BEFORE THE GOVERNOR FOR THE STATE OF TEXAS
AND
THE TEXAS BOARD OF PARDONS AND PAROLES

In re

TROY DALE FARRIS

Applicant

APPLICATION FOR REPRIEVE
FROM EXECUTION OF DEATH SENTENCE AND
COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE

SUBMITTED BY:

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INTRODUCTION

Troy Dale Farris sits on death row despite the fact that four years ago, the Texas Court of Criminal Appeals revisited their decision denying Farris relief on direct appeal, and expressly stated that their prior opinion in Farris' case was "wrongly decided", "expressly overrule[d]" and could not be followed. *Riley v. State*, 889 S.W.2d 290, 300-301 (Tex. Crim. App. 1994) (on reh'g), *cert. denied*, 515 U.S. 1137 (1995). At the time of the *Riley* decision, Farris was pending before the federal courts. Because of the procedural morass that comprises the habeas appellate system, Farris has been unable to return to the Texas Courts to ask for the relief that he is entitled.[1] Those same procedural rules may yet preclude Farris from obtaining the reversal of his death sentence to which the highest court of this State has said he is entitled. If there was ever a case where an inmate was effectively "denied access to the courts", this is it, and demands the intervention of this Board.

This is not the only fact calling for the exercise of this Board's unique powers. Mr. Farris' conviction resulted from a trial comprised of circumstantial evidence and the testimony of a co-defendant who walked away from a capital murder charge with a probated sentence. It was replete with state misconduct, destruction of evidence by members of law enforcement investigating the case, mysteriously disappearing evidence, and the overwhelming fact that the physical evidence in existence directly contradicted the testimony of the co-defendant, upon which Farris' conviction depended. It would be a blight on this state's justice system to allow the execution of a man convicted and sentenced to death on the basis of such a trial.

Without the intervention of this Board, Mr. Farris may be put to death despite the

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[1] An application for a writ of habeas corpus raising this issue is being filed with the Texas Court of Criminal Appeals on the same date as this application.

profound questions surrounding his conviction, and the recognition by the Texas Court of Criminal Appeals that he was convicted by an unconstitutionally assembled jury. Today, the Governor and the Board may be the only forum able to fully consider the ramifications of Mr. Farris' unique situation. Thus, Troy Dale Farris respectfully requests that this Board of Pardons and Paroles recommend, and that the Governor grant, a thirty day reprieve and commutation of his sentence of death to life imprisonment.

STATEMENT OF THE CASE

A. Statements Required by 37 TAC §143.42

1. Name of Applicant

Troy Dale Farris

2. Identification of Agents Presenting Application:

Raoul D. Schonemann, attorney for Mr. Farris

Maurie Levin, attorney for Mr. Farris

3. Copies of Indictment, Judgment, Verdict, Sentence and Execution Date:

Attached as Exhibits to Appendix A.

4. Statement of the Offense

A Tarrant County Grand Jury indicted Troy Dale Farris for the 1984 shooting death of Tarrant County Sheriff's Office ("TCSO") Deputy Clark Rosenbalm. Mr. Farris plead not guilty and has consistently maintained his innocence of the offense.

There were no eyewitnesses to the murder, although two individuals, Vance Nation and Charles Lowder, claimed to have been at the crime scene immediately before the offense. According to Nation's testimony at trial, he asked Lowder (who did not know Mr. Farris) to drive him from his home in Wichita Falls to meet Mr. Farris at a pre-arranged location in Tarrant County to conduct a drug transaction. Nation testified that when he and Lowder arrived at the rendezvous point, Mr. Farris was already there. Lowder parked on the shoulder of the roadway, a short distance behind Mr. Farris' truck. Nation testified that he then exited Lowder's car, walked to and got in Mr. Farris' truck, where the drug transaction was completed.

Nation testified that as he was leaving Mr. Farris' truck to rejoin Lowder, he noticed a car approaching with its bright lights on. Suddenly, the driver of the car drove across the centerline and pulled up adjacent to Mr. Farris' truck, facing the wrong direction in the northbound lane of the road.[2] Nation testified that he and Lowder panicked, but that because the radio in Lowder's car was playing so loudly, and the patrol car's lights were shining in his eyes, he could neither see nor hear what happened next. Lowder put his car in gear and drove off. At this point Mr. Farris' truck had already left the scene. Nation testified that neither he not Lowder saw or heard any shooting.

Witnesses testified that they later found Rosenbalm lying in the road, partially beneath the still open driver's side door. There were numerous indications that Rosenbalm had been in a struggle with someone, as Rosenbalm's service revolver, broken sunglasses, and two sets of handcuffs were scattered at a distance of up to 12 feet from where his body was found, and investigators located pieces of glass from the broken sunglasses on the hood of the patrol car.

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[2] There is no record of Officer Rosenbalm ever calling in this stop to the dispatcher or another unit of the TCSO.

"In the opinion of one expert witness, these circumstances were more consistent with a protracted struggle than with Rosenbalm's having fallen where he was shot". *Farris v. State*, 819 S.W.2d at 494.

TCSO senior officers deliberately interfered with crime scene investigators' efforts to preserve evidence at the crime scene. During voir dire, it belatedly came to light that senior law enforcement officers at the crime scene had found marijuana in Officer Rosenbalm's jacket and had either concealed this evidence or destroyed it. Tarrant County Sheriff's Captain Johnny Prince later admitted in a sworn affidavit that he found the marijuana in Rosenbalm's jacket and had "flushed" it. Subsequently, Prince recanted his affidavit, claiming that the marijuana had miraculously resurfaced in an evidence locker at the Sheriff's Department.

