Aldape: Index & Docs. in U.S. Sup. Ct. (1/88-10/88)

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Guerra's Case

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1-9/19/88 FROM: Supreme Court of the U.S
to: William C. Zapalac A.A.G.
extension Has been granted

2-9/12/88 FROM: Supreme Cour of the U.S
to: William C. Zapalac A.A.G.
same as #1

3-5/16/88 FROM: Court of Criminal appeals in Austin, tx
to: Ricardo Aldape
a extension of time to file a motion for Rehearing is Granted

4- oct. 1882.
Affidavit from Donna Monroe

5-7/29/88 Ricardo Guerra Petitioner
Affidavit in Support of Motion for leave to Proceed in forma Pauperis on Petition for writ of certiorari

6- oct. 1988 Ricardo Guerra Petitioner
Motion for stay of execution

7- oct. 1988 Ricardo Guerra Petitioner
Motion for leave to Proceed in forma Pauperis

8- oct. 1988 Ricardo Guerra Petitioner
Application for A writ of certiorari to the Court of Criminal appeals of texas

9-5/12/88 Ricardo Guerra Appellant
Appellant's Motion for an extension of time in which to file motion for Re-Hearing

10-5/12/88 Ricardo Guerra Appellant
Appellant's Motion to stay issuance of Mandate

11-5/16/88 Ricardo Guerra Appellant
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12-5/16/88 Ricardo Guerra Appellant
Appellant's pro se Motion for Re-Hearing

13-8/10/88 FROM: Supreme court of the U.S
to: Ricardo Guerra
a notification to the opposing counsel that the case was docketed

14-oct. 1988 Ricardo Guerra - Petitioner
Application for A writ of certiorari to the
court of criminal appeals of tx.

15-8/10/88 FROM: Supreme court of the U.S.
to: Ricardo Guerra

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

September 19, 1988

William C. Zapalac, Esquire
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, TX 78711

Re: Ricardo Aldape Guerra v. Texas
No. 88-5237

Dear Mr. Zapalac:

Your request of September 12, 1988, for a further extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been further extended to and including September 19, 1988.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Christopher W. Vasil
Deputy Clerk

kb
cc: Mr. Ricardo Aldape Guerra
Michael B. Charlton, Esq.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

September 12, 1988

William C. Zapalac, Esquire
Assistant Attorney General
Supreme Court Building
Austin, TX 78711-2548

Re: Richard Aldape Guerra v. Texas
No. 88-5237

Dear Mr. Zapalac:

Your request of September 6, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including September 12, 1988.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Christopher W. Vasil
Deputy Clerk

kb
cc: Michael B. Charlton, Esq.
Mr. Ricardo Aldape Guerra

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

RICARDO ALDAPE GUERRA — CAUSE NUMBER 69,081

VS.

STATE OF TEXAS

On this 16th day of May, 1988, came on to be considered the Appellant's Motion for an Extension of Time in which to File a Motion for Rehearing.

AND SUCH MOTION IS HEREBY GRANTED and the time to file the said item has been extended until 6-6-88.

The mandate in this cause will not issue until the disposition of the motion for rehearing has been rendered.

IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: Louise Hudson
Deputy Clerk

COURT OF CRIMINAL APPEALS OF TEXAS

CONCLUSION

The Petition for Writ of Certiorari should be granted, his sentence of death set aside, and his conviction reversed with an instruction for a new trial.

Respectfully Submitted

RICARDO ALDAPE GUERRA
Petitioner/Pro Se
T.D.C. #000727
Ellis One Unit, H-17
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Petition for Writ of Certiorari to be sent on August 2, 1988, by the U.S. Postal Service to William Zapalac , Esq., Assistant Attorney General, P.O. Box 12548, Supreme Court Building, 6th Floor Austin, Texas 78711, the attorney for respondent,

RICARDO ALDAPE GUERRA

STATE OF TEXAS *
* KNOW ALL MEN BY THESE PRESENTS THAT:
COUNTY OF HARRIS *

" My name is Donna Monroe, I was a juror in the case styled The State of Texas vs. Ricardo A. Guerra. This was a Capital Murder case, in which two (2) Mannequins were introduced, they were marked States Exhibit 19220. Those two (2) Mannequins affected me tremendously especially the bloodstained one. They were eerie mannequins which were positioned right at the jury. They remained in our presence staring straight at me during the whole time. They made me nervous and I cannot help but think that they influenced my verdict. I also believe that the mannequins reinforced the witness' identification. I also don't believe that Ricardo Guerra was the actual killer, I believe the other man was. By the other man, I mean Robert C. Flores. But I did as I was instructed. I have read this statement and it is true and correct."

DONNA MONROE

On this ___ ___ day of October, 1982, DONNA MONROE personally appeared before me and stated on her oath that she read the foregoing statement and she swor that it was true and correct.

NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

MY COMMISSION EXPIRES:

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICARDO ALDAPE GUERRA,
Petitioner

VS.

JAMES A. LYNAUGH,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner RICARDO ALDAPE GUERRA, pursuant to 28 U.S.C. Sec. 1915, respectfully moves this Honorable Court for an order permitting him to proceed without prepayment of fees and costs or security, in his Petition for a Writ of Certiorari. Petitioner has attached an Affidavit of Poverty, as required by Rule 46.1 of the Rules of the Supreme Court, in support of this Motion.

RESPECTFULLY SUBMITTED

RICARDO ALDAPE GUERRA
Petitioner/Pro Se
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Motion for Leave to Proceed in Forma Pauperis to be sent on August 2, 1988, by the U.S. Postal Service to William Zapalac, Esq., Assistant Attorney General, P.O. Box 12548, Supreme Court Building, 6th Floor, Austin, Texas 78711, the attorney for respondent.

RICARDO ALDAPE GUERRA

NO. _____

RICARDO ALDAPE GUERRA PETITIONER	)	IN THE
VS.	)	SUPREME COURT
JAMES A. LYNAUGH, RESPONDENT	)	OF THE UNITED STATES

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON PETITION FOR WRIT OF CERTIORARI

I, RICARDO ALDAPE GUERRA, being first duly sworn, depose and say that I am the Petitioner in the above styled cause; in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for writ of certiorari are true.

1. Are you presently employed?

   No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you have any cash or checking or saving account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, other valuable property?

   No.

5. List the persons who are dependant upon you for support and state your relationship to these persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Ricardo Aldape Guerra

RICARDO ALDAPE GUERRA
T.D.C. #000727
Ellis One Unit, H-17
Huntsville, Texas 77343

SUBSCRIBED AND SWORN TO before me on this the 29 day of July, 1988, to certify which witness my hand and seal of office.

David Morales

NOTARY PUBLIC

My commission expires: July 1, 89 David Morales

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICARDO ALDAPE GUERRA, Petitioner	(
VS.	(
JAMES A. LYNAUGH, Respondent	(

MOTION FOR STAY OF EXECUTION

To the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner, RICARDO ALDAPE GUERRA, prays that an order be entered, pursuant to 28 U.S.C. S. 2101 (f), staying the execution of his death sentence pending a final disposition in this Court of his petition for writ of certiorari. In support of this application, Petitioner respectfully shows:

1. At a jury trial in the _____ Judicial District Court in and for Harris County, Texas, Petitioner was convicted of capital murder; affirmative findings were returned regarding the Special Issues determinative of sentence in Texas capital cases; and a judgment was entered fixing his punishment at death.

2. By opinion dated May 4, 1988, annexed hereto as Appendix A, Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Texas.

3. The Petitioner filed a timely Motion for Leave to File Motion for Rehearing, and the Court denied the said Motion on June 8, 1988, without a written order.

4. The Petitioner filed in the Court of Criminal Appeals, a Motion to Stay Issuance of the Mandate pending filing and disposition of a Petition for Writ of Certiorari in this Court. On June 8, 1988, the Court of Criminal Appeals granted a 60 day stay of issuance of the mandate. The Court's Order is annexed hereto as Appendix B.

5. Absent the granting of a stay of execution by this Court, Petitioner will be brought before the _____ Judicial District Court in and for Harris County, Texas, and an execution date will be set upon expiration of the 60 day stay granted by the Court of Criminal Appeals. The 60 day stay expires on August 8, 1988.

6. The opinion of the Court of Criminal Appeals affirming Petitioner's conviction and sentence raises federal constitutional claims as to which review in this Court is being sought. In this regard, Petitioner refers this Honorable Court to his accompanying Petition for Writ of Certiorari, which raises serious constitutional issues, including:

> "(a) Whether the State may, consistent with the Eighth Amendment and the Due Process Clause, introduce evidence of unadjudicated extraneous offenses at the punishment phase of a capital trial?
>
> (b) Whether the State violates the Equal Protection Clause when it permits the sentencer body to consider evidence of unadjudicated offenses in capital cases but not in non-capital cases?

7. Petitioner is presently in the custody of the Warden of the Ellis One Unit of the Texas Department of Corrections, Huntsville, Texas. A stay of execution would neither prejudice the State of Texas nor interfere with Petitioner's custodial status, but is necessary to assure that Petitioner is not executed before this Court can hear and determine the issues raised in his Petition for Writ of Certiorari.

WHEREFORE PREMISES CONSIDERED, Petitioner requests an order staying his execution pending further order(s) of this Honorable Court.

RICARDO ALDAPE GUERRA, PRO SE
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Motion for Stay of Execution to be sent on August 2, 1988, by the U.S. Postal Service to William Zapalac, Esq., Assistant Attorney General, P.O. Box 12548, Supreme Court Building, 6th Floor, Austin, Texas 78711, the attorney for respondent.

RICARDO ALDAPE GUERRA

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICARDO ALDAPE GUERRA,
Petitioner

VS.

