XII. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT IT COULD NOT CONSIDER THE APPLICANT'S CONFESSION UNLESS IT FOUND BEYOND A REASONABLE DOUBT THAT IT WAS VOLUNTARILY MADE

FINDINGS OF FACT

F370 1. Pursuant to the Supreme Court's holding in Jackson v. Denno, 378 U.S. 368 (1964), the trial court conducted an extensive hearing outside of the presence of the jury to determine whether or not the Applicant's written statement was admissible in evidence.

F371 2. Pursuant to the Court of Criminal Appeals' decision in McKittrick v. State, 535 S.W.2d 873 (Tex.Crim.App. 1976), the trial court filed findings of fact and conclusions of law in which it concluded that the Applicant's written statement had been freely and voluntarily made.

F372 3. The court finds that although the Applicant's written statement was admitted in evidence over defense counsel's objections, no evidence was introduced before the jury that the Applicant's written statement was not voluntary.

F373 4. At the conclusion of the guilt or innocence stage of the Applicant's trial, defense counsel did not request that the trial court instruct the jury that they could not consider the Applicant's written statement unless the found beyond a reasonable doubt that the statement had been voluntarily made.

CONCLUSIONS OF LAW

C247 1. Because defense counsel failed to request that the trial court instruct the jury that they could not consider the Applicant's written statement unless they found beyond a reasonable doubt that it had been voluntarily made, the Applicant is procedurally barred from advancing this contention. Ex parte Coleman, supra.

C248 2. Evidence presented by the State in anticipation of an attack on the voluntariness of a confession does not place the voluntariness of that confession into issue. Moseley v. State, 696 S.W.2d 934 (Tex.App.--Dallas, 1985).

C249 3. Regardless of defense counsel's procedural default, the Court concludes that the Applicant was not entitled to a jury instruction pursuant to Article 38.22, Section 6, V.A.C.C.P., as to whether or not his written statement had been voluntarily made inasmuch as the Applicant presented no evidence before the jury as that his written statement had been involuntarily obtained so as

to properly raise this issue for the jury's consideration. White v. State, 779 S.W.2d 809 (Tex.Crim.App. 1989).

C250 4. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Castaneda, supra.

C251 5. Because the Applicant has not demonstrated by a preponderance of the evidence that he was entitled to a jury charge instructing the jury that they could not consider the Applicant's written statement unless they found beyond a reasonable doubt that the statement had been voluntarily made, the Court recommends that habeas corpus relief as to this ground be DENIED.

XIII. THE UNCONSTITUTIONALITY OF THE SYSTEM FOR THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN HARRIS COUNTY

FINDINGS OF FACT

F374 1. The system for the appointment of counsel for indigent defendants in Harris County pursuant to Article 26.04, V.A.C.C.P., did not impose any uniform minimum standards of competency for appointed counsel and did not impose any restrictions on the volume of cases appointed counsel could handle.

F375 2. Because the system for the appointment of counsel for indigent defendants in Harris County is largely, if not exclusively an arbitrary decision and unreviewable decision made by each of the individual criminal district judges, the quality of appointed trial counsel in capital murder cases is a function of whatever district court to which the case is assigned at random.

F376 3. At the time of the Applicant's trial, defense counsel were compensated only for actual court appearances and were not directly compensated for out-of-court time devoted to activities such as factual investigation of the case, legal research regarding the controlling issues, or consultation with experts.

CONCLUSIONS OF LAW

C252 1. Where a defendant seeks to challenge the constitutionality of a statute, he assumes the burden of demonstrating how he, in particular, has been harmed by the statute. Clark v. State, 665 S.W.2d 476 (Tex.Crim.App. 1984).

C253 2. In a post-conviction writ proceeding where the applicant seeks habeas corpus relief, neither the trial court nor the Court of Criminal Appeals is authorized to enter a declaratory

judgment, but may only inquire into the legality of the applicant's restraint or confinement. Ex parte Herring, 271 S.W.2d 657 (Tex.Crim.App. 1954).

C254 3. While many things about the system of appointing counsel for indigent defendants in capital murder cases in Harris County may be in need of change, the Court concludes that the relief which the Applicant seeks must be sought in a civil rights suit, see Preisser v. Rodriguez, 411 U.S. 475 (1973), and not in a post-conviction writ proceeding such as this. See Ex parte Brager, 704 S.W.2d 46 (Tex.Crim.App. 1986).

C255 4. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C256 5. Because the Applicant has failed to demonstrate by a preponderance of the evidence that the alleged unconstitutionality of the system by which counsel for indigent defendants in Harris County are appointed is a claim upon which habeas corpus relief may be granted, the Court recommends that habeas corpus relief as to this ground be DENIED.

XIV. THE CONDUCT OF LEAD DEFENSE COUNSEL RON MOCK

FINDINGS OF FACT

F377 1. During the jury selection phase of the Applicant's trial, Ron Mock, lead defense counsel, was arrested on a contempt of court citation for failing to timely file an appellate brief in a capital case other than the Applicant's.

F378 2. During his final argument to the jury during the punishment stage of the Applicant's trial, Mock acknowledged to the jury that the reason that the proceedings were late in getting started was because of his tardiness.

F379 3. At the evidentiary hearing held in this case, Mock admitted that he had been cited by appellate courts some five times for failing to timely file briefs in the time frame before, during, and immediately after his representation of the Applicant in the primary case.

F380 4. Mock attributed this to the large volume of cases that he handled during this time frame as well as to the axiom that "shit [sic] happens."

CONCLUSIONS OF LAW

C257 1. While Mock's conduct as set forth above is certainly something less than professional and deserving of condemnation, the Court nonetheless concludes that it does not rise to that level of conduct which prejudiced the Applicant's defense. Strickland v. Washington, supra.

C258 2. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C259 3. Because the Applicant has failed to demonstrate by a preponderance of the evidence that Mock's conduct as set forth above denied him the effective assistance of counsel at his trial in the primary case, the Court recommends that habeas corpus relief as to this ground be DENIED.

XV. THE PROSECUTOR'S EQUATION OF THE MEANING OF "DELIBERATE" WITH THE MEANING OF "INTENTIONAL" DURING HIS FINAL ARGUMENT IN THE PUNISHMENT STAGE OF THE PRIMARY CASE

FINDINGS OF FACT

F381 1. During his final argument in the punishment stage of the Applicant's trial in the primary case, the prosecutor argued to the jury that, "In Special Issue No. 1, we have to show, in addition to showing that the defendant acted intentionally, we have to show you that he acted deliberately."

F382 2. The prosecutor also argued to the jury that, "That's the first bit of evidence that shows you he acted deliberately. We already know he acted intentionally."

F383 3. The prosecutor also argued to the jury that, "What does that tell you about the chances that he intended for Hall to have? He intended for Hall to have no chance. He intended for Hall to die...Even if there is a possibility that you have a problem with deliberate based on that evidence by itself, we went beyond that."

F384 4. Defense counsel did not object to any of the foregoing final argument voiced by the prosecutor.

CONCLUSIONS OF LAW

C260 1. To the extent that defense counsel failed to object to the prosecutor's final argument as set forth above, the Applicant is procedurally barred from advancing this contention. Harris v. State, supra. 784 S.W.2d 5 (Tex.Crim.App. 1989).

2. Notwithstanding defense counsel's failure to object to the prosecutor's final argument, the Court concludes that this C261 argument was proper inasmuch as it constituted a reasonable deduction from the evidence. Borjan v. State, supra.

3. Because the prosecutor's argument was a reasonable deduction from the evidence and not an attempt to impermissibly C262 equate a jury finding of "intentional" in the guilt or innocence stage of the trial with a finding of "deliberate" insofar as the first special issue submitted during the punishment is concerned, the Court concludes that the case at bar is distinguishable on its facts from Lane v. State, 743 S.W.2d 617 (Tex.Crim.App. 1987).

4. In view of the fact that the prosecutorial argument alluded to above was a reasonable deduction from the evidence, the C263 Court concludes that defense counsel's failure to object to it did not constitute deficient performance. Stafford v. State, supra.

5. Because defense counsel's failure to object to the prosecutor's argument as set forth above was not deficient performance, the Court concludes that it need not determine C264 whether trial counsel's conduct prejudiced the Applicant's defense. Strickland v. Washington, supra.

6. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance C265 of the evidence. Ex parte Salinas, supra.

7. Because the Applicant has not demonstrated by a preponderance of the evidence either that the prosecutorial argument alluded to above impermissibly equated the meaning of C266 "intentional" with the meaning of "deliberate," or that defense counsel's failure to object to this argument denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

XVI. OTHER PURPORTED FAILINGS OF DEFENSE COUNSEL DURING THE JURY SELECTION PROCESS

A. DEFENSE COUNSEL'S FAILURE TO INQUIRE OF THE PANELISTS WHETHER THE DECEDENT'S RACE WOULD AFFECT THEIR IMPARTIALITY AT EITHER STAGE OF THE APPLICANT'S TRIAL

FINDINGS OF FACT

1. During the jury selection stage of the Applicant's trial in the primary case, defense counsel did not attempt to F385 ascertain if the decedent's race would affect the veniremembers' ability to be fair and impartial at either stage of the proceedings.

F386 2. Lead defense counsel Ron Mock explained that he did not engage in this type of inquiry as a result of his trial strategy never to use the "black man killing a white man tactic."

F387 3. Mock acknowledged, however, that depending upon the facts and circumstances of a particular case, he might opt to use this tactic.

CONCLUSIONS OF LAW

C267 1. The United States Supreme Court has held that the a capital murder defendant accused of an interracial crime is entitled to have the prospective jurors informed of the race of the victim and questioned on the issue of whether this fact will affect their ability to be fair and impartial at either stage of the proceedings. Turner v. Murray, 476 U.S. 28 (1986).

