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

## In re

## Johnny Dean Pyles,

## Petitioner

---

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

---

# APPLICATION FOR CLEMENCY
# AND MEMORANDUM IN SUPPORT THEREOF

Johnny Dean Pyles respectfully submits this application for clemency, requesting that this Board of Pardons and Paroles recommend, and that the Governor grant, a commutation of his sentence of death to life imprisonment.

**Statements Required by 37 TAC §143.42**

1. **Name of Applicant:** Johnny Dean Pyles

2. **Identification of Agents Presenting Application:**

   Rita J. Radostitz, Attorney for Mr. Pyles

   Elizabeth Cohen, Attorney for Mr. Pyles

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

   Attached as Exhibits to Application

4. **Statement of the Offense**

Johnny Dean Pyles was charged by indictment with capital murder for the June 20, 1982 shooting of Dallas County Sheriff Ray Kovar. After a seven week jury trial in the First Criminal District Court of Dallas County, Mr. Pyles was convicted of capital murder. The jurors answered the special issues affirmatively and, on October 21, 1982, the trial court sentenced him to death. The facts established at trial are as follows:

At approximately 1:00 a.m. on the morning of June 20, 1982, Johnny Dean Pyles was shot in the hand by Officer Ray Kovar of the Dallas County Sheriff's Office. The

shooting took place in a dark alley behind a building. Officer Kovar had been investigating a suspected burglary when he saw Mr. Pyles. Witnesses heard Officer Kovar yell for Mr. Pyles to get up, and then heard shots. In a burst of gunfire, Officer Kovar fired six shots at Mr. Pyles. Mr. Pyles shot four times at Officer Kovar. One shot struck him in the chest, and he died from the wound.

Mr. Pyles was arrested shortly after the shooting. He was in need of medical treatment, however, he received it only after he provided a confession to the police. In that confession, he admitted shooting at the deceased, but said he shot only because he saw a flashlight and a gun pointed at him. He said he did not see the person he shot. In his statement, Mr. Pyles indicated he shot not at the deceased, but at the gun and flashlight pointing at him.

Mr. Pyles was detained after being charged with capital murder. He was housed in the Dallas County Jail. At some point prior to trial, Mr. Pyles was transferred from a solitary cell to a five person tank in the jail. One known informant, Gary LaCour, was already in the tank when Pyles was transferred and the State placed another informant, Robert Banschenbach, there before the trial. These informants related incriminating information about Mr. Pyles, and they later testified to various inculpatory statements Mr. Pyles had supposedly made while in custody. One of these informants also testified Mr. Pyles wrote inculpatory remarks on the wall above his bunk. At trial, these informants testified in exchange for certain consideration extended to them by the prosecution. The

Federal District Court Magistrate Judge found that each of these witnesses lied at trial and their testimony incriminating Mr. Pyles was false.

The sole issue presented by the defense at trial was whether Mr. Pyles knew he was shooting at a police officer at the time he fired his gun. One of the trial jurors, Geraldine Sarratt, could not determine the answer to this question based on the testimony presented by the State in the courtroom. She therefore made an unauthorized visit to the scene of the crime. This crime scene visit convinced her to return a verdict of guilty, and Mr. Pyles was convicted of capital murder and sentenced to death.

**5. Statement of Appellate History**

The Texas Court of Criminal Appeals affirmed Mr. Pyles' conviction and sentence on June 1, 1988. *Pyles v. State*, 755 S.W. 2d 98 (1988).

Mr. Pyles filed an Amended Petition for Writ of Habeas Corpus October 17, 1990. The State filed its opposition and proposed findings of fact and conclusions July 10, 1991, without notice or service to counsel. On July 15, 1991, the trial court recommended denial of relief by adopting verbatim the State's Proposed Order. On July 19, 1991, the Texas Court of Criminal Appeals affirmed the denial of relief. On July 22, 1991, Mr. Pyles filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.

An evidentiary hearing was held before Magistrate Judge Kaplan on January 24-

25, 1996. On January 16, 1997, Magistrate Judge Kaplan entered his Findings and Recommendation. After *de novo* review the District Court adopted the findings and denied relief on June 16, 1997. Mr. Pyles' Motion to Alter and Amend Judgment was denied on July 9, 1997. His Notice of Appeal was filed on July 28, 1997. The District Court granted a certificate of appealability on August 18, 1997. The Panel scheduled oral argument for March 4, 1998 and one day later, on March 5, 1998, issued its opinion denying relief. Mr. Pyles' Petition for Rehearing and Suggestion for Rehearing *En Banc* were also denied.

