

BEFORE THE GOVERNOR OF THE STATE OF TEXAS

AND

THE BOARD OF PARDONS AND PAROLES

In Re:

DAVID WAYNE STOKER

PETITION FOR REPRIEVE FROM EXECUTION OF DEATH SENTENCE

AND

COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE

**DAVID WAYNE STOKER WAS CONVICTED IN HALE
COUNTY. HE IS SCHEDULED TO BE EXECUTED ON
JUNE 16, 1997 AFTER 6:00 P.M.**

DAVID WAYNE STOKER by Stephen M. Latimer, his attorney, petitions the Honorable George Bush, Governor of the State of Texas and the Texas Board of Pardons and Paroles pursuant to Texas Code of Criminal Procedure Art. 48.01 and 37 Texas Admin. Code Ch. 143 for a reprieve of execution and commutation of sentence to life imprisonment.

"This is a Christian Community, so-called; least it boasts of it. Let me ask this court, is there any doubt about whether these boys would be safe in the hands of the Founder of the Christian religion? It would be blasphemy to say they would not."

Clarence Darrow's closing argument in the case of *Illinois v. Loeb and Leopold* (1924) as reported in the novel *Compulsion*.

PROCEDURAL BACKGROUND

1. David Stoker was arrested on May 18, 1987 for the November 9, 1986 murder of a convenience store clerk based on information supplied by Carey Todd, who had worked as a confidential informant for the Sheriff of Hale County. The physical evidence included three shell casings from a .22 caliber Ruger pistol, and a spent bullet. Todd placed the weapon in Stoker's hands, both figuratively at time of the murder by his trial testimony, and literally, shortly before he told local authorities that he knew Stoker had the weapon.
2. Stoker was tried on a charge of capital murder in the 242d District Court, Hale County, Texas in October 1987, and convicted on October 26, 1987. He was sentenced to death on November 24, 1987. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals in 1989.
3. In May, 1991 Stoker filed a petition for post conviction relief. On April 20, 1992, the Court of Criminal Appeals denied the petition. He then filed a petition for a writ of habeas corpus in federal district court. The primary grounds for both petitions were that the prosecutor withheld information concerning Todd that would have cast doubt on Todd's veracity at trial and probably would have affected the outcome. Indeed, one judge on the panel in the United States Court of Appeals that heard the case asked if it was just as likely that Todd committed the murder as Stoker.
4. On October 19, 1994, the United States District Court for the Northern District of Texas dismissed Mr. Stoker's petition for a writ of habeas corpus; the United States Court of Appeals for the Fifth Circuit affirmed on October 26, 1996; the United States Supreme Court denied certiorari on April 28, 1997. On May 5, 1997 the 242 District Court

ordered that Mr. Stoker be executed on June 16, 1997.

**STOKER REQUESTS A COMMUTATION OF HIS
SENTENCE TO LIFE IMPRISONMENT BECAUSE IF THE
REALITIES OF TEXAS DEATH PENALTY TRIALS HAD
PERMITTED HIM TO PRESENT AVAILABLE
MITIGATING EVIDENCE WITHOUT FEAR THE IT
COULD BE USED AGAINST HIM NO RATIONAL JURY
WOULD HAVE SENTENCED HIM TO DEATH**

5. At the time of trial a jury simply was required to answer the three special issues "yes" in order to sentence a person to death. Tex. Code of Crim Pro. Art. 37.071(b). The determining factor for a sentence of death was the second special issue "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." At the time Texas and Oregon were the only states that did not specifically provide for the introduction of mitigating evidence at trial. It is respectfully submitted that in any other state that provides for capital punishment, and in Texas after the addition of Tex. Code Crim. Proc. Art. 37.71, §2 (b) (2), §2 (e) Stoker would have been sentenced to a sentence other than death if the jury could have heard the mitigating evidence.
6. The dilemma facing capital defendants before the statute was amended was best described by the Supreme Court decision in *Penry v. Lynaugh*, 492 U.S. ___, 109 S.Ct. 2934, 2981, (1989), "[H]istory of abuse is thus a two edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." The mitigating edge of Mr. Stoker's early history indicates that Mr. Stoker was less morally culpable because he suffered abuse throughout his childhood. The aggravating edge was that if the jury had heard the evidence, they could

have determined that Mr. Stoker's past and susceptibility to bad influences suggest that he is likely to be dangerous in the future, and therefore special issue number two must be answered "yes."

7. In other words, just because a person may pose a threat to society at some undetermined future time, does not mean that he does not possess redeeming qualities that render him worthy of a life sentence rather than execution. Yet, that is precisely the result mandated the pre-1991 sentencing statute under which Stoker was sentenced. The question of "future dangerousness" was the only means a rational juror had to assess the mitigating force of a capital defendant's positive character traits. The statute thus precluded jurors from giving any independent mitigating effect to the evidence of Stoker's valuable human qualities, and from expressing their reasoned moral response to this evidence by voting for a life sentence.

