Aldape: Fed. Habeas Pleadings
(6/93-11/93) [v. 9)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner.	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	

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VOLUME IX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner.	§	
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JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	

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vol. 9

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47 CHARLES ST., BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 011 (44-71) 491-7236
FAX 011 (44-71) 499-5320

November 10, 1993

By Messenger

Hon. Ken Hoyt
515 Rusk
Suite 9513
Houston, TX 77002

RE: Civil Action No. H-93-290; Ricardo Aldape Guerra v. James A. Collins; in the U.S. District Court for the Southern District of Texas, Houston Division

Dear Judge Hoyt:

As you requested at the status hearing on November 2, I have enclosed a witness list for Petitioner and Respondent as well as a list of unusual exhibits for Petitioner.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

cc: William Zapalac - (by telecopy - 512/463-2084)
Roe Wilson
Hon. Thomas Gibbs Gee
Stanley Schneider

cc: Ricardo Aldape Guerra
Kari Sckerl

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA,	§	
	§	
Petitioner.	§	
	§	
v.	§	**Civil Action No. H-93-290**
	§	
JAMES A. COLLINS,	§	
Director, Institutional Division,	§	
Texas Department of Criminal Justice,	§	
	§	
Respondent.	§	
	§	

PETITIONER'S WITNESS AND EXHIBIT LIST

Ricardo Aldape Guerra, Petitioner ("Guerra"), files this Witness and Exhibit List as follows:

A. At the evidentiary hearing scheduled to begin on November 15, 1993, Guerra proposes to take testimony from the following witnesses:

1. Ricardo Aldape Guerra: testified
2. Hector Anguiano: substantially as described in habeas petition
3. Jose Armijo, Jr.: testified
4. Sam Acheson: 1982 location of street markers at Edgewood and Walker intersection
5. Richard Bax: substantially as described in habeas petition

6. Patricia Diaz: testified

7. Candelario Elizondo: pretrial discussions with witnesses; what information he was given pretrial by D.A.'s; J. Heredia demeanor at trial; use of mannequins and uniformed police presence at trial; client right handedness

8. Elvira Flores: testified

9. Hilma Galvan: testified

10. Herlinda Garcia: testified

11. Armando Heredia: interviewed by HPD and gave statement

12. Jose Heredia: testified

13. Joe Hernandez: pretrial discussions with witnesses; what information he was given pretrial by D.A.'s; J. Heredia demeanor at trial; use of mannequins and uniformed police presence at trial; client right handedness

14. Linda Hernandez: J. Heredia demeanor at trial; character and quality of trial translations;

15. Elena Gonzalez Holguin: testified

16. Donna Monroe Jones: use of mannequins and uniformed police presence at trial; impact of "illegal alien," parole and law of parties comments and victim impact and character testimony;

17. Elizabeth Loftus: expert on the nature and malleability of memory

18. John Matamoros: interviewed by HPD and gave statement

19. Floyd McDonald: expert on crime reconstruction, TMDT, weapons

20. Trinidad Medina: interviewed by HPD and gave statement

21. Robert Moen: substantially as described in habeas petition

22. John Nail: number of local TV clips about the case

23. Roberto Onofre: interviewed by police

24. Frank Perez: testified

25. Sylvan Rodriquez: his likely sources for a news story that aired on Channel 13, 6 p.m. news, July 14, 1982

26. Enrique Torres Luna: interviewed by police

27. Jose Luis Torres Luna: testified

28. Channel 13 TV videotype library custodian: the authenticity of a videotaped news story aired on Channel 13's 6 p.m. news, July 14, 1982.

B. At the evidentiary hearing scheduled to begin on November 15, 1993, Guerra proposes to introduce the following unusual exhibits:

1. Video clips from 1982 TV news programs re: case

2. Sketches of crime scene neighborhood

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No. 01418400
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2024
FAX: (713) 758-2346

OF COUNSEL:

STANLEY G. SCHNEIDER
Texas Bar No. 17790500
Schneider & McKinney
11 E. Greenway Plaza
Houston, Texas 77046
(713) 961-5901

THOMAS GIBBS GEE
Texas Bar No. 07789000
Baker & Botts
One Shell Plaza
910 Louisiana, Suite 3725
Houston, Texas 77002
(713) 229-1198

**ATTORNEYS FOR APPLICANT,
RICARDO ALDAPE GUERRA**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by regular mail, and by telecopy on William C. Zapalac, Assistant Attorney General; Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station, Austin, Texas 78711, on the 10th day of November, 1993.

Scott J. Atlas

0399\2580
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f- p/ldge

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 10, 1993

The Honorable Michael N. Milby, Clerk
United States District Court
Southern District of Texas
Houston Division
P.O. Box 61010
Houston, Texas 77208

NOV 1 [illegible] 1993
S.J.A.

Re: *Guerra v. Collins,* No. H-93-290

Dear Sir:

Enclosed for filing in the above numbered and styled cause is the original and one copy of **Respondent's Witness List.** Please indicate the date of filing on the enclosed copy of the letter and return it to me in the enclosed self-addressed envelope.

By copy of this letter, I am forwarding a copy of the same to counsel for petitioner. Thank you for your kind assistance in this matter.

Sincerely yours,

William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 463-2080

WCZ/br
Enclosure
c: Mr. Scott J. Atlas
VINSON & ELKINS
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA	§	
Petitioner	§	
	§	
v.	§	Civil Action No. H-93-290
	§	
JAMES A. COLLINS, DIRECTOR	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE, INSTITUTIONAL DIVISION,	§	
Respondent	§	

RESPONDENT'S WITNESS LIST

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Witness List in connection with the evidentiary hearing scheduled in this cause.

I.

At the evidentiary hearing scheduled to begin on November 15, 1993, the Director proposes to take testimony from the following witnesses in addition to those included on the Petitioner's witness list:

1. Officer G. T. Neely, Houston Police Department, to testify concerning the line-up conducted for witnesses in this case;

2. Officer L. E. Weber, Houston Police Department, to testify to statements of witnesses at the scene of the crime describing the murderer;

3. George E. Brown, to testify about what he observed at and in the vicinity of the scene of the crime and about the line-up procedures;

4. Jose Armijo, Jr., who testified at trial.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully submits his witness list.

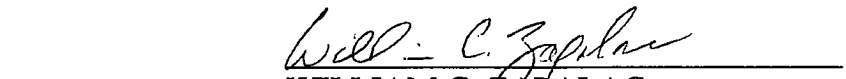
Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division



WILLIAM C. ZAPALAC
Assistant Attorney General
Southern District #8615

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Witness List has been served by facsimile transmission to (713) 758-2024, and by placing same in the United States Mail, postage prepaid, on this the 10th day of November, 1993, addressed to: Mr. Scott J. Atlas, VINSON & ELKINS, 2500 First City Tower, 1001 Fannin, Houston, Texas 77002-6760.

William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA Petitioner	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

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Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

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Deputy Attorney General for
Criminal Justice

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Assistant Attorney General
Chief, Capital Litigation Division

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Assistant Attorney General
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William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General

11/10/93
Fax to
Sean S.
Tom G.
Sandra
cc: Team

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA Petitioner	§ § §	
v.	§ §	Civil Action No. H-93-290
JAMES A. COLLINS, DIRECTOR *TEXAS DEPARTMENT OF CRIMINAL* *JUSTICE, INSTITUTIONAL DIVISION,* Respondent	§ § § §	

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William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General

11/10/93

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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RICARDO ALDAPE GUERRA Petitioner	§ § §	
v.	§ §	Civil Action No. H-93-290
JAMES A. COLLINS, DIRECTOR *TEXAS DEPARTMENT OF CRIMINAL* *JUSTICE, INSTITUTIONAL DIVISION,* Respondent	§ § § §	

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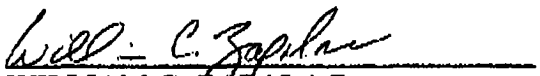

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Southern District #8615

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RICARDO ALDAPE GUERRA	§	
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	§	
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William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General

11/10/93

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA	§	
Petitioner	§	
	§	
v.	§	Civil Action No. H-93-290
	§	
JAMES A. COLLINS, DIRECTOR	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE, INSTITUTIONAL DIVISION,	§	
Respondent	§	

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Attorney General of Texas

WILL PRYOR
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

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William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General

** TX CONFIRMATION REPORT ** AS OF NOV 10 '98 17:48 PAGE.01

DATE	TIME	TO/FROM	MODE	[illegible]	[illegible]
NOV	10	17:35	512 463 [illegible]	[illegible]	[illegible]

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ATTORNEYS AT LAW
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AUSTIN
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DALLAS
Fax# (214) 220-7716

WARSAW
Fax# (011) 48-2-625-2245

MOSCOW
Fax# (011) 70-95-202-0295

CENTRAL FACSIMILE TRANSMITTAL PAGE

DATE: 11-10-93	CONFIRMATION NO:
TO: Bill Zapalac	
COMPANY:	
TYPE OF DOCUMENT:	
NUMBER OF PAGES (including this transmittal page): 10	

FROM: Scott Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE:	

We are sending from a machine that is Group I, II, III compatible. Please check transmission after the last page. If this FAX transmission is illegible or you do not receive all pages, please call the CENTRAL FAX DEPARTMENT at (713) 758-2861.

If you wish to respond, use FAX #: (713) 758-2346.

OPERATOR:	RECIPIENT'S FAX#: 512/463-2084

Form VE0138 - Rev. 10.30.92

cc: Stan S.
Tom Gee
Sandra Team
O-F Aldg

VINSON & ELKINS
L.L.P.
ATTORNEYS AT LAW

2500 FIRST CITY TOWER
1001 FANNIN
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
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47 CHARLES ST., BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 011 (44-71) 491-7236
FAX 011 (44-71) 499-5320

November 8, 1993

By Messenger

Ms. Roe Wilson
Harris County's D.A.'s Office
201 Fannin, Suite 200
Houston, Texas 77002

Dear Roe:

Since I returned to the office from the status hearing, I have attempted to quickly identify the documents that I intend to use. I have come to realize that I cannot be certain about which documents I will need until late this week. Potentially, it could be most of the documents. I may even want all the documents entered as an exhibit. In any event, I need to resolve the authenticity issue as soon as possible.

As a result, I feel that I have no choice but to send you the entire set of documents produced in response to a request for documents under the Texas Open Records Act. The documents are page-number stamped from F000002 to F000690, F002002 to F0020005, and F002031 to F002043. Most, but not all, of the duplicates within these numbers were culled out.

I recognize that this will require someone to turn every page. It seems to me that it is better to spend this time now then to spend it in the middle of the hearing. The entire process should not take long.

As a result, I would appreciate very much your letting me know if you have problems with the authenticity of any of these documents.

Very truly yours,

Scott

Scott J. Atlas

Enclosure

0399:4912
f:\sa0399\aldape\wilson.ltr

f. pldgs 35

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA,

Petitioner.

v.

JAMES A. COLLINS,
Director, Institutional Division,
Texas Department of Criminal Justice,

Respondent.

Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have John Reyes Matamoros, TDC No. 463559, now confined in the Ellis I Unit, Huntsville, Texas, brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to testify the truth, according to his knowledge, in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this 5th day of November, 1993.

UNITED STATES DISTRICT JUDGE

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VINSON & ELKINS
L.L.P.
ATTORNEYS AT LAW

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LONDON W1X 7PB, ENGLAND
TELEPHONE 011 (44-71) 491-7236
FAX 011 (44-71) 499-5320

November 4, 1993

By Messenger

Hon. Michael N. Milby, Clerk
United States District Court
United States Courthouse
515 Rusk
Houston, Texas 77002

RE: Ricardo Aldape Guerra v. James A. Collins; Civil Action No. H-93-290; in the U.S. District Court For The Southern District of Texas, Houston Division

Dear Mr. Milby:

Enclosed for filing in the captioned cause please find the following pleadings:

(1) a First Amended Application for Writ of Habeas Corpus Ad Testificandum; and

(2) a proposed Order.

A copy of this pleading is being sent to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: Hon. Kenneth Hoyt

0399:4912
f:\sa0399\aldape\milby.nov

cc: William C. Zapalac [by telecopy (512/463-2084) and regular mail]
Assistant Attorney General
Enforcement Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

bcc: Sandra Babcock
Francisco Gonzalez de Cossio
Hernan Ruiz Bravo
Santiago Roel
Mary Lou Soller
Julia E. Sullivan
Team

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner.	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	

FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

COMES NOW the Petitioner, who represents and shows:

That there is now confined in Ellis I, Huntsville, Texas, one John Reyes Matamoros, TDC No. 463559, in custody of the warden, sheriff or jailor; that the prisoner is a necessary and competent witness in a hearing in the above-entitled case, which is presently set before the United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, and that in order to secure the attendance of the prisoner it is necessary that a Writ of Habeas Corpus ad Testificandum be issued commanding the warden, sheriff or jailer to produce the prisoner in the courtroom of the Honorable Kenneth M. Hoyt, Judge, United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, at 9:00 a.m. in order that the prisoner may respond to and

answer such questions as may be propounded to him during the course of the hearing in the above-entitled case.

Wherefore, your Petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Testificandum, out of and under the seal of this court, commanding the warden, sheriff or jailer to have and produce the prisoner in the United States Courtroom on that date, then there to respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case; and at the termination of the hearing of the above-entitled case to return him to the above-mentioned institution.

Dated: October 18, 1993.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No. 01418400
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2024
FAX: (713) 758-2346

OF COUNSEL:

STANLEY G. SCHNEIDER
Texas Bar No. 17790500
Schneider & McKinney
11 E. Greenway Plaza
Houston, Texas 77046
(713) 961-5901

BAKER & BOTTS

BY: Thomas Gibbs Gee

THOMAS GIBBS GEE
Texas Bar No. 07789000
One Shell Plaza
910 Louisiana, Suite 3725
Houston, Texas 77002
(713) 229-1198

ATTORNEYS FOR PETITIONER,
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by overnight mail on Hon. Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; Price Daniel Sr. Bldg.; Austin, Texas 78711, on the 4th day of November, 1993.

Scott J. Atlas

Scott J. Atlas

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have John Reyes Matamoros, TDC No. 463559, now confined in the Ellis I Unit, Huntsville, Texas, brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to testify the truth, according to his knowledge, in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this _____ day of November, 1993.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have the above-named Petitioner, Ricardo Aldape Guerra, now confined in the Ellis I Unit, Huntsville, Texas, brought to the Harris County Jail on the 10th of November, 1993, by 9:00 a.m. of said date and to remain there from day to day until the 15th day of November, 1993, and then to have Petitioner brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to participate as a party in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this 3rd day of November, 1993.

UNITED STATES DISTRICT JUDGE

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f- pldge

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FAX 011 (44-71) 499-5320

November 2, 1993

By Messenger

Hon. Michael N. Milby, Clerk
United States District Court
United States Courthouse
515 Rusk
Houston, Texas 77002

RE: Ricardo Aldape Guerra v. James A. Collins; Civil Action No. H-93-290; in the U.S. District Court For The Southern District of Texas, Houston Division

Dear Mr. Milby:

Enclosed for filing in the captioned cause please find the following pleadings:

(1) a First Amended Application for Writ of Habeas Corpus Ad Testificandum; and

(2) a proposed Order.

A copy of this pleading is being sent to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: Hon. Kenneth Hoyt

0399:4912
f:\sa0399\aldape\milby.nov

cc: William C. Zapalac [by telecopy (512/463-2084) and regular mail]
Assistant Attorney General
Enforcement Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

bcc: Sandra Babcock
Francisco Gonzalez de Cossio
Hernan Ruiz Bravo
Santiago Roel
Mary Lou Soller
Julia E. Sullivan
Team

bcc: Alvaro Luna

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner.	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	

FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

COMES NOW the Petitioner, who represents and shows:

That there is now confined in Ellis I, Huntsville, Texas, one Ricardo Aldape Guerra in custody of the warden, sheriff or jailor; that the prisoner is both the Petitioner and a necessary and competent witness in a hearing in the above-entitled case, which is presently set before the United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, and that in order to secure the attendance of the prisoner and properly prepare for said hearing, it is necessary that a Writ of Habeas Corpus ad Testificandum be issued commanding the warden, sheriff or jailer to produce the prisoner (1) in the Harris County Jail by 9:00 a.m. on November 10, 1993 in order that he and counsel may prepare for the November 15, 1993 hearing and (2) in the courtroom of the Honorable Kenneth M. Hoyt, Judge, United States District Court for the Southern District

of Texas, Houston Division, on November 15, 1993, at 9:00 a.m. in order that the prisoner may participate in said hearing as a party in the above-entitled case.

Wherefore, your Petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Testificandum, out of and under the seal of this court, commanding the warden, sheriff or jailer to have and produce the prisoner in the Harris County Jail beginning on November 10, 1993, and continuing to November 15, 1993, and then in the United States Courtroom on November 15, 1993, then and there to participate as a party in said hearing in the above-entitled case; and at the termination of the hearing of the above-entitled case to return him to the above-mentioned institution.

Dated: November 1, 1993.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: 

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No. 01418400
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760
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OF COUNSEL:

STANLEY G. SCHNEIDER
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(713) 961-5901

BAKER & BOTTS

BY: Thomas Gibbs Gee /sa

THOMAS GIBBS GEE
Texas Bar No. 07789000
One Shell Plaza
910 Louisiana, Suite 3725
Houston, Texas 77002
(713) 229-1198

ATTORNEYS FOR PETITIONER,
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by overnight mail on Hon. Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; Price Daniel Sr. Bldg.; Austin, Texas 78711, on the 2nd day of November, 1993.

Scott J. Atlas
Scott J. Atlas

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have the above-named Petitioner, Ricardo Aldape Guerra, now confined in the Ellis I Unit, Huntsville, Texas, brought to the Harris County Jail on the 10th of November, 1993, by 9:00 a.m. of said date and to remain there from day to day until the 15th day of November, 1993, and then to have Petitioner brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to participate as a party in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this _____ day of _____, 1993.

_____
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have the above-named Petitioner, Ricardo Aldape Guerra, now confined in the Ellis I Unit, Huntsville, Texas, brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to testify the truth, according to his knowledge, in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this 21st day of October, 1993.

UNITED STATES DISTRICT JUDGE

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Tab 52

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FAX 011 (44-71) 499-5320

October 28, 1993

By Messenger

Hon. Michael N. Milby, Clerk
United States District Court
United States Courthouse
515 Rusk
Houston, Texas 77002

RE: Ricardo Aldape Guerra v. James A. Collins; Civil Action No. H-93-290; in the U.S. District Court For The Southern District of Texas, Houston Division

Dear Mr. Milby:

Enclosed for filing in the captioned cause please find the following pleadings:

(1) an application for Writ of Habeas Corpus Ad Testificandum; and

(2) a proposed Order.

A copy of this pleading is being sent to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: Hon. Kenneth Hoyt

cc: William C. Zapalac [by telecopy (512/463-2084) and regular mail]
Assistant Attorney General
Enforcement Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

0399:4912
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bcc: Sandra Babcock
Francisco Gonzalez de Cossio
Hernan Ruiz Bravo
Santiago Roel
Mary Lou Soller
Julia E. Sullivan
Team

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

COMES NOW the Petitioner, who represents and shows:

That there is now confined in the Harris County Jail, 701 North San Jacinto, Cell 6B2, Houston, Texas, one Johnny Reyes Matamoros, in custody of the warden, sheriff or jailer; that the prisoner is a necessary and competent witness in a hearing the above-entitled case, which is presently set before the United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, and that in order to secure the attendance of the prisoner it is necessary that a Writ of Habeas Corpus ad Testificandum be issued commanding the warden, sheriff or jailer to produce the prisoner in the courtroom of the Honorable Kenneth M. Hoyt, Judge, United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, at 9:00 a.m. in order that the

prisoner may respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case.

Wherefore, your Petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Testificandum, out of and under the seal of this court, commanding the warden, sheriff or jailer to have and produce the prisoner in the United States Courtroom on that date, then there to respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case; and at the termination of the hearing of the above-entitled case to return him to the above-mentioned institution.

Dated: October 28, 1993.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No. 01418400
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2024
FAX: (713) 758-2346

OF COUNSEL:

STANLEY G. SCHNEIDER
Texas Bar No. 17790500
Schneider & McKinney
11 E. Greenway Plaza
Houston, Texas 77046
(713) 961-5901

BAKER & BOTTS

BY:_____

THOMAS GIBBS GEE
Texas Bar No. 07789000
One Shell Plaza
910 Louisiana, Suite 3725
Houston, Texas 77002
(713) 229-1198

ATTORNEYS FOR PETITIONER,
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by overnight mail on Hon. Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; Price Daniel Sr. Bldg.; Austin, Texas 78711, on the _____ day of October, 1993.

_____
Scott J. Atlas

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

ORDER

TO: Hon. Johnny Klevenhagen, Sheriff of Harris County, Texas, and U.S. Marshall's Office or any other proper U.S. authority

Greetings:

You are commanded to have Johnny Reyes Matamoros, now confined in the Harris County Jail, 701 North San Jacinto, Cell 6B2, Houston, Texas, brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to testify the truth, according to his knowledge, in a hearing in the above-entitled cause to be heard before this Court, and immediately after the said Prisoner has given his testimony, that you return him to the Harris County Jail, Houston, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this _____ day of _____, 1993.

_____
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner.	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	

APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

COMES NOW the Petitioner, who represents and shows:

That there is now confined in Ellis I, Huntsville, Texas, one Ricardo Aldape Guerra in custody of the warden, sheriff or jailor; that the prisoner is both the Petitioner and a necessary and competent witness in a hearing in the above-entitled case, which is presently set before the United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, and that in order to secure the attendance of the prisoner it is necessary that a Writ of Habeas Corpus ad Testificandum be issued commanding the warden, sheriff or jailer to produce the prisoner in the courtroom of the Honorable Kenneth M. Hoyt, Judge, United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, at 9:00 a.m. in order that the prisoner may participate in

the hearing and to respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case.

Wherefore, your Petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Testificandum, out of and under the seal of this court, commanding the warden, sheriff or jailer to have and produce the prisoner in the United States Courtroom on that date, then there to respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case; and at the termination of the hearing of the above-entitled case to return him to the above-mentioned institution.

Dated: October 18, 1993.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: /S/

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No. 01418400
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760
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OF COUNSEL:

STANLEY G. SCHNEIDER
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(713) 961-5901

BAKER & BOTTS

BY: /s/

THOMAS GIBBS GEE
Texas Bar No. 07789000
One Shell Plaza
910 Louisiana, Suite 3725
Houston, Texas 77002
(713) 229-1198

ATTORNEYS FOR PETITIONER,
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by overnight mail on Hon. Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; Price Daniel Sr. Bldg.; Austin, Texas 78711, on the _____ day of October, 1993.

/s/
Scott J. Atlas

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have the above-named Petitioner, Ricardo Aldape Guerra, now confined in the Ellis I Unit, Huntsville, Texas, brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to testify the truth, according to his knowledge, in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this 21st day of October, 1993.

UNITED STATES DISTRICT JUDGE

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f - pldgs

VINSON & ELKINS
L.L.P.
ATTORNEYS AT LAW

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600 CONGRESS AVENUE
AUSTIN, TEXAS 78701-3200
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47 CHARLES ST., BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 011 (44-71) 491-7236
FAX 011 (44-71) 499-5320

October 18, 1993

By Messenger

Hon. Michael N. Milby, Clerk
United States District Court
United States Courthouse
515 Rusk
Houston, Texas 77002

RE: Ricardo Aldape Guerra v. James A. Collins; Civil Action No. H-93-290; In The U.S. District Court For The Southern District of Texas, Houston Division

Dear Mr. Milby:

Enclosed for filing in the captioned cause please find the following pleadings:

(1) an application for Writ of Habeas Corpus Ad Testificandum and

(2) a proposed Order.