On February 28, 1986, a grand jury indicted Prince for perjury and for fabricating false evidence in this case. When called to testify at Mr. Farris' trial, Prince "took the fifth", and refused to testify. Prince was conveniently indicted just long enough to avoid testifying, as shortly thereafter the charges were dismissed and all documents and files related to the case were expunged (without the knowledge of the special prosecutor who obtained the original indictment of Prince), thereby destroying the documentary record of Prince's admitted misconduct.

In addition, prior to and during Farris' trial, it came to light that senior law enforcement officers directed crime scene investigators to stay out of Deputy Rosenbalm's car, and to neither photograph it, fingerprint it, not take custody of the evidence in it. As many as 61 crime scene photographs that were taken, as well as plaster casts taken of tire tracks in the area, had disappeared by the time of trial and were never seen by defense counsel.

Over a year after Deputy Rosenbalm's murder, Vance Nation was arrested on the basis of a tip from an unidentified informant. That informant did not testify at trial, and his identity is

still unknown. Nation, upon his arrest, after a year of silence, fingered Troy Farris, who was subsequently arrested.

The physical evidence offered by the State against Farris was circumstantial, failed to connect him to the shooting, and contradicted the testimony of the state's two star witnesses: Vance Nation and Jimmy Daniels, Farris' brother-in-law. As the Texas Court of Criminal Appeals noted in their opinion on direct appeal: "circumstantial and forensic evidence offered at trial not only failed to connect [Farris] with the killing of Rosenbalm, but also failed in nearly all material respects to confirm the testimony of Nation and Daniels." *Farris v. State*, 819 S.W.2d at 495. Daniels claimed to have heard Farris confess, although that account conflicted in substantial ways from Daniels' testimony before the Grand Jury. "Consequently, his report of Farris' confession must have been viewed with considerable circumspection.. . ." *Farris v. State*, 819 S.W.2d at 495. Nation testified to the events as recounted herein. At the time of his testimony, he was under indictment for capital murder. He claimed that he had not received any deals or promises in exchange for his testimony. However, after Farris' trial, the State dismissed the capital murder charge and four other counts against Nation, and allowed him to plead guilty to one count of delivery of marijuana in exchange for a seven year *probated sentence.* Two years later, Nation successfully petitioned the convicting court to terminate his probation.[3]

Curiously, although the State granted Charles Lowder full immunity from prosecution in exchange for his cooperation against Mr. Farris, the prosecution did not call Lowder as a witness at trial. The reason for this became apparent when he was instead called as a witness at the

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[3] Both Nation and Lowder also failed several polygraph tests administered by the state. As the state refused to disclose the specific results of those tests, their meaning cannot be fully evaluated.

punishment phase for the defense: Lowder testified -- under questioning by the prosecution -- that the first written statement he gave to law enforcement officers was false and had been obtained by TCSO detectives through coercion and intimidation.

The record reflects that Farris had never before been convicted of a criminal offense, nor been arrested, except as a juvenile.

5. Appellate History

In May of 1986, a jury convicted Petitioner Troy Dale Farris (hereinafter "Petitioner") of capital murder for the shooting death of Tarrant County Deputy Sheriff Clark Rosenbalm. In a separate punishment hearing, the jury affirmatively answered the two special issue questions presented. Accordingly, on June 2, 1986, the trial court entered judgment of conviction and sentenced Petitioner to death.

The Texas Court of Criminal Appeals affirmed the judgment. *Farris v. State*, 819 S.W.2d 490 (Tex. Crim. App. 1990), *cert. denied*, 503 U.S. 911 (1992).

On September 8, 1992, Petitioner filed an application for post-conviction writ of habeas corpus with the state trial court. In February 1993, the trial court conducted an evidentiary hearing on designated claims for relief,[4] and on August 11, 1993, entered findings of fact and conclusions of law recommending that Petitioner's application be denied. The Texas Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus on December 15, 1993. *Ex parte Farris*, No. 15,938-02 (Tex. Crim. App. Dec. 15, 1993) (unpublished order).

On March 2, 1994, Petitioner filed a petition for writ of habeas corpus in the United

[4] The issues addressed at the evidentiary hearing did not include the claim that Mr. Farris was sentenced to death by a jury assembled in violation of the United States Constitution.

States District Court for the Northern District of Texas, Fort Worth Division.

On December 21, 1994, while Petitioner's petition for habeas corpus was pending before the federal district court, the Texas Court of Criminal Appeals issued *Riley v. State*, 889 S.W.2d 290, *aff'd on reh'g*, 889 S.W.2d 297, 298 (Tex. Crim. App. 1994), *cert. denied*, 515 U.S. 1137 (1995), which held that "*Farris* was wrongly decided" and is "expressly overruled."

In response to the *Riley* decision,, on August 31, 1995, Petitioner filed a one-issue petition for a writ of habeas corpus in state court raising the "*Witherspoon / Adams*" claim. However, the Court of Criminal Appeals refused to address the merits of the claim, citing Texas' "two forum rule," which provides that the state courts should not address the merits of claims raised by habeas petitioners who simultaneously have litigation pending in the federal courts. *Ex Parte McNeil*, 588 S.W.2d 592 (Tex. Crim. App. 1979).

On August 9, 1996, the district court referred the case to United States Magistrate Judge Charles Bleil to determine if an evidentiary hearing was necessary, and for entry of proposed findings, conclusions, and recommendations. On January 24, 1997, the magistrate judge entered proposed findings and conclusions and recommended that the district court grant relief on Petitioner's *Witherspoon/Adams* claim.

