IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF TEXAS

CAUSE NO. _____

BRANDON WOODRUFF

v.

BRAD LIVINGSTON, Director,
Texas Department of Criminal Justice
Institutional Division

MEMORANDUM IN SUPPORT OF APPLICATION FOR POSTCONVICTION WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

PETITIONER IS REPRESENTED BY
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TO THE HONORABLE PRESIDING JUDGE:

Brandon Woodruff, Petitioner, by and through his Attorney, Franklyn Mickelsen, files this application for a post-conviction writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his judgment of conviction in the District Court in Hunt County, Texas under cause number No. 23,319 and in support shows the following:

PROCEDURAL HISTORY

On November 10, 2005, Mr. Woodruff was indicted by the Hunt County Grand Jury with the charge of capital murder for allegedly murdering his parents on October 16, 2005. On March 4, 2009 he went to trial on the charge. The jury convicted him on March 20, 2009 and he was sentenced to life imprisonment without parole. He appealed his conviction and his conviction was affirmed on December 3, 2010. On May 25, 2011 the Court of Criminal Appeals refused to grant a petition for discretionary review. On August 23, 2011, Mr. Woodruff filed a petition for a writ of certiorari in the United States Supreme Court. That petition was denied on August 31, 2011. On November 3, 2011, Mr. Woodruff filed a motion requesting post-conviction DNA testing. On April 3, 2012 the trial court granted that motion. This petition for a writ of habeas corpus, raising the Federal constitutional issue decided by the Texas Court of Appeals of Texarkana, follows.

PETITIONER'S ALLEGATION

Mr. Woodruff is being illegally restrained in his liberty because his conviction was secured in violation of his rights under the United States Constitution. Specifically, Mr. Woodruff asserts that his Sixth Amendment rights under the United States Constitution were violated when the state prosecutor intentionally recorded and monitored his telephone conversations with his defense attorney.

EXHAUSTION OF STATE REMEDIES

Mr. Woodruff raised this issue in his direct appeal. Although the Texas Court of Appeals found that the State had violated his constitutional rights, it affirmed Mr. Woodruff's conviction finding that Mr. Woodruff could not show that he was prejudiced by the State's illegal eavesdropping. All of Mr. Woodruff's allegations are therefore exhausted.

TIMELINESS OF PETITION

Mr. Woodruff's claim is subject to review under the amendments to the habeas corpus statutes, the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA.") This act requires that the Federal petition be filed within one year from "the date on which the judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C.

§2244(d)(1)(A). A pending application for State post-conviction or other collateral review tolls the running of the limitation period. 28 U.S.C. § 2244(d)(2).

Texas law provides that after a person has been convicted; one can file a motion for forensic DNA testing of certain evidence containing biological material. TEX. CODE CRIM. PROC. ANN. art. 64.01(a–1)(Vernon Supp. 2014). Mr. Woodruff filed his motion under this provision and the state trial court has granted the motion. Article 64.04 provides that if the trial court grants the motion, the trial court is required to hold a hearing "and make findings as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." TEX.CODE CRIM. PROC. ANN. art. 64.04 (Vernon Supp. 2014). In this instance the state district court has not made the findings mandated by statute, and thus the collateral proceeding remains pending. Because that collateral proceeding does not pertain to the constitutional claims raised in this Federal petition, this Court may resolve the Federal constitutional claim presented here. As a result Mr. Woodruff's one-year statue of limitations began to run on October 31, 2011, but was tolled by the filing of the motion for DNA testing four days later on November 3, 2011. *See Hutson v. Quarterman*, 508 F.3d 236 (5th Cir. 2007).

THE IMPACT OF AEDPA

ON REVIEW OF THE STATE COURT'S FINDINGS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to this case. Title 28 U.S.C. §2254(d)(2) provides in relevant part:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

This claim was brought was raised at the trial court level and raised on direct appeal. The Texas courts' decision was contrary to clearly established Federal law.

STATEMENT OF FACTS

Brandon Woodruff was convicted in March 2009 in Hunt County for murdering his parents on October 16, 2005. He exhausted his appeals, but has not previously filed a writ of habeas corpus pursuant to § 11.07.

Brandon's parents, Dennis and Norman were murdered in their trailer home in Royse City. At that time Brandon was a student at Abilene Christian University. His sister attended college in Texarkana.

