IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

AND

THE 292ND JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

Trial Court Cause No. F01-40949-V
Texas Court of Criminal Appeals No.. 74,354
Writ No.WR-62,298

EX PARTE: MARK ANTHONY STRÖMAN No_____

TO THE HONORABLE COURT OF CRIMINAL APPEALS AND THE DISTRICT COURT:

COMES NOW, Mark Ströman, Petitioner, and applies to this Court pursuant to the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the Texas Constitution and other law set forth below, to order that his conviction and/or sentence be vacated. The grounds for his petition are as follows:

HISTORY OF THE CASE

State Court. The culpability phase lasted one day.[1] At its conclusion, Mr. Ströman was convicted of capital murder in the 292nd District Court in Dallas County, TX. The verdict was based on an indictment that charged Mr. Ströman with intentionally causing the death of Vasudev Patel, by shooting him with a firearm, while in the course of committing and attempting to commit the offense of robbery of

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[1] A mere three days after a spec scan had been done, and about two months from the date of appointment of a mitigation specialist, and only six months from the initial appointment of defense counsel, the trial on the merits began and ended. The culpability phase lasted only one (1) day. (RR vol. 18).

the deceased. (CR 1:02) [2]

The punishment phase lasted two days. It began April 2, 2002, the same day the jury returned a verdict of guilty of capital murder. (CR 5:741; RR 19:28). On April 4, 2002, the jury's answers to the special issues resulted in the imposition of a death sentence on Mr. Ströman. (CR 5:750, 755-757; RR 21:91-92). Some of the first, crucial facts about Mr. Ströman's mental impairments had not been uncovered until after voir dire and the culpability phase of the trial had been concluded, and were never properly developed.[3]

On November 19, 2003, the Texas Court of Criminal Appeals affirmed the conviction and sentence of death on direct appeal. *Ströman v. State*, Cause No. 74,354 (Tex. Crim. App. Nov. 19, 2003) (not designated for pub.). The United States Supreme Court denied certiorari on June 28, 2004. *Ströman v. Texas*, 542 U.S. 939 (2004).

On November 13, 2003, through his state-appointed habeas counsel, Mr. Parks, Mr. Ströman filed an Application for Writ of Habeas Corpus in the state court. The petition was based on minimal factual investigation, and raised only record-based claims of ineffective assistance of counsel for failure to challenge a prospective juror, who was seated, and failure to object to various hearsay admitted in the punishment phase (testimony from Officers Presley and Weaver and hearsay in a psychological report). On July 9, 2004, the state habeas court signed, verbatim, the proposed findings of fact and conclusions of law drafted by the State of Texas, which

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[2] Throughout voir dire defense counsel practically conceded Mr. Stroman's guilt ("And we're going to be fighting with all our might to let twelve people know that even though he might be guilty of capital murder he does not deserve the death penalty.") (RR 13:143)

[3] During the culpability phase, defense counsel had argued lack of intent was shown because Mr. Stroman shot the victim only one time, despite having the opportunity to have shoot him again, had Mr. Stroman wanted to kill the victim. (RR 19:14-15)

recommended denial of habeas relief. On July 27, 2005, the Texas Court of Criminal Appeals, in an unpublished order, adopted the findings and conclusions of the lower state habeas court and denied habeas relief. *Ex parte Ströman*, No. WR-62,298 (Tex. Crim. App. July 27, 2005).

U.S. District Court. Mr. Ströman did not want Mr. Parks to represent him in federal habeas. However, the federal court appointed Mr. Parks as federal habeas counsel. Thereafter, Mr. Ströman, as well as Mr. Parks, filed further requests for appointment of federal habeas counsel other than Mr. Parks. *See* Fed. Hab. Docs. #6-8.

On October 12, 2005, the federal court appointed Mr. Mills as federal habeas counsel, relieving Mr. Parks. *See* Fed. Hab. Doc. # 9. On July 25, 2006, Mr. Mills filed the federal habeas petition, *see* Fed. Hab. Doc. # 30, although what he filed was significantly less competent even than the state habeas petition. Apparently, Mr. Mills had "farmed out" the case to Mr. Voth, his associate, who was not on any of the approved state or federal lists for appointment to represent capital litigants, and who was not competent to provide meaningful representation.

The federal habeas petition was, at best, a "cut and paste" of two claims from the state habeas application, and one from the direct appeal. The federal habeas petition contained three grounds: Ground I, record-based ineffective assistance of counsel claims from the state habeas petition; Ground II, a cumulative error claim; and Ground III, a claim that the death penalty violates the evolving standards of decency. Other than an article from The Lancet, the federal habeas petition contained no extra-record evidence in support of the three grounds. It lacked any argument as to why such evidence was unavailable. It failed to make a demand for discovery and an evidentiary hearing.

Long before the federal statute of limitations had run, Mr. Ströman himself had filed several motions requesting appointment of federal habeas counsel other than Mr. Mills, and for equitable tolling. *See* Fed. Hab. Docs. ##11, 24, 26, 27, 45, 46. The basis for the motions was that Mr. Mills failed to render competent and meaningful assistance in Mr. Ströman's federal habeas proceeding. Mr. Ströman put the federal district court on notice of Mr. Ströman's belief (which was subsequently proven true) that "Mr. Mills intends to do nothing more than the usual 'cut and paste pre-fab' writ prevalent in so many Texas death sentence appeals (a carbon copy of the state appeal or state writ, most likely), and is therefore deliberately compromising Petitioner's life with his lack of due care or concern." Fed. Hab. Doc. #26, p. 3.

After repeated denials of the requests by Mr. Ströman, and after the habeas petition had been filed by Mr. Mills and the statute of limitations had run, the federal court removed Mr. Mills and replaced him with undersigned counsel. *See* Fed. Hab. Doc. #47.

On September 29, 2007, Mr. Ströman through undersigned counsel and with leave of court, filed an amended habeas petition, as well as motions for equitable tolling, stay and abeyance, funding and discovery. In the amended federal habeas petition, Mr. Ströman raised Grounds 1-6, which included claims of actual innocence; lack of a presumption of innocence; lack of a fair defense; and ineffective assistance of counsel claims for failure to investigate and failure to introduce favorable evidence in the culpability phase of the trial.[4] *See* Amended Petition for Writ of Habeas

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[4] These claims pivoted on the mental impairments of Mr. Stroman. which had not been adequately developed or introduced until the eve of the punishment phase of trial:

A. Exhibit B: Mitigation Report, 4/2/02, of Mary Connell, Ed.D., ABPP ("It is these forces, then, that acted on this person to cause him to commit heinous acts of violence. Without the

Corpus at 40-41. Grounds 7-9 included claims from the original federal habeas application pertaining to ineffective assistance of counsel claims for failure to challenge a prospective juror, who was seated, failure to object to various hearsay admitted in the punishment phase, and a challenge to the method of execution, lethal injection.

In anticipation that the State would raise exhaustion and procedural default defenses with respect to the claims not raised in state court, Mr. Ströman argued that he had cause for any alleged unexhausted or procedural default of his claims because state habeas counsel "violated 'the first rule of habeas corpus': the burden of alleging facts which entitle a state habeas petitioner to relief." Amended Petition at 10-12.

Mr. Ströman also argued that his state habeas counsel's wholesale failure to adequately investigate the case and present extra-record evidence was so far below the standard of care that his counsel "acted outside the course of the representation" and was not acting as his agent. *See* Amended Petition for Writ of Habeas Corpus at 8-10. He also argued that the exhaustion requirement should be excused under 28

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combination of abuse and neglect, rejection, untreated behavioral disorder, and the effects of drug addiction, it is unlikely that he would have become a violent person who would engage in such criminal acts.");

B. Testimony of Dr. Stonedale, Exhibit 9, brain scans of Mr. Stroman admitted into evidence. (RR 21:22-23) ("That's the right frontal brain, which has a lot of effect on emotion and impulsivity. That's the area that controls our acting out. I mean, we all have impulses sometimes to act out, to do something but, you know, we control ourselves. And it's in an instant. We don't even think about it. That area of the brain is part of what helps us control that... [Studies have shown that people with the type of brain scan results obtained by Mr. Stroman] ... are consistent with people who act out. (RR 21:22-23); and

C. Attestation of Dr. Lundberg-Love ("It is my conclusion that on the date of the charged offense, Mr. Mark Stroman did not have the necessary mental states of "knowing" or "intentional" for capital murder because of his various mental impairments, including his involuntary drug addiction to methamphetamine, organic brain impairment, posttraumatic stress disorder (PTSD), and history of childhood abuse and neglect."). Exhibit A: Affidavit of Paula Lundberg-Love, Ph.D.

U.S.C. § 2254(b)(1)(B)(ii) because Texas grants condemned state habeas applicants the right to counsel, but does not require habeas counsel to provide effective assistance of counsel and because Mr. Ströman's state habeas counsel was in fact ineffective in his case. *Id*. at 15.

On February 2, 2008, Mr. Ströman filed a Motion invoking the stay-and-abey procedure[5] authorized by *Rhines v. Weber*. Fed. Hab. Doc #77. Mr. Ströman requested, in the alternative, that if the federal court determines that it lacks the authority to grant habeas relief on unexhausted claims, then the federal district court should stay and abey the federal court proceedings to allow him to return to state court to pursue habeas relief as to all those claims deemed "unexhausted." The motion was denied. Fed. Hab. Doc #83.

The district court held that "Grounds 2-6 of [Ströman's] amended petition are therefore unexhausted and procedurally barred." Mem. Op. at 12, 19-20. The court also wrote that it "need not decide whether these grounds are time-barred because it has already concluded that they are unexhausted and procedurally defaulted." Mem. Op. at 20, n.16. Thereafter, Mr. Ströman filed a notice of appeal, and also asked the federal district court to grant a certificate of appealability, which it denied. Fed. Hab. Doc. ## 100-102.

Fifth Circuit Court of Appeals. Mr. Ströman then filed a COA, as well as a motion asking the Fifth Circuit Court of Appeals to stay and abey the federal proceedings to allow him to return to state court should the Fifth Circuit determine certain claims were unexhausted.

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[5] Under Texas's "two-forum" rule, as modified in *Ex Parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004), Texas courts will not entertain a habeas application in a case that is also pending in federal court unless the federal proceedings have been stayed.

In its unpublished opinion, the Fifth Circuit denied a COA for the unexhausted claims because:

> ... Ströman never filed a successive state petition, and thus, there never was a § 5(a) ruling. The Fifth Circuit has held post-*Ruiz* that § 5(a) remains an independent and adequate state ground for the purpose of imposing a procedural bar. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *see also Rocha v. Thaler*, 619 F.3d 387(5th Cir. 2010) (denying an application for a COA as an abuse of the writ under § 5, *clarified and panel rehearing denied*, __ F.3d __, 2010 WL 4630794 (5th Cir. Nov. 17, 2010).

Ströman v. Thaler, Slip Op. No. 09-70034 (Dec. 27, 2010) at 4.

U.S. Supreme Court. Mr. Ströman filed a petition for writ of certiorari and a motion for stay of execution in the U.S. Supreme Court, both of which were denied on June 27, 2011. *Ströman v. Thaler*, 2011 WL 1324467 (June 27, 2011).

STATEMENT OF FACTS

"This man needs to die, pure and simple," said Assistant District Attorney Bob Dark in his closing argument to the jury. (TR21 at 54) The question remains: was he right? Was this the civilized response to Mark Ströman?

1. Who is Mark Ströman?

Mark Ströman was born on October 3, 1969. Mark and Tina Ströman were married when she was 15, he was 16. (TR20 at 94) he was trying to escape his own family. He was obviously much too young for this.

They have a daughter Amber. (TR20 at 94) Robert was born in 1987. (TR20 at 99) Erica was born in 1988. (TR20 at 101) Erica is not actually his child, as she was conceived when he was in prison for a burglary – he was sent to prison because he had broken into houses when nobody was home, primarily to steal food. (012663) But Mark has always treated Erica as his own child. Mark and Tina are still married.

While Mark Ströman would not begin to pretend that, even today, he is the person he wants to be, he has struggled to overcome some of the "lessons" that his parents taught him.

2. The victims reflect the best that humankind has to offer

While the reasons for his actions have never before been made clear, Mark Ströman certainly caused great pain to the families of the two men he killed – Vasudev Patel and Waqar Hasan – as well as to the third person shot, Rais Bhuiyan. Notwithstanding this, and with neither a request nor prompting from Mark's lawyers, Rais has been very actively seeking mercy over vengeance, with support from the other families.

"There are three reasons I feel this way," Rais told *The Dallas Morning News*. "The first is what I learned from my parents. They raised me with the religious principle that he is best who can forgive easily. The second is because of what I believe as a Muslim, that human lives are precious and that no one has the right to take another's life. And, finally, I seek solace for the wives and children of [Vasudev] Patel and [Waqar] Hasan, who are also victims in this tragedy. Executing Stroman is not what they want, either. They have already suffered so much; it will cause only more suffering if he is executed." DIANE SOLIS, *Why My Attacker Should Be Spared the Death Penalty*, DALLAS MORNING NEWS 1B (May 22, 2011).

This raises a crucial question: in whose name are we carrying out these executions? It is perhaps ironic, given the 9/11 spark that precipitated these tragedies, that Islamic (or Shari'a) law would not permit executions under these circumstances. The essence of a judicial process is that the victims cannot unilaterally demand

vengeance – the state procedure is placed between the perpetrator and the victim to avoid the cycle of revenge. However, at the other end of the pendulum, there is no moral basis for suggesting that the victims cannot exercise mercy. If they called for mercy in an Islamic court, their wishes would be respected.

Why is this not the case in Texas when the victims would rather choose mercy?

3. Mark Ströman is very willing to engage in mediation and reconciliation with the victims

While he does not properly understand why he did what he did, Mark Ströman recognizes that his actions were profoundly wrong and had a terrible impact upon Plaintiff, as well as the families of Mr Patel and Mr Hasan. He is very remorseful for taking two lives, almost taking a third, and for the pain and suffering that he has caused.

Mark Ströman has struggled to come to terms with what he has done, and has moved along the path towards rehabilitation. However, he recognizes that, while he has come a long way, he has a longer way still to go.

Mark Ströman is very grateful to the victims for the compassion that they have shown to him, and wishes to do everything that he can in order to engage in meaningful mediation and reconciliation.

4. Mark Ströman chose the wrong parents.

As he says in his statement, Rais Bhuiaian clearly had wonderful parents. Unfortunately – and this is said by way of explanation, not excuse – Mark did not.

Mark's mother Sandra was "a severe alcoholic." She was found in a gutter during one of her pregnancies and hospitalized in Shreveport. In that instance, her twin infants were taken away from her and raised by adoptive parents. They were the fortunate ones.

Sandra married Doyle Baker, Mark's stepfather. According to her sister, they were always heavy drinkers living in their own world. Mark would ride his bike 30 miles at the age of 8 to get away from them and come to his grandparents' house. His mother Sandra has wanted nothing to do with him since he was a small child. She would say "she wished she had had a dog. That it would have been better if she'd had dogs instead of children."

One vignette illustrates the family dynamic. Doyle would have the children confined to their rooms every day, even Christmas. Mark's step-grandfather had it out with him about this one Christmas, when Mark and his sisters had been sent to their rooms and told to keep out of the way of the adults.

Doyle physically abused Mark throughout his childhood. Mark was thumped, his aunt reported, "he was called stupid, ignorant, and the list goes on. It was really sad." The "bad thumpings" would come for frivolous things such as not holding his fork in the "proper way".

Doyle and Sandra would also be sadistic in their punishments for pointless things. For example, sister Charlotte reports that Mark had very bad allergies. Knowing this full well, the parents used to punish him by making him pull weeds in the garden for a complete summer afternoon, until his face would be streaming with tears from his allergies.

Doyle was physically abusive of Sandra, and would beat her. Mark had to watch this and (notwithstanding the way Sandra mistreated him) began early to try to intervene to stop it. This only got him worse beatings.

Doyle was also sexually abusive. This is a very sensitive issue for obvious reasons.

Mark had problems in school. He had a stutter. He was naturally intelligent, but while he would start off well in school, get teased, and then it would decline until he was expelled. Doyle was ultimately the cause of most of these issues. If Mark came home complaining about being teased or bullied, Doyle would send him back out at once, with instructions to beat up the kids who were doing this. When Mark refused to go, or failed to report a successful fight, Doyle would beat Mark himself, to show the child what he should do.

By the age of 11, Mark had clocked up several runaway citations. Around then he tried to leave for good to go to live with his step-grandfather, who he adored. [6] Sadly, he could never escape the influence of his mother and step-father, who continued to play a devastatingly negative role in his life.

Two years later, when Mark was 13, "his mother said he was just $50 short of being aborted, I wish I'd borrowed the money." Common sense tells us what kind of impact this would have on a child. This time, the documentary record confirms what happened. "I ran away from home about 2 or 3 days before I took the truck. While I was away from home I stayed in two vacant houses on Lakeshore Drive. I broke a

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[6] At trial, the prosecutors argued to the jury that he had left home for good at age 11, and lived in the security of his grandfather's home. They suggested to the jury that any impact of his parents should have been negligible, since it was "only" up to that age. This is false, as the records amply demonstrate. Mark Ströman was still under the control of his mother and step-father, and is still seen to be running away until his was fifteen – shortly before he married Tina.

window to get into one house and I threw some coke cans in the swimming pool of that same house. I also broke a window to get into the other house." (012642) He saw a truck with the keys on the floor, took the truck and tried to drive to his grandparents' house. On the way, he was arrested by the police, and committed for theft.

It was at the instigation of Doyle and Sandra that Mark was sent to a Boys' Home. This was not done to help him, but to get him out of their presence.

The fruit does not fall far from the tree. Mark absorbed many lessons from his mother and step-father – on violence, on racism, on paranoia, on substance abuse – none of which was positive.

By the age of 13, Mark's first mental health review summed up his world view:

> *"Mark generally views the world as a hostile and unpredictable place which demands constant scrutinization. He invests a great deal of energy in constantly scanning his environment for clues of impending punishments which he experiences as being largely arbitrary in nature."*

(011673) The mental health professional, Dr Dan Cox, recommended placement outside the home. (011674) This did not happen, and there is no record of any action being taken against his mother or stepfather for Mark's years of abuse.

At age 15, the records reflect that Mark Ströman was living in a vacant house. (012698) He was a juvenile; it is clear who was responsible for him. He was punished; nothing was done to his parents.

5. Addicted from the age of Eleven; permanently damaged later

Mr. Ströman has been addicted to drugs since he was perhaps eleven years old. Notwithstanding those who feel we "make free decisions", anyone with

experience with children knows that it is unreasonable to blame an eleven year old for being in that predicament.

"He was using marijuana … from 11, 12, 13," Dr Connell reports, "and by the time he was 15 he was using methamphetamines … a seriously addictive drug." Meths makes people energetic and aggressive, as well as paranoid. His addiction is reflected by his dramatic weight changes. He would normally be 200 lbs, but he got down to 102 lbs. Even a hardened police officer conceded that those addicted to methamphetamine "tend to have paranoia as one of their characteristics." (TR18 at 103) The first informant to link Mark Ströman to these crimes said that he was a "speed freak". (010692)

It is always difficult to know what is chicken, and what is egg – does the individual self-medicate because of an existing mental illness, or does the drug abuse cause the illness? In Mark's case, it is clearly a combination of both. His traumatic childhood experience caused him to suffer from Post-Traumatic Stress Disorder (PTSD). He then abused drugs as a way of repressing the effects of that illness; yet meths was a sure way to exacerbate his mental problems. "Constant abuse as a child, intrauterine drug abuse, his drug abuse," said Dr Stonedale. "He was the perfect person to get this disorder."

6. Unfortunately, Mark Ströman was also gun-obsessed in a gun-obsessed culture

As is typical of young men in many parts of the United States, and certainly in Texas, guns played a major role in Mark Ströman's life growing up.

"Guns had always been a part of his life," Dr Connell reports. "He had a significant arsenal and he was by now heavily armed in a highly agitated paranoid state, and he took action."

7. Mark Ströman became obsessed with 9/11

Many people forget today what a traumatic effect the 9/11 attacks had on the average American. Yet is there any American who did not see the dramatic pictures of the second plane hitting the World Trade Center? Is it possible to overestimate the impact that had on the American psyche?

Mark Ströman was not the "average American". He was a paranoid "speed freak", raised in an environment of racism, who would not know the difference between a Sikh and a Muslim, or between Arabic and Urdu. As the recent descendant of immigrants, he perhaps shared the trait of being more patriotic than the most patriotic American. He became obsessed with both his own losses (his half-sister perished in the WTC), and those of America.

None of this detracts from the tragedy of the crimes, or the pain and the loss experienced by the victims. Neither is this intended to "excuse" what happened; yet if we do not attempt to understand the past, we are doomed to repeat our mistakes. The question must be – why did this happen?

Mark's wife Tina explained that after 9/11, he was emotionally overwhelmed by what had happened. Mark let everyone know how angry he was, and how his half-sister had been killed.[7] When he talked to Richard Wood, his boss, Wood "had to go

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[7] Mark had long since talked to his wife Tina about his sister Liz in New York. His aunt confirmed that Mark had another half-sister on his father's side. Thus, contrary to what the prosecution insinuated to the jury, Mark Ströman was not making up a convenient and non-existent sister as a pretext for the crime. Indeed, he had talked about this as one precipitant of his rage well before

because I couldn't take hearing him cry." Mark was obsessed with how the "country needs to handle it."

His stepfather had taught him – endlessly – that the only way to respond to violence was with violence. If another kid in school picked on him, or teased him, and Mark failed to beat the kid up, his stepfather would beat Mark instead. This is a lesson that was harshly learned, and took a long, long time to un-learn. Only when he reached death row in 2002 did Mark Ströman get insight into the error of his stepfather's education. Unfortunately, that was too late.

Obviously, 9/11 happened on September 11, 2001. According to the police reports, Mark Ströman's response was angry and immediate. (013812) His paranoia rapidly ratcheted up his response. He became obsessed with "fighting back" against the Muslims who had attacked America. He could not go to the Middle East, so he turned on those who he thought were Middle Easterners who had come to the USA. Sad to say, this reaction was not uncommon at the time: the ethnically motivated crimes against Muslims leapt from 28 in 2000, to 481 in 2001 – sixteen times as many as the year before, and almost all after 9/11.[8]

Only four days after the terrorist attack, on September 15, he walked into the Mom's store where Waqar Hasan had recently invested his money, and where the unsuspecting 46 year old Pakistani immigrant was cooking hamburgers. He simply

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he was arrested. Mark told his friend Kevin "Bear" Hartline that his sister had been killed in the World Trade Center. According to Mark's boss, George Washington Dodd, Mark was angry at 9/11, said "his sister or sister-in-law maybe was injured in some way there…" They talked about it, but "I had to go because I couldn't take hearing him cry." Mark Ströman had not known about his half sister until about 1997. She was in New York and he, in Texas, so his contacts were limited. He told the police about his dead sister. As he said in his statement shortly after the crime: "I was, and still am, deeply disturbed from the terrorist actions and tried to find some type of closure for me and my missing sister and other fellow Americans." (011252)

[8] See http://articles.sfgate.com/2002-11-26/news/17570762_1_crime-incidents-crime-victims-african-americans (FBI statistics).

shot Hasan and left. While there was money lying around, none was taken. Detective Daniel Wojcik stated that robbery did not appear to be a motive of the crime. The original police report on the Hasan murder was similarly stark: “No motive, no robbery, no suspects, no witnesses.” (011186)

Six days later, on September 21, Mark Ströman marched into the Buckner Food Mart in Dallas where a young man from Bangladesh, Raisuddin Bhuiyan, was working. Rais said it initially seemed like a robbery, but it became clear that money was not the intruder’s motive. “He didn’t even look towards the money, rather he asked me a question.” Rais could not understand what he said. “Then I asked him, since I didn’t understand the question, then I asked him what was that. And then he shot me.” Rais was shot in the right side of the face; Mark Ströman then left without taking any money.

