No. _____

EX PARTE	**)**	**366th DISTRICT COURT**
	)	
XXX YYY	**)**	**FANNIN COUNTY, TEXAS**
_____	**)**	

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO TEX. CODE CRIM. P. ART. 11.07[1]

I. INTRODUCTION

The representation of XXX YYY's trial counsel, Joe Moss, was plainly deficient in at least two instances. Individually and commutatively, these instances rise to the level of ineffectiveness of counsel. Indeed, "[i]n evaluating the effectiveness of counsel, the reviewing court looks at the totality of the representation and the particular circumstances of each case." *Ex Parte Lane*, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009). Here, as detailed below, Mr. Moss committed serious errors at both the guilt-innocence and punishment phases of Mr. YYY's trial.

II. DISCUSSION

A. Mr. Moss Was Ineffective for Allowing the State to Introduce at Trial a Videotaped Interview of Mr. Crew in Which the Investigator Repeatedly Referred to Extraneous Acts/Offenses That Were Allegedly Similar to the Instant Offense and in Which the Investigator Repeatedly Commented on the Credibility of Both Mr. YYY and the Complainant.

1. Background

[1]Mr. YYY respectfully requests this court to hold an evidentiary hearing to resolve any factual disputes necessary to resolve his motion.

At trial, the state offered into evidence a videotaped interview of Mr. YYY by the Fannin County Sheriff's Investigator Wayne Walker as State's Exhibit 18. *See* Trial Tr. 3/25/09 at 42. While Mr. YYY's trial attorney, Joe Moss, attempted to keep the videotape out of evidence with the patently frivolous objection that Mr. YYY had not been *mirandized* prior to the interview, Mr. Moss ultimately offered no objection to the admission of the tape when it was clear that Mr. YYY had, in fact, been *mirandized* prior to the interview. *Id* at 35, 42.[2] The interview was then played for the jury. *Id*. at 45.

During the interview, although such evidence was clearly inadmissible under Tex. R. Evid. 404(b), Investigator Walker repeatedly referred to Mr. YYY's prior arrests for a domestic disturbance and aggravated assault and the similarity of those arrests to the instant offense.[3] Moreover, through the videotape, the jury was offered Investigator Walker's opinions regarding the credibility of the complainant, Stephanie Friedman, and his opinions regarding the lack of credibility of Mr. YYY.[4] Examples

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[2]It does not appear that Mr. Moss actually watched the videotape prior to trial or knew its contents given that he did not know if Mr. YYY had been *mirandized* prior to the questioning by Investigator Walker. *See* Trial Tr. 3/25/09 at 35-37.

[3]Tellingly, despite his repeated reference during the two hour interview to an extraneous aggravated assault case in Tarrant County, Investigator Walker *never* mentioned (so the jury *never* heard) that Mr. YYY was acquitted of that charge and was only convicted of a lesser misdemeanor charge. *See* Attachment A.

[4]It is well established that one witness, especially a law enforcement officer, may *not* comment upon the credibility of another witness. *See, e.g., Rivera v. State,* 2010 Tex. App.

of the portions of the videotape containing clearly objectionable evidence is set forth below with the hour, minute and approximate seconds from the videotape noted.

> 0:7:40 Mr. YYY is asked about his "criminal history" and advises that he has an arrest in Dallas for "something along the same lines" of the instant offense.
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> 0:8:13 Investigator Walker interprets Mr. YYY's criminal history as Mr. YYY telling him that he has "a history of this."
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> 0:8:30 Mr. YYY questioned about his 2002 aggravated assault arrest in Tarrant County. Investigator Walker comments that this aggravated assault was for "basically the same thing" he was accused of in this case and that Mr. YYY had "a history of this." Investigator Walker never mentions that Mr. YYY was acquitted of the aggravated assault charge.
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> 0:9:55 Investigator Walker discusses the similarity between this case and Mr. YYY's prior arrest for aggravated assault in Tarrant