A copy of this pleading is being sent to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: Hon. Kenneth Hoyt

William C. Zapalac [by telecopy (512/463-2084) and regular mail]
Assistant Attorney General
Enforcement Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

0399:4912
f:\sa0399\aldape\milby.ltr

bcc: Sandra Babcock
Francisco Gonzalez de Cossio
Hernan Ruiz Bravo
Santiago Roel
Mary Lou Soller
Julia E. Sullivan
Team

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

COMES NOW the Petitioner, who represents and shows:

That there is now confined in Ellis I, Huntsville, Texas, one Ricardo Aldape Guerra in custody of the warden, sheriff or jailor; that the prisoner is both the Petitioner and a necessary and competent witness in a hearing in the above-entitled case, which is presently set before the United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, and that in order to secure the attendance of the prisoner it is necessary that a Writ of Habeas Corpus ad Testificandum be issued commanding the warden, sheriff or jailer to produce the prisoner in the courtroom of the Honorable Kenneth M. Hoyt, Judge, United States District Court for the Southern District of Texas, Houston Division, on November 15, 1993, at 9:00 a.m. in order that the prisoner may participate in

the hearing and to respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case.

Wherefore, your Petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Testificandum, out of and under the seal of this court, commanding the warden, sheriff or jailer to have and produce the prisoner in the United States Courtroom on that date, then there to respond to and answer such questions as may be propounded to him during the course of the hearing in the above-entitled case; and at the termination of the hearing of the above-entitled case to return him to the above-mentioned institution.

Dated: October 18, 1993.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas

SCOTT J. ATLAS
Attorney-in-Charge
Texas Bar No. 01418400
2500 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2024
FAX: (713) 758-2346

OF COUNSEL:

STANLEY G. SCHNEIDER
Texas Bar No. 17790500
Schneider & McKinney
11 E. Greenway Plaza
Houston, Texas 77046
(713) 961-5901

BAKER & BOTTS

BY: Thomas Gibbs Gee /sga by permission

THOMAS GIBBS GEE
Texas Bar No. 07789000
One Shell Plaza
910 Louisiana, Suite 3725
Houston, Texas 77002
(713) 229-1198

ATTORNEYS FOR PETITIONER,
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by overnight mail on Hon. Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; Price Daniel Sr. Bldg.; Austin, Texas 78711, on the 18th day of October, 1993.

Scott J. Atlas

f:\sa0399\aldape\ad-test.app

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner. v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	§	Civil Action No. H-93-290

ORDER

TO: James Collins, Director of Texas Department of Corrections, and U.S. Marshal's Office or any other proper U.S. authority.

Greetings:

You are commanded to have the above-named Petitioner, Ricardo Aldape Guerra, now confined in the Ellis I Unit, Huntsville, Texas, brought before the United States District Court for the Southern District of Texas, Houston Division, on the 15th day of November, 1993, by 9:00 a.m. of said day, and from day to day thereafter, there to testify the truth, according to his knowledge, in a hearing in the above-entitled cause to be heard before this Court, and at the termination of said hearing in the above-entitled case to return him to the Ellis I Unit, Huntsville, Texas, under safe and secure conduct, and have you then and there this writ.

Dated at Houston, Texas, this _____ day of _____, 1993.

_____
UNITED STATES DISTRICT JUDGE

f:\sa0399\aldape\ad-test.ord

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FACSIMILE TRANSMITTAL PAGE

DATE:	October 18, 1993	CONFIRMATION NO:	
TO:	WILLIAM ZAPALAC		
COMPANY:	ENFORCEMENT DIVISION		
TYPE OF DOCUMENT:	LETTER		
NUMBER OF PAGES (including this transmittal page):	3		

FROM:	SCOTT J. ATLAS	SENDER'S PHONE #:	(713) 758 - 2024
MESSAGE:			

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OPERATOR:	RECIPIENT'S FAX#: 512/463-2084	

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FACSIMILE TRANSMITTAL PAGE

DATE: October 18, 1993	CONFIRMATION NO:
TO: Mr. William C. Popular	
COMPANY:	
TYPE OF DOCUMENT:	
NUMBER OF PAGES (including this transmittal page): 8	

FROM: Neil J. Coles	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE:	

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OPERATOR:	RECIPIENT'S FAX#: 512/463.2084	

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FACSIMILE TRANSMITTAL PAGE

DATE: 10/18/93	CONFIRMATION NO:
To: Hon. Tom Gee	
COMPANY:	
TYPE OF DOCUMENT:	
NUMBER OF PAGES (including this transmittal page): 10	

FROM: Scott Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: May I sign your name by permission?	

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OPERATOR:	RECIPIENT'S FAX#: 229.1522	

** TX CONFIRMATION REPORT ** AS OF OCT 18 '92 16:16 PAGE.01

S J ATLAC

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	10/18	16:14	512 463 2084	G3--S	01'37	03	

** TX CONFIRMATION REPORT ** AS OF OCT 18 '93 13:12 PAGE.01

S J ATLAS

	DATE	TIME	TO/FROM	MODE	MIN'SEC	PGS	STATUS
01	10/18	13:07	1789	G3--S	05"03	10	OK

** TX CONFIRMATION REPORT ** AS OF OCT 18 '98 15:49 PAGE.01

S J ATLAS

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	10/18	15:45	512 463 2084	G3--S	03'31	07	INC

#51 vol. 9

25

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-93-290
	§	
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,	§	
	§	
Respondent.	§	

ORDER

Pending before the Court is the petitioner's, Ricardo Aldape Guerra, application for writ of habeas corpus and request for an evidentiary hearing in support of the application. The Court has reviewed the stated basis for an evidentiary hearing, concludes that the motion is well taken and shall grant the motion for an evidentiary hearing.

On October 12, 1992, the applicant was convicted of capital murder and sentenced to death. The Texas Court of Criminal Appeals affirmed the judgment and conviction, and after certiorari was denied by the Supreme

Court, the applicant commenced his writ proceedings. The applicant was denied an evidentiary hearing by the state trial court and no findings of fact were prepared. Nevertheless, the court of criminal appeals accepted the recommendation of the state trial court and, in a one-page per curiam opinion, denied the applicant's request for relief. Pursuant to Title 28 U.S.C. §2254, the applicant moves this Court to issue a Writ of Habeas Corpus for his release from confinement on the "grounds that he is being denied his liberty under an illegal and unconstitutional conviction and sentence of death."

Stated briefly, the facts show that on July 13, 1982, the applicant and another individual named Roberto Carrasco Flores were approached by a Houston police officer after their vehicle stalled due to mechanical problems. When the officer accosted Guerra and Carrasco, he instructed them to come over to the police vehicle. While following the officer's instructions, one of the two, shot and fatally wounded the police officer.

Numerous witnesses claim to have seen part of the occurrence or were present at the time of the shooting. Confusion or lack of knowledge among and between the witnesses resulted in conflicting statements, but all pointed to Carrasco. Although the initial statements given by the witnesses either exonerated Guerra or failed to identify him as the "trigger man",

additional statements were taken from the same witnesses after a group line-up was conducted. At the line-up, discussion occurred by and among various witnesses concerning the identity of Guerra.

The record shows that no pre-trial identification hearing was requested by the applicant or conducted by the court. The applicant attributes this failure to a lack of knowledge concerning police and prosecutorial misconduct that resulted in the witnesses changing their statements based on this alleged misconduct. The applicant contends that it was not merely the altered statements but the manner in which the statements were altered and the circumstances under which the alteration occurred that violate federal constitutional law.

The Court has reviewed the witnesses' original statements, their later statements, the circumstances that allegedly gave rise to the latter statements, the testimony and trial antics that occurred during trial and determines that the conduct of the police officers and the behaviors of the prosecutors may have tainted the in-court identification resulting in a misidentification. For example, the level of certainty demonstrated by witnesses at the scene and recorded in their initial statements is confounded by their later statements and by their testimony. A line of cases from the

Supreme Court dictate an evaluation of the evidence that cannot be adequately performed without a hearing that addresses the identification issue. *Manson v. Brathwaithe*, 433 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. United States*, 390 U.S. 377 (1968).

Because the trial court did not address the law questions regarding the identification issue prior, during or after trial or at the state habeas hearing, no alternative remains but to address them now by conducting a hearing.

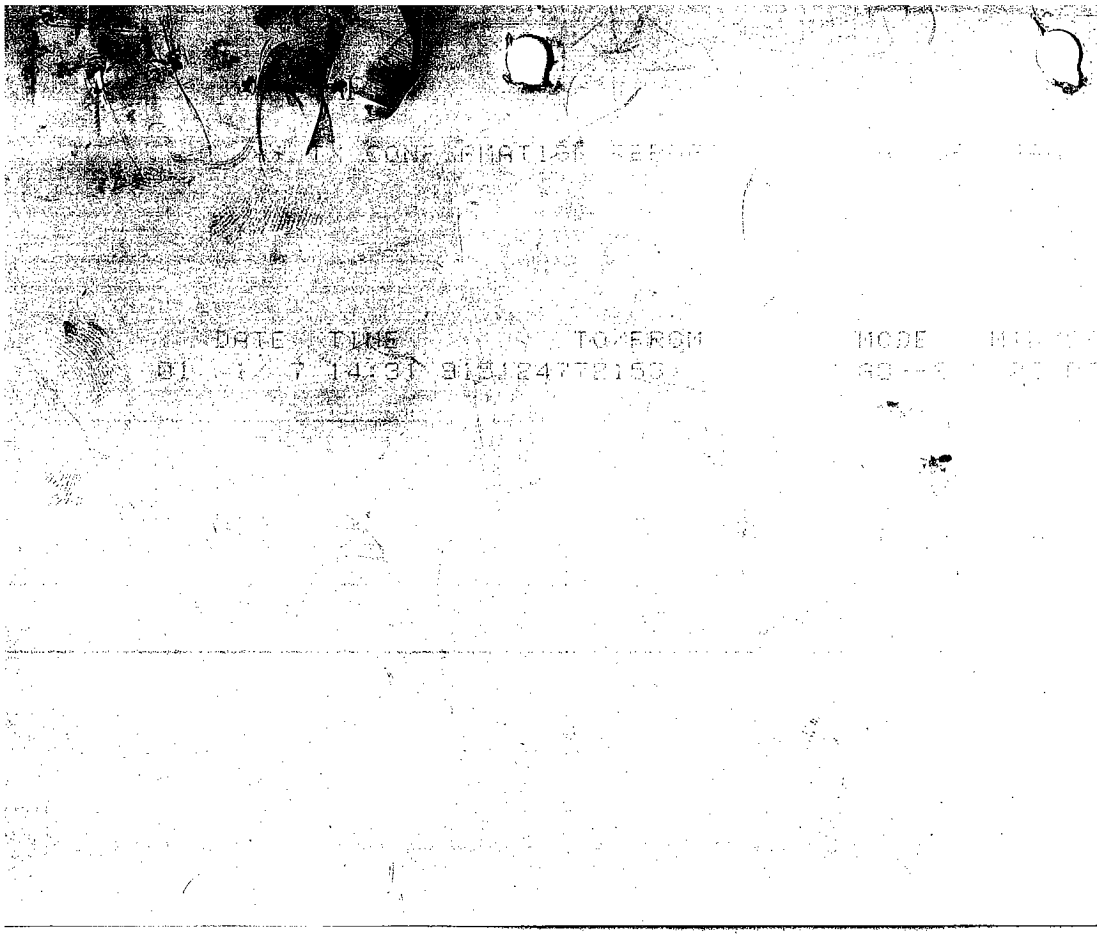
It is ORDERED that a hearing shall be conducted concerning the questions of whether there was police and prosecutorial misconduct in the investigation and preparation of the case that resulted in a misidentification of the applicant as the "shooter."

The hearing is set for the 15th day of November, 1993, to commence at 9:00 o'clock a.m.

It is so ORDERED.

Signed this 29th day of September, 1993.

KENNETH M. HOYT
United States District Judge



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FACSIMILE TRANSMITTAL PAGE

DATE: 1.7.94	CONFIRMATION NO:
TO: Sandra Barnes	
COMPANY: Texas Resource Center	
TYPE OF DOCUMENT:	
NUMBER OF PAGES (including this transmittal page): 5	

FROM: Mark Brainerd	SENDER'S PHONE #: (713) 758 - 2288
MESSAGE: As requested.	

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OPERATOR:	RECIPIENT'S FAX#: 512/477.2153	

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-93-290
	§	
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,	§	
	§	
Respondent.	§	

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It is so ORDERED.

Signed this 29th day of September, 1993.

KENNETH M. HØYT
United States District Judge

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: RUBEN CAZARES	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 951.4066	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:14 PAGE.01

V-E LLP X5796 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:11	7139514066	G3--S	02"57	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: JULIA SULLIVAN	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 202.789.7668	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:21 PAGE.01

V-E LLP X5796 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:19	2028985638	G3--S	02"01	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: STAN SCHNEIDER	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:22 PAGE.01

V-E LLP X5792 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:20	7139615954	EC--S	02"21	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: Mary Lou Soller	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 202/628.0858	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:23 PAGE.01

V-E LLP X5791 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:21	2026280859	EC--S	02"05	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: HON. THOMAS GIBBS GEE	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 229.1522	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:24 PAGE.01

V-E LLP X5790 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:21	1789	G3--S	03"05	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: Rick Morris	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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6025

OPERATOR:	RECIPIENT'S FAX#: 760.6000	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:26 PAGE.01

V-E LLP X5789 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:23	7139606026	G3--S	03"05	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: PHILLIP SANOV	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 541.3535	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:23 PAGE.01

V-E LLP X5786 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:21	713 547 3535	EC--S	02"03	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: GREGORIO G. CANALES ZAMBRANO	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:06 PAGE.01

V-E LLP X5790 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:04	7281783	EC--S	02"31	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: ARMANDO ORTIZ ROCHA	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 512/478.8008	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:09 PAGE.01

V-E LLP X5791 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:06	5124788008	G3--S	03"10	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: Amb. Francisco Gonzalez de Cossio	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 523.6244	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:08 PAGE.01

V-E LLP X5792 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:05	95236244	G3--S	03"17	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: THELMA ELIZALDE	
COMPANY:	
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NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 224.9511	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:07 PAGE.01

V-E LLP X1996 HQUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:05	7135465054	EC--S	01"54	05		OK

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DATE: 9/30/93	CONFIRMATION NO:
TO: HERNAN RUIZ BRAVO	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 523.6244	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:11 PAGE.01

V-E LLP X1995 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:08	95236244	G3--S	03"10	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: RENATO SANTOS	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 862.9647	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:10 PAGE.01

V-E LLP X1994 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:06	98629647	G3--S	03"26	05		OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: ROSEMARY GARZA	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 236.1809	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:09 PAGE.01

VE- LLP X1993 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:06	7132361809	G3--S	03"08	05		OK

0399/ RP0127/29000

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: HUMBERTO HERNANDEZ	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 512/227.1817	

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 17:08 PAGE.01

V-E LLP X5789 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	9/30	17:05	512 227 1817	G3--S	02"37	05		OK

FACSIMILE REQUEST

Please print or type

DATE 9-30-93		RECIPIENT'S CONFIRMATION NO.	
RECIPIENT 15 Recips.			
COMPANY NAME			NO. OF PAGES 5 X 15 = 75
SENDER SCOTT AT/AS # 0399			EXT. 2024
RECIPIENT'S FAX NO.		CITY	
CHARGE TO ☐ Client ☐ Firm	CLIENT NO. PR0127	MATTER NO. 29000	COST 75 00
ATTY INITIALS	ROOM NO.	TIME SENT 5:05	OPERATOR NW

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PR0125/29026

FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO: 3544
TO: Santiago Roel	
COMPANY:	
TYPE OF DOCUMENT:	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott. Atlas	SENDER'S PHONE #: (713) 758 -
MESSAGE: Judge Hoyt granted an evidentiary Hearing on Nov. 15. I will send you a copy of his order when I get it.	

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OPERATOR:	RECIPIENT'S FAX#: 011-525-280-3669	

** TX CONFIRMATION REPORT ** AS OF OCT 1 '93 6:16 PAGE.01

V-E LLP X5796 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	10/ 1	06:15	203 5717	G3--S	00"51	01		OK

** TX CONFIRMATION REPORT ** AS OF OCT 1 '93 6:13 PAGE.01

V-E LLP X5796 HOUSTON

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
01	10/ 1	06:12	203 5717	G3--SR	01"00	01/ 00	07	INC

** TX CONFIRMATION REPORT ** AS OF SEP 30 '93 16:38 PAGE.01

S J ATLAS

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	9/30	16:34	915124772153	G3--S	03"13	05	OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: SANDRA BABCOCK	
COMPANY:	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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F- [illegible] pledges (w/ 4-pg ruling)

** TX CONFIRMATION REPORT ** AS OF OCT 1 '93 9:14 PAGE.01

S J ATLAS

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	10/ 1	09:10	713 780 0967	G3--S	03"30	05	OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: Carmen	
COMPANY:	
TYPE OF DOCUMENT: [redacted]	
NUMBER OF PAGES (including this transmittal page): 5	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 780-0967	

** TX CONFIRMATION REPORT ** AS OF OCT 1 '93 8:50 PAGE.01

S J ATLAS

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	10/ 1	08:46	713 624 1444	G3--S	03"07	05	OK

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FACSIMILE TRANSMITTAL PAGE

DATE: 9/30/93	CONFIRMATION NO:
TO: Steve McVicker	
COMPANY: Houston City Magazine	
TYPE OF DOCUMENT: 5	
NUMBER OF PAGES (including this transmittal page):	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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OPERATOR:	RECIPIENT'S FAX#: 624-1444	

** TX CONFIRMATION REPORT ** AS OF OCT 1 '92 10:12 PAGE.01

S J ATLAS

	DATE	TIME	TO/FROM	MODE	MIN'SEC	PGS	STATUS
01	10/ 1	10:07	17138507804	G3--S	05"15	05	OK

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DATE: 9/30/93	CONFIRMATION NO:
TO: Peter Cooney	
COMPANY: Reuters News	
TYPE OF DOCUMENT: [redacted]	
NUMBER OF PAGES (including this transmittal page): 5	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2024
MESSAGE: Judge Hoyt has granted Ricardo Aldape Guerra an evidentiary hearing on November 15.	

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** TX CONFIRMATION REPORT ** 05 OCT 5 '95 14:44 PAGE.01

S I ATLHQ

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	10/ 5	14:39	9131034461 42	G3-S	05'59	05	OK

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DATE: 10.5.93	CONFIRMATION NO:
TO: Ramon Rodriguez	
COMPANY:	
TYPE OF DOCUMENT:	
NUMBER OF PAGES (including this transmittal page): 5	

FROM: Scott J. Atlas	SENDER'S PHONE #: (713) 758 - 2288
MESSAGE:	

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cc: Team
Gee
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Babcock
RAG
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner, v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	)	Civil Action No. H-93-290

MOTION AND ORDER FOR ADMISSION PRO HAC VICE

This lawyer, Mary Lou Soller (Miller & Chevalier, Chartered; 655 15th Street, N.W.; Suite 900; Washington, D.C. 20005; (202) 626-5800)), who is licensed to practice in the Commonwealth of Virginia (17372) and the District of Columbia (246231) and is admitted to practice before the United States District Court of the Eastern District of Virginia and the United States District Court of the District of Columbia, hereby requests permission of this Court to appear as the attorney of record for the Government of the United Mexican

States, which is seeking to file an amicus curiae brief in the above-captioned case.

Respectfully submitted,

Mary Lou Soller
Miller & Chevalier, Chartered
655 15th Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800

August 6, 1993

ORDER: This lawyer is admitted pro hac vice.

Date: _____

Signed: _____
United States District
Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner, v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	)	Civil Action No. H-93-290

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, THE GOVERNMENT OF THE UNITED MEXICAN STATES, SUPPORTING THE BRIEF OF PETITIONER

The government of the United Mexican States ("Mexico") respectfully moves this Court for leave to file the brief that accompanies this Motion.

Petitioner in the above-captioned case, Ricardo Aldape Guerra, is a citizen of Mexico. As such, Mexico has a vital interest in his treatment by the governments of the State of Texas and the United States. Further, Mexico is concerned that principles of international law be recognized in this case.

Amicus curiae believes the attached brief would be of substantial assistance to this Court in resolving the issues raised by Petitioner's brief. It was permitted to file

a brief to the Texas Court of Criminal Appeals raising these issues.

For these reasons and for those set forth in the Statement of Interest in the attached brief, amicus curiae requests leave to file the accompanying brief.

Respectfully submitted,

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Attorneys for the Government
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August 6, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Leave to File Amicus Curiae Brief Supporting Brief of Petitioner was served by first-class mail, postage prepaid, this 5th day of August, 1993, on counsel of record in this proceeding, as follows:

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Attorney for the Respondent

Mary Lou Soller

Attorney for the Government of
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA, Petitioner, v. JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.	Civil Action No. H-93-290

BRIEF OF AMICUS CURIAE, THE GOVERNMENT OF THE UNITED MEXICAN STATES, SUPPORTING THE BRIEF OF PETITIONER

Amicus curiae, The Government of the United Mexican States ("Mexico"), submits this brief to assist the Court in determining whether to issue a Writ of Habeas Corpus for the release of Petitioner, Ricardo Aldape Guerra,[1] from confinement because (1) his due process rights were violated in the trial below and (2) his status as an undocumented immigrant was improperly considered by the jury as evidence in the capital sentencing proceeding.

[1] Although the Petitioner's surname is "Aldape," for the purposes of consistency with pleadings filed by other parties in this case, Mexico will hereinafter refer to the Petitioner as "Mr. Guerra."

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STATEMENT OF INTEREST OF AMICUS CURIAE

Mexico has a vital stake in the treatment of its citizens by other governments. As a sovereign nation, Mexico -- like all nations -- is responsible under customary principles of international law for its citizens' welfare, wherever they are located.[2] That responsibility extends to Mr. Guerra, a citizen of Mexico.

Mexico also has a vital interest in assuring compliance by other states with a matter covered by international law. Under both the International Covenant on Civil and Political Rights ("Covenant")[3] and customary international law, nations must ensure that the protection of their laws is extended to foreign nationals within their territories. In this instance, Mexico is not seeking preferential treatment for Mr. Guerra. Rather, consistent with the dictates of international law, Mexico seeks to ensure that the protections provided by the laws of the United States and of the State of Texas are fully extended to him.

---

[2] See J.L. Brierly, The Law of Nations 276 (6th ed. 1963); Restatement (Third) of Foreign Relations Law of the United States ("Restatement") § 713, comment b (1987). The United States has often intervened or expressed concern in situations similar to the instant case. For example, in September 1991, the United States expressed its concern to the government of Pakistan about the sentence imposed on two U.S. citizens (Daniel and Charles Boyd). The conviction and sentence were ultimately overturned.

[3] 999 U.N.T.S. 171. This Covenant was adopted by the United Nations on December 19, 1966. It was ratified by Mexico on March 23, 1976, and by the United States on September 8, 1992.

Furthermore, under both the Covenant and customary principles of international law, the United States is also obligated to avoid acts contributing to discrimination based on race or national origin. As a neighbor, Mexico has a particularly acute interest in ensuring that the State of Texas by its official actions, discourages, rather than encourages, any prejudices that exist in the United States against Mexican nationals. This interest is heightened when such prejudices, as alleged here, affect a jury's deliberations on the life of a Mexican citizen.

POINTS OF ERROR

There has been a litany of substantial allegations that Mr. Guerra's statutory and constitutional rights to substantive and procedural due process have been violated. If these allegations are true, and if the trial court's rulings -- and Mr. Guerra's conviction and sentence -- are allowed to stand, it would effectively deny Mr. Guerra the equal protection of the laws of the United States that both the Covenant and customary international law provide. Such action would necessarily violate the United States' international obligations.

In addition, such a ruling would sanction the discrimination implicit in the government's usage of a defendant's immigration status as a relevant factor in the jury's decision whether to impose the death penalty. Of

further harm, such a ruling might also result in the establishment of a legal precedent in Texas. This form of discrimination on the basis of race or national origin would also entail a violation of the United States' obligations under the Covenant and principles of customary international law.

ARGUMENT

In this instance, both the United States' treaty obligations under the International Covenant on Civil and Political Rights and principles of customary international law apply with equal force to the issues raised by Mr. Guerra's case.

The Covenant requires each signatory nation "to ensure to all individuals within its territory and subject to its jurisdiction" certain basic rights. Covenant, art. 2(1). As a matter of customary international law,

> [a] state is obligated to respect the human rights of persons subject to its jurisdiction . . . [t]hat states generally are bound to respect as a matter of customary international law.

Restatement (Third) of Foreign Relations Law of the United States ("Restatement") § 701(b) (1987). Those recognized principles in turn establish two standards of particular relevance here.