"If there is such a thing as justice, it could only be administered by one who knew the inmost thoughts of the men to whom he was meting it out. It means that you must appraise every influence that moves them, the civilization in which they live, and all the society which enters into the making of the child or the man! If Your Honour can do it, you are wise, and with wisdom goes mercy."

Darrow, *supra*

8. Stoker's evidence of devotion to his family, and concern for those close to him could not be given full and independent mitigating effect under the special issues. While these facts about Mr. Stoker's character and background may have had some relevance to the "future dangerousness" question, their relevance to the appropriateness of a death sentence is not exhausted by that slender probative value.

9. Without clarification the second special issue easily could be answered in the

affirmative with respect to any person convicted of capital murder. That point is nowhere better illustrated than in this case. Mr. Stoker's jury was instructed in the bare terms of this vague special issue and thus did not receive the constitutionally required specific and detailed guidance concerning its meaning and application. After deliberating for over one hour, the jury submitted a note to the court asking "Does criminal acts of violence mean acts with a weapon or just acts with mean" -- underlined -- "intentions--like with fists?" The court refused to further define the terms. S.F. 16 at 212-13.

10. Clearly, the jury was confused as to what it must find under the second special issue. It did not know it could save Mr. Stoker's life if it simply found that he was a mean man. It did not know whether a fist fight might be an act of criminal violence, or whether use of a weapon was necessary. And, the trial judge refused to further guide their discretion.
11. After the Supreme Court decided *Penry* the legislature enacted Tex. Code Crim. Proc. Art. 37.71, §2 (b) (2), §2 (e), which provides:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Had that statute been in existence in November, 1987 Stoker could have introduced the following mitigating circumstances to warrant that a sentence of life in prison be imposed rather than death.

12. David Stoker is a 32 year old white male (DOB 1-25-59). He has been incarcerated since May 18, 1987. He has been on death row since November 24, 1987.
13. David is the fourth of six children: Shirley-Ann, Andrew Jackson, Deborah Kay, Danny Roy, and

Rodney Dee. David was born in Amarillo. Ms. Stoker carried David full term. He was born on a Sunday. She was at the hospital for 15 minutes when he was born. Dr. Puckett delivered him. He was red when born. She did not breast feed him. Ms. Stoker had a total of six live births. She miscarried twice, once with twins.

14. When David was less than a year old, the three older kids had measles. Just as they were getting over it David got a high fever. He had convulsions. They took him to the hospital and were told by the doctors that he had spinal meningitis. They packed him in ice and kept him for three days running a high fever. His mother decided to take him to a hospital in Lubbock, but on the way she changed her mind and just took him home.
15. The family moved frequently during David's childhood. They usually lived in the country, just outside of different small towns. He attended the first and second grades in Plainview, Texas, then spent the third grade in Alto, Texas. They moved back to Plainview for a year, and then moved to Lufkin, Texas. On several occasions they moved between Plainview and Alto. When David was in the seventh and eighth grades, they lived in Jacksonville, Texas. He had to drop out of school during the ninth grade.
16. The Stoker family attended a Church of Christ. David was baptized when he was 13 years old.
17. David's father is Jasper Jackson Stoker, and his mother, who died in April of this year from a heart attack, was Jo Ann Pierce Stoker. When David was growing up, the family was poor because the father had a serious drinking problem. According to David's mother, Jasper Johnson was a skilled carpenter who worked steadily early in their marriage, even though he was always a heavy drinker. As time wore on, the father's drinking became a problem. The children remember their father rising and beginning to drink as they left for school in the mornings. By the time they came home in the afternoon, he would be passed out.

18. David's oldest sister, Shirley Stoker Young, is an psychiatric L.V.N. She was born with a facial defect which caused her to require numerous surgeries on her face. She reports being quite close to David, and says all of her siblings were very protective of her because of the teasing and abuse she experienced at school.
19. Ms. Young confirms that her father had a drinking problem. In addition, she detailed the physical and emotional abuse to which her father subjected the family, especially Mrs. Stoker. She remembers when David was a toddler and was always present when their mother was being physically abused. Once their father had their mother on the floor and strangled her and was beating her in the face with both fists. Shirley went and tapped her dad on the shoulder to tell him to stop. Her father picked her up to the ceiling and just dropped her. Then he kicked her mother through the house and out the back door. Shirley's arm was fractured from being dropped, but she was never taken to the doctor.
20. After he had kicked their mom outside, their father wouldn't let the kids leave the house. It was Halloween, and finally Shirley talked him into letting her take the kids trick or treating. When they got out of the house they went and hid in a nearby alley. They stayed hidden until they saw their mom drive up, then they ran and all got in the car. They went and stayed with their paternal grandmother, who was battered in their presence by their grandfather. You couldn't even tell who their mother was because her face was so bruised and swollen. Ms. Young remembers lots of times when their mother had to eat through a straw as a result of beatings she received from her husband. On this particular occasion, Mrs. Stoker's eyes were so swollen that she could hardly see. They were all afraid of their father. He always ruined holidays, even Christmas, because he would get so drunk.
21. Once they were living out west of Plainview, and their dad's brother came to visit. They just sat around and talked. When their uncle left, their father turned to mom and started beating her real bad, saying she had done something wrong. There was a real bad thunderstorm going on. Ms. Young