JAMES A. LYNAUGH,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner RICARDO ALDAPE GUERRA, pursuant to 28 U.S.C. Sec. 1915, respectfully moves this Honorable Court for an order permitting him to proceed without prepayment of fees and costs or security, in his Petition for a Writ of Certiorari. Petitioner has attached an Affidavit of Poverty, as required by Rule 46.1 of the Rules of the Supreme Court, in support of this Motion.

RESPECTFULLY SUBMITTED

RICARDO ALDAPE GUERRA
Petitioner/Pro Se
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Motion for Leave to Proceed in Forma Pauperis to be sent on August 2, 1988, by the U.S. Postal Service to William Zapalac, Esq., Assistant Attorney General, P.O. Box 12548, Supreme Court Building, 6th Floor, Austin, Texas 78711, the attorney for respondent.

RICARDO ALDAPE GUERRA

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICARDO ALDAPE GUERRA, Petitioner VS. JAMES A. LYNAUGH, Director, Texas Department of Corrections, Respondent	DEATH PENALTY CASE

****

APPLICATION FOR A WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS OF TEXAS

****

RICARDO ALDAPE GUERRA
Petitioner/Pro Se
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

TABLES OF CASES

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QUESTIONS PRESENTED

1. Whether the trial court abused his discretionary authority to enforce "The Rule," by allowing the testimony of witness Marie Estelle Armijo in violation of the rule for sequestration, and against Petitioner's objection, whereas her testimony bolstered the State's key witness testimony.

   (a) Whether the trial court's action in admitting the testimony of witness Marie Estelle Armijo in violation of the rule deprived Petitioner of due process of law in violation of the Fifth, Sixth and Fourteenth Amendment to the Constitution of the United States.

   (b) Whether the Texas Court of Criminal Appeals' two steps approach in determining whether the trial court abused his discretion in allowing witness Marie Estelle Armijo's testimony in violation of the rule denied the Petitioner substantive and procedural due process and his Texas statutory right to place witnesses under the rule.

2. Whether the State may, consistent with the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, introduce evidence of unadjudicated extraneous offenses at the punishment phase of a capital trial.

   (a) Whether the trial court's failure to instruct the jury, in regard to evidence of unadjudicated extraneous offenses, that it could consider the evidence only if they believed beyond a reasonable doubt that Petitioner committed the unadjudicated offenses and only as they related to the second special issue asking whether there is a probability that the defendant

would commit criminal acts of violence that would constitute a continuing threat to society, denied Petitioner a fair trial, & due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the State violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States when it permits the sentencer body to consider evidence of unadjudicated extraneous offenses in capital cases but not in non-capital cases.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is not yet reported; a copy of the slip opinion is attached as Appendix A.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is based on the following:

1. Petitioner's conviction and sentence of death were affirmed by the Court of Criminal Appeals of Texas on May 4, 1988.
2. His motion for rehearing, was denied by the Court without written opinion, on June 8, 1988.
3. On June 8, 1988, the Court of Criminal Appeals of Texas granted Petitioner's motion to stay the mandate until August 8, 1988.
4. Rule 17.1 (c), Rules of the Supreme Court: The State Court "has decided an important question of federal law which has not been, but should be, settled by this Court, (and) has decided a federal question in a way in conflict with applicable decisions of this Court."
5. 28 U.S.C. Section 1257 (3): "Where the validity ... of a State statutes drawn in question on the grounds of its being repugnant to the Constitution of the United States ...(and) where any title, right, privilege or immunity is specially set up or claimed under the Constitution ... of the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime has been committed ...

2. Eighth Amendment to the Constitution of the United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

3. Fourteenth Amendment to the United States Constitution: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

4. Article 37.071, Texas Code of Criminal Procedure:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence...

(b) On conclusion of the presentation of the evidence, at the penalty stage of the trial, the court shall submit the following: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defen-

dant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The State must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted."

5. Article 37.07, Texas Code of Criminal Procedure:

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

"(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any conviction material to the offense charged."

6. Section 19.03, Texas Penal Code:

"(a) A person commits an offense if he commits murder as defined under Section 19.02 (a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman."

7. Article 36.03, Texas Code of Criminal Procedure:

"At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the..."

8. Article 36.04, Texas Code of Criminal Procedure:

"The party requesting the witnesses to be placed under rule may designate such as he desires placed under rule, and those NOT designated will be exempt from the rule, or the party may have all the witnesses in the case place under rule. The enforcement of the rule is in the discretion of the court."

9. Article 36.05, Texas Code of Criminal Procedure:

"Witnesses under rule shall be attended by an officer, and all their reasonable wants provided for, unless the court, in its discretion, directs that they be allowed to go at large; but in no case where the witnesses are under the rule shall they be allowed to hear any testimony in the case."

STATEMENT OF THE CASE

The following summary of the substantive facts of the offense contained in the minority opinion by the Court of Criminal Appeals of Texas is accurate and is adopted herein:

"Houston Police Officer James Harris was on "K-9" patrol, his only partner a police dog, on the evening of July 13, 1982, in what was described as a lower middle class Mexican-American neighborhood in Houston. At approximately 10:00 p.m. Harris spoke to a pedestrian, George Brown, who informed him that a black "Cutlass" had only moments before attempted to run over Brown, forcing him into a ditch. Other witnesses had seen this car 'driving fast. . . spinning tires, burning rubber.' Harris gave pursuit.

"Less than a minute later Harris came upon a black Buick with red vinyl top stalled at the intersection of Edgewood and Walker. Harris stepped out of his vehicle, leaving the door open, and beckoned to the occupants of the Buick. Appellant, who was the driver,

and his companion, Roberto Flores, approached Harris. One of the two then shot Harris three times, the bullets entering the left side of his face and exiting on the right. Three spent nine millimeter cartridges were subsequently found beside Harris' vehicle, and three bullets fired from a Browining nine millimeter pistol were recovered from a house in the direction in which the slugs that killed Harris would have traveled. The shots proved fatal. Appellant and Flores then fled on foot in an easterly direction from Walker.

"At this time Jose Armijo and his two children, Jose, Jr., and Lupita, were driving west on Walker. From the passenger side of the car, on the north side of Walker, came a shot from a Browning nine millimeter pistol that killed Armijo, Sr. Two nine millimeter cartridges were found on the north side of the street. Also found, on the south side of Walker, were two cartridges from a .45 caliber pistol.

"Approximately an hour later Flores died in a shootout with Houston police, during which an officer was also seriously wounded. The shootout occurred outside the residence next door to which appellant had been living, several blocks from the scene of Harris' killing. Under flores' body was found a Browning nine millimeter pistol, which he had used in the gun battle with police. It was positively shown this was the weapon that killed Armijo, Sr.; and it is also reasonable to believe, although it could not be proved definitively, that this gun killed Harris. Also found on Flores were a magazine containing 20 nine millimeter rounds, and Harris' service revolver. Police found appellant at the same location,

crouching behind a horse trailer. The .45 caliber pistol which had been fired earlier was discovered wrapped in a bandana under the trailer, two feet from where appellant was found.

"The sole contested issue at trial was whether Flores, rather than appellant, shot officer Harris. The State produced five witnesses, including Jose Armijo, Jr., who "saw" the shooting and testified that appellant was the perpetrator. Appellant and two other eyewitnesses testified, in essence, that Flores actually shot Harris. The State's own witnesses contradicted one another as to which man had run down the north side, which the south, of Walker -- a critical question, since whoever fled down the north side shot Armijo with the same weapon used to kill Harris. No witness went unimpeached. Thus we apparently have, in addition to the undisputed testimony as set out in Part A, ante, nothing more than a classic "swearing match." Nonetheless, for reasons to be developed, I believe that the testimony of Jose Armijo, Jr., was critical to the State's case. I turn first to examination of the testimony of the State's other witnesses --eyewitnesses . . .

"Armijo, Jr., ten years old at the time of trial, testified before any of the State's other eyewitnesses. Thus he gave the jury its initial impression of the events surrounding the actual shooting of Officer Harris.

"Armijo testified that he was coming home from the auto parts store with his father and sister when they noticed "the black car" and Harris' vehicle blocking the intersection ahead. Armijo saw two men with their hands on the hood of the patrol car.

"Q: What did you see?

A: The other one scratched his back.

Q: Which scratched his back?

A: The one that has long hair.

Q: All right. was the man that had the long hair closer to the police officer when he had his hands on the hood or was he the one farther away from the police officer?

A: Closer.

Q: And what did you see that man do?

A: He shot the police.

Q: Before he shot the police officer, did you see him do anything with his hands?

A: Yes. He acted like he was scratching his back.

Q: When you said -- he took his hands from off the police car and acted like he was scratching his back?

A: Yes.

Q: After he did that, what happened then?

A: He took out the gun and shot the police.

Q: Do you know how many times he shot the policeman?

A: No.

Q: Did you see any fire coming from the gun when he shot the police officer?

A: Yes.

Q: What did you see happen to the policeman after he was shot?

A: He fell down on the ground.

Q: Do you remember what the man was wearing that was standing closer to the police officer, that scratched his back?

A: Yes.

Q: And came out with a gun?

A: Yes.

Q: What was he wearing?

A: A green shirt.

"When found, appellant was wearing a green shirt; and indeed, Armijo apparently identified appellant in court as the man who shot Harris; but see n. 2, ante. One of the men, Armijo did not know which, then took Harris' gun and "they started running and shooting all over the place." "The one with the green shirt" ran by the car and shot into it, killing Armijo, Sr.

"The State then elicited, still on direct, that at the police lineup early the next morning, Armijo, Jr., told police he could identify no one, but that this had been "a lie." Armijo explained that he had not identified appellant because, as he said, "I was scared he might come out and get me."

"On crossexamination Armijo's perceptions of the shooting itself were not tested. Instead defense counsel focused on a statement the boy had given police the night of the shooting in which he had said he did not know what the two men looked like nor what they had worn. Armijo admitted that at the lineup he had been told that the one way mirror would prevent those in the lineup from seeing him. It was further established that, once he heard the first shots, Armijo pushed his sister to the floorboard of the car where they remained until the two men had run well past them.