First, at a minimum, each nation is obligated to ensure that foreign nationals receive the fair national

treatment of its laws, both substantively and procedurally. See id. § 711, comment c (customary international law "requires that foreign nationals be accorded the equal protection of the laws and forbids unreasonable distinctions between aliens and nationals"). That protection extends to all foreign nationals, "even those unlawfully in the country." Id. at comment i.[4] This protection is repeated in the Covenant, which mandates that each signatory nation protect the rights of "all individuals" and "all persons." Covenant arts. 2(1) and 26. It draws no distinctions between a nation's obligations to aliens and its nationals.

Second, every nation must ensure that its official actions do not contribute to a systematic pattern of discrimination based on race. See Restatement § 702 (a nation "violates international law if as a matter of state policy, it practices, encourages or condones . . . systematic racial discrimination"). As a signatory to the Covenant, the United States has further undertaken "to guarantee to all persons equal and effective protection against discrimination,"

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[4] It is axiomatic that a nation's laws also must satisfy a minimum standard of justice. The most "accepted general articulation of recognized rights" is the Universal Declaration of Human Rights. G.A. Res. 217, 3 GAOR U.N. Doc. A1810 at 71 (Dec. 10, 1948); Restatement Part VII, Introductory Note, n.2; Restatement § 701, reporters' note 6. These rights include "a fair and public trial for persons charged with crime, with guarantees necessary for one's defense; the presumption of innocence; [and] the right to be convicted only according to law . . . ." Id.; see also International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3; Restatement Part VII, Introductory Note, n.3.

including that based on "race, colour, . . . national or social origin, . . . birth or other status."[5] Covenant art. 26; see also Covenant art. 2(1).

In this case, both of these principles -- and the United States' international obligations -- would be violated if the allegations made on Mr. Guerra's behalf are true and the trial court's rulings are allowed to stand. The United States Supreme Court has consistently held that customary international law is a part of the law of the United States that is to be applied by courts of the United States. See Paquete Habana, 175 U.S. 677, 700 (1900). The requirement to adhere to international law is applicable to state courts as well. See Restatement § 111, comment d ("As the law of the United States, international law is also the law of every State . . ."); id. § 702, comment c ("The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts"); see also Restatement § 111(i) and § 115, comment e; R. Lillich (ed.), International Law of State Responsibility for Injuries to Aliens 333 (1983). Failure of the trial court to conform its rulings to these customary standards of international law is entirely inconsistent with the United States' obligations under those same standards.

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[5] This language precisely conforms to that used in Article 2 of the Universal Declaration of Human Rights, as well. These same principles are also repeated in the International Covenant on Economic, Social and Cultural Rights. See Restatement § 701, reporters' note 6.

I. The Failure to Afford Mr. Guerra the Due Process Rights Available Under United States and Texas Law Would Violate the International Obligations of the United States.

As noted above, Mexico is responsible for the welfare of its nationals, wherever located. Because it shares a border and has extensive ties with both the United States and Texas, Mexico has a particular interest in ensuring that all of its citizens receive the full protection of the laws of the United States and Texas.

In this instance, Mexico is concerned whether these protections have been afforded to Mr. Guerra. The allegations made by Mr. Guerra about the injury he has suffered as a result of the violation of his due process rights are substantial. See First Application for Writ of Habeas Corpus ("Application"). Mexico has reviewed the pleadings in this case and is persuaded by Mr. Guerra's arguments that there appear to have been violations of his due process rights. If indeed true, those allegations require that the trial court's rulings -- and Mr. Guerra's sentence -- be overturned under the laws of both the United States and Texas.[6]

Mr. Guerra has alleged violations of his due process rights beginning at the time of his arrest and continuing through the sentencing phase of the trial. These violations

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[6] All persons in the United States, of course, are entitled to the guarantees provided in the Constitution, including due process -- whether or not they are U.S. citizens. Plyler v. Doe, 457 U.S. 202, reh'g denied, 458 U.S. 1131 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); see also Restatement § 722(1) and comments a and k.

occurred at the hands of the prosecutors, the defense attorney, and the trial court. They include (but are not limited to) the use of suggestive identification procedures, the denial of Mr. Guerra's rights to the discovery of exculpatory evidence, the prosecutors' damaging conduct of voir dire, the ineffective assistance of counsel provided to Mr. Guerra in the preparation and presentation of his defense, the government's use of improper and highly prejudicial evidence and statements of "facts" and inferences it knew to be false, the use of jury instructions inadequate to ensure a fair trial, pressure on the jury during its deliberations, and the utilization of improper factors in the jury's consideration of the death penalty.

In such circumstances, allowing the court's rulings to stand would result not only in a denial of equal protection under the law of the United States and Texas, but also in a violation of the United States' obligations under the Covenant and customary principles of international law.

Article 14 of the Covenant obligates every signatory nation -- including the United States -- to ensure that all persons tried on a criminal charge "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Based on the litany of violations alleged by Mr. Guerra in this case, Mexico is concerned that this guarantee was not provided to him. Application at 62-283. For example, Article 14(3)(a) of the

Covenant specifically mandates that every defendant have "adequate time and facilities for the preparation of his defence." As Mr. Guerra has set forth, this right was not afforded to him. Id. at 207-37.

Mexico therefore urges this Court, consistent with the United States' obligations under the Covenant and consistent with the principles of customary international law, to review carefully the arguments made on Mr. Guerra's behalf and ensure that the treatment afforded to him, as a Mexican national, meets the full measure of protection required under the law of the United States and Texas. Prior to such consideration, however, Mexico supports Mr. Guerra's request that this Court provide a evidentiary hearing to more fully develop the facts on which his Petition is based.

II. The Use of Mr. Guerra's Immigration Status as a Factor in the Jury's Consideration of the Death Penalty Results in the Sanctioning of Ethnic Discrimination by the Court and Its Officers in Violation of International Law.

As noted above, every nation is obliged to avoid any official action that "encourages or condones, as a matter of state policy, systematic racial discrimination." Restatement § 702. Further, and more importantly, the United States is required to ensure "the equal protection of the law" by "prohibit[ing] any discrimination and [by] guarantee[ing] to all persons equal and effective protection against discrimination on any ground such as race, colour, . . .

national or social origin . . . birth or other status." Covenant art. 26.

Mexico is particularly concerned that derogatory prosecutorial statements regarding Mr. Guerra's status as an undocumented Mexican immigrant were permitted in the sentencing phase of his trial. As early as voir dire, the prosecutors raised this point with several members of the jury. See Application at 75, 133-40. As the prosecutors conceded, this issue was not relevant to Mr. Guerra's guilt or innocence. The prosecutors' position was that Mr. Guerra's status was relevant to the jury's consideration of the death penalty. (Statement of Facts Vol. 12 at 2133; Vol. 17 at 2603-04 and 2925; Vol. 18 at 3213-14 and 3254; and Vol. 19 at 3552.) Specifically, the State argued that this evidence should be used to answer the second question contained in Tex. Code Crim. Proc. Ann. art. 37.071 Sec. 2(b)(1) (1991) -- that is, whether Mr. Guerra's character was such that he was likely to commit criminal acts of violence that would constitute a continuing threat to society. Id.

In fact, however, Mr. Guerra's nationality and immigration status were not probative evidence of "future dangerousness." On the contrary, as the pleadings filed by other amici curiae illustrate, such comments actually was misleading because the inferences drawn by the government were patently wrong. See Amici Curiae Brief of American Immigration Lawyers Assn., et al. Supporting the Petitioner at

12-13 and A5-A12; Petitioner's Response to Respondent's Answer, Motion for Summary Judgment, and Brief in Support ("Response") at 38. Moreover, it appears that those statements were highly prejudicial because they exploited stereotypes, preconceptions, and fears extant in the community. See Application at 133-39; Response at 35-41.[7] The government's argument at trial thus sought to promote (or, at least, had the undeniable impact of promoting) discrimination based on race and national origin.

Mexico is deeply concerned that any representative of the State of Texas would attempt to base any sentence -- much less a sentence of death -- on such a patently discriminatory factor. Texas is one of Mexico's closest neighbors and a state with which Mexico has extensive ties. Many Texas citizens are Mexican immigrants. For the State of Texas to imply that an undocumented worker, based on his immigrant status alone, is somehow a danger to the community or that this status reveals something about the individual's criminal tendencies is troubling in the extreme.

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[7] As set forth more fully in Petitioner's Application, many Houston residents evidently blamed undocumented immigrants for increases in crime, displacement of American workers, and excessive reliance on public welfare programs. Application at 120-23, 128-29. This apparently was aggravated by articles in the press in 1982, fueling the community's fears about the effect of the passage of the Immigration Reform Control Act and a Supreme Court decision ruling that the children of illegal aliens were entitled to attend free public schools. Id. at 124-28.

As noted above, international law enjoins official actions that contribute to discrimination based on race. See Covenant arts. 2(2) and 26; Restatement § 702. That principle applies with particular force in judicial proceedings when an individual's basic rights -- and indeed, his life -- are at stake.

While Mexico is immediately concerned about the impact of the use of a discriminatory factor in Mr. Guerra's case, Mexico is as concerned about the continuing effect of the trial court's ruling on this issue if it is allowed to stand. Specifically, Mexico is concerned that this will serve as a precedent in other capital cases and, in effect, may gain the status as an accepted rule of law in Texas. If this occurs, the racial discrimination that occurred in this case will be systematically repeated in other cases. This will exacerbate the discrimination prohibited by the Covenant.[8]

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[8] The Covenant does not differentiate in its prohibition of racial and ethnic discrimination between single acts and systematic practices. On the other hand, under customary principles of international law, "[o]ccasional official practices of racial discrimination might not rise to the level of a violation of customary principles." See Restatement § 702, comment i. In this case, however, Mexico is concerned that both are likely to occur. Under the United States' system of jurisprudence where the principle of stare decisis controls, establishing a judicial precedent that officially sanctions discrimination on the basis of race would "encourage[] or condone[] as a matter of state policy, . . . systematic racial discrimination," contrary to customary international law. Id. Where -- as is possible here -- the "official practice" involves a ruling that may be binding on future courts, the nature and effect of the rule is to induce the systematic discrimination by future courts (and the judicial process) on the basis of race alone. This is

(continued...)

Fortunately, in this instance, the applicable international law would appear to require no more than the law of the United States would otherwise provide. As the Supreme Court has held, the United States Constitution itself forbids any State from urging the jury to utilize sentencing factors that appeal to racial or other such prejudices. Furman v. Georgia, 408 U.S. 238, 242 (1971); Aldridge v. United States, 283 U.S. 308, 313 (1931).[9] Thus, it would be a violation of both United States and international law to allow this practice to stand here or continue in the future.

PRAYER FOR RELIEF

WHEREFORE, amicus curiae respectfully urges this Court to consider carefully the due process issues raised on behalf of Ricardo Aldape Guerra and to assure that Mr. Guerra is

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[8](...continued)
precisely the type of discrimination that the customary rules of international law are designed to prevent.

[9] Indeed, the United States Constitution does not permit the use of any sentencing criteria that are based on or involve racial aspects, even when -- unlike here -- that might be probative of the issue of future dangerousness. Furman, 408 U.S. at 364-65 n. 154 (Marshall, J., concurring). Capital sentences must be based on "reason and reliable evidence," not on prejudice and innuendo. See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989); Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982); United States v. Sanchez, 482 F.2d 5 (5th Cir. 1973). This is particularly true if the prejudice at issue is racially based. See, e.g., United States v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990) ("Racial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice."); United States v. Sanchez, 482 F.2d 5 (5th Cir. 1973); Riascos v. State, 792 S.W.2d 754 (Tex. App. Houston [14th Dist.] 1990).

afforded the equal protection of both United States and Texas law, as required by the Covenant and customary international legal principles. If this Court finds that any such violations have occurred, amicus curiae urges that appropriate relief be granted.

Amicus curiae also respectfully prays this Court to overturn Mr. Guerra's sentence because it was based on an appeal to the jury to discriminate on racial and ethnic grounds, and could contribute to the establishment of a legal precedent, also in violation of international law.

Respectfully submitted,

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Attorneys for the Government
of the United Mexican States

August 6, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae Supporting Brief of Petitioner was served by first-class mail, postage prepaid, this 6th day of August, 1993, on counsel of record in this proceeding, as follows:

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January 18, 1993

By Federal Express

Mr. William Zapalac
Office of the Attorney General
of Texas
P.O. Box 12548
Austin, Texas 78711

Re: Ex Parte Ricardo Aldape Guerra

Dear Bill:

Stan Schneider told me that you have agreed that so long as we file Mr. Aldape Guerra's Application for Writ of Habeas Corpus in federal court on or before February 5, 1993, you will agree not to request an execution date. I intend to have the application filed well before then.

I appreciate your cooperation in this matter.

Very truly yours,

Scott

Scott J. Atlas

0399:2580
c:\aldape\zapalac.jan

cc: Ms. Kari Sckerl [by messenger]
Mr. Stan Schneider [by fax]

bcc: Mr. Tom Gee

S. pldge ~~of Brief~~
- Affs. to -
#49 vol 9

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June 16, 1993

By Messenger

Hon. Michael N. Milby, Clerk
United States District Court
Southern District of Texas
Houston Division
515 Rusk
Houston, Texas 77002

Re: C.A. No. H-93-290; *Ricardo Aldape Guerra v. James A. Collins*; in the United States District Court, Southern District of Texas, Houston Division

Dear Mr. Milby:

When I filed yesterday the Petitioner's Response to Respondent's Answer, Motion for Summary Judgment, and Brief in Support, I inadvertently failed to include the two Attachments. An original and two copies of those attachments are enclosed.

Please file-stamp the enclosed extra copy of the attachment and return to the undersigned. Opposing counsel has been provided a copy of this filing.

Sincerely,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: William C. Zapalac - overnight mail

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Please file-stamp the enclosed extra copy of the pleading and return to the undersigned. Opposing counsel is being provided a copy of this filing.

Sincerely,

Scott J. Atlas

Scott J. Atlas

F:\sa0399\aldape\milby.jun
Enclosures

cc: William C. Zapalac - by overnight mail
Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

bcc: Sandra Babcock
Francisco Gonzalez de Cossio
Hernan Ruiz Bravo
Santiago Roel
Mary Lou Soller
Julia E. Sullivan

bcc: Alvaro Luna

bcc: JoAnn Zuniga

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Sincerely,

Scott J. Atlas

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Enclosures

cc: William C. Zapalac - by overnight mail
Ricardo Aldape Guerra
Kari Sckerl
Hon. Thomas Gibbs Gee
Stanley Schneider

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICARDO ALDAPE GUERRA,	§	
Petitioner.	§	
v.	§	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice,	§	
Respondent.	§	

PETITIONER'S RESPONSE TO RESPONDENT'S ANSWER, MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

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ANSWER, MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

Petitioner Ricardo Aldape Guerra files this response to the State's Answer, Motion for Summary Judgment, and Brief in Support ("Answer") as follows:

RESPONSE TO STATEMENT OF FACTS

Much of the State's summary of the trial evidence is accurate. But some, by omission, is misleading, and some is simply inaccurate.

So-Called "Eyewitness" Identifications of the "Shooter" -- First, for example, by relying on selected bits of testimony in response to leading questions from the prosecutors, the State attempts to demonstrate that Herlinda Garcia, Vera Flores, Hilma Galvan, and

Patricia Diaz testified that they saw Guerra shoot Officer Harris. Answer at 3-6. The State even insists that "[t]he record also reflects that five witnesses [these four plus Jose Armijo, Jr.] identified Guerra as the person who shot Officer Harris." Id. at 17. A closer examination, however, reveals that each of these four witnesses either clarified (or retracted) this testimony on cross-examination or that the State's description of their testimony is incorrect.

Ms. Garcia initially claimed to have seen Guerra pull something out of his pants and shoot Harris. S.F. Vol 22 at 449. But she subsequently explained on direct and again on cross-examination that from where she was standing, she could ***not*** tell what he pulled out of his pants. Id. at 450, 479. On cross-examination, she said that because she had already started to run, she did not see Guerra raise his hand, id. at 484, and was not looking at him during the gunfire, see id. at 480.

Ms. Flores made quite clear on both direct and cross-examination that she saw ***no one*** with a gun, id. at 512, 513, saw ***no one*** shoot Harris, id. at 535, and only ***assumed*** that Guerra had shot Harris because, after the murder, she saw him running and shooting "down the street," id. 513, 535. Even after acquiescing to a leading question on re-direct that she had seen the driver pull a pistol and shoot Harris, id. at 543-44, she immediately backpedalled to say that she was unsure what the driver had pulled out and did ***not*** remember seeing him shoot Harris, id. at 545.

Ms. Galvan, after initially testifying only that she heard shots and saw Harris fall, id. at 559, then responded affirmatively twice when asked on direct whether she saw Guerra

shoot Harris, id. at 560-61. But she readily admitted that she never saw a gun, just a flash. Id. at 560. And on cross-examination, she conceded that on the night of the shooting she had given police a radically different version of what she had seen. Application at 27-29.

Nor did Ms. Diaz, as the State claims, testify that she saw Guerra pointing "towards the officer [Harris]" just before shots rang out. Answer at 6. Rather, when asked whether Guerra was pointing in the direction of the police car or the police officer, she stated that it was "in the direction of the police ***car***." S.F. Vol. 21 at 313 (emphasis added).[1] Moreover, she testified unequivocally that she could not remember seeing anything in the man's hands, id. at 318, and did not see him fire a gun, id. at 330, or see "who shot who," id. at 331, 340, because she had ducked before hearing the shots, id. at 314.

In sum, none of these four witnesses testified that they saw Guerra hold a gun and shoot Harris. Their testimony reveals why: before the shooting, they did not see Guerra holding a gun; and at the time of the shooting, they were either not looking at Guerra or could not see him clearly.

Tangible Evidence -- Second, the State initially gives the impression that the police found only two nine-millimeter cartridges on the north side of Walker Street. See Answer at 6; compare id. at 8-9. But HPD Firearms Examiner C.E. Anderson found six of these cartridges on the north side of the street. See S.F. Vol. 20 at 120-21, 129-30, 142-44; First

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[1] The prosecutor mischaracterized her testimony several times by casually incorporating into his questions a reference to the person seen "pointing at the police officer." See S.F. Vol. 21 at 316-18. But her own words described Guerra facing "[t]owards the police car" and pointing in "the direction of the police car." Id. at 313.

Application for Writ of Habeas Corpus ("Application") at 13-14. Only two .45 caliber casings were ever found. See S.F. Vol. 20 at 102, 104, 128-31, 144-45. Thus, the murderer shot many more times than the person running down the south side of the street.

Third, the State describes chemist Danita Smith's testimony that Guerra's hands were dirty and bore no metal trace pattern. Answer at 8. But the State omits her testimony that the metal of which the .45 caliber pistol is made leaves no trace metal pattern. S.F. Vol. 21 at 188.

Finally, the State points out that HPD firearms examiner C.E. Anderson could not determine whether the three nine-millimeter bullets found embedded in the outside wall of a house at the northwest corner of Walker and Edgewood, see S.F. Vol. 20 at 73, 132-33, were fired from the nine-millimeter pistol found on Carrasco. Answer at 9. But the State fails to mention the testimony of HPD homicide detective G.T. Neely, who deduced that when Officer Harris was shot, he was standing by his car door, and that the bullets that killed him were fired so that they traveled across Harris' car "in an almost perpendicular position" toward the house where the bullets were found embedded in the wall. S.F. Vol. 20 at 87; see App. 182 (F1567).

GROUNDS FOR RELIEF

I. GUERRA IS ENTITLED TO AN EVIDENTIARY HEARING

The State makes no new response in arguing that Guerra is not entitled to an evidentiary hearing on his habeas corpus petition. See Answer at 64-65. Therefore, Guerra

directs the Court's attention to the following pleadings filed in this Court, which are incorporated by reference herein: (1) Guerra's Motion for Evidentiary Hearing and Memorandum of Law in Support Thereof (filed on or about Feb. 1, 1993), (2) Petitioner Ricardo Aldape Guerra's Reply to Respondent's Response to Petitioner's Motion for Evidentiary Hearing and Brief in Support (filed on or about April 5, 1993), and (3) Guerra's First Application for Writ of Habeas Corpus at 49-54.

II. INNOCENCE

The State concedes that a majority of the Justices in Herrera v. Collins, 113 S. Ct. 853 (1993), acknowledged that it would violate the Eighth Amendment to execute an innocent person if there were sufficient new evidence of innocence. Answer at 13-14 n.3. The State's only response to Guerra's innocence claim is that Guerra "relies not on newly discovered evidence but merely on his new interpretation of the evidence introduced at his trial." Id. at 14. This argument ignores Guerra's numerous proffers of newly discovered evidence.

For example, the jury heard none of the following:

(1) witnesses who, for the first time, will describe seeing (a) Guerra's ***empty*** hands on the police car hood as Officer Harris was being shot, see Application at 61, 68; (b) Carrasco standing ***east*** of Harris at the time of the shooting, see id. at 68, (c) Carrasco running down the ***north*** side of Walker and carrying a gun that appeared to be a

nine-millimeter pistol, see id. at 61, 69; and (d) one witness's pressuring others to identify Guerra as the shooter, see id. at 61, 168;

(2) witnesses who will describe how they were pressured by the prosecution to testify, using words that were twisted to create the incorrect impression that either they saw Guerra shoot Harris or they saw nothing helpful to Guerra's defense. See id. at 68, 72-73;

(3) Ms. Galvan's acknowledgement at the reenactment that Guerra was standing ***south*** of Harris when she heard the shots, see App. 91 (F375);

(4) testimony that Carrasco was left-handed, that the trace metal pattern on Carrasco's left hand was consistent with the pattern left by the murder weapon, see Application at 70, that Jose, Jr. gave a statement on the night of the shooting describing the shooter as ***left***-handed, see id. at 30 n.19, 70, 176; App. 7 (F16), and that Guerra is ***right***-handed;

(5) the absence of Guerra's fingerprints on the murder weapon, App. 89 (F368);

(6) unequivocal proof that key defense witnesses Jose Torres Luna and Jose Manuel Esparza were ***not*** lying when they claimed to be home when, according to their testimony, they heard Carrasco confess to having killed a policeman, see Application at 105-06;

(7) proof that the lineup and other pretrial identification procedures were skewed against Guerra, see id. at 73-74, 168-69, 171-75;

(8) proof that there was no "cemetery murder," see id. at 86; App. 93 (F376A);

(9) evidence that the State's proof that Guerra and one of his roommates had robbed a gun store was flimsy or even insupportable, see Application at 91-92; and

(10) a description of Guerra's background and character, see id. at 228-30.

The jury heard none of this evidence, the most helpful of which was unknown by Guerra's lawyers at the time of trial. It is hard to believe that any jury that heard this evidence would have convicted Guerra, much less have sentenced him to die. The quality and quantity of evidence that Guerra plans to offer will meet any test of innocence ultimately adopted by the Supreme Court.

III. INSUFFICIENT EVIDENCE OF GUILT

The State suggests that Guerra's insufficiency claim is procedurally barred and that the trial evidence amply supports Guerra's conviction. The State is wrong on both counts.

A. Procedural Default

The State advances three reasons in support of its argument that Guerra's insufficiency claim is procedurally barred. All are easily rebutted. Initially, the State argues that Guerra's failure to challenge the sufficiency of the evidence on direct appeal bars consideration of his claim here under the rule that "[t]he state court's bar must be honored in federal court ***as long as the state court expresses its invocation of the procedural bar by a 'plain statement.'***" Answer at 15 (quoting Harris v. Reed, 489 U.S. 255, 265 (1989) (emphasis added)).[2] The State's argument is misdirected for several reasons. First, the State did not

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[2] The State argues that Guerra's failure to comply with a state procedural rule bars relief in federal court concerning the following arguments: (1) improper *voir dire* remarks, Answer at 22; (2) the knowing use of false evidence about a supposed murder in a cemetery, id. at 30; (3) the hostile attitude that infected Guerra's trial and resulted in an unfair verdict, id. at 35; (4) the improper consideration of Guerra's status as an illegal alien

contend in the state habeas proceeding that Guerra's claim of insufficient evidence was procedurally barred by his failure to raise it on direct appeal. See Respondent's Original Answer at 13-15, Ex parte Guerra, No. 24,021-01 (Tex. Ct. Crim. App. Jan. 13, 1993) (en banc). Therefore, the state court could not have relied on procedural waiver in deciding this issue.