C268 2. While it might have been prudent for defense counsel to have inquired of the veniremembers whether the decedent's race would have affected their ability to be fair and impartial, the Court concludes that defense counsel's failure to engage in this inquire did not fall outside of the wide range of reasonable professional assistance so as to constitute deficient performance. Strickland v. Washington, supra; Stafford v. State, supra.

C269 3. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, supra.

C270 4. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to inquire of the veniremembers whether the race of the decedent would affect their ability to be fair and impartial denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

B. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S EQUATION OF "DELIBERATE" AND "INTENTIONAL"

FINDINGS OF FACT

F388 1. During the voir examination of veniremember Kraus, who was eventually selected to sit on the jury, the prosecutor stated without objection from defense counsel that the first special issue that asked whether the defendant has acted "deliberately," essentially "[A]sks you the same thing you have answered during the trial of the guilt-or-innocence stage."

F389 2. During the voir dire examination of veniremember Farrell, who was eventually sat on the jury, defense counsel did not object when the prosecutor defined "deliberate" as a "greater conscious intent."

F390 3. The Court finds that no sound trial strategy could have been served given defense counsel's failure to object to the prosecutor's misstatement of the law.

CONCLUSIONS OF LAW

C271 1. The Court concludes that defense counsel's failure to object to the prosecutor's equation of "deliberate" with "intentional" was neither the result of reasonable professional judgment nor a rational tactical decision and that defense counsel's performance in this instance fell below an objective standard of reasonableness. Black v. State, supra.

C272 2. In light of the evidence adduced as to the Applicant's deliberateness at both stages of the trial, the fact that the prosecution did not argue in the punishment stage of the trial to the jury that "deliberate" and "intentional" were synonymous, and that the trial court correctly charged the jury on the law applicable to the facts of the case, the Court concludes that the Applicant has failed to show that but for trial counsel's failure to object as set forth above, the jury would have answered the first special issue in the negative. Black v. State, supra; Motley v. State, 773 S.W.2d 283 (Tex.Crim.App. 1989).

C273 3. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, supra.

C274 4. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to object to the prosecutor's equation of "deliberate" and "intentional" denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

C. DEFENSE COUNSEL'S STATEMENTS TO VENIREMEMBERS THAT A KILLING COULD NEVER BE REASONABLE

FINDINGS OF FACT

F391 1. In explaining the third special issue to prospective jurors, defense counsel stated on several occasions that he did not think that a killing could ever be reasonable.

F392 2. Defense counsel noted that his strategy in making these comments was that he wanted the jurors to find him credible and, by association to find the Applicant credible.

CONCLUSIONS OF LAW

C275 1. Given the broad presumption that defense counsel rendered reasonable professional assistance, Duncan v. State, 717 S.W.2d 345 (Tex.Crim.App. 1986), the Court concludes that it cannot use hindsight to second guess a tactical decision made by a trial attorney that does not fall below an objective standard of reasonableness. Butler v. State, 718 S.W.2d 48 (Tex.Crim.App. 1986).

C276 2. While defense counsel's strategy in informing prospective jurors in a capital case that he did not believe, within the meaning of the third special issue, that a killing could ever be reasonable, might involve a calculated risk, cf. Hernandez v. State, 726 S.W.2d 53 (Tex.Crim.App. 1986), the Court concludes that it nonetheless did not fall below an objective standard of reasonableness. Derrick v. State, 773 S.W.2d 271 (Tex.Crim.App. 1989).

C277 3. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, supra.

C278 4. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's statements that he did not believe that a killing could never be reasonable denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

D. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S DEFINITION OF "PROBABILITY"

FINDINGS OF FACT

F393 1. During his voir dire examination of veniremember Goodner, who eventually sat on the jury, the prosecutor defined "probability" without objection from defense counsel as "more likely than not ... odds are ... a fifty-one percent chance."

F394 2. During his voir dire examination of veniremember Farrel, who also sat on the jury, the prosecutor stated without objection from defense counsel that the State could prove future dangerousness by showing that the Applicant had a "propensity" for committing violent crimes.

CONCLUSIONS OF LAW

C279 1. The Court of Crimial Appeals has consistently held that because the term "probability" does not have a statutory definition, it is to be taken and understood in its usual acceptance in common language. Williams v. State, 674 S.W.2d 315 (Tex.Crim.App. 1984).

C280 2. The Court of Criminal Appeals has alluded to the definition of "probability" from Black's Law Dictionary as including: "likelihood; reasonable ground of presmption; a condition or state when there is more evidence in favor of the existence of a given proposition than there is against it." Cuevas v. State, 742 S.W.2d 331 (Tex.Crim.App. 1987).

C281 3. In light of the defintion of "probability" sanctioned by the Court of Criminal Appeals in Cuevas v. State, supra, the Applicant could not have been prejudiced by the prosecutor's definition of "probability" and defense counsel was not derelict in failing to object to the prosecutor's comments. Motley v. State, supra; Stafford v. State, supra.

C282 4. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C283 5. Because the Applicant has not demonstrated by a preponderance of the evidence that that defense counsel's failure to object to the prosecutor's definition of "probability" denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

E. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISSTATEMENT CONCERNING THE LAW OF PARTIES

FINDINGS OF FACT

F395 1. During his voir dire examination of veniremember Evans, who did not serve on the jury, the prosecutor pointed out that the law of parties did not apply at the punishment stage of the trial and could not be used to answer the three special issues.

F396 2. The prosecutor told Evans that if the State used the law of parties to convict the Applicant, she could not answer the three special issues in the affirmative unless "[T]he State presented evidence that showed that those three special issues should be answered yes..."

CONCLUSIONS OF LAW

C284 1. The Court concludes, contrary to the Applicant's assertion, that the prosecutor's comments correctly explained the operation of the law of parties and how this principle could not be used during the punishment stage in answering the three special issues. Green v. State, supra; Nichols v. State, supra.

C285 2. Because the prosecutor's explanation as to the operation of the law of parties was a correct statement of the law, defense counsel had no duty to voice an objection to the prosecutor's remarks. Stafford v. State, supra.

C286 3. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Maldonado, supra.

C287 4. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel had a duty to object to the prosecutor's explanation as to the operation of the law of parties, the Court recommends that habeas corpus relief as to this ground be DENIED.

F. DEFENSE COUNSEL'S "CURSORY" REHABILITATION OF VENIREMEMBER LOUIS MCDANIELS

FINDINGS OF FACT

F397 1. During the State's voir dire examination of veniremember Louis McDaniels, McDaniels stated that he would be unable to "take an oath and participate" in a capital murder trial or otherwise render a true and impartial verdict.

F398 2. After the State challenged Daniels for cause, Daniels told defense counsel that he could not make a fair and impartial determination of guilt or innocence in a capital case and that his feelings about the death penalty would substantially impair his ability to abide by his oath to be a fair and impartial juror.

F399 3. At the conclusion of defense counsel's examination, the trial court granted the State's challenge for cause to Daniels.

CONCLUSIONS OF LAW

C288 1. It is clear that the State may challenge for cause a prospective juror who makes it clear that their views about capital punishment will prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and oath. Adams v. Texas, 448 U.S. 38 (1980).

2. Consistent with this notion, veniremember McDaniels made it unmistakably clear during both the State's as well as defense counsel's voir dire examination that his views on capital C289 punishment were such that the State's challenge for cause was well founded. Briddle v. State, 742 S.W.2d 379 (Tex.Crim.App. 1979).

3. In view of McDaniels' clear and unambiguous feelings about the death penalty, defense counsel's tactical decision to C290 forego any prolonged attempt at rehabilitating the veniremember did not fall below an objective standard of reasonableness. Derrick v. State, supra.

4. Because defense counsel's decision to forego any prolonged attempt at rehabilitating Veniremember McDaniels was not C291 deficient performance, the Court concludes that it need not determine whether defense counsel's conduct prejudiced the Applicant. Motley v. State, supra.

5. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance C292 of the evidence. Ex parte Alexander, supra.

6. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's "cursory" rehabilitation of veniremember McDaniels denied him the effective C293 assistance of counsel, the Court recommends that habeas corpus relief as to this ground be DENIED.

G. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S "TRIVIAL EXAMPLE" OF A DELIBERATE ACT

FINDINGS OF FACT

1. During his examination of a number of veniremembers including John Olden, who was eventually seated on the jury, the F400 prosecutor attempted to characterize the difference between "intentionally" and "deliberately," which the prosecutor noted "mean[t] just a little bit more than intentionally," by using the example of a veniremember being bitten an insect.

2. Without objection from defense counsel, the prosecutor characterized a veniremember immediately striking an insect that F401 was biting them on the arm as engaging in an "intentional" act while characterizing a veniremember who felt another insect biting them on the leg and who drew back their hand, took aim, and then smashed the insect as engaging in a "deliberate" act, an act encompassing a "more conscious intent" than merely an "intentional" act.

CONCLUSIONS OF LAW

C294 1. Regardless of the purportedly "trivial" example the prosecutor utilized to explain the distinction between an "intentional" act and a "deliberate" act, the Court concludes that the prosecutor's example was an essentially correct statement of the law in that it apprised the veniremembers that a finding that the two words were not "linguistic equivalents." Heckert v. State, 6123 S.W.2d 549 (Tex.Crim.App. 1981).

C295 2. The Court also concludes that the prosecutor's example was essentially a correct statement of the law that made it clear that a veniremember's finding that act was "deliberate" required more than just a ratification of their earlier finding that an act was "intentional." James v. State, 772 S.W.2d 84 (Tex.Crim.App. 1989).

C296 3. The Court concludes that while the prosecutor's example of distinguishing betweeen "deliberate" and "intentional" conduct may indeed have been trivial, defense counsel's tactical decision not to object to the use of this example did not fall below an objective standard of reasonableness. Derrick v. State, supra.

C297 4. Because defense counsel's decision not to object to the prosecutor's example was not deficient performance, the Court concludes that it need not determine whether defense counsel's conduct prejudiced the Applicant. Motley v. State, supra.