On June 17, 1997, the district court entered a final judgment denying Petitioner a writ of habeas corpus, thereby rejecting the recommendation of the magistrate judge. *See* Appendix D.. On July 10, 1997, the district court entered an amended order in light of *Lindh v. Murphy*, __ U.S. __, 117 S.Ct. 2059 (1997), denying relief under 28 U.S.C. § 2254 prior to its amendment by the Antiterrorism and Effective Death Penalty Act of 1996.

On August 5, 1997, Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On April 27, 1998, the Fifth Circuit issued an unpublished opinion

affirming the district court's denial of habeas relief. *Farris v. Johnson*, No. 97-10864 (5th Cir. April 27, 1998). *See* Appendix F. The Fifth Circuit denied Petitioner's timely motion for rehearing on May 28, 1998. *See* Appendix G. The Court's mandate issued on June 5, 1998.

On August 17, 1998, Applicant filed a petition for a writ of certiorari with the United States Supreme Court, which was subsequently denied.

On November 18, 1998, the convicting court set Mr. Farris' presently scheduled January 13, 1999 execution date.

On the same date as the filing of this application, January 5, 1999, Mr. Farris is filing an application for a writ of habeas corpus with the Texas Court of Criminal Appeals, seeking relief from his sentence of death on the basis that that same Court had expressly overruled their prior decision in Farris' case in the collateral case of *Riley v. State*. That application is still pending.

6. Statement of the Legal Issues Raised on Appeal

Mr. Farris has asserted a number of constitutional challenges to the validity of his conviction and death sentence. The major claims raised included but are not limited to the following:

1. The trial court erred in not assuring Farris of conflict free representation, and Farris did not and could not waive his Sixth Amendment right to such representation.

2. Misconduct by state agents deprived Farris of a fair and impartial trial and of due process. The misconduct included placing a jailhouse spy in a cell adjoining Farris, offering leniency to witnesses without disclosing such deals to the defense, and destruction of evidence.

3. The State used its peremptory challenges in a racially discriminatory manner.

4. The jury pool selection practices of Tarrant County, Texas, violated the Equal Protection Clause.

5. Ineffective assistance of counsel at the punishment phase for failure to investigate prior unadjudicated offenses, failure to present mitigating evidence, and failure to investigate witness Elisher's false allegations.

6. The trial court erred in sustaining the State's challenge for cause against veniremember Goodson.

7. The trial court erred in allowing the jury to consider prior unadjudicated offenses at punishment

8. There was insufficient evidence that Rosenbalm was acting in the lawful discharge of his duties at the time of his death (thereby making the case capital)

9 Fatal variance between the allegation in the indictment and the proof presented at trial.

10. The State engaged in misconduct during closing argument at the guilt / innocence phase and during closing argument at the end of the punishment phase of the trial.

7. Victim Impact Statement

Out of respect for the Rosenbalm family's privacy, neither undersigned counsel nor Mr. Farris have attempted to contact them directly, and thus cannot convey in any detail the undoubtedly profound impact of their loss.

REASONS WHY CLEMENCY OR 30 DAY REPRIEVE SHOULD BE GRANTED

A. The Texas Court of Criminal Appeals Has Recognized that Farris Was Convicted by an Unconstitutionally Assembled Jury, but May Nonetheless Be Unable to Give Him the Relief to Which He Is Entitled.

In order to give the Board the full flavor of the procedural trap in which Farris has found himself -- and the manner in which he has effectively been denied access to the courts -- counsel sets out below the chronology of the ways in which Farris has faithfully raised to the appellate courts his meritorious claim that he was convicted by an unconstitutionally assembled jury.

1 Farris' Attempts to Seek the Relief the to which the Texas Court of Criminal

Appeals has said he is Entitled.

On direct appeal of his 1986 conviction, Petitioner raised a "*Witherspoon / Adams*" claim, asserting that the trial court improperly excused prospective juror Janice Goodson for cause based on her views about the death penalty. In its opinion discussing the ground of error, the Court of Criminal Appeals acknowledged that the record indicated that Ms. Goodson "could answer affirmatively the special issues if the facts warranted" and that she "understood her responsibilities as a juror and said she would not violate her oath." *Farris*, 819 S.W.2d at 501. Nonetheless, the Court of Criminal Appeals upheld the trial court's exclusion of Ms. Goodson without regard to whether she could abide by her oath as a juror and return honest answers to the special issues based on the evidence, and affirmed Petitioner's conviction and sentence. *Farris v. State*, 819 S.W.2d 490 (Tex. Crim. App. 1990).

Judges Teague and Clinton dissented as to the majority's disposition of Farris' *Witherspoon/Adams* claim, asserting that the point of error "call[ed] for a fairly straightforward application of the principles enunciated in *Hernandez v. State*, 757 S.W.2d 744 (Tex. Crim. App. 1988)" -- a recent decision of the Court of Criminal Appeals applying the principles of *Witherspoon* and *Witt* in the context of the Texas capital sentencing scheme.[5] The dissent argued that the trial court excluded Ms. Goodson in the absence of any demonstration on the part of the State that she could not perform her duties as a capital juror under Texas law. *See Farris*, 811 S.W.2d at 508 (Teague, J., and Clinton, J., dissenting). Thus, the dissenting judges concluded

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[5] In *Hernandez*, a two-judge plurality of the Court of Criminal Appeals held that a prospective juror is disqualified on the basis of his opposition to the death penalty "only when [the] juror is unable or substantially impaired in his ability to resolve the questions entrusted to him" under the Texas capital sentencing scheme. *Hernandez*, 757 S.W.2d 744, 752 (Tex. Crim. App. 1988) (plurality opinion).

that the majority decision was in error because it approved Ms. Goodson's exclusion from jury service "on account of her opposition to the death penalty, and for no other reason. Doing so is contrary to the United States Constitution and Texas law. . . ." *Id.* at 509.

