Case No.________________________
(Please assign a case number)

In the

United States Supreme Court

of

America

IN RE: LEXTER KENNON KOSSIE,

APPLICANT,

THE STATE OF TEXAS,
Lori Davis, Director,
Texas Department of Criminal Justice
Institutional-Division,

RESPONDENT.

APPLICATION FOR A WRIT OF HABEAS CORPUS
[Pursuant to 28 U.S.C.A. §2241]

(S) Lexter Kossie
Lexter Kennon Kossie
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Beeville, Texas 78102

Pro se Applicant

QUESTION(S) PRESENTED

Can trial counsel willfully assist a defendant in executing an illegal scheme and in doing so, make serious trial errors and/or omissions without depriving a defendant of his rights to effective assistance and due process under the Sixth and Fourteenth Amendment of the U.S. Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF APPENDICES

Contents | Page

IN THE UNITED STATES SUPREME COURT
OF AMERICA

IN RE:LEXTER KENNON KOSSIE, Applicant,	§	
	§	Case No.________________
LORI DAVIS, Director, Texas Department of Criminal Justice-Institution Division, Respondent.	§ §	

ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUSTICE BREYER:

COMES NOW, **Lexter Kennon Kossie**, hereinafter ('**Applicant**'), pro se, in good faith, files this **Original Application For Writ Of Habeas Corpus** pursuant to 28 U.S.C.A. §§§ 2241, 2242, 2243, and will show that 'exceptional circumstances' warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other court.

I.

JURISDICTION

U.S.C.A. §2241(a) provides the power to a justice to grant a writ of habeas corpus. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. (See Order of the Fifth Circuit Court of Appeals attached as **Exhibit 'A'**).

U.S.C.A. §2241(b) gives a justice discretion to transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

II.

CONFINEMENT AND RESTRAINTS

Lori Davis, Respondent-Director of the Texas Department of Criminal Justice (TDCJ) has unlawful custody of Applicant pursuant to a void judgment and sentence from the 185th District Court of Harris County, Texas; re:Cause No.679887, whereas on November 29, 1994, a jury convicted Applicant of aggravated robbery by using and exhibiting a deadly weapon to-wit: a firearm. Subsequently, the jury assesed punishment at Life imprisonment at (TDCJ).

III.

APPLICANT IS IN CUSTODY IN VIOLATION OF THE U.S. CONSTITUTION

The provision of 28 U.S.C.A. §2241(c)(3) provides that the writ of habeas corpus shall not extend to a person unless he is in custody in violation of the constitution or laws or treaties of the United States. Here, Applicant complains that his Sixth Amendment right to effective assistance was violated when trial counsel labored under an 'actual conflict of interest' and in doing so, committed fraud on the court by eliciting false evidence from Applicant in which she knew or should have known would produce perjurious testimony in response thereto. Another aspect of Applicant's Sixth Amendment claim is, though trial counsel willingly assisted Applicant in getting his illegal scheme across to the jury, counsel subtly and nefariously made serious constitutional errors and/or omissions to make sure that Applicant would be found guilty and sentenced to life in prison. Specifically, the evidence will show that trial counsel entered into the trial with no intentions of being prepared and made errors and/or omissions so serious throughout the entire trial that deprived Applicant of a fair trial, a trial whose result is unreliable.

IV. EXHAUSTION

The Texas Court of Criminal Appeals denied Applicant's initial habeas corpus application, re: Cause No.679887, without written order on March 15, 1995. See **Ex parte Kossie**, Application No.10,978-09. After discovering the Court's decision in **Trevino v. Thaler**, 133 S.Ct. 1911 (2013), Applicant filed at least 5 state habeas applications beginning in 2015 thru 2017. The Texas Court of Criminal Appeals found that Applicant's claims were procedurally defaulted under state law. (See generally, Application Nos.10,978-27(denied on 04/08/15); 10,978-28 (denied on 07/08/15); 10,978-29 (denied on 05/11/16); 10,978-30 (denied 10/12/16) and 10,978-31 (denied on 03/29/17). Each of these state applications contain ineffective assistance of trial counsel claims that were raised after the Court's decision in Trevino,supra. Some of those claims are the subject of this §2241 petition.

V.

REASON FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

Applicant moved in the Fifth Circuit Court of Appeals for authorization to file a successive §2254 application regarding the claims of ineffective assistance of trial counsel mentioned above. Based on the Fifth Circuit's ORDER, any pleading filed by Applicant, including this §2241 application will in all probability be construed as a successive application requiring authorization to be filed since it would entail the presentation of new claims. Thus, the filing of the instant §2241 application would unquestionably subject Applicant to ADDITIONAL SANCTIONS if the district court construe it as a successive §2254 application requiring authorization for filing. Consequently, "the denial of authorization ... **SHALL NOT** be appealable and **SHALL NOT** be the subject of a petition for a writ of certiorari."(See 28 U.S.C.A. §2244(a)(3)(E). Therefore, for these reasons, Applicant did not make an application to the district court.

VI.

EXCEPTIONAL CIRCUMSTANCES WARRANTS THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS

Applicant's claims of constitutional violation are presented in light of Trevino,supra. The Court held that Texas procedures make it nearly impossible for an ineffective assistance of trial counsel claim to be presented on direct review. Therefore, the Court concluded that Texas procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal and for these reasons:

> "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S.,at____(slip op.,15).