C298 5. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C299 6. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to object to the prosecutor's "trivial example" of a deliberate act denied him the effective assistance of counsel, the Court concludes that habeas corpus relief as to this ground be DENIED.

H. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S COMMENT REGARDING INCOMPLETE CONFESSIONS

FINDINGS OF FACT

F402 1. During his voir dire examination of veniremember Glen Herron, who was eventually seated on the jury, the prosecutor described his right to use an incomplete confession in which he was able to omit those portions that were inconsistent with his theory of the case.

F403 2. The prosecutor then informed Herron without objection from defense counsel that, "[I]f the defense wants to, they can offer the remainder of the confession into evidence because they may say, well, we believe that portion of the confession."

F404 3. The prosecutor then secured a commitment from Herron that he would not hold it against either the State or the defense if either side opted not to introduce the entire confession.

CONCLUSIONS OF LAW

C300 1. The Court concludes that the prosecutor's comments that the State is allowed to introduce part of a statement or confession and that the defendant, if he wishes, may then introduce the remainder of the statement of confession, was an essentially correct statement of the law. Adams v. State, 685 S.W.2d 661 (Tex.Crim.App. 1985).

C301 2. While the prosecutor's comment that the defense is free to introduce the remainder of confession is they "believe that portion of the confession" may have been improper as suggesting that the defense had some duty to bring forward the remainder of the confession, the Court concludes that defense counsel's failure to object to it did not fall below an objective standard of reasonableness. Derrick v. State, supra.

C302 3. In view of the fact that the jury was charged at both stages of the trial that the burden of proof was on the State and never shifted to the defense, even if defense counsel's failure to object to the prosecutor's comment could be viewed as deficient performance, the Court concludes that the Applicant was not prejudiced as a result of this conduct. Black v. State, supra.

C303 4. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C304 5. Because the Applicant has not demonstrated by a preponderance of the evidence that defense counsel's failure to object to the prosecutor's comments regarding the introduction of the remainder of a confession denied him the effective assistance of counsel, the Court recommends that habeas corpus relief as to this grounds be DENIED.

XVII. CONCLUSION

In concluding that the Applicant was denied the effective assistance of counsel, this Court is not unmindful of the fact that the right to counsel as embodied in both the Sixth Amendment ot the United States Constitution and Article I, Section 10 of the Texas Constitution, does not mean errorless counsel or counsel whose competency or adequacy is to be judged by hindsight. Mercado v. State, 615 S.W.2d 225 (Tex.Crim.App. 1981). Nor is this Court unaware that the adequacy of an attorney's services must be gauged by the totality of the representation, Ex parte Raborn, 658 S.W.2d 602 (Tex.Crim.App. 1983), rather than by isolated acts or omissions of trial counsel. Wilkerson v State, 726 S.W.2d 542 (Tex.Crim.App. 1986).

Because the fact that another attorney might have pursued a different course of action at trial will not in and itself support a finding of ineffectiveness, Passmore v. State, 617 S.W.2d 682 (Tex.Crim.App. 1981), this Court has carefully heeded the admonition of the United States Supreme Court that:

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time of trial."

Strickland v. Washington, 466 U.S. 668, 689 (1984).

But a careful reading of this record readily reveals that in those instances when this Court has found that trial counsel's performance deficient, it was only because trial counsel was either unable to articulate any trial strategy at all for their conduct, see Ex parte Duffy, 607 S.W.2d 507 (Tex.Crim.App. 1980), or because their self-professed trial strategy was so far beyond the pale that it did not fall within "the wide range of reasonable professional assistance." Strickland v. Washington, supra, at 690. While appellate courts should not be free to second-guess trial strategy that does not fall outside of this professional norm, Motley v. State, 773 S.W.2d 283 (Tex.Crim.App. 1989), neither can trial counsel insulate their otherwise unprofessional conduct from appellate review by blithely denominating it as a "strategic, albeit inane, trial tactic." Lyons v. McCotter, 770 F.2d 529, 533 (5th Cir. 1985).

In reviewing this record, this Court has not only taken great care to consider the totality of the representation afforded the Applicant but the totality of the evidence before the jury at both stages of the trial as "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Ex parte Guzmon, 730 S.W.2d 724, 734 (Tex.Crim.App. 1987), quoting Strickland v. Washington, supra, at 696. It is precisely because the evidence at the Applicant's trial as to whether or not he fired the fatal shot was not overwhelming that a reasonable

probabilty exists that trial counsel's deficiencies at the very least affected the outcome of the punishment stage of the Applicant's trial. Ex parte Guzmon, supra; Ex parte Walker, 777 S.W.2d 427 (Tex.Crim.App. 1989); Ex parte Welborn, 785 S.W.2d 391 (Tex.Crim.App. 1990).

While this Court's review and ultimate disposition of the issue of whether the Applicant was afforded the effective assistance of counsel has been guided by a faithful adherence to both the law and the record, the ultimate focus of its inquiry, like the ultimate aim of the criminal justice system itself, has been fundamental fairness. Ex parte Adams, 768 S.W.2d 281, 293 (Tex.Crim.App. 1989). As the Court of Criminal Appeals has only recently reaffirmed:

> "Due process of law is the cornerstone of a civilized system of justice. Our society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when an accused is treated unfairly."

Ex parte Brandley, 781 S.W.2d 886, 894 (Tex.Crim.App. 1989).

And throughout every phase of this post-conviction proceeding, the Court has taken great pains to heed the words of Mr. Justice Frankfurter that:

> "The nature of the duty of [judicial review] makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions."

Haley v. Ohio, 332 U.S. 596, 602 (1948):

In discharging its duty in this case, the Court's only concern is that the conclusion that it reaches and the recommendation that it makes be correct and that it be in keeping with the due administration of the law and the preservation of life and liberty, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of the State of Texas. Cf. Purcell v. State, 322 S.W.2d 268, 278 (Tex.Crim.App. 1958)(Davidson, J., concurring).

Although this Court does not have the power to grant final relief to the Applicant pursuant to Article 11.07, V.A.C.C.P., Ex parte Williams, 561 S.W.2d 1 (Tex.Crim.App. 1978), it does have the power to recommend to the Court of Criminal Appeals that there has been a breakdown in the adversarial process sufficient to undermine confidence in the outcome of these proceedings, Ex parte Guzmon, supra, at 735, and this Court so recommends.

XVIII. ORDER

Having considered the evidence and exhibits offered by the parties and in light of the foregoing Findings of Fact and Conclusions of Law, it is the opinion of the Special Master that the relief prayed for by the Applicant in this case be GRANTED.

DONE and ENTERED this 2nd day of October, 1991.

THE HONORABLE BRIAN W. WICE
SPECIAL MASTER
339th CRIMINAL DISTRICT COURT
HARRIS COUNTY, TEXAS

ORDER

On this 14th day of October, 1991, having reviewed the above and foregoing Findings of Fact and Conclusions of Law, the Court hereby adopts same and recommends to the Texas Court of Criminal Appeals that the relief prayed for in this case be GRANTED, and that the Applicant be afforded a new trial.

It is further ORDERED that the Clerk prepare a transcript of all papers filed in this cause and transmit same to the Court of Criminal Appeals as provided for by Article 11.07, V.A.C.C.P., consisting of the following documents:

1. all of the Applicant's pleadings filed in cause no. 401695-A, including his Petition for Writ of Habeas Corpus and his Amended Petition for Writ of Habeas Corpus;

2. the Respondent's Original Answer in cause no. 401695-A;

3. these Findings of Fact and Conclusions of law prepared by the Special Master and hereby adopted by this Court;

4. any Proposed Findings of Fact and Conclusions of law submitted by either the Applicant or the Respondent;

5. the Order of this Court appointing BRIAN W. WICE as the Special Master in this cause;

6. the nine volumes, including exhibits, of the statement of facts from the evidentiary hearing held in cause no. 401695-A;

7. the appellate record in State of Texas vs. John Dale Henry, cause no. 405136, unless it had been previously forwarded to the Court of Criminal Appeals;

8. the clerk's transcript and statement of facts in cause no. 401695, the primary case, unless it has been previously forwarded to the Court of Criminal Appeals; and

9. the sealed State's file, excluding the voir dire, in cause no. 401695, the primary case.

It is further ORDERED that copies of these Findings of Fact, Conclusions of Law, and Order of the Court be served on Counsel for the Applicant, Barry Abrams, and Counsel for the Respondent, and Roe Wilson, in open court on the 14th day of October, 1991.