Second, the State cites no authority in support of its argument that failure to raise insufficiency of the evidence on direct appeal procedurally bars a claimant from raising the issue on collateral attack.

Third, there has been no "plain statement" by any state court expressly invoking a state procedural bar to avoid hearing any of Guerra's claims. The State cites Wainwright v. Sykes, 433 U.S. 72 (1977), for the proposition that where a state court has "held" that a petitioner's claim is waived under state law, a federal court's consideration of the claim is barred unless the petitioner shows either "cause and prejudice" or a "miscarriage of justice." Harris, 489 U.S. at 258. The defect in the State's position is reflected in the Harris court's clarification of Wainwright, which is cited by the State; namely, that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its

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in deciding punishment, id. at 43; (5) the identification procedures that violated Guerra's right to a fair trial, id. at 50; and (6) the trial court's failure to define certain statutory terms used in the special sentencing issues, id. at 61-62. Guerra's response to the State's procedural bar argument on the insufficiency claim is equally applicable to all these arguments. Ironically, the State's position that counsel waived these errors provides further support for Guerra's ineffective assistance of counsel contention. See Application at 207.

judgment rests on a state procedural bar." Harris, 489 U.S. at 263 (citing Caldwell v. Mississippi, 472 U.S. 320, 326 (1985), quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)). ***Here, however, no state court has issued a statement of any kind, much less a "plain statement," indicating that its decision was based on a state procedural rule.*** Thus, Guerra's claim is not procedurally barred. "[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" Harris, 489 U.S. at 261 (quoting Caldwell, 472 U.S. at 327).

Even if the Court finds that Guerra must meet the Wainwright standard, Guerra easily qualifies. Guerra satisfies the "cause" requirement by demonstrating ineffective assistance of counsel. See Application at 207-37; Murray v. Carrier, 477 U.S. 478 (1986). The "prejudice" requirement is satisfied by referring to the substance of each issue that the State claims Guerra has waived. At the very least, Guerra has demonstrated that it would be a "miscarriage of justice" if the substance of his contentions were not reviewed, since he is actually not guilty. See Application at 55-62; Herrera, 113 S. Ct. at 862.

Next, the State argues that the "Court of Criminal Appeals has consistently held that it will not address claims of insufficiency of the evidence in collateral attacks on convictions." Answer at 15. On the contrary, where a defendant has entered a plea of not guilty, a habeas court can review the sufficiency of the evidence. See Jackson v. Virginia, 443 U.S. 307 (1979). The state standard of review is "ultimately identical" to the federal

standard. Parker v. Procunier, 763 F.2d 665, 666 n.1 (5th Cir.), cert. denied, 474 U.S. 855 (1985) (citing Carlsen v. State, 654 S.W.2d 444, 449-50 (Tex. Crim. App. 1983) (en banc), overruled on other grounds, Geesa v. State, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991) (en banc)); cf. Ex parte Williams, 703 S.W.2d 674, 683 (Tex. Crim. App. 1986) (en banc).

None of the four cases cited by the State, see Answer at 15, is apposite. The first, Grantham v. State, 760 S.W.2d 661 (Tex. Crim. App. 1988) (per curiam) (en banc), does not even purport to address the standard for reviewing the sufficiency of the evidence on collateral attack. The second case, Ex parte Brown, 757 S.W.2d 367 (Tex. Crim. App. 1988) (en banc), stands only for the narrow proposition that a collateral attack is not permitted on the sufficiency of the evidence to prove the proper sequence of enhancement allegations. Id. at 368. The third case, Williams, undermines the State's argument because the opinion approvingly cites Parker. Williams, 703 S.W.2d at 683. Williams also expressly did not reach the Jackson v. Virginia insufficiency of evidence issue in collateral attacks where the plea was 'not guilty.'" Id. The fourth case, Ex parte Banspach, 91 S.W.2d 365 (Tex. Crim. App. 1936), was decided before Jackson v. Virginia and Williams. Since Banspach, the sufficiency of the evidence issue has risen to constitutional dimension and may be attacked on habeas corpus when the defendant, like Guerra, has pleaded not guilty. See Tr. 8.

Finally, the State argues that the Court of Criminal Appeals could not have reached the conclusion that there were "no controverted, previously unresolved facts material to the legality of Guerra's confinement" without imposing a procedural bar to Guerra's claims. Answer at 16. This is mere speculation by the State: No "plain statement" appears in any

state court opinion regarding any of Guerra's arguments raised in his habeas petition. Harris, 489 U.S. at 265.

Although it is both surprising and generous of the State to concede that its substantive arguments were so entirely meritless that the Court of Criminal Appeals' decision could only have rested on procedural grounds, there is simply no way for the State to determine conclusively that any decision made in the state court was based solely on procedural grounds.

B. Sufficiency of the Evidence

To demonstrate the adequacy of the trial evidence, the State relies on unsupported and inaccurate assertions. Most significantly, the State once again claims that "five witnesses identified Guerra as the person who shot Officer Harris" and that "[t]he witnesses testified that Guerra pointed a gun at Harris and shot him . . . ." Answer at 17. Guerra has demonstrated that this claim, often repeated by the trial prosecutors, see Application at 101, cannot withstand careful review of the trial testimony, see pp. 1-3, supra.

Moreover, the State boldly claims that inconsistencies in the witnesses' testimony "were fully explored during cross-examination" so that the jury could decide who to believe. Answer at 18. But no one explained to the jury that ***every*** prosecution witness placed Guerra in a position from which he could not have been the shooter -- given the physical evidence -- and only Guerra's witnesses testified in a manner consistent with this evidence.[3]

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[3] The State denigrates the trace metal test results in an attempt to overcome a major defect in its case against Guerra: no trace metal from the murder weapon ***or*** the police officer's gun was found on Guerra's hands. The State argues that if Guerra's hands had

IV. PROSECUTORIAL MISCONDUCT

A. Pretrial Misconduct

1. Failure to Disclose -- and Affirmative Concealment of -- Material Exculpatory Evidence.

The prosecution concealed evidence in the form of witness statements and trace metal tests. Application at 68-70.

a. Witness Statements.

As to witness statements, the State responds that Guerra's assertions are conclusory and do not warrant relief because (1) Guerra fails to identify the witnesses in question, (2) in the case of Hector Anguiano, there is no basis to conclude that the information given by Anguiano to the police was inaccurately reported to Guerra, and (3) the witnesses were interviewed just a few hours after the shootings and the police could not yet have begun to edit witness statements and police reports selectively to fit a particular scenario without knowing yet what that scenario was. Answer at 20. None of these arguments is persuasive.

First, Guerra need not prove his claims or name witnesses until he is granted an evidentiary hearing. The State does not -- and cannot -- point to cases holding that the failure to identify witnesses by name is fatal. Guerra need only ***allege*** specific facts that

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been clean, "the tests would have shown that he had handled at least one of the guns found." Answer at 18 n.5. This argument is sheer sophistry. In no way is it probative to a "sufficiency of the evidence" point; it a red herring. Guerra admitted holding the .45 caliber pistol, which leaves no trace metal residue because of the composition of the gun's metal. S.F. Vol. 21 at 188. (Moreover, Guerra has offered to prove that the State's tests on Carrasco's hands were in error, see Application at 70, and that Guerra's hands were not sufficiently dirty to obliterate trace metal residue, see id. at 18 n.8.)

either "point to a real possibility of constitutional error,'" Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977), or, if proved, would entitle him to relief, Townsend v. Sain, 372 U.S. 293, 312 (1963); Wilson v. Butler, 825 F.2d 879, 880 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988). The State recognizes this elsewhere in its Answer. See Answer at 64. The State has simply ignored the Application, which contains extensive proffers of proof that would create "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

Furthermore, and fundamentally more significant, every factual allegation in the Application that does not appear in the trial transcript or the police files can be proven at an evidentiary hearing.

Second, in the case of Hector Anguiano, the State likewise cannot claim that Guerra's allegation -- that the police withheld a taped interview -- must fail because Guerra supplies no proof that the police inaccurately communicated to Guerra the information provided by Anguiano. The time for proof is at an evidentiary hearing. The detail of Anguiano's statement contradicts the police report and supports Guerra's testimony that Guerra was not the killer. See Application at 69-70. Because the information contained in the police offense report was selectively incomplete and deprived Guerra of information helpful to his defense, it was inaccurate and prejudicial.

Third, it is naive for the State to argue that the taking of witness statements hours after the murder compels the conclusion that the police did not have sufficient information

or motivation to edit police reports and witness statements to frame a particular suspect. The police began preparing written witness statements and police reports only *after* they knew that Carrasco was dead; they already knew that the only live potential defendant was Guerra. It was not a difficult step for the police, who wanted someone to punish for this killing of "one of their own," to tailor their reports and the witness statements to point to Guerra and to omit facts suggesting that Carrasco was the triggerman.

In addition, Guerra will produce witnesses who insist that the police selectively edited reports and witness statements; it will be for the Court, at the evidentiary hearing, to decide whom to believe.

Finally, whether the police acted merely carelessly or in bad faith is irrelevant. The Supreme Court addressed this very issue in Brady v. Maryland when the Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, ***irrespective of the good faith or bad faith of the prosecution***." 373 U.S. 83, 87 (1963) (emphasis added).

b. Trace Metal Tests.

With regard to the trace metal test results, the State argues that this evidence is not material evidence that was withheld from the defense. The State reasons that since Guerra's arguments demonstrate that Guerra has recently either run new tests or re-interpreted the original tests, and since the results of neither analysis was available to the State at the time of trial, these results could not have been suppressed. Further, the State

argues that if Guerra had thought that the original trace metal test results were significant, he was free to ask to see them and to perform his own tests. Answer at 21.

This response is without merit for two reasons. First, as shown in his Application at 67, Guerra requested all test results. Guerra's attorneys do not recall ever receiving a copy of the report of the trace metal test on Carrasco's hands and were informed orally only that the test results for Guerra were negative and that the results for Carrasco were positive as to Officer Harris's gun and inconclusive as to the murder weapon. Without seeing the report, Guerra would not have known that the pattern matching Harris's gun appeared on Carrasco's ***right*** hand and that the inconclusive pattern appeared on Carrasco's ***left*** hand. With that information and the knowledge that Guerra was right-handed and Carrasco was left-handed, Guerra would have known to conduct his own tests on the murder weapon. This information was critical to impeaching the testimony of the only actual eyewitness to the shooting, Jose Jr., who told the police that the shooter pulled a gun and shot Officer Harris with his ***left*** hand.

Second, under the State's reasoning, the State's failure to provide the defense with exculpatory physical evidence would never be reversible error unless the defense -- without seeing the evidence in question -- recognizes the exculpatory nature of that evidence. This cannot be the law. The State's apparent failure to give Guerra a copy of the trace metal test report, although requested, is a serious error.

2. Pretrial Intimidation of Witnesses and Other Improper Procedures.

The State argues that Guerra's allegations of police (1) intimidation of witnesses, (2) improper lineup procedures, and (3) suggestive displays to witnesses of photos of Carrasco and Guerra, while noting to the witnesses that Carrasco was dead and that Guerra was "the man who shot the cop," are "conclusory" and lack "any specific content."[4] As elsewhere, the State argues erroneously that Guerra is not entitled to relief or an evidentiary hearing because he has not named the witnesses who were subjected to police intimidation or who viewed Guerra handcuffed before the lineup. Answer at 22; see pp. 12-13, supra. At an evidentiary hearing Guerra will present extensive newly discovered evidence to support these and other allegations of police and prosecutorial misconduct. See pp. 5-7, supra.

B. Improper Trial Conduct.

1. Improper Remarks During *Voir Dire*.

a. Comment on Illegal Alien Status and Punishment.

This will be discussed separately. See pp. 35-41, infra.

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[4] Answer at 21. The State, while arguing that Guerra's allegations are conclusory, does not address Guerra's allegation that the witnesses improperly were allowed:

(1) to view Guerra in handcuffs and in the presence of police before the witnesses saw Guerra in the lineup;

(2) to jointly view to confer with each other about the shooter's identity ***during*** the lineup; and

(3) to pressure each other to identify the defendant as the shooter.

Application at 73-74.

b. Comment on Credibility of Police Witnesses.

The State argues that Guerra waived his objection to the prosecutor's comments to prospective jurors about police witnesses' being more credible than other witnesses, Answer at 22, and misconstrued those comments, which the State interprets to mean only that "like any witness with special training [police officers] might be more credible when testifying about matters within their field of expertise." Id. at 22-24 (footnote omitted). The State is wrong on both counts.

First, Guerra concedes that his attorney did not object to these comments. But this is not a procedural default since there was no such determination in the state habeas court. See pp. 7-9, supra.

Second, a fair reading of these comments demonstrates that, contrary to the State's assertion, the prosecutor's message was that a police officer's testimony is intrinsically entitled to greater credibility. The State cursorily dismisses Guerra's claim by suggesting that "everyone present at voir dire understood" that the prosecutor had not stated that a police officer's testimony should be given additional weight. This is an unsupportable and entirely speculative conclusion. In attempting to bolster this bald assertion by citation to Wainright v. Witt, 469 U.S. 412, 431 (1985), the State blatantly overstates the dictum of Witt's footnote 11: Nowhere does it say that counsel's failure to object at the time of error is "persuasive evidence" that none was committed.

Equally unconvincing is the State's assertion that improper references to police credibility were not made in the *voir dire* of each and every juror is "persuasive evidence"

that the prosecution did not intend to make improper comments. Prejudicial comments are often made to some, but not all, prospective jurors. Moreover, the prosecution's intent (or lack of intent) to engage in such selective misconduct is irrelevant.

c. Comment on "Life" Meaning "Parole."

The State insists that the prosecutor told jurors nothing about parole except the contents of the trial court's charge, Answer at 24, and that Guerra waived his objection by failing to object at trial, id. at 22. Again, Guerra must disagree.

First, the court's instruction, quoted in the Application at 76 n.40, says only that the length of sentence the defendant would be required to serve "comes within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor . . . ." Tr. 330. The prosecutor's comments, however, go far beyond that instruction. The prosecutor explained that a person, whether given a life sentence or a term of years, can be paroled, that the Board of Pardons and Paroles will "release someone if they feel they should . . . . They make that decision based on a formula they use." S.F. Vol. 7 at 1087 (quoted in Application at 76 n.40). As a result of this comment, the jurors received information that did not appear in either the charge or the parole laws.

The prosecutor's comment, moreover, leaves the misleading impression that someone convicted of capital murder and assessed a life sentence could be released at any time based on the rote application of a formula.[5] This obviously was calculated to frighten and to

[5] The Parole Board uses a formulaic approach to determine whether someone is *eligible* for parole. See generally TEX. CRIM. PROC. CODE ANN. art. 42.18, § 8 (Vernon Supp. 1993). But the Board follows no formula when exercising its discretion in deciding

influence any juror to give the defendant the death penalty rather than "life" defined as a formula-driven period that impliedly could be only a few years.

A comment that invites the jury to consider the parole laws during punishment constitutes error because it is calculated to introduce prejudice into the jurors' minds by suggesting and highlighting the necessity of an excessive sentence to protect against the parole board's actions. Application at 77 (citing cases).

Second, the procedural bar doctrine does not apply, since the state habeas court did not find any such waiver. See pp. 7-9, supra.

d. Comment on Law of Parties.

With respect to Guerra's argument that the prosecutor misstated the law of parties to certain members of the jury during *voir dire*, Guerra overlooked the State's response during the state habeas proceeding. On reflection, while Guerra believes that the prosecutor may have confused the jury by failing to fully describe the correct standard for applying the law of parties to the special issues, compare Enmund v. Florida, 458 U.S. 782, 798, 801 (1982), with Tison v. Arizona, 481 U.S. 137, 146-58 (1987), and Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir. 1991), aff'd, 112 S. Ct. 2514 (1992), Guerra withdraws the assertion that the prosecutor misstated the law of parties during *voir dire*.

With respect to the remainder of this issue, see pp. 61-62, infra.

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whether to grant parole. E.g., Ex parte Rutledge, 741 S.W.2d 460, 463 (Tex. Crim. App. 1987) (en banc).

e. Comment on Guerra's Failure to Testify.

The State claims that Guerra waived this error by failing to object or, alternatively, that Guerra has simply "misinterpreted" the State's comments and that the prosecution was only "emphasizing the importance of the jury drawing no inference from the defendant's decision not to testify." Answer at 27. Again, the State should not prevail on either contention.

First, there was no waiver, since the state habeas court did not so rule. See pp. 7-9, supra.

Second, the State contends that, "in context," a prosecution comment such as "as crazy as it may seem, if a person doesn't want to testify, he can remain totally silent . . . [a]t one of the most important days of his life . . . ." really was intended to convince the jury that although such behavior might be considered "peculiar" in a generalized way, the jurors should not draw any inferences from it. See id. at 27-28. The State's literalism, however, cannot obscure the fact that the prosecutor's comments contained the clear and constitutionally impermissible message to the jury that -- if innocent -- only a "crazy" person would not testify. See Application at 81 (quoting prosecution comments on this issue).

2. Use of Evidence Known to be False.

a. Accusation that Guerra Committed an Unrelated Cemetery Murder.

During Guerra's trial, Jose Heredia, a defense witness, referred to rumors of a murder of a woman in a cemetery near to the place and on the same night that Officer Harris was murdered. Application at 84-86. Heredia clarified that he was not suggesting

that Guerra had participated in such a murder. Id. at 84. On cross-examination, however, Mr. Moen asked Heredia eight consecutive questions -- over Guerra's objection -- that were clearly intended to convey to the jury that Guerra and Carrasco had committed the "murder." S.F. Vol. 23 at 746-47. In fact, the prosecutor knew that the rumored murder never happened; and, in spite of the prosecutor's promise to the court to "spell out" the materiality of his questions, id. at 747, he never did.

In his Application, Guerra demonstrated that the prosecution's deliberate portrayal of the false or misleading testimony as fact violated Guerra's rights under the U.S. Constitution. Application at 87-91. In its Answer, the State does not address directly that showing. Instead, the State now maintains that (1) any error was waived because the same evidence was admitted without objection earlier in the trial; and (2) the prosecution did not actually leave a false impression with the jury. Answer at 29-31. Each response lacks merit.

(i) The Earlier Testimony Did Not Connect Guerra to the Rumored Murder.

The State seeks to avoid a determination on its introduction of known false evidence regarding the "cemetery murder." Citing Wainwright v. Sykes, 433 U.S. 72 (1977), the State contends that "[t]he Court need not address this allegation because the ***same evidence*** about the earlier killing was introduced without objection through the testimony of Joseph Escobar, a fire department paramedic." Answer at 29 (emphasis added). The State now rationalizes that Guerra foreclosed review of his claim in these proceedings because he did

not object to this earlier introduction of the "same evidence," thus procedurally barring him from claiming error based on the introduction of the "cemetery murder" testimony.

In reality, Escobar gave no such testimony about Guerra. The Escobar testimony to which the State refers is the following:

Q. Did you receive that call while you were back at Fire Station No. 18?
A. No, I was initially responding to a shooting at the cemetery.

Q. Someone had ***reported*** a shooting at the cemetery?
A. Right.

Q. And were you and Chris Sanchez both trying to locate that shooting?
A. Right.

Q. Were there also police officers in the same vicinity as you, trying to locate that shooting?
A. Right behind us.

Q. Can you tell us, give us an idea of what time of the night this was that you and the police officers were trying to locate a shooting at the cemetery?
A. It was between 9:45 p.m. and 9:50.

Q. ***Were you ever able to find anyone shot at the cemetery?***
A. ***No.***

Q. When did you get any type of word a police officer had been shot at Edgewood and Walker streets?
A. Well, it was at the cemetery.

S.F. Vol. 22 at 598-99 (emphasis added). It is apparent from this testimony only that a shooting at the cemetery had been ***reported*** and that after investigation Escobar could find no indication that a murder had occurred.

The State now rationalizes that Escobar's testimony covered the same evidence that the prosecution later elicited from Heredia, i.e., that someone had been ***murdered*** at the

cemetery and that *Guerra* had somehow been involved. This interpretation is plainly at odds with Escobar's testimony. Escobar did not connect Guerra to the rumored "cemetery murder." Escobar testified only that he could find no one who had been shot.

Escobar's testimony related only to his whereabouts just before his arrival at the scene of the Harris shooting. Guerra had no basis on which to object to that testimony. But he did object correctly when the prosecution sought to create the impression that Guerra and Carrasco had murdered a woman in the cemetery. In short, no evidence connecting Guerra with a "cemetery murder" had been previously offered, much less introduced without objection by the defense.[6] The error in allowing the prosecution's cross-examination of Heredia regarding the "cemetery murder" was thus preserved by Guerra's objection thereto, and was not rendered harmless by earlier testimony.

(ii) The Prosecutors Falsely Implied that Guerra Committed the "Cemetery Murder."

The State's assertion that Guerra has "misread the import of the prosecutor's questioning" and that the questioning did not imply that Guerra was involved in the "cemetery murder" is belied by the facts. Obviously, Guerra and Carrasco were the focus of the prosecutors' case. As prosecutor Moen repeatedly questioned Heredia about the "murder" that some undefined "they" allegedly perpetrated on the same day that "they" killed

[6] Even if the Escobar testimony were sufficiently related to have required an objection by Guerra, Guerra's failure to object would not have procedurally barred him from objecting to the questions posed to Heredia by the prosecution, since the state habeas court did not so find. See pp. 7-9, supra.

the policeman, the mannequins of the two men created by the prosecution gazed relentlessly at the jury. In context, "they" could have referred only to Guerra and Carrasco.[7]

The trial court therefore plainly erred when, over Guerra's objection, it allowed the prosecution to elicit testimony of a fictitious "murder," which had no relevance to its case but was highly prejudicial to Guerra.

In Brecht v. Abrahamson, 113 S. Ct. 1710 (1993), a five-Justice majority held that on habeas review of constitutional error of the "trial type," the test for whether to grant relief is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Id. at 1714, 1722, citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)[8] The Court then raised the possibility that such a finding would be unnecessary in

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[7] By way of example, the last exchanges between Moen and Heredia can only be read by substituting "Guerra and Carrasco" for "they," as follows:

> Q: And did you go down there and see the woman's body when the police officers were down there as well?
> A: Well, we didn't go there. You see, they only told us that ***they*** [Guerra and Carrasco] had killed a lady down there at the cemetery.
>
> Q: Who told you ***they*** [Guerra and Carrasco] had killed a woman down there at the cemetery?
> A: Some boys.

S.F. Vol. 3 at 747 (emphasis added). In contrast, it makes no sense to substitute "some boys" for "they," as the State suggests; to do so would have the witness replying that "some boys" confessed to having killed a woman.

[8] "Trial errors" occur in the trial process and can be "quantitatively assessed." Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991).

the event of a "deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct":

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

113 S. Ct. at 1722.

The prosecutor's elicitation of the false cemetery murder testimony constituted just such a deliberate and especially egregious error as well as such an error "combined with a pattern of prosecutorial misconduct." As Guerra demonstrated in his Application, knowing prosecutorial use of material false testimony is unconstitutional. Application at 87-91. A new trial is required if a prosecutor deliberately deceives a court and jurors by presenting false evidence, or allows false evidence to go uncorrected. Id. at 87-88. Given the charged atmosphere of Guerra's capital murder trial, the prejudicial effect sought by the prosecutor must be presumed, and relief granted accordingly.

Moreover, even if the error does not warrant habeas relief simply because of its very nature, there can be no doubt that "it [is] highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos, 328 U.S. at 776; see pp. 46-50, infra. Indeed, the State certainly, if inadvertently, confirms this likelihood through its plainly implausible interpretation of the prosecution's cross-examination of Mr. Heredia.

Accordingly, the knowing elicitation of false and misleading testimony about a non-existent murder deprived Guerra of his rights to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution. See Application at 87-91.

b. Accusation that Guerra's Roommate Committed a Robbery and Use of This Evidence in Arguing for Imposition of the Death Penalty.

Guerra contended that it was improper for the State to argue at trial that he was likely to be a future danger to society because he associated with people like Enrique Torres Luna, who was charged, but not convicted, of an earlier gun store robbery. See id. at 91-94. The State responds that Luna was independently identified at the scene of the robbery by two witnesses and that there is no evidence that the prosecution pressured the witnesses to testify falsely. See Answer at 32.