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LEXIS 10133 at *18 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010) ("It is generally improper for a witness to offer a direct opinion as to the truthfulness of another witness and such opinion is therefore inadmissible. This type of testimony is inadmissible "because it does more than 'assist the trier of fact to understand the evidence or to determine a fact in issue'; it decides an issue for the jury."); *Foy y. State*, 2008 Tex. App. LEXIS 8289 at *8 (Tex. App.—Dallas Nov. 4, 2008) ("It is generally improper for a witness to give his opinion to the truthfulness of another witness. Because such testimony decides a issue that is only for the factfinder, it is inadmissible."); *In re G.M.P.*, 909 S.W.2d 198, 206 (Tex. App.—Houston [14th Dist.] 1995) ("A determination of who is telling the truth is the sole province of the jury. We hold that, under Texas Rule of Civil Evidence 702, the trial court erred in allowing Detective Amato to testify that, in his expert opinion, appellant sexually assaulted K.B. and that K.B. was telling the truth."); *Viser v. State*, 2010 Tex. App. LEXIS 9483 (Tex. App.—Houston [14t[l]Dist.] Dec. 2, 2010) ("A witness' direct opinion about the truthfulness of another witness is inadmissible evidence."); *Arcement v. State,* 2009 Tex. App. LEXIS 1096 at *10 (Tex. App.—Texarkana Feb. 18, 2009) (A direct comment on a complainant's truthfulness is "absolutely inadmissible- under Rules 701 and 702."); *Arzaga v. State*, 86 S.W.3d 767, 776 (Tex. App.—El Paso 2002) (Testimony of police officer was improper where he testified that he interviewed two witnesses and believed one over the other because "a lay witness is not permitted to offer an opinion that another witness is truthful.").

County and comments that this case looks "just like the offense report from Tarrant County" on the extraneous act.

0:36:18 Investigator Walker observes that the current offense reads "almost word for word [with the extraneous act with which Mr. YYY had previously been charged] with in Tarrant County."

0:36:45 Investigator Walker notes that this was not the "first time [Mr. YYY] was ever charged with" the type of offense charged in the instant case.

0:37:14 Investigator Walker tells Mr. YYY that he was charged with "basically the same offense" in 2000 and "from what I understand you were almost charged with Aggravated Kidnaping in Tarrant County"

0:38:02 Investigator Walker tells Mr. YYY that he "went through the same thing [as the instant offense] in Tarrant County."

0:41:38 Investigator Walker states that the instant case involves the same charges as in Tarrant County almost "word for word".

0:41:50 Investigator Walker makes the observations that, based on Mr. YYY's criminal history, it would be "impossible" for the complainant in this case to be making a false allegation and that there was an "astronomical[y]" low "probability"that she was not telling the truth.

1:16:08 Investigator Walker claims that the Tarrant County case against Mr. YYY must have invovled "grievous bodily injury."

1:13:25 Investigator Walker explains that a judge in Hunt County believed that there was a "high probability" that the complainant's allegations were true.

1:14:00 Investigator Walker states that this case "mirrors" Mr. YYY's Tarrant County case.

1:15:00 Investigator Walker questions Mr. YYY about the Tarrant County case.

1:26:29 Investigator Walker accuses Mr. YYY of "not telling the truth."

1:30:20 Investigator Walker explains that Mr. YYY shows "five out of seven clues of deception which means [Mr. YYY] is lying." Investigator Walker then goes on to identify the "clues of deception"

1:44:53 Investigator Walker opines that Mr. YYY is deceptive. "I can tell it."

The state would later return in its closing argument to Investigator Walker's observations from the videotape regarding Mr. YYY's lack of credibility by noting that, in Investigator Walker's opinion, it was "abundantly clear" that Mr. YYY's was "evasive." *See* Trial Tr. 3/26/09 at 60.

2. Direct Appeal

Mr. YYY challenged the admission of the videotaped interview on direct appeal arguing that, as described above, it contained repeated inadmissible references to Mr. YYY's prior "bad acts" in violation of Tex. R. Evid. 404(b) and also arguing that it contained inadmissible opinion evidence from Investigator Walker regarding credibility determinations reserved for the jury. The Court of Appeals refused to consider these points of error related to the videotape because of Mr. Moss's failure to preserve these errors.

At trial, however, none of these statements or conversations were

brought to the court's attention when the State sought to admit the recorded interview into evidence. Rather, YYY's primary objection was that he was not advised of his right to counsel or of his right to remain silent prior to giving the statement. The court reviewed the first five to ten minutes of the interview and determined that YYY was, in fact, advised of his rights.