"Then, the following occurred, and with it were engendered appellant's three grounds of error at issue here:

"Q: Has anybody talked to you about this case?

A: Yes.

Q: The Prosecution, the prosecutors, Mr. Bax and Mr. Moen?

A: Yes.

Q: Have the police talked to you?

A: Yes.

Q: Yesterday?

A: Yes.

Q: Did they talk to you any other times?

A: Yes.

Q: Did they talk to you Saturday?

A: Yes.

Q: Did they talk to you today?

A: Yes.

Q: Who talked to you?

A: I forgot his name.

Q: Mr. Bax?

A: Yes.

Q: And Mr. Moen?

A: Yes.

Q: Any police officers talk to you?

A: Yes.

Q: So after you have talked to these people, you have changed your complete version of the facts and they are completely different from what you told the police back on the night of the incident; isn't that correct?

A: Yes."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

At the conclusion of the crossexamination of the witness Armejo, Jr., there was an outburst "from a woman in the back of the courtroom," later shown to be Marie Armijo, Jose Armijo, Jr.'s, mother.

She was escorted out by the bailiff, not to return until she herself testified toward the end of the State's case in chief. Thus she did not hear the bulk of the State's eyewitnesses testimony. But, though she spoke no English, she did hear her son's testimony, translated to her by her sister-in-law.

After a hearing, and over repeated objections -- including that admission of Mrs. Armijo's testimony violated the trial court's own order at the beginning of trial that all witnesses be placed under the rule, Marie Armijo was allowed briefly to take the witness stand and testify through an interpreter. She testified that on the night of the shooting she had gone to the hospital where her husband had been taken, while Jose, Jr., went to the police station to give a statement. She did not see Jose again until 8:30 the following morning. At this time he cryingly told her:

> ". . . that he had seen the person that had done it and he was able to identify the person, but he was very much afraid to tell the police about that and didn't think he should tell them."

Further, she testified that since his father's death, Jose, Jr., had not been the same carefree child as before, and that he was afraid of the person that had shot his father. It was established that on the Saturday prior to her testifying, Marie Armijo had informed prosecutors that her son could identify the killer. Finally she confirmed that her son had also been afraid to testify at trial[1/].

On crossexamination it was established that Marie Armijo had made the outburst at the end of her son's testimony, which had been translated for her. Then:

1/ See footnote 5 at Judge Clinton's dissenting opinion.

"Q: Have you talked to your son since then?

A: Yes, sir.

Q: Did you talk to your son yesterday?

A: Yes, about he was a witness and what was the truth.

Q: Did he talk about the facts in this case?

A: Yes, sir"

Again objection was made that the witness had been allowed to testify in violation of the rule. The objection was overruled.

The two-step approach of the Court of Criminal Appeals of Texas: On direct appeal, Petitioner asserted that the trial court in admitting the testimony of Marie Estelle Armijo in violation of the rule for sequestration of witnesses. Article 36.03, Texas Code of Criminal Procedure. See Slip opinion at Pp. 39. The majority in the Court's rejected Petitioner's claim by adopting the following two-step approach in answering the question of whether a trial judge has abused his discretion in allowing a violation of "The Rule:"

> "The appellate court must first determine what kind of witness was involved. If the witness was one who had no connection with either the State's case-in-chief or the defendant's case-in-chief and who, because of a lack of personal knowledge regarding the offense, was not likely to be called as a witness, no abuse of discretion can be shown. On the other hand, if the witness was one who had personal knowledge of the offense and who the party clearly anticipated calling to the stand, then the appellate court should then apply the Haas test as amended above and in Archer."

The Court concluded: "In the instant case, Mrs. Armijo had no personal knowledge of the offense. Although her husband and children were directly involved, she was not present during the commission of the offense and thus could shed no light on Appellant's involvement. Only after her son's identification of appellant was

impeached by a prior inconsistant statement was it necessary for the State to put Mrs. Armijo on the stand. Consequently, we find her to be the same type of witness as Peggy Stevens, in Green v. State, supra. Although not intended to be a witness, because of events which occurred during the trial, Mrs. Armijo became a necessary witness. Based on the record before us, we are unable to say that the trial court abused its discretion in allowing Mrs. Armijo to testify." Id. at Slip opinion Pp. 39-40.

UNADJUDICATED EXTRANEOUS OFFENSES

At the punishment phase of the trial evidence was introduced to show that Petitioner, Roberto Flores and Enrico Lunas Torres, committed a robbery at a gun store only five days before the instant offense. The witnesses who testified to this effect did not appear to have identified the Petitioner prior to trial, nor the record reflects that Petitioner was placed in a police lineup for such a purpose. The record is silent as to whether defense counsel knew in advance that the State was going to adduce such unadjudicated extraneous robbery.

In direct appeal the Petitioner asserted that the trial court erred in admitting into evidence at the punishment phase, an extraneous offense for which a final conviction had not been obtained and for which no formal notice had been provided, in violation of due process of law and the equal protection of the law.

In the majority opinion, the Court, in determining whether Petitioner's due process right was violated or not, went on to state:

> "This Court has previously held that, absent a showing of unfair surprise, proof of unadjudicated, extraneous offenses at the punishment stage of a capital case is admissible."

In deciding Petitioner's claim adversily to him, the Court concluded: "Appellant does not make a claim that he was surprised by the introduction of this evidence, nor did he make such claim at trial." The Court did not address Petitioner's Equal Protection claim.

REASONS FOR GRANTING THE WRIT

I. Violation of "The Rule" Issue

Article 36.03, Texas Code of Criminal Procedure reads in relevant part:

> "At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule."

"The purpose of the rule is 'to prevent the testimony of one witness from influencing the testimony of another.' Cook v. State, 30 Tex. App. 607, 18 S.W. 412 (1892). The genesis of the rule is said to lie in the History of Susanna, a book of the Apocrypha:

> "The story of Susanna is familiar. Her accusers testified in the presence of each other to her guilt. She was about to be condemned when Daniel interposed, saying: 'Put these two aside, one far from another, and I will examine them.' His examination disclosed such discrepancies in their testimony as resulted in the release of Susanna and the condemnation of her accusers. Since then the importance of the separation of witnesses has been regarded as a valuable adjunct to the cross-examination of witnesses and a right accorded whenever demanded in the trial of causes (citations omitted)."

Bishop v. State, 81 Tex. Cr. R. 96, 194 S.W. 389 (1917).

"It had long been held under the common law that 'the admissibility of witnesses who have violated the rule, or who have not been placed under the rule, is within the sound discretion of the court, and such discretion will be presumed to be correctly

exercised until the contrary appears.' Cook v. State, supra. That holding was essentially codified in Art. 645, Vernon's Ann. Code of Criminal Procedure (1925), now article 36.04, V.A.C.C.P., which provides, inter alia, that 'the enforcement of the rule is in the discretion of the court,' see Wilson v. State, 158 Tex. Cr. R. 334, 255 S.W.2d (1953), and was most recently reiterated in Green v. State, 682 S.W.2d 271 (Tex. Cr. App. 1984).

"The trial court abuses its discretion when its refusal to enforce the rule works to the injury or prejudice of the accused. Hougham v. State, 659 S.W.2d 410 (Tex. Cr. App. 1983); Haas v. State, 498 S.W.2d 206 (Tex. Cr. App. 1973). Relevant criteria for determining injury are (1) whether the witness actually heard, either (2) a defense witness whom he then contradicts, or (3) a prosecution witness whose testimony he subsequently corroborates, (4) on an issue of fact bearing upon guilt or innocence. Hougham v. State, supra (Clinton, J., concurring); Day v. State, 451 S.W.2d 508 (Tex. Cr.App. 1970); Wilson v. State, supra. Archer v. State, 703 S.W.2d 664 (Tex. Cr. App. 1986).

"The record clearly indicates that Mrs. Armijo actually heard the testimony of her son. Though that testimony had to be translated to her, her outburst and explanation for it indicate that she well understood the testimony which she subsequently corroborated. Furthermore, during the interim between her son's testimony and her own, they discussed the facts and 'what was the truth.' Thus the only impediment to a finding of abuse of discretion on the part of the trial court in allowing Mrs. Armijo's corroborating testimony is a determination whether what she corroborated was 'an issue of fact

bearing upon guilt or innocence.' To this end, it is appropriate to take a glance at the evidence upon which the jury relied to find Petitioner, not Roberto Flores, killed Officer Harris.

"Jose Armijo, Jr., was the only State's witness who saw both Petitioner and Flores and could testify unambiguously that Petitioner perpetrated the shooting. His were the only perceptions that went unimpeached. See: Judge Clinton's dissenting opinion at Part IB.

The critical factor for the jury in assessing Jose's testimony, in view of his prior inconsistent statements to police, was his credibility as a witness. In anticipation of this, and to soften its inevitable effect upon the jury, the State elicited the prior statement, along with an explanation, during Jose's direct testimony. A great deal depended upon the plausibility of the explanation, and a blow to that could prove critical. Thus, though Marie Armijo did not testify to facts bearing directly upon determination of Petitioner's guilt or innocence, her testimony directly impacted the credibility of the witness whose testimony most bore upon Petitioner's guilt or innocence. Having heard her son's testimony, she was in an ideal position to know precisely how to testify in order to rehabilitate him. There is a considerable likelihood her testimony affected the jury's verdict -- indeed, it may have sealed the finding of guilty in a case otherwise rife with doubt.

