

Aldape: Fed. Habeas Pleadings  
(1/94-7/95) (Dist. Ct. & 5th Cir.) (v.1)



No. 2K2502-5-1&3  
UPC 19920

HASTINGS, MN





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

RICARDO ALDAPE GUERRA,  <div style="text-align: right; padding-right: 20px;">Petitioner.</div>	§ § § § § § § § § § §	Civil Action No. H-93-290
JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice,  <div style="text-align: right; padding-right: 20px;">Respondent.</div>	§ § § § § § § § § § §	

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

RICARDO ALDAPE GUERRA,  <div style="text-align: right;">Petitioner.</div>	§ § § § § § § § § § §	Civil Action No. H-93-290
v.  JAMES A. COLLINS, Director, Institutional Division, Texas Department of Criminal Justice,  <div style="text-align: right;">Respondent.</div>		

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12	First Amended Certificate of Conference for Motion for Attorneys' Fees and Costs	01/11/95





NAACP LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.

National Office

Suite 1600

99 Hudson Street

New York, N.Y. 10013-2897 (212) 219-1900 Fax: (212) 226-7592

C: Van Fleet  
Quens  
Lampton  
Lopez

July 19, 1995

RECEIVED

JUL 23 1995

HARRY M. REASONER

Via Federal Express

Hon. Charles R. Fulbruge, III, Clerk  
United States Court of Appeals  
for the Fifth Circuit  
100 U.S. Courthouse  
600 Camp Street  
New Orleans, Louisiana 70130

Re: **Hopwood v. State of Texas (Thurgood Marshall Legal Society, et al.,  
appellants and *amici curiae*)**  
5th Circuit Nos. 94-50569, 50564

Dear Mr. Fulbruge:

Enclosed is an application for admission to the Fifth Circuit Court of Appeals and a notice entering my appearance on behalf of the appellants and *amici curiae* Thurgood Marshall Legal Society, et al. in the above referenced action.

Thank you for your assistance with this.

Very truly yours,

Dennis D. Parker

encs.

cc: all counsel

Regional Offices

Suite 301  
1275 K Street, NW  
Washington, DC 20005  
(202) 682-1300  
Fax: (202) 682-1312

Suite 208  
315 West Ninth Street  
Los Angeles, CA 90015  
(213) 624-2405  
Fax: (213) 624-0075

## FORM FOR APPEARANCE OF COUNSEL

Only attorneys admitted to the Bar of this Court since October 1, 1981 may sign this form and practice before the Court. An application for admission is incorporated. Two persons from the same organization or firm may sign this form.

No. 94-50569Hepwood, et. al  
(Plaintiff)

vs.

State of Texas et. al  
(Defendant)

The Clerk will enter my/our appearance as Counsel for Thurgood Marshall Legal Society and Black  
Pro Law Association, Proposed Intervenor-Defendants-Appellants  
(Please list names of all parties represented)

who IN THIS COURT is

☐ Petitioner(s)☐ Respondent(s)☐ Amicus Curiae☒ Appellant(s)☐ Appellee(s)☒ Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or application for admission is being made below.

Dennis D. Parker

(Signature)

Dennis D. Parker

(Type or Print Name)

Associate Counsel

(Title, If Any)

NAACP Legal Defense + Educational Fund

(Firm or Organization)

Social Security No. 134-46-1531Date of Birth 7/26/55 Sex: ☒ M ☐ FResident State/Bar No. New York, N/AStreet Address 99 Hudson StreetCity & State New York, NY Zip 10013 Phone (212) 219-1900 Fax (212) 226-7592

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom notification is to be sent, with the understanding that if other counsel should be informed *he or she will perform that function*. If lead counsel has not signed above, lead counsel *must* complete his or her own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or Print) Dennis D. ParkerUNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
APPLICATION AND OATH FOR ADMISSION

600 Camp Street, New Orleans, LA 70130

Name PARKER (Last) DENNIS (First) D (Middle)Firm or Agency NAACP Legal Defense and Educational Fund, Inc.Street Address 99 Hudson Street Suite 1600City & State New York, NY Zip 10013 Social Security No. 134-46-1531Phone (212) 219-1900 Resident State/Bar No. New York Date of Birth 7/26/55 Sex: ☒ M ☐ F

ADMISSION FEE: Admission fees may be paid by personal check, certified check or postal money order. Please make payable to the Librarian, United States Court of Appeals. Basis for amount of fee may be found in Rule 46; Local Rules of the United States Court of Appeals for the Fifth Circuit, which states:

"Only attorneys admitted to the Bar in this Court may practice before the Court. Admission to the Bar of this Court is governed by FRAP 46. Each attorney shall pay to the Clerk an admission fee of \$40, which shall be transferred to the Library Fund. An attorney who is appointed by the Court to represent an appellant in forma pauperis and an attorney who appears on behalf of the United States must have all other qualifications for admission, but shall be admitted to practice in this Court without payment of an admission fee."

FEE DATA: (Check One)

☐ Cash☐ Check☐ Court Apptd.☐ U.S. Counsel

CASE NUMBER (If Any):

(Attach Admission Check Here)

DKT-5 (09/94)

CONTINUED ON REVERSE SIDE

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court.

B. Inquiry of Counsel

To your knowledge and that of your co-counsel from whom you are to make inquiry:

(1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)?

Yes ☒

No ☐

(2) Is there any such case now pending in a District Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed to the Fifth Circuit?

Yes ☐

No ☒

(3) Is there any case such as (1) or (2) in which judgement or order has been entered and the case is on its way to this Court by appeal, petition to enforce, review, deny?

Yes ☐

No ☐

(4) Does this case qualify for calendaring priority under Local Rule 47.7? If so, cite type of case Already briefed  
and scheduled for argument.

If answer to (1), or (2), or (3), is yes, please give detailed information.

Number and Style of Related Case Hopwood, et. al v. State of Texas, No. 94-50664

Name of Court or Agency Fifth Circuit Court of Appeals

Status if Appeal (if any) Consolidated with this matter.

Other Status (if not appealed)

NOTE: Attach sheet to give further details.

APPLICATION: I, Dennis D. Parker

, make application for admission to the Bar of the United States Court of Appeals for the Fifth Circuit. My personal Statement showing my eligibility for membership is as follows (please refer to FRAP 46 for qualifications for admission): I am admitted to practice in the following court or courts:

State of New York all courts; United States Supreme Court; Eleventh Circuit Court of Appeals; United States District Courts Southern and Eastern Districts of N.Y.

OATH: I, Dennis D. Parker

, do solemnly swear that I will demean myself as an attorney and counselor of this Court, uprightly and accordingly to law, and that I will support the Constitution of the United States.

Dennis D. Parker

Signature of Applicant

Subscribed and sworn to before me a Notary Public in and for the

of New York, State of New York this 14 day of July 19 95

ABAYOMI A. JAIYEBO  
Notary Public, State of New York  
No. 01AJ5029802

Qualified in Kings County  
Commission Expires July 8, 1996

Abayomi A. Jayeoba  
Signature of Notary

MOTION: I, NORMAN J. CHACHIKIN

move for admission of the above attorney.

Norman J. Chachikin  
Signature

Admitted this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

CHARLES R. FULBRUGE III, CLERK  
United States Court of Appeals

By \_\_\_\_\_

Deputy Clerk



## FORM FOR APPEARANCE OF COUNSEL

Fifth Circuit

Only attorneys admitted to the Bar of this Court since October 1, 1981 may sign this form and practice before the Court. An application for admission is incorporated herein. Two persons from the same organization or firm may sign this form.

Guerra, Ricardo  
(Plaintiff)

No.

95-20443

vs.

Wayne Scotts  
(Defendant)

The Clerk will enter my/our appearance as Counsel for Ricardo Aldape Guerra

(Please list names of all parties represented)

who IN THIS COURT is

☐ Petitioner(s)☐ Respondent(s)☐ Amicus Curiae☐ Appellant(s)☒ Appellee(s)☐ Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or application for admission is being made below.

Scott J. Atlas  
(Signature)

(Signature)

Scott J. Atlas

(Type or Print Name)

(Type or Print Name)

(Title, If Any)

(Title, If Any)

Vinson & Elkins L.L.P.

(Firm or Organization)

(Firm or Organization)

Social Security No. 463-84-2472

Social Security No. \_\_\_\_\_

Street Address 1001 Fannin, 2300 First City Tower

Suite \_\_\_\_\_

City & State Houston, TexasZip 77002-6760Phone (713) 758-2024

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom notification is to be sent, with the understanding that if other counsel should be informed *he will perform that function*. If lead counsel has not signed above, lead counsel *must* complete his own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or Print) Scott J. Atlas

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
APPLICATION AND OATH FOR ADMISSION**

600 Camp Street, New Orleans, LA 70130

Name \_\_\_\_\_

(Last)

(First)

(Middle)

Firm or Agency \_\_\_\_\_

Street Address \_\_\_\_\_

Suite \_\_\_\_\_

City &amp; State \_\_\_\_\_

Zip \_\_\_\_\_

Phone ( ) \_\_\_\_\_

Social Security No. \_\_\_\_\_

ADMISSION FEES: Admission fees may be paid by personal check, certified check or postal money order. Please make payable to the Librarian, United States Court of Appeals. Basis for amount of fee may be found in Rule 46; Local Rules of the United States Court of Appeals for the Fifth Circuit, which states:

"Only attorneys admitted to the Bar in this Court may practice before the Court. Admission to the Bar of this Court is governed by FRAP 46. Each attorney shall pay to the Clerk an admission fee of \$40, which shall be transferred to the Library Fund. An attorney who is appointed by the Court to represent an appellant in forma pauperis and an attorney who appears on behalf of the United States must have all other qualifications for admission, but shall be admitted to practice in this Court without payment of an admission fee."

FEE DATA: (Check One)

☐ Cash☐ Check☐ Court Appd.☐ U.S. Counsel

CASE NUMBER (If Any): \_\_\_\_\_

DKT-5 (09-92) •

(Attach Admission Check Here)

CONTINUED ON REVERSE SIDE

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court

None

B. Inquiry of Counsel:

To your knowledge and that of your co-counsel from whom you are to make inquiry:

(1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)?

Yes ☐

No ☒

(2) Is there any such case now pending in a District Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed to the Fifth Circuit?

Yes ☐

No ☒

(3) Is there any case such as (1) or (2) in which judgment or order has been entered and the case is on its way to this Court by appeal, petition to enforce, review, deny?

Yes ☐

No ☒

(4) Does this case qualify for calendaring priority under Local Rule 47.7? If so, cite type of case Yes, it is an appeal from a habeas corpus petition

If answer to (1), or (2), or (3), is yes, please give detailed information.

Number and Style of Related Case N/A

Name of Court or Agency

Status of Appeal (if any)

Other Status (if not appealed)

NOTE: Attach sheet to give further details.

APPLICATION: I, \_\_\_\_\_, do hereby make application for admission to the Bar of the United States Court of Appeals for the Fifth Circuit. My personal Statement showing my eligibility for membership is as follows (please refer to FRAP 46 for qualifications for admission): I am admitted to practice in the following court or courts: \_\_\_\_\_

OATH: I, \_\_\_\_\_, do solemnly swear that I will demean myself as an attorney and counselor of this Court, uprightly and according to law; and that I will support the Constitution of the United States.

Signature of Applicant

Subscribed and sworn to before me a Notary Public in and for the \_\_\_\_\_

of \_\_\_\_\_, State of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

Signature of Notary

MOTION: I, \_\_\_\_\_, a member of the Bar of this Court, do hereby move for admission of the above attorney.

Signature

Admitted this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

CHARLES R. FULBRUGE III, CLERK  
United States Court of Appeals

By \_\_\_\_\_

Deputy Clerk



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

NO. 95-20443

---

WAYNE SCOTT, DIRECTOR  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent-Appellant

v.

RICARDO ALDAPE GUERRA,

Petitioner-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

---

DESIGNATION OF ADDITIONAL PARTS OF RECORD

---

TO: Honorable Dan Morales, Attorney General; Enforcement Division; Office of the Attorney General; 300 West 15th Street, Austin, Texas 78711;

William C. Zapalac; Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, and 209 West 14th Street at Lavaca; Austin, Texas 78711.

Pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure, notice is hereby given that Petitioner-Appellee, RICARDO ALDAPE GUERRA deems it necessary for determination of the issues to be presented on appeal that the following additional parts of

the proceeding had in the above-entitled and numbered action be ordered and included in the record on appeal by Respondent-Appellant:

<b>DATE</b>	<b>DOCKET ENTRY #</b>	<b>DESCRIPTION</b>
1. 02/01/93	5	MOTION with memorandum in support for evidentiary hearing by Ricardo Aldape Guerra. [Entry date 02/04/93]
2. 02/02/93	1	APPLICATION for writ of habeas corpus by Ricardo Aldape Guerra.
3. 02/02/93	2	Appendix to First Application for Writ of HABEAS CORPUS.
4. 02/19/93	6	RESPONSE by James A. Collins in opposition to motion for leave to proceed in forma pauperis. [Entry date 02/24/93]
5. 02/22/93	8	ORDER granting motion for appointment of counsel. [Entry date 02/24/93]
6. 02/22/93	9	ORDER granting motion for leave to proceed in forma pauperis. [Entry date 02/24/93]
7. 02/25/93	--	STATE COURT RECORDS, received and forwarded to file room. (2 corrugated boxes)
8. 03/03/93	--	STATE COURT RECORDS, received and forwarded to file room. (3 brown expandable folders)
9. 03/16/93	10	RESPONSE by James A. Collins to motion for evidentiary hearing, filed. [Entry date 03/19/93]
10. 04/05/93	11	REPLY by Petitioner Ricardo Aldape Guerra to Respondent's response to Petitioner's motion for evidentiary hearing & brief in support. [Entry date 04/08/93]

<b>DATE</b>	<b>DOCKET ENTRY #</b>	<b>DESCRIPTION</b>
11. 04/13/93	12	MOTION for leave to file Amici Curiae Brief Supporting the Petitioner by the American Immigration Lawyers Association, et al, Motion Docket Date 5/3/93 motion, filed (Original Amici Curiae Brief of the American Immigration Lawyers Association, et al Supporting the Petitioner attached to Motion for Leave and filed) (ph) [Entry date 04/15/93]
12. 04/13/93	13	AMICI CURIAE BRIEF of the American Immigration Lawyers Association, et al. Supporting the Petitioner. [Entry date 04/15/93]
13. 05/17/93	19	ANSWER to Complaint by James A. Collins.
14. 05/17/93	19	MOTION with brief in support for summary judgment by James A. Collins.
15. 06/15/93	23	RESPONSE by Ricardo Aldape Guerra to respondent's answer, motion for summary judgment and Brief in support. [Entry date 06/16/93]
16. 06/16/93	--	ATTACHMENTS/SUPPLEMENT to response by James A. Collins. [Entry date 06/17/93]
17. 08/09/93	24	MOTION for leave to file brief of Amicus Curiae, the government of the United States [of Mexico], supporting the brief of petitioner by Ricardo Aldape Guerra.
18. 09/29/93	25	ORDER granting pltf's motion for evidentiary hearing--set evidentiary hearing for 9:00 11/15/93. [Entry date 09/30/93]

DATE	DOCKET ENTRY #	DESCRIPTION
19. 11/02/93	32	Minute entry: Pre-Trial Conf. held; App: S. J. Atlas f/William Zapalac; S. Schneider f/S. Cornelius; granting def't's motion for Mary Lou Soller to appear pro hac vice set pretrial order due for 11/10/93, terminated previous deadlines Ct. Reporter: J. Shaefer, entered. The petitioner intends to offer into evidence their (3) weapons in the custody or care of the Harris County District Clerk; It is the Order of this court that the state atty cooperate in the recovery of those weapons and exhibits and securing them for the 11/15/93 hearing. Parties ntfd. (Signed by Judge Kenneth M. Hoyt) (bj) [Entry date 11/04/93] [Edit date 11/08/93]
20. 11/02/93	33	ORDER granting the government's motion for Mary Lou Soller to appear pro hac vice, entered; Parties notified. (Signed by Judge Kenneth M. Hoyt) (bj) [Entry date 11/04/93]
21. 11/03/93	31	ORDER, entered; Parties notified. Respondent to have Petitioner brought to the Harris County Jail on 1/10/93 by 9 am and remain there until 11/15/93 then have Petitioner brought to the USDC on 11/15/93 by 9 am for a hearing. Certified copies sent to U S Marshal. (signed by Judge Kenneth M. Hoyt) (ph) [Entry date 11/04/93]
22. 11/12/93	36	EXPERT WITNESS LIST by James A. Collins.
23. 11/15/93	39	EVIDENTIARY HEARING held on 11/15/93. Apps: Atlas, Gee and Schneider f/pltf; Zapalac f/def't. Petitioner's evidence begins. Continued to 11/16/93 at 9 am. terminated deadlines Ct Reporter: J. Schaffer. [Entry date 11/17/93]
24. 11/16/93	40	Evidentiary hearing held before Judge Kenneth M. Hoyt, Ct. Reporter: J. Schaffer; App: Same as first day. Petitioner's case continues. Houston Police departments motion to quash withdrawn. [Entry date 11/19/93]

<b>DATE</b>	<b>DOCKET ENTRY #</b>	<b>DESCRIPTION</b>
25. 11/18/93	42	3rd Day hearing held before Judge Hoyt. Ct. Reporter: F. Warner. Appearances: Same as first day. [Entry date 11/22/93]
26. 11/18/93 [sic]	45	4th Day hearing held. Ct. Reporter: F. Warner. Appearances: Same as first day. Respondent's motion to amend witness list denied. [Entry date 11/29/93]
27. 11/22/93	43	Miscellaneous hearing held. Ct. Reporter: J. Schaffer. Appearances: Same as first day. [Entry date 11/24/93]
28. 11/22/93	44	Exhibit list by Ricardo Aldape Guerra, filed. [Entry date 11/24/93]
29. 12/30/93	46	Proposed WRITTEN FINDINGS OF FACT AND CONCLUSION OF LAW by Ricardo Aldape Guerra, filed. [Entry date 01/04/94]
30. 01/03/94	47	Proposed FINDINGS OF FACT AND CONCLUSION OF LAW by James A. Collins, filed. [Entry date 01/04/94]
31. 01/07/94	48	ORDER granting pltf's motion for leave to file Amici Curiae Brief, granting pltf's motion for leave to file brief of Amicus Curiae, motion for summary judgment taken under advisement. [Entry date 01/11/94] [Edit date 01/13/94]
32. 11/14/94	51	ORDER granting pltf's writ application. [Entry date 11/15/94]
33. 12/13/94	52	FINAL JUDGMENT: Petitioner's application for Writ of Habeas Corpus is GRANTED. [Entry date 12/14/94]
34. 12/27/94	53	MOTION pursuant to FRCP 52(b) to alter judgment, or to amend judgment by Ricardo Aldape Guerra, Motion Docket Date 1/16/95 motion, 1/16/95 motion, filed. [Entry date 12/28/94]

<b>DATE</b>	<b>DOCKET ENTRY #</b>	<b>DESCRIPTION</b>
35. 12/28/94	54	MOTION to alter judgment, or to amend judgment, order by James A. Collins, Motion Docket Date 1/17/95 motion, 1/17/95 motion, filed.
36. 01/04/95	59	ORDER granting Respondent's motion to alter judgment and motion to amend judgment, order, entered. [Entry date 01/05/95]
37. 01/23/95	61	MOTION to alter, or to amend judgment by Ricardo Aldape Guerra, Motion Docket Date 2/12/95 motion, 2/12/95 motion. [Entry date 01/25/95]
38. 05/18/95	65	AMENDED ORDER granting pltf's application for writ of Habeas Corpus, entered. [Entry date 05/19/95]
39. 05/18/95	66	ORDER granting pltf's motion to amend judgment; granting pltf's motion to quash, granting pltf's motion to alter; granting pltf's motion to amend judgment. [Entry date 05/19/95]
40. 06/02/95	67	NOTICE OF APPEAL of order, order by Wayne A. Scott. [Entry date 06/06/95]
41. 06/06/95	--	Notice of appeal and certified copy of docket transmitted to USCA.

Respectfully submitted,

VINSON & ELKINS L.L.P.

OF COUNSEL:

STANLEY G. SCHNEIDER  
Texas Bar No. 1770500  
Schneider & McKinney  
11 E. Greenway Plaza  
Houston, Texas 77046  
(713) 961-5901

RICHARD A. MORRIS  
Texas Bar No. 14497750  
Feldman & Associates  
12 Greenway Plaza, Suite 1202  
Houston, Texas 77046

By: Scott J. Atlas  
SCOTT J. ATLAS  
Attorney-in-Charge *by Michael Mucchetti*  
Texas Bar No. 01418400  
J. Anne B. Clayton  
Glenn S. Greene  
Theodore W. Kassinger  
Manuel Lopez  
Jim Markham  
Michael J. Mucchetti  
J. Cavanaugh O'Leary  
2300 First City Tower  
1001 Fannin  
Houston, Texas 77002-6760  
(713) 758-2024  
FAX: (713) 615-5399

ATTORNEYS FOR PETITIONER-APPELLEE  
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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac; Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, and 209 West 14th Street at Lavaca; Austin, Texas 78711 on the 22nd day of June, 1995.