Norman Lanford

THE HONORABLE NORMAN LANFORD
Presiding Judge
339th Criminal District Court
Harris County, Texas

FINDINGS OF FACT

TAB 1

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F246	56	1	SF VII, 16-150
F59	14	1	SF I, 176
F60	14	2	AX 51
F61	15	3	SF I, 146
F62	15	4	SF I, 146
F63	15	5	SF I, 146
F64	15	6	SF VI, 57
F65	15	7	SF I, 158-59/SF II, 43/ SF II, 216
F66	15	8	SF VII, 26-30
F67	15	9	SF II, 112-13
F68	15	10	SF II, 26-30
F69	15	11	AX 51/SF VI, 67-68
F70	15	12	SF I, 152-53
F71	16	13	AX 18/SF II, 69
F72	16	14	AX 18
F73	16	15	AX 20/SF VI, 80-81
F74	16	16	SF III, 146/AX 19
F75	16	17	AX 19
F76	16	18	AX 52
F77	16	19	AX 41
F78	16	20	SF I, 88-89/SF III, 17, 75, 90
F79	16	21	SF I, 68-79
F80	16	22	SF I, 165

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F81	17	23	SF VII, 30-34
F82	17	24	SF I, 126
F83	17	25	SF I, 126
F84	17	26	SF I, 144
F85	17	27	SF II, 115
F86	17	28	SF II, 115-16
F87	17	29	SF I, 193/SF II 90, 12, 132
F88	17	30	SF VI, 145-46
F89	17	31	SF VI, 144
F90	18	32	SF VII, 35-38
F91	18	33	SF III, 196-254
F92	18	34	SF III, 224
F93	18	35	SF III, 208-14
F94	18	36	SF III, 215-17, 247-50
F95	18	37	SF III, 214-15, 233-34
F96	19	38	SF VII, 5-15
F97	19	39	SF VIII, 11-12/SF III, 231
F98	19	40	SF VII, 9-10
F99	19	41	SF III, 241-42
F100	19	42	SF III, 216/SF VI, 8-9
F101	19	43	SF III, 251-52
F102	19	44	SF III, 252
F103	19	45	SR
F104	20	46	SF VII, 35-38
F105	20	47	SF VII, 24-38

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F106	20	48	SF VII, 24-45
F2310	52	1	-------
F2311	52	2	SF I, 88-89
F2312	52	3	SF I, 88-89
F2313	52	4	SF I, 126
F2314	53	5	SF I, 126
F2315	53	6	SF I, 144
F2316	53	7	SF III, 75-85, 104-112
F2317	53	8	SF III, 75-85, 104-112
F2318	53	9	SF III, 75-85, 104-112
F240	53	10	SF VII, 104-112
F241	53	11	SF VII, 104-112
F242	54	12	SF VII, 104-112
F243	54	13	SF VII, 104-112
F244	54	14	SF VII, 104-112
F245	54	15	SF VII, 104-112

J. APPLYING THE "TOTALITY OF THE REPRESENTATION" TEST TO THE FACTS AND CIRCUMSTANCES OF THE APPLICANT'S CASE

FINDINGS OF FACT

F246 1. In the interest of judicial economy, the Court hereby incorporates by reference those Findings of Fact which appear in Sections A, B, C, G, H, and I, supra.

CONCLUSIONS OF LAW

C155 1. The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution entitle the accused in a criminal case to the reasonably effective assistance of counsel. Ex parte Duffy, supra.

C156 2. The adequacy of counsel's assistance is tested by the totality of the representation, rather than by isolated acts or omissions of trial counsel or by isolating or separating out one portion of trial counsel's performance for examination. Bridge v. State, 726 S.W.2d 558 (Tex.Crim.App. 1986).

C157 3. While the Court of Criminal Appeals has held that some isolated omissions may so affect the outcome of a particular case as to undermine the reliability of the proceedings, see May v. State, 722 S.W.2d 699 (Tex.Crim.App. 1984), the Applicant has demonstrated numerous errors and omissions on trial counsel's part during every stage of his trial as set forth above, the cumulative effect of which clearly prejudiced the Applicant so as to lead this Court to conclude that he was denied the reasonably effective assistance of counsel. Cf. Weathersby v. State, supra. ("The impact in this case of the numerous such defaults" compels a finding that counsel was ineffective.); Williamson v. State, supra. ("We cannot overlook the number and seriousness of counsel's deficiencies."); Riascos v. State, supra. ("The cumulative effect of [counsel's] errors is outrageous..."); Miller v. State, supra. ("[W]ithout trial counsel's many errors, a reasonable probability exists that the outcome could have been different.").

C158 4. As in all post-conviction writ matters, Ex parte Salinas, supra, the Applicant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. Moore v. State, 694 S.W.2d 528 (Tex.Crim.App. 1985).

C159 5. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation as set forth above is examined, the number and seriousness of counsel's deficiencies and the concomitant prejudice the Applicant suffered thereby denied him the reasonably effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. DEFENSE COUNSEL'S FAILURE TO FORMULATE A SOUND TRIAL STRATEGY FOR DEFUSING THE APPLICANT'S ADMISSION THAT HE WAS ARMED WITH A .22 CALIBER FIREARM

FINDINGS OF FACT

F231 1. In the interest of judicial economy, the Court hereby incorporates by reference those Findings of Fact which appear in Section B, supra.

F232 2. Counsel for both sides in the primary case agreed that the issue of whether the Applicant fired the fatal .22 caliber bullet which killed the decedent was a "life or death issue."

F233 3. Defense counsel readily acknowledged and the Court finds that the creation of a reasonable doubt in the mind of a single juror as to whether the Applicant possessed a .357 or .22 caliber weapon during the commission of this offense would in all probability have saved the Applicant's life.

F234 4. When asked to describe the trial strategy that he had formulated insofar as convincing the jury that the Applicant did not fire the fatal .22 caliber bullet was concerned, lead defense counsel Ron Mock replied that, "I really didn't have one."

F235 5. Mock, however, later described the trial strategy that he had formulated to convince the jury that the Applicant had not fired the fatal .22 caliber bullet as being premised on "confusion" and "total[] speculation."

F236 6. When asked at the evidentiary hearing to recall what evidence existed at the time of the Applicant's trial that he did not fire the fatal .22 caliber bullet, Mock replied, "None."

F237 7. During his final argument in the punishment stage of the Applicant's trial, defense co-counsel Frank Alvarez argued to the jury that, "[T]here is some evidence perhaps that [the Applicant] may have had a .357 magnum instead of a .22. Of course, in the [Applicant's] statement, it says he had a .22. I can't explain that. I can't get around that. I'm going to be honest with you. It's not beyond the realm of possibility, however, that the Sheriff's people may have put the wrong caliber down for their purposes. There is no proof of that, but if [the Applicant] had a .357 magnum, then he wasn't the person who pulled the trigger that killed Mr. Hall." (Emphasis added).

F238 8. To the extent that this argument may be viewed as a last-minute attempt to formulate a trial strategy calculated to defuse the Applicant's admission in his written statement that he was armed with a .22 caliber firearm, the Court finds that it cannot be fairly described as a sound trial strategy.

F239 9. Viewed against the backdrop of Mock's testimony at the evidentiary hearing, Alvarez' final argument at the punishment stage of the Applicant's trial, and the physical evidence which defense counsel was aware of or should have reasonably been aware of, the Court finds that defense counsel had no sound trial strategy to defuse the Applicant's admission that he was armed with a .22 caliber firearm.

F240 10. During the evidentiary hearing, Randy Schaffer, the Applicant's expert witness on the area of ineffective assistance of counsel noted that at the time the Applicant gave investigators his written statement in which he admitted that he was armed with a .22 caliber firearm, neither the Applicant nor the investigators knew that the decedent had been killed with a .22 caliber bullet.

F241 11. Schaffer pointed out that because it was his experience in criminal cases involving co-defendants that, "[E]ach one claims the other one did it," it was reasonable to conclude that the Applicant more than likely switched places with John Dale Henry in terms of both the weapons they possessed and their places during the commission of the primary offense because the Applicant believed at the time that a bullet from his .357 magnum had caused the death of the decedent.

F242 12. The Court finds that reasonably competent counsel, particularly one with the amount of trial experence in both capital and non-capital cases that Mock possessed at the time of the Applicant's trial, would have seen that a sound trial strategy--perhaps the only sound trial strategy--in defusing the Applicant's admission that he was armed with a .22 caliber firearm, was that the Applicant switched places with his co-defendant in his written statement to avoid being identified as the actor whom he believed at the time had fired the fatal shot.

F243 13. The Court finds that the trial strategy alluded to by Schaffer at the evidentiary hearing, a strategy certainly not beyond the intellectual grasp of reasonably competent counsel, that the Applicant might have been a liar but not a killer, was not only consistent with the physical evidence in the Applicant's case but was infinitely more sound than the trial strategy premised on "confusion", "total[] speculation", and "no proof" advanced by defense counsel.

F244 14. The Court finds that based on the physical evidence of which defense counsel was either aware of or should have reasonably been aware of, that the trial strategy alluded to by Schaffer was not only plausible but was legally and ethically supportable as well.

F245 15. To the extent that this trial strategy could have been developed by defense counsel through the cross-examination of the homicide detectives, the Court finds that it would not have been necessary for defense counsel to have put the Applicant on the stand to expressly admit that he had switched places in his written statement with his co-defendant.

CONCLUSIONS OF LAW

C144 1. It is well settled that a criminal defense attorney must have a firm command of the facts of the case before he can render reasonably effective assistance of counsel. Butler v. State, supra.

C145 2. Defense counsel has the responsibility of conducting an independant investigation of the facts of his client's case and he may not rely exclusively upon his client's version to discharge this responsibility. Ex parte Ewing, supra.

3. Defense counsel has a professional duty to present all
C146 available evidence and arguments in support of his client's positions and to contest with vigor all adverse evidence and views. Thomas v. State, supra. (Emphasis added).

4. While the Applicant must overcome the strong
C147 presumption that defense counsel's conduct as set forth above might be considered sound trial strategy, it may not be argued that a given course of conduct constituted trial strategy unless and until defense counsel has conducted the necessary legal and factual investigation. Ex parte Welborn, supra.

5. Because defense counsel has a duty to bring to bear
C148 such skill and knowledge as will render the trial a "reliable adversarial testing process," Strickland v. Washington, supra, the Court concludes that defense counsel's failure to formulate and advance a sound trial strategy for defusing the Applicant's admission that he was armed with a .22 caliber firearm fell outside of the wide range of professionally competent assistance, Butler v. State, supra, so as to constitute deficient performance. Black v. State, supra.

6. In light of the physical evidence available to them at
C149 the Applicant's trial, the Court concludes that defense counsel's trial strategy of "confusion" and "total[] speculation" in attempting to convince the jury that the Applicant did not fire the fatal .22 caliber bullet, when contrasted with that legally and ethically plausible trial strategy alluded to above, cannot be fairly viewed as a sound trial strategy. Ex parte Guzmon, supra; Riascos v. State, supra; Miller v. State, supra.

7. Claims of ineffectiveness must be judged on whether
C150 defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial, at either stage of the proceedings, cannot be relied upon as having produced a just result. Strickland v. Washington, supra; Ex parte Welborn, supra.

