denied Applicant Due Process and a Fair Trial.

Grounds for Relief

(CONT)

7. The Decision to Seek the Death Penalty in this Case Was Not Made after Consideration of Applicant's Moral Blameworthiness, But, Rather, the Decision Was Made Based on the Prosecutor's Perception of Community Expectations. As Such, the Decision Was Made Without Any Guidance Based on Non-emotional Facts and Was, Thus, Arbitrarily Made.

8. The Present Administration of a Lethal Injection to One Who Is Sentenced to Death Is Cruel and Unusual Punishment and Violates the Eighth and the Fourteenth Amendments to the United States Constitution.

9. Articles 37.071 §§ 2(e) and 2(f), C.Cr.P., Violate Applicant's Rights Under the United States Constitution

10. Articles 37.071 §§ 2(e) and 2(f), C.Cr.P., Violate Applicant's Rights Under the United States Constitution

11. Articles 37.071 § 2(b)(2), C.Cr.P., Violate Applicant's Rights Under the United States Constitution

12. The Statutory Definition of Mitigating Evidence Violates Applicant's Rights Under the United States Constitution.

No. 42,969

EX PARTE	§	IN THE 400th DISTRICT COURT
	§	
	§	OF
	§	
THOMAS BARTLETT WHITAKER	§	FORT BEND COUNTY, TEXAS

Original Application for Post-Conviction Writ of *Habeas Corpus*

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Thomas Bartlett Whitaker, Applicant in the above styled and numbered cause, by and through his undersigned attorney, David A. Schulman, pursuant to Article 11.071, C.Cr.P., and files this "Original Application for Post-Conviction Writ of *Habeas Corpus*," and in support of such would respectfully show the Court as follows:

Illegal Confinement and Restraint

Applicant is presently confined and restrained of his liberty by the state of Texas, pursuant to a judgment and sentence in the instant cause. Copies of the indictment, judgment and sentence are not attached hereto, but are available as records of the Court. See Article 11.14, C.Cr.P.

Procedural History

Applicant was charged by indictment with the offense of capital murder, upon which the State sought the imposition of the death penalty. On his plea of "Not Guilty," Applicant was convicted by a jury and a death sentence was imposed. Direct appeal is pending. Pursuant to Order of the 400th District Court dated January 15, 2009, this Application is timely if filed on or before April 17, 2009.[1]

Ground for *Habeas Corpus* Relief Number One Restated

Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Investigate and/or Prepare a Case in Mitigation of the Death Penalty and/or Any Real Defensive Punishment Theory.

Facts Relevant to Ground Number One

The totality of the evidence McDonald present during the punishment phase of Applicant's trial, consisted of:

1. Norman Kent Whitaker - Applicant's father;

2.

3. Applicant.

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[1] A true and correct copy of such order is attached as Exhibit 1 hereto. All exhibits attached to this application are incorporated by reference the same as if fully copied and set forth at length.

McDonald's preparation for the punishment phase of trial thus consisted of asking two members of Applicant's family to testify.

The testimony presented through those two witnesses was, basically, that Applicant was a spoiled child but one who the family wished to live. Additionally, the very brief examination of these three witnesses during the punishment phase was the only presentation of evidence which McDonald would make during the entire trial, as he put on no case during the initial, guilt or innocence, phase of the trial.

McDonald's failure to put on any defense at the guilt or innocence phase was in consonance with his opening statement in which he said that the trial would be about punishment and who gets time and who gets death. McDonald deliberately conducted the individual *voir dire* in a manner which he designed to ensure a jury disposed to life imprisonment and not the death penalty.[2]

Applicant's life, therefore, rode on the success of McDonald's strategy for the punishment phase of trial. McDonald primed the jury for that phase of trial by conceding guilt, despite the not guilty plea

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[2] The undersigned offer no comment at this juncture as to McDonald's *voir dire* skills and/or the successfulness of his *voir dire* strategy. They merely acknowledge that it is clear that his strategy was to pick a jury which would be more inclined to impose a life sentence.

(RR Vo. 30, PP. 49-50).[3] In his closing statement at the guilt or innocence phase of trial, counsel stated, "Factually, factually he's guilty" (RR Vol. 30, P. 52).

McDonald was paid the sum of $180,000 for his services by Applicant and his father. He personally chose not to have second chair counsel assist in either the preparation for trial, or actually in trial, despite being aware that money was not an impediment to appropriate representation, as Applicant's father would have arranged payment. Additionally, McDonald neither sought out nor consulted with a mitigation specialist, psychologist, or psychiatrist, despite being fully aware that Applicant's father would pay for those experts, as well.

Trained only as an attorney, McDonald does not possess any expertise or accreditation which would allow him to make judgments on mental health issue without the assistance of experts who do possess the necessary knowledge, training and experience.[4]

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[3] The undersigned question the wisdom of adopting a trial strategy which involves admitting the defendant's guilt while using a legal subterfuge to avoid a guilty plea. See *infra*.

[4] See Bouchillon v. Collins, 907 F.2d 589, 595-597 (5th Cir. 1990); Brown v. Sternes, 304 F.3d 677, 693-698 (7th Cir. 2002); Ex parte Briggs, 187 S.W.3d 458 (Tex.Cr.App. 2005).

Nevertheless, he intentionally declined to have Applicant examined by a mental health professional and failed in any other manner to investigate any potential physical or mental problems which might have affected or caused Applicant's behavior.

McDonald did not have Applicant's background and life examined for any type of condition, event, mental or physical disorder or injury which might prove of value in mitigation of punishment. Thus, the jury was left with only one possible explanation for Applicant's actions, that he "did it" for the money.

Argument & Authorities - Ground Number One

The standard for measuring the assistance of counsel in a criminal case is set out in *Strickland v. Washington*. 466 U.S. 668 (1984). *Strickland* requires that the Court judge ineffective assistance according to "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S., at 686.

To obtain relief, the applicant must show first that counsel's performance was deficient. *Id.*, at 687. Deficiency is shown when counsel's performance falls below an objective standard of

reasonableness. *Id.*, at 688; *Ex parte Amezquita*, 223 S.W.3d 363, 366 (Tex.Cr.App. 2006); *Ex parte Ard*, No. AP-75,704 (Tex.Cr.App. March 11, 2009)(Not Designated for Publication).

Second, the applicant must prove that this deficient performance prejudiced his defense at trial. *Strickland*, 466 U.S., at 687; *Ex parte Gonzales*, 204 S.W.3d 391, 393 (Tex.Cr.App. 2006). Prejudice is evaluated by whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S., at 694.

Applicant asserts that, in addition to the deficient performance alleged in Ground for Relief Numbers Three and Four, Randy McDonald denied him the effective assistance of counsel in the follow manners:

A. By failing to arrange for second chair counsel;

B. By failing to conduct a mitigation investigation, and/or arrange for any mental health expert to be part of the defense team;

C. By failing to conduct any significant preparation for the punishment phase of trial; and

D. By failing to engage in an signification discussion with the three punishment witnesses in order to prepare them for their testimony; and

E. By adopting the inconsistent trial strategy of admitting Applicant's guilt while using a legal subterfuge to avoid having Applicant enter a guilty plea.

I

Deficient Performance

Part A. Failure to Conduct a Mitigation Investigation.

Guideline 3.1 of the SBOT Guidelines and Guideline 4.1 of the ABA Guidelines each provide that "the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."[5]

Despite the widely recognized need for qualified personnel, as set out in the ABA and SBOT Guidelines, the only utilization of experts in this case was the use Dr. Jerome Brown, a psychologist who had been engaged by previous defense counsel to provide therapy to Applicant prior to trial. Brown was unable to do so, however, due to the jail restrictions.

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[5] See SBOT Guideline 3.1 (A)(2), attached hereto as Exhibit 2, and ABA Guideline 4.1 (A)(2), attached hereto as Exhibit 3.

Additionally, McDonald made no use of Dr. Brown. Brown made no evaluation, conducted no tests or in any other manner, never attempted to develop an understanding of Applicant for purposes of mitigation of evidence, or, for that matter, for any reason whatsoever. Additionally, there is no copy of any report by the Doctor in McDonald's files.

It was certainly thought by Applicant's father that McDonald should have Applicant examined by a psychiatrist or other mental health profession (see Exhibit 4). However, McDonald brought into the defense team no mental health professional and no medical professional. No such independent medical or mental health examination was ever conducted. When Applicant's father broached the subject of a mental health examination, counsel opined that the use of mental health experts was "legal suicide". It was his stated intent to avoid psychological evidence (see Exhibit 4).

More importantly, regardless of Applicant's father's position, McDonald's duty was to Applicant, not his family, or to his own bizarre and unsupportable notions of the dangers of psychological or psychiatric evidence. Applicant asserts that, as evidenced by

statements in the Spencer Report and both the ABA and SBOT Guidelines, the importance of having qualified mental health experts involved in the defense of a capital trial cannot be seriously disputed.

That McDonald needed to have Applicant examined is evident. He described his client to the jury as "withdrawing from society" (RR Vol. 32, P. 34), yet offered no explanation and, most assuredly, no expert witness to testify that one should judge or punish one who is "withdrawing from society" less severely due to that action or status. In truth, counsel did nothing more than imply that Applicant was a rebellious youth.

McDonald collected no records of his client's life history, medical or otherwise. Simply put, counsel could offer no explanation for his client's behavior because he never sought one for himself from anyone trained to determine if problems explaining this behavior existed.

McDonald acknowledged to the undersigned that he was aware that Cogdell had brought Dr. Brown into the case. Thus, he should have been tipped off by Dr. Brown's presence that something might be wrong with his theories, but then failed to follow through. He was given a warning by Cogdell's statements regarding the lie regarding his

repressed homosexuality Applicant may have been living, yet did no investigation whatsoever.

McDonald had available to him the results of testing from 1997 which indicated psychosis on Applicant's part. Given his expressed beliefs, that his client was "withdrawing from society," along with his failure to explain that to the jury and his duty to his client, it is patently clear that McDonald should have considered and examined Applicant's 1997 records in depth, and should have had Applicant examined for potential mitigating evidence. See *Brown v. Sternes*, 304 F.3d 677, 693-698 (7th Cir. 2002), noting that:

> [a]ttorneys have an obligation to explore all readily available sources of evidence that might benefit their client . . .," and concluding that counsel who had access to defendant's medical records "had a professional obligation to do an in-depth investigation into their client's deep-seated psychiatric problems.

The failure to do so was held to be ineffective assistance of counsel. See *Briggs*, 187 S.W.3d at 467 [FN23].

A capital defendant has an unqualified right to present any facet of his character, background, or record which might call for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 113-115 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the

> particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

In *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), the Supreme Court found counsel was ineffective when he failed to investigate his client's life history for mitigating evidence beyond a pre-sentence investigation report and the department of social services records. See *Cobble v. Quarterman*, 496 F.3d 430, 441 (5th Cir. 2007). Similarly, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court held that counsel was ineffective when defense attorneys failed to investigate and present substantial mitigating evidence during the sentencing phase of his capital murder trial. See *Coble*, 496 F.3d at 441. Finally, in *Rompilla v Beard*, 545 U.S. 374 (2005), counsel failed to make reasonable efforts to obtain mitigation evidence, or even examine the file on the defendant's prior convictions, despite having knowledge that the State would rely on them in seeking the death penalty. See *Blanton v. Quarterman*, 543 F.3d 230, 239 (2008); *Pondexter v. Quarterman*, 537 F.3d 511 (5th Cir. 2008).

Applicant submits that defense counsel in *Wiggins*, *Williams* and *Rompilla*, all found to have provided ineffective assistance, still did more to prepare for punishment phase than McDonald did in this case. A comparison of each of those three cases to the instant case is instructive.

The Supreme Court in *Wiggins* found defense counsel ineffective when he failed to investigate his client's life history for mitigating evidence beyond a pre-sentence investigation report and the department of social services records. McDonald failed to do even that.

McDonald made no advance preparation for the punishment phase, as evidenced by the fact that there were no witnesses called to testify as to mitigating factors on Applicant's behalf at punishment. This is no doubt so because counsel has an almost phobic lack of confidence in mental health professionals and was convinced that there were no mitigating factors. McDonald should have left that determination to others, more expert than he. In this, he failed his client.

In *Williams*, defense counsel:

1. Began to prepare for the guilt phase a week before trial;

2. Failed to investigate mitigating evidence;

3. Failed to introduce evidence that the defendant was "borderline mentally retarded;"

4. Failed to investigate positive evidence regarding the defendant's trustworthiness, and

5. Failed to contact a favorable witness.

See *Williams*, 529 U.S. at 396. According to the Fifth Circuit, in *Coble*, *supra*, "the mitigation evidence that *Williams*' counsel presented was weak, consisting only of the testimony of three relatives who stated that Williams was "a nice boy," and the tape recorded statement of a psychiatrist. *Coble*, 496 F.3d at 441. The similarity of the performance of defense counsel in *Williams* and McDonald in this case is striking. Applicant asserts, however, that McDonald's performance in this case is categorically much worse than that of the attorney in *Williams*.

While defense counsel in *Williams* "only prepared for the guilt phase a week before trial," McDonald's preparation consisted only of calling two witnesses who testified, basically, that neither they, nor

the /Whitaker family, wished Applicant be put to death. Additionally, as discussed below, McDonald made no attempt to properly prepare his punishment witnesses for their testimony. Simply put, little or no preparation would have been required for the somewhat pathetic presentation made by McDonald in this case.

McDonald's punishment case was similar to that in *Williams*, because the sum total of the testimony of the two witnesses he presented was that Applicant should be spared because the family wished it. Finally, while defense counsel in *Williams* played a tape recorded statement of a psychiatrist, McDonald utterly failed in this regard by not even having a mental health expert on the defense team. McDonald totally failed to have Applicant examined by any medical or mental health professional.

The only other witness called was Applicant himself, hardly an expert witness on the psychological underpinnings of the crime. That a competent attorney would put his client, who had been labeled a psychopathic manipulator (RR Vol. 31, P. 45-51), on the stand without professional intervention, beggars belief. That he was seen as such

after his testimony by the jury members was predictable. Nevertheless, that is all counsel did.

In *Rompilla*, defense counsel failed to make reasonable efforts to obtain mitigation evidence, or even examine the file on the defendant's prior convictions, despite having knowledge that the State would rely on them in seeking the death penalty. In the instant case, despite having been given notice by the prosecution showing the State was intent on gaining a death sentence, McDonald did nothing to provide the jury with any real reason to spare his client's life. He did not investigate Applicant's life, and thus was wholly unaware of the meaning and importance of the web of deceit and manipulation which Applicant had spun. A competent attorney would have been aware of, understood, and utilized the idea of countering the punishment evidence which the State provided the jury with evidence that placed Applicant's actions in a less damaging light and, thus, mitigated against the death penalty. Despite all of the indications that mitigating evidence existed, McDonald did nothing to investigate any of these potential problems, and, thus, provided the members of the

jury nothing which might help them reject the State's plan to kill his client.