**6. The Legal Issues Raised**

Numerous legal issues have been raised throughout the litigation in Mr. Pyles' case, including a claim that his conviction was based upon extrinsic evidence obtained by a juror's unauthorized visit to the crime scene; that the prosecution knowingly presented false testimony; that law enforcement officials instructed Banschenbach and LaCour to elicit incriminating statements from Petitioner; that Petitioner's conviction and sentence of death was the result of perjured testimony; and that the prosecution withheld material evidence relevant to the credibility of the informants. Further, Mr. Pyles asserted that his confession was involuntary and coerced; and that the jury heard significant mitigating evidence regarding his youth, work history, remorse, abusive and neglectful childhood to which it could neither consider nor give effect under the unconstitutionally preclusive Texas sentencing statute.

**7.** Inapplicable

**8. Effect of the Crime on the Victim's Family**

There can be no doubt that the impact of the crime on Mr. Kovar's family has been traumatic, and nothing within the power of either Mr. Pyles or undersigned counsel can ameliorate their deep sadness and suffering over the loss of a loved one. At least several members of Mr. Kovar's family have remained interested in this case as evidenced by their presence at the evidentiary hearing in federal district court in January, 1996, and at the oral argument before the U.S. Court of Appeals for the Fifth Circuit in March of this year. Neither Mr. Pyles nor undersigned counsel have attempted to make contact with Mr. Kovar's family out of respect for their grief and privacy.

## REASONS WHY EXECUTIVE CLEMENCY SHOULD BE GRANTED

### THERE IS SUBSTANTIAL AND COMPELLING EVIDENCE THAT DEMONSTRATES THAT MR. PYLES IS INNOCENT OF CAPITAL MURDER, AND THAT HIS CONVICTION AND SENTENCE OF DEATH RESTS ON UNAUTHORIZED EXTRINSIC EVIDENCE AND ON FALSE TESTIMONY KNOWINGLY PRESENTED BY THE PROSECUTORS.

#### A. Introduction

A grant of executive clemency is appropriate when the Board and the Governor have substantial reason to believe that the condemned man was culpable of less than a capital crime, or was convicted on the basis of unreliable or unlawfully obtained evidence. In recent years, Governors and clemency boards from across the country have

granted executive clemency when faced with lingering concerns about the condemned man's guilt, or degree of reasonableness of the jury's verdict.

For example, in 1992, Governor Douglas Wilder of Virginia commuted the sentence of Herbert Bassette because, "[a]fter a thorough review of the evidence, including evidence . . . which was not before the jury when they rendered their verdict," he could not "in good conscience erase the presence of a reasonable doubt and fail to employ the powers vested to me as Governor to intervene."

Also in 1992, Governor James Martin of North Carolina commuted the death sentence of Anson Maynard, even though "lengthy, prayerful consideration" left him unsure of Mr. Maynard's innocence. Finally, Governor George Allen of Virginia commuted the death sentence of Joseph Payne -- even though he believed the evidence pointed to Payne's guilt -- because of his concerns about the reliability of some of the evidence in Payne's case.[1]

### B. The Texas Appeals Process Does Not Provide A Forum For The Review Of This Ground For Clemency.

In 1994, the Texas Court of Criminal Appeals declared, in *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389 (Tex. Crim. App. 1994), that claims of actual innocence based on newly discovered evidence may be brought in postconviction judicial proceedings. The standard announced in *Holmes* requires the criminal defendant to

[1] Frank Green, Clemency Came With Promises: Payne Vows No New Trial, No Royalties, Richmond Times-Dispatch, Nov. 9, 1996 at B1.

prove, based on the newly discovered evidence and the entire record before the jury that convicted him, that "no rational trier of fact could find proof of guilt beyond a reasonable doubt." Under the *Holmes* test, however, the evidence from the record before the jury that convicted the defendant is viewed in the light most favorable to the prosecution.

Putting aside the legally troubling question of whether the *Holmes* standard can ever be satisfied in theory or in practice, the fact is that *Holmes* does not provide a basis for judicial review of the merits of the ground for clemency that Mr. Pyles advances here. Mr. Pyles' claim is not that there is not or was not "legally sufficient" evidence for a jury to convict him for some degree of involvement in the offense; rather, Mr. Pyles asserts that there is substantial and compelling proof that strongly indicates that his conviction rested on extrinsic evidence obtained by a juror's unauthorized visit to the scene of the crime during the trial and prior to deliberation. Further, he contends that the State knowingly presented false testimony upon which the jury relied. Despite persuasive evidence that Mr. Pyles did not receive a fair trial, neither the state nor federal courts have acted to remedy this constitutional infirmity. Instead, they have turned a blind eye to explicit facts and have relied on technical procedural grounds in denying Mr. Pyles' claims.