8. If defense counsel's presentation of the Applicant's
C151 defensive theory had been premised, inter alia, on the sound trial strategy that the Applicant switched places in his written statement with his co-defendant, the Court concludes that any lingering "residual doubt" that the jury might have had that the Applicant had not fired the fatal .22 caliber bullet would have clearly operated in his favor at the punishment stage of the trial. See Lockhart v. McCree, supra.

9. Because the jury's resolution of whether the Applicant
C152 fired the fatal shot was literally a matter of life and death to the Applicant, the Court concludes that the Applicant was prejudiced by defense counsel's conduct and that a reasonable probability exists that the outcome of the proceedings at the punishment stage of the Applicant's trial would have been different but for defense counsel's deficient performance. Ex parte Guzmon, supra; Boyington v. State, 738 S.W.2d 704 (Tex.App.--Houston [1st Dist.], 1985).

C153 10. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Alexander, supra.

C154 11. Because the Applicant has demonstrated by a preponderance of the evidence that when the totality of defense counsel's representation is viewed in conjunction with those other failings of counsel set forth in Sections B, C, G, and H, supra, he was denied the effective assistance of counsel, the Court recommends that habeas corpus relief in this regard be GRANTED.

FINDINGS OF FACT

TAB 2

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F107	24	1	AX 62/SF VI, 175-76
F108	24	2	AX 62
F109	24	3	AX 72
F110	24	4	SF I, 135-38/SF II, 174
F111	25	5	SF VI, 176-77
F112	25	6	SF VI, 177-78, 192
F113	25	7	SF VII, 54-64
F114	25	8	SF VII, 54-64
F115	25	9	SF VII, 54-64
F116	25	10	AX 63/SF VI, 179-80
F117	25	11	SF VI, 181
F118	25	12	SF VI, 179-80
F119	25	13	AX 64/SF VI, 181
F120	25	14	SF VII, 54-64
F121	26	15	SF VI, 182
F122	26	16	SF VI, 183
F123	26	17	SF VI, 64-72
F124	26	18	AX 65-67
F125	26	19	AX 67/SF VI, 186-87
F126	26	20	SF VII, 54-72
F127	26	21	SF VI, 187-88
F128	26	22	SF VI, 188-90
F129	26	23	SF VII, 54-72
F130	27	24	AX 68/SF VI, 190
F131	27	25	SF VI, 191-92

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F132	27	26	SF VI, 193
F133	27	27	SF V, 194
F134	27	28	SF VII, 54-64, 102-04
F135	27	29	SF VII, 54-64, 102-04
F136	27	30	AX 69/SF VI, 195-97/SF VI, 198-99/SF VI, 199-200
F137	27	31	AX 69/SF VI, 195-97/SF VI, 198-99/SF VI, 199-200
F138	27	32	AX 69/SF VI, 195-97/SF VI, 198-99/SF VI, 199-200
F139	28	33	SF VII, 98-100
F140	28	34	AX 69/SF VI, 202
F141	28	35	AX 70/SF VI, 202-08
F142	28	36	SF VII, 98-100
F143	28	37	AX 71/SF VI, 206-09
F144	28	38	SF VI, 207
F145	28	39	SF VII, 98-100
F146	28	40	AX 72/SF VI, 210-215
F147	28	41	AX 72/SF VI, 210-215
F148	28	42	AX 72/SF VI, 210-215
F149	29	43	AX 72
F150	29	44	SF VI, 211-12
F151	29	45	SF VI, 211, 214
F152	29	46	SF VI, 211-12
F153	29	47	SF VII, 101-104

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F154	29	48	SF VII, 54-64
F155	29	49	SF VII, 54-64
F156	29	50	SF III, 280-84

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

the Applicant's case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

C68 4. Many of the limits that the United States Supreme Court has placed on the imposition of capital punishment are rooted in concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 566 (1978); Gardner v. Florida, supra.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C81

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

C82

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

C83

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

C84

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

C85

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

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

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

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

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

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

FINDINGS OF FACT

TAB 3

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F12	4	1	SF III, 265
F13	4	2	SF III, 292-93, 303
F14	4	3	AX 48
F15	4	4	AX 48
F16	4	5	AX 48
F17	4	6	SF III, 303
F18	4	7	SR I, 170
F19	4	8	-----
F20	4	9	-----
F21	5	10	SF I, 92-93
F22	5	11	SF I, 98
F23	5	12	SF I, 94-95
F24	5	13	SF II, 121-22
F25	5	14	SF II, 123
F26	5	15	SF II, 124
F27	5	16	SF II, 125-26
F28	5	17	SF II, 127
F29	5	18	SF III, 45-54
F30	6	19	SF VII, 45-54
F31	6	20	SF VII, 45-54
F32	6	21	SF VIII, 16, 23
F33	6	22	SF VIII, 22
F34	6	23	SF VIII, 24-25
F35	6	24	SF VIII, 25
F36	6	25	SF VIII, 36

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F37	6	26	SF VIII, 37
F38	7	27	SF VIII, 40-41
F39	7	28	SF VIII, 44-45
F40	7	29	SF III, 258-63
F41	7	31	SF III, 258-63
F42	7	32	SF III, 260-61
F43	7	33	SF III, 266-67
F44	7	34	SF III, 266-68
F45	8	35	AX 48
F46	8	36	SF III, 269-70
F47	8	37	SF III, 170
F48	8	38	AX 35
F49	8	39	SF III, 272-75
F50	8	40	SF III, 275-76
F51	8	41	SF III, 276-77
F52	8	42	SF III, 277
F53	8	43	AX 40
F54	9	44	AX 34, 40
F55	9	45	AX 34
F56	9	46	SR
F57	9	47	SR
F58	9	48	SR

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

FINDINGS OF FACT

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

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

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

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

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

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

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

FINDINGS OF FACT

TAB 4

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F188	42	1	AX 11
F189	42	2	AX 11
F190	43	3	AX 11
F191	43	4	AX 11
F192	43	5	AX 11
F193	43	6	SF VII, 93-95
F194	43	7	-----

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

TAB 5

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F195	44	1	SF VI, 236
F196	45	2	SF VI, 234-35
F197	45	3	SF VI, 236
F198	45	4	SF VIII, 64-74, 98-101
F199	45	5	SF VI, 195-99
F200	45	6	SF VI, 199-201
F201	45	7	SF VIII, 64-74, 98-101
F202	45	8	SF VIII, 64-74, 98-101
F203	45	9	SF VIII, 64-74, 98-101
F304	45	10	SF VIII, 64-74, 98-101
F205	46	11	SF VIII, 64-74, 98-101
F206	46	12	SF VIII, 64-74, 98-101
F207	46	13	SF VIII, 64-74, 98-101

B. NON-DISCLOSURE OF THE SUPPLEMENTARY OFFENSE REPORT

FINDINGS OF FACT

F299 1. On January 23, 1985, Deborah Eubanks Young testified for the prosecution in the aggravated robbery trial of John Dale Henry, the Applicant's co-defendant.

F300 2. On February 13, 1985, Young was summoned to the Harris County District Attorney's Office to meet with prosecutor John Kyles and District Attorney's Investigator Jim Jackson as part of the prosecution's pre-trial preparation for the Applicant's trial.

F301 3. Kyles recounted that one of the purposes of this meeting was to show a photographic array of firearms to Young to determine if she would be able to identify the type of firearm that the Applicant "was known to carry."

F302 4. The photographic array Jackson put together and which was shown to Young at this meeting contained six guns including a .22 caliber cowboy style gun, a .357 caliber weapon, and a Derringer.

F303 5. Kyles believed that a photographic array was the fairest opportunity to test Young's ability to identify the weapon the Applicant had possessed.

F304 5. Although cowboy style guns come in a number of different calibers, the only cowboy style gun in the photographic array Young viewed was the .22 caliber model.

F305 6. After viewing the photographic array, Young identified what was eventually admitted at the Applicant's trial as State's Exhibit 17 [Applicant's Exhibit 21] as a photograph of a weapon "just like" the one the Applicant had used.

F306 7. When State's Exhibit 17 had been previously offered and admitted at the trial of John Dale Henry, C.E. Anderson had identified it as being either a .357, a .38, or a .22 caliber firearm.

F307 8. During the Applicant's trial, Anderson testified that the firearm depicted in State's Exhibit 17 was a .22 caliber Ruger style single action revolver.

F308 9. After examining Anderson's ballistics report, Floyd McDonald, the Applicant's expert witness on firearms and ballistics concluded that the weapon depicted in State's Exhibit 17 could not have been the weapon that fired the fatal shot in this case because a Ruger style revolver has six "lands and grooves" and the bullet that killed the decedent had eight "lands and grooves."

F309 10. McDonald's conclusion is consistent with the fact that Anderson's computer search to determine what weapons could have fired the fatal shot did not include the Ruger he had identified as State's Exhibit 17 at the Applicant's trial.

F310 11. Although he ultimately agreed with Anderson's testimony at the Applicant's trial, McDonald pointed out that it would be extremely difficult to determine from a side view alone whether State's Exhibit 17 was a .22 or a .357 caliber weapon.

F311 12. After Young picked State's Exhibit 17 out of the photographic array, she was asked by Kyles if she knew the type and caliber of the weapon she had just identified as having been used by the Applicant.

F312 13. In response to Kyles' inquiry, Young stated that the weapon the Applicant possessed during the commission of the primary offense was a "large caliber weapon, either a .38 or .357 caliber," and that she "knew it was larger than a .22 caliber."

F313 14. The statements Young made in the presence of Kyles and Jackson were memorialized in a document styled "Supplementary Offense Report" and which was admitted at the evidentiary hearing as Applicant's Exhibit 49.

F314 15. On February 25, 1985, the trial court granted that portion of defense counsel's Motion for Discovery and Inspection which sought, inter alia, "Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt." (Emphasis added).