As has been true throughout Mark Ströman’s life, opportunities to stop his descent into crime were missed. Bobby Joe Templeton later gave a statement to the police. “Mark told me that the guy (store clerk) had taken money out of the cash register. Mark had said that the guy was Arabic and he was speaking Arabic to him. Mark then told me that he shot the clerk. Mark told me that he shot the clerk in the face, but he didn’t kill him.” (010667)

Unfortunately, Templeton did nothing about this until the police came to see him. Had he done so, Mr Patel might be alive today. Templeton’s statement is revealing in other ways, since it is clear that Rais was not speaking Arabic – just as he was not an Arab. This only goes to show Mark Ströman’s ignorance – which is really the root of all prejudice.

Fifteen days later, on October 4, 2001, Mark Ströman walked into the Shell Station on John West Road and Big Town Boulevard in Mesquite to commit the

crime for which he would be sentenced to death. According to Mark, this was part of his ongoing campaign, but this time Vadusev Patel pulled a gun on him first. This is corroborated: the police found a .22 pistol by his hand, with seven bullets in the magazine and a round in the chamber of the .22. The police conceded that the evidence was consistent with Patel having the gun in his hand when he was shot. The magazine was not locked so it could not fire, meaning that perhaps only the failure of the gun to operate prevented Mark Ströman from being shot in this incident as well.

Assistant District Attorney Bob Dark argued this to the jury:

> "I would suggest to you, it's a reasonable deduction from the evidence, at that point Mr. Patel sees the defendant coming in with the gun in his hand, and now he's going to try to protect himself and protect his property. And that's why you heard the evidence earlier in the case about the .22 revolver being on the floor. That's what Mr. Patel was trying to do, protect himself, protect his property."

(TR19 at 8)

Nobody is blaming the victim here–he certainly had the legal right to defend himself. However, these facts make the offense rather less cold-blooded than the story proposed by the prosecution.

Again, there was no money stolen. The prosecution tried to make out that this was a regular robbery, committed purely for personal gain. However, the jury did not hear the second statement that Mark Ströman made to the police:

> "This is regarding the shooting of the Shell Station in Mesquite. I gave another statement … to the Mesquite Police not understanding his direction of my fate. He convinced me it would be better in my behalf to say it was not a hate crime just a crime. That was incorrect. I lost a love one in the NYC terrorist attack. I went to the Shell Station for some type of revenge. The owner … pulled a gun on me so I walked in an shot him. I was tired of seeing news events from NYC. I was, and still am, deeply disturbed from the terrorist actions and tried to find some type of closure for me and my missing sister and other fellow Americans." (011252)

It would be difficult to pretend that Mark Ströman was anything but mentally disturbed when he was committing these crimes. Indeed, when he was arrested, Mark Ströman was "crying and laughing both at the same time" when the police interviewed him, which even the officer agreed was an "inappropriate" mood swing.

Mark wrote a contemporaneous statement about what he had done that illustrates how muddled was his thinking, how disturbed was his mind:

> "True American: I can tell you with unequivocal honesty that as I sat watching TV on what was an otherwise uneventful September day, everything that I could muster emotionally, mentally, physically, spiritually and patriotically came to a tragically painful and subsequently remorseful show of expression due to the terrorist attack on the World Trade Center. ... I watched in wretched horror as my sense of self, love, liberty and security, family and patriotism was all but removed by these despicable acts of disrespect, aggression and utter disregard for American lives ... I began to feel a great sense of rage, hatred, loss, bitterness and utter degradation. Although revenge wasn't my motive, I did want to exact a measure of equality, I wanted those Arabs to feel the same sense of insecurity about their immediate surroundings. I wanted them to feel the same sense of vulnerability and uncertainty on American soil much like the mindsets of chaos and bedlam that they were already accustomed to in their home country. How dare they come to America and be at peace and find comfort in … our country, my country, America, and here we are under siege at home because we are the land of freedom. My sense of anger surged when I reflected upon the past… Their homeland was a place our country fed when they were starving, medicated when they were sick, clothed when naked or cold, educated when in error and gave willing assistance and defended when it was under attack. I look at the fact that over 5000 innocent Americans lost their lives because some foreigners felt a need to make a statement at the expense of innocent people. So I felt as Americans we needed to exact some sort of retribution and also make a statement here at home and abroad. That if we as Americans were going to be under siege here at home, then certainly they would have need to feel our pain. My sense of security and my right to live in peace and sanctity was all but shattered. As I began to reflect upon what I could do, would do, or better yet should do in the wake of the World Trade Center atrocity, I looked at the situation and took an assessment. I then found myself going to the store to make a purchase and there perched behind the counter, here in the land of the free and the home of the brave, land of the Pilgrim Pride, land for which my forefathers died, life of pursuit of happiness had all been silenced by these people. He was there perched behind the counter here in the land of milk and honey, living the freedom and liberty of the thousands of victims of September 11th … this foreigner whose own people who now had sought to bring the same exact

> chaos and bewilderment upon our people in society as they lived in themselves at home abroad. It left me with a sense of just having someone spit in my face. After all our country has done to help build, educate and liberate their country, and to see that those people thought so little of America, and consequently the American way of life, with such contempt and utter disregard. In closing, this was not a crime of hate but an act of passion and patriotism, and act of country and commitment, an act of retribution and recompense. This was not done during a peacetime but war time. I, Mark Anthony Ströman, felt a need to exact some measure of equality and fairness for the thousands of victims of September 11th, 2001, for the United States of America and its people, the people of this great country. Mark Anthony Ströman, God Bless America. [January 20, 2002]. United we stand." (TR20 at 189-92)

Nobody – least of all Mark Ströman today – agrees that this is a justification for picking on three foreign-born people, none of whom was in any way involved in the atrocity of 9/11, and attacking them. However, it provides an insight into the paranoid and confused mind of the man who committed the crimes. It is not surprising that he is still struggling to understand why he did what he did, as it was irrational to any rational person.

8. Positive aspects of Mark Ströman's character

The death penalty is very final, and allows for no humanity in the person who is to be killed. In contrast, in the 9 years 9 months since his arrest, Mark Ströman has tried to make something of his life. He would be the first to concede that he has a long way to go before he makes himself into the type of character he would want to be, even supposing he is to be allowed the time. But he has slowly struggled, trying to come to terms with where he comes from, what he has done, and where he would like to end up.

Mark has been a faithful friend to many people since being sent to death row. One vignette is particularly illustrative of his efforts. In 2004, he began writing to a

78 year old lady living just north of London, Mrs. Meakins. At the time, she was deeply depressed, she had lost her husband, been moved into an old people's home, and had effectively given up the will to live. Her daughter Linda had tried everything she could to cheer her up, without success, when finally she set on the idea of getting her to write to someone on death row. Without ever asking for anything in return, Mark scrupulously corresponded with her for the next seven years, often writing twice a week, encouraging her and teasing her kindly in every letter. Today, she has shed her depression, and has recently moved back into the family home. Both mother and daughter put her change in spirits down almost exclusively to Mark's devotion to their friendship. Predictably enough, Linda expects her mother to plumb the depths of her previous depression if Mark is executed.

Mark has selflessly touched a large number of other people, as set out in *Exhibit K* (incorporated herein by reference).

Mark would be the first to say that none of this justifies what he did, or validates in any way the views he has held that were palpably wrong. His efforts to improve himself have been difficult, and without any meaningful professional help. But he is making the effort, as best he can. Rais Bhuiyan, his victim, wants to help him progress some more.

9. Human hubris: are we really so wise that we can say that "Mark Ströman really need[s] to die"?

At Mark Ströman's trial, a prosecutor by the name of Bob Dark told the jury that "[t]his man needs to die, pure and simple." (TR21 at 54) The question remains: was he right?

Under the Texas death penalty scheme, the jurors were called upon to predict the future, and determine that Mark Ströman, then sentenced to a solitary prison cell at the age of 32, would commit violent crimes in the future:

> "Special issue number one: Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Mark Anthony Ströman, would commit criminal acts of violence that would constituted 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. Signed Lloyd Roberts, presiding juror." (TR21 at 91)

As with so many such predictions, the jurors have been proven wrong. The jurors were also asked whether there were sufficient redeeming factors in Mark Ströman's character to merit mercy; they answered that there were not. As with all things human, life is subject to change. While Mark Ströman makes no claim to be rehabilitated – or, perhaps the term should be "habilitated" given his childhood, when he was never taught life's lessons the first time around – to the extent he would wish to be, he has not committed acts of violence, he strives to shed the violent training that he received from his parents, and he works in small ways to do acts of kindness for those around him.

The surreal nature of the death penalty imposed in this case was placed in harsh relief when the trial judge, Judge Wade, imposed sentence upon him:

> THE COURT: [I]t is therefore the order, judgment and decree of this Court that you be taken by the sheriff of Dallas County and shall immediately thereafter be delivered to the Director of the Institutional Division of the Texas Department of Criminal Justice or other person legally authorized to receive such prisoners, and shall be confined in said Institutional Division in accordance with the laws governing the said Institutional Division until such date, to be determined by this Court, at some time after the hour of 6 p.m., in a room arranged for the purpose of execution, the said Director, acting by and through the executioner designated by the said Director as provided by law, is commanded, ordered, and directed by this Court to carry out this sentence of death of intravenous injection of a substance or substances, in a lethal quantity sufficient to cause your death, until you are dead. You are hereby remanded to the jail until the sheriff can obey the directions of this sentence.

THE COURT: Mr. Ströman, good luck to you.

THE DEFENDANT: Have a good one. Thank you sir." (TR21 at 92-93)

This Court should vacate the conviction and/or the sentence.

STANDARD OF REVIEW

As set forth in greater detail in appropriate places below, the appropriate standard of review is a de novo review of the merits of each issue.

ISSUES MANDATING RELIEF

Each of the following issues incorporates all the allegations set out elsewhere in the petition, and is predicated on the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as such other authorities as may be particularly set forth:

I. PETITIONER IS ACTUALLY INNOCENT OF THE CRIME ALLEGED AGAINST HIM AND OF THE DEATH PENALTY

Petitioner does not suggest that he did not commit the *actus reus* of this offense: he did, and he is deeply remorseful for that fact. However, the fact remains that he is legally innocent of the crime charged: he did not commit capital murder as defined by Texas law, because he did not commit the offense in the course of an armed robbery – something accepted by the surviving victim of these crimes, Rais Bhuiyan, and (based only on the evidence adduced at trial) by at least two of the jurors.

Furthermore, for reasons set out below, Petitioner is "innocent of the death penalty". Obviously he could not have been sentenced to death if he had not been convicted of capital murder; however, neither could he or should he have been sentenced to death based on a vague and unguided assessment of his "future dangerousness", which assessment has been proven false. [9]

In addition to the other factors discussed below, Petitioner's legal innocence operates as "cause" to excuse any procedural bar to the consideration of any of the issues discussed below.

In Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the Court held that claims of innocence that are offered as "cause" to excuse the procedural default of a constitutional violation require no more than proof that the errors have "probably resulted" in conviction of an innocent person. This applies to the first question (guilt of capital murder). On the second issue, the sentence of death, Petitioner must meet the standard of Sawyer. See Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (when claiming "innocence of death" the

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[9] This assessment of future dangerousness was itself performed without a proper evaluation of the mitigating factors in his case. See *infra*.

petitioner must show "a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty").

In this case, of course, we have already demonstrated that no fewer than four of the jurors – and perhaps more – *actually* entertain a reasonable doubt as to Petitioner's guilt of capital murder, since they do not believe he committed his offenses in the course of a robbery. See *Exhibits F, H & I*.

As a preliminary matter, though, it is not Petitioner's burden to prove that he definitively *would* secure relief at a hearing - he must only make out a *prima facie* case on the pleadings. Calderon v. Thompson, 151 F.3d 918, 925 (9th Cir.) (*en banc*) ("By 'prima facie showing' we understand [it to be] simply a sufficient showing of possible merit to warrant a fuller exploration in the district court."). In assessing the validity of the *prima facie* case, the court must accept as true the reasonable allegations in the pleadings of the petitioner. In re Boshears, 110 F.3d 1538 (11th Cir. 1997) ("we must identify 'the facts underlying the [applicant's] claim' and accept them as true for purposes of evaluating the application.").

Precisely what must this *prima facie* case include? It is clear that Petitioner need not prove himself "innocent" of *any* crime. Schlup, 513 U.S. at 328 n.47 ("Actual innocence, of course, does not require innocence in the broad sense of having led an entirely blameless life."). Indeed, Petitioner need not prove that he did not commit the *murder* in this case. He only need prove that he did not commit the crime with which he is charged -- here, capital murder.

For example, in Bousley v. United States, 523 U.S. 614, 624, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), the question posed was whether the petitioner had to be

innocent of any crime with which he could have been charged, or simple of the crime for which he was actually charged. Chief Justice Rehnquist made the issue clear:

> In this case, the Government maintains that petitioner must demonstrate that he is actually innocent of both 'using' and 'carrying' a firearm in violation of § 924(c)(1). But petitioner's indictment charged him only with 'using' firearms in violation of § 924(c)(1). App. 5-6. And there is no record evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty. Accordingly, petitioner need demonstrate no more than that he did not 'use' a firearm as that term is defined in *Bailey*.

Id. at 624.

Likewise, the Fifth Circuit has held that Petitioner need not prove that he did not commit the *actus reus* -- merely, that he did not commit the crime as charged. For example, in Finley v. Johnson, 243 F.3d 215 (5th 2001), the Court rejected the government's contention that the "gateway" was closed because the defendant perpetrated the acts charged, because the defendant had a defense of justification which supported a claim of actual innocence of the crime for which he was convicted:

> Finley's defense was that, although he committed the acts alleged against him, he was innocent of the crime of kidnapping because he reasonably believed his acts were immediately necessary to avoid imminent harm to Towery's wife and daughter. Under these circumstances, the district court's conclusion that Finley cannot show "actual innocence" seems a too restrictive interpretation of the requirement. The purpose of the exception is to prevent a miscarriage of justice by the conviction of someone who is entitled to be acquitted because "he did not commit the crime of conviction."

Id. at 220-221, citing Fairman v. Anderson, 188 F.3d 635, 644 (5th Cir. 1999) (finding *Schlup* gateway applicable where defendant admitted killing but claimed self defense); *see also* Van Buskirk, v. Baldwin, 265 F.3d 1080 (9th Cir. 2001) (finding *Schlup* test appropriate where newly discovered evidence of insanity was presented,

although ultimately finding the evidence insufficient); Gall v. Parker, 231 F.3d 265, 320 (6th Cir. 2000) (posing but pretermitting the question "whether, under *Coleman, Schlup* and this Circuit's caselaw a fundamental miscarriage of justice results when a trial error more likely than not stood in the way of a verdict of acquittal due to insanity.").

Even more directly on point is the case of Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), where the petitioner made "no appreciable effort to assert his innocence of [the] murder." Id. at 560. However, he did contest the proof of the underlying rape that elevated the case to capital murder, as Petitioner contests the element of robbery. The Supreme Court held that such a challenge was clearly covered by the claim of "factual innocence."

II. THE FAILURE TO RESPECT THE WISHES OF THE VICTIMS IN THIS CASE VIOLATE THE LAW IN A NUMBER OF WAYS

One – perhaps the – central issue in this case is the fact that the victims do not want Petitioner to die. While Rais Bhuiyan is the victim with the most emotional wherewithal to engage openly with these issues, he has the support of the families of the other two victims.

Rais recently wrote to the District Attorney requesting that the prosecution join him in seeking to stop Mark Ströman's execution:

> …I do not think that the execution of Mark Stroman is the correct solution. I do not remember ever being given an option, during the trial, between execution and life in prison without parole. I forgave Mr. Stroman many years ago. My upbringing and my Islamic faith teaches me that forgiveness is the best policy, and saving one life is like saving the entire mankind. And I believe by pardoning Mr. Stroman we will give him an opportunity to realize his actions, and perhaps in due time and maturity, he might even become a spokesperson for hate crime. Therefore, today I am writing to you with an earnest plea to Pardon Mark, and lower his punishment from death to life imprisonment without parole. His execution will not eradicate hate crimes

> from the world; instead, if Mark is given life in prison, he could have the opportunity to better his life and one day he might contribute to society in a positive manner.

Exhibit K (attachment 1, Letter of Rais Bhuiyan to Craig Watkins, June 2, 2011).

The families of Vasudev Patel and Waqar Hasan support Rais' request for compassion and mercy. Rais has acted as their spokesman, as all the victims have gone through enough, and wish to achieve their goal with the minimum of additional pain. However, Rais makes clear that Mark Ströman's execution will only add to their suffering.

A. THE U.S. AND TEXAS CONSTITUTIONS DO NOT PERMIT THE EXECUTION OF A PERSON WHEN THE VICTIMS OPPOSE IT BECAUSE THE LAW OF THE UNITED STATES AND OF THE STATE OF TEXAS IS NOT SOMEHOW INFERIOR TO ISLAMIC OR SHARI'A LAW

While the issue is one of first impression before this Court, the primary question is whether there is a constitutional principle that forbids the execution of a prisoner when the victims of his crime oppose his execution? The answer must be that there is such a principle, and it would violate the First, Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

1. Should The State Of Texas Be Permitted One Final Cruel And Unusual Punishment Before Commonsense and the Constitution Prevail?

It may be, bizarrely, that Respondent will argue that this issue should be "procedurally barred". Such an argument would be meritless for a number of reasons.

Most important, the failure on the part of the State of Texas to comply with its basic duties under the Texas Victims Bill of Rights is the very reason that this issue has not been available for resolution before now. *See generally infra*. The party that seeks equity must arrive with clean hands, and the State of Texas cannot claim the equitable benefit of procedural default given the dirty hands with which the State arrives at the scene.

Second, it would add insult to injury for the State of Texas to pretend, today, that it is respecting its obligation under the Texas constitution to treat victims with dignity and respect, while simultaneously trying to prevent them from even having an opportunity to be heard on this issue. "The fundamental requisite of due process of law is the opportunity to be heard." Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful

time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In Mullane, the Supreme Court observed that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear…" Id. at 314.

Thus, the United States Supreme Court has held that a state cannot deprive a person of his driver's license and registration without first providing a hearing to determine whether there is a reasonable probability of a judgement being rendered against him due to an accident. Bell v. Burson, 402 U.S. 535, 542 (1971). Nor can a person's wages be frozen without the opportunity for a hearing. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). It cannot be said that a person has a right to a hearing before his driver's license is revoked, while a victim of a serious crime has no right to a hearing before the Court before his life is further ruined by the State of Texas.

Third, Rais Bhuiyan has made it abundantly clear that if the State of Texas goes through with this execution, it will inflict additional injury upon him, compounding the extensive suffering that he has already undergone. For the State of Texas to argue that a victim's rights have been "waived" in this regard would be nothing short of obscene.

Fourth, this is an important substantive issue that cannot be barred from review because it was not raised earlier. This claim would lift Petitioner out from the group of those eligible for the death penalty, since if it is unconstitutional to execute a

person in the face of the victim's opposition, Petitioner simply could not be put to death. [10]

Were the State to argue that such a ruling could not be applied to Petitioner, the State would essentially be taking the position that Texas should be allowed just one more cruel and unusual punishment, and one further abuse of the victims, before the ruling should take effect.

Fifth, the evidence that Petitioner is innocent of capital murder, and ineligible for the death penalty, is itself a basis for excusing any default.

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The creation of a new death penalty statute in Texas, if that is what happened, would not change this, as it could not legally be applied against Petitioner without violating the ex post facto provisions of the US Constitution. Any change to create a minimally constitutional system similar to those of other states would not be merely procedural, but would fundamentally alter the nature of the facts necessary to impose a death sentence. "There is perhaps no provision of our state or federal constitution founded on broader and juster views of human rights and liberty than that which prohibits *ex post facto* laws." Lindsey v. State 5 So. 99, 100 (Miss. 1888). Shortly after the foundation of the Nation, the Supreme Court condemned any law "that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Calder v. Bull, 3 Dall. 386, 390, 1 L. Ed. 648 (1798); accord Miller v. Florida, 482 U.S. 423, 429, 107 S. Ct 2446, 96 L. Ed. 2d 351 (1987) (application of revised sentencing guidelines law to petitioner, whose crimes occurred before the law's effective date, violates the Ex Post Facto Clause of Article I of the Federal Constitution.).

2. To execute Petitioner in the face of the victims' opposition would violate the State and Federal Constitutions

In enforcing the criminal law, the judicial process has evolved over hundreds of years primarily to replace vigilantism and the terrible cycle of revenge. Society gradually sought to place limitations on the degree of punishment so that a blood feud between two families would not continue wreaking havoc for generations:

> In ancient times, wrongs done to a person or his property were generally regarded as private matters, subject to remedial action by a victim and his family against an offender and his family. Norms of permissible retaliation and recompense arose among tribal and family-based cultures for what are now regarded as criminal offenses against individual victims. The early centrality of the victim's role in these primitive "criminal" proceedings is evidenced by provisions of the Torah, the Code of Hammurabi, and other ancient codes. These codes require offenders' repayment in kind or extent to those suffering criminal victimization in addition to or instead of prescribed retributive sanctions. The goals of these early legal systems were to make the victim whole and to minimize private revenge. [11]

While we strive to limit, or at least channel, revenge, in no way does this reflect an effort, or a desire, on the part of society to curtail a victim's desire for compassion. Indeed, the law supposes that the opinion of the merciful victim should be given even greater weight. In the law there is, and always should be, "an asymmetry weighted on the side of mercy…" Stanley v. Zant, 695 F.2d 955, 960 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984). Thus, there is nothing illogical about a system where society does not always fulfil the victim's desire for revenge, but always respects the victim's desire for mercy.

Although society sought to replace vengeance with a justice system, there has never been a suggestion that we should supercede a victim's desire for mercy. Speaking to us from 2,000 years ago, the Bible discusses mercy in emphatic terms:

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[11] Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 CRIM. & CIV. CONFINEMENT 21, 22 (1999) (footnotes omitted).

"*Blessed are the merciful, for they shall obtain mercy.*"[12] No matter what each person's religious faith, Rais Bhuiyan and the other victims understand that their own path to personal salvation depends on their ability to show mercy. If the victims are not permitted to apply their sense of mercy, they are (again) the primary victims.

Similarly, the 1,400-year old Islamic system of Shari'a law – while it may sometimes be interpreted to impose harsh punishments – allows the victims to demand mercy for the most heinous of crimes. The precipitant of the crimes here was the horrific attack on the World Trade Center, where terrorists sought to frighten America into abandoning her principles. It would be sadly ironic if the law of Texas were unable to show respect equal or greater to Shari'a law for a compassionate victim of crime.

A mere 400 years ago, William Shakespeare wrote of the precepts that set mankind apart from the wild beasts:

> "*The quality of mercy is not strain'd, it droppeth as the gentle rain from Heaven, upon the place beneath. It is twice blessed; it blesseth him that gives, and him that takes. 'Tis mightiest in the mightiest – it becomes the thonèd monarch better than his crown.*"[13]

The legal system does not seek to veto compassion; rather, to the extent possible, the process remains focused on repairing the damage done to the victims. Often, the corporate mindset seems to imagine that victims are a homogeneous block, all of whom want revenge. This is a very strange assumption, belied both by people like Rais Bhuiyan and the lessons that almost every mother teaches the child on her knee. There are many – perhaps an increasing number – who wish for comprehension more than retribution, and who offer mercy rather than vengeance. As one respected

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[12] *Matthew 5, vii.*

[13] W. Shakespeare, *The Merchant of Venice*.

victim's advocate has noted, "[r]etribution is not the only sentencing value relevant to victim participation. In fact, victims may seek leniency or rehabilitation."[14]

Once the death sentence has been imposed, the State of Texas has almost invariably respected the wishes of victims who have called for execution. Where, as here, the victims are calling for compassion, surely their rights should be respected equally?

If there is an exception to the victims' right to behave in the finest traditions of humanity, there must be a very, very heavy burden on society to justify disrespecting them.

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[14] Douglas E. Beloof, *Article And Essay: Bargaining In The Shadow Of The Law-The Relationship Between Plea Bargaining And Criminal Code Structure: Victims, Apology, And Restorative Justice In Criminal Procedure: Dignity, Equality, And Public Interest For Defendants And Crime Victims In Plea Bargains: A Response To Professor Michael O'Hear*, 91 Marq. L. Rev. 349 (2007). Professor Beloof of Lewis & Clark Law School is director of the National Crime Victim Law Institute.