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Rule 33.1(a) of the Texas Rules of Appellate Procedure provides that a complaint is not preserved for appeal unless it was made to the trial court "by a timely request, objection, or motion" that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." Likewise, under Rule 103 of the Texas Rules of Evidence, error may not be predicated upon a ruling which admits or excludes evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."

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Based on the exchange above, the trial court at least believed that it understood the nature of YYY's objections: the alleged failure to advise YYY of his rights before engaging in a noncustodial interrogation and that the video recording was not relevant to the issue on trial. It also appears, from the context of the exchange, that is what defense counsel was talking about. Given the circumstances of this objection, and the manner in which it was made, there was no indication that the trial court should have believed that the relevance complaint was specifically based upon the mention and/or discussion of prior crimes and/or prior bad acts and/or statements by Walker regarding "signs of deception" in the recorded interview with YYY. *The court addressed the issue of whether there was any other evidence the defense wanted the court to review. After the trial court concluded that the recording indicated that YYY was advised of his rights prior to beginning the interview with Walker, defense counsel stated, "I have nothing else." The opportunity*

> *presented itself for YYY to clarify the objection and to specifically state the basis of it to have involved the mention of extraneous acts/offenses.* It was YYY's responsibility to do all that was necessary to bring to the attention of the trial court the specific evidentiary rule in question and its precise and proper application to the evidence in question. *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). This was not done.
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> ....Accordingly, YYY's claim of error with respect to the admission of the recorded interview with Walker was not preserved for appellate review.

YYY v. State, 2009 WL 4907423, *10-11 (Tex. App.–Texarkana, Dec. 22, 2009) (footnotes omitted) (emphasis added).

3. Mr. Moss's Performance was Deficient Based Upon well Established Case Law

Mr. YYY's trial counsel actually filed a motion *in limine* to exclude extraneous acts and the state was ordered to approach the bench prior to introducing such evidence before the jury. *See* Trial Tr. 3/23/09 at 27-28. This motion was again discussed during the trial and the state was again reminded that it was to approach the bench prior to introducing any extraneous acts. *Id*. at 3/25/09 at 5-9. Nevertheless, Investigator Walker's two hour videotaped interview contained repeated references to extraneous acts however, based upon his *Miranda* objection to the videotape, it does not appear that Mr. Moss familiarized himself with the content of the videotape and, in any event, he completely abandoned his objection to the introduction of extraneous acts by not objecting to the videotape.

The cases are legion which hold that trial counsel performs deficiently when he allows the introduction into evidence of inadmissible extraneous acts/offenses. For example, in *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985), the United States Court of Appeals for the Fifth Circuit held that the failure of defense counsel to move to exclude testimony indicating that the defendant had been previously charged with the same type of crime for which he was on trial constituted ineffective assistance of counsel even if counsel claimed to have had a reason for not moving to exclude the evidence. *See also, e.g., Hall v. State*, 161 S.W.3d 142, 154 (Tex. App. – Texarkana 2005)("Extraneous offenses are inherently prejudicial, and when counsel fails to object to numerous extraneous and prejudicial matters, counsel is ineffective."); *Strickland v. State*, 747 S.W.2d 59, 60-61 (Tex. App.– Texarkana 1988) (Defense counsel held ineffective where he allowed state to introduce, without objection, evidence of four inadmissible extraneous offenses. "[F]ailing to object to the State's proof of four extraneous offenses cannot reasonably be labeled "'strategy.'"); *Crude v. State*, 588 S.W.2d 895 (Tex. Crim. App. 1979) (same).[5]

[5]Even if the extraneous acts/offenses referenced throughout the videotaped interview were somehow admissible, Mr. Moss would still have been ineffective for failing to object to their admittance by way of the videotape. Indeed, as to the extraneous acts/offenses, Investigator Walker's statements lacked foundation and were hearsay. As a result, the jury was not told that the Tarrant County charge of aggravated assault resulted in an acquittal and, contrary to Investigator Walker's statements, that it did *not* involve "grievous bodily injury." Moreover, as Investigator Walker well knew, it was *not* the case that Mr. YYY was "almost charged" with "aggravated kidnaping" in Tarrant County nor did the Tarrant County case compare "almost word for word" to the instant offense as Investigator Walker represented to the jury. In sum,