F315 16. At the evidentiary hearing, Ron Mock initially testified that the prosecution never provided him with a copy of Applicant's Exhibit 49 prior to trial.

F316 17. Mock noted that it would have been extremely helpful to have had Applicant's Exhibit 49 at the Applicant's trial as it not only would have useful for purposes of impeaching Young, but to generally discredit the State's theory of the case.

F317 18. Mock also noted that the contents of Applicant's Exhibit 49 would have been helpful during the punishment stage of the Applicant's trial in convincing the jury that the third special issue should be answered in the negative.

F318 19. After testifying that he might have seen Applicant's Exhibit 49 if it was in the State's file, Mock again reaffirmed his earlier testimony that he had never seen the exhibit before admitting that the passage of time made it possible that he was simply unable to remember if in fact he had ever seen it.

F319 20. Regardless of whether or not Mock had seen Applicant's Exhibit 49, the record of the Applicant's trial reveals that Mock never made use of it during his cross-examination of Young or at any other time during the proceedings.

F320 21. Neither does the record at the Applicant's trial affirmatively reflect that Mock either asked for or was furnished with a copy of Applicant's Exhibit 49.

5. Assuming without deciding that Applicant's Exhibit 49 was actually tendered to defense counsel, the Court concludes that defense counsel's failure to utilize it for impeachment purposes
C194 as set forth above clearly constituted deficient performance inasmuch as no sound trial strategy could have been served by defense counsel's failure in this regard. Black v. State, supra; Ex parte Guzmon, supra; Ex parte Walker, supra.

6. Assuming without deciding that Applicant's Exhibit 49 was actually tendered to defense counsel, the Court concludes that but for defense counsel's deficient performance in failing to
C195 utilize it for impeachment purposes, a reasonable probability exists that the outcome of the proceedings at the punishment stage of the Applicant's trial would have been different. Ex parte Guzmon, supra; Ex parte Walker, supra; Cooper v. State, 769 S.W.2d 301 (Tex.App.--Houston [1st Dist.], 1989).

7. In seeking habeas corpus relief, the Applicant bears the burden of proving his factual allegations by a preponderance
C196 of the evidence. Ex parte Salinas, supra.

8. Because the Applicant has demonstrated by a preponderance of the evidence that the State's failure to disclose
C197 that impeachment material contained in Applicant's Exhibit 49, evidence material to the jury's resolution of the third special issue during the punishment stage of the Applicant's trial, violated both state and federal due process considerations, or in the alternative, that defense counsel's failure to utilize this exhibit for impeachment purposes in the event that it had in fact been disclosed to him denied him effective assistance of counsel, the Court recommends that habeas corpus relief as to this ground be GRANTED.

FINDINGS OF FACT

TAB 6

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F324	70	1	SF VIII, 80-85
F325	70	2	SF III, 79, 131
F326	70	3	SF III, 134-37, 304
F327	70	4	SF III, 137-39
F328	70	5	SF III, 139
F329	71	6	SF III, 139-140
F330	71	7	SF III, 140-41
F331	71	8	SF III, 141
F332	71	9	SF III, 143
F333	71	10	SF III, 158
F334	71	11	SF III, 303-04
F335	71	12	SF III, 304
F336	71	13	App. Ex. 31
F337	71	14	App. Ex. 31

F334 11. Although the ballistics report conducted by C.E. Anderson and subsequently analyzed by Floyd McDonald revealed that the Ruger .22 depicted in State's Exhibit 17 could not have fired the bullet that killed the decedent, Kyles stated that he would be "surprised" if this finding were in fact correct.

F335 12. If, however, it was true that the Ruger could not have fired the fatal shot, Kyles admitted that it would have been misleading to have told the jury that State's Exhibit 17 either was in fact the murder weapon or looked like the murder weapon.

F336 13. In urging the jury to find that the Applicant had fired the shot that killed the decedent, Kyles referred the jury during his final argument, inter alia, to the testimony of C.E. Anderson.

F337 14. Kyles also argued to the jury that Young had identified the gun the Applicant had threatened her with "as being a cowboy looking gun, a .22."

CONCLUSIONS OF LAW

C198 1. In the interest of judicial economy, the Court hereby incorporates by reference those Conclusions of Law which appear in Sections A and B, supra.

C199 2. It is axiomatic that the Fourteenth Amendment requires that a defendant's conviction be set aside when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears." Giles v. Maryland, 386 U.S. 66 (1967).

C200 3. Reversible error is also committed where the prosecutor negligently or inadvertently fails to disclose evidence which may exonerate the accused or which may be of material importance to the defense, even though it is not offered as testimony at trial and even though defense counsel is not diligent in his preparation for trial. Crutcher v. State, supra; Means v. State, supra.

C201 4. That Kyles professed an unawareness that the .22 caliber Ruger depicted in State's Exhibit 17 was virtually indistinguishable from a .357 when viewed merely from a photographic side view is irrelevant as this knowledge that C.E. Anderson, as a member of "the prosecution team" had of this evidence is imputed to Kyles. Ex parte Adams, supra; O'Rarden v. State, supra.

C202 5. That Kyles was unaware that Anderson had previously testified at the Henry trial that State's Exhibit 17 could have been a .22, .357, or .38 caliber handgun is irrelevant as the knowledge of both Krocker and Anderson of this evidence is imputed to Kyles. Ex parte Adams, supra; O'Rarden v. State, supra.

C203 6. If the prosecution's use of false or misleading testimony could "in any reasonable likelihood have affected the judgment of the jury" at either stage of the proceedings, due process requires the granting of a new trial. Giglio v. United States, supra; Ex parte Adams, supra.

C204 7. In view of that other evidence from both the Henry trial and the Applicant's trial tending to show that the Applicant possessed a .357 caliber weapon, the Court concludes that the jury would have found the State's case as to punishment "significantly less persuasive," cf. Schneble v. Florida, 405 U.S. 427 (1972), had the prosecution not made use of State's Exhibit 17 as set forth above to convince the jury that the Applicant in fact possessed the .22 caliber weapon capable of firing shot that killed the decedent. Ex parte Adams, supra; Crutcher v. State, supra; Ex parte Turner, 545 S.W.2d 470 (Tex.Crim.App. 1977).

C205 8. Having evaluated the circumstances surrounding the prosecution's use of State's Exhibit 17 during the Applicant's trial in the context of the entire record, the Court concludes that the cumulative effect of the prosecution's misleading use of State's Exhibit 17 during both the presentation of its case as well as during final argument was egregious enough to undermine confidence in the outcome of the proceedings at the punishment stage of the Applicant's trial. United States v. Bagley, supra; Ex parte Adams, supra; Ex parte Brandley, supra.

C206 9. Because the constitutional principle requiring the reversal of a defendant's conviction where the prosecution, although not soliciting false evidence, permits it to go uncorrected when it appears, is mandated by both state and federal constitutional due process considerations, the recommendation of this Court is enforcing these rights "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial for the accused." Brady v. Maryland, supra; Ex parte Adams, supra.

C207 10. In seeking habeas corpus relief, the Applicant bears the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Griffin, supra.

C208 11. Because the Applicant has demonstrated by a preponderance of the evidence that the circumstances surrounding the prosecution's use of State's Exhibit 17 throughout the course of the Applicant's trial as set forth above violated those due process considerations embodied in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution, the Court recomends that habeas corpus relief as to this ground be GRANTED.

C. THE PROSECUTION'S MISLEADING USE OF STATE'S EXHIBIT 17

FINDINGS OF FACT

F324 1. In the interest of judicial economy, the Court hereby incorporates by reference those Findings of Fact which appear in Section A, supra.

F325 2. John Kyles admitted that he made no effort to secure any portion of the statement of facts from the trial of John Dale Henry, the Applicant's co-defendant, to determine what those witnesses that he would call at the Applicant's trial had previously testified to at the Henry trial.

F326 3. In view of Anderson's testimony at the Henry trial that State's Exhibit 17 could have been a .22, a .357, or a .38 caliber handgun, Kyles admitted that it was somewhat misleading for Anderson to have told the jury during the Applicant's trial that State's Exhibit 17 was in fact a .22 caliber handgun.

F327 4. Kyles admitted that in view of Anderson's earlier testimony that State's Exhibit 17 could have been any of three different caliber handguns, every State's witness who identified State' Exhibit 17 as being like the weapon the Applicant possessed might have been corroborating their earlier identification of the Applicant's gun as a .357.

F328 5. Kyles acknowledged that he used State's Exhibit 17 to make the point that the Applicant had a .22 caliber handgun and that he used Anderson's testimony to drive home this point to the jury during the Applicant's trial.

F329 6. Kyles acknowledged that neither he nor any other member of the prosecution team ever revealed to defense counsel that the photograph embodied in State's Exhibit 17 that he used to advance the contention that the Applicant fired the fatal .22 caliber bullet was equally consistent with being a .357 caliber handgun.

F330 7. Even if he been informed of this fact by C.E. Anderson, Kyles would not have felt compelled to bring this fact to the attention of defense counsel as he felt it was incumbent upon defense counsel "to investigate exactly what type of weapons those [in the photographic array] were."

F331 8. Neither did Kyles feel that it was his responsibility to inform defense counsel of Anderson's prior testimony during the Henry trial that State's Exhibit 17 could have been a .22, a .38, or a .357 caliber handgun "[a]s long as they were aware that Mr. Anderson was going to be out expert, and as long as they had the opportunity to view our exhibits."

F332 9. Kyles admitted that the fact that Anderson had previously testified during the Henry trial that State's Exhibit 17 could have been a .22, a .38, or a .357 caliber handgun should have been brought to the jury's attention during the Applicant's trial.

F333 10. Kyles admitted that although Young was never asked, and so did not testify whether the Applicant had a .22 caliber weapon, he had her describe his firearm as a cowboy style gun before getting her to commit that it looked like State's Exhibit 17.

