Honorable Katherine Tyra
Harris County District Clerk
301 Fannin, P.O. Box 4651
Houston, Texas 77210

RE: Request to File & Set First Writ of Habeas Corpus for review.
EX PARTE SHIRLEY A. SOUTHERLAND/Cause No. 526673 A

Tuesday, June 21, 1994

HONORABLE KATHERINE TYRA:
Dear Ms. Tyra,

Please find enclosed one original and two copies of my styled "FIRST APPLICATION FOR WRIT OF HABEAS CORPUS" and, kindly file and set the same for a review and ruling in the 180th Judicial District Court of Harris County, Texas.

Sufficient copies are enclosed for your records and files. Kindly **DATE-STAMP** the second copy and return it to me at my address below for inclusion in my personal files.

By copy of this letter (including one copy of the above-mentioned application for first writ of habeas corpus), I am notifying the state's attorney, the Honorable John B. Holmes, Jr. that the same is being submitted for a judicial review by the trial court and for the subsequent automatic review by the Texas Court of Criminal Appeals in Austin, Texas.

I wish to thank you in advance for your most considerate time and assistance in this matter. I remain

Respectfully yours,

Shirley Southerland

SHIRLEY A. SOUTHERLAND
(Applicant, in pro se)
TDCJ-ID #555516-Hobby Unit
Route 2, Box 600
Marlin, Texas 76661-9772

ENCLOSURES:
SAS/l.s.g.

cc: J.B.H./L.H./files

DON STRICKLIN
FIRST ASSISTANT

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002

June 27, 1994

Katherine Tyra, District Clerk
Harris County, Texas
301 San Jacinto Street
Houston, Texas 77002

RE: Ex Parte Shirley Annette Martin Southerland
No. 526673-A in the 180th
District Court of Harris County, Texas
Filing date: June 27, 1994

Dear Sir:

I hereby acknowledge receipt of a copy of the above-captioned post-conviction petition for writ of habeas corpus, filed pursuant to article 11.07 of the Texas Code of Criminal Procedure. Therefore, I waive service by certified mail as provided therein.

I understand that I have 15 days in which to file an answer.

Sincerely,

JUN 29 1994.
Date received

Assistant District Attorney
Harris County, Texas

KATHERINE TYRA

HARRIS COUNTY DISTRICT CLERK

June 27, 1994

Shirley A. Southerland #555516
Hobby Unit
Rt. 2 Box 600
Marlin, Texas 76661-9772

Shirley Annette Martin Southerland

RE: Cause No. 526673-A

180th District Court

Dear Applicant:

Please be advised that your post-conviction petition for writ of Habeas Corpus was received and filed on June 27, 1994. Article 11.07 of the Texas Code of Criminal Procedure affords the State 15 days in which it may answer said petition. After the 15 days allowed the State, the Court has 20 days in which it may order a hearing. If the Court has not entered an order within 35 days from the date of the filing of the petition, the petition will be forwarded to the Court of Criminal Appeals for their consideration.

The records of this office reflect the following:

CAUSE NO.	PETITION FOR WRIT OF HABEAS CORPUS FILED	DISPOSITION

Please be further advised that all future correspondence should indicate the above listed cause number.

Very truly yours,

Raymond Posado lm

RAYMOND POSADO, Manager
Post-Trial Systems
Criminal Division
for KATHERINE TYRA, District Clerk
Harris County, Texas

RP: lm

cc: Judge of the above named District Court
District Attorney's Office
Appellate Division

PC/CR-1 R01-01-91

WRIT OF HABEAS CORPUS NO. _____

EX PARTE	§	IN THE 180th JUDICIAL
SHIRLEY A. SOUTHERLAND	§	DISTRICT COURT OF
Pro-se Applicant	§	HARRIS COUNTY, TEXAS

****

FIRST APPLICATION FOR WRIT OF HABEAS CORPUS

TRIAL CAUSE NO. 526673

IN THE 180th JUDICIAL DISTRICT COURT

OF HARRIS COUNTY, at Houston, Texas

Appellate No. C-14-90-00246-CR

IN THE COURT OF APPEALS FOR THE

FIRST DISTRICT OF TEXAS

AT HOUSTON, TEXAS

SHIRLEY A. SOUTHERLAND
(Applicant in pro se)
TDCJ-ID# 555516-Hobby Unit
Rt. 2, Box 600
Marlin, Texas 76661-9772

HONORABLE KATHERINE TYRA
HARRIS COUNTY DISTRCT CLK.
301 Fannin-P.O. Box 4651
Houston, Texas 77210
(1 original, 2 copies)

John B. Holmes, Jr.; D.A.
District Attorney's Office
201 Fannin, Suite 200
Houston, Texas 77002
(1 copy: State's Attorney)

PRELIMINARY STATEMENT

This First Application For Writ Of Habeas Corpus is being submitted by a legally unsophisticated pro se litigant. However, a thorough inspection of the legal claims herein, supported by eleven annexed EXHIBITS, will reveal that the Applicant's claims are true, meritorious, and deserving of prompt judicial attention, actions and resolutions. The lack or want of form &/or legal arguments may require the trial court's patience, and the appointment of an attorney would expedite & facilitate this instant habeas corpus proceeding tremendously.

In light of the recent decision by the Texas Court Of Criminal Appeals under **HOLMES ET AL vs. THIRD COURT OF APPEALS** **___S.W.2d___, (Tex.Cr.App. #71,764, 4/20/94),** Applicant now brings her substantial claim of factual innocence to a 1990 murder conviction, founded upon her "newly discovered evidence" that was heretofore unavailable.

Once a constitutional claim has been shown, courts will usually consider its merits. This is especially true when the claims have been asserted through pro se pleadings, as in this instant case. "Prisoners acting as their own counsel do not have the same burden as lawyers do in drafting pleadings, and the federal courts must construe such pleadings liberally **[see: Boag v. MacDougal, ___U.S.___, 70 L.Ed.2d 551, 102 S.Ct. 700 (1982); Price v. Johnson, 334 U.S. 266, 291-291, 92 L.Ed.2d 1356, 68 S.Ct. 1049 (1948)]."**

WRIT OF HABEAS CORPUS NO. _____

EX PARTE	§	IN THE 180th JUDICIAL
SHIRLEY A. SOUTHERLAND	§	DISTRICT COURT OF
Pro-se Applicant	§	HARRIS COUNTY, TEXAS

****

FIRST APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Shirley Annette Southerland, henceforth the "Applicant," pro-se, in the above styled cause and presents this APPLICATION FOR WRIT OF HABEAS CORPUS pursuant to the Tex. Code Of Criminal Procedures Ann. Art. 11.07, §2 et seq. (Vernon's 1977 & Supp. 1994). In support thereof, Applicant would respectfully show the following:

I.

CONFINEMENT AND RESTRAINT

Applicant is unlawfully confined and restrained of her liberty at the W.P. Hobby Unit of the Texas Department Of Criminal Justice's Institutional Division (e.g.: TDCJ-ID), by James A. Collins, acting in his official capacity as the Executive Director of said Institutional Division, pursuant to a judgment of conviction in Cause Number 526673 in the 180th Judicial District Court of Harris County, Texas, for the offense of murder. Punishment was assessed by a jury at

life imprisonment, and a $10,000.00 fine.

Pursuant to Article 11.14(2), supra, a copy of the Indictment, Judgment and Sentence in said cause is annexed hereto and marked as Applicant's EXHIBIT ONE and EXHIBIT TWO.

II.

STATEMENT OF FACTS

The offense for which the Applicant was convicted and sentenced allegedly occurred on or about February 19th, 1989 (see annexed: Applicant's EXHIBIT ONE, Indictment in Cause Number 526673). Applicant was arrested on March 30th, 1989, and formally charged by a Magistrate on March 31st, 1989. Applicant entered her plea of NOT GUILTY and has vehemently maintained her innocence at all points in time since then. Applicant was indicted by a Harris County, Texas, Grand Jury on June 6th, 1989. Trial by jury commenced in March of 1990, in the 180th District Court of Harris County, Texas. The Honorable Patricia R. Lykos presided as judge, the State was represented by Assistant District Attorney Steve Baldassano; and, the Applicant was represented by court-appointed counsel, Mr. Ken Goode. Applicant was found guilty and sentenced on March 13th, 1990 (see annexed: Applicant's EXHIBIT TWO, Judgment & Sentence in Cause Number 526673). Notice of Appeal was given orally and in writing; and, the Fourteenth Court of Appeals affirmed the Applicant's conviction on February 28th, 1991. Applicant has analyzed her Trial Records during 1992 and 1993 and, after careful evaluations based upon applicable case laws, drafted five

meritorious claims that challenge the legality of her conviction. During this period of time, Applicant's evaluations indicated that the District Attorney's Office had selectively and maliciously suppressed evidences favorable to the Applicant's defense. Inasmuch as, after making several requests for investigatory assistance, newly discovered documentary evidences were brought to the Applicant's attention by attorney Bill McQuillin in 1993.

However, the documentary evidences that came to light, (which are material to two of the Applicant's five claims) have tenuously continued to be illegally suppressed by the District Attorney of Harris County, Texas. Evidence that, if properly released to public disclosures in accordance to the laws of this State, would present significantly new issues on a subsequent judicial review. Evidence that would clearly present a substantial claim of "factual innocence" that would undoubtly exonerate the Applicant from any participation or intentional wrongdoing in the murder offense she was unlawfully convicted of perpetrating in 1989 [see: **Holmes v. 3rd Court of Appeals**, ___S.W.2d___, (Tex.Crim.App. #71,764, 4/20/94)].

III.

HISTORY OF THIS CASE

While pouring over her Trial Records in late 1992, Applicant discovered that the State's Attorney (Steve Baldassano) had formerly suppressed several items of favorable evidence from the views of the indicting grand jury

members; and, also from the examination of the trial court jurors. Evidence which was material to the Applicant's original "factual innocence claim" proclaimed on March 31st, 1989 (see annexed: Applicant's EXHIBIT THREE, the State's MOTION IN LIMINE). Because such suppression by the prosecution aroused her suspicions, Applicant subsequently requested and received investigatory assistance from attorney Bill McQuillin. He later notified the Applicant and confirmed that the Harris County District Attorney possessed documentary evidence in a file that was kept under D.A.'s FILE Cause Number 526673. Said evidence was in the form of an eye-witness's (i.e., JUDY FRAZIER) written statement that was taken by members of the Houston Police Department on the night that the murder victims' body was discovered. The eye-witness gave an account that she saw the murder take place and knew who the perpetrator was. Secondly, additional evidence in the form of analyzed blood samples that were taken from the eye-witness's clothes was found to match the blood type of the deceased complainant (see again: Applicant's EXHIBIT THREE, State's MOTION OF LIMINE).