"The majority finds the situation in Green v. State, supra, analogous to that here, and thus concludes there has been -- indeed, there 'can be' -- no abuse of discretion shown. Green, however, is easily distinguishable. There the witness Stevens had been in attendance the entire trial and had overheard Green speaking informally in the

courtroom. Thus she was in a position to dispute defense testimony that Green did not have a speech impediment, which was critical issue in the case. However, Stevens 'was apparently not connected with the case in any way and simply heard (the defendant) speak.' The same cannot be said of Marie Armijo. Her husband had been shot to death only moments after the events in issue at Petitioner's trial, and her son was the State's principal witness. Her emotional investment in the case was clearly manifested by her outburst in the courtroom at the conclusion of Jose's testimony

"The majority derives far more from the somewhat lean analysis in Green than will withstand scrutiny. From the language quoted the majority identifies a 'two-step approach' to measuring abuse of discretion in enforcement of the rule. If the witness had no connection with the proponent's case in chief and was not contemplated as a 'likely' witness at the outset 'because of lack of personal knowledge regarding the offense,' 'no abuse of discretion can be shown.' Only 'if the witness was one who had personal knowledge of the offense and who the party clearly anticipated calling to the stand' will the test as refined in Archer v. State, supra, even come into play. In other words, rebuttal or impeachment witnesses are effectively insulated from enforcement of the rule. Green did not purport to mandate such a 'two-step approach,' however. There the Court merely observed that there are two identifiable classes of witnesses: those who were initially placed under the rule, and those who were not because not originally believed to be necessary either to the State's case in chief or to rebut anticipated defense evidence. There is no suggestion that a prejudice analysis would

be inapposite to an appellate determination of whether permitting the testimony of a member of the latter class who has listened to all or portions of the trial was an abuse of discretion. There is only the observation that the witness Stevens was 'not connected with the case in any way . . .' By this it could be properly perceived that the Court meant it could imagine no respect in which Stevens' having heard the evidence at trial could have influenced the substance of her testimony."

Considering the correlation of the above delineated factors, the thrust of the Petitioner's claim is that the admission of Mrs. Armijo's testimony in violation of the rule deprived Petitioner of his right to a fair trial and to due process of law, and an evaluation of the constitutionality of the Texas Court of Criminal Appeals' "two-step approach" in answering the question of whether a trial judge has abused his discretion in allowing a violation of "The Rule" is both a substantive and a procedural due process question.

II. The Unadjudicated Extraneous Offenses Issue

In this case, the State had the burden of proving beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Texas Code of Criminal Procedure, Article 37.071 (b)(2). To that end, the State adduced into evidence unadjudicated extraneous offense of armed robbery. Petitioner was not given notice of the State's intention to use that offense at the punishment phase, nor did the trial court instruct the jury that it could consider the evidence only if they believed beyond a reasonable doubt that Petitioner committed the unadjudicated armed robbery and only as

they related to the second special issue.

While Texas has found that the admission of unadjudicated extraneous offenses is not of constitutional significance and have required merely that the evidence be relevant, see Milton v. State, 599 S.W.2d 824 (Tex. Cr. App. 1980) (en banc), Cert. denied 451 U.S. 1031 (1981), this Court has consistently held that in any proceeding to enhance punishment "the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty must be fully protected." Graham v. West Virginia, 224 U.S. 626 (1912); Chewing v. Cunningham, 368 U.S. 443 (1963).

Nowhere is this principle more firmly established than with respect to a sentencing trial in which the defendant faces execution. "Fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978); See also Gardner v. Florida, 430 U.S. 349 (1977).

The use of unadjudicated extraneous offenses at the Texas capital-sentencing procedure presents a serious constitutional issue, as it subverts a capital-defendant 's right to an impartial jury, and the principle ("In the need for reliability in the determination that death is the appropriate punishment") so often ennunciated by this Court as well.

Certainly, the use of unadjudicated extraneous offenses at the sentencing phase increases the possibility of a death sentence, and hence they may be relevant to punishment. However, they, too increases the possibility of encouraging prosecutors to carve extraneous

of virtually anything regardless of whether the evidence to be adduced satisfies the requirement of proof beyond a reasonable doubt or not. See Santana v. State, 714 S.W.2d 1 (Tex. Cr. App. 1986). For if the evidence do not satisfy the standard of proof beyond a reasonable doubt, the inflamatory effect in the minds of the jury will still remain. As reasoned by Justice Marshall, joined by Justice Brennan, in Williams v. Lynaugh, ___U.S.____, 98 L.Ed. 2d (1987), "a jury that already has decided (concluded) unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice."

In the instant case, Petitioner suffered the overwhelming prejudice inherent in the allegation of the particular extraneous unadjudicated offense of armed robbery. The unproven allegations, particularly that the Petitioner participated in the aggravated robbery of a gun store, with intent to obtain firearms for use in criminal acts involving violence (see Slip opinion at Pp. 13), were so prejudicial that no generalized "reasonable doubt" instruction (as given in this case) focused only on special issue No. 2 could ever cure the overwhelming prejudice. See: e.g., Michelson v. United States 335 U.S. 469, 475-76 (1984).

III. The Equal Protection Issue

As Justice Marshall observes in his dissent opinion to the denial of certiorari in Williams v. Lynaugh, supra, the Texas rule on admitting evidence of unadjudicated extraneous offenses also raises Fourteenth Amendment Equal Protection considerations. Texas forbids the use of such evidence in sentencing determinations in

non-capital cases recognizing their extreme prejudice. In providing extra protection in non-capital sentencing decisions, Texas is subverting the notions of equity and justice. This Court has repeatedly recognized that the finality and horror of capital sentencing decisions are qualitatively different than other sentencing determinations and "there is a corresponding difference in the need for reliability in the determination that death is the appropriate decision in an specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). For Texas to provides greater protection to defendants in non-capital cases as opposed to capital murder cases is irrational and violative of Petitioner's equal protection rights under the Fourteenth Amendment to the Constitution of the United States.

In Weber v. Aetna Casualty & Surety Company, 406 U.S. 173, 92 S.Ct. 1400 (1972), this Court ennunciated the test to determine the validity of statutes under the Equal Protection Clause as follows:

> "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? Id. at U.S. 173, S.Ct. 1405.

While it may be presumed that the State has an interest in exacting the death penalty, and to that end, evidence of extraneous offenses is relevant, ~~that~~ the State's interest does not outweigh the Petitioner's interest in reliability and equality. On the other hand, the use of unadjudicated extraneous offenses at the capital sentencing phase endanders Petitioner's rights to a fair and impartial trial, and due process of law as well.

CAUSE NO. 69,081

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, AUSTIN, TEXAS

RICARDO ALDAPE GUERRA .....APPELLANT

VS.

THE STATE OF TEXAS .....APPELLEE

APPELLANT'S MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE MOTION FOR RE-HEARING

TO THE HONORABLE JUDGES OF THE SAID COURT:

NOW COMES Ricardo Aldape Guerra, Appellant in the above styled and numbered cause, and by himself respectfully moves this honrable Court to entertain and grant this (his) Motion for an Extension of Time in Which to File Motion for Rehearing, for a period of fifteen (15) additional days, pursuant to Rules 100 and 230 of the Rules of Post Trial and Appellate Procedure In Criminal Cases, and in support hereof Appellant will show this Court the following:

1. The Appellant was convicted of the offense of capital murder and the trial court assessed his punishment at death after the jury affirmatively answered the issues submitted to them at the punishment phase of the trial.

2. Once Appellant had been adjudged guilty of capital murder and sentence to death, the trial court, having found that Appellant was too poor to hire and couldn't hire an attorney to perfect his appeal, proceeded to appoint Mr. Michael B. Charlton to represent him on direct appeal.

3. On May 4, 1988, this Court affirmed the

judgment of conviction and sentence of death of Appellant, and at such a time Mr. Michael B. Charlton was relieved of all obligations with Appellant, as criminal defendants do not have a constitutional or statutory right to counsel to pursue motions for rehearing or applications for review in the Supreme Court of the United States.

4. The Appellant wrote to his appeal attorney as soon as he learned of this Court's decision in his case, to discover whether he (Mr. Charlton) is intending to remain on his case (voluntarily) or not. The Appellant, however, hasn't heard from him as of yet, and he has reasons to believe that his appeal attorney is not going to represent him any further.

5. The Appellant also wrote to the honorable Thomas Lowe, as soon as he learned of this Court's decision (on May 5th), and requested from him a copy of this Court's opinion . The Appellant, however, hasn't received a copy of it as of yet, and as of this writing, the Appellant has less than five working days in which to file his motion for rehearing.

6. Since it is indispensable that the Appellant reads this Court's opinion, in order to prepare and file a meaningful motion for rehearing, the granting of this motion should be deemed appropriate.

7. The Appellant will diligently prepare and file a motion for rehearing in this Court should this Court grant him the fifteen (15) days extension of time herein being requested.

WHEREFORE, the Appellant prays that this Court grant him fifteen (15) extension of time in which to file a motion for rehearing in this cause, and such other and further relief to which the Appellant may be entitled in justice and equity.

RESPECTFULLY SUBMITTED,

RICARDO ALDAPE GUERRA
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been served upon the Appellate Section of the Harris County District Attorney's Office and upon the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 by mailing same with duly affixed postage in the U.S. Postal Service this 12 day of May, 1988.

Ricardo Aldape Guerra

CAUSE NO. 69,081

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, AUSTIN, TEXAS

RICARDO ALDAPE GUERRA .....APPELLANT

VS.

THE STATE OF TEXAS .....APPELLEE

APPELLANT'S MOTION TO STAY ISSUANCE
OF MANDATE

TO THE HONORABLE JUDGES OF THE SAID COURT:

Subject to Appellant's Motion for Leave to File Appellant's Motion for Rehearing and this honorable Court's Order thereon, comes now Ricardo Aldape Guerra, Appellant in the above entitled and numbered cause and by himself moves that issuance of the mandate of affirmance in this cause be stayed pending the filing and determination of a timely petition for a writ of certiorari in the Supreme Court of the United States; or, in the alternative, for a period of sixty (60) days in which to apply to a justice of the Supreme Court of the United States for a stay of execution pending the filing and determination of a timely petition for a writ of certiorari. In Support of the aforesaid motion, Appellant would show the Court as follows:

1. The Appellant was convicted of the offense of capital murder and the trial court assessed his punishment at death after the jury affirmatively answered the issues submitted to them at the punishment phase of the trial.

