APPLICATION FOR COMMUTATION OF DEATH PENALTY

(Section 143.57, Rules Of Executive Clemency)

TO: **TEXAS PAROLE BOARD DIVISION**

PETITIONER : CHARLES H. RECTOR, Death Row # 721

FROM: Roy E. Greenwood , Attorney at Law

DATE: February 5, 1999

SCHEDULED EXECUTION DATE: **MARCH 25, 1999**

I.

INTRODUCTION

Background of Counsel

Because of the importance of the Board's reliance upon this written presentation by the attorney for petitioner, counsel for petitioner believes that it is necessary to provide this Board with background information about counsel of record, in order to reassure the Board that the experience, reputation and reliability of the written word of counsel should have some weight in the presentation of these written arguments.

Since the state of Texas and this Board have taken the position in recent federal and state court litigation that there will be rarely, if any, actual face-to-face hearings on these applications for death penalty commutation and clemency matters, this Board is relying upon the written presentations of counsel for petitioner, and thus it is crucial, and indeed imperative, that the Board have some background information upon

counsel, prior to reviewing the material submitted on behalf of this petitioner.

Therefore, attached hereto as an Exhibit to this APPLICATION FOR COMMUTATION is the *Curriculum Vitae* of counsel for petitioner, Roy E. Greenwood, to provide the board with this background information.

Relationship of Counsel To Petitioner

As will be pointed out within the further written materials as reasons for commutation, see SUBSECTION IV, supra, this attorney for petitioner herein was originally appointed to represent the co-defendant of this petitioner in November, 1981, one Anthony Michael Miller, who had also been indicted for capital murder of the victim in this case. As a result, counsel herein has been reviewing the facts and circumstances concerning this murder since November, 1981, and probably possesses more information concerning the overall facts than any other human being alive.

After the petitioner was convicted and assessed the death penalty in September, 1982, counsel herein was appointed by the 167th District Court to represent Mr. Rector in the direct appeal of his case. In the meantime, counsel continued to represent co-defendant Miller in preparation for his trial, after it was determined that there would not be any conflict of interest involved in this joint representation of these two co-defendants.

In January, 1983, co-defendant Miller went on trial for murder and burglary in the 167th District Court of Travis County, and after a trial lasting more than two weeks, the jury ***acquitted*** Mr. Miller of both murder and burglary arising from this transaction. During the Miller trial, the state presented some evidence against Mr. Miller involving a witness by the name of **Carolyn Stillwell**, a person that was completely unknown to

either this attorney or to the trial attorneys representing the petitioner. As will be shown in this presentation, the testimony of Ms. Stillwell, presented in the Miller trial, was "*newly discovered evidence*" to the defense, which we have been submitting, for almost two decades, was exculpatory and relevant evidence tending to show that Charles Rector was not present during the murder of Carolyn K. Davis, the victim in this case.

As a result, counsel for petitioner herein has been continuously representing Mr. Rector in the presentation of these claims, which unfortunately, have not been recognized by the state and federal courts as having sufficient merit under the prevailing legal standards and practices of this time to result in the conviction being set aside.

Summary of Counsel's Clemency Request

Based upon the a longtime evaluation of the facts of this case, and the continued investigation for almost 18 years of the murder of Carolyn Davis, counsel for petitioner herein believes that the evidence clearly shows that, while petitioner Charles Rector was involved in a conspiracy to commit burglary of the apartment of Ms. Davis, that he was simply not present at the scene of the Davis murder, and in fact was some 9 miles away, in the presence of newly discovered witness Carolyn Stillwell at the time that Ms. Davis was murdered.

The evidence at the trial of petitioner reflected that there were three (3) suspects in the kidnapping and burglary of the Davis apartment, but the evidence also reflects that the suspects in this murder utilized two (2) separate vehicles, with petitioner Rector taking the stolen property from the scene in one car, while the other suspects, i.e., Howard Simon, and a third person, took the kidnapped victim, Carolyn Davis, to Red Bud Island, in far Southwest Travis County, where they murdered her, at a time when Mr. Rector was in far Northeast Austin in the presence of Mrs. Stillwell.

For various technical reasons, the courts of the state of Texas and the federal courts have rejected the "legal claims" presented by petitioner, i.e., that the failure to provide the defense at the Rector trial with the identity and information of Mrs. Stillwell, and various errors committed by trial counsel during the trial of petitioner, did not meet the technical, complex and upon the stringent legal requirements necessary to set aside the conviction, based upon claims that: (1) counsel rendered the ineffective assistance of counsel; (2) the state had "suppressed exculpatory evidence" from the defense, and (3), that the "newly discovered evidence" of Ms. Stillwell under Texas law required the conviction to be set aside.

However, counsel for petitioner believes that, even though this newly discovered evidence, unavailable to the defense at trial, may not have met the precise illegal standards for setting aside the conviction and death penalty of Mr. Rector, according to the previous court decisions, that the presentation of these facts and circumstances to this Board should be sufficient to provide the Board with justification under their policies and standards to have the death penalty in this matter commuted to a LIFE SENTENCE.

With this INTRODUCTION, Counsel will now proceed to his presentation of this application for commutation of sentence.

II.
EXHIBITS ATTACHED TO APPLICATION

1. Death DATE ORDER – 167th District Clerk , Travis County
2. Opinion from U.S. Court of Appeals for Fifth Circuit – Rector v. Johnson, 120 F.3d 551 (5th Cir. 1997)
3. Opinion for U.S. Court of Appeals for Fifth Circuit on "Subsequent Habeas Action" – Denied January 21, 1999
4. Stillwell Testimony – Miller Trial

5. John Barrett Statement about Mark Arnold Testimony
6. *Curriculum Vitae* – Counsel Roy E. Greenwood
7. Affidavit of Roy E. Greenwood

III.
LITIGATION HISTORY

Petitioner was convicted of capital murder and assessed the death penalty in a trial in Travis County, Texas, September, 1982. His conviction was affirmed on appeal. See Rector v State 738 S. W. 2d 235. Certiorari was denied. See Rector v. Texas, 484 U.S. 872.

The initial State habeas corpus action was filed, and a State habeas evidentiary hearing was conducted in January--February, 1988, with the trial court entering a recommendation denying relief in March, 1988. The complete and corrected habeas record was filed in the Court of Criminal Appeals on May 16, 1988, with the court denying habeas relief on May 18, 1988, two days later. See Ex Parte Rector, unpublished Order, Writ No. 11,548-03, 5/18/88.