The tenor of *Wiggins*, *Williams*, *Rompilla*, *Coble*, *Blanton*, *Pondexter*, the ABA Guidelines and the SBOT Guidelines, is that the failure to conduct a meaningful investigation into potential mitigating evidence falls "below an objective standard of reasonableness" under "prevailing professional norms," as set out in *Strickland*, 466 U.S. at 687-688.

The Fifth Circuit Court of Appeals determined that a capital murder defense counsel's investigation into mitigating evidence should include "efforts to discover all reasonably available mitigating evidence." *Perry v. Quarterman*, _____ F.3d _____, No. 08-70017 (5th Cir. March 11, 2009), relying on *Wiggins*, 539 U.S. at 524.

McDonald's theory was that everything was about punishment - who deserved to die, and who didn't, for their crimes (RR Vol. 25, P. 51-58) - yet he made no effort to provide the jury with any support for his implied contention - that Applicant was one of those who did not deserve to die. While he presented evidence that Applicant's remaining kin wanted the jury to spare Applicant's life, McDonald

presented absolutely no evidence showing why petitioner didn't deserve to die. This was the question which the jury would have to confront and would want answered. Further, this was a direct result of McDonald's total failure to investigate. Accordingly, the first prong of *Strickland* is satisfied. To hold otherwise would be an objectively unreasonable application of *Wiggins* and *Rompilla*.

McDonald informed the undersigned that the failure to investigate and use expert testimony was, in some part, financial. During the undersigned's interview of McDonald at his office, McDonald stated that there was no money for an investigator, no money for second chair counsel and no money for expert witnesses. The failure to do the job required cannot, however, be sloughed off to a failure of money. Dan Cogdell, the first attorney involved in this case, opined that there was money for a first rate defense team, and told that to McDonald (see Cogdell's affidavit, Exhibit 11).

Applicant has informed the undersigned, that he inquired of McDonald several times regarding the use of psychological or psychiatric evidence. According to Applicant, McDonald consistently

told him that "it was unnecessary. Applicant's statement under penalty of perjury is attached as Exhibit 5.

Kent Whitaker, Applicant's father, states unequivocally that money was never a stumbling block to a complete defense team being built and utilized. In *Ex parte Briggs*, *supra*, the Court stated without dispute that money cannot be the reason counsel does not perform adequately. *Briggs*, 187 S.W.3d at 469. The truth is, even assuming that counsel was absolutely truthful in his assertion that there was not enough money for investigators, mitigation specialists, psychologists and other experts, the trial court could have been, and most assuredly should have been, approached with regard to obtaining court funding for an adequate and constitutionally valid defense.

There is, simply put, no reason of principle which can be advanced in support of the decision trial counsel made to forego any investigation of his client's social and psychological history. The facts of the case screamed for it, because an explanation was due.

In a case such as this, in which an upper middle class child of privilege conspired not once, not twice but thrice, to kill his parents

and his younger brother, there were but two explanations. First, as hinted at by the State, is that Applicant did it for money. The second possible explanation, that something was wrong with Applicant or the family dynamic which drove him to an otherwise unexplainable act, provided a potential defense but was never explored or presented.

If the first were true, Applicant was the coldest of killers, and easily portrayed as deathworthy. If the second were demonstrated, after proper investigation, the act, however reprehensible, could be understood as an act not of a deathworthy individual but of one who deserved the mercy of the state.

Without an attempt to show the second, only the State's version, that Applicant did it for the money, and hence, that Applicant was a deathworthy individual, was presented to the jury for its consideration. Applicant was, by counsel's failure, left without anyone attempting to demonstrate his lack of deathworthiness and that failure was, literally, fatal.

That the jury expected something more than was presented is patently obvious[6] and, when shown, demonstrates the constitutional violation alleged herein - the provision of ineffective assistance of counsel to Applicant in the presentation of his defense. The affidavit of Mr. Robert Hirschhorn (see Exhibit 6), is indicative of the jury desires which went unfulfilled. Mr. Hirschhorn is a nationally recognized expert on juries and jury selection.

The affidavit demonstrates the need which McDonald, by his deficient conduct, failed to fill. Hirschhorn's opinion is that of an expert on juries and jury selection. He has spoken with hundreds of jurors from many different cases regarding their desires and expectations.

Specifically, Hirschhorn states that jurors wish to know why crimes are committed, the more so in a crime of this type, in which the actions of the defendant seem inexplicable. Hirschhorn points out

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[6] Applicant does not depend on obviousness alone to demonstrate the jury's expectations. In the Houston Chronicle article dated March 9, 2007, entitled "A Family Destroyed" (see Exhibit 7), Presiding Juror Steve Watkins, is quoted as saying, "I was praying he would show repentance and give me a reason not to pass that judgment on him." Presiding Juror Watkins literally prayed for someone, perhaps counsel as it was his job, to "give [him] a reason" not to assess the death penalty.

the obvious - the State satisfied the expectations of the jurors in this case and the defense, despite the implied promises, did not. This is supported by the Houston Chronicle article of March 9, 2007, in which it was stated, "They [the jury] also concluded there were no mitigating circumstances. Whitaker had lived a life of comfort that included travel, cars, a town house, a generous allowance and college tuition paid by his parents." The decision was inevitable as no mitigating circumstances were shown or even investigated. The members of the jury were praying not to have to make the decision they did, but they were simply given no reason not to.

It is Hirschhorn's opinion that the failure on the part of defense counsel was "catastrophic." The strategy adopted by McDonald left the State's explanation, that Applicant was a cold blooded, monetarily driven killer, as the only explanation before the jury. This failure "undoubtedly harmed" Applicant before the jury. As shown by the March 9, 2007 article, which Hirschhorn did not review in arriving at his assessment, he was absolutely correct.

In light of the restrictions of Rule 606(b), Tex.R.Evid., the opinion of a noted and respected researcher and consultant of Hirschhorn's stature becomes much more important. McDonald set the stage for a situation demonstrating that the truth of Hirschhorn's opinions regarding the jury expectations in this case cannot be denied.

Hirschhorn's opinion is a recognition of that which all competent trial attorneys know about juries, they are curious and their curiosity requires sation. In that expectation, and the failure to fulfill it, McDonald delivered the "fatal" blow to his client. McDonald's incompetence left his client standing alone, without an explanation, when the jury truly needed that explanation, and allowed the State to fill the void he created with his undelivered promises. It is submitted that Hirschhorn's opinions are more than mere opinions. They are informed, and confirmed, truth.

McDonald told the undersigned, and made similar statements to the jury, that this case was about who should die and who shouldn't. The jury's natural expectation was thereby heightened. In fact, McDonald told the jury that it was about who should die and who

shouldn't, with the natural implication that they would be shown that his client was one of those who didn't deserve to die. The one reason not to kill Applicant provided by the defense to the jury, however, had nothing to do with Applicant and his personal deathworthiness but, rather, the desires of others in the family. In reality, counsel failed to provide the explanation which he promised the jury he would provide, that Applicant would be shown to be one who did not deserve to die for his crimes.

Mitigating Evidence Was Available

The evidence which counsel neglected to present for was readily available, but only to those who bothered to look. This far exceeds the "reasonably available" test of *Perry*, *supra*, and, as such, demonstrates the neglect of counsel. In the course of *habeas* investigation, the undersigned sought the assistance of a clinical psychologist, Dr. Kit Harrison, who examined petitioner and, following and pursuant to the examination, has reached certain conclusions concerning the petitioner and the crime which he committed (Dr. Harrison's report is appended hereto as Exhibit 8).

In that report Dr. Harrison opines on the various conditions and syndromes which afflict petitioner. While the conditions and syndromes described by Dr. Harrison may not excuse the actions taken, they, it is submitted, are the specific type of evidence the defense needed to demonstrate that the crime was not about the money, but related more to Applicant's deep seated mental problems. Further, this type of evidence may well have convinced this jury that petitioner did not *deserve* to die for his admitted crimes. Without any effort, no such evidence was presented, and the conclusion foregone.

Dr. Harrison's report provides ample support for the conclusion that Applicant was suffering from a psychological injury which resulted in delusional thinking, narcissism and psychosis, a delusional paranoid disorder, and that Applicant had been suffering from such a condition since prior to 1997. The report makes clear that this condition was detectable by accepted psychological testing.

Additionally, and more importantly, Dr. Harrison's report demonstrates a consistency of diagnosis stretching back to Applicant's first psychological evaluation. This fact validates and confirms , an

important factor in determining the validity of Dr. Harrison's observation. Further, it demonstrates that the information was easily available, had McDonald only looked.

As detailed by Dr. Harrison, Applicant was no ordinary human who enjoyed play acting, but a disturbed individual who took refuge from his psychological problems in alternative personas occurring as early as high school. Applicant was narcissistic, which Harrison would describe as symptomatic of a developmental defect which manifested itself as an unconscious belief, or delusion, that when the affected individual believed something, it was necessarily true. This narcissism was evident in the facts of the crime, but Applicant's narcissism wasn't explained as the result of psychological or developmental disorders but, rather, was left to be explained by the State as nothing more than a spoiled child wanting his parents' money.

Additionally, Dr. Harrison's report details a family beset by dysfunction to the extent that it was obvious Applicant's emotional needs had not been met. Instead of providing this gifted student

support when he needed it, that need was ignored, at least in the perception of Applicant, and that reaction led to anti-social behavior on Applicant's part in an effort to overcome the reaction.

Applicant was, however, never heard. Applicant was unable to make the difficult transition from the natural narcissism of early youth, to an adoption of a socially accepted view of the world in which the person is not necessarily the arbiter of reality.

Dr. Harrison noted that Applicant had latent homosexual thoughts, as well as an increasing level of alienation from his family and the general context of his life. He became delusional to the point that he began to believe that he could not find happiness in the constrictive environment, and persona, in which found himself. He needed, in his delusional way of thinking, to begin his life again without those internal conflicts and those who, by their unaccepting behavior, could not accept him. This could have easily been seen as mitigating petitioner's deathworthiness, providing as it did, a psychological reason for Applicant's actions, no matter how reprehensible they were.

This internal conflict, and the resulting disassociative feelings and actions, were exacerbated by several factors, again according to Dr. Harrison's examination. First, Applicant engaged in a fantasy life to escape his perceived situation. That fantasy life included the assumption of alternative *personas* to fit into particular social situations.

Dr. Harrison's thoughts on this propensity are supported by Applicant's long-time girlfriend/fiancé, , that Applicant engaged in an active fantasy life including pretending to be something and someone he was not, tending toward multiple personalities. He was, according to , a chronic liar and someone who was at home in assuming different personalities ('s affidavit is attached hereto as Exhibit 9).

Dr. Harrison's thoughts on this propensity are further supported by Applicant's own statements to the undersigned. During a recent interview, Applicant indicated to the undersigned that he did, indeed, use the alias "Sebastian Cole" while visiting dance clubs in Dallas. He stated that he was unhappy with who he was, so he assumed a

different identity, and that "Sebastian," was what today would be called a "metrosexual," a term generally applied to men whose lifestyles display attributes stereotypically attributed to gay men.

Despite the fact that Applicant had been engaged to , and had dated her for several years, McDonald made no attempt to contact whatsoever. There was no attempt to determine if she would have been able to shed any light on Applicant's behavior. Her observations fit precisely with Dr. Harrison's professional evaluation of Applicant and would have supported the impact of the mitigating evidence of the underlying currents causing Applicant to act as he did.

's thoughts alone would have been sufficient to tip off competent counsel that a more thorough investigation was needed. She was, however, never contacted until the undersigned contacted her during the *habeas corpus* investigation.

Dr. Harrison notes that Applicant's history is marked by the unusual and restricted range of interests which accompanies aspects of the autism spectrum of developmental disorders, which left him increasingly out of the social context of his life. He noted that there

were early manifestations of social impairments, most resembling several features suggestive of early Asperger's Disorder, and that Applicant had difficulty in distinguishing between fantasy and reality, a problem which still exists. He was increasingly out of the context of his family and his peers. His early experiments with homosexuality and the pressures brought to bear on him by his parents due to that latent interest were also noted. His study of Applicant's history revealed one who was affected by an increasing level of delusional thinking, to the point of disavowal of self as a protective measure. The psychosis noted by others is confirmed.

That these specifically identified symptoms were not raised or investigated by counsel, is undisputed. That the potential mitigating effect of this diagnosis was not investigated as it applied to Applicant is, likewise, undisputable.

Applicant had no mitigation specialist to do the investigation because counsel did not hire one. Applicant had no psychological investigation conducted by his defense team because counsel declined to have him examined by a professional and, also, had no defense

team with whom to consult. McDonald was convinced, without the benefit of either an investigation or credentials to make the call, that there was no mitigation available, and that the use of mental health experts was not only not necessary, but would be damaging. In acting on this belief, McDonald acted to the detriment of his client.

Part B. McDonald's Failure to Arrange for Second Chair Counsel.

Both the American Bar Association ("ABA") "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," and the State Bar of Texas ("SBOT") "Guidelines and Standards for Texas Capital Counsel," provide for a minimum of two lawyers for the defense in a capital trial.[7] The reasons are manifest.

[7] See 2006 SBOT Guideline §3.1, "The Defense Team and Supporting Services." A complete copy of the 2006 SBOT Guidelines, which meet or exceed the requirements of the ABA guidelines, are attached to this application as Exhibit 2.

Guideline 3.1 of the SBOT Guidelines and Guideline 4.1 of the ABA Guidelines[8] each provide:

> A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.
>
> (1) The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."

The requirement for two attorneys in death penalty cases has been a long standing part of American death penalty practice. In 1998, the Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Juridical Conference of the United States, delivered a report styled "Federal Death Penalty: Recommendations Concerning the Cost and Quality of Defense Representation ("The Spencer Report").[9] In relevant part, that report stated:

> Since the First Judiciary Act in 1789, federal law has provided for the appointment of a minimum of two lawyers per defendant in a capital case. Judges have generally appointed two lawyers in federal death penalty cases, although there have been rare instances in which the court

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[8] See 2003 ABA Guideline §4.1, "The Defense Team and Supporting Services." A complete copy of the 2003 ABA guidelines are attached to this application as Exhibit 3.

[9] The Spencer Report can be located on the official website of the United States Courts. See http://www.uscourts.gov/library/dpenalty/1COVER.htm. A copy is also attached hereto as Exhibit 10.

> has not done so until after the prosecution has filed notice of its intention to seek the death penalty, effectively delaying defense preparation. In a few cases, a judge has formally appointed more than two lawyers.

Spencer Report, § C (1). The report makes it clear why such a requirement is imposed, and many of the reasons found important in that report, while addressed to federal death penalty crimes and representation, are not limited in any manner to federal practice.

To paraphrase the entirety of the report and its recommendations, the demands on counsel's time and expertise in most, if not all, death penalty cases, require at a minimum two qualified attorneys, supported by other counsel when necessary, and appropriate professional support staff including para-legals, investigators and mental health and mitigation specialists. It is this complexity, no doubt, which caused both the ABA and SBOT to establish a standard requiring a minimum of two defense lawyers in every capital case. The recommendations made in the Spencer report were adopted by the Judicial Conference of the United States on September 15, 1998.