In April of 1993, Applicant sought copies of the District Attorney's files that are maintained under Cause Number/D.A.'s FILE# 526673, by forwarding a "TEXAS OPEN RECORDS ACT" letter requesting photocopies. Such written request was denied by the Harris County District Attorney's general counsel, William Delmore, III (see annexed: Applicant's EXHIBIT FOUR, D.A.'s denial letter of 4/27/93).

Thereafter, Applicant wrote an additional letter citing Attorney General Opinions which entitled her to copies of her records that the District Attorney possessed (see annexed: Applicant's EXHIBIT FIVE, 2-paged letter of 5/03/93).

The District Attorney's Office immediately sent a written request to move the Texas Attorney General's Office to forbid the disclosure of the D.A.'s File #526673 (see annexed: Applicant's EXHIBIT SIX, D.A.'s 8-paged letter of 5/13/93).

The Attorney General assigned FILE I.D.# 20289. Applicant filed her "STATED OBJECTIONS" to the District Attorney's request to refuse her files (see annexed: Applicant's EXHIBIT SEVEN, a 7-paged letter of 5/28/93).

In an informal letter ruling, the Assistant Texas Attorney General ruled in the Applicant's favor for the disclosure and release of the District Attorney's file, such which contained the eye-witness's written statement and the results of the blood sample analysis taken from the eye-witness's clothes (see annexed: Applicant's EXHIBIT EIGHT, 3-paged letter of 7/2/93 by Asst. Attorney General William Walker).

Once again, the District Attorney sought to further suppress the "newly discovered evidence" by filing a law suit against the Attorney General, the Applicant, and other interested parties (see annexed: Applicant's EXHIBIT NINE, a law suit CITATION dated July 21, 1993; and, Applicant's EXHIBIT TEN, the D.A.'s 10-paged "Motion For Declaratory Judgment" of July 15th, 1993).

The District Attorney lost the law suit he initiated, and a judgment was made in the favor of the defendant class parties on February 16th, 1994. The District Attorney thereafter appealed to the Third Court of Appeals of Texas, and filed a $1000.00 Surety Bond Rider on April 18th, 1994 (see annexed: Applicant;s EXHIBIT ELEVEN, Surety Bond Rider of 4/18/94).

Applicant now asserts that she can no longer procrastinate in filing this application for writ of habeas corpus, due to none other than the intentional delays that the District Attorney is creating with his redundant litigations; delays, which when contrasted with the selective and malicious prosecutions extant in the Applicant's conviction, are designed to perpetually suppress the "newly discovered evidence" which makes up the substantial "factual innocence claim" that the Applicant is now championing.

IV.

FIRST GROUND FOR RELIEF

In advance of presenting her first ground for review, Applicant now states that at the time she appealed her murder conviction in 1990, the material and relevant evidences that were selectively and maliciously suppressed by the State's Attorney had not yet came to the Applicant's attention (see annexed: Applicant's EXHIBIT SEVEN [STATED OBJECTION] at page 2, and dated 5/28/93). Until recently, Texas law prevented

the Applicant from raising her claim of "factual innocence based on newly discovered evidence that was not available at the time the trial took place," because of a statutorily mandated thirty-day time limit for introducing claims of newly discovered evidence.[1]

Applicant herein acknowledges and believes that, in light of recent developments in a decision by the Texas Court Of Criminal Appeals, that Applicant's instant case should provide the perfect vehicle to properly review and test the "extraordinarily high" threshold standard of factual innocence claims. In the interests of justice being served, Applicant moves this Honorable Court to fully and fairly consider the merits of this claim. Applicant presents the following ground which meets that threshold standard, to wit:

APPLICANT'S FIRST GROUND FOR REVIEW

APPLICANT HAS BEEN DENIED DUE COURSE OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DUE COURSE OF LAW UNDER ARTICLE I, §19 OF THE TEXAS CONSTITUTION, IN THAT APPLICANT HAS ASSERTED A SUBSTANTIAL CLAIM OF "FACTUAL INNOCENCE" WHICH THE TRIAL COURT JURY WAS OBSTRUCTED FROM VIEWING AT THE TIME OF THE 1990 TRIAL BECAUSE THE STATE'S ATTORNEY HAD SELECTIVELY, MALICIOUSLY, AND ILLEGALLY SUPPRESSED MATERIAL AND RELEVANT EVIDENCE THAT WAS FAVORABLE TO THE APPLICANT'S DEFENSE; THUS, THE "NEWLY DISCOVERED EVIDENCE" NOW BEING PRESENTED FOR THE TRIAL COURT'S REVIEW CLEARLY ENTITLES APPLICANT TO A NEW TRIAL UNDER THE AUTHORITY OF HOLMES, ET AL V. THIRD COURT OF APPEALS, ____S.W.2d____, (Tex.Crim.App. #71,764, 4/20/94).

V.
ARGUMENT

Applicant argues that the Harris County District Attorney, John B. Holmes, Jr., and his subordinate assistant district attorney Steve Baldassano, are in possession of

[1] For a full discussion, read **Ex Parte Binder**, 660 S.W.2d 103 (1983).

material and relevant evidence which would exonerate and clear the Applicant from the murder charge she was unlawfully convicted for in 1990. Applicant's court-appointed trial attorney, Ken Goode, was extremely ineffective for failing to assert **Rule 501** of the Texas Rules Of Criminal Evidence at the time he represented the Applicant and learned about the eye-witness, Judy Frazier, and the scientific evidence (blood samples) that was found on Judy Frazier's clothes. Such discovery was readily apparent merely on the strength of the contents in the State's MOTION IN LIMINE (see annexed: Applicant's EXHIBIT THREE). **Tex. Rules Of Crim. Evid., at Rule 501,** says:

....."[E]xcept as otherwise provided by these rules or by Constitution, statute, or court rule proscribed pursuant to statutory authority, no person has a privilege to:
(1). Refuse to be a witness; or
(2). Refuse to disclose any matter; or
(3). Refuse to produce any object or writing; or
(4). Prevent another from being a witness or disclosing any matter or producing any object or writing."

The District Attorney has thus far resisted all of the Applicant's legal efforts to obtain the items of documentary evidence described on the foregoing pages (see annexed: Applicant's EXHIBITS THREE, FOUR, SIX, NINE, TEN, and ELEVEN). However, in light of recent legal rulings held by the Texas Court Of Criminal Appeals pertaining to "newly discovered evidence," Applicant presently believes that said new decision rendered under Holmes et al, supra, fully authorizes the trial court to afford the Applicant with a forum and opportunity to present her new evidence claims.

Furthermore, pursuant to V.A.C.C.P. Article 11.07 §2(d),

the trial court is empowered and authorized to subpoena the documentary evidences from the District Attorney prior to making its written FINDINGS OF FACT & CONCLUSIONS OF LAW. The trial court may also subpoena the eye-witness, Judy Frazier, to an evidentiary hearing into the validity of the Applicant's instant claim. The trial court is also authorized by this same Article to appoint an attorney to the Applicant to protect her constitutional rights during any evidentiary hearings. If, perchance, the District Attorney continues to persist with his illegal suppression of the relevant evidences now being raised; then, the trial court judge is fully authorized to issue a warrant for the District Attorney's arrest for contempt of court. V.A.C.C.P. Article 11.17., (Vernon's 1977 & Supp. 1994 C.C.P.).

As it stood in the past and still stands today, the Applicant has and will be effectively obstructed from presenting each of her five legal challenges until the suppressed evidence is brought to public disclosures. These are the five claims in that were formulated at the conclusion of a thorough, critical legal analysis of her trial records and conviction.

VI.

THE STANDARD OF REVIEW

The applicable standard of review for this instant case is founded upon the recent ruling by the Texas Court Of Criminal Appeals under **Holmes, Et Al v. Third Court of Appeals**, ___S.W.2d___(Tex.Cr.App. #71,764, 4/20/94), and concerns the appropriateness of when habeas corpus relief is available to defendants based upon valid "newly discovered evidence" claims. Even though the **Holmes** decision dealt with

a capital murder case, it is clear that the gist of the opinion would apply to all post-conviction habeas corpus cases, if the Applicant can meet a specifically stringent threshold and burden of proof requirement.

In this instant case, the Applicant is contending that the fundamental fairness of her 1990 trial was manifestly harmed by the recent discovery of "newly discovered evidence" which clearly creates a doubt to the efficacy of the jury's guilt verdict. This new evidence meets the "extraordinarily high" threshold showing of innocence that is required for obtaining an appropriate habeas corpus proceeding (**Holmes**, et al, **supra**). The Justices of the Court in **Holmes** concluded that the threshold question was:

"[C]onsequently, we hold an applicant seeking habeas relief based on a claim of factual innocence must, as a threshold, demonstrate that the newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different. Once that threshold has been met the habeas court must afford the applicant a forum and opportunity to present his evidence." Holmes, at slip opinion, p. 16.

In reference to this threshold question, the Applicant herein has surely met it head-on; moreover, the Applicant asserts that her case qualifies even better than the capital murder case that the Court ruled on in Holmes/supra.

Again in this instant case, Applicant is contending that her federal and state constitutional rights were deliberately violated when the State's Attorney knowingly and intentionally committed several acts of prosecutorial misconducts. By withholding the eye-witness's statement that identified the perpetrator, in addition to withholding the

results of the forensic blood typing analysis taken from this witnesss's clothes; then, the State's Attorney deliberately set out to mislead the grand jury and the trial jurors in his zealousness to unlawfully convict the Applicant of murder. These items of evidence constituted substantial exculpatory evidences critical to the issue of the Applicant's intent and culpable mental state which was essential in proving the offense of murder. The United States Supreme Court issued an opinion in **U.S. v. Williams**, 899 F.2d 898, 904 (10th Cir. 1990); cert. granted 112 S.Ct. 294 (1991), which directed prosecutors to present grand juries with any substantial evidence that directly negates inferences of a defendant's guilt. In Texas during the past years, the standard has been that if a defendant fails to raise "insufficient evidence" on direct appeal, then it cannot be raised later by way of habeas corpus [**Ex Parte Taylor**, 480 S.W.2d 692 (Tex.Cr.App. 1972)]; [**Colbroth v. Wainwright**, 466 F.2d 1193 (5th Cir. 1972)]. The same opinion was made concerning the presentation of newly discovered evidences by way of post-conviction habeas corpus [**Ex Parte Binder**, 660 S.W.2d 103 (Tex.Cr.App. 1983)]. The current decision made in the opinion in **Holmes, supra**, overrules **Binder**.