Petitioner filed his first Federal habeas action in the District Court in May, 1988, and with the permission of the U.S. Court, further State habeas corpus issues were presented, this time with three (3) Judges of the Court of Criminal Appeals dissenting to the denial of relief in 1991.

After re-exhausting remedies on these additional issues, Petitioner returned to the federal courts, and subsequently, the United States Magistrate entered a 54 page Report and Recommendation on March 29, 1996, recommending that habeas relief be denied. On May 14, 1996, the District Court adopted the Magistrate's findings. On June 10, 1996, Petitioner filed his formal Notice of Appeal to the Fifth Circuit Court of Appeals. Eventually, this Court of Appeals also denied relief. See Rector v. Johnson, 120 F.3d 551 (No. 96-50443, decided August 18, 1997; 5th Cir.

1997). The U.S. Supreme Court denied certiorari from the 5th Court of Appeals Circuit ruling on February 23, 1998, in No. 97-6761.

Then, pursuant to the provisions of Texas law, under Article 11.071, Code Of Criminal Procedure, the petitioner sought relief in a "subsequent" State post conviction proceeding on or about September 2, 1998, alleging three Grounds for habeas corpus relief in the state courts. Since petitioner is only raising one of those three Grounds for Habeas Corpus Relief in this Court, those claims, as presented to the state courts, are summarized as follows:

1. Since the 1993 ruling in Holmes vs. Third Court of Appeals, , 885 S.W.2d 386, which was decided after Petitioner's State habeas proceedings were finished, the Court of Criminal Appeals of Texas declared, for the first time, that claims of "newly discovered evidence" reflecting "factual innocence" were cognizable in Texas post conviction habeas corpus matters., that petitioner was able to claim, under Section 5 (1)(a) of Article 11.071, V.A.C.C.P. that evidence petitioner had previously claimed had been "suppressed" from the defense by the state also constituted "newly discovered evidence" reflecting such factual innocence, thus giving petitioner a valid State claim, for the first time, of such ground for habeas corpus review, and

2. That because the United States Supreme Court decision in Schlup vs. Delo, 513 U.S. 298 (1995) , was not decided until well after the conclusion of petitioner's first State habeas corpus proceedings, that the provisions of Section 5 (1)(a) of Article 11.071 allowed petitioner, for the first time, to raise a claim under Schlup that due of the failure of his attorneys to adequately prepare for trial, in combination with the newly discovered evidence obtained, see infra, Issue No. 1, petitioner was entitled to a subsequent State habeas corpus review of this Schlup claim, since the Schlup decision must be applied in a retroactive fashion.

Under the provisions of Article 11.071, a "subsequent" petition for writ of habeas corpus is filed with the trial court, but the trial court cannot, under the statute, take any action to determine the merits of the claims presented in a subsequent writ, but rather, must simply order of the entire

transcript of the proceedings to the Court Of Criminal Appeals with a notification that such case is a "subsequent petition". This procedure was accomplished, and on December 16, 1998, the Court Of Criminal Appeals issued the following order:

> "In the instant cause, applicant presents three allegations in which he challenges the validity of his conviction and resulting sentence. We have examined application find it fails to satisfy the pleading requirement of Section 5 and accordingly dismissed the application as an abuse of the writ."

To this action, Judge Overstreet dissented, indicating that he would "file and set" the writ of habeas corpus for briefing, argument and further consideration by the court.

Under the provisions of the federal *Antiterrorism And Effective Death Penalty Act* of 1996, petitioner then sought leave of the Honorable Fifth Circuit United States Court of Appeals for the filing of a "subsequent" federal writ of habeas corpus on December 30, 1998. This leave was denied by the 5th Circuit on January 21, 1999.

Petitioner is presently seeking review of that decision by way of a request for the United States Supreme Court to consider an *Original Habeas Corpus Petition.*

IV.
FACTUAL BACKGROUND SUMMARY

1. The Crime

On the evening of October 17, 1981, a Saturday night, the victim in this case, Carolyn Davis, hereinafter referred to as "Davis", was abducted from her second floor apartment, off 38th Street in Austin, Texas (central Austin), between 9:00 P.M. and 9:15 P.M. A witness noticed three Black males outside the apartment at that precise time, but no witness ever identified Petitioner as being involved in this abduction or murder.

After her disappearance was noted, police were called and an investigation began. At approximately 11:00 that night, investigators in the Davis apartment noted two other Black males come to the door, and then flee the scene. Petitioner was not identified as one of those two men.

Shortly thereafter, at 11:15, Petitioner was seen in the laundry room of the apartment complex, by an independent witness, Mrs. Troller, who related that Petitioner was looking for "two Black dudes".

At 11:30 p.m., Austin police officer Matthews noticed Petitioner's car, a Buick, in the vicinity of the apartment complex, committing a traffic offense. Petitioner was stopped and during the stop, Matthews noted that the trunk of the car was open, and inside Matthews saw items described as being similar to those taken from the Davis apartment two hours earlier. Petitioner was then placed under arrest immediately, and has been in custody since that time.

On the afternoon of October 18, 1981, the body of Davis was found on Red Bud Island, in far southwest Austin, submerged in the flowing water of Town Lake. It was later determined by the Medical Examiner that she had drowned, after being shot once in the head with a firearm.

Petitioner, and eventually, two other black males, Howard Simon and Anthony Miller, were indicted for this murder, while in the course of kidnapping and burglary, under the Texas capital murder statute. Prior to Petitioner's trial, co--defendant Howard Simon escaped the Travis County jail and was eventually killed in Louisiana in another robbery attempt. Co--defendant Miller went to trial in January, 1983, after Petitioner was convicted, and was acquitted by the jury. This writer was lead counsel in the Miller defense team.

2. The Trial

During Petitioner's trial in August--September, 1982, the State put on evidence showing Petitioner's possession of the stolen property from the Davis apartment, being identified by Davis' boyfriend, Mark Arnold.

There were no witnesses identifying Petitioner as a party to Davis' murder. Petitioner did not confess. Scientific expert witnesses of the State indicated that they could find no connection to Petitioner's vehicle being involved in the kidnapping of Davis, nor any indication that this car had ever been to the Red Bud Island area where Davis was shot and drowned.

A ballistics test of the bullet in Davis' body reflected that it was a .22 caliber bullet, and while a gun of that caliber was found in Petitioner's car, the tests could not show that such gun fired the bullet. Neither the gun nor its' holster had Petitioner's fingerprints on them. A knife scabbard was also found in Petitioner's car, and an unidentified knife was found at the abduction scene, but once again, there was no evidence or fingerprints proving that Petitioner had ever possessed that knife.

