UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD ALLEN MASTERSON,	§	
Petitioner,	§	**CASE NO. 4:09-CV-2731**
vs.	§	**HON. KENNETH M. HOYT**
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	**DEATH PENALTY CASE**
Respondent.	§	**EXECUTION DATE: JANUARY 20, 2016**

SECOND PETITION FOR A WRIT OF HABEAS CORPUS

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PETITION FOR A WRIT OF HABEAS CORPUS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Petitioner Richard Allen Masterson is currently confined in the Allan B. Polunsky Unit of the Texas Department of Criminal Justice's Correctional Institution Division in Livingston, Texas. He is in the custody of the Director of the Correctional Institutions Division, Williams Stephens, Respondent. Mr. Masterson is confined in violation of the Constitution and laws of the United States. He, therefore, files this Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, challenging his guilty verdict and death sentence. Mr. Masterson respectfully asks this Honorable Court to issue a writ of habeas corpus and vacate his capital-murder conviction and death sentence.

In support, Mr. Masterson avers the following:

INTRODUCTION

Richard Allen Masterson is an innocent man on death row in Texas. The State convicted him on false scientific testimony from an assistant medical examiner who performed the autopsy incorrectly, hiding Mr. Masterson's innocence. This examiner, Paul Shrode, lied on his job application to the Harris County Medical Examiner's Office, botched multiple capital-murder autopsies, and misclassified the autopsy in Mr. Masterson's case. Despite possessing this exculpatory evidence and being aware of his false and misleading testimony, the State has never notified Mr. Masterson. Mr. Masterson still does not know the extent of Mr. Shrode's fraud, lies, and mistakes.

The decedent's death was not a homicide at all. He died of a heart attack caused by a preexisting severe coronary artery disease. Because of this scientific evidence, Mr. Masterson could not have committed a crime and, therefore, does not qualify for the death penalty.

This petition seeks to correct a terrible error and pending tragedy.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

I. Introduction

Mr. Masterson was tried and convicted of capital murder based on flawed state court proceedings and state fraud. Consequently, the state deprived Mr. Masterson of his constitutional rights to due process and a fair trial. And his case of actual innocence was never investigated despite evidence that the medical examiner, Paul Shrode, relied on Mr. Masterson's suicidal, false confession and prepared an autopsy report to support the prosecution's theory with insufficient scientific observations to support it. As such, the jury's determination that Mr. Masterson killed the victim by strangulation was entirely erroneous because of Mr. Shrode's false and unqualified report. The state court accepted Mr. Shrode's report, and Mr. Masterson's appellate counsel, state habeas counsel, and federal habeas counsel failed to raise the issue of Mr. Shrode's fraud or to uncover the truth about the manner in which Darin Honeycutt died despite the Harris County Medical Examiner's Office reprimand of Mr. Shrode for deficient work in another case.

This claim differs from the claim raised in Mr. Masterson's state habeas petitions. While the state habeas petition's conclusion that Darin Honeycutt died accidentally through erotic asphyxiation remains the same, the evidence that the State's chief expert witness, Mr. Shrode, was a fraud and unqualified to perform the autopsy was suppressed. Under *Brady v. Maryland*, the prosecution had a duty to disclose the evidence of Mr. Shrode's fraud when they became aware of it so that Mr. Masterson could have the evidence reevaluated to show his actual innocence. Mr. Shrode lied to the State of Texas; he was not qualified to be an assistant medical examiner and had no business preparing reports on which the state and the jury relied to decide to kill Mr. Masterson. This fraud and trial counsel's deficient performance along with appellate

counsels' ineffective assistance of counsel combined to deprive Mr. Masterson of his federal constitutional rights.

II. Statement of the Case and Procedural History

A Grand Jury of Harris County, Texas for capital murder in Cause Number 867834 indicted Mr. Masterson on February 2, 2001. The indictment alleged that Mr. Masterson intentionally and knowingly caused the death of Darin Shane Honeycutt by choking him with his arm. *State v. Masterson*, Trial Cause No. 867834, 176th Judicial District of Harris County, Texas (1 CR 2-3). The indictment charged Mr. Masterson with "serious bodily injury murder" alleging that he intended to cause serious bodily injury to the complainant by intentionally and knowingly "choking [the Complainant] with his arm." *Id.*

Mr. Masterson entered a plea of not guilty and was tried for capital murder on this charge. The trial was held on April 22, 2002, in the 176th Judicial District of Harris County, Texas, the Honorable Brian Rains presiding. (18 RR 1). Mr. Masterson was represented by lead attorney Mr. Robert Loper and co-counsel Mr. Layton Duer. Representing the State were Ms. Sunni Mitchell and Mr. Dan Rizzo of the Harris County District Attorney's Office. (1 RR 2). On April 24, 2002, a jury, after answering the special issues, found Mr. Masterson guilty of capital murder, and on April 25, 2002, the same jury sentenced him to die. (22 RR 118-20). Mr. Masterson timely filed a notice of appeal; his attorneys did not file a motion for a new trial.

Mr. Masterson filed his Brief on Appeal on May 16, 2003, in the Texas Court of Criminal Appeals. On February 2, 2005, that Court affirmed Mr. Masterson's conviction and sentence. *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005). Rehearing was denied on March 2, 2005. On May 3, 2005, Mr. Masterson timely filed a petition for writ of certiorari in the United

States Supreme Court. On February 21, 2006, that petition was denied. *Masterson v. Texas*, No. 04-10283, 546 U.S. 1169 (2006).

While his direct appeal was still pending, Mr. Masterson belatedly[1] filed his "Application for Post-Conviction Writ of Habeas Corpus" in the trial court on February 26, 2004. *Ex Parte Masterson*, No. WR-59,481-01. The court accepted the filing and ruled that it was properly filed.

On February 4, 2008, the trial court denied an evidentiary hearing and recommended that relief be denied, and the Texas Court of Criminal Appeals denied Mr. Masterson's application for habeas corpus relief on August 20, 2008. *Ex Parte Masterson*, No. WR-59,481-01, 2008 WL 3855113 (Tex. Crim. App. Aug. 20, 2008) (not designated for publication).

On August 17, 2009, Mr. Masterson filed his initial "Petition for Writ of Habeas Corpus" relief pursuant to 28 U.S.C. § 2254 in this Court. *Masterson v. Quarterman*, ECF No. 1, 4:08-MC-00476. And on November 3, 2011, this Court stayed the action because of the pendency of relevant United States Supreme Court cases.

On June 12, 2012, Mr. Masterson filed a subsequent state habeas application in the Texas Court of Criminal Appeals, Cause No. 867834-B. And that court again denied relief on December 19, 2012. *Ex Parte Masterson*, WR-59,481-02, 2012 WL 6630160 (Tex. Crim. App. Dec. 19, 2012) (not designated for publication).

On June 27, 2012, this Court ended the stay, and on April 8, 2013, Mr. Masterson filed an amended federal habeas petition. On February 28, 2014, this Court denied relief and did not issue

[1] Mr. Masterson's state habeas counsel, J. Sidney Crowley, filed the application thirty-six days after the original deadline and did not file a Motion to Extend the Filing deadline until June 28, 2004—four months after the habeas application was originally filed. *See Ex Parte Masterson*, Motion to Extend Filing Deadline for 11.071 Writ, No. 867834A (Tex. Dist. Ct. 176th Jud. Dist. June 28, 2004).

a certificate of appealability. *Masterson v. Thaler*, ECF No. 79, 2014 WL 808165 (S.D. Tex. Feb. 28, 2014) (not designated for publication).

On March 28, 2014, Mr. Masterson filed a "Motion to Alter or Amend Final Judgment" under Rule 59(e) of the Federal Rules of Civil Procedure in this Court. On April 24, 2014, the Court denied his Rule 59(e) motion. *Masterson v. Stephens*, Order, ECF No. 88, 4:09-CV-2731 (S.D. Tex. Apr. 24, 2014).

On September 12, 2014, Mr. Masterson filed an "Application for a Certificate of Appealability ("COA") in the United States Court of Appeals for the Fifth Circuit. And on January 9, 2015, that Court denied his request for a COA. *Masterson v. Stephens*, 597 F. App'x. 282 (5th Cir. 2015).

On June 15, 2015, the United States Supreme Court denied Petitioner's petition for writ of certiorari. *Masterson v. Stephens*, __ U.S. __, 135 S. Ct. 2841 (2015).

On December 29, 2015, Mr. Masterson filed a second subsequent state habeas application and "Motion to Stay Execution" in the Texas Court of Criminal Appeals, Cause No. 867834-C, which is still pending before that court.

Texas still intends to kill Mr. Masterson; his execution is scheduled for January 20, 2016.

A. Claims Raised in State Court[2]

a. Points of Error Raised on Direct Appeal

The following points of error were brought on direct appeal:

1) The trial court erred in failing to submit the requested charge on criminally negligent homicide, which was a lesser-included offense in this case.

[2] In the interests of the accurate identification of the exhausted claims, the following titles are taken from the Appellant's brief and state habeas briefs; some alterations have been included for easier reading.

2) The trial court erred in admitting Mr. Masterson's statement to police because the statement was given in exchange for a police officer's promise to help see that charges were dropped against Mr. Masterson's nephew.

3) The trial court erred in admitting Mr. Masterson's statement because the statement was elicited through police questioning after Mr. Masterson had invoked his right to counsel.

4) The trial court erred in refusing Mr. Masterson's request to give the closing argument at punishment on the mitigation special issue.

5) Considering that the law would require Mr. Masterson, on a life sentence, to serve forty calendar years in prison before parole eligibility, the state failed to prove beyond a reasonable doubt the probability that, given his testimony that he would attempt to commit criminal acts of violence, he would be allowed to constitute a continuing threat to prison society for forty years and/or that after that time, given his testimony that he would attempt to commit criminal acts of violence, he would ever be paroled into free society. (emphasis in original).

6) The continuing threat special issue was unconstitutional, as applied to obtain the death penalty because that issue was not susceptible to proof beyond a reasonable doubt, and the jury could not apply the rule for decision (beyond a reasonable doubt) fairly in the context of the punishment question.

7) The "12-10 Rule," of Art. 37.071, V.A.C.C.P., which requires at least ten "no" votes for the jury to return a negative answer to the first or second special issues and at least ten "yes" votes for the jury to return an affirmative answer to the third special issue, violates the Eighth Amendment of the United States Constitution.

8) The trial court committed reversible error in denying Mr. Masterson's request to inform the jury that the failure to answer a special issue would result in a life sentence, in violation of his rights as protected by the Eighth Amendment to the United States Constitution.

b. Claims for Relief Raised on State Post-Conviction

The following grounds for relief were raised in the Petitioner's state habeas petition:

1) Applicant was denied his right to trial by jury and to due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when a juror slept through critical testimony given by the medical examiner.
2) Applicant was deprived of his Sixth Amendment right to the effective assistance of counsel both at the guilt-innocence and at the punishment phase of the trial.

c. Claims for Relief Raised in Second State Post-Conviction Application

The following grounds for relief were raised in the Petitioner's first subsequent state habeas petition:

1) Trial counsel [and by extension habeas counsel] provided ineffective assistance of counsel under the Sixth and Fourteenth Amendments for failing to introduce evidence of organic brain dysfunction that would have been admissible under *Jackson v. State* in Texas Courts had that been discovered.
2) The trial counsel [and by extension habeas counsel] were ineffective under *Rompilla v. Beard* for failing to adequately investigate and prepare a rebuttal against the state's use of juvenile records during the punishment phase of his trial.

3) The trial counsel [and by extension habeas counsel] provided ineffective assistance of counsel when they failed to present and develop mitigating evidence on the fact that Mr. Masterson had been shot as a youth.
4) The trial counsel [and by extension habeas counsel] were ineffective under *Strickland v. Washington* for failing to investigate and develop evidence of seizure disorder which could have been brought forward at the guilt stage of Mr. Masterson's trial on capital murder.

d. Claims for Relief Raised in Third State Post-Conviction Application

The following grounds for relief were raised in the Petitioner's second subsequent state habeas petition:

1) Applicant is entitled to a new trial because the State presented false, or misleading, evidence regarding the complainant's cause of death. Correct testimony from the medical examiner may have caused the jury to render a verdict of not guilty to capital murder and/or changed the answers to the special issues.
2) Applicant is entitled to a new trial because new scientific evidence indicates that the Complainant may have died from an accident, and/or a fatal cardiac event, as opposed to an intentional strangulation. This new evidence may have caused the jury to render a verdict of not guilty to capital murder or given different answers to the special issues.
3) Given newly discovered facts and available science, Applicant was incapable of knowingly waiving his constitutional rights.
4) Given newly discovered facts and available science, applicant's confession was not voluntarily provided, given his inability to resist the inducement of law enforcement.

5) Applicant was unable to form the specific intent to kill as a result of his brain injury and his long-term drug abuse.

6) The new research linking prolonged drug abuse to chemically induced depression provides additional mitigating evidence which would have likely caused the jury to answer the questions regarding the special issues differently.

B. Claims Raised in Federal Court[3]

a. Claims for Relief Raised in Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus

The following grounds for relief were raised in the Petitioner's federal habeas petition:

1) Mr. Masterson was deprived of his Sixth Amendment right to the effective assistance of counsel at the guilt-innocence phase of the trial when trial counsel failed to consult with a pathologist and offer expert medical testimony on the cause of Honeycutt's death.

(Also brought as Claim 2 on state habeas)

2) Mr. Masterson was deprived of his Sixth Amendment right to the effective assistance of counsel at the punishment phase of the trial when trial counsel failed to adequately develop and present mitigating evidence.

(Also brought as Claim 3 on subsequent state habeas)

3) Mr. Masterson was denied his right to trial by jury and to due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when a juror slept through critical testimony given by the medical examiner.

(Also brought as Claim 1 on state habeas)

[3] In the interests of the accurate identification of the exhausted claims, the following titles are taken from the Petitioner's federal habeas brief; the capitalization of those claims has been altered for easier reading.

4) Mr. Masterson was denied due process when the trial court refused to charge the jury on the lesser-included offense of negligent homicide, which was raised by the evidence, including Mr. Masterson's testimony.

   (Also brought as Claim 1 on direct appeal)

5) Mr. Masterson's Fifth Amendment right was violated by the admission of his confession which was given in exchange for a promise by police.

   (Also brought as Claim 2 on direct appeal)

6) Mr. Masterson's Fifth and Sixth Amendment rights were violated by the admission of his confession, which was given after police continued questioning him after he had invoked his right to counsel.

   (Also brought as Claim 3 on direct appeal)

7) The State failed to carry its burden of proving that Mr. Masterson would be a continuing threat to society when based on his own testimony it was apparent that he would spend his time in confinement under such restraint that he could not be a danger to society.

   (Also brought as Claim 5 on direct appeal)

8) Mr. Masterson was denied his Sixth Amendment right to effective assistance of counsel when the trial court refused the defense request to argue last at punishment on the issue of mitigation.

   (Also brought as Claim 4 on direct appeal)

9) The "12-10" Rule is unconstitutional as applied in this case because the jury findings it requires and the scheme in which it is applied violate the Eighth Amendment to the United States Constitution.

   (Also brought as Claim 7 on direct appeal)

10) Mr. Masterson's constitutional right to be free of cruel and unusual punishment was violated in this case by the trial court's refusal to inform the jury that a hung jury would result in a life sentence.

(Also brought as Claim 8 on direct appeal)

C. Summary of Trial Proceedings

a. Pre-trial Motions

Before the trial began, several pre-trial motions were heard. The court held a hearing on March 5, 2002. Defense counsel moved to suppress the identification testimony of Morgan Porter and Jereme Rado. (2 RR 5-6, 175). The court denied the motion in respect to both Mr. Porter and Mr. Rado. (2 RR 55, 193).

Defense counsel also moved to suppress the confession obtained by Officer David Null representing that the promise of leniency for Mr. Masterson's nephew contributed to the voluntariness of the confession. (2 RR 196-97). The court denied the motion. (2 RR 197-98).

b. The State's Case at the Guilt/Innocence Phase

Ms. Sunni Mitchell gave the State's opening statement. She alleged that Shane Honeycutt, the Complainant, was murdered by Mr. Masterson on January 26, 2001, for the sole purpose of taking Mr. Honeycutt's car in order to get out of Houston. (18 RR 15-16). The deceased was Darin Shane Honeycutt. (18 RR 15). Mr. Honeycutt was known to dress as a woman who went by the name of Brandy Houston. (18 RR 30).

One Thursday afternoon, Mr. Brown and Mr. Honeycutt agreed to check in with each other later that night because Mr. Honeycutt planned to go out to the bar. (18 RR 32-33). Mr. Brown did not hear from Mr. Honeycutt. (18 RR 33). On Saturday morning, he went to Mr. Honeycutt's apartment and approached the landlord, Alfred Bishop, requesting access to the

apartment. (18 RR 20-32). Mr. Bishop waited outside while Mr. Honeycutt's friends, Larry Brown and Dennis Brown entered the apartment. (18 RR 20-32). After going straight to the bedroom, he discovered Mr. Honeycutt undressed and lying on the side of the bed. (18 RR 37-39).

Officer Steven Duffy from the Houston Police Department was dispatched for a D.O.A. situation and arrived at Mr. Honeycutt's apartment after the Houston Fire Department paramedics. (18 RR 71-73). Officer Duffy found no signs of forced entry and the front door and all windows secured. (18 RR 77). He also found no signs of trauma on Mr. Honeycutt's body or anything unusual about the bed in the room where Mr. Honeycutt was found. (18 RR 80-81). Officer Duffy noticed that a drawer from Mr. Honeycutt's jewelry cabinet was not in its usual place. (18 RR 74-75). The drawer was located on the floor next to the cabinet itself. (18 RR 75). Officer Justin Wood, Houston Police Department, was the crime scene investigator who did the primary scene investigation at Mr. Honeycutt's apartment. (18 RR 96). Officer Wood found some small sized items on the floor surrounding the drawer that was misplaced but noted that the drawer contained the majority of the jewelry items. (18 RR 91).

Sergeant Robert G. Parish, a homicide investigator for the Houston Police Department, was also dispatched to Mr. Honeycutt's apartment on January 27, 2001. (18 RR 131-33). From the initial investigation conducted at the scene, Sergeant Parish was unable to determine what, if any, property was missing from Mr. Honeycutt's apartment. (18 RR 135). Sergeant Parish testified that Mr. Honeycutt's car, a 1997 Ford Escort, was not at the scene. (18 RR 135).

Morgan Porter was a construction manager for whom Mr. Masterson's brother, James Masterson worked. (18 RR 109). Mr. Porter knew Mr. Richard Masterson through his interactions with James Masterson. (18 RR 110). In January 2001, Mr. Richard Masterson went

to look for his brother at his job site. (18 RR 109-111). Mr. Porter was there and noticed that Mr. Masterson was nervous and edgy. (18 RR 111). Mr. Masterson told Mr. Porter "I think I put somebody to sleep." (18 RR 111-112). Mr. Porter assumed he was referring to applying a sleeper hold since Mr. Masterson had previously mentioned he knew how to do that. (18 RR 112). Mr. Masterson was driving a red Ford Escort and said he wanted to go back to Georgia but needed money to get home, so Mr. Porter bought him some gas. (18 RR 114).

Mr. Porter testified that he later learned about the murder and contacted the police. (18 RR 117-18). Sergeant Parish went to see Mr. Porter to show him a photo spread and Mr. Porter testified that he picked Mr. Masterson out. (18 RR 119-20). An alert was soon thereafter sent out to police agencies throughout to the country to be on the lookout for Mr. Honeycutt's missing car. (18 RR 135-136). The car was located in Emerson, Georgia, but Mr. Masterson was not driving it. (18 RR 139).

James Masterson allowed his brother, Mr. Richard Masterson, to move in with him when he left Georgia, right after their father passed away in October of 2000. (18 RR 164). Mr. Richard Masterson lived with him until he was kicked out. (18 RR 168). Mr. James Masterson testified that Mr. Richard Masterson called him and told him he had put someone down. (18 RR 169-170). Mr. James Masterson told him to call the police to clear the matter up. (18 RR 169). He also told him "the guy might have died from a heart attack." (18 RR 170).

Mr. James Masterson also mentioned Adam Tanturri, who had been arrested driving Mr. Honeycutt's car in Georgia, and stated that Mr. Tanturri was his, and Mr. Richard Masterson's, nephew. (18 RR 174-75). Sergeant Parish, the homicide investigator on the case, told Mr. James Masterson that if his brother made a statement, they would let Mr. Tanturri go. (18 RR 181).

The State's critical witness, Paul Shrode, Harris County assistant medical examiner, performed the autopsy on Mr. Honeycutt. (18 RR 193). He testified that his qualifications included having "a medical degree from Texas Tech University . . . specialized training in pathology and subspeciality [sic] training in forensic pathology . . . and a license to practice . . . in Texas [and] Ohio." (18 RR 193). He also indicated he had conducted over 2,500 autopsies. (18 RR 193). Subsequently, however, it became apparent that Mr. Shrode lied about his qualifications to land his position and committed fraud, which will be discussed extensively below.

Mr. Shrode received Mr. Honeycutt's body "without the jewelry… compared to the scene photograph," which showed Mr. Honeycutt wearing jewelry at the time the photograph had been taken. (18 RR 211). He never found out the cause for why the jewelry had been missing when it was presented to him even though he knew that the body was not to be moved or tampered with in any way until an assistant medical examiner was present. (18 RR 212). The mishandling of Mr. Honeycutt's body and Mr. Shrode's failure to properly investigate and rectify it continued the fraud committed by Mr. Shrode.

Mr. Shrode testified that the cause of death was external neck compression, which cuts off the oxygen to the brain. (18 RR 207-08). He testified that Mr. Honeycutt could not have survived the external neck compression. (18 RR 219). Mr. Shrode identified petechial hemorrhages around Mr. Honeycutt's eyes. (18 RR 198). He testified that they are caused by two main factors: "a decrease in the return flow of blood to the heart" with rupture of the tiny vessels, and by pooling of blood with gravity in "a body that has been lying face down." (18 RR 198). He also distinguished between a chokehold and a sleeper hold. (18 RR 200-01). A sleeper hold was a hold that would block the veins on the sides of the neck and would be more likely to cause

such hemorrhages on the eyes. (18 RR 201). Mr. Shrode stated that "[i]n this particular case there were no fractures to the neck, either to the hyoid bone or even to the thyroid cartilage, the windpipe area" directly conflicting with his later statement where he testified that there were "some very small hemorrhage areas…in the windpipe [and] in front of the windpipe." (18 RR 203, 205).

Mr. Shrode also testified that "in looking at some of the photographs that [he had] to take there were some contusions of the knuckles." (18 RR 206). After being presented with State's Exhibit 27 and directed to identify the contusions on the knuckles, Mr. Shrode was unable to point to the contusions stating it didn't "show up well" on the photograph. (18 RR 212, 214). He did not list the contusion in his report and instead "directed that they be photographed and it was just denoted." (18 RR 214).

Mr. Shrode testified that he found no evidence that Mr. Honeycutt "was suffering from any kind of heart disease" and later stated that Mr. Honeycutt did have a coronary heart condition, in fact, that he "had significant coronary artery disease" in an artery. (18 RR 206-07, 222-23). He testified that other vessels were, nonetheless, "supplying the heart muscle when the large one couldn't" based on the evidence that "the other vessels were open." (18 RR 223). He testified that Mr. Honeycutt had not died from a heart attack because "there was no hemorrhaging in the heart muscle which could suggest an acute heart attack." (18 RR 207).

The cause of death was consistent with a sleeper hold, which blocks the arteries, as opposed to a choke hold, which cuts off air supply. (18 RR 226-28, 229). Mr. Shrode testified that he did not believe the cause of death to be part of an autoerotic asphyxiation act because of the continued compression of the neck after the person would have passed out from lack of blood flow. (18 RR 231). Yet Mr. Shrode's beliefs were entirely erroneous because he was not a

qualified expert to determine the cause of death or conduct this autopsy. Reliance on Mr. Shrode's testimony was misleading and hid Mr. Masterson's innocence.

Mr. Shrode falsified information on his employment application; he was a fraud, yet the State relied extensively on his testimony. Without the necessary qualifications, he performed autopsies and testified about expert matters, including the cause of death. After Mr. Masterson's trial, the Harris County Medical Examiner's Office reprimanded Mr. Shrode for deficient work in another case, mainly identifying the incorrect cause of death.

DNA analyst Christy Kim from the Houston Police Department analyzed samples taken from Mr. Honeycutt's body. (18 RR 246). She identified semen from both Mr. Honeycutt's penile swab and a control swab taken from his thigh area. (18 RR 246). There was no blood found under Mr. Honeycutt's fingernails. (18 RR 247-48). DNA analyst Jennifer LaCross from the Houston Police Department determined that the DNA pattern from Mr. Honeycutt's penile swab and the control swab of his thigh area indicated it was his own semen. (18 RR 261).

Kyle Teems from the City of Emerson Police Department in Georgia stopped Charles Tanturri for a traffic violation. (19 RR 9, 11). He was driving a 1997 Ford Escort. (19 RR 10). After placing Mr. Tanturri under arrest, Officer Teems testified that he inventoried the vehicle and found a billfold containing identification belonging to Mr. Honeycutt. (19 RR 13).

Eric Thorenson, who was working for the Belleview Police Department at the time, testified that he arrested Mr. Masterson in Florida on February 6, 2001, based on the active warrant out of Harris County. (19 RR 47, 49).

When Houston Police learned that Mr. Masterson was in custody in Florida, they sent Officer David S. Null to bring him back. (18 RR 144-45). Shortly thereafter, Officer Null, Houston Police Department, flew to Marion County, Florida, and interrogated Mr. Masterson at

the county jail. (19 RR 57, 59-60). When Officer Null first saw Mr. Masterson, he noticed Mr. Masterson was thinner. (19 RR 61). Officer Null had an entire unrecorded interrogation with Mr. Masterson that lasted over forty-five minutes, and once he elicited the information he wanted, he began a second interrogation, the second time recorded. (19 RR 64-65, 96) The second interrogation consisted of answers in response to an entire conversation full of nothing but leading questions by Officer Null and thus lasted a mere twenty minutes. (19 RR 70-89).

Officer Null shared incriminating evidence with Mr. Masterson during the unrecorded conversation in order to elicit answers to his questions. (19 RR 95). Additionally, he also spoke to Mr. Masterson about "his nephew being arrested in Georgia." (19 RR 99-100). Officer Null told Mr. Masterson he would relay any information that Mr. Masterson wanted to share with him to the authorities in Georgia handling his nephew Adam Tanturri's case. (19 RR 102-03). However, the only relevant statement regarding Mr. Tanturri found on the report was that Mr. Masterson could not explain how his nephew had ended up with Mr. Honeycutt's vehicle in Georgia. (19 RR 101-02). Officer Null admitted that various statements made by Mr. Masterson related to their conversation about his nephew, among other things, were left out of his report. (19 RR 101-04). In response to whether Officer Null passed on the information relayed by Mr. Masterson to the authorities in Georgia as he promised, he said, "I talked to Sergeant Parish and let him know about it. He had all the contact with the people in Georgia. I never even spoke with them." (19 RR 105). Further, he stated he had "no knowledge of anything that occurred in Georgia" and was unaware that the charges against Mr. Masterson's nephew had been dismissed. (19 RR 105). Officer Null assumed Sergeant Parish would fulfill the promise he had made to Mr. Masterson since "it was [Sergeant Parish's] case and it was [Sergeant Parish's] information." (19 RR 105).

The taped confession of Mr. Masterson was recorded on a cassette recorder and was played for the jury over defense objections. (19 RR 65, 68, 70-89). However, what the jury never heard was the underlying fear, severe mental illness, and neuropsychological bases for the behavior that followed. Mr. Masterson met Brandy at a bar, knowing he was a man. (19 RR 72-73). Mr. Honeycutt expressed interested in taking Mr. Masterson home and asked him if he wanted to go. (19 RR 73). After closing time, Mr. Honeycutt left the bar with Mr. Masterson and two other men. (19 RR 73). Mr. Honeycutt drove while Mr. Masterson was in the passenger seat and the other two men were in the back of the car. (19 RR 73-74). After dropping off the two other men, Mr. Honeycutt drove to his home. (19 RR 74). After arriving at his apartment, Mr. Honeycutt got undressed in the bedroom, and Mr. Masterson came up to Mr. Honeycutt from behind and grabbed him around the neck as requested. (19 RR 75-76). Mr. Honeycutt "never struggled, never did [sic] nothing, just went to sleep." (19 RR 76).

When Officer Null interrogated Mr. Masterson about whether he intended to kill the deceased, Mr. Masterson answered, "[u]m, yeah, I think so." (19 RR 77). Mr. Masterson claimed that he did not intend to have sex with Mr. Honeycutt. (19 RR 77). He did maintain that he did not originally have the intention to kill him. (19 RR 78). Mr. Masterson stated, "I don't know why I did it, something just told me in my mind that – and I just said to myself that I was going to kill him." Afterward, Mr. Masterson took the VCR from Mr. Honeycutt's apartment to make it look like a robbery, and gave the VCR to someone on the street the same night. (19 RR 78, 82). He wanted to make it look like a robbery because he had been seen with Mr. Honeycutt and thought that people would not suspect him if it looked like the house had been burglarized.

c. The Defense Case at the Guilt/Innocence Phase

Defense counsel, Robert Loper, gave the opening statement where he posited the theory that Darin Honeycutt died during consensual sex acts. Richard Masterson was the defense's first witness. (19 RR 113-14). The defense moved to allow the Mr. Masterson to testify without being impeached with his prior convictions; the court denied its motion. (19 RR 109-10).

First, Mr. Masterson admitted to prior convictions for burglary in 1992, theft in 1996, and two assaults in 1999 and 2000. (19 RR 115). All of these convictions were outside of Texas. Mr. Masterson moved to Houston, Texas, in October 2000. (19 RR 115).

Mr. Masterson first met Mr. Honeycutt in a bar on January 26, 2001. They met just before the bar closed at about 1:45 AM. (19 RR 117-18). Mr. Masterson asked Mr. Honeycutt for a ride home, and he obliged after first giving someone else a ride home. (19 RR 119). Then, when they were alone, Mr. Honeycutt invited Mr. Masterson to go home with him; he asked in a manner that led Mr. Masterson to believe they were going to have sex. (19 RR 120).

When they arrived at Mr. Honeycutt's apartment, Mr. Honeycutt went into the bathroom and removed his clothing save for his underwear. (19 RR 123). When he came out of the bathroom, he approached Mr. Masterson, who also removed his clothing, and they began to have sex propped up against the wall and then the headboard of the bed. (19 RR 123-24). Mr. Masterson then put his arm around Mr. Honeycutt's neck to asphyxiate him because Mr. Honeycutt asked him to do so. (19 RR 126). Then, Mr. Honeycutt and Mr. Masterson engaged in sexual activity on the bed with Mr. Masterson positioned behind Mr. Honeycutt and his hand on his genitalia. (19 RR 127-28). When Mr. Masterson got up, Mr. Honeycutt began "making noises, grunting, gurgling," but Mr. Masterson thought he was still alive when he went into the

living room to get cigarettes. (19 RR 129-30). When Mr. Masterson went back into the room, he knew Mr. Honeycutt had died. (19 RR 130).

Mr. Masterson, because he had prior convictions, panicked, got dressed, took the VCR and opened several drawers to make the scene look like a robbery, and then he left to go to Georgia where his mother lived. (19 RR 130-32). Mr. Masterson did not intend to kill Mr. Honeycutt. (19 RR 130).

While in Georgia for five days, Mr. Masterson heard that Houston police were looking for him. (19 RR 132-33). Mr. Masterson called Sergeant Parish and told him that he was looking for the wrong person. (19 RR 133).

After Mr. Masterson was arrested and met with Officer Null, he asked him to get the case against his nephew dropped. Officer Null said that he would try in exchange for Mr. Masterson's statement, but Mr. Masterson said that he did not know what he would say because he did not do anything. (19 RR 136). Mr. Masterson asked Officer Null what would constitute capital murder, and Officer Null told him that premeditated murder would elevate the charge—explaining what premeditated murder meant. (19 RR 137). Then Mr. Masterson confessed to intending to kill Mr. Honeycutt, adding elements that would elevate the case to capital murder because he said he would rather die than have to serve a life sentence. (19 RR 137-38, 140). Mr. Masterson testified that the only true part of his confession was the part about his nephew and that he had "something to do with causing [Mr. Honeycutt's] death," but that he did not intend to kill him. (19 RR 139).