However, it is crucial to note the fact that exculpatory evidences were maliciously and selectively withheld by the prosecution at the Applicant's 1990 murder trial, and that such exculpatory evidences did not come to light until late in 1992, two years after the Applicant's conviction. Such a belated discovery constitutes "newly discovered evidence"

since the Applicant was unaware that the favorable evidences were available at the time the trial took place. Except for the District Attorney's refusal to reveal it, Applicant would have in all probability been found innocent if the jurors had heard the eye-witness's account of the murder incident.

Indeed, based upon the Harris County District Attorney's continued resistance in not disclosing the two articles of documentary evidences being sought by the Applicant (even after the Assistant Texas Attorney General ruled that the Applicant was entitled to receipt of the documents), certainly combines to lend credence to the fact that this is a case involving absolutely **NO EVIDENCE** whatsoever sufficient to prove all the essential elements of murder beyond a reasonable doubt [**see: Ex Parte Barfield**, 660 S.W.2d 103 (Tex.Cr.App. 1983)]. Outside of what the District Attorney created himself in the way of selectively prosecuting the Applicant, impacted with the prejudicial jury arguments he presented; then, it is clear that there was no evidence in existence which tended to connect the Applicant to the murder offense. Applicant submits that she was naively responsible for placing herself in such a vulnerable position, for she left herself wide open for this malicious prosecution simply because she and the deceased had engaged in a verbal argument the day before the murder occurred. Applicant never denied that this argument incident took place, but she did proclaim her innocence against the mendacious murder accusation.

The standard in the federal courts, on the other hand, focuses on whether the evidence presented at a trial was

insufficient to prove all of the essential elements of the crime beyond a reasonable doubt [**Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781 (1979)]. Such is the situation in the Applicant's conviction. The fact that the newly discovered evidence has just recently came to light only reinforces the Applicant's assertions that **NO EVIDENCE** was in existence.

VII.

CONCLUSION

Applicant concludes this habeas corpus application by stating she is confident that more than an ample record is herein provided in which to authorize and compel this Honorable Court to act upon this claim of "factual innocence based upon newly discovered evidences" not before available to the Applicant. Inasmuch as, adequate and sufficient proof is also provided in the form of supporting documentations which the Applicant has annexed hereto as her eleven exhibits. Applicant concludes that she has established a prima facie case that meets the threshold standard as set out in **Holmes, supra.** Thus, Applicant embraces and advances the same conclusions that are stated by the Justices of the Texas Court of Criminal Appeals in **Holmes, supra,** that this:

> **".....[t]hreshold standard and burden of proof will satisfy the Due Process Clause of the Fourteenth Amendment and we adopt them in the habeas context. If the applicant meets the threshold standard announced the habeas judge must hold a hearing to determine whether the newly discovered evidence, when considered in light of the entire record before the jury that convicted him, shows that no rational trier of fact could find proof of guilt beyond a reasonable doubt."** (Underscored emphases added by Applicant).

VIII.

PRAYER

Applicant prays that this Honorable Court will render a fair decision on the merits of the foregoing application, in accordance to the applicable case law and the true issues of fact that the Applicant has raised in this instant proceeding. Applicant prays for general relief in the form of receiving a full and fair hearing addressing her claims of newly discovered evidence and factual innocence.

SO MOVED AND PRAYED FOR ON THIS THE ____DAY OF_____, 1994 A.D.

Respectfully submitted:

SHIRLEY A. SOUTHERLAND
(Applicant, in pro se)
TDCJ-ID# 555516-Hobby Unit
Rt. 2, Box 600
Marlin, Texas 76661-9772

NOTICE & OATH
INMATE NOTARY PUBLIC SERVICE

Under both federal law (28 U.S.C. §1746) and state laws (V.T.C.A. Civil Practice & Remedies Code, §132.001-132.003), inmates incarcerated in Texas may use an unsworn declaration under penalty of perjury in the place of a written declaration, verification, certification, oath, or affidavit sworn before a commissioned Notary Public. An unsworn declaration and oath is hereby stated by the undersigned inmate, to wit:

"I, SHIRLEY ANNETTE SOUTHERLAND, (TDCJ-ID# 555516), being presently incarcerated in the W.P. Hobby Unit of the Texas Department of Criminal Justice's Institutional Division (herein referred to as "TDCJ-ID"), which is located at Route 2, Box 600, Marlin, Texas 76661-9772, does declare under penalty of perjury that the foregoing matters set forth in the written instrument entitled and styled, to wit: EX PARTE/PRO-SE "FIRST APPLICATION FOR WRIT OF HABEAS CORPUS" is upon my oath true and correct to the best of my knowledge and beliefs."

EXECUTED ON THIS THE 21 **DAY OF** June, 199 4 **A.D.**

/s/ Shirley Southerland
SHIRLEY A. SOUTHERLAND
(Applicant, pro se)
TDCJ-ID# 555516-Hobby Unit
Route 2, Box 600
Marlin, Texas 76661-9772B

FILED
KATHERINE TYRA
District Clerk
JUN 27 1994
Time: 2:10
Harris County, Texas
By [signature] Deputy

CERTIFICATE OF SERVICE

I, SHIRLEY ANNETTE SOUTHERLAND, on this the 21 day of June, 199 4 A.D., do certify that one original and two copies of the above-named and foregoing writ has been sent via a U.S. mail Depository Box to:

Honorable Katherine Tyra
Harris County District Clerk
301 Fannin-P.O. Box 4651
Houston, Texas 77210

to file and set this writ proceeding for a review in the appropriate 180th District Court for Harris County, Texas.

Additionally, on this same date noted above, one copy has been forwarded via regular U.S. Postal Services to the State's Attorney, District Attorney John B. Holmes, Jr., at his offices on 210 Fannin, Suite 200, Houston, Texas 77002.

Shirley Southerland
SHIRLEY A. SOUTHERLAND
Applicant, pro se
TDCJ-ID# 555516-Hobby Unit
Route 2, Box 600
Marlin, Texas 76661-9772

Applicant's Exhibit One

EX. ONE

INDICTMENT

FILED: JUNE 6, 1989

REV. 5/8(

THE STATE OF TEXAS
VS.

SHIRLEY ANNETTE STOKLEY SPN: 00324430
3422 Cedar Hill DOB WF 11-3-48
HOUSTON, TEXAS
FELONY CHARGE: MURDER
CAUSE NO.: 526673
HARRIS COUNTY DISTRICT COURT NO.: 180TH

DATE PREPARED 5-17-89 BY: ah DA NO. 302
AGENCY: HCSO O/R NO. 89-044959
NCIC CODE: 090320 ARREST DATE:
RELATED CASES: Vol 150 Page 216 AX GM
209th GJ
BAIL $ 50,000
PRIOR CAUSE NO.:

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

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas,

AKA SHIRLEY ANNETTE STOKLEY AKA SHIRLEY ANNETTE MARTIN Southerland

hereafter styled the Defendant, heretofore on or about FEBRUARY 19, 1989, di

then and there unlawfully

,intentionally and knowingly cause the death of SHAWNTE COLLINS,hereafter styled the Complainant, by shooting the Complainant with a deadly weapon, namely, a firearm.

It is further presented that in Harris County, Texas, SHIRLEY ANNETTE STOKLEY AKA SHIRLEY ANNETTE MARTIN, hereafter styled the Defendant, heretofore on or about February 19, 1989, did then and there unlawfully intend to cause serious bodily injury to SHAWNTE COLLINS, hereafter styled the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely, by shooting the Complainant with a deadly weapon, namely, a firearm.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

209th Foreman

Karen Winston

FOREMAN OF THE GRAND JURY

FILED
MARY HARDY DIST. CLERK
HARRIS COUNTY, TEXAS
1989 JUN -6 PM 4:47
BY DEPUTY

RECORDER'S MEMORANDUM:
At the time of recordation, this instrument was found to be inadequate for the best photographic reproduction because of illegibility, carbon or photo copy, discolored paper, etc. All blockouts, additions and changes were present at the time the instrument was filed and recorded.

000012

Applicant's Exhibit Two

Ex. Two

4201/D10 Plea of Not Guilty Before Jury - Court Assessing Punishment Rev. 12-85

THE STATE OF TEXAS
VS Shirley Annette Martin Southerland

NO. 526673

IN THE 179th DISTRICT
COURT OF HARRIS COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

Judge Presiding : Patricia R Lykos
Date of Judgment: 3-13-90
Attorney for State : Steve Baldassano
Attorney for Defendant: Ken Goode
Offense Convicted of : Murder

Degree : 1st
Date Offense Committed: 2.19.89

Charging Instrument: Indictment/~~Information~~

Plea : not guilty
Jury Verdict : guilty
Foreman: William Arthur Wathke

Plea to Enhancement Paragraph(s) : NA
Enhancement Paragraph(s): NA

Findings on Use of Deadly Weapon : affirmative

Punishment Assessed by : jury

Date Sentence Imposed : 3-16-90
Costs: $142.50

Punishment and Place of Confinement : life and $10,000.00 fine
Date to Commence: 3-31-89

Time Credited : NA
Total Amount of Restitution/Reparation: NA

Concurrent Unless Otherwise Specified.

On this day, set forth above, this cause was called for trial, and the State appeared by the above named attorney, and the Defendant appeared in person in open court, the above named counsel for Defendant also being present, or, where a defendant is not represented by counsel, that the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent, and having pleaded as shown above to the indictment herein, both parties announced ready for trial and thereupon a jury, to-wit, the above named foreman and eleven others was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper office to consider the verdict, and afterward were brough into Court by the proper officer, the Defendant and defendant's counsel being present, and returned into open court the verdict set forth above, which was received by the Court and is here now entered upon the minutes of the Court as shown above.

[NA] The Defendant, in person, in writing, and in open court, with the written agreement of the court, waived his right to the preparation of a pre-sentence report by the Probation Office, such waiver having been filed in the papers of the cause.

[NA] The Defendant not having waived the preparation of a pre-sentence report by the Probation Officer, the Court directed the Probation Officer to prepare such a report.

Thereupon, the Defendant elected to have punishment assessed by the above shown assessor of punishment, and when shown above that the indictment contains enhancement paragraph(s), which were not waived, and alleges Defendant to have been convicted NA previously of any felony or offenses for the purpose of enhancement of punishment, then the Court asked Defendant if such allegations were true or false and Defendant answered as shown above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the Court; they retired to consider such question, and after having deliberated, they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by the Court, in due form of law further evidence was heard by the Court relative to the question of punishment and the Court fixed punishment of the Defendant as shown above.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, as set forth above, and said Defendant be punished in accordance with the Jury Verdict or the Court's Finding, as shown above and that the Defendant is sentenced to a term of imprisonment or fine or both, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Department of Corrections of the State of Texas, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And the said Defendant is remanded to jail until said Sheriff can obey the directions of this judgment.