The evidence presented herein, shows that trial counsel labored under an 'actual conflict of interest' and in doing so, counsel committed **fraud on the court** by knowingly eliciting false evidence from Applicant while he testified, in which counsel knew or should have known would produce perjurious testimony in response to her line of questioning. The evidence further shows that even though trial counsel willingly assisted Applicant in getting his illegal scheme across to the jury, counsel also subtly and nefariously made serious constitutional errors and/or omissions to make sure that Applicant would be found guilty and sentenced to Life in prison, simply because she had allowed Applicant to talk her into going to trial on a fabricated defense when in fact, she wanted Applicant to cop-out to **AGGRAVATED** robbery by using a firearm, a crime in which he did not commit.

These claims are substantial and are the type of claims in which this Court had envisioned in **Trevino,supra**, requiring that they be raised in post-conviction habeas corpus proceeding where a full record on the matter can be raised. Particulary as here, where trial counsel can explain under oath at a 'live evidentiary hearing' why she chose to proceed to trial on a fabricated defense in which she knew or should have known was such, and that by eliciting false evidence from Applicant would produce perjurious testimony.

Applicant contends that the state failed to provide him with a meaningful opportunity to present his claims in his first appeal as of right under **Evitts v. Lucey**. 469 U.S. 387 (1985(, coupled with trial counsel's fraud on the court and the "equities" of his case, constitutes unique and 'exceptional circumstances' that warrants the exercise of the Court's discretionary powers to either grant the relief sought herein or transfer the application for a hearing and determination to the district court having jurisdiction to entertain it. (See 28 U.S. C.A. §2241(b)).

VII.

ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM

On January 26, 1999, Applicant filed his federal habeas petition. (Docket Entry No.1). On February 13, 2001, a final judgment was entered denying the petition with prejudice (Docket Entry No.23). On September 30, 2015, Applicant filed a MOTION to Reopen case under the Court's decision in **Trevino,supra,** accompanied with a proposed amended §2254 petition (Docket Entry No.87). On February 16, 2016, the District Court entered an ORDER denying MOTION to Reopen (Docket Entry No.88). Applicant then moved in the Fifth Circuit for authorization to file a successive §2254 petition to pursue his claims of ineffective assistance of trial counsel in light of **Trevino**, however, relief was denied on January 5, 2017.(See ORDER from the Fifth Circuit attached as **Exhibit 'B'**)(holding that **Trevino** does not provide a basis for Rule 60(b)(6) relief)(citing **Diaz v. Stephens**, 731 F.3d 370,374,379 (5th Cir.2013)). Applicant sought authorization to re-open his case again in light of **Trevino**. The Fifth Circuit denied the requested relief on August 15, 2017 (holding that because **Trevino** was merely an application of **Matinez's** equitable rule, it likewise did not establish a new rule of constitutional law).

In sum, Applicant cannot rely on **Trevino** to pursue his precedural defaulted ineffective assistance claims through a successive §2254 petition because he can not meet the requirements for authorization setforth under §2244(b)(2)(B)(i)(ii), thus §2254 remedy is "inadequate or ineffective." Regarding §2255 motions, several circuits have held that §2255 is "inadequate or ineffective" when its limitations on second or successive motions perclude a prisoner from challenging a sentence imposed for conduct rendered noncriminal by a Supreme Court decision issued after the prisoner's initial §2255 motion. (See, e.g., **In re Jones**, 226 F.3d 328, 334 (4th Cir.2000)(§2255 "inadequate or ineffective" if: prisoner convicted under settled law; subsequent to prisoner's direct appeal and first §2255 motion, substantive law changed such that conduct for which prisoner was convicted deemed not criminal; and prisoner cannot satisfy gatekeeping provision of §2255 because new rule is not one of constitutional law); **Reyes-Requenena v. U.S.** 243 F.3d 893, 904 (5th Cir.2001)(§2255 inadequate and §2241 petition allowable when prisoner's claim based on Supreme Court interpretation decided after prisoner's first §2255 petition); **In re Davenport**, 147 F.3d 605, 610-11 (7th Cir. 1998)(§2255 inadequate and §2241 petition allowable when Supreme Court's retroactive interpretation of fedeal statute overturns well-established circuit interpretation, thus rendering prisoner's offense nonexistent); **Wofford v. Scott**, 177 F.3d 1236, 1244 (11th Cir. 1999)(§2255 remedy "inadequate or ineffective" if: prisoner's claim based upon retroactively applicable Supreme Court decision; holding of that decision establishes prisoner convicted of nonexistent offense; and circuit law squarely foreclosed such claim at time it otherwise should have been raised in prisoner's trial, appeal, or postconviction claim).

Because 'adequate or effective' relief cannot be obtained by remedy of §2254 petition or in any form other than a §2241 application, Applicant must be allowed to proceed on this forum to pursue his procedural defaulted ineffective assistance of trial counsel in light of this Court's holdings in **Trevino**; an 'equitable' ruling for Texas prisoners, not one of constitutional law, which was decided almost 18 years after Applicant had filed his initial state habeas application on March 15, 1995, and almost 13 years after he had filed his federal petition on January 29, 1999.

VIII.

FACTS SUPPORTING CLAIMS ARE INCORPORATED WITH ARGUMENTS AND AUTHORITIES

On August 11, 1986, Applicant was released on parole and after being released less than a year he had become addicted to 'crack cocaine'. He initially admitted himself into St.Joseph Hospital, West Oaks Hospital and finally his parole officer had him admitted at the Texas House (now Southeast Texas Transitional Center) but soon after being released, within days Applicant was right back using 'crack'.