FINDINGS OF FACT

TAB 7

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F299	66	1	AX 18
F300	66	2	AX 49/SF VI, 17
F301	66	3	SF III, 16
F302	66	4	SF III, 22
F303	66	5	SF III, 19
F304	66	5	SF III, 22
F305	66	6	AX 49
F306	66	7	AX 20
F307	67	8	AX 28
F308	67	9	SF VII, 11-12
F309	67	10	AX 28/SF III, 230-31
F310	67	11	SF III, 209-11, 214-15
F311	67	12	AX 49
F312	67	13	AX 49
F313	67	14	AX 49
F314	67	15	AX 17
F315	67	16	SF VI, 121-22
F316	68	17	SF VI, 122-24
F317	68	18	SF VI, 124
F318	68	19	SF VI, 268-70
F319	68	20	SR
F320	68	21	SR
F321	68	22	SF VIII, 80-85
F322	68	23	SF VIII, 80-85
F323	68	24	SF VIII, 80-85

B. NON-DISCLOSURE OF THE SUPPLEMENTARY OFFENSE REPORT

FINDINGS OF FACT

F299 1. On January 23, 1985, Deborah Eubanks Young testified for the prosecution in the aggravated robbery trial of John Dale Henry, the Applicant's co-defendant.

F300 2. On February 13, 1985, Young was summoned to the Harris County District Attorney's Office to meet with prosecutor John Kyles and District Attorney's Investigator Jim Jackson as part of the prosecution's pre-trial preparation for the Applicant's trial.

F301 3. Kyles recounted that one of the purposes of this meeting was to show a photographic array of firearms to Young to determine if she would be able to identify the type of firearm that the Applicant "was known to carry."

F302 4. The photographic array Jackson put together and which was shown to Young at this meeting contained six guns including a .22 caliber cowboy style gun, a .357 caliber weapon, and a Derringer.

F303 5. Kyles believed that a photographic array was the fairest opportunity to test Young's ability to identify the weapon the Applicant had possessed.

F304 5. Although cowboy style guns come in a number of different calibers, the only cowboy style gun in the photographic array Young viewed was the .22 caliber model.

F305 6. After viewing the photographic array, Young identified what was eventually admitted at the Applicant's trial as State's Exhibit 17 [Applicant's Exhibit 21] as a photograph of a weapon "just like" the one the Applicant had used.

F306 7. When State's Exhibit 17 had been previously offered and admitted at the trial of John Dale Henry, C.E. Anderson had identified it as being either a .357, a .38, or a .22 caliber firearm.

F307 8. During the Applicant's trial, Anderson testified that the firearm depicted in State's Exhibit 17 was a .22 caliber Ruger style single action revolver.

F308 9. After examining Anderson's ballistics report, Floyd McDonald, the Applicant's expert witness on firearms and ballistics concluded that the weapon depicted in State's Exhibit 17 could not have been the weapon that fired the fatal shot in this case because a Ruger style revolver has six "lands and grooves" and the bullet that killed the decedent had eight "lands and grooves."

F309 10. McDonald's conclusion is consistent with the fact that Anderson's computer search to determine what weapons could have fired the fatal shot did not include the Ruger he had identified as State's Exhibit 17 at the Applicant's trial.

11. Although he ultimately agreed with Anderson's testimony at the Applicant's trial, McDonald pointed out that it would be F310 extremely difficult to determine from a side view alone whether State's Exhibit 17 was a .22 or a .357 caliber weapon.

12. After Young picked State's Exhibit 17 out of the photographic array, she was asked by Kyles if she knew the type F311 and caliber of the weapon she had just identified as having been used by the Applicant.

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

14. The statements Young made in the presence of Kyles and Jackson were memorialized in a document styled "Supplementary F313 Offense Report" and which was admitted at the evidentiary hearing as Applicant's Exhibit 49.

15. On February 25, 1985, the trial court granted that portion of defense counsel's Motion for Discovery and Inspection F314 which sought, inter alia, "Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt." (Emphasis added).

16. At the evidentiary hearing, Ron Mock initially testified that the prosecution never provided him with a copy of F315 Applicant's Exhibit 49 prior to trial.

17. Mock noted that it would have been extremely helpful to have had Applicant's Exhibit 49 at the Applicant's trial as it not only would have useful for purposes of impeaching Young, but to F316 generally discredit the State's theory of the case.

18. Mock also noted that the contents of Applicant's Exhibit 49 would have been helpful during the punishment stage of the Applicant's trial in convincing the jury that the third F317 special issue should be answered in the negative.

19. After testifying that he might have seen Applicant's Exhibit 49 if it was in the State's file, Mock again reaffirmed his earlier testimony that he had never seen the exhibit before F318 admitting that the passage of time made it possible that he was simply unable to remember if in fact he had ever seen it.

20. Regardless of whether or not Mock had seen Applicant's Exhibit 49, the record of the Applicant's trial reveals that Mock F319 never made use of it during his cross-examination of Young or at any other time during the proceedings.

21. Neither does the record at the Applicant's trial affirmatively reflect that Mock either asked for or was furnished F320 with a copy of Applicant's Exhibit 49.

F316

17. Mock noted that it would have been extremely helpful to have had Applicant's Exhibit 49 at the Applicant's trial as it not only would have useful for purposes of impeaching Young, but to generally discredit the State's theory of the case.

F317

18. Mock also noted that the contents of Applicant's Exhibit 49 would have been helpful during the punishment stage of the Applicant's trial in convincing the jury that the third special issue should be answered in the negative.

F318

19. After testifying that he might have seen Applicant's Exhibit 49 if it was in the State's file, Mock again reaffirmed his earlier testimony that he had never seen the exhibit before admitting that the passage of time made it possible that he was simply unable to remember if in fact he had ever seen it.

F319

20. Regardless of whether or not Mock had seen Applicant's Exhibit 49, the record of the Applicant's trial reveals that Mock never made use of it during his cross-examination of Young or at any other time during the proceedings

F320

21. Neither does the record at the Applicant's trial affirmatively reflect that Mock either asked for or was furnished with a copy of Applicant's Exhibit 49.

F321

22. Had the State furnished Mock with a copy of Applicant's Exhibit 49 or had Mock obtained due diligence to obtain it as a prior statement of the witness during his cross-examination of Young, he would have been able to elicit before the jury the fact that only one cowboy style gun had been included in the array as well as the difficulty in distinguishing between Ruger style .22 and .357 caliber weapons based solely on a side view in a photograph.

F322

23. Had Mock been furnished with that testimony from the Henry trial that moments after the primary offense, Young had identified Alton Dickey's .357 pistol as the type of weapon the Applicant had used, he would have been able to elicit before the jury that such an identification was infinitely more reliable than that obtained from the photographic array viewed by Young and memorialized in Applicant's Exhibit 49.

F323

24. Had the State furnished Mock with a copy of Applicant's Exhibit 49 or had Mock exercised due diligence in obtaining it, he would have been able to use it to elicit before the jury, either through cross-examination of Anderson or through his own expert witness, that the weapon portrayed in State's Exhibit 17 could not have fired the fatal .22 caliber shot, a critical fact that Mock never made the jury aware of during the Applicant's trial.

FINDINGS OF FACT

TAB 8

FINDING	PAGE NO.	PARAGRAPH NO.	RECORD REFERENCE
F374	84	1	SF III, 54, 57/SF VII, 131
F375	84	2	SF VII, 131-32
F376	84	3	SF II, 85-87

XIII. THE UNCONSTITUTIONALITY OF THE SYSTEM FOR THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN HARRIS COUNTY

FINDINGS OF FACT

F374 1. The system for the appointment of counsel for indigent defendants in Harris County pursuant to Article 26.04, V.A.C.C.P., did not impose any uniform minimum standards of competency for appointed counsel and did not impose any restrictions on the volume of cases appointed counsel could handle.

F375 2. Because the system for the appointment of counsel for indigent defendants in Harris County is largely, if not exclusively an arbitrary decision and unreviewable decision made by each of the individual criminal district judges, the quality of appointed trial counsel in capital murder cases is a function of whatever district court to which the case is assigned at random.

F376 3. At the time of the Applicant's trial, defense counsel were compensated only for actual court appearances and were not directly compensated for out-of-court time devoted to activities such as factual investigation of the case, legal research regarding the controlling issues, or consultation with experts.

CONCLUSIONS OF LAW

C252 1. Where a defendant seeks to challenge the constitutionality of a statute, he assumes the burden of demonstrating how he, in particular, has been harmed by the statute. Clark v. State, 665 S.W.2d 476 (Tex.Crim.App. 1984).

C253 2. In a post-conviction writ proceeding where the applicant seeks habeas corpus relief, neither the trial court nor the Court of Criminal Appeals is authorized to enter a declaratory judgment, but may only inquire into the legality of the applicant's restraint or confinement. Ex parte Herring, 271 S.W.2d 657 (Tex.Crim.App. 1954).

C254 3. While many things about the system of appointing counsel for indigent defendants in capital murder cases in Harris County may be in need of change, the Court concludes that the relief which the Applicant seeks must be sought in a civil rights suit, see Preisser v. Rodriguez, 411 U.S. 475 (1973), and not in a post-conviction writ proceeding such as this. See Ex parte Brager, 704 S.W.2d 46 (Tex.Crim.App. 1986).

C255 4. In seeking habeas corpus relief, the Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. Ex parte Salinas, supra.

C256 5. Because the Applicant has failed to demonstrate by a preponderance of the evidence that the alleged unconstitutionality of the system by which counsel for indigent defendants in Harris County are appointed is a claim upon which habeas corpus relief may be granted, the Court recommends that habeas corpus relief as to this ground be DENIED.