B. PETITIONER'S AND THE VICTIMS' ASSERTION OF THE PROVISIONS OF THE TEXAS VICTIMS' BILL OF RIGHTS AND OTHER RELATED LAW

This Court does not need to reach the Constitutional right to victim-initiated mercy because so many other provisions of Texas law have been violated in this case. While these issues each rest on a Texas constitutional or statutory basis, the issues also all have a federal constitutional dimension, since the manner in which Petitioner and Rais Bhuiyan have been treated in this case violates various federal provisions.

As previously noted, Rais Bhuiyan strongly desires mediation and reconciliation, and has for a long time. Other members of the victims' families may join him in this, as it progresses. Neither Rais nor any other relevant victim has ever been informed of the right to such mediation by the State of Texas. Neither Rais nor any other relevant victim has otherwise been shown the respect that is mandated by the Texas Victims Bill of Rights. Neither Rais nor any other relevant victim was given meaningful mental health assistance by the State of Texas to work through the terrible trauma that he suffered during the crime.

Neither Rais nor any other relevant victim was informed by the State of Texas of the right to testify to what they truly believed at trial, but was rather told they could only answer the questions that they were asked.

Rais and the other relevant victims did not want to rush into a public spotlight. Had Rais only known his rights, he would have been quietly pressing for his rights for a long time. There are various reasons why this was not possible. First, neither the TDCJ nor any other Texas official told him about his right to mediation. Second, he understood that it was not permissible for him to contact Mark Ströman and not permissible for Mark to contact him.

Only when he learned that an execution date had been set for Mark Ströman did it become clear that he had to act. He made clear in public his opposition to executing Mark Ströman – a step he took after considerable thought, as he knew it would cause him to relive a great deal of pain. Only when he began to make his feelings known in public did he learn that his rights as a victim had been ignored or trodden on for the past nine and a half years.

Mark Ströman had previously been informed by officials of the TDCJ that he could not contact Rais or the other victims.

Rais Bhuiyan leads Petitioner to believe that he (Rais) understands, to a certain degree, why Mark acted as he did. However, Mark Ströman lacks understanding to a significant degree, and has never received the professional help necessary for him to come to a full understanding of his own actions. At the same time, to a greater extent Rais Bhuiyan also lacks understanding of why he was a victim, and is looking for these answers. Both Rais and Mark anticipate that a full mediation and reconciliation process will help them to reach this better understanding.

Rais Bhuiyan leads Petitioner to believe that he (Rais) also understands to a certain extent where Mark obtained the racist beliefs that partially drove him in 2001 – now that Rais has seen evidence of Mark's terrible childhood and background. Mark Ströman has, to a certain extent, been able to rehabilitate himself even while on death row. Rais expressed pleasure that this has been the case. However, Rais understands that Mark Ströman has a long way to go before he will fully comprehend the tragedy of the racial beliefs that he inherited from his stepfather.

Rais Bhuiyan has made it clear to Petitioner that his own ability to reach a cathartic point in his own recovery depends very much on his being able to make full efforts to help Mark Ströman to reach his full potential, and to overcome the very

negative lessons that Mark was taught as a child. This will inevitably be a process that will take time. It will be prevented – terminally – by Mark Ströman's execution.

Rais Bhuiyan did not know of his rights as a victim until recently because no Texas official had informed him.

Meanwhile, Mark Ströman had been informed by Texas officials that it would be a violation of TDCJ rules for him to contact Plaintiff. Only the dire straits of Mark Ströman's execution date led him to question whether the TDCJ rule might be illegal.

Mark Ströman wrote to the TDCJ authorities asking for the opportunity to meet with Rais and initiate mediation as soon as Rais' comments in the media suggested to him that Rais might be open to it. See *Exhibit A* (Letter of Mark Ströman to TDCJ, June **, 2011). To date, Respondent has not replied to his letter.

Meanwhile, Rais called the TDCJ to learn what he had to do in order to benefit from mediation with Mark Ströman. He later wrote to confirm the details of the conversation. See *Exhibit B* (Letter of Rais Bhuiyan to TDCJ, July **, 2011). Respondents have made no response as the time ticked by towards Mark Ströman's execution date.

There should be no question but that the victim has the right to meaningful mediation. The TDCJ states on its website as follows:

> It is not uncommon for states to have victim offender dialogue programs for nonviolent offenses. The uniqueness of the TDCJ program is that it has been developed for victims of violent crime. The VOM/D process can only be initiated at the request of the victim, and offender participation is voluntary. If an offender chooses to participate, he/she must admit guilt and take responsibility for the offense. Either party may withdraw from the VOM/D process at any time. Participation in the VOM/D program is not expected to affect the offender's prison, parole, or community supervision (probation) status. Therefore, it is assured that offenders are not participating in order to enhance their chances for parole approval. Through VOM/D, the victim may receive answers to questions, which may facilitate his/her healing and recovery. It provides offenders

> the opportunity to take responsibility for their actions and to be accountable for the pain and suffering those actions have caused.

See Texas Department of Criminal Justice, http://www.tdcj.state.tx.us/victim/victim-vomd.htm.

The "frequently asked questions" on the TDCJ website include the following queries and their answers:

> **When will the mediation take place?**
>
> Every case is unique and the preparation process varies in length for each case. However, the preparation usually lasts between 4 and 6 months from the time a mediator is assigned to the case, and the actual mediation day.
>
> **How long before a mediator is assigned to the case?**
>
> There is a waiting list of individuals requesting mediation and many variables affect the length of waiting time. Meeting with an offender is a very important step, and the VOMD staff will make every effort to begin each case as soon as possible.
>
> **Does the offender have to agree to mediation?**
>
> Offender participation in VOMD is voluntary, but many offenders agree to participate. An offender may decline further participation at any time prior to and including the day of the mediation. If the offender chooses ***not*** to participate, other options are available in the mediation program.
>
> **Is it permissible to write or visit the offender prior to the mediation?**
>
> Corresponding/visiting with the offender prior to mediation is highly discouraged during the mediation preparation process, as there is a chance of re-victimization. Any correspondence with the offender prior to or after the mediation is required to go through the VOMD office.
>
> **Can a support person come to the mediation session?**
>
> This is something that will be discussed with the mediator and the VOMD Program Supervisor. Victims are encouraged to have a support person in a waiting area of the prison during the mediation. Breaks will be taken as often as needed during the meeting.

See http://www.tdcj.state.tx.us/faq/faq-victim-vomd.htm. What this means, of course, is that it takes four to six months to initiate the process.

Mark Ströman could not put Rais on his visitation list, because offenders are forbidden from adding their victims to their visitation lists. Virtually anyone else in the U.S. – or even worldwide – can be put on Petitioner's visitation list. The only people with whom Mark Ströman is forbidden to associate includes the person who most wants meet with him, Rais Bhuiyan.

The TDCJ has established a rule that violent prisoners can only engage in mediation with the victim after their legal challenges to their conviction and sentence are concluded. This means in effect that capital defendants and their victims (or the families of the deceased victims) – the instances where reconciliation would bear the greatest benefits – can effectively not benefit from the rights under the law.

If the process cannot begin until appeals the offender's case are concluded, that means it was not possible for the mediation to begin in Petitioner's case until (at the earliest) roughly four months after the denial of certiorari in Petitioner's case – which took place on June 27, 2011. *Stroman v. Thaler*, 2011 WL 1324467 (June 27, 2011).[15] Prior to that time, it was the State of Texas that set Mr Ströman's execution date for July 20, 2011. Thus, no matter what side one looks at this from, the State of Texas is trying to render nugatory the right to mediation.

While in theory a victim could go through their office's victim-offender mediation/dialogue program to meet with Mark Ströman, Petitioner knows of no occasion when this has been done with death row inmates, however, because the TDCJ policy is not to allow victim-offender mediation/dialogue so long as the offender's case is on appeal, and death row offenders' cases are always on appeal.

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Indeed, if Mr Ströman (reasonably enough) files additional challenges to his conviction and sentence – as is happening here – the TDCJ rules do not even allow the process to begin then.

In addition to the offender, both the offender's attorney and the AG would have to consent to the dialogue. Even if Plaintiff, Mark Ströman and Mr Ströman's attorney all consented, the Attorney General can block the process without giving public reasons.

C. RESPONDENTS HAVE SYSTEMATICALLY VIOLATED THE TEXAS VICTIMS' BILL OF RIGHTS AND OTHER RELATED LAW

Respondents have systematically applied policies and rules that have violated Texas and federal law concerning the interface between Petitioner and the victims.

1. Respondents have violated Texas law requiring that the victims should be consulted on the issue of plea bargaining

We are now nine years and nine months on from the start of the case, with much heartache behind many people. Much of the suffering could have been avoided from the very beginning, had the government only respected the law in first place. The states overwhelming require that prosecutors consult with victims on plea bargaining decisions.[16] Here, the victims were never informed that they could express their views on the appropriate resolution of the case; they were not allowed to make a victim impact statement prior to sentence.

The State was obliged to notify the victims in this case of their right to make a victim impact statement. See Tex. Code Crim. Pro. Art. 56.02(a)(13) ("the right to be informed of the uses of a victim impact statement and the statement's purpose in the criminal justice system, to complete the victim impact statement, and to have the victim impact statement considered: (A) by the attorney representing the state and the judge before sentencing or before a plea bargain agreement is accepted").

This law has been flouted, such that the victims did not know that they had a meaningful input on sentence. In short, the Texas Victims' Bill of Rights has, to date, simply been ignored. This is not just morally wrong, it is legally unacceptable:[17] "A

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[16] Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 CRIM. & CIV. CONFINEMENT 21, 64 n168 (1999) (even by 1999, 40 states mandated victim participation in plea bargaining; now the number is higher).

[17] Under the Federal victims' bill of rights, for example, a victim has "[t]he right to be treated with

victim's right to be heard at sentencing has been one of the most widely adopted victim rights in the last fifteen years. The federal system and every state provide eligible victims an opportunity to offer input to the court regarding sentencing either in writing, orally or both." [8]1

This issue is ultimately one of the suppression of evidence favorable to the defense. We know that if Rais Bhuiyan had been advised of his rights, he would have insisted on the right to make a statement in Mark Ströman's favor at sentencing. See *Exhibit C*. The prosecution failed to make this known to Rais, and his evidence therefore did not become known to the prosecution.

It hardly bears stating "the prosecutor's obligation to serve the cause of justice." State v. Johnson, 464 So.2d 1363, 1363 (La. 1985). The State has an affirmative obligation to reveal all favorable evidence. United States v. Agurs 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed. 2d 342 (1976). Evidence is favorable if it tends to exculpate the defendant or impeach a prosecution witness. United States v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Importantly for the purposes of this case, evidence favorable to the issue of punishment must also be disclosed. Brady v. Maryland, 373 U.S. 83, 88, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him *or reduce the penalty* helps shape a trial that bears heavily on the defendant") (emphasis supplied).

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fairness and with respect for the victim's dignity…" *18 U.S.C. §3771 (a) (8)*.

[18] Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 CRIM. & CIV. CONFINEMENT 21, 69 (1999) (footnotes omitted). The article speaks of the past 15 years, but since it was written 12 years ago, the same is now true for a quarter of a century.

The failure to disclose favorable evidence warrants reversal if the evidence was material. Kyles v. Whitley, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). What could be more "material" than positive evidence from a victim that he wishes to engage with the prisoner, and assist with his rehabilitation? Indeed, there is no need to speculate on the impact of the information, since one of the juror who condemned Mark to death has specifically stated that this would have made all the difference. See, e.g., *Exhibit G*.

2. Respondents have violated Texas law requiring that there should be mediation, where desired, between Petitioner and the victims

There is plenty of clear law relating to the interface between the victim of a crime and the perpetrator. For example, there is a "right to request victim-offender mediation coordinated by the victim services division of the Texas Department of Criminal Justice." *Tex. Code Crim. Pro. Art. 56.02. (12)*; see Patrick Drake, *Victim-Offender Mediation in Texas: When "Eye for Eye" Becomes "Eye to Eye"*, 47 S. Tex. L. Rev. 647 (2006) ("Of the thirteen numbered rights, the twelfth is "the right to request victim-offender mediation coordinated by the victim services division of the Texas Department of Criminal Justice." This portion of the statute was not enacted until the 77th legislative session in 2001.") (footnotes omitted).

This requirement is not discretionary -- the statute says that the state 'shall' provide mediation services through the referral of a trained volunteer if requested to do so by a victim. This has never been done; rather, the State of Texas has refused to allow Mark Ströman and the victims even to meet. Such mediation obviously cannot be achieved if the State of Texas executes him on July 20th.

3. Respondent's focus on vengeance represents an unconstitutional interference with the religious views of both Mark Ströman and Rais Bhuiyan

The view of the role of victims in capital cases taken by the State of Texas, the District Attorney and the TDCJ is clearly focused on the establishment of religious values that exalt vengeance over compassion. To the contrary, the Muslim views of Rais Bhuiyan clearly elevate compassion; the Christian views of Mark Ströman, since he found them in his prison cell, are consistent with those expressed by Rais Bhuiyan. It should be said that, partly as a result of the tremendous inspiration given by Rais, Mark Ströman's desire to live is focused less on his own prospect of spending the rest of his life in prison, and more on the opportunity that he would have to help Rais with the mediation and reconciliation process, and help those with whom he corresponds in their own struggles.

However, the motives of both men are indivisibly their religious views.

As illustrated by the facts of this case, it is the policy of the State of Texas to refuse the benefits of the law to those whose religious beliefs compel them to see meaningful mediation and reconciliation, in violation of *U.S. CONST. Amend. I.*

This also violates the Texas Constitution, which provides:

> FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

Tex. Const. Art. 1, § 6.

It also violates Texas statutory law. For example, Tex. Civ. P. & R. Code Tit. 5, Sec. 110.001, provides:

> (a) In this chapter:
>
> (1) "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.
>
> (2) "Government agency" means:
>
> (A) this state or a municipality or other political subdivision of this state; and
>
> (B) any agency of this state or a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, or public institution of higher education.
>
> (b) In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution.
>
> Sec. 110.002. APPLICATION. (a) This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority.
>
> (b) This chapter applies to an act of a government agency, in the exercise of governmental authority, granting or refusing to grant a government benefit to an individual.
>
> (c) This chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.

Tex. Civ. P. & R. Code Tit. 5, Sec. 110.002.

Texas law protects religious freedom:

> Sec. 110.003. RELIGIOUS FREEDOM PROTECTED. (a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.
>
> (b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person:
>
> (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that interest.

(c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

Tex. Civ. P. & R. Code Tit. 5, Sec. 110.003.

Under these circumstances, where the victims do not want it, executing Mark Ströman does not qualify as a “compelling governmental interest”.

Texas law specifically provides for injunctive relief under these circumstances:

> Sec. 110.005. REMEDIES. (a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover:
>
> (1) declaratory relief under Chapter 37;
>
> (2) injunctive relief to prevent the threatened violation or continued violation;
>
> (3) compensatory damages for pecuniary and nonpecuniary losses; and
>
> (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.
>
> (b) Compensatory damages awarded under Subsection (a)(3) may not exceed $10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's exercise of governmental authority. A claimant is not entitled to recover exemplary damages under this chapter.
>
> (c) An action under this section must be brought in district court.
>
> (d) A person may not bring an action for damages or declaratory or injunctive relief against an individual, other than an action brought against an individual acting in the individual's official capacity as an officer of a government agency.
>
> (e) This chapter does not affect the application of Section 498.0045 or 501.008, Government Code, or Chapter 14 of this code.

Tex. Civ. P. & R. Code Tit. 5, Sec. 110.005.

4. The refusal of the opportunity of full mediation to anyone on death row is an invidious violation of Equal Protection

Petitioner has the right to equal rights and equal protection of the laws under both the state and federal constitutions. See Tex. Const. Art. 1, § 3 ("EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."); Tex. Const. Art. 1, § 3a ("EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."); U.S. CONST. Amend. V, XIV.

Respondent denies Petitioner effective mediation where those who are the victims of lesser crimes, or crimes that are perhaps essentially identical in all respects but for Respondent's plan to inflict capital punishment on the perpetrator, enjoy this right.

5. Respondents have violated and continue to violate the First Amendment

Petitioner and Rais Bhuiyan enjoy the right under the First Amendment to the United States Constitution to freedom of association. See US CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

This has been construed, and rightly so, to include the right to Freedom of Association. Such a right cannot be violated on a discriminatory basis. In this case, while Respondent allows a large number of people to visit Mark Ströman and associate with him, including significant numbers of foreign nationals from countries such as Britain and Germany, Plaintiff is not allowed to meet with him. Indeed, Respondent purports to impose limits on Mark Ströman's right even to write to Rais. Meanwhile, CBS News and large numbers of other media outlets are also allowed to meet with Mark Ströman.

These discriminatory rules are vague, arbitrary and wrong.

6. Respondents have violated and continue to violate the Eighth Amendment

Both Petitioner and Rais are suffering, and will suffer, a great deal if they are not permitted a fair opportunity to come to terms with the fact that Petitioner shot Rais, and that Rais was shot in the face and could have died as a result of Mark Ströman's attack on him.

In arbitrarily denying them the right to attempt to reach some degree of catharsis on this point, Respondent is inflicting cruel and unusual punishment on both of them, above and beyond the sentence already imposed upon Mark Ströman, and without due process. US CONST. AMEND. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); Tex. Const. Art. 1, § 13 ("EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

III. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS TRIAL PROCEEDINGS

Mark Ströman was denied his right to the effective assistance of counsel in a number of ways.

A. THIS COURT MUST REACH THE MERITS OF THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

As set forth in detail below, Petitioner received ineffective assistance of counsel in his original state habeas proceedings, excusing any failure to raise this issue thoroughly previously.

Additionally, Petitioner was actually innocent of capital murder, since he did not commit the murder in the course of robbery; while there was strong indication that this was the case during trial, it is clearly the case, and Petitioner would not have been found guilty of capital murder but for the errors committed below. See, e.g., *Exhibit F*.

Petitioner would not have been sentenced to death but for the errors committed below.

Furthermore, as stated below, Respondent has actively prevented Petitioner from raising some of the elements of this claim before, most particularly in creating rules that make it impossible for him to develop the facts concerning his attempts at reconciliation with the victims.

Any rule that infringes upon the effective implementation of the writ of habeas corpus violates the constitution, as discussed below.

B. INEFFECTIVE ASSISTANCE OF COUNSEL MUST BE ASSESSED IN THE TOTALITY OF THE CIRCUMSTANCES

The question of ineffective assistance of counsel is a cumulative one. It is not proper to divide each issue up in an effort to "conquer" it; rather, this Court must review the totality of the circumstances and the cumulative effect of counsel's lapses. See Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984) (when reviewing counsel's effectiveness, court must look to "all the circumstances" of the trial); Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995) (counsel ineffective based on cumulative prejudice test); Wenzy (Maurice) v. State, 855 S.W.2d 52 (Tex. Ct. App. 1993) (counsel ineffective in aggravated robbery case because of the cumulative effect of counsel's behavior); Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990) (counsel ineffective because of cumulative effect of errors).

Therefore, all the issues discussed below must be viewed in their cumulative context, rather than in isolation.

C. COUNSEL DID NOT ENSURE THAT THEY HAD SUFFICIENT TIME IN WHICH TO PREPARE THEIR CASE

Counsel for Mark Ströman had very little time to prepare for his trial. Petitioner was arrested on October 5, 2001; his trial was over and he was sentenced to death by April 4, 2002, less than six months later. The entire culpability phase lasted less than one day; the penalty phase spilled over into the next day; then Mark Ströman was on death row, after a trial that lasted less time than one might expect a court to take over a relatively minor monetary contract.

Indeed, as of January 2002, both counsel were attending a lengthy seminar training lawyers in the defense of capital cases. This was too little, too late.

The first formal hearing in the trial process included a state motion to photograph Mr Ströman that would cause him great prejudice later. (TR2, 4) The complete hearing lasted less than five pages of transcript. (TR2) The second proceeding in the trial of case came on February 15, 2002. This was the general voir dire of the full panel. (TR3) The defense pre-trial motions were all heard on February 19, 2002 (after the preliminary jury selection was over) and there was no evidence presented at all except the motion to suppress statements. (TR4)

Individual voir dire of the jurors began on March 4 and went through March 26, 2002. During this time, counsel had little time to prepare for the substance of trial – the overwhelming majority of which should anyway have been completed before jury selection began.

The presentation of evidence for the culpability phase began and ended on April 1, 2002, but the April Fool's joke was on Petitioner: all the evidence was concluded (with none from the defense) by the end of the day.

By midday on April 2, Mark Ströman was convicted of capital murder. The case moved immediately into the penalty phase, with only a pause for lunch. The penalty phase spilled over onto April 4, but only by one witness. Soon, Mark Ströman found himself under a sentence of death and the judge was wishing him good luck.

> THE COURT: Mr. Ströman, good luck to you.
> THE DEFENDANT: Have a good one. Thank you sir. (TR21 at 93)

Obviously, Petitioner would need some luck, given the speed with which his trial had concluded.

Counsel never sought additional time from the Court for any aspect of the case. The failure to take any step to try to ensure adequate time in which to prepare and present a defense violated one of counsel's most basic duties, and the consequences permeated the trial.

Counsel should clearly have sought additional time before jury selection – which began four months after the client's arrest. This Court should "conclude . . . that the failure to move for a continuance was both professionally deficient and prejudicial, and . . . abridged [appellant's] sixth amendment rights." Code v. Montgomery, 799 F.2d 1481, 1485 (11th Cir. 1986); see also Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (counsel ineffective where he expressed no interest in judge's offer of continuance to secure mental health records). It is clear that counsel

was ineffective for failing to move for a continuance even if the trial court had been under no absolute obligation to grant one. See, e.g., Thames v. Dugger, 848 F.2d 149, 151 (11th Cir. 1988) (no absolute right to severance). However, it is clear in this case that any such motion should have been granted, for the "denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant's constitutional rights." Wade v. Armontrout, 798 F.2d 304, 307 (8th Cir. 1986).

Furthermore, because preparation for the penalty phase is qualitatively different from preparation for the guilt phase and because trying the guilt phase is emotionally exhausting to all involved, due process bears particularly heavily on the need for time in a capital case. Thus, counsel was under a duty to ensure sufficient time to prepare; indeed, if counsel found themselves unprepared for the penalty phase – as must have been obvious to any competent counsel – they were even required to demand a continuance between the two proceedings. See generally, Abrams, *A Capital Defendant's Right to a Continuance Between the Two Phases of a Death Penalty Trial*, 64 N.Y.U.L. Rev. 579 (1989).[19]

19

l. In Maryland, for instance, courts routinely permit continuances of thirty days, or more. Id. at 623 and n. 324 (discussing practice under Maryland Ann. Code art. 27 § 413(a), which states that the sentencing proceeding shall be held as "soon as practicable"). South Carolina has legislatively allowed a 24-hour continuance. See South Carolina Code § 16-3-20. Courts in other states have granted long continuances. Scull v. State, 533 So. 2d 1137, 1138 (Fla. 1988) (trial court permitted 24-hour continuance); Payne v. Commonwealth, 233 Va. 460, 472, 357 S.E.2d 500, 507 (Va. 1987) (trial court granted two-month continuance); People v. Erickson, 117 Ill. 2d 271, 301-02, 513 N.E.2d 383, 393 (Ill. 1987) (trial court granted four-week continuance); State v. Steffen, 31 Ohio St. 3d 111, 121, 509 N.E.2d 383, 393 (1987) (finding three-day continuance reasonable); State v. Brown, 38 Ohio St. 3d 305, 528 N.E.2d 523 (Ohio 1988) (finding three-day continuance reasonable); People v. Howard, 44 Cal. 3d 375, 422-24, 749 P.2d 279, 306-07, 243 Cal. Rptr. 842, 870-71 (Cal. 1988) (trial court continued penalty phase for three and one half weeks).

D. THE COURSE OF THE TRIAL MAKES CLEAR THAT COUNSEL WERE NOT PROPERLY QUALIFIED TO CONDUCT A CASE OF THIS IMPORTANCE

Petitioner does not mean to sound rude when he states that counsel were not properly qualified: he means only that his life was at stake, and he should have been allowed counsel whose experience matched the desperately high stakes.