On November 13, 1993, Eugene Williams and Applicant had been using 'crack'. (See AFFIDAVIT OF EUGENE WILLIAMS as **Exhibit 'C'**). After they ran out of money they begin to ride around looking for away to make some quick money to buy some more 'crack'. Williams drove to a Burger King. Applicant went inside with a bunch of change in his hand. He ordered a BK Big Fish sandwich. When the order came up he intended to spill the change on the floor and then steal the money out of the register while the cashier was picking up the change from the floor. However, he did not have enough to pay for the order so the cashier did not open the register drawer. Realizing that the cashier wasn't going to open the register, Applicant started to unzip his jacket as if he had something. He told the cashier that he hated to do this to her but he needed for her to open the register. She did not take him serious so Applicant reached down inside his partially unzipped jacket with his right hand while simultaneously reaching underneath his jacket with his left hand. The cashier believing that she saw a brown wooden handled 'gun' opened the register. Applicant grabbed the money out of the register and fled. (Reporter's Records Vol. 3, pp.112-118)

Williams and Applicant went bought more 'crack' and when they ran out they started riding around in the same area where the robbery had occurred looking for away to get some more money for more 'crack'. The craving for the 'crack' had took completely control of their rational thinking. While riding around they were pulled over and arrested by Humble Police Officers around 4:00a.m. just blocks away from the Burger King Applicant had robbed only 6 hours before. Applicant was charged with aggravated robbery by using and exhibiting a deadly weapon to-wit: a firearm. Williams was immediately released without any charges.

When Applicant initially talked to Sherra Miller, his court appointed counsel, he told her that the complainant was an acquaintance and that she had freely given him the money out of the cash register and that no robbery occurred because the complainant was a party to 'theft'. He told counsel that he had met the complainant at Jesse Jones Park which was in the same neighborhood where the complainant lived. He told counsel that he had called the complainant at her home a few times and then stopped altogether. Counsel advised Applicant not to communicate with the complainant anymore and he agreed not to. However, in April 1994, approximately 5 months later Applicant wrote the complainant at her home address asking her to come forward and tell the truth that she had given him the money freely. It frightened the complainant because she knew that she had never seen Applicant prior to the night he had robbed the Burger King. She took the letter to Humble Police authorities who in return notified the Harris County District Attorney's Office regarding the letter.

Someone in the DAs office notified trial counsel regarding the letter. Counsel immediately came to visit Applicant who at that time was still in Harris County Jail. Counsel was pretty upset because Applicant had disregarded her advice to not communicate with the complainant and wanted to know why Applicant had gone against her advice. At that point, Applicant feeling guilty and ashamed confessed to counsel that the only reason he had claimed that the complainant had participated in 'theft' was because she had lied about seeing him with a 'gun' during the robbery. Applicant admitted to committing a robbery by conning the complainant into believing that he had something but emphasized to counsel that he did not have a 'gun'. Applicant told counsel that he and Eugene Williams had been doing 'Crack Cocaine' the night of the robbery. Applicant told her that he was under the influence of 'crack' when he robbed the Burger King. He asked counsel to help him get into CENIKOR DRUG PROGRAM because he really needed help with his addiction. Counsel started shaking her head in the negative. She told Applicant that she hated that he had told her all that (meaning the truth about complainant) because CENIKOR was not going to accept him because of his violent criminal background. Applicant told counsel, "I guess I'm going to have to stick to my story if she continue to lie about seeing a gun." With a little sarcasm, counsel asked, "You must really like it down there?" Applicant snapped back, "So now you're going to sell me out?" In a fiery tone counsel responded, "That's what wrong with ya'll -- everytime ya'll get ya'll selves into trouble ya'll think somebody is trying to sell ya'll out." Finally, counsel calmed down and nonchalantly said, "We'll see what happen -- I'll see you on your next court date." Then she walked out.

On the next court appearance, Applicant asked counsel [sic] to set up a meeting with the prosecutor so he could try to convince the prosecutor that the complainant was his friend and that she had freely given him the money. Counsel did not want to do it but Applicant persuaded her to at least let him try. Counsel made arrangements with the prosecutor to talk to Applicant inside the jury booth. Applicant begin by telling the prosecutor how the complainant had freely allowed him to steal the money out of the cash register. Out of thin air counsel blurted, "He conned her out of the money." The prosecutor looked at her with a strange face as if he could sense that something wasn't right. He then asked counsel, "Are you sure he hasn't conned you?" Counsel just chuckled and said something to the effect that it didn't happen like that. The prosecutor then asked Applicant why did the complainant give him the money. Applicant told him that she was his friend and that she knew he was on 'crack' and wanted the money to buy some. The prosecutor told Applicant that he was going to bring the complainant into his office and after talking to her -- if he was 100% sure that she had given Applicant the money he was going to do something for Applicant (meaning either help him get into treatment or reduce the charge to misdemeanor 'theft'). Applicant never saw the prosecutor again and when Applicant asked counsel about him, counsel told him that the prosecutor [sic] had been transfered to another court. The case was set for trial on November 28, 1994.

The weekend before trial counsel came to visit Applicant who at this time was jailed at the Harris County Rehab. It had been over a year since Applicant's arrest on November 13, 1993, and counsel had not discussed any trial strategy, had not interviewed the complainant to see if the complainant may have saw Applicant's brown knuckles instead of a brown wooden handle of a 'gun', had not interviewed Eugene Williams who had been arrested with Applicant, to see if he would verify that he and Applicant had been doing 'crack' prior to Applicant committing the robbery or to testify to whether he had seen Applicant with a gun. Counsel hadn't interviewed Applicant's parole officers to see if they would have documentation verifying that Applicant had been in several drug treatment facilities since his release on parole in August 1986. Nor had counsel interviewed any of Applicant's family members to see if they would provide testimony regarding Applicant's addiction to 'crack'. In fact, counsel had not investigated a single lead in which Applicant provided her regarding his addiction to 'crack'.