VOL._____PAGE_____

RECORDER'S MEMORANDUM:
At the time of recordation, this instrument was found to be inadequate for the best photographic reproduction because of illegibility, carbon or photo copy, discolored paper, etc. All blockouts, additions and changes were present at the time the instrument was filed and recorded.

00168

VOL 0181 PAGE 255

Applicant's Exhibit Three

THREE

CAUSE NO. 526673

THE STATE OF TEXAS	}{	IN THE 180TH JUDICIAL
VS.	}{	DISTRICT COURT OF
SHIRLEY STOKLEY	}{	HARRIS COUNTY, TEXAS

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, by and through her Assistant District Attorney, Harris County, Texas, Steve Baldassano and moves and requests that the Court instruct Defendant and Defendant's Attorney not to mention, allude or refer to in any manner the following:

1) the criminal history of the Complainant Shawnte Collins
2) any written statement by Judy Frazier
3) blood typing performed or any evidence in the case and its results until a hearing has been held outside the presence of the jury to determine the admissability of such.

Respectfully submitted,

Steve Baldassano
Assistant District Attorney
180th District Court
Harris County, Texas

FILED
RAY HARDY
District Clerk
MAR 12 1990
Time: 11:27
Harris County, Texas
By _____ Deputy

E

E9

Applicant's Exhibit Four

DON STRICKLIN
FIRST ASSISTANT

DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002-1901

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

April 27, 1993

Shirley Sutherland
T.D.C.J.--I.D. # 555517
Rt. 4, Box 800 B-2-29
Gatesville, Tx. 76528-9399

Re: Your recent Open Records Act request.

Greetings:

Your recent correspondence concerning the Open Records Act was referred to me for review. This office does not maintain a list of documents contained in the file for Cause No. 526,673, and the Act does not require that such a list be compiled. To the contrary, the attorney general's office held in ORD-467 that the Act does not require governmental bodies to create or prepare new information or to prepare information in the form requested.

I regret that this office cannot be of more assistance to you at this time.

Yours sincerely,

William J. Delmore, III
General Counsel
Office of the District Attorney

WJD/bd

Applicant's Exhibit Five

Mr. William J. Delmore, III
General Counsel, Office of the District Attorney
District Attorney's Bldg., 201 Fannin, Suite 200
Houston, Texas 77002-1901

Ms. Shirley A. Southerland
T.D.C.J.-I.D. #555516
Rt. 4, Box 300 B-2-29
Gatesville, Texas 76597-9399

RE: District Attorney's Files in Cause No. 526,673

Monday, May 3rd, 1993

MR. WILLIAM J. DELMORE, III
Dear Mr. Delmore,

I am enclosing a copy of your letter dated April 27th, 1993; which I received in response to my Open Records Act Request of 4-15-93. I hope to clear up any confusion you may have in regards to my recent request for copies of the file under Cause No. 526,673.

I originally asked about a possible itemized price list (&/or a Table Of Contents) of the pages in the D.A.'s file, to which I now see was a mistake. Please disregard that correspondence and allow me to re-state my request below.

I wish to purchase copies of the District Attorney's file in Cause No. 526,673; which should largely consist of police offense reports and other documents which were not filed in the records of the 180th Judicial Court of Harris County, Texas. I am aware that the district attorney cannot permit disclosure of the prosecutor's private notes, which constitute the privileged work product of counsel for the State of Texas, nor certain computerized criminal history information, the disclosure of which is prohibited by law. I am also aware your office does not disclose autopsy photographs and other photographs which, if disclosed, would tend to violate the privacy rights of third parties. In fact, I am unconcerned about the autopsy portions, as I already possess the pertinent portions thereof in my copies of the Trial Records.

Furthermore, I am aware that pursuant to Op.Atty.Gen. 1986, No. ORD-433, indigent persons are not exempt from payment of the statutory fee for copying records under the Act. I have the understanding that photocopies of those documents which are subject to disclosure generally cost fifty cents for the first page and fifteen cents per page thereafter. Thus, I simply want a price estimate based on the number of pages in the file that I am allowed by law to obtain, so that I can arrange for my sister to purchase those records. Her name is Ms. Jeanette B. Martin, 631 E. Spreading Oak, Houston, Texas 77076. Once you notify me of the costs for photocopies, I shall arrange for my sister to personally appear at your offices and pay for the file, so that you can forward it to me at my address listed above. This method of payment is more expedient than having the money transferred from my TDC Inmate Trustfund Account.

In closing, please allow me to apologize for misunderstandings that

(Continued on pp. 2)

(Continued from pp. 1)

I may have caused in my letter of April 15th, 1993. Based upon reliable information that was divulged to me by an informed attorney, I am confident that every page in the district attorney's file that you deem legitimate to photocopy will meet my needs, irregardless of the costs. In my letter of 4-15-93, I had mistakenly assumed that an "itemized list" or "Table of Contents" of the file existed; I had merely wished to avoid purchasing copies of records which I possibly already possessed in my Trial Transcripts/Records. However, that will be perfectly fine.

I wish to thank you in advance for your generous time and consideration in this matter. I respectfully urge you to be prompt in responding so that I can arrange for payments of this requested file. I remain
Cordially yours,

/s/ SHIRLEY A. SOUTHERLAND

SAS/lsg
(cc: files; J.B.K.; P.M.)

Applicant's Exhibit Six

DON STRICKLIN
FIRST ASSISTANT

DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002-1901

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

May 13, 1993

Hon. Daniel C. Morales
Attorney General
Supreme Court Building
P.O. Box 12548
Austin, TX 78711-2543

Attn.: Open Government Section, Opinion Committee.

Re: Enclosed Open Records Act request.

Dear Sir:

On May 7, 1993, this office received the enclosed request for disclosure of information under the Open Records Act. On behalf of John B. Holmes, Jr., the district attorney of Harris County, Texas, I request that the attorney general determine whether the Harris County District Attorney is a "governmental body" under the Open Records Act, and whether the information sought by the author of the enclosed correspondence is exempt from disclosure under subsections 3(a)(1), 3(a)(3) and 3(a)(8) of the Act.

The author of the enclosed request is seeking disclosure of the contents of the district attorney's files for her prosecution for the offense of murder in Cause No. 526,673 in the 180th District Court, Harris County, Texas. The defendant was convicted of murder after a jury trial, and on March 16, 1993, her punishment was assessed at confinement in the Texas Department of Corrections for life, and payment of a $10,000.00 fine. The judgment of conviction has been affirmed on appeal.

It is respectfully suggested that the attorney general consider this request in conjunction with the previous correspondence of the Harris County District Attorney, assigned ID # 17357, in which it was requested that the attorney general reconsider all prior opinions which limit the application of the "law-enforcement exception," subsection 3(a)(8), of the Act, to (1) materials in files for "open" investigations and prosecutions, and (2) materials in "closed" files which, if disclosed, would "unduly interfere with law enforcement."

The district attorney also requests that the attorney general reconsider the prior

determination, in Op.Atty.Gen 1984, JM-266, that the Harris County District Attorney is a "governmental body" required to comply with the Texas Open Records Act.

The district attorney has no objection to the disclosure of those instruments which were filed in the trial court in which the prosecution occurred. The file for this murder investigation and prosecution is quite voluminous, however, hence the first fifty pages of the contents of the file are enclosed as a representative sample thereof, pursuant to Op.Atty.Gen. 1988, No. ORD-497.

(a) Definition of "governmental body."

It is apparent under the terms of the Open Records Act that John B. Holmes, Jr., the Harris County District Attorney, is not a "governmental body" subject to compliance with the Act.

One of the definitions of "governmental body," set out in subsection 2(1)(A) of the Act, includes any governmental "office" which is "within the executive or legislative branch of the state government"; and subsection 2(1)(H) of the Act specifically provides that "the Judiciary is not included within this definition."

The Harris County District Attorney holds an elective "office" which exists by virtue of Article 5, § 21, of the Texas Constitution. Article 5 of our Constitution establishes and defines the "Judicial Department" of our State government. Since his "office" is created under Article V of the Constitution, the district attorney is a part of the judicial department of State government, *Meshell v. State*, 739 S.W.2d 246, 253 (Tex.Crim.App. 1987), and therefore he does not fall within the definition set out in subsection 2(1)(A).

In opinion No. JM-266, the attorney general stated that the office of the district attorney ccomes within the definition of "governmental body" set out in subsection 2(1)(G) of the Act, in that it constitutes a "part, section or portion of [an] organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends governmental funds." The attorney general's construction of that provision is too broad, in that it would incorporate and render superfluous all of the other six definitions of "governmental body." If the receipt or expenditure of governmental funds was sufficient to meet the subsection 2(1)(G) definition of "governmental body," the other definitions would be useless surplusage, since all of the agencies and entities described ther[illegible] do receive or expend governmental funds.

The "part, section or portion" language of 2(1)(G) obviously was intended by the Legislature to apply to divisions of non-governmental corporations or other organizations which are funded by or expend public monies. And the constitutional office of a district attorney simply is not a "part, section or portion" of any "institution or agency."

Although one of the exclusionary provisions of the Act, subsection 3(a)(8), makes reference to certain records of "prosecutors," it must be assumed that Legislature intended that reference to apply only to prosecutors employed by agencies not within the

judicial department of State government, in light of the express limitation of the applicability of the Act to officers within the executive and legislative branches of State government.

Any construction of the Act which would require the district attorney to comply with the Open Records Act, such as that suggested in Op.Atty.Gen. 1984, No. JM-266, would violate the separation of powers doctrine set out in Article 2, § 1, of the Texas Constitution. *See Meshell v. State, supra.* A legislative enactment that interfered with the work product privilege of the district attorney woud infringe upon the core functions of a judicial department officer, and suffer from the same constitutional infirmity as that recognized in *Meshell.* The participation of an executive department officer (the attorney general) in enforcement of the Act against the district attorney would further violate the separation of powers doctrine.

It is respectfully submitted that the attorney general's prior construction of subsection 2(1)(G) should be reconsidered for the foregoing reasons.

(b) Subsection 3(a)(8)--the law enforcement exception.

It previously has been determined by the attorney general that witness statements, offense and investigative reports and similar materials from files for "closed" cases are exempt from disclosure under subsection 3(a)(8) only if it can be shown that their disclosure would "unduly interfere with law enforcement." *See, e.g.,* Open Records Act Decision No. 434. Nothing in the Open Records Act or case law construing the Act supports any such distinction between "open" and "closed" files.

Subsection 3(a)(8) unambiguously exempts from Open Records Act disclosure all internal records of law enforcement agencies and prosecutors, and it makes no reference whatsoever to "closed" files or "undue interference with law enforcement."