On March 2, 1994, Petitioner filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Texas alleging, among other constitutional claims for relief, that the trial court's exclusion of prospective juror Goodson violated the principles of *Witherspoon*, *Witt*, and *Adams*.

On December 21, 1994, while Petitioner's habeas petition was still pending before the federal district court, the Texas Court of Criminal Appeals reconsidered its analysis of *Witherspoon/Adams* error in *Riley v. State*, 889 S.W.2d 290, *aff'd on reh'g*, 889 S.W.2d 297, 298 (Tex. Crim. App. 1993) -- including the claim raised in Farris' direct appeal -- and announced that "*Farris* was wrongly decided" and is "hereby expressly overrule[d]."

In *Riley*, and in ruling that their prior opinion in *Farris* was "expressly overruled", the Court of Criminal Appeals specifically revisited the voir dire of prospective juror Goodson and expressly repudiated its prior determination in *Farris*. The Court of Criminal Appeals observed that "in every material aspect [Goodson's] voir dire testimony was *identical* with venireman Brown's in the [*Riley*] case." *Riley*, 889 S.W.2d at 300 (emphasis added). After conducting a complete review of the record of Ms. Goodson's voir dire, the Texas Court of Criminal Appeals concluded that she was steadfast in her affirmations that she could follow the law and take her oath:

> Acknowledging that it would violate her conscience to do so, Goodson nevertheless insisted that she would not violate her oath to render a true verdict, and unambiguously and unwaveringly insisted she would answer the specials issues honestly and in accordance with the evidence.

Riley v. State, 889 S.W.2d at 300 (Tex. Crim. App. 1994). Because the Court of Criminal Appeals held that venireman Brown was erroneously excluded, the Texas court reasoned that in reaching its decision in *Riley* it must either "follow *Farris* or forsake it." *Id.* Citing Judge Teague's dissenting opinion in *Farris* with approval, the Court of Criminal Appeals concluded: "**We now expressly overrule our holding in *Farris*** [. . .] and resurrect the above principle from *Hernandez*." *Id.* at 301.[6]

Following the Court of Criminal Appeals' decision in *Riley*, Farris filed an application for writ of habeas corpus in state court raising a single issue: his claim that prospective juror Goodson had been improperly and unconstitutionally excluded -- the same claim which the *Riley* court had deemed meritorious and wrongly rejected on direct appeal. The Court of Criminal Appeals, however, declined to address the merits of the claim and dismissed the application, citing *Ex parte McNeil*, 588 S.W.2d 592 (Tex. Crim. App. 1979), which held that the state courts may not address habeas claims of petitioners who are simultaneously pending before the federal courts.

Thus, unable to take the risk of giving up his federal appeals, Farris continued to pursue his federal habeas remedies. These included raising the juror claim to the federal courts -- not without some recognition of its merits. On August 9, 1996, the United States District Court referred Farris' case to United States Magistrate Judge Charles Bleil, who recommended that the district court grant habeas corpus relief. With respect to Petitioner's *Witherspoon / Adams*

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[6] Indeed, since 1994, the Court of Criminal Appeals has reversed other capital convictions on the basis of its decision in *Riley*. *See, e.g., Clark v. State*, 929 S.W.2d 5 (Tex. Crim. App. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1245 (1997); *Howard v. State*, 941 S.W.2d 102, 128 (Tex. Crim. App. 1996). Ironically, as Farris has been unable to return to state court, he has been precluded from the same relief -- despite the fact that the error in his case had already been expressly recognized by the state court.

claim, Judge Bleil agreed with the Court of Criminal Appeals that there was no basis for the trial court to sustain the State's challenge for cause:

> [Goodson] repeatedly made it plain that, on principle, she was opposed to the death penalty but that despite her feelings, she could serve as an impartial juror and follow the law given her by the court. Although some of the questions posed by the lawyers on both sides as well as the trial judge might be termed ambiguous, Goodson's views remained constant and clear. The opinion of the Texas Court of Criminal Appeals, as expressed in *Riley*, that Goodson did not vacillate appears correct. Under these circumstances, no basis exists for the trial court to sustain a challenge for cause.

Nonetheless, the district court chose not to follow the recommendation of the magistrate judge and denied relief on Farris' juror claim, rejecting the magistrate judge's reliance on *Riley*. Instead, the district court accorded a presumption of correctness to the trial court's determination that Ms. Goodson's views on the death penalty would substantially impair her ability to serve as a juror. *Farris v. Johnson*, 967 F. Supp. 200, 202, 206 (N.D. Tex. 1997).

On appeal to the Fifth Circuit, Petitioner argued that the district court's decision below was in error because the district court failed to accord the Texas Court of Criminal Appeals' decision in *Riley* any respect, and because the trial court's "finding" that Ms. Goodson was disqualified was not entitled to a presumption of correctness. In an unpublished opinion, the Fifth Circuit Court of Appeals held that the *Riley* opinion did not dictate the federal courts' decision on the matter, and that the record supported the trial court's determination that Ms. Goodson was properly excluded.

2. Farris Has Been Effectively Denied Access to the Courts.

The *Riley* decision imparted a unique state law twist to a commonly recognized federal constitutional claim. Thus, while its merit was finally recognized by the state courts, that did not

compel a grant of relief by the federal courts. Yet because Farris was pending in federal court at the time of the *Riley* decision, he could not return to the state courts. It is only now, after having completed his federal appeals, that he is able to seek long overdue relief from the Texas Court of Criminal Appeals.