Just days before trial, the only concern counsel had was whether Applicant was going to stick to his story. Counsel made no attempt to dissuade Applicant by suggesting or offering an alternative defense, which was an indication to Applicant that counsel felt as though she could help pull-off the illegal scheme. Applicant told counsel that when he take the stand he was going to tell the jury that the complainant gave him the money because she knew he was on 'crack' and wanted to give him the money out of the register to buy some. Counsel told Applicant not to

[sic] mention anything about being on dope because jurors frown upon dope users. Counsel's plans for trial were just to play everything by hear and basically play alone with the illegal scheme then subtly and nefariously set Applicant up for failure once he took the stand. However, counsel would try one last time to try to get Applicant to cop-out to **AGGRAVATED** robbery on the day of trial, but she knew that was going to be almost impossible since he insisted there was no gun.

On November 28, 1993, the day of trial, while sitting in the court room ready to pick a jury, Applicant was approached by counsel and the prosecutor. Prosecutor, "I'm offering a 15 year plea bargain for aggravated robbery." Applicant,"I'm not taking no aggravated time because I didn't have no gun." Prosecutor, "Well, I thought I would let you know that the 15 years was on the table." Applicant, "You know I didn't have a gun!" Prosecutor,"Who do you think the jurors are going to believe -- you or that young girl?" Applicant,"I guess I'll be picking a jury." Trial counsel, "You know what you are doing, huh?" Applicant, "I told you that I didn't have a gun." Voir dire begun and a jury was empaneled.

After selecting a jury, the trial commenced. Crischelle Toliver, the complainant was the prosecution first witness. While Toliver was on the stand, the prosecutor was in the process of admitting State's Exhibit No.1, the letter which Applicant had wrote to Crischelle Toliver on April 15, 1994. Counsel asked Applicant if he wanted the letter to come in without objections. Counsel knew that Applicant wanted the letter to come in because the contents of the letter made it appear as though Applicant knew Toliver and that she had freely given him the money out of the register. Counsel also knew that Applicant wanted the letter in to help convey his illegal scheme, a fabricated defense in which counsel was going to attempt to help him pullover on the jurors. The letter was entered without objections in which Toliver read to the jury. After Toliver finished reading the letter she was examined by Prosecutor Todd Bennett. Because the facts are important, it is necessary to examine the record itself, at length. Verbatim quotations allows one to see the facts clearly, without bias or a spin.

On direct examination, Crischelle Toliver, testified that the following transpired (Reporter's Records Vol. 3, pp.112-118):

Q. Okay. And what happened when the man came in, what's the first thing that happened?
A. He opened the door and when he was coming in, he crossed over the chain instead of walking around, he crossed over it and that's how I noticed his clothes.

****

Q. Okay. Now you say this man came through the door up to your register crossing over the chain; is that correct?
A. Yes, sir.

****

Q. Okay. What happened when that man approached you there at the counter, Ms.Toliver?
A. He asked me how much was a BK Big Fish and I told him and he had his -- bunch of change in his hands.
Q. Let me stop you right there. Now, how much is a BK Big Fish?
A. It was $1.85
Q. Okay.
A. That's without tax.
Q. Did you tell him that it was $1.85?
A. Yes.
Q. Okay. And what did that man do next?
A. That's when he started counting his change. He had a bunch of change in his hand.
Q. Okay. And then what happened?
A. And then he asked me, he said well, I don't have enough, no, I asked him, I said would you like --

****

Q. After you told him how much the sandwich cost, what happened next?
A. I asked him would you like me to ring it up.
Q. And he said yeah, he wanted it.
A. Okay.
Q. Did you ring it up then?
A. Yes, that's how I knew what time it was.

****

A. I told him it was $2.00
Q. What did that man do?
A. He was counting the change and said he didn't have it.
Q. So what did you do?
A. And I said, well, sir, you asked me how much it was and I rung it up and it was $2.00
Q. Okay. And then what happened next?
A. He asked me, he said well, how much you got in your register, and he told me to open the register, but he did a little smirk, so I didn't think nothing of it.

****

Q. Okay. You say you didn't think nothing of it, what do you mean by that?
A. I didn't think he was serious.
Q. Okay. Then what happened after that?
A. And he asked me again.
Q. Okay. What did he say at that time, the next time?
A. He said, I hate to do this to you.
Q. Okay. Did he say anything other than that?
A. He said, I hate to do this to you, but open up the drawer. And by that time, he was opening up his jacket.

Q. Okay. What did you see inside his jacket?
A. A brown handle in his pants hanging out.
Q. Okay. And what was it?
A. A gun.

On cross-examination by trial counsel, Crischelle Toliver stated the following transpired (Reporter's Records Vol.3, p.140):

Q. And you didn't actually see a gun, did you?
A. Yes, I did. I saw the handle.

****

Q. There wasn't a gun pulled on you, was it?
A. I saw it when he opened up his jacket, I saw the gun.

****

Q. Well, you just said he didn't have a gun out.
A. He had a gun.
Q. Okay. I will ask you one more time. Did the person who robbed you pull a gun out?
A. He didn't pull it out, I saw it when he opened up his jacket, he had it inside his pants.
Q. What part of the gun did you see?
A. Handle. It was brown, brown wooden handle.
Q. You didn't see any of the barrel of the gun?
A. No, it was inside his pants.
Q. Was there ever any motion towards that gun?
A. No.