It is true that the propriety or fitness of a lawful sentence is ordinarily a matter within the province of the jury. In this case, there are two reasons why the jury's sentencing verdict should not deter a proper exercise of executive clemency. First, the

jury's deliberations were irrevocably tainted by extrinsic evidence obtained by a juror's unauthorized visit to the scene of the crime. Second, the jury in this case heard and considered false evidence knowingly presented by the prosecutor regarding significant material facts related to both the guilt/innocence and penalty phases of trial. As a result, the jury's sentence of death simply does not reflect consideration of facts relevant to the primary issue in the case, namely, whether Mr. Pyles knowingly shot a police officer.

Therefore, Mr. Pyles comes before the Board of Pardons and Paroles and the Governor to ask that the fail safe of clemency be extended to him, as the process by which he was convicted leaves grave and substantial doubts that he knowingly shot a police officer or received a fair trial. As the following discussion makes clear, the case for executive clemency in this case deserves the greatest and most serious consideration of the Governor and the Board.

### C. There is Substantial and Compelling Evidence that Mr. Pyles' Conviction and Sentence were Based on Extrinsic Evidence Obtained By a Juror's Unauthorized Visit to the Crime Scene

At trial, the primary issue raised by the defense was whether Mr. Pyles knew at the time of the shooting that the intended victim was a peace officer. Absent this knowledge, Mr. Pyles was not guilty of capital murder. V.A.C.C.P. Sec. 19.03(a)(1). Apparently this issue was a difficult one for at least one of the jurors, and caused her to visit the scene of the crime in order to resolve her doubts.

In her affidavits, Juror Sarratt stated that she was not convinced from the evidence

that Mr. Pyles knew at the time of the shooting that the victim was a peace officer. To resolve her doubts, she made an unauthorized visit to the scene of the crime. Based on her visit to the scene, and not on the evidence produced at trial, she concluded Mr. Pyles must have known the victim was a peace officer, and therefore became convinced that Mr. Pyles was guilty of capital murder.

The district court held that Ms. Sarratt's visit was not prejudicial to the defense because "there is no evidence that by visiting the crime scene, Ms. Saffert [sic] obtained access to any information which was not already before the jury." This finding ignores the obvious -- a photograph is two dimensional, not three dimensional, and all photographs distort the depth perception, the dimensions of the objects depicted, and the lighting[2].

Further, it defies the lessons of common experience to suggest that a photograph will convey the same information as a visit to the scene. As anyone knows who has taken a picture of a mountain scene, a child's face, or a sunset on the beach, when photos are returned, they often have failed to capture the image in the mind's eye. Indeed, the difference between a picture of reality and reality itself is the very reason behind the prohibition against *unauthorized* visits to the scene, and the reason that jurors are sometimes taken for views of the scene during a trial where the dimensions and lighting of a scene are critical to determine the issues in dispute.

Over ten years since Mr. Pyles' trial, Ms. Sarratt can still articulate the significant

[2]It is difficult, if not impossible, to recreate the lighting of a scene at night -- without a flash, film cannot capture the image; with a flash, the natural lighting is distorted, if not destroyed.

differences between the photographs and diagrams of the crime scene from her in-person view. Ms. Sarratt stated:

> During the trial, while I was sitting on the jury of Mr. Pyles' capital murder trial and prior to his conviction, I went to the exact scene of the crime. I went to the scene because the photographs and diagrams presented at trial were inadequate for me to understand the dimensions of the area. Most, if not all, of the photographs introduced during the trial were taken of the building and the lot at night. I went to the scene during the day light hours. At that time, I was able to clearly see the dimensions of the area where the crime occurred. The dimensions of the scene in person were very different than the photographs and diagrams shown to the jury during the trial.
>
> Specifically, the lot was much smaller than the photographs and diagrams indicated at trial. Viewing the area in person, I was able to see that Mr. Pyles and the victim were much closer in proximity to each than any of the photographs and diagrams shown to the jury had indicated. My visit to the scene of the crime surprised me because it looked so much different to me than the photographs and diagrams in evidence. It was only after viewing the crime scene for myself, in person, that I decided that if there had been a police car and police officers in the lot, that anyone hiding in the lot would have known a police officer was present.

Given the above description, it is clear that Ms. Sarratt did, in fact, obtain access to information "which was not already before the jury" during the trial proceedings and prior to deliberations.