5. Unless a stay is granted, the mandate of this Court will issue, an execution date will be set, and Appellant will be subject to execution without having the opportunity to present to the Supreme Court of the United States the substantial constitutional questions set forth above, and others as well.

WHEREFORE, the Appellant prays the issuance of the mandate in this cause be stayed pending the filing and determination of timely petition for a writ of certiorari in the Supreme Court, or, in the alternative, for a period of sixty (60) days.

RESPECTFULLY SUBMITTED,

RICARDO ALDAPE GUERRA
T.D.C. #000727
Ellis One Unit, G-15
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been served upon the Appellate Section of the Harris County District Attorney's Office and upon the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 by mailing same with duly affixed postage in the U.S. Postal Service this 12 day of May, 1988.

Ricardo Aldape Guerra

CAUSE NO. 69,081

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, AUSTIN, TEXAS

RICARDO ALDAPE GUERRA ..... APPELLANT

VS.

THE STATE OF TEXAS ..... APPELLEE

MOTION FOR LEAVE TO FILE MOTION
FOR RE-HEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW RICARDO ALDAPE GUERRA, Appellant in the foregoing styled and numbered cause, and by himself on rehearing only, moves this honorable Court for leave to file his Motion for Rehearing in the foregoing styled and numbered cause, which is incorporated herein by reference in the interest of brevity, and in addition to the matters set forth therein will show this honorable Court that this Court's opinion in the foregoing styled and numbered cause delivered on May 4, 1988, is erroneous for the reasons set forth in the Motion for rehearing accompanying this document.

WHEREFORE, PREMISES CONSIDERED, the Appellant respectfully moves this honorable Court to grant leave to file his Motion for Rehearing herein.

RESPECTFULLY SUBMITTED,

RICARDO ALDAPE GUERRA
T.D.C. #000727
Ellis One Unit, H-17
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been served the Appellate Section of the Harris County District Attorney's Office and upon the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 by mailing same with duly affixed postage in the U.S. Postal Service this 16th day of May, 1988.

Ricardo Aldape Guerra

CAUSE NO. 69,081

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

RICARDO ALDAPE GUERRA ..... APPELLANT

VS.

THE STATE OF TEXAS ..... APPELLEE

APPELLANT'S PRO SE MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW RICARDO ALDAPE GUERRA, Appellant who was found guilty of the offense of capital murder and following the presentation of evidence on the issue of punishment, the jury answered affirmatively two special issues submitted to them in accordance with Article 37.071 of the Texas Code of Criminal Procedure. Appellant was accordingly sentenced to death. This honorable Court, on May 4, 1988, issued an opinion affirming both the conviction and sentence of death of Appellant for the offense of capital murder. Accordingly, the Appellant, by himself on rehearing, respectfully moves this Court to grant rehearing in the foregoing styled and numbered cause pursuant to Rule 100 of the Rules of Post Trial and Appellate Procedure in criminal cases. In support of the aforesaid motion, the Appellant would show the following:

1. In Ground of Error Number ~~Sixteen~~ seventeen (17), the Appellant asserted that the trial court erred in admitting into evidence during the punishment phase, an extraneous offense for which a final conviction had not been obtained and for which no formal notice had been provided. In the majority opinion in the instant case, with respect to this ground of error, thi honorable

Court, in determining whether Appellant's due process right was violated or not, went on to state:

> "This Court has previously held that, absent a showing of unfair surprise, proof of unadjudicated, extraneous offenses at the punishment stage of a capital case is admissible."

In deciding Appellant's claim adversely to him, this Court concluded: "Appellant does not make a claim that he was surprised by the introduction of this evidence, nor did he make such a claim at trial."

This honorable Court's rule to the effect that absent a showing of unfair surprise, proof of unadjudicated extraneous offenses at the punishment stage of a capital case is admissible, is constitutionally infirm because it erodes the fair notice requirement of the due process clause of the Fifth Amendment --one of Appellant's most guarded rights. In re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1948).

In a well considered dissent to the denial of certiorati in Williams v. Lynaugh, _____U.S._____, 98 L.Ed.2d (1987) Justice Marshall, joined by Justice Brennan, evaluates in detail the constitutionality of this Texas procedure. The analysis is directly applicable to this ground of error.

Allowing the introduction of non-adjudicated extraneous offenses, particularly without the benefits of a formal notice of the State's intention to use them at the punishment stage, and of a limiting instructions (that the jury could consider the evidence only if they believed beyond a reasonable doubt that Appellant committed the unadjudicated offense and only as they related to the second special issue), is a violation of the due process protections of the Fifth and Fourteenth Amendments and the special Constitutional safeguards mandated in capital cases under the Eighth Amendment. See e.g.,

Eddings v. Oklahoma, 455 U.S. 104, 117--18 (1982) (O'Connor, J. concurring) ("Because sentences of death are 'qualitatively different' from prison sentences, this Court has gone extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.").

This Court, in rejecting Appellant's ground of error, makes much of the fact that the State gave to the trial attorney access to the entire State's file, and hence that Appellant does not claim unfair surprise. By focusing on this generalized assumption (that the trial attorney knew that the State was going to adduce the extraneous offense herein discussed), the Court ignores the overwhelming prejudice inherent in the allegation of that particular extraneous unadjudicated offense. The unproven allegations, particularly that the Appellant participated in the aggravated robbery of a gun store, with intent to obtain firearms for use in criminal acts involving violence (see: Slip opinion, page #13), are so prejudicial that no generalized "reasonable doubt" instruction (as given in this case) focused only on special issue No. two (2) could ever cure the overwhelming prejudice. See: e.g., Michelson v. United States, 335 U.S. 469, 475-76 (1984). This Court's rule to the effect that absent a showing of unfair surprise, proof of unadjudicated extraneous offenses at the punishment stage of a capital case is admissible, as it was applied to this case, runs afoul of the vagueness doctrine. See: e.g., Grayned v. City of Rockfold, 408 U.S. 104, 108 (1972).

This Court failed to address Appellant's claim that the admission of the unadjudicated extraneous offense of aggravated robbery at the

punishment stage.

As Justice Marshall notes in his dissent to the denial of certiorari in Williams v. Lynaugh, supra., the Texas rule on admitting evidence of unadjudicated extraneous offenses also raises Fourteenth Amendment equal protection considerations. Texas forbids the use of such evidence in sentencing determinations in non-capital cases recognizing their extreme prejudice. In providing extra protection in non-capital sentencing decisions, as a prominent lawyer put it, Texas rule turns traditional Constitutional wisdom on its head. The Supreme Court has repeatedly recognized that the finality and horror of capital sentencing decisions are qualitatively different than other sentencing determinations and "there is a corresponding difference in the need for reliability in the determination that death is the appropriate decision in a specific case." Woodson. v. North Carolina, 428 U.S. 280, 305 (1976, see also, Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982). For the Texas Courts to provide greater protection to defendants in non-capital cases as opposed to capital murder cases is irrational and violative of Appellant's equal proction rights under the Fourteenth Amendment.

2. In Ground of Error Number Eleven (11), the Appellant asserted that the trial court erred in admitting the testimony of Marie Estelle Armijo in violation of the rule for sequestration of witnesses. The majority in this Court's opinion rejected the Appellant's claim, and the Honorable judges Clinton and Teague dissented to such a rejection.

Appellant, in the interest of brevity, respectfully incorporates by reference the arguments and authorities set forth in support of

of this Ground of Error in the dissenting opinion of the Hnorable judge Clinton.

3. The Appellant, by filing this Motion for Rehearing, does not waive any other ground heretofore presented to this honorable Court.

WHEREFORE, PREMISES CONSIDERED, the Appellant respectfully moves this honorable Court to grant this Motion for Rehearing and reverse the judgment in the foregoing styled and numbered cause and remand this cause to the 248th District Court of Harris County, Texas, for a new trial for the reasons stated hereinfore.

Respectfully submitted,

Ricardo Aldape Guerra
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been served upon the Appellate Section of the Harris County District Attorney's Office and upon the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 by mailing same with duly affixed postage in the U.S. Postal Service this 16th day of May, 1988.

Ricardo Aldape Guerra

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 10, 1988

Mr. Ricardo A. Guerra #000727
Ellis One Unit
Texas Dept. of Corrections
Huntsville, TX 77343

Re: Ricardo Aldape Guerra, Applicant v.
Texas
v. Texas
No. 88-5237

Dear Mr. Guerra #000727:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on August 6, 1988 as No. 88-5237.

A form is enclosed for notifying opposing counsel that the case was docketed.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

by Kimberly A. Parker
Kimberly A. Parker
Assistant

Enclosures

SUPREME COURT OF THE UNITED STATES

_____
Petitioner—Appellant

No. _____

_____
Respondent—Appellee

To _____ Counsel for Respondent—Appellee:

YOU ARE HEREBY NOTIFIED that a petition for a writ of certiorari—an appeal—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the _____ day of _____, 19_____.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed with the Clerk by the counsel of record who will represent your party. The form should be filed at or before the time you file your response to our petition—jurisdictional statement.

Only counsel of record can expect to receive notification of the Court's action(s) in this case.

_____
Counsel for Petitioner—Appellant

_____
Number and Street

_____
City, State and Zip Code

_____
Telephone Number

NOTE: Please indicate whether the case is a petition for certiorari or an appeal by crossing out the inapplicable terms. A copy of this notice should *NOT* be filed in the Supreme Court.

CO–75A

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

vs.