Following the above, Crischelle Toliver stated the following on direct examination (Vol. 3, p. 147)

Q. Now, you say that was a gun that, the robber had when he opened up his windbreaker; is that correct?
A. Yes.
Q. You say a gun, you mean like a pistol, handgun type thing?
A. Yes.

From the testimony quoted above, it can be seen that the complainant's assertion that Applicant had a gun was based on her observation of some brown handled object hanging out of Applicant's pants which she believed to be a gun. Counsel did little to test the assertion that the brown handled object was a gun other than establishing that she saw the barrel and that the 'gun' was was never pulled. Then after the complainant said the brown handled object was a gun, the prosecutor had the complainant characterize it as a "handgun". But when that characterization is traced back to its source, it stems from the viewing of a wooden handled object which the complainant allegedly saw and believed to be a gun, even though she had no way of knowing for certain that a gun was involved because all she ever saw was a brown wooden handle, rather than an actual handgun or firearm.

The reason there was not more rigorous cross-examination about the nature of the alleged brown handled object is that counsel did not interview the complainant before her testimony and was afraid of what the witness might say. Another aspect of Applicant's Sixth Amendment ineffective assistance of trial counsel claims asserts that trial counsel failed to effectively interview the complainant before trial and did not effectively cross examine her. Applicant has submitted statements and affidavits of the complainant showing that she never told the prosecutor or police that she saw a gun before her testimony, that the only thing the complainant actually saw was a brown handle, that complainant had no experience or familiarity with guns before the robbery, that the complainant was afraid to be around anyone with a loaded firearm and that the complainant did not see a gun or know if Applicant actually had one. (See **exhibits 'D'-'I'**, submitted herewith) See again, **Exhibit 'C'**, Applicant Had No Gun.

If counsel had interviewed the witness before her testimony, she would have learned about such facts and been more able to effectively cross-examine on them. Because this was not done and counsel did not know what the witness might say, there was only tepid cross-examination on this key issue. Trial counsel has refused to provide an affidavit admitting to lack of pre-testimony consulation with the complainant (See **Exhibit 'J'**, submitted herewith). Counsel's refusal to respond to this request for an admission amounts to an adoptive admission by counsel that she failed in her professional responsibilities towards Applicant. 2 Texas Practice 161-163, **A guide to the Texas Rules of Evidence , (Goode, Wellborn and Sharlot**, 2002)(when witness does not speak out to refute adverse assertion made in her presence, the law treats this as an admission of the truth of the statement or an "adoptive admission").

Counsel is obligated to familarize himself with evidence he is aware will be critical to the state's case. See **Rompilla v. Bread**, 125 S. Ct. 2456, 2464-67 (2005). Counsel does not act effectively by failing to interview a state witness before trial when more familarity with the witness could have assisted the defense or development of crucial facts. **Bryan v. Scott**, 28 F.3d 1411, 1418-1419

(5th Cir. 1994), **Soffar v. Dreke**, 368 F.3d 441, 4471 (5th Cir. 2004). Had counsel established that complainant never told the prosecutor and police that she saw a gun before testifying, that the only thing the complainant actually saw was a brown handle in which she did not know what it was, that the complainant had no experience with or familiarity with guns before the robbery, that complainant was afraid to be around anyone with a loaded firearm and that the complainant did not see a gun or know if Applicant actually had one, no rational jury could have found Applicant guilty of aggravated robbery by using a firearm, beyond a reasonable doubt. Therefore, Applicant is otherwise, 'actual innocent' under the standard defined in **Schlup v. Delo**, 513 U.S. 298, 329, 115 S.Ct. 851, 868, 130 L. Ed 2d 808 (1995)("The meaning of actual innocence ... does not merely require a showing that a reasonable doubt exists in light of new evidence, but rather that no reasonable juror would have found the defendant guilty.").

Even without such favorable cross-examination, any rational jury would have been hard pressed to find, beyond a reasonable doubt, that a firearm was actually used. There were no aggressive maneuvers or threats implying or confirming that a handgun or firearm actually existed. Cf. **Jones v. State**, 810 S.W.2d 824 (Tex.App.-Houston [14th] 1991)(threat to kill bank teller confirmed handle was a gun), **Davis v. State**, 796 S.W.2d 813 (Tex.App.-Dallas 1990, pet.re'fd)(threat to shoot someone confirmed that handle was firearm), **Banda v. State**, 758 S.W.2d 902 (Tex.App.Corpus 1988)(same).

The only peson claiming to see a gun was the complainant but what she actually saw was a brown handle and no gun was pulled on her or pointed at her. There was otherwise no testimony about the size or shape of the brown handle or how the complainant knew it was attached to a gun. Though the complainant claimed the "gun" was in Applicant's pants, there was no indication of what the complainant based this on, whether there was a lump and if so, what it looked like. And there was no demonstrative evidence which compared what the complainant saw to a real firearm

In light of the above, the showing of ineffective performance also suffices to establish a reasonable probability of a different outcome or harm. **Strickland v. Washington**, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed.2d 674 (1984) (defendant must show that there is a reasonable probability that but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome). The real issue to be taken into consideration is whether trial counsel was laboring under an 'actual conflict of interest' and really had no intent to subject the prosecution's 'gun' allegation to a meaningful adversarial testing.

All through trial, counsel had pushed the false narrative that the complainant was Applicant's friend and that she had willingly participated in 'theft' with Applicant and that no robbery had actually occurred. Still it wasn't the no-holds barred type of examination expected of a trial counsel that had a real serious interest of winning the case. Counsel was afraid that if she put too much pressure on the 18 year old complainant it was possible the complainant would 'crack', thus there was a conflict of interest to present her client's defense and to protect the 18 year victim. Therefore, counsel tried to play both ends-from-the-middle as shown below.