Michael J. Mucchetti  
Michael J. Mucchetti

F:\MM1097\ALDAPE\RECORD.DES



Jun. 21. 1995 10:02AM

6-21-95  
No. 6992 P. 1/1

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS  
**FILED**

JUN 21 1995

No. 95-20443

CHARLES R. FULBRUGE III  
CLERK

RICARDO ALDAPE GUERRA,

Petitioner-Appellee,

versus

WAYNE SCOTT, Director,  
Texas Department of Criminal Justice  
Institutional Division,

Respondent-Appellant.

-----  
Appeal from the United States District Court for the  
Southern District of Texas  
-----

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that respondent-appellant's motion to stay  
the district court's judgment is **GRANTED**.

RECEIVED

JUN 21 1995

SJA



6-20-95

CO: TRM  
R-F. Aldape Guerra

CASE NO. 359605 CHARGE \_\_\_\_\_

THE STATE OF TEXAS

248

DISTRICT COURT

VS.

OF HARRIS COUNTY, TEXAS

Ricardo Aldape Guerra

RECEIVED

JUN 20 1995

TO THE HONORABLE JUDGE OF SAID COURT:

S.J. ATLAS

Now comes Ricardo Aldape Guerra, defendant in the above styled and numbered cause, and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel.

Ricardo Aldape Guerra  
Defendant

Sworn to and subscribed before me on this, the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 1995.

Harris County District Court  
Harris County, Texas

ORDER APPOINTING COUNSEL

On this, the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 1995, it appearing to the Court that the above named defendant has secured no attorney to represent him in said cause and is too poor to employ counsel; it is ordered that the attorney listed below is appointed to represent the above named defendant in said cause.

Scott A. Atlas  
Attorney

1000 Fwy 291, Suite 2300  
Address

Houston, TX 77057  
City State Zip

758-2024  
Phone

01418400  
Phone

BAR #

It is further ordered that the said cause is set for DISP. MOT. FILE PERIAL MOTIONS on the 12th day of July, 1995.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 1995.

[Signature]  
Judge



---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

NO. 95-20443

---

WAYNE SCOTT, DIRECTOR  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent-Appellant

v.

RICARDO ALDAPE GUERRA,

Petitioner-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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PETITIONER-APPELLEE'S OPPOSITION TO  
RESPONDENT-APPELLANT'S MOTION TO STAY THE JUDGMENT

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RICARDO ALDAPE GUERRA

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 95-20443

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WAYNE SCOTT, DIRECTOR  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent-Appellant

v.

RICARDO ALDAPE GUERRA,

Petitioner-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

---

PETITIONER-APPELLEE'S OPPOSITION TO  
RESPONDENT-APPELLANT'S MOTION TO STAY THE JUDGMENT

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Petitioner-Appellee Ricardo Aldape Guerra ("Guerra") opposes the Motion of Respondent-Appellant to Stay the District Court's Judgment ("Motion to Stay"). Respondent-Appellant (the "State") filed a similar motion to stay the judgment with the District Court, which was rejected on June 16, 1995. *See Order*, a copy of which is attached

to this Opposition as Exhibit A.<sup>1</sup> This Court, in reviewing an order of a district court denying a stay pending appeal, should review that decision for an abuse of discretion. *Beverly v. United States*, 468 F.2d 732, 740 n.13 (5th Cir. 1972); James W. Moore et al., *Moore's Federal Practice* ¶ 208.05 (1995 and Supp. 1994-95) (when FED. R. APP. P. 8 is used, in effect, to appeal a FED. R. CIV. P. 62 decision, the Court of Appeal should defer to the district court absent abuse of discretion); *see also Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992) (using an abuse of discretion standard to review a district court's grant of a stay pending appeal). Moreover, the District Court, in its Order, made numerous findings of fact. This Court should accept those findings unless they are clearly erroneous. FED. R. CIV. P. 52(a). The basis for the District Court's decision is entirely sound. While identifying the correct standard for whether to grant a stay, Respondent-Appellant (the "State") fails to adequately explain it and has completely failed to meet its requirements.

A. The Appropriate Standard

1. The State correctly identifies the four prerequisites to be considered in deciding whether to grant a stay:

(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

*Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (hereafter "*Ruiz I*"). The State also

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<sup>1</sup>For the Court's convenience, a copy of the First Application for Writ of Habeas Corpus is attached as Exhibit B and a copy of the Appendix to First Application for Writ of Habeas Corpus is attached as Exhibit C.

correctly points out that this Court in *Ruiz I* ruled that to obtain a stay pending appeal the movant need not always demonstrate probable success on the merits, but instead need show only "a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Id.*

2. The State omits, however, two subsequent amplifications on *Ruiz I* by this Court. First, the State ignores this Court's admonition that the assumption by many stay applicants "that *Ruiz I* was a coup de grace for the likelihood-of-success criterion in this circuit . . . is unwarranted." *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (hereafter "*Ruiz II*") (cited approvingly in *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988). As the *Ruiz II* court explained, the first criterion -- likelihood of success -- is required in "the usual case," and a stay will be granted in its absence only if (1) the balance of the equities (*i.e.*, the other three factors) is "heavily tilted" in the movants' favor and (2) the issue is one "with patent substantial merit." 666 F.2d at 857 (quoting *Ruiz I*, 650 F.2d at 565-66).

3. Second, the State fails to note that even when the equities tilt heavily towards the movant, which is not the case here, the weaker version of the first prerequisite requires not only proof of a substantial case on the merits, but also the involvement of a serious legal question. *Wildmon*, 983 F.2d at 23-24.

4. Moreover, the burden of establishing all these prerequisites is on the party seeking a stay. *Ruiz II*, 666 F.2d at 856. The State has failed to meet its burden on any of the requirements.

B. The State Has Failed to Demonstrate a Substantial Case on the Merits Involving a Serious Legal Question.

5. The State's effort to show a substantial case on the merits is limited to a claim that it will likely prevail on appeal because "many of the [district] court's *critical findings* about actions of the police and prosecutors are at odds with the record evidence in the case and are clearly erroneous." Motion to Stay at 3 (emphasis added). The only examples of such "critical findings" cited by the State are the following:

- (a) the court noted that Jose Armijo -- the second murder victim -- was left at the murder scene without medical attention for a long time after he was shot, though one report suggests he arrived at the hospital about 45 minutes after the shooting, *id.* at 3 n.1;
- (b) the court criticized the tone of voice used by the trial prosecutors in questioning witnesses, even though the court was not present at trial to hear the tone of voice used, *id.* at 3 n.2; and
- (c) the court attributed the police misconduct to the desire to charge both men with the same crime, *id.*

But these are not "critical findings." Even if the State were correct that each of these statements is clearly erroneous, which they are not, the District Court's ultimate fact determinations would be unaffected and no more susceptible to attack on appeal. The State cannot meet its burden of showing that it will likely succeed on the merits merely by making the conclusory allegation that critical findings of the District Court are clearly erroneous. Having failed to identify a single such critical finding and showing it to be clearly erroneous, the State has not met its burden.

6. The flimsiness of the State's argument is demonstrated by the weakness of these examples of supposedly "clearly erroneous" findings. If the State can do no better -- and it cannot -- in finding errors in a 47-page opinion replete with fact findings detailing serious, extensive, and flagrant police and prosecutorial misconduct, then it cannot possibly win on appeal. Even if none of the three statements were true. -- *i.e.*, even if Mr. Armijo had received immediate medical attention, the prosecutors had used a less demeaning tone of voice, and the police had been motivated by less troublesome motives -- the actions described by the District Court would remain no less disturbing, and the court's ruling would be no less immune to attack because those facts have no direct bearing on the District Court's ultimate fact determinations. Moreover, each comment is amply supported in the record<sup>2</sup> and does not remotely meet FED. R. CIV. P. 52's "clearly erroneous" test as defined in *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's

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<sup>2</sup>As to Mr. Armijo's treatment, see testimony of George Brown (Mr. Armijo was still slumped in the front seat of his car when Brown returned 45-60 minutes after the shooting); Pet. Ex. 5 (TV news clip for July 14, 1982 stating that police at first thought Mr. Armijo was the killer and left him unattended in his car for 45 minutes); *see also* Pet. Ex. 4 at F239 (Mr. Armijo's first words at the hospital: "I did not shoot anybody"; on night of shooting, Armijo's "involvement in Officer Harris's death was not clear"). The documents in the police files are consistent with an elapsed time of about 55 minutes between the time Armijo was shot and his first receipt of medical attention upon arrival at the hospital. *Compare id.* at F80 (officer heard 3-4 "fireworks" about 9:50 p.m. followed by about 7 more a few seconds later), *with* F444 (Mr. Armijo arrived at the hospital at 10:46 p.m.). In contrast, Officer Harris received constant medical attention, beginning within minutes, from paramedics who were among the first to arrive, *see id.* at F81-82, F85-86, and later from a Life Flight doctor, ending only when Harris was pronounced dead at 10:50 p.m., *see id.* at F86, F339.

As to the prosecutors' tone of voice during trial, see testimony of Patricia Diaz (prosecutors yelled at her during trial). For the tone of voice used by prosecutors before trial, see testimony of Herlinda Garcia and Trinidad Medina. The State makes the argument that the Court could not make findings of fact regarding the prosecutors' tone of voice because the Court was not present during Guerra's trial. Motion to Stay at 3 n.2. Apparently, the State believes the startling notion that a federal district judge can make findings of fact only when he has personal knowledge of the events in question. This is simply not the law.

As to the police motives, see testimony of Officer James Montero (he and all other police officers with whom he has discussed the issue believe that if one man shoots a policeman and a second man's only offense is carrying a gun, both men are equally to blame).

account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

7. In addition, the State has not even attempted to identify a serious legal question, which this Court has defined to mean one that has far-reaching effects or public concern. *See Wildmon*, 983 F.2d at 24. The only rulings identified by the State as erroneous are fact determinations, none of which has an impact beyond this case. Thus, the State has failed to meet its burden of proving that it can make a substantial case involving a serious legal question.

8. In sum, the State's total failure to even attempt to demonstrate its likelihood of prevailing on appeal shows the futility of that effort and is a far cry from the substantial case on the merits involving a serious legal question required by *Ruiz I* and *Ruiz II*. Since the State has failed to meet the first prerequisite, the Court need not even consider the State's showing on the other three requirements. *See, e.g., Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988).

C. The State Has Failed to Demonstrate that a Stay Is Strongly Favored by the Equities.

9. Even if the State had met a weaker version of the first prerequisite, it has failed to demonstrate that the other three requirements tilt heavily in its favor. First, the State has not shown that it will suffer irreparable injury if the stay is denied. The only claimed harm to the State if a stay is not granted is the waste of resources on an unnecessary trial if this Court reverses the District Court after the State has initiated retrial proceedings against Guerra. But even if the State expends some resources on a retrial, this

is merely a minor financial irritant (especially in light of the strong likelihood that Guerra will prevail on appeal), not the "irreparable injury" required by this Court. Moreover, this prerequisite is independent of the first one -- likelihood of success -- and thus must stand on its own, even if one assumes Guerra's ultimate victory on appeal. But if Guerra wins this appeal, then the State's resources used in the retrial will not have been wasted, but merely expended early.

10. Second, the State has failed to show that granting the stay would not substantially harm Guerra. The State argues that a stay will not substantially harm Guerra because he "will remain in custody under any circumstances." Motion to Stay at 4. Specifically, "[i]f the State begins a retrial . . . Guerra will be subject to incarceration pursuant to the indictment, pending the outcome of the trial." *Id.* But the State unwittingly makes Guerra's point on this issue. If a stay is granted and Guerra wins on appeal, thus vindicating the district court's ruling that an innocent man was wrongfully convicted by flagrant prosecutorial misconduct, Guerra must nevertheless remain incarcerated for many more months while awaiting and then living through the nightmare of a second multi-month capital murder trial.

11. If a stay is denied, however, Guerra can be retried soon, hopefully win an acquittal, and obtain his release as soon as the current appeal ends. After 13 years on death row for a crime he did not commit based on a conviction resulting from egregious prosecutorial misconduct, Guerra deserves the opportunity for additional months of the

precious freedom he has been so unfairly denied for so long.<sup>3</sup> Surely, prolonged imprisonment constitutes "substantial harm." Cf. *Dhine v. District Director*, 822 F. Supp. 1030, 1032 (S.D.N.Y. 1993) (under FED. R. APP. P. 23(c), even someone who has served a three-year sentence "faces substantial injury for every day he is forced to remain in custody").

12. Finally, the State has not shown that the granting of a stay would serve the public interest. The State claims that "if a stay is granted, there will be no need to force the State to expend scarce resources to retry Guerra when review by the Court of Appeals likely will make a new trial unnecessary." Motion to Stay at 4. But as with the second prerequisite (irreparable harm to the State), this argument again assumes that the State has proven the first prerequisite -- likelihood of success on appeal. Since this element must stand on its own (especially since here the State has failed to demonstrate that it will likely succeed on appeal) even assuming Guerra's ultimate win on appeal, the State's argument fails. If Guerra wins on appeal, there will have been no wasted resources; instead, a man wrongfully convicted and sentenced to die will have obtained earlier vindication.

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<sup>3</sup>It is unclear whether the State must prove each of the four prerequisites or only show that the overall balance tilts heavily in its favor. Before the balancing test first surfaced in *Ruiz I*, the party seeking a stay had to satisfy each prerequisite. See, e.g., *Beverly*, 468 F.2d at 741 n.13 (5th Cir. 1972). No post-*Ruiz I* case has squarely addressed the issue of whether a movant must not only meet the balancing test but also satisfy each of the three equitable prerequisites, although this can be inferred from comments made in *Wildmon*, 983 F.2d at 23. If so, then the State must lose because it cannot show that Guerra will not be significantly harmed if a stay is granted.

13. The State also argues that a stay will protect "[s]ociety['s] ... entitle[ment] to careful appellate review of the correctness of these complaints before having to begin retrial proceedings . . . ." *Id.* at 4. But society's interest does not depend on whether this review occurs before or after a retrial. That interest will be fully protected by this Court's actions on appeal.

D. Conclusion

14. In sum, the State has failed to establish any of the prerequisites for a stay. It has not shown that it has a substantial appellate case on the merits involving a serious legal question, much less that it will likely succeed. It has failed to demonstrate that the balance of the three equitable prerequisites tilts in its favor at all, much less the "heavy tilt" required to qualify the State to the lesser test under the first prerequisite of only "a substantial case on the merits involving a serious legal question" rather than likely success on appeal.

Accordingly, Respondent Ricardo Aldape Guerra respectfully requests that the Court deny the State's Motion to Stay the Judgment.

Respectfully submitted,

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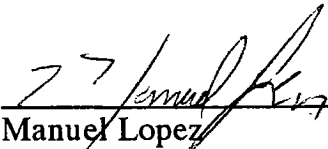
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ATTORNEYS FOR PETITIONER-APPELLEE,  
RICARDO ALDAPE GUERRA

### 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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P. O. Box 12548, Capitol Station; Austin, Texas 78711, and 209 W. 14th St. at Lavaca; Austin, Texas on the 17<sup>th</sup> day of June, 1995.

  
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Manuel Lopez

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

United States District Court  
Southern District of Texas  
ENTERED

JUN 16 1995

**RICARDO ALDAPE GUERRA**

**Petitioner.**

**VS.**

**JAMES A. COLLINS, DIRECTOR  
TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,**

**Respondent.**

Michael N. Milby, Clerk of Court

**CIVIL ACTION NO. H-93-290**

## ORDER

On this day came on to be heard Respondent's Motion to Stay the Judgment in the captioned case, and after reviewing the relevant pleadings on file herein, the Court is of the opinion that the Motion should be denied on the grounds that the Court finds the following:

1. Respondent has failed to show that it will likely succeed on the merits. The allegedly erroneous fact findings cited by Respondent were neither erroneous nor central to this Court's ultimate fact determinations. Respondent has also failed to show that it has a substantial case on the merits involving a serious legal question. None of the fact determinations cited by the State, even if all were incorrect, would have any impact beyond this case. Nor would any of the fact determinations made by this Court have any impact beyond this.
2. Respondent has failed to show that it would be irreparably injured if the stay is not granted. The claimed harm of a waste of resources to retry Petitioner is a minor financial irritant to Respondent at best. Moreover, if Petitioner ultimately prevails on

**EXHIBIT A**

appeal of this Court's judgment, then Respondent's resources used in the retrial would not have been wasted at all.

3. Respondent has failed to show that the granting of the stay would substantially harm Petitioner. To the contrary, if a stay is granted and the Petitioner wins on appeal and in a retrial, the granting of a stay would substantially harm Petitioner by extending for many months his incarceration (for retrial after appeal) for a crime that he did not commit.

4. Respondent has failed to show that the granting of the stay would serve the public interest. The public interest does not depend on whether a stay is granted. That interest will be protected by the Fifth Circuit's review on appeal and is independent of whether that review occurs before or after a retrial.

5. Respondent has failed to demonstrate that the balance of the three equitable prerequisites for a stay -- irreparable harm to Respondent, lack of substantial harm to Petitioner, and serving the public interest -- heavily tilts in favor of granting a stay. To the contrary, taken as a whole, these three factors tilt in favor of Petitioner.

It is therefore ORDERED that Respondent's Motion to Stay the Judgment is hereby DENIED.

SIGNED on this the 16th day of June, 1995, at Houston, Texas.

  
United States District Judge



6-16-95

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

United States District Court  
Southern District of Texas  
ENTERED

JUN 16 1995

**RICARDO ALDAPE GUERRA**

**Petitioner.**

Michael N. Milby, Clerk of Court

**VS.**

**CIVIL ACTION NO. H-93-290**

**JAMES A. COLLINS, DIRECTOR  
TEXAS DEPARTMENT OF  
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**Respondent.**

**ORDER**

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appeal of this Court's judgment, then Respondent's resources used in the retrial would not have been wasted at all.

3. Respondent has failed to show that the granting of the stay would substantially..... harm Petitioner. To the contrary, if a stay is granted and the Petitioner wins on appeal and in a retrial, the granting of a stay would substantially harm Petitioner by extending for many months his incarceration (for retrial after appeal) for a crime that he did not commit.

4. Respondent has failed to show that the granting of the stay would serve the public interest. The public interest does not depend on whether a stay is granted. That interest will be protected by the Fifth Circuit's review on appeal and is independent of whether that review occurs before or after a retrial.

5. Respondent has failed to demonstrate that the balance of the three equitable prerequisites for a stay -- irreparable harm to Respondent, lack of substantial harm to Petitioner, and serving the public interest -- heavily tilts in favor of granting a stay. To the contrary, taken as a whole, these three factors tilt in favor of Petitioner.

It is therefore ORDERED that Respondent's Motion to Stay the Judgment is hereby DENIED.

SIGNED on this the 16th day of June, 1995, at Houston, Texas.

  
United States District Judge

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF TEXAS**  
**HOUSTON DIVISION**

**FAX No. (713) 250-5550**



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6-15-95

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

RICARDO ALDAPE GUERRA

Petitioner,

VS.

WAYNE SCOTT, DIRECTOR  
TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent.

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CIVIL ACTION NO. H-93-290

**PETITIONER'S OPPOSITION TO RESPONDENT'S  
MOTION TO STAY THE JUDGMENT**

Petitioner Ricardo Aldape Guerra ("Guerra") opposes the motion of Respondent to stay the judgment ("Motion to Stay"). While identifying the correct standard for whether to grant a stay, Respondent (the "State") fails to adequately explain it and has completely failed to meet its requirements.

A. The Appropriate Standard

1. The State correctly identifies the four prerequisites to be considered in deciding whether to grant a stay:

(1) whether the movant has made a showing of likelihood-of-success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

*Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (hereafter "*Ruiz I*"). The State also correctly points out that the Fifth Circuit in *Ruiz I* ruled that to obtain a stay pending

appeal the movant need not always demonstrate probable success on the merits, but instead need show only "a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Id.*

2. The State omits, however, two subsequent amplifications on *Ruiz I* by the Fifth Circuit. First, the State ignores the Fifth Circuit's admonition that the assumption by many stay applicants "that *Ruiz I* was a coup de grace for the likelihood-of-success criterion in this circuit . . . is unwarranted." *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (hereafter "*Ruiz II*") (cited approvingly in *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988). As the *Ruiz II* court explained, the first criterion -- likelihood of success -- is required in "the usual case," and a stay will be granted in its absence only if (1) the balance of the equities (*i.e.*, the other three factors) is "heavily tilted" in the movants' favor and (2) the issue is one "with patent substantial merit." 666 F.2d at 857 (quoting *Ruiz I*, 650 F.2d at 565-66) (quoted in *Alberti v. Klevenhagen*, 606 F. Supp. 478, 480 (S.D. Tex. 1985)).