The defense of a capital trial is as difficult as any case that any lawyer may ever face. For this reason, counsel must have particular qualifications in order to handle such a case effectively. Rose v. State, 675 So.2d 567 (Fla. 1996) (counsel ineffective in capital case for presenting an accidental death theory that even he believed was weak, because he was inexperienced); Copas v. Commissioner of Correction, 662 A.2d 718 (Conn. 1995) (counsel ineffective in murder case for advising defendant to plead guilty without an agreement; counsel was a self-described tax and corporate law specialist who did not understand and thus did not advise defendant that a mental status defense could be presented which did not rise to the level of insanity); Commonwealth v. Perry, 644 A.2d 705 (Pa. 1994) (counsel ineffective for completely failing to interview eyewitnesses or defense character witnesses or prepare at all for capital sentence hearing because counsel did not even realize until four days prior to trial that it was a capital case).

In this case, counsel simply did not have the qualifications for this onerous task. King v. Strickland, 714 F.2d 1481, 1486 (11th Cir. 1983), vacated on other grounds, 467 U.S. 1211, adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (The picture of lead counsel . . . is of a skilled criminal attorney who for a variety of reasons, some of which were beyond his control, was not ready to

proceed to trial. * * * This was probably the biggest case [counsel] ever had as a criminal lawyer. He worried about it day and night. . . .).

An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986). Indeed, the failure to perform this investigation eliminates any argument that counsel chose a particular presentation at the penalty phase. For example, in State v. Brooks, 94-2438 (La. 10/16/95); 661 So.2d 1333, the Court held:

> Under these circumstances, it is impossible to say that defendant's counsel made a reasonable strategic decision not to make a complete investigation. As we stated in Busby, 538 So.2d at 171, "while the failure to present mitigating evidence at trial can be reasonable if shown to be the result of tactical decision, the failure to investigate the existence of such evidence is ineffective assistance of counsel."

Id. at 1338 (emphasis in original); see also Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) ("'[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), quoting Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992); Turpin v. Christenson, 269 Ga. 226, 497 S.E.2d 216, 227 (Ga. 1998) (where trial counsel decided not to investigate the defendant's mental illness history, this could not be a strategic decision; "before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing"); State v. Davis, 116 N.J. 341, 561 A.2d 1082, 1090 (N.J., Aug 03, 1989) ("an inadequate investigation of law or fact robs a strategic choice of any presumption of competence").

In Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), cert. denied, 116 S.Ct. 753 (1996), the Court stated the obvious: "'Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake,' we believe that it was [counsel's] duty ... to collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial." Id. at 1367, quoting Hill v. Lockhart, 28 F.3d 832, 845 (8th Cir. 1994). Unfortunately, counsel did not have the experience to do this here.

E. COUNSEL HAD NEITHER THE TIME NOR THE EXPERIENCE TO DEVELOP A MEANINGFUL RELATIONSHIP WITH THE CLIENT

Counsel did not establish a sufficient relationship of trust with Petitioner, and were therefore in no position either to learn information critical to the defense, or persuade the client of the wisest course of action in his own defense.

On January 21, 2002, roughly three weeks before the initial selection of the jury, and ultimately only six weeks before the final jury selection would begin, and Petitioner sent a letter to Oatman, saying "we have only discussed a few things and what was only a short period of time." (011279) Counsel was meant to be developing a full case both in defense and in mitigation, yet he had barely begun working with the client.

This made it impossible for counsel to provide effective assistance of counsel. For example, in Rickman v. Dutton, 1997 WL 769368 (6th Cir. December 2, 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)), the Court presumed prejudice because counsel did not serve as advocate and showed contempt for his client such that he was a "second prosecutor" and defendant would have been "better off to have been merely denied counsel."

F. MARK STRÖMAN'S COUNSEL NEVER EVEN ATTEMPTED TO SPEAK TO THE VICTIMS OF THE CRIMES IN THIS CASE

It is a truism that those involved in the defense of people facing the death penalty do not wish the victims to suffer more than they already have in the trial process; indeed, it is defense counsel's obligation to seek to help the victim or his family to come to terms with the consequences of crime, whether the client is culpable or not.

Defense counsel made no effort to contact the victim (Rais Bhuiyan) or the relatives of the victims in this case (hereinafter referred to jointly as "the victims"). While the primary responsibility for the failure to advise the victims would rest by statute with the District Attorney, the defense has a duty to conduct victim outreach as well. See Branham & Burr, *Understanding Defense-Initiated Victim Outreach And Why It Is Essential In Defending A Capital Client*, 36 Hofstra L.Rev. 1019 (2008)

This alone can result in a finding of ineffectiveness, and should in this case, as the Court found in United States v. Kreutzer, 59 M.J. 773, 783-84 (Army Ct. Crim. App. 2004):

> The defense counsel's decision not to cross-examine many of the victims who testified, even if counsel had been fully prepared and aware of how the witness would likely respond, could be a reasonable tactic. But as to [the victim's widow], defense counsel's failure to even interview her before she testified at trial, in order to determine whether or not they should cross-examine her, was a tragic flaw. [She] is apparently a woman of strong religious faith which gave her a powerful impetus to forgive appellant for his terrible act of killing her kind and loving husband. Regrettably, this evidence of her forgiveness, which she clearly communicated to the prosecution, was not disclosed by the government to the defense counsel. Regardless of the prosecutor's failing, defense counsel's failure to interview the principal victim, who would testify against their client about the devastating impact his killing of her husband had on her and their eight children, and to discover her extraordinary

> feelings of forgiveness and her belief that appellant should not be put to death, rendered their performance grossly ineffective on behalf of their client.

Id. at 783-84 (citations omitted).

G. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA BARGAINING PROCESS

Under Texas law, the Dallas District Attorney was required to take the views of the victims into account when it came to deciding whether to engage in plea bargaining.[20]

Clearly, the failure to pursue plea negotiations may establish ineffective assistance of counsel. Turner v. Tennessee, 664 F. Supp. 1113 (M.D. Tenn. 1987) (incompetent advice to reject a plea bargain was ineffective assistance when a reasonable lawyer would have advised its acceptance and defendant would have followed counsel's advice); Ex Parte Wilson, 724 S.W.2d 72 (Tex. Cr. App. 1987) (failure to advise a defendant of an offered plea bargain constitutes ineffective counsel); Pennington v. State, 768 S.W.2d 740 (Tex. Ct. App. 1988) (counsel ineffective in felony indecency with child case for failing to advise the defendant of plea offers in which state was willing to accept misdemeanor plea and not oppose probation; defendant got 7 years); Hanzelka v. State, 682 S.W.2d 385 (Tex. Ct. App. 1984) (counsel ineffective for failing to advise defendant of plea offer for probation when defendant got a year confinement).

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[20] As discussed above, the District Attorney has much more liberty to override the victim's desire for vengeance than he does the victim's demand for clemency.

H. COUNSEL HAD NO COHERENT THEORY OF DEFENSE

On a most basic level, counsel did not have a consistent theory of the defense. At the culpability phase of the trial, defense counsel argued:

> "Mr. Dark tells you that you first must acquit him of capital murder before you can consider the lesser included offense of murder. I disagree with him. The charge will direct you, if you find from the evidence beyond a reasonable doubt that the defendant is either guilty of capital murder or murder, but you have a reasonable doubt as to which offense he is guilty [of], then you should resolve the doubt in the defendant's favor, and in such event you will find the defendant guilty of the lesser included offense of murder."

(TR19 at 15) So far, so reasonable. However, counsel argued that the informant Gonzales was the key to the case. Without him it is simple murder as there is no specific intent. (See e.g. TR19 at 17)

This was the theory at the culpability phase. By the penalty phase, the theory had done a rapid *volte face*. Now, to the extent that the incoherent presentation could be said to have a consistent theme, the issue was whether Mark Ströman committed the murders and attempted murder because of his crazy response to 9/11.

Having an effective and consistent theory of the case for life is a national standard of practice in capital cases.

Because counsel did not have a consistent theory, there was a complete failure to subject the prosecution's case to meaningful adversarial testing. Bell v Cone, 535, U.S. 685, 697 (2002); see also McFadden v. United States, 614 A.2d 11 (D.C. 1992) (counsel ineffective where he admitted that he had not investigated case and had not determined theory or defenses as of scheduled trial date); People v. Hattery, 488 N.E.2d 513 (Ill.), cert. denied, 478 U.S. 1013 (1986) (counsel ineffective for failing to

advance a theory of defense).

In Ross v. Kemp, 393 S.E.2d 244 (Ga. 1990), counsel were jointly ineffective where appointed counsel cross-examined state's witnesses and argued a theory of mental illness and insufficiency of evidence while retained counsel presented unprepared testimony of defendant and argued an inconsistent alibi theory. See also People v. Woods, 502 N.E.2d 1103 (Ill. App. Ct. 1986) (counsel ineffective in burglary case for conceding in closing argument that defendants' were guilty of theft which contradicted their theory of innocence which had been maintained throughout trial).

Here, defense counsel could surely have seen the prosecution's problem: they chose to prosecute the last case (the death of Mr Patel) first, because they thought it was the one in which their evidence of motive was least weak. In both of the other attacks, there was clear evidence that the murders were neither motivated by, nor concurrent with, an armed robbery.

Detective Daniel Wojcik ultimately would testify that robbery did not appear to be a motive of the crime for the Hasan murder. (TR19 at 127) The September 19, 2001, police report on the Hasan murder stated this clearly: "No motive, no robbery, no suspects, no witnesses." See *Exhibit J.*

With the Bhuiyan attempted murder, likewise, while the victim thought initially that it seemed like a robbery, "he didn't even look towards the money, rather he asked me a question." (TR19 at 145) Mr Bhuiyan could not understand due to the bandana that the perpetrator was wearing. "Then I asked him, since I didn't understand the question, then I asked him what was that. And then he shot me." (TR19 at 146) The man left without taking any money. (TR19 at 148) Had counsel talked to Mr

Bhuiyan, he would have learned that the victim himself would have testified that the attack was not motivated by robbery.

It was for this reason that the prosecution chose to go with the last crime first: while no money was taken then either, at least there was no police report or surviving victim to say affirmatively that robbery was *not* the motive. Because counsel did not think the case through and did not take the time to investigate and produce a proper theory of the case, Defense counsel then chose to proceed on the unsustainable theory that Mark Ströman had no intent. He went with this without any defense evidence to present on the theory – he did not even develop an expert who could have presented the theory to the jury.

The prejudice from this aspect of the case is clear: Juror Reeves is one example of a juror who saw through to the truth of this case. She had a reasonable doubt that the murder was committed for pecuniary motives. See *Exhibit F*. She had this doubt even without any defense evidence; by the time the other two cases were presented at the penalty phase, she felt specifically *betrayed* by the misleading way in which Mark Ströman's motives had been presented:

> I had strong doubts that Mark Ströman was guilty of capital murder, as I was not convinced that he committed murder in the course of a robbery. I had these doubts at the end of the first phase of his trial. However, during the second phase it became clear that I had been actively deceived, as with the other two victims it was even clearer that robbery was not the motive. I remember very clearly being shown pictures in the second phase of Mark Ströman, leaving a large stack of cash in the store where one of the victim's worked. I was shocked as this reconfirmed the doubts that I had in the first phase.
>
> At the first phase I had doubts, as I say, and thought that he was doing this for reasons other than murder in the course of a robbery. As I understood it, without that element, it would mean that he was not guilty of capital murder. When the prosecution later produced evidence in the other two cases, I felt deceived. It was clear to me that they had chosen the Patel murder case to try to make it look as if the murders committed by Mark Ströman were done in the course of robberies—with robbery as the

> motivation. The other two cases made it very obvious that this was not true.

Id.

Had counsel prepared in a competent way, counsel could have blended two defenses. To be sure, Mark Ströman did not intend to kill these people in the course of a robbery; but neither was he rational and coherent. Thus, an effective mental health investigation would have shown that he did not have the capacity to consider any motive rationally.

"At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982); accord Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), adhered to, 739 F.2d 531 (1984).

As the Court held in Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1986):

> Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies . . . 'counsel has a duty to make reasonable investigations. . . .'"

Id. at 307, quoting Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 2589, 91 L. Ed. 2d 305 (1986), quoting Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

This is particularly critical where it relates to the failure to investigate and present a potential defense. Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir.), cert. denied, 375 U.S. 832 (1963) (counsel has affirmative obligation to seek out possible defenses); cf. State v. Wood, 648 P.2d 71 (Utah 1982) (ineffective counsel found if attorney refuses to present the defendant's basic defense).

In this case, counsel failed to ensure that a proper investigation take place.

I. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT CULPABILITY PENALTY PHASE OF HIS TRIAL

Petitioner's counsel did not provide adequate representation at the time of trial. There is a reasonable probability that, but for this inadequate representation, the outcome of the culpability phase would have been different. The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. *U.S. Const. amend. VI.* The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." Strickland, 466 U.S. at 685 (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 240, 87 L. Ed. 268 (1942)).

The issue of ineffective assistance of counsel is not a slur against counsel's good name. In Curry v. Zant, 371 S.E.2d 647 (1988), the Georgia Supreme Court ruled that:

> Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the plea of guilty and the sentence of death must be set aside.

Id. at 649. The issue is, however, whether the accused received a fair trial.

J. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE LITIGATION OF MOTIONS

Motions practice is a crucially important part of any capital case. It is the way in which counsel should seek to ensure that the trial is fair. Counsel handled the motions in a way that can only be termed incompetent.

To begin with, counsel filed only a series of boilerplate motions that were not tailored to the needs of the case. For example, counsel filed a "Motion to determine constitutionality of 37.071(2) Subsection 2 being two parties charged." (TR4 at 11) But there are not two parties charged, as the prosecutor pointed out – "he's a principal acting alone." (TR4 at 11) This is simply frivolous – a boilerplate motion filed with no relevance to the case.

Second, counsel filed his boilerplate motions so that they were not heard until after the process of jury selection had begun.

Third, while the majority of motions that carry any weight in a capital case depend on the evidence presented in support of them, counsel only filed one boilerplate motion where any evidence – one witness called by the prosecution – was presented. Basic motions were not filed. For example, the search documents made clear that in the search conducted in the house outside which Petitioner was arrested was conducted without a warrant. (011216) All items seized but for one (a .380 weapon) were located in Ströman's bedroom. (011216) Clearly, under these circumstances, Petitioner had an expectation of privacy, such that a "consent to search" from another inhabitant of the house would not be sufficient.

Counsel also failed to challenge the motions by the prosecution. For example, there were a series of motions on the issue of future dangerousness: "Same thing. Except the argument here would be the defense would sometimes say, well, you can

consider the non-prison population if the state proves to you that the defendant will be outside the penitentiary. Again, there's no burden on the state to prove that before the jury considers non-prison population." (TR4 at 15) What the state was arguing here was that they could ask the jury to speculate that the defendant will be free again – either through being paroled or after escaping – when there was no evidence that this would ever be the case. This is highly improper and quintessentially the opposite of what the state should be doing. Indeed, the state's suggestion undermined the most powerful argument the defense has – why do we need to kill the prisoner as he is going to die in prison anyway?

Counsel should have been working very hard to ensure that the jury would not make the assumptions offered by the prosecution. Yet counsel consented to the motion. (TR4 at 15)

It is clear that this issue alone had a devastating impact on the trial since the jurors would not have voted for the death penalty but for the misunderstanding – the false speculation – that Petitioner would be free and therefore would kill again or cause mayhem on the outside. See *Exhibits F, G, H.*

K. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE JURY SELECTION PROCESS

The ineffective manner in which counsel approached voir dire seriously undermined Mark Ströman's opportunity to receive a fair trial.

1. COUNSEL COMMITTED THE CARDINAL SIN IN A CAPITAL CASE OF FOCUSING THE ENTIRETY OF VOIR DIRE, ALBEIT IN AN INEFFECTIVE MANNER, ON THE DEATH PENALTY

It is vitally important in a capital case that the jurors not get the impression that the only issue at stake is whether the defendant should live or die. Thus, it is a primary rule in capital voir dire that counsel should constantly remind the jurors of the fact that there are other, very weighty decisions to make before reaching any possible penalty phase.

Counsel's entire voir dire was focused on the death penalty. Counsel barely touched on anything else in three weeks or more of jury selection. This was a basic mistake. Quite apart from the fact that counsel would only fortuitously stumble upon other bases for a juror's excusal, this means that the jurors are left thinking that the only question is whether the accused should be sentenced to death. (This is particularly true, of course, where counsel adds to his initial error by failing to give an opening statement, thereby failing to give the jurors any sense of what the defense theory might be.)

The prejudice stemming from counsel's failure to do this is apparent from the declaration of Juror Reeves, who expresses surprise and dismay at some other jurors' presumption of guilt:

> At the first phase, I was shocked that the majority of the other jurors seemed to be automatically for death penalty in this case, before we had even started deliberating. Their minds were made up when they walked into that jury room. They did not seem to consider whether Mark was guilty of murder in the course of a robbery.

2. COUNSEL FAILED TO MAKE ANY EFFORT TO REHABILITATE JURORS WHO SHOULD NOT HAVE BEEN STRUCK FOR CAUSE

However, counsel failed even to conduct the death penalty voir dire in a minimally competent manner. First, given that the jurors' views on the death penalty were very significant to the case, counsel failed to make even a cursory effort to rehabilitate jurors who expressed reservations about the death penalty. A venireperson who is called for this very onerous duty comes into the courtroom only to be assaulted with questions about life and death. This is not a situation that jurors face every day. Any reasonable person would express qualms at being saddled with such a duty. It is one of the duties of defense counsel to make sure that the juror is given a full opportunity both to learn the contours of the law, and fully consider what her response truly is.

Venireperson Ramirez was on *Witherspoon* exclusion where counsel made no attempt at rehabilitation. She had circled 2 on the questionnaire, meaning she was quite strongly in favour of the death penalty. "I said yes I do believe in it." (Tr11 at 101) But she had been thinking about it and does not think she could return a death verdict. (TR11 at 101) That was the sum total of her voir dire on the matter. Defense counsel did not make even a brief foray to determine whether she really believed this.

Venireperson Hill was another very weak cause challenge on *Witherspoon* where there was no effort at rehabilitation by the defense. "I really don't think that I would be a – Well, without knowing, my true feeling would be that I would not be comfortable, I think, with that situation. That's just a gut feeling. I really couldn't say for sure. But to render a verdict under those circumstances, I would really waver

on a lot of emotions there I would think." (TR13 at 47)

This is precisely what any normal human being should feel in a capital case, if they are going to sit. "I think I would be able to judge. But I think that I would have a lasting emotion from that particular incident." (TR13 at 47) The strongest thing he said was to agree that he "think[s]" that "problems might arise for me" with the sentencing. (TR13 at 48) He should not have been struck even based on this, without any rehabilitation, yet the defense failed to question him effectively, and raised no objection to a challenge for cause. (TR13 at 48)

Charlotte Klimaszewski made one statement about wondering whether she can impose a death sentence, and then said: "And I got up this morning and I said, you know, I can do this. But in reality I don't know." (TR6 at 79) Defense counsel made no effort to rehabilitate her. Not a single word. [12]

In Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the Supreme Court held that a State's exclusion for cause of a venire member who voiced objections to or conscientious scruples against the death penalty constitutes a violation of a capital Defendant's Sixth and Fourteenth Amendment rights. In Witherspoon, the Supreme Court said that potential jurors may be excluded for cause when they:

> make it clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's *guilt*.

Id., 391 U.S. at 522 n.21 (emphasis in original)

21

Similarly, counsel made no effort with Venireperson Fuentes (TR14 at 45, 48) or Venireperson Coombier. (Tr11 at 75) While their views were somewhat firmer, the same could be said of any number of pro-death jurors who said at one point that they would always impose death, but retreated somewhat when confronted by additional facts.

A potential juror may not be excused for cause simply because he or she "cannot swear that the possibility of the death penalty will not affect his deliberations on any issue of fact. . . ." State v. David, 425 So. 2d 1241, 1249-50 (1983). Indeed, a juror should probably swear that the possibility of the death penalty *will* affect his assessment of the case. See also Hernandez v. State, 757 S.W.2d 744, 754 (Tex.Cr.App. 1988) (prospective juror improperly excused for cause from jury based on response that he opposed "`imposition'" of death penalty); Willie v. State, 585 So.2d 660, 672-73 (Miss. 1991) ("A prospective juror may not be struck from the jury venire simply because the juror voiced general objections to the death penalty or expressed conscientious or religious scruples against the infliction of capital punishment").

In follow up voir dire, a juror may say that she will lay aside her personal views. Burns v. Estelle, 626 F.2d 396, 397-98 (5th Cir. 1980) (en banc) (reversible for trial court to excuse for cause juror who "stated she did not believe in the death penalty," but never indicated she could not "lay her personal views aside" and "follow the court's instructions"); Jarrell v. State, 413 S.E.2d 710, 712 (Ga. 1992) ("The voir dire testimony ... established no more than that the juror had some `qualms' about imposing a sentence she supported in principle and, before hearing any evidence, leaned toward a life sentence. Her testimony does not support a finding that she was disqualified and her excusal is reversible error"); People v. Seuffer, 582 N.E.2d 71 (Ill. 1991) (death sentence vacated where trial court erred in excluding for cause prospective juror who stated that he had feelings against death penalty but could be fair and follow the law).

It is clear that the wrongful exclusion of just one juror under the rule of *Witherspoon* is per se harmful error. Counsel's failure to preserve Petitioner's right to

a fair jury was ineffective. For example, in Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), the Court found that counsel had provided ineffective assistance where counsel had, *inter alia*, failed to object to an improper Witherspoon excusal.

The defense always has an opportunity to rehabilitate a juror. Indeed, the court's refusal to allow this opportunity would have constituted reversible error. State v. McIntyre, 381 So. 2d 408 (La. 1980). Yet counsel never even sought to exercise this right.

3. COUNSEL FAILED TO OBJECT TO THE EXCLUSION OF JURORS WHO WERE NOT EXCLUDABLE FOR CAUSE

The exclusion of so-called *Witherspoon* jurors was not the only error of this kind made by defense counsel. Jared Benton was excluded for cause because he would limit future dangerousness to future cases of murder. The defense made no meaningful effort to explore this opinion, and the State's challenge was granted without objection. (TR6 at 124)

Again this, as with the rest of the voir dire process, was ineffective.

4. COUNSEL FAILED TO UNDERSTAND AND ENFORCE THE LAW REGARDING THE EXCLUSION OF JURORS WHO WERE BIASED AGAINST THE CLIENT

As is apparent from subsequent issues raised in this petition concerning the failure to instruct jurors properly on mitigation, it was apparent that defense counsel had no idea of the evolving law on the requirement that jurors give full effect to the full range of evidence in mitigation. As a result, inevitably, counsel failed to challenge jurors who would not consider evidence in mitigation, and failed to help educate potential jurors as to their full responsibilities.

As far as mitigation, Juror Wood thought that this was a matter of "whether they have a history of mental problems and are unable to control themselves." TR8 at 57. In other words, the juror felt that the accused had to be not guilty by reason of insanity. This would be a *defense* in Texas, so this is clearly not the full scope of mitigation. See also TR8 at 60 ("Again, I would like to know their mental state – their mental state as to whether they knew what they were doing, basically.").

Far from considering evidence in mitigation, the same juror felt that evidence offered in mitigation should be deemed aggravating because it "compounds" the offence. The juror said that the use of drugs and alcohol "compounds the problem. And the person who does the drugs is responsible for their actions, the same as alcohol." TR8 at 61. With this, a large swathe of Petitioner's mitigation – concerning his addiction to drugs going back to the age of eleven, and his total dependence on meths – was rendered an aggravating circumstance.

Juror Bridgewater was another person who would not take mitigating evidence into account. TR10 at 101 (Juror Bridgewater: "I think if a person knows if

something is bad for them, they should stay away. I don't think that's an excuse to use. If you know it's going to change or alter your personality or cause you to commit a crime or do something other than you wouldn't do if you weren't taking the drugs, that you shouldn't use that as an excuse."). She also did not view age as mitigating. TR10 at 100.