Defense counsel then pressed Mr. Masterson on why he confessed to intending to murder Mr. Honeycutt. (19 RR 140). And Mr. Masterson explained that he did it to help his nephew and

because he was embarrassed to admit that he was having sex with a man when he died. (19 RR 140). The defense rested. (19 RR 178).

d. The State's Case in Rebuttal

The State began its rebuttal with testimony by David S. Null, the officer who interrogated and recorded Mr. Masterson's confession. (19 RR 194). He stated that Mr. Masterson "got defensive" when asked whether he had engaged in any sexual acts with Mr. Honeycutt. (19 RR 194-95). He also testified that when he asked how Mr. Masterson felt about having killed Mr. Honeycutt, he responded by saying it didn't really matter to him. (19 RR 95).

Steven Drew met Mr. Masterson at a bar a couple of miles from his home on February 3, 2001. (19 RR 201, 204). He and Mr. Masterson began a conversation and ended up playing pool and drinking beer at the bar. (19 RR 202). Mr. Drew invited Mr. Masterson over to his place to have sex, and Mr. Masterson accepted. (19 RR 201, 218). Once they were at the apartment, Mr. Drew testified that he was approached from behind and put in a headlock. (19 RR 206). A struggle ensued that lead to Mr. Drew landing on his back. (19 RR 209). After being straddled and choked for some time, Mr. Drew lost consciousness. (19 RR 209-10). When he regained consciousness, he determined that his wallet and car key were missing and filed a report with the police. (19 RR 210-11). Mr. Drew testified that he later identified Mr. Masterson to police from a photo spread. (19 RR 213). Mr. Masterson was arrested outside of a trailer where Office Thoreson testified he located Mr. Drew's stolen car. (19 RR 226-28).

In the State's closing argument, it argued that Mr. Masterson viewed Mr. Honeycutt as a means to an end. (20 RR 29). It also argued that Mr. Masterson's conduct was inconsistent with an accident. (20 RR 10).

The jury then retired to deliberate. (20 RR 38). After deliberations, the jury found Mr. Masterson guilty of capital murder, as charged in the indictment. (20 RR 39-40).

e. The State's Case at the Punishment Phase of Trial

The punishment phase of the trial began on April 24, 2002. The State reoffered all evidence from its case-in-chief, State's Exhibits 52, 53, 54, and all documents either certified or filed with the business records affidavit. (21 RR 5). All were admitted without objection. (21 RR 5).

As its first witness, the State called Cheryl Shook. (21 RR 6). Ms. Shook stated that Mr. Masterson is the cousin of her ex-boyfriend, James West. (21 RR 7). She testified that in July 2000, Mr. Masterson threw a beer bottle through her screened front porch, hitting her in the mouth. (21 RR 8-9). She testified that some of her teeth were knocked out from the blow. (21 RR 15). Mr. Masterson did not appear intoxicated that day and that she could not remember why he threw the beer bottle through the screen. (21 RR 20). She did not think Mr. Masterson intentionally threw the beer bottle at her but rather threw it toward the house. (21 RR 22). She was not afraid of Mr. Masterson. (21 RR 25).

Officer Dale Colegrove from the sheriff's office in Oconee County in South Carolina met with Ms. Shook at the hospital after the incident. (21 RR 26, 28). When he arrived at the hospital, Ms. Shook was "definitely frightened." (21 RR 29). Ms. Shook told Officer Colegrove that her boyfriend had done it because he was mad at her for calling the police on him but later said it had been Mr. Masterson. (21 RR 32-33).

Officer Rothell, another investigation officer, testified that he later arrested Mr. Masterson and charged him with assault and battery. (21 RR 40, 43). He found there had been

some type of exchange and that Ms. Shook might have thrown a beer bottle at Mr. Masterson first. (21 RR 46).

A deputy sheriff for Harris County, Ladell Urick, Jr., testified to a fight that occurred between Mr. Masterson and another inmate. (21 RR47, 61). The inmate had disrespected the brothers of the Aryan Brotherhood, and Mr. Masterson took it upon himself to take care of that problem. (21 RR 53-54). Deputy Urick Jr. did not know who had started the fight. (21 RR 61). He testified that the inmate sustained deep lacerations over his eyes. (21 RR 52).

Deputy Willie Drew, from the Harris County Sheriff's Department, ordered Mr. Masterson to pick up his food tray that he had thrown on the floor on January 8, 2002. (21 RR 64-65). He testified that Mr. Masterson was not cooperative and after threatening him with writing him up, Mr. Masterson told him he would choke him as he had done to his victims. (21 RR 66-69).

In September of 1999, Corrections Officer Michael Williams responded to a call involving Mr. Masterson at a jail in Mescosta County. (21 RR 84-86). He testified that Mr. Masterson was involved in an altercation with another inmate. (21 RR 88). The inmate had disrespected Mr. Masterson. (21 RR 89). Officer Williams observed some scrapes on Mr. Masterson's chest and testified that he observed a swollen eye on the other inmate. (21 RR 89).

On February 13, 2000, in a separate incident during Mr. Masterson's confinement in Michigan, a corrections officer, Mark Killingveck, responded to a call to a particular cell that Mr. Masterson shared with another inmate. (21 RR 110-13). The other inmate asked to be removed from the cell. (21 RR 113). Officer Killingveck testified that Mr. Masterson began hitting the inmate in the face. (21 RR 114). Officer Killingveck pepper sprayed Mr. Masterson, and he retreated inside the cell. (21 RR 115). He did not observe any injuries on the other inmate.

(21 RR 115). Officer Killingveck did not see who started the fight, and no charges were filed. (21 RR 116).

In July of 1999, Deedra Foster met Mr. Masterson while visiting her younger sister in South Carolina. (21 RR 117, 119). They began dating, and she asked Mr. Masterson to go back with her to Michigan. (21 RR 120-21). They began living together in Big Rapids, Michigan. (21 RR 123). After receiving a call by an unknown number on August 12, 1999, Ms. Foster testified that Mr. Masterson became angry. (21 RR 123-24). She testified that he ripped the phone off the wall and threw it at her. (21 RR 124). He accused Ms. Foster of seeing someone else behind his back because the person who called hung up after Mr. Masterson picked up. (21 RR 124-25). Ms. Foster testified that she ran out of the house and went to a friend's house after he told her he would kill her if she called the police. (21 RR 125-26).

Later at night, she returned home, locked all of her windows and doors, and went to bed but awoke when she heard a noise coming from the bathroom. (21 RR 127). Ms. Foster testified that she saw Mr. Masterson trying to come in through a window, and she became terrified. (21 RR 127-28). She pushed him back out of the window and ran to her bedroom where she called the police. (21 RR 128-29). Ms. Foster testified that he kicked the door to her bedroom and became very angry when he found out she had called the police. (21 RR 129-30). She testified that he proceeded to pull the phone out of the wall and hit her several times with it on both sides of her head. (21 RR 130-31). Suddenly, Mr. Masterson stopped, hugged her, and told her he was sorry. (21 RR 133).

The police eventually arrived, and Ms. Foster told Mr. Masterson to run so he would not go to jail. (21 RR 133-34). Mr. Masterson was arrested. (21 RR 135). She told the police she was not going to press charges against Mr. Masterson. (21 RR 134). About two weeks later and upon

hearing that Mr. Masterson would be released from jail, Ms. Foster testified that she picked up her things and left to her sister's house in South Carolina. (21 RR 135).

In April of 2000, while living in South Carolina with her three children, Ms. Foster testified that Mr. Masterson walked into her home with his cousin. (21 RR 126-38). He stayed for a few minutes and then left. (21 RR 138). She testified that he came knocking later that night, but she told him to go away. (21 RR 138-39). Within a couple of days, she packed her things and moved to Houston, where the father of one of her children lived. (21 RR 139).

Mr. Masterson was "great" with Ms. Foster's children. (21 RR 11). He did not exhibit bad or inappropriate behavior around them. (21 RR 11).

An officer from Big Rapids, Michigan, James Eddinger, testified to responding to Ms. Foster's call in August 1999. (21 RR 20-20). When arriving at Ms. Foster's home, he testified that he found Mr. Masterson very upset and with his fists clenched. (21 RR 22). He testified that he placed Mr. Masterson in handcuffs. (21 RR 23). After inspecting the home for damage, Officer Eddinger returned to his patrol car and found Mr. Masterson had brought his handcuffs from behind him to the front of him. (21 RR 25-26).

f. The Defense Case at the Punishment Phase of Trial

After the State rested, Mr. Masterson presented extensive defense testimony; he also testified at this phase of the trial. Officer Aubrey Monroe, a Harris County detention officer, testified that he worked for a year in the cellblock where Mr. Masterson was held. (22 RR 32). Officer Monroe testified that he never had trouble with Mr. Masterson and that Mr. Masterson never refused orders or requests from him. (22 RR 33). On cross-examination, however, Officer Monroe said he heard of incidents that Mr. Masterson had with other deputies. (22 RR 39).

The Defense called another Harris County deputy, Officer Henry Roger Legg, Jr., who also interacted with Mr. Masterson for a year in jail. He testified that he never had any difficulties with Mr. Masterson either. (22 RR 43, 45). Officer Legg testified that Mr. Masterson followed orders and did not make threats and that if someone showed Mr. Masterson respect, he would do the same in return. (22 RR 45). But, on cross-examination, Officer Legg acknowledged that he heard of other deputies having problems with Mr. Masterson. (22 RR 49-50).

Then Mr. Masterson's sister, Ramona Weiss, detailed their violent and neglected childhood. Their family included a total of eight children. (22 RR 54). They lived in a broken home and never lived with both their mother and father continuously. (22 RR 55). Their parents would often split. (22 RR 55). On one of those occasions, their father left their mother for another woman. (22 RR 56). Later, in 1975, their father came back and kidnapped their mother and took her to Florida, leaving their eight children alone in Texas for a month. (22 RR 56). At the time, Mr. Masterson was three years old. (22 RR 55-56). Ms. Weiss and Mr. Masterson's oldest sister, Sherry, who was sixteen years old at the time, took care of all of the children until someone reported that they had been abandoned by their parents. (22 RR 56).

Mr. Masterson's father never came back to Texas. (22 RR 57). Instead, he beat their mother. (22 RR 57). Their father beat her so badly that he destroyed both of her dentures, and gave her black eyes and cuts all over her face. (22 R 57). He then sent her back by plane. (22 RR 57). She returned to Texas but was arrested and put in jail for abandoning her children. Their father, however, was not incarcerated. (22 RR 57).

Mr. Masterson's father also beat him. (22 RR 58). His father beat him and the other children after coming home drunk; depending on who he felt like hitting that night, he would yank them out of bed and kick them from one end of the house to the other. (22 RR 58).

After their mother's arrest, their father took her and the children, including Mr. Masterson, who was four or five years old at the time, to Florida. (22 RR 58-59). Mr. Masterson stopped attending school regularly by the age of eleven or twelve. (22 RR 60). Mr. Masterson was close to his mother, but the children never received attention or affection from their father. (22 RR 60).

When Ms. Weiss left the home, the other children were put into foster care. (22 RR 61). She believed that her brother could be non-violent in a controlled environment. (22 RR 62). She further testified that Mr. Masterson had physical problems growing up—his eyes were crossed when he was young, and his parents never sought medical attention for this condition. (22 RR 64). Mr. Masterson received medical attention when he went to live with Officer Cherry, but the solution was a patch over his eye, which schoolchildren teased him for. (22 RR 64-65). When Mr. Masterson was about thirteen or fourteen years old, he had surgery to correct the eye, but he is legally blind in the left eye. (22 RR 65).

Then, in a hearing outside the presence of the jury, the State objected to the Defense's expert witness, Professor Dennis Longmire, on future dangerousness. (22 RR 70-71). But after Mr. Longmire testified that he thought that Mr. Masterson had a "high probability" of future dangerousness, the State withdrew its objection, and the Defense declined to call the witness. (22 RR 74-75).

Mr. Masterson was then questioned about his decision to testify. (22 RR 76-77). Mr. Loper and Mr. Duer told him that it would not be a good idea to testify, but he wanted to do so anyway. (22 RR 77).

In his punishment testimony, Mr. Masterson denied or explained most of the State's punishment evidence. He admitted to throwing a bottle near Cheryl Shook, but he said that he did not intend to hit her. (22 RR 78-79).

During the incident in the Harris County Jail, Mr. Masterson was involved in the fight after the other inmate hit Mr. Masterson first and Mr. Masterson was forced to defend himself. (22 RR 79). In response to the incident with Deputy Drew, Mr. Masterson stated that he had set the tray on the floor and had not thrown the tray on the floor as Deputy Drew testified. (22 RR 80).

Mr. Masterson stated that Deedra Foster's testimony was not entirely truthful. (22 RR 82). She never pushed him out of the window but merely pulled the window down. (22 RR 83). As Mr. Masterson proceeded to walk toward the back door in the kitchen that night, Ms. Foster stood there snickering. (22 RR 83). On a separate occasion, Ms. Foster struck Mr. Masterson in the face in public, and Mr. Masterson did nothing. (22 RR 83).

Mr. Masterson lost hope and turned on himself, saying he often "got [his] ass whooped because [he] deserved it a lot of times" even though he admitted he "got whooped because [he] didn't deserve it." (22 RR 84). Mr. Masterson knew that he would have to stand up for himself and defend himself in prison against anyone hurting him and for that reason said he would be considered a future danger to others when he fought back. (22 RR 98-99). Mr. Masterson did not believe he would go very long in prison without the need to defend himself from anyone who tried to hurt him. (22 RR 99). The jury never heard the underlying fear, severe mental illness, and neuropsychological bases for Mr. Masterson's suicidal behavior on the stand.

After his testimony, the defense rested. (22 RR 100).

D. Subsequent History of Richard Masterson's Case

a. Richard Masterson's state-habeas lawyer performed below any acceptable professional level, as he repeatedly does.

The *Guidelines and Standards for Texas Capital Counsel* set forth the professional norms that post-conviction habeas counsel must meet, and Mr. Masterson's state-habeas lawyer, J. Sidney Crowley, has repeatedly failed to meet these standards. As with so many other clients, he failed Mr. Masterson because he does not adhere to even the basic professional standards for post-conviction habeas counsel. In 1995, the Texas Legislature enacted the Habeas Corpus Reform Act of 1995, which provided for appointment of counsel to represent all those convicted of capital murder and sentenced to death in their habeas petitions. *See Ex Parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). Then Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which granted federal courts authority to grant habeas relief if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1) (April 24, 1996). Under the Texas Act of 1995, state appellate counsel must immediately request the appellate record from the convicting court clerk under Texas Rules of Appellate Procedure 34.5 and 34.6. The professional norm for state-habeas lawyers is to investigate the factual and legal grounds for filing an application for a writ of habeas corpus and to timely apply in the convicting court. *See* Tex. Code Crim. P. art. 11.071, § 3(a).

In Mr. Masterson's case, Mr. Crowley failed to meet the professional norms for state-habeas counsel. He did not even request the complete record for review. Moreover, he did not timely file Mr. Masterson's application for a writ of habeas corpus, and the meager nineteen-page, thinly supported application failed to meet professional standards for writs of habeas

corpus because "the highly technical law applicable to habeas litigation dictates [that the writs] be lengthy." *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals*, The Texas Defender Service, 2002, *available at* http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf.

As discussed in more detail below, Mr. Crowley's negligent representation left significant evidence that Mr. Masterson is innocent of capital murder and of the death penalty undiscovered, causing compelling post-conviction claims to go unadjudicated in both the state and federal habeas courts.

i. The State of Texas appointed an incompetent capital defense attorney, J. Sidney Crowley, who has been found ineffective for similar poor performances and who has a disciplinary history with the State Bar of Texas for neglecting his clients.

Mr. Crowley neglects his duties to the court and his clients and has a troubling history of procrastination that is not unique to Mr. Masterson's case. On May 5, 2005, Mr. Crowley was appointed as lead counsel to represent Francisco Castellano, who was indicted for capital murder. Mr. Crowley neglected his duty when, on December 15, 2005, the 130th Judicial District Court of Matagorda County, Texas found that *prior* to trial, Mr. Crowley provided ineffective assistance of counsel to Mr. Castellano. *State v. Francisco Castellano*, Trial Cause No. 05-138, 130th Judicial Dist. Court of Matagorda County, Texas. For nearly seven months after his appointment, Mr. Crowley did not file a single motion. Mr. Crowley did not seek funds for investigation, mitigation, or experts. Mr. Crowley visited Mr. Castellano only once in seven months. Mr. Crowley did not examine the evidence nor did anyone else on his defense team. Mr. Crowley did not even ask Mr. Castellano for records releases to do so. And Mr. Crowley interviewed no state witnesses.

Yet on November 23, 2005, Mr. Crowley represented to the court that he would be prepared to proceed to trial on March 6, 2006. The court ordered Mr. Crowley to appear on December 15, 2005, to demonstrate that Mr. Castellano's case would be ready for trial or to show cause why he should not be found ineffective. That same day, December 15, 2005, Mr. Crowley refused to join his second chair's, Tommy James Stickler, motion to continue, in which Mr. Stickler concluded that the defense could not be prepared to effectively represent Mr. Castellano in a capital trial.

Finally, after an *ex parte* proceeding with Mr. Stickler and Mr. Crowley on December 15, 2005, the court found that, "as a matter of Federal constitutional law," Mr. Crowley provided ineffective assistance of counsel to Mr. Castellano. *Id.* at 10-16. The court immediately removed Mr. Crowley as first chair counsel and found that he exhibited serious contempt for the court and for the legal system. Because Mr. Crowley, as the court ruled from the bench, neglected his obligations to a "defendant charged with capital murder and who [stood] trial with his life at stake," the court, in the administration of justice, continued Mr. Castellano's trial. *Id.* at 10-13. And notably, after new counsel reached a plea agreement with the State in November 2007, the State waived the death penalty for Mr. Castellano.

In addition to Mr. Crowley's ineffective assistance in Castellano, the Commission for Lawyer Discipline of the State Bar of Texas sued him for mishandling George S. Guo's appeal in *State of Texas v. George S. Guo*, Trial Cause No. 0032362, 240th Judicial District Court of Fort Bend County, Texas. (Petitioner's Original Disciplinary Petition *Commissioner for Lawyer Discipline v. James S. Crowley*, Cause No. 05-CV-140898, 240th Judicial District Court of Fort Bend County, Texas). Mr. Crowley was appointed to handle Mr. Guo's appeal on September 5, 2003, and the appellant's brief was due on October 6, 2003. *Id.* at 2. Mr. Crowley failed to timely

file the brief because he "was occupied with several other matters." *Id.* He further failed to move to extend time to file the brief before October 21, 2003, and he did not notify Mr. Guo of the status of his appeal or that he missed the filing deadline. *Id.* at 2-3. Mr. Crowley did not file a Motion to Extend Time until March 12, 2004, after receiving two letters from Mr. Guo demanding that he file a brief. *Id.* The 13th Court of Appeals extended the time to file until April 8, 2004, but still Mr. Crowley did not file the appellant's brief until April 29, 2004—six months overdue. *See id.*

On May 26, 2006, the 240th Judicial District Court of Fort Bend County, Texas issued a public reprimand finding that Mr. Crowley had committed professional misconduct in his representation of Mr. Guo. (Agreed Judgment of Public Reprimand, Cause No. 05-CV-140898, 240th Judicial District Court of Fort Bend County, Texas). The court found that Mr. Crowley had violated Rules 1.01(b)(1) (neglecting his client), 1.01(b)(2) (frequently failing to fulfill obligations to a client), and 1.03(a) (failing to keep a client informed about the status of the case) of the Texas Disciplinary Rules of Professional Conduct. *Id.* at 2.

Moreover, Mr. Crowley's lack of diligence is widely known among Texas capital counsel because he has been named as one of the worst capital defense attorneys in Texas. *See Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals*, The Texas Defender Service, 2002. In *Ex Parte Nenno*, Mr. Crowley filed a state-habeas petition consisting of only eight pages in which he made only two record-based claims. *See Ex Parte Nenno*, Writ No. 50, 598 (Tex. Crim. App. Nov. 14, 2001). In *Ex Parte Rousseau*, Mr. Crowley swore that when the court appointed him, he "did not know how to litigate a capital habeas corpus case and was not aware of the need to investigate facts outside of the trial record." Affidavit of CCA Appointed State Habeas Counsel, *Rousseau v.*

Johnson, No. 00-CV-2588 (S.D. Tex. July 25, 2000). Mr. Crowley also showed his gross lack of diligence when he filed a nine-page petition in *Ex Parte Villareal*, a fourteen-page writ with no exhibits in *Ex Parte Arthur*, and a nine-page writ in *Ex Parte Smith*. *See Ex Parte Villareal*, Writ No. 50, 599 (Tex. Crim. App. Oct. 31, 2001); *Ex Parte Arthur*, Application for Writ of Habeas Corpus, No. 763189 (Tex. Dist. Ct. 180th Jud. Dist. Nov. 17, 1999); *Ex Parte Smith*, Writ No. 48, 130 (Tex. Crim. App. Jan. 17, 2001). Mr. Crowley continually "conceded his inexperience and unawareness of the basic requirements of competent representation." *Lethal Indifference* at 20. But this incompetence is no excuse for his dismal performances in each case, nor does it justify his continued lack of due diligence in recent cases after over thirty years of experience. And it certainly is no excuse for his continued decisions to accept capital appointments when he clearly is not capable of handling them competently.

Similarly, Mr. Crowley exhibited his lack of diligence and ignored his duty to provide effective counsel in his representation of another capital defendant, Derrick Dewayne Charles. *See Charles v. Quarterman*, Amended Petition for Writ of Habeas Corpus, No. 09-CV-00592 (S.D. Tex. Sept. 22, 2009). There, Mr. Crowley and co-counsel, Connie Williams, failed to present available mitigation evidence during the punishment phase of Charles' trial. *See id.* at 85. The state took five days to present its case for the death penalty, but Mr. Crowley and Mr. Williams presented only a two-hour defense. *Id.* at 85-86. Most troubling, Mr. Crowley and Mr. Williams included no mitigating evidence despite Charles' extensive history littered with mental illness, violence, poverty, and drug abuse. *Id.* at 86. The jury had no opportunity to hear any of the voluminous mitigating evidence because Mr. Crowley and Mr. Williams conducted their defense in an unprecedented *in camera* hearing with only the court and the court reporter. *Id.* at 80, 86. As a result, the jury had no choice but to sentence Charles to die, which it did.

ii. J. Sidney Crowley provided ineffective assistance of counsel to Richard Masterson when he filed a nineteen-page writ of habeas corpus in which he presented only two allegations challenging the validity of Mr. Masterson's conviction and resulting sentence.

Mr. Masterson has similarly been prejudiced by Mr. Crowley's gross lack of diligence, which, as evidenced above, was all but inevitable because Mr. Crowley is one of Texas' worst capital defense attorneys; Mr. Crowley does not take his duty to the court or to his clients seriously. On February 26, 2004, thirty-six days after the original deadline, Mr. Crowley filed Mr. Masterson's initial state application for post-conviction writ of habeas corpus. *See Ex Parte Masterson*, Application for Post-Conviction Writ of Habeas Corpus, No. 867834A (Tex. Dist. Ct. 176th Jud. Dist. Feb. 26, 2004). Despite knowing the application was over one month late, Mr. Crowley did not file a Motion to Extend the Filing Deadline until June 28, 2004—four months after the habeas application was originally filed. *See Ex Parte Masterson*, Motion to Extend Filing Deadline for 11.071 Writ, No. 867834A (Tex. Dist. Ct. 176th Jud. Dist. June 28, 2004).

In his state-habeas application, Mr. Crowley raised only two allegations of error: (1) Mr. Masterson was denied his due process right to a jury trial when a juror slept through the medical examiner's testimony, and (2) Mr. Masterson was deprived of the right to effective assistance of counsel at the guilt-innocence and punishment phases of trial. *See Ex Parte Masterson*, Application for Post-Conviction Writ of Habeas Corpus at 11-12. Mr. Crowley simply drew a conclusion for the first allegation of error and did not explain to the court how a juror sleeping through trial testimony prejudiced Mr. Masterson. Furthermore, Mr. Crowley did not explain that the proper method to preserve error regarding jury misconduct was to move for a new trial, which Mr. Masterson's trial counsel should have done. *See* Tex. R. App. P. 21.2, 21.3(g); *Trout*

v. State, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985); *James v. State*, No. 14-98-01083-CR, 2000 WL 123771, at *1 (Tex. App. Feb. 3, 2000).

While Mr. Crowley supported the second allegation of error with more analysis and support, he still failed to corroborate Mr. Masterson's mitigating evidence with additional evidence and witness testimony that was available when the original state-habeas application was filed. Even more troubling, when Mr. Crowley was questioned about his investigation into Mr. Masterson's history and review of the trial records to use for the state-habeas application, he stated that he only reviewed the trial records once because the records were so voluminous. Ex. 5 (Dore Affidavit ¶4). Mr. Crowley also did not review Mr. Masterson's juvenile records or have copies of the trial records to reference when drafting the habeas application. *See id.* Thus, with a thinly supported initial habeas application in which Mr. Crowley made conclusory statements with little-to-no support, the CCA had no choice but to issue a *per curiam* order with no explanation affirming the lower court's denial of Mr. Masterson's state-habeas application. *See Ex Parte Masterson*, Order, Writ No. 59, 481-01 (Tex. Crim. App. Aug. 20, 2008).

JURISDICTION

I. Mr. Masterson satisfies the jurisdictional requirements of 28 U.S.C. § 2254.

To challenge a state conviction in federal habeas proceedings, petitioners must show that they are (1) in custody (2) as the result of a state conviction and that (3) their detention violates federal law, treaties, or constitutional principles. 28 U.S.C. § 2254(a).

Here, Mr. Masterson satisfies all these jurisdictional requirements. First, the Texas Department of Criminal Justice is incarcerating Mr. Masterson in its Allan B. Polunsky Unit, located at 3872 FM 350 South, Livingston, Texas 77351. He is inmate number 999414. Second, Mr. Masterson is incarcerated as a result of the state conviction he is challenging in this Petition. The case number is 867834 from the 176th Judicial District Court of Harris County, Texas. Mr. Masterson was convicted of capital murder in that case and sentenced to death. He challenges the guilty verdict and death sentence here. And third, Mr. Masterson's conviction, continued detention, and imminent execution violate the United States Constitution and laws as detailed below.

CLAIMS FOR RELIEF

I. The State violated, and continues to violate, Mr. Masterson's Fifth, Sixth, Eighth and Fourteenth Amendment due-process rights by concealing evidence that its expert witness and attending medical examiner, Paul Shrode, was unqualified to perform the Mr. Honeycutt's autopsy, botched Mr. Honeycutt's autopsy, and gave false testimony.

The State affirmatively suppressed evidence that its most critical guilt phase witness, Paul Shrode, falsified his credentials and gave false testimony in at least two other criminal trials. The State continues to suppress evidence related to Mr. Shrode's firing from the El Paso County Medical Examiner's Office based on his fraud. Indeed, it never disclosed Shrode's fraud or its knowledge of the circumstances surrounding his firing to Mr. Masterson. The State furthermore elicited false testimony from Mr. Shrode at the guilt phase of Mr. Masterson's trial.

The State's misconduct violated Mr. Masterson's constitutional rights, entitling him to guilt-phase and sentencing-phase relief.

FACTUAL BACKGROUND

A. Paul Shrode, the State's most crucial guilt phase witness, gave false testimony based on a critically flawed autopsy examination.

Mr. Shrode committed fraud to get his Assistant Medical Examiner job. He had to falsify his qualifications because he is simply not competent to conduct an autopsy. Mr. Shrode grievously mishandled Mr. Honeycutt's autopsy and gave scientifically erroneous testimony in Mr. Masterson's case. He mishandled other autopsies as well.

Mr. Shrode's testimony was the only expert evidence that Mr. Honeycutt's cause of death was homicide. As every pathologist to look at the autopsy report since Mr. Masterson's conviction and sentence has pointed out, Mr. Shrode's opinion was incorrect because he did not understand elementary medical concepts. Instead, he simply conformed his opinion to the prosecution's theory of the case and testified falsely it was based on his autopsy findings.

Mr. Shrode opined that Mr. Honeycutt's death was a homicide and that the cause of death was external neck compression, which is medical jargon for strangulation. He noted that Mr. Honeycutt had a critical artery with more than 90% blockage, but discounted that as a contributor to the death, testifying that his opinion, based solely on his autopsy findings, was that Mr. Honeycutt was intentionally strangled to death. In 2015, Mr. Masterson's qualified medical expert reviewed Mr. Shrode's work and exposed his errors. Ex. 15. In addition, Mr. Masterson's other medical expert, Dr. Paul B. Radelat, opined that Mr. Honeycutt's autopsy results were consistent with Mr. Masterson's trial testimony. Ex. 14.

Dr. Christena Roberts directly contradicts Mr. Shrode's findings. As an initial matter, she notes that Mr. Shrode did not properly review his work and that he did not follow all necessary protocols to allow his work to be reviewed. Perhaps this occurred because Mr. Shrode had a significant backlog due to his lack of qualification. Perhaps it occurred because he just did not know how to competently prepare autopsies. Nevertheless, it is just another example of Mr. Shrode's poor work product. Dr. Roberts detailed Mr. Shrode's errors, revealing how an innocent man was convicted.

First, Dr. Roberts noted that the decedent was found with his face lower than the rest of his body. She correctly identified that the petechial hemorrhages on the face are often caused by increased pressure on blood vessels caused by gravity *after death*. Dr. Roberts noted that she had personally seen cases with much worse hemorrhaging just from the gravity of a face being lower than the rest of the body. Therefore, Mr. Shrode testified falsely when he asserted the petechial hemorrhages were indicative of strangulation.

Second, Dr. Roberts exposed Mr. Shrode's false testimony regarding defensive wounds on the decedent. She reviewed the autopsy photos, finding one that showed the left hand. Mr.

Shrode swore that he noted defensive wounds on this hand. Dr. Roberts correctly noted that the hand had no defensive wounds. And even if the decedent had bruises that were undetectable in the photos, scientific evidence cannot date them without histological sections, which Mr. Shrode did not perform.

Third, Dr. Roberts exposed Mr. Shrode's incorrect assumption that the decedent had suffered blunt force trauma. Mr. Shrode emphasized an abrasion over the decedent's right eye and three abrasions on his upper right buttock. But these superficial marks have no medical or forensic significance despite Mr. Shrode's testimony. The mark above Mr. Honeycutt's eye is consistent with a common "rug burn" easily explained by the face resting on the floor. And the linear, superficial scratches on Mr. Honeycutt's buttocks are consistent with consensual sex as Mr. Masterson described.

Most importantly, Dr. Roberts explained why Mr. Shrode's expert opinion that Mr. Honeycutt died from external neck compression was incorrect. She started by noting that "there is no documentation in the autopsy report of evidence of external neck compression." She destroyed the basis for Mr. Shrode's erroneous findings:

> "[H]emorrhagic sclera" (white part of the eye) and congestion of the conjunctivae lining the eye (bulbar) and the eyelids (palpebral). There is no documentation of petechial hemorrhages of the conjunctivae. There is no description of distribution or size of the petechiae. There is no description of confluence of petechiae (larger pools). The only place this is listed is under "pathologic findings" simply as a diagnosis of "bilateral bulbar and palpebral petechial hemorrhages".
>
> It should be noted that petechial hemorrhages when found with other findings in the neck are "supportive" of a diagnosis of strangulation and are not "diagnostic" of strangulation. Petechial hemorrhages are caused by increased pressure in the vessels in the eyes which results in rupture of the tiny capillaries. This can occur in various types of manual strangulation (see discussion below) but can also be seen in natural disease processes such as fatal heart disease. Petechial hemorrhages can be found in positional asphyxia (upside down position) secondary to pooling of the blood, increased pressure and rupture of the vessels.

> Hemorrhages in the eyes can also be seen when the head is in a lower position than the body after death (or when just face down) and the blood pools in the facial tissues by gravity. The vessels eventually rupture causing petechial hemorrhages that may become large. This is called dependent lividity as would be expected with the body position in this case. It is quite easy to find textbook references in Forensic literature showing extensive facial, periorbital and conjunctival hemorrhages in people who die of heart disease and are found in the prone position (face down).
>
> *As noted above, review of the photographs from the court records clearly show congestion that is consistent with dependent lividity. There are a few scattered large petechial hemorrhages that could be from the extreme dependent position of the body or could be from antemortem increased pressure. There is no scientific reliable way to separate the two as petechial hemorrhages are a non-specific finding that only indicates increased pressure with rupture of the tiny vessels and pooling. In addition, there were early decompositional changes of the face and some of the red discoloration in the eyes would be from decomposition. These changes also can't be reliably separated from dependent lividity.*

Ex. 15 (emphasis in original). And to drive home Mr. Shrode's egregious errors, Dr. Roberts noted that even Mr. Shrode admitted that Mr. Honeycutt's body showed no physical signs of strangulation. The body had no external bruising on the neck, and it had no internal evidence of trauma. The lack of injuries on the inside or outside of Mr. Honeycutt's neck should have ruled out strangulation, but Mr. Shrode was either unqualified to know or purposefully lied to fit the prosecution's theory. Specifically, Dr. Roberts explained that strangulation leaves discoloration of the soft tissues inside the neck, which is not present here. Without this discoloration, there could be no hemorrhaging in the anterior neck structures. So Mr. Honeycutt was not strangled to death, as Mr. Shrode "expertly" opined. Furthermore, other normally present physical signs of strangulation were missing. The sensitive hyoid bone and thyroid cartilage were intact and had no fractures as qualified medical professionals would normally expect to see in strangulation deaths. There was not even blood around the structures. Critically, the autopsy did not note any petechiae of the larynx or trachea. And finally, Mr. Honeycutt's neck had no signs of defensive

wounds or a struggle as normally seen in manual-strangulation cases. Dr. Roberts would expect to see these scratches in a case of manual strangulation.