3. Second, the State fails to note that even when the equities tilt heavily towards the movant, which is not the case here, the weaker version of the first prerequisite requires not only proof of a substantial case on the merits, but also the involvement of a serious legal question. *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23-24 (5th Cir. 1992).

4. Moreover, the burden of establishing all these prerequisites is on the party seeking a stay. *Ruiz II*, 666 F.2d at 856. The State has failed to meet its burden on any of the requirements.

B. The State Has Failed to Demonstrate a Substantial Case on the Merits Involving a Serious Legal Question.

5. The State's only effort to show a substantial case on the merits is to claim it will likely prevail on appeal because "many of the court's critical findings about actions of the police and prosecutors are at odd with the record evidence in the case and are clearly erroneous." Motion to Stay at 2. In support of this claim, the State cites the following three comments by the Court:

- (a) the Court noted that Jose Armijo --- the second murder victim -- was left at the murder scene without medical attention for a long time after he was shot, though one report suggests he arrived at the hospital about 45 minutes after the shooting, *id.* at 2 n.1;
- (b) the Court criticized the tone of voice used by the trial prosecutors in questioning witnesses, even though the Court was not present at trial to hear the tone of voice used, *id.* at 3 n.2; and
- (c) the Court attributed the police misconduct to the desire to charge both men with the same crime, *id.*

Even if the State was correct that each of these statements were clearly erroneous, which they are not, the opinion would remain impervious to challenge.

6. The flimsiness of the State's argument is demonstrated by the weakness of these examples of "clearly erroneous" findings. If the State can do no better -- and it cannot -- in finding errors in a 47-page opinion replete with fact findings detailing serious, extensive, and flagrant police and prosecutorial argument, then it cannot possibly win on appeal. Even if none of the three statements were true. -- *i.e.*, even if Mr. Armijo had received immediate medical attention, the prosecutors had used a less demeaning tone of

voice, and the police had been motivated by less troublesome motives -- the actions described by the Court would remain no less disturbing, and the Court's ruling would be no less immune to attack. Moreover, each comment is amply supported in the record<sup>1</sup> and does not remotely meet Rule 52's "clearly erroneous" test as defined in *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

7. In addition, the State has not even attempted to identify a serious legal question, which under the case law means one that has far-reaching effects or public concern. See *Wildmon*, 983 F.2d at 24. The only rulings identified by the State as erroneous are fact determinations, none of which has an impact beyond this case. Thus, the State has failed to meet its burden of proving that it can make a substantial case involving a serious legal question.

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<sup>1</sup>As to Mr. Armijo's treatment, see testimony of George Brown (Mr. Armijo was still slumped in the front seat of his car when Brown returned 45-60 minutes after the shooting); Pet. Ex. 5 (TV news clip for July 14, 1982 stating that police at first thought Mr. Armijo was the killer and left him unattended in his car for 45 minutes); see also Pet. Ex. 4 at F239 (Mr. Armijo's first words at the hospital: "I did not shoot anybody"; on night of shooting, Armijo's "involvement in Officer Harris's death was not clear"). The documents in the police files are consistent with an elapsed time of about 55 minutes between the time Armijo was shot and his first receipt of medical attention upon arrival at the hospital. Compare *id.* at F80 (officer heard 3-4 "fireworks" about 9:50 p.m. followed by about 7 more a few seconds later), with F444 (Mr. Armijo arrived at the hospital at 10:46 p.m.). In contrast, Officer Harris received constant medical attention, beginning within minutes, from paramedics who were among the first to arrive, see *id.* at F81-82, F85-86, and later from a Life Flight doctor, ending only when Harris was pronounced dead at 10:50 p.m., see *id.* at F86, F339.

As to the prosecutors' tone of voice during trial, see testimony of Patricia Diaz (prosecutors yelled at her during trial). Numerous witnesses testified about the tone of voice used by prosecutors before trial.

As to the police motives, see testimony of Officer James Montero (he and all other police officers with whom he has discussed the issue believe that if one man shoots a policeman and a second man's only offense is carrying a gun, both men are equally to blame).

8. In sum, the State's feeble attempt at demonstrating its likelihood of prevailing on appeal shows the futility of that effort and is a far cry from the substantial case on the merits involving a serious legal question required by *Ruiz I* and *Ruiz II*. Since the State has failed to meet the first prerequisite, the Court need not even consider the State's showing on the other three requirements. See, e.g., *Byrne v. Roemer*, 847 F.2d 1130, 1133 (5th Cir. 1988) (per curiam).

C. The State Has Failed to Demonstrate that a Stay Is Strongly Favored by the Equities.

9. Even if the State had met a weaker version of the first prerequisite, it has failed to demonstrate that the other three requirements tilt heavily in its favor. First, the State has not shown that it will suffer irreparable injury if the stay is denied. The only claimed harm to the State if a stay is not granted is the waste of resources on an unnecessary trial if the Fifth Circuit reverses this Court after the State has initiated retrial proceedings against Guerra. But even if the State expends some resources on a retrial, this is merely a minor financial irritant (especially in light of the strong likelihood that Guerra will prevail on appeal), not the "irreparable injury" required by the Fifth Circuit. Moreover, this prerequisite is independent of the first one -- likelihood of success -- and thus must stand on its own, even if one assumes Guerra's ultimate victory on appeal. But if Guerra wins this appeal, then the State's resources used in the retrial will not have been wasted, but merely expended early.

10. Second, the State has not shown that granting of the stay would not substantially harm Guerra. The State argues that a stay will not substantially harm Guerra because he "will remain in custody whether the State begins a retrial . . . or the Court's judgment is stayed pending appeal." Motion to Stay at 3. But the State unwillingly makes Guerra's point on this issue. If a stay is granted and Guerra wins on appeal, thus vindicating this Court's ruling that an innocent man was wrongfully convicted by flagrant prosecutorial misconduct, Guerra must nevertheless remain incarcerated for many more months while awaiting and then living through the nightmare of a second multi-month capital murder trial.

11. If a stay is denied, however, Guerra can be retried soon, hopefully win an acquittal, and obtain his release as soon as the current appeal ends. After 13 years on death row for a crime he did not commit based on a conviction resulting from egregious prosecutorial misconduct, Guerra deserves the opportunity for additional months of the precious freedom he has been so unfairly denied for so long.<sup>2</sup> Surely, prolonged imprisonment constitutes "substantial harm."

12. Finally, the State has not shown that the granting of a stay would serve the public interest. The State claims that a stay "will prevent the spectacle of forcing the State to expend scarce resources to retry Guerra when review by the Court of Appeals likely will make that unnecessary." *Id.* at 3. But as with the second prerequisite (irreparable harm to

---

<sup>2</sup>It is unclear whether the State must prove each of the four prerequisites or only show that the overall balance tilts heavily in its favor. Before the balancing test first surfaced in *Ruiz I*, the party seeking a stay had to satisfy each prerequisite. See, e.g., *Beverly v. United States*, 468 F.2d 732, 741 n.13 (5th Cir. 1972). No post-*Ruiz I* case has squarely addressed the issue of whether a movant must not only meet the balancing test but also satisfy each of the three equitable prerequisites, although this can be inferred from comments made in *Wildmon*, 983 F.2d at 23. If so, then the State must lose because it cannot show that Guerra will not be significantly harmed if a stay is granted.

the State), this argument again assumes that the State has proven the first prerequisite -- likelihood of success on appeal. Since this element must stand on its own (especially since here the State has failed to demonstrate that it will likely succeed on appeal) even assuming Guerra's ultimate win on appeal, the State's argument fails. If Guerra wins on appeal, there will have been neither a spectacle nor wasted resources; instead, a man wrongfully convicted and sentenced to die will have obtained earlier vindication.

13. The State also argues that a stay will protect "[s]ociety[']s ... entitle[ment] to careful appellate review of the correctness of the institutions and the individuals implicated in the case before having to begin retrial proceedings . . . ." *Id.* at 4. But society's interest does not depend on whether this review occurs before or after a retrial. That interest will be fully protected by the Fifth Circuit's actions on appeal.

D. Conclusion

14. In sum, the State has failed to establish any of the prerequisites for a stay. It has not shown that it has a substantial appellate case on the merits involving a serious legal question, much less that it will likely succeed. It has failed to demonstrate that the balance of the three equitable prerequisites tilts in its favor at all, much less the "heavy tilt" required to qualify the State to the lesser test under the first prerequisite of only "a substantial ~~case~~ on the merits involving a serious legal question" rather than likely success on appeal.

Accordingly, Respondent Ricardo Aldape Guerra respectfully requests that the Court deny the State's Motion to Stay the Judgment.

Respectfully submitted,

VINSON & ELKINS L.L.P.

OF COUNSEL:

STANLEY G. SCHNEIDER  
Texas Bar No. 1770500  
Schneider & McKinney  
11 E. Greenway Plaza  
Houston, Texas 77046  
(713) 961-5901

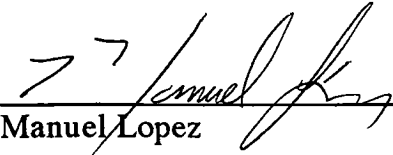
RICHARD A. MORRIS  
Feldman & Associates  
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(713) 960-6019

By: Scott Atlas / *with permission*  
SCOTT J. ATLAS  
Attorney-in-Charge  
Texas Bar No. 01418400  
Glenn S. Greene  
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Manuel Lopez  
Jim Markham  
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2300 First City Tower  
1001 Fannin  
Houston, Texas 77002-6760  
(713) 758-2024  
FAX: (713) 615-5399

ATTORNEYS FOR PETITIONER-APPELLEE,  
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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P. O. Box 12548, Capitol Station; Austin, Texas 78711, and 209 W. 14th St. at Lavaca; Austin, Texas on the 15<sup>th</sup> day of June, 1995.

  
\_\_\_\_\_  
Manuel Lopez



6-15-95  
No. 95-20443

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

*RICARDO ALDAPE GUERRA,*  
Petitioner-Appellee,

v.

*WAYNE SCOTT, DIRECTOR,*  
*TEXAS DEPARTMENT OF CRIMINAL JUSTICE,*  
*INSTITUTIONAL DIVISION,*  
Respondent-Appellant.

---

On Appeal From the United States District Court  
For the Southern District of Texas  
Houston Division

---

**RESPONDENT-APPELLANT'S MOTION  
TO STAY THE DISTRICT COURT'S JUDGMENT**

---

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellant, hereinafter "the Director," by and through the Attorney General of Texas, and files this Motion to Stay the District Court's Judgment.

**I.**

On November 15, 1994, the United States District Court for the Southern District of Texas, Houston Division, entered an order granting the writ of habeas corpus. *Guerra v. Scott*, No. H-93-290 (S.D. Tex. 1994). The court ordered the

state to commence retrial of Petitioner ("Guerra") within thirty days or to release him. On December 12, 1994, the court entered final judgment pursuant to the order. On January 4, 1995, the court granted the Director's motion to alter or amend the judgment to make clear that the state was required only to have arraigned Guerra within thirty days of the judgment's becoming final. On May 19, 1995, the court granted Guerra's motion to alter or amend the findings of fact, pursuant to Fed. R. Civ. P. 52(b). The Director then filed timely notice of appeal from the court's orders and judgment. On June 7, 1995, the Director applied to the district court for a stay of its judgment pending appeal. The motion to stay the judgment provided that, because of time constraints, if it was not acted on by the close of business on June 14, 1995, it would be deemed denied and application would be made to this court for a stay. No action had been taken on the motion by the close of business on June 14.

## II.

This court has held that four factors are relevant in deciding whether to grant a stay of a judgment:

- (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

*Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). In applying this standard, the movant need not demonstrate probable success on the merits, but only that there is "a substantial case on the merits when a serious legal question is involved" and that the balance of the equities weighs heavily in favor of granting the stay. *Id.*

### III.

Here, a strong likelihood exists that the Director will prevail on appeal. Many of the court's critical findings about actions of the police and prosecutors are at odds with the record evidence in the case and are clearly erroneous.<sup>1</sup> As a result, relief was erroneously granted. In addition, although criticizing police and prosecutors for presenting theories that were speculative, the court in many cases engages in wholly unwarranted speculation in order to reach the conclusion that Guerra was entitled to relief.<sup>2</sup> Finally, these and other glaringly erroneous findings remain a part of the court's opinion even after it granted Guerra's motion to amend the findings, which noted at least fifteen serious inaccuracies in the recitation of facts.

### IV.

In addition, the balance of the other factors weighs heavily in favor of the state and requires that a stay be granted. If a stay is not granted, the state will be forced to begin a retrial for Guerra before this court has had the opportunity to pass

---

<sup>1</sup> As just one example, the court related as fact that Jose Armijo, the civilian victim, was kept at the scene of the murder without medical attention for a long time after he was shot. The court goes on to surmise that "[t]his delay by the police quite possibly resulted in the death of a key witness." Order of November 15, 1994, at 11 & n.4; Amended Order of May 19, 1995, at 11 & n.4. Medical reports in evidence reflect that Armijo was at the hospital approximately 45 minutes after the shooting took place.

<sup>2</sup> For example, at one point the court criticized the "tone of voice" prosecutors used to question witnesses. Order of November 15, 1994, at 14; Amended Order of May 19, 1995, at 14. There is no evidence anywhere in the record that the court was present during Guerra's trial and heard the prosecutors' tone of voice. The court also attributed what it found to be police misconduct to "the strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so." Order of November 15, 1994, at 13-14; Amended Order of May 19, 1995, at 13. This is pure speculation on the court's part, with nothing in the record to support it. However, this speculation colored the court's interpretation of the evidence that was introduced.

on the correctness of the lower court's judgment. If the court affirms, there will be an opportunity then for the state to initiate retrial proceedings. If the court reverses, the state will not have been required to waste its resources on an unnecessary trial.

Further, a stay of the judgment will not substantially harm Guerra. Guerra will remain in custody under any circumstances. If the state begins a retrial in compliance with the district court's order, Guerra will be subject to incarceration pursuant to the indictment, pending the outcome of the trial. Thus, he will not suffer any different consequences from the granting of a stay until the appeal is decided.

Finally, the stay will serve the public interest. If a stay is granted, there will be no need to force the state to expend scarce resources to retry Guerra when review by this court likely will make a new trial unnecessary. At the very least, the state should not be put to the task of a retrial until review by this court determines that one is needed. In addition, Guerra makes serious allegations of misconduct on the part of the police and the district attorney's office, and accuses the criminal justice system of failing to function in the manner that the public has a right to expect. Society is entitled to careful appellate review of the correctness of these complaints before having to begin retrial proceedings, and a stay will serve this interest.

### **CONCLUSION**

For the foregoing reasons, the Director respectfully requests that the court grant a stay of the district court's judgment pending resolution of this appeal.

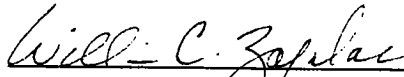
Respectfully submitted,

DAN MORALES  
Attorney General of Texas

JORGE VEGA  
First Assistant Attorney General

DREW T. DURHAM  
Deputy Attorney General for  
Criminal Justice

MARGARET PORTMAN GRIFFEY  
Assistant Attorney General  
Chief, Capital Litigation Division

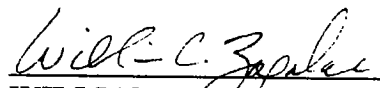
  
WILLIAM C. ZAPALAC  
Assistant Attorney General

P.O. Box 12548, Capitol Station  
Austin, Texas 78711  
(512) 463-2080  
Fax No. (512) 320-8132

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 Motion to Stay the District Court's Judgment has been served by placing same in Federal Express, prepaid, on this the 15<sup>th</sup> day of June, 1995, addressed to: Mr. Scott J. Atlas, VINSON & ELKINS, 1001 Fannin Street, Suite 2500, Houston TX 77002.

  
WILLIAM C. ZAPALAC  
Assistant Attorney General

## **CONTENTS\***

- A. Respondent's Motion for Summary Judgment
- B. Petitioner's Response to Motion for Summary Judgment
- C. Order on Application for Writ of Habeas Corpus, November 15, 1994
- D. Order granting Petitioner's Motion to Amend Findings, May 19, 1995
- E. Amended Order on Application for Writ of Habeas Corpus, May 19, 1995
- F. Application to district court for stay of judgment

\*The original petition for writ of habeas corpus is over 270 pages long, only a portion of which sets out the issues on which relief was granted. The relevant contentions are addressed in detail in the other pleadings and in the district court's orders. Thus, in the interest of saving the court time in reviewing the relevant materials, the original petition has not been included.



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

*RICARDO ALDAPE GUERRA,*  
Petitioner

vs.

*WAYNE SCOTT, DIRECTOR*  
*TEXAS DEPARTMENT OF*  
*CRIMINAL JUSTICE,*  
*INSTITUTIONAL DIVISION,*  
Respondent

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Civil Action No. H-93-290

**RESPONDENT SCOTT'S MOTION TO STAY THE JUDGMENT  
TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Motion to Stay the Judgment. The Director would respectfully show the court as follows:

**I.**

On November 15, 1994, the court entered an order granting the writ of habeas corpus in the above-referenced cause. The court ordered the state to commence retrial of Petitioner ("Guerra") within thirty days or to release him. On December 12, 1994, the court entered final judgment pursuant to the order. On January 4, 1995, the court granted the Director's motion to alter or amend the judgment to make clear that the state was required only to have arraigned Guerra within thirty days of the judgment's becoming final. On May 19, 1995, the court granted Guerra's motion to alter or amend the findings of fact, pursuant to Fed. R.

Civ. P. 52(b). The Director then filed timely notice of appeal from the court's orders and judgment.

## II.

The Fifth Circuit has held that a court should consider four factors in deciding whether to grant a stay of its judgment:

(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

*Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). In applying this standard, the court need not find that the movant has demonstrated probable success on the merits. Rather, it is necessary only that there is "a substantial case on the merits when a serious legal question is involved" and that the balance of the equities weighs heavily in favor of granting the stay. *Id.*

## III.

Here, there is a real likelihood that the Director will prevail on appeal. Many of the court's critical findings about actions of the police and prosecutors are at odds with the record evidence in the case and are clearly erroneous.<sup>1</sup> As a result, relief was erroneously granted. In addition, although criticizing police and prosecutors for presenting theories that were speculative, the court in many cases

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<sup>1</sup> As just one example, the court related as fact that Jose Armijo, the civilian victim, was kept at the scene of the murder without medical attention for a long time after he was shot. The court goes on to surmise that "[t]his delay by the police quite possibly resulted in the death of a key witness." Order of November 15, 1994, at 11 & n.4; Amended Order of May 19, 1995, at 11 & n.4. Medical reports in evidence reflect that Armijo was at the hospital approximately 45 minutes after the shooting took place.

engages in wholly unwarranted speculation in order to reach the conclusion that Guerra was entitled to relief.<sup>2</sup> Finally, these and other glaringly erroneous findings remain in the court's opinion even after granting Guerra's motion to amend the findings of fact, which noted over fifteen serious inaccuracies in the recitation of facts.

#### IV.

In addition, the balance of the other factors weighs heavily in favor of the state and requires that a stay be granted. If a stay is not granted, the state will be forced to begin a retrial for Guerra before the court of appeals has had the opportunity to pass on the correctness of this court's judgment. If the court of appeals affirms, there will be an opportunity then for the state to initiate retrial proceedings. If the court of appeals reverses, the state will not have been required to waste its resources on an unnecessary trial.

Further, a stay of the judgment will not substantially harm Guerra. Guerra will remain in custody whether the state begins a retrial in compliance with the court's order or the court's judgment is stayed pending appeal. Thus, he will not suffer from any different and unfavorable treatment while the case is on appeal if a stay is entered.

Finally, the stay will serve the public interest. Granting the stay will prevent the spectacle of forcing the state to expend scarce resources to retry Guerra when review by the court of appeals likely will make that unnecessary. In

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<sup>2</sup>For example, at one point the court criticized the "tone of voice" prosecutors used to question witnesses. Order of November 15, 1994, at 14; Amended Order of May 19, 1995, at 14. There is no evidence anywhere in the record that the court was present during Guerra's trial and heard the prosecutors' tone of voice. The court also attributed what it found to be police misconduct to "the strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so." Order of November 15, 1994, at 13-14; Amended Order of May 19, 1995, at 13.

addition, the case involves serious allegations of misconduct on the part of the police and the district attorney's office, and an alleged failure of the criminal justice system to function in the manner that the public has a right to expect. Society is entitled to careful appellate review of the correctness of the complaints against the institutions and the individuals implicated in the case before having to begin retrial proceedings, and a stay of the judgment will serve this interest.