The Medical Examiner testified that, in his expert opinion, the deceased had died "most probably at 11:00 p.m." on the evening of October 17th. Even though the Medical Examiner admitted that the deceased could have died at anytime between 9:00 p.m. (the 17th) and 3:00 a. m.(of October 18th), he nevertheless consistently maintained that the most probable time of death was 11:00 p.m. on the 17th.

With the above evidence, the jury convicted, finding Petitioner in recent possession of the stolen property from the victim and having no substantial rebuttal testimony by the defense being presented. No evidence was presented by the defense during the punishment phase of the trial, even though defense counsel had substantial mitigating evidence in their possession. The State proved up several extraneous offenses, and a prior conviction, and the jury returned its verdict of death.

IV.

REASONS FOR COMMUTATION

A. Claims Of Innocence Of Murder –

In the direct appeal process before the Texas Court Of Criminal Appeals, petitioner contended that the evidence was insufficient to support the verdict, however, in a lengthy and complicated analysis, the Court Of Criminal Appeals determined that the "circumstantial evidence" was sufficient to sustain the jury verdict of guilty. See Court Of Criminal Appeals opinion, Rector v. State, 738 S.W.2d 235. Further, he Court of Criminal Appeals held that the evidence was sufficient to support the finding that the death penalty was justified during the punishment phase of the trial.

Counsel for petitioner also attempted to obtain permission from the Court Of Criminal Appeals to "re-open the evidence" to have the Court remand the case back to the trial court for an out -- of -- time motion for new trial hearing to consider the evidence presented by Ms. Stillwell in the Miller trial, occurring for 4? months after the trial of petitioner.

The Court Of Criminal Appeals denied the *preliminary* motion to remand filed during the *pendency* of the appeal and then Petitioner contended, in his Direct Appeal Brief, that such claim of "newly discovered evidence" should be reconsidered and remanded to the trial court for such hearing at a later time. The court, rather than rule **solely** upon the motion to remand, attempted to rule upon the "merits" of the claim of "suppression of evidence" of Stillwell, even though no hearing had ever been conducted on this issue. As a result, the Court Of Criminal Appeals ruling on direct appeal of this issue was **wrong**, in numerous respects. It was not until the habeas corpus evidentiary hearing in 1988 did petitioner subsequently have an opportunity to present evidence in support of his written claims on this issue.

As the Board can tell from an analysis of the evidence, the Court Of Criminal Appeals did not find that the evidence of guilty was overwhelming in this case.

At time that petitioner initiated his first State habeas corpus action, Texas law did not allow a claim of "factual innocence" or "newly discovered evidence" to be cognizable on State habeas corpus. It was not until the decision of the Court Of Criminal Appeals in 1994, of Holmes vs. Third Court of Appeals, that the Court Of Criminal Appeals permitted such claims to be raised on habeas corpus. However, petitioner's original State habeas proceedings had been completed many months prior to that ruling. The United States Supreme Court had previously held, in Herrera vs. Collins, that a claim of "factual innocence" was not, in and of itself, a proper claim for federal habeas corpus relief, thus petitioner was not able, in his 1993 federal habeas corpus proceedings, to raise a claim of factual innocence.

However, in 1995, the United States Supreme Court decided the case of Schlup vs. Delo., which permitted a claim of "denial of due process", if a habeas corpus petitioner and federal court could claim that he was "factual innocent", and that because of other procedural errors, such as a claim that evidence was "suppressed from the defense" and/or that counsel was ineffective, such evidence of factual innocence was not properly presented to the jury.

During the petitioner's habeas corpus proceedings in federal court, after the decision of Schlup was rendered by the Supreme Court, petitioner attempted to argue to the federal courts that Schlup was applicable to this case, since petitioner claimed both that the state suppressed evidence and that because of such suppression, and other errors by counsel, that counsel were rendered ineffective. However, the federal courts never

considered the "due process" claims permitted by Schlup during the original federal habeas corpus action.

Thus, petitioner has had to raise these claims under Schlup in his "subsequent" State and federal habeas corpus actions, but the Court Of Criminal Appeals, in a *clearly erroneous* ruling, with one judge dissenting, Judge Overstreet, found that the State habeas corpus law, Article 11.071, did not permit such a "subsequent" habeas corpus challenge. Thus, petitioner was clearly denied a full and complete second State habeas corpus review of his present claims in the Court Of Criminal Appeals, as the court never considered the merits of either his "newly discovered evidence" or Schlup claims

The United States Court of Appeals for the Fifth Circuit was also presented with an opportunity to reconsider this case under Schlup, but as noted hereinabove, that Court also refused to give any due and proper consideration to that claim, as should have been given the during the first federal habeas corpus review.

As a result, petitioner has been completely denied full and complete access to the presentation of his claims, and a full an appropriate consideration of said claims by the judiciary of this state and the federal courts. It is now, unfortunately, the responsibility of this Board to attempt to correct the factual errors made by the Judiciary.

B. Newly Discovered Evidence - The Stillwell Evidence - The Miller Trial

After petitioner was convicted in September, 1982, Co-defendant Miller's trial commenced in January, 1983, with the State consolidating for trial two separate indictments, for the offenses of murder and burglary, arising out of this transaction, thus waiving their right to seek a death penalty against Co-defendant Miller. The evidence proceeded, with the State resting their direct case, and then the defense presented its case.

The State, in its' Rebuttal case, called Carolyn Stillwell to testify, who related the following events:

1. She was working as cashier a U-Totem store at 51st Street and Airport, in far North East Austin, on the evening of Saturday, October 17, 1981, until closing time, at midnight;

2. She saw Petitioner Rector, Miller and a third unidentified man pull up in a car in front of the store, with the light on in the car, before they entered, sometime "near closing";

3. The unidentified man went back outside, and waited "by a trash can by the front door" (see page 5);

4. Miller and Petitioner remained in the store for "approximately" 15-20 minutes (see page 7);

5. Petitioner then left the store first, with Miller buying some items and leaving last (see pp. 8-9);

6. After all three left, Stillwell noticed the third unidentified black male get into a pick-up truck, "with some other people in back of it", with the truck and Petitioner's auto leaving at the same time (see page 10).

Austin police officer Andy Anderson was then called against Defendant Miller, to corroborate the fact that he had located witness Stillwell approximately one week after the killing, when she had given her statement to him concerning seeing the Petitioner and Miller together at the U-Totem store in far northeast Austin.