The State's response misses the point: The prosecution relied on extremely damaging testimony, perhaps given by witnesses in good faith, that the ***prosecutors knew to be false***. The prosecutors knew that (1) Luna could not have participated in the robbery because he did not meet the suspect's description since he had no tattoo (of a Mexican caballero) on his right arm, Application at 91; and (2) one of the robbery witnesses who did not testify could not identify Luna. The prosecution later acknowledged the lack of proof against Luna by dropping all charges against him.

Moreover, the State's response ignores Guerra's arguments that (1) by associating Guerra with Luna, the State improperly impeached the testimony of Luna's brother, Jose Torres Luna, one of only two witnesses who were at 4907 Rusk when Carrasco (and later Guerra) arrived at the house following the murder; (2) the State falsely portrayed for the

jury the type of people with whom Guerra associated by repeatedly reminding the jury that Guerra and the Luna brothers were long-time friends and that Enrique Luna was a crook; and (3) the State falsely impeached an individual who never testified at trial (Enrique Luna) and tainted Guerra's mother and father, by association, since they sat next to Enrique Luna during trial. See id. at 92-93.

Guerra has alleged sufficient facts to show the existence of prosecutorial misconduct in the use of false evidence to characterize Enrique Luna as dangerous, and the subsequent implication that Guerra's association with Luna also made Guerra dangerous. Such prosecutorial misconduct corrupts the "truth-seeking function of the trial process." Cf. United States v. Agurs, 427 U.S. 97, 104 (1976). Guerra is, therefore, entitled to an evidentiary hearing.

3. Display of Mannequins Throughout Trial.

The State argues that the admission into evidence of the two life-like mannequins was solely for evidentiary purposes. Answer at 33. In support of its argument, the State cites cases in which a photograph of an individual or the individual himself is identified in the courtroom. Id. at 33. But the State fails to discuss two key factors that distinguish the State's use of the mannequins from the type of evidence presented in the cited cases.

First, the State makes much of the fact that the mannequins were "very good likenesses" and "reinforced the testimony of the state's witnesses who identified Guerra." Id. The argument the State misapprehends, however, is that it was the mannequins' life-like accuracy that improperly enabled witnesses to easily identify Guerra by matching him with

the "Guerra" mannequin. See Application at 94-97, 172-174. The State kept the suggestive mannequins in plain view so that witnesses could identify Guerra at trial by matching him with the mannequin that was ***not*** wearing the ***bloody, bullet-riddled***, "dark maroon" or open "brown" shirt of the dead man. Id.

Since each juror and each witness was aware that Carrasco had been killed in a shootout with police on the night of the offense, even a person who was uncertain about the identification of the two men, and in fact, even a person who had not been an eyewitness to the crime, could easily identify which of the two mannequins depicted Carrasco and which depicted Guerra. Thus, the witnesses' in-court identifications were tainted by the presence of the mannequins and did not have origins independent of the previous improper pretrial identification procedures. Id. at 172, 174, 197-207.

Second, the State, while recognizing that juror Monroe's affidavit described the mannequins as "eerie" and claimed that they "influenced my verdict," argues that Monroe "did not state that the alleged influence was in any way improper." Answer at 33. But the State cites no authority supporting the proposition that a juror who testifies that mannequins influenced her verdict must also opine that the influence was improper. Such determinations, of course, concern admissibility of evidence and are within the exclusive province of judges, not jurors. See TEX. R. CRIM. EVID. 104, 403. The State's use of these mannequins as permanent fixtures in the courtroom prejudiced Guerra's due process rights by interjecting impermissibly suggestive factors into the trial process. Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

4. **Elicitation of Irrelevant Testimony that Witnesses Feared Guerra.**

Guerra argued that it was improper for the prosecutor to question witnesses about their unsubstantiated fear of Guerra or of testifying. Application at 97-98. The State's sole response is to distinguish the two cases cited by Guerra, United States v. Herberman, 583 F.2d 222 (5th Cir. 1978), and Chambliss v. State, 200 S.W.2d 1003 (Tex. Crim. App. 1947), on the grounds that, unlike here, those cases involved prosecutor argument, without evidentiary support, that witnesses feared the defendant. Answer at 34. The State then asserts that Guerra offered no authority for the proposition that it is improper for a prosecutor to elicit testimony about fear of the defendant. Id. Neither argument is valid.

First, Guerra cited Herberman and Chambliss only to lend support to the proposition -- using a "cf." cite -- that it is misconduct for a prosecutor to imply to a jury that witnesses are too scared to testify and then to argue *a fortiori* that prosecutors should not even question witnesses about such fears. Thus, the State's attempt to distinguish Herberman and Chambliss is meaningless.

Second, testimony by the witnesses that they feared Guerra or feared testifying, particularly when coupled with the presence of uniformed police officers in the courtroom, created a perception that Guerra was a violent and dangerous person, and made it more likely that the jury would find Guerra guilty and answer "yes" to the special issue on dangerousness during the punishment phase. Because the prejudicial effect of such testimony far outweighs its probative value, allowing the witnesses to testify that they feared Guerra violated rule 403 of the Texas Rules of Criminal Evidence, which provides that

"relevant . . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The prejudicial effect of such testimony is obvious.

5. Improper Jury Argument and Repeated Recitations of Personal Opinions and Matters Outside the Record.

a. Improper Bolstering of Prosecution Witnesses with Imaginary Facts or Impermissible Opinions.

The State has not even attempted to fashion a response to Guerra's demonstration that the prosecution improperly bolstered the testimony of their most important witnesses by insisting, without proof, that

(1) five of them had identified Guerra at the lineup as the killer of both Officer Harris and Mr. Armijo and at trial as the man who shot into Mr. Armijo's car, see Application at 101-02,

(2) Jose Jr.'s stated reason for refusing to read his own statement -- that he did not have his glasses -- was really an excuse for his shyness and inability to read, id. at 102.

These are egregious examples of the prosecutor's bolstering its witnesses with imaginary facts or improper opinions.

b. False, Unsworn Prosecutorial Testimony to Unfairly Impeach *Every One* of Guerra's Witnesses.

The State has not responded to the following arguments made by Guerra:

(1) The prosecutors gave unsworn testimony and invented out of whole cloth the claim that defense witness Jose Heredia, who testified that he saw Carrasco shoot Officer Harris, id. at 39, was testifying under the influence of narcotics or liquor. Id. at 103-05.

(2) The prosecutors improperly impeached two defense witnesses, Jose Torres Luna and Jose Manuel Esparza, who testified that they heard Carrasco confess that he had killed a policeman. The impeachment was accomplished by the prosecutors' eliciting and relying on testimony that was directly contradicted by an unassailable police report in the prosecutors' files. Nevertheless, without any evidentiary basis, the prosecutors accused these two witnesses of perjury. Id. at 105-08.

(3) The prosecutors gave unsworn testimony, based on nothing in the record, to unfairly impeach defense witnesses Heredia and Jacinto Vega by posing cross-examination questions asserting as fact prior inconsistent statements made only to the prosecutor. Id. at 108-10.

6. **Victim Impact Testimony.**

This will be discussed separately. See pp. 41-52, infra.

7. **Attempt to Invoke Religion to Persuade the Jury to Give the Death Penalty.**

The State makes no effort to respond to Guerra's argument that the prosecutors made several inflammatory and improper appeals to religion by telling the jury that the Bible commands them to impose the death penalty. See Application at 114-16.

V. HOSTILE ENVIRONMENT

The State argues that because Guerra did not object to each and every subversive act and statement that infected his trial, this Court is foreclosed from reviewing his claims. Answer at 35. The State then argues, in the alternative, that Guerra's allegations do not

entitle him to the relief requested in the Application. Id. The State is wrong on both counts.

First, Guerra's failure to object to each and every event contributing to the hostile environment should not constitute waiver, especially since the state habeas court made no such ruling. See pp. 7-9, supra.

The State's second argument also fails for three separate reasons. First, it unfairly and inaccurately tries to reduce Guerra's hostile environment claim to a number of single-issue claims that arose at discrete times during the trial. Contrary to the State's premise, Guerra does not argue that ***any one*** factor alone -- media attention, presence of uniformed officers, the State's inappropriate use of his illegal alien status or otherwise -- sufficiently tainted the trial process, but that a combination of hostile factors, the "totality of the circumstances" viewed in the context of his trial, contributed to deny him his right to a fair trial. Application at 118-19.

Second, the State focuses primarily on whether or not Guerra adequately demonstrated actual prejudice, paying only lip service to the principle that when a federal court reviews a state court practice, the federal court must "look at the scene presented to jurors and determine whether what they saw was so ***inherently*** prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Answer at 40-41; Holbrook, 475 U.S. at 572 (emphasis added).

The State argues this issue as if inherent prejudice is relevant only on the uniformed police presence question. But Holbrook does not stand for the proposition that the

required review for inherent prejudice should be limited to that factor alone, but rather whether there was either actual or inherent prejudice regardless of the factors coming into play. Application at 118.

Moreover, although each impermissible prejudicial factor, standing alone, may be insufficient to render a verdict constitutionally unfair, all questionable factors must be viewed in context, and the "totality of the circumstances" must be examined to evaluate the fairness of the trial. Id. at 118-19. Therefore, not only is Guerra ***not*** required to show that the jury was consciously affected by these impermissible factors, but he does not have to show that any one factor standing alone is sufficient to violate his right to a constitutionally fair trial. Id. Guerra has met his burden by describing evidence of each impermissible factor that intruded into the trial process and by demonstrating the inherent risk that these factors in combination produced a jury verdict that was not reached solely on the basis of evidence introduced at trial. Guerra has shown that these factors in combination resulted in a verdict based at least in part on fear, intimidation, and prejudice.

Finally, the State's argument as to each factor respectively is flawed. For example, the State argues that Guerra did not request a change of venue even after jury selection. Answer at 35. This contention is absurd in context. It was impossible for Guerra to know ***before*** trial that the State would employ the strategy of attacking Guerra by referring during trial to his status as an "illegal alien" to incite juror prejudices and fears. Before trial, Guerra could not have known that during the most critical stages of the trial, dozens of uniformed police officers would crowd the courtroom to send a message to the jury. The

presence of the uniformed officers in the courtroom during the trial plus the prosecution's egregious conduct throughout that same trial in combination violated Guerra's right to a fair trial.

The State then argues that the publicity surrounding Guerra's trial and the community feeling toward illegal aliens are individually insufficient to constitute a prejudicial trial. Answer at 36-38. The State again errs procedurally by trying to isolate segments of the trial.

Then the State tries to bolster this weak claim by arguing that "[Guerra] was apparently satisfied when questioning of potential jurors revealed ***no bias*** or ***animosity*** toward illegal aliens on the part of the jurors selected." Answer at 35 (emphasis added). These contentions are disingenuous. Guerra unsuccessfully challenged for cause at least one person selected to the jury, S.F. Vol. 18 at 3284 (challenging Smith as unacceptable). And the State admits that "***several*** members of the venire expressed biased attitudes." Answer at 38 (emphasis added); compare Application at 128-29. In addition, Guerra has proffered sufficient evidence to show that the jurors heard about and almost certainly were affected by the hostility that many Houstonians expressed toward illegal aliens. For example, Guerra demonstrated that several jurors had followed the investigation in the press, Application at 120, and that certain jurors had ***expressed*** their reservations concerning Guerra's illegal status and the Supreme Court decision in Plyler v. Doe, 457 U.S. 202 (1982), Application at 128-29.

Finally, the State argues that the presence of many uniformed police officers in the courtroom during the trial did not heighten the risk of unfair prejudice. Answer at 40-42. Once again the State has not viewed Guerra's trial based on the "totality of the circumstances," but has attempted to isolate one contributing factor. Although Guerra does not contend that the police officers present at his trial engaged in improper conduct during the trial, at an evidentiary hearing Guerra will demonstrate that large numbers of uniformed officers were present at critical stages of the trial and that their presence under the color of law telegraphed a message to the jury that Guerra was guilty. Application 130-31. The risk that the message was received, even if only by isolated members of the jury, deprived Guerra of his right to a fair trial. This factor, combined with evidence of the juror's statements during *voir dire*, the State's comments during *voir dire* and throughout the trial regarding Guerra's status and each of the other impermissible factors that infected Guerra's trial, confirms that there was an unacceptable risk that Guerra's due process right to receive a fair trial was violated.

VI. ETHNIC PREJUDICE

Guerra argued that the prosecutor appealed to ethnic prejudice by not only making frequent references during voir dire to Guerra's being an "illegal alien," but also by (1) telling four jurors during *voir dire* that Guerra's status as an "illegal alien" was a factor that the jury could consider at the punishment phase in evaluating his character, i.e., on the issue of future dangerousness, and (2) making several comments in closing argument on

punishment, including the statement that the jury should "let the other residents of 4907 Rusk . . . know . . . what we as citizens of Harris County think about this kind of conduct." Application at 133-35 & nn.77-79. In response the State argues that (1) the prosecutor's comments in closing argument constituted a proper plea for law enforcement and a request to send a message to the rest of the community, id. at 46-47; (2) during the punishment phase of a capital case, the fact that an individual is in the country unlawfully is relevant to the issue of future dangerousness and is not an appeal to ethnic prejudice, id. at 44-45; (3) Guerra failed to show that the prosecutor's comments in closing argument were so improper as to rise to constitutional magnitude, id. at 45-46; (4) a prosecutor should be allowed the same right as that given a capital defendant by Turner v. Murray, 476 U.S. 28 (1986), Answer at 43-44; (5) the record does not reflect that the prosecutor labeled all "illegal aliens" as dangerous, id. at 44; and (6) during both trial and closing argument,[9] Guerra failed to preserve the error by contemporaneous objection and failed to show both cause for the lack of objection and resulting prejudice, Answer at 43. Guerra disagrees with each point, although the first two are the most astonishing.

First, the State argues that the prosecutor's comments during his closing argument constituted a proper plea for law enforcement because it tells the jury that as citizens, they could tell Guerra and "the rest of the community" that illegal conduct will be punished.

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[9] The State does not claim waiver on Guerra's objection to the prosecution's instructions to several jurors during *voir dire* to consider Guerra's "illegal alien" status in determining punishment. See Application at 134 n.78 (describing Guerra's objection to such comments). The State raised no such objection in the state habeas court.

Answer at 46. But the prosecutor's request did not ask the jury to send a signal to "the rest of the community." It asked that a message be directed only to Guerra's ***roommates***, all of whom the State wanted the jury to assume were undocumented, immigrant Hispanic workers who came to Houston from Mexico and who were not "citizens." See Application at 138-39 & n.85.[10] The "prosecutor reminded the jury ***over and over*** that the crime occurred in ***their*** [the jury's] community . . . ." Answer at 46 (emphasis added). The prosecutor further emphasized Guerra's ethnic and alien status by repeating that Guerra had come to Houston from Monterrey, Mexico. The prosecutor again stressed the differences between the jury and the defendant when he used the characterizations "other ***residents*** at 4907 Rusk" and "we as ***citizens*** of Harris County." The implication was that the other residents at 4907 Rusk were, unlike the jurors, not citizens -- they were "illegal aliens from Mexico" like Guerra. The State defends these arguments with the ***extraordinary*** statement in its Answer: "It was logical to assume that those with whom Guerra was living on Rusk Street would be likely to have shared in the fruits of the gun store robbery . . . ." Id.

The State just doesn't seem to "get it." The State's arguments demonstrate that it does not understand the harm in ethnic stereotyping and branding with guilt by association. The intended implication was that Guerra's roommates were deserving of punishment since

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[10] None of the roommates had been involved in any crime. Indeed, the prosecutors compounded the wrong by falsely accusing one of the residents of the gun store robbery (Enrique Torres Luna) but later dismissed this charge because he did ***not*** meet the description of the participants. See pp. 26-27, supra.

they were all "illegal aliens" who must have conspired together to commit crimes. This plea is unfair and beneath the dignity of the State of Texas. By painting this picture, the prosecutor blatantly inflamed and encouraged the jury to indulge their prejudices regarding "illegal aliens." Guerra deserves a new trial based on this conduct alone.

The State's second contention -- that the "offense" of unlawful entry into the United States helps prove the defendant's propensity for future violent and criminal behavior -- in essence argues that if a jury is vacillating between a life sentence and a death sentence but is not quite prepared to render a death sentence, it could use the act of unlawful entry into the United States to justify the imposition of a death sentence. It is difficult to believe that in 1993 representatives of the State of Texas would make such an argument.

This argument is outrageous and unfair for several reasons. Unlawful entry into the United States is a non-violent, administrative, and non-criminal offense. Conviction for littering likewise arguably shows a lack of respect for our laws. Under the State's logic, the crime of littering would provide some incremental justification for the imposition of the death penalty. The fallacy in this reasoning is obvious. In addition, existing data shows that undocumented workers are ***less prone*** than citizens and resident aliens to commit violent crimes. See Amicus Brief of American Immigration Lawyers Assn., et al. at 12-13 & Apps. 2-3, filed in this Court. Moreover, use of stereotyping to support a punishment is improper; a convicted capital defendant is entitled to have punishment assessed based on his personal conduct, not those of people with whom he may share certain characteristics.

Third, the State argues that for Guerra to prevail on its claim that the prosecutor's remarks during closing argument in the punishment phase were improper, the asserted error must be of constitutional magnitude. Guerra agrees that the issue is whether the comments were of constitutional magnitude, and the State's comments rose to that level.

The cases cited by the State are not on point. Ortega v. McCotter, 808 F.2d 406 (5th Cir. 1987), and Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986), dealt with remarks made by the prosecutor during the guilt phase of the trial. Ortega was not even a capital case. Neither case involved comments of a racial nature. In Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983), which is cited by the State, the remarks in issue were not race-related, although the remarks did occur in the punishment phase of the trial.

The Supreme Court has recognized that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." Turner, 476 U.S. at 35 (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)). Also, because a greater degree of scrutiny is mandated at the sentencing stage, appeals to racial or ethnic prejudice, such as those made here, easily rise to constitutional magnitude.

Fourth, the State's argument that the defense was first to bring up Guerra's status as an "illegal alien" during voir dire and that the State should be given the same right as that given to Guerra by Turner misses the point. Turner allows a capital defendant accused of an interracial crime to inform potential jurors about the defendant's race and to inquire about racial bias. Even if a prosecutor has similar leeway, only questions calculated to

determine a prospective juror's attitude towards undocumented workers and Mexican nationals would be permitted. Instead of investigating for prejudicial attitudes, however, the prosecutors here did the opposite -- they informed jurors that stereotypically prejudicial attitudes could be indulged when assessing punishment.[11]

Fifth, the State argues that the prosecution neither labeled all "illegal aliens" as dangerous, nor referred to Guerra's "illegal alien" status as an appeal to prejudice. In fact, no benign, credible motive for the prosecutors' comments has been presented. Moreover, a review of the prosecutors' comments demonstrates that they created a great risk that jurors would rely on unfair ethnic stereotypes of undocumented Hispanic workers as different, dangerous, and physically and economically threatening. The risk of this negative

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[11] The State, while conceding that Guerra "was entitled to seek out prospective jurors whose biases would interfere with their duty to base their decisions on the evidence, and to have them removed from his jury" argues that "[t]he fact that the state asked the same questions of some of the jurors does not convert the practice into a due process violation" and that "Guerra cannot have engaged in a particular practice and then complain because the state does the same thing." Answer at 43-44. The State, however, mischaracterizes its trial efforts. The State itself concedes that "on three occasions during voir dire, the prosecutors mentioned to persons ultimately selected to serve on the jury that, although they could not consider Guerra's illegal alien status to convict him, they could consider his being an illegal alien ***as a factor in evaluating his character to decide on the appropriate punishment.*** Id. at 44. The prosecution's efforts were calculated and transparent appeals to prejudice.

The State also claims that the defense invited these comments. Answer at 43-44. But *voir dire* questions by Guerra's counsel designed to determine ethnic bias invite only prosecution inquiry to the ***same*** prospective jurors on the ***same*** issue, cf. Kincaid v. State, 534 S.W.2d 340, 342 (Tex. Crim. App. 1976) (invited argument "does not grant the prosecution a license to stray beyond the scope of the invitation"), but ***not*** (1) to ***other*** prospective jurors (to whom Guerra's counsel had made no comments whatsoever) or (2) to encourage prejudice.

stereotyping was especially great in 1982 in the hostile atmosphere engendered by the events publicized in the Houston and national media. See Application at 120-28.

Moreover, to instruct a juror that a person's "illegal alien" status can be considered in any way in the punishment phase means that "a juror who believes that ['illegal aliens'/Hispanics] are violence prone or morally inferior might well be influenced by that belief in deciding whether" there is a reasonable probability that the defendant would commit future acts of violence. Turner, 476 U.S. at 35. "More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of ['illegal aliens'/Hispanics], which could easily be stirred up by the violent facts of [the] crime, might incline a juror to favor the death penalty." Id. Given these risks, the prosecutors' comments were morally and constitutionally unacceptable.

Finally, with respect to Guerra's failure to object to the prosecutor's emphasis on Guerra's status as an "illegal alien" and comments during closing argument, there is no procedural bar since the state habeas court did not so rule. See pp.7-9, supra. As to the prosecutor's emphasis on Guerra's status as an "illegal alien," the State failed to raise the question of waiver in state court.

VII. VICTIM IMPACT EVIDENCE

During *voir dire* and the guilt-innocence phase of Guerra's trial, the prosecutors repeatedly advised prospective jurors and Guerra's jury that they represented the deceased and his family; immediately after introducing autopsy photographs, called Officer Harris's

widow to testify at length, over repeated objection, about the qualities of her husband as a devoted family man; elicited testimony from Mrs. Armijo about the impact of her husband's murder on their son; and in closing argument, relied on Mrs. Harris's testimony in pleading for retribution. See Application at 36-37, 111-14, 140-41, 143.

In its Answer the State makes no attempt to dispute that Mrs. Harris' testimony was erroneously introduced at the guilt-innocence phase of Guerra's trial over repeated objection. Nor does the State even address, much less explain, the prosecutors' repeated misrepresentations that they represented the victims and their families. Further, the State makes no attempt to refute ***any part*** of Guerra's demonstration, in his Application at 140-156, that the Fifth, Eighth, and Fourteenth Amendments prohibited both use of such testimony in the guilt-innocence phase of his trial and the prosecutors' misrepresentations as to their "clients."[12] The State thus concedes the fundamental factual and legal bases of

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[12] The State briefly discusses Payne v. Tennessee, 111 S. Ct. 2597 (1991), where the Court held that victim impact testimony may be admissible during the ***sentencing phase*** of a capital trial (although even then such testimony remains subject to challenge as unfairly prejudicial under the Fourteenth Amendment). Answer at 47-48. The State, however, fails to explain its reference to Payne. This silence is ample admission that Payne is not applicable to Guerra's case, where the prosecution relied on victim impact testimony during the ***guilt-innocence phase*** of the trial. Indeed, Chief Justice Rehnquist explicitly limited Payne to the sentencing phase. 111 S. Ct. at 2611 n.2. See generally Application at 151-52. In a footnote the State inadvertently reinforces this point by asserting that it could not have been error to admit Mrs. Armijo's testimony at the sentencing phase of Guerra's trial. Even if true, that point is irrelevant: it ***was*** constitutional error to introduce Mrs. Harris' and Mrs. Armijo's victim impact testimony during the guilt-innocence phase of his trial. At least as to Mrs. Harris' testimony, the State does not dispute this contention and, instead, simply suggests that the error was harmless.

Guerra's claim, including the fact that the error (at least as to Mrs. Harris' testimony) was of constitutional magnitude.

Nonetheless, the State briefly asserts that, assuming *arguendo* that Mrs. Harris' testimony was erroneously admitted, under Brecht v. Abrahamson, 113 S. Ct. 1710 (1993), Guerra cannot meet his purported "burden" of showing that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Answer at 48. Separately, the State insists that Mrs. Armijo's testimony about the effect of her husband's death on their son was relevant and admissible. Id. at 49.

The State's minimalist response cannot obscure either the pervasiveness or the malignancy of the prosecution's blatant reliance on the testimony of the victims' widows, rather than objective evidence, to obtain Guerra's conviction. As shown below, the prosecution's conduct created constitutional error of the type that ***requires*** reversal; but even if Brecht requires a showing of substantial harm, Guerra easily has met that burden.