However, during the time that Farris was pending in the federal courts, the statutory provisions authorizing and setting the guidelines for capital inmates' habeas corpus applications in the state courts were substantially revised. Among the changes made were the addition of substantial hurdles an applicant must clear before he is allowed to file, or have considered on the merits, a second or "successive" habeas application. *See* Tex. Code Crim. Proc. art. 11.071 §5. Thus, Farris is now in the position of having to meet those substantial hurdles -- despite the fact that he diligently raised the subject claim in both his direct appeal and his first state habeas application. Farris has submitted an application seeking relief from the Texas Court of Criminal Appeals, and believes he meets the necessary criteria for his application to be considered and relief granted. However, there is one possible construction of article 11.071 that entirely fails to address the situation in which Farris, through no fault of his own, has been placed.

It is in this manner that Troy Farris has been denied access to the courts. After four years, the irony is readily apparent: four years after the highest court of this state recognized the merits of a claim that would have entitled him to relief on direct appeal had they properly considered it at that time, Farris is still sitting on death row, one week away from execution. Clemency is the "fail-safe" of our criminal justice system. The system has failed Troy Farris, and in doing so, has betrayed its inadequacies. It is incumbent upon this Board to ensure that those failures do not allow the unconstitutional execution of Troy Farris.

B. Mr. Farris' Trial Was Riddled with State Misconduct, Concealed Evidence, Incredible Witnesses, and the Story of a Co-Defendant Who, after Testifying, Walked Away with a Probated Sentence.

As outlined in the statement of facts, above, the trial leading to Troy Farris' conviction was a travesty. The physical evidence offered by the state was circumstantial at best, and entirely failed to connect Farris to Clark Rosenbalm's murder. Evidence that could have provided direct proof of who was at the scene was either destroyed or never collected. Plaster casts taken of tire tracks found in the area -- which could have established the identity of the vehicles at the scene -- were mysteriously "missing" by the time of trial. Crime scene photographs which could have provided insight into the course of events the night Rosenbalm was murdered disappeared during the course of the investigation of the case. The senior officers at the scene directed the crime scene investigators not to photograph or fingerprint Deputy Rosenbalm's vehicle, or take custody of the evidence in it -- despite the fact that the physical evidence at the scene indicated that a physical struggle had take place in the direct vicinity of, and perhaps on, that vehicle. Those fingerprints that were never taken could have provided direct evidence of who was there that night, who struggled with Deputy Rosenbalm, and who took his life. Finally, marijuana taken from Deputy Rosenbalm's clothing, according to the admission of the senior officer at the scene, was later destroyed.

Moreover, the physical evidence contradicted the testimony of the two witnesses the state presented to link Farris to the shooting: Vance Nation and Jimmy Daniels. As the Court of Criminal Appeals notes, Daniels testifimony at trial was inherently incredible because it was entirely inconsistent with his previous sworn testimony before the Grand Jury. Nation, silent for a year after the offense, and then fingering Farris when he was arrested, had an overwhelming interest in Farris' conviction, as he was next in line on charges of capital murder. While the

physical evidence gave every indication there was a protracted struggle at the scene, Nation testified that he and Lowder saw nothing of the sort, and that they simply drove away after Farris had already left. In short, Nation's testimony did not comport with the undisputed evidence. It did, however, serve to absolve Nation of any participation in Rosenbalm's death. What the jury didn't know when they heard Nation testify, and when they evaluated the crucial matter of his credibility, was that after Farris' conviction, Nation would walk away with a probated sentence.[7]

The sordid, conflicting, and unreliable evidence used to convict Troy Farris -- and law enforcement's involvement in the disappearance and absence of readily available evidence that could have provided invaluable insight into the persons responsible for Deputy Rosenbalm's death -- compels this Board's intervention. Indeed, to allow Troy Farris' execution in the face of such a record would make a mockery of the system of justice upon which we must rely before taking another life.

C. Mr. Farris is Worthy of this Board's Mercy.

Troy Farris is 36 years old. At the time he was arrested on this case at the age of 22, he had never before been arrested or convicted of a criminal offense, except for minor incidents as a juvenile. His prison record reflecting the time he has been on death row is bereft of anything but the most minor infractions. In short, there is nothing to indicate that he will be a danger to anyone if this Board exercises its powers and recommends commutation of his sentence of death.

To the contrary, Troy has come into adulthood during the 12 years he has lived on death

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[7] Moreover, Nation never spent any significant time in jail. During the two year period between his arrest and Farris' trial, he was out on a $500,000 cash bond. During those same two years, Nation was represented by three different attorneys, all retained by his father. Farris, of course, was represented by court-appointed counsel.

row. Troy's positive characteristics - and the vital role he has played in the lives of those he is close to -- are testified to by the numerous letters in support submitted with this Application. *See* Appendix B. As those letters evince, he has matured into a responsible, compassionate, thoughtful individual. The people who have stayed in touch with him during this time "love him and believe in him." *Id.* His son -- now sixteen years old -- looks to him for guidance and support. *Id* "He is a good father and I love him very much." *Id.* His niece states that he is "like a father to me" and that she relies on him for 'comfort, support and strength that no other could possibly give me." *Id.* As his long time friend, Tina McIntire states: "Troy has a great many people who love and respect him. People who have counted on him for support and advice. He has greatly enriched the lives of many, inside and outside prison walls." *Id.*

The life Troy has led as he has matured into adulthood in the impossible conditions of death row compel the conclusion that he will continue to provide love and support to his son, his family and his friends. His worth and redemptive value as a human being deserve the consideration of the Governor and this Board. Texas will not benefit by his execution.