Dr. Robert specifically rebutted Mr. Shrode's testimony that Mr. Honeycutt must have died during manual strangulation, and once against highlighted Mr. Shrode's clinically unacceptable practices:

> Dr. Shrode testified that the victim could not have survived the external neck compression. Victims often lose consciousness from manual strangulation and suffer anoxic brain injury and die at a later time. He states during his testimony that this was not present at autopsy as evidenced by "no cerebral edema." The autopsy report has a blank space where the brain weight should have been documented so it is unknown is [*sic*] the brain was swollen and heavier than it should have been. The standard of Forensic Pathology would be to submit sections of brain for microscopic examination and look for ischemic changes. As no microscopic sections were taken of the brain Dr. Shrode or another pathologist can't rule out the presence of schemic changes. As no microscopic sections were taken of the brain and no brain weight was recorded, no independent evaluation can be made.

Ex. 15. Mr. Shrode's disregard for this important procedure ensures that no other professional can determine if the heart muscle had signs of being ischemic, medical jargon for a heart attack. After reviewing all available evidence, Dr. Roberts opined that Mr. Honeycutt died of a heart attack – not strangulation. This expert opinion supports Mr. Masterson's testimony that Mr. Honeycutt died accidentally after the two engaged in sexual asphyxiation.

Dr. Roberts' review of the available evidence showed the most critical problem with the State's case: "there is no evidence of this neck compression at autopsy but only relayed by the defendant." She gave her qualified, expert opinion:

> There is no independent scientific evidence of external neck compression or any other type of manual strangulation in the autopsy of Darrin Honeycutt. There is no external bruising of the neck, hemorrhage in the strap muscles or soft tissues of the neck or fractures of neck structures. The "petechial hemorrhages" that were listed as a diagnosis in the autopsy report and testified to as evidence of external neck compression are non-specific. The hemorrhages in the eyes are simply from increased pressure and rupture of tiny capillaries. This could have occurred from a fatal cardiac event, antemortem compression of the neck or dependent lividity from

> blood pooling after death. There is no accurate scientific method to distinguish between them. In addition, there were early decompositional changes of the face with some degree of red discoloration further complicating interpretation.
>
> Even in the event that one could separate out antemortem petechial hemorrhages they are "supportive" of but not "diagnostic" of a manual compression event. The pathologist appears to have relied on the "confession" and not any independent scientific observation.
>
> In his trial Richard Masterson testified that during a sexual act Darrin Honeycutt asked him to perform erotic asphyxiation. During this act his body weight was pressing on the torso of the decedent and when they both fell to the floor they were in a dependent position. The decreased oxygenation could have created stress on the heart. Darrin Honeycutt had severe coronary artery disease which easily could have triggered an ischemic event with resultant fatal ventricular arrhythmia and death following the increased stress on the heart.
>
> The pathologist in this case inaccurately ruled out that Darrin Honeycutt died from an acute ischemic event of the heart followed by a lethal arrhythmia based on the absence of hemorrhaging in the heart muscle. As noted above there would be no visual findings in the heart tissue if one died immediately from that event.

Ex. 15.

In a nutshell, Mr. Shrode's lack of qualifications and professionalism led him to botch Mr. Honeycutt's autopsy. He missed obvious evidence that Mr. Honeycutt died of a heart attack brought on accidentally through a combination of consensual sex with Mr. Masterson involving sexual asphyxiation and pre-existing, severe heart disease. Mr. Shrode did not understand elementary medical principles of cardiology. His fundamental lack of knowledge led him to simply adopt the State's theory instead of relying on medical science. Instead of acknowledging his lack of qualifications, and admitting that he could not give a qualified expert opinion on the cause of death questions asked of him on the witness stand, Mr. Shrode simply provided an erroneous opinion that bolstered the State's case and rebutted the defense's case. He had no scientific basis for his opinion.

B. The State suppressed and continues to suppress evidence that Paul Shrode falsified his credentials, was unqualified to give an expert opinion on Mr. Honeycutt's cause of death, and had given material, false testimony in other capital murder trials.

Mr. Shrode is a prolific, habitual liar who does not care about oaths or the penalties of perjury. His courtroom lies and incorrect conclusions started before he moved to Texas. Before Texas, Mr. Shrode was a medical examiner in Ohio. There, he botched another autopsy in a capital case with eerily similar facts. In 1997 in *Ohio v. Nields*, Mr. Shrode provided the critical testimony that raised a murder to a capital murder. For Mr. Nields' clemency application filed in 2010, a new, qualified doctor, Robert Pfalzgraf, reviewed Mr. Shrode's work and conclusions. The new doctor found serious flaws in Mr. Shrode's work. Specifically, Mr. Shrode gave false testimony in five crucial aspects:

1. Mr. Shrode opined that injuries on the decedent's head were inflicted between fifteen minutes and six hours before death. This opinion allowed the State to argue that Mr. Nields viciously attacked the decedent with premeditation, fitting its theory for capital murder. A qualified review of Mr. Shrode's medical conclusion, however, showed that it was inaccurate. Bruising can only be estimated by the healing process. The decedent had no signs of healing, so there was no evidence that the injuries were inflicted any period of time before death.
2. In another effort to age injuries on the decedent's head, Mr. Shrode relied on rigor mortis to date bruising. But Dr. Pfalzgraf corrected this fundamental misunderstanding of medical science. Rigor mortis has no relevance to dating trauma or bruises.
3. Disturbingly similar to his testimony in Mr. Masterson's case, Mr. Shrode also opined that the decedent's injuries indicated that she sustained a concussion and lost consciousness before death. The State's argument based on this evidence was that Mr.

Nields must have intended to kill the victim because she was unconscious before she was strangled to death. Dr. Pfalzgraf rectified Mr. Shrode's erroneous conclusion. Injuries cannot indicate a loss of consciousness; Mr. Shrode had no scientific basis to opine that the decedent lost consciousness before dying from the strangulation.

4. Mr. Shrode testified that the lack of DNA evidence under the decedent's fingernails indicates that she lost consciousness before dying from strangulation. But Dr. Pfalzgraf fixed this incorrect testimony. He informed the parole board that it is actually rare for fingernails to collect evidence during a crime.
5. Finally, Mr. Shrode used the presence of petechial to scientifically determine the time of death. And Dr. Pfalzgraf corrected this fundamental medical error. Petechial is not relevant to a time-of-death determination.

Ex. 14. Mr. Shrode's work was the basis for the State's theory that Mr. Nields killed the decedent with premeditation and prolonged viciousness. The State of Ohio also relied on Mr. Shrode's false testimony to argue to the jury that Mr. Nields continued to choke the decedent after she lost consciousness to ensure that she was dead, just as the State of Texas did in Mr. Masterson's case. Mr. Nields received clemency on the basis of Mr. Shrode's flawed scientific testimony.

And Mr. Shrode's lies and biased, shoddy work did not end when he moved to Texas. His first job in Texas was with the Harris County Medical Examiner's Office. He applied to that office on May 27, 1997. In his application, Mr. Shrode lied about his qualifications. Ex. 6, 9, 12. He claimed to have a paralegal degree from Southwest Texas State University. But he did not have a paralegal degree. Mr. Shrode only attended the University for one semester in 1979 and

was enrolled in political science courses. Ex. 12. He did not earn any degree from Southwest Texas State University.

Mr. Shrode's lies still continued afterward, becoming more brazen and distinguished. On his application for employment with the El Paso County Medical Examiner's Office, Mr. Shrode improved his degree significantly, declaring that he had obtained a graduate law degree from Southwest Texas State University. Ex. 12. And Mr. Shrode had no qualms about taking a sworn oath in a court of law recounting his lies. In 2007, he testified that he had earned a "degree in law from the graduate school of political science" at Southwest Texas State University. He swore that he attended one year of law school to earn the degree but that the graduate political science program conferred his degree because the law school did not become accredited. Ex. 9 at 217. Even after being challenged about this absurdity, he unequivocally stated that he had "a law degree from the graduate school of political science." *Id.* at 218. He then incredibly falsely asserted that he was a member of the State Bar of Texas from 1979 to 1983. *Id.* at 219-220.

Mr. Shrode lied under oath and lied on his employment applications. He attended Southwest Texas State University for one semester in 1979. He took only political science courses. He obviously did not earn a degree – not a paralegal degree, not a political-science degree, not a law degree, and certainly not a graduate law degree. Southwest Texas State University does not confer those degrees for one semester of coursework.

Eventually, Mr. Shrode's lack of qualification and lies caught up with him. After Mr. Masterson's trial, the Harris County Medical Examiner's Office reprimanded Mr. Shrode for his "defective and improper work." Ex. 8. Specifically, Mr. Shrode incorrectly classified a death as a homicide when it was a drug overdose. But Mr. Shrode's work did not improve afterward. In 2003, the Harris County Medical Examiner's Office again reprimanded Mr. Shrode. Ex. 7. In

that reprimand, the Office noted that Mr. Shrode had an inordinately "large number of pending cases (103 cases) [and] uncompleted (classified and pending) autopsy reports (178 cases currently in the medical records area)." The Office did not assign new cases to Mr. Shrode for three days for him to "diminish these backlogs." Mr. Shrode was also required to create a log of his work during those days for his superiors to review. *Id.* Then, in 2007, Mr. Shrode was partially exposed as a fraud during a jury trial regarding Child Protective Services and parents of a protected child. There, attorneys revealed that Mr. Shrode had lied on his employment applications, as discussed above. Ex. 9.

Mr. Shrode's charade culminated in 2010, when the Ohio governor commuted Mr. Nields' death sentence to a life sentence based on Mr. Shrode's incorrect and biased work in the case. Ex. 11. That same year, an El Paso County judge publicly declared that he had "lost confidence in Dr. Shrode." He predicted more revelations: "As time goes on, I believe a lot more is going to come to light regarding him." Ex. 12. After much pressure from politicians and others, the El Paso Chief Medical Examiner's Office finally fired Mr. Shrode. *See* Ex. 13.

Mr. Masterson remains ignorant of many of the facts related to Mr. Shrode's fraud on the States of Texas and Ohio, instances of his botched autopsy reports and findings, instances of his false testimony, and the circumstances surrounding his censure by the courts and the State of Texas. The State never notified Mr. Masterson when it learned it had presented patently false expert testimony at his trial, by a patently unreliable expert. It has not turned over any discovery for Mr. Masterson to rely upon for exculpatory and impeachment purposes. Instead, the State kept all information regarding Mr. Shrode's fraud hidden from Mr. Masterson, despite that Mr. Masterson cannot independently access much of this information.

Instead of informing Mr. Masterson that he was convicted on the basis of fraudulent expert testimony, the State attempted to preemptively avoid any legal challenges based on Mr. Shrode's dishonesty by arguing in its Answer and Motion for Summary Judgment in the initial federal proceedings that "Dr. Shrode opined that the crime was intentional rather than accidental because Honeycutt would have survived autoerotic asphyxiation. Dr. Shrode's conclusion was premised more on logic than medical opinion[]." Respondent Thaler's Answer and Motion for Summary Judgment with Brief in Support at p. 18, *Masterson v. Thaler*, Case No. 4:09-cv-02731, ECF No. 5 (Oct. 12, 2010). The State's attempt to avoid this issue by disclaiming Mr. Shrode's expert status at Mr. Masterson's trial should not prevail. Dr. Shrode provided the jury with an expert pathological opinion, under oath, that Mr. Masterson intentionally killed Mr. Honeycutt based on a botched autopsy and false, scientifically unsupportable conclusions. The State is now seeking to execute Mr. Masterson without any court of law reviewing the validity of his conviction and sentence in light of Mr. Shrode's fraud on the court. But Mr. Masterson's execution under these circumstances would work a manifest injustice against Mr. Masterson and the public.

Mr. Masterson seeks discovery from the State to fully develop the claims he presents below.

LEGAL CLAIMS FOR RELIEF

C. The State's suppression of material evidence that was favorable to Mr. Masterson violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and to be free from cruel and unusual punishment.

The State must disclose exculpatory evidence to criminal defendants. U.S. Const. amend. XIV; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This constitutional obligation exists regardless of whether the defendant requests the information. *United States v. Bagley*, 473 U.S. 667, 682

(1985) (plurality opinion). Exculpatory evidence is evidence favorable to the defendant that is material to either guilt or punishment. *Id.* And *Brady* evidence includes evidence that can be used by the defense to impeach State witnesses. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 677 (1985) (rejecting any distinction between impeachment and exculpatory evidence for *Brady* purposes); *Giglio v. U.S.*, 405 U.S. 150, 154 (1972). Under *Brady* and its progeny, a petitioner seeking relief must demonstrate: (1) the prosecution suppressed favorable evidence; and (2) the evidence was material to either the guilt or punishment. *Brady*, 272 U.S. at 373. *See Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Bagley*, 473 U.S. at 683; *Blackmon v. Scott*, 22 F.3d 560, 564 (5th Cir. 1994), *cert. denied*, 513 U.S. 1060 (1994); *Ex parte Adams*, 768 S.W.2d at 290.

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 434; *Bagley*, 473 U.S. at 682. The *Kyles* decision clarified four significant aspects of a materiality analysis under *Brady*. First, to demonstrate materiality, Mr. Marshall is not required to demonstrate by a preponderance of the evidence that the suppressed evidence, if known to the defense, would have resulted in an acquittal or a life sentence. *Kyles*, 514 U.S. at 434. The inquiry is whether the suppressed evidence undermines confidence in the jury's decision. *Id*.

Second, a materiality analysis "is not a sufficiency of the evidence test." *Id*. The Supreme Court clearly stated, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would have been enough left to convict [or return a sentence of death]." *Id*. at 434-35. One demonstrates a *Brady* violation by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435 (footnote omitted); *see also*

Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witnesses' testimony).

Third, harmless error analysis is not applicable to *Brady* violations. *Kyles*, 514 U.S. at 435. "[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review." *Id*.

Finally, materiality must be assessed "in terms of the suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436. The Supreme court has found *Brady* violations where the State failed to disclose impeachment evidence that could have been used to impugn the credibility of the State's "key witness," *Giglio*, 405 U.S. at 154-44, or that could have "significantly weakened" key eyewitness testimony. *Kyles*, 514 U.S. at 441, 453. *See also Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (holding that a *Brady* violation occurred because the State suppressed impeachment evidence that two "essential" prosecution witnesses had been coached by police and prosecutors before they testified); *Graves v. Dretke*, 442 F.3d 334, 344 (5th Cir. 2006).

a. The State suppressed favorable exculpatory and impeachment evidence by failing to disclose Paul Shrode's fraud, his lack of qualifications to testify as an expert pathologist, and other instances of him giving false, misleading and scientifically unsound testimony.

Information is favorable for *Brady* purposes if it tends to negate guilt or impeaches a State witness. *Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. 676-77.

Here, the State suppressed favorable information that its critical expert guilt-phase witness, Paul Shrode, knowingly falsified his credentials to qualify for employment to conduct autopsies and gave scientifically unsupported testimony in numerous cases, including Mr. Masterson's. This information is clearly favorable for two reasons. First, it tends to negate Mr. Masterson's guilt. Mr. Shrode was unqualified to perform Mr. Honeycutt's autopsy. His lack of

qualification caused him to commit serious and fundamental medical errors during that autopsy that falsely implicated Mr. Masterson as a murderer. Furthermore, Mr. Shrode was not qualified to testify as an expert witness about Mr. Honeycutt's autopsy. Because he performed the autopsy, he was required to testify about it. U.S. Const. amend. VI; *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004). Without his testimony, the State would have had no expert evidence related to Mr. Honeycutt's cause of death.

Second, the information obviously would have impeached Mr. Shrode. A witness's dishonesty and bias are always permissible areas of impeaching cross-examination. U.S. Const. amend. VI; *see also Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Davis v. Alabama*, 415 U.S. 308 (1974). Mr. Shrode's fraud would have attacked both areas. It demonstrates that Mr. Shrode is a habitual liar who has no regard for sworn oaths or the penalties of perjury. But it also would have exposed Mr. Shrode's bias toward the State, because his unscientific testimony boiled down to a reiteration of the State's arguments. He repeatedly lied under oath and, therefore, was exposed to false-statement and perjury charges. So he had every reason to keep the State happy, just as any other person who wants to avoid or minimize potential criminal charges. *See Burbank v. Cain*, 535 F.3d 350, 357-59 (5th Cir. 2008). Moreover, Mr. Masterson could have used the information to impeach Mr. Shrode's quality of work because he was not qualified to conduct the autopsy, which is at the center of Mr. Masterson's wrongful conviction and innocence.

Under any of these theories, Mr. Shrode's fraud is favorable to Mr. Masterson under *Brady* and its progeny.

The State suppresses information when it does not disclose it to the defense. It has no duty to disclose exculpatory information that belongs to the defendant, *see, e.g.*, *United States v. Hsu*, 669 F.3d 112, 117 n.2 (2d Cir. 2012), that the defendant already possesses, *see. e.g.*, *Pondexter v. Quarterman*, 537 F.3d 511, 526 (5th Cir. 2008), or that is outside the State's prosecuting and investigating team, *see, e.g.*, *United States v. Reyeros*, 537 F.3d 270, 281-85 (3d Cir. 2008). But the prosecutor has an affirmative duty to investigate, learn, and disclose information known to other government agents. *See Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006); *Kyles*, 514 U.S. at 437. The prosecutor's intent when not disclosing the evidence is irrelevant. *Brady*, 373 U.S. at 87.

The State had constructive knowledge that Mr. Shrode falsified his credentials, was not qualified to perform Mr. Honeycutt's autopsy, had botched and cut corners on Mr. Honeycutt's autopsy, and had provided scientifically unfounded testimony against Mr. Masterson because Mr. Shrode was a member of the prosecutor's team. The State's medical examiner is part of the investigative arm of the prosecution. Tex. R. Crim. P. 49.25 art. 989a. The Texas legislature requires assistant medical examiners to be qualified and to participate in homicide investigations. First, the legislature requires assistants to have the same qualifications as head medical examiners. These qualifications include being a licensed doctor. Additionally, "to the greatest extent possible," the examiners will have "training and experience in pathology, toxicology, histology[,] and other medico-legal sciences." The legislature further requires examiners to "hold inquests" for death investigations. The circumstances under which the legislature requires inquests include when people are killed, die from natural causes, or die from unexplained causes. During the inquest, the examiners can take testimony under oath or take affidavits. Importantly, the examiner must conduct an autopsy to determine the cause of death beyond a reasonable

doubt. After determining that cause, the Texas legislature requires medical examiners to report their findings to the appropriate district attorney. Of course, this mandatory reporting is to allow the State to determine whether to prosecute, just like all other parts of crime investigation. To aid with that potential prosecution, examiners must provide certain information that would normally be required in criminal prosecutions.

The legislature's mandates require assistant medical examiners like Mr. Shrode to be part of the prosecution team. Their roles are similar to policing agencies. Consider a Harris County police detective. After a death, she will direct police officers to search for potential evidence. She will direct evidence technicians to photograph the body, any potential evidence, and any biological matter like blood. The detective will interview the people who found the body. She will interrogate the decedent's family members. Once she forms her opinion of the reason the person died and potential suspects, she will forward the evidence and her opinions to the district attorney. The district attorney will then decide whether to prosecute. This policing is classic investigation. And medical examiners have a nearly identical role. The legislature requires them to collect potential evidence and determine a cause of death. Crucially, Texas requires the medical examiner to provide this evidence and opinion to the district attorney, just like police officers do. In this case, Mr. Shrode testified that the autopsy he performed on Mr. Honeycutt was numbered ML01-307. 18 R.R. 193. He explained that the initials "ML" stood for "medical legal." *Id*. Moreover, when testifying on cross-examination that it was impossible for Mr. Honeycutt's death to be the result of accidental sexual asphyxiation, Mr. Shrode testified, "Well, I don't think so, and we use other things other than, you know, autopsy. It's police investigation – I mean, that's why it's a medical legal case." 18 R.R. 238.

Because Mr. Shrode's knowledge is imputable to the State, the State had a duty to disclose this evidence to Mr. Masterson's trial defense team. Moreover, despite Mr. Shrode's dishonesty, the State could have easily discovered his fraudulent credentials by simply verifying the information on his application for employment. The State had a duty to do so under *Brady*. In addition, Mr. Shrode was first reprimanded by the Harris County Medical Examiner's Office for making the wrong cause of death determination in 2001, before Mr. Masterson's trial. The State had a duty to disclose this information as soon as it became aware of it.

b. The suppressed evidence related to Paul Shrode's fraud, lack of qualifications, and other instances of false testimony, was material exculpatory and impeachment evidence.

Favorable evidence is material if it reasonably could have changed the outcome of the trial or sentence. *See, e.g.*, *Cone*, 556 U.S. at 469-70. Evidence reasonably could have changed the outcome, commonly called a reasonable probability, if the probability is "sufficient to undermine confidence" in the verdict or sentence. *Bagley*, 473 U.S. at 678, 682. When evaluating materiality for *Brady* purposes, the court cannot look at the favorable evidence alone; it must consider the cumulative effect of the evidence in light of the other evidence at trial. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Accordingly, a single piece of suppressed *Brady* evidence can be sufficient to undermine confidence in an outcome. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). To demonstrate that suppressed evidence is sufficient to undermine confidence in a verdict or sentence, a petitioner need not demonstrate that the evidence is sufficient to require a directed verdict or even sufficient to establish innocence by a preponderance of the evidence. It is a lower bar than both those standards. *See Kyles*, 514 U.S. at 434.

In *Kyles*, the petitioner was convicted of capital murder and a jury sentenced him to death. The state's case rested largely on the word of an informant, Joseph Wallace, who supposedly bought the victim's stolen vehicle from Kyles. *Id*. at 424. During Wallace's meeting with an investigating detective, he changed his story multiple times, used multiple false names, and repeatedly expressed concern that he would become a suspect. *Id*. at 424-25. He also said that he wanted a reward for the information and that he did not want to lose the $400.00 he paid for the vehicle. *Id*. at 426. Wallace gave another statement, which he knew was recorded. In that statement, Wallace contradicted his previous statements and embellished details. *Id*. at 426-27. Kyles's defense theory was that Wallace was the actual murderer and framed Kyles to deflect suspicion. *Id*. at 429. After the first trial ended in a deadlocked jury, the prosecutor interviewed Wallace, who changed his story again. *Id*. at 429-30. This time, Wallace inculpated an important defense witness. *Id*. at 430. The Supreme Court held that the State's failure to disclose this information violated Kyles's *Brady* rights because the State's case primarily rested on eyewitness testimony and Wallace's story. *Id*. at 445. It reasoned that Kyles could have presented a defense theory that the police negligently failed to follow leads pointing to Wallace, bolstering its defense theory. *Id*. at 447-49. Similarly, in *Banks*, the Supreme Court held that the State violated Banks's *Brady* rights when it failed to disclose it had paid a key informant against Banks. *Banks v. Dretke*, 540 U.S. 668, 699 (2004). It reasoned that this information would have weakened the testimony of key state witnesses, which is enough to undermine confidence in the outcome. *Id.* at 701-03.

Here, both parties argued to Mr. Masterson's jury that the only question before it was whether Mr. Masterson intended Mr. Honeycutt's murder, as the State argued, or whether Mr. Honeycutt died accidentally during consensual sex involving sexual asphyxiation, as the defense

argued. Mr. Shrode supplied the only expert medical testimony relative to Honeycutt's cause of death, and testify that his medical opinion was that Mr. Honeycutt's death was an intentional homicide. His testimony significantly undermined the credibility of Mr. Masterson's defense that the death was accidental. The jury, without any medical training, would naturally accept Mr. Shrode's testimony that the death was not intentional.

Information that Mr. Shrode was not qualified to conduct autopsies, had botched numerous prior autopsies, had falsified his credentials to get the job as an assistant medical examiner in Harris County, and had given false, unscientific testimony in other criminal cases would have discredited Mr. Shrode completely in the eyes of the jury. It would have also prompted the defense to consult with their own expert pathologist and present testimony like that now provided by Dr. Roberts, which provides material expert evidence in support of Mr. Masterson's defense. *See* Ex. 17. And trial counsel would have used the impeachment evidence to destroy Mr. Shrode's credibility and work product in the eyes of the jury. *See id.* Without Mr. Shrode's evidence, and with the opinion of a *qualified* pathologist to assist them, the jury would have no basis upon which to determine beyond a reasonable doubt that Mr. Masterson intended Mr. Honeycutt's death.

D. The State's knowing use of Paul Shrode's false testimony to secure a capital conviction violated Mr. Masterson's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process and to be free from cruel and unusual punishment.

In *Mooney v. Holohan*, 294 U.S. 103 (1935), the Supreme Court held that the prosecution's knowing use of false testimony violates a defendant's due process rights because "a deliberate deception of the court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id*. at 112. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court condemned the State's knowing use of perjured testimony as a

violation of the Fourteenth Amendment's due process guarantee. The Supreme Court has further held that a prosecutor has a constitutional obligation to correct his witness's perjured testimony, even if he did not know that the witness was going to lie. *Giglio v. United States*, 405 U.S. 150 (1972). Moreover, the prosecutor has a duty to correct false impressions created by its witnesses even without committing perjury. *Miller v. Pate*, 386 U.S. 1 (1967); *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States v. O'Keefe*, 128 F.3d 885, 897 (5th Cir. 1979).

To implicate a defendant's due-process rights, the testimony need not be "technically false, but merely leave the jury with a false impression." *See Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) (per curiam); *see United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *United States v. Harris*, 498 F.2d 1164, 1169 (3rd Cir.), *cert. denied*, 419 U.S. 1069 (1974).

A petitioner is entitled to relief for a due process violation under *Napue* if: (1) the testimony was false; (2) the State knew the testimony was false; and (3) "there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Napue*, 360 U.S. at 269-72; *see Ex parte Adams*, 768 S.W.2d 289 (Tex. Crim. App. 1989). The knowing use of false testimony renders the result of a proceeding "fundamentally unfair, and [the verdict] must be set aside if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *United States v. Bagley*, 473 U.S. 667, 679 (1985) (emphasis added).

a. Mr. Shrode's testimony was false and misleading.

To qualify as false testimony, the testimony need not be technically false, but merely leave the jury with a false impression. *See e.g. Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) (per curiam); *see*

United States v. McClintic, 570 F.2d 685, 692 (8th Cir. 1978); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1974).

When testimony misleads the jury, it is false testimony for due-process purposes. In *Blankenship*, the Fifth Circuit granted an evidentiary hearing on whether the prosecution's failure to correct misleading testimony violated Blankenship's due-process rights. It reasoned that a State witness misled the jury although he did not technically lie. 513. There, Blankenship, his cousin, and two others robbed a supermarket. 512. Blankenship's cousin died in a shootout with police after the robbery. *Id.* The two others claimed that Blankenship was the mastermind in subsequent statements to police. *Id.* At Blankenship's trial, both men testified that they were "under indictment" for felony offenses in connection with the robbery. 513. During cross-examination, the men denied crafting their stories to "get off the hook." *Id.* After the trial, another inmate disclosed that the men had discussed a deal with the prosecution, and the prosecution dropped both men's charges. *Id.* The Fifth Circuit determined that Blankenship's allegations, if true, entitled him to relief. Although the State's cooperating witnesses may not have technically lied, they created an impression that they were not testifying in exchange for State leniency. *Id.* The State was required to correct information that even created a false impression – regardless of whether the misleading information was technically true. *See id.*

Here, Mr. Shrode materially misled the jury when he testified falsely that, based on his autopsy, he formed the expert medical opinion that Mr. Honeycutt died of external neck compression, that the autopsy showed signs of a struggle, that his opinion was based solely on his autopsy findings, that he could rule out cerebral edema, and that he could rule out an accidental death caused by a heart attack brought on by Mr. Honeycutt's blocked artery and

consensual engagement in sexual asphyxiation. As Dr. Roberts reports, based on her expert review of Mr. Shrode's botched autopsy, Mr. Shrode did not testify based on scientific opinion. Instead, he "appears to have relied on the 'confession' and not any independent scientific observation." Ex. 15.

b. Knowledge of Mr. Shrode's false and misleading testimony is imputable to the State because Mr. Shrode was part of the State's investigation team.

The actual prosecutor assigned to a case need not know that the witness's testimony is false or misleading to establish a due process violation under *Napue*. Knowledge of false or misleading testimony must be imputed to the prosecution when any member of the prosecutor's team, including prosecutorial and investigative functions, is aware of the false testimony. *See Giglio*, 405 U.S. at 152-55; *see also Ex parte Castellano*, 863 S.W.2d 476, 480 (Tex. Crim. App. 1993); *see also Ex parte Adams*, 768 S.W.2d at 291 ("[K]knowledge of perjured testimony is imputable to the prosecution where such knowledge is possessed by anyone on the 'prosecution team,' which includes both investigative and prosecutorial personnel.")

As demonstrated above, Mr. Shrode was an arm of the prosecution's team, and, therefore, his knowledge that he testified falsely is imputable to the State. When Mr. Shrode performed Mr. Honeycutt's autopsy, he was participating in the investigation into a potential murder and was assisting the police and prosecution. Moreover, at some point, the State became aware that Mr. Shrode had repeatedly testified falsely, including in Mr. Masterson's case, based on autopsies that he had botched and was not qualified to conduct. Even if the State can argue it had no way of discovering Mr. Shrode's false testimony at the time of trial, the State has no excuse for failing to correct this testimony after it was put on notice that Mr. Shrode had a long history of testifying falsely in a manner strikingly similar to the manner in which he testified in Mr.

Masterson's case. At that point, the State had a duty to independently investigate whether it had presented false testimony against Mr. Masterson, and to inform Mr. Masterson and the courts when it discovered it had done so.

c. There is a reasonable likelihood that Mr. Shrode's false testimony could have affected the jury's verdict.

To evaluate *Napue* prejudice, courts use a lower standard than in *Brady* violations because it "involves a corruption of the truth-seeking function of the trial process." *Bagley*, 473 U.S. at 681 (internal quotation marks omitted). Courts are called upon to determine whether the false testimony *could have* affected the jury's verdict. *Id.* at 679. When reviewing whether the testimony could have affected the jury's verdict, courts reverse convictions if they find "any reasonable likelihood" that it had an impact. *Id.* This standard is equivalent to the familiar *Chapman* harmless-beyond-a-reasonable-doubt standard. *Chapman v. California*, 386 U.S. 18 (1967). *See Bagley*, 473 U.S. at 679 n.9; *Ex parte Castellano*, 863 S.W.2d at 485 ("the use of perjured testimony will be found to be material unless a reviewing court is convinced beyond a reasonable doubt that the perjury did not contribute to the conviction or punishment"). The *Chapman* standard requires the State "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Bagley*, 473 U.S. at 679 n.9; *Barham*, 595 F.2d at 242; *see Ex parte Castellano*, 863 S.W.2d at 485 ("the use of perjured testimony will be found to be material unless a reviewing court is convinced beyond a reasonable doubt that the perjury did not contribute to the conviction or punishment.").