remembers chasing her uncles car in the storm, trying to flag him down so he could come back and stop the beating, but he couldn't hear her through the thunder. Finally mom said she would apologize. They all went into town to the uncle's house. Mom apologized, but the uncle said there was nothing to apologize about.

22. Andy, the oldest boy, was the first one who protected mom. All the kids tried to protect her. Dad would beat up on Andy too. He would grab his ear and punch him. He used his fists on all the kids. He would punch them in the head and face. He would also whip the kids when he was drunk. He used a belt. There would be whelps on their bottoms and legs. He would not know when to stop. The beatings got worse as the years went by. But the physical violence was nothing compared to the mental violence. Vacations were always a nightmare. He would take them to the mountains so he could scare them. He liked to act like he was going to drive off the mountains or into the lake. Ms. Young cannot even go to Palo Duro Canyon and look down. He was constantly trying to scare them.
23. When Shirley was 16 years old, mom and dad were messing with the stove. Dad had mom's head between the stove and a cabinet door and he was pushing really hard on the door. Shirley tried to get him to stop and he started screaming at her. She ran off. When she came back the police were there. Her dad had run off. The police said that a man needed to drink after working hard all week.
24. Once dad came home and he had lost the family car. He was so drunk he didn't know where he had left it. Dad would eat steak while everyone else had sandwiches. When Shirley was young, she could remember dad working, but as she got older he never worked. He would use Shirley as an excuse to not work. She required a lot of surgery for her face, and he would tell people he didn't have money because he was paying all these medical bills, but he never paid the bills. He just bought liquor. He took her to Galveston for surgery on her nose. Mom was working at the Lufkin State School. So the plan was for Dad to go with her and live close by and get a job. But she only saw him maybe once a

day, just long enough for him to give her a 6 pack of cokes.

25. Once in Alto Dad had a gun. He was pointing it around. Mom got on him about pointing it. He pointed it at the ceiling to show it wasn't loaded, but it was loaded, and it shot a hole in the ceiling.
26. When the mother was working as a clerk in a store, she fell and seriously hurt her back. Surgery was required and she was disabled for a period of time after the surgery. After their mother hurt her back on the job, their dad left. Shirley was grown and married and had a child of her own. When their mothers' workers' compensation settlements were coming in for the job injury, Dad came back. It was a large amount of money. He hung around until that was all gone. He would tell her to sign checks and she would have to do it. She couldn't refuse. Once the money was gone and a bunch of checks started bouncing, he left for good. Shirley went out to mom's house about that time, and found that mom and three kids had no heat, no food. They were all wrapped in blankets. It was real cold. Shirley took them home and fed and kept them until they came up with money for butane and food. It was mom, Danny, David, and Rodney. It was around this time that Mrs. Stoker attempted to commit suicide, using pain killers which had been prescribed for her back injury.
27. Ms. Young describes David as a caring brother who did what he could to help the family. He dropped out of school and worked, giving his pay checks to his mother after their father left, and while she was still unable to work due to her back injury. David's other sister, Deborah, also described a caring side to David. She says he always liked to go fishing and hunting. Deborah got married when she was 17 years old. David was 14 when she left home. He was very immature. He had to grow up the hard way and had to grow up very fast because they didn't have it easy as children. Mainly this was because of the father's drinking. The family didn't have money. Daddy wasn't a father figure for them. Even when he tried to be a father figure, no one would accept it from him because of his drinking. No one wanted to go around him, although the kids wanted to make him proud.