CONCLUSION

Cognizant of the numerous clemency applications received each year by this Board, it is difficult to imagine what will make each reader take notice that there is an individual before them who deserves the Board's full attention and consideration. Troy Farris deserves your full attention. His trial was riddled with misconduct and his conviction was dependent upon the testimony of a co-defendant whose credibility is eminently suspect. Nonetheless, he has sat on death row for twelve years, despite the additional aggravating fact that the highest court of this state belatedly recognized the validity of a constitutional claim for relief that Farris brought to

their attention eight years ago. Because of the convoluted nature of habeas appeals, he has been unable to return to that court until recently to seek the relief to which they said he was entitled. Troy Farris' case, and his application to this Board, deserve the closest scrutiny, and compel the conclusion that he is entitled to relief.

As his son, Troy Dale Farris, Jr., states in his letter to this Board: "thank you for thinking more about this before you take him away forever."

REQUEST FOR RELIEF

On behalf of Troy Dale Farris, undersigned counsel respectfully petitions the Texas Board of Pardons and Paroles for a recommendation to the Honorable George Bush, Governor for the State of Texas, to commute Mr. Farris' sentence of death to life imprisonment, and respectfully petition the Board and the Governor for a 30-day reprieve of Mr. Farris' January 13, 1999 execution date to allow the Board to convene a hearing to consider evidence and argument in support of this application. In processing this clemency application, Mr. Farris requests that the Board of Pardons and Paroles comply in all respects with the Texas Constitution, art. 4 §11, and the Texas Open Meetings Act, Tex. Gov't Code §551.101 et. seq.

Respectfully submitted,

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SUPPLEMENT

TO

APPLICATION FOR REPRIEVE
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INTRODUCTION

Troy Dale Farris, scheduled to be executed tomorrow, January 13, 1999, submits the following information in order to supplement his previously filed *Application for Reprieve from Execution of Death Sentence and Commutation of Sentence to Imprisonment for Life.* This case presents extraordinary circumstances calling for this Board's intervention. Yesterday afternoon, the Texas Court of Criminal Appeals summarily refused to review Farris' case, even though that same court acknowledged four years ago that there was *harmful constitutional error* in his case that tainted his death sentence, an issue that the Court candidly admitted it had "wrongly decided" when Mr. Farris originally presented it in his prior appeal.

This morning, the Fort Worth Star-Telegram published an editorial calling on this Board to recommend a 30-day reprieve of Farris' presently scheduled execution because of the inequities apparent in his case and doubts about his guilt. The editorial observes that "the Farris case was bungled from the beginning," and notes the errors and misconduct of law enforcement officers in the investigation of the case. The editorial noted that the circumstantial and forensic evidence presented against Farris at trial "failed to connect [Farris] to the killing." Finally, the editorial observes the extraordinary fact that the Court of Criminal Appeals has failed to correct its own mistake by refusing to even review Mr. Farris' appeal.

This supplement is therefore submitted to bring to the Board's attention these recent developments, which require the Board's serious consideration, and heighten the need for its intervention.

MR. FARRIS HAS BEEN DENIED ACCESS TO THE COURTS

As outlined in further detail in his original application, Troy Farris sits on death row despite the fact that four years ago the Texas Court of Criminal Appeals -- the highest criminal court of this state -- stated in *Riley v. State* that their prior opinion denying Farris relief on his claim that he was convicted by an unconstitutionally assembled jury was "wrongly decided" and expressly overruled". At the time, Farris was in the midst of his federal habeas appeals, and thus unable to return to the Texas courts. It was only this past week that he was in a position to submit an application to the Court of Criminal Appeals asking for the relief to which they had said he was entitled in 1994. Yesterday, counsel for Farris received the Court's order rejecting his application. The Order states simply: "[w]e have reviewed the application and find it fails to satisfy the requirements of Art. 11.071, Sec. 5(a). Accordingly, the application is dismissed as an abuse of the writ." *See* Appendix C.

This was not a rejection of the merits of the claim presented. Section 5(a) of Article 11.071 of the Texas Code of Criminal Procedure -- revised in 1995 -- sets out the guidelines for when the court may consider a second or "successive" application for a writ of habeas corpus.

> Sec. 5(a) If . . . a subsequent application is filed . . . a court may not consider the merits of or grant relief based on the subsequent . . . application unless the application contains specific facts establishing that:
>
> > (1) the currents claims and issues have not been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable
> >
> > > (A) on the date the applicant filed the previous application; or
> > >
> > > (B) if the applicant did not file an original application, on or before the last date for the timely filing of an original application.

These guidelines, adopted in 1995 in conjunction with a substantial overhaul of the procedures employed in appellate review of death penalty cases, were not in place at the time that Farris

filed his direct appeal, or at the time he filed his first application for a writ of habeas corpus.