After all witnesses had testified, Applicant told counsel to put him on the stand. She already knew that Applicant wanted to push his illegal scheme across on the jury. She also knew that the only way he could get it across to the jury she had to elicit false evidence from him. Counsel had no problem with that because she already had plans to set him up for failure by asking him on direct exaimination whether he had ever been in troulble with the law. Counsel knew that if she ambushed Applicant with that question it would 'open the door' to his prior violent criminal history which would allow the prosecutor to roast him on cross examination. It was noway that counsel was going to let Applicant take that inno-

cent 18 year old high school kid down the drain with **him. On direct examination counsel elicited** the following false evidence in which counsel knew **would cause** Applicant to commit perjury. **(Reporter's Records Vol. 4, pp.14-21)**

Q. Did you commit a robbery on November 13, 1993?
A. No, ma'am, I didn't.

****

Q. Now, when you went into the Burger King, did you see anyone that you recognized?
A. Yes, I did.
Q. And who was that?
A. Crischelle Toliver.
Q. Do you know Crischelle Toliver?
A. Yes, I do.
Q. Did you know Crischelle Toliver before November 13, 1993?
A. Yes, ma'am.
Q. Where did you meet Crischelle Toliver?
A. I met her at a park, Jesse Jones Park, it's by her house.

****

Q. When did you meet her?
A. About two months prior to that night. Well, I'd say about -- Yeah, about two months.
Q. Had you talked to her on more than one occasion?
A. Yes, I did.
Q. Had you talked -- About how many occasion had you talked to her?
A. When I met her at the park, you know, she gave me her phone number and stuff and I called her a couple of times, but, you know, I just wrote her number down in my book and, you know, I talked to her a couple of times, but then I just kind of, you know, just let it go. I stopped calling her.

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Q. After you started going there on a regular basis, did you realize that Crischelle Toliver was someone that you knew who worked at the Burger King?
A. The first time I went to the Burger King is when I saw her there.
Q. Okay.
A. And we got to talking about why, you know, I hadn't called her, you know, why I stopped calling her.

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Q. Did you and Crischelle have a relationship?
A. Just -- Just a friendship.
Q. It was not intimate? Was it intimate?
A. No, it wasn't.
Q. But you knew Crischelle?
A. Yes, ma'am.
Q. And did she know you?
A. Yes. Ma'am.
Q. And did she know you before November 13, 1993?
A. Yes, ma'am.
Q. Now, when you went into the Burger King on November 13, did you go in with the intent to rob the Burger King?
A. No, I didn't.
Q. Why did you go into the Burger King?
A. I wanted to go hang around and talk to her.
Q. How long were you there?
A. About 10 to 15 minutes.

Q. Did you ask her for money?
A. No. I didn't ask her for any money.
Not — I'm not really understanding your question.
Q. Okay. During the conversation, 10 minutes or whatever it was, did you ever ask her for any money?
A. Yes, I did.
Q. Did she agree to give you any money?
A. She did. Yes, ma'am.
Q. Did you ever threaten her in any way?
A. No, I didn't.
Q. Did you ever display a weapon to her in any way?
A. No, I didn't.
Q. Was she a party to theft in this case?
A. She did. I mean , she was a party, yes, ma'am.
Q. Did she know what was going on?
A. Yes, ma'am.
Q. At any time did you put Crischelle Toliver in fear of her life?
A. No, I didn't. As a matter of fact —

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Q. Mr. Kossie, you've been in trouble before, haven't you?
A. Yes, I have.
Q. And what year was that?
A. 1979.

(Reporter's Records Vol. 4, pp. 24-25)

On cross-examination prosecutor Todd Bennett 'chewed-up' Applicant and 'spit him out' just as planned by counsel. The following transpired on cross examination (Reporter's Records Vol. 4, pp. 26-48):

Q. Actually, Mr. Kossie, the reason you're on the stand, that's the only way you can get the scam across, this scheme that you have , across to the jury; is that right?
A. Scheme?
Q. Yes, sir. The scheme you learned about and talked about with your buddies pretty much while you were in prison.
A. No, sir.

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Q. Now, the defense counsel asked you have you ever been in trouble with the law before, you remember her asking you that question?
A. Yes, sir.

****

Q. Okay. Tell the ladies and gentemen of the jury, if you would, specifically, what kind of trouble you got in.
A. It was aggravated robbery.

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Q. Okay. Quite frankly, Mr. Kossie, aggravated robbery is right up your alley, isn't it?
A. No, it isn't.

****

Q. Tell the ladies and gentlemen of the jury and me too, why an 18-year old girl who has never been in trouble with the law, working her way through high school, why she cares anything about hanging out with a 40-year-old elder.
A. I —

Counsel knew that Applicant had made a complete fool out of himself and that the prosecutor had in all probability sealed a conviction. When Applicant came off the stand, counsel asked him, "I thought you knew what you were doing?" (referring to Applicant executing his scheme)

Both sides rested and the Court's Charge To The Jury was presented to counsel to see whether there were any objections to it. Mr. Brown who was trial counsel's husband participated in the examination of the charge. Brown requested that 'theft' be included as a lesser charge. Since the defensive theory of the case was that the complainant had freely given Applicant the money and that evidence was presented at trial entitled Applicant to a lesser-included instruction on theft. The trial judge gave Brown and trial counsel several opportunities to go get the law to prove that Applicant was entitled to 'theft' as a lesser-included offense. Neither Brown or trial counsel made any effort to go get the law because they were afraid that maybe one juror would believe that Applicant had committed 'theft' which would possibly cause a hung-jury resulting in a mistrial. Nevertheless, the Court's Charge To The Jury only included robbery as a lesser-included offense of the aggravated robbery that Applicant was on trial for. Ironically, robbery was not a theory either party had presented at trial. (OBJECTION TO THE CHARGE , Reporters Record Vol. 4, pp. 53-55)