During the cross-examination of Officer Andy Anderson, the officer related that he located Ms. Stillwell on October 23, 1981, and that she had told him, during his initial interview of her, that Petitioner had remained in the store, before closing time, for a period of "30-45 minutes", and that "a couple of black males and a white dude had come in (the store) at the same time"....and..."they left in a pickup truck with two Latins in the back of the truck" (see page 23). See also Anderson's offense report, State's Exhibit 2.

See Excerpt of Stillwell testimony, Exhibit No. 4, attached.

C. Suppression of Evidence and/or Lack of Production of Evidence by State –

Needless to say, this rebuttal evidence of Stillwell by the State was totally startling to the defense teams of Petitioner and Miller, including this writer, since we had no idea that Ms. Stillwell existed.

The State knew that, under no circumstances, could they present evidence to Petitioner's jury that the deceased had died during the early morning hours of October 18, 1981, otherwise this Petitioner would not be eligible for the death penalty sanction, under the then recent decision of Enmund v. Florida, 458 U.S. 783, 102 S.Ct. 3368. (Decided on July 2, 1982)

As a result of Enmund, all the attorneys for both co-defendants in this case were highly cognizant that "time of death" was the KEY to the defense cases, Petitioner Rector's case due to the timing of his arrest, yet trial counsel did not confirm Dr. Bayardo's pre-trial "time of death" opinion.

All three of Petitioner's trial lawyers saw the relevance and exculpatory nature of this evidence, after it was shown and explained to them, as they testified to during the State habeas hearing. See counsel Ganne (Vol. 3, pages 127-130), and the opinion of co-counsel Barrett (Vol. 3, pages 55-60) and lead counsel Collins (Vol. 3, 110-112, 116,-120).

The lead State's attorney, Assistant District Attorney Phil Nelson, has testified that he simply "did not recognize" that such Stillwell evidence had any exculpatory value, in his opinion, thus he did not divulge this information to the trial counsel for petitioner. There was no claim my any member of the Travis County District Attorney's office that the defense knew of the existence of Stillwell, but rather, over the years, they have contented that such information would not have been helpful to the defense.

As will be shown in this presentation before the board, such claim is patently "**ridiculous**" when it is realized what impact the Stillwell evidence could have had with regard to presentation of that evidence, plus the utilization of other evidence, to show that petitioner had an alibi for the "most probable times" during which Ms. Davis could have been murdered.

Since the evidence is **undisputed** that petitioner was back at the Davis apartment complex at 11: 15 p.m. and was placed under arrest at 11: 30 p.m. on the night of Ms. Davis' kidnapping, and has never been out of custody since that time, if, in fact, Ms. Davis was murdered between 1:00 a.m. and 3: 00 a.m. the following morning, as has been opined as either possible, by doctor Bayardo, or probable, by Doctor Bux, then petitioner is clearly shown to have been **innocent** in any role involving the death of Ms. Davis.

D. Unreliable/ Incomplete Forensic Evidence –

Time of Death Estimates - Dr. Bayardo had previously testified in another murder case, styled Texas v. Edward Holloman, to a completely different set of standards for evaluating time of death, in contravention of his testimony in the Rector trial. During the State habeas hearing, Petitioner entered into evidence portions of Bayardo's testimony in Holloman case, for the purpose of showing further impeachment of Bayardo's opinion. See Petitioner Exhibit 16. This excerpt of testimony clearly shows that, in accordance with the State's theory in Holloman, Bayardo testified that the best rate of body temperature loss was "1 and 1/2 degrees" per hour, even when the subject was a male victim, during the hot Texas month of July, laying out in an open field. See Exhibit 16, pages 1330, 1332, 1349, 1351,1358.

Petitioner submits that, had Dr. Bayardo used the same mathematical formula that he did in Holloman in the instant case, his testimony would

clearly have confirmed that, at the time of Carolyn Davis' death, Petitioner had been in custody of the Austin Police Department for many hours! Yet, this evidence was not utilized by the defense, thus clearly showing further deficient performance on behalf of counsel.

During the state habeas hearing, Petitioner presented the testimony of Bexar County Medical Examiner, Dr. Robert Bux, who related that Bayardo's estimates were flawed, since Bayardo used the "one degree per hour" ratio for cooling, rather than the "one and one-half degree" ratio, as recommended by the scientific majority. See Vol. 3, Habeas s/f, pages 87-93.

Dr. Bux estimated that, in his professional opinion, due to the fact that the body in this case was submersed in cooler, flowing water, and involved a female subject more prone to faster cooling, that the time of Ms. Davis death was "most likely" after 1:30 A.M. on October 18, 1981, some two hours after Petitioner's arrest in this case.

Dr. Bayardo's trial testimony makes clear that, at least at that time, he believed Ms. Davis died "most probably" around 11:00 P.M. that night, on Red Bud Island, in West Lake Hills, Texas, a time at which Petitioner was, according to Stillwell, at 51st and Airport, almost nine miles away by car.

Cause Of Death Evidence -

After Bayardo indicated that Ms. Davis died as a result of drowning (see autopsy report), the gunshot wound was then discussed. See Volume 17 (or 16), page 383, et seq. He confirmed that the gunshot would have been fatal, and then related that the gunshot would "usually take(s) about 30 minutes to an hour for this type of injury to cause death." See 16/17, page 391. However, since Davis drowned, the "30 minute-one hour " window was irrelevant to the issue! Bayardo's testimony, with regard to "time of death" from a gunshot wound explains how the jury could have been confused on this critical factual issue!

Dr. Bux provided his opinion as to how long it took for Davis to die, after being shot and thrown in the water, and undisputed fact that Davis died with "five to ten minutes" as a result of the drowning. See Vol. 3, pages 93, 95. Bayardo was never asked his opinion on this issue during trial

E. Ineffective Assistance Of Counsel -

The Problem

Here, Petitioner contends that trial counsel were rendered "ineffective" because they did not properly and reasonably anticipate the change in Dr. Bayardo's testimony discussed above, and failed to properly prepare for trial accordingly, and because of the suppression of the Stillwell evidence, which admittedly harmed their defensive presentation during the guilt-innocence phase of the trial. For example:

Trial Preparation (Guilt Phase)

Counsel for Petitioner had knowledge, since December, 1981, of evidence in possession of Don Cripps, the defense investigator, that Dr. Bayardo had determined the time of death as being sometime after 1:00 a.m. on October 18, 1981, several hours after Petitioner Rector had been arrested! (11:30 p.m.).. However, none of the Rector trial defense team ever personally consulted Dr. Bayardo in order to obtain confirmation of this vital testimony.