Courts must find that the false or misleading testimony did not contribute to the verdict to before they can deny *Napue* relief. In *Napue*, the government knowingly used perjured testimony to convict the petitioner by failing to correct a witness who lied about receiving consideration in exchange for his testimony. 360 U.S. 264, 265 (1959). The Court held that the State cannot

knowingly use false evidence, including false testimony, even if the evidence goes only to the credibility of a witness. *See id.* at 269. If the false testimony had an effect on the outcome of the trial, the judgment must be reversed. *Id.* at 272. The Court in *Giglio v. United States* applied the same reasoning. Defense counsel discovered new evidence that the Government failed to disclose an alleged promise made to its key witness, Robert Taliento, that he would not be prosecuted in exchange for his testimony against petitioner. 405 U.S. 150, 151 (1972). Although the Assistant United States Attorney who tried the case was unaware of the promise because another Assistant United States Attorney executed the exchange, the Court held that the prosecution had the responsibility to disclose, regardless of negligence or intent. *See Id.* at 154. The Government's case depended largely on Taliento. *Id.* at 151. The Court held that Taliento's credibility as a witness was critical and that evidence of an agreement barring future prosecution would be particularly relevant for a jury. The Court reversed the conviction and remanded for a new trial as required by *Napue. Id.* at 154-55. The court in *Drake v. Portuondo* also applied the same logic with expert witnesses. 553 F.3d 230. The prosecution called an expert approximately two weeks before trial to testify to a fictional syndrome of "picquerism," which was medically "nonsense." The prosecution wanted to advance a theory of a sex-crime and sought additional information to convince the jury of intentional murder. *Id.* at 234. The prosecution consulted with a Dr. Walter, although it never confirmed his credentials. *Id.* at 235. The prosecution did not inform defense counsel of their intent to call Walter until the day before he was to testify. *Id.* Walter's testimony was filled with technical jargon and gave the impression of a large body of research into the medical condition. *See id.* at 236. Years after his conviction, Drake moved to vacate based on newly discovered evidence that Walter lied about his credentials, was not a doctor, and did not conduct any studies on the so-called "picquerism." *See id.* at 237. The court

held that there was sufficient factual basis to grant the habeas petition and to set aside the conviction. *Id.* at 241; *see also United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) (finding constitutional error where the government should have known its witness committed perjury but chose to avoid recognizing the obvious because of the importance of witness' testimony.)

Here, the State relied on the false statements of its expert medical examiner, Paul Shrode, to convict Mr. Masterson. Paul Shrode falsified information on his employment application to convince the State of Texas into hiring him as an Assistant Medical Examiner. Without the necessary qualifications, he performed autopsies and testified about expert matters, ultimately rendering a false and misleading opinion that Mr. Honeycutt's death was an intentional homicide caused by external neck compression, i.e. strangulation. Ex. 15. After Mr. Masterson's trial, the Harris County Medical Examiner's Office reprimanded Shrode for deficient work in another case, namely identifying the incorrect cause of death. Ex. 8. In Mr. Masterson's case, Shrode merely conformed his opinions to the prosecution's theory, and testified falsely that his opinions were based on valid scientific evidence. Two expert pathologists later reviewed the autopsy results and concluded that Mr. Honeycutt died from a heart attack, consistent with Mr. Masterson's testimony at trial.

The State filed a motion for summary judgment in Mr. Masterson's federal habeas case after it learned that Mr. Shrode falsified his credentials and made an incorrect determination of cause of death in at least two other capital cases. However, the State never informed Mr. Masterson's counsel or the court that Mr. Shrode had provided false and misleading testimony in this case, instead opting to anticipate and attempt to avoid a challenge to Shrode's expertise and credibility. Like in *Drake*, the State relied on Shrode's testimony to argue Mr. Masterson

murdered Mr. Honeycutt through strangulation. Shrode was central to the State's claim that Mr. Honeycutt was murdered and did not die through natural means. As spelled out in *Napue*, relief must be granted even if the prosecution did not actively solicit false evidence, but rather allowed incorrect evidence to go uncorrected. Going beyond *Giglio*, the State's purposeful concealment of evidence, which directly addressed Shrode's credibility as an expert, clearly causes *Napue* prejudice. As in *Napue* and *Giglio*, the credibility of the witness was critical to the prosecution's case, and the prosecution had a responsibility to disclose. Similar to *Drake*, Shrode lied about his credentials and ultimately provided scientifically unfounded, incorrect testimony, which prejudiced Mr. Masterson by impacting the jury's deliberations in favor of the State. And trial counsel would have used the evidence to attack Mr. Shrode's credentials, credibility, and work product on the stand had they known. Ex. 17.

The State's purposeful concealment of evidence that directly addressed Shrode's credibility as a witness produces *Napue* prejudice and should cause the Court to grant habeas relief. Moreover, before any courts adjudicates these claims, the State should be ordered to disclose all favorable evidence related to Mr. Shrode, in conformity with its constitutional duties to Mr. Masterson.

II. Mr. Masterson is actually innocent of murder, and his execution by the State of Texas would violate his Eighth and Fourteenth Amendment rights.

A. Individuals enjoy the constitutional right to not be executed when they have not committed a capital crime. U.S. Cont. amend. VIII, XIV. To prevail on a freestanding actual innocence claim, the evidence of innocence must be "extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming that the constitutional right exist); *see also Jackson v. Calderon*, 211 F.3d 1148, 1164 (9th Cir. 2000) (noting that a majority in *Herrera* supported a freestanding constitutional claim of innocence). The evidence of innocence must be higher than that required for *Schlup* claims that forgive procedural defaults. *House v. Bell*, 547 U.S. 518 (2006). Mr. Masterson presents a compelling, substantial case of actual innocence.

a. New, competent medical evidence shows that the decedent died of a heart attack instead of strangulation as the State theorized at trial.

As detailed above, the State's expert witness who performed Mr. Honeycutt's autopsy was a fraud; he botched the autopsy, and he fabricated testimony to bolster the State's case without having a valid scientific basis for that testimony. Mr. Masterson retained two medical experts who exposed Mr. Shrode's mistakes. A chart of the most critical mistakes shows just how harmful the errors were:

Mr. Shrode's Erroneous Findings	How the Mistakes Bolstered the State's Theory	Dr. Robert's Corrections
Emphasized petechial hemorrhaging in the face.	Argued the death was a homicide caused by external strangulation.	Cannot determine when the petechial hemorrhaging occurred due to Shrode's sloppy work. Likely caused by pools of blood in the face because of body's condition. Easily could have happened after death. Not probative of external strangulation.
Testified about a defensive wound on Mr. Honeycutt's hand.	The defensive wound was caused by Mr. Honeycutt fighting back.	The one photograph that should have shown the defensive wound did not show any wound.
Testified about an abrasion above Mr. Honeycutt's eye.	Wounds from a struggle.	The abrasion is a common rug-burn caused by the face resting on the ground after death.
Testified about scratches on Mr. Honeycutt's upper right buttock.	Wounds from a struggle.	Perfectly consistent with consensual sex.
The cause of death was external strangulation.	The only scientific evidence at trial suggesting a homicide.	See below.
The cause of death was not a heart attack.	Scientific evidence refuting the defense theory and defeating any innocence claim.	See below.

Ex. 15.

Mr. Shrode's biggest and most prejudicial error was his cause-of-death determination. This blunder hid the uncomfortable truth now facing this Court: Mr. Honeycutt's death was not a homicide. Mr. Honeycutt died from a heart attack.

To reach his incorrect conclusion, Mr. Shrode overemphasized petechial hemorrhages that he observed. He essentially ended his evaluation after that point despite scientific evidence clearly establishing that petechial hemorrhages are only supportive of strangulation if combined with other evidence of neck injury, which was not found in Mr. Honeycutt's autopsy. But that was only the beginning of his errors. Mr. Shrode also did not understand that these hemorrhages often occur after death when the body is situated face down, like Mr. Honeycutt's was found. So not only did Mr. Shrode overemphasize their presence, he did not recognize that their presence had no significance whatsoever. Readily available textbooks show heart-attack victims with facial petechial hemorrhages when their bodies rest head down.

Furthermore, Mr. Shrode documented that Mr. Honeycutt's neck had no injuries at all as would be expected in a strangulation victim. Internally, Mr. Honeycutt's neck showed no discoloration, which means that he had no hemorrhages in his anterior neck structures. This soft tissue would have hemorrhaged after a violent strangulation. Additionally, Mr. Honeycutt's fragile hyoid bone and thyroid cartilage were unharmed. They did not even have blood around them. Qualified medical professionals often see harm to these sensitive areas after a strangulation. And externally, Mr. Honeycutt's neck had no bruising or scratches. Normally, strangulation victims attempt to remove the hands or arm closing their airways. These efforts usually leave scratches on the victims' necks. Mr. Honeycutt did not have these defensive wounds.

Finally, and most importantly for these constitutional claims, Mr. Shrode erroneously discounted the true manner and cause of death: a natural death from a heart attack. His reason to discount the truth boils down to his lack of knowledge about basic principles of cardiology. Mr. Shrode discounted a heart attack because Mr. Honeycutt's heart muscle showed no signs of hemorrhaging. This reasoning is patently and completely clinically unsound. **When people die suddenly from a heart attack, their hearts do not show visual signs of injury.** Because Mr. Shrode did not follow proper procedure and collect microscopic samples of Mr. Honeycutt's heart, neither he nor anyone else could test to determine if Mr. Honeycutt suffered a heart attack.

Nevertheless, the weight of the available scientific medical evidence shows the truth about Mr. Honeycutt's death. Mr. Honeycutt was a seriously ill man before his death. He suffered from AIDS and took the harsh medicines necessary to combat that terrible virus. Those harsh medicines have serious adverse side effects that impact the liver. In addition to those awful ailments, Mr. Honeycutt had severe coronary artery disease. His heart was significantly weakened, and his main artery was already over 90% closed by what is commonly called 'The Widow Maker." And Mr. Honeycutt did not maintain a calm lifestyle to protect his failing health. Instead, he regularly went to bars, drank alcohol, and stayed out until establishments closed in the early morning hours. His close friends warned him about his lifestyle, but he did not listen.

In the early morning hours of January 26, 2001, Mr. Honeycutt pushed his ailing body to extremes for physical pleasure. He drank alcohol while taking harsh medications that adversely affected his liver. He stayed at a bar until it closed around 2:00 AM. He took a stranger home for near-anonymous sex. And to further heighten his sexual pleasure, he asked Mr. Masterson to perform a risky sexual practice known as sexual asphyxiation. This practice compresses the

cardioid arteries on both sides of the neck. These arteries carry the oxygen-rich blood from the heart to the brain. When performed, the sudden deprivation of oxygen and the accumulation of carbon dioxide creates "giddiness, lightheadness, and pleasure." *Erotic Asphyxiation*, Wikipedia, *available at* en.wikipedia.org/wiki/Erotic_asphyxiation. Author George Shuman described the resulting pleasure as "a lucid, semi-hallucinogenic state called hypoxia. Combined with orgasm, the rush is said to be no less powerful than cocaine, and highly addictive." *Id.* Mr. Honeycutt's already failing health simply could not handle that extra stress. The lack of oxygen, abundance of carbon dioxide, added stress, and weight of Mr. Masterson's body was finally too much for his severely diseased heart. Mr. Honeycutt had a fatal heart attack. He did not die from strangulation.

Mr. Masterson thought that he had accidentally killed Mr. Honeycutt. In his cocaine- and alcohol-induced stupidity, he made the house look like it had been burglarized. Because others had seen him with Mr. Honeycutt, he mistakenly thought that no one would think he was stupid enough to then kill and rob him. Then he understood that the police would not believe his story due to his history. Despite the truth, Mr. Masterson believed he would be convicted. So he fled and continued his drug binge. The police finally caught him in Florida.

b. New neuropsychological scientific evidence gives a biological explanation for Mr. Masterson's suicidal behavior when falsely confessing to murder and asking the jury to sentence him to death.

Florida police incarcerated Mr. Masterson as soon as they found him. That incarceration ended Mr. Masterson's drug binge, causing him to descend into extreme, suicidal depression.

Mr. Masterson began using drugs as a young teenager. He had run away from home to escape horrific physical and sexual abuse at the hands of his father and older brother. After he left, no one came to look for him; he was on his own. So he turned to the coping mechanisms

that teenage runaways often use to survive: drugs and prostitution. His drug use quickly became drug addiction. And a drug addiction during adolescence severely damages brain development during one of the most critical times for that development. *See* Ex. 16.

At the time of Mr. Honeycutt's death and Mr. Masterson's subsequent arrest, Mr. Masterson was shooting cocaine, smoking crack cocaine, shooting methamphetamine, and drinking alcohol on a daily basis. He had been abusing those drugs every day for at least a year. In fact, Mr. Masterson smoked so much crack for so long that he started having seizures. When Mr. Masterson was arrested and incarcerated, he no longer received his daily drugs, causing him to experience horrific withdrawals. Unfortunately, neuropsychological research did not completely explain the significance of this withdrawal until after Mr. Masterson's trial and sentencing. *See id.*

In 2010, the National Institute of Alcohol Abuse and Alcoholism first recognized the need for further research in this area. As a result, it funded the first Consortium on the Neurobiology of Adolescent Drinking in Adulthood. Mr. Masterson retained an expert neurobiologist who is part of that consortium – Dr. Wilkie A. Wilson.

Dr. Wilson interviewed Mr. Masterson and reviewed the trial transcripts and expert reports. He noted the importance of one particular study that demonstrated a remarkable correlation between the symptoms of major depressive disorder and the effects of withdrawal from stimulants. The biological effects of stimulant withdrawal drastically decrease dopamine levels in the brain. Dopamine is the pleasure neurotransmitter in the brain. So without dopamine, Mr. Masterson was severely depressed. Dr. Wilson noted that these major depressive symptoms often include suicidal ideation. And that is exactly what happened to Mr. Masterson when he was incarcerated in Florida. *See id.*

After Dr. Wilson personally evaluated Mr. Masterson and reviewed all relevant scientific literature and case documents, he formed an expert opinion: Mr. Masterson was suicidal when Officer Null visited him in the Florida jail. Mr. Masterson attempted to commit suicide by confession. *Id.* After Mr. Masterson spoke with Officer Null without being recorded, he gave a rehearsed confession that fit the evidence and statutory aggravator for the death penalty perfectly. Of course, everyone believed his false confession and did not test the hard, scientific evidence that could have exonerated him.

And how do we know that Mr. Masterson falsely confessed? We know he falsely confessed the way people often discover undeniable false confessions: the scientific evidence exonerates him. Mr. Honeycutt's death was not a homicide. He did not die from strangulation. His death was a natural one. Mr. Honeycutt died from a heart attack after putting too much stress on his severely diseased heart.

Mr. Masterson is an innocent man.

B. Mr. Masterson has Eighth and Fourteenth Amendment rights to not be executed when he is innocent.

In 1993, a majority of the Supreme Court wrote that the Constitution prohibits the execution of an actually innocent person. *Herrera v. Collins*, 506 U.S. 390 (1993). It did not reach a holding on the exact nature of the constitutional rights but provided guidance for lower courts. And other cases show that the execution of an innocent man offends any sense of decency and the United States Constitution.

a. A State violates the Eighth Amendment's prohibition against cruel and unusual punishment when it executes an innocent man.

Courts judge whether a punishment is cruel and unusual according to society's "evolving standards of decency . . . ." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Trop v.*

Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). The "legitimacy of a punishment is inextricably intertwined with guilt." *Herrera*, 506 U.S. at 433-34 (Blackmun, J., dissenting). So a punishment is cruel and unusual, and, therefore, unconstitutional if it involves "the purposeless and needless imposition of pain and suffering" or is "grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

The Supreme Court has limited the imposition of death to only the worst murders. Death may not be imposed for raping an adult, *Coker*, 433 U.S. at 597-600, raping a child, *Kennedy*, 554 U.S. at 446, or a robbery, *Enmund v. Florida*, 458 U.S. 782, 797 (1982). Indeed, states cannot allow the death penalty unless the victim dies. *See, e.g.*, *Coker*, 433 U.S. at 598 (plurality opinion). Furthermore, the death penalty is cruel and unusual when the defendant did not intend to kill or exhibit reckless disregard for life while playing a central role in the crime. *Tison v. Arizona*, 481 U.S. 137, 157 (1987); *Enmund*, 458 U.S. at 797.

Additionally, the Supreme Court has limited the imposition of death to only truly deserving people, the worst of the worst, who are the most morally culpable. For example, the Court held that the death penalty is cruel and unusual when imposed on minors, *Roper v. Simmons*, 543 U.S. 551 (2005), on the intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002), and on the insane, *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion).

An innocent person, like Mr. Masterson, necessarily must be excluded from the limited categories of people who may be executed. Because Mr. Masterson did not murder anyone, intentionally or otherwise, *Tison* and *Enmund* forbid his execution. *See also Coker*, 433 U.S. at 598. No one was murdered in this case. *Roper*, *Atkins*, and *Ford* prohibit the death penalty for defendants with moral culpability that is diminished due to their personal characteristics. Mr. Masterson, however, has much less moral culpability than those categories of people because he

did not murder anyone. Even if he is not an angel, the Supreme Court clearly and definitely has ruled that his lack of moral culpability in the crime for which he was convicted removes him from consideration for the death penalty.

To the extent that *Herrera* held that a freestanding claim of innocence is not constitutionally cognizable, society's standards of decency have evolved since 1993 and now are firmly against that notion after 156 exonerations from death row since 1973. (http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row). Of those exonerees, 108 occurred since 1993. So society was aware of forty-eight exonerations at the time of *Herrera*. That number jumped astronomically afterward. American society is weary of the death penalty when the condemned may be innocent. Indeed, the system has failed innocent men before. Two of the highest profile wrongful executions occurred in Texas, Cameron Todd Willingham and Carlos DeLuna. To address this concern, fifty jurisdictions enacted statutes to allow inmates to demonstrate their innocence to be released from incarceration after 1993. *How is Your State Doing?*, The Innocence Project *available at* www.innocenceproject.org/how-is-your-state-doing. This trend clearly shows that American society does not tolerate even the incarceration of innocent people.

The Supreme Court promised that it would limit the death penalty to only the worst of the worst after reviving it. Federal courts break that promise if they deny relief to a habeas petitioner with credible claims of actual innocence. As discussed above, Mr. Masterson has presented a compelling, credible claim of actual innocence. He deserves relief.

b. A State violates the Fourteenth Amendment's substantive-due-process requirements when it executes an innocent man.

The Substantive Due Process Clause of the Fourteenth Amendment also prohibits the execution of innocent people. The Substantive Due Process Clause prevents a state from

"engaging in conduct that shocks the conscious." *Rochin v. California*, 342 U.S. 165, 172 (1952). Additionally, it forbids a state from interfering with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). "This liberty is not a series of isolated points . . . . It is a rational continuum, which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992) (internal quotations omitted).

State conduct that shocks the conscience violates a person's substantive-due-process rights. In *Rochin*, police officers broke into Rochin's room while investigating narcotics violations. 342 U.S. at 166. After entering the room, they saw two capsules on Rochin's night stand. *Id.* Rochin swallowed the capsules. *Id.* The officers attempted to remove the capsules from Rochin's mouth, and after realizing he had swallowed the capsules, they had a hospital forcibly pump them from his stomach. *Id.* The Supreme Court reversed Rochin's resulting narcotics conviction, holding that the officers violated his substantive-due-process rights. *Id.* at 172. It reasoned that the officers' actions offended "even hardened sensibilities." *Id.*

Here, the State's continued desire to kill Mr. Masterson, a man with a compelling actual-innocence claim, shocks the conscience and interferes with rights implicit in ordered liberty. If violating a suspect's body violates that suspect's substantive-due-process rights, pumping poison into a man's veins until he dies must also. Mr. Masterson's actual innocence also presents a threat to ordered liberty. Ordered liberty depends on a system that punishes the guilty and releases the innocent. If incarcerating the innocent is a threat to ordered liberty, executing the innocent delivers a fatal blow to any perception that Americans live in a civilized society that strives for ordered liberty. Therefore, the State is violating Mr. Masterson's substantive-due-

process rights by continuing to incarcerate him, and it certainly violates his rights by continuing its efforts to kill him.

Accordingly, this Court must issue a writ of habeas corpus and reverse Mr. Masterson's capital murder conviction.

CONCLUSION AND PRAYER FOR RELIEF

The State's expert witness and attending medical examiner, Paul Shrode, incorrectly classified the death in this case as a homicide. The State suppressed, and continues to suppress, critical evidence that this witness lied on his job application to qualify for his position, consistently performed poorly at the job, repeatedly botched autopsies and cause of death determinations in Texas criminal cases, and ultimately botched Mr. Honeycutt's autopsy and gave material, false testimony implicating Mr. Masterson's guilt of capital murder in this case. While the State may have initially been the victim of Mr. Shrode's fraud, the State also had a duty to investigate their agents' credentials to ensure their qualifications and the integrity of their life-or-death opinions. The State neglected that duty with regard to Mr. Shrode.

At some point, the State learned the full extent of Mr. Shrode's misdeeds. But instead of notifying Mr. Masterson and the courts that it had sponsored false testimony in this case, and instead of turning over material, exculpatory evidence related Mr. Shrode's misdeeds in this case, the State opted to keep Mr. Shrode's fraud and fraudulent testimony secret, seeking to execute Mr. Masterson before a fair trial not plagued by false expert testimony could be had. To allow the State to execute Mr. Masterson in these circumstances would work a manifest injustice against Mr. Masterson and the public, both of whom have real interests in avoiding the execution of innocent persons.

Because of the State misconduct in this case and new evidence of Mr. Masterson's actual innocence, he petitions this Honorable Court for a writ of habeas corpus.

For the reasons discussed above, Mr. Masterson respectfully asks the Court to:

- Stay his pending execution;
- Order further briefing on the issues presented in this Petition;

- Order Respondent to turn over all material, exculpatory evidence related to Mr. Shrode's fraudulent work in the State of Texas and in this case;
- Thereafter hold a hearing on the issues presented herein; and
- Issue a Writ of Habeas Corpus, vacating Mr. Masterson's capital-murder conviction and death sentence.

Respectfully submitted,
RICHARD ALLEN MASTERSON

By: /s/ *Gregory W. Gardner*

Gregory W. Gardner[4]
Bar ID No. 2707338
D.C. Bar No. 499514
641 S Street, N.W.
Third Floor
Washington, D.C. 20001
O: (202) 684-6331
F: (202) 747-2986
gardnerlegal@gmail.com

[4] The author thanks and acknowledges Miranda Dore, Pam Ly, Mark W. Hsen, and Ryan S. Traeger from American University's Washington College of Law and Erica Santamaria from the Georgetown University Law Center for their assistance.

VERIFICATION

I, Gregory W. Gardner, am the attorney for Richard Allen Masterson, Petitioner in this Petition for a Writ of Habeas Corpus. I have read the petition and am familiar with its contents. On behalf of Richard Allen Masterson and on information and belief, I verify, under the penalties of perjury, that the factual matters stated in the petition are true and correct to the best of my knowledge.

DATED: January 12, 2016

/s/ Gregory W. Gardner
Gregory W. Gardner
Attorney for Mr. Masterson

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Civil Procedure 5(b), I certify that I electronically filed this petition and its exhibits with the United States Court of Appeals for the Fifth Circuit's CM/ECF system on January 12, 2016, which delivered a true and correct copy to all counsel of record.

/s/ Gregory W. Gardner
Gregory W. Gardner
Attorney for Mr. Masterson

EXHIBIT 1

J

THE STATE OF TEXAS
VS.

RICHARD ALLEN MASTERSON
UNKNOWN

230rd
GJ

SPN: **01035874**
DOB: **WM 03-05-72**
DATE PREPARED: **05-02-01**

D.A. LOG NUMBER:**660987**
CJIS TRACKING NO.:
BY: **MLS** DA NO: **058149045**
AGENCY:**HPD**
O/R NO: **11846601L**
ARREST DATE: **02-09-01**

NCIC CODE: **0907 10**

RELATED CASES:

FELONY CHARGE: **CAPITAL MURDER**
CAUSE NO: **867834**
HARRIS COUNTY DISTRICT COURT NO: **176**
FIRST SETTING DATE:

Vol 236 Page 427 AX GM

BAIL: **$NO BOND**
PRIOR CAUSE NO:

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, **RICHARD ALLEN MASTERSON**, hereafter styled the Defendant, heretofore on or about **JANUARY 26, 2001**, did then and there unlawfully, while in the course of committing and attempting to commit the robbery of DARIN SHANE HONEYCUTT, intentionally cause the death of DARIN SHANE HONEYCUTT by choking DARIN SHANE HONEYCUTT with his arm.

It is further presented that in Harris County, Texas, RICHARD ALLEN MASTERSON, hereafter styled the Defendant, heretofore on or about JANUARY 26, 2001, did then and there unlawfully while in the course of committing and attempting to commit the robbery of DARIN SHANE HONEYCUTT, intentionally cause the death of DARIN SHANE HONEYCUTT by choking DARIN SHANE HONEYCUTT with his hands.

STATE ABANDONS (BE)

It is further presented that in Harris County, Texas, RICHARD ALLEN MASTERSON, hereafter styled the Defendant, heretofore on or about JANUARY 26, 2001, did then and there unlawfully while in the course of committing and attempting to commit the robbery of DARIN SHANE HONEYCUTT, intentionally cause the death of DARIN SHANE HONEYCUTT by choking DARIN SHANE HONEYCUTT by an unknown manner and means.

STATE ABANDONS (BE)

01 NOV -4 PM 1:19

230th FOREMAN

AGAINST THE PEACE AND DIGNITY OF THE STATE.

FOREMAN OF THE GRAND JURY

INDICTMENT

STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and/or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this

DEC 30 2015

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Deputy

DISTRICT COURT OF HARRIS COUNTY, TEXAS

EXHIBIT 2

CAUSE NO. 867834

THE STATE OF TEXAS	§	IN THE 176TH DISTRICT COURT
VS.	§	OF HARRIS COUNTY, TEXAS
RICHARD ALLEN MASTERSON	§	FEBRUARY TERM, A. D., 2002

CHOOSE ONE

"We, the Jury, find the defendant, Richard Allen Masterson, guilty of capital murder, as charged in the indictment."

FILED
CHARLES BACARISSE
District Clerk
APR 24 2002
Time
Harris County, Texas
By Deputy

Foreman of the Jury

DANNY L. EPPERS

(Please Print) Foreman

"We, the Jury, find the defendant, Richard Allen Masterson, guilty of murder."

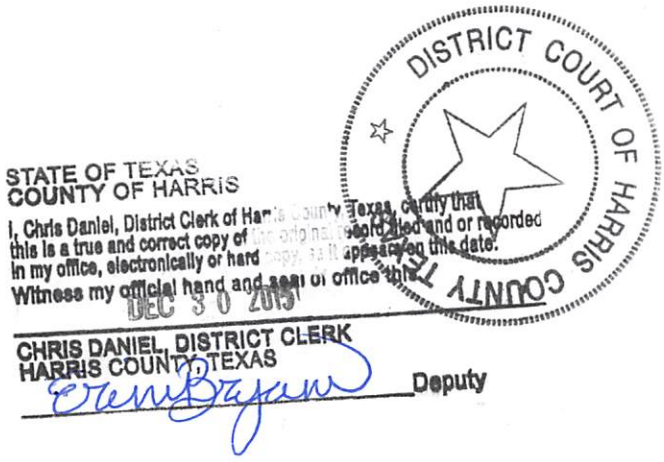
Foreman of the Jury

(Please Print) Foreman

"We, the Jury, find the defendant, Richard Allen Masterson, guilty of manslaughter."

Foreman of the Jury

(Please Print) Foreman


DISTRICT COURT OF HARRIS COUNTY TEXAS
STATE OF TEXAS
COUNTY OF HARRIS
I, Chris Daniel, District Clerk of Harris County Texas, certify that
this is a true and correct copy of
in my office, electronically or hard
Witness my official hand and seal of office this
DEC 30 2015
CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS
Deputy

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Richard Allen Masterson, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."

DANNY L. EPPERS
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the probability that the defendant, Richard Allen Masterson, would commit criminal acts of violence that would constitute a continuing threat to society, determine that the answer to this Special Issue is "NO."

Foreman of the Jury

In the event that the jury has answered Special Issue No. 1 in the affirmative, and only then, shall the jury answer Special Issue No. 2 to be found on the following page.


DISTRICT COURT OF HARRIS COUNTY TEXAS
Deputy
CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS
DEC 9 0 2015

SPECIAL ISSUE NO. 2

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Richard Allen Masterson, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER

We, the jury, unanimously find that the answer to this Special Issue is "NO."

DAWN L. EPPERS
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed, find that the answer to this Special Issue is "YES."

Foreman of the Jury

After the jury has answered each of the Special Issues under the conditions and instructions outlined above, the Foreman should sign the verdict form to be found on the last page of this charge.

STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this

DEC 30 2015

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Deputy

DISTRICT COURT OF HARRIS COUNTY TEXAS

VERDICT

We, the Jury, return in open court the above answers to the "Special Issues" submitted to us, and the same is our verdict in this case.

DAWN L. EPPERS
Foreman of the Jury

FILED
CHARLES BACARISSE
District Clerk
APR 25 2002
Time: Harris County, Texas
By Deputy

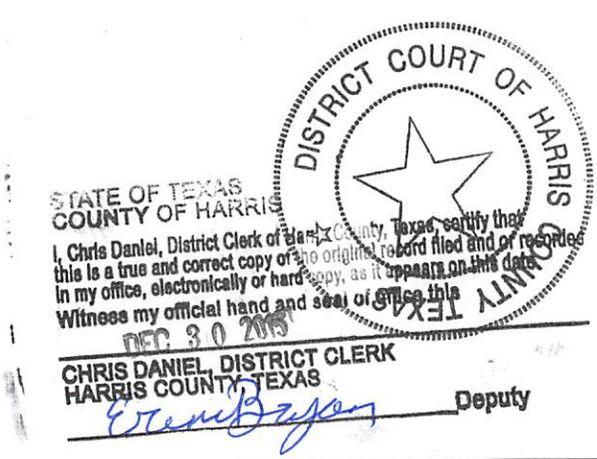

DISTRICT COURT OF HARRIS COUNTY TEXAS
STATE OF TEXAS
COUNTY OF HARRIS
I, Chris Daniel, District Clerk of Harris County, Texas, certify that
this is a true and correct copy of the original record filed and or recorded
in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this
DEC 30 2015
CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS
Deputy

EXHIBIT 3

197

JUDGMENT – DEATH PENALTY

CAUSE NO. 867834

THE STATE OF TEXAS
VS.
RICHARD ALLEN MASTERSON
(Name of Defendant)
AKA

IN THE 176TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Date of Judgment: APR 24 2002	Date of Offense: FEB 9 2001
Attorney for State: SUNNY MITCHELL	
Attorney for Defendant: BOB LOPER	☐ Defendant Waived Counsel
Offense Convicted of: CAPITAL MURDER	
A FELONY, DEGREE: CAPITAL	

(Circle appropriate selection – N/A = not available or not applicable)

Plea to Enhancement Paragraph(s):	1st Paragraph: True | Not True (N/A)	2nd Paragraph: True | Not True (N/A)	Charging Instrument: Indictment
Findings on Enhancement(s):	1st Paragraph: True | Not True (N/A)	2nd Paragraph: True | Not True (N/A)	Plea: Not Guilty

This cause being called for trial, in Harris County, Texas, unless otherwise referenced, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above; or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court, and both parties announced ready for trial.

A Jury composed of DANNY LEE EPPERS and eleven others was selected, impaneled, and sworn. The indictment was read to the Jury, and the Defendant entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and having heard argument of counsels, the Jury retired in charge of the proper officer and returned into open Court on APR 24 2002, the following verdict, which was received by the Court and is here entered on record upon the minutes:

"We, the Jury, find the defendant, Richard Allen Masterson, guilty of capital murder, as charged in the indictment."

Thereupon, the Jury, in accordance with law, heard further evidence in consideration of punishment, and having been again charged by the Court, the jury retired in charge of the proper officer in consideration of punishment and returned in open Court on APR 25 2002, the following verdict, which was received by the Court and is here entered of record upon the minutes:

(Special Issues/Verdict/Certification):

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Richard Allen Masterson, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER:

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."

(Special Issues – Continued):

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Richard Allen Masterson, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER:

We, te jury, unaminously find that the answer to this Special Issue is "NO."

VERDICT

We, the Jury, return in open court the above answers to the "Special Issues" submitted to us, and the same is our verdict in this case.

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the Jury, and that the said Defendant committed the said offense on the date indicated above, and that he be punished as has been determined by the Jury, by death, and that Defendant be remanded to jail to await further orders of this Court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the Jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division, Texas Department of Criminal Justice or any other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division in accordance with the provisions of the law governing the Texas Department of Criminal Justice, Institutional Division until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance from the Court of Criminal Appeals of the State of Texas. The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From which sentence an appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas.

Signed and entered on APR 25 2002

X Brian Rains

BRIAN RAINS

JUDGE PRESIDING

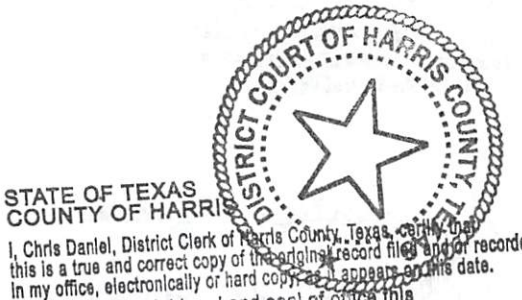
RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filing.