V.

Because this court's order requires that retrial proceedings begin by arraigning Guerra by June 19, 1995,<sup>3</sup> the Director will assume that it has been denied if it is not ruled upon by the close of business on June 14, so that there will be an opportunity to present a motion for stay to the United States Court of Appeals for the Fifth Circuit.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests that the court stay the effect of its judgment pending the outcome of the appeal in this case.

Respectfully submitted,

DAN MORALES  
Attorney General of Texas

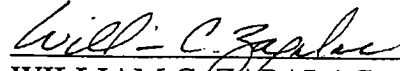
JORGE VEGA  
First Assistant Attorney General

DREW T. DURHAM  
Deputy Attorney General for  
Criminal Justice

---

<sup>3</sup> The court's order granting Guerra's Rule 52(b) motion was entered on May 19, 1995, making it necessary for the state to begin retrial proceedings thirty days from that date, or June 18. Because that date is a Sunday, the state must arraign Guerra by June 19.

MARGARET PORTMAN GRIFFEY  
Assistant Attorney General  
Chief, Capital Litigation Division

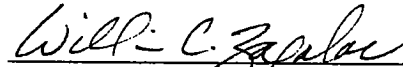
  
WILLIAM C. ZAPALAC  
Assistant Attorney General

P.O. Box 12548, Capitol Station  
Austin, Texas 78711  
(512) 463-2080  
Fax No. (512) 320-8132

ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF CONFERENCE**

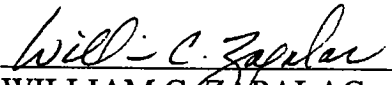
I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that on June 7, 1995, I attempted unsuccessfully to contact Scott J. Atlas, attorney for Petitioner, about the contents of this motion. It is assumed that he is opposed to it.

  
WILLIAM C. ZAPALAC  
Assistant Attorney General

### 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 Motion for Stay of Judgment has been served by placing same in Federal Express, prepaid, on this the 4th day of June, 1995, addressed to:

Mr. Scott J. Atlas  
VINSON & ELKINS  
2300 First City Tower  
1001 Fannin Street  
Houston TX 77002-6760

  
\_\_\_\_\_  
WILLIAM C. ZAPALAC  
Assistant Attorney General

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

*RICARDO ALDAPE GUERRA,*  
Petitioner

vs.

*WAYNE SCOTT, DIRECTOR*  
*TEXAS DEPARTMENT OF*  
*CRIMINAL JUSTICE,*  
*INSTITUTIONAL DIVISION,*  
Respondent

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Civil Action No. H-93-290

**ORDER**

Be it remembered that on this \_\_\_\_ day of \_\_\_\_\_, 1995, came on to be heard Respondent's Motion to Stay the Judgment, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's Motion to Stay the Judgment be, and it is hereby GRANTED. The judgment in this case is stayed pending issuance of the mandate by the Court of Appeals for the Fifth Circuit, if this court's judgment is affirmed.

SIGNED on this the \_\_\_\_ day of \_\_\_\_\_, 1995, at Houston, Texas.

\_\_\_\_\_  
United States District Judge



6-1-95

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

*RICARDO ALDAPE GUERRA,*  
Petitioner

vs.

*WAYNE SCOTT, DIRECTOR*  
*TEXAS DEPARTMENT OF*  
*CRIMINAL JUSTICE,*  
*INSTITUTIONAL DIVISION,*  
Respondent

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Civil Action No. H-93-290

**NOTICE OF APPEAL**

Notice is hereby given that Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent in the above-named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order and final judgment entered in this action on November 15, 1994, as amended by order entered on May 19, 1995.

June 1, 1995

Respectfully submitted,



WILLIAM C. ZAPALAC  
Assistant Attorney General  
Southern District # 8615  
State Bar #22245480

P.O. Box 12548, Capitol Station  
Austin, Texas 78711  
(512) 463-2080  
Fax No. (512) 320-8132

ATTORNEY FOR RESPONDENT

CLOSED APPEAL

U.S. District Court  
TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 93-CV-290

Guerra v. Collins, et al  
Assigned to: Judge Kenneth M. Hoyt  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 02/02/93

Nature of Suit: 530  
Jurisdiction: Federal Question

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

RICARDO ALDAPE GUERRA  
plaintiff

Scott J Atlas  
Below Address Terminated on 2/19/93  
713-615-5399  
[COR LD NTC]  
Vinson & Elkins  
1001 Fannin St  
Ste 2500  
Houston, TX 77002  
713-758-2024  
FTS 5434

Scott J Atlas  
713-615-5399  
[COR LD NTC]  
Vinson & Elkins  
1001 Fannin St  
Ste 2500  
Houston, TX 77002  
713-758-2024

v.

JAMES A COLLINS, Director  
TDCJ-ID  
defendant

Bob Walt  
[COR LD NTC]  
Assistant Attorney General  
State of Texas  
P O Box 12548  
Austin, TX 78711  
512/463-2080

Mary Lou Soller  
202-628-0858  
[COR LD NTC]  
Attorney at Law  
655 15th NW  
Ste 900  
Washington, DC 20005

Proceedings include all events.

4:93cv290 Guerra v. Collins, et al

CLOSED APPEAL

202-626-5800

WAYNE A SCOTT  
respondent

William C Zapalac  
512-463-2084  
[COR LD NTC]  
Attorney Generals Office  
P O Box 12548  
Austin, TX 78711  
512-463-2080

Proceedings include all events.  
4:93cv290 Guerra v. Collins, et al

CLOSED APPEAL

RICARDO ALDAPE GUERRA

plaintiff

v.

JAMES A COLLINS, Director TDCJ-ID;

defendant

WAYNE A SCOTT

respondent

Proceedings include all events.  
4:93cv290 Guerra v. Collins, et al

CLOSED APPEAL

2/1/93 3 MOTION for leave to proceed in forma pauperis by Ricardo Aldape Guerra, Motion Docket Date 2/21/93 [3-1] motion , filed (mac) [Entry date 02/04/93]

2/1/93 4 MOTION for appointment of counsel by Ricardo Aldape Guerra, Motion Docket Date 2/21/93 [4-1] motion , filed (mac) [Entry date 02/04/93]

2/1/93 5 MOTION with memorandum in support for evidentiary hearing by Ricardo Aldape Guerra, Motion Docket Date 2/21/93 [5-1] motion , filed (mac) [Entry date 02/04/93]

2/2/93 1 APPLICCATION for writ of habeas corpus by Ricardo Aldape Guerra, Motion Docket Date 2/22/93 [1-1] motion , filed (ad)

2/2/93 2 Appendix To First Application For Writ OF HABEAS CORPUS (ad)

2/19/93 6 RESPONSE by James A Collins in opposition to [3-1] motion for leave to proceed in forma pauperis , filed (mac) [Entry date 02/24/93]

2/22/93 7 Minute entry: conference held before Judge Kenneth M Hoyt, Response to motion reset to 3/15/93 for [5-1] motion for evidentiary hearing, Response to motion reset to 4/16/93 for [1-1] motion for writ of habeas corpus reply briefs to be filed by 3/31/93, Any need for an evidentiary hearing will be deteremined on or before 3/31/93, set notice of compliance for the state to file State Court Records due for 3/8/93 Ct Reporter: Smith , entered. Parties ntfd. ( Signed by Judge Kenneth M. Hoyt ) (mac) [Entry date 02/24/93] [Edit date 02/24/93]

2/22/93 8 ORDER granting [4-1] motion for appointment of counsel , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (mac) [Entry date 02/24/93]

2/22/93 9 ORDER granting [3-1] motion for leave to proceed in forma pauperis , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (mac) [Entry date 02/24/93]

2/25/93 -- STATE COURT RECORDS, received and forwarded to file room. (2 corrugated boxes) (fs)

3/3/93 -- STATE COURT RECORDS, received and forwarded to file room. (3 brown expandable folders). (fs)

3/16/93 10 RESPONSE by James A Collins to [5-1] motion for evidentiary hearing , filed (fs) [Entry date 03/19/93]

4/5/93 11 REPLY by Petitioner Ricardo Aldape Guerra to Respondent's response to Petitioner's [5-1] motion for evidentiary hearing & brief in support, filed (ea) [Entry date 04/08/93]

Proceedings include all events.

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CLOSED APPEAL

- 4/13/93 12 MOTION for leave to file Amici Curiae Brief Supporting the Petitioner by the American Immigration Lawyers Association, et al , Motion Docket Date 5/3/93 [12-1] motion , filed (Original Amici Curiae Brief of the American Immigration Lawyers Association, et al Supporting the Petitioner attached to Motion for Leave and filed) (ph) [Entry date 04/15/93]
- 4/13/93 13 AMICI CURIAE BRIEF of the American Immigration Lawyers Association, et al Supporting the Petitioner, filed. (ph) [Entry date 04/15/93]
- 4/19/93 14 FIRST UNOPPOSED MOTION for extension of time by Respondent James A Collins, Motion Docket Date 5/9/93 [14-1] motion , (ea) [Entry date 04/20/93]
- 4/20/93 15 ORDER granting [14-1] motion for extension of time, set answer due for 4/30/93 for James A Collins , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (ea) [Entry date 04/21/93]
- 5/3/93 16 SECOND UNOPPOSED MOTION to extend time to respond by James A Collins, Motion Docket Date 5/23/93 [16-1] motion , filed (fs) [Entry date 05/05/93]
- 5/6/93 17 ORDER granting [16-1] motion to extend time to respond, reset answer due for 5/14/93 for James A Collins , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (fs) [Entry date 05/07/93]
- 5/17/93 18 MOTION to extend time to respond by James A Collins, Motion Docket Date 6/6/93 [18-1] motion , filed (hs)
- 5/17/93 19 ANSWER to Complaint by James A Collins (Added attorney ), filed. (hs)
- 5/17/93 19 MOTION with brief in support for summary judgment by James A Collins, Motion Docket Date 6/6/93 [19-1] motion , filed (hs)
- 5/18/93 20 ORDER granting [18-1] motion to extend time to respond , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt) (fs) [Entry date 05/19/93]
- 5/28/93 21 FIRST UNOPPOSED MOTION for extension of time by Ricardo Aldape Guerra, Motion Docket Date 6/17/93 [21-1] motion , filed (fs) [Entry date 06/01/93]
- 6/2/93 22 ORDER granting [21-1] motion for extension of time, Response to motion reset to 6/15/93 for [19-1] motion for summary judgment , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (fs) [Entry date 06/04/93]

Proceedings include all events.

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CLOSED APPEAL

6/15/93 23 RESPONSE by Ricardo Aldape Guerra to respondent's [19-1] answer, [19-1] motion for summary judgment and Brief in support, filed. (fs) [Entry date 06/16/93]

6/16/93 -- ATTACHMENTS/SUPPLEMENT to [23-1] response by James A Collins , received/fwd to file. (fs) [Entry date 06/17/93]

8/9/93 24 MOTION for leave to file brief of Amicus Curiae, the government of the United States, supporting the brief of petitioner by Ricardo Aldape Guerra, Motion Docket Date 8/29/93 [24-1] motion , filed (bj)

8/9/93 -- MOTION AND ORDER for Mary Lou Soller to appear pro hac vice, Motion Docket Date 8/29/93 [0-1] motion , rec'd (bj)

9/29/93 25 ORDER granting pltf's [5-1] motion for evidentiary hearing set evidentiary hearing for 9:00 11/15/93 , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 09/30/93]

10/18/93 26 APPLICATION FOR WRIT of habeas corpus ad testificandum by Ricardo Aldape Guerra , filed. (bj) [Entry date 10/22/93]

10/21/93 27 ORDER, entered; Parties notified. The petitioner Richardo Aldape Guerra confined in the Ellis unit, Huntsville, Tx. is to brought before the U.S.D.C for the Southern Dist. of Tx. Houston Div. on the 15th day of Nov. 1993, by 9:00 a.m. and from day to day thereafter, to testify in a hearing held before this court, to be returned at the termination of said hearing to the Ellis Unit. ( signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 10/22/93]

10/28/93 28 APPLICATION FOR WRIT of Heabeas Corpus Ad Testificandum by Ricardo Aldape Guerra , filed. (bj) [Entry date 10/29/93]

11/1/93 29 ORDER granting pltf's [28-1] writ application , entered; Parties notified. Respondent is commanded to have Johnny Reyes Matamoros, now confined in the Harris County Jail , brought before the Dist. Court for the Southern Dist. of Tx. Hou. Div. on the 15th day of Nov. 1993, by 9:00 a.m. to testify. Immediately after said prisoner has given his testimony, he is to be returned to the Harris County Jail. ( signed by Judge Kenneth M. Hoyt ) (bj) [Edit date 11/16/93]

11/2/93 30 FIRST AMENDED APPLICATION/MOTION for writ of habeas corpus ad testificandum by Ricardo Aldape Guerra, Motion Docket Date 11/22/93 [30-1] motion , filed. (ph) [Entry date 11/04/93]

Proceedings include all events.

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CLOSED APPEAL

- 11/2/93 32 Minute entry: Pre-Trial Conf. held; App: S. J. Atlos f/William Zacalac; S. Schneper f/S.. Cornelus; granting deft's [0-1] motion for Mary Lou Soller to appear pro hac vice set pretrial order due for 11/10/93, terminated previous deadlines Ct Reporter: J. Shaefer, entered. The petitioner intends to offer into evidence their (3) weapons in the custody or care of the Harris County District Clerk; It is the Order of this court that the state atty cooperate in the recovery of those weapons and exhibits and securing them for the 11/15/93 hearing. Parties ntfd. ( Signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 11/04/93] [Edit date 11/08/93]
- 11/2/93 33 ORDER granting the government's [0-1] motion for Mary Lou Soller to appear pro hac vice, entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 11/04/93]
- 11/3/93 31 ORDER, entered; Parties notified. Respondent to have Petitioner brought to the Harris County Jail on- 1/10/93 by 9 am and remain there until 11/15/93 then have Petitioner brought to the USDC on 11/15/93 by 9 am for a hearing. Certified copies sent to U S Marshal. ( signed by Judge Kenneth M. Hoyt ) (ph) [Entry date 11/04/93]
- 11/4/93 34 APPLICATION FOR WRIT of Habeas Corpus Ad Testificandum by Ricardo Aldape Guerra, filed. (bj)
- 11/5/93 35 ORDER, entered; Parties notified. Proper U.S. authority are commanded to have John Reyes Matamoros now confined in the Ellis I Unit, Huntsville, Tx. brought before the U.S. 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. At the termination of said hearing party to be returned ot the Ellis I Unit, under safe and secure conduct. ( signed by Judge Kenneth M. Hoyt ) (bj)
- 11/12/93 36 EXPERT WITNESS LIST by James A Collins filed. (ph)
- 11/15/93 39 EVIDENTIARY HEARING held on 11/15/93. Apps: Atlas, Gee and Schneider f/pltf; Zapalac f/deft. Petitioner's evidence begins. Continued to 11/16/93 at 9 am. terminated deadlines Ct Reporter: J Schaffer, filed. (ph) [Entry date 11/17/93]
- 11/16/93 40 Evidentiary hearing held before Judge Kenneth M. Hoyt Ct Reporter: J. Schaffer; App: Same as first day. Petitioners case continues. Houston Police departments motion to quash withdrawn. (bj) [Entry date 11/19/93]
- 11/16/93 41 MOTION to quash, or to modify supoena duces tecum by movant HPD, Motion Docket Date 12/6/93 [41-1] motion, 12/6/93 [41-2] motion, filed. (bj) [Entry date 11/19/93]

Proceedings include all events.  
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11/17/93 37 ORDER , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (SEALED BY ORDER OF COURT) (mcg)

11/17/93 38 ORDER sealing instrument #37 , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (mcg)

11/18/93 42 3rd Day hearing held before Judge Hoyt Ct Reporter: F. Warner Appearances: Same as first day. (mcg) [Entry date 11/22/93]

11/18/93 45 4th Day hearing held. Ct Reporter: F. Warner Appearances: Same as first day. Respondent's motion to amend witness list denied. (mcg) [Entry date 11/29/93]

11/22/93 43 Miscellaneous hearing held. Ct Reporter: J. Schaffer Appearances: Same as first day. (mcg) [Entry date 11/24/93]

11/22/93 44 Exhibit list by Ricardo Aldape Guerra , filed (mcg) [Entry date 11/24/93]

11/23/93 -- returned the 2 mannequins to Mark Kohn on this date, as evidence by his signature. (bj) [Entry date 11/30/93]

12/30/93 46 Proposed WRITTEN FINDINGS OF FACT AND CONCLUSION OF LAW by Ricardo Aldape Guerra , filed. (bj) [Entry date 01/04/94]

1/3/94 47 Proposed FINDINGS OF FACT AND CONCLUSION OF LAW by James A Collins , filed. (mcg) [Entry date 01/04/94]

1/7/94 48 ORDER granting pltf's [12-1] motion for leave to file Amici Curiae Brief, granting pltf's [24-1] motion for leave to file brief of Amicus Curiae, [19-1] motion for summary judgment taken under advisement , entered; Parties notified. ( signed by Judge Kenneth M. ) (bj) [Entry date 01/11/94] [Edit date 01/13/94]

3/11/94 49 TRANSCRIPT OF PROCEEDINGS of TESTIMONY of Richard Bax and Robert Moen for dates of 11/22/93 before Judge Kenneth Hoyt , filed. ( Court Rptr: Joyce Schaefer) (ph) [Entry date 03/16/94]

3/11/94 50 TRANSCRIPT OF PROCEEDINGS of TESTIMONY of Floyd McDonald and Sam Acheson for dates of 11/15/93 before Judge Kenneth Hoyt , filed. (Court Rptr: Joyce Shaefer) (ph) [Entry date 03/16/94]

6/27/94 -- Status check. (bj) [Entry date 06/28/94]

Proceedings include all events.

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CLOSED APPEAL

11/14/94 51 ORDER granting pltf's [34-1] writ application , entered; Parties notified. This case is remanded to the 248th Judicial District Court where the court shall, within 30 days, proceed in conformity this memorandum opinion to retry the petitioner or relaease him ( signed by Judge Kenneth M. Hoyt ) (Mail Certified Copy of Remand to State Court) (bj) [Entry date 11/15/94]

11/15/94 -- Case closed (bj)

12/13/94 52 FINAL JUDGMENT: Petitioner's application for Writ of Habeas Corpus is GRANTED., entered. Parties ntfd. ( signed by Judge Kenneth M. Hoyt ) (hs) [Entry date 12/14/94]

12/13/94 -- Case closed (hs) [Entry date 12/14/94]

12/27/94 53 MOTION pursuant to FRCP 52(b) to alter judgment, or to amend [51-1] judgment by Ricardo Aldape Guerra, Motion Docket Date 1/16/95 [53-1] motion, 1/16/95 [53-2] motion , filed. (1a) [Entry date 12/28/94]

12/28/94 54 MOTION to alter judgment, or to amend [52-1] judgment, [51-1] order by James A Collins, Motion Docket Date 1/17/95 [54-1] motion, 1/17/95 [54-2] motion , filed. (1a)

12/28/94 55 MOTION to file billing records under seal by Ricardo Aldape Guerra, Motion Docket Date 1/17/95 [55-1] motion , filed. (Original and Copy of Exhibits (invoices) placed in sealed envelope and fwd to CRD) (1a) [Entry date 12/29/94]

12/28/94 56 MOTION for attorney fees, and for costs by Ricardo Aldape Guerra, Motion Docket Date 1/17/95 [56-1] motion, 1/17/95 [56-2] motion , filed. (Attorney vouched fwd to CRD attached to order form) (1a) [Entry date 12/29/94]

1/3/95 57 NOTICE of Certificate of Conference for Unopposed Motion for attorney's fees and costs by pltf Ricardo Aldape Guerra filed (nc) [Entry date 01/04/95]

1/3/95 58 NOTICE of Certificate of conference for unopposed Motion to file billing records under seal by Ricardo Aldape Guerra, filed (nc) [Entry date 01/04/95]

1/4/95 59 ORDER granting Respondent's [54-1] motion to alter judgment and [54-2] motion to amend [52-1] judgment, [51-1] order , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (ph) [Entry date 01/05/95]

1/11/95 60 NOTICE of first amended certificate of conf. for motion for atty fees and costs by Ricardo Aldape Guerra , filed (bj) [Entry date 01/13/95]

Proceedings include all events.