The Spencer report also points out the obvious, that there is not a single trial in a capital case but, rather, two criminal trials which

present unique problems in preparation, both for the litigants and the trial court. The two phases and each's unique problems must be prepared for assiduously, which, alone, calls for two attorneys with support staff. In the instant case there was only the one attorney, with no support staff and, of course, with the concomitant lack of support itself.[10]

The lack of a second attorney to assist might be acceptable for certain attorneys - perhaps iconic but mythical attorneys such as Horace Rumpole[11] or Atticus Finch.[12] In the real world, however, where an attorney's client faces the death penalty, one defense attorney is never enough. In many cases, in fact, as recognized by the Spencer Report and both the ABA and SBOT Guidelines, even two attorneys won't be sufficient.

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[10] It should be noted that Mr. McDonald's office arrangement is that of an "executive" office. Mr. McDonald has no staff of his own, but shares staff (reception only), with others in his office. To the undersigned's knowledge, McDonald has no personal secretary, no legal assistant and no investigator.

[11] See "Rumpole of the Bailey," by John Mortimer, QC; multiple publishers, multiple copyright dates.

[12] See "To Kill a Mockingbird," Harper Lee; © 1962, McGraw Hill; New York, NY.

Further, while McDonald told Applicant he did not need a second lawyer, the reality, as in most cases, is far from what McDonald initially envisioned. In his statement under penalty of perjury, Applicant states that, during "voir dire, McDonald told him that, this is where he could use a second lawyer.[13] Additionally, in May of 2007, when the undersigned was important, the Court's coordinator stated that McDonald was "worn out" during trial and that she thought he "needed someone there to do the little things for him." Although unaware of the undersigned's conversation with the Court Coordinator, Applicant stated that, on several occasions during trial, McDonald "expressed concern about how much work he was doing and how little sleep he was getting."

In the instant case, the failure to have two attorneys directly affected the decisions which were made in every single instance. This is true at all phases of the case, from the failure to investigate and present psychological evidence, to the failure to properly prepare by consulting mitigation specialists. This all resulted from McDonald's

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[13] Applicant also states that, prior to trial, McDonald told him that Applicant would have to act as second chair during jury selection.

belief that mental health experts would be more harmful than helpful. In essence, because of McDonald's fear of potential adverse results in a general sense, the jury heard no evidence explaining or giving foundation to Applicant's actions. McDonald's beliefs, it must be recognized, are directly contrary to the competing, and perhaps wiser, views as typified by the ABA and SBOT Guidelines.

McDonald's statement to the undersigned that money was an issue is not supported by the evidence, as Kent Whitaker has made it clear that he would have paid whatever money was necessary to save Applicant's life, and that McDonald knew it. Beyond that, McDonald was paid $180,000 for his services. If Kent Whitaker could not contribute further funds for a second lawyer, McDonald should have paid someone out of his own pocket. There are literally dozens of qualified lawyers who would have worked the entire trial for a fraction of what McDonald was paid. The reality is that there is no excuse for McDonald's failure to obtain a second lawyer to assist.

Part C. McDonald's Failure to Conduct any Significant Preparation for the Punishment Phase of Trial

That this trial would only be about punishment was recognized and enunciated by McDonald at or about the time he was retained.[14] Nevertheless, he proceeded to spend no time at all in "preparing" for punishment. It must be noted that McDonald presented absolutely no expert psychological or mitigation testimony so his preparation time would, necessarily be reduced by the amount of time necessary to prepare in accordance with the ABA and SBOT guidelines. Additionally, he did not prepare those witnesses he did call as he wished the jury to hear the testimony spontaneously. He did not go over their testimony other than by listening to their stories.

Preparation for punishment, the "second trial" in a capital case, is so important that the Spencer Report and both the ABA and SBOT Guidelines require multiple counsel to enable adequate preparation. By failing to enlist the aid of one or more attorneys to assist in the

[14] McDonald told the undersigned that he felt he was being retained to negotiate a guilty plea, that Applicant's guilt was not at issue.

preparation and trial of this case, McDonald's performance was deficient.

Part D. McDonald's Failure to Prepare his Punishment Witnesses

Reviewing defense counsel's performance, one has to wonder what he did do to prepare for the punishment phase. The evident answer is that he did nothing.

McDonald did not prepare those witnesses he did call to give testimony. Kent Whitaker's affidavit plainly shows that McDonald did not spend any time preparing his testimony. As a result his testimony was relegated to that of a parent seeking mercy for his child.

Kent Whitaker has also stated that McDonald did not prepare him at all for his testimony. McDonald reportedly told him that "it was important to appear spontaneous and that preparation would imperil that spontaneity." See Mr. Whitaker's affidavit, attached hereto as Exhibit 4.

Similarly, Applicant has also stated that McDonald spent no time preparing him for his testimony. He also stated that McDonald told

him that he wasn't going to prepare him for testifying because he did not want it to appear "rehearsed."

It is widely accepted that a witness testifying at any stage of legal proceedings should be properly prepared by the sponsoring attorney. For example, in "***Preparing Witnesses***, A Practical Guide for Lawyers and their Clients,"[15] attorneys are given a detailed seven step process for preparing a witness. The introduction sums up the importance of the process:

> Imagine sitting down on a park bench and telling a total stranger your most troubling secrets. You wouldn't feel comfortable doing that, so why should anyone think your new client would feel comfortable doing the same thing Just because the other person is a lawyer? You're a stranger, no matter what the environment, whether you're representing them personally, or you're an agency or corporate lawyer. The fact that you're a stranger makes them doubly uncomfortable. Take the time to get to know them and get comfortable with each other. What do you need to know about your client's background? What does the client need to know about yours? The time invested up front to do this is well worth it.

Although the advice pertains to preparing the client for his or her testimony, it is valid as to any witness being sponsored by an

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[15] "***Preparing Witnesses***: a Practical Guide for Lawyers and Their Clients;" by Daniel I. Small; 2nd Edition; Published by American Bar Association, 2004 (ISBN 1590313798, 9781590313794)

attorney. As stated by Thomas A. Mauet,[16] author of several books on trial advocacy widely utilized as required text in American law schools:

> Preparing a witness to testify at trial involves explaining to the witness why his testimony is important, identifying the key testimony you plan to bring out during the direct examination, training the witness to be an effective communicator, and preparing the witness for the likely cross-examination. This takes time to do well, and lawyers frequently fail to schedule enough time before trial to prepare their client and other cooperative witnesses. The lawyer who will do the direct examination at trial should be the lawyer doing the witness preparation. Only when you personally meet with the witness and review his testimony will you get a feel for the witness; understand how he talks, sounds, and acts; and become able to use that information to develop focused and confident testimony. Let the witness know it is perfectly proper for you (and the other lawyers, for that matter) to meet with the witness to determine what the witness's testimony will be, and that the jury will even be instructed to that effect.

More importantly, as it pertains to this case, all three witnesses called by McDonald but not prepared for their testimony, were witnesses in the punishment phase of trial.

Had he properly prepared for the punishment phase of trial, McDonald could have shown the childhood travails of Applicant, culminating in burglaries of his own high school and the elementary school at which his mother worked and the earlier assessment of

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[16] See. e.g., "***Trials***, Strategy, Skills, and the New Power of Persuasion;" by Thomas Mauet; Published by Aspen Publishers Online, 2005 (ISBN 0735551030, 9780735551039)

Applicant as delusional and psychotic. By failing to properly investigate and prepare, McDonald had truly nothing to show the jury.

He did not go over questions he would be asking in an effort to allow Applicant to answer those questions with familiarity, preferring, instead, spontaneity. McDonald's strategy of having Applicant appear "spontaneous," of course, was disastrous. In the Houston Chronicle article dated March 9, 2007, entitled, "A Family Destroyed," it was stated, "The jurors also said they thought Whitaker was not sincere in his testimony and was trying to manipulate them."

While the appearance of spontaneity may well be a laudable goal in certain cases, the worthiness of that goal, along with the decision to seek it, must be evaluated in light of the fact that Applicant was a delusional paranoid individual who exhibited overtly manipulative behavior. A failure to prepare such a person to give testimony was either a massive mistake or an indication of a failure to perceive reality on the part of the lawyer. Had McDonald properly investigated the case, he would have fully understood Applicant's mental health issues and would either have not had Applicant testify, or would have

properly prepared Applicant to testify, both on direct and on cross examination.

Additionally, McDonald anticipated , Applicant's uncle, being his best witness at punishment. He has informed the undersigned that, even in light of the ultimate outcome, he believes his anticipation was fulfilled. This outcome was predictable, as McDonald's examination of can be seen to be the product of greater preparation. 's testimony centered on his desires for Applicant to live and his efforts to achieve that goal.

The Spencer Report specifically mentions the burden on counsel to prepare for two separate trials in a capital murder prosecution, the guilt or innocence trial and the punishment trial. Although the Spencer Report centered on federal death penalty litigation, that does not in any way minimize its importance to Texas death penalty practice, as the overall procedures are similar to the procedures utilized in Texas' courts. This is further apparent in the two lawyer standard embodied in the both the ABA and SBOT Guidelines.

That preparation not only for the punishment trial itself is important, and that preparation of the individual witnesses to give their testimony in a focused and effective manner is equally important cannot be denied. That type of punishment preparation was not engaged in and thus the evidence was not effectively presented.

Part E. <u>McDonald's Inconsistent Trial Strategy</u>

McDonald personally admitted to the jury that there was no question about Applicant's guilt when he told them there "has never been a need to have this trial," (RR Vol. 25, P. 56), and that the purpose of the trial was to get a life sentence. This was clearly part of McDonald's trial strategy - Applicant's guilt would be conceded and punishment would consist of a plea for mercy. Inconsistent with that trial strategy, however, was McDonald's decision to have Applicant refuse to enter a plea (RR Vol. 32, P. 197, L. 19 to P. 198, L. 14), knowing that this would require the judge to enter a "not guilty" plea on Applicant's behalf. Article 27.16(a), C.Cr.P. That the strategy chosen was, to be charitable, ill advised, became obvious during Felcman's cross-examination of Applicant.

Vol. 32, P. 195, L. 6

A. (The Defendant) I don't know. That never entered my mind, sir. I was always under the impression from the very beginning there was no other outcome from this, there could be no other outcome other than a guilty verdict.

Q. (Mr. Felcman) How could there not be another outcome from these ladies and gentlemen when they decide guilty or not guilty?

A. (The Defendant) That was my feeling and the impression that my attorney had given me.

Q. Well, then, what was this, "I refuse to plea" and make the Judge up there enter a plea of not guilty, if you didn't think maybe this jury panel over here may find you not guilty?

A. I don't know. That was not what I wanted to do, but this is all very -- this is all huge to somebody sitting in my chair, when you have an attorney that's been practicing law for 30 years tell you you're not going to do something one way. I listened to him, and I didn't agree with it at the time, and I don't agree with it now, but that was the way it was done.

Q. You don't want to really drag Mr. McDonald into this, do you, that somehow he made you do this?

A. I took his advice, sir, so it was my decision, yes, but it was his very strong decision.

Q. You were in this courtroom when these jurors heard from Mr. McDonald that he's trying to seek justice on this case, did you not?

A. Yes, sir.

Q. But then you refused to plead guilty where you could have just gotten up and said, "Ladies and gentlemen, I did this"?

A. Yes, sir.

After Felcman beat Applicant up a little more about the failure to plead guilty, McDonald finally began to object, then, in a bench conference, stated:

> (Mr. McDonald) I thought we made this really, really, really very clear about this plea. We had a conference call about it, it's available to us. He can't come back here and complain about that. I actually, on the record, entered the plea. He did not. Okay? I argued to the jury the reason I did that. He wants to call it legal maneuvering, and he knows what it is. The bottom line is, if he enters a plea of guilty, then the accomplice testimony is all that has to be offered. They are seeking the death penalty. I am trying to get life. I am trying to actually get him to plead to life. He would have pled guilty if he'd have given him life, but why are we going over this stuff over and over?
>
> (Mr. Felcman) Because he brought it up on the direct, that it was his idea to do not guilty.
>
> (Mr. McDonald) It was -- he just got through telling you I'm the lawyer. Do you think he knows the law that you would enter a plea?
>
> (The Court) I'm going to sustain the objection.
>
> (Mr. Felcman) Okay, Judge.
>
> (End of bench conference)

Applicant would point out that, although Felcman argued that he was engaged in this line of questioning because "Because he," obviously meaning Applicant, "brought it up on the direct, that it was his idea to do not guilty," the absolute reverse is what actually occurred. Shortly after Felcman began the barrage of questions pertaining to why Applicant did not plea guilty, Applicant testified that

"That was not what I wanted to do . . . (RR Vol. 32, P. 195, L. 19-20), and that his decision to do so was based on McDonald's advice (RR Vol. 32, P. 196, L.3).

McDonald's strategy was fatally flawed and, therefore, unreasonable. If, as McDonald stated on multiple occasions, the case was not about the guilt or innocence of Applicant but, rather, all about the penalty to be given, the decision was fatal, as it demonstrated to the jury that Applicant did not feel remorse and that he was, because of that lack, undeserving of any leniency.

What McDonald's action did was to portray his client as one who would hide behind the law to avoid acceptance of responsibility, opening him up to the type of questioning which Felcman used to accomplish precisely that. What McDonald's action did was to deny Applicant the most important indication of remorse - the guilty plea - a public acceptance of responsibility and a demonstration of a willingness to accept the consequences. Applicant's protestations that he had wished to plead guilty but had accepted his attorney's advice

was a poor substitute. In the end, without a guilty plea, all of Applicant's expressions of remorse rang hollow.

Throughout this trial McDonald's "strategy" was distinguished by the inconsistency which marked this particular error. An example may be found in his opening arguments (RR Vol. 25, PP. 51-58), in which he tells the jury the case will be about punishment, but then questions the adequacy of the State's evidence. The same is true here. It is submitted that a rational juror, hearing that the case was truly all about punishment, about who got the death penalty and who didn't, would question why a guilty plea had not been entered.

Additionally, when given the incomplete explanation that it was done based on his attorney's advice, without a reason given showing why such action was legally desired which did not detract from Applicant's acceptance of responsibility, an average juror would be left without an option other than to conclude the failure to enter a plea was another example of legal trickery and an attempt to avoid that responsibility. In failing to enter a guilty plea when the trial was all about punishment with guilt not being contested, was sheer folly and

hardly a reasonable trial strategy even if it qualifies as a strategy of any sort. Without any valid reason for engaging in the conduct which deprived Applicant of an important method of showing his remorse, and thus furthering McDonald's aim of making the trial about punishment, the conduct was constitutionally deficient conduct.