Likewise, it is deficient performance by trial counsel to fail to object to the state's attempt to elicit testimony from one witness opining on another witness's credibility. *See, e.g., Weathersby v. State*, 627 S.W.2d 729 (Tex. Crim. App. 1982) (Trial counsel ineffective for failing to object to testimony from detective that he believed the defendant was guilty); *Garcia v. State*, 712 S.W.2d 249, 253 (Trial counsel ineffective for failing to object to detective's testimony related to complainant's credibility).

Moreover, Investigator Walker's testimony (through the videotape) regarding the "seven clues of deception" is very similar to the type of testimony that the Texarkana Court of Appeals found to be inadmissible in *Sessmus v. State*, 129 S.W.3d 242 (Tex. App. – Texarkana 2004). There the state called an expert witness who purported to educate the jury as to factors to look for in judging credibility. *Id*. at 248. The Court of Appeals had no problem finding that trial counsel was ineffective for failing to object to this type of testimony. *Id*. ("In this case, we find ourselves reviewing the activities of trial counsel in failing to object to clearly and unquestionably objectionable testimony of the most outrageous and destructive type. There is no conceivable strategy or tactic that would justify allowing this testimony

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even if the extraneous acts/offenses were admissible, Mr. Moss failed to object to them being admitted through inadmissible hearsay from a person with no first hand knowledge of the true facts related to the acts/offenses.

in front of a jury.").

In sum, it does not appear that Mr. Moss watched the two hour videotape and, if he did, he did not have a recollection of its contents. Had he known of the contents of the videotape, he would have realized that it contained the very extraneous acts/offenses he sought to exclude from evidence in this case. Indeed, the video had repeated references to such extraneous acts/offenses as well as comparisons between them and the instant offense. Likewise, the videotape contained Investigator Walker's opinions regarding the complainant's credibility, his opinion that Mr. YYY's was "deceptive" and "lying," and his identification of the alleged "seven clues of deception." Moreover, the videotape also contained Investigator Walker's statements that a judge in Hunt County thought there was a "high probability" that the complainant's claims against Mr. YYY were true. Such comments were "clearly and unquestionably objectionable" and were "of the most outrageous and destructive type." *Id*.

4. Prejudice

This case rose and fell on the complainant's credibility versus Mr. YYY's plea of "not guilty." While the evidence supporting Mr. YYY's conviction was found to be sufficient on direct appeal, it was hardly overwhelming. For example, even though the complainant testified that she was held against her will, she admitted that Mr.

YYY took her to a convenience store and that she did not say anything to the clerk at the store. *See* Trial Tr. 3/24/09 at 50-51. In addition, even though the complainant claimed that Mr. YYY kicked in doors and broke lamps and dishes during the course of the kidnaping, Mr. YYY's father, who owned the home where the complainant was allegedly kept, testified that there were no lamps in the house and that he never found any evidence of broken or missing dishes or broken door jambs. *See* Trial Tr. 3/25/-09 at 109-14. Moreover, the complainant told police that the kidnaping took place December 22-24, yet phone records established that this testimony was highly suspect because the complainant and Mr. YYY exchanged several phone calls during that weekend. *See* Trial Tr. at 3/24/09 at 131; Trial Tr. 3/25/09 at 129-37. Finally, the complainant waited two months to file charges and even then made later attempts to withdraw the charges and continue a dating relationship with Mr. YYY while sending him intimate pictures of herself. *See* Trial Tr. 3/25/09 at 110-11; 153-56; Defendant's Exhibit 8, 11, 12 and 18.