28. When Deborah's husband went into the military, she lived in Georgia where her husband was stationed. At that time she was pregnant with her first child. They were invited to a party at the General's house, but she didn't have any clothes to wear. Her pregnancy had advanced far enough that all her clothes were too small. Her mother didn't have any money either. David sent the money for her to buy some new clothes so she didn't have to be embarrassed when she went to the party.
29. Deborah describes David as a hard worker. He always found work and supplied cash for the family. He worked long hours. He always had a job. He was good about helping people. Various relatives mentioned that when their grandmother suffered a stroke, he made himself available so that he would be there if she needed to be moved for any reason. He was always very gentle with the grandmother. She had been an extremely modest woman all her life, and even though she couldn't speak after experiencing the stroke, David knew she was concerned about being covered whenever she was being carried from room to room. David was always conscious of her desires and took great pains to keep from embarrassing her.
30. Grandpa was a violent alcoholic, too. The kids remember him beating on their grandmother. When the family was living in Alto, their father's parents were living there also. Grandpa got real drunk and he wanted the boys to go hunting with him. Mrs. Stoker refused to allow them to go. Grandpa had a gun and he was threatening everyone with it. They all ran outside into the woods and hid until their dad got home. Grandpa was eventually placed in Rusk State Hospital for a period of time.
31. David describes the period after his father left, when his mother tried to kill herself, as the worst time in his life. Mrs. Stoker was placed in Rusk State Hospital for a period of time. It was then that David was forced to drop out of school in order to support his younger brothers. Because of David's efforts, both of his younger brothers were able to graduate from high school.
32. When David was seventeen, he joined the army. After completing basic training, he was stationed in

Germany. During that time he developed a heavy drinking problem and an intravenous drug problem. When he got out of the military, his friends and family noticed that he had changed. He received an honorable discharge for substance abuse reasons. He had never used drugs before he was in the military.

33. James Skains is a sixty year old business man who worked with David in an irrigation ditch digging business after David got out of the army. He met David when he was looking for someone to work for him. They worked together for a little over a year. When they agreed to hook up, David told Mr. Skains why he was out of the service and about his drug problem. Mr. Skains is certain that David did not use drugs or too much alcohol while he working Mr. Skains. He feels certain about this because they would have breakfast on Sunday mornings together. David never seemed to be hung over or high or anything. David learned fast and was eager. He was honest and was good with customers. He wasn't afraid to work hard and get dirty and greasy. Mr. Skains would sign blank checks for David and David would take them and buy stuff for the business. David always brought back receipts. He never skimmed. David had a temper. Once they had a disagreement and David "bowed up like a young man will sometimes." Later, he apologized. David was in debt when he started working for Mr. Skains.. He got out of debt and bought a car. He had some money saved when he left. David was reliable on the job. Mr. Skains never had to wait for him or go get him. They worked together for 14 to 16 months.
34. They split up because David got hit with income taxes: Mr. Skains had warned him about putting money aside, but David had not done so. David wanted Mr. Skains to pay him wages and withhold money. They disagreed on that and that is why they split up. Mr. Skains says that he understands more now why David felt that way.
35. Mr. Skains remembers that David talked some about what a hard time he had growing up. David

never blamed anyone for it, though. He was always concerned and tried to do for his mother. Once David cried when he talked about his mother. He was tough and stout but he was awful big hearted. He was polite and had good manners. David talked rough because of the way he had been taught when he was growing up. Mr. Skains helped him curtail that. He was kind of like a son to Mr. Skains. After David stopped working with Mr. Skains, he started working for an oil field company. Mr. Skains would see him driving the company truck on occasion.

36. Another employer was Robert Vernon. Mr. Vernon also employed David's mother as a secretary. David worked for Mr. Vernon off and on for several years. He was an intermittent worker because there wasn't steady work. He worked on repairing and remodeling houses. He was a good carpenter. He also painted and did other jobs remodeling. He worked for Mr. Vernon a little before he went into the army, back when he was 16 or 17 years old. When he came back from the army he worked for Mr. Vernon again. He was 21 or 22 years old when he started working again. He was a good worker. He needed some supervision but not continuously. Vernon would set him to working and he would just do it. Very strong and able to do the work. David was an honest and reliable worker. David was never drunk on the job, and got along with other workers just fine.
37. David held a variety of other jobs, including carpentry odd jobs, cement truck driver, route salesman and delivery for Coca-Cola, flour processing for Harvest Queen, construction work for Hasty Construction, hot mop roofing for Leatherwood Brothers (he really liked this work a lot), Green Machine Pump Company, Bryan Jackson Pumps, and as a gas station attendant.
38. Lynda Long is David's girlfriend. They first met in March of 1986. They were neighbors. She'd just gotten a divorce. When she moved to a different house, they eventually broke up. They were together less than a year. However, they are now regularly corresponding and both profess deep feelings for one another.