When this office previously requested a reconsideration of the attorney general's interpretation of subsection 3(a)(8), the response cited for authority the decisions in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex.App.--Houston [14th] 1975), writ refused, 536 S.W.2d 559 (1976), and *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). *See* letter ruling OR 88-389. But the Court of Appeals opinion in the *Houston Chronicle* case expressly held, at 531 S.W.2d 185, that "[t]he Offense Report as described in this opinion is a record of a law enforcement agency that deals with the 'detection and investigation of crime'," and that "these records fall within section 3(a)(8)" and are therefore exempt from disclosure under the Act. Nothing in the *Houston Chronicle* opinion even remotely suggests that its holding was limited to "open" investigations, and that police offense reports and law enforcement records concerning "closed" cases are not exempt unless additional circumstances are present. The Court's holding which requires release of the information which now comprises the first page of a police offense report was not even based upon the Act, but upon a constitutional right of access to information.

The origin of the attorney general's "unduly interfere with law enforcement" proviso

appears to be a single sentence of dicta in *Ex parte Pruitt*, at 551 S.W.2d 710, in which the Supreme Court described its previous dicta in the opinion refusing writ of error in *Houston Chronicle*:

> This Court recognized in *Houston Chronicle* that while strong considerations exist for allowing access to investigatory materials, the better policy reason is to deny access to the materials if it will unduly interfere with law enforcement and crime prevention.

The decision in *Ex parte Pruitt* was not even based upon the Open Records Act; it was based instead upon Article 1606c, V.A.C.S. And the above-quoted dicta refers to language in *Houston Chronicle* concerning the public's constitutional right of access to information, rather than the Open Records Act. Furthermore, that dicta was intended to *support* the denial of access to investigatory reports, rather than create some new restriction on the scope of the law enforcement exception to the Open Records Act. In short, there is no case law whatsoever which construes subsection 3(a)(8) of the Open Records Act as exempting records of law enforcement agencies and prosecutors in closed cases *only* upon a showing that release of their records would "unduly interfere with law enforcement."

To the contrary, in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987), the Supreme Court specifically cited subsection 3(a)(8) in its decision recognizing the existence of a "law enforcement privilege" in civil litigation. While *Hobson v. Moore* happened to pertain to discovery of records of an "ongoing criminal investigation," the Court did not indicate that its recognition of the "law enforcement privilege" applied only to pending investigations and prosecutions.

The subsequent decision in *Euresti v. Valdez*, 769 S.W.2d 575, 579 (Tex.App.--Corpus Christi 1989), seemed to make a distinction between "open" and "closed" files in dicta discussing the "law enforcement privilege" recognized in *Hobson v. Moore, supra,* but that opinion is not persuasive authority for ignoring the express language of the Open Records Act law enforcement exception. First, the opinion expressly limits itself to a determination of the existence of a privilege from civil discovery, and does not purport to construe the Open Records Act. Second, the majority opinion hopelessly confused the rules pertaining to discovery of grand jury testimony (which does not constitute a record of a "governmental body" under subsection 2(1)(G) of the Act) and the rules governing disclosure of prosecutors' records (which have been found to be subject to the Act in opinion No. JM-266).

That confusion is highlighted in the dissenting opinions of Chief Justice Nye in *Euresti v. Valdez*, which also provided sound policy reasons for maintaining the confidentiality of prosecutors' files:

> I firmly believe that the investigative files of the county attorney should be exempt from discovery because of the "chilling effect" their discovery would have upon witnesses and others who come forward to give factual information. The need for confidentiality within the criminal justice

Applicant's Exhibit Seven

Copy

Ms. Shirley Southerland, (Requestor)
T.D.C.J.-I.D.# 555516
Rt. 4, Box 800 B-2-29
Gatesville, Texas 76597-9399

Friday, May 28th, 1993

THE HONORABLE DANIEL C. MORALES
Texas Attorney General
Supreme Court Bldg.
P.O. Box 12548
Austin, Texas 78711-2548

Attn: Open Government Section-Committee Opinion

RE: Requestor's STATED OBJECTIONS to the Harris County Texas District Attorney's wanton failure to disclose non-privileged, discoverable records that are contained in **D.A. File No./Cause # 526,763**; as such was requested pursuant to the Texas Open Records Act (Tx.Rev.Civ.Stat.Ann. art. 6252-17(a) §2(1). **[SEE: A.G.'s docket for copy of D.A. John B. Holmes, Jr.'s letter dated May, 13th, 1993].**

Dear Sir;

The Requestor herein, SHIRLEY SOUTHERLAND, has twice sought to purchase the records that are in the Harris County District Attorney's possession; such records which pertain to the Requestor's arrest, trial, and conviction to an alleged 1989 murder charge.

In response to the Requestor's first letter dated April 15th, 1993; General Counsel for the District Attorney (William J. Delmore III) stated in part,"....'[t]he attorney general's office held in ORD-467 that the act does not require governmental bodies to create or prepare new information in the form requested'"(dated April 27, 1993).

Requestor again mailed a request for the D.A.'s Files in Cause No. 526,673 on May 3rd, 1993, in which Mr. William Delmore III attached to his letter dated May 13, 1993, and forwarded to your Offices.

The Requestor herein formally enters her STATED OBJECTIONS to the ostentatious letter that Mr. Delmore utilized, in which he was seeking the assistance of the Texas Attorney General's Office to prevent the Requestor from obtaining these crucial records that are in the District Attorney's possession. Therein, Mr. Delmore's position was that the Harris County District Attorney's Office was not a governmental body, and thus was exempt from disclosure. This is contrary to his position that was stated in his letter to the Requestor, of April 27, 1993.

In the May 13, 1993 letter to the Honorable [illegible] C. Morales; Mr. Delmore

not too subtly suggested that the Attorney General should override all previous A.G. Opinions which supported disclosure of "privileged records", under the proper circumstances, as required by the Texas Open Records Act. Therein, Mr. Delmore urged multifarious reasons as to why the Harris County District Attorney should not be required to disclose the records in File #526,763 to the Requestor.

Requestor objects to this blatant attempt of Mr. Delmore's to receive political or judicial favoritism from another intergovernmental Texas State department. The following facts, objections, and "particularized needs" are submitted by the Requestor, in order to show that these certain records are discoverable and, are not "privileged" from disclosure; to wit:

FACTS OF THIS CASE

I.

Requestor requires the records possessed by the Harris County District Attorney in order to meet her burden of proof to establish that she was illegally arrested, tried, and convicted by virtue of malicious and selective prosecutions of a 1989 murder charge, to which the Requestor pled Not Guilty. As a result of such malicious prosecution, the Requestor was denied due process rights to receive a full and fair trial upon the murder charge. Accordingly, Requestor was found guilty and sentenced to Life imprisonment and fined $10,000.00.

Requestor is now contemplating possible civil suits and postconviction proceedings based upon such malicious and selective prosecutions; and, other related causes for action that attached therefrom.

II.

The Harris County District Attorney's Office, and the Assistant District Attorney that prosecuted the murder charge, deliberately withheld exculpatory evidence from the Grand Jury and the trial jurors. Such exculpatory evidence was in the form of an eye-witness's account about the actual murder incident. One Judy Frazier was arrested six city blocks from the location of the deceased, shortly after the corpse was discovered. Said arrest was for Public Intoxication. During the arrest, the said Judy Frazier related to the police that the deceased; a fat Mexican man; and, Judy Frazier were all together when an argument broke out over sex and drugs. Thereupon, the Mexican man withdrew a handgun and shot the deceased in the side of the head. Blood spots were discovered on the clothing of Judy Frazier at the time of her arrest. On or about February 15th, 1993, Requestor was informed through attorney William "Bill" McQuillin (7203 Horse Whip Dr., San Antonio, Texas 78240-3220) that the statement of Judy Frazier, and the analysis of the blood typing, had been deliberately withheld from the Grand Jurors whom indicted the Requestor. Further, that such constituted "Newly Discovered Evidence", pursuant to T.R.A.P. Rules 30(b)(2),(5),(6), and (9).

III.

Testimony at the Requestor's trial revealed that the deceased and the Requestor was last seen together in the living room of four admitted drug dealers. (Jesse Cavazos, Pedro Cavazos, Angelica Cavazos, and Yvonne Munoz Gonzalez). These four admitted drug dealers testified that they also worked for an attorney named Victor Rosa. In a well structured litany, the four drug dealers, appearing as the State's witnesses, gave conflicting accounts of how

the Requestor and the deceased had engaged in an argument, after which the Requestor left the premises. Additionally, the four drug dealers repeatedly used the words "garbage" and "trash" when describing alleged comments that the Requestor was credited with saying after the murder occurred.

IV.

Certain Police officers, appearing as the State's witnesses, testified to the fact that a note written in Spanish, and reflecting the word "Hermano", was found in the container in which the deceased's body was discovered. This crucial piece of evidence was deemed lost &/or destroyed at the Requestor's trial.

Furthermore, testimony revealed that the carpet in the drug dealer's living room had been removed and could not be located during subsequent police investigations. The reason the carpet was removed by the drug dealer's, (even though the house was rented from attorney Victor Rosa), remained uncertain and unsubstantiated.

Police officers testified that it took four grown men weighing around two hundred pounds to load the container with the deceased's body into a Crime Scene van for transportation.

V.

In order to meet its burden of proof necessary to convict the Requestor of murder, evidence indicated the State induced a jail inmate (Wanda White) to solicit incriminating statements from the Requestor that would directly connect her with the murder. Although the jail inmate succeeded in befriending the Respondent and, learning about facts in which the Requestor had recapitulated concerning what her attorney had conveyed to the Requestor about the subject-matter of the then pending case.....the jail inmate manipulated these conversations by implying at the trial that the Requestor had "bragged" and confessed to the murder.

VI.

During the course of the trial the deceased's step-mother, Ms. Kitty Smith, proffered evidence (outside the presence of the jury) when she testified that she told police that the deceased, Shawnte Collins, had gotten into some trouble about a year prior to her death with a Columbian named Pablo, and that she (the deceased) had "ripped" him off in a drug deal. Ms. Smith stated that not only had she gained this information from the decedent a year prior to her death; but, she also testified that a Mexican named Arnulfo Rameriz had advised of this fact.

VII.

Other than the testimonial evidence which the Assistant District Attorney procured, no direct evidence was offered by the State which tended to connect the Requestor to the act of murder. At best, the evidence could remotely be deemed circumstantial. A conviction on circumstantial evidence cannot be sustained if circumstances do not exclude every other reasonable hypothesis except that of the guilt of the accused, and proof to only a strong suspicion or mere probability is not sufficient. [SEE: Robinson vs. State, 701 S.W.2d. 898; Boozer vs. State, 717 S.W.2d. 608; and, Jackson vs. Virginia, 443 U.S. 307,319, 99 S.Ct. 2781-2789,(1979)].