Counsel should have confirmed Dr. Bayardo's position well in advance of trial, in order to "lock him" into his testimony, and to further determine his basis for such evaluation, in order to prepare for the State's challenge to Dr. Bayardo's evaluation, should it eventually come. However, counsel did not take this very easy step in confirming this crucial evidence, after being led to believe was totally exculpatory in nature.

Then, during trial, when Dr. Bayardo "altered" his expert opinion in his testimony before the jury, it is clear that the trial attorneys were placed in a position of having to reorganize their trial strategy. This consequence was admitted by attorneys Barrett and Collins, during their testimony in the State hearing. See Vol. 3, supra. No effort was made to continue the trial, in order to obtain any possible expert rebuttal evidence to Dr. Bayardo's altered opinion. Rather, they only asked for a brief recess in the proceedings, while co-counsel John Barrett went to the Texas Medical Library in order to "research" medical information concerning time of death.

As has been noted, by Dr. Robert Bux's testimony during the State Habeas Corpus Hearing, Bux was clearly available and willing to testify on behalf of the Petitioner in this case. No pathology expert was contacted by the defense.

Rather, trial counsel sought merely to attempt to impeach Dr. Bayardo by using medical textbook impeachment with regard to the processes for evaluating time of death. As noted by Dr. Bayardo's testimony, he consistently maintained, under this unprepared cross examination, that the "most probable" time of death was 11:00 p.m. on October 17, 1981, a time period which allowed the jury to consider Petitioner as a viable suspect in the murder (absent, of course, the Stillwell evidence suppressed from the defense).

Punishment Phase

Furthermore, they were then thus caught totally "flat footed" with regard to this crucial evidence, which clearly impacted counsels' decisions with regard to their preparation during the punishment phase of the trial, even though counsel admitted that they had knowledge of substantial evidence of mitigation prior to that time. See attorneys Collins and Barrett's affidavits, attached as exhibit to State petition for writ of habeas corpus.

They were totally unprepared to present evidence in mitigation at that point in the proceedings, thus no defense evidence was presented.

It is submitted that these combinations of procedural due process errors "probably resulted" in a miscarriage of justice, which has resulted in the conviction of a factually innocent defendant.

Prior Court of Criminal Appeals and Federal Court Rulings on Ineffective Assistance

In the state habeas corpus petition filed in 1987, petitioner contended that his attorneys were rendered " ineffective", primarily because Dr. Bayardo altered his testimony concerning the "time of death" of the deceased. After the Court Of Criminal Appeals rejected the first habeas corpus petition, petitioner received permission from the federal courts to return to state court on additional issues, including further claims that counsel were ineffective. In 1991, the Court Of Criminal Appeals denied this second writ of habeas corpus, with three (3) judges on the Court dissenting to said ruling.

As witnessed by the federal court decision by the Court of Appeals for the Fifth Circuit, in Rector I, attached hereto as Exhibit No. 2, the Fifth Circuit, even though finding that counsel were "not diligent" in their preparation for trial, nevertheless also held, in a completely contradictory manner, that petitioner was not deprived of the effective assistance of counsel.

Because of these *contradictory* rulings by the courts over the years with regard to these claims made by petitioner that his counsel were "ineffective", petitioner has been deprived of complete and fair access to the court on these claims. Petitioner would thus request of this board, in its present clemency review, to recognize the merits of these claims, for

the purposes of determining whether this death penalty should be commuted.

F. Evidence the Jury Did Not Hear -

Assuming that the State would have notified the defense as to Stillwell and her evidence, and assuming that counsel would have confirmed with Dr. Bayardo, as they should have, about the 11;00 P.M. time of death, then the defense could have put together, by combining the corroborating other evidence, such as the post arrest statements about the truck and the store, the other "possible suspects", plus the driving times and distances, plus expert medical evidence, to account for Petitioner's whereabouts at almost all the critical times surrounding Ms. Davis' death, thus providing a solid alibi for the murder. For example:

Ms. Stillwell's testimony places Petitioner at the U-Totem convenience store, near 51st Street and Airport Boulevard, at approximately 11:00 p.m. on the evening of Ms. Davis' kidnapping. While Ms. Stillwell, at trial, indicated that Petitioner had been in the store for a period of time from "15-20 minutes", her prior statements to Officer Anderson indicated that the men could have been in the store for up to 45 minutes! Thus, Petitioner's possible alibi was extended back to perhaps as early as 10:15 p.m.!

As Ms. Stillwell admitted on cross examination, since it had been "one and a half years" since the incident, before she was called to testify, that, as to some of her recollections as to times, she "can't remember". See page 30, Petitioner's Exhibit 4. However, thus delay cannot be chargeable to the Petitioner !

Stillwell further related that another, unidentified black male came to the Store in Petitioner's car, and that that man then got into a pickup truck with the some other men, and then both Petitioner's car and the truck then drove off.

It is undisputed that Petitioner told the arresting officers, immediately upon his being stopped, that he had obtained the stolen property from some men in a pickup, at a U-Totem convenience store at 38th and Guadalupe. It is undisputed that Stillwell placed a third black male in Petitioner's car, at the time of their arrival at the Stillwell U-Totem store. This statement made by Petitioner to the officers was not utilized by trial counsel, since they had no foundation for using it, but had they known of Stillwell, and her indication that petitioner had contact with other potential suspects, who also had other vehicles, then this information could have been favorably used by the defense before the jury in this case.

Was this testimony that there was a third black male with Petitioner, who then got into the pickup with several other men, with both vehicles leaving at approximately the same time a coincidence? Perhaps, but to a reasonable person, in a circumstantial evidence, death penalty case, these revelations do indicate some connection between the vehicles! Petitioner submits that a jury could likewise so believe.

If the jury would have been shown that the possible suspects in this crime involved three or more individuals, and that they were using at least two vehicles, then it is reasonable to believe that Petitioner could have been alone in one of the vehicles, and that the other suspects took Ms. Davis to Redbud Island, where she was killed, without the knowledge or presence of the Petitioner.

The driving times and distances involved in this case are crucial. Petitioner has attempted throughout his pleadings to show these factors, but they are continuously ignored by the State. However, they cannot be ignored as a matter of physical fact.

Under the State's scenario, with the time of death being pegged at "most probably" 11:00 P.M. by Bayardo, and the undisputed evidence showing that Davis died within "5-10 minutes" of the shooting and being

thrown in the water, the State's theory of the case has the assault occurring at "most probably" 10:50 P.M.