39. Ms. Long has three children from her only marriage: Dondi, Deidre, and Deandra. David was really good with the girls. Dondi has cerebral palsy and has behavior problems. She has the mind of a 6 year old. David would carry the little one around with him all the time. He never tried to use force with her kids. He was really patient with them.
40. Ms. Long reports that David was always real proud of his mother's house. He would point to all her things real proudly. He would also talk about his father. He would be sad and hurt whenever he talked about it. Lynda's exhusband is Johnny Long. Mr. Long used to abuse her by pushing her around and breaking things. He would always call and hang up. David was protective of her with Mr. Long, and played a major role in getting him to stop harassing her. David was strongly opposed to men abusing women because of his mother.
41. David married Rebecca Pratt in 1986, after he had been arrested on drug charges but before he was charged with capital murder. Ms. Pratt was pregnant when she married David. She has since given birth to a son who David has never seen. Ms. Pratt disappeared after the jury was selected in David's capital murder trial. After she had been gone for a couple of years, David obtained a divorce.
42. Prior to the arrest in this case, David had a DWI conviction and an assault conviction. He had also been arrested for failing to return some rented video tapes.
43. Had Stoker been sentenced under the current capital sentencing scheme, his life story would have been permitted the dignity and force the Eighth Amendment requires, with instructions focusing the jury's attention on Mr. Stoker's mitigating evidence. A reasonable juror could then have voiced a "reasoned moral response" to Mr. Stoker by voting to impose a life sentence, rather than death.

**STOKER REQUESTS A COMMUTATION OF HIS SENTENCE TO
LIFE IMPRISONMENT BECAUSE THERE ARE SERIOUS DOUBTS
ABOUT HIS GUILT**

44. David Stoker requests that his sentence be commuted to life imprisonment pursuant to the Rules of the Texas Board of Pardons and Appeals §143.57 on the grounds that there exists substantial doubt as to his guilt.

A. The Evidence of Sandra Back

45. Sandra Back, the manager of the Allsup's at the time of the murder believes it unlikely that Stoker committed the murder for several reasons. She tried to explain her reasons to the police and to give the police information about the real possible killer.
46. Based on her experience in the Allsup's Ms. Back believes that the murder was committed by someone familiar with the store and who was known to Mannrique. The basis of her belief is that the flood light in the rear of the store was off and the security latch on the back door was unbarred. The back floodlight is left on all night and is only turned off at around 7:30 or 8:00 a.m. Only someone familiar with the store would know where the light switch is. To her knowledge Stoker had never before been in the store.
47. Ms. Back believes that Donald Parker killed David Mannrique because Mannrique was sexually harassing his wife, Mary Eubanks, who worked in the store. Mary told Parker that Mannrique was patting her rump and was rubbing her hair. She told Ms. Back that she told Parker about it.
48. David Mannrique was afraid of Parker and had been threatened by him a few days before he got killed. was afraid of someone. As the trial testimony showed, Mannrique brought a machete to work because he was afraid that someone was going to harm him.
49. A few days before Mannrique got killed Ms. Back was entering the store to go to work. As she approached the store she saw Parker shaking his finger in Mannrique's face. She could not hear what was being said. When she entered the store the men shut up. Objections to defense counsel's attempts to elicit this testimony were sustained.

50. The morning of the murder when Ms. Back arrived at the store and saw what had happened she tried to tell Chief of Police Cordell that there was a problem between Mannrique and Parker. He brushed me aside and did not want to hear what I had to say.
51. Don Parker was a heavy drinker and drug user. About a week after the murder Parker told Ms. Back that he had an argument with Mannrique and that he had the same kind of gun used in the murder. After that she tried to tell every police officer she could about Parker but no one wanted to listen to her.
52. On information and belief no statement was ever taken from Ms. Back, Ms. Eubanks or Mr. Parker.

B. Charles Tue

53. Tue was the sheriff of Hale County at the time of the murder. He had a conversation in May, 1997 with Stephen M. Latimer Stoker's counsel.
54. At a pre trial hearing Tue testified that he arrested Stoker for a drug transaction but that he was not investigating Stoker for the Mannrique homicide.
55. Tue had been in law enforcement for twenty eight years at the time of the murder. He had known Stoker all his life. It is Tue's opinion that Stoker did not commit the murder because that was not Stoker's style.
56. Tue believes that Stoker "would rear up on his hind legs and fight" but he would not engage in a cold blooded killing like the Mannrique homicide.

C. Carey Todd Is the Likely Murderer and Had Good Reason to Lie at Trial

57. Carey Todd was the principal witness against Stoker. The evidence uncovered during investigation after the trial revealed that Todd had been paid a \$1000 crimestoppers reward for his cooperation in the case, that pending felony drug charges against him were dismissed the very day he testified against Stoker at the hearing to suppress the gun, and that the prosecutor went to extreme lengths to

conceal both events from the defense.