Automatic Appeal 4-25-02

MANDATE OF AFFIRM. 3-7-05

2/998/EE

4/444/EE



STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and/or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this

DEC 30 2015

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Deputy

EXHIBIT 4

9pc/13/9566pc
9pc/13/#955 6pc

CAUSE NO 867834

EX PARTE § IN THE 176TH DISTRICT COURT

§ OF

RICHARD ALLEN MASTERSON, § HARRIS COUNTY, TEXAS
Defendant

EXECUTION ORDER

You, RICHARD ALLEN MASTERSON, were indicted by the Grand Jury of Harris County, Texas, charging you with the offense of capital murder in cause no 867834 On April 24, 2002, a jury in this Court returned a verdict finding you guilty of the offense of capital murder On April 25, 2002, the same jury in this Court returned answers to the special issues, submitted to the jury at punishment pursuant to Article 37 071 of the Texas Code of Criminal Procedure, and this Court, in accordance with the jury's findings at punishment, assessed your punishment at death. The judgment of this Court was reviewed by the Texas Court of Criminal Appeals and the Court of Criminal Appeals affirmed the judgment of this Court in all things. Subsequently, the Court of Criminal Appeals denied your initial application for writ of habeas corpus in cause no 867834-A This Court now proceeds with the judgment and sentence in your case and now enters the following order

IT IS HEREBY **ORDERED** by this Court that you, RICHARD ALLEN MASTERSON, having been adjudged guilty of capital murder and having been assessed punishment at death, in accordance with the findings of the jury and the judgment of this Court, shall at some time after the hour of 6 00 p m on the 20TH day of January, 2016, be put to death by an executioner designated by the Director of the Institutional Division of the Texas Department of Criminal Justice, who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body sufficient to cause your death and until your death. such execution procedure to be determined and supervised by the said Director of the Institutional Division of the Texas Department of Criminal Justice.

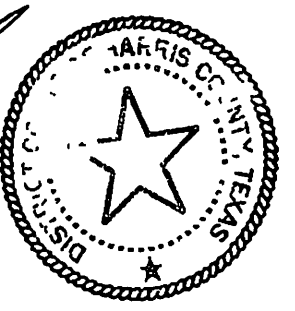
It is **ORDERED** that the Clerk of this Court shall issue a death warrant, in accordance with this sentence, to the Director of the Institutional Division of the Texas Department of

Criminal Justice, and shall deliver such warrant to the Sheriff of Harris County, Texas to be delivered by him to the Director of the Institutional Division of the Texas Department of Criminal Justice together with the defendant, RICHARD ALLEN MASTERSON.

The Defendant, RICHARD ALLEN MASTERSON, is hereby remanded to the custody of the Sheriff of Harris County, Texas, to await transfer to Huntsville, Texas and the execution of this sentence of death

DONE AND ENTERED this 17TH day of July, 2015.

STACY BOND
Presiding Judge
176TH District Court
Harris County, Texas



STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this

DEC 30 2015

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Deputy

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD ALLEN MASTERSON, **Petitioner,** **vs.** **WILLIAM STEPHENS,** **Director,** **Texas Department of Criminal Justice, Correctional Institutions Division,** **Respondent.**	§	**CASE NO. 4:09-CV-2731** **HONORABLE KENNETH M. HOYT** **DEATH PENALTY CASE**

AFFIDAVIT OF MIRANDA A. DORE

I, Miranda A. Dore, make these statements under the penalties of perjury:

1. I am a student at American University's Washington College of Law. I am an intern at the Law Office of Gregory W. Gardner.
2. I volunteered to work on Mr. Masterson's case. I have not been and will not be compensated for my work on his case.
3. On October 8, 2015, I contacted J. Sidney Crowley, Mr. Masterson's initial state habeas attorney.
4. Mr. Crowley told me that he went to look at Mr. Masterson's trial records, which included his juvenile records, only one time because the records were so voluminous. Mr. Crowley said that he never received all of the files because there were too many.

5. When I asked Mr. Crowley how many times and for approximately how long he reviewed Mr. Masterson's files, he said that he only went one time, and he did not recall for how long he was there, but the visit occurred on a single day.

I confirm that all of these statements are true and accurate to the best of my knowledge. And I make these declarations under the penalties of perjury. I executed this Affidavit in Washington, D.C. on the 29th day of December 2015.

Respectfully,

Miranda Dore

Public Notary

WELLS FARGO

Jurat Certificate

State of District of Columbia

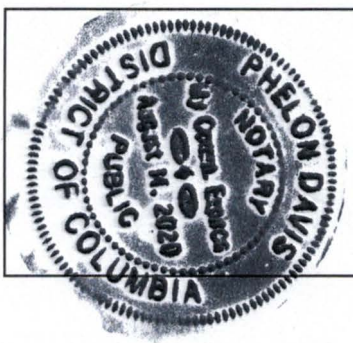
~~County~~ City of Washington

Subscribed and sworn to (or affirmed) before me on this 29th

day of December, 20 15, by [signature]

Place Seal Here

Notary Signature [signature]



Description of Attached Document

Type or Title of Document: IN the US District Court for the Southern District of Texas Houston Division

Document Date: 12-29-15

Number of Pages: 2

Signer(s) Other Than Named Above:

DSG3018 (Rev 00-2-15)

EXHIBIT 6

HARRIS COUNTY

PLEASE RETURN APPLICATION TO:
1310 PRAIRIE, SUITE 200
HOUSTON, TEXAS 77002-1987

APPLICATION FOR EMPLOYMENT

An Equal Opportunity Employer

Job Hotline
755-5044
Office 755-5250
TDD 755-6870

Position #79

PLEASE READ THE FOLLOWING BEFORE COMPLETING APPLICATION:

Harris County does not discriminate in hiring on the basis of race, color, religion, national origin, sex, ancestry, age, or on the basis of a mental or physical impairment. No question on this application is intended to secure information to be used for such discrimination, or to violate the provisions of the Immigration Reform and Control Act of 1986.

Thank you for applying for employment with Harris County. In preparing the application, we require you to use blue or black ink, write legibly and answer all questions.

NOTE: YOU MAY INCLUDE YOUR RESUME, BUT ALL QUESTIONS MUST BE ANSWERED.

In compliance with the Immigration Reform & Control Act of 1986 you will be requested to verify employment eligibility (Form I-9) if hired.

YOUR APPLICATION WILL NOT BE FORWARDED WITHOUT A PERSONAL INTERVIEW

Print Your	First	Middle	Last	Maiden Name
Full Name	PAUL	W.	SHRODE	
Present Address	Street	City	State/Zip TX	How Long 3½ YRS	Home Phone
Previous Address	Street	City	State/Zip	How Long	Business/Alternate Phone [redacted]

Are you between 18-21 yrs. old ☐ Are you over 21 yrs. old ☒ | Social Security No. | Are You: citizen or national of the United States ☒ | Or an alien lawfully admitted for permanent residence ☐ (Alien Number _____)

Or an alien authorized by the Immigration and Naturalization Service to work in the United States ☐
(Alien Number or _____ Admission Number _____) Expiration of employment authorization, if any. _____

DATE OF BIRTH REQUIRED FOR BACKGROUND CHECK IF APPLYING FOR JUVENILE PROBATION, PRE-TRIAL SERVICES OR COMMUNITY SUPERVISION & CORRECTION

POSITION DATA D.O.B. _____

Date you can start 01 JULY 1997 | Referred by

EDUCATION

NAME AND ADDRESS OF INSTITUTIONS	DATES FROM Mo-Yr.	DATES TO Mo-Yr.	MONTH/YEAR GRADUATED	TYPE OF DEGREE/DIPLOMA RECEIVED
HIGH SCHOOL CLARKE CO. HIGH, ATHENS, GA.	1/64	5/67	5/67	LIB. ARTS
COLLEGE INDIANA CENT. UNIV.	1/69	5/72	5/72	BA
COLLEGE SOUTHWEST TX ST. UN. SAN MARCOS TX	1/79	5/79	5/79	PARALEGAL
OTHER TX. TECH UNIV. SCHOOL OF MED. LUBBOCK	8/87	5/91	5/91	MD

Note: Transcripts from ALL Colleges may be Required.

MAJOR SPANISH LANG/HISTORY No. HOURS 24/EACH MINOR ENGLISH LIT No. HOURS 18

GPA 3.4 ON A 4.0 SCALE

LIST SCHOLASTIC HONORS, OFFICES HELD AND ACTIVITIES IN SCHOOL AND COLLEGE Total College Hours: 124

EPSILON SIGMA ALPHA HONOR SOCIETY. GRAD CUM LAUDE

GENERAL DATA

Answer Items 1 through 6 by placing an "X" in the proper column. Give details in No. 12 below.	YES	NO
1. Are you now working for or have you previously worked for Harris County?		X
2. Do you or does your spouse have any relatives presently working or holding office in Harris County Government?		X
3. Are you aware of any reason which would keep you from being bonded?		X
4. Are you licensed to operate a motor vehicle? If yes, give Driver's License No. and State in No. 12 below. (Will not be considered unless related to job for which you are applying)	X	
5. Are you willing to work any hours assigned to you?	X	
6. Have you ever been convicted of an offense? Please include driving while intoxicated or driving under the influence of drugs (exclude minor traffic violations). Give details and date in No. 12 below.		X
7. FOREIGN LANGUAGE SKILLS Speak X Read X Write X	X	

8. MACHINE AND EQUIPMENT SKILLS: (Word Processing, P.C.'s, etc) Typing 50 WPM Shorthand _____ WPM
Give details in No. 12 below.

9. SPECIAL QUALIFICATIONS AND SKILLS. Use this space to indicate any additional experience, skills, licenses or certificates, etc. which in your opinion would qualify you for the position you seek.
Give details in No. 12 below.

10. GENERAL REMARKS. You may wish to include civic or community activities, membership in professional or scientific societies, Publications, Copyrights, Patents or Inventions, Honors, Awards and Fellowships.
Give details in No. 12 below.

11. If you are a veteran, indicate branch served in: _____ N/A

Dates: From _____ To _____

Are you an orphan or surviving spouse of a veteran? _____ Yes X No

12. SPACE FOR DETAILED ANSWERS, INDICATE ITEM NUMBER FOR WHICH ANSWERS APPLY

ITEM #	DETAILS	ITEM #	DETAILS
4	TEXAS: [redacted]		
7	SPANISH		

EMPLOYMENT HISTORY

Name of Last Employer (or Present) Employer			Supervisor and Title	
HAMILTON Co. CORONER'S OFFICE			CARL HARDIT, MD Co. CORONER	
Address: City/State/Zip (Include Street No. & Name)			Your Title	
3159 EDEN AVE: CINCINNATI, OH. 45219			FORENSIC PATH FELLOW	
From: Month & Year	To: Month & Year	Starting Salary	Final Salary	No. of Persons Supervised
7/96	7/97	36000	36000	—

Reason for Leaving: COMPLETED FELLOWSHIP TRAINING

Phone No.: 513·221·4524

Describe Your Duties

DEPUTY CORONER FOR HAMILTON Co. PERFORMED POST MORTEM EXAMINATIONS, SUPERVISED SCENE INVESTIGATIONS, FINALIZED DEATH REPORTS

Name of Employer			Supervisor and Title	
SCOTT & WHITE HOSPITAL			STEVE BEISSNER MD, PH.D.	
Address: City/State/Zip (Include Street No.& Name)			Your Title	
2401 So. 31st TEMPLE TX			PATHOLOGY RESIDENT	
From: Month & Year	To: Month & Year	Starting Salary	Final Salary	No. of Persons Supervi
7/91	7/96	26000	32000	—
Reason for Leaving		Phone No.		
COMPLETED PATHOLOGY RESIDENCY		817-774-2111		
Describe Your Duties				
THE REQUIRED ANATOMIC & CLINICAL PATHOLOGY CORE CURRICULUM				

Name of Employer			Supervisor and Title	
SCOTT & WHITE HOSPITAL			FRANCISCO PEREZ-GUERRA MD	
Address: City/State/Zip (Include Street No.& Name)			Your Title	
Some			SLEEP DISORDERS LAB TE	
From: Month & Year	To: Month & Year	Starting Salary	Final Salary	No. of Persons Supervis
8/84	7/87	18000	21000	—
Reason for Leaving		Phone No.		
BEGAN MEDICAL SCHOOL				
Describe Your Duties				
MONITORED & SCORED SLEEP PATTERNS OF PATIENTS				
SUFFERING FROM APNEA, NARCOLEPSY SEIZURES, IMPOTENCE, ETC.,				

Name of Employer			Supervisor and Title	
LEGAL AID SOCIETY of CENTRAL TEXAS			NICOLAS SERNA	
Address: City/State/Zip (Include Street No.& Name)			Your Title	
513 So. MAIN BELTON TX.			PARALEGAL	
From: Month & Year	To: Month & Year	Starting Salary	Final Salary	No. of Persons Supervis
5/79	8/83	15000	18500	—
Reason for Leaving		Phone No.		
WENT BACK TO UNDERGRADUATE SCHOOL				
Describe Your Duties				
REPRESENTED CLIENTS IN ADMINISTRATIVE LAW CASES				
(e.g. SOC. SECURITY, INS, AFDC), DREW UP WILLS & RESEARCHED CIVIL CASE				

REFERENCES

LIST THREE PERSONS WHO ARE NOT RELATED TO YOU AND WHO HAVE DEFINITE KNOWLEDGE OF YOU QUALIFICATIONS FOR THE POSITION FOR WHICH YOU ARE APPLYING. DO NOT REPEAT NAMES OF SUPERVISORS LISTED UNDER EMPLOYMENT HISTORY.

FULL NAME	HOME OR BUSINESS ADDRESS AND PHONE NUMBER (NUMBER, STREET, CITY, STATE, ZIP)	BUSINESS OR OCCUPATION	YEA ACQUA
JOHN D. HOWARD MD	PIERCE CO. M.E. (206)-591-6494 3619 PACIFIC AVE; TACOMA WA. 98408-7929	CHIEF MED EXAMINER PIERCE CO., WA.	1½
ROBERT BUX MD	BEXAR CO. FORENSIC SCI CENTER, (210)-615-2160 7337 LOUIS PASTEUR, SAN ANT. TX. 78229	DEPT. CHIEF M.E. BEXAR CO., TX.	3
SANDRA COMBAS MD	FOR. PATH SECTION, MED. UNIV. OF So. CAROLINA 171 ASHLEY AVE. CHARLESTON, SC. (803)-792-3641	PROF & DIR. FOR. PATH.	7

I AUTHORIZE INVESTIGATION OF ALL STATEMENTS CONTAINED IN THIS APPLICATION.
I certify that there are no willful misrepresentations, omissions or falsification in the foregoing statements and answers to questions. I am aware that should an investigation disclose any misrepresentation, omission or falsification, my application may be rejected, or if already employed, my employment may be terminated. References and previous employer will be contacted to confirm statements unless otherwise indicated.

YOUR APPLICATION WILL NOT BE CONSIDERED UNLESS SIGNED AND ALL QUESTIONS ANSWERED.

DATE 29 MAY 97 **APPLICANT'S SIGNATURE** [signature] M.D.

Date____ Alpha ____ Num.____ Spell. ____ Date ____ WPM____ / ____ Date ____ WPM ____ / ____

Date____ Alpha ____ Num.____ Spell. ____ Date ____ WPM____ / ____ Date ____ WPM ____ / ____

VETERANS PREFERENCE INFORMATION

The "Veteran's Employment Preference" (Ch. 657 of the Texas Code) relates to the appointment or employment of veterans who served during a national emergency, an individual classified as surviving spouse who has not remarried or an orphan of a Veteran. To determine if you are entitled to the Veteran's Employment Preference, the following information must be answered.

A veteran qualifies for a veterans employment preference if the veteran:

Served in the military for not less than 90 consecutive days during a national emergency declared in accordance with federal law or was discharged from military service for an established service-connected disability; was honorably discharged, and is competent.

Do your qualify for this preference?

- ☐ Yes
- ☐ No

A veterans surviving spouse who is not remarried or an orphan of veteran qualifies for veterans preference if:

Veteran was killed while on active duty, veteran served in military not less than 90 days during a national emergency and spouse or orphan is competent.

Do you qualify for this preference?

- ☐ Yes
- ☐ No

"Veteran" means an individual who served in the Army, Navy, Air Force, Marine Corps, Coast Guard of the U.S. or in an auxiliary service of those branches.

If employed, employee will be asked to provide documents to verify preference

DATE NAME

EXHIBIT 7

Luis A. Sanchez, M.D.
Chief Medical Examiner

(713) 796-9292
FAX: (713) 796-6844

JOSEPH A. JACHIMCZYK FORENSIC CENTER

file

MEMORANDUM

TO: Paul Shrode, M.D.
Assistant Medical Examiner

FROM: Dwayne Wolf, M.D., Ph.D.
Deputy Chief Medical Examiner

RE: Case Log

DATE: December 15, 2003

A review of your cases from 2003 reveals a large number of remaining pending cases (103 cases), uncompleted (classified and pending) autopsy reports (178 cases currently in the medical records area). In order to allow you time to diminish these backlogs you will be relieved of any responsibility from performing autopsies on Wednesday, December 17, Thursday, December 18, and Friday, December 19.

During this period of time, you will need to maintain a log of cases completed (number unpended, and number of autopsies released for final form). These numbers should be forwarded to me at the conclusion of each day.

Cc: Luis A. Sanchez, M.D.

DAW/bg

EXHIBIT 8

Harris County Medical Examiner's Office
1885 Old Spanish Trail
Houston, Texas 77054

COUNSELING WORKSHEET

Dr. Paul W. Shrode — NAME
10-5-01 — DATE

1. ( ) Unreported Absence
2. ( ) Tardiness
3. ( ) Drinking on duty
4. ( ) Insubordination
5. ( ) Dishonesty
6. ( ) Failure to obey orders
7. ( ) Fighting on premises
8. ( ) Leave without permission
9. ( ) Improper conduct
10. ( ) Reporting under the influences of alcohol
11. ( ) Violation of rules
12. (✓) Defective and improper work
13. ( ) Carelessness
14. ( ) Destruction of property
15. (✓) Other: Wrong determination of cause of death. Case - ML01. 2587

REMARKS: Set forth all facts relating to the above. Please use 2nd page if necessary.

The determination of cause of death was incorrect and case was not completed on time despite all pertinent information available since August 23, 2001.

The appropriate cause of death, manner of death and "How injury occurred" determinations were changed on numerous occasions including the staff meeting on August 22, 2001.

Correct ruling:
COD: Acute Toxic effects of cocaine and heroin
MOD: Accident
How injury occurred: Consumed drug mixture of cocaine and heroin.

Signature of Supervisor — 10/08/01 Date

RECEIVED
Kathy Ramsey
OCT 0 8 2001
MEDICAL EXAMINER'S OFFICE

Signature of Employee — 10-08-01 Date

The above has been noted and is made a part of the above employee's record, as of this date.

09/93

EXHIBIT 9

REPORTER'S RECORD
TRIAL COURT CAUSE NO. 2006CM4085
VOLUME 2 OF VOLUMES

IN THE INTEREST OF:	IN THE 65TH JUDICIAL
ANGEL RENAI DOMINGUEZ, AKA ANGEL RENAI SILVA, DAMIEN JOSEPH RAMOS, ELLIE NICHOLE RAMOS and ALICIA DANIELLE RAMOS,	DISTRICT COURT OF
Minor Children.	EL PASO COUNTY, TEXAS

****

JURY TRIAL

****

COPY

On the 13th day of August, 2007, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable ALFREDO CHAVEZ, Judge Presiding, held in El Paso, El Paso County, Texas:

Proceedings reported by machine shorthand utilizing computer-assisted realtime transcription.

APPEARANCES

For Child Protective Services:

BRUCE YETTER
SBOT # 22153500
RICHARD DECK
SBOT # 00785812
Assistant County Attorneys
500 San Antonio, 5th Floor
El Paso, Texas 79901

For Respondent Mother Alicia Silva:

THERESA CABALLERO
SBOT # 03569625
300 E. Main, Ste. 1136
El Paso, Texas 79901

For Respondent Father David Ramos:

CHRISTOPHER T. COX
SBOT # 00787296
6006 N. Mesa, Ste. 220
El Paso, Texas 79912

ROSENDO TORRES
SBOT # 20144550
1220 Montana, Ste. 201
El Paso, Texas 79902

For Angel Renai Dominguez:

BERNARDO GONZALEZ
SBOT # 081245100
7362 Remcon
El Paso, Texas 79912

For Ramos Children:

CELIA A. VILLASENOR
SBOT # 24043975
1112 Montana Avenue
El Paso, Texas 79902

DEBORAH BABERS
Court Appoint Special Advocate

CHRONOLOGICAL INDEX.

8/13/07

EXHIBITS

want to miss anything. If I assume this is a natural death, then I'm not going to think about an accident other a homicide or anything like that.

Q. Why do you assume anything?

A. Well, you know, the law assumes a person is innocent until proven guilty. Why can't I assume some things?

Q. Do you think there is a burden in medicine because there are burdens in the law -- are you telling the ladies and gentlemen of the jury that like the law, that medicine has burdens? And if you are telling me that medicine has burdens, then I'd like you to show me what medical book outlines that.

A. No, I'm not going to tell you that.

Q. Let's talk about your CV, Doctor. You have down on your resume your educational background. You have a graduate law degree from school of political science Southwest Texas University, San Marcos, Texas 1979. You are saying you have a graduate law degree?

A. It's from the school of political science. It's not from the school of law.

Q. Do you have a law degree, Doctor?

A. Not in the sense of a law degree from a school of law, not like you.

Q. Not like me. Do you have a diploma, a

certificate, anything that hangs on your wall that you can show the ladies and gentlemen of the jury that says I Dr. Shrode have a law degree? Not just a law degree, a graduate law degree?

A. No, I do not have that.

Q. And so in fact you don't have a law degree, graduate or otherwise?

A. Well, I have a degree in law from the graduate school of political science. As I mentioned, it was the first year of law school in this school that did not get eventually accredited.

Q. First year of law school. How many years did you attend?

A. One.

Q. Do you know how long law school is?

A. Three.

Q. Three. So you got a law degree in one year from the school that is not an accredited law school?

A. Well, the school of law was not accredited. Everything was done under the -- it wound up being under the school of political science.

Q. Are you -- I want to understand what you're telling me. Are you saying that you have a law degree?

A. I do not have a law degree.

Q. So your CV is misleading. Graduate law degree,

am I reading that incorrectly?

A. No, that's what it says.

Q. So that's not what you have though, is it?

A. Well --

Q. That's a "yes" or a "no".

A. I have a law degree from the graduate school of political science.

Q. Is that different from you have a graduate law degree?

A. In terms of having a law degree from a school of law, I do not have that. And if you want me to say I don't have a law degree, I do not have a law degree.

Q. I want you to just tell me what you have, Doctor. It's not I want you to say this or I want you to say that. I see you have said in plain English graduate law degree from school of political science.

A. Okay. I have a degree from the graduate school of political science.

Q. And what does that degree entail?

A. It's law. We studied a year of law. We studied contracts and all the things that you do in first year law.

Q. Are you aware there is a criminal justice program at UTEP and students can go take contracts and torts and civil procedure and criminal procedure at that

criminal justice program, but they don't call them a law degree?

A. No, I am not aware of that.

Q. Do you think that that is perhaps misleading?

07:41:46 A. Well, if it is misleading it can be looked at.

Q. Looked at or changed, rectified, corrected?

A. Corrected, whatever.

Q. In fact, didn't you say earlier it was a paralegal degree?

07:42:06 A. I worked as a paralegal.

Q. I didn't ask you that. Didn't you say earlier it was really a paralegal degree?

A. It was paralegal studies.

Q. And the paralegal in the legal profession would

07:42:23 be what a medical assistant is in the medical profession?

A. I can't make that correlation. I don't know.

Q. Is a medical assistant the same as a doctor?

A. No.

Q. Could a medical assistant who studied medicine

07:42:36 for one year say that she has a graduate medical degree?

MR. GONZALEZ: Judge, I'm sorry. It's time to object. This is argumentative and totally irrelevant. That's not why we're here today.

THE COURT: Sustained.

07:42:54 Q. (BY MS. CABALLERO) And in fact, you have under

your qualifications profile that you were a member of the State Bar of Texas from 1979 to 1983, correct?

MR. GONZALEZ: Same objection.

THE COURT: Sustained. Move on.

Q. (BY MS. CABALLERO) Is there anything else on here, Doctor, that needs to be corrected? Anything else under your qualifications?

A. You're saying I was not a member of the State Bar?

Q. Sorry?

A. You're saying I was not a member of the State Bar?

Q. I didn't say that. I asked you if you said that?

A. I was a member of the State Bar of Texas.

Q. Is there anything else on your CV that you think isn't entirely accurate or would be misleading to a jury that takes this back to read it?

A. No, I don't believe so.

Q. And there was a supplemental report generated by Rex K. Parsons investigator, correct?

A. Yes.

Q. And that supplemental report was generated because in fact the case numbers were mixed up, correct?

A. Yes, the case numbers were incorrect.

Q. So they were using a camera and shots are taken and they put case number 06-0219 on some information. And as it turns out that should have been 06-0220, correct?

07:44:32 A. Correct.

Q. Any other mistakes that we need to know about here?

A. I am not aware of any.

MS. CABALLERO: I pass the witness.

07:44:50 THE COURT: Let's brake for the day. Ladies and gentlemen of the jury, at this time we are going to recess for the day. The instructions I've given you previously continue. Do not discuss this case with anyone. Anyone attempts to discuss the case with you, 07:45:04 inform us immediately.

I need you in the jury room at 8:30 tomorrow morning so we can continue this case. Good night.

(Proceedings adjourned for the day.)

STATE OF TEXAS)
COUNTY OF EL PASO)

I, Diane J. Marquez, Court Reporter in and for the 65th Judicial District Court of El Paso County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of ~~all~~ excerpts of portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND this the 21 day of Sept., 2007.

Diane J. Marquez

DIANE J. MARQUEZ, Texas CSR# 3160
65th District Court
El Paso, TX 79901 (915) 546-2102
Expires: December 31, 2008

EXHIBIT 10

Affidavit of Dr. Robert Pfalzgraf

(1)

State of Florida,

County of Lee, SS:

Dr. Robert Pfalzgraf, after being duly sworn according to law, states as follows:

1. I am a licensed medical doctor in the State of Florida. I am also a diplomat in the of Anatomic and Clinical Pathology as well as Forensic Pathology.

2. I graduated from the Ohio State University College of Medicine in 1984, complete my residency in forensic pathology at the University of Cincinnati Medical Center in 1988 an completed my post-graduate fellowship in forensic pathology at the University of New Mexic School of Medicine in 1989.

3. I have attached to this affidavit, as Exhibit A, my curriculum vitae and bibliography which accurately reflects all of the positions I have held since I became a medical doctor. In addition to my employment, my curriculum vitae also identifies my academic appointments, professional society memberships, as well as the publications I have authored and presentations have given at teaching seminars.

4. I was employed by the Hamilton County Coroner's Office in Cincinnati, Ohio from 1989 to 1992 as a Deputy Coroner. I worked as an Assistant Medical Examiner for District 13 i Tampa, Florida from 1992 to 1996. From 1996 to 2004, I was the Chief Deputy Coroner and Director of Forensic Pathology for the Hamilton County Coroner's Office.

5. As Chief Deputy Coroner, I supervised the fellows in the approach to developing cause and manner of death opinions on their cases, including the use of the autopsy, scene investigation and other information gathering to develop these opinions. In addition, I taught fellows techniques in special dissections, evidence collection and identification of unrecognizable bodies, all of which are unique to the field of forensic pathology.

6. Dr. Paul Shrode was a fellow under my supervision and training at the Hamilton County Coroner's Office from December 2, 1996 to June 27, 1997. In medical terms, a fellowship is the period of training that a physician may undertake after completing his or her residency.

7. I was requested by the Office of the Federal Public Defender for the Southern District of Ohio to review the testimony of Dr. Paul Shrode in *State v. Nields*, Hamilton C.P. No. B97-03305. The attorneys who asked me to review the testimony of Dr. Shrode did so because I was the senior doctor on the case and also signed the autopsy report for Patricia Newsome, the victim in *State v. Nields*.

(2)

8. This is the first time I have ever been contacted to review the testimony given by Dr. Shrode in *State v. Nields*. In reviewing the materials provided to me, I was not working for nor hired by the prosecution or defense counsel. I was simply asked to review the materials provided to me and answer the question of whether or not Dr. Shrode's testimony provided the jury with accurate information relating to the autopsy of Patricia Newsome.

9. To assist me in my review, the Office of the Federal Public Defender for the Southern District of Ohio provided me with the following materials:

a) the October 7, 1998 affidavit of Dr. Michael Clark,
b) trial testimony of Dr. Shrode,
c) trial testimony of Dr. Von Loveren,
d) crime scene photographs,
e) crime scene video,
f) the autopsy report of Patricia Newsome,
g) photographs of Richard Nields' hands,
h) autopsy photographs,
i) excerpts from Harris County personnel records,
j) Texas Medical Board complaint against Dr. Shrode,
k) 2004 resume of Dr. Shrode,
l) 2007 resume of Dr. Shrode prior to revisions,
m) 2007 revised resume of Dr. Shrode.

10. At the time of Patricia Newsome's autopsy, I was the senior/supervising doctor on the case. I was one of the two doctors who signed the autopsy report for Patricia Newsome. The other doctor signing the autopsy was Dr. Shrode, who was under my training and supervision. At the time of the autopsy, Dr. Shrode was completing his fellowship with the Hamilton County Coroner's Office. For purposes of this affidavit, I have reviewed the autopsy report of Patricia Newsome and agree with all of the statements and conclusions contained therein.

11. Dr. Shrode was called as an expert witness by the prosecution in *State v. Nields*. Prior to testifying, Dr. Shrode never reviewed his proposed testimony with me. At the time he testified, Dr. Shrode had completed his fellowship with the Hamilton County Coroner and moved on to other employment. I was not in the courtroom when Dr. Shrode testified in the *Nields* case.

12. Dr. Shrode testified shortly after he completed his fellowship. Therefore, this may have been one of the first times he ever testified. Due to delays between arrest of suspects and subsequent criminal trials, fellows in forensic pathology ordinarily do not have many opportunities to testify during their training. When fellows testify, supervising pathologists often assist in the preparation for trial and observe the fellow during trial. As stated earlier, this did not occur in the *Nields* case.

13. Although I agree with Dr. Shrode's conclusions discussed in the autopsy report, I disagree with several of the findings he later testified to at trial. Specifically, I disagree with:

(3)

- Dr. Shrode's opinion that the trauma and swelling to the victim's head was inflicted fifteen minutes to six hours prior to her being strangled.
- Dr. Shrode's testimony about concussions and unconsciousness.
- Dr. Shrode's testimony regarding the fingernail scrapings of Patricia Newsome.

14. As the supervising doctor in this case, I would not have signed a version of the autopsy report that contained this information. I would not have signed my name to the findings and conclusions Dr. Shrode testified to because they were incorrect.

15. Dr. Shrode, in his testimony, opined that the head trauma and swelling inflicted on the victim occurred fifteen minutes to six hours prior to her death. This statement is incorrect. Dr. Shrode should have answered that he had "no idea when the victim sustained the injury to her eye." You can only age bruising or swelling by viewing evidence of healing. When the healing process begins, the wound will turn from purple to yellow.

16. Dr. Shrode testified that at the time of the autopsy, the bruising on the victim's head had a "black and blue appearance." This shows a lack of healing, making it impossible to age the wounds. No medical doctor can age a wound without evidence of healing. In this case there is no medical evidence to support the conclusion that the victim sustained the trauma and swelling to her head a substantial length of time prior to her death.

17. When testifying concerning the fifteen minute to six hour time period between the swelling and strangulation, Dr. Shrode cited to the issue of rigor mortis. This has no relevance to when the victim sustained the trauma to her head. Dr. Shrode could have possibly confused the issues concerning the time of the eye injury with the time of the death.

18. Dr. Shrode also testified about concussions, without specifically or correctly tying that testimony to the victim in this case. A person, including the victim in this case, could have sustained fractures or bruises to the head and not lost consciousness. That is not an uncommon occurrence. Fractures and bruises to the head are markers of impacts, not markers of lack of consciousness. There is no evidence in the present case that shows the victim sustained a concussion or was ever unconscious.

19. Dr. Shrode also testified about the fingernails of the victim in this matter. Although I have not personally seen the fingernail report, Dr. Shrode testified that the lack of scrapings on her nails supports the theory that she was already unconscious at the time of her death. That testimony is not correct. A lack of evidence on a victim's fingernails tells one nothing. It is actually very rare for a victim's fingernails to collect evidence during a crime.

20. The three issues that I have addressed in this affidavit; the infliction of the bruises and swelling preceding the victim's death by up to six hours, the victim's state of consciousness and the victim's fingernails being used as support for the victim's lack of consciousness were not addressed in the autopsy that I signed. I would not have signed a version of the autopsy that

(4)

contained this information because it was incorrect.

Further affiant sayeth naught.