If Petitioner was in Northeast Austin at 11:00 P.M., and in fact, could have been at the Stillwell store as early as 10:15 P.M., as she told Officer Anderson in his first interview with her (who indicated that they could have been in the store for perhaps as long as 45 minutes), then Petitioner could not have been on Red Bud Island, killing Davis, before 9:57 P.M., since to traverse the distance from the store to the death scene takes 18 minutes. See, Petitioner's Exhibit 11-12 (Driving Times And Distances Logs).

Thus, this presentation of the evidence reflect that Petitioner was not involved in the murder of Ms. Davis.

Prior Court of Criminal Appeals and Federal Court Rulings on Suppression/Newly Discovered Evidence Claims

The Court of Criminal Appeals in its *alleged* consideration (?) of the claim of petitioner that evidence of Stillwell was suppressed, took a grand total of two days, from May 16, 1988 until May 18, 1988, to reject said claim without written opinion. It is perfectly clear that the Court Of Criminal Appeals failed in its *constitutional responsibility* to review the facts and circumstances and legal issues during the original presentation of the habeas corpus claims made by petitioner.

Further, when petitioner submitted his "subsequent writ of habeas corpus" to the state courts, claiming that the evidence that he had previously contended had been "suppressed" was in fact "newly discovered evidence", a claim that he could not have raised during his original habeas corpus actions, because Texas law did not permit it until 1994, when the decision of Holmes vs. Third Court of Appeals was decided. The Court Of Criminal Appeals once again abrogated their *constitutional authority* by finding that the provisions of Article 11.071, Section 5, were not met in obtaining jurisdiction to submit such second

habeas corpus application. There is no doubt that such ruling by the Court Of Criminal Appeals was **wrong**, on the facts and the law, as recognized by Judge Morris Overstreet, who dissented to the opinion of the Court Of Criminal Appeals on December 16, 1998.

In the Federal Courts analysis in the Rector I opinion, the panel of the Court of Appeals made various "findings" which Petitioner submits were " factually" incorrect, and are now clearly relevant to the issue presented in this habeas action. For example:

1. Prior Knowledge of Alibi Location

The 5th Circuit Court of Appeals found in Rector v. Johnson, 120 F.3d 551 (Rector I) that Petitioner should have known where he was, even though the undisputed evidence reflects that he told others that he thought he was at the store on 38th Street. See Attorney General Answer in Federal Court, page 22. On that page, the Attorney General concedes that Petitioner told both police officers Martin and Garza that he was that the 38th Street store. Further, Respondent Attorney General acknowledged that defense counsel testimony indicated that Petitioner told his attorneys that he thought he was at the 38th Street store. See Respondent's Answer, page 25, footnote 19.

Thus, the undisputed evidence reflects that petitioner told both his trial counsel and the police that he was at a place other than the 51st Street store, and in fact, the Court of Appeals recognizes that fact, where they specifically note (Rector I) that was the evidence in the case. See footnote No. 9, Slip opinion page 5104, where the Court of Appeals stated:

> ".....the convenience store in Rector's story was at 38th and Guadalupe, while the store in Stillwell's version was at 51st and Airport".

This information in the footnote is correct, and therefore, not only is there insufficient evidence to support the prior Court of Appeals finding, but

in fact, there is no evidence to support same, and in fact, the Court of Appeals made a factual finding in direct conflict with its' finding that Petitioner knew, or should have known, where he was!

There is other and further evidence in the record that confirms the version of petitioner in this matter. For example, the evidence at trial reflects that petitioner had just recently purchased his vehicle, a months or so before this incident, therefore the finding of the Court of Appeals that petitioner had "seven months" to learn the city of Austin, is unfounded. See Slip opinion page 5103 (Rector I) . Furthermore, the undisputed evidence reflects that petitioner was on parole from a previous conviction, being forced to live at a half--way house as a term and condition of parole. Thus, petitioner's ability to travel around was limited by his parole conditions. The legal conclusions and factual findings by the Court of Appeals were clearly erroneous, thus depriving Petitioner of a fair and accurate assessment of his claims under the Brady doctrine.

2. Is the Stillwell Evidence Exculpatory?

The Court of Appeals (Rector I) concluded that the Stillwell evidence was not exculpatory because: (1) since the evidence did not show, as a matter of fact, that the deceased died at 11:00 p.m., that therefore the evidence did not reflect an exculpatory alibi, (2) that petitioner's whereabouts at 11:00 p.m. were "immaterial" to an alibi defense, (3) and that "because there is not even a hint in Stillwell's statement that she saw Rector at any time before 11 p.m., on the night of the murder", that the evidence is not exculpatory, and finally (4) that "whether or not Davis died while Rector was in custody is irrelevant to Rector claim that the State suppressed exculpatory evidence". See Slip opinion pages 5103—5104 (Rector I) .

In response to these legal conclusions, Petitioner would acknowledge that while the actual time of death could not be absolutely

shown, the State's medical examiner placed the "most probable" time of death at 11 p.m., in fact. Since the undisputed evidence from the petitioner's expert witness indicates that the deceased would have died within "five--10 minutes" as a result of drowning, which was the cause of death, then it is therefore crucial to understand that the period of time from 10:50 p.m. until 11 p.m. was the critical evidence in this case.

If the medical examiner would have testified, as he had indicated in a pre--trial statement, that the deceased died between 1 and 3 a.m. on the following morning, then Petitioner would have been clearly exonerated from guilt of the murder in this case, as the trial lawyers were originally anticipating, because he would have been in custody of the police department for a period of time that would have completely covered the homicide of the deceased!

Apparently, the Court of Appeals panel (Rector I) did not seem to understand that concept, especially since they specifically state that such fact was "irrelevant" to petitioner's claim that the Stillwell evidence was exculpatory to this entire case! Compare however, Enmund v. Florida, 458 U.S. 783.

3. Materiality

As to the materiality of such evidence, it would seem that if there is evidence showing the whereabouts of the defendant, at the precise time that a deceased was killed, that materiality of this "alibi" witness would be a foregone conclusion, but not apparently in the opinion of this panel of the Court of Appeals (Rector I) .

The Court of Appeals previously neglected to consider that, if Stillwell placed Petitioner in her store, shortly before closing, and had been there for "20 – 45 minutes", and since petitioner was shown to have been back at the apartment complex by 11:15 p.m., and it only took a few minutes to drive from the Stillwell store to the apartment, then it is apparent

that such evidence would have placed Petitioner in the Stillwell store at approximately 11:00 p.m.