In assessing the weight of the evidence presented against the defendant, the district court found that the circumstances of Mr. Pyles' arrest and contemporaneous incriminating statements before the jury were sufficient evidence that Mr. Pyles knew the victim was a police officer. However, as Ms. Sarratt's need for an unauthorized visit to the scene demonstrates, evidence that Mr. Pyles knew the deceased was an officer is tenuous at best. The testimony was clear that the deceased did not identify himself as a

peace officer, and Mr. Pyles testified that he did not realize the deceased was an officer. In addition, the other officers on the scene testified that the shooting happened almost immediately after Officer Kovar passed into the shadows, and that the exchange of gunfire was over within seconds.

The shooting, moreover, occurred at approximately 1:00 a.m., and the testimony from every officer on the scene established that the area was quite dark, and that visibility was exceedingly poor. One of the first responding officers, Officer Charles Mitchell, testified that visibility was extremely poor:

> A. On that night, I could just barely make it out [a fence behind the building], make out the bushes and vines that had grown over it.
>
> Q. That was with your flashlight?
>
> A. Yes, sir.
>
> Q. *Well, without your flashlight, would it be safe to say you couldn't see anything back there?*
>
> A. That's correct.

(emphasis added). Finally, the testimony established that the deceased had an illuminated flashlight. Mr. Pyles testified, consistent with common experience, that while a flashlight may have improved visibility for the officers, the opposite is true for the person upon whom the flash is shining, and that his vision was blinded by Officer Kovar's flashlight.

The officers testified they used their lights and sirens only to within one-half to three-quarters of a mile of the scene. At that point, they intentionally cut both the lights

and sirens and approached in complete silence, except for the sound of their car engines. Furthermore, these officers testified they employed this tactic precisely so that a suspect, if he were present, *would not realize that officers had arrived on the scene. Id.* In other words, these officers -- including the partner of the deceased -- testified that their goal was to assure that any suspect in the area *would not* learn that officers were on the scene:

> [W]hen we arrived at the scene, we didn't want to broadcast, hey, you know, everybody is around, you're surrounded. So we cut our siren as a procedure. That way, if we do have someone there, we don't actually scare them off and we're able to apprehend them.

Thus, the undisputed testimony at trial was that the physical characteristics of the scene and the actions of the police were not conducive to Mr. Pyles' knowing that the person shooting at him was a peace officer. This, coupled with Mr. Pyles' testimony that he did not know that he was firing at a police officer created the central issue disputed at trial.

Despite concrete evidence of both the visit and the effects on the jury and trial deliberations, the federal courts relied on technical procedural rules to justify denying Mr. Pyles claim. In its Order dated June 16, 1997, the federal district court stated that Rule 606(b) of the Federal Rules of Evidence governing the impeachment of jury verdicts post-trial disallows jurors from testifying about (1) the method or arguments of the jury's deliberations; (2) the effect of any particular thing upon the outcome in the deliberations, (3) the mind set or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during deliberations. The court held that the portion of Mrs. Sarratt describing her visit to the scene of the crime is competent evidence, but that any

testimony regarding her thought process or the effect of her visit to the scene on her deliberations cannot be considered. The court did concede that the existence of this extrinsic evidence created a presumption of prejudice that the State must rebut by showing that there is no reasonable probability that the jury was improperly influenced. However, the court found that "there was no reasonable possibility that the jury verdict was influenced by the juror's visit to the crime scene."

Even more amazingly, the Panel of the Fifth Circuit Court of Appeals held that Federal Rule of Evidence 606(b) precluded consideration of all but the simple fact that Ms. Sarratt went to the scene during the course of trial. Any inferences regarding her reasons for the visit to the scene and impressions of how the scene differed from the evidence presented at trial were precluded from consideration.

The Panel Opinion held that Mr. Pyles' constitutional rights were violated by the juror's visit to the crime scene but held the violation to be Constitutionally harmless. The Panel's conclusion that the visit did not have a 'substantial and injurious effect or influence' on the verdict completely ignores the most relevant and conclusive evidence of the effect and influence of the visit -- the juror's statements regarding why she went to the scene and that the scene differed from the evidence presented at trial. The Panel's justification for excluding the juror's statements from consideration is that such consideration is barred by Rule 606(b). However, by excluding such evidence, Mr. Pyles is precluded from presenting the most relevant (and uncontested) evidence proving that he

was harmed by the unconstitutional visit to the scene. Because technical procedural rules have prevented Mr. Pyles from obtaining relief from the admitted violation of his Constitutional rights, clemency is appropriate.