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CLOSED APPEAL

1/23/95 61 MOTION to alter , or to amend [52-1] judgment by Ricardo Aldape Guerra, Motion Docket Date 2/12/95 [61-1] motion, 2/12/95 [61-2] motion , filed. (bj) [Entry date 01/25/95]

5/17/95 62 ORDER granting petitioner's [56-1] motion for attorney fees, granting petitioner's [56-2] motion for costs , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 05/18/95]

5/17/95 63 ORDER granting petitioner's [55-1] motion to file billing records under seal , entered; Parties notified. ( signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 05/18/95]

5/17/95 64 SEALED DOCUMENT placed in vault, petitioner's billing records, filed (bj) [Entry date 05/18/95]

5/18/95 65 AMENDED ORDER granting pltf's [34-1] application for writ of Habeas Corpus, entered; Parties notified. The conviction and judgment are set aside. The writ of habeas corpus is conditionally granted unless the state begins retrial proceedings by arraigning the petitioner within thirty days from the date this order becomes final. ( signed by Judge Kenneth M. Hoyt ) (bj) [Entry date 05/19/95]

5/18/95 66 ORDER granting pltf's [53-2] motion to amend [51-1] judgment; granting pltf's [41-1] motion to quash, granting pltf's [61-1] motion to alter; granting pltf's [61-2] motion to amend [52-1] judgment , entered; Parties notified. This court's order on application for writ of Habeas Corpus signed on 11/14/94, and entered on 11/15/94, is hereby amended as provided in attachment A to petitioner's first amended motion to alter or amend the judgment. ( signed by Judge Kenneth M. ) (bj) [Entry date 05/19/95]

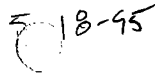
5/18/95 -- Bill Zapalac and Scott Atlas personally notified by telephone that the Amended Order on Application for Writ of Habeas Corpus was entered on 5/19/95. mb (ph) [Entry date 05/22/95]

5/25/95 -- rec'd return receipt #P 028 067 196 reflecting service to Peggy Giffey AAG. (bj)

6/2/95 67 NOTICE OF APPEAL of [51-1] order, [66-1] order by Wayne A Scott , filed. Fee Status: paid Receipt #: 448497 (mac) [Entry date 06/06/95]































6/6/95 -- Notice of appeal and certified copy of docket transmitted to USCA: [67-1] appeal (mac)





MAY 10 1935

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

CIVIL ACTION NO. H-93-290

This case is before the Court pursuant to the application for a writ of habeas corpus filed by the petitioner, Ricardo Aldape Guerra. This Court granted the petitioner's motion for an evidentiary hearing and pursuant thereto, received documentary and testimonial evidence. Having reviewed the writ application, the response, the state trial record, the exhibits introduced into evidence and the testimony presented at the evidentiary hearing, the Court is of the opinion that the writ shall be granted.

## **I.**

### **Factual and Procedural History**

On July 13, 1982, J. D. Harris, a Houston police officer, was on a patrol in a Hispanic neighborhood. Around 10:00 p.m. a pedestrian, later determined to be George Lee Brown, waved down officer Harris complaining that a black and burgundy Cutlass automobile had almost run him over while he was walking his dog. Within minutes, officer Harris approached a stalled vehicle fitting the description given to him by the pedestrian.

The vehicle was occupied by Ricardo Aldape Guerra and Roberto Carrasco Flores, undocumented workers, who lived in the neighborhood. Pursuant to officer Harris' command, the occupants approached officer Harris' vehicle. The second occupant pulled a nine-millimeter Browning semi-automatic pistol and shot officer Harris three times. It is undisputed that the weapon was owned by Carrasco. At the time of the shooting, the first occupant had placed or was placing his hands on the hood of officer Harris' vehicle in obedience to officer Harris' command. As the individuals fled the scene of the crime, the second occupant fired a nine-millimeter pistol into an approaching vehicle shooting Jose Armijo, Sr., in the presence of his two children.

It is undisputed that Carrasco wore a maroon shirt and brown pants and that Guerra wore a light green shirt and blue jeans. Carrasco was also known in the neighborhood as "Guero" or "Wero" because of his light-skin. As well, he was clean-shaven and had short hair; Guerra, on the other hand, had black, straight, shoulder-length hair, a mustache, and a beard.<sup>1</sup>

Within an hour of the shooting, Carrasco was killed in a shootout with police, but not before he shot and seriously wounded another police officer with the same weapon used to kill officer Harris and Mr. Armijo. Officer Harris' weapon, a .357 Colt Python, was found in Carrasco's waistband when his body was searched or examined at the morgue. Also discovered was an additional "ammo" magazine for the nine-millimeter pistol in a "military-type" magazine pouch attached to Carrasco's belt.

Guerra was arrested shortly after Carrasco was killed, while hiding beneath a horse trailer. He was unarmed at the time, although a .45-caliber Detonics pistol was found lying under the trailer, wrapped in a bandanna. After he was arrested, he was taken to the crime scene where spectators had gathered and witnesses were being identified and questioned. Later, he was taken to the police station.

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<sup>1</sup> These characteristics and features are important because the identity of the "shooter" was in dispute.

Guerra was tried for the offense of capital murder and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. His conviction was affirmed on May 4, 1988, by the Texas Court of Criminal Appeals in Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988) (*en banc*), cert. denied, 492 U.S. 925 (1989).

On September 21, 1992, the state trial court denied Guerra's application for writ of habeas corpus, as well his request for an evidentiary hearing and failed to enter findings of fact. Guerra's case was automatically forwarded to the Texas Court of Criminal Appeals, which adopted the trial court's recommendation in an unpublished, per curiam, order. Guerra then filed this application for a federal writ of habeas corpus.

## II.

### Petitioner's Contention:

In his several arguments, Guerra contends that he was denied a fair and impartial trial because of: (a) pretrial intimidation of witnesses; (b) an improper identification procedure; (c) the prosecutors' failure to disclose materially exculpatory evidence; (d) the prosecutors' use of known false evidence and known illegitimate arguments to the jury; and, (e) the cumulative effect of the prosecutorial error.

Each of these contentions and the relevant evidence will be addressed in turn. To assist the reader in following this discussion, it should be noted that the evidence consists of (a) the statements of witnesses taken on the morning following the shooting; (b) the trial testimony in the underlying conviction; and (c) the testimony taken in this proceeding.

Restated, Guerra complains that he was brought to the crime scene and location of the witnesses in handcuffs; at the police station, he was twice escorted past the witnesses with handcuffs and bags over his hands; at the lineup, he was the sole Hispanic on exhibition with long-hair; before, during, and after the lineup, the witnesses were permitted to communicate amongst themselves, with one particular witness urging the others to identify Guerra as the shooter; at a reenactment of the crime and at a pretrial weekend meeting of the witnesses, the prosecutor told the witnesses that Carrasco was dead and that Guerra was the shooter; at the trial, two life-size mannequins were stationed in front of the jury from the beginning to the end of the trial. Finally, Guerra argues that the prosecution failed to disclose materially exculpatory evidence and used evidence known to be false, or half truths, to convict him. The cumulative effect of all of these actions resulted in a violation of his "due process" rights and the fundamental right to a fair

procedure leading up to trial.

### **III.**

#### **Pretrial Intimidation of Witnesses:**

##### **III (a) The Petitioner's Contentions:**

The petitioner contends that several, if not all, of the witnesses were intimidated by the police and the prosecutors, the result of which was that the witnesses either gave contradictory testimony, or their testimony was presented in a manner that shaded the truth. On the question of intimidation, the petitioner called several witnesses who were under the age of 18 at the time: Patricia Diaz (age 17); Elena Holguin; Frank Perez (age 17); Herlinda Garcia (age 14); Jose Heredia (age 14); and Elvira Flores (age 16).

The evidence is undisputed that the witnesses were brought to the police station before midnight on July 13, 1992. They remained until about 6:30 a.m. the next morning. The petitioner asserts that in addition to lack of sleep, the ability to coerce and intimidate the witnesses was made easy by three other factors common to most of the key witnesses, i.e., their inability to speak fluent English, their lack of education, and their youth.

The native language of all but one of the neighborhood witnesses is Spanish and, at the time, many of the witnesses had little or no command

of the English language. These facts, coupled with the lack of formal education, according to the petitioner, created a situation where the witnesses' statements as taken lent themselves to selective interpretations. These circumstances, according to the petitioner, set the tone for how the witnesses were handled.

### III (b) Federal Habeas Testimony:

During the federal evidentiary hearing, Patricia Diaz, a minor in 1982, testified that she told police officers at the crime scene that she did not see the shooting, but only got a glimpse of Guerra's profile after she heard the shots. She told them that Guerra's hands looked empty. One of the police officers, using vulgar language, insisted that Diaz had seen more and threatened to take away her infant daughter unless she cooperated. While still at the crime scene, Diaz saw another officer yelling at, handcuffing, and placing her aunt, Trinidad Medina, into a police car.

Diaz also testified that at the pretrial weekend meeting, held shortly before trial, the prosecutors also yelled at her, insisting that she change her testimony in some respects. She also told the prosecutor that she never saw Guerra pointing at officer Harris.<sup>2</sup>

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<sup>2</sup> During Diaz' testimony the prosecutor, on several occasions, altered the testimony by question and reaffirmed it again and again. For example:

Elena Holguin also testified at the trial and this proceeding. She stated that she was in her home at the time of the shooting. After she told police officers that she had not seen officer Harris get shot, one of the police officers became angry and told her that she had a duty to help them. Because of her alleged uncooperativeness, she was handcuffed, without provocation or justification, and placed into a police car. She was taken to the police station barefoot because the police would not permit her to get her shoes. She further testified that, in total, she was kept in handcuffs for more than two hours and they were not removed until she reached the police station.

Frank Perez testified that shortly after Harris was shot, a police officer pointed a gun at an unidentified Hispanic male, told him to lie down on the ground and yelled: "Why did you kill the cop?" The man on the ground was neither Carrasco nor Guerra. He also testified that at the pretrial weekend meeting, he told the prosecutors that, shortly after officer Harris was shot, a man who looked like Carrasco had run past him and pointed an object

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Q. "Could you see or make out, Patricia, what type of object, if anything, this man had in his hand?" (p. 314, L. 6)

Q. "Could you see which way this man went after he pointed at the police officer like you have shown the jury....?" (p. 315, L. 2)

Q. "Now, could you describe this man you saw pointing at the police officer...?" (p. 316, L. 12)

Q. "Does that look a lot better, like the way he looked that night he was pointing at the police officer?" (p. 318, L. 4).

The record shows that Diaz never saw either man pointing at the police officer, only at the car. Further, she never saw any object. See also note 9A at p. 38 *infra*.

at him that appeared to be a nine-millimeter gun. In response, the prosecutor insisted that if Perez was less than "100%" certain that the object was a gun, he should not testify that the object pointed at him was a "gun," just an "object."

Jose Luis Luna was called to testify, as well. He testified that after officer Harris had been shot, but shortly before Carrasco was killed, police officers came to his home at 4907 Rusk, with guns drawn. The police officers ordered J. Luna and Jose Manual Esparza outside, forced them face down on the front porch, pointed guns at their heads, put a foot on them and cursed and screamed at them, while they searched the area.

Roberto Onofre testified that he witnessed this event between the police, J. Luna and Esparza as he was returning to the house that he shared with them. Onofre also testified that after Carrasco was killed, two police officers returned and questioned himself, Jose Luna, Jose Esparza and Enrique Torres Luna. During this exchange, the officers screamed, cursed, and threatened to arrest them if they did not tell what they knew. Several police officers then entered the house and searched it.

Onofre and J. Luna both testified that several times during July, after Carrasco's death and the after the arrest of Guerra, police officers came

to their home after midnight while they were asleep, entered the house, conducted themselves violently and used abusive language. They would order the residents to sit in the living room while they searched the house, kicking items out of the way and tearing up any newspaper clipping about Guerra. Although Onofre signed a consent to search at the time, he testified that he did so only because of the police officers' conduct, their actions toward the residents, and their mannerisms.

Herlinda Garcia, 14 years old at the time, testified that she told the police that Carrasco was the shooter. At that time, several police officers told her she would be arrested and jailed unless she cooperated. An unidentified police officer stated to her "that she just did not know what all could happen to her and her husband." At the time, Garcia's husband was over 18 years and on parole. She testified that she took these comments as a threat to reincarcerate her husband on rape charges if she did not say what was expected of her.

At the pretrial weekend meeting, after Garcia told one of the prosecutors that Guerra was not the man who had shot officer Harris, the prosecutor told her that she was confused and that she could not now change her mind because she had already made a statement identifying Guerra as the

shooter, not only of officer Harris but also Mr. Armijo.<sup>3</sup>

George Brown testified that after Mr. Armijo was shot, he was left in his car, without medical attention, for over an hour. However, officer Harris was immediately taken to the hospital within a few minutes after the ambulance arrived.<sup>4</sup> For the four to six hours leading up to the lineup at 6:00 a.m., Brown was kept separate from the other Hispanic witnesses, they were seated on a bench in a hallway outside the Homicide Division office. He attributes this segregation to the fact that his last name is of European origin. He could, nevertheless, overhear them talking among themselves about the shooting.

Garcia also testified that while at the police station she overheard police officers tell several of the Hispanic witnesses not to discuss the case with

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<sup>3</sup> The statement referred to by the prosecutor states in relevant:

"This evening sometime after 10:00 p.m. my sister and me (sic) were going to the store .... My sister and I was (sic) walking down the sidewalk when I remembered that I had left my money .... I ran home to get my money .... When I got back to my sister we saw this black car turn off of Walker on to Lenox street rear (sic) fast .... As the car was getting ready to back up a police car ... pulled in behind it."

"...[H]e told the men in the black car to get out of the car.... Both men came out of the car on the driver's side .... [H]e told them to put their hands on the hood...."

"Before I got a chance to move I saw this guy with the blond hair reach into the front of his pants and pull out a pistol and shoot the policeman.... The man with blond hair came after me shooting at me.... [H]e then shot the man in the read (sic) car." [Mr. Armijo]

"... I did not get to see the other man and I do not know what happened to him ... the man that shot the policeman ... was wearing brown pants and a brown shirt that was open all the way down."

<sup>4</sup> Mr. Armijo was still alive during this time and was kept at the scene, according to police, because they thought that he had shot officer Harris. This delay by police quite possibly resulted in the death of a key witness.

anyone, except the police and the prosecutors, and especially warned them not to talk to Guerra's lawyers or "they [the witness] could get in trouble." In addition, Garcia and several of the other witnesses testified that at the pretrial weekend meeting one of the prosecutors pointed to a picture of Carrasco and stated to the witnesses that the man in the picture was the man who died in the shootout with police. They then pointed to a picture of Guerra and said that he was the man who shot and killed officer Harris and Mr. Armijo.

### III (c) Discussion and Conclusion:

Intimidation by the police or prosecution to dissuade a witness from testifying or to persuade a witness to change his testimony, when combined with a showing of prejudice to the defendant, violates a defendant's "due process" rights. See United States v. Heller, 830 F.2d 150, 152-53 (11th Cir. 1987). This was the case in United States v. Smith, 577 F. Supp. 1232, 1236-38 (S.D. Ohio 1983) where the Court found that threats by government agent caused a witness to give false, damaging testimony. See also Webb v. Texas, 409 U.S. 95 (1972). Thus, the government does not have the unfettered right to interference with any witness, particularly, in making the choice to testify or not. United States v. Hammond, 598 F.2d 1008, 1012-13 (5th Cir. 1979). Where interference occurs by the police, police actions that intimidate

witnesses may be imputed to the state in its prosecution. *Cf.*, Fulford v. Maggio, 692 F.2d 354, 358 (5th Cir. 1982), rev'd on other grounds, 462 U.S. 111 (1983). Equally so, the state has a duty to disclose such conduct. This duty is imposed not only upon its prosecutor, but upon on the state as a whole, including its investigative agencies. Therefore, if a confession is in the possession of a police officer, constructively, the state's attorney has both access to and control over the document. *Id.*

It is clear to this Court that the mood and motivation underlying the police officers' conduct arising out of this case was to convict Guerra for the death of officer Harris even if the facts did not warrant that result. The Court finds and holds that the police officers and the prosecutors intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense. Specifically, the written statements that were taken after the line-up are in many respects in significant contrast to those taken before the line-up.

The Court attributes this to the fact that Carrasco had been killed and the strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so.

In addition to the scurrilous conduct exhibited by the police, the Court is confounded by the fact that the police would handcuff two innocent

women, threaten to revoke the parole of another's common-law husband, and repeatedly, day after day in the early morning hours, search the residence of innocent people. This conduct alone speaks volumes about the intimidation suffered by these children who were caught up in the police net and the circumstance.

The prosecutors' conduct was equally rank. Before and during the trial, questions to the witnesses were stated in such a manner that the questions stated or implied complicity by Guerra, irrespective of the fact that the answers did not conform. The tone of voice, as well as the artful manner in which the questions were asked, left little room for truthful answers or explanation. When the answers were not to their liking, they resorted to ridicule. Such conduct severely prejudiced Guerra's right to a fair trial and, therefore, violated his right to "due process" of law. See Heller, 830 F.2d at 152-53; Smith, 577 F. Supp. at 1236-38; see generally Webb, 409 U.S. 95 (1972) *cf.*, Hammond, 598 F.2d at 1012-13.

The Court concludes that the pretrial intimidation of the witnesses, most of whom were children, resulted in violating Guerra's right to fundamental "due process" and a fair trial.

## IV.

### Improper Identification Procedures

#### IV (a) The Legal Standard:

The Supreme Court has adopted a "totality of the circumstances test" to be utilized in the analysis of identification testimony. Identification testimony is admissible if it appears "reliable," even if it is flawed by improper police behavior. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). Thus, an unnecessarily suggestive identification is not subject to a "per se" exclusion. Id. The Court must determine whether an identification procedure constitutes a denial of "due process." In doing so it must first be determined whether the pretrial identification was unnecessarily suggestive. Assuming that it was, the Court must then determine whether the identification was so unreliable that the defendant's "due process" right to a fair trial would be precluded if the identifications were permitted. Id.

The factors to be considered in evaluating the reliability of an identification are: (i) the witnesses' opportunity to view the accused at the time of the crime; (ii) the witnesses' degree of attention; (iii) the accuracy of the witnesses' prior description; (iv) the level of certainty demonstrated at the confrontation; and (v) the time between the crime and the confrontation. Id.

(citing Neil v. Biggers, 409 U.S. 188 (1972)).

Where the state's use of pretrial identification procedures posed a substantial likelihood of tainting the state witnesses' identifications of the defendant and both, their out-of-court and in-court, identifications are not shown to be independently reliable, the Court must determine if admission of the identifications into evidence is harmless error. See Young v. Herring, 917 F.2d 858, 864 (5th Cir. 1990), cert. denied, 112 S. Ct. 1485 (1992) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). When the state is the beneficiary of any error, the burden of proving that the error was harmless, beyond a reasonable doubt, rest at the state's door. Thigpen v. Cory, 804 F.2d 893, 897 (6th Cir. 1986), cert. denied, 482 U.S. 918 (1987) (citing Chapman, 386 U.S. at 24).

#### IV (b) Discussion:

The facts of this case present a situation that is somewhat peculiar to the Brathwaite case. Here, the facts show that the petitioner was known in and around the neighborhood, therefore, it was logical that the witnesses could identify the petitioner as being at the scene when officer Harris was shot. Moreover, Guerra's presence at the scene is not in dispute. Guerra gave a statement to that effect on the evening of the shootings. What is confounding

is that the police took statements shortly after the shooting. Several were essentially exculpatory of Guerra, and others described the shooter in ways that blended characteristics of both men; none pointed unequivocally to Guerra. After learning of Carrasco's death and after the lineup, the police took additional statements that contradicted or impeached the prior statements in some subtle and other not so subtle ways.

In this regard, the record shows that there were at least eight witnesses who claim to have seen officer Harris shot: Hilma G. Galvan, Herlinda Medina Garcia, Jose Francisco Armijo, Jr., Elvira Medina Flores, Patricia Ann Flores Diaz, Jacinto Vega, Jose and Armando Heredia. When these persons gave their first written statements, between 12:00 a.m. and 1:00 a.m., they stated in relevant part the following:

... "I know the one that shot the officer by sight...."  
The shooter "was wearing dark brown pants and a dark brown or black shirt. He (sic) tall and thin and has shoulder length straight blond hair." (Hilma G. Galvan at 12:05 a.m., July 14, 1982).

\* \* \*

... "I saw the guy with the blond hair reach into ... his pants and pull out a pistol and shoot the policeman.... He was wearing brown pants and a brown shirt that was open all the way down." (Herlinda Medina Garcia, at 12:12 a.m., July 14, 1992).