On the night of the murders Brandon's sister tried to call her parents at their home but was unable to get through to them. The next day Brandon's aunt requested the police to conduct a welfare check but no one responded when the police knocked on the door. Brandon's aunt then urged a friend of the family to break in through a window and he discovered the scene of the murders.

Dennis and Norma were found sitting on the living room couch covered in blood and obviously dead. Dennis still grasped a cup in his hand that he used for spitting tobacco juice. There were no signs of forced entry and the home was not ransacked. Both Dennis and Norma's wallets, however, were missing. Dennis and Norma had been shot several times in addition to being stabbed. Due to stippling on Norma's face it appeared she was shot at close range, and a wound to the back of her hand suggested she had attempted to protect her face. Large

caliber bullets were recovered from the bodies but no shell casings were recovered from the scene.

Brandon Woodruff claimed, and cell phone records confirmed, that on the night of the murders that he had been at his parent's trailer home in Royse City, then drove to their other home in Heath, Texas. Afterwards he drove to Dallas to pick up his friend Robert Martinez outside a Denny's restaurant. Although the cell phone records largely confirmed Mr. Woodruff's statement in terms of the sequence of his movements, his estimation of the time he was at these places was off by a couple of hours.

Although it is possible Mr. Woodruff killed his parents when he was at their home the schedule would have been extremely tight. His grandmother spoke with Dennis and Norma around 9:00 pm that night. The cell phone calls also showed that Mr. Woodruff spoke to his girlfriend Morgan at 9:32 and 9:41 pm. A neighbor saw Mr. Woodruff at the house in Heath, twenty-five minutes away, shortly after 10 pm and testified that Mr. Woodruff drove away around 10:15-10:30 pm. According to the cell tower records he was passing Lake Ray Hubbard and on his way to Dallas at 10:45 pm.

According to Mr. Martinez, Mr. Woodruff originally was supposed to pick him up at 6:00 pm but did not meet him until around 11:00 pm. When Mr. Woodruff finally showed up he wasn't wearing a shirt or shoes, which Martinez

considered unusual. After picking up Martinez, Mr. Woodruff, who is gay, went to pick his boyfriend up and the group went to a gay bar in Dallas.

Shortly after the murders, the parents of Morgan Lee, Brandon's girlfriend, who was unaware of Brandon's sexual attraction to men, noticed that a western style revolver was missing from its holster in their home along with some of the bullets kept in the holster. Although the Lees had no idea how long the revolver had been missing, Mr. Woodruff had showered at their house the day before the murders and would have had an opportunity to take the revolver.

At trial the State offered expert testimony that the missing gun might have been used to commit the murders. The State was unable, however, to definitively match the bullets kept in the holster with the missing revolver to those bullets recovered at the crime scene. The State also was unable to say with certainty the caliber of the bullets recovered from the bodies.

Two and half years after the murders Mr. Woodruff's aunt found a large medieval style knife in the barn at the house in Heath. Close forensic examination revealed that underneath the hilt there was a drop of Dennis' blood. A roommate of Mr. Woodruff's claimed that he had once seen that same knife in Mr. Woodruff's dorm room, although in a statement he had given shortly after the murder, and years before the knife was discovered, he described the knife that he

saw in Mr. Woodruffs dorm room as being much smaller than the knife recovered in the barn.

At trial the defense called the former chief medical examiner of Harris County who testified that the knife found in the barn was inconsistent with the wounds made on Dennis and Norma.

The State offered no clear motive for the murders. One motive that the State alleged was that the day before Mr. Woodruff's parents were murdered Brandon had told them he was gay. A friend of Dennis' had said that Dennis was "very sad and hurt." However, as a friend of Dennis' testified, there was no discussion of disowning Brandon or otherwise cutting him off financially.

Mr. Woodruff was also doing poorly at college and was on academic probation. His parents had warned him they would not continue supporting him if he flunked out of college.

Weeks before the murder Mr. Woodruff and his father had argued over the fact that Brandon had spent several thousand dollars since school had started, and that he had spent a $1,300.00 tuition refund check he owed to his father. In addition, the State contended that Mr. Woodruff coveted his mother's truck that he began to drive after his parents' murders.

To further bolster its case, the State called a jailhouse informant who testified that Mr. Woodruff had asked him how long a gun with a wooden handle

would stay submerged. The informant, however, also acknowledged that he was angry at Mr. Woodruff for complaining about him to jail authorities, and acknowledged that he received a sentence of probation for drug dealing in Rockwall County despite his extensive criminal history.