The Court of Appeals found that there is no showing that "she saw Rector at any time before 11 p.m.", at Slip opinion page 5103, footnote No. 9 (Rector I). This finding that there is no evidence to show that petitioner was in the store before 11 p.m. was clearly erroneous! As we have attempted to show by substantial evidence, Stillwell indicated that petitioner was in the store, at that time, for a period of a minimum of 15--20 minutes, and possibly up to 45 minutes, according to her pre--trial statement.

These undisputed facts, which are completely ignored by the Court of Appeals, reflect that Petitioner could have been, under the Stillwell evidence, in that store as early as 10:15 p.m. until 11:00 p.m. Furthermore, since the petitioner has shown, by his driving times and distances logs, that the driving time from the location of the murder in far South West Austin was 18 minutes, there is in fact, evidence to reflect that petitioner was elsewhere, other than at the murder site, as late as possibly 9:57 p.m.!

All three trial counsel, after discovering the existence of the Stillwell evidence, testified during the state habeas corpus hearing that they believed that such evidence was clearly favorable and material to a defensive strategy of showing that Appellant was not present at the scene of the murder of the deceased.

Therefore, these findings of the Court of Appeals (Rector I) were factually incorrect.

4. Lack of Diligence

In concluding its review of the Brady claim, the Court of Appeals (Rector I) merely found that the failure to obtain the Stillwell evidence was

thus a showing of a "**lack of diligence**" on the part of the defense. However, as we have shown above, since the defense had no actual knowledge of the Stillwell evidence, since petitioner did not know where he was, but thought he had been at the 38th and Guadalupe store, that therefore, counsel were not lacking in diligence on this issue.

On the other hand, if they were lacking in diligence, in it is clear that the Court of Appeals subsequent ruling that counsel were not "ineffective" in their preparation for the guilt--innocence phase of the trial is also clearly erroneous. See Slip opinion pages 5105--5106.

If the original Stillwell evidence was available to the defense, then her testimony would have shown that Petitioner had been at a location for a substantial period of time during which the abduction and murder of the victim was still occurring! Petitioner submits that, had a jury considered the evidence presented herein, a reasonable juror would have been convinced that the petitioner was not guilty of this murder.

Furthermore, under Enmund vs. Florida, supra, had the jury had this evidence available, for consideration during the punishment phase of the trial, petitioner could have shown that he was not "death eligible" under the required standard of clear and convincing, as the newly discovered evidence clearly reflects that petitioner was completely removed from the scene of the killing, thus had no intent to kill, which thus would have prevented the death penalty from being assessed in this case.

In summary, Petitioner has attempted, by submitting evidence during his habeas corpus hearing, to show that the suppression of the Stillwell evidence, in combination with Dr. Bayardo's "change of heart as to time of death", and the failure of Petitioner's counsel to properly prepare, clearly undermined the jury's verdict in this case. It is clear that Petitioner's whereabouts on the night of the crime could have been clearly solidified

into indicating his lack of participation or presence at the murder scene on Red Bud Island.

As previously mentioned, while the federal courts rejected the claim of petitioner that the Stillwell evidence was unconstitutionally ""suppressed" under the rule of Brady vs. Maryland, during the first habeas corpus review, the court of appeals completely failed to consider the claim of petitioner that he was denied a "fair trial" under the Supreme Court decision of Schlup vs. Delo. When this claim was again submitted to the United States Court Of Appeals in December, 1998, once again, they refused to give proper consideration to it, once again denying petitioner a fair and full access to the courts with regard to these claims. It is submitted that these combinations of procedural due process errors "probably resulted" in a miscarriage of justice, which has resulted in the conviction of a factually innocent defendant.

Therefore, once again, petitioner respectfully requests this Texas Parole Board, in this clemency application, correct the errors of the judiciary made with regard to this case.

G. No Direct Evidence of Petitioner's Conduct -

As previously submitted, there is no direct evidence that petitioner had any part in the murder of Ms. Davis. He did not confess. No witness testified against him during the trial of this case, either as an independent eyewitness or as an accomplice witness. There was no evidence found in the automobile belonging to petitioner that Carolyn K. Davis was ever in he his car, i.e. hair, blood, fingerprints, etc, or that his vehicle was ever on Red Bud Island, the scene of the murder.

While the petitioner's car did contain stolen property from the apartment of Ms. Davis, as we have previously pointed out, the evidence clearly reflects that there were three (3) suspects in this kidnapping --

murder offense, where the three suspects being in two (2) separate automobiles, with petitioner having the stolen property and with the victim being kidnapped and taken away in the vehicle of the other co-defendants. There was no evidence found to link petitioner to read bud Island. Other than petitioner being in possession of clothing owned by the deceased, there were simply no evidence presented to this jury that petitioner was involved in the actual murder of Ms. Davis.

While the opinion of the Court of Criminal Appeals indicates that the evidence shows that petitioner was "wearing the blue jeans" at the time of his arrest, that had been worn by Ms. Davis, this finding in the Court of Criminal Appeals was flawed as a result of the "suppression of evidence" to impeach that opinion.

In fact, Mark Arnold, the boyfriend of Ms. Davis provided a written statement to the police, which was also not divulged to the defense of petitioner during trial, where Mr. Arnold indicated that he was "not sure" which "blue jeans" Ms. Davis was wearing at the time she was kidnapped. Therefore, since the evidence shows that a substantial amount of clothing, and other property, was taken from the apartment of Arnold and Davis, and since Arnold was not present at the time of the kidnapping, there is simply no evidence to show that Ms. Davis was actually wearing the blue jeans in question at the time she was kidnapped. This item of clothing could have been stolen along with the other items of clothing during this burglary, without linking petitioner to Ms. Davis at all. See Exhibit 5, attached hereto, an affidavit of John Barrett, one of the trial counsel for Mr. Rector, discussing the failure of Mark Arnold in identifying the blue jeans being worn by Ms. Davis prior to trial, but during tiral he did so identify those pants.

I. Other Factors - The Co-Defendants

As counsel for Anthony Michael Miller in the trial court preparation for trial in this case, petitioner's counsel herein, it was quickly determined that the evidence linking both petitioner Rector and Miller came initially from another co-defendant, Howard Simon, who had initially been arrested for this offense, after fleeing Austin and being located in Dallas, Texas. Simon believed that petitioner, after being arrested on the evening in question, had " snitched" on Simon and informed the police about his role in the crime. So, Howard Simon provided a statement to police, which resulted in other persons being arrested for this crime, including Anthony Michael Miller.