\* \* \*

... "The man shot the gun with his left hand.... I didn't see the men that shot the policeman too good and I don't remember what they looked like or what they were wearing...." (Jose Francisco Armijo at 12:15 a.m., July 14, 1982).

\* \* \*

... "Both the driver with blond hair and the passenger ... put their hands on the police car.... At this time the blond-haired driver pulled a pistol ... and started shooting at the police officer .... I don't think I can identify the two persons I saw...." (Elvira Medina Flores at 12:40 a.m., July 14, 1982).

\* \* \*

... "I told the detective that the man that was standing fourth from the left was the same man that I had seen on Walker.... I guess he had a gun in his hand." (Patricia Ann Flores Diaz, second statement, at 6:20 a.m. July 14, 1982).<sup>5</sup>

\* \* \*

..."One of the Mexican[s] ... put his hands on the hood of the police car as if he was under arrest. The other Mexican ... walked up behind the first Mexican ... and all of a sudden ... pulled a pistol out from somewhere and shot at the police officer about four (4) times.... The first Mexican ... was the one who had his hands

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<sup>5</sup> Diaz's first statement, given at 1:40 a.m., described the shooter as a Hispanic male with "collar length black hair and was wearing a long sleeve, dark colored shirt." By the time Diaz gave her second statement she was unsure which of the men had shot the officer. For sure she did not know whether Guerra even had a weapon.

on the hood of the police car and he would have been the driver of the car.... [T]he one who shot the police was the passenger of the car.... I never got to see their faces so I cannot recognize them if I ever see them again. I cannot remember what they looked like and cannot remember what either one was wearing." (Jacinto Vitales Vega at 12:10 a.m., July 14, 1982).

\* \* \*

... The man that was driving the car came out of the car and to where the policeman was at .... [T]he other man in the car ... came out of the car and walked up behind the policeman and shot him. ... I didn't get to see the man's face that was shooting the policeman." (Jose Angel Heredia at 4:15 a.m., July 14, 1982).

\* \* \*

.... "The man that shot the police officer I know him as Wedo (sic). I have known him about a month. As soon as he got out of the car I recognized him. He was also the man that ... shot the policeman." (Armando Heredia at 4:35 a.m. July 14, 1982).

\* \* \*

Two others gave relevant statements that bear upon the identification issue because of their proximity in time and circumstances to the events. John Reyes Matamoros and George Lee Brown gave statements before the lineup. In relevant part they state:

"I was able to see one of the men that had gotten arrested [after Carrasco was killed] and he was the man that was sitting in the front passenger seat

[between 9:45 p.m. to 10:00 p.m.]....." (George Lee Brown at 12:40 a.m., July 14, 1982).

\* \* \*

"The man I saw running with the gun was a mexican american (sic) about 20 or 21 years old. He had shoulder length hair that was not as dark as mine and it looked more like hair that a white person would have. He was wearing a button up shirt and brown pants....." (John Reyes Matamoros at 12:10 p.m., July 14, 1982).

Several of the witnesses knew Guerra from the neighborhood. For the police to utilize this familiarity in the reckless manner that it did, is troubling. In fact, the state used a host of improper identification procedures in an effort to manipulate the witnesses' statements and testimony. Notably suggestive were (i) permitting the witnesses to see the petitioner in handcuffs on several occasions while the witnesses were waiting to view the lineup, and (ii) permitting the witnesses to talk about and discuss identification before, during and after the lineup.

The prosecutors joined the hunt by conducting a reenactment of the shooting shortly after the incident with various chosen witnesses participating. This procedure permitted the witnesses to overhear each others view and conform their views to develop a consensus view. At the pretrial weekend conference, the prosecutors presented the two mannequins intended

for use during trial. These life-size mannequins, created in the images of Guerra and Carrasco, were utilized then and throughout the trial to reinforce and bolster the witnesses' testimonies. The effect of these impermissible suggested procedures also resulted in a denial of "due process", as evidenced by the witnesses' federal habeas testimony.

The habeas testimony reveals that Guerra, handcuffed and with paper bags over his hands, was walked and shoved down the hallway outside the Homicide Division offices past the witnesses. He was then taken from the Homicide Division offices to the photo lab, where his clothes were taken from him. On both occasions, he was escorted along the hall before Diaz, Flores, Garcia, Jose, Jr., Galvan, Medina and Perez.

Before the lineup, witnesses either described the shooter in such a way that the description fit only Carrasco, i.e., he had blond-like hair and wore brown pants and a brown/maroon shirt, described a composite of both men, or described what could have been either man. While both Carrasco and Guerra had dark hair, the use of Carrasco's nickname, "Guero," which means "light-skinned" or "light-colored, blond-like hair," to describe the shooter may have confused the police interviewers. Clearly, the word "blond" did not describe Guerra's dark brown hair. Jose, Jr., who was 10 years old at the time,

could only identify the shooter as being left-handed. This description was critical because Carrasco was left-handed. After the lineup and, with the knowledge that Carrasco was dead, several of the witnesses gave a series of second statements declaring, in spite of numerous previous assurances to the contrary, that Guerra was the shooter.

The various testimonies also show that Galvan spent most of her time in the hallway talking to Jose, Jr., and Flores. Although a general instruction or warning against talking was given, Galvan continued. She pointed toward Guerra and said to Jose, Jr., Jose and Armando Heredia, in Spanish, loud enough for all the witnesses and the officers in the room to hear, that since Carrasco had died, they could blame the man who "looked like God" or the "wetback" from Mexico for the shooting of officer Harris. Based on her various accounts, Galvan's statement, that she actually witnessed the shooting, is suspect. Nevertheless, she encouraged the minors to identify Guerra as the shooter knowing that Guerra did not fit even her own description of the shooter.

She continued by stating that, Mexicans only come to the United States to commit crimes and take jobs away from United States citizens. She repeatedly referred to Mexican Nationals as "Mojados" or "wetbacks". She was

also heard repeatedly telling Jose, Jr., that Guerra was the killer. This conduct can be attributed only to her prejudice toward Mexican Nationals who, as Galvan stated, "took the jobs from Americans." The Court concludes that these expressions of prejudice against undocumented aliens was, as likely as any, the motivation for the inconsistencies between Galvan's own statement and her testimony.

Galvan's influence also explains how Jose, Jr.'s testimony was so specific and direct when he was overheard in the hallway at the police station admitting that he had not seen Guerra or Carrasco clearly enough to know which had fired the shots. In fact, Jose, Jr. admitted in his trial testimony (pp. 302-03, 307-08) that he had not seen who shot his father because his father had pushed him below the dashboard as the shooting commenced. He repeated his inability to identify the shooter while he was sitting in the hallway outside the Homicide Division upon seeing Guerra during the lineup.<sup>6</sup> It is more likely so than not, that Jose, Jr.'s belief that Guerra was the shooter was a result of seeing Guerra in handcuffs at the police station and hearing Galvan, repeatedly, insist that Guerra was the shooter.

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<sup>6</sup> It was argued by the state that Jose, Jr. became fearful when he saw Guerra and did not want to tell all that he knew. It was later, when he had gathered himself that he had the courage to come forward. However, the court had the benefit of a news clip in which Jose, Jr. was featured and related the incidents to the news media the day after the shooting.

During the trial, the prosecutors placed the mannequins in front of the jury and they remained there during the testimony of the witness. Heredia and Perez testified that during the trial, the positioning of the mannequins helped them identify which of the men was dead. [The Carrasco mannequins' shirt had bullet holes and blood stains, while the shirt on the Guerra mannequin did not.] Donna Monroe Jones, a juror during the trial, also testified. She testified that the jurors noticed that the shirt on the Carrasco mannequin was blood-stained and bullet-riddled. Additionally, she testified that the mannequins made the jurors feel uncomfortable and ill at ease.

Given the undisputed facts leading up to and surrounding the lineup, the identification of Guerra at the lineup was predestined. After all, he was present at the time of the shooting. To then use that fact as the sole basis to prosecute him for capital murder, is more than a stretch. Under the "totality of the circumstances," the identification procedures used by the police and the prosecutors were so corrupting that it caused witnesses, who either knew otherwise, or did not know at all, to testify that Guerra had committed the crime.

It is also relevant that the police officers and the prosecutors did

not quiet Galvan and others, as they commented before, during and after the lineup. It is relevant to this inquiry, as well, that the prosecutors misused the identification of Guerra so as to violate his right to a fair trial. So, different from Thigpen and Neil, it is the effects of these draconian procedures and the results attendant to this abuse of power, that are arresting.

The pretrial use of the mannequins in the meeting with witnesses at the prosecutors' office the weekend before trial was certain to reinforce the consensus facts so that there would be complete harmony in the testimony. The unrestricted, incessant presence of the mannequins, one wearing a bullet-riddled, blood-stained shirt that the jurors and witnesses saw daily, violated a constitutional guarantee of a fair trial, by injecting impermissible suggestive factors into the trial process. Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

It was no mystery to the state that their entire case against Guerra rested on the witnesses identifying him. The state had to count on the eyewitnesses excluding from their testimony, facts that clearly pointed to Carrasco.<sup>7</sup> Therefore, the state, to seal its victory, deliberately chose to taint the identification process by insisting upon perjured testimony. The physical evidence equivocally pointed to Carrasco as the shooter. The statements taken

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<sup>7</sup> [Richard Bax, one of the prosecutors in the 1982 trial, conceded "the physical evidence ... totally pointed towards Carrasco Flores as being the shooter...."]

before the lineup makes it abundantly clear that the witnesses either identified Carrasco as the shooter or described a composite of both men. It was only after the unexplained misconduct by the police officers, the permitted misconduct on the part of Galvan, and the reinforcement by the prosecutors, that Guerra was chosen as the shooter.

**IV (c) Conclusion:**

The state has the burden of proving, beyond a reasonable doubt, that the intentional act of causing to be admitted tainted, unreliable and perjured testimony, identifying Guerra as the shooter, was harmless. Thigpen, 804 F.2d at 897 (citing Chapman, 386 U.S. at 24.) The state has offered no evidence to contradict this point and has failed to discharge its duty.

**V.**

**Failure to Disclose Materially Exculpatory Evidence**

**V (a) The Legal Standard:**

There is long standing authority for the principle 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." Brady v. Maryland, 373 U.S. 83, 87 (1963). In order to establish that

evidence falls within the purview of Brady, a petitioner must establish that the evidence was suppressed and that it was material and favorable. Id. Suppressed evidence is "material" if there is 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).

V (b) Discussion:

Before the trial, Guerra's attorneys filed motions requesting production of all material inconsistent with the guilt or lawful arrest of Guerra. They also filed an extensive motions for pretrial discovery and inspection. Obviously, the conduct of the police and prosecutors was unknown to the defense attorneys. Yet, it was the type of conduct that the motions sought and the type that the prosecutors were duty bound to disclose.

In the discussion that follows, the Court analyzes the various witness statements and the police's and prosecutors' conduct surrounding the statements. It is the conduct giving rise to and surrounding the statement that is the focus of the petitioner's charge.

She described the events and actor as follows:

The blond hair (sic) reach into the front of his pants and pull out a pistol and shoot the policeman ... the man with the blonde hair then shot the man in the read (sic) car ... the man that shot the policeman and

the man in the red car had blonde hair and was about 5'8" tall .... He was wearing brown pants and a brown shirt....

According to Garcia, she told the police on the night of the shooting that the short-haired man was the shooter. The first written statement prepared her. She was asked to sign this written statement, which omitted her exonerating reference to the fact that the short-haired man was the shooter and that the long-haired man was the man with the empty hands near the front end of the police car at the time Officer Harris was shot. Garcia, who had attended only seven years of school, asked the police officer to read it to her because she could not read well. The police officer refused and told her to "just sign it."

According to Garcia, she then signed it because of the earlier verbal threat that another police officer made concerning revoking her husband's parole for living with her, Garcia, a minor.

After Garcia watched the lineup, she told the police that the man in the number 4 position was not the shooter but, instead, was the man with empty hands near the front of the police car at the time officer Harris was shot. When the second statement was prepared, it omitted the exonerating information provided by Garcia. This second statement was not read to Garcia. She was asked to sign this second statement. She did so, for the

same reason that she had signed the first statement.

At the re-enactment, Garcia told one of the two prosecutors that the short-haired man was the one who appeared to have been the shooter, not the long-haired man. This exculpatory evidence was not recorded and not passed on to the defense.

At the pretrial weekend meeting, Garcia told one of the two prosecutors again that the long-haired man wearing the green shirt was not the man who had shot the police officer. This exculpatory evidence was not recorded and not passed on to the defense.

From the Court's perspective, knowledge of this conduct explains the prosecutor's impatience with Garcia during the trial of the case. The prosecutor insisted that Garcia had not seen a blond-haired man shoot officer Harris causing her to testify that she had not. The prosecutor then attributed Garcia's reluctance to testify to fear of reprisal from people in the neighborhood.

According to Diaz, she told the police that when officer Harris was shot, the long-haired man was standing on the driver side of the police car near the front end, facing toward the police car with his arms extended out over the police car, feet spread apart, and that the palms of his hands were

facing down toward the police car. In addition, his hands were empty and were positioned as if he were about to place his hands on the hood of the car to be searched. In spite of this, an officer prepared a statement omitting the exonerating information provided by her and inserting the incorrect information that the long-haired man pointed a gun in the direction of the police car and shot four times at the police car. Tired, she signed the statement without reading it, unaware of its true contents.

After the lineup was conducted, Diaz told the police that the man in the number 4 position was the man who had been on the driver side, near the front, of the police vehicle. In spite of hearing this, an officer prepared another statement omitting the exonerating information provided by her. She signed this statement, as well, without reading it, unaware of its true contents.

At the pretrial weekend meeting, Diaz told one of the two prosecutors that she was at the crime scene at the time of the shooting and that it did not look as though Guerra had a gun, because at the time of the shooting Guerra's hands were open with his palms down on the hood of the police car. This exculpatory evidence was not recorded and not passed on to the defense.

During the habeas hearing, Perez testified that he told the police

on the night of the shooting that he saw two men running past him that evening after the shooting of officer Harris. The first man ran east on the south side of Walker and turn south onto Lenox. Perez stated that he was too far away to recognize the runner. A second man ran east on the north side of Walker and turned south on Lenox. As the second man ran past Perez, the man, who looked like Carrasco, pointed an object at Perez that he was holding in his left hand. As he ran, the object fell from his hand to the street. It made a metallic sound as it hit the pavement and looked like a handgun with a clip. The runner stopped to pick the object up, and continued running south on Lenox toward McKinney.

When Perez's statement was prepared, it omitted the fact that Perez had identified the object as a handgun. The police officer persuaded Perez to have the description in the statement read that the runner had dropped a metallic object. Later, in discussing his testimony with the prosecutor he was informed that he should describe the "object" as an "object" if he was not "100% certain" that it was a gun.

At the lineup, Perez told the police that he recognized Guerra from having seen him earlier in the hallway, but that Guerra was not the man who had dropped the object as he ran past him earlier that night. He was not

invited to the reenactment a week or so after the shooting.

Jose Heredia's testimony in this proceeding and his written statement identifies the passenger as the shooter. He testified that he told the police that when officer Harris was shot, officer Harris was standing just behind his driver's door and that the long-haired man was standing on the driver's side of the police car near the front end. He further stated that the man was facing the police car with his hands on the hood of the police car, a foot apart, palms down and empty. The short-haired man, approaching a few feet southeast of officer Harris and the long haired man (Guerra), pointed a gun at officer Harris and shot him.

After hearing Heredia's version, a police officer prepared a statement that omitted the exonerating information given concerning Guerra; specifically, that Guerra was against the car and empty handed when Carrasco came up behind Guerra and shot officer Harris. Heredia, like several of the other witnesses, tried to read his statement but could not because he could not read English. Like others, he was told to "just sign it." He further testified that he was afraid not to sign the statement, having seen his mother (Holguin) arrested and handcuffed at the scene.

After Heredia viewed the lineup, he told a police officer that he

recognized Guerra as the driver of the black car and that Guerra was not the man that shot officer Harris. Heredia was not asked to sign another statement.

Holguin, Heredia's mother, testified that she told the police that she had not seen the shooting at all. In spite of this, a statement was prepared that she was told to sign. Holguin testified that she informed the police officer who prepared the statement that she could not speak English. No one translated the statement for her benefit. Although completely unaware of the contents of the statement, Holguin testified that she signed it because she was ordered to do so. Earlier that evening, she had been handcuffed at the scene for several hours before being brought to the police station.

George Brown testified in this proceeding that he told the police that, after hearing shots that were later determined to have killed officer Harris, he ran west on Walker street from Delmar past Lenox to Edgewood. As he passed Lenox he saw someone running south on Lenox that appeared to be Carrasco. Later, he saw Perez who stated to him that the man who was seen running south on Lenox was carrying a gun and had dropped it. Brown related Perez's statement to the police, that the person handling the weapon had dropped it while running. Brown's written statement omitted the

information that he had received from Perez and had related to the police.

V (c) Conclusion:

The Court finds that the testimony of Garcia, Diaz, Holguin, Heredia and Perez is credible. Moreover, it is consistent with the physical evidence that establishes that Guerra did not shoot officer Harris and Mr. Armijo. Specifically, the physical evidence shows that the shooter used a nine-millimeter handgun, to kill both, officer Harris and Mr. Armijo. It further shows that the weapon had marks on it of the nature and type that would exist had the weapon been dropped to the pavement.<sup>8</sup> Important to these findings is the physical description of the shooter given by the scene witnesses in their initial interviews describing Carrasco and the omission of material exonerating information from the written statements prepared by the police based on the interview descriptions.

As well, the fact that the weapon was found on the body of Carrasco was ample evidence of an exonerating nature to put the police and the prosecutors on notice that Carrasco was the killer. The prosecutors'

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<sup>8</sup>Floyd E. McDonald, formerly head of the forensic lab for Houston Police Department, the department where Amy P. Heeter worked, testified that the description by Perez of what occurred on that evening concerning the dropping of the weapon, is consistent with the marks that he found on the weapon. Moreover, the positioning of the parties leads to the conclusion that the person whose hands had been placed on the hood of the vehicle was not the shooter. The shooter, because of the location of the bullets found after the shooting, would have stood east of the police officer and the other person. The bullets lodged in the house on the northwest corner of Walker and Edgewood. Officer Harris' vehicle was parallel to this house.

theory, that Guerra and Carrasco had mistakenly switched weapons in the car before the shooting and had exchanged them later at the house (4907 Rusk), was sheer speculation and no evidence was ever proffered to support this theory. Moreover, it was not even a reasonable hypothesis based on any inference that could have been drawn from the evidence.

The police officers and prosecutors had a duty to accurately record the statements of the witnesses, to fairly investigate the case, and to disclose all exculpatory evidence. Moreover, they had a duty to not prosecute an innocent man. They failed in these duties. These intentional omissions, during the investigation and prosecution, and the inclusion of poisonous speculations during trial, had the effect of suppressing and destroying favorable testimony that the Court finds was material to Guerra's defense. The information that the police and prosecutors failed to disclose, as well as the manner that the investigation and prosecution were conducted, hardly left a paper trail, and intentionally so. The concept of deceit was planted by the police and nurtured by the prosecutors. This conduct by the police and prosecutors could only have been deliberate and, so much so, that even the exonerating evidence was used in such a manner as to create a materially misleading impression.

The prosecutors and officer Amy Parker Heeter, the state's expert

on trace metal test, also misled the defense attorneys concerning the trace metal detection test results. Specifically, Guerra's attorneys were not shown or told what the true results of the trace metal detection test were. The prosecutors told the defense attorney only that the test had been positive as to Carrasco's handling of officer Harris' weapon and negative for the murder weapon. According to the defense attorneys, this statement led them to conclude that only one trace metal pattern was found on Carrasco's hands, that of officer Harris' weapon.<sup>9</sup> This was a half-truth.

In fact, the trace metal pattern matching officer Harris' weapon was on Carrasco's right hand. There were also trace metal patterns found on Carrasco's left hand. This revelation could have been utilized by the defense to impeach the expert's testimony and/or impeach the state's theory of the case, that Guerra was the shooter and had, during the course of escaping, returned Carrasco's weapon. More importantly, armed with this knowledge, Guerra's attorneys may have hired their own trace metal expert who could have testified that the trace metal patterns on Carrasco's left hand were consistent with the patterns left by the nine-millimeter weapon found under his

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<sup>9</sup>It should be noted that during the testing of the nine-millimeter pistol Heeter held it in her left hand, as was observed and reported about Carrasco by the witnesses. Yet, she failed to disclose that trace metal was found on Carrasco's left hand.

body after he was shot and killed by the police.