II

The Result of the Proceeding Would Have Been Different

Such a blatant violation of the Texas and ABA standards without reason or benefit cries out for an analysis which presumes harm. This is so because the violations are so egregious and so complete that the harm is obvious. Applicant was examined by others in his past, including those who testified for this State in this trial. In that testimony, the State's experts expressed concerns about Applicant's psychological condition and even that did not trigger any investigation on counsel's part to determine if that evidence could be countered or bent to advantage. Again though, absolutely *nothing* was attempted in the realm of mitigation. In this posture and with the evidence

presented and easily obtainable at the time, it is asserted, the presumption must be that Applicant was harmed.

Even if harm cannot be presumed, the facts of the *habeas* record demonstrate harm beyond doubt. Counsel did no investigation based on his presumption that nothing was wrong with Applicant and that no mitigating circumstances existed. He presented none because he didn't look. Counsel put his own biases and prejudices before his duty to his client and caused his client, thereby, to stand defenseless to the State's push for the death penalty.

The Fifth Circuit, in regard to prejudice in failing to investigate and produce mitigating evidence, has stated that a reviewing court must ask whether "the changes to the mitigation case would have a reasonable probability of causing a juror to change his or her mind about imposing the death penalty." *Perry*, *supra*, slip op. at 6; see also *Blanton*, 543 F.3d at 236. It is the totality of the mitigation evidence, including that adduced at trial as well as that in the *habeas corpus* proceeding, is viewed in the assessment. *Williams*, 529 U.S. at 397-398.

The following areas which should have been investigated by Mr. McDonald are easily ascertainable:

1. Potential psychological damage caused by a suppression of homosexual feelings in an actively anti-homosexual home;

2. Potential psychological damage and possible other physical maladies related to possible autistic symptoms and tendencies;

3. Delusional thinking in association with a delusional paranoid disorder;

4. Narcissism, and its interlocking relationship with delusional thinking and behaviors.

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It is clear this is an area which should have been investigated by Mr. McDonald, but wasn't, and, had Mr. McDonald brought a mitigation expert into the defense team, he would have been able to put on a punishment case more like what is expected in light of *Wiggins*, *Williams*, *Rompilla*, *Coble*, *Blanton*, *Pondexter*, the ABA Guidelines and the SBOT Guidelines.

It is patently obvious that McDonald did not investigate the psychological results of the conflicts between Applicant and his repressed, secret life and that life which he found himself inhabiting. That he was unprepared to demonstrate the mitigating potential of

that type of evidence is entirely understandable - he didn't even investigate it. His decision not to develop the theory with experts cannot be justified until he learned about it. This is the whole point of *Wiggins.*

Further, McDonald had information that there were mental issues and he did not investigate them. It was his opinion that experts were dangerous to defendants. Pursuant to *Wiggins* and *Rompilla*, McDonald should have investigated the mental aspects of Applicant's development and their potential for mitigation use. More importantly, it is clear that he failed to grasp the concept that all it might take to save his client would have been for one juror would accept the mitigation evidence, despite the facts of the crime.

Additionally, McDonald never appreciated the double edged nature of the sword he wielded at punishment, which is that, by putting on the testimony of only family members who had no problems with the law, to say, as in *Williams*, Applicant was a "nice boy," it demonstrated to the jury that Applicant had all the tools to live a straight and peaceful live but didn't. McDonald's punishment case,

if one can call it such, was premised on obviously personal family love and desire for mercy and not scientific information showing a lack of deathworthiness which would tend to mitigate against the death penalty, as demanded by of *Wiggins*, *Williams*, *Rompilla*, *Coble*, *Blanton*, *Pondexter*, the ABA Guidelines and the SBOT Guidelines. The harm then, is demonstrated by the total lack of presentation of significant evidence which was readily available through investigation, which evidence demonstrated that Applicant was not a cold-blooded killer as the State would have it, but, instead, a conflicted and tormented young man who raged against the demons who inhabited his soul. The differences are, and would have been for the jury had they been presented, stark. Was Applicant a cold-blooded, spoiled offspring of privilege who killed his own kin for money, or was he a disturbed young man, driven to actions beyond even his own comprehension? The jury had to decide that question. The harm caused by counsel's ineffectiveness is that it was never presented to that body for a decision.

Regarding McDonald's decision to have his client enter no plea, thus resulting in the trial court being require to enter a "not guilty" plea, the same is true. That Applicant was harmed by this error on the part of his attorney is evident. He was subjected to cross-examination by Felcman which made him the goat for insisting on pleading not guilty and putting the jury through the trial despite his acknowledgment that his guilt was a foregone conclusion from before the trial. He was brought to task for not pleading guilty, as set out above, to the point that he was admonished that he didn't "really want to drag Mr. McDonald into this," despite all the evidence demonstrating it was McDonald's idea and decision. Applicant was, thereby, shown to wish to avoid responsibility for his crime.

There was nothing to be gained from the failure to enter a plea to counter the perception of a lack of acceptance. The only result of the unreasonable action taken by McDonald was confusion on the part of the jury and a suspicion that Applicant was still engaging in the type of behavior which had brought him to this point. As such,

the conduct was damaging to the extreme and constituted ineffective assistance of counsel.

Conclusion - Ground Number One

Both prongs of *Strickland* are satisfied. Applicant was prejudiced by McDonald's failure to have a second lawyer to assist him, as well as his failure to prepare a real defense at punishment. Additionally, there is no doubt but that the extent of counsel's failures demonstrate that a finding that he acted effectively would constitute an objectively unreasonable application of *Wiggins* and *Rompilla*.

McDonald procured no mitigation witnesses and, despite his calling of two family members to beg for Applicant's life, he was unprepared for a punishment hearing. There was a complete and total lack of follow through with the one psychologist McDonald claimed to have contacted, despite the family's insistence that they always wanted to have Applicant examined. But for McDonald's failure, the jury would have seen evidence in mitigation, and evidence which would have permitted them to view the crime as something

other than a financially motivated action. McDonald's performance was deficient, and Applicant was harmed by that action.

Applicant's claim of ineffective assistance is absolutely clear and any finding to the contrary would constitute an objectively unreasonable application of *Strickland*. *Wiggins* and *Rompilla*. Applicant is entitled to a new trial.

Ground for *Habeas Corpus* Relief Number Two Restated

Applicant Was Denied the Due Process of Law When the State's Attorney Failed to Negotiate in Good Faith, Causing the Defense Attorney to Produce the Defendant's Version of the Events Which the State Rejected as the Basis for Negotiations Then Used to Prepare For Trial.

Facts Relevant to Ground Number Two

Applicant's then attorneys, Dan Cogdell and James "Jimmy" Ardoin, were approached by the prosecutor in the instant case, Fred Felcman, while they were in a retail store in Sugarland, Texas. Felcman proposed to the two attorneys that negotiations would be enhanced by the submission by the defense of what came to be known as "the proffer," a statement of the facts of the offense, detailing Applicant's involvement in a strictly factual manner.

It was specifically stated that Applicant's words should be used and it was stressed that there should be no embellishment of the factual statement with mention of remorse or contrition. In exchange for a satisfactory proffer, Applicant's representatives were told that the State would consider removing the death penalty as a punishment option.

Pursuant to the instructions given by Felcman, Ardoin visited with Applicant and, using his notes to incorporate Applicant's words, wrote a multi-paged document conforming to those stated desires. That document was then presented to Felcman.

The proffer was rejected as unsatisfactory because, according to Cogdell and Ardoin, there were no statements of Applicant's remorse within it. The State retained the proffer in written form, as shown by their later using it at trial (RR Vol. 25, PP. 104-107; RR Vol. 32, PP. 257-258). In each instance it was the State who brought forth the proffer, exhibited it in front of the jury and examined the witness on its contents. The State made a point of asking Applicant, after he had been given the opportunity to read the proffer, if he could name one

fact which would lessen his "moral blameworthiness" (RR Vol. 32, P. 260). The implication was plain - nothing Applicant had said in his written statement would be sufficient to spare Applicant's life. The State had obviously used the preferred statement to prepare for trial.

No further plea negotiations were engaged in by Mr. Felcman both with Cogdell and Ardoin, or with Mr. Randy McDonald, who became counsel after Cogdell withdrew. While McDonald made offers to the State, Mr. Felcman refused to entertain any offer, including an offer for two life sentences to be served consecutively. As a result, Applicant was effectively denied counsel during a critical phase of trial, plea negotiations, and, thus, due process of law.

Argument & Authorities - Ground Number One

The Court of Criminal Appeals has noted:

> While no court has been able to give a full and complete definition of the term, 'due process,' as used in both our state and federal constitutions, yet we know that it includes and means that an accused shall, in a criminal case, be accorded that fundamental fairness necessary to the due administration of justice.

Webb v. State, 278 S.W.2d 158, 160 (1955). It is this "fundamental fairness necessary to the due administration of justice," which has been denied Applicant in this case. This requirement has been used

to condemn judicial incursion into plea negotiations as its participation denies a defendant due process of law. *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 8 (Tex.Cr.App. 1983); *Rouse v. State*, 03-07-0214-CR (Tex.App. - Austin June 27, 2008)(not designated for publication).

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the prosecutor told the defendant during negotiations that if he did not plead guilty and save the State the inconvenience of a jury trial the State would re-indict him using two prior felony convictions to obtain a life sentence potential. It was undisputed that the prosecutor was in possession of the information concerning the prior convictions when he informed defendant of his intentions, should defendant not plead to the original indictment.

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.

Blackledge v. Allison, 431 U.S. 63, 71 (1977). Precisely what constitutes a proper administration of the plea bargaining procedures has not been totally fleshed out. Nevertheless, the Supreme Court

has recognized the importance of the procedures and of the participation of counsel within it.

> The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, Brady v. United States, 397 U.S. 742, 758, the need fora public record indicating that a plea was knowingly and voluntarily made, Boykin v. Alabama, 395 U.S. 238, 242, and the requirement that a prosecutor's plea-bargaining promise must be kept, Santobello v. New York, 404 U.S. 257, 262.

Hayes, 434 U.S. at 362. Similarly, the role of the various attorneys has not been fully explored, but the Supreme Court has made some observations of the roles counsel must play within the criminal justice system, some of which must be seen as those which lead to a "proper administration of the plea bargaining procedures." In *Hayes*, the Court recognized that a "prosecutor's plea-bargaining promise must be kept," *Hayes*, 434 U.S. at 362. The plea bargaining process, including the negotiation phase, is marked by both the interests of justice and standards of good faith. *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993), citing *Santobello v. New York*, 404 U.S. 257, 262-263 (1971).

In addition to the requirement of honesty, a State's counsel cannot act in a vindictive manner without offending the Constitution.

North Carolina v. Pearce, 395 U.S. 711 (1969); see also, *Blackledge*, 417 U.S. at 27. Certainly vindictiveness in the plea bargaining cannot be countenanced for the same reasons. While it is true that there is no due process violation where plea negotiations merely presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, *Hayes*, 434 U.S. at 365, that is not the situation in the case at bar.

The case at bar involves State solicitation of a bargain based on State-set conditions. The Supreme Court's cases demand, at the very least, prosecutorial honesty in the process which was sorely lacking as demonstrated by the State's alteration of the terms after Applicant complied with the conditions previously set.

The *Hayes* Court distinguished *Pearce* and *Perry*, by stating:

> In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction — a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."

Hayes, 434 U.S. at 362; quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970). This case is an example of the plea bargaining

process used by the State to derive evidence it was not entitled to obtain or use. It simply cannot be said that this was truly a plea bargaining procedure, "properly administered," to the "benefit all concerned," addressed in *Blackledge*, 431 U.S. at 71.

The presumption of vindictiveness was unwarranted in *Hayes* because the prosecution had done no more than openly present the defendant with the unpleasant alternatives of forgoing trial and pleading guilty or facing charges on which he was plainly subject to prosecution. That is a far cry, however, from the actions of the prosecutor in this case in seeking a constitutionally sufficient deal, imposing conditions on any possible bargaining, as the only options were death and life, and then, altering those conditions after Applicant had relied upon and complied with the stated and demanded conditions. The prosecutor's imposition of a condition, and alteration of that condition after reliance on the promise and compliance with the condition, violated the Applicant's due process rights to a fair administration of the plea bargaining procedures and requires a new trial.

In *United States. v. Saltzman*, 537 F.3d 353 (5th Cir. 2008), the Fifth Circuit Court of Appeals refused to find prosecutorial vindictiveness in a situation in which defendant, after accepting the plea bargain, withdrew his guilty plea. The Court held that it could see no difference in the two actions. It held that the defendant's successful withdrawal of his guilty plea should have informed him, as a reasonable minded defendant, that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish. *Saltzman*, 537 F.3d at 361. Contrast the approved prosecutorial response in *Saltzman* with the prosecutor's action in this case, and the motivation becomes clear.

In this case, the prosecutor instigated the action, which he represented as the only means by which negotiations to remove the death penalty could have any chance of success, by causing a proffer of Applicant's version of events to be prepared, which the prosecutor stated he desired be prepared in a certain way. He then rejected that proffer as a basis for negotiation based upon its preparation in that desired manner - without mention of contrition. Further, he then

retained the proffered statement and used it trial, as detailed herein, in violation of Rule 410, Tex.R.Evid., and Applicant's rights under the U.S. Constitution to Due Process. The State thus had its cake and it ate it, too.

Saltzman, *supra*, contains additional instruction in this matter. In that case, the District Court had found the fact that the government added additional charges after defendant's counsel had conceded facts leading to them was insignificant in finding governmental vindictiveness. The Fifth Circuit held, "In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." *Saltzman*, 537 F.3d at 362.

It truly cannot be fairly said that the prosecutor in this case "uncovered additional information" or came to realize that information the State previously had possessed a broader significance, simply or otherwise, because he approached Applicant and actively solicited it as a part of the only plea negotiation he was offering Applicant and,

then when the offer was acted upon and the information sought received by the State, he changed the offer and rejected the proffer, albeit keeping and using a copy.

Unlike the defendant in *Saltzman*, Applicant has "demonstrate[d] a reasonable likelihood of vindictiveness," *Saltzman*, 537 F.3d at 363, and, thus, a violation of due process of law sufficient to warrant a new trial. If a finding of actual vindictiveness requires direct evidence, such as evidence of a statement by the prosecutor, Applicant has succeeded in carrying the burden. *United States v. Johnson*, 221 F.3d 83, 94 (2nd Cir. 2000).

The decision to offer a plea bargain is generally considered to be within the discretion of the prosecutor. *United States v. Gomez-Herrera*, 523 F.3d 554, 561 (5th Cir. 2008). Both the Supreme Court and the Court of Criminal Appeals have recognized the legitimacy of the State's interest in persuading the defendant to plead guilty and forego his right to a time-consuming and expensive trial. *Hayes*, 434 U.S. at 364; *Castleberry v. State*, 704 S.W.2d 21, 25 (Tex.Cr.App. 1984).

Truly, though, cases such as *Castleberry* cannot be compared to the situation at bar, involving as they do rejection of an offered plea bargain and not, as here, acceptance of and compliance with the State's stated terms. However, cases dealing with prosecutorial vindictiveness are helpful, in that they show that without a showing or presumption of vindictiveness there is no due process violation, with the implication that if there is a showing of vindictiveness there is a due process violation. *Castleberry*, *supra*; *United States v. Goodwin*, 457 U.S. 368 (1982).