_____ _____

(Petitioner or Appellant) (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for _____

_____

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae
☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature _____

(Type or print) Name _____

☐ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm _____

Address _____

City & State _____ Zip _____

Phone ( ) _____

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO–73A

Ricardo Aldape Guerra #D.R. 727
Ellis One Unit, H-17
Huntsville, Texas 77343

August 9, 1988

Mr. Michael B. Charlton
Attorney at Law
3934 F.M. 1960 West #215
Houston, Texas 77068

Dear Mr. Charlton:

Upon the Court's affirmance of my case, I wrote to you and asked you whether you were going to remain on my case or not --of course, I wanted you to. However, you neglected my letter, and as of this writing I haven't heard from you. In addition to your silence, you haven't taken any action in my case, since it was affirmed by the Court. As a result of your "stand-still" attitude, I have been obligated to file my own motions for rehearing and for stay of execution, and to petition the United States Supreme Court for a writ of certiorari as well. The date for filing the writ was due on August 8, 1988. I felt that it was important to file it, mainly, to stall for time, and to prevent the State from pushing me through the federal court(s) without the assistance of an attorney. At any rate, I learned from reliable sources that you are campaining for a judgeship, and, presumably, it must be more important to you than my case. Since it is important that I have an attorney at this stage in my appeal process, and since it is readily apparent that your interest on your campain outweighs any possible interest you may have on my case, I would hereby cordially inform you that I'm no longer counting on you to provide me legal assistance. I will be asking the Capital Punishment Clinic and the NAACP to help me find a volunteer practitioner.

Please know that I appreciate everything you did for me as my appeal attorney. Thanks!

Sincerely yours,

Ricardo Aldape Guerra

cc: Mr. Tanya E. Coke, Director of Research
NAACP, New York

cc: file

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICARDO ALDAPE GUERRA,
Petitioner

VS.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent

DEATH PENALTY CASE

****

APPLICATION FOR A WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS OF TEXAS

****

RICARDO ALDAPE GUERRA
Petitioner/Pro Se
T.D.C. #000727
Ellis One Unit
Huntsville, Texas 77343

TABLES OF CASES

QUESTIONS PRESENTED

1. Whether the trial court abused his discretionary authority to enforce "The Rule," by allowing the testimony of witness Marie Estelle Armijo in violation of the rule for sequestration, and against Petitioner's objection, whereas her testimony bolstered the State's key witness testimony.

   (a) Whether the trial court's action in admitting the testimony of witness Marie Estelle Armijo in violation of the rule deprived Petitioner of due process of law in violation of the Fifth, Sixth and Fourteenth Amendment to the Constitution of the United States.

   (b) Whether the Texas Court of Criminal Appeals' two steps approach in determining whether the trial court abused his discretion in allowing witness Marie Estelle Armijo's testimony in violation of the rule denied the Petitioner substantive and procedural due process and his Texas statutory right to place witnesses under the rule.

2. Whether the State may, consistent with the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, introduce evidence of unadjudicated extraneous offenses at the punishment phase of a capital trial.

   (a) Whether the trial court's failure to instruct the jury, in regard to evidence of unadjudicated extraneous offenses, that it could consider the evidence only if they believed beyond a reasonable doubt that Petitioner committed the unadjudicated offenses and only as they related to the second special issue asking whether there is a probability that the defendant

would commit criminal acts of violence that would constitute a continuing threat to society, denied Petitioner a fair trial & due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the State violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States when it permits the sentencer body to consider evidence of unadjudicated extraneous offenses in capital cases but not in non-capital cases.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is not yet reported; a copy of the slip opinion is attached as Appendix A.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is based on the following:

1. Petitioner's conviction and sentence of death were affirmed by the Court of Criminal Appeals of Texas on May 4, 1988.
2. His motion for rehearing, was denied by the Court without written opinion, on June 8, 1988.
3. On June 8, 1988, the Court of Criminal Appeals of Texas granted Petitioner's motion to stay the mandate until August 8, 1988.
4. Rule 17.1 (c), Rules of the Supreme Court: The State Court "has decided an important question of federal law which has not been, but should be, settled by this Court, (and) has decided a federal question in a way in conflict with applicable decisions of this Court."
5. 28 U.S.C. Section 1257 (3): "Where the validity ... of a State statutes drawn in question on the grounds of its being repugnant to the Constitution of the United States ...(and) where any title, right, privilege or immunity is specially set up or claimed under the Constitution ... of the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime has been committed ...

2. Eighth Amendment to the Constitution of the United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

3. Fourteenth Amendment to the United States Constitution: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

4. Article 37.071, Texas Code of Criminal Procedure:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence...

(b) On conclusion of the presentation of the evidence, at the penalty stage of the trial, the court shall submit the following: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defen-

dant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The State must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted."

5. Article 37.07, Texas Code of Criminal Procedure:

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

"(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any conviction material to the offense charged."

6. Section 19.03, Texas Penal Code:

"(a) A person commits an offense if he commits murder as defined under Section 19.02 (a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman."

7. Article 36.03, Texas Code of Criminal Procedure:

"At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the..."

8. Article 36.04, Texas Code of Criminal Procedure:

"The party requesting the witnesses to be placed under rule may designate such as he desires placed under rule, and those not designated will be exempt from the rule, or the party may have all the witnesses in the case place under rule. The enforcement of the rule is in the discretion of the court."

9. Article 36.05, Texas Code of Criminal Procedure:

"Witnesses under rule shall be attended by an officer, and all their reasonable wants provided for, unless the court, in its discretion, directs that they be allowed to go at large; but in no case where the witnesses are under the rule shall they be allowed to hear any testimony in the case."

STATEMENT OF THE CASE

The following summary of the substantive facts of the offense contained in the minority opinion by the Court of Criminal Appeals of Texas is accurate and is adopted herein:

"Houston Police Officer James Harris was on "K-9" patrol, his only partner a police dog, on the evening of July 13, 1982, in what was described as a lower middle class Mexican-American neighborhood in Houston. At approximately 10:00 p.m. Harris spoke to a pedestrian, George Brown, who informed him that a black "Cutlass" had only moments before attempted to run over Brown, forcing him into a ditch. Other witnesses had seen this car 'driving fast. . . spinning tires, burning rubber.' Harris gave pursuit.

"Less than a minute later Harris came upon a black Buick with red vinyl top stalled at the intersection of Edgewood and Walker. Harris stepped out of his vehicle, leaving the door open, and beckoned to the occupants of the Buick. Appellant, who was the driver,

and his companion, Roberto Flores, approached Harris. One of the two then shot Harris three times, the bullets entering the left side of his face and exiting on the right. Three spent nine millimeter cartridges were subsequently found beside Harris' vehicle, and three bullets fired from a Browining nine millimeter pistol were recovered from a house in the direction in which the slugs that killed Harris would have traveled. The shots proved fatal. Appellant and Flores then fled on foot in an easterly direction from Walker.

"At this time Jose Armijo and his two children, Jose, Jr., and Lupita, were driving west on Walker. From the passenger side of the car, on the north side of Walker, came a shot from a Browning nine millimeter pistol that killed Armijo, Sr. Two nine millimeter cartridges were found on the north side of the street. Also found, on the south side of Walker, were two cartridges from a .45 caliber pistol.

"Approximately an hour later Flores died in a shootout with Houston police, during which an officer was also seriously wounded. The shootout occurred outside the residence next door to which appellant had been living, several blocks from the scene of Harris' killing. Under flores' body was found a Browning nine millimeter pistol, which he had used in the gun battle with police. It was positively shown this was the weapon that killed Armijo, Sr.; and it is also reasonable to believe, although it could not be proved definitively, that this gun killed Harris. Also found on Flores were a magazine containing 20 nine millimeter rounds, and Harris' service revolver. Police found appellant at the same location,

crouching behind a horse trailer. The .45 caliber pistol which had been fired earlier was discovered wrapped in a bandana under the trailer, two feet from where appellant was found.

"The sole contested issue at trial was whether Flores, rather than appellant, shot officer Harris. The State produced five witnesses, including Jose Armijo, Jr., who "saw" the shooting and testified that appellant was the perpetrator. Appellant and two other eyewitnesses testified, in essence, that Flores actually shot Harris. The State's own witnesses contradicted one another as to which man had run down the north side, which the south, of Walker -- a critical question, since whoever fled down the north side shot Armijo with the same weapon used to kill Harris. No witness went unimpeached. Thus we apparently have, in addition to the undisputed testimony as set out in Part A, ante, nothing more than a classic "swearing match." Nonetheless, for reasons to be developed, I believe that the testimony of Jose Armijo, Jr., was critical to the State's case. I turn first to examination of the testimony of the State's other witnesses --eyewitnesses . . .

"Armijo, Jr., ten years old at the time of trial, testified before any of the State's other eyewitnesses. Thus he gave the jury its initial impression of the events surrounding the actual shooting of Officer Harris.

"Armijo testified that he was coming home from the auto parts store with his father and sister when they noticed "the black car" and Harris' vehicle blocking the intersection ahead. Armijo saw two men with their hands on the hood of the patrol car.

Q: What did you see?

A: The other one scratched his back.

Q: Which scratched his back?

A: The one that has long hair.

Q: All right, was the man that had the long hair closer to the police officer when he had his hands on the hood or was he the one farther away from the police officer?

A: Closer.

Q: And what did you see that man do?

A: He shot the police.

Q: Before he shot the police officer, did you see him do anything with his hands?

A: Yes. He acted like he was scratching his back.

Q: When you said -- he took his hands from off the police car and acted like he was scratching his back?

A: Yes.

Q: After he did that, what happened then?

A: He took out the gun and shot the police.

Q: Do you know how many times he shot the policeman?

A: No.

Q: Did you see any fire coming from the gun when he shot the police officer?

A: Yes.

Q: What did you see happen to the policeman after he was shot?

A: He fell down on the ground.

Q: Do you remember what the man was wearing that was standing closer to the police officer, that scratched his back?

A: Yes.

Q: And came out with a gun?

A: Yes.

Q: What was he wearing?

A: A green shirt.