### D. There is Substantial and Compelling Evidence that Mr. Pyles' Conviction was Based on False Evidence Knowingly Presented by the Prosecutors

The prosecutors knowingly presenting false testimony at trial of jailhouse informants, Banschenbach and LaCour, regarding material evidence. Substantial evidence was presented to the district court through affidavits and live testimony proving that the testimony of both LaCour and Banschenbach was false, and the authorities knew it was not true. Significantly, the federal district court found that Banschenbach and LaCour lied at trial, stating: "Banschenbach and LaCour refused to answer any questions that touched on the veracity of their trial testimony. It is therefore reasonable to infer that these witnesses invoked their privilege against self-incrimination to avoid prosecution for giving perjured testimony at trial."

Specifically, at trial, both Banschenbach and LaCour testified that Mr. Pyles had made incriminating statements to them indicating that he knew the victim was a police officer at the time he shot him. LaCour further testified that he had seen Mr. Pyles scratching on the wall of his cell where authorities later found the words "Kill all Whie Pig Ploice, Kill, kill Judge, DA." At the federal evidentiary hearing, one of the

prosecutors, Winfield Scott, testified that he believed the scratchings were "probably written by some non-white who was a semi-literate and who made G's the same way." He further testified "I certainly had no, you know, no way of knowing whether his testimony to this day is true or false," and then attempted to make light of his duty to ascertain the truth by stating "The big issue is how do you know they're lying?" This is all evidence of the neglect by the prosecution team to make any true attempt to know whether they were presenting false and misleading testimony. Such neglect cannot be tolerated.

Due process is violated when a prosecutor presents testimony that is false and "the prosecution actually knows *or believes the testimony to be false* or perjured." It is immaterial whether each and every prosecutor knew or believed the testimony to be false. The testimony of Winfield Scott that he believed that the scratchings on the wall had not been made by Mr. Pyles confirms that the State made no effort to ascertain whether LaCour and Banschenbach's statements were not true.

The record clearly establishes that the prosecutors did know the testimony from Banschenbach and LaCour was false and knowingly presented it regardless. There is ample evidence that the State knew that Banschenbach and LaCour lied on the witness stand. For example, in his affidavit, Mr. LaCour states that his "entire testimony was untrue and the state knew it." In addition to Banschenbach's and LaCour's statements against interest that the State knew their testimony was false, there is evidence that the

district attorneys working on the case either knew that the testimony was false, or purposefully failed to make any investigation into the truth or falsity of the information. Winfield Scott apparently was the only prosecutor that even spoke with LaCour and Banschenbach prior to his testimony. Scott was sent by Banks to "size up" the witnesses, however, they were relying solely on the questioning apparently done by Sheriff Potts for the substance of the witnesses testimony. Winfield Scott admitted:

> "[T]o this day I don't know whether his testimony is true or false. My only concern was how is it going to impact the jury. I certainly had no, you know, no way of knowing whether his testimony to this day is true or false."

Additional evidence indicates that the prosecution was sufficiently concerned regarding the authenticity of LaCour's information to briefly contemplate administering a polygraph test to LaCour. Yet, this was never done. Thus, the prosecution purposefully failed to make any investigation into the truth or falsity of LaCour's statements.

A prosecutors egregious negligence in failing to make any true attempt to learn whether it was presenting false and misleading testimony cannot be tolerated. Because the courts have failed to rectify this egregious error, clemency is appropriate.

## CONCLUSION

The sole issue in dispute at Mr. Pyles' capital murder trial was whether he knew the victim was a police officer when he shot him. This remains unresolved. The jury deliberations regarding this issue were irrevocably tainted by extrinsic evidence obtained by a juror's unauthorized visit to the scene of the crime during trial. The State knowingly

presented the false testimony of two "snitches" regarding incriminating oral statements and scratchings on the cell wall allegedly made by Mr. Pyles' indicating that he knew his victim was a police officer at the time of the shooting. As a result, the request for executive clemency in this case deserves the greatest and most serious consideration of the Governor and the Board.

## REQUEST FOR RELIEF

On behalf of Johnny Dean Pyles, undersigned counsel respectfully petitions the Texas Board of Pardons and Paroles for a recommendation to the Honorable George Bush, Governor for the State of Texas, to commute Mr. Pyles' sentence of death to life imprisonment.

Respectfully submitted,

RITA J. RADOSTITZ
Member, Fifth Circuit Bar

P.O. Box 296
Austin, Texas 78767-0296

ELIZABETH COHEN
Member, Fifth Circuit Bar

P.O. Box 280
Austin, Texas 78767-0280

TEL (512) 320-8300
FAX (512) 477-2153

TEL (512) 320-8300
FAX (512) 477-2153