Prosecutorial vindictiveness has been limited to two distinct situations: first, when it is proved that circumstances exist which pose a "realistic likelihood" of prosecutorial misconduct sufficient to raise a "presumption of prosecutorial vindictiveness," which the State must rebut or face dismissal of the charges; or, second, where there is proof of "actual vindictiveness," defined as a situation in which direct evidence establishes that the prosecutor's charging decision was an unjustifiable penalty resulting solely from the defendant's exercise of

a protected legal right. *Neal v. State*, 150 S.W.3d 169, 173 (Tex.Cr.App. 2004).

Applicant submits that, while a due process violation may be shown by a demonstration, as outlined, of prosecutorial vindictiveness, that is not the only form of prosecutorial conduct which can demonstrate a due process violation. When, as here, the State instigates a plea bargaining procedure designed to have a defendant divulge the facts of the offense from his perspective, and hence most of the potential defense, and then alters the terms of the agreement to ensure defendant cannot comply with the State's desires, the State has not acted in a manner consistent with "the requirement that a prosecutor's plea-bargaining promise must be kept . . .," under *Santobello*, 404 U.S. at 262. *Hayes*, 434 U.S. at 362.

Even if it cannot be presumed that Prosecutor Felcman acted in a vindictive manner, the evidence nevertheless shows that he, in fact, acted in that manner. His perfidiousness in altering the terms of the procedure he had dictated, following compliance with those terms, more than adequately demonstrates the bad faith in which the State

engaged in this crucial and critical phase of the proceedings. In doing so, the State violated the Due Process rights of Applicant.

It may well be argued that what the prosecutor did in this case cannot be characterized as vindictiveness. If that is so, perhaps the word "over-reaching" would be descriptive of his behavior. Prosecutorial over-reaching can also be violative of the Due Process clause. *United States v. Melancon*, 972 F.2d 566, 578 (5th Cir. 1992). Most assuredly, the facts of the situation demonstrate the State acted in bad faith, and it is good faith which is a requirement of plea bargaining. *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993).

The State, acting outside the bounds of good faith, and, in fact, in bad faith, induced Applicant to make a statement deleterious to his interest upon the representation that it was the only way in which the death penalty could be avoided.[17] In so doing, the State violated

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[17] Interestingly, the State also represented to the defense that the death penalty could be avoided if Applicant's uncle, , came to the prosecutor and begged for his nephew's life (affidavit of Dan Lamar Cogdell, Exhibit 11, p.3)(see also affidavit of James Madison Ardoin III, Exhibit 12). complied with the request by begging for his nephew's life, but the State reneged on the deal (RR Vol. 32, PP. 86-87). The lack of good faith exhibited by the State's actions in dealing with is strikingly similar to that same lack of good faith present in the

Applicant's rights to a fair trial and his due process rights by gaining an advantage over Applicant through his own words.

Remedy Requested

In his dissent to the Court's opinion in *Neal*, Judge Womack, joined by Judges Johnson and Price, noted that an appropriate remedy in a situation which called for relief would be that which defendant in the case had actually asked for, limitation of the sentence imposed to that term the plea bargaining had called for before the violation. *Neal*, 150 S.W.3d at 180-181. Certainly, in *habeas*, a request to dismiss an indictment would be inappropriate.

It is contended, however, that the proper remedy is that recognized in the dissenting opinion in *Neal*, specific performance. This remedy would be consistent with due process as well as the fair and constitutional administration of the plea bargaining system and with the plea bargaining in this case.

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situation at bar.

Conclusion - Ground Number Two

The action of the prosecutor in soliciting a written statement by Applicant detailing his involvement in the offenses in order to facilitate plea bargaining, imposing certain conditions on the statement Feldman requested in order to insure its acceptance, changing those conditions after compliance, and then rejecting the statement as insufficient to facilitate bargaining because it did not comply with the altered condition and then using the statement thus obtained against Applicant at trial, violated Applicant's due process rights, his right to a fair trial and, in that violation, require a new trial.

Conditional Submission

The following Ground for Relief (Number 3) is brought conditionally. If the Court fails or refuses to address the merits of Ground Number Two, *supra*, based on McDonald's failure to timely object, Applicant would then submit this Ground for Relief. If the Court does address the merits, then the Ground for Relief is withdrawn.

Ground for *Habeas Corpus* Relief Number Three Restated

Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Raise Objection of Any Kind to the State's Attorney Bad Faith Actions.

Facts Relevant to Ground Number Three

Applicant's then attorneys, Dan Cogdell and James "Jimmy" Ardoin, were approached by the prosecutor in the instant case, Fred Felcman, while they were in a retail store in Sugarland, Texas. Felcman proposed to the two attorneys that negotiations would be enhanced by the submission by the defense of what came to be known as "the proffer," a statement of the facts of the offense, detailing Applicant's involvement in a strictly factual manner.

It was specifically stated that Applicant's words should be used and it was stressed that there should be no embellishment of the factual statement with mention of remorse or contrition. In exchange for a satisfactory proffer, Applicant's representatives were told that the State would consider removing the death penalty as a punishment option.

Pursuant to the instructions given by Felcman, Ardoin visited with Applicant and, using his notes to incorporate Applicant's words, wrote a multi-paged document conforming to those stated desires. That document was then presented to Felcman, who promptly rejected it, according to Cogdell and Ardoin, because there were no statements of Applicant's remorse within it.

Subsequently, prior to withdrawing from the case, Cogdell provided McDonald with all the details of the history of his dealings with Felcman. See Cogdell's affidavit, Exhibit 11, P. 5.

Additionally, during the meeting at the Limestone County Detention Center, when Cogdell and McDonald came to visit Applicant together, at the time Cogdell was about to withdraw and McDonald was taking over as counsel, McDonald told Applicant he believed that Felcman had acted in bad faith. Because of that belief, McDonald would not be keeping Cogdell on as second chair, because he intended to call him as a witness to demonstrate Felcman's bad faith.

Thus, failing any other evidence, McDonald was on notice of Felcman's bad faith in obtaining the preferred statement.

Nevertheless, although Cogdell and Ordain completely withdrew from the case and had nothing further to do with representing Applicant, McDonald made no challenge whatsoever to Felcman's actions, or the fruits thereof, which was the State's knowledge and use of Applicant's version of the facts of the case.

Argument & Authorities - Ground Number Three

The standard for measuring the assistance of counsel in a criminal case is set out in *Strickland v. Washington*. *supra*. *Strickland* requires that the Court judge ineffective assistance according to "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S., at 686.

To obtain relief, the applicant must show first that counsel's performance was deficient. *Id.*, at 687. Deficiency is shown when counsel's performance falls below an objective standard of reasonableness. *Id.*, at 688; *Amezquita*, 223 S.W.3d at 366;*Ard*, *supra*.

Second, the applicant must prove that this deficient performance prejudiced his defense at trial. *Strickland*, 466 U.S., at 687; *Gonzales*,

204 S.W.3d at 393. Prejudice is evaluated by whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S., at 694.

I

Deficient Performance

It is undisputed that McDonald was aware, at the time he undertook representation in this case, of Felcman's bad faith actions in obtaining the preferred statement. He told Applicant as much at the time he took over.

Further, it is undisputed that McDonald new he could raise some form of objection to Felcman's actions. That, too, he made clear to Applicant with his statement that he intended to call Cogdell as a witness to demonstrate Felcman's bad faith.

In *Neal*, *supra*, the defendant was charged with possession of a weapon inside a penal institution. Certain facts existed which arguably demonstrated the charge was the result of prosecutorial

vindictiveness in response to the defendant's filing of a federal civil-rights lawsuit alleging mistreatment in the jail. The defendant did not raise these issues in or to the trial court, and, in his brief to the Court of Appeals, the defendant alleged, for the very first time, that his indictment constituted prosecutorial vindictiveness in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals agreed and held that the sequence of events raised a presumption of vindictiveness and that there was no evidence in the trial record to overcome it, and, thus, reversed the conviction and dismissed the charges. *Neal v. State*, 117 S.W.3d 301 (Tex.App. - Texarkana 2003).

The Court of Criminal Appeals reversed that decision, holding that, because the defendant had never uttered the words "prosecutorial vindictiveness" or made a due process violation claim at trial, he never gave the trial court or the prosecution the required notice of the claim and did not preserve the issue for appellate review. *Neal*, 150 S.W.3d at 180.

Discretionary review was granted in *Neal* in April of 2004, the Court of Criminal Appeals' decision was in November 2004. McDonald took over as Applicant's attorney in April of 2006. Pre-trial motion hearings in the instant case were conducted between June and October of 2006, with trial on the merits being conducted in January and February of 2007. Thus, McDonald had more than four months prior to the commencement of voir dire in which to "utter the words" "bad faith" to the trial court. See *Neal*, 150 S.W.3d at 177.

The undersigned submit that the proper vehicle would have been a motion to enforce the implied agreement offered by Felcman, that, in exchange for a written statement containing no statements of remorse or contrition, but merely stating Applicant's involvement with the offenses charged (see Cogdell's affidavit, Exhibit 11, p. 3.), the possibility of a death sentence would be taken "off the table."

Further, Applicant asserts that it should have been clear that Applicant had everything to gain and nothing to lose by attempting to bar the State from seeking the death penalty. McDonald himself had offered a plea of guilty in exchange for two stacked life sentences, but

had been totally rebuffed by Felcman. Thus, it was clear that Felcman was not going to agree to anything less than a death sentence, and, if there was no plea bargaining, the best Applicant could hope for would be that the jury returned a life sentence. Accordingly, even if an attempt to prevent the State from seeking the death penalty were to have been unsuccessful, Applicant could be and would be no worse off.

Consequently, it is clear that, in failing to launch a vehicle attempting to prevent the State from seeking the death penalty, McDonald's performance fell below the objective standard of "reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688. McDonald's performance was deficient. The first prong of *Strickland* is satisfied.

II

The Result of the Proceeding Would Have Been Different

Under *Strickland*, Applicant must show that trial counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 668. As this submission is

conditional, it is clear that the Court would not be considering the merits of the Ground unless it had declined to address the merits of the issue because the issue was waived by McDonald's failure to raise the issue in the trial court. The prejudice resulting from McDonald's deficient performance, therefore, is two-fold.

First, because McDonald failed to raise Felcman's bad faith in the trial court, the death sentence was available as a punishment option. When combined with McDonald's other deficient conduct (failure to investigate, locate and introduce evidence in mitigation of the death penalty, as set out in Ground One), the jury had no choice but to reach the verdict it did. Second, because the McDonald failed to raise Felcman's bad faith in the trial court, Applicant has been denied the opportunity to litigate the issue in this *habeas corpus* proceeding.[18] The second prong of *Strickland* is satisfied.

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[18] Applicant asserts that appellate counsel cannot be faulted for not having raised the issue of Felcman's bad faith on direct appeal, nor may Applicant be prevented from litigating the issue at this time by *Ex parte Gardner*, 959 S.W.2d 189 (Tex.Cr.App. 1996)(claims which were available to be raised on direct appeal but were not are procedurally defaulted and barred form habeas review), because nothing in the trial record would appellate counsel on notice that there was a "bad faith" issue. Thus, it could not have been raised on direct appeal and is available for litigation in this *habeas corpus* proceeding.

Remedy Requested

Applicant recognizes that the standard remedy on a finding of ineffective assistance is to return the case to the lower courts so that the issue can be properly litigated. In the instant case, as the ineffective assistance is the failure to raise the issue of Felcman's bad faith, the Court can effect a proper remedy one of two ways: either address the merits of Applicant's second ground for relief, or abate the direct appeal and permit the parties to brief the issue in that proceeding. Applicant further suggests that, in the interest of judicial economy, and since the parties will have had the opportunity to brief this issue in this *habeas corpus* proceeding, the better remedy will be to address the merits of Applicant's second ground in this proceeding.

Conclusion - Ground Number Three

McDonald was aware of Felcman's bad faith from the beginning of his representation. He told Applicant he intended to litigate the issue and intended to call Cogdell as a witness. Nevertheless, he made no challenge to Felcman's actions and, as a result, the death penalty was available as a punishment option and Applicant has been

prevented from litigating the merits of the claim, and was denied his right to the effective assistance of counsel.

The Court should enter a finding that Applicant was denied the effective assistance of counsel by McDonald's failure to raise the issue of Felcman's bad faith at the trial court. The Court should then, rather than add to the length of these proceedings, address the merits of the claim.

Ground for *Habeas Corpus* Relief Number Four Restated

Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Failed to Properly Object During the Punishment Phase of Trial When the State Improperly Used Applicant's Statement Which Had Been Proffered During the Plea Bargain Process.

Facts Relevant to Ground Number Four

Applicant's original attorneys, in response to an offer by prosecutor Felcman to "take death off the table," submitted a typed statement detailing Applicant's involvement in the instant offense. For the reasons detailed above, Felcman rejected the proffer and the option of a death penalty remained a possibility.

It was during the guilt/innocence phase of trial, and, in fact, during examination of the very first State's witness, when the subject

of the proffer first came up. During Felcman's direct examination, Applicant's father, Kent Whitaker, stated that, when Applicant returned from Mexico and he saw him for the first time in 15 months, he realized that Applicant "was guilty and ready to confess" (RR Vol. 25, P. 104, L. 21). When Felcman argued that there "was no confession, though, at any time . . .," Whitaker raised the subject of the "proffer." The following occurred:

RR Vol. 25, P. 104, L. 24

A. (Kent Whitaker) There was no confession. There was a proffer 25 offered to the District Attorney's office a year and, what, three or four months ago.

Q. (Mr. Felcman) Uh-huh. You know, of course, that proffer was absolutely inadmissible, and I could not have used it for any purposes. You understand that?

A. No, I didn't understand that.

Q. Okay.

* * *

See also, RR Vol. 25, P. 105, L. 15

Q. (Mr. Felcman) So, the remorse or repentance that my office received was -- let me ask you this: Did the Defendant prepare that, or did one of Dan Cogdell's partners prepare that?

A. (Kent Whitaker) I don't even think it was a partner. I found out much later -- in my visit with you, what, six weeks ago, that was at the time I found out that Bart had not written the proffer, and that you were offended by the tone of it, and that was when I knew that Jimmy -- I can't think of his last

name -- anyway, one of Dan's junior assistants, I'd heard had written that up.

Q. There was no legal repentance, there was nothing. There was legal maneuvering on your son's part. Am I correct on that?

A. What?

Q. He -- he repented to you, but he didn't put his neck on the line about this case, correct?

A. As I understand it, it would have been -- Dan would not have allowed him to.

Q. Uh-huh.

A. I think that the problem broke when Dan and you did not seem to realize that Bart was trying to confess to this.

Subsequently, during the punishment phase of trial, Applicant testified in his own behalf. During cross-examination, Felcman suddenly produced the proffered statement and began to ask Applicant questions about it. The following occurred:

RR Vol. 32, P. 256, L. 22

Q. (Mr. Felcman) If you could go back. I asked you before if you ever sent Steven Champagne and Chris Brashear out on any type of errands. Remember that?