58. **THE UNANSWERED QUESTION IN THIS CASE IS, IF THE DISTRICT ATTORNEY WAS NOT UNLAWFULLY PROTECTING HIS INFORMANT AND IF TODD WAS NOT CONNECTED TO THE MURDER, *WHY DID HE GO TO SUCH EXTREME LENGTHS TO CONCEAL THE BENEFITS TODD RECEIVED?***

59. In fact, one judge on the Fifth Circuit panel asked the State Attorney who argued the case in that court "isn't it just as likely that Todd committed the murder as Stoker?" The answer to that question has to be a resounding "YES"

60. The Fifth Circuit Court of Appeals described the evidence:

In April 1987, Carey Todd (Todd), an associate of Stoker's, approached local law enforcement officers claiming that he believed that he could obtain possession of the weapon used to kill Mannrique. Todd testified that he was told that law enforcement would be interested in seeing the weapon if he could obtain it. On May 16, Todd obtained a .22 caliber Ruger automatic pistol claiming to have received it from Stoker to assist Stoker in killing two people, Ronnie and Deborah Thompson. Todd turned this weapon over to Texas Department of Public Safety Officer Claudie Hinkle (Hinkle). At that time, charges were filed against Todd for unlawfully carrying a weapon, although both Todd and Hinkle testified that these were sham charges filed to protect Todd. Todd also assisted law enforcement officers in recovering a fourth .22 caliber shell casing from Stoker's car on May 18, 1987.

Stoker was arrested for selling drugs to Todd during a "controlled buy" set up by Todd in cooperation with police. After this arrest he was charged with the murder of Mannrique.

61. Todd told the police that Stoker told him to kill Ronnie and Deborah Thompson. (Sl. Op. at 3). Deborah Thompson, the other key witness for the prosecution, testified as to an alleged admission by Stoker.

Deborah Thompson, Ronnie's estranged wife, testified that Stoker had also told her "that he had gotten in some debt, and he needed some money, and he killed the man in the Allsup's store," indicating that he had shot the man three times.

She also identified that Ruger pistol as belonging to Stoker. Another witness, Ronald Dean Hale (Hale), also indicated that he had seen Stoker in possession of the Ruger pistol, although he was unable to recall just when.

62. Deborah's testimony is suspect for several reasons. She was living with Todd at the time of trial and occasionally prior to that time. At trial Todd testified (S.F. Vol 14 at 45 -46):

Q. And Deborah Thompson and Ronnie are married aren't they?

A. Yes, they are.

Q. And at this time they are still married, aren't they?

A. Yes they are.

Q. And at the present time you're living with Mrs. Thompson aren't you?

A. Not living with. She's staying with me.

Q. And how long has she been staying with you?

A. About a month.

Q. Did she ever stay with you while you were living in Kress?

A. Yes, she has.

Q. How long has she stayed with you while you were living in Kress?

A. About two months.

63. The Fifth Circuit acknowledged that the earliest the murder weapon was seen in Stoker's possession was "between Thanksgiving and Christmas of 1986," and that a prosecution witness "had known both Todd and Stoker to carry the [murder weapon] in the past." Thus if Todd had been successfully impeached there would have been no case against Stoker.

A. The Crime Stoppers Reward

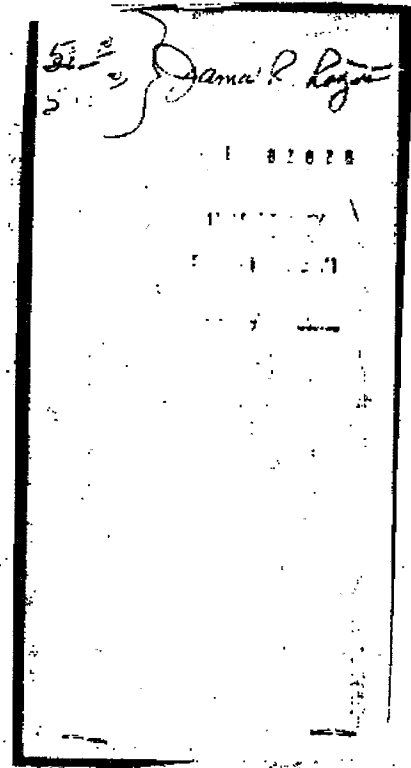
64. It is no longer seriously disputed that a \$1000 reward was paid to Carey Todd through the Crime Stoppers organization, or that it was it was channeled through the Hale County District Attorney's office. But, it was not always so.

65. From trial through the post conviction proceedings the prosecutor went to great lengths to hide the

payment of the Crime Stoppers money from the defense. First, according to Richard Cordell, who was the Hale Center police chief in 1986, no Hale Center Crime Line organization ever existed, nor was any reward money ever authorized. Dec. 12 E.H. Vol. 1 at 14, 15.