The state failed to disclose that there were any trace metal patterns on Carrasco's left hand, even though they knew that they, arguably, matched the nine-millimeter weapon. Although the police were told, repeatedly, that the shooter fired the weapon with his left hand, there is no meaningful record of any efforts to identify the trace metal patterns on Carrasco's left hand. The police and prosecutors had a duty to eliminate Guerra as the shooter, if the evidence supported it.

Floyd McDonald, a ballistics expert, testified at the evidentiary hearing that when held and fired, the murder weapon left a discernible trace metal pattern in less than 60 seconds. He testified that neither sweat nor normal washing with soap and water would remove the pattern. Rubbing one's hands with sand or dirt, with less than sustained vigor, would not remove such a pattern. Police records reflect that the police believed that the dirt found on Guerra's hands, when he was arrested, came from his having been on the ground being searched by the police after his arrest. Although the ground was damp from a light rain, contact with the ground would not have erased any trace metal on his hands.

McDonald also testified that the two trace metal patterns found on

Carrasco's left hand after his death are consistent with both the type of trace metal pattern left by firing the nine-millimeter weapon and Perez's testimony that Carrasco dropped and retrieved a gun as he ran past him. This dropping and retrieving of the weapon accounts for the double trace metal image found on Carrasco's left hand. It is undisputed that Guerra had no trace metal of any sort on either hand or on his body. So the testimony of Heeter, that the metal comprising officer Harris' weapon does not easily leave trace metal patterns, was a "red-herring." It was of no evidentiary value to the trial and was designed merely to confuse the jury.

The state's theory, that both defendants laid their weapons on the front seat in the vehicle and somehow did not realize that they had exchanged weapons until they met later at which time they switched weapons, in the face of this physical evidence, is beyond belief, particularly when the theory does not rise above the level of speculation.

This evidence, even if it were concealed from the prosecution by the police, is imputed to the state prosecutors because the evidence was material and critical to the case and because an inquiry would have revealed it to them. Williams v. Griswald, 743 F.2d 1553, 1542 (11th Cir. 1984); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979). By dealing in half-truths

and innuendo and by suppressing evidence that was favorable and material to Guerra's defense, the prosecutors violated Guerra's right to a fair trial. Brady, 373 U.S. at 87.

The Court concludes that, but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense or the trial would have resulted in an acquittal. Bagley, 473 U.S. at 682.

## VI.

### **Prosecution's Use of Known False Evidence And Known Illegitimate Arguments at Trial**

Next, the petitioner asserts that the prosecutor used known false testimony and illegitimate arguments in the trial and closing arguments. In this regard, the petitioner asserts that: (a) the prosecutors solicited and encouraged Garcia and Perez to overstate or understate the facts; (b) the prosecutors injected false statements concerning the character of Heredia, the 14 year old, when they accused him of being either drunk or having "smoked something" because he yawned during his testimony; and (c) the prosecutors questioned Heredia about an alleged murder at the cemetery, near the shooting scene knowing that it was a yarn spun by the children.

The Court has previously stated the facts surrounding the

testimony of Garcia and Perez and will not restate the fact here. Suffice it to say that the knowing use of false testimony by the prosecutors violates a defendant's "due process" rights under the Fifth and Fourteenth Amendments. See Napue v. Illinois, 360 U.S. 264, 269 (1959). The Court finds that such violations are abundant in the record.

The prosecutors also committed misconduct by deliberately and knowingly putting into the mouths of witnesses words that the witnesses had not said and did not believe to be true. This was accomplished by persistently cross-examining those witnesses on a false basis and by making improper insinuations and assertions calculated to mislead the jury and discredit unfavorable testimony. During the course of the testimony, the prosecutor inserted in his questions inaccurate statements from Diaz's testimony that were prejudicial to Guerra. The question and answer is as follows:

Q. You say you saw this one man and your saw him "pointing." Was he pointing toward or in the direction of the police car or the police officer?

A. Uh-huh, the direction of the police car.

On no less than five (5) other occasions, the prosecutor included within the question, an incorrect statement of the witness' prior testimony. He

repeatedly used the phrase "pointing at the police officer."<sup>10</sup> The use of this untrue information was material and detrimental to Guerra's defense. United States v. Williams, 112 S. Ct. 1735, 1749 (1992) (quoting Berger v. United States, 295 U.S. 78 (1935)).

Regarding the questions to Heredia about alcohol and drugs, the prosecutor asked him if he was drunk or had smoked anything. These questions were designed to strike down the young boy because he would dare testify contrary to the prosecutor's case theory. In closing argument, the prosecutor argued to the jury that Heredia was under the influence of either alcohol or narcotics. This improper conduct is rank ridicule and intimidation utilized to its consummate when any witnesses did not testify to this state's liking.

The petitioner also complains about the trial testimony of officer Jerry Robinette. After J. Luna testified that Carrasco had arrived at their home brandishing both the nine-millimeter weapon and officer Harris' weapon, the state called officer Robinette. Officer Robinette testified that J. Luna and Esparza had told him that they were not home in and around the time that the shootings had occurred because they had left earlier and did not return until

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<sup>10</sup> See also note 2 at p. 8 supra.

around 11:30 p.m., when they were questioned. Even if this is true, the testimony is of no value because they were there when Carrasco arrived later.

Officer Robinette's testimony is inconsistent with J. Luna's trial testimony and also with police reports showing that both J. Luna and Esparza were home when Carrasco and Guerra left as well as when they returned later that night. The police reports<sup>11</sup> show that officer Antonio Palos questioned J. Luna at 4907 Rusk just before Carrasco was killed. In spite of this knowledge, the prosecutor argued that J. Luna and Esparza had lied when they testified that they were at 4907 Rusk when Carrasco returned.

Both prosecutors claimed as fact, in closing argument, that five eyewitnesses, who had not conferred with each other, told the police that Guerra killed officer Harris and Mr. Armijo and had identified Guerra at the lineup. Both prosecutors knew that this was factually incorrect because at least one of the prosecutors was at the scene shortly after the shooting and participated in the gathering and interviewing of witnesses. Moreover, both had participated in the reenactment and the pretrial weekend meeting where the various statements of the witnesses were discussed and conformed.

The petitioner also urges, and legitimately so, that there was no

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<sup>11</sup> These reports were not produced or made available to the defendant, pretrial, pursuant to the defendant's discovery request.

justification for informing four jurors, during voir dire, that he was an "illegal alien" and that this fact was something that the jurors could consider when answering the punishment special issues. According to the prosecutors, this fact could help in a determination of whether Guerra should received a life sentence or the death penalty.

The "offense" of unlawful entry into the United States is irrelevant to the issue of a defendant's propensity for future violent and dangerous criminal behavior. No proof was offered that illegal aliens are more prone than citizens to commit violent crimes. Guerra was entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic. Zant v. Stephens, 462 U.S. 862, 879 (1983).

The prosecutors also appealed to the jury to "let the other residents at 4907 Rusk ... know just exactly what we citizens of Harris County think about this kind of conduct...." This appeal went beyond arguments seeking law enforcement to improperly play to the jury's prejudice by painting all the residents at 4907 Rusk with the broad brush of shared responsibility for the death of officer Harris. Thus, they were in need of being taught a lesson.

This "us" against "them" argument is also nothing more than an appeal to ethnic or national origin prejudice which is constitutionally impermissible. McCleskey, 481 U.S. at 309 n.30; see also McFarland v. Smith, 611 F.2d 414, 416-17 (2d Cir. 1979); United States v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990); see Haynes, 481 F.2d at 157.

The petitioner's claim of denial of "due process" did not end with the police and the prosecutor, it continued into the Court process. It is asserted that the inaccurate translations of the witnesses' testimony from Spanish to English by the court interpreters prevented a fair trial. The first interpreter, Linda Hernandez, was removed after one of the jurors complained that she was interpreting inaccurately. The second court interpreter, Rolf Lentz, acted inappropriately by making jokes and adopting an improper casual manner, while communicating with several defense witnesses in Spanish. Much of this went unchecked by the court.

The petitioner also questions the propriety of an experienced prosecutor questioning a witness about the witness' participation in a crime that the witness was not under investigation for and had not been criminally charged. One of Guerra's roommates, who testified in Guerra's defense, was questioned about his "participation" in a robbery that the prosecutors well

knew had not resulted in a charge. Yet, it was done in all likelihood, to affect the judgment of the jury in determining the witnesses' credibility. This knowing false accusation by the prosecutors violated Guerra's "due process" rights because the question was not a proper question, even on character.

This type of deliberate violation of oath as a prosecutor and violation of the rules of evidence is incompatible with the rudimentary demands of justice and fair play. This principle remains true even when the state, though not soliciting false evidence, allows it to go uncorrected. Giglio v. United States, 405 U.S. 150, 154 (1972).

## VII.

### Cumulative Effect of Prosecutorial Error

Finally, the petitioner contends that the cumulative effect of the errors made by the trial court and the prosecutors resulted in an unfair trial. Because the state court, in considering the petitioner's petition for writ of habeas corpus, found no waiver of error, there is no bar to considering the errors found in a cumulative error analysis. Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992) (*en banc*), cert denied, 113 S. Ct. 2928 (1993). When the errors of the state infuses a trial with such prejudice and unfairness as to deny a defendant a fair trial, due process has not been enjoyed. Derden, 978 F.2d

at 1458.

Here, the extent of the prosecutorial misconduct is legion. The number of instances of misconduct as well as the type and degree compels the conclusion that the cumulative effect of the prosecutors' misconduct rendered the trial fundamentally unfair. There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted. Kirkpatrick v. Blackburn, 777 F.2d 272, 278-79 (5th Cir. 1985), cert. denied, 476 U.S. 1178 (1986).

## CONCLUSION

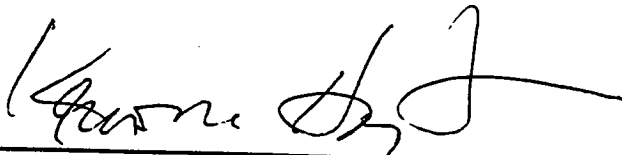
The police officers' and the prosecutors' actions described in these findings were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. It is these type flag-festooned police and law-and-order prosecutors, who bring cases of this nature giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another "notch in their guns" despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.

The police officers and prosecutors were successful in intimidating and manipulating a number of unsophisticated witnesses, many mere children, into testifying contrary to what the witnesses and prosecutors knew to be the true fact, solely to vindicate the death of officer Harris and for personal aggrandizement. The cumulative effect of the police officers' and prosecutors' misconduct violated Guerra's federal constitutional right to a fair and impartial process and trial.

Therefore, the petitioner's Writ of Habeas Corpus is GRANTED, the conviction and judgment are set aside.

It is ORDERED that the writ of habeas corpus is conditionally granted unless the state begins retrial proceedings by arraigning the petitioner within thirty days from the date this order becomes final. If the state does not complete the arraignment within the allotted time, the petitioner shall be released from custody.

Signed this 18th day of May, 1995.

  
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KENNETH M. HOYT  
United States District Judge



63

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

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
ENTERED

MAY 18 1995

Michael N. Milby, Clerk

Civil Action No. H-93-290

RICARDO ALDAPE GUERRA,

Petitioner.

v.

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

Respondent.

**ORDER**

On this day came on to be considered Petitioner's Motion to File Billing Records Under Seal. After considering said motion, the Court is of the opinion that the Motion is well-founded and should in all things be GRANTED.

It is therefore ORDERED that petitioner be granted leave to file unredacted invoices under seal, not to be made part of the public record of the case.

DATED this 17th day of May, 1995.

  
HONORABLE KENNETH HOYT  
UNITED STATES DISTRICT JUDGE



62

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

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
ENTERED

MAY 18 1995

Michael N. Milby, Clerk

RICARDO ALDAPE GUERRA,

Petitioner.

v.

Civil Action No. H-93-290

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

Respondent.

ORDER

On this day came on to be considered Petitioner's Motion for Attorneys' Fees and Costs. After considering said motion, the Court is of the opinion that the Motion is well-founded and should in all things be GRANTED.

It is therefore ORDERED that:

1. the law firm of Vinson & Elkins shall recover \$187,758.<sup>75</sup> in attorneys' fees and 26,412.<sup>32</sup> in expenses;
2. the law firm of Baker & Botts shall recover \$10,507. — in attorneys' fees and \$19.<sup>50</sup> in expenses;
3. the law firm of Schneider & McKinney shall recover 11,875.<sup>—</sup> in attorneys' fees and — 6 — in expenses; and
4. the law firm of Feldman & Associates shall recover 10,718.<sup>25</sup> in attorneys' fees and \$4.31 in expenses.

DATED this 17th day of May, 1995.

  
HONORABLE KENNETH HOYT  
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

**PETITIONER'S FIRST AMENDED MOTION TO ALTER OR AMEND THE JUDGMENT,  
PURSUANT TO FED. R. CIV. P. 52(b)**

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner Ricardo Aldape Guerra ("Guerra") files this First Amended Motion to Alter or Amend the Judgment, Pursuant to Fed. R. Civ. P. 52(b) (the "Amended Motion"), on the following grounds:

1. Guerra has discovered a few factual errors in the findings contained in this Court's Order on Application for Writ of Habeas Corpus (entered Nov. 15, 1994) (the "Order") and requests that the Court modify the findings on pages 3, 6, 8, 17-18, 21-22, 25-29, 32, 34-36, and 38 of the Order as provided in the annotated Order that is attached hereto, marked "Attachment A," and incorporated herein for all purposes.

2. In the Order, the Court indicated that Carrasco was known as "Guero" because of his light skin and light-colored blond-like hair. Order at 3. But as shown by State's Exhibit 71, (which was made a part of the record in the November 1993 habeas corpus proceeding as "Petitioner's Exhibit 2") and numerous police records included in "Petitioner's Exhibit 4" (such as pages F424 and F497), Carrasco's hair was black. Accordingly, Guerra has proposed changes to the Order on pages 3, 17, 18, 21, 25, and 32.

3. Since Jose Heredia testified at the original trial and at the habeas hearing, while his brother, Armando Heredia, never testified at either proceeding, Guerra has proposed revisions to the Order on pages 6, 8, 17, 18, and 21.

4. A paragraph in footnote 9 on page 34 of the Order appears to be a typographical error of placement, so Guerra has proposed changes to the Order on pages 8, 34, and 38.

5. Guerra believes that the remaining changes are self-explanatory.

6. The only substantive change between this Amended Motion and Petitioner's Motion to Amend the Judgment, Pursuant to Fed. R. Civ. P. 52(b) (filed Dec. 27, 1994) (the "Original Motion"), is that page 21 of Attachment A to the Original Motion inadvertently

included factual inaccuracies about witness statements. A corrected page 21 has been inserted in the "Attachment A" attached to this Amended Motion.

Respectfully submitted,

VINSON & ELKINS L.L.P.

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FAX: (713) 615-5399

ATTORNEYS FOR PETITIONER,  
RICARDO ALDAPE GUERRA

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**CERTIFICATE OF CONFERENCE**

I, Scott J. Atlas, do hereby certify that pursuant to Local Rule b(A)(4), I conferred by telephone on January 23, 1995, with William C. Zapalac, attorney for Respondent, about the contents of this motion, and he informed me that he does not agree about the disposition of this motion.

  
Scott J. Atlas

**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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, and 209 W. 14th St. at Lavaca; Austin, Texas, on the 23rd day of January, 1995.

  
Scott J. Atlas



#51

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

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
ENTERED

RICARDO ALDAPE GUERRA,

Petitioner,

VS.

JAMES A. COLLINS, DIRECTOR  
TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent.

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NOV 15 1994

Michael N. Milby, Clerk

CIVIL ACTION NO. H-93-290

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**ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS**

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This case is before the Court pursuant to the application for a writ of habeas corpus filed by the petitioner, Ricardo Aldape Guerra. This Court granted the petitioner's motion for an evidentiary hearing and pursuant thereto, received documentary and testimonial evidence. Having reviewed the writ application, the response, the state trial record, the exhibits introduced into evidence and the testimony presented at the evidentiary hearing, the Court is of the opinion that the writ shall be granted.



ATTACHMENT A

**I.**

**Factual and Procedural History**

On July 13, 1982, J. D. Harris, a Houston police officer, was on a patrol in a Hispanic neighborhood. Around 10:00 p.m. a pedestrian, later determined to be George Lee Brown, waved down officer Harris complaining that a black and burgundy Cutlass automobile had almost run him over while he was walking his dog. Within minutes, officer Harris approached a stalled vehicle fitting the description given to him by the pedestrian.

The vehicle was occupied by Ricardo Aldape Guerra and Roberto Carrasco Flores, undocumented workers, who lived in the neighborhood. Pursuant to officer Harris' command, the occupants approached officer Harris' vehicle. The second occupant pulled a nine-millimeter Browning semi-automatic pistol and shot officer Harris three times. It is undisputed that the weapon was owned by Carrasco. At the time of the shooting, the first occupant had placed or was placing his hands on the hood of officer Harris' vehicle in obedience to officer Harris' command. As the individuals fled the scene of the crime, the second occupant fired a nine-millimeter pistol into an approaching vehicle shooting Jose Armijo, Sr., in the presence of his two children.

It is undisputed that Carrasco wore a maroon shirt and brown pants and that Guerra wore a light green shirt and blue jeans. Carrasco was also known in the neighborhood as "Guero" or "Wero" because of his light-skin, ~~and light-colored blond-like hair~~. As well, he was clean-shaven and had short hair; Guerra, on the other hand, had black, straight, shoulder-length hair, a mustache, and a beard.<sup>1</sup>

Within an hour of the shooting, Carrasco was killed in a shootout with police, but not before he shot and seriously wounded another police officer with the same weapon used to kill officer Harris and Mr. Armijo. Officer Harris' weapon, a .357 Colt Python, was found in Carrasco's waistband when his body was searched or examined at the morgue. Also discovered was an additional "ammo" magazine for the nine-millimeter pistol in a "military-type" magazine pouch attached to Carrasco's belt.

Guerra was arrested shortly after Carrasco was killed, while hiding beneath a horse trailer. He was unarmed at the time, although a .45-caliber Detonics pistol was found lying under the trailer, wrapped in a bandanna. After he was arrested, he was taken to the crime scene where spectators had gathered and witnesses were being identified and questioned. Later, he was

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<sup>1</sup> These characteristics and features are important because the identity of the "shooter" was in dispute.

taken to the police station.

Guerra was tried for the offense of capital murder and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. His conviction was affirmed on May 4, 1988, by the Texas Court of Criminal Appeals in Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988) (*en banc*), cert. denied, 492 U.S. 925 (1989).

On September 21, 1992, the state trial court denied Guerra's application for writ of habeas corpus, as well his request for an evidentiary hearing and failed to enter findings of fact. Guerra's case was automatically forwarded to the Texas Court of Criminal Appeals, which adopted the trial court's recommendation in an unpublished, per curiam, order. Guerra then filed this application for a federal writ of habeas corpus.

## II.

### **Petitioner's Contention:**

In his several arguments, Guerra contends that he was denied a fair and impartial trial because of: (a) pretrial intimidation of witnesses; (b) an improper identification procedure; (c) the prosecutors' failure to disclose materially exculpatory evidence; (d) the prosecutors' use of known false evidence and known illegitimate arguments to the jury; and, (e) the cumulative

effect of the prosecutorial error.

Each of these contentions and the relevant evidence will be addressed in turn. To assist the reader in following this discussion, it should be noted that the evidence consists of (a) the statements of witnesses taken on the morning following the shooting; (b) the trial testimony in the underlying conviction; and (c) the testimony taken in this proceeding.

Restated, Guerra complains that he was brought to the crime scene and location of the witnesses in handcuffs; at the police station, he was twice escorted past the witnesses with handcuffs and bags over his hands; at the lineup, he was the sole Hispanic on exhibition with long-hair; before, during, and after the lineup, the witnesses were permitted to communicate amongst themselves, with one particular witness urging the others to identify Guerra as the shooter; at a reenactment of the crime and at a pretrial weekend meeting of the witnesses, the prosecutor told the witnesses that Carrasco was dead and that Guerra was the shooter; at the trial, two life-size mannequins were stationed in front of the jury from the beginning to the end of the trial. Finally, Guerra argues that the prosecution failed to disclose materially exculpatory evidence and used evidence known to be false, or half truths, to convict him. The cumulative effect of all of these actions resulted in a

violation of his "due process" rights and the fundamental right to a fair procedure leading up to trial.

### III.

#### Pretrial Intimidation of Witnesses:

##### III (a) The Petitioner's Contentions:

The petitioner contends that several, if not all, of the witnesses were intimidated by the police and the prosecutors, the result of which was that the witnesses either gave contradictory testimony, or their testimony was presented in a manner that shaded the truth. On the question of intimidation, the petitioner called several witnesses who were under the age of 18 at the time: Patricia Diaz (age 17); Elena Holguin; Frank Perez (age 17); Herlinda Garcia (age 14); Jose Heredia (age 14); ~~Armando Heredia (age 16)~~ and Elvira Flores (age 16).