A. The Testimony of Mrs. Harris and Mrs. Armijo Was Irrelevant, Prejudicial, and Inflammatory

1. Testimony of Mrs. Harris.

The State simply asserts that the effect of Mrs. Harris's testimony and the prosecutor's argument referring to it did not have a substantial and injurious effect or influence in determining the jury's verdict. But the testimony of both widows plainly had no purpose ***other*** than to contribute to a verdict of "guilty" ***by inflaming the jury*** -- the State certainly offers none. And any fair reading of the record leaves no doubt that the prosecution succeeded in its purpose.

The State's effort to downplay Mrs. Harris's testimony is belied by her lengthy discussion (10 pages in the transcript) of her closely knit family and faithful, hardworking husband. See S.F. Vol. 23 at 701-10. Mrs. Harris testified that her murdered husband was hardworking, S.F. Vol. 23 at 710, that he was a good husband and father, id. at 709-10, and that he had friends, id. at 703; and she identified a photograph of him as "he appeared during his lifetime," id. at 710. She also testified about: their children, id. at 701, 702, 705, 709-10; how she and her husband met, id. at 703; his background and training, id. at 702-04; how excited he was about his work, id. at 708-09; how he worked extra jobs so that Mrs. Harris could stay at home to raise the children, id. at 710; that he took time for a recent trip with his children, id. at 709-10; and their parting words ("I love you"), id. at 709. While this testimony was truly substantial, the gravity of the error is measured ultimately by its inflammatory quality, not its quantity.

At the time of this testimony, the prosecution made no effort to justify its relevance, and the trial judge never explained his consistent refusals to entertain Guerra's repeated objections. Even now, the State offers no justification. It merely rationalizes that, even if constitutionally dubious, the testimony was harmless. But plainly the sole purpose of the testimony was to inflame the minds of the jurors. The nature and timing of the testimony leaves no doubt on this score. Only the most cynical review of this record permits the position in effect taken by the State: that Guerra's jurors were so callous, so emotionally hardened and dispassionate in the discharge of their duties, that they disregarded the prosecutor's emphasis on their "clients," Mrs. Harris' testimony, and the prosecution's

closing plea for retribution. Guerra's guilty verdict is conclusive proof, however, that the testimony had the desired effect.

2. Testimony of Mrs. Armijo.

The State also asserts that Mrs. Armijo's testimony about the effect of her husband's death on her son was "relevant and admissible" to rebut Guerra's showing that Jose Jr. had changed his story at trial from what he told detectives the night of the murder. Answer at 49. This assertion is implausible on its face. Changes in Jose Jr.'s behavior after his father's death on July 20, 1982, see S.F. Vol. 20 at 71, were not -- and could not possibly have been -- connected to the information he gave the police a week earlier. This testimony "rebutted" nothing. The testimony -- doing nothing but prompting juror sympathy -- therefore was inadmissible during the guilt-innocence phase of Guerra's trial for the same reasons as Mrs. Harris' testimony.

B. The Use of Victim Impact Testimony During the Guilt-Innocence Phase of Guerra's Trial Constituted Reversible, Structural Constitutional Error

1. Strict Separation of the Guilt-Innocence and Sentencing Phases Is Fundamental to Fair Capital Trials.

In his Application, Guerra demonstrated that the use of victim impact testimony during the guilt-innocence phase of his trial violated his Eighth and Fourteenth Amendment rights because it effectively destroyed the bifurcated capital trial procedure mandated by the Eighth Amendment and Texas law, thereby resulting in the arbitrary and capricious imposition of the death penalty and a substantial violation of his right to due process. Application at 146-51. As the Court pointed out in Gregg v. Georgia, 428 U.S. 153, 190-92

(1976), the bifurcated capital trial procedure is necessary to prevent juries, before determining guilt or innocence, from hearing highly prejudicial evidence that is relevant only to sentencing. Indeed, since Payne now permits some victim impact evidence to be introduced during the sentencing phase, see note 12, supra, it is even more essential that the integrity of the guilt-innocence phase be preserved by strictly separating the two phases of the trial. To introduce such evidence during the guilt-innocence phase obliterates the bifurcated scheme embraced by Gregg.

There simply is no effective remedy once the wall between the two trial phases has been breached. Guerra, for example, realistically could not have contested Mrs. Harris' testimony through cross-examination or by introducing rebuttal evidence to show that Officer Harris was not the devoted family man portrayed by his widow -- even if true, such evidence would not have disproved Guerra's guilt, and merely proffering it surely would have inflamed the jurors even more than they already were. Thus, the bifurcated scheme is a ***structural*** trial mechanism grounded in constitutional guaranties intended to ensure the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

2. Use of Victim Impact Evidence During the Guilt-Innocence Phase Requires Reversal of the Conviction.

As noted previously, Brecht recently held that on habeas review of constitutional error of the trial type, the test is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 113 S. Ct. at 1714, 1722, citing Kotteakos, 328

U.S. at 776. The Court noted two other types of errors that might compel relief without regard to whether such an effect or influence occurred. First, "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding" to justify habeas relief without a showing that it influenced the verdict. 113 S. Ct. at 1722. Second, constitutional errors that are "structural defects in the constitution of the trial mechanism" continue to require automatic reversal because they infect the entire trial process. Id. at 1717. Such structural errors "deprive the criminal trial of constitutional protections without which the criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." United States v. Pavelko, 1993 U.S. App. LEXIS 9508, at *10-*11 (3d Cir. Apr. 27, 1993). They "defy analysis by 'harmless-error' standards." Brecht, 113 S. Ct. at 1717, quoting Arizona v. Fulminante, 111 S. Ct. at 1254.

The prosecution's use of victim impact testimony in Guerra's case falls within those latter two classes of cases that "defy analysis" by harmless error standards. As shown above, the division in capital proceedings between the guilt-innocent phase and the sentencing phase stems directly from Gregg, where the Court embraced the bifurcated capital trial proceeding as an essential structural mechanism necessary to ensure that a capital defendant receives individualized, reasoned determinations with respect to both guilt and sentencing. The very purpose of separating those two phases is to exclude from the jury's consideration

of the defendant's innocence matters that, if relevant at all, pertain only to the sentencing determination.

While the misuse of victim impact evidence in Guerra's trial occurred, in part, during the presentation of the case to the jury, it hardly bears "quantitative assessment." The errors involved sustained prosecutorial effort to focus the jury on the surviving victims, rather than on the evidence of Guerra's guilt. These incidents of misconduct were no mere isolated slips of the tongue. From *voir dire* to closing argument, they plainly constituted a calculated assault on the jury's emotions. The combination of these actions effectively breached the wall between the guilt-innocence phase and the sentencing phase of the proceedings, thereby destroying the integrity of the two-phase trial mechanism and preventing the trial from "reliably serving its function as a vehicle for determination of guilt or innocence." Pavelko, 1993 U.S. App. LEXIS 9508, at *10-*11. As such, the error is neither a "trial type error" nor susceptible to "harmless error" review. Instead, fundamental fairness requires automatic reversal.

For the same reasons, Guerra's case also fits squarely within the other category of cases that Chief Justice Rehnquist identified in Brecht as not subject to the Kotteakos standard of review. In their very nature and in their pervasiveness, the prosecution's tactics were "deliberate and especially egregious." As demonstrated in Guerra's Application and in this Answer, the victim impact evidence also was "combined with a pattern of prosecutorial misconduct" that so "infect[ed] the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict."

Brecht, 113 S. Ct. at 1722 n.9. The errors were palpable, and made all the more egregious by the weakness of the State's case generally. There was no physical evidence linking Guerra to the murder of Officer Harris. As detailed elsewhere in the Application, the sole evidence used to convict Guerra, other than the victim impact testimony, primarily consisted of the contradictory, highly confused, and plainly erroneous witness "identifications" of Guerra as the shooter. All the incriminating physical and other circumstantial evidence pointed toward Carrasco, not Guerra, as the murderer. In short, one can only conclude that the prosecution's misconduct in using victim impact evidence in Guerra's trial so infected the verdict as to require a reversal.

3. The Errors also Meet the *Kotteakos* Standard of Substantial Harm.

Alternatively, even under the general standard of review laid down in Brecht and Kotteakos, Guerra's Application requires relief. Mrs. Harris's testimony was not probative of any material issue in the case. Its sole purpose plainly was to inflame the jury. Moreover, the victim impact testimony was made ever-present throughout the trial by the prosecutors' repeated misrepresentations about who they represented, and was reinforced through the testimony elicited from Mrs. Armijo. Its magnitude was further emphasized when Mrs. Harris was called as the last witness, after the prosecution introduced the horrific pictures of her husband's skull. The prosecution completed its strategy by emphasizing Mrs. Harris's testimony in closing argument.

Kotteakos "requires a reviewing court to decide that 'the error did not influence the jury' . . . and that 'the judgment was not substantially swayed by the error . . . .'" Brecht,

113 S. Ct. at 1724 (Stevens, J., concurring), citing Kotteakos, 328 U.S. at 764-65. Kotteakos further emphasized that the essential question on review is "what effect the error had ***or reasonably may be taken to have had*** upon the jury's decision." 328 U.S. at 764 (emphasis added).

For all of the foregoing reasons, one can only conclude that the misuse of victim impact evidence in Guerra's trial, at a minimum, reasonably may be taken as having improperly influenced the jury. It was highly prejudicial, rendering his trial fundamentally unfair and denying him the due process to which he was entitled.[13]

C. The Prosecutors' Repeated Assertions that They Represented the Victims and Their Families also Constitute Reversible Error

As part of their strategy of substituting sympathy for the Harris and Armijo families for evidence of Guerra's guilt, the prosecutors repeatedly emphasized to the jury that they "represented" the victims of the crimes and their families. Their false and improper assertions began during *voir dire* and continued through closing argument in the

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[13] The five-Justice majority in Brecht did not change the previous rule (established both in Kotteakos and Chapman v. California, 386 U.S. 18, 19, 26 (1967)) that the ***prosecution*** bears the burden of showing that the constitutional error did ***not*** have a substantial and injurious effect on the jury. See 113 S. Ct. at 1723 (Stevens, J., concurring). In Chapman the Court stated: "Certainly error, constitutional error, in illegally admitting highly prejudicial error or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24. Brecht only settled the standard to be applied on habeas review. The majority neither suggested nor held that it was changing the burden of demonstrating harm or harmlessness. Indeed, Justice Stevens emphasized that his concurrence with the majority holding rested on that understanding as well as on other aspects of Kotteakos that made clear that its standard for review is "appropriately demanding." 113 S. Ct. at 1723. The State obviously cannot sustain that burden regarding this error, as the substantial harm is so palpable. The Brecht standard would be satisfied even if Guerra bore the burden of meeting it.

guilt-innocence phase of the trial. Application at 110-14. Indeed, in closing the prosecutor made a highly emotional appeal to the jury in his self-described capacity as the Harris's "representative." Guerra contends that, alone and in conjunction with the misuse of victim impact testimony, these misrepresentations also violated his right to due process.

In its Answer, the State simply ignores these misrepresentations. Perhaps this is because such misconduct, particularly when considered in the context of the prosecution's use of victim impact testimony and other appeals to sympathy, was so manifestly erroneous.[14]

For the reasons explained in the preceding section, the nature, clear purpose, and context of the error leaves no doubt that the misrepresentations may "reasonably be taken to have had" substantial and injurious effect upon the jury. Thus, under Kotteakos the error again compels a finding that Guerra's right to due process was violated and that his conviction must be set aside.

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[14] Compare Commonwealth v. Mendiola, No. 91-10093, 1993 U.S. App. LEXIS 350, at *32-*35 (9th Cir. Jan. 14, 1993). As in Guerra, the prosecution in Mendiola sought improperly to incite fear and loathing of the defendant in the minds of the jurors. There, the prosecution introduced photographs of the defendant reenacting the crime and the bloody clothes of the victims. In Guerra's trial, the State used the mannequins of Guerra and Carrasco, including Carrasco's blood-stained shirt, to similar effect. Also, as in Guerra's trial, in Mendiola there was no physical evidence linking the defendant to the crimes. The Ninth Circuit found that "[u]nder such circumstances, prejudice against Mendiola's case due to the improper argument of the prosecuting attorney was highly probable." Id. at *35.

In Rougeau v. State, 738 S.W.2d 651 (Tex. Crim. App. 1987) (en banc), cert. denied, 485 U.S. 1029 (1988), overruled on other grounds, Harris v. State, 784 S.W.2d 5, 19 (Tex. Crim. App. 1989) (en banc), cert. denied, 494 U.S. 1090 (1990), the Texas Court of Criminal Appeals made a trenchant observation about the prosecutor's claim of representing the victim's family that is also generally applicable to the prosecution's tactics in Guerra's trial with respect to its appeals to the juror's emotions.

> One of the duties of a prosecuting attorney in a criminal case in this State, no matter how repulsive the accused person may be to him, is to deal justly and fairly with that person, and he should never let his zeal get the better of his judgment. . . . Thus, "the prosecuting attorney must assume the position of an impartial representative of justice, not that of counsel for the complainant. The obligation of a prosecutor to protect accused persons from wrongful conviction is as binding as his duty to enforce the law."

738 S.W.2d at 657 (quoting 21 Tex. Jur. 3d § 1438, at 22); cf. Berger v. United States, 295 U.S. 78, 88 (1935). Similarly, in condemning the improper prosecutorial conduct at issue in Mendiola, the Ninth Circuit recently declared: "A prosecutor's use of illegitimate means to obtain a verdict brings his office and our system of justice into disrepute." 1993 U.S. App. LEXIS 350, at *35.

Guerra's prosecutors failed in their duty of fair dealing. Among other reasons, Guerra's conviction was fatally flawed by the prosecutor's reliance on victim impact testimony and the prosecution's misrepresentations about their role during the guilt-innocence phase of his trial. In these circumstances, the Fifth, Eighth, and Fourteenth Amendments require reversal.

VIII. THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE INVESTIGATION AND TRIAL

The Answer sets forth the applicable "totality" standard, without any analysis of its application here. As its response to Guerra's claim of due process violations in the identification procedures, the State merely asserts that there is a procedural bar and incorporates the substantive argument made in the state habeas proceeding.

There was no bar, however, since the state habeas courts never made any such finding. See pp. 7-9, supra. As to the State's other arguments on the "totality of the circumstances," Guerra incorporates as his response his Reply to Respondent's Original Answer to Applicant's First Amended Application for Writ of Habeas Corpus at 64-82, Ex parte Guerra, No. 24,021-01 (Tex. Crim. App. Jan. 13, 1993) (en banc). A copy of these pages is attached hereto and marked "Attachment 1" for the Court's convenience.

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Inadequate Pretrial Investigation and Preparation for the Guilt-Innocence Phase

The State argues that defense counsel rendered effective assistance during the pretrial investigation because they were familiar with the witnesses' pretrial statements and conducted "thorough" cross-examination of the State's witnesses. Answer at 53. Guerra in his Application demonstrated the failings of this argument in light of defense counsel's time constraints and failure to ***promptly*** review police files, seek appointment of and extensively use an independent investigator, immediately and thoroughly investigate the crime scene,

and identify, find, and interview witnesses, often due to misconduct by the police and prosecutors. Application at 213-16.

The State insists that different strategy from the perspective of hindsight does not demonstrate ineffective assistance. Answer at 53. Guerra has shown, however, that a merely ***adequate*** investigation would have uncovered the location of the bullets and casings, which, when combined with the streetmarkers, pool of blood, other fixed objects in the street, and Guerra's location as described by the witnesses, would have demonstrated to counsel -- and allowed counsel to demonstrate to the jury -- that Guerra could not have been the shooter. Application at 13-14, 19, 56-57 & n.30, 176-78, 217 & n.163. A minimally adequate investigation also would likely have uncovered at least some of the misconduct detailed in the Application. This is not benefitting from hindsight -- it is detailing the ineffective assistance that Guerra received from his trial counsel.

B. Failure to Consult and Retain Experts

The State claims that defense counsel acted reasonably in failing to hire independent experts because it is only "speculation" that these experts could have refuted eyewitness testimony or otherwise provided helpful evidence. Answer at 53. Guerra has already committed in his Application to demonstrate that recognized ballistics, firearms, and trace metal experts could have contradicted the prosecution's so-called "eyewitnesses" and trace metal experts on critical issues. Application at 217 & nn.163-64. Moreover, these experts -- ballistics and firearms, trace metal, fingerprint, chemistry, and lighting -- would have provided Guerra the necessary investigation into the facts of the case. See id. at 217-19.

Defense counsel never consulted *any* experts prior to trial to evaluate the possibilities of rebutting, or at least questioning, the State's assertions. No defense counsel can possibly develop a reasonable trial strategy and provide effective assistance without a reasonably substantive investigation. Baldwin v. Maggio, 704 F.2d 1325, 1332-33 (5th Cir. 1983), cert. denied, 467 U.S. 1220 (1984).

In addition, the State's claim -- that the failure to hire any experts is no proof of ineffective assistance -- ignores the undeniable truth that such neglect reflects inattentiveness, which is probative of incompetence, one of the elements of ineffective assistance.

C. Failure to Attack the Identification Procedures and Other Pretrial Investigative Techniques

The State argues that defense counsel's failure to request a hearing to test the admissibility of the witness identifications was inconsequential since (1) Guerra has made only unsubstantiated claims of police misconduct and (2) each identification would have been admitted because each had an independent origin. Answer at 54. This ignores Guerra's offer to prove specific instances of police misconduct. See Application at 68-70, 72-74, 94-95, 165-68, 171-75. Moreover, if counsel had requested such a hearing, the lineup identifications and subsequent investigative procedures almost certainly would have been suppressed at trial, see id. at 175-207, and Guerra likely would not have been convicted, see id. at 220-21, 223-24. In any event, the decision to forego a Wade-Gilbert hearing could not possibly have been the product of reasonable trial strategy. See id. at 220-21.

D. Conduct During *Voir Dire*

In response to Guerra's argument that defense counsel's conduct during *voir dire* amounted to ineffective assistance, the State responds simply that "Guerra has mischaracterized the comments of the prosecution in every instance." Answer at 54. Reviewing the comments, however, indicates that the State, not Guerra, is mistaken. No strategic basis exists for defense counsel's failure to object to prosecution statements during *voir dire* instructing the jurors to:

(1) give greater credibility to police officers than others,

(2) consider Guerra "crazy" if he chose not to testify,

(3) remember that people with a life sentence will be released on parole based on automatic application of a formula, and

(4) consider Guerra's status as an illegal alien as a factor in deciding whether he deserved a death sentence.

See Application at 222.

E. Conduct During the Guilt/Innocence Phase

The State did not respond to Guerra's arguments that defense counsel during the guilt-innocence phase should have mentioned that someone in Guerra's position at the time of the shooting could not have been the shooter. Application at 222-23. The State challenges only Guerra's criticism of trial counsel's failure to cross-examine the prosecution's fingerprint expert. Answer at 54-55. The State claims that it was reasonable trial strategy for trial counsel not to cross-examine the expert, but gives no explanation

except that the prosecution's expert had already testified that it is difficult to lift useable prints for numerous reasons and the jury knew that Carrasco had held the 9-millimeter pistol and that Aldape claimed to have held the .45 caliber gun. Id.

This argument misses the point: the jury never knew that Guerra's fingerprints did not appear on the 9-millimeter pistol -- the gun he allegedly used to shoot Harris. While there were plausible theories to explain the absence of prints, one such theory is that Guerra never touched the gun. By failing to raise this issue by cross-examining the prosecution's expert, Guerra's counsel forfeited that argument for no legitimate reason.

F. **Conduct During the Penalty Phase**

The State argues that defense counsel's failure to present testimony during the punishment phase from friends about Guerra's good character was a reasonable trial strategy because (1) the jury would give more weight to Guerra's recent, allegedly violent tendencies; (2) subjecting non-English-speaking witnesses to cross-examination would have been dangerous; and (3) witnesses willing to assist Guerra now might not have been so cooperative in 1982. Answer at 55-56. These arguments have no merit.

First, there is nothing to the argument that it would have been fruitless to point out Guerra's background in light of the proof of Guerra's then recent alleged participation in a gun store robbery. Guerra demonstrated the questionable nature of the robbery proof. See Application at 235-36 & n.174. Moreover, the prosecution's withering rhetoric in closing argument about the lack of testimony from Guerra's mother and friends about

Guerra's character as both a child and an adult, see id. at 226, belies any notion that the prosecution considered such proof to be useless.

Second, the State does not divulge the sinister information that it believes could have been extracted by cross-examination of Guerra's mother and friends. Guerra's current counsel has questioned them and can find no such dangerous revelations. More importantly, Guerra's trial counsel were unaware of any such damaging information because they never spoke to these witnesses and never even knew that they existed because counsel never attempted to identify or speak to them.

Third, the State's speculation that Guerra's mother and friends might not have agreed to assist in 1982 is insupportable. His mother could have helped more, if only she had been asked to say more. Guerra will demonstrate that his friends will help now and would have helped then -- if anyone had asked.

Finally, the State fails to explain how the failure to investigate the defendant's background and develop a strategy for the punishment phase of trial can *ever* represent a plausible trial strategy.[15] Case law is uniformly to the contrary. See Application at 226-28, 231-37; Martinez v. Collins, 810 F. Supp. 782 (W.D. Tex. 1991) (failure to present evidence from family members about defendant's good character traits), aff'd, 979 F.2d 1067 (5th Cir. 1992); see also Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992) (failure to employ psychologist

[15] In fact, the decision to ask Guerra's mother only whether Guerra had prior felony convictions hurt Guerra by opening the door to the prosecutor's query about how to interpret defense counsel's failure to ask her about Guerra as a child. Application at 226.

or psychiatrist in the sentencing phase on an obviously critical issue was ineffective assistance).

X. THE COURT'S REFUSAL TO EXCUSE FOUR PROSPECTIVE JURORS FOR CAUSE

The State adopts by reference its state habeas court response on this issue. Guerra will do likewise. See Guerra's Reply to Respondent's Original Answer to Applicant's First Amended Application for Writ of Habeas Corpus at 88-94, Ex parte Guerra, No. 24,021-01 (Tex. Crim. App. Jan. 13, 1992) (en banc). A copy of these pages is attached hereto and marked "Attachment 2" for the Court's convenience.

XI. TIMING OF PEREMPTORY CHALLENGES

The State concedes that Guerra successfully preserved his objection to the Texas method of exercising peremptory challenges in a capital murder trial. The State asserts, however, that Guerra gave no authority or reasoning to justify overturning Janecka v. State, 739 S.W.2d 813 (Tex. Crim. App. 1987) (en banc), Answer at 57, which found that the Texas method for jury selection in capital murder cases did not violate state or federal due process or equal protection. The State is wrong.

As Guerra argued, see Application at 252, the Janecka court not only recognized the disadvantage inherent in the timing of the use of peremptory challenges, but failed to identify *any* state interest that is advanced by preventing a capital defendant from using peremptory strikes after examining the entire venire. See 739 S.W.2d at 834. In listing the

other benefits provided capital defendants, the Janecka court noted that five extra peremptory strikes help counteract the disadvantage of the forced use of peremptory strikes during the *voir dire* process. Id.

This rationalization is hollow. In selecting the jury for Guerra's trial, 90 potential jurors were examined, a typical number in a capital case. A mere five extra peremptory challenges cannot undo the harm inflicted by the inability to exercise these challenges after examining the entire venire. Defense counsel undoubtedly refrained from striking objectionable potential jurors early in *voir dire* out of concern about using too many challenges too early. The harm -- having unacceptable people on the jury -- is irremediable.

Furthermore, Guerra provided authority and reasoning to justify overturning Janecka by citing several Supreme Court cases and a Fifth Circuit case in which the importance of the peremptory challenge and the ability to exercise these challenges intelligently in the *voir dire* process were grounds for reversal, irrespective of prejudice to the defendant. See Application at 250-54.

The State proffers only one alleged rational basis -- efficiency -- for the requirement that preemptory challenges in capital cases be exercised after examining each prospective juror. The State claims that allowing preemptory challenges after the entire panel has been questioned could cause delay if the combination of challenges for cause and preemptory challenges resulted in fewer than 12 jurors. But this argument creates a straw man. So long as for-cause challenges are made after each prospective juror has been questioned, preemptories can be exercised -- and a jury selected immediately -- once the number of

prospective jurors who have been questioned and not struck for cause equals 13 plus the total number of preemptory challenges allowed. This will cause ***no*** delay and cannot provide a rational basis for depriving a capital defendant of the right to the same intelligent use of preemptory challenges provided to other defendants.