COPY

May 12, 1997

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

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

Dear Governor Bush:

Enclosed for your review and consideration is a supplement to the emergency request for a reprieve of a death sentence that is scheduled to be carried out at 6:00 p.m. tomorrow, May 13, 1997. This supplement includes affidavits from the witnesses who spoke with John Dale Henry in a tape recorded telephone conversation *at approximately 12:20 a.m. this morning*, in which Henry confessed to shooting the man that Westley is slated to be executed for killing.

In addition to the other newly-discovered evidence of Mr. Westley's innocence that has not yet been considered by the Texas Board of Pardons & Paroles, this recent tape recorded confession constitutes powerful evidence that the State is scheduled to execute the wrong man this evening.

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

Should the Governor of a great State like Texas do less than that, one reasonably expect that when the public at large and responsible members of the bench and Bar listen to John Dale Henry's tape recorded confession and reflect on the fact that no Texas state official did anything to assure that evidence could be thoughtfully developed and considered before Westley was put do death -- public respect for this State and its public officials will be, and rightfully should be, diminished.

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

Very truly yours,

Barry Abrams

HONORABLE GOVERNOR GEORGE BUSH

ANTHONY RAY WESTLEY,
Applicant

SUPPLEMENT TO EMERGENCY REQUEST
FOR REPRIEVE OF DEATH SENTENCE

Anthony Ray Westley ("Westley") is currently confined on death row by the Texas Department of Criminal Justice and is **SCHEDULED FOR EXECUTION TODAY, MAY 13TH, 1997, AFTER 6:00 P.M. C.S.T.** Last night, Westley telecopied his emergency request for reprieve of death Westley seeks a reprieve to allow him the opportunity to present to the Texas Board of Pardons & Paroles the recently-obtained evidence that he is innocent of the murder for which is set to die.

As set out in Westley's emergency reprieve request, Westley's claim of actual innocence is grounded on newly discovered evidence of a confession by John Dale Henry ("Henry"), that *he*, and *not Westley*, actually fired the fatal .22 caliber bullet into the back of Frank Hall ("Hall"), the bait store owner who died during the robbery in question. This supplement has been filed to alert the Governor to the discovery early this morning of **additional compelling evidence of Westley's actual innocence** of the murder. At approximately 12:20 a.m. to 1:20 a.m. *this morning, May 13, 1997* -- counsel obtained a **tape recorded statement by John Dale Henry in which he directly admits that:**

(a) ***he* shot Frank Chester Hall; Westley did not shoot Hall;**

(b) **he, Henry, had a .22 caliber pistol, and Westley had a .357 caliber pistol during the robbery in which Hall was killed; and**

(c) Westley did not have a .22 caliber pistol during the robbery in which Hall was killed.

See Attached Affidavits of Barry Abrams & Marie Walker. After so confessing, Henry then stated to two other persons that although he would not confess to them *on the telephone* that he had murdered Hall, he had earlier told Martha Dunbar "the truth" and that he would tell them the truth about who shot Hall in person -- but would not do so over the telephone. *See* attached Affidavits of Marie Walker and Tressa Walker. Henry also has confirmed to his own daughter that Westley did not have a .22 caliber pistol during the robbery in which Hall was killed by a .22 caliber bullet. *See* attached affidavit of Domonike Dunbar.

In light of Henry's newly-discovered confession that he, not Westley, killed Hall — a confession fully corroborated by compelling proof adduced in the first habeas proceedings that Westley did not fire the weapon that killed Hall — it is beyond cavil that, but for the constitutional errors committed at Westley's trial, no rational juror could have found him guilty of capital murder beyond a reasonable doubt *and* no rational juror could have answered in the State's favor the special issues on whether Westley deliberately killed Hall, a finding necessary to qualify Westley for the death penalty under Texas law.

CONCLUSION

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

counsel and the accompanying misconduct by the state prosecution.

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

Respectfully submitted,

By:_____
Barry Abrams

OF COUNSEL:

ABRAMS SCOTT & BICKLEY, L.L.P.

Robert Scott
600 Travis, Suite 6601
Houston, Texas 77002
(713) 228-6601
(713) 228-6605 (Fax)

ALLISON & SHOEMAKER, L.L.P.

William B. Allison
7700 San Felipe, Suite 480
Houston, Texas 77063
(281) 290-9350
(281) 290-9625 (Fax)

Deborah Bagg Gee
1703 Lake Arbor Drive
El Lago, Texas 77586
(713) 326-2607

AFFIDAVIT OF BARRY ABRAMS

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Barry Abrams who, being by me duly sworn, deposed as follows:

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

2. I am one of the volunteer lawyers who has represented Anthony Ray Westley during post-conviction proceedings since 1989. I am an honors graduate of Princeton University and the University of Texas Law School. I am a licensed lawyer in the State of Texas and have been admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Fifth, Ninth and Eleventh Circuits, and the United States District Courts for the Southern, Northern, Eastern and Western Districts of Texas and the Northern District of California. I formerly served as a judicial clerk for the Honorable Joseph T. Sneed, United States Circuit Judge for the Ninth Circuit Court of Appeals.

3. Approximately two and one half weeks ago, I was contacted by Martha Walker Dunbar, who informed me that she knew Lee Edward ("Tyrone") Dunbar, John Dale Henry and Anthony Ray Westley in 1984; in 1984 she was married to Tyrone Dunbar; and that at the time of Tyrone's death in April 1984, she was pregnant with a child fathered by John Dale Henry. Mrs. Dunbar told me that she then knew Anthony Ray Westley, because he was a friend of John Dale Henry's sister.

4. Mrs. Dunbar also informed me that she knew that in April 1984, her husband Tyrone owned a .25 caliber automatic pistol, John Dale Henry owned a .22 caliber pistol and Anthony Ray Westley owned a .357 caliber pistol.

5. Mrs. Dunbar further informed me that: John Dale Henry had recently been released on parole from his earlier conviction for the aggravated robbery that took place in April 1984; since being paroled in the last several months, John Dale Henry had gotten in touch with her with the request to visit his daughter -- the child that she was then pregnant with in April 1984; during her conversations with Henry since the time of his recent parole, Henry had told her on several different times that he, not Anthony Ray Westley, had shot Frank Chester Hall; John Dale Henry has told her that he shot Frank Chester Hall in the back and that Mr. Hall then turned and shot him (Henry); and John Dale Henry had specifically told her that he (Henry) killed Mr. Hall and that Anthony Ray Westley did not do so.

6. When informed of this newly-discovered evidence of Anthony Ray Westley's actual innocence of killing Mr. Hall, I immediately retained a private investigator to assist in attempts to document Mr. Henry's admissions on tape for use in these proceedings. Between the date of my first contact with Mrs. Dunbar and May 6, 1997, Mr. Henry did not speak with Mrs. Dunbar about the April 1984 incident. In view of Anthony Ray Westley's upcoming May 13, 1997 execution date, I secured the May 6, 1997 affidavit from Mrs.Dunbar that was used to support Mr. Westley's initial request for stay and second habeas application that was filed on May 9, 1997. Diligent efforts to further document Mr. Henry's admission to shooting Mr. Hall have continued on a constant basis since that time.

7. At approximately 10:00 p.m. last night, May 12, 1997, I was informed that Mr. Henry had agreed to call Mrs. Dunbar and to speak with various of her children shortly after midnight on May 13, 1997 -- the day on which Mr. Westley is scheduled to be executed. At approximately 2:00 a.m. this morning, May 13, 1997, I was informed that Mr. Henry had telephoned Mrs. Dunbar and that during that tape recorded conversation with various of her children, he had in fact again admitted that he shot Mr. Hall during the

April 1984 incident,

8. I have in my possession the audiotape recording containing the May 13, 1997 conversations between John Dale Henry and Martha Dunbar, Marie Walker, Tressa Walker, Louise Walker and his daugher, Domonike Dunbar. The audiotape recording in my possession is the tape recording referred to in the affidavits that have now been provided my Marie Walker, Tressa Walker and Domonike Dunbar.

9. I have been informed that the various witnesses mentioned in this affidavit have contacted me because they do not want to see an innocent man executed (Westley) for a murder that he did not commit, while the guilty man walks free (Henry).

Further, Affiant saith not.

_____
Barry Abrams

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

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

NO. 401695-B

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

AFFIDAVIT OF MARIE WALKER

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Marie Walker who, being by me duly sworn, deposed as follows:

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

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

3. At approximately 12:20 a.m. on May 13, 1997, John Dale Henry telephoned my mother, Martha Walker-Dunbar, and then spoke to me personally about the events that took place during the April 1984 incident in which Mr. Hall was killed. My conversation with John Dale Henry was tape recorded. I have provided the tape recording of my conversation to Anthony Ray Westley's lawyers.

4. As is reflected in the tape recording of our conversation this morning, John Dale Henry specifically told me at the beginning of our conversation that Frank Chester Hall shot him during the April 1984 incident and that "after he shot me, I shot him [Hall]." Henry said that during that incident, Anthony Ray Westley did *not* have a .22 caliber weapon but instead had a .357 caliber pistol. Henry also admitted that he had, and fired, a gun during the incident and claimed that he only fired one shot -- the shot he admits firing into Hall.

5. Later in our conversation, Henry said that he did not want to incriminate himself on the telephone and therefore would not talk further on the telephone about his role in shooting Hall, but that we would do so in person at a later date.

6. I also was on the telephone later during the conversation when my sister, Louise Walker, spoke with Henry. I heard Henry tell Louise that he wouldn't tell her on the telephone about who shot Hall but that he earlier had told "Mama" [Martha Walker Dunbar] "the truth." Henry also said that it had been "Hell" to be in prison, that he would kill to keep from going back to the prison and that he would not talk further on the telephone about who shot Hall.

Further, Affiant saith not.

_____
Marie Walker

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

_____
Notary Public in and for The

State of T E X A S

COPY

May 12, 1997

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

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

Dear Governor Bush:

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

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

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

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

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

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

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

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

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

Very truly yours,

Barry Abrams