According to the Court of Criminal Appeals' opinion, Farris failed to clear the hurdles set out in Article 11.071, section 5. Farris filed the subject claim with the Court in the first instance -- in his direct appeal -- in a timely and conscientious fashion. It was the Court that, by its own admission, erroneously rejected the claim when it was first presented. In 1994, in *Riley v. State*, the Court recognized its error and "expressly overruled" its prior decision in Farris' case. Nonetheless, the Court now apparently finds that procedural hurdles set in place in the interim period since Farris' original timely filing of the claim preclude any consideration of the merits of the constitutional claim which that very Court said entitles him to relief.[1]

Thus, Farris is caught in a cruel irony: having timely presented the claim, he is now unable to avail himself of the Court of Criminal Appeals' belated recognition of its merits. The Court of Criminal Appeals decided four years ago that Farris' death sentence violates the United States Constitution. In doing so, they reversed Mr. Riley's death sentence. Yesterday, they failed to provide Farris the same relief, despite the fact that they recognized their own error in rejecting his claim -- identical to Riley's -- when it was first presented. Employing a procedural bar whose application to the facts of this case is so inequitable as to make even a lay person cry out in disbelief, the Court of Criminal Appeals failed to stop the execution of a sentence that they have recognized is unconstitutional. If access to the courts is one of the factors considered by this Board, it is difficult to imagine a more clear cut example than that presented herein.

This case is unique. This scenario -- in which the error in a case is reversed in another case, yet the wronged party is unable to return to the courts to seek appropriate relief -- is

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[1] According to an article in today's Fort Worth Star-Telegram, Rick Wetzel, clerk of the Court, stated that "they [the Court] did not even look at the merits of his complaint."

extremely rare. Apparently, a preliminary determination has been made by the Court -- or one of its clerks -- that the procedural hurdles established by Article 11.071 section 5 preclude the Texas Court of Criminal Appeals from now considering the merits of a claim that they have already recognized as undermining the validity of Farris' sentence. The blatant inequities cry out for this Board's intervention. Without it, Troy Farris will be executed on the basis of a death sentence that the highest court of this State has recognized was unconstitutionally rendered, yet refuse to correct.

INCREASING RECOGNITION OF THE PROFOUND QUESTIONS SURROUNDING TROY FARRIS' CONVICTION AND SENTENCE.

In the original Application submitted to this Board, undersigned counsel outlined the numerous ways in which Farris' conviction and sentence are riddled by inconsistencies and conflicting and unreliable evidence, which make it possible that the State of Texas is about to execute an innocent man. Under the illusion that the relief promised by the Court of Criminal Appeals years ago was finally forthcoming, counsel did not submit to the Board the voluminous documentation supporting the facts set forth in Farris' original application. Since its submission, an article has come out reflecting the independent investigation of a reporter for the Fort Worth Star-Telegram confirming that profound questions regarding Deputy Rosenbalm's death, and the identity of the person responsible, remain unanswered. The results of that investigation include newly discovered evidence, statements by law enforcement questioning the conviction, and the statement by one of the co-defendants that he now believes Troy Farris is innocent. That article was provided to the Board two days ago, on Monday, January 11, 1999.

Today, the Fort Worth Star-Telegram printed an editorial reflecting the views of the

paper, calling for a halt to Troy Farris' execution because of doubts about his guilt and the unforgivable error that would result from the execution of an innocent man. A copy is attached hereto as Appendix D.

At this late stage -- after being informed yesterday afternoon that the Court of Criminal Appeals was not going to redress the constitutional error they had previously recognized -- it is not feasible for counsel to submit all the documentation supporting the facts set forth in the original Application submitted to this Board, as it would comprise hundreds of pages. Many of the facts are a matter of public record, and have already been set forth by the Court of Criminal Appeals. These include the state of the physical evidence, the fact that crucial pieces of evidence were either never collected or "disappeared", the inconsistencies between the physical evidence and the testimony of the State's star witnesses, and the unreliability of those witnesses' testimony. In order to further this Board's review of the extraordinary facts of this case in the short time remaining, counsel sets forth below a summary of the evidence which evinces that Troy Farris' execution cannot proceed. While some of this summary repeats facts presented to the Board in Farris' original application, new facts are urged which require consideration in the context of the bigger picture. The urgent nature of the situation, and the addition of new information, compel this Board's careful review of what is set out below. Where indicated, additional evidence which is not a matter of public record is attached hereto.

Summary of the Evidence Undermining the Validity of Farris' Conviction

1. Troy Farris conviction rested upon the testimony of two witnesses: Vance Nation, a co-defendant, and Jimmy Daniel, Farris' brother-in-law. "The jury's verdict convicting [Farris] for the capital murder of Rosenbalm depended almost exclusively on the credibility of the testimony of Nation and Daniels." *Farris v. State*, 819 S.W.2d 490, 495 (Tex. Crim. App. 1990). There was no physical evidence to link Farris to Deputy Rosenbalm's murder, and the physical evidence flatly contradicted Nation's and Daniel's testimony. The Court of Criminal Appeals

recognized these facts in their direct appeal opinion: "Circumstantial and forensic evidence offered at trial not only failed to connect [Farris] with the killing of Rosenbalm, but also failed in nearly all material respects to confirm the testimony of Nation and Daniels." *Farris v. State*, 819 S.W.2d at 495.

2. Both Nation's and Daniel's testimony were suspect, and the accounts they gave of the alleged events surrounding Deputy Rosenbalm's murder were contradicted by the physical evidence.

3. Nation was the first person arrested on this case, almost a year after Deputy Rosenbalm's death. He pointed the finger at Troy. Shortly after his arrest Nation was released on a $500,000 cash bond, provided by his father. During the year and a half between the time of his arrest and the time of Farris' trial, Nation was represented by three different privately retained attorneys. He testified for the State at trial, and claimed that he had not received any deals in return for his testimony. A few short months after Farris' conviction, the capital murder charges against Nation were dismissed, and he walked away with a probated sentence on a charge of delivery of less than four ounces of marijuana.

4. According to Nation's testimony, as further outlined in Farris' original Application, at the time that Rosenbalm's vehicle pulled up to the scene, he and Lowder were in Lowder's car, and Farris was in his truck. Within minutes if not seconds, both vehicles drove away.