At trial the defense suggested that Mike Etherington committed the murders. Mr. Etherington and Mr. Woodruff had a long-standing rivalry. Norma had suspected that Mr. Etherington once had poisoned Brandon's dog. Mr. Etherington also had attempted to manufacture incriminating evidence against Mr. Woodruff by falsely claiming that Brandon had posted inculpatory statements on his MySpace page. In addition, the telephone records showed that after the murders, Mr. Etherington called the Royce City home where Norma and Dennis were murdered several times attempting to block caller identification by employing *97. Mr. Etherington also had been to Morgan Lee's house shortly before the murders and could have taken the gun that the State attempted to tie to the murders at trial.

The evidence against Mr. Woodruff at trial was far from overwhelming. There was no confession, eyewitness, or clear motive.

Prior to trial the State infringed on Mr. Woodruff's Sixth Amendment rights. While Mr. Woodruff was in jail awaiting trial, the district attorney's office directed the Sheriff's office to record Mr. Woodruff's calls to his attorneys and

provide the district attorney's office with the recordings. This situation came to the attention of the defense and it moved to dismiss the indictment. After a hearing on the issue, the district attorney's office recused itself and the Texas Attorney General's Office took over the prosecution without the benefit of the recorded conversations that Mr. Woodruff made to his attorneys. On appeal the court of appeals found no reversible error on the basis that Brandon was not harmed as a result of this constitutional violation. Notably, if it were not for the delays in reaching trial due to this violation the knife with Dennis' blood on would not have been recovered prior to trial.

After his conviction was affirmed on appeal Mr. Woodruff's attorneys sought to have hair found in the hand of Norma DNA tested. Hoping that Brandon could be ruled out as having contributed the hair they intended to argue that if the hair belonged to someone else then whoever that individual was likely committed the murders. The test was inconclusive. Although Brandon could not be ruled out as a contributor of the hair, the test also did not establish that the hair was his. The hair is also consistent with that of his mother.

After Mr. Woodruff exhausted his appellate rights, Eric Holden, one of the most respected polygraph examiners in the nation, administered a polygraph examination on whether Mr. Woodruff murdered his parents. Mr. Woodruff denied that he killed his parents and the test indicated his response was truthful.

To further corroborate this result and examination was administered on the same question and Mr. Woodruff again showed to be truthful. According to studies addressing the reliability of polygraph examinations the chances of two properly conducted polygraph examinations both erroneously showing a truthful response are less than 2 percent.

ARGUMENT AND AUTHORITIES

Factual Background:

While Mr. Woodruff was in jail awaiting trial, the Hunt County District Attorney's Office instructed the Hunt County Sheriff's Office to record Mr. Woodruff's telephone conversations with his attorneys and provide the District Attorney's office with copies of the recordings.

In July 2007, almost two years after Mr. Woodruff had been arrested for the murders of his parents and held in pretrial detention, Mr. Woodruff's trial counsel learned that the Hunt County District Attorney's Office had recorded attorney-client calls that another inmate had made from the jail in which Mr. Woodruff was being held. Trial counsel discussed the issue with District Attorney's office and the prosecutor assigned to the case admitted that she had listened to all of Mr. Woodruff's conversations made from the jail, including those made to his defense

counsel. The prosecutor disclosed that she had taken forty-three pages of hand written notes from listening to the recordings.

Trial Court Determination:

After several hearings the trial court ruled that the Hunt County District Attorney's Office violated the Mr. Woodruff's Sixth Amendment right to counsel and ordered evidence obtained as a result of the recordings suppressed. The trial court, however, denied Mr. Woodruff's motion to dismiss the indictment. It also denied Mr. Woodruff's motion to disqualify the District Attorney's Office. It also refused to permit defense counsel to cross-examine the prosecutor about what she may have learned from the telephone calls and refused to require the prosecutor to produce the forty-three pages of notes she had made while listening to Mr. Woodruff's calls.

Despite the fact that trial court refused to disqualify the Hunt County District Attorney's office, it nevertheless recused itself after the trial court's finding that it had violated Mr. Woodruff's Sixth Amendment rights. Mr. Woodruff's prosecution was thereafter conducted by the Texas Attorney General's Office.