Nevertheless, Mr. YYY's presumption of innocence was completely destroyed when the jury learned that he allegedly committed acts involving "grievous bodily injury" that "mirror[ed]" the instant charge. As has been repeatedly recognized, evidence that involves conduct similar to the offense for which a defendant is charged, is highly prejudicial. *See, e.g. Lyons v. McCotter*, 770 F.2d 529, 534 (5th

Cir.1985) (Characterizing evidence of prior convictions that were similar to the charged offense as "highly prejudicial and incriminating"), *cert. denied*, 474 U.S. 1073 (1986); *United States v. Preston*, 608 F.2d 626, 639 & n. 18 (5th Cir.1979) (Recognizing danger that a jury presented with extraneous offense evidence will think "once a criminal, always a criminal," and that "[t]he risk of prejudice may be particularly high where [ ] the former crime is of the same nature as the one for which defendant is being tried"), *cert. denied*, 446 U.S. 940 (1980); *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir.1979) ("We can hardly imagine anything more prejudicial to Nero than allowing the jury in his armed robbery case to hear the prosecutor's comments that Nero had been convicted twice before of burglary and once on drug charges."); *Ex Parte Menchaca*, 854 S.W.2d 128 (Tex. Crim. App. 1993) (same).

At the same time Mr. YYY's presumption of innocence was being destroyed, the complainant's credibility was bolstered with evidence of the type that the Texarkana Court of Appeals called "clearly and unquestionably objectionable...of the most outrageous and destructive type." *Sessmus*, 129 S.W.3d at 248. The state offered evidence that not only told the jury that its trained sheriff's investigator believed the chances that the complainant was not credible were "astronomical" but evidence that a state judge believed it "highly probable" that the complainant's allegations were true. In companion, the state also offered evidence by which the

trained investigator was allowed to tell the jury about the "clues of deception" and the five he observed in Mr. YYY. The "clues" were then parroted by the state in its closing argument.

In sum, while the videotape in question destroyed Mr. YYY with its repeated emphasis on its "did if before, did it again" analysis, it also repeatedly bolstered the complainant's credibility with regard to the accusations. In light of this, it would be difficult to conclude that there is not at least a "reasonable probability" that the results in this case would have been different had Mr. YYY received effective assistance of counsel.[6]

B. Mr. Moss Was Ineffective for Failing to Object to Questions Violating the Attorney-Client Privilege Which Severely Undermined His Credibility and Mr. YYY's Credibility Before the Jury.

Mr. YYY did not testify at the guilt-innocence portion of his trial. He did testify at the punishment phase of the trial. In his direct examination he explained that he respected the jury's verdict and requested the jury to place him on probation:

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[6]It is important to note that the prejudice inquiry for an ineffective assistance of counsel claim-is there a reasonable probability that the result of the proceeding would have been different- is not outcome determinative. *Strickland* itself expressly rejected an "outcome determinative standard" requiring the defendant to show that counsel's deficient conduct "more likely than not altered the outcome" of the case. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). Instead, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* Thus, the "reasonable probability" standard – a probability sufficient to undermine confidence in the outcome – is a less onerous burden than even the preponderance of the evidence standard.

Q. The jury found you guilty?

A. That's right.

Q. What do you have to say about that?

A. I'm not guilty, but you found me guilty and I respect that and I'm going to have to live with that of course.

Q. All right. Are you asking this jury to give you probation?

A. Yes, I'm humbly requesting probation. I have good people around me. I have a lot of good work opportunities around me. I can do the right thing with something like that. I have the right people around me, if it ever becomes something that - - I humbly request probation if possible.

Trial Tr. 3/27/09 at 129.

Nevertheless, the state sharply attacked Mr. YYY's expressed "respect" for the jury's verdict and portrayed it as a complete ruse concocted between he and his defense attorney. It did so by questioning Mr. YYY regarding conversations between him and his counsel in what can only be seen as an egregious attack on the attorney-client privilege.

Q. That whole speech you gave at the very beginning of your testimony, that, oh, I'm not guilty but I respect your opinion, who told you to say that?

A. I knew in my heart it was the right thing to do.

Q. Who told you to say that?

A. Not another living soul, sir.

Q. *So, when you're sitting in that holdover and you had a conversation with Mr. Moss, that didn't come out?*

A. Absolutely not.

Q. Now, if I called that probation officer who was sitting right around the corner from that, is he going to testify the same way you are?