5. Nation's account of events the night that Deputy Rosenbalm was killed do not comport with the physical evidence. The evidence indicated that Rosenbalm had been in a struggle. His revolver, broken sunglasses, and two sets of handcuffs were found scattered up to 12 feet from where his body was found near his vehicle. Pieces of glass from the broken sunglasses were found on the hood of the patrol car. Rosenbalm had an abrasion on his face, grass stains on his pants (he was found on a black top highway), and there were indications that he had been struck by his own flashlight. Furthermore, Deputy Rosenbalm was wearing a bulletproof vest, and the bullet that killed him entered through his left side -- a near impossible feat without restraint of the victim. "In the opinion of one expert witness, these circumstances were more consistent with a protracted struggle than with Rosenbalm's having fallen where he was shot". *Farris v. State*, 819 S.W.2d at 494.

6. According to the first statement given to the police by Charles Lowder, there was a struggle between Nation and Deputy Rosenbalm at the scene, and Nation took Rosenbalm's gun and threw it on the ground. Lowder subsequently gave another statement that comported with the account given by Nation. Lowder was granted immunity by the State before trial, but was never called by the prosecution to testify. When called by the defense, he stated under questioning by the prosecution that his statement had been obtained through coercion and intimidation. According to the January 10, 1999 article in the Fort Worth Star-Telegram, Lowder now states that he believes that Troy is innocent. Lowder's statement to the police is attached hereto as Appendix E.

7. The first sworn testimony provided by Jimmy Daniel was before the Tarrant County

Grand Jury, when he denied any knowledge of the crime. At trial, he changed his story, alleging that Farris had confessed to him. Daniel's testimony was necessary to corroborate that of Vance Nation, who, as an accomplice, could not be the sole source of information used to convict Farris. However, as the Court of Criminal Appeals noted: "Daniel's credibility was seriously undermined by the fact that he had previously testified under oath before the Grand Jury in a manner inconsistent with his trial testimony and, therefore, inconsistent with [Farris'] guilt." *Farris*, 819 S.W.2d at 495. Moreover, crucial details of that alleged confession could never be confirmed by the police. First, Daniel testified that Farris told him that he threw the murder weapon -- a .357 Magnum -- into Marine Creek Lake near the boat ramp. Expert divers searched the area described, and were unable to find any weapon. In addition, Daniel told officers that Farris had fired that same gun into a certain tree trunk on Daniel's land -- but the markings on the bullets retrieved from the tree did not match the markings left on the bullets taken from Rosenbalm's body.

8. The processing of the crime scene was inartful at best. As Mike Parrish, one of the attorneys who prosecuted Farris stated in the Fort Worth Star-Telegram article, "the integrity of that crime scene was the worst I'd ever seen." Evidence that could have provided clues to who was present at the scene, or who was responsible for Deputy Rosenbalm's death, was never collected, in some instances at the explicit directions of the senior officers at the scene, who directed crime scene investigators to stay out of Deputy Rosenbalm's car, and to neither photograph it, fingerprint it, not take custody of the evidence in it. While there were indications that Rosenbalm was struck with his own flashlight before he was killed, the flashlight, which had blood on it, was taken from the scene by sheriff's deputies, and thus could not be processed for fingerprints.

9. Evidence that was taken from the scene disappeared before trial, and was never seen by defense counsel. The disappearing evidence included over 60 crime scene photographs and plaster casts taken of tire tracks in the area. Marijuana found in the coat pocket of Deputy Rosenbalm's jacket was taken at the scene, and either concealed or destroyed. Then Tarrant County Sheriff's Captain Johnny Prince said later that he had "flushed" it, and then changed his story to state that he had rediscovered the marijuana in an evidence locker.

10. At least one Tarrant County Sheriff supervisor -- Richard Toy -- believed that Farris was innocent. Toy is now deceased. Prior to his death, undersigned counsel spoke with Toy, who expressed his grave concerns about Farris' conviction, but counsel failed to obtain an affidavit from Toy before his death. His beliefs, however, are verified by his widow, who spoke with the Fort Worth Star-Telegram reporter.

11. Charles Lowder told the Fort Worth Star-Telegram reporter that he believes that Deputy Rosenbalm was killed after he, Nation, and Farris drove away. Statements made to law enforcement by numerous informants shortly after Deputy Rosenbalm's murder make repeated references to the possibility that other persons were responsible, fail to identify Nation, Lowder, or Farris, and repeatedly reference the possible involvement of one individual in particular, a Robert Joe Milton. Some of this information was provided to defense counsel prior to trial in the form of the "State's Answer to Defendant's Motion to Produce Inconsistent Evidence", which is

attached hereto as Appendix F. To counsel's knowledge, this information was not investigated by defense counsel prior to trial. Undersigned counsel have made efforts to locate and interview the informants named, but have been unable to locate crucial witnesses.

CONCLUSION

Troy Farris' scheduled execution flies in the face of fairness, equity, and the belief that in a civilized society, innocent persons are not executed by the State. In light of the issues and evidence presented in this supplement and the original application for commutation and a reprieve submitted to this Board, undersigned counsel, on behalf of Troy Dale Farris, respectfully reurge their original request that the Texas Board of Pardons and Paroles submit a recommendation to the Honorable George Bush, Governor for the State of Texas, that he commute Mr. Farris' sentence of death to life imprisonment. In the alternative, Mr. Farris respectfully petition the Board and the Governor for a 30-day reprieve of Mr. Farris' January 13, 1999 execution date to allow the Board to convene a hearing to consider evidence and argument in support of this application.

Respectfully submitted,

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