VIII.

PARTICULARIZED NEEDS:

An impartial assessment of the above facts gives rise to grounds for cause of actions that establish;

1). Malicious prosecution was deliberately committed, and should have immediately been recognized at the outset of the proceedings of the murder trial by defense counselor representing the Requestor; and,

2).a malpractice lawsuit and, postconviction proceedings for relief, against defense attorney Ken Goode.These types of legal actions are being taken under consideration, based on Ineffective Assistance of Counsel.

The Requestor asserts she has shown that particulaized needs exist in that:
(1). a reasonable period of time has elapsed between the date the Harris County District Attorney filed the complaint (3/30/89); the date the Requestor was arrested (3/31/89); the date of the Grand Jury indictment (6/6/89); the date of the trial (3/13/90); and, the date the Judgment and conviction was affirmed by the 14th Court Of Appeals. This rendered the conviction finalized as far as investigatory purposes and confidentiality of witnesses are concerned (2/28/93). No civil or criminal litigation proceedings are presently underway. The names of all the State's witnesses, along with the basis of their testimonies,were for the most part revealed at trial. Thus, the contentions of Mr. William J. Delmore III, that Requestor's request under the Open Records Act (subsections 3(a)(1), 3(a)(3), and 3(a)(8)) are exempt from disclosure is baseless;

(2). the documents in the District Attorney's possession which reflects the witnesses statements are material to the Requestor's case;

(3). the credibility of evidence and testimony, whether omitted or produced to the Grand Jurors in Cause No. 526,673, is in serious doubt and can only be ascertained by an inspection of the grand jury proceedings;

(4). whether the grand jury proceedings were procedurally sufficient, in light of Judy Frazier's and,jail inmate Wanda White's statements and testimonies being suppressed or presented..... as well as whether the credibility of the State's "drug dealer" witnesses, and the possibility that they were coached to testify in a "legally sophisticated, practiced manner" by their employer, (attorney Victor Rosa) is in serious doubt;

(5). the failure of the indictment to meet the prerequisites of C.C.P. Articles 20.19, 20.21, 20.22, 21.02(2), and 27.03(1); as well as the failure of the indictment to meet the requisites of Art. 1 §10 and Art. 5 §13 of the Texas Constitution, caused the trial court to lack lawful jurisdiction of the subject matter to convict. This is violative of the Requestor's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

(6). The failure of defense counsel to seek out and identify these procedural deficiencies; illegal suppression of favorable evidence; and, presentation of false evidence (Wanda White's biased informations), and defense counsel's

failure to object to such in a proper manner for the preservation of the trial records,..... renders such to being ineffective representation that is violative of the Requestor's rights to receive effective assistance of counsel, as guaranteed to all criminal defendants under the Sixth Amendment of the United States Constitution; and,

(7). that a miscarriage of justice was not in fact committed is in serious doubt.

"....deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice"....."the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears".....suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution". When the "reliability of a given witness may well be determinative of guilt or innocence", nondisclosure of evidence affecting credibility falls within this general rule.

Giglio v. United States, 405 U.S. 150,153, 92 S.Ct. 763,765, 31 L.Ed.2d. 104(1972).

IX.

ELEMENTS OF MALICIOUS PROSECUTION

As outlined in **Euresti v. Valdez, 769 S.W.2d. 579 (Tex. Crim.App.-Corpus Christi 1989)**, the elements of malicious prosecution in Texas is held to be... (1)the commencement of a criminal prosecution against (e.g., the Requestor) plaintiff, (2)which was caused by the defendant (e.g., District Attorney, et al.) or through the defendant's aid and cooperation (3) which terminated in the plaintiff's favor, (4)that plaintiff was innocent, (5) that there was no probable cause for the proceedings ,(6) that it was done with malice, and (7) that it damaged the plaintiff.

"A private person which procures a prosecution by giving false information with malice is liable for damage. Greens v. Meadows, 517 S.W.2d. 799,808, (Tex.Civ.App.-Houston [1st Dist] 1975); Suhre v. Kott, 193 S.W.2d 417,419 (Tex.Civ.App.-San Antonio 1917).

"Whether the person made full/fair disclosure in the judicial proceedings is part of the malice and probable cause elements of the plaintiff's case. See Trek v. Deaton, 555 S.W.2d. 154,155-56 (Tex.Civ.App.-El Paso 1977, no writ). Thus, the grand jury or other testimony on which a malicious prosecution suit is based is discoverable and admissible.(See also, Diamond Shamrock Corp. v. Ortiz, 753 S.W.2d. 238, 241 (Tex.Civ.App.-Corpus Christi 1988)".

X.

ASSESSMENT OF INEFFECTIVE ASSISTANCE OF COUNSEL

Requestor's contemplation of seeking civil and criminal proceedings for ineffective assistance of counsel can become a reality only by the disclosure of the District Attorney's files in Cause No. 526,673. To make these files exempt from disclosure would plainly result in the Requestor being deprived of the necessary materials to meet her burdens of proof.

This assessment is based on the facts known to the attorney, and the rules of law and procedure the attorney is held to know as a lawyer representing defendants in criminal proceedings [Vela v. Estelle, 708 F.2d. 954,965, (5th Cir. [Tex.] 1983), cert. denied, ___ U.S.____, 79 L.Ed.2d 195, 104 S.Ct. 736 (1984)].

The inquiry is whether, considering all these circumstances, counsel's assistance was reasonably effective [Wainwright v. Skyes, 97 S.Ct. 2497(1977); Strickland v. Washington, ___U.S.___,___,80 L.Ed.2d. 674, 104 S.Ct. 2052 (1984); Ewing v. State, 549 S.W.2d. 392,395 (Cr.App. 1977); Vela v. Estelle, supra, -number, nature, and seriousness of charges must be considered].

The Requestor has the burden of proving ineffective assistance of counsel [[Cannon v. State, 668 S.W.2d. 401,403 (Crim.App. 1984]. In doing so, the Requestor must overcome the strong presumption that an attorney's conduct falls within the wide range of reasonable professional assistance. To accomplish this burden the Requestor must identify specific acts or omissions of counsel that were not the result of reasonable professional judgment and thus were outside the wide range of professionally competent counsel.

Attached hereto and marked **Exhibit One** is the State prosecutor's MOTION IN LIMINE that was used at trial to suppress Judy Frazier's written statement and, the blood typing that was performed on her clothing. This document should have alerted defense counsel to the fact that exculpatory evidence and testimony was withheld from the Grand Jury that indicted the Requestor. Moreover, the trial records are silent as to whether-or-not defense counsel sought an in-camera hearing into facts and nature of Judy Frazier's description of how the murder was actually committed.

By refusing to allow the Requestor's files to be disclosed, the Harris County District Attorney is impeding the Requestor's rights of access to the courts.

It would be fruitless for the Requestor to seek action by alleging unsubstantiated contentions for relief, on the grounds that she received ineffective assistance of counsel; or, that the grand jury proceedings and the indictment thereof were deficient by virtue of malicious prosecutions and other overt acts by the members of the Harris County District Attorney's Office.

State prosecutors in Harris County, infamous for opposing petitions by stating the petitioner failed to meet his burden of proof, thus reducing his meritorious contentions to mere, unsubstantiated, allegations that "fail to allege facts which if true, would entitle him to relief (usually citing Ex Parte Young, 418 S.W.2d. 824 (Tex.Crim.App. 1967) and Ex Parte Maldonado, 688 S.W.2d. 114,116 (Tex.Crim.App. 1985).

CONCLUSION

In conclusion to this, the Requestor's STATED OBJECTIONS to the Harris County District Attorney's refusal to disclose non-privileged records; Requestor offers her last items of rebuttal evidence to demonstrate that the Offices of John B. Holmes, Jr., condones methods of double-standards when choosing whether-or-not he will divulge requested records under the Texas Open Records Act.

Attached hereto and marked Exhibit Two (A); and, Exhibit Two (B) are two documents which directly refute Mr. William J. Delmore's pleas for his records to be considered privileged and "exempt from disclosure to convicted murderers".

Exhibit Two (A) is a letter signed by Mr. William J. Delmore (dated Feb. 6, 1993), wherein he is offering the D.A.'s files to one Mr. Jesse Carlos Gomez. Mr. Delmore showed his consent to allow a man convicted in 1984 of Capitol Murder to receive his requested records.

Exhibit Two (B) is the written request that Mr. Jesse Gomez utilized to obtain Mr. Delmore's permission to receive the Capital Murder files that are under Cause No. 398,666. No "particularized needs" are asserted by Mr. Gomez; only his written request, submitted pursuant to Tx.Civ.Stat.Ann. art. 6252-17(a) and subsection 2(1)(a) were urged upon Harris County District Attorney John B. Holmes, Jr., therein.

Mr. Delmore's position in that incident certainly contrasts his position in the Requestor's case. Inasmuch as, the requestor's contention that malicious prosecution played a part in her arrest, trial, and conviction is made that much more credible by Mr. Delmore's reluctance to disclose the records under Cause No. 526,763.

Pursuant to Tx. Rev. Civ. Stat. Ann. art. 6252-17(a), subsection §7(a), Requestor Shirley Southerland respectfully requests that the Texas Attorney General shall forthwith render a decision , consistent with standards of due process, to determine whether the requested information is a public record, or else falls within one of the ostentatious stated exceptions that have been suggested by Mr. William J. Delmore III, in his letter of May 13th, 1993.

Requestor points out the importance of ordering the Harris County District Attorney to supply the Attorney General with a full, complete copy of his records in Cause No. 526,763; to prevent any temptations that may possibly arise to "doctor" these crucial documents.

The instances of malicious prosecutions described herein are the primary basis for the adverse publicity that the Texas Judicature experiences, in cases of indigents and minorities being abused by the legal system in this state. Cases such as Gary Graham, Randell Adams, Clarence Bradley, and Lionel Geter are only the tip of the real ice burg.

Respectfully submitted:

/s/ S. Southerland

Ms. Shirley Southerland
TDCJ-ID # 555516 B-2-29
Rt. 4, Box 800
Gatesville, Texas 76528-9399

(cc: JBH/ files)

(Posted via Certified Mail/R.R.R. Permit No. P-____-____-____)

Applicant's Exhibit Eight

E-16HT

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 2, 1993

Mr. William J. Delmore, III
General Counsel
Office of the District Attorney
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR93-408

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 20289.