After an investigation by this counsel, it was determined that Mr. Miller was **totally innocent** of his involvement in this crime, and was in fact working as a disc jockey, in a club in East Austin, having over 35 alibi witnesses indicating that he was present in the club throughout all times in which the evidence of the state would show that Ms. Davis had been kidnapped. Further, Mr. Miller was in the continuous presence of another witness for the State from 1: 00 a.m. on Oct. 18th, 1981, until the late hours of that morning, indicating that Miller had no opportunity to be involved in this murder. Numerous witnesses provided information to the defense, and this information was provided to representatives of the District Attorney, but these alibi witnesses were summarily rejected by the prosecutors in this case.

During the trial of Mr. Miller, about a dozen witnesses appeared to testify as to his alibi, with it being unnecessary to call the other witnesses at that time. The jury **acquitted** Mr. Miller within two hours of deliberations, even though the trial had lasted more than two weeks. At all times throughout this proceeding, counsel herein was convinced of the innocence of Mr. Miller, and attempted to show the representatives of the

state these facts on numerous occasions, yet all of his efforts were rebuffed.

It is clear to counsel for petitioner that the obtaining of this acquittal on behalf of Mr. Miller has resulted in the state becoming extremely "protective" of its prosecution in the Rector case, based upon subjective, emotional and personal factors, which have no place in the criminal justice system, yet which have obviously prevented the proper consideration of the legal claims to the judiciary in this state.

Counsel also determined almost immediately that the statement given by Howard Simon was **false**, **perjurious** and **incorrect** in many respects. For example, Simon indicated that after he and his co-defendants had kidnapped Carolyn Davis, that they rode around in the vehicle belonging to Rector for a substantial length of time, prior to going to Red Bud Island, where Ms. Davis was raped and killed. The statement given by Simon indicates that Ms. Davis was in the automobile belonging to Rector for a lengthy period of time after 12: 30 a.m., on Oct. 18, 1981.

However, these statement are obviously **untrue**. The scientific evidence produced by the Department Of Public Safety Experts clearly reflects that Carolyn K. Davis was <u>never</u> shown to have been in the vehicle belonging to petitioner, much less for the several hours of time indicated by Simon. Further, as the undisputed record shows, Mr. Rector was arrested by Austin police officers at 11: 30 p.m. on Oct. 17, thus making the statement by Simon incorrect as to the timing. Furthermore, he indicated that Ms. Davis was raped, when the medical examiner found no evidence of such rape, as described by Simon.

Further, not only did Howard Simon flee Austin after the crime, but while he was in jail, after being charged with this capital murder, escaped the Travis county jail and was later killed in a robbery attempt in Louisiana.

In representing Anthony Michael Miller, counsel for petitioner herein determined the reasons why Simon escaped jail, at the time he did, as counsel for Mr. Miller had a deposition set with the girlfriend of Howard Simon shortly before his escape, wherein it was learned that Mr. Simon probably confessed to this crime and implicated petitioner solely because members of the police department promised him a very short prison sentence, and such false promise was revealed to the girlfriend during the deposition.

For all these reasons, the statement of Howard Simon implicating petitioner is incorrect and untrue on numerous factors, and thus should not be relied upon in this Parole Clemency process. Counsel for petitioner brings up this fact at this time, since the state has attempted to introduce the Simon statement "for the record" in almost every judicial proceeding in which petitioner has litigated his claims, for the purposes of attempting to show the state's alleged version of the crime. However, that version is incorrect, for a number of reasons, which can be shown should the Board desire to have a full and complete hearing on the record in this case.

The mere fact that the Miller acquittal occurred should be of this Board some "pause" in permitting at this execution to continue.

Further, attached hereto this application for clemency is an affidavit of this writer, counsel for petitioner Charles Rector, Exhibit No. 7, providing additional statements with regard to the background of this case, including conversations that counsel has had with two previous ex-assistant Attorney Generals who have represented the state of Texas in prior litigation in federal court in this matter.

VI.

PRIOR PRECEDENT

Petitioner realizes that, in the modern history of the Texas parole board, only a single death penalty inmate has been commuted it to a LIFE

sentence as a result of a showing of "factual innocence" -- the case of **HENRY LEE LUCAS.**

While petitioner does not have all the background information concerning the Lucas matter, it is clear that this board commuted that sentence because there were substantial evidence showing that Lucas was in Florida at the time of the killing of the victim in that case. As the Board knows, a presentation of such evidence took years to obtain, and was rejected by numerous state and federal courts in the judicial habeas corpus process.

Likewise, in the instant case, *clearly exculpatory* evidence reflecting that petitioner was not present at the scene of the Davis murder has been continuously disregarded by the Texas Court Of Criminal Appeals, and the federal courts in this state. The United States Supreme Court has only recently determined that the habeas corpus review process by the United States Court of Appeals for the Fifth Circuit is clearly flawed, when the Supreme Court set aside the death penalty and conviction from Louisiana in the case of Kyles v. Whitely, where substantial exculpatory evidence had been suppressed from the defendant.

Unfortunately, the United States Court of Appeals for the Fifth Circuit has a poor reputation for giving proper review and analysis to death penalty habeas corpus cases, and thus in the interest of justice, and in order to accord constitutional due process to this petitioner, it is hoped that this Parole Board will give full and complete consideration to this request for commutation of sentence, and will set this matter for a full and complete hearing before the Board, at a location appropriate, in order to permit the Board to see and consider witnesses relevant to these proceedings, and to determine appropriately whether petitioner is fully entitled to this commutation.

Counsel for petitioner herein is well aware that the commutation process has recently been upheld against constitutional challenges made by various litigants, but would nevertheless submit that in order to do justice and fairness, under both the State and Federal Constitutions, that petitioner Rector be accorded a face-to-face hearing before the Board, or a panel of the Board, in order to permit argument and discussion concerning the issues presented in this matter.

VII.
PRAYER FOR RELIEF

WHEREFORE, premises considered, the petitioner herein respectfully requests the Board to grant a full and complete hearing upon the allegations contained within this request for commutation, including the right to have witnesses and cross examination, and the right to present argument to the Board by counsel, and that upon consideration of the materials presented, the Board vote to recommend that the sentence of DEATH given to petitioner be commuted to a LIFE SENTENCE, in the interest of justice, and to recommend that the Governor accordingly commute the sentence pursuant to the law.

Respectfully submitted,

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