A. I believe so, sir. I had mention—I asked Joe specifically what I am supposed to say, am I supposed to please—

Q. Ah-ha. So, you are asking, what am I supposed to say?

A. He went and talked to my parents afterwards, sir.

Q. Did you or did you not ask him what you were supposed to say?

A. I asked Mr. Moss several times what in the world was going on.

Q. No, no, no, no. Answer my question, sir.

A. I asked him if it was more appropriate to please the Court—

Q. Did you understand my question—

A. No, sir, I don't understand the question.

Q. *Did you or did you not ask Mr. Moss, what I should say to the jury?*

A. Not in those words, no sir.

Q. *Okay. But did you or did you not, in substance, ask him that question?*

A. In substance, I wanted to know what was going on because I wasn't guilty. I didn't know how to answer your question when it came to this point, sir.

Q. How about you tell the truth?

A. I am.

Id. at 144-45 (emphasis added).

It is, of course, axiomatic that the "advice of the attorney" to the client are protected by attorney client privilege. *Austin v. State*, 934 S.W.2d 672, 673 (Tex. Crim. App. 1996).[7] Yet, despite the state's blatant affront to the privileged conversations Mr. YYY had with his attorney, Joe Moss, Mr. Moss sat silently while the privilege was assailed and made no objection whatsoever.[8]

Mr. YYY is entitled to a new punishment hearing as long as it can be shown that there is simply "a reasonable probability" that, but for Mr. Moss's unprofessional error at the sentencing hearing, the punishment verdict would have been different.

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[7]*Cf. Harris v. State,* 56 S.W.3d 52, 59–61 (Tex. App.—Houston [14th Dist.] 2001) (Question to defendant posed by the state during cross-examination at punishment phase violated attorney-client privilege where it required defendant to reveal what he discussed with his attorney and the advice given to him by his attorney); *Neugebauer v. State*, 974 S.W.2d 374, 375-76 (Tex. App. – Amarillo 1998) (same).

[8]It is not clear whether a probation officer actually heard the privilege conversation although this was implied in the state's questioning. Nevertheless, even if this conversation was overheard by a probation officer "sitting right around the corner," this would not vitiate the privilege. Mr. YYY was not aware of the presence of the probation officer "around the corner" and intended his conversation with his lawyer to be privileged. *See* Affidavit of XXX YYY (attached hereto as Attachment B) at ¶ 3. Mr. YYY had every right to expect that Fannin County was providing a location in which he could have privileged conversations with his attorney. In any event, Tex. R. Evid 503 "abolished the 'eavesdropper' rule" and the fact that a privileged conversation is inadvertently overheard does not vitiate the privilege. David A. Schlueter & Robert R. Barton, *Texas Rules of Evidence Manual*, at 378 (Juris, 8th ed. 2009).

Ex Parte Gonzales, 204 S.W.3d 391, 397 (Tex. Crim. App. 2006) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 397-98.

Mr. YYY was eligible for probation in this case and had no prior felony convictions, yet the jury sentenced him to fifteen years imprisonment (only five years shy of the maximum sentence it could impose). There is certainly a "reasonable probability" that the jury was offended when was made to suspect that it was being "played" by both Mr. YYY and Mr. Moss. Indeed, the state's impermissible questioning of Mr. YYY was calculated to completely undermine both Mr. YYY's and Mr. Moss's credibility with the jury. In light of this blatant violation of the attorney-client privilege and the probable effect it had on the jury's analysis of both Mr. YYY's punishment testimony and Mr. Moss's closing argument at the punishment phase of the trial, the confidence in the jury's punishment verdict is undermined.

III. CONCLUSION

Applicant, XXX Brandon YYY, respectfully requests this court recommend to the Texas Court of Criminal Appeals that his Writ of Habeas Corpus Pursuant to Tex. Code Crim. P. Art. 11.07 be granted and his conviction in the underlying case be vacated. In the alternative, he requests that it recommend that the Writ of Habeas

Corpus Pursuant to Tex. Code Crim. P. Art. 11.07 be granted and his sentence in the underlying case be vacated.

Respectfully submitted,

F. Clinton Broden
Tx. Bar 24001495
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Applicant
XXX YYY

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that, on June 8, 2011, I caused a copy of the above document to be served via first class mail, postage prepaid, on:

Fannin County District Attorney's Office
101 E. Sam Rayburn Drive, Suite 301
Bonham, Texas 75418

F. Clinton Broden