Robert A. Pfalzgraf

Dr. Robert Pfalzgraf

Sworn and subscribed to me this 11 day Of February 2010.

Pamela M Dragoo

PAMELA M. DRAGOO
MY COMMISSION # DD 69069
EXPIRES: August 19, 2011
Bonded Thru Notary Public Underwriters

EXHIBIT 11

DATE TYPED: May 14, 2010
DATE PUBLISHED: May 18, 2010

IN RE: RICHARD NIELDS, OSP #A352-374

STATE OF OHIO
ADULT PAROLE AUTHORITY
COLUMBUS, OHIO

Date of Meeting: May 10, 2010

Minutes of the **SPECIAL MEETING** of the
Adult Parole Authority held at 770 West Broad Street,
Columbus, Ohio 43222 on the above date.

IN RE: Richard Nields, OSP #A352-374

SUBJECT:	Death Sentence Clemency
CRIME, CONVICTION:	Aggravated Murder with specifications, Aggravated Robbery.
DATE, PLACE OF CRIME:	March 27, 1997 in Springfield Township, Ohio
COUNTY:	Hamilton
CASE NUMBER:	B9703305
VICTIM:	Patricia Newsome
INDICTMENT:	5/2/1997: Counts 1-2: Aggravated Murder with specification, Count 3: Aggravated Robbery.
TRIAL:	Found guilty by jury
DATE OF SENTENCE:	12/22/1997
SENTENCE:	Aggravated Murder with specifications: DEATH Aggravated Robbery: 10 years * Counts 1- 2 merged for purposes of sentencing.
ADMITTED TO INSTITUTION:	December 23, 1997
JAIL TIME CREDIT:	1 day
TIME SERVED:	136 months
AGE AT ADMISSION:	47 years old
CURRENT AGE:	59 years old
DATE OF BIRTH:	May 19, 1950
JUDGE:	Honorable Thomas C. Nurre
PROSECUTING ATTORNEY:	Joseph T. Deters

FOREWORD:

Clemency in the case of Richard Nields, A352-374 was initiated by the Ohio Parole Board, pursuant to Section 2967.03 and 2967.07 of the Ohio Revised Code and Parole Board Policy #105-PBD-01.

On April 29, 2010, Mr. Nields was interviewed via video-conference by the Parole Board at the Ohio State Penitentiary. A Clemency Hearing was then held on May 10, 2010 with seven (7) members of the Ohio Parole Board participating. Arguments in support of and in opposition to clemency were then presented.

The Parole Board considered all of the written submissions, arguments, information disseminated by presenters at the hearing, prior investigative findings as well as judicial decisions and deliberated upon the propriety of clemency in this case. With seven (7) members participating, the Board voted four (4) to three (3) to provide a favorable recommendation for clemency to the Honorable Ted Strickland, Governor of the State of Ohio.

DETAILS OF THE INSTANT OFFENSE (B):

The following account of the instant offense was obtained from the Ohio Supreme Court opinion, decided August 29, 2001:

On the night of March 27, 1997, Patricia Newsome was found strangled on her kitchen floor. Police arrested the subject, Richard Nields, Newsome's frequent live-in companion, at Newsome's home that night, not long after Springfield Township Police had transported him there. Nields was indicted for aggravated murder and aggravated robbery, found guilty as charged, and sentenced to death.

Prior to 1997, Nields and Patricia Newsome had an on-again, off-again relationship for approximately ten to twelve years. In the year leading up to the murder, they lived together at Newsome's home in Finneytown, Springfield Township, in Hamilton County. Newsome worked as a realtor in Fairfield, and Nields was a keyboard musician who was out of work most of the time. On March 27, 1997, Newsome had lunch with her friend, Dorothy Kiser. Newsome told Kiser that she asked Nields to move out. Even though subject had packed his clothes in his car in order to move out, "he kept coming back to the house."

In the weeks leading up to March 27, Nields would call Newsome with hostile messages. On one occasion, an angry call for Newsome was received by the office receptionist, Floanna Ziegler, from a man identifying himself as a musician. Newsome wrote the incident down and told Ziegler, "I'm trying to file charges against him and I want to document everything that he said to you."

During the afternoon of March 27, Dorothy Alvin had a conversation with subject, who was a stranger to her, at Lulu's bar in Springfield Township. Nields told Alvin that the

lady whose house he lived in was throwing him out. Nields further told Alvin, "I'd like to kill her, but I guess I won't do that because I don't want to go to prison."

Later, during the evening of March 27, Barbara Beck and Patricia Denier were dining at the Briarwood Lounge on Hamilton Avenue. At approximately 10:30 p.m., Nields entered the bar and approached the two women, both of whom he knew. Both women noticed blood on his right hand and asked him what happened. Nields said to them, "You'll hear it on the news tomorrow." Nields also kept repeating, "I'm in serious, serious trouble." Both women thought that he was in shock and was acting strange. Neither smelled any alcohol on his breath.

As Beck and Denier left the lounge, subject walked them to their car and asked to go with them. After they declined to take subject with them, Nields told them, "I'm going to be driving home in a Cadillac." They saw subject walk across the street to a white Cadillac. Friends of Patricia Newsome testified that she owned a white Cadillac but never let anyone else drive it, especially subject, "because of the way he drank."

Anthony Studenka was at DJ's Pub on Winton Road on the night of March 27, a little before midnight and sat down next to a person at the bar who "told me he killed somebody." That person was Nields. Nields showed Studenka his hands, which had cuts on them, and told Studenka that he had killed some kid who was a drug pusher. Nields then suddenly became belligerent and started calling Studenka insulting names. Kimberly Brooks, a friend of Studenka, also heard subject declare that he had killed someone and noticed that subject had "dried blood all over" his hands. However, Nields then denied that he had killed anyone, and said that he had helped drag the body away. Brooks called 911 to report subject's statements.

Springfield Township Police Officer Greg Huber was in front of DJ's Pub when he heard a radio call that a male at the bar was bragging that he had killed someone. Huber encountered Nields inside the bar and asked him to step outside because of the noise. After initially refusing to do so, Nields went outside and spoke with Huber, who then noticed blood on both of subject's hands. When asked about the blood, Nields told Huber that he was in a fight across the street at Lulu's bar. At that time, Police Sgt. Ken Volz arrived on the scene. Huber then went to Lulu's to investigate and discovered that there had been no fight there.

Sgt. Volz and another officer, Clayton Smith, spoke with subject outside of DJ's Pub. Nields told the officers that the story of the killing he was telling inside the bar was really about a Clint Eastwood movie. Smith, who was familiar with such movies, asked subject questions to find out to which movie subject was referring. However, subject could not sufficiently answer any of his questions. Sgt. Volz then instructed Smith to drive subject home due to his "intoxication level."

Nields pointed to the white Cadillac across the way as "his girlfriend's car" that he drove, which Volz learned was registered to Patricia Newsome. Volz then went to Newsome's house on 8527 Pringle Avenue, "to check on her well being." When he peered through

the front window, he could see that the television and some lights were on, and he could hear the dog barking inside.

As Officer Smith drove up to the Pringle Avenue residence with Nields, Sgt. Volz was standing on the front porch area. Nields "became very uptight and aggressive and verbal and almost yelling" at Smith. Nields declared that they were not going into the house without a search warrant. Nields eventually calmed down, and the officers let him enter the house and hoped he would calm down for the night. However, after Nields entered the house, the officers could see him through the front window "waving his hands in an erratic fashion."

As the officers were leaving, they noticed the door on the attached garage was open. Officer Smith entered the open lit garage and peered in a window that looked into the kitchen. Smith saw "a female on the ground who was obviously deceased." The officers went to the front door and saw the subject through the front window still waving his arms. They knocked on the door, and as Nields opened the door, they grabbed his arm, pulled him outside, and handcuffed him. Police arrested Nields and advised him of his *Miranda* rights. Sgt. Volz entered the house to check on the victim but could not detect a pulse.

While Nields was detained in the police cruiser, he kept asking Officer Smith, "Is she alive?" During the arrest, police found fifteen traveler's checks in the subject's possession, all of which bore Patricia Newsome's name. Police Chief David Heimpold arrived at the scene and readvised Nields of his *Miranda* rights. Nields told Heimpold that he and Newsome had been in an argument. She hit him with the telephone, he then pushed her, and she hit her head on a bookcase. Nields also mentioned that someone named "Bob" was also there, but shortly thereafter, he admitted that this was a lie. Nields admitted that he had choked Newsome after they had had a fight. The assistant medical examiner, who performed the autopsy on Newsome, concluded that she had died from asphyxia due to manual strangulation.

Nields was incarcerated at the Hamilton County Justice Center. Two days after the murder, he talked with Timothy Griffis, who was serving time that weekend for nonpayment of child support. Nields told Griffis that "he had killed his girlfriend," that they had argued, and that he "jumped on top of her, started beating her up." Nields said that he then went to a bar. He came back to Newsome's home to see if she was breathing and started strangling her. He laid the phone on top of Newsome's chest, called her either "bitch" or "baby," and told her, "Call me from heaven." According to Griffis, the subject at times appeared to be remorseful, but at other times, he exhibited a carefree attitude while recounting the details of the murder. Nields also told Griffis that he took money, jewelry, and traveler's checks out of Newsome's purse. According to Griffis, the subject was kind of upset because he could not use the traveler's checks.

On May 2, 1997, the grand jury indicted Richard Nields for aggravated robbery, aggravated murder with prior calculation and design, and aggravated felony-murder during an aggravated robbery. A death penalty specification attached to the aggravated

murder counts alleged that Nields had committed aggravated murder during the aggravated robbery and that he was either the principal offender or committed the aggravated murder with prior calculation and design. R.C. 2929.04(A)(7).

Prior to trial, a suppression hearing was held on the subject's motion to suppress his statement to police after he requested an attorney, his statements at DJ's Pub, and his statement to Timothy Griffis because the police entered the curtilage of Newsome's home without a warrant. The trial court denied the motion to suppress, holding that exigent circumstances justified the search of the home. The court further held that Richard Nields statements to police after he requested an attorney were freely and voluntarily given and that his statement at the Justice Center to Griffis and his statements at the pub were not suppressible.

The state called numerous witnesses to establish Nields' guilt before a jury. The defense conceded that Nields had killed Newsome but disputed that Nields had purposefully or "knowingly caused the death of Patricia Newsome" because he was "under the influence of sudden passion and rage." During the trial, Officer Nancy Richter testified that she discovered three pages of yellow legal paper entitled "Record of Abuse" at Newsome's residence while she and Newsome's children were looking for her will several days after the murder. A forensic document examiner with the coroner's office determined that the "Record of Abuse" pages were written by Newsome.

Also at trial, Springfield Township Police Officer Paul Rook testified that he responded to a "domestic call" at Newsome's residence on March 1, 1997. At that time, Newsome told Rook that she wanted Nields to leave her home and that she was afraid of him. Rook and another officer took Nields from Newsome's residence until he could find someone else who would come and get him. The defense called one witness.

After deliberation, the jury found Nields guilty as charged.

At the mitigation hearing, the defense presented three witnesses: Nields' sister, Rochelle Pittman; Dr. Emmett Cooper, psychiatrist and pharmacologist; and Assistant Public Defender James Slattery. Pittman chronicled Nields' family life, including the fact that Nields' father was an alcoholic who left the family when Nields was in high school. Pittman also testified that she became friends with Newsome and that a few weeks before the murder, they discussed having Nields committed at Newsome's suggestion.

Dr. Cooper testified that Nields was an alcoholic and reviewed the medical ailments that Nields suffered as a result of his alcoholism. Dr. Cooper observed that Nields' time in jail since his arrest represented his longest period of sustained sobriety since 1976. Slattery, an admitted alcoholic, testified as to the deleterious effects of alcohol and how his alcoholism interfered with his ability to do what was best for himself as well as his ability to practice law.

The jury recommended death, and the court imposed the death sentence on Nields.

CRIMINAL HISTORY:

Juvenile: Unknown

Adult: Richard Nields has the following known adult arrest record:

Date	Offense	Location	Disposition
2/2/1976 (Age 25)	Drunk Driving on Highway	Riverside, California	3/8/1976: 1 year summary probation, $315 fine.
6/2/1977 (Age 27)	Drunk Driving on Highway	Santa Ana, California	7/26/1977: 24 months probation, 9 days jail, $316 fine.
3/9/1981 (Age 30)	Drunk Driving on Highway	Santa Ana, California	3 weekends
12/20/1989 (Age 39)	Domestic Violence 89CRB039644	Cincinnati, Ohio	12/28/1989: $200 fine, 1 year probation; 12/28/1990: terminated.
10/06/1991 (Age 41)	OVI – Alcohol and/or Drugs	Butler County, Ohio	10/7/1991: Convicted
3/27/1997 (Age 46)	Aggravated Murder, Aggravated Robbery (B973305)	Cincinnati, Ohio	INSTANT OFFENSE

Traffic Violations: On 11/25/1985, Nields received a moving violation in Hamilton County for which he received a $100 fine.

Institutional Adjustment:

Richard Nields was admitted to the Department of Rehabilitation and Correction on December 23, 1997. His work assignments while incarcerated at the Mansfield Correctional Institution included Food Service Worker, Laundry Worker and Recreation Worker. He was assigned to the extended privilege unit while at this institution. Since his transfer to the Ohio State Penitentiary, his work assignment has been as a Porter. Nields is also currently assigned to the extended privilege unit at OSP.

Since his admission, Richard Nields has never been placed in disciplinary control for any conduct problems.

Currently, Nields is actively involved in religious service programs, bible studies and worship services. He also assists in church musical programs where he plays the keyboard. Nields has also volunteered for community service projects both at the Mansfield Correctional Institution and at the Ohio State Penitentiary.

APPLICANT'S STATEMENT:

On April 29, 2010, Nields was interviewed from the Ohio State Penitentiary via video-conference by the Parole Board. During this interview Nields shared with the Board that he is asking for life without the possibility of parole. Additionally, he expressed sorrow and shared that not a day goes by that he does not feel remorse for what he did to the victim. He further shared that he "loved Patty, still loves Patty, and prays for her family."

When questioned by the Board as to what his role was in the instant offense, Nields shared the following: Nields stated that things began in the morning after the victim left for work. He began by stating he had been intoxicated for a period of ten days. On the morning of the instant offense, Nields walked to the liquor store and purchased some alcohol. He then went to the bar where he claims to have consumed alcohol all day long. Eventually, he went back home and continued drinking.

When Nields arrived home, Ms. Newsome was sitting on the couch and was very upset with him about his drinking. Nields claims that Ms. Newsome was so upset that she began yelling at him, and things started to "go down hill real fast." Nields indicated that the victim threw the telephone, hit him in the head with it, and he "snapped." This was the point at which Nields said he pushed the victim hard against the bookcase causing her to fall and hit her head. Next, Ms. Newsome picked up the phone again, and Nields tore it out of the wall. Nields then followed her to the kitchen and "grabbed" her as she attempted to leave. It was at this time that Ms. Newsome slipped on a mat by the door and hit her head on the kitchen floor. Nields shared that he got on top of her after she fell and started to hit and choke her. Eventually, he realized the victim was not responding, and blood started to come out of her mouth so he stopped.

Nields, then stated that after beating and choking the victim, he sat there for a minute, started to drink again, and began to talk to the victim. He also checked to see if the victim had a pulse, but she was already dead. Nields also states that he prayed for the victim as he finished his bottle of liquor. Next, he got into the car and drove to the local bar. It was at this time Nields told people he did an "insane thing" and let them know they would hear about it on the news. Eventually, he came to his senses and went back home. Upon arriving back home, Nields realized that the victim had not moved. He checked her pulse again and listened for a heart beat. Once again, he began praying and talking to the victim and eventually left to go to another bar.

While at the second local bar, Nields shared that he confessed to another patron about killing his girlfriend. It was at this time that someone must have called the police. The police showed up at the bar, questioned Nields, and drove him back home. After police drove Nields to the house, he told them that they needed a warrant before they could

search his house, and then he closed the door. Police knocked again, Nields opened the door, and he was arrested.

Nields shared that he and the victim met in 1985. He stated they had a "beautiful relationship, loved one another, and did fun things together." They were involved as a couple for 12 years and lived together for approximately ten years. He did disclose to the Board that the police were dispatched to the home earlier in the month because the victim was upset that he was drunk and had been smoking. In fact, Nields shared that he was not arrested by police when they arrived and stated that they removed him from the home by dropping him off at the local bar. He also admitted to being arrested in 1989 for domestic violence against the victim. Nields indicated that he had been drinking, he and the victim argued, and he smacked her with an "open hand." The victim telephoned police the next day, and Nields was arrested.

Other than the aforementioned arrest for domestic violence, Nields denied any other record of domestic violence. He shared that he had been an alcoholic since 1976, had been in and out of rehabilitation multiple times, and had attended Alcoholics Anonymous. He also indicted that he had never been sober for longer than five months prior to coming to prison. This upset him because he was never able to receive his six-month sobriety token from Alcoholics Anonymous. Inmate Nields shared that he has been completely sober for the last 13 years.

Upon further questioning by the Board, Nields denied that he and the victim had discussed him moving out or leaving the home. Furthermore, he couldn't recall stating to anyone prior to that time that he wanted to kill the victim. He did recall confessing to the murder to another inmate while he was held in the county jail for the murder of Ms. Newsome.

Nields admitted to taking money from Patricia Newsome's purse along with money orders or cashier checks as he was leaving to go the bar after killing the victim. He further admitted to taking the victim's car keys and driving the car to the local bar. Nields also shared that he drove the victim's car "quite a bit," especially when going to visit the victim's daughter. Nields indicated that he made a deal with the victim that he could drive her car as long as he was sober.

Nields shared that he is estranged from his sister. His friends are his Christian brothers in prison. When questioned by the Board as to whether or not he received a fair trial Nields indicated that he was not a lawyer, but he believed that he was over-indicted and over-sentenced. Rather, Nields believed that he should have received life in prison without the possibility of parole and stated that his attorney believed his case was closer to that of manslaughter. Nields believed that his crime was one of passion and did not deserve the death penalty.

The Board also asked Nields if he returned to the crime scene to kill the victim. He denied leaving and going back to strangle the victim. He stated that he went back to the crime scene because he was hoping for a miracle. Nields also denied that he stated that

he went back to strangle the victim to Timothy Griffis while being held in the county jail. Nields went on to add that he believed that Timothy Griffis was "speaking fiction when he did that" and added, "It disgusts me and makes me sick that he got on the stand and said that lie."

Nields was questioned as to why he did not get the victim help. He indicated that he did not know why and said, "When someone's dead, you know she's dead." He went on to state that he was not thinking clearly either. He admitted that it took approximately three to four minutes to strangle Ms. Newsome to death. Nields indicated that his conscience keeps this crime in the forefront of his mind, and he beats himself up over his actions as they play like videotapes over and over in his head.

Inmate Nields also shared with the Board that he did not steal the victim's car. He claimed that he took it because it was in the garage and that it was more convenient than taking his car which was parked on the street. Nields stated that it was not unusual to drive Ms. Newsome's car to the grocery store, and he was insured to drive her vehicle. He also indicated that he did not know why he took her money but did know that he would not be in prison if it were not for his alcohol abuse.

Nields adamantly denied ever being violent with anyone before the instant offense. He did share that the police were called to his home three or four times throughout his 12-year relationship with the victim. He further added that he has never been involved in a fight and hates violence. At this time, Nields was confronted with a document he had authored entitled *Anger-People I Harmed.* It is in this document that Mr. Nields describes multiple episodes of violence involving at least eight separate women to include his first and second wives, live-in girlfriend, roommate, and other female friends. Nields said these accounts were probably true since he recorded them in his AA inventory. However, he could not recall all of the descriptions listed in the inventory.

Nields shared that Ms. Newsome did not drink or do drugs. He also indicated that she was not fearful of him and that she "loved him and was crazy about him." Nields was then confronted with the fact that the victim kept a diary outlining her fears about him and the fact that he made statements of killing her and his sister. He claims that those statements were nothing more than figures of speech. In fact, Nields told the Board that the victim kept the diary because she wanted to have him committed.

Nields shared that he has spent most of his time on death row studying the word of God, and he knows that Jesus forgives him for the wretched life that he has lived. He finds peace in Jesus, plays music on the keyboard, plays chess and reads. He has remained a positive person over the last 13 years.

Nields concluded the interview by stating that he was grateful to have had the opportunity to speak to the Board, and that no one has visited with him with the exception of his attorneys. He said he told us the truth and has turned everything over to God. Nields also wanted to let Ms. Newsome's family know that he is sorry for what he did, prays for

them, and believes in the power of prayer. Finally, he told the Board he would be grateful if the Board would let him live.

ARGUMENTS IN SUPPORT OF CLEMENCY:

A written application with exhibits outlining the arguments in support of clemency for Richard Nields was received by the Parole Board. On May 10, 2010, a hearing was conducted to further consider the merits of the application. Carol Wright and Justin Thompson of the Federal Public Defender's Office and Randall Porter of the Ohio Public Defender's Office represented Inmate Nields and presented oral arguments and witnesses in support of clemency.

Attorney Carol Wright shared with the Board that they are requesting life without the possibility of parole for Richard Neilds. She began the presentation by quoting from the United States Sixth Circuit Court of Appeals. In 2007, this was the last court to have an opportunity to examine Richard Nields'case. She pointed out that those justices involved cited the following in their decision: "Despite the weakness of Nields' legal arguments on appeal, we cannot help but note that the circumstances of this case just barely get Nields over the death threshold under Ohio law." They further added, "At the same time, however, we recognize that a determination of whether this particular murder fits within that narrow category is a policy matter initially delegated by the State of Ohio to the jury and eventually delegated by the State to its governor to resolve in a fair-minded and even handed manner."

Attorney Wright stressed that the last court to examine Nields' case was "bothered" by what it saw. She also told the Board that she was going to present information that the jury, trial judge, and reviewing courts did not have available to them. Specifically, they relied on incorrect medical testimony that was provided by Dr. Paul Shrode. Additionally, they did not have available to them evidence showing that Nields has a damaged brain.

Nields' attorney began with the videotaped testimony from Dr. Robert Pfalzgraf. Dr. Pfalzgraf was the Deputy Coroner who supervised Dr. Shrode at the time of Nields' case, and he signed off on the autopsy results of Patricia Newsome that were conducted by Dr. Shrode. Dr. Pfalzgraf began his testimony by stating that the results of the autopsy report are correct and that nothing is technically wrong with them. However, what Dr. Pfalzgraf did not agree with are the conclusions that Dr Shrode testified to in front of the jury during Nields' trial. It should be noted that Dr. Shrode did not review his testimony in advance with Dr. Pfalzgraf in that he had moved out of state to take a different position.

Dr. Pfalzgraf shared that the conclusions that Dr. Shrode testified to at trial were not "scientifically supported," and he outlined five specific areas where his conclusions were not correct. First, he pointed out that there was no scientific evidence available to support the age of the bruises on the victim in that there was no evidence of healing. However, Dr. Shrode narrowed the time frame of the bruising on the victim down to 15

minutes all the way up to six hours. Dr. Pfalzgraf pointed out that bruises can appear within seconds and last for a day or more.

Second, Dr. Pfalzgraf stated that Dr. Shrode was also incorrect regarding his conclusions on the fingernail clippings that he examined. Dr. Shrode led the jury to believe that due to the lack of DNA evidence under the victim's fingernails, she was already rendered unconscious and was unable to fight back when she was being strangled to death. Dr. Pfalzgraf pointed out that one cannot scientifically conclude that the lack of DNA under the victim's fingernails means that she was not fighting back and/ or conscious during the attack. In fact, he has never had a case where there was DNA evidence left under the victim's fingernails in all of his years of experience as a pathologist. Dr. Pfalzgraf further pointed out that the lack of DNA cannot ensure that the victim was unconscious. In fact, he stated in his affidavit to the Board "that it is actually rare for a victim's fingernails to collect evidence during a crime."

Third, Dr. Shrode attempted to establish a gap in the victim's death between the beating and her strangulation when talking about rigor mortis. Dr. Pfalzgraf pointed out that the only thing that can be scientifically established from rigor mortis is that it occurs after a person is dead.

Fourth, Dr. Shrode's testimony in relation to petechia was also incorrect. Dr. Pfalzgraf pointed out that the only thing petechia can support in this case is that the victim was strangled. In no way can it assist in determining her time of death.

Finally, Dr. Pfalzgraf pointed out that there are no findings available to determine that the victim was unconscious when she was strangled to death. Again, Dr. Pfalzgraf pointed out that Dr. Shrode was incorrect to conclude that the victim was strangled to death 15 minutes up to six hours after being beaten. Rather, Dr. Pfalzgraf shared that this could have all occurred as a single act, and that no evidence exists to support two separate attacks.

Defense counsel pointed out that the jury relied on this incorrect medical information to conclude that the murder of Ms. Newsome was one involving prior calculation and design, in that the beating, then the strangulation, were two separate acts separated by at least 15 minutes up to 6 hours. The trial court also utilized this same factor in imposing the sentence of death.

Counsel next presented Dr. Doug Lehrer who is the Medical Director of Kettering Medical School to offer information about Nields' damaged brain. Dr. Lehrer is a Board Certified Forensic Pathologist. He obtained brain imaging tests in the form of an MRI and a Pet Scan on Nields. These scans were conducted by Dr. Lehrer's colleagues. The results showed that Inmate Nields does have a damaged brain. In fact, the tests concluded that almost every area of Nields' brain had less activity than that of the average normal person, and that this damage would impact every area of his cortex.

The neurological tests that were performed on Nields were completed in 2010. Dr. Lehrer pointed out that one could conclude that these same results would have been worse in 1997 when the crime occurred due to Nields' chronic alcohol abuse. In closing, he shared that these scans get better with prolonged remission from alcohol abuse. Nields' damaged brain would have caused him to be highly impulsive with emotionally driven behavior. While time has allowed for Nields' brain to heal, it is still damaged today.

Jackie Votaw is one of Nields' ex-wives. She provided videotaped testimony to the Board and highlighted the fact that Nields was a great guy who was a prankster and liked to have a lot of fun. She also shared that "music was his whole life." Ms. Votaw states that Nields was her first boyfriend and meant everything to her. They married in 1969, and together they have one daughter.

Ms. Votaw heard about Nields' crime on the news and was shocked to hear what he had done. She further shared that Nields was not shown love by his family and that his father was a drinker and ended up leaving the family. In the end, Ms. Votaw understands why Nields left their marriage. He wanted to be a famous drummer, and she did not want to hold him back from that dream. She indicated that today, Nields' admits to her that his biggest mistake was leaving her. In conclusion, Ms. Votaw said that she and her daughter would be deeply impacted if he is executed and asked for the Board to grant him clemency. She also pointed out that she never was called to testify at Nields' trial.

Nields' childhood friend Greg Mendell also gave videotaped testimony to the Board. He stated that he and Nields were the best of friends in high school and that Nields ended up being the best man in Mr. Mendell's wedding. Mr. Mendell shared that Nields was a nice guy and was never mean-spirited. In fact, he was "shocked" to read about Nields' arrest in the paper. He, too, was never contacted to testify at the trial.

Additionally, Mr. Mendell described Nields as being devoted to his music and often witnessed him practice his music for hours at a time. Mr. Mendell ended his statement by sharing that Inmate Nields has had sincere faith since the first grade and that this is what keeps him going. He asked the Board to let Nields spend the rest of his life in prison and "let God sort out his punishment."

Clinical Psychologist Dr. Robert Smith also presented videotaped testimony to the Board regarding alcoholism. He shared that 90% of Americans drink, but only 10% become alcoholics. He further stated that 10% become alcoholics due to biological or genetic factors, psychological factors, and/or environmental factors. Nields met all three of these factors.

Dr. Smith pointed out that Nields paternal and maternal grandfathers were alcoholics along with his father and his paternal uncles. Thus, Nields did not have a choice in the matter of becoming an alcoholic in that it was in his genetic make-up.

Dr. Smith also pointed out that environmentally, Nields felt that it was "normal" to drink and watched multiple family members drink a great deal. Finally, Dr. Smith pointed out that 40% of all alcoholics have co-occurring depressive disorders along with a history of emotional trauma. In Nields' case, he was diagnosed with depression, had financial problems, and his father left him when he was 18 years of age.

Dr. Smith stated that nothing externally forced Nields to drink. However, he described his craving for alcohol as being caused by a chemical change in the reward center of the brain. Dr. Smith compared it to non-alcoholics having a similar craving for food and water. He further added that working in bars and taverns while playing music could have also been a big trigger to Nields' alcohol abuse.

Dr. Smith concluded by stating that Nields had been drinking heavily on the day of the instant offense and that he would have been acutely intoxicated. Thus, this situation impaired his brain, made him impulsive, and caused him to have incorrect perceptions. Ultimately, Nields reacted to what he felt inside. Rather than talking about his feelings, he acted them out with aggression.

Nields' attorney presented one final witness to the Board. Ms. Pam Ewen, a friend of Nields, shared that she met him in 1993 at the Briarwood Lounge. She was employed as a waitress, and Nields was employed as the musician. Ms. Ewen highlighted the fact that Nields "loved music." She described him as a good man who was liked by everyone. She did admit that he drank too much and that she did witness him make failed attempts to get assistance for his drinking. She further pointed out that he was only sober for very short periods of time.

Ms. Ewen recalled her own mother driving Nields home from work on several occasions because he was too intoxicated to drive. She also claimed that there were times when Nields would fail to show up to work on a Saturday night and would not change his clothes for several days at a time. She said it was not unusual for him to get paid with "alcohol" by the owner of the lounge for his performances.

Ms. Ewen stated that Nields "drank all the time." She witnessed him become a "sloppy, nasty drinker." However, she was surprised to learn of his crime. She felt sorry for him at the time of trial because he was all alone. Ms. Ewen further commented that she would be greatly impacted if Nields is killed. She said, "He has a disease like cancer. We should not put him away, and should let him help others."

Federal Public Defender Carol Wright emphasized that Nields' case barely meets the threshold for the death penalty as was pointed out by the court. The jury and the judge relied on incorrect medical testimony, and Nields was destined to be an alcoholic who suffered brain damage as a result of his drinking.

Ohio Public Defender Randall Porter pointed out that this case was first indicted as a murder, and it was not until one month later that it was re-indicted as a capital case. He argued that the re-indictment for Aggravated Murder was based on the receipt of the

medical evidence Dr. Shrode would provide. It was not until then that the state believed it could establish prior calculation and design. Without the medical evidence provided by Dr. Shrode, the entire approach to this case would have been different. Although the case was technically eligible for the death penalty due to the aggravated robbery, the state relied heavily on the medical evidence to prove prior calculation and design. Likewise, the jury and sentencing court also relied on this evidence in making the recommendation and imposing the death sentence. The fact that the medical evidence is now refuted should not be considered as insignificant.

Finally, Attorney Porter pointed out that Nields was remorseful about his crime from the very beginning. He was tearful when telling his story to law enforcement and was upset and crying at times when sharing his story with Timothy Griffis, the jailhouse informant. It is also documented on his jail intake form that he was crying, saw no future for himself and was depressed. The jail ended up putting Inmate Nields on suicide watch.

ARGUMENTS IN OPPOSITION TO CLEMENCY:

Arguments in opposition to clemency were presented by Assistant Hamilton County Prosecutor Phil Cummings, and Assistant Attorney General Justin Lovett. Assistant Prosecutor Cummings shared that Nields is not worthy of clemency and that the victim in this matter loved and supported him. He described Nields as a cold, calculated, pre-meditated murderer who continues to lie and minimize his culpability in this crime.

Prosecutor Cummings pointed out that no one knows the exact sequence of events from that evening, in that Nields has told multiple stories and customizes this story, depending on his audience. He pointed out that what we do know is that this was a cold and deliberate act. Patricia Newsome, the victim in this case, documented her fears in her own written document entitled "Record of Abuse." A common theme that she wrote about in this record was Nields' continued need for money as well as his threats to choke her. He also left her threatening voice mail messages at her place of employment, and the police were called to their home one month prior to her murder for a domestic dispute where Nields was removed from the home.

Prosecutor Cummings also shared with the Board that Inmate Nields told Ms. Dorothy Alvin three to four hours prior to the murder, "As a matter of fact, I'd like to kill her, but I guess I won't do that because I don't want to go to prison." He also disclosed during this conversation that he was a musician who could not obtain employment and was financially broke. He was upset with Patricia Newsome for throwing him out of her home. Prosecutor Cummings points out that Nields had murder on his mind for months, and this crime was not one that involved a sudden fit of rage.

Prosecutor Cummings shared that it takes approximately three to five minutes to strangle someone to death. He also argued that the jury did have the option of finding Inmate Nields guilty of manslaughter, but they chose not to do so, based on the evidence presented at trial.