A. (The Defendant) Yes, you did.

Q. You also mentioned something about a proffered statement. Remember that?

A. I -- yes, sir.

(Mr. Felcman): May I approach him, Judge?

(The Court): You may.

Q. (Mr. Felcman) Don't read this out loud to the jury. Do not read it out loud to the jury, but read this to yourself.

A. (Reading.)

Q. Is that true?

A. I did not write that.

Q. You didn't write it?

A. No. I -- I wanted to write the proffer. That was some confusion between me and Mr. Cogdell at the time when initially -- I guess it was your office that suggested that if we wrote the proffer, we could all end this. It was my impression that I would write this admission of guilt.

Q. It wasn't my suggestion.

A. A. I'm sorry?

Q. Your father poured his heart out to me, and I saw no remorse on your part.

A. I didn't actually write that. The one that I wrote was in my cell, and it did have remorse. It was really how I felt at the time, and I didn't -- I was under the impression that I was going to be giving that copy to Mr. Cogdell, and then I find out -- I guess I didn't see him for a few weeks. I found out the next time that I talked to him that a proffer had been rejected. I was very confused, because it was my understanding that I would be writing it myself.

Q. The proffer that presented -- that you didn't even have anything to do with. You understand how insulting that is to somebody that has to listen to the father plea, and I see no remorse on the Defendant?

A. Yes, extremely insulting. I knew it would be, if it had been done that way. I wouldn't have agreed to that at all. I was very upset about that.

Despite his knowledge of the history of Felcman's actions in obtaining the proffered statement and his presumed knowledge of the

Rules of Evidence and Texas case law, McDonald voiced no objection to Felcman's in-trial use of the proffered statement.

Argument & Authorities - Ground Number Four

The standard for measuring the assistance of counsel in a criminal case is set out in *Strickland v. Washington*. *supra*. *Strickland* requires that the Court judge ineffective assistance according to "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S., at 686.

To obtain relief, the applicant must show first that counsel's performance was deficient. *Id.*, at 687. Deficiency is shown when counsel's performance falls below an objective standard of reasonableness. *Id.*, at 688; *Amezquita*, 223 S.W.3d at 366;*Ard*, *supra*.

Second, the applicant must prove that this deficient performance prejudiced his defense at trial. *Strickland*, 466 U.S., at 687; *Gonzales*, 204 S.W.3d at 393. Prejudice is evaluated by whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S., at 694.

I

Deficient Performance

Initially, McDonald could have objected to Felcman's use of the proffered statement under Rule 410, Tex.R.Evid. ("Inadmissibility of Pleas, Plea Discussions and Related Statements"), which provides that statements made during plea negotiations are inadmissible. Rule 410 makes inadmissible any statement made in the course of unsuccessful plea discussions with an attorney for the prosecuting authority.

Thus, purported plea offers or other statements to anyone other than an attorney for the prosecution, are not covered by Rule 410, regardless of what the defendant believed when he made the statement in question. *Monreal v. State*, 947 S.W.2d 559, 565 (Tex.Cr.App. 1997). Further, the Court of Criminal Appeals has held that statements which are protected by Rule 410 are not only "not

admissible," they should not be "used" against a defendant. *Bowie v. State*, 135 S.W.3d 55 (Tex.Cr.App. 2004).

Additionally, as to Felcman's use of the proffered statement in his cross-examination of Applicant, McDonald should have voiced an objection based on a lack of a good faith basis. It is clear that Felcman knew that Applicant did not write the proffered statement, and that it had been prepared by Ardoin.

The State was required to have a "good faith" basis for its questions and be prepared to produce documentary evidence or a witness (outside the presence of the jury) to testify to them. See, e.g., *Starvaggi v. State*, 593 S.W.2d 323, 328 (Tex.Cr.App. 1979); *Stone v. State*, 583 S.W.2d 410, 416 (Tex.Cr.App. 1979). See also *Cavender v. State*, 547 S.W.2d 601 (Tex.Cr.App. 1977).

Certainly, once Kent Whitaker had testified, Felcman that Applicant did not prepare the proffered statement, because Kent Whitaker testified to that effect in open court. An examination of Kent Whitaker's testimony reveals that, although Felcman posed a question asking whether Applicant prepared the proffered statement, it was

Felcman himself who had informed Kent Whitaker, some six weeks earlier, that Applicant did not prepare the proffered statement.

RR Vol. 25, P. 105, L. 15

> Q. (Mr. Felcman) So, the remorse or repentance that my office received was -- let me ask you this: Did the Defendant prepare that, or did one of Dan Cogdell's partners prepare that?
>
> A. (Kent Whitaker) I don't even think it was a partner. I found out much later -- **in my visit with you**, what, six weeks ago, that was at the time I found out that Bart had not written the proffer, and that you were offended by the tone of it, and that was when I knew that Jimmy -- I can't think of his last name -- anyway, one of Dan's junior assistants, I'd heard had written that up.

(emphasis added). Thus, the reality was that Felcman knew approximately six weeks before trial that Applicant did not prepare the proffered statement. More importantly, McDonald knew that, either as a result of Kent Whitaker's testimony, or because he told Kent Whitaker, Felcman knew that Applicant did not prepare the proffered statement. Further, the trial court had this knowledge.

In addition to the Rule 410 prohibition, because Felcman knew that Applicant did not prepare the proffered statement, it was improper for him to question Applicant about it. McDonald knew that Felcman knew that Felcman could not and did not have a good faith belief that Applicant prepared the proffered statement, and he should

have objected on that basis. The trial court knew that Felcman knew that Applicant did not prepare the proffered statement, so it would have undoubtably sustained the objection . . . had McDonald made it.

The prohibition against the use of statements made during plea bargain negotiations is so fundamental that it would be surprising to find even a law student who has taken an evidence class who is unaware of it. A reasonable trial attorney would have voiced objection to Felcman's use of the proffered statement. McDonald should have objected, but didn't. His performance, therefore, is deficient in this regard. The first prong of *Strickland* is satisfied.

II

The Result of the Proceeding Would Have Been Different

Through his unobjected to use of the proffered statement while conducting cross-examination of Kent Whitaker, Felcman was able to inject into the proceedings the fact that the proffered statement was devoid of statements of remorse or contrition, yet never had to reveal that he was the one who commanded that occur. Through his unobjected to use of the proffered statement while conducting cross-

examination of Kent Whitaker, Felcman was also able to inject into the proceedings how he was "offended" by the proffered statement, yet never had to reveal that it was prepared pursuant to his instructions and in compliance with his specifications.

Additionally, the harmful effect of McDonald's deficient performance in failing to object to Felcman's use of the proffered statement was compounded by his total failure to prepare Applicant for his testimony. Due to the convergence of these two acts of deficient performance, Felcman was able to make Applicant look anything but remorseful.

McDonald compounded these failures by not seeking to establish, through his client's testimony or the testimony of Cogdell and/or Ardoin, the fact that the lack of remorse within the proffered statement was orchestrated for the jury by Felcman himself, the one who feigned offense by its absence. Felcman's lies could easily have been exposed to the jury, but McDonald sat mute.

McDonald had several choices, but he ignored them all. He could have taken Applicant on re-direct examination[19] and asked him why the proffered statement contained no recitations of remorse or contrition. Alternatively, he could have requested a brief continuance and obtained the testimony of either Cogdell or Ardoin, or both. It is clear from the affidavits what the tenor of their testimony would have been, that it had been Felcman who had insisted on the there being no statements of remorse or contrition in the proffered statement.

Felcman should never have been allowed to use the proffered statement in his cross-examination of either Applicant or the direct examination of his father, Kent Whitaker. But for McDonald's failure to object, he would not have been able to do so. But for McDonald's failure to object, the jury would not have heard that the proffered statement was devoid of statements of remorse or contrition. But for McDonald's failure to object, the jury would not have heard how offended Felcman allegedly was when he read the proffered statement he had so carefully orchestrated.

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[19] McDonald chose instead to pass on the opportunity for re-direct, stating simply, "No questions" (RR Vol. 32, P. 263, L. 1).

Finally, but for McDonald's failure to object, his failure to properly prepare his witness for his testimony, and his failure to correct the false impression left by Felcman that he was expecting to see some remorse or contrition in the proffered statement, Applicant would not have looked so badly to the jury. All McDonald had to do was to ask whose idea it was for there to be no remorse within the document. He had available three different witness who could have answered that question, yet he wholly failed in this endeavor by failing to establish the circumstances of the making of the proffered statement. The second prong of *Strickland* is satisfied.

Conclusion - Ground Number Four

Felcman should never have been allowed to use the proffered statement for any purpose, let alone use it in-trial during his examination of both Applicant and his father. McDonald's performance in failing to object to such use was deficient conduct. Due to the information improperly received by the jury, including Felcman's increased ability to portray Applicant in an extremely negative light, it is clear that Applicant suffered extreme prejudice,

and that there is significant probability that, but for McDonald's deficient conduct, the outcome of the proceeding would have been different. Applicant is entitled to a new trial.

Ground for *Habeas Corpus* Relief Number Five Restated

Applicant Was Denied the Due Process of Law By the Operation of Rule 606(b), Tex.R.Evid.,Which Prevents the Full Investigation of Ineffective Assistance of Counsel, a Constitutional Violation.

Facts Relevant to Ground Number Five

The undersigned, in developing and investigating the allegation of ineffective assistance of counsel, have found it necessary to investigate expectations of the jurors both as raised by counsel's words and attitudes and, also, as a product of the natural curiosity of a jury member. This component is critically important when determining the harm caused by the failure of trial counsel to satisfy the expectations of that particular jury. However, Rule 606(b), Tex.R.Evid., prevents inquiry into the mental processes of the jury members. This rule has been strictly interpreted by the Court of Criminal Appeals, as well as other Texas courts. *White v. State*, 225 S.W.3d 571, 574-575 (Tex.Cr.App. 2007); *Fenoglio v. State*, 252

S.W.3d 468, 477 (Tex.App. - Fort Worth 2008); *State v. Dudley*, 223 S.W.3d 717, 723 (Tex.App. - Tyler 2007).

Argument & Authorities - Ground Number Five

Rule 606(b) states:

> (b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

It is not the rule itself with which Applicant takes issue. In the ordinary course of things, the rule serves a purpose by shielding members of the juries of Texas from overenthusiastic inquiries into their mental processes. When the stakes are relatively low, it is easy to see how the rule plays an important role in the orderly administration of justice. When the stakes are raised however, to the point of a potential violation of the constitutional rights of the affected party, the rule cannot be read to prevent investigation and, if appropriate, vindication of the constitutional violation.

As applied to this case, Rule 606 would prevent this Court from considering evidence from the jurors, either live or in affidavits, as evidence of "any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing" any juror's vote, unless the evidence was offered to show "(1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve." Rule 606(b), *supra*; see also *White*, 225 S.W.3d at 573.[20]

That the allegation of ineffective assistance of counsel presents an allegation of constitutional dimension, is beyond question. *Strickland*, *supra*. One accused of crime in the United States has a right under the Sixth Amendment to the United States Constitution,

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[20] Applicant is aware of *Lucero v. State*, 246 S.W.3d 86, 95 (Tex.Cr.App. 2008), in which the Court of Criminal Appeals upheld the trial court's refusal to hold a hearing on a Motion for New Trial alleging jury misconduct based on affidavits from all twelve jurors solicited by the State, in which the jurors denied that the foreman's reading of scripture affected their deliberations, while not holding that the reading was a outside influence. Applicant cannot explain how evidence solicited by one party to the litigation from the jury regarding their deliberations can be considered in refusing the other party the right to solicit evidence from the jury regarding their deliberations, or, for that matter, in deciding harmlessness, and will leave a fuller explanation for another day.

to the effective assistance of counsel. The question then becomes one of priorities.

Is the state procedural rule of equal or greater importance when dealing with allegations of constitutional dimension. It is Applicant's assertion that, in this situation, the constitutional requirement for effective counsel, and the Applicant's ability to enforce that right, must be deemed superior to that of a state procedural rule, no matter how worthy the rule or its purpose.

The Court of Criminal Appeals suggested in *White* that the rule was not unconstitutional because a defendant is not precluded from proving matters which can be proven through juror testimony, but merely precluded from doing so by that method. Other methods to prove harm resulting from potential jury misconduct are available and must be utilized. *White*, 225 S.W.3d at 574-574. It is imperative, however, to recognize the limitations of that interpretation, especially when dealing with harm attendant to the constitutional violation of ineffective assistance of counsel for failure to place before that jury matters which could have been seen as mitigating. While it is not

necessary to determine whether or not a particular piece of evidence would have been seen as mitigating, it is especially important to determine whether or not the members of the jury expected Applicant to present mitigating evidence and, when it wasn't delivered, the conclusions drawn from the failure. Without this ability to ask individual jurors questions relating to their expectations, the role of defense counsel in setting those expectations, their observations on whether or not defense counsel fulfilled those expectations and what effect that failure, if any, had, Applicant is effectively deprived of his due process right to prove the constitutional deprivation of effective counsel.

In *Ford Motor Co. v. Castillo*, ___ S.W.3d ___ (Texas, No. 06-0875, April 3, 2009), the Texas Supreme Court considered the purpose and scope of Rule 606 in dealing with a trial court's investigation into jury misconduct. In that case, Ford Motor Company had been sued by the plaintiff, who was seeking monetary damages for injuries suffered as a result of a collision involving a Ford product. During deliberations, the jury sent out a note asking the maximum amount of money they

could assess as damages. Ford Motor Company promptly settled the case but discovered in post-trial proceedings that only the jury foreman had sent the note and that the rest of the jury were convinced that the plaintiff should not recover.

Pursuant to Ford Motor Company's pleadings, the trial court investigated with the plaintiff appealing a ruling favorable to the defendant to the Texas Supreme Court. That Court held that the rule must give way to important considerations of justice and that the jury misconduct was just such an important consideration to which the rule must bow.

Cases such as *Tanner v. United States*, 483 U.S. 107 (1987), upon which the Court relied, are not on point. In that case, the Supreme Court underlined the need for the same rule in the federal system:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

Tanner, 483 U.S. at 120. Applicant asserts that the purpose of the inquiry required in the instant case, along with its setting, a statutorily required *habeas corpus* review of death penalty cases, requires a distinction. The whole notion of disruption of finality is inapposite to the instant situation as the procedure in which the inquiry is to be made is one designed to hasten and ensure finality of the judgment to allow for execution of the applicant.

The Supreme Court also expressed that one purpose behind the rule was to prevent unwarranted scrutiny of a jury's verdict, because such scrutiny would cause the jury pause in the fulfillment of its duty.

> Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-121. This consideration, like the last, has no application to the situation at bar. The jury is not being investigated. Disclosure of their expectations driven, in part, by defense counsel, along with their assessments of whether defense counsel failed to deliver the expected evidence, will not in any manner discourage a jury's "full and frank discussion in the jury room," because those

discussion are not called into question. Nor would such an inquiry impact in any way the "jurors' willingness to return an unpopular verdict," once again because their inclinations are not being scrutinized.

The Court of Criminal Appeals has examined the rule in a recent death penalty case, albeit in a much different context. *Thomas v. State*, No. AP-75,218 (Tex.Cr.App., delivered Oct. 8, 2008)(not designated for publication). In that case several jurors had expressed to the trial judge, after the verdict, that they had discussed during their deliberations their desire to hear the defendant express remorse. The defendant contended that such was a violation of his constitutional right not to testify and that, therefore, he should be allowed to introduce evidence from the members of the jury relating to their deliberations. While the Court upheld the rule, the distinction between trying to prove jury misconduct through juror testimony and trying to prove ineffective assistance of counsel through juror evidence was not investigated and certainly not precluded by the analysis.

Applicant further asserts that the constitutional imperative requiring effective assistance of counsel in every case, when viewed in the death penalty milieu, must likewise present an important consideration of justice which requires the subservience of the rule to the constitutional imperative. The Court of Criminal Appeals must re-examine its view of the rule in light of these considerations.

Applicant is entitled to a fair and full consideration of the claims he makes, especially with regard to the requirements of the constitution. He had a due process right to the fair administration of the justice system and the statute under which he seeks relief. In preventing the investigation of the violation of Applicant's constitutional right to effective assistance of counsel, Rule 606(b), violates Applicant's due process rights and prevents him from a full and fair hearing of those claims.

Thus, to the extent that the Court may ultimately utilize the restrictive application of Rule 606(b) to prevent jurors from advising the courts what, for example, expectations the individual jurors had of the defense in this case, such application denies Applicant Due

Process. Applicant is entitled fully litigate his claims, so that it can truly said that he got that "one bite at the apple" which Article 11.071, C.Cr.P., is envisioned to be.

To accomplish this goal, the Convicting Court must presume that the logic expressed by the Texas Supreme Court in *Castillo* will prevail over the restrictive interpretation of Rule 606(b). There is no fundamental difference between permitting Ford Motor Company to investigate what happened or did not happen in the jury room in that civil case, and permitting Applicant to investigate what happened or did not happen in the jury room in this case with regard to the effectiveness of his attorney.

Conclusion - Ground Number Five

The application of Rule 606(b), Tex.R.Evid., in restricting Applicant's ability to introduce juror testimony regarding expectations and counsel's role in setting and fulfilling, or not, those expectations, violates Applicant's right to the Due Process of Law by impermissibly restricting his ability to investigate, present and prove a violation of his constitutional right to the effective assistance of counsel.

Ground for *Habeas Corpus* Relief Number Six Restated

Intentional References by the Prosecutor to Matters Contained in the Plea Bargaining Process Was Improper and Denied Applicant Due Process and a Fair Trial.

Facts Relevant to Ground Number Six

The first instance occurred when the attorney for the state had called Kent Whitaker, Applicant's father, to the witness stand during the guilt portion of the trial. The issues were admissions made by the defendant. The state's attorney, Felcman, knew that discussion of the proffered statement was inadmissable and that the father knew about the proffered statement. Nevertheless, he asked Kent Whitaker, "There was no confession, though, at any time, was there?" Whereupon, the Mr. Whitaker answered, "there was no confession, there was a proffer offered to the District Attorney's office a year and, what three or four months ago." Instead of abandoning the questioning at that time, Felcman kept on inquiring about the proffered statement, who prepared it, and the fact that the attorney who Kent Whitaker hired to represent Applicant was a "high-profile" attorney (RR Vol. 25, PP 104 to 107).

Applicant took the witness stand in the punishment phase of the trial. On cross-examination, he mentioned that he had wanted to talk to the state's attorney about the plea and that he told his attorney that fact and his attorney prepared a proffer (RR Vol. 31, P. 227). Felcman could not leave it alone. He took the actual proffered statement to Applicant, called his attention and the attention of the jury to it. He directly asked Applicant if he wrote it. The ensuing explanation and resulting questions specifically mentioned the proffered statement, what Applicant thought about it, how he tried to prepare it, and how his attorney handled it (RR 32, PP 257-258).

Argument & Authorities - Ground Number Six

Rule 410, Tex.R.Evid., provides in part:

> " Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> .....(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority, in a criminal case, that do not result in a plea of guilty or a plea of nolo contendere or that results in a plea, later withdrawn, of guilty or nolo contendere.
>
> However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it."

In every instance where the proffered statement and the plea negotiations were mentioned, it was questioning by Felcman which brought it up and induced the comment. Additionally, the state, knowing that such conduct was prohibited, continued to emphasize Applicant's statements made during the plea bargaining procedures and specifically concerning the proffered statement. At the hearing on the motion for new trial, Applicant's attorney attempted to obtain a copy of the proffered statement which had been inquired about as part of the appellate record. The attorney for the state refused and responded:

> "What Mr. Phillips is trying to do is interject that's not in the record by going behind the record on this particular thing. I don't see how that would be admissible. I don't see how that would be pertinent on a motion for new trial."

(RR Vol. 34, P. 5, L. 8-12)

The trial judge refused to allow an evidentiary hearing for the specific purpose to have the appellate record show what was exhibited before the jury and used in the questioning of Applicant by Felcman.[21] The purpose of the state in making references to the proffered

[21] Additional comments by Felcman are found at RR Vol. 34, PP. 14-16).

statement and how it was prepared appears to be such as would cause an emotional reaction with the jurors. In each instance it was brought up by the State and was a predicate to further ask additional questions in regards to the proffered statement and the manner in which it was used and the truth it contained. In each instance the misstatement of fact as to the missing element of remorse was continued.

Even the excuse of"impeachment" as the reason for the use of the content and references to the purpose and authorship of the proffer must fail. Rule 410, does not allow such use for impeachment. The State is prohibited from admitting against a defendant any statement made to a prosecuting attorney during the course of plea discussions. It is only when a defendant offers statements made during plea bargain discussions that the State may, in the interest of fairness, offer other statements made during the same plea bargain discussions. *Tavlor v. State*, 19 S.W.3d 858 (Tex.App. - Eastland 2000). Applicant made no offer during the trial of statements which were made during plea negotiations.

In such a situation, the San Antonio Court of Appeals has opined:

> Here, the prosecutor's cross-examination was an attempt to show that Abdygapparova was lying to the jury based on her statements made during plea negotiations. Because the plea bargaining process is recognized as an important and necessary integral aspect of the criminal justice system, Rule 410 protects statements made during plea negotiations. Wayne v. State, 718 S.w.2d 393, 396-97 (Tex.App.-Dalias 1986), rev'd on other grounds, 756 S.W.2d 274 (Tex.Crim.App.1988). "[A] defendant, in the course of plea negotiations must be free to negotiate settlements without fear that his statements will later be used against him." Id. Only when the defendant offers statements made during plea bargain discussions may the State, in the interest of fairness, offer other statements made during the same plea bargain discussions. Taylor, 19 S.W.3d at 863. Moreover, Rule 410 should bar the use of pleas and plea related statements for impeachment. Id. Thus, the trial court erred in allowing the State to proceed with questions relating to statements made during plea negotiations. FN14"

Abdvgapparova v. State, 243 S.W.3d 191,206 (Tex.App. - San Antonio 2007).

This was a death penalty case, and it was the State's theory that Applicant was manipulative and a liar. He would say anything and do anything to achieve his goals. The State advocated that the use of the proffered statement authored by his "high priced" attorneys to get him a plea bargain was just another ploy on his part. It was intended to and could only have reduced the "moral worth" of Applicant.

Conclusion - Ground Number Six

Felcman's repeated references to the proffered statement and the plea negotiations was improper under Rule 410. They denied Applicant due process and a fair trial.

Ground for *Habeas Corpus* Relief Number Seven Restated

The Decision to Seek the Death Penalty in this Case Was Not Made after Consideration of Applicant's Moral Blameworthiness, But, Rather, the Decision Was Made Based on the Prosecutor's Perception of Community Expectations. As Such, the Decision Was Made Without Any Guidance Based on Non-emotional Facts and Was, Thus, Arbitrarily Made.

Facts Relevant to Ground Number Seven

There were three people involved in the murder case for which Applicant was tried. Through a plea bargain, Steven Champagne was given a fifteen year sentence. He drove the getaway car from the scene of the shooting. The State agreed not to seek the death penalty against Christopher Brashear. He was the person who actually fired the shots which killed Applicant's mother and brother and wounded Kent Whitaker (RR Vol. 3, PP. 11-13). Applicant alone was tried on the capital case in which the state sought and obtained the penalty of death.

Argument & Authorities - Ground Number Seven

As the Supreme Court has often held, "death is different" in kind from other punishments. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); see *Ring v. Arizona*, 536 U.S. 584, 606 (2002). The federal Constitution requires more than the minimal safeguard of a comparative proportionality review to ensure the fair imposition of the death penalty. Because death is qualitatively different from any other punishment, the federal Constitution requires the highest degree of reliability in the determination that it is the appropriate punishment. E.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972) (decided in conjunction with *Branch v. Texas*). To ensure this reliability, the United States Constitution imposes requirements of proportionality of offense to punishment, of a narrowly defined class of death eligible defendants, and of an opportunity for each juror to consider and give effect to circumstances mitigating against the imposition of the death sentence. See *Tuilaepa v. California*, 512 U.S. 967 (1994).

Without dispute, this principle of law is commonly applied to the sentences of death which have been found to be appropriate by juries. The reasoning which justifies it should be no less when applied to the initial determination of a prosecutor who seeks to authorize a jury to assess the death penalty. Under Texas procedure, once the grand jury has found evidence sufficient to warrant the filing of a capital indictment, the prosecution has the discretion to seek a death sentence or not seek a death sentence. It is the unfettered use of this discretion in death penalty cases as applied to him, of which Applicant complains.

The Texas death penalty scheme violates equal protection in accordance with the standards set out in *Bush v. Gore*, 531 U.S. 98 (2000). Specifically, the death penalty in Texas violates the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and fair jury guarantees of the Sixth and Eighth Amendments to the United States Constitution, Article 1, §§ 10 and 15 and the Due Course of Law provisions of the Texas Constitution, as well as Articles 1.04 and 1.05,

C.Cr.P. The Code of Criminal Procedure only provides that the State must give notice if it will seek death. The determination of whether to seek the death penalty in the state of Texas without any guidelines is an arbitrary use of that power. In the case at bar, the record is more than clear that the decision was based on the prosecutor's perception of what it was which the community expected, without any empirical date in support.

Applicant is aware of the holding of this court in *Hankins v. State* that:

> "The State has discretion to seek the death penalty and this prosecutorial discretion is not unconstitutional. Cantu v. State, 842 S.W.2d 667, 692 (Tex.Crim.App.1992), cert. denied, 509 U.S. 926,113 S.Ct. 3046, 125 L.Ed.2d 731 (1993); Barefield v. State, 784 S.W.2d 38, 46 (Tex.Crim.App.1989), cert. denied, 497 U.S. 1011, 110 S.Ct. 3256, 111 L.Ed.2d 766 (1990). See also Gregg v. Georgia, 428 U.S. 153,96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (holding that prosecutorial discretion was not unconstitutional). We have specifically rejected the claim that this discretion violates the Eighth and Fourteenth Amendments. See Ladd v. State, 3 S.W.3d 547, 574 (Tex.Crim.App.1999). Appellant raises no novel argument to persuade us to re-visit these holdings."

Hankins v. State, 132 S.W.3d 380, 387-388 (Tex.Cr.App. 2004). Likewise the Court of Criminal Appeals has consistently rejected the "*Bush v. Gore*" claims. See *Threadgill v. State*, 146 S.W.3d 654 (Tex.Cr.App. 2004), and *Lucero*, 246 S.W.3d 102.

This principal of law is not absolute, however. Although the Supreme Court has recognized that, in general, the decision whether or not to prosecute and what to charge rests entirely in a prosecutor's discretion in non-capital cases,[22] the decision whether to prosecute cannot be based on an "unjustifiable standard" such as race, religion, or other arbitrary classification. *Oyler v. Boles*, 368 U.S. 448 (1962). Thus, while the existence of discretion vested in the prosecutor to make the decision to seek death or not is not, in and of itself, unconstitutional, the way that discretion is exercised may not be in an unconstitutional manner.

In this case, Applicant complains of the arbitrary use of that discretion without any uniform reason or guidance for its application. Statewide, there are no published uniform guidelines for how to make the determination that the death penalty will be sought in any given capital case. The result is that the decision to seek death cannot be uniformly applied in the state in each of the 254 counties.

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[22] *Hayes*, 434 U.S. at 364.

In Fort Bend County, there are not any published guidelines concerning the appropriateness of the decision to seek the death of each individual defendants.[23] Without any guidelines, it is the whim of the prosecutor, tempered only by the economics of government, which determines whether death is sought. The decision to seek the death penalty against Applicant was completely dependent on whatever reasons are determined to be valid by the prosecuting attorney in Fort Bend County, without any uniformity as to any other persons who were to be tried when the State asks for the sentence of death.

Because the reason to seek death without any guidelines is known only to the prosecutor, Applicant should have the right to seek the determination of the reason or reasons that the death penalty was sought against him. Without such a right, it would be impossible for Applicant to ever demonstrate that the State chose to seek death against him because of a "unjustifiable standard" such as race,

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[23] Applicant asserts that because his appellate attorney was denied the opportunity of an evidentiary hearing, Applicant was not allowed to develop the fact that there are no guidelines whatsoever for the State or for Fort Bend County, and that the prosecutorial discretion to seek death has not been properly exercised.

religion, personal vindictiveness, personal feelings of animosity toward his counsel, as was expressed in this case by the prosecutor, or other arbitrary classification.

Applicant was denied this opportunity by the trial court when it refused to allow an evidentiary hearing on this question. In so ruling, the trial court denied Applicant the due process of law to which he was entitled, and perpetuated the constitutionally deficient method of selecting those who will be tried for capital murder with the potential for the death penalty.

Conclusion - Ground Number Seven

Death is different from other types of punishment. The serious nature of the death penalty requires more than just saying that the prosecution has the right to exercise its discretion in prosecution and punishment of a criminal defendant. The serious nature of the death penalty requires a basic uniformity when seeking to execute a defendant for a capital crime. It also requires that the prosecutorial discretion be exercised in a proper manner and that if there are no guidelines as to its application, that the reasoning be satisfactory to

justify seeking the death of a human being. Without these basic protections, the death penalty is unconstitutionally imposed.

Ground for *Habeas Corpus* Relief Number Eight Restated

The Present Administration of a Lethal Injection to One Who Is Sentenced to Death Is Cruel and Unusual Punishment and Violates the Eighth and the Fourteenth Amendments to the United States Constitution.