Reasoning of the Texas Court of Appeals:

The Texas Court of Appeals noted in its opinion that the State listened to fifty-four calls Mr. Woodruff made to his counsel. The court of appeals stated that

most of the calls contained irrelevant information concerning visits or money being placed on Mr. Woodruff's commissary account. However, the court also noted that many of the calls discussed potential witnesses and their addresses; the fact that Mr. Woodruff could provide evidence explaining why he was not wearing shoes on the night of the murder; and Mr. Woodruff reveals what truck he drove from his parent's trailer home to their home in Heath, Texas.

On appeal the State conceded that it had violated Mr. Woodruff's constitutional rights. It took the position, however, Mr. Woodruff was not prejudiced by this violation of his rights.

The Texas court of appeals held that although there was a Sixth Amendment violation it was Mr. Woodruff's burden to show prejudice or a substantial threat of prejudice, relying on the case of *Murphy v. State*, 112 S.W.3d 592, 603 (Tex. Crim. App. 2003.) It held that on the facts of this case, that despite the fact that the prosecutor took forty-three pages of notes after listening to the recorded telephone conversations; and having noted in its opinion that some of those telephone conversations were related to trial strategy; facts concerning Mr. Woodruff's movements around the time of the murders; and discussions pertaining to potential witnesses, Mr. Woodruff nevertheless had failed to demonstrate that he was actually prejudiced by the State's violation of his rights.

Although the Texas Court of Appeals held that Mr. Woodruff must show prejudice resulting from the violation of his rights, it also held that the trial court did not err when it refused to permit his lawyers either to cross-examine the prosecutor who listened to the recorded telephone calls or produce her forty-three pages of notes. The Texas Court of Appeals held that her testimony and notes were protected by the work product privilege. It held that the crime-fraud exception to the privilege did not apply because the violation of Mr. Woodruff's Sixth Amendment rights did not constitute a crime, and even if the items were not privileged, Mr. Woodruff failed to show a substantial need to produce the testimony or the notes.

The Texas Courts Erroneously Placed the Burden of Showing Harm on Mr. Woodruff:

Although refusing to order dismissal, the Texas court of appeals nevertheless recognized a constitutional violation by the State. Therefore, under general principles of constitutional harmless error review, the burden should have been on the State to show Mr. Woodruff was not harmed by the constitutional violation. *Chapman v. California*, 366 U.S. 18 (1967). (State must prove beyond a reasonable doubt that constitutional error did not contribute to conviction.)

In *United States v. Morrison*, 499 U.S. 361 the Supreme Court overruled a lower court's decision to dismiss an indictment where the Government had

interfered with the defendant's Sixth Amendment rights by knowingly meeting with the defendant outside the lawyer's presence and attempting to persuade her to plead guilty and cooperate. *Id*., at 364. In *Morrison* the defendant never alleged or attempted to prove prejudice and as a result the Supreme Court held dismissal was not warranted and held, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. *Id*, at 365. Notably, the Supreme Court in *Morrison* did not address which party, the defendant or the State, should carry the burden of proof. The Court in *Morrison* only made clear that there must be prejudice.

Unfortunately, the Federal Circuit courts of appeals have not been consistent in deciding which party bears the burden or proof concerning the issue of prejudice when the prosecuting authority has intentionally violated a defendant's Sixth Amendment rights. In *Biggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Circuit 1983) the court held that prejudice is presumed but the government could rebut the presumption. In *United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000), the Fifth Circuit noted that the defendant was unable to show any prejudice, but as in *Morrison*, it was clear that the defendant was in no way prejudiced. In *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) the Tenth Circuit held "when the state becomes privy to confidential communications because of its purposeful

intrusion into the attorney-client relationship … a prejudicial effect on the reliability of the of the trial process must be presumed." The Third Circuit has also held that intentional violations of the attorney-client communications constitute *per se* violations of the Sixth Amendment. *United States v. Costanzo*, 740 F.2d251, 54 (3rd Cir. 1984).

In this case, where there was an intentional intrusion into Mr. Woodruff's attorney-client communications, and where that intrusion disclosed at least some trial strategy information, such as Mr. Woodruff's having an explanation for being barefoot and potential witnesses the defense might call, the Texas courts constitutionally erred by not presuming prejudice.

The Work Product Privilege:

Assuming for the sake of argument Mr. Woodruff should have been required to prove that he was prejudiced by the State's intentional violation of his Sixth Amendment right, he would have needed to examine the notes the prosecutor made while eavesdropping on his conversation with his lawyer, and he should have been able to cross-examine the prosecutor about what she had gleaned. The trial court prohibited this, ruling that all such information was protected by the work-product privilege.