XII. THE LAW OF PARTIES

Guerra argued that the prosecutor's repeated explanations of the law of parties during *voir dire* and the trial court's refusal to charge the jury on the inapplicability of the law of parties to the special issues caused the unconstitutional application of the first special issue to Guerra. Application at 257-60. In response, the State attempts to distinguish Nichols v. Collins, 802 F. Supp. 66 (S.D. Tex. 1992), and cites Harris v. Collins, No. 92-2918, 1993 U.S. App. LEXIS 8819 (5th Cir. Apr. 22, 1993) (eventually will be at 990 F.2d 185), and Bridge v. Collins, 963 F.2d 767 (5th Cir. 1992), as controlling. But this case is similar to Nichols and not to Harris and Bridge. In Nichols, the jury was instructed on the law of parties in the guilt-innocence phase; similarly, during the *voir dire* of Guerra's jury, the prosecutor repeatedly explained and described the law of parties to the jurors. See Application at 77-78 & n.41. The harm suffered by Nichols as a result of the trial court's failure to give an "anti-parties" charge is the same harm suffered by Guerra: It is likely that the jury believed that the law of parties applied to the first special issue. Thus, where Guerra's entire defense was that he was not the triggerman and the prosecutors repeatedly made references to the law of parties during *voir dire*, the trial court's failure to explain the

inapplicability of the law of parties caused the unconstitutional application of the first special issue to Guerra. Furthermore, as the outcome in Nichols has not been ultimately decided, Guerra requests that this Court await the Fifth Circuit decision in Nichols before deciding this issue.

Harris is easily distinguishable. The Harris court stated that "[t]he most serious weakness of [Harris' law of parties argument] is its lack of evidentiary support," since there was no direct evidence that any party other than defendant Harris had killed the deceased. 1993 U.S. App. LEXIS 8819, at *10. In Guerra's case, however, several of the eyewitnesses testified that Carrasco, not Guerra, killed Officer Harris. Additionally, it is likely that, without a clarifying instruction from the trial court, the Guerra jury did not fully understand that the law of parties did not apply to the first special issue because, unlike the defendants in Harris and Bridge, (i) Guerra's jury was never instructed on the law of parties, either at the guilt-innocence phase or the punishment phase, (ii) Guerra's main defense was that Carrasco was the person who shot Officer Harris, and (iii) ***the prosecutors had repeatedly discussed the law of parties during jury selection.***

XIII. FAILURE TO DEFINE TERMS IN SPECIAL ISSUES

The State makes three arguments in response to Guerra's claim that the trial court's failure to define "reasonable doubt" and several terms used in the special sentencing issues violates Guerra's Eighth and Fourteenth Amendment rights. None of the State's points have merit. First, the State argues that Guerra waived this claim because he objected at

trial on grounds different than those raised now. Answer at 61-62. Since the state habeas court did not so rule, this issue is not foreclosed. See pp. 7-9, supra.

Second, the State argues that Guerra's position is "foreclosed" by Fifth Circuit and Supreme Court precedent. Answer at 62. The State cites two cases in arguing that the undefined terms in the punishment issues contain a meaning that juries are capable of understanding. Pulley v. Harris, 465 U.S. 37, 49 n.10, (1984), quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring); Milton v. Procunier, 744 F.2d 1091, 1096 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985). But the Supreme Court in Jurek, the seminal case, did not "foreclose" review of this issue. Justice White's concurring opinion stated that the determination that juries "***should be*** capable" of understanding the statutory terms was made "at this juncture." Justice White thus clearly implied that courts could later, upon review, determine that juries were not, ***in reality*** and upon application, interpreting the statutory terms consistently and reliably as required by the Eighth and Fourteenth Amendments. 428 U.S. at 279 (emphasis added).

The Fifth Circuit, in Milton, agreed. 744 F.2d 1096 (stating that Jurek had answered the question only "in the abstract"). Guerra has demonstrated that juries do not interpret these terms consistently. See Application at 273-80.

Additionally, the State cites Lowenfield v. Phelps, 484 U.S. 231 (1988), to argue that where the constitutionally required narrowing function is performed at the guilt-innocence phase of the trial, no further narrowing is required at the punishment stage. Answer at 62. This assertion flies in the face of the Texas courts' post-Lowenfield holdings that "the

function of Article 37.071 . . . [is] to ***further narrow*** the class of death-eligible offenders to *less* than all those who have been found guilty of [capital murder] as defined under [the Texas capital murder statute]." Smith v. State, 779 S.W.2d 417, 420 (Tex. Crim. App. 1989) (emphasis added) (quoted in Application at 270).

If the special issues used in Guerra's trial were intended to serve as part of the narrowing process, they must meet the constitutionally mandated requirement that the terms of the aggravating factors must not be inherently vague or imprecise. Key standards contained in the Texas statue, such as "deliberately" and "criminal acts of violence that would constitute a continuing threat to society," do not on their face provide sufficient guidance to the jury in determining whether the death penalty should be imposed.

Finally, the term "reasonable doubt" was not defined at the guilt-innocence phase to the jury, and thus, even under the State's analysis, the constitutionally mandated requirement that the terms used in applying the death penalty provide sufficient guidance to the jury was not met.

XIV. THE EVIDENCE CUSTODIAN'S LOSS OF THE CRIME SCENE MAP

The State argues that (1) the loss of the crime scene map (State Ex. 5) and any resulting due process violation is limited to direct appeal and (2) there is no allegation that there was error in the admission or use of the map at trial. The State's arguments are misplaced. First, the State offers no reason to distinguish between the right to have a crucial part of the record available on direct appeal and not in habeas corpus proceedings.

As previously argued, the doctrine is the same: A state cannot deny a defendant the means to rebut the prosecutor's case, whatever the stage of proceedings. See Application at 281-83. The State cannot argue that due process protections do not extend to habeas proceedings.

Second, the fact that Guerra does not question the admissibility of the map misapprehends Guerra's argument and is irrelevant. Without the map showing witnesses' initial recollection of their respective locations at the time of the shooting in relation to the location of Officer Harris, Guerra, and Carrasco, Guerra is hampered in presenting his claims. See id. at 282-83. Thus, it is Guerra's inability to review the eyewitnesses' testimony with the aid of the only map detailing the movements of the triggerman and Officer Harris that has in the past denied and ***continues*** to deny Guerra's due process rights.

XV. CUMULATIVE EFFECT

The State insists that Guerra has failed to establish some of the requirements laid down by the Fifth Circuit in Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992), for the application of the cumulative error doctrine. First, the State claims that Guerra "has failed to identify any errors in his trial" and "cannot demonstrate a due process violation that would allow any possible error to be considered." Answer at 64. Guerra has identified trial errors throughout the Application and this Answer. Derden, in accord with Fifth Circuit precedent, does not require that the individual errors, the cumulative effect of which is of

constitutional proportions, each constitute a reversible due process violation.[16] Indeed, if such were the case, the doctrine of cumulative error would be superfluous. Second, the State claims that any errors were not preserved by contemporaneous objections. Id. But there was no waiver, since the state habeas court made no such finding. See pp. 7-9, supra. Third, the State contends, without explanation, that any errors did not produce "an unreliable result." Answer at 64. But Guerra has demonstrated that errors that permeated Guerra's trial "more likely than not caused a suspect verdict, " as required by Derden, 978 F.2d at 1458.

PRAYER FOR RELIEF

Applicant RICARDO ALDAPE GUERRA requests that this Court:

(i) delay Mr. Guerra's execution pending final disposition of this Application;

(ii) vacate Mr. Guerra's conviction for capital murder and sentence of death;

(iii) issue a writ of *habeas corpus* releasing Mr. Guerra from custody; or alternatively, release Mr. Guerra from custody unless the State grants him a new trial;

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[16] United States v. Wicker, 933 F.2d 284, 292 (5th Cir.), cert. denied, 112 S. Ct. 419 (1991) ("[t]here may be instances where improper statements, which are not individually prejudicial enough to require reversal, could cumulate to affect the defendant's substantial rights"); United States v. Garza, 608 F.2d 659, 665-66 (5th Cir. 1979) ("[w]hile any single statement among those we have isolated might not be enough to require reversal of the conviction . . . [,] we think it beyond question that the prosecutor's improper comments, taken as a whole, affected substantial rights of the defendant . . . . [A]t some point the transgressions of this prosecutor cumulated so greatly as to be incurable."). Similarly, Chief Justice Rehnquist noted that a "trial type" error "combined with a pattern of prosecutorial misconduct" might warrant habeas relief, "even if it did not substantially influence the jury's verdict." Brecht, 113 S. Ct. at 1722 n.9.

(iv) in the alternative, order and conduct an evidentiary hearing at which additional proof may be offered supporting the allegations of this Application;

(v) allow Mr. Guerra a reasonable period of time and an opportunity to submit a memorandum of law briefing all of the issues in this Application following an evidentiary hearing, and an opportunity for oral argument;

(vi) deny the State's Motion for Summary Judgment; and

(vii) grant such other relief as law and justice require.

Respectfully submitted,

VINSON & ELKINS L.L.P.

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STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT OF VERIFICATION

I, SCOTT J. ATLAS, upon oath state that I have read the foregoing First Application for Writ of Habeas Corpus; I am familiar with its contents, and to the best of my knowledge and belief the matters set forth therein are true and correct.

Scott J. Atlas

Scott J. Atlas

Subscribed and sworn to before me this 15th day of June, 1993.

Notary Public

My commission expires:

MARK S. BRAINERD
Notary Public, State of Texas
My Commission Expires
03/05/97

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by overnight mail on Hon. Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; Price Daniel Sr. Bldg.; Austin, Texas 78711, on the 15th day of June, 1993.

Scott J. Atlas

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D. Conclusion.

37. In Rougeau, this Court made a trenchant observation about the prosecutor's claim of representing the victim's family that is also applicable to the prosecution's tactics in Guerra's trial:

> One of the duties of a prosecuting attorney in a criminal case in this State, no matter how repulsive the accused person may be to him, is to deal justly and fairly with that person, and he snould never let his zeal get the better of his judgment. . . . Thus, "the prosecuting attorney must assume the position of an impartial representative of justice, not that of counsel for the complainant. The obligation of a prosecutor to protect accused persons from wrongful conviction is as binding as his duty to enforce the law." 21 Tex. Jur. 3rd § 1438 at page 22.

738 S.W.2d at 657; cf. Berger v. United States, 295 U.S. 78, 88 (1935).

38. Guerra's prosecutors failed in this duty of fair dealing. Among other reasons, Guerra's conviction was fatally flawed by the prosecutor's reliance on victim impact testimony and the prosecution's misrepresentations about their role during the guilt-innocence phase of his trial. In these circumstances, the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 13 and 19, of the Texas Constitution, require reversal.

VII. THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE INVESTIGATION AND TRIAL

1. The State insists that there was no "blind focus" like that condemned in Ex parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) (en banc), cert. denied, 111 S. Ct. 61 (1990). Answer at 99. Ironically, the State's Answer itself perpetuates this blind focus by ignoring (1) much of the State's use of improper identification procedures and related

State misconduct;[35] and (2) witnesses' stories that were inconsistent over time, among each other, and with the irrefutable physical evidence. Further, the State has failed to address, much less attempted to distinguish, the numerous cases cited by Guerra in his Application,[36] with the exception of providing distorted analysis of the courts' decisions in Brandley and Manson v. Brathwaite, 432 U.S. 98 (1977). See pp. 75-82, infra. Instead, the State makes numerous misdirected and mistaken arguments, including that (1) Guerra

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[35] The State, has not addressed numerous instances of improper conduct, including:

(1) attempting to skew the lineup by placing Alex Sanchez, who witnesses had previously failed to identify at the crime scene, in the lineup;
(2) openly soliciting an identification in the presence of other witnesses;
(3) allowing witnesses to speak with each other during the lineup;
(4) allowing witnesses to verbally identify Guerra in a manner that was audible to all other witnesses present;
(5) highlighting Guerra's "collar length hair" (the initial description of the shooter given to police by Diaz and Galvan) by not including anyone else with long hair in the lineup;
(6) attempting to manufacture testimony by conducting a "walk-through" or "reenactment" of the shooting;
(7) allowing witnesses to view the mannequins on the Saturday before trial; and
(8) showing several witnesses pictures of Carrasco and Guerra, while identifying Carrasco as dead and describing Guerra as "the man who shot the cop."

[36] In particular, the State failed to address case law providing that the following conduct was improper and in violation of due process, including:

(1) allowing witnesses to jointly view a lineup;
(2) allowing witnesses to discuss their perceptions before identifying a defendant;
(3) allowing witnesses to see a defendant handcuffed and in the presence of police officers;
(4) identifying or suggesting the identity of the defendant to a witness;
(5) pressuring witnesses to identify a defendant;
(6) conducting a suggestive "walk-through" that contributes to the creation of false testimony; and
(7) failing to make visual and sound recordings.

waived any argument regarding the witnesses' in-court identifications; (2) jointly viewing a lineup is not improper; (3) there were no material inconsistencies in the witnesses' stories; (4) the witnesses' in-court identifications were not tainted; and (5) Brandley is distinguishable.

A. Waiver.

2. The State concedes that trial counsel objected to the mannequins and their use to bolster the witnesses' testimony throughout trial. Answer at 39. These objections, directed at the device used to improperly aid the witnesses' in-court identifications, were sufficient to preserve error.

3. Further, counsel's failure to object specifically to the in-court identifications did not waive this issue for three reasons. First, Guerra has only recently learned of the misconduct by the police and prosecution as witnesses have come forward to admit being subject to improper identification procedures and in some instances blatantly pressured to identify Guerra as the shooter. Accordingly, no court has ever made findings of fact or conclusions of law concerning the State's misconduct. See Landano v. Rafferty, 670 F. Supp. 570, 575 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989) (basis for petitioner's argument that he suffered an unfair trial as a result of the improper admissions of tainted identification testimony resulted from information discovered subsequent to the underlying trial).

4. Second, Guerra's lack of awareness of the misconduct regarding identification procedures was due to the active concealment by the police and the prosecution of evidence of the misconduct. The State should not profit from a waiver argument when

it concealed its misconduct from trial counsel. See Application at 145 n.92. Finally, the admission of tainted identification testimony in the present case constitutes fundamental error. See Application at 108-10.

B. Pretrial Identifications.

5. While admitting that "the better practice is to allow each witness to separately view a lineup," the State argues that (1) "it is not improper to allow witnesses to view the lineup as a group," Answer at 70; (2) Guerra has failed to plead and prove grounds entitling him to relief because he has not named the witnesses who were subjected to police intimidation or who viewed Guerra handcuffed before the lineup, id. at 71, and; (3) Guerra "fails to acknowledge that ***prior to*** the walk-through and to any witnesses viewing the mannequins, three witnesses identified the applicant as the shooter." Id.

6. First, the State's argument that a joint viewing is an acceptable procedure ignores numerous cases holding that the joint viewing of a lineup is improper, see Application at 155-60, and misconstrues the court's holding in Chappell v. State, 489 S.W.2d 923, 924-25 (Tex. Crim. App. 1973). The Chappell court noted that allowing victims of a crime to jointly view a lineup was "not to be commended," yet concluded, based on the "totality of the circumstances" of that case, that the procedures used were not so unnecessarily suggestive and conducive to mistaken identification that due process was violated. Id. The "totality of the circumstances" here, however, is far different from

that in Chappell.[37] More important, Chappell predates Manson, which includes the current test for improper identification procedures. See 432 U.S. at 114.

7. Second, the State cites no authority for the proposition that Guerra is required to name the witnesses who experienced police intimidation, saw Guerra handcuffed, or testified untruthfully as a result. Guerra need only allege facts supporting his claims and prove them at an evidentiary hearing.[38] Further, at an evidentiary hearing Guerra will show that the witnesses to whom he referred either did not tell the whole truth or testified untruthfully on several points, including:

(1) whether Guerra's hands were empty at the time of the shooting;

(2) whether Guerra's hands were outstretched as if holding a gun or as if he had removed his hands from a car;

(3) whether Carrasco was standing east of Officer Harris at the time of the shooting;

(4) whether Carrasco ran down the north side of Walker; and

(5) whether Carrasco was carrying a gun that looked like a nine-millimeter.

Moreover, Guerra will identify witnesses who were not asked to testify because the State omitted material information from offense reports or witness statements, or intimidated

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[37] Most notably, unlike here, there was no evidence in Chappell that witnesses were allowed to:

(1) view the defendant handcuffed and in the presence of police before viewing the lineup;
(2) speak with each other about the shooter's identity during the lineup; and
(3) pressure each other to identify the defendant as the shooter.

[38] Ironically, the State argues that Guerra has not proven grounds for relief but continues to oppose his request for a hearing. See Answer at 156; see also text accompanying note 8, supra.

witnesses who saw Guerra with empty hands at the time of the shooting to say that they had seen nothing at all of the event.

8. Finally, Guerra has never maintained that Diaz, Galvan, or Garcia did not identify Guerra before the walk-through; instead, Guerra argues that the same witnesses provided their identifications in response to a highly improper lineup, ***never*** identified Guerra in an atmosphere free from undue suggestion, and ultimately admitted that they did not see Guerra holding and firing a gun at the time of the shooting.

C. The State Witnesses' Identifications Were Fundamentally Unreliable.

9. The State next argues that inconsistencies in the witnesses' stories were insignificant. Without belaboring the numerous inconsistencies detailed in Guerra's Application, see Application at 163-83, the State's arguments regarding each witness are briefly addressed below.

1. Patricia Diaz.

10. While admitting that Diaz's statement does not mention facial hair, the State incorrectly argues that her description of the shooter was "accurate" although incomplete. Answer at 73. But facial hair was one of Guerra's most prominent features. See State's Trial Ex. No. 18. Moreover, Diaz incorrectly identified the shooter as wearing a long-sleeve, dark-colored shirt, App. 12-13 (F21-22), while Guerra was wearing a short-sleeve, green-colored shirt that was light in color.[39]

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[39] In the same connection, the State spends considerable energy challenging Guerra's assertion that Diaz testified that the pointer wore a short-sleeve green shirt, asserting that "the applicant has incorrectly cited the record." Answer at 74. The State itself, however, acknowledges that the green shirt was mentioned in response to a question posed by (continued...)

11. The State also concedes that Diaz testified that she did not see "who shot who," but notes that she testified about seeing Guerra point in the direction of the police car. Answer at 75. As Guerra has explained, see p. 2, supra, this demonstrates that Carrasco, not Guerra, shot and killed Harris.

2. Herlinda Garcia.

12. The State contends that Guerra's summary of Garcia's testimony is "not accurate" in claiming that she testified that she never saw the gun or gunfire, and that she turned and ran after she saw a man pull something from his pants. Answer at 79. Guerra maintains that he has accurately paraphrased Garcia's testimony.[40]

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[39](...continued)
Guerra's counsel on cross-examination. Id. In fact, in response to the question about the shirt worn by the shooter, Diaz, for the first time at trial, indicated that the shooter wore a light-green shirt by pointing at the Guerra mannequin. Thus, while Diaz did not *verbally* state that Guerra wore a green shirt, her pointing to a mannequin wearing such a shirt was a clear, non-verbal indication of the same.

[40] Surprisingly, the State details the portion of Garcia's testimony that affirms Guerra's summary of her testimony. Those portions provide as follows:

Q: ***When he pulled that something out of his pants, what did you do?***
A: ***That is when we just ran. I heard gunshots somewhere.***

. . . .

Q: ***Did you see the gunshots?***
A: ***No. I told you I was running at the time of the gunshots.***

Q: Well, did you see the man here, the man with the blond hair and brown pants and brown shirt? ***Did you see him fire at the police officer?***
A: Yes.

Q: You did? With what?
A: ***I didn't see with what.***

. . . .

Q: ***Did you see the fire come out of the barrel?***

(continued...)

13. More important, the State ignores Garcia's initial description of the shooter as ***blond***, wearing ***brown pants*** and ***a brown shirt*** that was "open all the way down," and her failure to mention Guerra's long hair or facial hair in her statement. See Application at 168.

3. Vera Flores.

14. As stated in Guerra's Application, after claiming for the first time that she saw the driver shoot Armijo in her second statement, Flores testified at trial that she did ***not*** see Armijo being shot. See Application at 169-70. The State challenges Guerra's characterization of this testimony as being a "recantation" of her statement and argues instead that she was being "literal" and may have "assumed" details in her statement. Answer at 82-83. Ironically, the State's own argument best supports excluding Flores' identification testimony as unreliable. If the State is correct that Flores made numerous assumptions in her testimony, that raises even more questions about the unreliability of her testimony.

15. More important are the numerous other problems with Flores's evolving story that were ignored by the State, including her:

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[40](...continued)

A: ***No, I didn't.***

. . . .

Q: So when you saw this man extend his arms - did he extend his arms?
A: Did I see him.?

Q: Uh-huh.
A: Yes. He pulled ***something*** out of his pants.

S.F. Vol. 22 pp. 479-82 (emphasis added).

(1) initial description of Guerra as blond;

(2) failure to mention long hair, facial hair, or clothing color in her statement;

(3) initial belief that she could not identify the suspects;

(4) recollection for the first time at trial that the driver wore a green shirt and had long hair, a beard, and a mustache; and

(5) admission that the only reason she accused "the driver" of killing Harris was because she saw the driver shoot "down the street" after Harris was shot.

See Application at 169-71.[41]

4. Hilma Galvan.

16. The State failed to address Galvan's:

(1) admission that she never saw Guerra holding a gun;

(2) description of the shooter as ***blond-haired***, wearing ***dark brown pants*** and a ***dark brown*** or ***black shirt***;

(3) initial claim from which she retreated at trial that she saw Harris push Guerra;

(4) description of the shooter as blond despite claiming to have known him by sight; and

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[41] The State also fails to address the substance of Flores's inconsistent statements regarding whether she had ever seen Guerra before the night of the shooting. In direct contradiction to her initial statement that she had never seen the suspects before the shooting, Flores told police at the July 22 reenactment that she knew Guerra as a "regular in the neighborhood." App. 92 (F376). Instead, the State, apparently challenging the accuracy of statements contained in the offense report, and without citing authority for its argument, contends that Guerra is attempting to improperly impeach Flores with the offense report. Answer at 83. Again, the State's argument misapprehends Guerra's challenges under Manson and Brandley, which call for such an inquiry to determine the witnesses' reliability in light of improper identification procedures and State misconduct. See pp. 75-82, infra. The many significant inconsistencies among the police report, Flores's statement, and her identification testimony brand her identification as unreliable.

(5) claim that she knew the shooter as "El Guero" (Carrasco's nickname), despite claiming on the night of the shooting that she did not know the shooter by name.

See id. at 171-74. Instead the State merely attacks the accuracy of its own offense report and argues that Guerra's use of that report was improper.

5. Jose Armijo, Jr.

17. The State again chose to ignore numerous arguments made in the Application, about Jose Jr.'s testimony, including his:

(1) initial statement providing that he "didn't see the men who shot the policeman too good, and [did not] remember what they looked like or what they were wearing;"

(2) failure to testify at trial that he saw one man tap the hand of the shooter;

(3) failure to testify at trial that the shooter used his left hand;

(4) failure to explain why he had told the police in his first statement, ***six hours before the line up***, that he did not know what the two men looked like or what they were wearing because he had not seen them very well -- but claimed ***at trial*** to be able to remember various specifics such as the shooter's long hair, mustache, beard, and green shirt; and

(5) insistence that he had seen Guerra shoot Mr. Armijo despite Jose, Jr.'s admission at trial that after hearing the shots that hit Harris, he ducked, ***hid*** under the dashboard, and stayed there until the two men ran past him to the corner of Lenox and Walker.

See id. at 174-76.