Facts Relevant to Ground Number Eight

Applicant incorporates the arguments made in the brief submitted to the Court on direct appeal. As in that brief, Applicant contends the present lethal injection method of execution in Texas uses a cocktail of Pancuronium Bromide and two other chemicals. Pancuronium Bromide is a drug which is prohibited for use in animals.

Argument & Authorities - Ground Number Eight

Applicant is aware of this court's recent holding in *Richardson v. State*, No. 75,200 (Tex.Cr.App., January 23, 2008)(not designated for publication):

> Richardson contends in point of error eight that the use of a chemical substance pancuronium bromide to carry out her execution violates the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. Richardson's execution is not imminent, however, and the method in which the lethal injection is currently administered is not determinative of the way it will be administered at the moment of Richardson's execution. Thus, this claim is not ripe for review.FN28 Point of error eight is overruled.
>
> FN28. See Gallo v. State, No. AP-74,900, 2007 Tex.Crim.App. LEXIS 1234, at *54, 2007 WL 2781276 (Tex.Crim.App. Sept. 26, 2007)." Richardson v. State 2008 WL 217973, 5 (Tex.Crim.App.) (Tex.Crim.App.,2008)

Conclusion - Ground Number Eight

Applicant reserves the right to raise this issue in the Supreme Court of the United States. If this Court changes its position, Applicant respectively requests that he be allowed to fully brief this issue.

Ground for *Habeas Corpus* Relief Number Nine Restated

Articles 37.071 §§ 2(e) and 2(f), C.Cr.P., Violate Applicant's Rights Under the United States Constitution

Facts Relevant to Ground Number Nine

Applicant incorporates the arguments made in the brief submitted to the Court on direct appeal. As in that brief, Applicant contends that Article 37.071 §§ 2(e) and 2(f), C.Cr.P., pertaining to instructions required to be given by the trial court regarding burden of proof, are unconstitutional.

Argument & Authorities - Ground Number Nine

Applicant is aware of this court's recent holding in *Busby v. State*, 253 S.W.3d 661 (Tex.Cr.App. 2008):

> Appellant claims in point of error five that the trial court erroneously denied his motion to declare Article 37.071, Tex.Code Crim. Proc., unconstitutional on its face because: (1) the mitigation special issue fails to place a burden of proof on the State regarding aggravating evidence, (2) the mitigation special issue permits the type of open-ended discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), (3) the mitigation special issue does not permit "meaningful appellate review," (4) the mitigation special issue fails to require that mitigation be considered, (5) the definition of "mitigating evidence" in the mitigation special issue is too narrow, (6) "various terms and phrases used in the three special issues" are not defined "in ways that would permit the jury to give full mitigating significance to those terms," (7) it permitted appellant to be sentenced to death as a result of "arbitrary and unchecked discrimination amounting to a denial of equal protection under the law," and (8) it is so vague as to be fundamentally unfair. Article 37.071 is not unconstitutional on its face. Appellant's multifarious arguments presented in this point of error have been

rejected. See Saldano v. State, 232 SW.3d 77,104-09 (Tex.Crim.App.2007) (and cases cited therein), cert. denied, 2008 U.S. LEXIS 2119 (Feb. 25, 2008). Point of error five is overruled."

Conclusion - Ground Number Nine

Applicant reserves the right to raise this issue in the Supreme Court of the United States. If this Court changes its position, Applicant respectively requests that he be allowed to fully brief this issue.

Ground for *Habeas Corpus* Relief Number Ten Restated

Articles 37.071 §§ 2(e) and 2(f), C.Cr.P., Violate Applicant's Rights Under the United States Constitution

Facts Relevant to Ground Number Ten

Applicant incorporates the arguments made in the brief submitted to the Court on direct appeal. As in that brief, Applicant contends that Article 37.071 §§ 2(e) and 2(f), C.Cr.P., pertaining to Applicant's requested instruction informing the jury that it must consider evidence in mitigation, violates his rights under the United States Constitution.

Argument & Authorities - Ground Number Ten

Applicant is aware of this court's holding in *Threadgill v. State*, 146 S.W.3d 654 (Tex.Cr.App. 2004):

"In his fourteenth point of error, appellant claims that the trial court erred by denying his motion to hold Article 37.071, §§ 2(e) and 2(f) unconstitutional because they fail to require the jury to consider mitigation. Appellant does not explain in what way the statute fails to do this.

[34] [35] When mitigating evidence is presented, the constitution requires a vehicle by which the jury can consider and give effect to mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. Raby v. State, 970 S.W.2d 1, 8 (Tex.Crim.App.), cert. denied, 525 U.S. 1003, 119 S.Ct. 515, 142 L. Ed.2d 427 (1998). Jurors individually determine what evidence, if any, mitigates against the imposition of the death penalty and what weight, if any, to give that evidence in its consideration. Id. Moreover, Article 37.071 § 2(e) provides that the jury "shall" answer the mitigation issue which directs "consideration of all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." Article 37.071 is constitutional because it requires the jury to consider all of the evidence and determine "[w]hether ... there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death be imposed." The trial court did not abuse its discretion by denying appellant's motion. Point of error fourteen is overruled."

Conclusion - Ground Number Ten

Applicant reserves the right to raise this issue in the Supreme Court of the United States. If this Court changes its position, Applicant respectively requests that he be allowed to fully brief this issue.

Ground for *Habeas Corpus* Relief Number Eleven Restated

Articles 37.071 § 2(b)(2), C.Cr.P., Violate Applicant's Rights Under the United States Constitution

Facts Relevant to Ground Number Eleven

Applicant incorporates the arguments made in the brief submitted to the Court on direct appeal. As in that brief, Applicant contends Applicant contends that Article 37.071 § 2(b)(2), pertaining to instructions required to be given by the trial court regarding what is called the "parties special issue," is unconstitutional.

Argument & Authorities - Ground Number Eleven

Applicant is aware of this court's holding in *Gondora v. State*, No. WR-60,115-02 (Tex.Cr.App., November 15, 2006)(not designated for publication):

> Nonetheless, we interpret appellant's point to be a challenge to the constitutionality of what has come to be known as the "anti-parties" charge of Article 37.071, section 2(b)(2), because of his citation to the United States Supreme Court cases of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676,95 L.Ed.2d 127 (1987), to support his claim.
>
> *12 Both Enmund and Tison were concerned with the implementation of the death penalty on defendants who were not proven to have an intent to kill. In Enmund, the Supreme Court held that the Eighth Amendment of the United States Constitution proscribes the execution of an individual who, albeit acting in the commission of a crime with others, does not himself intend that murder be committed and participates in only an attenuated capacity. Enmund, 458 U.S. at 790-91;

see also Lawton v. State, 913 S.W.2d 542, 555 (Tex.Crim.App.1995), cert. denied, 519 U.S. 826, 117 S.Ct. 88, 136 L.Ed.2d 44 (1996). In Tison, the Supreme Court clarified Enmund and held that the federal constitution does not proscribe the execution of a major participant in an offense who possesses "reckless indifference" towards a murder committed by parties acting with him in a crime. 481 U.S. at 158; Lawton, 913 S.W.2d at 555.

Conclusion - Ground Number Eleven

Applicant reserves the right to raise this issue in the Supreme Court of the United States. If this Court changes its position, Applicant respectively requests that he be allowed to fully brief this issue.

Ground for *Habeas Corpus* Relief Number Twelve Restated

The Statutory Definition of Mitigating Evidence Violates Applicant's Rights Under the United States Constitution

Facts Relevant to Ground Number Twelve

Applicant incorporates the arguments made in the brief submitted to the Court on direct appeal. As in that brief, Applicant contends that the jury in a capital case should be instructed that mitigating evidence is any evidence which may serve as a basis for a sentence less than death.

Argument & Authorities - Ground Number Twelve

Applicant is aware of this court's holding in *Preyor v. State*, No. AP-75,119 (Tex.Cr.App., January 23, 2008)(not designated for publication):

> In point of error five, the appellant claims that the trial court erroneously denied his request "to not instruct the jury that mitigating evidence is evidence that reduces the appellant's moral blameworthiness." In point of error six, he argues that the trial court erroneously denied his request to instead define "mitigating evidence" as "any evidence that may serve as a basis for a sentence less than death, regardless of whether the defendant is able to establish a nexus between the evidence and the commission of the crime."
>
> Pursuant to Article 37.071, the trial court instructed the jury that it "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness ." FN23 The appellant claims that this statutory definition is contrary to the United States Supreme Court decisions in Smith v. Texas, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004), and Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). He asserts that definition "leads a reasonable juror to believe that the juror cannot consider evidence as mitigating unless it reduces the defendant's blame." He further alleges that this definition "also requires a nexus between the evidence and the circumstances of the offense since the definition requires the evidence to reduce the defendant's blame for the offense before it can be considered as mitigating." FN23. Art. 37.071, § 2(f).
>
> We have decided this claim adversely to the appellant in previous cases. FN24 In Perry, we specifically stated that the mitigation special issue does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness and that the Supreme Court's Tennard decision, which was decided under another statutory scheme that did not include the mitigation special issue, does not hold otherwise.FN25 Points of error five and six are overruled. We affirm the judgment of the trial court.
>
> FN24. Roberts v. State, 220 SW.3d 521, 534 (Tex.Crim.App.), cert. denied, --- U.S. ----, 128 S.Ct. 282,169 L.Ed.2d 206 (2007); Perry v. State,

158 SW.3d 438, 449 (Tex.Crim.App.2004), cert. denied, 546 U.S. 933,126 S.Ct. 416,163 L.Ed.2d 317 (2005). FN25.ld.

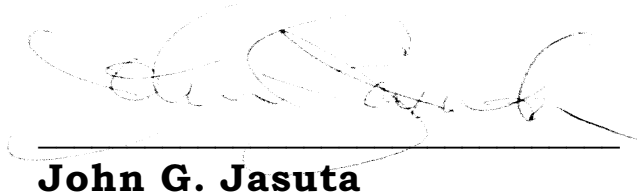
Conclusion - Ground Number Twelve

Applicant reserves the right to raise this issue in the Supreme Court of the United States. If this Court changes its position, Applicant respectively requests that he be allowed to fully brief this issue.

Prayer

WHEREFORE, PREMISES CONSIDERED, Applicant respectfully prays that the writ of *habeas corpus* shall issue as required by law; that the convicting court will set this matter down for an evidentiary hearing at which time Applicant can present live testimony in support of his claims; and, after such hearing, enter its Order, along with findings of fact and conclusions of law, and will recommend that the Court of Criminal Appeals vacate the conviction, herein, and Order that Applicant receive a new trial, or alternatively, vacate the sentence of death and remand this case for a new punishment hearing.

Respectfully submitted,



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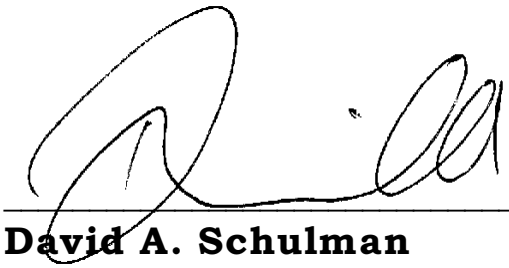
Attorneys for Applicant

Certificate of Delivery

This is to certify that a true and correct copy of the above and foregoing "Original Application for Post-Conviction Writ of *Habeas Corpus*" has been or will transmitted via electronic mail (eMail) to the office of the District Attorney of Fort Bend County, Texas, on April 17, 2009.



David A. Schulman

Oath of Co-Petitioner David Schulman

THE STATE OF TEXAS }
}
COUNTY OF FORT BEND }

BEFORE ME, the undersigned authority, on this day personally appeared David A. Schulman, known to me to be the person whose name and signature are affixed to this affidavit, and after being by me duly sworn on oath deposed and stated:

> " My name is David A. Schulman, I am court-appointed counsel for Thomas Bartlett Whitaker and co-petitioner in case number 42,969 in the 400th District Court of Fort Bend County, Texas (Court of Criminal Appeals No. 75,654). I have prepared and reviewed the above and foregoing 'Original Application for Post-Conviction Writ of *Habeas Corpus*.' Pursuant to Article 11.14 §5, C.Cr.P., I hereby verify, under oath, that, on information and belief, the allegations made therein which are not supported by the affidavits of others or documentary evidence attached hereto or referenced in the application, are true and correct.
>
> **David A. Schulman**, Co-Petitioner"

SIGNED and SWORN to before me, the undersigned authority,

on this the 17th day of April, 2009.

MADGIE HOLLINGSHEAD
Notary Public, State of Texas
My Commission Expires
November 20, 2011

Printed Name: Madgie Hollingshead

My Commission Expires: November 20, 2011

Oath of Co-Petitioner John Jasuta

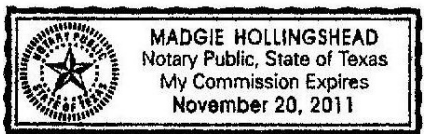
THE STATE OF TEXAS }
}
COUNTY OF FORT BEND }

BEFORE ME, the undersigned authority, on this day personally appeared John G. Jasuta, known to me to be the person whose name and signature are affixed to this affidavit, and after being by me duly sworn on oath deposed and stated:

> " My name is John G. Jasuta, I am court-appointed counsel for Thomas Bartlett Whitaker and co-petitioner in case number 42,969 in the 400th District Court of Fort Bend County, Texas (Court of Criminal Appeals No. 75,654). I have prepared and reviewed the above and foregoing 'Original Application for Post-Conviction Writ of *Habeas Corpus*.' Pursuant to Article 11.14 §5, C.Cr.P., I hereby verify, under oath, that, on information and belief, the allegations made therein which are not supported by the affidavits of others or documentary evidence attached hereto or referenced in the application, are true and correct.
>
> _____
> **John G. Jasuta**, Co-Petitioner"

SIGNED and SWORN to before me, the undersigned authority,

on this the 17th day of April, 2009.



_____
Printed Name: Madgie Hollingshead

My Commission Expires: November 20, 2011

No. 42.969

EX PARTE	§	IN THE 400th DISTRICT COURT
	§	OF
THOMAS BARTLETT WHITAKER	§	FORT BEND COUNTY, TEXAS

List of Exhibits

1 Convicting Court's Order Extending Filing Deadline

2 State Bar of Texas Guidelines and Standards for Texas Capital Counsel.

3 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

4 Affidavit of Kent Whitaker.

5 Statement Under Penalty of Perjury of Thomas Bartlett Whitaker.[24]

6 Affidavit of Robert B. Hirschhorn.

7 Houston Chronicle Article, March 9, 2007, "A Family Destroyed."

8 Report of Dr. Kit Harrison

9 Affidavit of .

10 Report by Subcommittee on Federal Death Penalty Cases Committee on Defender Services; Judicial Conference of the United States ("Spencer Report").

11 Affidavit of Dan Lamar Cogdell.

12 Affidavit of James Madison Ardoin III

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[24] An unsigned copy of Applicant's statement is attached, because the signed original is unavailable at time of filing. It will be filed with the District Clerk as soon as it has been delivered.

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