Prosecutor Cummings referenced testimony presented at trial from Timothy Griffis, who was another inmate being held at the Hamilton County Justice Center with Nields. Griffis was told details of the offense by Nields. Details such as how Nields and the victim argued over the telephone, how he grabbed her hair and pulled her to the floor, and thought that he knocked the victim unconscious or may have even killed her were reported by Nields. He also disclosed that he jumped on top of the victim, started beating her up and shared that "blood was coming out of the back of her head." Nields also admitted to knocking out the victim's teeth and said that "the little puppy she owned ran over and ate two of them." Nields also admitted to placing the phone near the victim's body and told her to "call me from heaven." He also bragged about a bloody handprint he left on a man after patting the man's shoulder. Nields also shared with Timothy Griffis that he made it a point to pull the blinds in the home to conceal the view of the victim's body and went back later to check on her.

Prosecutor Cummings shared that it really does not matter if the victim died from a single event or if Nields left and came back. He stressed that what is very clear is the fact that there is undisputed evidence that a robbery occurred, and that Nields' motive for this robbery was his financial dependence on Ms. Newsome. Nields realized that he would no longer have the victim's financial support. He stole the victim's money, travelers' checks, and her car after murdering her. In fact, Nields commented to his cellmate that he was upset that he was not able to use the travelers' checks.

Prosecutor Cummings pointed out that the Aggravated Robbery in this case was a key component to Nields' conviction. Furthermore, Cummings shared that the jury did have information available to them regarding Nields' brain damage by way of Dr. Cooper's testimony. Nields' sister also testified to her brother's battle with alcoholism. This testimony was presented during the penalty phase of Nields' trial.

Prosecutor Cummings also pointed out that because this case involves domestic violence that this should not diminish the inmate's culpability in this case. He believes that this case deserves more scrutiny than one not involving domestic violence.

The State also interviewed Dr. Pfalzgraf and provided a videotaped presentation of this interview. Dr Pfalzgraf shared that Dr. Shrode could not have determined a time frame between the beating and strangulation of the victim. Additionally, the autopsy of the victim would not assist in determining this time frame of the victim's death. He did share that it is "possible" that the crime happened the way that Dr. Shrode said it did as he testified at trial.

Assistant Attorney General Justin Lovett offered oral arguments to the Board during the clemency hearing. He began by stating that Dr. Shrode's testimony does not effect the second aggravated murder specification surrounding the robbery involved in this offense. He also shared that Nields had been a violent person for many years prior to this crime. We know this information by reading his own documentation of violence in Nields' AA inventory. The abuse dates back to 1970 when he abused his first wife Jackie.

Assistant Attorney General Lovett also shared that the police brought this case to the prosecutor as a murder and domestic violence charge. However, upon further investigation, the State went back to the Grand Jury with additional evidence. Thus a second indictment involving capital specifications was sought.

Attorney Lovett also pointed out that Dr. Shrode's testimony was not the only evidence to "hook" the jury into believing that this case involved premeditation. He went on to state that this was not a passionate murder. Rather this was about money and that this case deserves the death penalty.

In terms of the recent brain scans submitted by the defense, Attorney Lovett shared that these scans do not give the Board any idea as to when Nields' brain was actually injured. He commented that Nields could have sustained a head injury while playing basketball in prison.

In closing, the State reiterated that this case deserves the death penalty. The statement that the facts "barely" meet the threshold to impose the penalty of death is simply not accurate.

VICTIMS' REPRESENTATIVES:

Connie Brown, the victim's daughter, also presented testimony in opposition to clemency. She described her mother, Patricia Newsome, as a good woman who loved life, taught Sunday School and protected animals. She also had a very strong work ethic. Her mother showed Nields kindness. However, "the kindness was what Richard Nields took advantage of. He stole her kindness, her personal belongings, and ultimately her life."

Ms. Brown shared that three weeks prior to her mother's death, she visited with her in Cincinnati. During this visit, Patricia Newsome told her daughter that she should stay with her grandmother in that she has been having problems with Nields. Ms. Newsome shared that Nields had become very angry the previous night, and she became frightened and asked him to leave. When he refused to leave, Ms. Newsome called the police Police arrived and escorted Nields off of the property. Ms. Brown stated that approximately one week prior to her mother's death, Ms. Newsome had shared with her that Nields had been threatening her, and she had been keeping a record of the incidents to give to the police. Ms. Newsome never had an opportunity to present these threats to the police.

Ms. Brown respectfully asked the Board to deny clemency to Nields. She shared that he has been able to publish a book, yet has never taken the time to apologize to her family.

Carol Young, the victim's sister also provided oral testimony to the Board opposing clemency. She began her statement by telling the Board that her sister was her best friend and that their parents taught them to value life, help others, and work hard.

Ms. Young shared how she and her sister would go line dancing. They also went to real estate school together, took the test together, and worked together. She also spoke about how particular Ms. Newsome was about her Cadillac and shared that she never let anyone drive her car.

Ms. Young said that Ms. Newsome was a kind and generous person and was always willing to help others. She would often put the needs of others before her own. Ms. Young never recalled Nields having a full-time job. Rather, her sister took care of him, and when she finally had enough of his abuse, Nields killed her.

Ms. Young concluded by stating, "Richard Nields was given a sentence to pay for the crime of murdering my sister, and I am only asking that his sentence be carried through and clemency be denied."

The Office of Victim Services also read a letter from Ms. Newsome's son who is also opposed to clemency in this matter.

PAROLE BOARD'S POSITION AND CONCLUSION:

The Board reviewed documentary evidence presented both in support of and in opposition to clemency. Four (4) of the seven (7) Parole Board Members found the following factors pivotal in making a recommendation to commute Nields' sentence to life without the possibility of parole:

- Those voting to commute Nields' sentence to life without the possibility of parole are concerned with the medical evidence that was testified to at the time of trial by Dr. Shrode and has since been called into question by his former supervisor Dr. Pfalzgraf. While Dr. Pfalzgraf does not question the accuracy of the autopsy results completed by Dr. Shrode, he does question the lack of scientifically-supported conclusions that he testified to at that time of trial.
- Specifically, the Board was concerned that Dr. Shrode testified to the fact that the two attacks on Ms Newsome were separated by a minimum of 15 minutes to a maximum of six hours. Dr. Shrode came to this conclusion from bruising on Ms. Newsome. However, Dr. Pfalzgraf pointed out that there was no scientific evidence available to support the age of the bruises on the victim in that there was no evidence of healing. In fact, the bruising could have occurred within seconds and last up to a day or more.
- Members also put much weight into the United States Sixth Circuit Court of Appeals' decision. Members of this court stated the following: "Despite the weakness of Nields' legal arguments on appeal, we cannot help but note that the circumstances of this case just barely get Nields over the death threshold under Ohio law." They further cite in their opinion: "At the same time, however, we recognize that a determination of whether this particular murder fits within that narrow category is a policy matter initially delegated by the State of Ohio to the jury and eventually delegated by the State to its governor to resolve in a fair-minded and even-handed manner."

- Members also factored into their recommendation Justice Pfeifer's dissent in the Ohio Supreme Court decision. He stated in this dissent, "I do not believe that Nields'crime is the type of crime that the General Assembly did contemplate or should have contemplated as a death penalty offense." He further went on to state, "This case is not about robbery. It is about alcoholism, rage, and rejection and about Nields' inability to cope with any of them."
- Members give significant weight to Justice Pfeifer's opinion in that he was a member of the Ohio General Assembly in 1981, and was one of the leading forces who helped write and enact Ohio's current death penalty statute.
- Upon examining Judge Nurre's rationale for his decision to impose the ultimate sentence of death, it is clear that he did factor Dr. Shrode's medical conclusions into his decision to impose the death sentence. Judge Nurre cites the following: "The uncontroverted facts and exhibits reveal that the defendant first brutally beat the decedent, and at some time at least fifteen minutes later, the defendant returned to strangle Patricia Newsome to death." While this is not the only factor he lists, it is clear that it was considered.
- Finally, prosecutors relied on the timing of the victim's death throughout the guilt phase of the trial. They made references to this timing during opening and closing statements.
- In conclusion, members voting favorable are concerned about the medical evidence that has been called into question and not refuted by the State during their clemency presentation. Members also respect the dissent of Justice Pfeifer as well as the concern that the Justices of the United States Sixth Circuit Court of Appeal had, in that the circumstances of this case just barely get Nields over the death threshold under Ohio law. For this reason, we believe that Nields' sentence should be commuted to that of life without the possibility of parole.

Three (3) of the seven (7) Parole Board Members found the following factors pivotal in making an unfavorable recommendation regarding clemency:

While it is troubling that the jury and the courts relied on information from the medical examiner that may have been incorrect, we find that the information presented to the Board during the course of its clemency review lead us to vote in the minority.

- Even though the medical examiner's testimony has been rightly called into question, there is plenty of evidence of prior calculation and design in this case. Nields had threatened Ms. Newsome in the past, including in the time leading up to the murder. Hours before the offense, he told Ms. Dorothy Alvin, a stranger, that, "I'd like to kill her, but I guess I won't do that because I don't want to go to prison."

- Even without the prior calculation and design in this case, the Aggravated Robbery would be sufficient to make Nields eligible for the death penalty. After he killed her, Nields took her car, money, and travelers' checks. Nields was unemployed, without money, and nearly homeless. He needed money, and he went to a person from whom he had stolen in the past. Ms. Newsome wrote in

her diary, "I can't leave money in the house – he will steal it...I have to lock my purse in the car...He tells me every day to get rid of my car and asks for money..." Nields strangled Newsome and then made off with her valuables.

- Nields has been less than forthcoming about the details of the offense and his prior history of violence. He tried several times to mislead law enforcement while they were investigating the homicide. He said that he regularly drove Ms. Newsome's car when her family and her own notes indicate that he did not. He told the Parole Board that he had never been violent toward women in the past, in spite of his own notes in his AA Inventory.

- Nields has a history of violence against women, including a Domestic Violence conviction against Ms. Newsome after punching her in the face. He also recorded his own acts of violence against women in his AA Inventory. He had left harassing messages on her answering machine, and threatened her. He generated in her enough fear to cause her to keep a "Record of Abuse".

- Given all of these facts, we do not believe that the outcome of the case would have been any different had the court and jury heard more reliable medical testimony. We also believe that the aggravating circumstances in this case make death the appropriate sentence.

RECOMMENDATION:

The Ohio Parole Board with seven (7) members participating, by a vote of four (4) to three (3), recommends to the Honorable Ted Strickland, Governor of the State of Ohio, that executive clemency be granted in the case of Richard Nields, A352-374 in the form of a commutation to life without the possibility of parole.

Richard Nields, A352-374
Death Penalty Clemency Report

Adult Parole Authority
Ohio Parole Board Members
Voting **Favorable**

Cynthia Mausser, Chair

Robert Maszczynski

Kathleen Kovach

Ellen Venters

Ohio Parole Board Members
Voting **Unfavorable**

R. F. Rauschenberg

Bobby J. Bogan, Jr.

Trayce Thalheimer

Date: April 30, 2010

Honorable Governor Ted Strickland, Governor of Ohio
Distinguished Members of the Ohio Parole Board

RE: Clemency Hearing for Richard Nields

Dear Governor Strickland and the Ohio Parole Board:

I write this letter to request that clemency for Richard Nields be completely denied and for the imposed sentence of the death penalty to take place as scheduled.

How can anyone describe the tragic and unexplainable loss of a loved one, especially a parent, your mother? It's just not possible to describe what a son, daughter, mother, sister, grandchild and countless friends go through when told of the senseless murder of a loving, caring, giving, and unselfish person. My mother, Patricia Newsome, was just that person.

My mother raised her children to give of themselves, to always help others and to treat others as you would want to be treated. She raised her family to know right from wrong and to do the right thing. She taught us we are responsible for our actions. We were raised in church where she taught Sunday school each week. She was involved in our lives, not only as children, but involved in our adult lives, our families lives. Her grandchildren were the pride and the joy of her life. She lived everyday to the fullest.

Pat Newsome valued the people in her life. Acquaintances became friends, many became very dear friends. My mother valued her life, the things she had earned, the feeling and joy of giving to others. My mother was a sincere, honest, and loving person. She deserved the same in return, although she would never ask of anyone. She was a dedicated and an extremely hard working person.

Richard Nields took advantage of these facts. He had no problem taking from her. When she gave, he took, and he never hesitated to take more. He took her kindness, sincerity, and her willingness to help others. Even the night he calculated and brutally murdered my mother, he took from her. He stole the money she worked hard to earn. He stole her car that she worked so hard to have. The car she used so her clients could pursue their dreams of owning a home. The very car she would never let him drive. He will tell you that he drove the car quite often. It's not the truth and he knows it. It's yet another way for him to avoid taking responsibility for his actions. Though money and cars can be replaced, Richard Nields took the one thing that can never be replaced, he took her life.

Pat Newsome was an important and needed person in this world. She was the type of person that made this world a better place and made us better people. Richard Nields has never given to this world, he has only taken. He remains a cold and calculated murderer. Richard Nields has never denied the murder, nor has he ever shown any remorse for the senseless, brutal and aggravated murder of a beautiful person. At trial, he never spoke. At sentencing, he never spoke. He has had plenty of opportunities. Richard Nields never apologized, never said he was sorry and has never said to the family that what he did to my mother was wrong. He remains a useless person of this society. He deserves absolutely nothing. He has forever affected the lives of scores of people.

My mother had her reasons to keep Nields away from our family. The reasons were never more apparent until after her death. She didn't want him involved, nor was he ever involved with our family. None of the family, especially me, cared for him. Though I met him on two occasions, I suspected he was trouble. However, I never thought for a moment that anyone could commit the crime that he did. If only I'd known, what could I have done to prevent it? When asked to go through her personal belongings, I was completely surprised to find a written log that she was keeping, a written log describing Nields violence, a written log of his threats, a written log that showed my mother was scared. She never told me any of it, she didn't want to burden me, and she didn't want me to get involved. I live with this fact every day of my life.

I grew up with wonderful grandparents, the joys of holidays with family, their unconditional love, the knowing that your family is always there for you. I can't even imagine the pain my Grandmother had to endure every day in the loss of her daughter. I feel the loss and pain each and every day....not one day goes by that the thought is not there, not one day!! I will never be able to describe to anyone what it feels like to sit down with your children and explain what happened to their Grandmother. How do you tell a young child that she is just gone and how? They get older and want to know more. Their lives have been affected forever. I taught my family the value of trust, giving back, sharing and helping others, just as I had been taught. All of this has been shattered due to the actions of Richard Nields. It's now been thirteen years since the tragedy and it continues to impact the lives of all of us. No person on this earth deserves to die in the vicious, brutal and atrocious way that Richard Nields murdered my Mother.

The grandchildren will never feel the happiness and love of their grandmother, never. The grandchildren will never know how important they were to this beautiful person. They will never share in the love and happiness that she gave. I will never have the chance to give back to my mother as she gave to me. The loss will always be there. It has, it does, and it will continue to affect our family for generations to come!!

It doesn't seem right for me to write a couple pages to talk about my mother in an attempt to tell who she was, how she made a difference and that she never deserved what happened to her. She deserves a book to be written about her to let everyone know the person she was. I love my Mother, Patricia Newsome.

I will continue to have faith in our justice system and in this case, I have full faith that justice will be carried out. I, along with my family, request that clemency for Richard Nields is fully denied. We request that the imposed sentence of the death penalty be carried out as scheduled.

I greatly appreciate your time in reading this letter.

Sincerely,

Greg Newsome
(Son of Patricia Newsome)

EXHIBIT 12

Print Email

County confirms medical examiner Paul Shrode's résumé issues; no action to be taken

By Diana Washington Valdez / El Paso Times (mailto:dvaldez@elpasotimes.com?subject=El Paso Times:)
POSTED: 02/23/2010 12:00:00 AM MST

EL PASO -- County Human Resources Director Betsy Keller said her staff found discrepancies in Chief Medical Examiner Paul Shrode's résumé.

She reported her department's findings at Monday's meeting of the County Commissioners Court.

The commissioners first discussed Shrode's résumé during a closed session. Then, once back in open session, they announced that no action would be taken at this time.

Shrode did not attend Monday's meeting and has not returned phone messages for comment.

Keller said Shrode does not have a graduate law degree from Southwest Texas State University, which he claimed he had on the résumé he submitted when he applied in El Paso.

"He took several graduate courses at Southwest Texas," Keller said.

He has a medical degree from Texas Tech University Health Sciences Center but no other graduate degree, the county confirmed.

In a previous job application -- for Harris County -- Shrode indicated he had a paralegal diploma or degree from Southwest Texas State University, now known as Texas State University. However, according to the registrar's office, he attended the school for only one semester in 1979 and was enrolled in political science courses.

Shrode also said on his résumé that he was a deputy medical examiner for the Lubbock County Medical Examiner's Office before coming to El Paso.

However, the Human Resources Department confirmed that he was actually an employee of Texas Tech in Lubbock, which had hired him as a professor of pathology.

At the time, Texas Tech was on contract with Lubbock County to perform medical examiner duties, and Shrode was one of the Texas Tech employees who did autopsies and was allowed to use the title of deputy medical examiner on the paperwork.

David Fisher, a government watchdog in Elgin, Texas, said Texas Tech was forced to dismantle its former medical examiner arrangement with Lubbock County because it was allegedly illegal.

"Shrode's previous supervisors at Texas Tech in Lubbock did not have the authority to confer the title of deputy medical examiner on anyone," Fisher said.

Fisher has a complaint against Shrode pending before the Texas Medical Board.

Keller said Shrode received his undergraduate degree from Indiana Central University in world history and Spanish in 1972, and not in 1973, as his résumé indicated.

Keller also confirmed that Shrode passed only one of the two required exams to become board certified. "He is no longer eligible to sit for those boards (exams)," she said.

Elizabeth Gard, who also filed a complaint with the Texas Medical Board against Shrode, complained to commissioners about the way Shrode's office delayed releasing her late husband's autopsy report and death certificate, and about alleged errors in the documents.

County Assistant Attorney Holly Lytle defended how the county handled the release of the autopsy

replace the death certificate.

Later, Gard said, "What Lytle presented was inaccurate because she did not have the complete information from my husband's medical records."

After the meeting, County Judge Anthony Cobos said, "I've lost confidence in Dr. Shrode. As time goes on, I believe a lot more is going to come to light regarding him."

County Commissioner Veronica Escobar said the district attorney and county attorney consider Shrode qualified to be the medical examiner. Under Texas law, the only requirement for a medical examiner is that he or she be a licensed medical doctor.

Escobar said Shrode did embellish his résumé, but commissioners already admonished him a couple of years ago.

"It would be irresponsible for the county to fire someone simply to do the politically expedient thing," said Escobar, referring to other politicians who've said the county should fire Shrode.

Lawyer Theresa Caballero, who is running for county attorney in the Democratic Party primary election, said she would have advised the commissioners to fire Shrode.

"I told the commissioners (Monday) I wanted this to go to a vote, and for everyone to be able to see how they voted," Caballero said. "Shrode is dishonest. I would like for him to be fired. Lives are at stake."

Lawyer Sergio Coronado, a county judge candidate and Canutillo ISD board member, also has called for Shrode's ouster.

County Attorney Jo Anne Bernal, who faces a challenge by Caballero for the county attorney's post, said Shrode is qualified to stay on as El Paso's chief medical examiner.

Diana Washington Valdez may be reached at dvaldez@elpasotimes.com; 546-6140.

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Crowdynews

EXHIBIT 13

County fires Chief Medical Examiner Paul Shrode: Ohio Parole Board's ruling spurs decision

By Marty Schladen \ EL PASO TIMES (mailto:mschladen@elpasotimes.com?subject=El Paso Times)
POSTED: 05/25/2010 12:00:00 AM MDT

» Shrode resume
(http://extras.mnginteractive.com/live/media/site525/2010/0110/20100110_053046_Shroderesume.pdf)
» Transcript: Cross examination of Shrode
(http://extras.mnginteractive.com/live/media/site525/2010/0110/20100110_053811_Shrodercase.pdf)
» Richard Nields clemency report

(http://extras.mnginteractive.com/live/media/site525/2010/0522/20100522_124009_Richard_Nields_case.pdf)

EL PASO -- A majority of the County Commissioners Court stuck by Chief Medical Examiner Paul Shrode through three conflicting résumés and more than two years of questions about his credibility. All that changed Monday when court members fired Shrode on a 3-1 vote.

They acted after the Ohio Parole Board voted 4-3 last week to recommend clemency for a death-row inmate, citing problems with testimony Shrode gave against him in 1997.

County Judge Anthony Cobos and Commissioners Anna Perez and Veronica Escobar voted to dismiss Shrode immediately. Commissioner Dan Haggerty voted to keep him on the job. Commissioner Willie Gandara was absent on county business.

Now the commissioners must begin the search for another medical examiner.

District Attorney Jaime Esparza also is reviewing cases involving Shrode to see if convicts are likely to challenge his testimony.

"I don't think we'll see a rush to review his cases," Esparza said.

But Shrode probably is not done testifying in El Paso County courts. Defendants could call him in cases in which Shrode produced autopsy reports, Esparza said.

If Shrode testifies, taxpayers will be on the hook to pay his time and expenses, Esparza said.

He declined to say whether he still had confidence in Shrode. Esparza had publicly supported Shrode when his credentials were questioned in prior public meetings before the commissioners court.

Escobar said the Ohio case had little to do with her decision. Rather, she said, it was an accumulation of evidence -- some of it discussed in a lengthy closed-door session Monday -- that made her lose confidence in Shrode.

Perez said she believed there was little chance that people were wrongfully convicted in El Paso County based on Shrode's testimony.

Shrode, the county's highest-paid employee at more than $254,000 a year, declined to comment before or after the vote.

His troubles in El Paso began in August 2007, when Assistant County Attorney Bruce Yetter called Shrode to testify in a child protection case. Yetter introduced Shrode's résumé as a court exhibit. One entry on the résumé Shrode prepared said he had a "graduate law degree" from Southwest Texas State University.

Attorney Theresa Caballero cross-examined Shrode. She remembered that Southwest Texas State had no law school, so she asked: "Do you have a law degree, doctor?"

"Not in the sense of a law degree from a school of law, not like you," Shrode said.

He then admitted under oath that he had no law degree or diploma.

But in the résumés Shrode had submitted to El Paso and Harris counties, he claimed to hold a "graduate degree in law."

Later, after being questioned by Caballero, Shrode produced another résumé. That one said that he had a degree in law from a school of political science and that he was a member of the State Bar of Texas from 1979 to 1983. A third résumé by Shrode said that he had a "degree in law ... not a law degree" and that his bar membership was as a paralegal.

The State Bar of Texas had no record of Shrode being a member, either as an attorney or a paralegal.

When the commissioners court reviewed discrepancies on Shrode's résumés in November 2007, Escobar, Cobos and Haggerty all supported him.

The commissioners began new discussions about Shrode early this year, after a government watchdog named David Fisher filed a complaint against Shrode with the Texas Medical Board. Fisher said Shrode had lied on his résumés to obtain well-paying public jobs.

The El Paso County government did not authorize a check of all entries on Shrode's résumé until this year, nearly five years after the commissioners court hired him. In February, county Human Resources Director Betsy Keller told the court that Shrode had taken a semester's worth of political science courses at Southwest Texas State but had not received a graduate degree of any kind.

Caballero, speaking to the commissioners court Monday, said what happened with Shrode went beyond mistakes. It even went beyond Shrode, she said.

"It isn't about Dr. Shrode," Caballero said. "It's about elected officials and life and death."

Medical examiners frequently testify in felony trials.

Cobos said he wanted to fire Shrode early this year but did not have the support of the rest of the court.

"Nothing has changed for me," Cobos said Monday. "I was ready to act four or five months ago."

In its clemency recommendation last week, the Ohio Parole Board cited problems with Shrode's testimony in urging Gov. Ted Strickland to take Richard Nields off death row but keep him in prison for life.

Shrode testified that he knew from his autopsy that Nields beat Patricia Newsome in Cincinnati in 1997, left for 15 minutes to six hours, then came back and strangled Newsome. Shrode's supervisor later told the parole board that Shrode had no scientific basis for the claim, which helped establish to jurors that Nields acted in cold blood.

Perez said the Ohio ruling helped her change her mind about Shrode, "but it happened a long time ago."

Perez, an attorney, said she had no reason to believe that Shrode testified to any unsupported

conclusions in his testimony as El Paso County medical examiner. She said she was not concerned that anybody in El Paso might have been wrongly convicted based on Shrode's testimony.

Escobar and Perez would not say what they were told about Shrode in Monday's executive session, but they indicated that new information come to light about the medical examiner.

Esparza and County Attorney Jo Anne Bernal also would not divulge what was said. They said it was up to the commissioners to determine Shrode's fitness to be medical examiner.

Haggerty was the only commissioner to stick by Shrode, characterizing what Shrode did as "mistakes."

"Do people make mistakes?" he asked. "Yes."

Marty Schladen can be reached at mschladen@elpasotimes.com; 546-6127.

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EXHIBIT 14

STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT

My name is Dr. Paul B. Radelat. I am a medical doctor and forensic pathologist. A copy of my curriculum vitae is attached hereto and incorporated for all purposes. I have reviewed autopsy report Harris County Medical Examiner 2001-308 regarding Darrin Shane Honeycutt and trial testimony excerpts from Dr. Paul Strode and Defendant Richard Masterson. I have conducted this review in order to form opinions regarding the cause of death of Darrin Shane Honeycutt and the circumstances associated with his death.

Based upon the material available for my review and upon my forty plus years of training and experience in pathology, it is my opinion that the choke hold/sleeper hold applied to the neck of Darrin Shane Honeycutt by Defendant Richard Masterson produced a partial reduction in cerebral blood flow thus producing brain hypoxia and partial if not complete unconsciousness. Simultaneously with the brain hypoxia, there was compression on the carotid sinuses with increased heart rate and systemic hypertension. In reasonable medical probability, these additional stresses on the heart superimposed on the adrenergic effects of sexual excitement led to a fatal cardiac arrhythmia in Darrin Shane Honeycutt arising out of his unforeseeable pre-disposition to such an arrhythmia because of the coronary atherosclerosis demonstrated at post-mortem examination.

Expressed in other terms, the choke/sleeper hold applied to the neck of Darrin Shane Honeycutt at his request for erotic effect by Defendant Richard Masterson in reasonable medical probability could have produced the desired erotic effect, i.e. decreased consciousness, while almost simultaneously producing the decidedly undesirable effect of cardiac arrhythmia. This transition to cardiac arrhythmia, producing increasing semi-consciousness and eventual unconsciousness may not have been recognizable to Defendant Richard Masterson who may not then have reduced the hold quickly enough to avert irreversible consequences. This sequence of events would be consistent with the facts related by Richard Masterson in his trial testimony.

Paul B. Radelat

PAUL B. RADELAT, M.D.

SWORN AND SUBSCRIBED to before me on this 20 day of February, 2004.

Laura L. Morado

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

CURRICULUM VITAE

August 4, 2003

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EXHIBIT 15

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Attorney Work Product

Decedent: Darrin Honeycutt
Autopsy performed: Office of the Medical Examiner of Harris County, Houston, TX
Report by: Dr. Paul Shrode
Court Case/ Ref. #: 867834-B
County: Harris; 176th Judicial District
Defense Attorney: Patrick McCann
Defendant: Richard Allen Masterson

I was asked to review the discovery related to the autopsy of Darrin Honeycutt and offer an opinion about the determination of the cause and mechanism of death. I have attached a copy of my curriculum vitae. In summary I am a Forensic Pathologist who formerly practiced as an Associate Medical Examiner in two districts in Florida and practiced as an Assistant Chief Medical Examiner in Western Virginia. I now am a Forensic Pathology consultant in multiple jurisdictions and states. I consult in both criminal and civil cases and perform private autopsies. The majority of my work involves reviewing current and post-conviction murder cases and providing an objective scientific review of the discovery.

The following information has been reviewed:

- Autopsy report without body diagrams
- Autopsy photographs (4) from court records
- Report of investigation by Medical Examiner
- Police reports and witness statements
- Copies of four (4) of crime scene photographs; black and white
- Trial testimony of Dr. Shrode
- Affidavit of Dr. Paul Radelat

Background Information/Timeline:
Mr. Darrin Honeycutt was last seen alive on 1/25/2001 around midnight when he left a nightclub with 3 other people in his car. When he could not be reached by friends and hadn't reported for work a wellness check was initiated on 1/27/01 and he was found dead in his apartment. His body was located in the bedroom and he was found nude and partially face down on the bed.

He was positioned so that from the waist down his torso and lower extremities were on the bed and his torso was suspended in a bridge like fashion. His shoulders, upper extremities and head were on the floor and supported the upper torso body weight. His face was turned partially to the left. One first responder described that his feet were pointed towards the ceiling indicating that they were at least partially elevated off the bed. The local medical examiner described the corneas as being cloudy which is an early sign of decomposition and consistent with the time frame when he was last known alive. There was "pronounced" livor mortis (settling of blood after death due to gravity) of the chest, neck, face and upper extremities. The LME report notes blood and mucous around the nose. The "blood" was likely purge

fluid that is seen postmortem as there were no injuries to the mouth or nose. The mucous was pooling from gravity from the upper airways.

No injuries were noted at the scene. The apartment was locked and had no forced entry and there were no indications of a struggle at the scene other than a transfer of facial makeup to the sheets on the mattress and the carpet under the face. There were some signs of burglary in the apartment and the decedent's car was missing.

Richard Masterson was later found to be in possession of the decedent's car. According to witness statements Richard was one of the people in the car with Darrin on 1/25/01. He returned to Darrin's apartment with him. Richard reported to his brother James that he had Darrin in a head lock and he went limp and that he didn't mean to kill him.

Richard's statements give different explanations of how this occurred. Police reports indicate he stated that he waited for Darrin to get undressed and came from behind him and put Darrin's throat is the joint of his elbow (sleeper hold) and squeezed. He said he pushed him onto the bed and they slid to the floor.

In trial testimony Richard stated that Darrin had asked him to perform manual compression of his neck as part of a sexual act known as erotic asphyxiation. Richard described that Darrin was near the edge of the bed, face down, with his knees buckled and he was supporting himself with his right elbow. When asked, Richard put his right arm in a sleep hold around Darrin's neck. His left hand was guiding his own penis as part of the sexual act. Richard was unable to support himself and he said he was putting too much body weight on Darrin. During this act Darrin went limp and his right elbow came off the bed and both men fell towards the floor and both were in the position that Darrin was found in, with Ricard on top. Richard got up and Darrin was making grunting or gurgling sounds. He left the room and when he came back he could tell Darrin was dead.

Review of the Autopsy Report:
The autopsy was performed by Dr. Paul Shrode on 1/28/2001. The cause of death was listed as External Neck Compression with the manner of death as homicide. The autopsy report was signed on February 23, 2001.

Note that the autopsy appears to be at least partially based on a template that was incompletely filled in as blank spaces are present that were meant for measurements. After a sentence that states the "testes are normal size and shape without abnormality", is a sentence that reads "The second testicle is identified". This statement makes no sense contextually. These errors or omissions likely represent dictation into a standard template without re-wording or careful editing.

General:
Rigor mortis (stiffening of body after death) is absent at time of autopsy. Livor mortis is noted to be fixed and anterior (towards front of body) without any further description of extent of color and involvement of the face, neck, chest and upper extremities.

The autopsy report notes the sclera (white part of the eye globe) was hemorrhagic and the conjunctivae lining the eye and eyelids was congested. This is consistent with dependent lividity with the body positioned so that the head was much lower than the torso.

There is no documentation of rigor or livor on the LME form in the area provided. As the LME saw the body at the scene this information would be needed to make an opinion about time of death.

Review of the 2 autopsy photographs from the court records that show parts of the decedents face reveal drying artifact of the tip of the tongue that is a common postmortem finding. The eyes have scleral and conjunctival congestion that is consistent with dependent lividity. There are a few scattered coalesced areas (larger pool of hemorrhage) that are consistent with pooling from gravity after rupture of the small vessels from increased pressure. It is not possible to tell if these small vessels ruptured (petechial hemorrhages) from antemortem increased pressure from compression of the vessels in the neck or if it is from the dependent position of the body. The head was much lower than the waist and torso and gravity would have caused increased pressure with rupturing of the vessels. This reviewer has seen many cases where the body was simply face down and not suspended almost upside down, and the hemorrhage produced by gravity was much more pronounced than is seen in these photos.

Review of the photos also shows that the face has early decompositional changes consisting of patchy red discoloration of the skin over the cheeks, nose and periorbital area (around the eyes). These early decompositional changes were not documented in the autopsy report. With this level early decompositional changes present, some of the red discoloration will be from decomposition changes.

Blunt Force Trauma:
The autopsy report notes a single curvilinear drying abrasion over the outer corner of the right eyebrow. This is consistent with the position of the body and a "rug burn" when the face contacted the floor.