Though counsel refused to go get the law to prove that Applicant was entitled to a lesser-included instruction on 'theft', counsel during closing arguments continued to push the false narrative that the complainant was party to 'theft'. (Reporter's Records Vol. 4, p.69-70)

> "This is not an aggravated robbery, ladies and gentlemen, this is a simple theft. This is a misdemeanor theft"
> "You might believe that some wrong was committed, you might believe that a theft was committed, but he's not charged with theft, and theft is not a part of this charge. You might not like it, but you have to follow the law."
> "I submit to you that a misdemeanor theft took place, that Crischelle Toliver is just as guilty as Lexter Kossie of that misdemeanor theft"

If counsel truly believed that Applicant was guilty of 'simple theft' she would not have hesitated to get the law entitling Applicant to the lesser charge when the judge asked her to go get it. Since the judge did not include 'theft' in the Charge To The Jury the jurors assumed that the judge did not believe that Applicant was guilty of 'theft' either.

After the jury deliberated less than an hour, they returned a guilty verdict for aggravated robbery by using and exhibiting a deadly weapon to-wit: a firearm. (See DOCKET SHEET attached as **Exhibit 'K'**). Counsel was totally unprepared and had no intentions of being so. Approximately 45 minutes after the jury returned its guilty verdict, counsel proceeded straight into the sentencing trial. (See **Exhibit 'K'**, again). Counsel never discussed any strategy for the sentencing trial. She never informed Applicant of his right to testify or inquired into whether Applicant had a desire to testify. It was in Applicant's best interest to testify and let the jurors know how remorseful he was for trying to implicate an 18 year old high school student as a party to 'theft'. This was an opportunity for Applicant to come clean and explain the effect 'CRACK COCAINE' had on him before and during the robbery in which the jury could have appraised his mental state. Furthermore, trial counsel owed Applicant a duty to investigate and present mitigating circumstances that showed Applicant was a chronic 'CRACK COCAINE' abuser and had been in and out of drug treatment for approximately 7 years. With just a minimum amount of investigation counsel would have discovered that Applicant's parole officers had documentation of the many drug facilities in which Applicant had been treated for alcohol and crack.

Applicant had two character witnesses that were willing to testify at the punishment phase had counsel consulted them. These witnesses would have provided among other things, first hand knowledge regarding Applicant's extensive battle with 'CRACK COCAINE' and "ALCOHOL ADDICTION. (See AFFIDAVIT OF JOANN KOSSIE as **Exhibit 'L'** and AFFIDAVIT OF LUCINDA KOSSIE as **Exhibit 'M'**). Counsel did absolutely nothing to try to minimize the punishment because she was still angry at Applicant for not copping-out to aggravated robbery by using a firearm, a crime Applicant has maintained he did not do, since confessing to committing robbery in April 1994. In fact, counsel's only sentencing trial strategy was to just sit in as a 'warm body' attorney and make sure that Applicant got what he deserved for not taking the 15 years for aggravated robbery he was offered. This is evidenced by counsel's response to the trial court's question:

> THE COURT: Does either side have any evidence they wish to offer on punishment?
> COUNSEL: The defense rests, Your Honor. (Reporter's Records Vol. 5, pp. 7-9)

Counsel didn't even attempt to offer a 'grain of evidence' on punishment and to exasperate matters, during closing arguments on punishment counsel's plea for mercy had a life sentence written all-over it as shown below:

> COUNSEL: He has already paid for those things that he did. He has paid his debt to society, not once, but twice already. He's paid his debt to society by serving time for the things that he did and by being punished through the penal system.
> The second way that he's paid for that already before you even render your verdict on punishment is that because of his prior convictions, because of his prior stay in the penitentiary then the punishment range has been elevated from 5 to 99 years, up to 15 to 99 already. So that's the second way he's already been punished. I would ask you, please, not to punish him a third time for what he's done in the past. He's already paid for that ... and I would urge you you and submit to you that the appropriate punishment in this case falls at the bottom range, at the minimum range and ask you to render a 15 - year sentence as your punishment in this matter.

(Reporter's Records Vol. 5 , pp.9 -12)

The jury assessed punishment at life imprisonment at the Texas Department of Criminal Justice Institution Division (Reporter's Records Vol. 5, p.18) The fats of this case does not warrant a life sentence under any stretch of the imagination. The jury assessed punishment at life because trial counsel wholly failed to investigate and present mitigating evidence for the jurors to have considered.

Another aspect of Applicant's Sixth Amendment ineffective assistance of trial counsel claims asserts that counsel (1) failed to investigate and present mitigating evidence; (2) failed to call character witnesses or inquire into whether Applicant had character witnesses; (3) failed to inform Applicant that he had a right to testify at the punishment phase or inquire into whether Applicant had desired to testify; (4) failed to prepare for the punishment trial and/or had no intentions of being prepared; and (5) counsel labored under an actual 'con - flict of interest' and committed fraud on the court when she knew or should have known that the evidence she elicited from Applicant would cause him to perjury himself.