"When found, appellant was wearing a green shirt; and indeed, Armijo apparently identified appellant in court as the man who shot Harris; but see n. 2, ante. One of the men, Armijo did not know which, then took Harris' gun and "they started running and shooting all over the place." "The one with the green shirt" ran by the car and shot into it, killing Armijo, Sr.

"The State then elicited, still on direct, that at the police lineup early the next morning, Armijo, Jr., told police he could identify no one, but that this had been "a lie." Armijo explained that he had not identified appellant because, as he said, "I was scared he might come out and get me."

"On crossexamination Armijo's perceptions of the shooting itself were not tested. Instead defense counsel focused on a statement the boy had given police the night of the shooting in which he had said he did not know what the two men looked like nor what they had worn. Armijo admitted that at the lineup he had been told that the one way mirror would prevent those in the lineup from seeing him. It was further established that, once he heard the first shots, Armijo pushed his sister to the floorboard of the car where they remained until the two men had run well past them.

"Then, the following occurred, and with it were engendered appellant's three grounds of error at issue here:

"Q: Has anybody talked to you about this case?

A: Yes.

Q: The Prosecution, the prosecutors, Mr. Bax and Mr. Moen?

A: Yes.

Q: Have the police talked to you?

A: Yes.

Q: Yesterday?

A: Yes.

Q: Did they talk to you any other times?

A: Yes.

Q: Did they talk to you Saturday?

A: Yes.

Q: Did they talk to you today?

A: Yes.

Q: Who talked to you?

A: I forgot his name.

Q: Mr. Bax?

A: Yes.

Q: And Mr. Moen?

A: Yes.

Q: Any police officers talk to you?

A: Yes.

Q: So after you have talked to these people, you have changed your complete version of the facts and they are completely different from what you told the police back on the night of the incident; isn't that correct?

A: Yes."

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

At the conclusion of the crossexamination of the witness Armejo, Jr., there was an outburst "from a woman in the back of the courtroom," later shown to be Mario Armijo, Jose Armijo, Jr.'s, mother.

She was escorted out by the bailiff, not to return until she herself testified toward the end of the State's case in chief. Thus she did not hear the bulk of the State's eyewitnesses testimony. But, though she spoke no English, she did hear her son's testimony, translated to her by her sister-in-law.

After a hearing, and over repeated objections -- including that admission of Mrs. Armijo's testimony violated the trial court's own order at the beginning of trial that all witnesses be placed under the rule, Marie Armijo was allowed briefly to take the witness stand and testify through an interpreter. She testified that on the night of the shooting she had gone to the hospital where her husband had been taken, while Jose, Jr., went to the police station to give a statement. She did not see Jose again until 8:30 the following morning. At this time he cryingly told her:

> ". . . that he had seen the person that had done it and he was able to identify the person, but he was very much afraid to tell the police about that and didn't think he should tell them."

Further, she testified that since his father's death, Jose, Jr., had not been the same carefree child as before, and that he was afraid of the person that had shot his father. It was established that on the Saturday prior to her testifying, Marie Armijo had informed prosecutors that her son could identify the killer. Finally she confirmed that her son had also been afraid to testify at trial[1/].

On crossexamination it was established that Marie Armijo had made the outburst at the end of her son's testimony, which had been translated for her. Then:

1/ See footnote 5 at Judge Clinton's dissenting opinion.

"Q: Have you talked to your son since then?

A: Yes, sir.

Q: Did you talk to your son yesterday?

A: Yes, about he was a witness and what was the truth.

Q: Did he talk about the facts in this case?

A: Yes, sir"

Again objection was made that the witness had been allowed to testify in violation of the rule. The objection was overruled.

The two-step approach of the Court of Criminal Appeals of Texas: On direct appeal, Petitioner asserted that the trial court in admitting the testimony of Marie Estelle Armijo in violation of the rule for sequestration of witnesses. Article 36.03, Texas Code of Criminal Procedure. See Slip opinion at Pp. 39. The majority in the Court's rejected Petitioner's claim by adopting the following two-step approach in answering the question of whether a trial judge has abused his discretion in allowing a violation of "The Rule:"

> "The appellate court must first determine what kind of witness was involved. If the witness was one who had no connection with either the State's case-in-chief or the defendant's case-in-chief and who, because of a lack of personal knowledge regarding the offense, was not likely to be called as a witness, no abuse of discretion can be shown. On the other hand, if the witness was one who had personal knowledge of the offense and who the party clearly anticipated calling to the stand, then the appellate court should then apply the Haas test as amended above and in Archer."

The Court concluded: "In the instant case, Mrs. Armijo had no personal knowledge of the offense. Although her husband and children were directly involved, she was not present during the commission of the offense and thus could shed no light on Appellant's involvement. Only after her son's identification of appellant was

impeached by a prior inconsistant statement was it necessary for the State to put Mrs. Armijo on the stand. Consequently, we find her to be the same type of witness as Peggy Stevens, in Green v. State, supra. Although not intended to be a witness, because of events which occurred during the trial, Mrs. Armijo became a necessary witness. Based on the record before us, we are unable to say that the trial court abused its discretion in allowing Mrs. Armijo to testify." Id. at Slip opinion Pp. 39-40.

UNADJUDICATED EXTRANEOUS OFFENSES

At the punishment phase of the trial evidence was introduced to show that Petitioner, Roberto Flores and Enrico Lunas Torres, committed a robbery at a gun store only five days before the instant offense. The witnesses who testified to this effect did not appear to have identified the Petitioner prior to trial, nor the record reflects that Petitioner was placed in a police lineup for such a purpose. The record is silent as to whether defense counsel knew in advance that the State was going to adduce such unadjudicated extraneous robbery.

In direct appeal the Petitioner asserted that the trial court erred in admitting into evidence at the punishment phase, an extraneous offense for which a final conviction had not been obtained and for which no formal notice had been provided, in violation of due process of law and the equal protection of the law.

In the majority opinion, the Court, in determining whether Petitioner's due process right was violated or not, went on to state:

> "This Court has previously held that, absent a showing of unfair surprise, proof of unadjudicated, extraneous offenses at the punishment stage of a capital case is admissible."

In deciding Petitioner's claim adversily to him, the Court concluded: "Appellant does not make a claim that he was surprised by the introduction of this evidence, nor did he make such claim at trial." The Court did not address Petitioner's Equal Protection claim.

REASONS FOR GRANTING THE WRIT

I. Violation of "The Rule" Issue

Article 36.03, Texas Code of Criminal Procedure reads in relevant part:

> "At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule."

"The purpose of the rule is 'to prevent the testimony of one witness from influencing the testimony of another.' Cook v. State, 30 Tex. App. 607, 18 S.W. 412 (1892). The genesis of the rule is said to lie in the History of Susanna, a book of the Apocrypha:

> "The story of Susanna is familiar. Her accusers testified in the presence of each other to her guilt. She was about to be condemned when Daniel interposed, saying: 'Put these two aside, one far from another, and I will examine them.' His examination disclosed such discrepancies in their testimony as resulted in the release of Susanna and the condemnation of her accusers. Since then the importance of the separation of witnesses has been regarded as a valuable adjunct to the cross-examination of witnesses and a right accorded whenever demanded in the trial of causes (citations omitted)."

Bishop v. State, 81 Tex. Cr. R. 96, 194 S.W. 389 (1917).

"It had long been held under the common law that 'the admissibility of witnesses who have violated the rule, or who have not been placed under the rule, is within the sound discretion of the court, and such discretion will be presumed to be correctly

exercised until the contrary appears.' Cook v. State, supra. That holding was essentially codified in Art. 645, Vernon's Ann. Code of Criminal Procedure (1925), now article 36.04, V.A.C.C.P., which provides, inter alia, that 'the enforcement of the rule is in the discretion of the court,' see Wilson v. State, 158 Tex. Cr. R. 334, 255 S.W.2d (1953), and was most recently reiterated in Green v. State, 682 S.W.2d 271 (Tex. Cr. App. 1984).

"The trial court abuses its discretion when its refusal to enforce the rule works to the injury or prejudice of the accused. Hougham v. State, 659 S.W.2d 410 (Tex. Cr. App. 1983); Haas v. State, 498 S.W.2d 206 (Tex. Cr. App. 1973). Relevant criteria for determining injury are (1) whether the witness actually heard, either (2) a defense witness whom he then contradicts, or (3) a prosecution witness whose testimony he subsequently corroborates, (4) on an issue of fact bearing upon guilt or innocence. Hougham v. State, supra (Clinton, J., concurring); Day v. State, 451 S.W.2d 508 (Tex. Cr.App. 1970); Wilson v. State, supra. Archer v. State, 703 S.W.2d 664 (Tex. Cr. App. 1986).

"The record clearly indicates that Mrs. Armijo actually heard the testimony of her son. Though that testimony had to be translated to her, her outburst and explanation for it indicate that she well understood the testimony which she subsequently corroborated. Furthermore, during the interim between her son's testimony and her own, they discussed the facts and 'what was the truth.' Thus the only impediment to a finding of abuse of discretion on the part of the trial court in allowing Mrs. Armijo's corroborating testimony is a determination whether what she corroborated was 'an issue of fact

bearing upon guilt or innocence.' To this end, it is appropriate to take a glance at the evidence upon which the jury relied to find Petitioner, not Roberto Flores, killed Officer Harris.

"Jose Armijo, Jr., was the only State's witness who saw both Petitioner and Flores and could testify unambiguously that Petitioner perpetrated the shooting. His were the only perceptions that went unimpeached. See: Judge Clinton's dissenting opinion at Part IB.