The autopsy report also notes 3 linear superficial abrasions on the right upper buttocks. No information is provided about apparent age of the abrasions. No microscopic sections were taken of the abrasions for dating. The abrasions may be from that day or may have occurred at an earlier time. *No autopsy photos are available for review. These may represent patterned injuries consistent with fingernail scratches which by location may be consistent with contact during a sexual act.*

Trial testimony:
During testimony Dr. Shrode testifies that he directed photos to be taken of contusions on the knuckles. He gives no indication of color or size. There is no documentation in the autopsy report of contusions on the hands. It must be noted that the hands were also involved with pronounced lividity that would make interpretation of contusions difficult unless they were incised into. There was no indication in testimony that the contusions were incised to see if they were discoloration from lividity or truly a contusion. No microscopic sections were taken for dating. Without histology sections, even if the bruises were present there is no reliable way to say how old they were. They may have occurred from routine activities prior to the day of death.

Photos were presented to Dr. Shrode at trial and he was unable to demonstrate the contusions, indicating that the lighting of this photo was different. At the beginning of his testimony 9 (nine) autopsy photos were listed as being entered into evidence. There is no indication that Dr. Shrode referred to any of those photos to demonstrate these contusions.

Review of the autopsy photographs in the court records shows a single photograph of the left hand. There are no discernable contusions.

Clarifying if these contusions existed and their apparent age is important in this case as the reference to them may lead the jury to believe that Darrin had offensive injuries consistent with an altercation. There is no evidence of defensive wounds.

Negative Findings:
The nasal bone is noted to be intact. The lips and tongue have no traumatic injury.

Evidence of Manual External Neck Compression:
There is no documentation in the autopsy report of evidence of external neck compression.

As noted above the "External Examination" section notes "hemorrhagic sclera" (white part of the eye) and congestion of the conjunctivae lining the eye (bulbar) and the eyelids (palpebral). There is no documentation of petechial hemorrhages of the conjunctivae. There is no description of distribution or size of the petechiae. There is no description of confluence of petechiae (larger pools). The only place this is listed is under "pathologic findings" simply as a diagnosis of "bilateral bulbar and palpebral petechial hemorrhages".

It should be noted that petechial hemorrhages when found with other findings in the neck are "supportive" of a diagnosis of strangulation and are not "diagnostic" of strangulation[1]. See discussion below. Petechial hemorrhages are caused by increased pressure in the vessels in the eyes which results in rupture of the tiny capillaries. This can occur in various types of manual strangulation (see discussion below) but can also be seen in natural disease processes such as fatal heart disease. Petechial hemorrhages can be found in positional asphyxia (upside down position) secondary to pooling of the blood, increased pressure and rupture of the vessels.

Hemorrhages in the eyes can also be seen when the head is in a lower position than the body after death (or when just face down) and the blood pools in the facial tissues by gravity. The vessels eventually rupture causing petechial hemorrhages that may become large. This is called dependent lividity as would be expected with the body position in this case. It is quite easy to find textbook references in Forensic literature showing extensive facial, periorbital and conjunctival hemorrhages in people who die of heart disease and are found in the prone position (face down)[2].

As noted above, review of the photographs from the court records clearly show congestion that is consistent with dependent lividity. There are a few scattered large petechial hemorrhages that could be from the extreme dependent position of the body or could be from antemortem increased pressure. There is no scientific reliable way to separate the two as petechial hemorrhages are a non-specific finding that only indicates increased pressure with rupture of the tiny vessels and pooling. In addition, there were early decompositional changes of the face and some of the red discoloration in the eyes would be from decomposition. These changes also can't be reliably separated from dependent lividity.

<u>Negative Findings for Manual External Neck Compression:</u>
There is no external bruising on the skin of the neck.

Page 3 of the autopsy report under section "Internal Evidence of Injury" notes "none". Under the section "neck" the autopsy report specifically notes that the neck (likely anterior) was dissected in layers and there was no discoloration of the soft tissues. Therefore there was no hemorrhage (bruising) in the anterior strap muscles of the neck or of any of the anterior neck structures.

The hyoid bone and thyroid cartilage were intact and had no fractures. There was no blood noted around these structures.

The autopsy report specifically notes that there were no petechiae of the larynx or trachea.

There are no defensive injuries to the neck. In cases of manual strangulation when the victim struggles with their attacker there can be shallow, linear abrasions on the neck from the victim's fingernails scratching the skin while trying to remove the hands or arms.

<u>Trial Testimony:</u>

Dr. Shrode testifies that petechial hemorrhages can be from inability of the blood to return to the heart with rupture of the tiny vessels. In this same statement he testifies that the hemorrhages can be caused by pooling of blood with gravity in a body that is face down.

Dr. Shrode testifies that the jugular veins are occluded first with pressure as they are "more prominent and more out in front". The vessels are next to each other in the neck with the veins being only slightly more towards the front and outer aspect of the neck. The veins are occluded first because they are thin walled vessels that require only 4 pounds of pressure to be occluded. The carotid arteries are muscular walled vessels and require 11 lbs. of pressure to occlude.

On page 205 of the trial transcript Dr. Shrode testified that there were very small hemorrhage areas in the windpipe and on the windpipe. This is in direct conflict with his autopsy report that noted no internal neck injuries and specifically no discoloration of the tissues and no petechiae within the trachea.

Review of the autopsy photographs from the court records show the trachea with the thyroid cartilage and overlying thyroid gland. The dark discoloration of the right side is within the vascular pattern and is consistent with dependent lividity. There are a few scattered pinpoint dark red areas that are consistent with Tardieu spots which are concentrated dependent lividity. In the absence of external bruising of the neck and no hemorrhage in the overlying anterior strap muscles or soft tissues of the neck, these areas are clearly from congestion and rupture of small vessels from dependent lividity. They do not represent blunt force trauma.

Dr. Shrode testified that the victim could not have survived the external neck compression. Victims often lose consciousness from manual strangulation and suffer anoxic brain injury and die at a later time. He states during his testimony that this was not present at autopsy as evidenced by "no cerebral edema". The autopsy report has a blank space where the brain weight should have been documented so it is unknown is the brain was swollen and heavier than it should have been. The standard of Forensic Pathology would be to submit sections of brain for microscopic examination and look for ischemic changes. As no microscopic sections were taken of the brain Dr. Shrode or another pathologist can't rule out the presence of ischemic changes. As no microscopic sections were taken of the brain and no brain weight was recorded, no independent evaluation can be made.

Dr. Shrode testified that takes 5-6 seconds of external neck compression to "pass out". Studies have shown that unconsciousness can occur in 10-15 seconds if the arteries are occluded and 30-40 seconds or longer if only the veins are occluded (see below).

Natural Disease Processes:

Heart:

The left anterior descending artery had atherosclerosis with luminal stenosis of 90% along the proximal (upper) one-third. This is very significant coronary artery disease for a man this age. In general, one would see a more focal area of severe narrowing in a background of less significant narrowing. It is unusual for the entire proximal third to be narrowed to this degree.

No microscopic sections were submitted of the heart tissue so no independent evaluation of signs of ischemic heart muscle can be made.

Liver:

Toxicology showed the presence of a drug used to treat HIV-1 infection. This drug can be hepatotoxic (damages the liver) which can be life threatening, especially when first taking it. The gross description of the liver appears normal but no microscopic sections were submitted. Without histologic evaluation one can't determine the presence or severity of liver damage.

Liver damage may affect the metabolism of alcohol therefore increasing the half-life in the body. As the toxicology shows a level of alcohol that would be considered intoxicating, information about injury to the liver would be helpful when making an opinion about amount of alcohol consumed and the time since consumed.

Lungs:
The lungs have pulmonary congestion and edema at autopsy. The trachea and bronchi had white froth that is another indicator of pulmonary edema. This is a common finding at autopsy when death is due to imbalance between the heart and lungs, such as a heart attack or congestive heart failure. It is a non-specific finding and also is seen in drug overdose deaths. As the body was found with the head on the floor and much lower than the lower torso, the congestion and edema would be an expected finding with dependent lividity.

Trial testimony:
Dr. Shrode's testimony that he could rule out that Darrin Honeycutt died from "heart attack" (heart disease) because he didn't have any hemorrhage in his heart tissue is in error. His explanation shows a general lack of knowledge about heart pathology. Severe coronary artery disease can lead to sudden death with an acute ischemic event and fatal arrhythmia. When a person dies suddenly from an arrhythmia there are no findings in the heart muscle visually at autopsy or microscopically to prove this. One must make the opinion based on the presence of severe coronary artery disease and its likelihood to result in sudden death.

If a person suffers an ischemic event of the heart tissue (commonly called a heart attack) and survives then as the body attempts to heal the injured heart muscle findings are visually evident[3]. As early as 4-12 hours (survival) one can see some dark discoloration and microscopically see heart muscle necrosis (cell death). Noticeable dark mottling (red discoloration) of the heart muscle is seen after 12-24 hours. Mottling with a yellow tan center isn't seen until 1-3 days after the event. Scarring that is seen as dense white tissue is seen > 2 weeks after the ischemic event. *The reference included here is standard text cited from a medical school pathology book.*

Dr. Shrode's testimony that since there was [no] scarring of the heart muscle it indicated there was no evidence of heart disease is also in error. Very often at autopsy there will be severe coronary artery disease with no previous ischemic events or scarring and the first sign of heart disease is sudden death due to fatal arrhythmia.

Dr. Shrode's testimony that he knows the collateral vessels developed to supply this area of the heart because the other coronary arteries were "open" is in error and misleading. Each coronary artery supplies an area of the heart. For example, the right coronary artery supplies the right side of the heart and electric points called the SA node and AV node. When it has an open lumen it only tells you the circulation is intact to the aspect of the heart. It is not an indicator that it grew extra vessels and sent them to the left side of the heart. If an area of the heart has decreased oxygen supply collateral vessels can move into the area from nearby arteries but not to a great extent. The only way to demonstrate the presence of these vessels is to dissect them. This is not documented in the autopsy report.

Evidence:
The body was received with the hands bagged and the acrylic fingernails were clipped collected. It was noted at autopsy that the acrylic mail of the left "ring" finger (4^{th} digit) was partially torn off and there was possible dried blood under the nail. The lab report indicates that DNA from 3 people was present. There was no indication on the report that Richard Masterson's DNA profile matched.

A sexual assault kit was collected. The lab report indicated that the penile swab was positive for semen and no foreign DNA was identified.

Toxicology:
The toxicology performed on blood (no indication if the sample was from the aorta or peripheral) showed ethanol at 0.11 g/dl. This is alcohol in the blood at a level slightly higher than that most states list as their legal limit of driving which is 0.08. Medication prescribed to the decedent was also present. No narcotics were identified.

Discussion:
Manual strangulation causes death not by occluding the airway but by compressing the jugular veins and/or the carotid arteries in the neck. When enough pressure is applied to occlude the veins, blood can get to the brain but not leave, causing an increase in pressure and rupture of the tiny capillaries in the eyes (petechial hemorrhage). When the arteries are also occluded the blood and therefore oxygen cannot get to the brain and over seconds to a minute unconsciousness occurs. If the pressure is maintained and the brain is denied oxygen for a sufficient time period then death will occur. Often during manual or ligature strangulation the pressure will be released and repositioned. The greater the pressure, over a longer time period and larger, confluent scleral and conjunctival hemorrhage form.

Other types of manual strangulation would be variations of the choke hold. In the first type of choke hold is applied from behind with the arm wrapped around the neck and pulling the forearm in creating pressure on the victim's neck (airway and vessels affected).

The variation called the lateral vascular neck restraint (LVNR) is where the anterior neck is held in the antecubital fossa (front of the elbow) and the forearm is pulled towards the arm, compressing the vessels in both sides of the neck. This is basically a pincher movement with both sides of the neck between the arm and forearm and is commonly called a sleeper hold. If the victim is struggling and twisting then the hold can turn into a combination of the two choke holds. In this type of hold it takes less pressure to compress the veins in the neck and more pressure to compress the carotid arteries. Studies have shown that unconsciousness can occur in 30-40 seconds if the veins are compressed. If the arteries are completely occluded unconsciousness can occur as early as 10-15 seconds[1]. Another consideration with this type of hold is compression of the carotid sinus which can result in bradycardia (very slow heart rate) and rarely cardiac arrest. Generally this vagal stimulation only causes mild bradycardia and excessive stimulation is likely limited to individuals with significant cardiovascular disease as seen in this case.

In both types of choke hold if there was a struggle one can find hemorrhage in the strap muscles of the neck and possibly fractures of the thyroid cartilage and hyoid bone. The superior horns of the thyroid cartilage are thinner and more susceptible to fracture. These injuries are more likely with the choke type hold than the sleeper type of hold.

As noted above petechial hemorrhages when found with other findings in the neck are "supportive" of a diagnosis of strangulation and are not "diagnostic" of strangulation. Petechial hemorrhages are caused by increased pressure in the vessels in the eyes which results in rupture of the tiny capillaries. This can occur in various types of manual strangulation but can also be seen in natural disease processes such as fatal heart disease. Petechial hemorrhages can be found in positional asphyxia (upside down position) secondary to pooling of the blood by gravity. The increased pressure causes the same tiny ruptures of the vessels.

DeMaio's textbook of Forensic Pathology highlights one study involving 79 victims who survived attempted strangulation. Conjunctival hemorrhages were found in 14 of the surviving victims and only 8 of them had lost consciousness. This study helps illustrate that petechial hemorrhages are simply a result

of increased pressure in the vessels of the eyes. If compression is applied to the veins in the neck, petechial hemorrhages can occur with or without loss of consciousness and/or death.

Hemorrhages in the eyes can also be seen when the head is in a lower position than the body after death (or when just face down) and the blood pools in the facial tissues by gravity. The vessels eventually rupture causing petechial hemorrhages that may become large. This is called dependent lividity as would be expected with the position the body was found in this case. These changes can also be seen on the skin and the ruptured vessels are called Tardieu spots in the areas of prominent lividity. It is quite easy to find textbook references in Forensic literature showing extensive facial, periorbital and conjunctival hemorrhages in people who die of heart disease and are found in the prone position (face down). These changes can also be seen internally involving small vessels, in this case the vessels of the thyroid. There is no reliable scientific method to distinguish antemortem petechial hemorrhages from postmortem artifact hemorrhages caused by pooling of blood with gravity (dependent lividity).

One possible scenario in this case is that with or without external manual compression of the neck, Darrin Honeycutt died as a result of heart disease. The left anterior descending coronary artery had severe atherosclerotic disease. If this man had been found dead in his apartment with no other signs of trauma or natural disease process the cause of death would be determined "Atherosclerotic Heart Disease".

The left anterior descending artery is referred to as "the widow maker" as it's a large coronary artery supplying the anteriorlateral wall of the left ventricle, the apex of the heart and the interventricular septum. Since its supplies such a large portion of the left ventricle it's considered the most critical artery in supplying oxygen to the heart. Unfortunately, often the first sign of heart disease is sudden death. Often family will report that their family member had no history of heart disease or controlled high blood pressure and they die suddenly. At autopsy significant coronary artery disease is discovered. Even under normal activity one can die secondary to a fatal ventricular arrhythmia. When the body and therefore the heart are stressed by physical exertion the oxygen demand of the heart muscle increases and an acute ischemic can trigger a fatal arrhythmia[4].

In this case, one statement from the defendant was that he compressed Darrin's neck on request to cause decreased oxygen as part of erotic asphyxiation. Decreased oxygen would stress the heart muscle. As there was severe luminal narrowing of the left anterior descending artery this additional stress very likely could have resulted in an acute ischemic event and fatal arrhythmia. Once the victim became limp there would be no external signs that he was having or had a fatal arrhythmia.

Another factor to consider in this case is the position of the body such that the body weight was on the neck face and shoulders with the neck extended. This position may have caused a decreased ability to breath and one can't rule out a contribution of positional asphyxia, especially if the decedent were unconscious while in this position.

Review of the discovery included an Affidavit written by Dr. Paul Radelat that noted that the sleep hold placed on Darrin by Richard likely could have produced the desired erotic effect of decreased consciousness while simultaneously producing an undesired fatal cardiac arrhythmia. I agree with Dr. Radelat's Affidavit. I would note that there is no evidence of this neck compression at autopsy but only as relayed by the defendant.

Summary:
There is no independent scientific evidence of external neck compression or any other type of manual strangulation in the autopsy of Darrin Honeycutt. There is no external bruising of the neck, hemorrhage in the strap muscles or soft tissues of the neck or fractures of neck structures. The "petechial hemorrhages" that were listed as a diagnosis in the autopsy report and testified to as evidence of external

neck compression are non-specific. The hemorrhages in the eyes are simply from increased pressure and rupture of tiny capillaries. This could have occurred from a fatal cardiac event, antemortem compression of the neck or dependent lividity from blood pooling after death. There is no accurate scientific method to distinguish between them. In addition, there were early decompositional changes of the face with some degree of red discoloration further complicating interpretation.

Even in the event that one could separate out antemortem petechial hemorrhages they are "supportive" of but not "diagnostic" of a manual compression event. The pathologist appears to have relied on the "confession" and not any independent scientific observation.

In his trial Richard Masterson testified that during a sexual act Darrin Honeycutt asked him to perform erotic asphyxiation. During this act his body weight was pressing on the torso of the decedent and when they both fell to the floor they were in a dependent position. The decreased oxygenation could have created stress on the heart. Darrin Honeycutt had severe coronary artery disease which easily could have triggered an ischemic event with resultant fatal ventricular arrhythmia and death following the increased stress on the heart.

The pathologist in this case inaccurately ruled out that Darrin Honeycutt died from an acute ischemic event of the heart followed by a lethal arrhythmia based on the absence of hemorrhaging in the heart muscle. As noted above there would be no visual findings in the heart tissue if one died immediately from that event.

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[3]Robbins, SL and Cotran, RS: Pathologic Basis of Disease, 7th ed.: Elsevier Saunders; 2005; (12) *The Heart.* 555-618.

[4]Huikuri, H., Castellanos, A.; et al. *Sudden Death due to Cardiac Arrhythmias.* N Engl J Med, 2001. Vol 345, No 20. 1473-1482.

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EXHIBIT 16

Wilkie A. Wilson, PhD
302 Watts St.
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December 15 2015

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Dear Mr. McCann and Ms. Miller:

This letter is in reference to the case of Richard Masterson. You asked me to review this case from the standpoint of the effects of stimulants and their acute withdrawal could have had on Mr. Masterson at the time of his confession. In particular you asked that I consider what scientific findings have emerged since his trial in 2002.

I am a neuropharmacologist at Duke University in Durham, North Carolina and a Professor of Prevention Science in the Social Sciences Research Institute. I hold a B.S.E.E. from Louisiana State University and a Ph.D. from Duke University. Until 2009, I was a Research Professor of Pharmacology at Duke University Medical School, and an Associate Professor of Medicine until 2010. Additionally, until December 31, 2010, I served as a Research Career Scientist for the Veterans Health Service at the VA Medical Center in Durham, North Carolina. I still serve the VA in a "without compensation" position.

I continue to conduct scientific research concerning the effects of drugs on brain function in collaboration with other scientists. I am currently funded by the National Institute of Health through grants to study alcohol and nicotine. From July 1, 2012 to June 30. 2015, I, along with colleagues, had funding from the United States Department of Education Institute of Educational Sciences to develop brain-related educational programs for high school students (that work continues with funding from Duke).

I have written numerous research papers as detailed in my CV. In particular I have studied the unique effects of recreational drugs in adolescents. In addition, I have co-authored three books that explain the effects of recreational drugs to members of the public who are not scientists. The lead book of the series is *Buzzed: The straight facts about the most used and abused drugs from alcohol to ecstasy* (WW Norton, 1998, 2003, 2008, 2014). In this book we discuss the effects of cocaine, methamphetamine and ethanol on the brain and behavior.

I also teach members of the criminal justice community, about neuropharmacology, addiction, and recreational drugs at the School of Government at the University of North Carolina. I have testified in criminal proceedings as an expert in neuropharmacology in North Carolina, Louisiana, Texas, and Florida. I have consulted on other cases in Tennessee, Georgia, California and Virginia.

Sources of Information about this case

- Report of Dr. Shawanda Anderson dated 02/11/2013
- Trial Testimony dated from March, 2002 to April, 2002 including the guilt-innocence and punishment phases of the trial.
- An interview with Mr. Masterson December 4, 2015 at the Polunsky Unit.
- A transcript of Mr. Masterson's confession
- Autopsy report for the victim, Darrin Honeycutt

The interview of Richard Masterson

- I interviewed Mr. Masterson on December 4, 2015 in the death row facility of the Texas Department of Corrections Polunsky Unit.
- I first focused on his drug use in the time leading up to the death of the victim. Mr. Masterson stated that he was using I-V cocaine, smoking crack cocaine, methamphetamine (all drugs classed as "stimulants") , and ethanol on a daily basis. That had been his pattern of use for the preceding year, and that his drug use had begun as a young teenager.
- He indicated that he had experienced seizures associated with crack use.
- On the day of the death, he had been using stimulants and ethanol all day.
- He stated he was arrested 11 days prior to the death and had used stimulants for all but the last two days prior to his arrest. He stated that he had consumed all of his drugs and could not get more.
- I then asked him more about the circumstances of the death. He stated that he did not know the victim prior to their meeting at a club.
- He gave essentially the same description of the events leading up to the death that he did in his court testimony. The victim invited him to his apartment and asked to have sex, including erotic asphyxiation. Mr. Masterson complied with his wishes. As he released the victim from the neck compression, he realized that he was likely dead and then decided to escape rather than call for help because of his criminal record.
- When he was arrested he was depressed from stimulant withdrawal and "didn't have anything to live for." He wanted to get the death penalty.
- He described speaking with the detective "off camera" to script what he would have to say to get the death penalty and then he proceeded to repeat that for his taped confession.

Mr. Masterson's drug addiction history

The psychological report by Dr. Shawanda Anderson details the tragic life history of Mr. Masterson and it is not necessary to repeat it here except to say that he began using illicit drugs at age 15, when he was homeless. From age 21 he began

using I-V cocaine, and was using it at the time of the death of the victim. Clearly Mr. Masterson was addicted to stimulants and this began at the most vulnerable time for human addiction, during adolescence. Dr. Anderson's report includes the results of a neuropsychological examination that was given to assess Mr. Masterson's brain function. She concluded that Mr. Masterson had multiple deficits with a major deficit in his reasoning ability, and that these deficits may reflect some brain anomaly. She indicated that such brain dysfunctions could result from brain injury or damage from substance abuse. His stimulant abuse triggered frequent seizures, and the repeated seizures may well have caused damage to his brain.

Unique effects of adolescent drug exposure

The work of our group studying the unique effects of drugs in adolescents began in 1996 when we showed that alcohol was far less sedative in adolescent animals than in adult animals, mirroring the human experience. At that time there was very little attention paid to the effects of drugs on the teen brain. Slowly more laboratories began to study adolescents, and a seminal review paper was published in 2003, "Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability.[1]" This paper synthesized the emerging research concerning the adolescent brain and described new research models of its unique vulnerability to addictive agents.

This review paper has been cited more than 1000 times and gave enormous momentum to research about drugs and the adolescent brain. This paper was obviously not available at the time of trial and while some of the research cited in it was published before 2002, general awareness of the issue developed after its publication. As an example, just in 2010, the National Institute of Alcohol Abuse and Alcoholism recognized the need for research in this area and funded the first Consortium on the Neurobiology of Adolescent Drinking in Adulthood. Our group is part of that consortium.

If the defense team had known about the effects of drug use during adolescence they could have presented this information to the jury to explain how Mr. Masterson became addicted to the stimulants that eventually caused him to make a confession that he hoped would result in his death.

The mental state of Mr. Masterson at the time of arrest

Mr. Masterson made it very clear that he was extremely depressed at the time of his arrest and that he had no reason to live. He knew that he had a criminal record and felt that he would likely be convicted and given a life sentence. He felt hopeless and thought it best to get the death penalty rather than live out his life in prison. **Essentially, Mr. Masterson was committing suicide by confession.**

The unrecognized origin of Mr. Masterson's depression at the time of confession: drug withdrawal after prolonged use of stimulants

- Tolerance to and withdrawal from drugs

When the brain is repeatedly exposed to drugs, the natural response of the brain is to adjust its chemistry to try and oppose the effects of the drugs. This is called the development of drug tolerance. An example familiar to people who use caffeine is the caffeine tolerance and withdrawal syndrome. Caffeine inhibits the actions of a brain chemical, adenosine, and the block of adenosine makes people feel alert, awake, and generally stimulated. With regular use, the brain develops tolerance to the caffeine as the brain adjusts its adenosine sensors (receptors) to try and counter the effects of the caffeine. Thus a caffeine user may need more caffeine to achieve stimulation. But, if the user stops consuming caffeine, the brain, which is now hypersensitive to adenosine, produces feelings of lethargy, sedation, and the withdrawn person can have an awful headache. These are all symptoms of adenosine hyperactivity.

- Depression following stimulant withdrawal

  The issue in Mr. Masterson's case is not caffeine, but the much more powerful stimulants, cocaine (including IV cocaine and crack cocaine) and methamphetamine. These drugs produce stimulation of the individual by releasing endogenous stimulating neurochemicals in the brain. The most important of these is the neurotransmitter dopamine. Dopamine is produced by the anticipation of pleasurable events and organizes the brain to get the anticipated pleasure.

  Dopamine release is produced by all addicting drugs and behaviors, but the stimulant drugs such as cocaine (in all forms) and methamphetamine are highly effective releasers. They release much more dopamine that any "natural pleasure, such as food, sex, etc. When an individual use cocaine or "meth," especially by smoking or the I-V route, there occurs a massive elevation of dopamine in the brain and the individual becomes profoundly energized and euphoric. This state is the opposite of a depressive state.

  As a stimulant drug is repeatedly used, the brain attempts to maintain normality and it adjusts its chemistry to reduce the number and sensitivity of sensors for dopamine. At this point the individual needs the drugs just to feel normal, and natural pleasurable activities lose their value.

  When the stimulant drug is not present, the addict is deprived of dopamine function and she/he becomes depressed, perhaps profoundly so. Thus an individual, such as Mr. Masterson, who used stimulants for an extended period of time, is highly dependent on them to maintain anything approaching a non-depressed state.

  In late 2002 (after the date of the trial) a paper was published that demonstrated the remarkable correlation between the symptoms of major depressive disorder and the effects of stimulant withdrawal. This paper, "A 'crash' course on psychostimulant withdrawal as a model of depression[2]," was an invited paper in a very prestigious and widely read journal. While previous literature, mostly limited to stimulant researchers, recognized that people in stimulant withdrawal could be depressed, this paper made the case that this is a biological effect of stimulants, that the effects are identical to

those seen in major depressive disorder, and this could have profound effects on the function of the individual. In addition the paper emphasizes that the correlation is so good that stimulant withdrawal could be used as an animal research model of depression for the development of therapies.

The comparison table is reproduced below:

Table 1. Similarities between major depressive disorder and psychostimulant withdrawal in humans[a]

Major depressive disorder	Psychostimulant withdrawal	Refs
Behavioral (DSM-IV criteria)		
Depressed mood and/or irritability	Severely depressed mood and/or irritability	[14]
Diminished interest or pleasure in daily activities	Loss of interest or pleasure in daily activities	[14]
Large increase or decrease in appetite	Increase in appetite	[17]
Insomnia or excessive sleepiness	Excessive sleepiness	[17]
Psychomotor agitation or retardation	Psychomotor retardation	[17]
Fatigue or loss of energy	Fatigue and/or loss of energy	[16]
Diminished ability to think or concentrate	Poor ability to concentrate or confusion	[14]
Feelings of worthlessness and/or guilt	Unknown	
Recurrent thoughts of death or suicide	Significant suicidal ideation	[14]
Behavioral (non-diagnostic)		
Feelings of restlessness	Restlessness	[14]
Comorbid anxiety	High levels of anxiety	[14]
Carbohydrate craving	Increased craving for carbohydrates	[19]
Elevated drug self-administration	Greater drug-seeking and drug-taking behaviors	[57]
Physiological		
Disturbed HPA axis	Increased HPA axis activity	[58]
Disrupted sleep architecture	Decreased REM latency; higher REM density	[59]
Changes in regional brain metabolism	Elevated metabolic activity in orbitofrontal cortex	[60]

[a]Abbreviations: DSM-IV, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition; HPA, hypothalamic–pituitary–adrenal; REM, rapid eye movement.

This paper shows that depression following stimulant withdrawal can produce all the problems as seen in "major depressive disorder," including suicidal ideation. Mr. Masterson was not showing signs of clinical depression either before or after this withdrawal period, and the defense clearly never realized that there was a biological explanation, transient stimulant withdrawal depression, that led Mr. Masterson to confess and then to change his account at the time of trial. If this information had been available at the time of the trial, the defense team could have recognized that there was a completely rational explanation for his changed confession. He was suffering from major stimulant withdrawal depression and thus wanted to commit "suicide by confession." Moreover, this terrible decision was very likely facilitated by his documented brain deficits in reasoning, shown by Dr. Anderson's neuropsychological testing. When the withdrawal-triggered depression had subsided by the time of trial, he no longer wanted to die, and he changed his explanation of events when he testified.

Thus, it is my opinion that at the time of trial the general legal and clinical community could not have fully appreciated why Mr. Masterson first confessed in such a manner as to insure his conviction and virtually guarantee that he would receive the death penalty, and then why he would change his description of events at a later time. Had they had the information in this paper and the understanding of

stimulant-induced changes in the brain that have developed in the years since then, they could have explained this to the court.

Sincerely yours,

Wilkie A. Wilson, PhD
Neuropharmacologist and
Professor of Prevention Science
Duke University Social Sciences Research Institute

1. RA Chambers, JR Taylor, MN Potenza. Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability. Am. J. Psychiatry 160:6 June 2003.

2. AM Barr, A Markou, AG Phillips. A Crash Course On Psychostimulant Withdrawal As A Model Of Depression. TRENDS in Pharmacological Sciences Vol. 23 No. 10 (1041-1052) October 2002.

EXHIBIT 17

STATE OF TEXAS

COUNTY OF HARRIS

AFFIDAVIT OF ROBERT LOPER

My name is Robert K. Loper, and my business address and phone number is 111 W 15th Street, Houston, Texas 77008, (713) 880-9000. I am over eighteen and competent to make this affidavit. I was the trial attorney for Mr. Richard Allen Masterson in 2002. I wish to state under penalty of perjury the following:

1. "At the time of Mr. Masterson's trial, we attempted to suppress the confession based upon a theory of involuntariness because the police officer who took his statement made a promise to keep his nephew out of trouble. I have read the letter from Dr. Wilkie Wilson regarding the effect of chemical withdrawal in depression. Had I had this scientific information in my hands at the time, I would have also sought to suppress the confession based upon Mr. Masterson's mental state. Looking back at this with new knowledge, I believe we would have asked for a continuance and sought treatment with anti-depressants. This could have avoided his apparent breakdown on the stand where he was clearly trying to convince the jury to kill him because he was suicidal and depressed. We did not know about the effects of stimulant withdrawal at that time. If I had known about it, I would have approached the suppression of his confession in this case differently from just the involuntariness of it.

2. "I have also read the materials from the forensic pathologist retained by Mr. McCann and Ms. Miller. We did cross-examine the Harris County Assistant Medical Examiner Dr. Schrode. We believed that he was ignoring the possibility of a heart attack during consensual SEXUAL ACTIVITIY. Having read the new review by the new forensic pathologist, it seems clear now that the Harris County Assistant M.E. did not perform a through or satisfactory autopsy. Had I known that he committed such a flawed autopsy, I would have been able to use that information to impeach him. I also did not realize the fact that the deceased being treated for HIV at the time of his death might have played a role in his unfortunate end. I am not a medical person, nor do I have any training in pathology. We had no reason to distrust the State's expert. Looking at the many flaws pointed out in the new review by habeas counsels pathologist, it seems clear that we were duped into believing bad testimony based on bad science.

3. "The new information from both habeas counsels new experts would have been incredible important to us at the time. It would have resulted in a completely different defense strategy from the admissibility of his statements, to the timing of his trial, to the cross examination of the medical examiner, and to treating him for his depression before and during trial."

FURTHER AFFIANT SAYETH NOT.

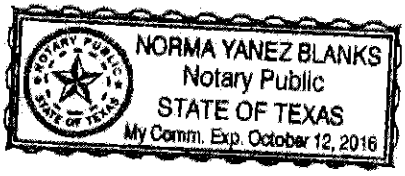
Robert K. Loper, Affiant

NOTARY

ON THIS DAY, THE AFFIANT ABOVE DID APPEAR AND SWEAR AND SUBSCRIBE TO THE TRUTH OF THE FOREGOING.

DATE: 12-26-2015

NOTARY PUBLIC, IN AND FOR HARRIS COUNTY, TEXAS



My commission expires: 10-12-2016