The Harris County District Attorney's Office (the "district attorney") has received a request for access to the district attorney's file in Cause No. 526,673, in which the district attorney prosecuted the requestor for the offense of murder. You do not object to release of some of the requested information. You claim, however, that the remaining information may be withheld from required public disclosure under section 3(a) of the Open Records Act.

As a threshold issue, we first address your contention that the district attorney's office is a part of the judiciary within the meaning of section 2(1)(H) of the act and therefore is not subject to the act. We rejected this argument in a recent ruling issued to your office, Open Records Letter OR93-213 (1993). As we stated in that letter, a district attorney's office does not fall within the judiciary exception because it is not a court and is not directly controlled or supervised by one and because its functions are primarily executive in that its primary duty is to enforce the law. *See* Attorney General Opinion JM-266 (1984). Furthermore, the district attorney is an entity that is supported by or expends public funds. V.T.C.S. art. 6252-17a, § 2(1)(G) (definition of governmental body). Accordingly, the district attorney is subject to the act and must release the requested information unless it falls within one of the exceptions enumerated in section 3(a) of the act. You claim that the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim

that the requested information is excepted by section 3(a)(1) because it constitutes work product and is subject to the "law enforcement privilege" set forth in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). This argument was also rejected in Open Records Letter OR93-213 (1993). As we stated in that ruling, section 3(a)(1) does not encompass work product or discovery privileges. *See also* Open Records Decision No. 575 (1990). Such protection may exist under section 3(a)(3), if the situation meets the section 3(a)(3) requirements.[1] You do not indicate that litigation in this matter is pending or reasonably anticipated. We thus have no basis on which to conclude that the requested information may be withheld from required public disclosure under either the work product doctrine or section 3(a)(3) of the Open Records Act. *See* Open Records Decision Nos. 551 (1990) (section 3(a)(3) applies to information relating to pending or reasonably anticipated litigation); 518 (1988) (section 3(e) does not relieve governmental body from demonstrating general applicability of section 3(a)(3)).[2]

Section 3(a)(8), which excepts

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

With respect to section 3(a)(8), you argue that this exception should apply to all material in a closed law enforcement file. You also dispute our use of a standard that permits you to withhold from a closed file only that information the release of which

[1]Please note that section 14(f) of the act, added by the 71st Legislature in 1989, chapter 1248, section 18 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Accordingly, the *Hobson* court's apparent use of section 3(a)(8) as a basis for the "law enforcement privilege" is no longer valid.

[2]The information submitted to us for review appears to include information generated by the National Crime Information Center ("NCIC"), the Texas Crime Information Center ("TCIC") files, and certain locally compiled criminal history record information ("CHRI"). Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* We conclude, therefore, that if the CHRI data was generated by the federal government or another state, it may not be made available to the public by the district attorney except in accordance with federal regulations. *See* Open Records Decision No. 565. CHRI information generated within the state of Texas and TCIC files must be withheld from required public disclosure under section 3(a)(1) in conjunction with common law privacy doctrine. *See* Open Records Decision Nos. 565; 216 (1978); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public). However, section 3B of the Open Records Act grants the requestor a special right of access to CHRI information generated within the state of Texas and to TCIC files relating to her.

Dani

would "unduly interfere with law enforcement." In Open Records Letter OR93-213, we reviewed the same argument and rejected it. Accordingly, we will apply the existing standard of undue interference with law enforcement.

When section 3(a)(8) is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)); *see also* Open Records Decision No. 413 (1984) (Department of Corrections is a "law enforcement" agency within the meaning of section 3(a)(8)). We have examined the information submitted to us for review. We conclude that release of some of the information would undermine a legitimate law enforcement interest. This information has been marked and may be withheld from required public disclosure under section 3(a)(8) of the Open Records Act. Except as noted above, the remaining information must be released in its entirety.

Because prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

William Walker
Assistant Attorney General
Opinion Committee

WMW/GCK/jmn

Enclosures: Marked Documents

Ref.: ID# 20289
ID# 20668

cc: Ms. Shirely Southerland
TDCJ-ID #555516
Route 4, Box 800 B-2-29
Gatesville, Texas 76597-9399
(w/o enclosures)

Applicant's Exhibit Nine

CITATION

THE STATE OF TEXAS

Cause No. 9307978

JOHN B. HOLMES JR.,DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS , Plaintiff

vs.

DAN MORALES,ATTORNEY GENERAL OF THE STATE OF TEXAS RANDY SCHAFFER, KIM WEINER, WINFRED H. MORGAN, & DAVID BRANAM , Defendant

To: SHIRFLEY SOUTHERLAND, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
#555516, ROUTE 4, BOX 800 B-2-29
GATESVILLE, TEXAS 76597-9399

Defendant, in the above styled and numbered cause:

YOU HAVE BEEN SUED. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A. M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the SECOND AMENDED ORIGINAL PETITION FOR DECLARATORY RELIEF

of the PLAINTIFF in the above styled and numbered cause, which was filed on the 19th day of July, 1993, in the 261ST Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 20th day of July, 1993.

REQUESTED BY:
WILLIAM J. DELMORE, III, ASST DIST A
HARRIS COUNTY, 201 FANNIN
HOUSTON, TEXAS 77002
(713) 755-5816

AMALIA RODRIGUEZ-MENDOZA
Travis County District Clerk
Travis County Courthouse
1000 Guadalupe, P.O. Box 1748
Austin, Texas

DISTRICT COURT OF TRAVIS COUNTY, TEXAS

By _____ Deputy

RETURN

Came to hand on the ___ day of _____, ____ at ____o'clock ___.M., executed at _____, within the County of _____on the ___ day of _____, ____, at _____o'clock ___.M., by delivering to the within named _____, each in person, a true copy of this citation together with the accompanying pleading, having first attached such copy of such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Service Fee:$ _____

BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS
SHERIFF/CONSTABLE/AUTHORIZED PERSON

Sworn to and subscribed before me this the _____ day of _____, _____.

BY: _____
PRINTED NAME OF SERVOR

NOTARY PUBLIC, THE STATE OF TEXAS

_____ County, Texas

~~Service Copy~~

Constable Precinct 5

~~9307978-D15~~

JUL 21 1993

MAILED THIS _____ DAY OF _____, 19____

BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS

R Bolima

DEPUTY

Applicant's Exhibit Ten

CAUSE NO. 93-07978

JOHN B. HOLMES, JR., DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, Plaintiff,	§	IN THE DISTRICT COURT FOR
V.	§	THE 261ST JUDICIAL DISTRICT,
DAN MORALES, ATTORNEY GENERAL OF THE STATE OF TEXAS, et al., Defendants	§	TRAVIS COUNTY, TEXAS

SECOND AMENDED PETITION FOR DECLARATORY RELIEF

COMES NOW JOHN B. HOLMES, JR., in his official capacity as District Attorney of Harris County, Texas, seeking relief from Open Records Act rulings issued by Hon. Dan Morales, Attorney General of Texas, in letter rulings No. OR93-278, OR93-330, OR93-331, and OR93-334; and pursuant to §§ 37.003, 37.004 and 37.009, V.A.T.C., Civil Practice and Remedies Code, and Article 6252-17a, §§ 8(b) and 10, V.A.C.S., petitions the Court to render a declaratory judgment that (1) the plaintiff is not a "governmental body" as that term is defined in the Texas Open Records Act, Article 6252-17a, § 2(1), V.A.C.S.; (2) the plaintiff's files for completed or inactive criminal investigations and prosecutions are exempt from mandatory disclosure to the public under subsections 3(a)(1), 3(a)(3) and 3(a)(8) of the Texas Open Records Act; and that (3) the Texas Open Records Act violates Article II, § 1, of the Texas Constitution, insofar as it may be found to compel disclosure of the work product of counsel for the State of Texas in criminal prosecutions.

The plaintiff would respectfully show the Court the following:

I.

The plaintiff is the elected district attorney in and for Harris County, Texas, and maintains an office at 201 Fannin, Suite 200, Houston, Texas 77002. He is bringing this suit in his official capacity as Harris County District Attorney.

II.

Defendant Daniel C. Morales is the elected attorney general of the State of Texas, and maintains an office at 209 W. 14th Street, P.O. Box 12548, Austin, Texas 78711-2548. He is sued only in his official capacity as attorney general.

III.

The following individuals have an interest in the outcome of this suit, and are therefore included herein as defendants pursuant to § 37.006, V.A.T.C., Civil Practice and Remedies Code:

(a) Mr. Randy Schaffer, Attorney at Law, 1301 McKinney, Suite 3100, Houston, Texas 77010.

(b) Ms. Kim Weiner, Strasburger and Price, L.L.P., 901 Main Street, Suite 4300, Dallas, Texas 75202.

(c) Mr. Winfred H. Morgan, Attorney at Law, Morgan & Singleton, 1800 Bering Drive, Suite 590, Houston, Texas 77057.

(d) Mr. David Branam, Office of Risk Management, Harris County, Texas, 1310 Prairie, Suite 1207, Houston, Texas 77002-2021.

(e) Mr. Donovan J. Carey, 900 Midwest Plaza East, 800 Marquette Avenue, Minneapolis, MN 55402-2842.

(f) Mr. Mark Moore, 3017 Houston Avenue, Houston, Texas 77009.

(g) Mr. Don M. Barnett, Attorney at Law, Suite 2000, Box 174, 440 Louisiana,

Houston, Texas 77002-1693.

(h) Ms. Betty Ghio, 6750 West Loop South, Suite 500, Bellaire, Texas 77401.

(i) Ms. Bridget Chapman, Attorney at Law, 1101 Heights Boulevard, Suite 200, Houston, Texas 77008-6915.

(j) Joe Gorton, 1101 Southwest Parkway, Suite 303, College Station, Texas 77840.

(k) Harold Lloyd, Attorney at Law, 952 Echo Lane, Suite 420, Houston, Texas 77024.

(l) Joel Chavez, Assistant Chief, Personnel Service, Department of Veterans Affairs Medical Center, 2002 Holcombe Boulevard, Houston, Texas 77030.

(m) Lee Willie Maxey, Texas Department of Criminal Justice, Institutional Division, # 574967, Ferguson Unit, Route 2, Box 20, Midway, Tx. 75852.

(n) Shirley Southerland, Texas Department of Criminal Justice, Institutional Division, # 555516, Route 4, Box 800 B-2-29, Gatesville, Tx. 76597-9399.

IV.

Each of the persons listed in section III of this petition have caused to be delivered to the plaintiff a written request for disclosure of the contents of one or more of the plaintiff's files for a criminal investigation or prosecution which is completed and not currently under active litigation, or a specified portion of the contents of one of those files.

V.