Juror Kirksey was another juror who was unwilling to consider evidence in mitigation. TR14 at 14 (Juror Kirksey, when asked whether there was anything on Special Issue 2 that "might really change your mind from death to life", replied, "No, I don't believe so."); TR14 at 15 (Juror Kirksey: "I think an adult is responsible for their actions no matter how old they are."); TR14 at 16 (Juror Kirksey – growing up in poverty etc. not mitigating). Indeed, basically the only matter that Juror Kirksey would take into account was mental retardation – which is, first, a complete defense to the death penalty, and second, not relevant to Petitioner's case. See TR14 at 17 (Juror Kirksey says she is in the "mental retardation" field, so she would take that into account).

Clearly jurors who will always vote for the death penalty are excludable for cause:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do .... Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Morgan v. Illinois, 501 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (constitutional error to refuse to excuse prospective juror who believed death penalty should automatically follow from murder conviction).

The same is true of jurors who will not consider anything in mitigation. In his dissent, Justice Scalia crystallized the holding of the majority in Morgan when he stated "under today's decision a juror who thinks a 'bad childhood' is never mitigating must also be excluded." Id., at 2238, n.3 (Scalia, J. dissenting).

Counsel's failure to understand and enforce this law was ineffective assistance. Knight v. State, 839 S.W.2d 505 (Tex. Ct. App. 1992) (trial counsel in burglary case ineffective for failing to challenge 10 jurors who expressed a bias or prejudice including: a burglary conviction should always carry maximum sentence, if convicted should receive death penalty, all people indicted are guilty, and defendant's failure to testify would be held against him); Nelson v. State, 832 S.W.2d 762 (Tex. Ct. App. 1992) (counsel ineffective for failing to challenge jurors who stated that they presumed guilt if a defendant was charged); State v. Terry, 601 So.2d 161 (Ala. Crim. App. 1992) (counsel ineffective for failing to challenge for cause or strike juror who stated during voir dire that she would tend to side with the state in considering evidence); Presley v. State, 750 S.W.2d 602 (Mo. Ct. App.), cert. denied, 488 U.S. 975 (1988) (counsel ineffective for failing to challenge for cause a venireman who admitted bias against defendant).

L. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE CULPABILITY PHASE

We have already discussed how counsel had no coherent theory of the defense, and how the failure to present a consistent and honest theory (that Mark Ströman did not intend robbery, and may also not have harboured intent to kill) at the culpability phase contributed to the fact that at least one juror (Juror Reeves) was bullied into convicting Petitioner for a crime for which he was innocent.

Counsel had simply not done (or caused to be done) the investigation that needed to be done. For example, counsel did not even get his client's school records until March 27, 2002 (010627), which was after the entire jury had been selected. It is implausible that counsel would begin jury selection (let alone end it, almost a month later) without having conducted such basic investigation.

Counsel made themselves almost totally dependent on the prosecution for materials in the case. Although counsel knew, for example, that Gonzales would be an important witness against the client (TR18 at 147), counsel had not done independent investigation in order to prepare for him. The State gave counsel the NCIC report on Gonzales, and counsel objected that he had not been able to investigate this man. (TR18 at 147-48) But in truth counsel simply had not done the investigation, but had depended on the state to provide what he needed.

Counsel's failure to investigate was particularly apparent with the testimony of Thomas Boston, a prosecution witness. (TR18 at 163) His brief testimony was that he drove past the crime scene, had an idea who might have done it, and called an ADA friend. He then identified Mark Ströman on the videotape from the store. Counsel conducted no cross-examination at all.

Had counsel prepared at all, counsel would have learned a huge amount of

favorable material that could have been used at either the cvulpability or the penalty phase, or both. See *Exhibit L*. Mr. Boston was a good friend of Mark Ströman's. Mr. Boston met Mark a long time ago. Mark had been working at another body shop and had approached him and applied for a job. Mr. Boston saw the positive side of Mark, and gave him a job as the manager of his body shop which at the time was located on Garland Road. Mark was an excellent worker, and brought several other people to work at the shop, including Ronnie Galloway who still works for there many years on.

Mr. Boston said that Mark was one of the most ambitious individuals that he has ever met and that he worked really hard. Mark was responsible for his shop having around the clock working hours with work being done day and night by separate day and night shift workers.

Mr. Boston knew a great deal about Mark's childhood. He said that Mark's parents had been very abusive towards him and that his mother, stepfather and uncle were all alcoholics. He said that Mark got his racist beliefs from his family.

Mr. Boston would have testified that Mark was on drugs especially heavily during 2000 and 2001. He said that things got really bad when Mark started working out at a local gym. Mark got some very bad advice and started taking steroids to enhance his performance. Mr. Boston stated that the steroids mixed with the other drugs that Mark was taking was a lethal drug cocktail that really sent Mark over the edge.

Mr. Boston could have provided additional background as to what tipped Mark still further over the edge at the time of the offenses. Mr. Boston would have testified that around that time Mark had returned to his apartment one day to find his girlfriend in bed with one of his friends. Mr. Boston would have described how that

disturbed Mark's already fragile mental state even more.

Mr. Boston would have testified about how Mark would be trying to get his life together but things just kept going wrong for him.

Mr. Boston would have testified that robbery was not consistent with Mark's character, as Mark was always a hard worker, and was not short of money. In the summer of 2001, Mr. Boston knew that Mark was doing marble and granite work and so he set him up with a job fitting some marble at a friend's house. His friend was called Brad Balles.

With respect to the penalty phase, Mr. Boston remembered one of the photos that was shown during the trial was of Mark with a gun pointing at Galloway (Shy) with Shy lying on the ground. Mr. Boston was also in the picture. Mr. Boston would have testified that it was all for fun – the gun belonged to him but it was not loaded.

Mr. Boston's credibility as such a favourable witness would have been solidified by the fact that he knew the Patels and their family, and so felt that he was in a difficult position. Mark's case affected Mr. Boston psychologically and he could not sleep for months after the trial. [22]

For this extraordinary amount of information, all counsel had to do was some basic investigation into the witnesses against Mark Ströman. This, he simply failed to do.

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[22] Boston could also have impeached one of the other key early witnesses in the prosecution case, since he would have testified that Billy Templeton had a very bad reputation in the local community (as a crooked former police officer). Boston could also have led the defense to a number of additional witnesses who could have helped the defense.

M. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE WHEN COUNSEL TO PRESENT AN OPENING STATEMENT AT THE CULPABILITY PHASE

Once the jury had been selected, the next significant stage of the case came with opening statements. Here, counsel simply abrogated his responsibility, and gave no opening at all. He did not even attempt to reserve his opening until later; he said nothing at all.

In State v. Sanders, 93-0001 (La. 11/30/94), 648 So.2d 1272, "[t]his court has come close to stating that an attorney's failure to make an opening statement constitutes ineffectiveness per se." Id. at 1292, citing Clark, 492 So.2d at 872 (failure to make opening statement "inappropriate" and "inexplicable"); State ex rel. Busby v. Butler, 538 So.2d 164, 173 (La. 1988) (failure to make opening statement important factor in determining whether penalty phase assistance of counsel ineffective); State v. Sanders, 93-0001 (La. 11/30/94), 648 So.2d 1272 (defense counsel admitted he was unprepared in opening, which consisted entirely of an apology for this)

As a result of this, counsel's performance was ineffective. Bowers v. State, 578 A.2d 734 (Md. 1990) (counsel ineffective in murder case for failing, *inter alia*, to make an opening statement); People v. Williams, 548 N.E.2d 738 (Ill. App. Ct. 1989) (counsel in murder case failed to make an opening).

N. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Trial counsel also provided the client with ineffective assistance of counsel at the penalty phase of the trial. As the Eleventh Circuit has held: "The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial." King v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983), vacated on other grounds, 467 U.S. 1211, adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (quoting Stanley v. Zant, 697 F.2d 955, 963 (11th Cir. 1983)). It is clear that a proper presentation of evidence must be made at this phase: "[E]xclusive reliance on a plea for mercy amounts to a hopelessly ineffective strategy at capital sentencing." Kubat v. Thieret, 679 F. Supp. 788, 811 (N.D. Ill. 1988), aff'd, 867 F.2d 351, 371 (7th Cir. 1989), cert denied, 110 S. Ct. 206 (1989). Unfortunately, here, for various reasons the penalty phase was a mere afterthought to the trial.

1. THE IMPACT OF ALL THE ERROR RELATED TO THE CULPABILITY PHASE MUST BE CONSIDERED FOR ITS IMPACT ON THE PENALTY PHASE

Petitioner reiterates that the second phase of the trial cannot be viewed in isolation, but all the earlier (and subsequent) elements of the ineffectiveness claim must be considered in aggregation.

2. COUNSEL FAILED TO GIVEN AN OPENING STATEMENT

As at the first phase of the trial, counsel failed entirely to give an opening statement. In State v. Sanders, 93-0001 (La. 11/30/94), 648 So.2d 1272, "[t]his court has come close to stating that an attorney's failure to make an opening statement

constitutes ineffectiveness per se." Id. at 1292, citing Clark, 492 So.2d at 872 (failure to make opening statement "inappropriate" and "inexplicable"); State ex rel. Busby v. Butler, 538 So.2d 164, 173 (La. 1988) (failure to make opening statement important factor in determining whether penalty phase assistance of counsel ineffective).

3. COUNSEL FAILED TO ENSURE THAT CRUCIAL EVIDENCE IN MITIGATION SHOULD BE PRESENTED THROUGH THE VICTIMS

Rais Bhuiyan was prepared, on his own behalf and on behalf of the other victims, to provide compelling evidence in mitigation on behalf of Petitioner. As previously noted, counsel did absolutely nothing to ensure that this took place. As counsel himself concedes, this would have been the most important and compelling evidence that could have been presented at the penalty phase. See *Exhibit E*.

It is not "merely" that this would have saved Petitioner's life; additionally, the jurors believed the contrary – that the victims wanted to see Petitioner dead. The death penalty was therefore imposed based on *false* information that Petitioner had no opportunity to deny or explain. This is a fundamental due process violation, as well as a violation of the Eighth Amendment and other laws set out above. See Skipper v. South Carolina, 476 U.S. 1, 5 n.1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (recognizing "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"); id. at 10 (Rehnquist & White, JJ., and Burger, C.J., concurring); Johnson v. Mississippi, 486 U.S. 578, 586, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) ("indeed, it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance").

4. MARK STRÖMAN'S COUNSEL FAILED TO DEVELOP AND COHERENTLY PRESENT A LARGE NUMBER OF MITIGATING CIRCUMSTANCES THAT WOULD HAVE SAVED HIS LIFE

There were various areas of mitigation that counsel should have investigated and presented. See, e.g., Harris v. Dugger, 874 F.2d 756 (11th Cir.), cert. denied, 493 U.S. 1011 (1989) (ineffective counsel in a capital murder case where they failed to prepare or present mitigation evidence because each lawyer believed that the other was responsible for preparing penalty phase of case).

5. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S CHILDHOOD AND BACKGROUND

As set forth above, there was an enormous amount of extremely sympathetic information that could have been fully developed, coherently presented and vigorously argued on Petitioner's behalf. Instead, what the jury heard was a limited, incoherent and anodyne version of Mark Ströman's story. This was ineffective itself. See, e.g., Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), cert. denied, 507 U.S. 951 (1993) (affirming 754 F. Supp. 1490 (W.D. Wash. 1991)) (counsel ineffective for failing to prepare and present mitigating evidence regarding defendant's background, family relationships, and the effects of assimilation problems and cultural conflict on young Chinese immigrants); State v. Van Cleave, 674 N.E.2d 1293 (Ind. 1996), affirmed on reh'g, 681 N.E.2d 181 (Ind. 1997) (cert. filed October 24, 1997) (counsel ineffective in sentencing for failing to adequately investigate and present evidence of a difficult childhood, including parents' divorce and racial issues); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert. denied, 504 U.S. 946 (1992) (affirming Blanco v. Dugger, 691 F. Supp. 308 (S.D. Fla. 1988)) (counsel failed to

present evidence of childhood poverty, etc.); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1990) (investigation would have revealed disadvantaged family life, etc.); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (available evidence would show impoverished childhood, etc.); Averhart v. State, 614 N.E.2d 924 (Ind. 1993) (counsel ineffective for failing to prepare and present mitigation evidence of defendant's disadvantaged background); Stevens v. State, 552 So.2d 1082 (Fla. 1989) (counsel was ineffective in sentencing phase for failing to investigate and present mitigating evidence of defendant's history of poverty and neglect); Ford v. Lockhart, 67 F.3d 162 (8th Cir. 1995) (affirming 861 F. Supp. 1447 (E.D. Ark. 1994) (counsel ineffective for failing to prepare and present mitigation evidence which would have shown that defendant suffered severe physical and psychological abuse from father, including being hung from the rafters in a cotton sack or by his wrists all day long and being beaten periodically with extension cord; and defendant witnessed father beating mother and siblings); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), 116 S.Ct. 1335 (1996) (counsel ineffective for failing to adequately prepare and present mitigation evidence even though a defense expert was called; other evidence would have shown that defendant: was blamed by his family for his mother's death giving birth; lived in a two-room house with grandmother and 15 relatives; was beaten with a frying pan and switch by grandmother; had to drink kerosene and sugar as medicine; was sexually abused by prostitutes who worked for father; was raped by a stranger and attempted suicide shortly afterwards); Jackson v. Herring, 42 F.3d 1350 (11th Cir.), cert. denied, 515 U.S. 1189 (1995) (affirming Jackson v. Thigpen, 752 F. Supp. 1551 (N.D. Ala. 1990)) (counsel ineffective during penalty phase of capital trial; available mitigation evidence included substantial personal hardships, including having to quit school in 8th grade because defendant was pregnant; brutal and abusive

childhood at the hands of an alcoholic mother); Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992), cert. denied, 508 U.S. 911 (1993) (evidence that defendant suffered extreme child abuse); Gaines v. Thieret, 665 F. Supp. 1342 (N.D. Ill. 1987), rev'd on other grounds, 846 F.2d 402 (7th Cir. 1988) (counsel ineffective in sentencing phase for failing to investigate and present evidence in mitigation which would have shown that defendant was repeatedly and severely beaten by father, sometimes while naked and tied up); State v. Lara, 581 So.2d 1288 (Fla. 1991) (counsel ineffective in sentencing for failing to investigate and present evidence: defendant's father was brutally abusive, had to eat dirt because dad wouldn't feed; tied and hung upside down over well; left in cane fields alone for days); Stevens v. State, 552 So.2d 1082 (Fla. 1989) (counsel was ineffective in sentencing phase for failing to investigate and present mitigating evidence of defendant's abusive childhood including being shot by father).

6. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S MENTAL HEALTH PROBLEMS

Counsel presented a muddled version of their client's mental health problems as well. This was partly because counsel did not prepare sufficiently before trial, and partly because they never developed a consistent and coherent theory of the defense. If they had, they would clearly have presented a case focused on Mark Ströman's mental problems as they related to his racism and his insane and senseless attacks on random people who looked like Muslims.

The failure to do this in a coherent way was ineffective. See, e.g., Kenley v. Armontrout, 937 F.2d 1298 (8th Cir.), cert. denied, 502 U.S. 964 (1991) (counsel

ineffective for failing to investigate and present mitigation evidence; investigation would have revealed a history of extreme personality or emotional disorder or disturbance, suicidal tendencies); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (counsel failed to prepare and present available mitigating evidence of a history of serious emotional problems); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), 116 S.Ct. 1335 (1996) (counsel ineffective for failing to adequately prepare and present mitigation evidence even though a defense expert was called; other evidence would have included evidence that defendant had a history of drug and alcohol use); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir.), cert. denied, 502 U.S. 964 (1991) (counsel ineffective for failing to investigate and present mitigation evidence; investigation would have revealed a history of alcohol abuse and intoxication); State v. Lara, 581 So.2d 1288 (Fla. 1991) (counsel ineffective in sentencing for failing to investigate and present evidence that client began drinking at age 8); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), cert. denied, 116 S.Ct. 753 (1996) (counsel ineffective for failing to investigate and present available evidence of bipolar disorder); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), cert. denied, 116 S.Ct. 1335 (1996) (mental health expert would have testified that defendant is genetically predisposed to serious mental illness which was exacerbated by background; defendant suffered from schizoaffective disorder, PTSD, and polysubstance abuse); Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102 (1995) (affirming 824 F. Supp. 1327 (E.D. Ark. 1993)) (counsel ineffective at penalty phase for failing to prepare and present evidence of defendant's mental state at the time of the offenses, and that defendant had a long history of schizophrenia but he was taking antipsychotic medication at the time of offenses); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert. denied, 504 U.S. 946 (1992) (affirming Blanco

v. Dugger, 691 F. Supp. 308 (S.D. Fla. 1988)) (counsel failed to present evidence of family history of psychosis, organic brain damage, borderline retardation, epileptic disorders and paranoid and depressive behaviors); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1990) (investigation would have revealed shock therapy, brain damage, mental retardation, susceptibility to the influence of others); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) (counsel ineffective for failure to conduct investigation into petitioner's background, which would have revealed a history of schizophrenia since age 12); State v. Brooks, 661 So.2d 1333 (La. 1995) (counsel ineffective for failing to prepare and present mitigation evidence concerning a history of mental problems, including borderline personality disorder; was taking prescription antidepressants at the time of the offense; and was dominated by his homosexual lover/co-defendant).

7. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S SUBSTANCE ABUSE PROBLEMS

Closely linked with his mental health problems were Mark's substance abuse problems. This was another area where counsel failed notably to ensure that jurors would take the information seriously during voir dire, and failed to present the material coherently. See, e.g., Ford v. Lockhart, 67 F.3d 162 (8th Cir. 1995) (affirming 861 F. Supp. 1447 (E.D. Ark. 1994) (counsel ineffective for failing to investigate and present evidence of intoxication at time of the offense despite the fact that hospital records after capture showed that he was "vomiting and drunk."); Heiney v. State, 620 So.2d 171 (Fla. 1993) (counsel ineffective in sentencing phase for failing to prepare and present evidence of chronic substance abuse and use of drugs and alcohol at time of the offenses).

8. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S REMORSE

Counsel made no effort to develop evidence of Mark Ströman's remorse for what he discovered that he had done. This would have been very sincere, and readily shown. See, e.g., State v. Weiland, 505 So. 2d 702, 709 (La. 1987) (noting in mitigation that the "defendant . . . showed immediate remorse and attempted suicide"); e.g., State v. Barrett, 469 S.E.2d 888, 895 (N.C. 1996) ("the jury may consider the remorse of the defendant during the sentencing phase as a mitigating circumstance"); State v. Daughtry, 340 N.C. 488, 518, 459 S.E.2d 747, 762 (1995) ("the testimony was relevant and admissible to prove the mitigating circumstance that defendant felt remorse following the murder"); Jackson v. State, 1996 MISS. LEXIS 7, *7 (1996) (discussing mitigating evidence that the accused "had demonstrated extreme remorse for the crimes he had committed"); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983) ("[a]ny convincing evidence of remorse may properly be considered in mitigation of sentence"); State v. Gillies, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (referring to "commendable" showing that the defendant had "become religious, shown remorse"); People v. Albanese, 102 Ill. 2d 54, 80-81, 464 N.E.2d 206, 219, 79 Ill. Dec. 608, 621 (1984) ("[t]he defendant's remorse is a proper subject for consideration as sentencing"). For example, in State v. Carr, 530 So. 2d 579 (La. App. 1 Cir. 1988), the Court noted that "[i]n addition to the mitigating factors initially noted by the trial court, the court stated that it felt defendant had shown remorse for his crimes. . . ." Id. at 593; accord State v. Hines, No. 95-111 (La. App. 3 Cir. 10/4/95), 663 So. 2d 199, 204 ("defendant points to the following mitigating factors: he accepted responsibility for the offense, he expressed genuine remorse, he pled

guilty").

9. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S SINCERE RELIGIOUS BELIEFS

Counsel made no effort to develop evidence of Mark Ströman's rediscovered faith. This is a cruel element in trying to get a jury to *empathize* with the client, since most jurors in a capital case are struggling themselves with the lessons of their own faith. See, e.g., Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (counsel ineffective for failing to prepare and present mitigation evidence because they didn't think it would do any good; relatives, friends, and a minister were available and willing to testify); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (available evidence would show that the defendant was a religious person, etc.); State v. Gillies, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (referring to "commendable" showing that the defendant had "become religious").

10. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S EFFORTS TO PERFORM GOOD DEEDS, NOTWITHSTANDING THE PROBLEMS HE FACED

It appeared from counsel's closing argument that counsel had not, himself, spent time sufficient with Mark Ströman to identify his positive side. Certainly counsel failed to present it. See, e.g., Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952 (1992) (available mitigation would have shown that defendant was a hard worker, a good youth, able to provide for his common law wife and their daughter); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (available evidence would show good worker, nonviolent); Johnson v. Kemp, 781 F.2d 1482 (11th Cir. 1986) (affirming 615 F. Supp. 355 (D.C. Ga. 1985)) (available mitigation

included 19 good character witnesses); State v. Twenter, 818 S.W.2d 628 (Mo. 1991) (counsel ineffective in murder case for killing parents for failing to investigate and present mitigation where friends, relatives, and coworkers would have testified that the defendant was a loving mother).

11. COUNSEL FAILED EFFECTIVELY TO PRESENT THE COMPELLING MITIGATING CIRCUMSTANCE OF MARK STRÖMAN'S HARD WORK HISTORY

Numerous witnesses could have testified to Mark Ströman's solid work ethic, which would have been both mitigating and would have supported the claim that he did not commit the crimes as part of a robbery. The failure to present this evidence was ineffective assistance of counsel. Gaines v. Thieret, 665 F. Supp. 1342 (N.D. Ill. 1987), rev'd on other grounds, 846 F.2d 402 (7th Cir. 1988) (counsel ineffective in sentencing phase for failing to present evidence of a good work history during six months prior to murder and how the client was kind to his live-in girlfriend and her son and helped to support them)

12. MARK STRÖMAN'S COUNSEL FAILED ADEQUATELY TO CHALLENGE THE ILLEGITIMATE USE OF HIS THEN-EXISTING, CONSTITUTIONALLY PROTECTED (ALBEIT REPREHENSIBLE) VIEWS IN AGGRAVATION

The prosecution sought to make a major issue at Mark Ströman's trial out of his tattoos and his supposed beliefs. It should be emphasized that his beliefs have changed radically since that time, and they were anyway misrepresented by the prosecution. What the prosecution did at the time of trial was unconstitutional.

The deluge of improper material began with Gonzales, the informant, who said Mark Ströman was a member of the Aryan Brotherhood, and had swastikas on

his arms. (TR19 at 131) This is, of course, precisely what was condemned in Dawson v. Delaware, 503 U.S. 159 (1992).

However, the prosecution made this a huge part of their presentation at the penalty phase. Offier Snipes had taken a number of photos of Mark Ströman. (TR19 at 182) He explained how there had been a change to the swastika on Petitioner, and a new tattoo in the middle of the chest and another smaller one on the left side of his neck. (TR19 at 182)

Beyond this, the prosecution introduced, and loudly displayed, a long list of highly prejudicial materials:

S117A a photo of Mark Ströman with SS T-shirt. (TR23 at 47)
S117B the same (TR23 at 48)
S117D a photo of two kids in front of Nazi flag. (TR23 at 50)
S118D a Southern Nazi poster. (TR23 at 54);
S121 another Southern Nazi poster. (TR23 at 57);
S122 another Southern Nazi poster (TR23 at 58)

.

Mark Ströman's body was used as a repeated violation of the First Amendment.

S125 Mark Ströman tattoos with a swastika, etc. (TR23 at 61);
S126 Close up of Mark Ströman swastika, with an image of a burning KKK person. (TR23 at 62);
S127 Mark Ströman left arm tattoos. (TR23 at 63);
S128 close up of Mark Ströman left arm tattoos. (TR23 at 64);
S129 photo of his arm tattoos. (TR23 at 65);
S130 Mark Ströman right arm tattoos. (TR23 at 66);
S131 Rear of Mark Ströman right arm tattoos. (TR23 at 68);
S132, other tattoos. (TR23 at 68)

The lesson of Dawson is that, no matter how distasteful people may find the kind of views that might be expressed by such tattoos and memorabilia, this falls within an individual's right to freedom of expression and cannot, consistent with the First Amendment, be used in aggravation of sentence.