In **Strickland v. Washington**, this court held that to obtain relief by way of federal habeas corpus on a claim of deprivation of effective assistane of coun-sel under the Sixth Amendment, the applicant must establish both serious attorney error and prejudice. To show such error, it must be established that the assist-ance rendered by counsel was constitutionally deficient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." **Strickland**, 466 U.S., at 687, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). To show prejudice, it must be established that the claim-ed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. **Id.**; at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052.

The **Strickland** court acknowledge that the Sixth Amendment does not require any particular response by counsel to a problem that may arise. Rather, the Sixth Amendment inquiry is into whether the attorney's conduct was "reasonable effec-tive." To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must "indulge a strong presump-tion that counsel's conduct falls within the wide range of reasonable profession-al assistance." **Id.**, at 689, 80 L.Ed.2d 674, 104 S.Ct. 2052. In giving shape to the perimeters of this range of reasonable professional assistance, **Strickland** mandates that:

> "[p]revailing norms of practice as reflected in American Bar Association Standards and the like,...are guides to determining what is reasonable, but they are only guides."
> **Id.**, at 688, 80 L. Ed.2d 674, 104 S.Ct. 2052.

In **Strickland**, this court recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." **Ibid.** Plainly, that duty is limited to legitimate , lawful conduct compatible with the very nature of a trial as a search for the truth. Although counsel must take all reasonable lawful means to attain the objective of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908.

These principles have been carried through to contemporary codifications of an attorney's professional responsibility. Disciplinary Rule 7-102 of the Model Code of Professional Responsibility (1980), entitled "Representing a Client Within the Bounds of the Law," provides:

> "(A) In his representation of a client, a lawyer shall not:
>
> ...
>
> "(4) Knowingly use perjured or false evidence.
> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. (See 1 W Burdick, Law of Crime §§ 293, 300, 318-336 (1946).

It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Model Rules of Professional Conduct

Rule 3.3, Comment; Wolfram. Client Perjury, 50 S Cal Rev 809, 849 (1977)). A statement directly in point is found in the commentary to the Model rules of Professional Conduct under the heading "False Evidence":

> "When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed."

Model Rules of Professional Conduct, Rule 3.3, Comment (1983)(**emphasis added**).

The essence of the brief amicus of the American Bar Association reviewing pratices long accepted by ethical lawyers is that under no circumstances may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what has been called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.

Considering trial counsel's representation in light of these accepted norms of professional conduct, this court must discern unbridled failures to adhere to reasonable professional standards that unequivocally makes out a deprivation of the Sixth Amendment right to counsel. The evidence shows that trial counsel knew before Applicant's trial testimony that he did not personally know the complainant and that she did not freely give Applicant the money out of the register. That Applicant confessed that he did not know the complainant and that the only reason he had told counsel that he knew the complainant was because the complainant had lied about seeing a 'gun'. That confession should have raised a 'red flag' that Applicant would commit perjury if at trial he claimed to have known the complainant. Furthermore, counsel knew that everything that Applicant had written in the letter to the complainant was only a means for executing his illegal scheme. Counsel passively played alone with the scheme by eliciting evidence from Applicant in which she knew would produce perjurious testimony.

It's obvious that throughout the entire trial counsel made no sincere or serious effort to put the prosecution's case to a meaningful adversarial testing. For whatever, reason trial counsel made no attempt to dissuade Applicant from the unlawful course of conduct, but instead willfully participated in the illegal scheme is a mystery and only trial counsel can answer that question. However, there is one thing for sure, trial counsel knew that that 18 year old high school student was not a party to 'theft'.

Nevertheless, the record as a whole clearly shows that counsel's representation of Applicant fell well outside the scope of accepted standards of professional conduct and the range of reasonable professional conduct acceptable under **Strickland**.

Under the prejudice prong of **Strickland**, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," in which Applicant has clearly demonstrated herein, 466 U.S., at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052.

In **Cuyler v. Sullivan**, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980), this court held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, providing it is established that the attorney was "actively represent[ing] conflicting interests." **Id.**, at 350, 64 L. Ed.2d 333, 100 S.Ct. 1708.

In conclusion, even if the court finds that there was no perjudice attributed to Applicant as a result of trial counsel laboring under an active 'conflict of interest' alone, this court must find that Applicant was prejudiced by counsel's ineffectiveness throughout the entire trial as a whole because counsel made serious errors and/or omissions that deprived Applicant of a fair trial, a trial whose result is unreliable. Cf. **Nix v. Whiteside**, 475 U.S. 157, 89 L.Ed.2d 123, 106 S.Ct. 988 (1986).

For all of the reasons stated herein, this Court must grant the requested relief below.

Respectfully submitted,

SIGNED ON THIS 11 DAY OF May ,2018.

/s/ Lexter Kossie
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Pro se Applicant

Prayer For Relief

WHEREFORE PREMISES ARE CONSIDERED, Applicant prays that after the Court having considered the §2241 application for a writ of habeas corpus, the documents attached thereto as exhibits, find that there are controverted, previously unresolved facts material to the legality of the Applicant's confinement that require a 'live evidentiary hearing' because the application contains sufficient, specific facts establishing by a prepondeance of the evidence, no rational juror could have found Applicant guilty beyond a reasonable doubt if not for ineffective-assistance-of-trial-counsel that violated Applicant's right under the Sixth Amendment. Applicant further pray that this Court find that there are exceptional circumstances which warrants the exercise of the court's discretionary powers to transfer the application for a hearing and determination to the district court having jurisdiction to entertain it. Finally, Applicant pray that the Court will grant any other and further relief in which the Court deems is appropriate and just under the circumstances presented herein. Applicant will forever pray.

/s/ Lexter Kossie
Lexter Kennon Kossie

Pro se Applicant