Upon receiving a request for disclosure of the contents of a "closed" file from each of the persons listed in section III of this petition, the plaintiff mailed to the attorney general a written request for an opinion as to whether the contents of those files were exempt from disclosure under the Act. In each such request for an opinion, the

plaintiff asked that the attorney general reconsider all previous attorney general's opinions regarding the scope of the "law enforcement exception," subsection 3(a)(8) of the Open Records Act. Those opinions have erroneously found that law enforcement officials must, in order to justify non-disclosure of the contents of "closed" files, show that such disclosure would "unduly interfere with law enforcement," despite the plain fact that the statute does *not* contain any such limitation upon the scope of the so-called "law enforcement exception":

> Sec. 3. (a) All information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only:
>
> * * *
>
> (8) records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution . . .

VI.

The plaintiff also asked, in each request for an attorney general's opinion, that the attorney general also determine whether the contents of the plaintiff's "closed" files are exempt from mandatory disclosure under subsections 3(a)(1) and 3(a)(3) of the Open Records Act, as the privileged work product of counsel for the State of Texas and the law enforcement agencies which investigate offenses subject to prosecution by the plaintiff.

VII.

The plaintiff also asked, in his requests for an attorney general's opinion regarding the Open Records Act inquiries received from the individuals listed in subsections III (b), III (f) through (k), III (m) and III (n) of this petition, that the attorney general reconsider the previous decision that the district attorney of Harris County, Texas, is a "governmental body" as that term is defined in subsection 2(1) of the Open Records Act. He subsequently supplemented his requests for an attorney general's opinion regarding the Open Records Act inquiries received from the other listed interested parties with a similar request for a decision as to whether he is a "governmental body" under the Act.

VIII.

On June 24, 1993, the plaintiff received in the mail, in response to his correspondence described in sections V, VI and VII of this petition, four informal letter rulings, dated June 21, 1993, and June 23, 1993, in which the attorney general found that the contents of the plaintiff's "closed" files were not exempt from disclosure under subsections 3(A)(1), 3(a)(3) and 3(a)(8) of the Open Records Act, absent a showing that related litigation was pending or anticipated, or that disclosure of particular information would "unduly interfere with law enforcement." The attorney general further found that the plaintiff was required to disclose the contents of his files as requested by interested parties listed in subsection III of this petition.

Ten more informal letter rulings, which contained similar findings on the issues raised in the plaintiff's correspondence, were received between July 1, 1993, and July 12, 1993.

In nine of these informal letter rulings issued in response to the plaintiff's requests for an opinion regarding the inquiries received from the individuals listed in

subsections III(b), III(f) through III(k), III(m) and III(n) of this petition, the attorney general also declined to reconsider his previous ruling that the Harris County District Attorney is a "governmental body" under the Open Records Act.

IX.

John B. Holmes, Jr., the Harris County District Attorney, is not a "governmental body" as that term is defined in the Act.

One of the definitions of "governmental body," set out in subsection 2(1)(A) of the Act, includes any governmental "office" which is "within the executive or legislative branch of the state government." Subsection 2(1)(H) of the Act specifically provides that "the Judiciary is not included within this definition."

The Harris County District Attorney holds an elective "office" which exists by virtue of Article V, § 21, of the Texas Constitution. Article V of our Constitution establishes and defines the "Judicial Department" of our State government. Since his "office" is created under Article V of the Constitution, the district attorney is a part of the judicial department of State government, *Meshell v. State*, 739 S.W.2d 246, 253 (Tex.Crim.App. 1987), and therefore he does not fall within the definition set out in subsection 2(1)(A). His office also is excluded from the definition of "governmental body" by the "judiciary" proviso set out in subsection 2(1)(H).

In Op.Atty.Gen. 1984, No. JM-266, the attorney general issued an opinion that the office of the district attorney came within the definition of "governmental body" set out in subsection 2(1)(G) of the Act, in that it constitutes a "part, section or portion of [an] organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends governmental funds." The attorney general's construction of that provision is too broad, in that it would

incorporate and render unnecessary all of the other six definitions of "governmental body." Subsection 2(1)(G) obviously was intended by the Legislature to apply to a division of a *private* organization which is funded by or expends public monies. The constitutional office of a district attorney simply is not a "part, section or portion" of an "institution or an agency."

Furthermore, any construction of the Act which would require the district attorney (an officer of the judicial branch of government) to submit the privileged and confidential work product of counsel for the State of Texas to the attorney general (an officer of the executive branch of government) for his review, and which would thereafter require the district attorney to disclose that privileged work product to members of the public--such as the construction suggested by the attorney general in Op.Atty.Gen. 1984, No. JM-266--would violate the separation of powers doctrine set out in Article II, § 1, of the Texas Constitution. *Meshell v. State, supra.*

X.

Even if the Harris County District Attorney was a "governmental body" under the Act, his records and files for investigations and prosecutions are expressly exempted from disclosure under subsection 3(a)(8) of the Act.

It is a fundamental rule of statutory construction that "[w]hen the legislative intent is clearly expressed in a statute, it must be enforced as written unless it is found to be unconstitutional or unenforceable for other legitimate reasons," and neither the courts nor the executive branch of government have "authority to circumvent or enlarge the statute to avoid what they consider an inequitable or unwise result." *Robinson v. Steak and Ale No. 105 Club*, 607 S.W.2d 286, 288 (Tex.App.--Txka. 1980, no writ). The Legislature has stated that the records of prosecutors dealing with the investigation and

prosecution of crime are exempt from disclosure, without limiting that exemption in the manner chosen by the United States Congress in the Freedom of Information Act. There is no ambiguity justifying the construction of the statute adopted by the attorney general, and there is no authority for the attorney general's limitation of the subsection 3(a)(8) "law enforcement exception," with regard to "closed" files, to information which would "unduly interfere with law enforcement" if disclosed.

It is respectfully requested that this Court give effect to the plain and unambiguous language of subsection 3(a)(8) of the Act as written, rather than as construed by the attorney general, and find that the district attorney's files for closed criminal cases are not subject to disclosure under the Act.

XI.

It is further submitted that all of the district attorney's files for criminal investigations and prosecutions are comprised of "information relating to litigation of a criminal or civil nature . . . to which the State . . . is, or may be, a party." Because the district attorney of Harris County has determined that the contents of those files should be withheld from public disclosure, it is requested that this Court find that they are not subject to disclosure under subsection 3(a)(3) of the Act.

The work product rule has been acknowledged to constitute "one aspect" of the subsection 3(a)(3) "litigation exception." *See* Open Records Act Decision No. 429 (1985). Police investigative reports, witness statements and internal memoranda of prosecutors have repeatedly been found to constitute the privileged work product of the State of Texas, exempt from disclosure in either criminal or civil cases. *See, e.g., Quinones v. State*, 592 S.W.2d 933, 940 (Tex.Crim.App. 1980).

The work product privilege is now recognized to be perpetual in duration.

Owens-Corning Fiberglass Corporation v. Caldwell, 818 S.W.2d 749 (Tex. 1991). Therefore, the contents of the district attorney's "closed" files should remain exempt from disclosure under subsection 3(a)(3).

XII.

In *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987), the Supreme Court expressly recognized the existence of a "law enforcement privilege" in civil litigation. The Supreme Court has not made any distinction between open or pending investigations and prosecutions, and "closed" or inactive files, in recognizing the existence of that privilege.

Because the contents of the district attorney's files are privileged and confidential, both as work product of counsel for the State and pursuant to the "law enforcement privilege" noted by the Supreme Court in *Hobson v. Moore, supra*, they should be found to be exempt from disclosure under subsection 3(a)(1) of the Act, as "information deemed confidential by law, either Constitutional, statutory, or by judicial decision."

THEREFORE, the plaintiff respectfully requests that the Court render a declaratory judgment, holding that the district attorney is not a "governmental body" as that term is defined in the Texas Open Records Act. In the alternative, the plaintiff requests that this Court hold that the contents of the plaintiff's "closed" files are not subject to disclosure upon the requests of the interested parties listed in section III of this petition, pursuant to subsections 3(a)(1), 3(a)(3) and 3(a)(8) of the Open Records Act, except to the extent that those materials have been made by public by filing with the Harris County District Clerk.

In the further alternative, to any extent that this Court may find that the privileged

work product of counsel for the State of Texas and law enforcement agencies investigating criminal offenses are subject to mandatory disclosure under the Act, the plaintiff asks that this Court hold that the Act violates the separation of powers provision of the Texas Constitution, as set out in Article II, § 1, thereof.

The plaintiff also requests that he be awarded his costs and reasonable attorney's fees, pursuant to § 37.009, V.T.C.A., Civil Practice and Remedies Code, and Article 6252-17a, § 8(b), V.A.C.S., and that he be granted such other relief to which he may be entitled in law or in equity.

RESPECTFULLY SUBMITTED this 15th day of July, 1993.

WILLIAM J. DELMORE, III
Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Texas 77002
(713) 755-5816
T.B.C. No. 05732400

Attorney for plaintiff
John B. Holmes, Jr.

Applicant's Exhibit Eleven

ELEVEN

UNIVERSAL SURETY OF AMERICA

RIDER

CAUSE NO: 93-07978
COURT: 261st District;
Travis County, TX

To be attached to and form a part of Bond No. 6422834

issued by UNIVERSAL SURETY OF AMERICA,

dated the 3rd day of March, 19 94

in behalf of (Principal) JOHN B. HOLMES, JR., HARRIS COUNTY DISTRICT ATTORNEY

in favor of (Obligee) AMALIA RODRIGUEZ-MENDOZA, DISTRICT CLERK, TRAVIS COUNTY, TEXAS, and/or her successors in office

In consideration of the premium charged, it is understood and agreed that effective from the 3rd day of MARCH, 19 94: Case Style is amended to read:

JOHN B. HOLMES, JR., DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS
vs.
DAN MORALES, ATTORNEY GENERAL OF THE STATE OF TEXAS, RANDY SCHAFFER, WINFRED H. MORGAN, DAVID BRANAM, MARK MOORE, BRIDGET CHAPMAN, JOE GORTON, HAROLD LLOYD, LEE WILLIE MAXIE and SHIRLEY SOUTHERLAND

Provided, however, that the liability of UNIVERSAL SURETY OF AMERICA, under the attached bond as changed by this rider shall not be cumulative.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or warranties of the above mentioned bond, other than as stated above.

Signed this 18th day of April, 19 94.

Accepted:

JOHN B. HOLMES, JR., HARRIS COUNTY
Principal DISTRICT ATTORNEY

by John B. Holmes Jr

UNIVERSAL SURETY OF AMERICA

by Paula Patterson
Attorney in Fact
Paula Patterson

William J. Delmore, III, Attorney
Assistant District Attorney, Harris County, TX
201 Fannin #200
Houston, TX 77002
(713) 755-5816
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