This is all the more so in this case for a number of reasons. First, the

prosecution tried to eschew the notion that Mark Ströman was acting out of an irrational racial animus at the first phase of the trial, and denied that this was true of the crimes at the penalty phase. Thus, the prosecution's sole basis for offering the materials was to smear Mark Ströman as a "bad person".

Second, this succeeded in a way that was inaccurate, as we know from the jurors who believed that the tattoos demonstrated that Mark Ströman had committed a homicide before September 11th.

Third, one reason that people have the right to a broad range of free (and sometimes distasteful) expression is, thankfully, that they can change their minds. This is precisely the case with Mark Ströman. Far from being defined by these tattoos and T-shirts, Mark Ströman has come to learn (during his time on Death Row) that any opinions he inherited from his violent and racist step-father were views that he should reject.

Counsel made no effort to combat this torrent of illegitimate and highly prejudicial evidence. To allow such "bad actor" evidence to go without challenge was ineffective assistance. Prichard v. Lockhart, 990 F.2d 352 (8th Cir. 1993) (defendant denied effective assistance when counsel failed to object to court's use of a prior out of state marijuana conviction for enhancement of sentence in violation of a statute prohibiting the use of such priors); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989) (counsel was ineffective during the sentencing phase of defendant's trial by failing to object to the use of one prior conviction resulting from a plea of nolo contendere and another prior conviction for an offense that relied on the nolo contendere conviction; under state law, admission of nolo contendere conviction was improper); Jenkins v. State, 591 So.2d 149 (Ala. Crim. App. 1991) (counsel ineffective for failing to investigate and object to admission of prior Florida convictions which were all based

on nolo contendere pleas and were thus improperly admitted under Alabama law for purpose of sentence enhancement under habitual offender act).

For example, in Warren v. Baldwin, 915 P.2d 1016 (Or. Ct. App.), review denied, 925 P.2d 908 (Or. 1996), counsel ineffective in manslaughter case for failing to object to prosecutor's argument that the "reckless" element of manslaughter had been proven and the jury could find the element based on the defendant's alleged drug dealing earlier in the day, his prior convictions, and his assaultive behavior towards other victims earlier in the day. While this other evidence was admissible in the trial for other purposes related to other charges, this evidence was not relevant and could not be used to prove "recklessness" as required for manslaughter conviction. See also People v. Rogers, 526 N.E.2d 655 (Ill. App. Ct. 1988) (counsel ineffective for failing to object to the improper closing argument where prosecutor argued that prior convictions were substantive proof of guilt).

13. COUNSEL FAILED TO ENSURE THAT MITIGATING CIRCUMSTANCES WOULD BE GIVEN THEIR TRUE AND CONSTITUTIONAL WEIGHT

Rather than reiterate the substantive allegations made below on the issues of the failure to guide the jurors properly with respect to their consideration of mitigating circumstances, Petitioner incorporates the allegations by reference.

Trial counsel clearly did not understand the manner in which mitigating evidence should be considered, and therefore failed to ensure that the jurors understood it as well.

14. COUNSEL FAILED TO ENSURE THAT THE JURORS UNDERSTOOD THE FACT THAT PETITIONER WOULD DIE IN PRISON

One of the most significant issues in any capital case is the jurors' perceptions concerning the likelihood that the client will ever again be a free person. Counsel failed to litigate this issue at the penalty phase of the trial in an effective manner. Indeed counsel allowed the jurors to be misled in a manner that was fatal to Petitioner. We have already discussed how counsel consented to the prosecution's motions allowing the prosecution to imply that Petitioner would roam free in future, able to kill and maim Texan citizens in future.

This was ineffective assistance of counsel. In Williams v. State, 445 So. 2d 798 (Miss. 1984), the Mississippi Supreme Court explained that

> A jury should have no concern with the quantum of punishment because it subverts a proper determination of the sentencing issue. Reference to the possibility of parole should the defendant not be sentenced to die [is] wholly out of place at the sentencing phase of a capital murder trial for two additional reasons.
> First, such references inevitably have the effect of inviting the jury to second guess the Legislature. The Legislature has declared that persons sentenced to life imprisonment may under certain circumstances become eligible for parole. Mississippi Code Annotated section 47-7-3(1) (Supp. 1982). It is not more proper for the jury to concern itself with the wisdom of that legislative determination than it is for the jury to consider the Legislature's judgment that death in the gas chamber be an authorized punishment for capital murder. Johnson v. State, 416 So. 2d 383, 392 (Miss. 1982).
>
> Second, parole is not automatic. No person sentenced to life imprisonment has any 'right' to parole. Allowing argument or testimony regarding the possibility of the defendant some day being paroled is in effect inviting the jury to speculate how *ten years in the future* the parole board may exercise its legislatively granted discretionary authority. This would introduce into the sentencing proceedings an 'arbitrary factor' ….

Id. at 810-12 (emphasis in original; citations omitted). Indeed, as the Supreme Court of New Jersey held more than fifty years ago:

> That death should be inflicted where a life sentence is appropriate is an

> abhorrent thought. * * * [J]uries shall [not] weigh the death penalty against something less than a life sentence and by that process arrive at a punishment which does not fit the facts.

State v. White, 27 N.J. 158, 178, 142 A.2d 65, 76-77 (1958).

In this case, not only did the prosecutor specifically (and endlessly) tell the jurors to consider whether Mark Ströman would show violence towards people outside prison, but he specifically entered into a discourse on another case where a gang of people had escaped from prison. Thus, he injected two highly speculative factors into the case – parole and escape – without the slightest hint that there might be some evidence to support his claims. This happened without any meaningful effort by the defense to curtail his forays.

In the context of capital trials, arguments on the speculative possibility of escape have been roundly condemned them. For example, in Collier v. State, 705 P.2d 1126 (Nev. 1985), the court held:

> The prosecuting attorney also improperly commented . . . that Collier "would still have hope, hope of escape, pardon. . . ." Remarks about the possibility of escape are improper. The prospect of escape is no part of the calculus that the jury should consider in determining a defendant's sentence.

Id., 705 P.2d at 1130 (citations omitted); accord Flanagan v. State, 754 P.2d 836, 838 (Nev. 1988).

In People v. Holman, 103 Ill.2d 133, 82 Ill.Dec. 585, 469 N.E.2d 119 (1984), the prosecutor argued that a life sentence would "afford him an opportunity to escape from prison." Id., 469 N.E.2d at 133 (emphasis omitted). Thus, anything but death might be "guaranteeing down the road future innocent victims will be slaughtered." Id. The court held that this argument went beyond any fact in evidence, and that "it may not be assumed in the absence of evidence that a person convicted of murder will escape from prison. . . ." Id., 469 N.E.2d at 134. The death sentence was reversed.

This is precisely what happened here: the jurors sentenced Mark Ströman to death because they thought he would be released to kill again. This is just not true.

15. MARK STRÖMAN'S COUNSEL FAILED TO APPRISE THEIR CLIENT OF HIS RIGHT TO ALLOCUTE

Counsel told Mark Ströman not to testify at either phase of the trial, and failed to take any steps to allow the jurors to see him as a human being, notwithstanding the fact that this is a vital aspect of any capital trial. Counsel failed to consider trying to involve him in voir dire, in opening, in closing, or even urging his right to allocute.

The right of allocution, that is, the right of a defendant to address his sentencer before the passing of sentence, has been protected since the time of English common law. See, e.g., Ball v. United States, 140 U.S. 118, 129, 11 S. Ct. 761 (1891); Green v. United States., 365 U.S. 301, 304, 81 S. Ct. 653 (1961) (plurality opinion by Frankfurter, J.). Allocution has been referred to over the past 40 years as a common law right "ancient in the law," United States v. Behrens, 375 U.S. 162, 165, 84 S. Ct. 295 (1963)(Black, J.), a "traditional right," (Burger, C.J.) and an "elementary right," (Harlan, J.) of "immemorial origin." McGautha v. California, 402 U.S. 183, 217, 91 S. Ct. 1454 (1971). It exists notwithstanding the rights now given to defendants to testify and to have counsel speak for them, for, as put by Justice Frankfurter:

> None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present the [sentencer] his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Green, 81 S.Ct. at 655. Following Green, the Federal Rules of Criminal Procedure were rewritten to make explicit that which Green found in the common law: "before the imposing sentence, the court must . . . address the defendant personally and ask

the defendant if the defendant wishes to make a statement and to present any information in mitigation of punishment." Fed. R. Crim. P. 32(c)(3)(C). See Boardman v. Estelle, 957 F.2d 1523, 1529 (9th Cir. 1992)(due process affords criminal defendant due process right to speak before imposition of sentence); Harris v. State, 306 Md. 344, 509 A.2d 120, 127 (1986); Homick v. State, 108 Nev. 127, 825 P.2d 600, 604 (1992); State v. Zola, 112 N.J. 384, 548 A.2d 1022, 1046 (1988); State v. Lord, 117 Wash.2d 826, 822 P.2d 177, 216 (1991).

16. MARK STRÖMAN'S COUNSEL FAILED TO CHALLENGE THE INADEQUATE AND IMPROPER INSTRUCTIONS IN A COMPETENT MANNER

It is clear that counsel's handling of instructions is a critical element of any trial, let alone a capital one, and can result in a finding of ineffectiveness. See Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988) (counsel ineffective in penalty phase for failure to explain to jury the instruction on mitigation which had been made questionable by the prosecutor's argument).

In United States ex rel. Barnard v. Lane, 819 F.2d 798 (7th Cir. 1987), the federal court held:

> The spectrum of counsel's legitimate tactical choices does not include abandoning a client's only defense in the hope that a jury's sympathy will cause them to misapply or ignore the law they have sworn to follow. By failing to tender instructions that would allow the jury to consider . . . the option of finding him guilty of a letter offense, trial counsel defaulted in his obligation to [the accused]. * * * We find . . . that where, as here, defense counsel fails even to tender such instructions, and that failure is prejudicial to the defendant, that failure can amount to a denial of the defendant's right to effective assistance of counsel.

Id. at 805; see also Yarborough v. State, 529 So.2d 659, 662 (Miss. 1988) ("Yarborough's attorney failed to file jury instructions, the only instruction being offered on behalf of the defendant being one by the court on the right of the defendant

not to testify"); People v. Wiley, 507 N.Y.S.2d 928 (N.Y. App. Div. 1986) (counsel ineffective failing to request an unfavorable inference instruction where the prosecutor did not produce the key witness or explain the efforts to obtain the testimony); Freeman v. Class, 95 F.3d 639 (8th Cir. 1996) (affirming 911 F. Supp. 402 (D.S.D. 1995)) (counsel ineffective for failing to request cautionary instruction on accomplice testimony where the only direct evidence against defendant was the testimony of accomplice); Greene v. State, 928 S.W.2d 119 (Tex. Ct. App. 1996) (counsel ineffective for failing to request an alibi instruction and failing to object to improper charges on law of parties and mens rea); Triplett v. State, 666 So.2d 1356 (Miss. 1995) (counsel ineffective for, *inter alia*, failing to request an instruction factually embracing the defense of accidental shooting during struggle); Luchenburg v. Smith, 79 F.3d 388 (4th Cir. 1996) (counsel ineffective for failure to request expanded instruction that more accurately explained to jury that, under Maryland law, it could not convict defendant of compound handgun charge unless it first found him guilty of predicate crime of violence, and that common-law assault was not predicate "crime of violence"); Capps v. Sullivan, 921 F.2d 260 (10th Cir. 1990) (counsel ineffective for failing to request an entrapment instruction after the defendant testified in his own behalf and admitted all the elements of the offense when there was evidence to support an entrapment defense); Brunson v. State, 324 S.C. 117, 477 S.E.2d 711 (1996) (counsel ineffective in possession with intent to distribute crack case for failing to request a mere presence charge when the evidence revealed that the drugs seized were not found on either of the two co-defendants who were tried jointly); People v. Campbell, 657 N.E.2d 87 (Ill. App. Ct.), appeal denied, 660 N.E.2d 1273 (Ill. 1995) (counsel ineffective for failing to request an accomplice testimony instruction where defendant was convicted on the basis of the testimony of two

accomplices); Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) (counsel ineffective for failing to request alibi charge in criminal sexual conduct case when state's case was circumstantial, and alibi witnesses testified); Commonwealth v. Horton, 644 A.2d 181 (Pa. Super. Ct. 1994) (counsel ineffective in robbery case for failing to request an instruction on the definition of "recklessly" in regards to the defense of duress, where eyewitness testified defendant took money from victim's pocket only after told to do so by person pointing gun in his direction and defense of duress was not available if the defendant had "recklessly" placed himself in position where it was probable that he would be subjected to duress); Commonwealth v. Hutchinson, 621 A.2d 681 (Pa. Super. Ct.), appeal denied, 634 A.2d 1114 (Pa. 1993) (counsel ineffective in homicide by vehicle case for failing to request an instruction on the lighting requirement where there was evidence that tractor operator's violation of lighting requirement of motor vehicle code may have been a substantial cause of fatal accident); Watrous v. State, 842 S.W.2d 792 (Tex. Ct. App. 1992) (counsel in aggravated sexual assault on child case ineffective for failing to request a jury instruction on the statutory defense of medical care which was the sole theory of defense); Vasquez v. State, 830 S.W.2d 948 (Tex. Crim. App. 1992) (counsel in possession of firearm by felon case was ineffective for failing to request an instruction on the statutory defense of necessity); People v. Newbolds, 562 N.E.2d 1051 (Ill. App. Ct. 1990) (counsel ineffective in unlawful use of weapons by felon case for failing to request an instruction on the defense of necessity where one version of facts was that defendant's girlfriend pulled a gun on him and the weapon discharged while he was taking the weapon away from her); People v. Pegram, 529 N.E.2d 506 (Ill. 1988) (affirming 504 N.E.2d 958 (Ill. App. Ct. 1987)) (counsel ineffective in robbery case for failing to request an instruction on defense of

compulsion and prosecution's burden of proof on that issue where defendant testified that he participated in robbery because he was being forced at gun point); Commonwealth v. Gass, 523 A.2d 741 (Pa. 1987) (counsel ineffective in murder case for failing to request an instruction on verdict of not guilty by reason of insanity when sanity was clearly in issue).

Counsel's treatment of the instructions – at both phases -- was ineffective in the extreme. Counsel raised no objection to the scheme that allowed the jury to ignore evidence in mitigation, or consider parole and escape; and counsel offered essentially no instructions that would have laid out the law clearly, in such a way as to preserve the rights of his client. [3]2

17. COUNSEL'S WOEDFUL CLOSING ARGUMENT AT THE PENALTY PHASE DID MORE HARM THAN GOOD

Counsel's closing at the penalty phase was patently ineffective:

> [T]ypically ineffective assistance of counsel results from the combination of a harmful closing argument and failure to present avail able mitigating evidence. The Court has little doubt that [defense counsel's] closing argument during sentencing hurt Mathis. Where counsel focuses on his role as attorney for the defendant in a closing argument, his effort can hardly be termed an attempt to humanize his client. Rather, he achieves a separation from his client that is inconsistent with the requirements of effective representation. * * * [S]ince mitigating evidence was available, [counsel's] closing argument--a failure both for what it said and what it did not say--erodes much of the Court's confidence in this death sentence.

Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989); See also Kubat v. Thieret, 867, F.2d 351, 367 (7th Cir. 1989) (counsel ineffective when gave "grossly substandard, rambling and incoherent" argument at sentencing), cert denied, 110 S. Ct. 206 (1989); State v. Myles, 389 So. 2d 12, 30 (La. 1979) ("In his closing

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Most of the individual issues on instructions are set forth below in the sections concerning ineffectiveness on appeal, the *Penry* claim and the issues of future dangerousness and arbitrariness in sentencing.

argument the defense counsel did little more than acknowledge the existence of an aggravating circumstance, state that the confession may be regarded as a mitigating circumstance, and submit the matter to the jury.").

Lead counsel's argument was woeful. "This case is about racism and terrorism," counsel said. "And that's why you have all these people out here and that's why you have the cameras in the hall." TR21 at 65. But counsel had previously said it was about intent (or lack thereof); counsel not presented any evidence about terrorism and its impact on the case; and counsel had notably failed to explain why his client might have harbored racist beliefs – an explanation that would have dove-tailed well into the abuse that Mark had suffered at the hands of his step-father.

Counsel went on and on about Mark being a racist, to the extent that his argument sounded much more like a prosecutor asking for death. Perhaps the low point of the presentation was his summary of his client's character, which might have provoked a mistrial if it had been said by the prosecutor: "He's a racist dog…" (TR21 at 79)

In State v. Sanders, 93-0001 (La. 11/30/94), 648 So.2d 1272 the court "held that a 'perfunctory' or 'lackluster' argument, or one which does not 'emphasize to the jurors any of their legal obligations designed to prevent the arbitrary or capricious imposition of the death penalty, e.g. the requirement that they . . . weigh any aggravating circumstances found against any mitigating circumstances' constitutes ineffective assistance." Id. at 1292, citing State v. Myles, 389 So.2d 12, 31 (1979); see also, Woodward v. State, 635 So.2d 805 (Miss. 1993) (counsel ineffective for telling jury in sentencing argument that he could not ask the jury to spare the defendant's life); Clark v. State, 690 So.2d 1280 (Fla. 1997) (counsel ineffective in sentencing phase because closing argument virtually encouraged giving the death

penalty by telling jury, *inter alia*, that counsel had no choice, it was the worst case he had seen, and that the defendant was from the "underbelly of society."); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989), appeal dismissed, 903 F.2d 1368 (11th Cir. 1990)("Where counsel focuses on his role as attorney for the defendant in a closing argument, his effort can hardly be termed an attempt to humanize his client. Rather, he achieves a separation from his client that is inconsistent with the requirements of effective representation"); Burris v. State, 558 N.E.2d 1067 (Ind. 1990) (counsel ineffective in penalty phase for arguing in closing that defendant is a "street person" and counsel didn't even like him); Gaines v. Thieret, 665 F. Supp. 1342 (N.D. Ill. 1987), rev'd on other grounds, 846 F.2d 402 (7th Cir. 1988) (counsel ineffective in sentencing phase where counsel's entire closing argument was simply to ask for a life sentence without offering any reason why it should be given); King v. Strickland, 748 F.2d 1462 (11th Cir.), cert. denied, 471 U.S. 1016 (1984) (counsel emphasized during closing argument the reprehensible nature of the crime and the fact that he had reluctantly represented defendant); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952 (1992) (counsel ineffective for arguing that they were local lawyers, not "bleeding heart, anti-death penalty lawyers" and calling the defendant a "worthless man" that defense counsel hates and conceding that maybe the defendant "ought to die" during closing argument); Kubat v. Thieret, 867 F.2d 351 (7th Cir.), cert. denied, 493 U.S. 874 (1989) (affirming 679 F. Supp. 788 (N.D. Ill. 1988)) (counsel ineffective during sentencing for making a bizarre and prejudicial closing argument which conceded that counsel "was not going to convince" jury and invited the jury to "decide" between the defendant and victim); Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994), cert. denied, 513 U.S. 1120 (1995) (counsel ineffective during penalty phase of capital trial for arguing during closing

argument that 1) defendant's life should be spared so doctors could examine him as human "guinea pig"; 2) that jurors had already decided on death; and 3) that executing defendant may "free him from this horror"); Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988) (counsel ineffective in penalty phase for failure to individualize defendant as a human being before the jury instead presenting an abstract religious argument); Quartarero v. Fogg, 849 F.2d 1467 (2d Cir. 1988) (affirming 679 F. Supp. 212 (E.D.N.Y.)) (trial counsel made a pathetic closing argument in which he did not inform the jury that there was little physical evidence linking the defendant to the murder and failed to point out that a witness who initially testified that the defendant admitted that he killed the victim subsequently recanted that testimony).

O. MARK STRÖMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE FAILURE EVEN TO ASSERT HIS RIGHT TO A MOTION FOR A NEW TRIAL, LET ALONE CONDUCT SUCH A HEARING

One extraordinary aspect of the trial is that counsel apparently never bothered to file a motion for a new trial at all, and therefore Petitioner never had one.

P. MARK Ströman RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL

Appellate counsel provided Petitioner with ineffective assistance of counsel on appeal in his case. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

On appeal, counsel made a cursory presentation of just six issues:

I. Does the death penalty violate evolving standards of decency?

II. Does the US Constitution require the State to prove insufficient mitigation beyond a reasonable doubt?

III. Does the 10-2 Verdict rule violate the Constitution?

IV. Does the US Constitution require further definition of the Special Issue terms "Moral Blameworthiness" and "Probability of Committing Future Crimes of Violence"?

V. Does the US Constitution require that the Defendant be permitted to present to the jury the Defendant's family members' pleas for mercy?

VI. Did the trial court err by permitting the State to impeach the Defendant's key expert witness by eliciting the fact that she had testified for the defense in other notorious cases in which the jury imposed the death penalty?

On the lead issue, counsel wrote: "counsel is aware that this Court will likely find this issue without merit." *Brief at 17*. A less persuasive beginning to the argument for life could hardly be imagined.

On the second issue, counsel argued for placing the burden of proof on the prosecution to disprove mitigation *beyond a reasonable doubt*, but merely assumed that the prosecution should bear the burden of proof at all. Why would counsel try to scale such an insurmountable mountain, without even trying climb the foothills below it? Notably, appellate counsel was present at the trial, and actually made a lesser argument there (TR21 at 40-41), but not on appeal.

The third issue involved the 10-2 verdict. Again, counsel pointed out that "[t]his Court has repeatedly upheld the validity of the 10-2 verdict rule in the face of these constitutional attacks." *Brief at 26 n.20*. Counsel would not fault appellate counsel for noting authority that opposes his argument, but counsel should (a) search for a way to distinguish his argument from the earlier cases, or modify his argument so that it does, and (b) not lead with the issues that he concedes to be meritless under Texas law.

With the fourth issue, once again we find counsel describing how "[t]his Court has repeatedly held that the phrase 'criminal acts of violence' and the term

'probability' need not be defined … [along with] the term 'moral culpability'..." *Brief at 30 n.21*.

On the fifth issue, counsel wrote that "this Court held the admission of such testimony to be inadmissible [sic]." *Brief at 32 n.22*.

When we reach the sixth issue, finally we come across an argument that counsel does not immediately concede to be meritless. However, here, counsel mischaracterises and undercuts the true issue. The question here is not whether impeaching the witness is a "classic method of cross-examining an expert for bias." *Brief at 37*. Rather, the issue is whether the prosecutor can impeach an expert by saying that an earlier jury rejected her testimony and *imposed a death sentence*. This is a classic example of highly prejudicial hearsay – without retrying the whole of the other case, it is impossible to say whether the jury was rejecting the witness' expert testimony, or whether the defense lawyer was simply inept, or whether there were so many aggravating circumstances that the most compelling testimony in mitigation could not win the day. Counsel does eventually come around to this issue, but only after 37 pages of a 40 page brief in which he has conceded the lack of merit in essentially every issue.

Meanwhile, in a footnote, counsel noted that there were "egregious" errors in the jury selection, which made up 17 of the 21 record volumes, *Brief at 19 n.16*, but failed to raise a single voir dire issue. Why not? To be sure, they might have been rejected because trial counsel failed to preserve the issue, but such a finding is a vital precursor to the ineffective assistance of counsel claim coming down the road.

In truth, there were many "egregious" errors in jury selection. Some have already been discussed in the context of ineffective assistance of counsel (*supra*) but should also be considered as substantive issues. Others were raised at the time of trial,

and should have been raised on appeal. For example, with Venireperson Mary Holt, trial counsel claimed that she should have been struck for cause both for this and because she would not consider mitigation. (TR6 at 162) Indeed, Ms. Holt said, "the way I'm looking at it is, if I find – if they prove that this is true or that he is guilty of this, then that would be automatically that he is a threat to society. So they would go hand in hand." (TR6 at 157-58) The challenge was denied.