66. Second, according to Riley Rogers, the investigator for the Hale and Swisher County District Attorneys, no money was ever paid through any Crime Stoppers organization in relation to the murder of David Mannrique, Dec. 12 E.H. Vol. 2, at 86-88, and the District Attorney's office had absolutely nothing to do with any crime line payments made to Carey Todd or Deborah Thompson. **Ibid.**
67. All that changed on January 27, 1992 when, in response to a subpoena, the bank draft issued by the First National Bank of Hale Center, Texas and bearing the endorsement of Riley Rogers was offered in evidence:

01/27/92
FIRST NATIONAL BANK, HALE CENTER, TEXAS
NOV / NOV / SUPER NOW / MONEY MARKET ACCOUNT
MICR: 991015
DEBIT
DESCRIPTION: net. Swisher, Justice Line (1/27/92)
Burnett, Hale Center, Texas
to pay funds to CRIME LINE (CITY OF SWISHER)
1,000.00
991015
⑆0000100000⑆



Jan. 27 E. H. at 70. R. E. 9.

68. Only then, for the first time, did the prosecutor acknowledge the existence of Crime Stoppers or of the payment of money to Todd through the organization. Rogers testified that his signature appeared on the back of the draft. He then said:

Q. Was there any money that you recall being paid for crimestoppers?

A. I don't recall any exacting (sic) transactions, but I would not have necessarily been involved with the crime -- crimestoppers people unless it was third party-type situation.

* * *

Q. Could it have been possible that you received a thousand dollars from Hale County and transferred that money, and gave it to Talmadge Todd? Is that possible?

A. Yes, sir, it's possible.

Jan. 27 E. H. at 72 - 73.

69. The tale told by the prosecution, that the reward money was paid to Todd without his knowledge, and out of the goodness of the prosecutor's heart, when considered in the face of the cover up was so implausible that a reasonable fact finder could not plausibly credit it. The federal magistrate looked at this evidence and noted

It certainly appears there were prosecution witnesses at the State Evidentiary Hearing who were, to put it generously, reluctant to discuss the circumstances surrounding the payment of the Crime Stoppers reward. ... However, whatever suspicion might be engendered by the stubborn recalcitrance of certain witnesses to testify accurately and fully about the procedures and post trial events involving the Crime Stoppers payment...

70. Again, the question remains, why would the prosecutor go to such extreme lengths to cover up a legitimate transaction if Todd was truthful and Stoker was guilty?

B. The dismissal of the drug charges

71. The lie about the reward also casts doubt about the truthfulness of the denial of favorable treatment on the drug charge in return for Todd's cooperation against Stoker. If the state lied about the reward, then Todd's attorney's testimony that he believed Todd's cooperation in the Mannrique murder investigation influenced the district attorney to dismiss, when combined with the dismissal notation in the Potter County district attorney's file has the ring of truth, and there was indeed a deal struck in exchange for Todd's testimony.
72. In February 1987 Todd was indicted for possession of amphetamines and the prosecution announced itself ready for trial. As part of pre trial discovery Stoker's defense counsel sought disclosure of Todd's past and pending criminal record. The trial court ordered District Attorney McEachern to provide the criminal histories of all lay witnesses. In response he was provided a Texas Department of Public Safety criminal history dated December 10, 1986, which did not reflect Todd's Potter

County charges for possession of drugs. Defense counsel never was made aware of the felony drug charges pending against Todd, nor of notes in the Potter County District Attorney's file suggesting Todd had been assisting in the Hale County murder prosecution.

73. At the suppression hearing Todd was the first witness offered by the State. Todd consistently denied that he was getting any consideration -- agreements, "help," reward money, or another other inducements -- to testify. At one point Stoker's counsel asked Todd if he had any pending charges and the District Attorney leaped forward with an objection:

[DEFENSE COUNSEL]: Now, Mr. Todd, do you have any charges pending against you at this time?

MR. McEACHERN: Well, now, Your Honor, we're going to object as this goes beyond -- completely beyond the scope of this hearing as to -- to the search and the alleged search that Mr. Felty has put down. And it's going into what I talked to the Court before about this free discovery so he could make me put all my witnesses on the stand so he could discover everything and hold them. And I object on that basis.

MR. FELTY: Your Honor, in this connection, they took him to jail on [Unlawfully Carrying Weapon] charge. I think I'm entitled to do that. And, I -- if I continue to find out whatever charges are pending.