The critical factor for the jury in assessing Jose's testimony, in view of his prior inconsistent statements to police, was his credibility as a witness. In anticipation of this, and to soften its inevitable effect upon the jury, the State elicited the prior statement, along with an explanation, during Jose's direct testimony. A great deal depended upon the plausibility of the explanation, and a blow to that could prove critical. Thus, though Marie Armijo did not testify to facts bearing directly upon determination of Petitioner's guilt or innocence, her testimony directly impacted the credibility of the witness whose testimony most bore upon Petitioner's guilt or innocence. Having heard her son's testimony, she was in an ideal position to know precisely how to testify in order to rehabilitate him. There is a considerable likelihood her testimony affected the jury's verdict -- indeed, it may have sealed the finding of guilty in a case otherwise rife with doubt.

"The majority finds the situation in Green v. State, supra, analogous to that here, and thus concludes there has been -- indeed, there 'can be' -- no abuse of discretion shown. Green, however, is easily distinguishable. There the witness Stevens had been in attendance the entire trial and had overheard Green speaking informally in the

courtroom. Thus she was in a position to dispute defense testimony that Green did not have a speech impediment, which was critical issue in the case. However, Stevens 'was apparently not connected with the case in any way and simply heard (the defendant) speak.' The same cannot be said of Marie Armijo. Her husband had been shot to death only moments after the events in issue at Petitioner's trial, and her son was the State's principal witness. Her emotional investment in the case was clearly manifested by her outburst in the courtroom at the conclusion of Jose's testimony

"The majority derives far more from the somewhat lean analysis in Green than will withstand scrutiny. From the language quoted the majority identifies a 'two-step approach' to measuring abuse of discretion in enforcement of the rule. If the witness had no connection with the proponent's case in chief and was not contemplated as a 'likely' witness at the outset 'because of lack of personal knowledge regarding the offense,' 'no abuse of discretion can be shown.' Only 'if the witness was one who had personal knowledge of the offense and who the party clearly anticipated calling to the stand' will the test as refined in Archer v. State, supra, even come into play. In other words, rebuttal or impeachment witnesses are effectively insulated from enforcement of the rule. Green did not purport to mandate such a 'two-step approach,' however. There the Court merely observed that there are two identifiable classes of witnesses: those who were initially placed under the rule, and those who were not because not originally believed to be necessary either to the State's case in chief or to rebut anticipated defense evidence. There is no suggestion that a prejudice analysis would

be inapposite to an appellate determination of whether permitting the testimony of a member of the latter class who has listened to all or portions of the trial was an abuse of discretion. There is only the observation that the witness Stevens was 'not connected with the case in any way . . .' By this it could be properly perceived that the Court meant it could imagine no respect in which Stevens' having heard the evidence at trial could have influenced the substance of her testimony."

Considering the correlation of the above delineated factors, the thrust of the Petitioner's claim is that the admission of Mrs. Armijo's testimony in violation of the rule deprived Petitioner of his right to a fair trial and to due process of law, and an evaluation of the constitutionality of the Texas Court of Criminal Appeals' "two-step approach" in answering the question of whether a trial judge has abused his discretion in allowing a violation of "The Rule" is both a substantive and a procedural due process question.

II. The Unadjudicated Extraneous Offenses Issue

In this case, the State had the burden of proving beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Texas Code of Criminal Procedure, Article 37.071 (b)(2). To that end, the State adduced into evidence unadjudicated extraneous offense of armed robbery. Petitioner was not given notice of the State's intention to use that offense at the punishment phase, nor did the trial court instruct the jury that it could consider the evidence only if they believed beyond a reasonable doubt that Petitioner committed the unadjudicated armed robbery and only as

they related to the second special issue.

While Texas has found that the admission of unadjudicated extraneous offenses is not of constitutional significance and have required merely that the evidence be relevant, see Milton v. State, 599 S.W.2d 824 (Tex. Cr. App. 1980) (en banc), Cert. denied 451 U.S. 1031 (1981), this Court has consistently held that in any proceeding to enhance punishment "the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty must be fully protected." Graham v. West Virginia, 224 U.S. 626 (1912); Chewing v. Cunningham, 368 U.S. 443 (1963).

Nowhere is this principle more firmly established than with respect to a sentencing trial in which the defendant faces execution. "Fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978); See also Gardner v. Florida, 430 U.S. 349 (1977).

The use of unadjudicated extraneous offenses at the Texas capital-sentencing procedure presents a serious constitutional issue, as it subverts a capital-defendant 's right to an impartial jury, and the principle ("In the need for reliability in the determination that death is the appropriate punishment") so often ennunciated by this Court as well.

Certainly, the use of unadjudicated extraneous offenses at the sentencing phase increases the possibility of a death sentence, and hence they may be relevant to punishment. However, they, too increases the possibility of encouraging prosecutors to carve extraneous

of virtually anything regardless of whether the evidence to be adduced satisfies the requirement of proof beyond a reasonable doubt or not. See Santana v. State, 714 S.W.2d 1 (Tex. Cr. App. 1986). For if the evidence do not satisfy the standard of proof beyond a reasonable doubt, the inflamatory effect in the minds of the jury will still remain. As reasoned by Justice Marshall, joined by Justice Brennan, in Williams v. Lynaugh, ___U.S.____, 98 L.Ed. 2d (1987), "a jury that already has decided (concluded) unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice."

In the instant case, Petitioner suffered the overwhelming prejudice inherent in the allegation of the particular extraneous unadjudicated offense of armed robbery. The unproven allegations, particularly that the Petitioner participated in the aggravated robbery of a gun store, with intent to obtain firearms for use in criminal acts involving violence (see Slip opinion at Pp. 13), were so prejudicial that no generalized "reasonable doubt" instruction (as given in this case) focused only on special issue No. 2 could ever cure the overwhelming prejudice. See: e.g., Michelson v. United States 335 U.S. 469, 475-76 (1984).

III. The Equal Protection Issue

As Justice Marshall observes in his dissent opinion to the denial of certiorari in Williams v. Lynaugh, supra, the Texas rule on admitting evidence of unadjudicated extraneous offenses also raises Fourteenth Amendment Equal Protection considerations. Texas forbids the use of such evidence in sentencing determinations in

non-capital cases recognizing their extreme prejudice. In providing extra protection in non-capital sentencing decisions, Texas is subverting the notions of equity and justice. This Court has repeatedly recognized that the finality and horror of capital sentencing decisions are qualitatively different than other sentencing determinations and "there is a corresponding difference in the need for reliability in the determination that death is the appropriate decision in an specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). For Texas to provides greater protection to defendants in non-capital cases as opposed to capital murder cases is irrational and violative of Petitioner's equal protection rights under the Fourteenth Amendment to the Constitution of the United States.

In Weber v. Aetna Casualty & Surety Company, 406 U.S. 173, 92 S.Ct. 1400 (1972), this Court ennunciated the test to determine the validity of statutes under the Equal Protection Clause as follows:

> "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? Id. at U.S. 173, S.Ct. 1405.

While it may be presumed that the State has an interest in exacting the death penalty, and to that end, evidence of extraneous offenses is relevant, ~~that~~ the State's interest does not outweigh the Petitioner's interest in reliability and equality. On the other hand, the use of unadjudicated extraneous offenses at the capital sentencing phase endanders Petitioner's rights to a fair and impartial trial, and due process of law as well.

CONCLUSION

The Petition for Writ of Certiorari should be granted, his sentence of death set aside, and his conviction reversed with an instruction for a new trial.

Respectfully Submitted

RICARDO ALDAPE GUERRA
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Ellis One Unit, H-17
Huntsville, Texas 77343

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Petition for Writ of Certiorari to be sent on August 2, 1988, by the U.S. Postal Service to William Zapalac , Esq., Assistant Attorney General, P.O. Box 12548, Supreme Court Building, 6th Floor Austin, Texas 78711, the attorney for respondent,

RICARDO ALDAPE GUERRA

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

August 10, 1988

AREA CODE 202
479-3011

Mr. Ricardo Aldape Guerra
T.D.C. #000727
Ellis One Unit
Huntsville, TX 77343

Re: Ricardo Aldape Guerra v. Texas
A-114 (88-5237)

Dear Mr. Guerra:

Enclosed is a certified copy of the order signed by Justice White on August 10, 1988, continuing the mandate of the Court of Criminal Appeals of Texas entered on June 8, 1988, pending the disposition of the petition for writ of certiorari in the above-entitled case.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

kb
encl.
cc: William Zapalac, Assistant Attorney General of Texas

Clerk, Court of Criminal Appeals of Texas
(Your No. 69,081)

Supreme Court of the United States

No.

A88-114 (88-5237)

Ricardo Aldape Guerra,

Applicant

v.

Texas

O R D E R

UPON CONSIDERATION of the application of the applicant,

IT IS ORDERED that the order of the Court of Criminal Appeals of Texas, case No. 69,081, entered on June 8, 1988, staying mandate is continued pending the disposition of the petition for a writ of certiorari in the above-entitled case. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order shall continue in effect pending the issuance of the mandate of this Court.

s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 10th day of August, 1988.

A true copy JOSEPH F. SPANIOL, JR.
Test

F - Old # A12 # B21 & # A26

(p.1) - CC: Anne Clayton
Lisa Beck
Rick Morris
Cavanaugh
O'Leary
Manuel Lopez
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(713) 615-5399

August 13, 1996

VIA TELECOPY (713) 862-6237

Mr. Rob L. Kimmons
Information Bank of Texas, Inc.
111 West 14th Street
Houston, Texas 77008

Re: No. 95-20443; *Ricardo Aldape Guerra v. Gary L. Johnson*

Dear Rob:

We would like to find the following witnesses, all of whom you have located for us previously in Houston:

Frank Perez	524-5503 (home), 528-2546 (office)
Patricia Diaz	649-2781 TDCL: 00500837 TX ID# DOB 9/17/64; SS# 654-41-5611
George Brown	923-4757
Elvira Flores	999-6114

I have listed the most recent telephone number that we had for each one. If you need any additional information, such as social security number, date of birth, or Texas driver's license number, let me know.

Very truly yours,

Scott

Scott J. Atlas

VEHOU07:21177.1

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COMPANY: Information Bank of Texas, Inc.

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