Counsel had various other issues that counsel could have forcefully presented. The brief he did write was thoroughly ineffective. See, e.g., Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995) (appellate counsel ineffective for failing to raise Brady claim or, in the alternative, ineffective counsel claim when trial counsel had failed to challenge the prosecution's failure to disclose exculpatory material); Mayo v. Henderson, 13 F.3d 528 (2nd Cir. 1994) (appellate counsel ineffective for failing to raise a claim on direct appeal when the New York Court of Appeals had previously held that it would apply a per se reversal rule on this issue and claim was preserved at trial); Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1991) (appellate defense counsel's performance in failing to raise on direct appeal issue of whether prosecutor improperly commented on defendant's failure to testify during closing argument was objectively unreasonable and deficient); Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990) (appellate counsel ineffective for filing a two page brief (when nonfrivolous issue could have been raised) requesting that the court of review simply check the record for errors patent without identifying any specific grounds for appeal); Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989) (appellate counsel rendered ineffective by failing to raise on appeal a Faretta claim, the right to voluntarily elect self-representation; because counsel did not fully review trial court file or talk with defendant or defendant's trial counsel, appellate counsel did not know of the state trial

court's denial of defendant's request to proceed pro se); Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987) (appellate counsel ineffective for failing to raise on appeal issue of error in admitting evidence of defendant's post-arrest silence--where comment violated defendant's Fifth Amendment rights); Matter of Personal Restraint of Maxfield, 945 P.2d 196 (Wash. 1997) (en banc) (counsel ineffective for failing to raise on appeal the state constitutional issue of privacy with respect to electricity consumption records where records had been voluntarily provided by commissioner to drug task force); State v. Reed, 660 N.E.2d 456 (Ohio 1996) (appellate counsel ineffective for failing to raise issue concerning the trial court's denial of appellant's request to represent himself in his drug abuse trial); People v. Mack, 658 N.E.2d 437 (Ill. 1995) (appellate counsel ineffective for failing to raise as issue the fact that the jury verdict form finding an aggravating circumstance (commission during robbery with intent or knowledge of strong probability of death or great bodily harm) and finding death eligibility omitted an essential element of the factor (intent or knowledge)); People v. Salazar, 643 N.E.2d 698 (Ill. 1994), cert. denied, 515 U.S. 1116 (1995) (appellate counsel ineffective for failing to raise during direct appeal issue of whether voluntary manslaughter instructions erroneously gave the prosecution the burden of proving mental status which reduced murder to manslaughter); Clark v. State, 851 P.2d 426 (Nev. 1993) (appellate Counsel ineffective for failing to raise abuse of discretion in adjudicating defendant a habitual criminal where he was not actually adjudicated as such and trial court may have mistakenly believed that his authority to punish the defendant was limited to deciding what sentence to impose once the requisite number of felony convictions had been established); Ex parte Daigle, 848 S.W.2d 691 (Tex. Crim. App. 1993) (appellate counsel ineffective for failing to raise as issue trial court's denial of defendant's timely

motion for jury shuffle which was a reversible error); Watkins v. State, 632 So.2d 555 (Ala. Crim. App. 1992), cert. denied, 114 S.Ct. 2153 (1994) (appellate counsel ineffective for failing to supplement record to establish Batson claim); Meyer v. Singletary, 610 So.2d 1329 (Fla. Dist. Ct. App. 1992) (appellate counsel ineffective for failing to raise per se reversible error that judge failed to provide notice to prosecution and defense before responding to deliberating jury's request to review evidence); People v. Logan, 586 N.E.2d 679 (Ill. App. Ct. 1991) (appellate counsel ineffective in murder case for failing to argue issue pertaining to admission of victim impact evidence in guilt phase where state referred to families during opening and closing, widow testified about children, and a picture of the victim's family was put in evidence); State v. Sumlin, 820 S.W.2d 487 (Mo. 1991) (appellate counsel ineffective for failing to argue that a newly amended drug sentencing provision should be applied to reduce the defendant's sentence); Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective for failing to raise an obvious reversible error on direct appeal, i.e., the guardian ad litem of the child criminal sexual assault victim was the only person to testify regarding the identity of the perpetrator and the details of the incident); People v. Ferro, 551 N.E.2d 1378 (Ill. App. Ct.), appeal denied, 561 N.E.2d 698 (Ill. 1990) (appellate counsel ineffective for failing to raise issue concerning trial court's comments which forced jury to reach a verdict by threatening that they would stay at hotel until they did); Dunn v. Cook, 791 P.2d 873 (Utah 1990)(appeal counsel ineffective for filing a brief that merely recited the prosecution and defense evidence, stated only four issues in single short sentences, presented no argument, listed cases but did not state case facts, did not even cite record in 2 of the 4 issues, and failed to raise a number of substantive issues later identified by habeas counsel); Ragan v. Dugger, 544 So.2d 1052 (Fla. Dist. Ct.

App. 1989) (appellate counsel ineffective for failing to allege as error trial court's failure to state with particularity its justification for retention of jurisdiction (based on state law requirement)); People v. Reyes, 542 N.Y.S.2d 178 (N.Y. App. Div. 1989) (appellate counsel ineffective for failing to raise Batson when the prosecution removed all Hispanics from the jury); Whitt v. Holland, 342 S.E.2d 292 (W. Va. 1986) (appellate counsel ineffective for failing to communicate with his client, failing to raise several important issues, including ineffective assistance during the trial, and exhibiting "a lack of conscientious attentiveness to the record."); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) (appellate counsel ineffective for failing to brief issues of sufficiency of evidence of premeditation and propriety of death sentence and failing to adequately prepare and present oral argument); see also Jenkins v. Coombe, 821 F.2d 158 (2nd Cir. 1987), cert. denied, 484 U.S. 1008 (1988) (defendant was completely denied assistance of appellant counsel where counsel filed a clearly deficient five page brief containing only one point; on 14th amendment due process grounds, defendant had a right to an attorney until a proper appellate brief had been filed).

Q. MARK Ströman RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS POST-CONVICTION PROCEEDINGS

Post-conviction counsel labored in a system that provides woefully inadequate resources for those who are charged with preserving the rights of those who are facing execution. That said, though, the state post-conviction petition illustrates how counsel approached the case without regard to the function of post-conviction relief.

The essence of state habeas is to review *new facts* that were either not available to, or not considered by, the trial court.[24] Thus, the essence of state post-conviction is *factual* investigation. The state habeas petition reflects no factual development at all. The six allegations made in the state habeas petition are as follows:

> 1. IAC on failure to challenge Jurors Kuehn, Gurley, Swint; failed to use peremptories. (at 13)
>
> 2. False impression that he had been convicted of Agg Robbery as a juvenile. (at 55)
>
> 3. IAC on the failure to correct the false impression that he was convicted of Agg Robbery. (at 65)
>
> 4. IAC failure to challenge hearsay.
>
> 5. IAC Failure to present a consistent theme.
>
> 6. Cumulative error.

None of these resulted from any factual development. They were all issues derived directly from the record. Even so, as illustrated by this petition itself, even these issues reflect a very limited review of the trial record: there are far more significant questions of ineffectiveness, other issues involving voir dire, and powerful

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[24] That is not to say that a state post-conviction petition does not address factors that are apparent from the trial record: of course it does, sometimes in the procedural context of ineffective assistance of counsel, sometimes where the law has changed, and sometimes because a substantive issue is involved that would change the legal landscape. However, it is essential to conduct a complete investigation.

substantive issues. In every case, either counsel should have raised them in the first state post-conviction petition (in which case he rendered ineffective assistance) or they are timely raised now anyway.

The central focus of this case is, and must be, the fact that the victims do not want Petitioner executed. State post-conviction counsel agrees with this, and has written:

> While I represented Mark Ströman, I was not aware that the victim's families and in particular, the surviving victim Rais Bhuiyan, did not support the death penalty and wanted to play a role in Mark's rehabilitation. There was nothing in the record to suggest this. Knowing that the victim's family did not support Mark's execution would definitely have affected what issues I raised in the petition.
>
> Indeed, in retrospect I wish I had contacted the victim's family to understand fully their perspective on Mark's execution. I regret not doing so.
>
> VII. However, I believe the trial lawyers, both for the prosecution and for the defense failed in its obligations under the Texas Victims' Bill of Rights with regard to their relationship with the surviving victim and the victim's family. Having Rais Bhuiyan testify for defense at the sentencing phase about his conviction that he should assist Mark's rehabilitation would have been a compelling piece of evidence for the jury to hear. Jim Oatman's failure to enter into a dialogue with the victim's family is consistent with ineffective assistance of counsel.

Exhibit D.

Thus, as counsel says, at the very least the failure to approach the victims to sound out there position on the case must be central to ineffective assistance of counsel. The investigation is also relevant to the other issues set forth above.

R. MARK Ströman'S TRIAL WAS FATALLY TAINTED BY "JUROR MISCONDUCT"

The Texas Constitution preserves the right to trial by jury, and the process must be maintained in its "purity". Tex. Const. Art. 1, § 15 ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.").

Unfortunately, this was not what happened. Juror Reeves correctly believed that there was a reasonable doubt concerning the motive behind the shooting – whether it was actually committed for the purpose of a robbery (which she doubted) or some other reason. She was bullied by other jurors into voting that Mark Ströman was guilty of capital murder, instead of murder. See *Exhibit F*.

Kenneth House similarly did not believe that robbery was the motive for the offence. See *Exhibit I*. Due to the inadequacy of the instructions, however, and the failure by defense counsel to argue the truthful and sensible theory of the case, he did not realize that this meant that he should vote for murder rather than capital murder.

Meanwhile, the jurors were misinformed to the effect that Mark Ströman's tattoos meant that he had already killed once before, see *Exhibit H*, thereby fatally tainting the jury and ensuring that they would vote Mark Ströman guilty.

Finally, at the prompting of the prosecution, the jurors discussed what they viewed as the likelihood that Mark Ströman would get out – either through parole or escape – as the basis for a verdict of death.

In isolation or in combination, these facts rendered the jury verdict flawed under the federal and the state constitutions.

In *McIntire v. State*, 698 S.W.2d 652 (Tex. Crim. App. 1985), the conviction for aggravated sexual assault and indecent liberties with a child was remanded for a

hearing because of several possible acts of jury misconduct, including a third party communication with a juror, and discussion of parole. One of the appellant's own character witnesses remarked "What do you do with a guy like that?" which was sufficient to raise a rebuttable presumption of injury to the defendant. Also, a juror admitted to discussing parole and this alone was sufficient to sustain appellant's motion for a hearing on a new trial.

In *Buentello v. State*, 826 S.W.2d 610 (Tex. Crim. App. 1992), a voluntary manslaughter conviction was reversed and remanded back to the trial court because two jurors were found to have misstated the application of the parole law, leading to at least two jurors voting for a harsher punishment that they would have if the misstatement had not occurred.

In *Johnson v. State*, 652 S.W.2d 541 (Tex. Ct. App. 1983), an aggravated robbery conviction was reversed and remanded because jurors misstated application of the parole law which resulted in one juror agreeing to a 75 year sentence because she believed that the defendant would only serve 20 to 30 years. The juror indicated that she would not have voted for such a harsh punishment if the discussions of parole had not occurred. See also *Collins v. State*, 647 S.W.2d 719 (Tex. Ct. App. 1982) (conviction for burglary with intent to commit theft was reversed and the case remanded for a new trial because the jurors extensively discussed the impact of parole on defendant's sentence); *Grismore v. State*, 641 S.W.2d 593 (Tex. Ct. App. 1982) (aggravated robbery conviction was reversed and remanded for a new trial because juror's discussions about parole caused one juror to change his opinion on sentencing); *Munroe v. State*, 637 S.W.2d 475 (Tex. Crim. App. 1982) (sentencing was reversed and his case remanded for a new trial because the jury discussed the possibility of parole and some jurors changed their sentencing verdict as a result of

such discussions); *Sanders v. State*, 580 S.W.2d 349 (Tex. Crim. App. 1978) (aggravated assault conviction was reversed and remanded because the jurors' discussions about parole law caused two jurors to change their vote from probation to confinement); cf. *Cross v. State*, 627 S.W.2d 257 (Tex. Ct. App. 1982) (DUI conviction was reversed and remanded because of juror's discussion of the prison's rehabilitation facilities); see also *Rasbury v. State*, 832 S.W.2d 398, 399 (Tex. Ct. App. 1992) (jurors could testify to statements made by other jurors "if the statement is relevant to the validity of the verdict.").

S. THE NOTION THAT A DECISION-MAKER COULD MEANINGFULLY PREDICT FUTURE DANGEROUSNESS IN PETITIONER'S CASE FLIES IN THE FACE BOTH OF HUMAN EXPERIENCE AND THE CONSTITUTION

The jury was asked to make the following, impossible and implausible finding:

> "Special issue number one: Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Mark Anthony Ströman, would commit criminal acts of violence that would constituted 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. Signed Lloyd Roberts, presiding juror."

(TR21 at 91)

This element of the Texas Death Penalty statute has attracted as much criticism as any over the years. The time has come for everyone to agree that predicting the "future dangerousness" of a prisoner is beyond the ken of mankind.

T. MARK STRÖMAN HAS NOT COMMITTED CRIMINAL ACTS OF VIOLENCE, BUT HAS WORKED TO REHABILITATE HIMSELF AND HAS DONE MANY KINDNESSES

In this case, the jurors' assessment has already been proven effectively wrong. Ten years have gone by and Mark Ströman has not committed criminal acts of violence, has not been a continuing threat to society, and has done many kindnesses to his fellow humans.

Exhibit K, attached, is a copy of the clemency petition filed by Mr Ströman. It reflects a wide array of the kindnesses that Mr Ströman has done for people in far flung places.

As previously mentioned, this is not a matter of *re*-habilitation, but of Mark learning lessons for the first time – and unlearning the lessons inflicted on him by his savage stepfather. While Mark would be the first to admit that he has thus far only walked a part of this road, he has made very positive strides towards bettering himself and fulfilling the aspirations that each victim shares for him.

First and foremost, Mark has reached a position where he able to accept what he did, acknowledge how terribly wrong it was, and apologize to the victims. He has written to Rais and to the widows of Mr. Patel and Mr. Hasan.[25] He and Rais have both wanted to meet for a long time, but this has thus far not been rendered possible by the TDCJ.

In contrast to the first 31 years of his life, in the 9 years since he was sent to death row in April 2002, Mark Ströman has tried to make something of his life. He would be the first to concede that he has a long way to go before he makes himself into the type of character he would want to be, even supposing he is to be allowed the

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[25] He has wanted to do this for a long time, but had been informed that the policies of the TDCJ forbade any contact between death row prisoners and their victims.

time. But he has slowly struggled, trying to come to terms with where he comes from, what he has done, and where he would like to end up.

Mark has been a faithful friend to many people since being sent to death row. One vignette is particularly illustrative of his efforts. In 2004, he began writing to a 78-year old lady living just north of London, Mrs. Margaret Meakins. At the time, she was deeply depressed, she had lost her husband, been moved into an old people's home, and had effectively given up the will to live. Her daughter Linda had tried everything she could to cheer her up, without success, when finally she set on the idea of getting her to write to someone on death row. Without ever asking for anything in return, Mark scrupulously corresponded with her for the next seven years, often writing twice a week, encouraging her and teasing her kindly in every letter. Today, she has shed her depression, and has recently moved back into the family home. Both mother and daughter put her change in spirits down almost exclusively to Mark's devotion to their friendship. See *Exhibit K, Attachments 4, 5.*

"Mark's wonderful letters have arrived every week for the past 2-3 years," Mrs Meakins reports. "They are filled with caring and support for me, he makes me laugh, gives me good practical advice, and he has made me think!" See *Exhibit K, Attachment 4*. "I do not know what I will do if you execute him," she writes, "you may as well take my life from me!"

Predictably enough, for all the good that Mark has done for her mother, Linda Meakins expects Margaret to plumb the depths of her previous depression if Mark is executed. See *Exhibit K, Attachment 5*.

Mark Ströman's friends are not merely lonely grandmothers. Linda Meakins is very well-connected with the music industry. Because of this, Mark Ströman's influence has reached far beyond the fence of the Texas penitentiary. "I am arranging

a concert to commemorate the tenth Anniversary year of the 9/11 terrorist attack," writes Linda Meakins. "Both Rais Bhuiyan and Mark will have pre-recorded messages shown at the concert." In this way, the victim and the perpetrator have come together in an effort to repair some of the wounds created by the 9/11 terrorist attack. What is the justice system if it is not designed to encourage precisely this kind of reconciliation?

Mark Ströman's friends range far and wide. For example, Susan Shaffer is from Germany. She writes in a way that shows that English is not her first language, but perhaps she puts it well: "Give him a chance to keep regretting what he did years ago." *Exhibit K, Attachment 15*.

Another of his friends is Terrence Gibbs, works with the UK Border Agency (the equivalent of the US Department of Homeland Security). "I am no soft touch or bleeding heart," writes Mr. Gibbs. "My work as a senior enforcement officer of the UK Border Agency involves me sending failed asylum seekers and illegal immigrants back to their own countries and I have fought my governments side for many years in immigration courts pressing for the removal of illegal immigrants." *Exhibit K, Attachment 7*.

"I was however struck by his honesty in addressing the issue and his remorse for what he had done," continues Mr. Gibbs. "It is clear that he now fails to understand what motivated him to take the actions he did. He does however fully appreciate they were very wrong."

Similarly, Sue Fenwick is a 62-year-old Government officer in the UK. She worked at a senior level in maximum security prisons for many years. This convinced her that some could try to make up for their offenses by trying to help others. "I appreciate and believe of course that every crime should receive

punishment, but the Mark Stroman who came to death row in 2002 is a very different person to the one he is today and I have seen him grow, mature and develop over the years I have known him. Indeed, some years ago when I suffered a particular tragic family bereavement it was Mark who continued to offer me guidance and support far longer than close friends over here. They were wonderful of course, but life goes on and it was Mark who recognised and realised that I still needed that level of support and gave it for a considerable time."

"Not only does he so much regret his personal actions following the 9/11 tragedy, but he also has one of his victims doing all he can in an endeavour that this life should be spared and this surely should carry a lot of weight in your deliberations," she continues. "I am proud to call Mark Stroman a friend and I sincerely hope that you will consider his life with the compassion and humanity that he has shown quietly to so many during the years I have known him."

Annette Bryant is a retired supervisory investigator from the Texas Attorney-General's Office, the Department of Victims of Violent Crimes – someone who is intimately involved with the suffering of victims such as Rais Bhuiyan. She, too, has come to learn of the positive side of Mark Ströman even though she came to their friendship with her prejudices fully intact. "When I worked for the Victims of Violent Crimes, I believed all inmates were monsters and believed they should be hung from the highest tree," she writes. "Since knowing Mark, I have found that not to be true at all." *See Exhibit K, Attachment 16*.

"Mark told me that the victim, Mr. Bhuiyan, is one heck of a man and that it took a lot of guts to forgive him…"

Ms. Bryant understands in some way the perverse anger that exploded in Mark Ströman in the wake of 9/11. "I know he did what he did he thought he was doing out

of love for his country and it was done in anger. He was watching television when he saw the Twin Towers go down. He watched his country under attack on our own land! Obviously what he did was wrong, and at the very least he is going to pay for it with life in prison, but he is sorry and he prays for forgiveness every morning and for their families who have also forgiven him as well as other Muslims."

"He accepts full responsibility for what he did and has accepted that he must be punished," Ms Bryant concludes. "Mark says his prayers every morning and is very religious. God has forgiven him. I pray for Mark to get life; Mark is NOT a monster and he certainly does not deserve the death penalty!"

A large number of others have also insisted on coming forward to attest to the manner in which Mark is reshaping himself.

"I am myself of mixed race," writes Laura Sheehan, another of Mark's friends from the UK. "My mother is Anglo-Indian and my father is Irish & English. Because of my colouring, people have often mistaken me for being of Middle Eastern descent… Also, at the time I began corresponding with Mark, I worked in a convenience store." *Exhibit K, Attachment 3.*

Obviously, this connection with the victims in this case might have made Ms Sheehan pause before befriending Mark Ströman. Fortunately, it did not deter her. She has come to know him well. "He has restored his faith in God, and along the way restored mine too, and has repented for what he did," she writes. "He is full of remorse and accepts responsibility for his actions"

"I started to write Mark Ströman 4 years ago while I was fighting off breast cancer," writes Valerie Cooper. "I am not a feeble or weak minded person but at that point in my life I was experiencing feelings of hopelessness and futility and had found it difficult to keep positive and keep going." See *Exhibit K, Attachment 6*.

While she hoped to do some good in what she feared might be the waning days of her own life, she discovered in Mark someone who helped her through her own traumas with cancer.

Mark has been a friend with a "heart the size of Texas" who has brought her strength. Indeed, he seems to have made a habit out of this. He has written a total of *one hundred and twenty-three* letters to Sheila Furniss, another British lady who had cancer, raising her spirits and helping to give her the will to live. This has been an act of friendship for which she will forever thank him. *Exhibit K, Attachment 11*.

Mark Dowd is a TV broadcast journalist based in Spain. He is also a religious man, a former Dominican Friar. He met Mark Ströman when he interviewed Mark for a documentary series called *The Children of Abraham*. The program explored the tensions between the different children of Abraham – Christians, Jews and Muslims. While their initial contact was purely professional on Mr. Dowd's part, the journalist was so impressed with the prisoner's sincerity that their relationship developed into friendship. *Exhibit K, Attachment 8*.

"Mark's faith has matured and deepened," Mr. Dowd reports. "He knows 'remorse' is a gift of grace and something from the heart and not an empty formula of words. He now knows that violence and lashing out only perpetuates the bad state of affairs. When he speaks of such things, he speaks from the heart and shows the touches and subtleties of tone and expression that only a man touched by God in some profound way could possibly demonstrate."

Clearly, Mr. Dowd writes, the person who is facing execution on July 20, 2011, is not the person who lost total control of himself and his senses after September 11, 2001. We would be executing a very different person from the man we sentenced to death.

"It has been quite a humbling experience," writes Conna Wright, a medical officer, "to see Mark moved to tears when acknowledging the irreparable harm his actions caused to so many. What I found truly amazing was to see not only those tears on many occasions but also the look of deep regret on his face as he spoke of the realization of the irreparable harm caused not only to the victims but to their families, friends and to his family and friends as well." *Exhibit K, Attachment 10*.

"I once asked Mark about the many tattoos he has and their meaning," Ms. Wright continues, "and he was quite open in his response. After explaining the meaning he lowered his head and said, 'The real meaning is they were about a little boy trying to look tough to keep the bad guys away.'" To be sure, Mark Ströman made such mistakes when he was young; but as Ms Wright says, his wish now is to turn the tragedy of his own childhood into a positive lesson for young people who might follow the path upon which he wishes he had never embarked.

Indeed, another of Mark's friends is a psychiatric nurse, Rhona Brown. *Exhibit K, Attachment 13.* She does not come from an anti-death penalty perspective – in some cases she believes that it can be a just punishment. Yet here, her long experience with mental health matters leads her to the clear conclusion – supported by a history that goes back to Mark Ströman's childhood – that his mental problems were the precipitating factor in the crimes for which he is on death row.

Other friends without Ms Brown's expertise have known Mark Ströman long enough to recognize some of the tragedy that made him. "To someone like me who grew up in an atmosphere of parental love and care, it became clear soon that Mark's childhood must have been quite different," writes Regina Fensterer, a retired teacher. "Still, one soothing picture of his boyhood days keeps coming up for comfort: himself and his grandfather driving a tractor. Nothing out of the common, one could say. But

others have lots and lots of such memories, where he has only one." *See Exhibit K, Attachment 17.* We all know why Mark Ströman ended up where he is today: if there were to be a trial of cause and effect, surely his step-father Doyle Baker would be in the dock.

Mark would be the first to say that none of this justifies what he did, or validates in any way the views he has held that were palpably wrong: yet a sentence of life imprisonment is a very, very harsh punishment. His efforts to improve himself have been difficult, and without any meaningful professional help. But he is making the effort, as best he can.