The Texas court of appeals upheld the trial court's ruling. It noted that under Texas law the work-product privilege applies in criminal cases. *See*

Cameron v. State, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007); *State ex. Rel. Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994). However, Texas Rules of Privilege 503(b)(2) provides that "if the services of [a] lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud" the privilege does not apply. This exception is known as the "crime-fraud" exception. *See Cameron* at 19. However, because the prosecutor had not actually committed a crime when violating Mr. Woodruff's rights, it held that the crime-fraud exception did not apply.[1]

In so ruling the Texas court of appeals ignored clear precedent of both Texas and Federal law. In *Volcanic Gardens Management v. Paxson*, 847 S.W.2d 343 (Tex. App. – El Paso 1993) the court held, "[U]nder the crime/fraud exception to the … privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud." The Federal cases that have applied the crime/fraud exception, to conduct that does not rise to the level of an actual crime or legion. In fact, the exception is often applied to obviate the privilege when a lawyer has acted unprofessionally. *See e.g., Moody v. I.R.S.*, 654 F.2d 795 (D.C. Cir. 1981).

[1] In fact a Federal prosecutor could easily have charged the prosecutor responsible with a conspiracy to violate Mr. Woodruff's civil rights pursuant to 18 U.S.C. §241, 242. When the Texas court of appeals held otherwise it was factually mistaken.

In this case the Texas courts have contrived to protect the Hunt County District Attorney's conviction and to uphold a murder conviction. On the one hand the courts acknowledge that Mr. Woodruff's constitutional rights were violated by the State's intentional violation of his attorney-client privilege, yet, on the other hand the courts have ironically invoked the work-product privilege to prevent Mr. Woodruff from showing that he was harmed by the State's unethical conduct. Although the states normally are free to delineate the scope of evidentiary privileges, just as a violation of the attorney-client privilege invokes Sixth Amendment rights, invoking the work-product privilege and applying it in a manner contrary to well establish precedent invokes the Due Process rights contained within the Fifth and Fourteenth amendments.

Finally, although they do not constitute binding precedent on this Court or the Texas courts, it is worthwhile to examine how other state courts have addressed similar issues. In *Connecticut v. Lenarz*, 22 A.3d 536 (2011) a defendant was charged with several counts of sexually abusing children. After he had retained counsel his computers were seized. He obtained a court order protecting attorney-client communications that were contained on the computer. Nevertheless the prosecutor took possession of and read those communications. The Connecticut Supreme Court dismissed the charges against the defendant

finding that when the communications contained trial strategy prejudice is presumed.

In *Morrow v. Superior Court*, 30 Cal. App.4th 1252 (1994), while the defendant was on trial for residential burglary, the prosecutor directed his investigator to sit in a location that enabled him to eavesdrop on the conversation that the defendant was having with his attorney in the "holdover" just outside the courtroom. The California Court of Appeals held, that when the state has engaged in misconduct it has the burden of proving that the defendant was not prejudiced by the violation of Sixth Amendment right to attorney-client confidentiality.

In *State v. Cory*, 382 P.2d 1019 (1963) involved a case in which the sheriff installed a microphone in a room in which the defendant was consulting with his attorney. That court dismissed the charges against the defendant without making a prejudice finding. It also concluded that remanding for a new trial was an inadequate remedy, holding, "if the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first."

REQUEST

Mr. Woodruff requests that this Court should conduct an evidentiary hearing at which the prosecutor who listened to his attorney client telephone calls would be required to produce her notes and testify. Mr. Woodruff ultimately requests this Court to grant his petition and order the Texas court to dismiss the charges against him.

Respectfully submitted,

/s/Franklyn Mickelsen
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CERTIFICATE OF SERVICE

I, Franklyn Mickelsen, do hereby certify that, on this the __h day of April, 2015, I caused a copy of the foregoing document to be served on the office of the Attorney General of Texas.

/s/Franklyn Mickelsen
Franklyn Mickelsen

INDEX OF ATTACHMENTS

Attachment A – Petitioner's Initial Brief and Reply Brief Raising Constitutional Issues in this Petition

Attachment B –The Texas Court of Appeals Decision Addressing the Claim

Attachment A

Attachment B