MR. McEACHERN: Your Honor, that's completely --

THE COURT: I will sustain the objection as to the evidence. You may proceed. (S.F. Vol. 2)

74. That very day the pending drug charges were dismissed against Todd. Defense counsel did not cross-examine Todd about his criminal record at trial.
75. At the state post-conviction hearing the facts concerning the dismissal of the drug charges were fully developed. On November 23, 1986, two weeks after the murder, Carey Todd was arrested in near-by Potter County on the charge of carrying a concealed weapon. An inventory search of his car revealed amphetamines and marijuana, for which he was charged the next day. A \$15,000 bond was set.
76. After being charged with the felony drug offense Todd retained Thomas Page Brittain as defense

counsel. Brittain testified in the state habeas proceedings, the transcripts of which were relied upon by the Magistrate-Judge in federal habeas proceedings. While Brittain could not recall which Assistant District Attorney he discussed it with, he did recall telling the District Attorney "that my client had some information about an offense here in Hale County." Dec. 12 E.H. Vol. I, 96. Citing attorney-client privilege, Brittain would not testify as to the specific communications he had with his client and the District Attorney during these negotiations:

Q. ... Why did you relay that information to the District Attorney's office at that time?

THE WITNESS: (Pause) Your Honor, I'm not sure if I'm getting into an area that would be attorney-client privilege or not.

Q. (BY MR.. LATIMER:) I'm interested in discussions you had with the District Attorney's office.

A. Only the -- with the DA?

Q. Yeah. I am not interested in anything you talked about with your client.

A. Okay. Well, I think the answer would have to--would have to be something that my client had -- had discussed with me, so I think it would have to go back to the attorney-client.

Q. ... Did you expect to gain some benefit for your client by relaying that information, to the District Attorney?

* * *

A. Yes, I did.

Q. And what was the benefit that you expected to gain for him?

A. Well, some kind of consideration in his treatment ... in the case in Potter County.

Q. And hopefully the case would be dismissed in exchange for that information. Is that correct?

A. That would be the best possible outcome, yes, sir.

Id., 96-97.

77. Brittain was required by Texas professional ethics to communicate to Todd the content of all plea

discussion with the District Attorney and to allow Todd to make any necessary decisions.¹

Presumably Brittain did act ethically and fully reported his discussions with the District Attorney to Todd, and Todd both made decisions and acted upon that information.

78. Judge Ebelardo Lopez, a chief Assistant District Attorney in Potter County at the time, could not recall the Todd drug case. Dec. 12 E.H. Vol. 1, 117-18. "The only thing I remember is looking at the file, reading the IR's, and making my decision to dismiss for the reasons that are in there." *Id.*, 118. He did not recall if he had any discussions with Todd's lawyer about the case. *Id.*, 106 and 119. He agreed that the prosecutor had filed a written notice of ready for trial pursuant to the speedy trial act that was in effect at the time and he assumed this meant the assistant district attorney involved was ready to proceed. *Id.*, 113-14.
79. At the time Todd received this benefit Judge Lopez or his boss, District Attorney Danny Hill, were the only ones in the office with the authority to dismiss cases. *Id.*, 118-19. "And unless it was something really major, I don't think that [Hill] would have looked at it." *Id.*, 118. Judge Lopez did recall that felony drug cases were sometimes dismissed as part of negotiations. *Id.*, 107-08.

¹ In 1972 the State Bar of Texas adopted the following Ethical Consideration:

E.C. 7-7. In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the right of a client, a lawyer is entitled to make the decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Texas Lawyers' Professional Ethics Manual. Austin: Texas Young Lawyers Association, 1979, 2 - 35

80. Judge Lopez also identified a handwritten note on the Todd drug file as his own. It read:

“Dismissed: this Δ helped Terry McEachern (286 5228) DA solve a murder case. (signed),”
R. E. 10, (see below):

FILE
91 OCT 18 AM
ANNEX
11-11-91

Dismissed: this is a legal issue, not a clemency issue (298-5248)
DA also a clemency case. Please

Applicant's Ex. 3
12-12-91

Id., 108. Judge Lopez could not explain this note:

I don't know who gave me that information. That is my handwriting. That ... notation could have come about from any means. It could have been the very prosecutor who brought it to me and said, this guy has helped, and I could have wrote it in for that reason.

Id., 114.

81. Judge Lopez regarded the information that Todd had assisted McEachern in a murder case as "important at the time I received it." **Id.**, 115. He would not dispute that Brittain had used the information on the murder to try and negotiate the best deal for Todd. **Id.**

CONCLUSION

"I am pleading that we overcome cruelty with kindness and hatred with love. Your Honour stands between the past and the future. You may hang [David Stoker], but in doing it you will turn your face toward the past. I am pleading for the future; I am pleading for a time when we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

"If I should succeed in saving [Stoker's life] and do nothing for the progress of the law, I should feel sad indeed. If I can succeed, my greatest reward and my greatest hope will be that I have done something to help human understanding, to temper justice with mercy, to overcome hate with love."

---Clarence Darrow summing up for Loeb and Leopold 1924

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