6. Defense Witnesses.

18. The State next argues that there are as many discrepancies between the defense witnesses' stories as among those of the State's witnesses. Answer at 95. The weakness in the State's argument is revealed by its transparent attempt to identify

discrepancies in the only stories that over time remained substantially consistent with the physical evidence and with Guerra's trial testimony. See Application at 178-79. For example, the State contests the description in Vega's statement that the Buick took "half a u-turn" with his testimony stating that the car took "half a turn." Answer at 93. Guerra sees no inconsistency.[42/]

19. Additionally, the State suggests that Vega's failure to identify Guerra at the time of the shooting is inconsistent with the fact that Vega knew Guerra. Answer at 95. The State failed to mention, however, that Vega's statement provides that he could not identify the Mexican man because it was dark and he could not see their faces. App. 41-41A (F181-82). Thus, it is very possible that Vega could not identify the person -- even

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[42/] Similarly, the State argues that Vega's second statement and testimony contradicted his initial statement, which provides that he could not, and would not, be able to recognize any of the faces of the men in the Buick and that he could not remember seeing who was driving the Buick ***at the time he saw it.*** Answer at 92. In both Vega's second statement and at trial, however, he testified that he had seen Guerra drive the Buick ***sometime before the night of the shooting.*** Nothing in Vega's testimony or second statement suggests that Vega claimed to have seen Guerra drive the Buick on the night of the shooting. Vega's second statement provided:

> The number 4 man that I picked out is the man that I ***have seen*** drive the car that the police [man] that got shot had stopped.

App. 27 (F54) (emphasis added). His testimony was as follows:

> Q. Had you ***ever*** seen somebody drive that car before?
> A. Yes.
>
> Q. And this person that you ***had seen driving this car before***, was it Ricardo Guerra?
> A. Yes.

S.F. Vol. 23 at 715-16 (emphasis added).

someone he knew -- because of the darkness. Moreover, while Vega initially said that he could not identify Guerra at the time of the shooting, he could see that the shooter had short hair. Once he became aware that Guerra and Carrasco were indisputably present, he had no difficulty identifying Carrasco and not Guerra as the shooter.

20. Finally, the State repeatedly argues that the jury was able to judge the credibility and weight of the witnesses' testimonies. Answer at 90-91. As noted in Guerra's Application at 149, such an argument in an identification case begs the question and misapprehends the issue.[43/] The question is not one of weight but of constitutional reliability in light of witnesses being subjected to undue suggestion and State misconduct. Further, the jury and Guerra's trial counsel were unaware that the State used improper pretrial identification procedures to manipulate and generate false testimony against Guerra.

D. The *Manson* Reliability Analysis.

21. The State's assertion that its witnesses' in-court identifications were of independent origin, Answer at 96-97, and that the identifications were reliable under

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[43/] As explained by the Seventh Circuit:

> The evidence of reliability to which a court looks in determining if an identification may be admitted into evidence is (if it is otherwise admissible) to a large extent the same evidence to which a jury looks in determining whether to rely on the identification once it is admitted. (Citations omitted.) The analyses are quantitatively similar. The difference, and it is a crucial difference, is between the *degree* of reliability required to admit the evidence on the one hand, or to credit it once it is admitted on the other.

United States ex rel. Kosik v. Napoli, 814 F.2d 1151, 1156 n.9 (7th Cir. 1987) (emphasis in original) (quoted in Application at 149 n.95).

Manson, id. at 96-98, verge on the frivolous. All the witnesses participated in one or more pretrial identification procedures filled with undue suggestion, see Application at 154-63, while none identified Guerra in an atmosphere free of suggestion. Thus, their recollections were thoroughly tainted by the time of trial, and any hope of reconstructing the witnesses' original perceptions was futile.

22. Even if the trial offered the last opportunity for witnesses to make identifications free of impermissible suggestions, the prosecutors destroyed that opportunity by telling witnesses shortly before the trial that the shooter resembled the Guerra mannequin, showing them pictures of Guerra and Carrasco and identifying Carrasco as the dead man and Guerra as Harris's killer, and keeping the suggestive mannequins in plain view so that the witnesses were able to identify Guerra at trial by matching him with the Guerra mannequin, the one that was not wearing the bloody, bullet-riddled, dark "maroon" or "brown" shirt of the dead man. See id. at 161-62. Thus, there can be no doubt that the witnesses' in-court identifications were tainted by the presence of the mannequins.

23. Implicitly recognizing the impropriety of use of the mannequins at trial, the State tries to establish the reliability of its witnesses' testimony under Manson. Answer at 96-98.[44] An examination of the State's analysis reveals the failings in its argument.

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[44] The State fails to mention that on several occasions, the prosecution solicited testimony regarding the witnesses' out-of-court identifications. S.F. Vol. 21 at 317 (Diaz); Vol. 22 at 460 (Garcia); id. at 519 (Flores); id. at 567 (Galvan). The admission of any out-of-court identification that was the fruit of unnecessarily suggestive identification procedures is improper if, under the totality of circumstances, they are not sufficiently reliable. Dispensa v. Lynaugh, 847 F.2d 211, 218-21 (5th Cir. 1988).

1. The Opportunity to View the Criminal at the Time of the Crime.

24. The State argues that (1) while the shooting took only a matter of seconds, the witnesses actually saw Guerra and Carrasco for more than a few seconds; and (2) "there was sufficient light to illuminate the area so that everyone could see well enough to identify who they were seeing." Answer at 97.

25. The State's first argument fails because Guerra's presence at the time of the shooting was undisputed; the fact that witnesses saw Guerra before or after the shooting is irrelevant. ***The only relevant inquiry is what the witnesses saw as to which man shot the bullets that killed Harris.***[45] The shooting itself -- rather than the stop of Carrasco and Guerra by the Officer -- took only a few seconds. Moreover, the State forgets that in the relevant seconds attending the shooting, all five of the State's "witnesses" ducked or fled for cover immediately before or after hearing the initial gunshots. See Application at 184 n.134.

26. Finally, the State cites "facts" outside the record when it boldly concludes that "everyone could see well enough to identify who they were seeing." Answer at 97. If anything, the record, including the State's own police reports, establishes that lighting

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[45] For example, Rodriguez v. Young, 906 F.2d 1153 (7th Cir. 1990), cert. denied, 111 S. Ct. 698 (1991), held that the fact that the witness and the defendant knew each other and that the defendant was present at the crime scene, were unrelated to the key inquiry of whether the defendant was the killer. "The issue was not whether she [the witness] recognized him [the defendant] generally but whether she recognized him as the person she saw stab Guzman [the victim]." Id. at 1160; see also Ellis v. State, 551 S.W.2d 407, 412 (Tex. Crim. App. 1977) (mere presence at scene of crime is not direct evidence of participation in crime); Beardsley v. State, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987 (en banc) (mere presence at crime scene is insufficient evidence to sustain conviction).

conditions were poor. See App. 67 (T229).[46] For example, the State's claim that Diaz had the headlights of her "car shining on the area," Answer at 97, is betrayed by her testimony, which provides that she could only see "shadows" of the people in the intersection. S.F. Vol. 21 at 313.

2. The Witnesses' Degree of Attention.

27. The witnesses' ***lack of attention*** is best revealed by the numerous inconsistencies in their stories, which are addressed above and at length in Guerra's Application at 179-83. The State argues only that (1) Garcia and Flores talked to Guerra and Carrasco under a non-stressed situation before the shooting; and (2) Guerra was "known around the neighborhood." Answer at 97. Again, the State's arguments miss the point. The fact that witnesses may have talked to Guerra before the shooting or that he was known around the neighborhood by one or two of the prosecution's witnesses is wholly irrelevant because Guerra's presence during the shooting was undisputed.[47]

3. The Accuracy of the Witnesses' Prior Description.

28. ***The State*** -- with incredible candor -- ***concedes*** that ***none of the State's witnesses gave an accurate description of the shooter.*** Answer at 97. Instead, the State then

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[46] Guerra will prove at an evidentiary hearing that the location where the shooting occurred was poorly illuminated.

[47] More importantly, the State ignored the following:

(1) all of the State's witnesses ran for cover or ducked;
(2) during the shooting the witnesses were "scared" and "stunned"; and
(3) Flores had been drinking beer at the time of the shooting.

Application at 186-87.

argues weakly that there is no dispute about Guerra's presence during the shooting and that none of the descriptions more accurately described Carrasco than Guerra. Answer at 98. Even this hollow attempt is incorrect. Three of the five witnesses' initial descriptions of the shooter more accurately described Carrasco than Guerra, and the other two were unable to describe the shooter.[48] Moreover, there are numerous other failings in the accuracy of the witnesses descriptions of the shooter. See generally Application at 187.

4. The Witnesses' Level of Certainty.

29. The State incorrectly argues that there is no evidence of the witnesses' level of certainty and that "at no time before trial, during trial or after trial has any witness indicated that he or she was unsure of his or her identification." Answer at 98. This is patently wrong. Three of the five witnesses explicitly declared their uncertainty before trial,[49] and ***all five*** demonstrated their hesitancy in the remarkable changes over time in

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[48] Diaz's statement provides that the shooter wore a ***long sleeve, dark colored*** shirt. Application at 167. Garcia's statement provides that the shooter was wearing ***brown pants*** and a ***brown shirt***. Id. at 168. Galvan's statement provides that the shooter wore ***dark brown pants*** and a ***dark brown*** or ***black shirt***. Id. at 172. None of the statements mentioned hair length or facial hair. As noted above, Guerra was wearing blue jeans and a short-sleeve green shirt that was light in color, while ***Carrasco wore brown pants and a maroon long-sleeve shirt that was dark in color***. The other two witnesses, Flores and Jose Jr. were unable to provide any initial descriptions of the shooter. See id. at 169, 175.

[49] Flores's initial statement provides that she did not think she could identify the "two persons" she saw and that she had never seen them before. App. 9 (F18). Jose Jr.'s statement, taken approximately six hours before the lineup, provides that he did not see the men that shot the policemen "too good" and that he did not remember what they looked like or what they were wearing. App. 8 (F17). Diaz's initial statement provides that she did not think she could identify the Mexican man that shot Harris if she saw him again, although she thought she could get "pretty close." App. 12-13 (F21-22).

the witnesses' descriptions of the two men and the events at the scene. See Application at 166-79.

5. The Time Between the Crime and Confrontation.

30. The witnesses were forced to participate in a lineup at 6:00 a.m. after having been kept at the police station and interrogated throughout the night. See id. at 189. Sleep deprivation -- particularly in this context -- could easily have clouded or affected their recollections, and certainly made them more susceptible to police intimidation and improper persuasion.

6. Summary.

31. In sum, the State has failed to show by clear and convincing evidence that the witnesses' identification testimony was independently reliable.[50/]

32. Moreover, absent from the State's arguments is any explanation of the degree to which the witnesses' stories contradicted both the irrefutable physical evidence and each other, and changed over time. Such analysis further reveals the unreliability of the witnesses' testimony as demonstrated by Guerra's analysis of the appropriate Manson factors. See also Cook v. State, 741 S.W.2d 928, 950-52 & n.6 (Tex. Crim. App. 1987) (en banc), cert. denied, 112 S. Ct. 1705 (1992) (eyewitness identification, even under optimal

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[50/] The State cites Herrera v. State, 682 S.W.2d 313, 318 (Tex. Crim. App. 1984) (en banc), cert. denied, 112 S. Ct. 1074 (1992), for the proposition that a defendant who claims on appeal that the trial court erred must show by clear and convincing evidence that the complaining witnesses' identification was irreparably tainted. Answer at 69-70. This burden or proof, however, only applies on appeal and after a trial court has made an initial determination about the effect of the State's use of improper identification procedures. See Herrera, 682 S.W.2d at 318. Here, a court has yet to make a determination about the effects of the improper state procedures because they were unknown at the time of trial. See pp. 66-67, supra.

conditions, can be mistaken due to various factors, including "the desire to please authority figures," even when free of improper persuasion; this is especially true when suspect is a stranger and either identification is speculative or view is imperfect).

E. The *Brandley* Analysis.

33. The State distinguishes Brandley by arguing that, unlike in Guerra's case, in Brandley (1) the conviction was based entirely on circumstantial, rather than eyewitness evidence; (2) law enforcement authorities told the witnesses what happened rather than the reverse; and (3) the witnesses identified the alleged killer only after the State's misconduct rather than before. Answer at 98-99. Each distinction is nonexistent. Indeed, the Brandley factors are remarkably reminiscent of the circumstances here.

34. First, while the Brandley conviction was based on circumstantial -- and therefore weak -- evidence, Guerra's conviction was based ***solely*** on eyewitness testimony that is even more unreliable and was the product of improper identification procedures and related State misconduct. Further, each and every one of the stories of the prosecution's witnesses contradict the irrefutable physical evidence. See Application at 164-66.

35. Second, the State is incorrect in claiming that the witnesses in this case told the law enforcement authorities what happened. The witnesses' initially divergent stories were transformed at the jointly attended reenactment in which the police orchestrated the "play" and directed the witnesses (the "players"). Guerra will also show that ***before the lineup*** the State suggested whom the witnesses should identify. Finally, the State blatantly

told the witnesses to identify Guerra at trial -- the one who matched the mannequin without the blood-stained shirt -- as the shooter.

36. Thus, contrary to the State's assertions that Guerra was identified before the State's misconduct, Guerra has shown numerous instances where the State subjected witnesses to improper identification procedures and State misconduct -- before, during, and after the witnesses gave their initial statements and attended the lineup. See id. at 154-63.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Inadequate Pretrial Investigation and Preparation for the Guilt-Innocence Phase.

1. The State argues that defense counsel rendered effective assistance during the pretrial investigation because they hired an investigator, visited the crime scene, interviewed witnesses, cross-examined prosecution witnesses, and presented defense witnesses. Answer at 100-01. But Guerra has demonstrated at length defense counsel's time constraints and failure to ***promptly*** seek police files, employ an independent investigator, immediately investigate the crime scene, and find and interview witnesses, often due to misconduct by the police and prosecutors. Application at 197-201.

2. The State insists that no new evidence would have come from proper investigation. Answer at 100-01. Guerra has shown, however, that adequate investigation would have uncovered the location of the bullets and casings, combined with the streetmarkers, pool of blood, and other fixed objects in the street, and that this information would have demonstrated to counsel that Guerra could not have been the

16. Fourth, the State fails to explain how the failure to develop a strategy for the punishment phase of trial can *ever* represent a plausible trial strategy. Case law is uniformly to the contrary. See Application at 215-17; Martinez v. Collins, No. 88-0961R-01, slip op. (W.D. Tex. Nov. 6, 1991) (failure to present evidence from family members about defendant's good character traits), aff'd, No. 91-8656, 1992 U.S. App. LEXIS 32354 (5th Cir. Dec. 11, 1992); see also Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992) (failure to employ psychologist or psychiatrist in the sentencing phase on an obviously critical issue was ineffective assistance).

17. Finally, the State correctly explains that Guerra has no case support for his argument that the ineffective assistance test used to evaluate conduct in the punishment stage of a non-capital case should be used in a capital case. Answer at 109. Instead, Guerra argues for a change in the law based on logic and policy considerations. See Application at 223-27. Guerra stands fast to his position.

IX. COURT'S REFUSAL TO EXCLUDE FOUR *VENIRE* MEMBERS FOR CAUSE

1. After describing the alleged test for determining whether a juror should be excused for cause in a capital case, the State claims that Guerra failed to meet this standard for each of the four members of the *venire* discussed in the Application. But the standard that Guerra allegedly failed to meet is the wrong test. In asserting that each juror was qualified, the State does not provide any supporting argument, but relies only on lengthy quotes followed by conclusions that are unsupported by the quoted material.

A. The Correct Standard.

2. Citing Wainwright v. Witt, 469 U.S. 412, 420 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)), as well as Texas state law, the State claims that the general standard for determining juror qualification in a death penalty case "is whether a juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Answer at 109-10. But this standard applies only when determining whether a prospective juror may be excluded for cause because of his or her views on the death penalty. See Wainwright, 469 U.S. at 412, 419-20, 424.[51/] Except for this very limited situation, the requirement for juror qualification in both capital and non-capital cases is that the juror possess the necessary "mental attitude of appropriate indifference". United States v. Wood, 299 U.S. 123, 145-46 (1936). A defendant's right to an impartial jury means that the jury, and therefore each juror, "favors neither party, . . . is unprejudiced, disinterested, equitable, and just." Petteway v. State, 758 S.W.2d 861, 864 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd). Although this determination is normally committed to the judge's discretion, that discretion "is

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[51/] The Texas cases cited by the State do not provide any additional or different state law on the topic; they simply cite and apply the Wainwright standard in the context of jurors stating moral reservations about the death penalty. See Bell v. State, 724 S.W.2d 780, 794 (Tex. Crim. App. 1986) (en banc), cert. denied, 479 U.S. 1046 (1987); Sharp v. State, 707 S.W.2d 611, 620 (Tex. Crim. App. 1986) (en banc), cert. denied, 488 U.S. 872 (1988). While one case, Cordova v. State, 733 S.W.2d 175, 181 (Tex. Crim. App. 1987) (en banc), cert. denied, 487 U.S. 1240-41 (1988), applies Wainwright in the manner suggested by the State, a thorough review of all subsequent cases in Texas citing either Wainwright or Cordova shows that no Texas court, including this Court in subsequent opinions, has ever followed Cordova's application of Wainwright in the manner urged by the State.

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limited by 'the essential demands of fairness'." Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991) (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931)).

3. Four of Guerra's jurors did not meet this standard.

B. The Unqualified Jurors.

1. Detective Jack D. Lee.

4. Guerra argued that Detective Lee should have been disqualified by the trial court because of the totality of the circumstances surrounding his potential service on the jury. Application at 229-31. Three factors combined to make Detective Lee's service on the jury intolerably suspect:

(1) As a member of the Houston Police Department, he was being asked to judge the guilt or innocence of a man accused of killing a fellow HPD officer.

(2) He knew both trial prosecutors personally.

(3) He knew personally at least seven of the police officers who had been subpoenaed by the prosecution to testify at the trial and had worked with one of them on other cases. Application at 229, 231-32.

5. While the State correctly notes that Texas has no *per se* rule excluding police officers from criminal juries, this focus is misplaced. Nowhere in its answer has the State addressed the fundamental objection to Detective Lee: that he would have a natural tendency, either consciously or subconsciously, to identify with the prosecution team, of which he was a member in his day-to-day activities, when considering the highly emotional issue of the shooting of a fellow police officer. This is ***not*** a case in which Detective Lee was asked to sit on a jury hearing a case involving robbery, assault, or even the murder of a civilian. The situation here was so fraught with emotions for Detective Lee that it

was unreasonable to expect him to ignore those emotions and be "unprejudiced, disinterested, equitable, and just," Petteway, 758 S.W.2d at 864, or to possess the necessary "mental attitude of appropriate indifference" required by the United States Constitution, Wood, 299 U.S. at 145-46. In the face of Guerra's "totality of the circumstances" argument regarding Detective Lee, the State responds by demonstrating only that there is no *per se* rule barring police officers from criminal juries, a point never disputed by Guerra. The State left the heart of Applicant's argument unaddressed and intact.

2. Jerry C. Thagard.

6. Rather than providing some reason that Ms. Thagard was qualified to serve as a juror, the State instead seeks to mischaracterize Ms. Thagard's *voir dire* examination as "a series of confusing questions," Answer at 115, 119, and reprinting, without comment, a large excerpt of Ms. Thagard's *voir dire* examination.

7. But Ms. Thagard was unambiguously clear in stating her position on the death penalty: "[I]n the killing of a policeman, the death penalty should be the sentence." S.F. Vol. 12 at 2026. And she was anything but confusing in the following exchange where she unequivocally stated her intention to automatically answer "yes" to sentencing phase question number 2:

> Q. All right. Would you answer Question No. 2 automatically yes because he was found guilty in the first stage of intentionally and knowingly causing the death of the police officer? Would you automatically answer it yes?
> A. With the way No. 2 is worded?
>
> Q. Right.
> A. Yes.

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Id. at 2038. Ms. Thagard's reversal of the burden of proof was equally clear: "I would not be prejudgmental to say No. 2 should be yes. I could arrive at a ***no*** answer ***if the evidence were there*** . . . . " Id. at 2045-46 (emphasis added). Her stated intention of reversing the burden of proof at the sentencing phase was never withdrawn or contradicted. In light of Ms. Thagard's clear statements that she would automatically answer "yes" to punishment question No. 2 and could find in the defendant's favor only "if the evidence were there," the State's claim of confusion in Ms. Thagard's *voir dire* testimony is insupportable.

3. Cynthia Matthews.

8. The State fails to identify any reason why Guerra errs in arguing that Ms. Matthews was unqualified to serve as a juror in this case. Instead, the State merely reprints an extended excerpt of Ms. Matthews *voir dire* testimony, followed by the unsupported conclusion that "the trial court did not abuse its discretion." Answer at 126. The State makes no effort to rebut Guerra's argument that Ms. Matthews would impermissibly reduce the State's burden of proof "depending on what the crime was and what was done," S.F. Vol. 17 at 3107-08, and that she would require the defendant to "explain . . . why he is not guilty" and "prove his innocence" to her. Id. at 3112.[52]

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[52] Originally, the State contended that Guerra waived his challenge for cause to Ms. Matthews by failing to re-urge it after the State attempted to rehabilitate her. Answer at 126. But the State recently withdrew this claim. See Respondent's Supplemental Answer to Ricardo Aldape Guerra's Application for Writ of Habeas Corpus at 2 (filed on or about Dec. 9, 1992).

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4. Tommy Smith.

9. In addressing Guerra's objection to Tommy Smith, the State cites the case of Purtell v. State, 761 S.W.2d 360 (Tex. Crim. App. 1988) (en banc), cert. denied, 490 U.S. 1059 (1989), for the proposition that a defendant waives his challenge for cause if he fails to restate his challenge following the State's attempt to rehabilitate the juror. Answer at 126.

10. Purtell is irrelevant. The defendant in Purtell waived his objection to the juror's dismissal not because defense counsel failed to restate his objection, but because counsel's concluding comments after eliciting unfavorable testimony to his last questions left the impression that he was abandoning his objection and that a ruling was no longer required:

> [W]hen appellant elicited an unfavorable and ***unequivocal*** answer to his final question ***and then told the trial judge that he had nothing further***, appellant created the distinct impression that he was abandoning his opposition to the motion to dismiss for cause. At that point, the trial judge ***did not know*** that he was to rule on a *contested* point.

761 S.W.2d at 366 (bold emphasis added); see Ramos v. State, 819 S.W.2d 939, 943 (Tex. App.--Corpus Christi 1991, pet. ref'd) (Purtell found waiver when party "creates the impression that he is abandoning his objection").

11. Guerra's trial counsel, in contrast, said nothing to indicate that he was abandoning his objection to Mr. Smith during *voir dire*.[53] The Court clearly understood

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[53] After Guerra's trial counsel stated his objection for cause, S.F. Vol. 18 at 3284-85, the court denied it, id. at 3285, and the prosecutor asked a few questions, id. at 3286-87, Guerra's attorney, unlike the defense attorney in Purtell, asked no further questions and said nothing to indicate that he was abandoning his objection, see id. at 3287.

this when it said, after all questioning of Mr. Smith had ended, "Please note that the objection is noted and denied." S.F. Vol. 18 at 3290. Thus, the trial judge knew that "he was to rule on a *contested* point." Purtell, 761 S.W.2d at 366 (emphasis in original).[54]

12. Additionally, the State again failed to respond to Guerra's argument that Mr. Smith was unqualified to serve as a juror. As with Lee, Thagard, and Matthews, the State merely relies on an extended excerpt of Mr. Smith's *voir dire* testimony, followed by the unsupported conclusion that "the trial court did not abuse its discretion." Answer at 131. Although the State accuses Guerra of "examining certain phrases taken out of context," id. at 127, the State never demonstrated how the meaning of Mr. Smith's statements that "I would prefer death" and that he believes in "punishment for revenge's sake" might change when considered in context. In fact, nothing Mr. Smith said before these statements or afterward altered their meaning. Their effect was to demonstrate that Mr. Smith did not approach the case as an "unprejudiced, disinterested, equitable, and just" juror, Petteway, 758 S.W.2d at 864, and that he did not possess the required "mental attitude of appropriate indifference" to sit as a juror Guerra's trial. Wood, 299 U.S. at 145-46.

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[54] Additionally, Purtell addresses only a party's failure to object to the court's ***dismissal*** of a juror for cause; the case has nothing to do with a court's ***refusal to dismiss*** a juror for cause. Every case applying this part of Purtell has concerned a party's failure to object to the court's dismissal for cause. See, e.g., Crane v. State, 786 S.W.2d 338, 345 (Tex. Crim. App. 1990) (en banc); Fuller v. State, 827 S.W.2d 919, 924-25 (Tex. Crim. App. 1992, pet. filed) (en banc). No reported case has applied Purtell in the manner urged by the State.

ATTACHMENT 2