Rais expressed the hope that Mark Ströman would learn to turn his life around and contribute positively to a world where reconciliation may overcome hatred. Mark has already managed to coordinate with Rais Bhuiyan in a number of ways. He would be the first to stress that the overwhelming proportion of the good that has come from this interaction has been on account of Rais, because it is Rais who has demonstrated the power of compassion. Yet, just as Mark's work with the documentary helped to highlight a more positive response to the horrors of 9/11, so the advocacy by Rais has touched people around the world in a very positive manner. Consider, for example, the following post on a Muslim website by someone calling himself Shahnazz, a Junior Member of Turn-to-Islam:

> Subhan Allah, this is a beautiful example of the true teachings of Islam and how your average everyday Muslim CAN indeed make a difference in a world full of hatred and violence. Although I can't say I would have taken the same path as him, I will definitely acknowledge that this man's decision makes him a better Muslim than I can ever be. I can't post the article in it's entirety here, but I can guarantee that all who read it will truly be touched in some way.

Exhibit K, Attachment 12. This is the promise that Mark – working with Rais, his victim – holds out.

Between them – mostly Rais, but with an ever-increasing contribution from Mark Ströman, just as Rais hoped – this perpetrator-victim combination attracts others who are inspired by what has happened here. "As I stated earlier, I have forgiven the man who raped me and the man who murdered my cousin," writes Danielle Allen. "But the level of compassion Mr. Rais Bhuiyan and the widows of Mr. Hasan and Mr. Patel have shown is remarkable. Mr. Rais Bhuiyan, is an inspiration! He has traveled around the country and devoted his life at this time to saving Mark's life. He has shown how caring the human spirit can be. He has impacted me on a level that I never dreamed possible." (*Exhibit K, Attachment 19*)

How can it possibly be said that this man "needs to die, plain and simple"? How can it be said that another act of violent revenge will render the world a better place, rather than allowing Mark and his victim to work together towards a broader promise of reconciliation?

U. SHOULD THE STATE OF TEXAS BE PERMITTED ONE FINAL CRUEL AND UNUSUAL PUNISHMENT BEFORE COMMONSENSE PREVAILS: SINCE THIS ISSUE IS A SUBSTANTIVE QUESTION THAT WOULD SHIFT PETITIONER OUT OF THE CLASS OF THOSE WHO COULD LEGITIMATELY BE EXECUTED, IT IS TIMELY RAISED

This is an important substantive issue that cannot be barred from review because it was not raised earlier. This claim would lift Petitioner out from the group of those eligible for the death penalty, since if the future dangerousness element of the case is declared unconstitutional, as it should be, Petitioner simply could not be sentenced to death. [62]

Thus, were the State to argue that such a ruling could not be applied to Petitioner, the State would essentially be taking the position that Texas should be allowed just one more cruel and unusual punishment before the ruling should take effect.

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[26] The creation of a new death penalty statute in Texas, if that is what happened, would not change this, as it could not legally be applied against Petitioner without violating the ex post facto provisions of the US Constitution. Any change to create a minimally constitutional system similar to those of other states would not be merely procedural, but would fundamentally alter the nature of the facts necessary to impose a death sentence. "There is perhaps no provision of our state or federal constitution founded on broader and juster views of human rights and liberty than that which prohibits *ex post facto* laws." Lindsey v. State 5 So. 99, 100 (Miss. 1888). Shortly after the foundation of the Nation, the Supreme Court condemned any law "that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Calder v. Bull, 3 Dall. 386, 390, 1 L. Ed. 648 (1798); accord Miller v. Florida, 482 U.S. 423, 429, 107 S. Ct 2446, 96 L. Ed. 2d 351 (1987) (application of revised sentencing guidelines law to petitioner, whose crimes occurred before the law's effective date, violates the Ex Post Facto Clause of Article I of the Federal Constitution.).

1. THIS CASE ILLUSTRATES THAT TEXAS' LETHAL EXPERIMENT WITH "FUTURE DANGEROUSNESS" HAS BEEN AN ABJECT AND UNCONSTITUTIONAL FAILURE

The facts of this case show how impossible it is to make a meaningful assessment of "future dangerousness" under the vague and arbitrary procedures that have been developed in Texas on this issue.

2. THE JURORS WERE GIVEN NO MEANINGFUL GUIDANCE ON THE MEANING OF FUTURE DANGEROUSNESS

When asked about their understanding of future dangerousness, as defined in Texas, the jurors made two things clear: one, that they had no real idea what they were talking about; and two, that no two people agreed on what was meant. One juror was excluded because he felt it should involve a future murder. *See supra*. Another felt that a crime of violence might include using a bulldozer. TR6 at 54 (Juror Eades: "Let me think about it. *** I mean violence to a house or something doesn't seem – I don't know, it's a tough one. Criminal acts of violence, I would see that if you're being violent it doesn't have to include a person, if you went and bulldozed a house of something."). Other jurors took a very different view, thinking a bulldozer would not be enough. TR8 at 55 ("Where harm is done to another individual through, say, a gun, a knife.")

Some jurors thought that conviction for murder was sufficient proof of future dangerousness. As Venireperson Mary Holt said, "the way I'm looking at it is, if I find – if they prove that this is true or that he is guilty of this, then that would be automatically that he is a threat to society. So they would go hand in hand." TR6 at 157-58; see also TR15 at 35 (Laura Nadwairski: "I truly think that if somebody goes out there and – I don't care for what reason it is they go[] out there and kill, even if he's a heroin dealer and your daughter died from heroin. I feel that if you had the strength to go out and kill somebody like that you are very capable of doing it again.").

Some, including Juror Davis, suggesed that to "physically harm someone or threaten them" would fit the definition of future dangerousness. TR10 at 96. But of course this could be self-defense, or any other form of justifiable violence. Surely

doing an act fully sanctioned by law that should not be sufficient to justify death? This was a distinction that even the prosecutor did not make. TR5 at 138 ("A lot of people have said that's something directed against another person, either physically harming them or threatening them with physical harm").

There is not just the issue of what constitutes "future dangerousness", but also what level of certainty the juror had to have to find this factor. The prosecutor suggested that this would be 51%, more likely than not. TR13 at 57 (Juror Warren thought it should be "more likely than not"). But what does this mean? Did the jurors have to be sure "beyond a reasonable doubt" that there was a "preponderance of the evidence" that Mark Ströman would commit these acts of violence? In other words, was this a matter of being very convinced that something might happen, or marginally convinced that something was very likely? The prosecutor himself told the jurors that they could be all over the shop on this if they liked. TR5 at 137 ("Now, you can set it higher. I mean, you can set it 60, 70, 80, whatever you want. That's up to you. But it's a bear [sic] minimum. Can you see where to be a probability it has to be at least 51[%]?").

3. THE PROSECUTION REPEATEDLY SOUGHT TO HAVE THE JURY CONSIDER MARK STRÖMAN'S PURPORTED THREAT TO A PUBLIC "SOCIETY" WHERE HE WOULD NEVER LIVE

The prosecutors sought to persuade the jurors that Petitioner would be a threat to the "free world" society – without any evidence that Petitioner would ever again be in that free world. Indeed, this is ultimately the conclusion that most jurors came to.

Defining "society" in the future dangerousness as both the prison and non-prison populations, TR4 at 15, can only be relevant if the State proves that Petitioner will be in the non-prison population, a point made (albeit in support of his wrong-headed argument) by the prosecutor prior to trial:

> "Same thing. Except the argument here would be the defense would sometimes say, well, you can consider the non-prison population if the state proves to you that the defendant will be outside the penitentiary. Again, there's no burden on the state to prove that before the jury considers non-prison population."

TR4 at 15.

What the state is arguing here is that they can ask the jury to speculate that the defendant will be free again – either when paroled or after escaping – when he actually never will be. As discussed above, this is highly improper and quintessentially not what the state should be doing. It undermines the most powerful argument the defense has – why do we need to kill him now as he is going to die in prison anyway?

This issue alone injected total arbitrariness into the process.

4. THE LETHAL EXPERIMENT MUST END: AFTER MORE THAN THREE DECADES IT IS CLEAR THAT THE TEXAS PROCESS IS ARBITRARY AND CAPRICIOUS AND FAILS TO DISTINGUISH THOSE WHO MAY BE A FUTURE DANGER FROM THOSE WHO MAY NOT IN A CONSTITUTIONALLY ACCEPTABLE MANNER

If there is one matter that is clear, it is that this fatal experiment must come to an end. Neils Bohr, the Danish Physicist, said that "Prediction is very difficult, especially about the future." On the other hand, 35 years ago the Supreme Court optimistically rejected the notion "that it is impossible to predict future behavior and that the question is so vague as to be meaningless." Jurek v. Texas, 428 U.S. 262, 274 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 279 (White, J., concurring in judgment).

Perhaps the question is who is right: Neils Bohr or the plurality of the Supreme Court in Jurek. Posed so harshly, Justice Stevens would probably agree in hindsight that Neils Bohr was correct. See Baze v. Rees, 553 U.S. 35 (2008) (Stevens, J., concurring) (concluding that the underpinnings of the 1976 cases upholding the death penalty, including *Jurek*, were flawed, and that "the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes"). Recently, an increasing number of experts agree with this conclusion. See Frederick Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 Ct. L. Rev. (2011) ("This Article focuses on that problem in an area where the assessment of future dangerousness is particularly rigorous: sex offender civil commitment. Even here the prediction problem may be intractable.")

Yet there is a narrower ground on which this Court should rest its verdict. If an error is made on a bail application, it may be redressed. Even if a putative sex offender is wrongly committed, he may be released. Here, we deal with the death

penalty: when a mistake is made in deciding that Mark Ströman should be put to death, there is no redress short of reincarnation. The issue, then, is whether the past 35 years have taught us that Texas' process – putting people to death based on highly improbable predictions of future dangerousness made by wholly inexperienced and dubiously instructed juries – has passed its sell-by date.

The answer must be that it has.

5. THE JURORS WHO SENTENCED MARK Ströman TO DEATH WERE NOT PERMITTED FULLY TO CONSIDER EVIDENCE IN MITIGATION

Prior to trial, the defense filed a "Motion and Order to Impound (sic) Specific Questions to Veniremen regarding the Burden of Proof on Special Issue Mitigation." TR4 at 7. The State objected. TR4 at 7-8. Court reserved ruling, then denied it. TR4 at 11. Similarly, prior to trial the Court excluded various themes in mitigation, which the prosecution thought was "just simply is offered to invoke sympathy which is not a relevant matter on special issue number two." TR4 at 19; see *id*. at 20.

The jurors were very clear that they would violate Petitioner's right to have all evidence in mitigation fully considered. Intoxication was not mitigating, "[t]hat's your responsibility." TR5 at 48. Indeed, for some jurors it was specifically aggravating. TR8 at 61 (the use of drugs and alcohol "compounds the problem. And the person who does the drugs is responsible for their actions, the same as alcohol.").

The prosecutor said that was fine. One person's mitigating may be another person's aggravating. "There may be some people who say, well, look at all the good things he did in his life. Maybe that ought to lessen his punishment. And maybe an equal number of people would say, look at all the opportunities he had that other people didn't have, and yet he still goes out and kills someone. So it may be aggravating to other people." TR8 at 59.

Various jurors stated that age over 18 should not matter – meaning that age could never be a mitigating circumstance, since if the defendant were under 18 he could not face death. TR5 at 47.

Some thought that insanity would make a good mitigating circumstance, "whether they have a history of mental problems and are unable to control themselves." TR8 at 57; see also TR8 at 60 ("Again, I would like to know their mental state – their mental state as to whether they knew what they were doing, basically."). In other words, the defendant would have to be not guilty by reason of insanity for mental health to be a mitigating circumstance. Again, this would be a *defense* in Texas, so this is clearly not mitigation.

The only "mitigating circumstance" that the prosecutor thought sufficient to mitigate a sentence was mental retardation. TR5 at 140 (explaining Special Issue 2 with direct reference to Johnny Paul Penry, over defense objection, suggesting that it was "to take into account things like mental retardation or other items that you think might be important enough to change the death sentence into a life sentence."). Again, of course, if the defendant were mentally retarded he would not be subject to the death penalty in the first place.

Some jurors just came right out with it and said they thought that if they found him guilty of capital murder, that meant that there could be no mitigating circumstances. TR5 at 140 (Juror Adams: "it seems odd to me, because it would have been determined probably in the first part"); TR10 at 150 (Juror Sheehan said that, being asked the question, she could not think of anything that would lessen the blame for murder).

Beyond the question of what might be considered mitigating, there was the question of how the juror would make that assessment. Here, every juror was told that there was simply no burden of proof assigned on this issue, e.g.:

> "There's no burden of proof on either side in Special Issue Number 2. That's really up to you. If you see it, whatever it may be, and you say, I think that's important enough to spare his life, I don't think death is appropriate , you answer it 'yes' and he gets a life sentence."

TR8 at 58; see also, e.g., TR5 at 143 ("On [Special Issue] number two, no one has a burden of proof.")

And yet, as is true in most trials, the jurors were meant to make this decision while not actually understanding what mitigation really should be:

> Q. [Defense counsel] When I use the word mitigation, what do you think?
>
> A. [Juror Adams] I'd have to pull out my dictionary.

TR5 at 151.

Like the flaws in Special Issue 1, the failure to guide the jury's discretion in any meaningful way on Special Issue 2 creates an Eighth Amendment violation where to execute Petitioner would be cruel and unusual punishment. "A state of affairs where the capital sentencing jury is allowed to wander unguided through the maze of its own misperceptions is unconscionable." Mackbee v. State, 575 So.2d 16, 41 (Miss. 1990).

V. THE FAILURE TO CONSIDER THE ISSUES PRESENTED IN THIS PETITION ON THE MERITS WOULD DEPRIVE PETITIONER OF HIS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS

The Great Writ of Habeas Corpus is protected by the Texas Constitution. Tex. Const. Art. 1, § 12 ("HABEAS CORPUS. The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual."). The writ cannot be altered by legislative fiat, or by

court ruling, as the constitutional right must remain inviolate. Tex. Const. Art. 1, § 29 ("PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOLATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.").

Thus, any procedural rule that detracts from Mark Ströman's right to a full consideration of his habeas petition is illegal under the constitution.

W. THE MANNER IN WHICH THE PROSECUTION MISTREATED, THREATENED AND COERCED A MAJOR WITNESS IN THE CASE VIOLATED THE FEDERAL CONSTITUTION IN A NUMBER OF WAYS

Melquaides Gonzales was a major witness against Petitioner – probably the most important of all. (TR18 at 128)

1. GONZALES WAS AN EXTREMELY PREJUDICIAL WITNESS AGAINST PETITIONER

He was a jailhouse informant for an unauthorized use of a motor vehicle. (TR18 at 130) A hearing was held at the time of trial to determine whether he got a deal. (TR18 at 131) He said he had no deals. His UUMV was no billed, but with no help from the DA, he said. (TR18 at 134-35) The testimony presented then was a lie, just as was the rest of it.

When asked what his motive was for helping the State, he said his brother in law was from Kuwait and he felt Petitioner could have murdered someone in his own family. (TR18 at 134)

He testified that Petitioner "[s]aid that he had – they'd brought him in for a murder over in Mesquite and that they – that they, the police officer didn't know that was only about the ninth one he had committed." (TR18 at 132) In other words, he told the jury at the culpability phase that Petitioner had done the equivalent of eight other homicides.

At the penalty phase he was called back to prejudice Petitioner some more. (TR19 at 127) Now, he said that Petitioner had been stopped just before going postal and killing scores more people. Gonzales testified to how Petitioner boasted that he had some automatic weapons and was going to head to the Towneast Mall and "start shooting everybody." (TR19 at 129) His motives were again racial: "Because there's a lot of rag-heads there." (TR19 at 130)

Gonzales emphasised how Mark Ströman said he was a member of the Aryan Brotherhood, had swastikas on his arms. (TR19 at 131)

The defense cross examination was basically one question. (TR19 at 131)

2. GONZALES HAS NOW ADMITTED HOW HE WAS THREATENED AND COERCED

Now that his conscience has finally caught up with him, Gonzales has admitted what really happened. He admits that most of what he testified to was false – he exaggerated some things and made other stories up. Most important, it is not true that Petitioner had bragged about committing nine times as many homicides as the police knew. Petitioner did not say he was going to slaughter hundreds of innocent people in a mall. And so forth. See *Exhibit N*.

Equally important, Gonzales goes into details about information that he did not reveal at the time of trial that could have greatly assisted Petitioner's defense:

> Mark was clearly under the influence of drugs. I knew that Mark used methamphetamine and that he had used drugs from an early age. I asked

> him how long he had been up for and he told me that he had been awake for most of the last three weeks. He told me that he had killed someone and that he had shot some one else in a store that I used to go into. He was really messed up about it. I could not believe what he was saying.
>
> I knew that Mark did not shoot those people because he was trying to rob them. Mark was strung out on drugs. He was upset about what had happened when the World Trade Center was bombed because he mumbled when I saw him in the holding jail that he figured he had to do what his country would not. But I knew that Mark had been on a drug binge for weeks, I could tell that by looking at him, and I knew that he did not have much of a grip on reality.
>
> The whole time that I knew Mark he was always working. I did not have any one around me that was into robbing people, we just did not do that and I would not hang around with anyone that did. That was a part of our code.
>
> The idea that Mark wanted to rob his victims is a complete fabrication on the part of the district attorney Greg Davis. He wanted me to help him to make the court believe that so that they could execute Mark but I am completely convinced that Mark did not have robbery on his mind when he committed these tragic crimes.

Exhibit N.

Gonzales told this pack of lies, and declined to tell the truth about those matters that were favorable to Petitioner, because he had been threatened by the police:

> At the end of March I was working at my garage when a car pulled up and a black man and a white man got out both wearing suits. I thought that they must have been law enforcement agents. They told me they were from the district attorney's office and they came into my office and put a tape recorder on my desk and played me back the conversation I had had with Mark in the holding jail. I did not know that they could record people like that. It also made me think that these guys were setting Mark up the way they had recorded our conversation.
>
> These two men had my rap sheet with them and they told me that I was going to testify in Mark's case otherwise I would be going back to jail. It was a clear and simple if I did not go into court and say what they wanted me to say I would go back to jail. I did not want to go back to jail. I had a business and a family, there was too much at stake. Even after I was called to go to court I did not go. The next day they came and got me to take me to court.

3. THE MANNER IN WHICH GONZALES WAS THREATENED AND COERCED, AND EXCULPATORY INFORMATION WAS SUPPRESSED, VIOLATED PETITIONER'S FUNDAMENTAL RIGHTS

Clearly, this was a major violation of Mark Ströman's right to a fair trial. We have already discussed how the State has an affirmative obligation to turn over all favorable evidence. United States v. Agurs 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed. 2d 342 (1976). Evidence is favorable if it tends to exculpate the defendant or impeach a prosecution witness. United States v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Evidence favorable to the issue of punishment must also be disclosed. Brady v. Maryland, 373 U.S. 83, 88, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him *or reduce the penalty* helps shape a trial that bears heavily on the defendant").

Another fundamental principle is derived from Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), where the United States Supreme Court made it clear that the prosecution may not permit the presentation of perjury at any criminal trial -- let alone one where the State is seeking to have the accused executed. As the Supreme Court held in Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957), it makes no difference if the prosecutors "merely" allowed unsolicited false testimony to go uncorrected, rather than intentionally eliciting the falsehoods.

Yet here, the flaw is far greater than the "mere" suppression of favourable evidence, or the presentation of perjured evidence. Here, the State threatened a witness to force him to concoct false testimony, and then threatened him to present

that false evidence, and then threatened him if he disclosed that he had been threatened. Under these circumstances, we must remember the words of Justice Brandeis:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of justice the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir. 1986), quoting Olmstead v. United States, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

4. THE STATE CANNOT CLAIM PROCEDURAL DEFAULT AS A BAR TO THIS ISSUE WHEN THE STATE WAS THE PARTY THAT COVERED IT ALL UP

It would be fundamentally inequitable for the State to claim the equitable relief that is inherent in a rule of procedural default given that the State threatened a witness in a capital case in order to get the evidence in the first place, the State then threatened the witness with terrible consequences if he did not toe the State's line, and the only reason that the witness is finally willing to break his silence is that he finally became a victim of a capital murder charge himself, which he recently beat, and saw first hand just how terrible the consequences of his earlier misconduct had been.

Gonzales states that he would not have told the truth to the defense before now, because he was afraid of the State's threat. He is only agreeing to talk now because he realizes that his falsehoods have got Mark Ströman so close to being executed:

> I only now agreed to talk to the defense. I did not agree to before to talk to the defense before because I was worried that this would have repercussions for me and I thought again about going back to jail and the impact that that would have on my family. But I realise that Mark will be executed in just a few days and I do not want that to happen. I regret not coming forward sooner and I regret agreeing to help Greg Davis and the prosecution but at the time I truly believed that if I did not do what they wanted me to I would be sent right back to prison.

Exhibit N.

5. ALTERNATIVELY COUNSEL WERE INEFFECTIVE IN FAILING TO SECURE AND RAISE THIS INFORMATION

Alternatively, counsel – at trial and in state post-conviction relief – were ineffective for failing to investigate and raise this issue before this time. *See supra*.

X. THE CUMULATION OF ERROR IN THIS CASE RENDERS THE CONVICTION AND SENTENCE UNCONSTITUTIONALLY UNRELIABLE

The issues discussed above cannot be viewed in isolation. Petitioner incorporates all of the issues below and asserts his right to a fair trial, free from the cumulative taint of each of the errors combined. For example, the Florida Supreme Court has applied this analysis in a capital case:

> Gunsby is entitled to a new conviction-phase proceeding. *We reach this conclusion based on the combined effect of the errors in this case*, which include the State's erroneous withholding of evidence, the ineffective assistance of counsel in failing to discover evidence, and newly discovered evidence reflecting that this was a drug-related murder rather than a racially motivated crime.

State v. Gunsby, 670 So. 2d 920, 921 (Fla. 1996) (emphasis supplied).

Likewise, the Supreme Court has increasingly adopted an approach in habeas corpus that has focused on the totality of the circumstances of a trial under review. See, e.g., Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 144 (1986) (prosecutor's allegedly erroneous statements assessed in terms of "their effect on the trial as a whole"); Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (when reviewing counsel's effectiveness, court must look to "all the circumstances" of the trial); Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (waiver of constitutional rights assessed in light of the "totality of the circumstances"); California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (custodial status of suspect evaluated in light of the "totality of the circumstances").

The same rule has been applied to the so-called issue of "cumulative error." In Walker v. Engle, 703 F.2d 959 (6th Cir.), cert. denied, 464 U.S. 951 (1983), the Sixth Circuit granted relief where six pieces of evidence were admitted, each "marginally

relevant [or] irrelevant," but none of which individually violated the Constitution. Id. at 968. However, the overall effect was to deny the accused "fundamental fairness." Id.; see also Lundy v. Campbell, 888 F.2d 467, 481 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990); United States v. Parker, 997 F.2d 219, 221 (6th Cir. 1993) ("[t]aken in isolation, these errors may be considered harmless. After examining them together, however, we are left with the distinct impression that due process was not satisfied in this case") (citation omitted); see also Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993); United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) ("We have held that the 'cumulative effect' of multiple errors may so prejudice a defendant's right to fair trial that a new trial is required, even if the errors considered individually are non-reversible."); McDowell v. Calderon, 107 F.3d 1351, 1368 (9th Cir. 1997), vacated in part, 130 F.3d 833 (9th Cir. 1997) (*en banc*), cert. denied, 118 S.Ct. 1575 (1998) ("[a]lthough no single error may warrant habeas corpus relief, the cumulative effect of such errors may deprive a petitioner of the due process right to a fair trial").

Likewise, the cumulative effect of the errors in this case--both from the sentencing phase and from the spill-over effect of the errors at the culpability phase--tainted the jury's verdict as to sentence.

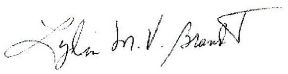
CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE Petitioner respectfully requests that this Court enter an order as follows:

a. appointing counsel;
b. requiring that Respondent reply to this petition under an expedited schedule;
c. entering a stay of execution;
d. ordering discovery under an expedited schedule;
e. ordering funds for a full development of the facts necessary to present these claims;

f. ordering an evidentiary hearing to develop these claims;
g. granting such other relief as the Court may deem just and proper.

Dated: July 12, 20 11



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