The evidence is undisputed that the witnesses were brought to the police station before midnight on July 13, 1992. They remained until about 6:30 a.m. the next morning. The petitioner asserts that in addition to lack of sleep, the ability to coerce and intimidate the witnesses was made easy by three other factors common to most of the key witnesses, i.e., their inability to speak fluent English, their lack of education, and their youth.

The native language of all but one of the neighborhood witnesses is Spanish and, at the time, many of the witnesses had little or no command of the English language. These facts, coupled with the lack of formal education, according to the petitioner, created a situation where the witnesses' statements as taken lent themselves to selective interpretations. These circumstances, according to the petitioner, set the tone for how the witnesses were handled.

### III (b) Federal Habeas Testimony:

During the federal evidentiary hearing, Patricia Diaz, a minor in 1982, testified that she told police officers at the crime scene that she did not see the shooting, but only got a glimpse of Guerra's profile after she heard the shots. She told them that Guerra's hands looked empty. One of the police officers, using vulgar language, insisted that Diaz had seen more and threatened to take away her infant daughter unless she cooperated. While still at the crime scene, Diaz saw another officer yelling at, handcuffing, and placing her aunt, Trinidad Medina, into a police car.

Diaz also testified that at the pretrial weekend meeting, held shortly before trial, the prosecutors also yelled at her, insisting that she change her testimony in some respects. She also told the prosecutor that she never

saw Guerra pointing at officer Harris.<sup>2</sup>

Elena Holguin also testified at the trial and this proceeding. She stated that she was in her home at the time of the shooting. After she told police officers that she had not seen officer Harris get shot, one of the police officers became angry and told her that she had a duty to help them. Because of her alleged uncooperativeness, she was handcuffed, without provocation or justification, and placed into a police car. She was taken to the police station barefoot because the police would not permit her to get her shoes. She further testified that, in total, she was kept in handcuffs for more than two hours and they were not removed until she reached the police station.

Frank Perez testified that shortly after Harris was shot, a police officer pointed a gun at an unidentified Hispanic male, told him to lie down on the ground and yelled: "Why did you kill the cop?" The man on the ground was neither Carrasco nor Guerra. He also testified that at the pretrial

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<sup>2</sup> During Diaz' testimony the prosecutor, on several occasions, altered the testimony by question and reaffirmed it again and again. For example:

Q. "Could you see or make out, Patricia, what type of object, if anything, this man had in his hand?" (p. 314, L. 6)

Q. "Could you see which way this man went after he pointed at the police officer like you have shown the jury....?" (p. 315, L. 2)

Q. "Now, could you describe this man you saw pointing at the police officer...?" (p. 316, L. 12)

Q. "Does that look a lot better, like the way he looked that night he was pointing at the police officer?" (p. 318, L. 4).

The record shows that Diaz never saw either man pointing at the police officer, only at the car. Further, she never saw any object.

See also note 9A at p. 38 infra.

weekend meeting, he told the prosecutors that, shortly after officer Harris was shot, a man who looked like Carrasco had run past him and pointed an object at him that appeared to be a nine-millimeter gun. In response, the prosecutor insisted that if Perez was less than "100%" certain that the object was a gun, he should not testify that the object pointed at him was a "gun," just an "object."

Jose Luis Luna was called to testify, as well. He testified that after officer Harris had been shot, but shortly before Carrasco was killed, police officers came to his home at 4907 Rusk, with guns drawn. The police officers ordered J. Luna and Jose Manual Esparza outside, forced them face down on the front porch, pointed guns at their heads, put a foot on them and cursed and screamed at them, while they searched the area.

Roberto Onofre testified that he witnessed this event between the police, J. Luna and Esparza as he was returning to the house that he shared with them. Onofre also testified that after Carrasco was killed, two police officers returned and questioned himself, Jose Luna, Jose Esparza and Enrique Torres Luna. During this exchange, the officers screamed, cursed, and threatened to arrest them if they did not tell what they knew. Several police officers then entered the house and searched it.

Onofre and J. Luna both testified that several times during July, after Carrasco's death and after the arrest of Guerra, police officers came to their home after midnight while they were asleep, entered the house, conducted themselves violently and used abusive language. They would order the residents to sit in the living room while they searched the house, kicking items out of the way and tearing up any newspaper clipping about Guerra. Although Onofre signed a consent to search at the time, he testified that he did so only because of the police officers' conduct, their actions toward the residents, and their mannerisms.

Herlinda Garcia, 14 years old at the time, testified that she told the police that Carrasco was the shooter. At that time, several police officers told her she would be arrested and jailed unless she cooperated. An unidentified police officer stated to her "that she just did not know what all could happen to her and her husband." At the time, Garcia's husband was over 18 years and on parole. She testified that she took these comments as a threat to reincarcerate her husband on rape charges if she did not say what was expected of her.

At the pretrial weekend meeting, after Garcia told one of the prosecutors that Guerra was not the man who had shot officer Harris, the

prosecutor told her that she was confused and that she could not now change her mind because she had already made a statement identifying Guerra as the shooter, not only of officer Harris but also Mr. Armijo.<sup>3</sup>

George Brown testified that after Mr. Armijo was shot, he was left in his car, without medical attention, for over an hour. However, officer Harris was immediately taken to the hospital within a few minutes after the ambulance arrived.<sup>4</sup> For the four to six hours leading up to the lineup at 6:00 a.m., Brown was kept separate from the other Hispanic witnesses, they were seated on a bench in a hallway outside the Homicide Division office. He attributes this segregation to the fact that his last name is of European origin.

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<sup>3</sup> The statement referred to by the prosecutor states in relevant:

"This evening sometime after 10:00 p.m. my sister and me (sic) were going to the store .... My sister and I was (sic) walking down the sidewalk when I remembered that I had left my money .... I ran home to get my money .... When I got back to my sister we saw this black car turn off of Walker on to Lenox street rear (sic) fast .... As the car was getting ready to back up a police car ... pulled in behind it."

"...[H]e told the men in the black car to get out of the car.... Both men came out of the car on the driver's side .... [H]e told them to put their hands on the hood...."

"Before I got a chance to move I saw this guy with the blond hair reach into the front of his pants and pull out a pistol and shoot the policeman.... The man with blond hair came after me shooting at me.... [H]e then shot the man in the rear (sic) car." [Mr. Armijo]

"... I did not get to see the other man and I do not know what happened to him ... the man that shot the policeman ... was wearing brown pants and a brown shirt that was open all the way down."

<sup>4</sup> Mr. Armijo was still alive during this time and was kept at the scene, according to police, because they thought that he had shot officer Harris. This delay by police quite possibly resulted in the death of a key witness.

He could, nevertheless, overhear them talking among themselves about the shooting.

Garcia also testified that while at the police station she overheard police officers tell several of the Hispanic witnesses not to discuss the case with anyone, except the police and the prosecutors, and especially warned them not to talk to Guerra's lawyers or "they [the witness] could get in trouble." In addition, Garcia and several of the other witnesses testified that at the pretrial weekend meeting one of the prosecutors pointed to a picture of Carrasco and stated to the witnesses that the man in the picture was the man who died in the shootout with police. They then pointed to a picture of Guerra and said that he was the man who shot and killed officer Harris and Mr. Armijo.

### III (c) Discussion and Conclusion:

Intimidation by the police or prosecution to dissuade a witness from testifying or to persuade a witness to change his testimony, when combined with a showing of prejudice to the defendant, violates a defendant's "due process" rights. See United States v. Heller, 830 F.2d 150, 152-53 (11th Cir. 1987). This was the case in United States v. Smith, 577 F. Supp. 1232, 1236-38 (S.D. Ohio 1983) where the Court found that threats by government agent caused a witness to give false, damaging testimony. See also Webb v.

Texas, 409 U.S. 95 (1972). Thus, the government does not have the unfettered right to interference with any witness, particularly, in making the choice to testify or not. United States v. Hammond, 598 F.2d 1008, 1012-13 (5th Cir. 1979). Where interference occurs by the police, police actions that intimidate witnesses may be imputed to the state in its prosecution. Cf., Fulford v. Maggio, 692 F.2d 354, 355 (5th Cir. 1982), rev'd on other grounds, 462 U.S. 111 (1983). Equally so, the state has a duty to disclose such conduct. This duty is imposed not only upon its prosecutor, but upon on the state as a whole, including its investigative agencies. Therefore, if a confession is in the possession of a police officer, constructively, the state's attorney has both access to and control over the document. *Id.*

It is clear to this Court that the mood and motivation underlying the police officers' conduct arising out of this case was to convict Guerra for the death of officer Harris even if the facts did not warrant that result. The Court finds and holds that the police officers and the prosecutors intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense. Specifically, the written statements that were taken after the line-up are in many respects in significant contrast to those taken before the line-up. The Court attributes this to the fact that Carrasco had been killed and the

strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so.

In addition to the scurrilous conduct exhibited by the police, the Court is confounded by the fact that the police would handcuff two innocent women, threaten to revoke the parole of another's common-law husband, and repeatedly, day after day in the early morning hours, search the residence of innocent people. This conduct alone speaks volumes about the intimidation suffered by these children who were caught up in the police net and the circumstance.

The prosecutors' conduct was equally rank. Before and during the trial, questions to the witnesses were stated in such a manner that the questions stated or implied complicity by Guerra, irrespective of the fact that the answers did not conform. The tone of voice, as well as the artful manner in which the questions were asked, left little room for truthful answers or explanation. When the answers were not to their liking, they resorted to ridicule. Such conduct severely prejudiced Guerra's right to a fair trial and, therefore, violated his right to "due process" of law. See Heller, 830 F.2d at 152-53; Smith, 577 F. Supp. at 1236-38; see generally Webb, 409 U.S. 95 (1972) cf., Hammond, 598 F.2d at 1012-13.

The Court concludes that the pretrial intimidation of the witnesses, most of whom were children, resulted in violating Guerra's right to fundamental "due process" and a fair trial.

#### IV.

#### **Improper Identification Procedures**

##### **IV (a) The Legal Standard:**

The Supreme Court has adopted a "totality of the circumstances test" to be utilized in the analysis of identification testimony. Identification testimony is admissible if it appears "reliable," even if it is flawed by improper police behavior. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). Thus, an unnecessarily suggestive identification is not subject to a "per se" exclusion. Id. The Court must determine whether an identification procedure constitutes a denial of "due process." In doing so it must first be determined whether the pretrial identification was unnecessarily suggestive. Assuming that it was, the Court must then determine whether the identification was so unreliable that the defendant's "due process" right to a fair trial would be precluded if the identifications were permitted. Id.

The factors to be considered in evaluating the reliability of an identification are: (i) the witnesses' opportunity to view the accused at the

time of the crime; (ii) the witnesses' degree of attention; (iii) the accuracy of the witnesses' prior description; (iv) the level of certainty demonstrated at the confrontation; and (v) the time between the crime and the confrontation. Id. (citing Neil v. Biggers, 409 U.S. 188 (1972)).

Where the state's use of pretrial identification procedures posed a substantial likelihood of tainting the state witnesses' identifications of the defendant and both, their out-of-court and in-court, identifications are not shown to be independently reliable, the Court must determine if admission of the identifications into evidence is harmless error. See Young v. Herring, 917 F.2d 858, 864 (5th Cir. 1990), cert. denied, 112 S. Ct. 1485 (1992) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). When the state is the beneficiary of any error, the burden of proving that the error was harmless, beyond a reasonable doubt, rest at the state's door. Thigpen v. Cory, 804 F.2d 893, 897 (6th Cir. 1986), cert. denied, 482 U.S. 918 (1987) (citing Chapman, 386 U.S. at 24).

#### IV (b) Discussion:

The facts of this case present a situation that is somewhat peculiar to the Brathwaite case. Here, the facts show that the petitioner was known in and around the neighborhood, therefore, it was logical that the witnesses could

and others described the shooter in ways that blended characteristics of both men; none pointed unequivocally to Guerra.

identify the petitioner as being at the scene when officer Harris was shot. Moreover, Guerra's presence at the scene is not in dispute. Guerra gave a statement to that effect on the evening of the shootings. What is confounding is that the police took statements shortly after the shooting, <sup>Several</sup> ~~that~~ were essentially exculpatory of Guerra. After learning of Carrasco's death and after the lineup, the police took additional statements that contradicted or impeached the prior statements in some subtle and other not so subtle ways.

In this regard, the record shows that there were at least <sup>eight</sup> ~~six~~ witnesses who claim to have seen officer Harris shot: Hilma G. Galvan, Herlinda Medina Garcia, Jose Francisco Armijo, Jr., Elvira Medina Flores, Jacinto Vega and Jose Patricia Ann Flores Diaz and Armando Heredia. When these persons gave their first written statements, between 12:00 a.m. and 1:00 a.m., they stated in relevant part the following:

... "I know the one that shot the officer by sight...." The shooter "was wearing dark brown pants and a dark brown or black shirt. He (sic) tall and thin and has shoulder length straight blond hair." (Hilma G. Galvan at 12:05 a.m., July 14, 1982).

\* \* \*

... "I saw the guy with the blond hair reach into ... his pants and pull out a pistol and shoot the policeman.... He was wearing brown pants and a brown shirt that was open all the way down." (Herlinda Medina

Garcia, at 12:12 a.m., July 14, 1992).

\* \* \*

... "The man shot the gun with his left hand.... I didn't see the men that shot the policeman too good and I don't remember what they looked like or what they were wearing...." (Jose Francisco Armijo at 12:15 a.m., July 14, 1982).

\* \* \*

... "Both the driver with blond hair and the passenger ... put their hands on the police car.... At this time the blond-haired driver pulled a pistol ... and started shooting at the police officer .... I don't think I can identify the two persons I saw...." (Elvira Medina Flores at 12:40 a.m., July 14, 1982).

\* \* \*

... "I told the detective that the man that was standing fourth from the left was the same man that I had seen on Walker.... I guess he had a gun in his hand." (Patricia Ann Flores Diaz, second statement, at 6:20 a.m. July 14, 1982).<sup>5</sup>

**insert page 18 A**

.... "The man that shot the police officer I know him as Wedo (sic). I have known him about a month. As soon as he got out of the car I recognized him. He was also the man that ... shot the policeman."

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<sup>5</sup> Diaz's first statement, given at 1:40 a.m., described the shooter as a Hispanic male with "collar length black hair and was wearing a long sleeve, dark colored shirt." By the time Diaz gave her second statement she was unsure which of the men had shot the officer. For sure she did not know whether Guerra even had a weapon.

... "One of the Mexican[s] ... put his hands on the hood of the police car as if he was under arrest. The other Mexican ... walked up behind the first Mexican ... and all of a sudden ... pulled a pistol out from somewhere and shot at the police officer about four (4) times ... The first Mexican ... was the one who had his hands on the hood of the police car and he would have been the driver of the car ... [T]he one who shot the police was the passenger of the car ... I never got to see their faces so I cannot recognize them if I ever see them again. I cannot remember what they looked like and cannot remember what either one was wearing." (Jacinto Vitales Vega at 12:10 a.m., July 14, 1982).

\* \* \*

... "The man that was driving the car came out of the car and to where the policeman was at. ... [T]he other man in the car ... came out of the car and walked up behind the policeman and shot him. ... I didn't get to see the man's face that was shooting the policeman." (Jose Angel Heredia at 4:15 a.m., July 14, 1982).

\* \* \*

(Armando Heredia at 4:35 a.m. July 14, 1982).

\* \* \*

Two others gave relevant statements that bear upon the identification issue because of their proximity in time and circumstances to the events. John Reyes Matamoros and George Lee Brown gave statements before the lineup. In relevant part they state:

"I was able to see one of the men that had gotten arrested [after Carrasco was killed] and he was the man that was sitting in the front passenger seat [between 9:45 p.m. to 10:00 p.m.]....." (George Lee Brown at 12:40 a.m., July 14, 1982).

\* \* \*

"The man I saw running with the gun was a mexican american (sic) about 20 or 21 years old. He had shoulder length hair that was not as dark as mine and it looked more like hair that a white person would have. He was wearing a button up shirt and brown pants....." (John Reyes Matamoros at 12:10 p.m., July 14, 1982).

Several of the witnesses knew Guerra from the neighborhood. For the police to utilize this familiarity in the reckless manner that it did, is troubling. In fact, the state used a host of improper identification procedures in an effort to manipulate the witnesses' statements and testimony. Notably suggestive were (i) permitting the witnesses to see the petitioner in handcuffs

on several occasions while the witnesses were waiting to view the lineup, and (ii) permitting the witnesses to talk about and discuss identification before, during and after the lineup.

The prosecutors joined the hunt by conducting a reenactment of the shooting shortly after the incident with various chosen witnesses participating. This procedure permitted the witnesses to overhear each others view and conform their views to develop a consensus view. At the pretrial weekend conference, the prosecutors presented the two mannequins intended for use during trial. These life-size mannequins, created in the images of Guerra and Carrasco, were utilized then and throughout the trial to reinforce and bolster the witnesses' testimonies. The effect of these impermissible suggested procedures also resulted in a denial of "due process", as evidenced by the witnesses' federal habeas testimony.

The habeas testimony reveals that Guerra, handcuffed and with paper bags over his hands, was walked and shoved down the hallway outside the Homicide Division offices past the witnesses. He was then taken from the Homicide Division offices to the photo lab, where his clothes were taken from him. On both occasions, he was escorted along the hall before Diaz, Flores, Garcia, Jose, Jr., Galvan, Medina and Perez.

described a composite of both men, or described what could have been either man. While both Carrasco and Guerra had dark hair, the use of Carrasco's nickname, "Guero," which means "light-skinned" or "light-colored, blond-like hair," to describe the shooter may have confused the police interviewers. Clearly, the word "blond" did not describe Guerra's dark brown hair.

Before the lineup, ~~Galvan, Garcia, Flores and Vega~~ described the shooter in such a way that the description fit only Carrasco, i.e., he had blond-like hair and wore brown pants and a brown/maroon shirt, <sup>witnesses either</sup> Jose, Jr., who was 10 years old at the time, could only identify the shooter as being left-handed. This description was critical because Carrasco was left-handed. After the lineup and, with the knowledge that Carrasco was dead, <sup>several of</sup> the witnesses gave a series of second statements declaring, in spite of numerous previous assurances to the contrary, that Guerra was the shooter.

The various testimonies also show that Galvan spent most of her time in the hallway talking to Jose, Jr., and Flores. Although a general instruction or warning against talking was given, Galvan continued. She pointed toward Guerra and said to Jose, Jr. and <sup>Jose and</sup> Armando Heredia, in Spanish, loud enough for all the witnesses and the officers in the room to hear, that since Carrasco had died, they could blame the man who "looked like God" or the "wetback" from Mexico for the shooting of officer Harris. Based on her various accounts, Galvan's statement, that she actually witnessed the shooting, is suspect. Nevertheless, she encouraged the minors to identify Guerra as the shooter knowing that Guerra did not fit even her own description of the shooter.

She continued by stating that, Mexicans only come to the United States to commit crimes and take jobs away from United States citizens. She repeatedly referred to Mexican Nationals as "Mojados" or "wetbacks". She was also heard repeatedly telling Jose, Jr., that Guerra was the killer. This conduct can be attributed only to her prejudice toward Mexican Nationals who, as Galvan stated, "took the jobs from Americans." The Court concludes that these expressions of prejudice against undocumented aliens was, as likely as any, the motivation for the inconsistencies between Galvan's own statement and her testimony.

Galvan's influence also explains how Jose, Jr.'s testimony was so specific and direct when he was overheard in the hallway at the police station admitting that he had not seen Guerra or Carrasco clearly enough to know which had fired the shots. In fact, Jose, Jr. admitted in his trial testimony (pp. 302-03, 307-08) ~~statement~~ that he had not seen who shot his father because his father had pushed him below the dashboard as the shooting commenced. He repeated his inability to identify the shooter while he was sitting in the hallway outside the Homicide Division upon seeing Guerra during the lineup.<sup>6</sup> It is more likely so than not, that

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<sup>6</sup> It was argued by the state that Jose, Jr. became fearful when he saw Guerra and did not want to tell all that he knew. It was later, when he had gathered himself that he had the courage to come forward. However, the court had the benefit of a news clip in which Jose, Jr. was featured and related the incidents to the news media the day after the shooting.

Jose, Jr.'s belief that Guerra was the shooter was a result of seeing Guerra in handcuffs at the police station and hearing Galvan, repeatedly, insist that Guerra was the shooter.

During the trial, the prosecutors placed the mannequins in front of the jury and they remained there during the testimony of the witness. Heredia and Perez testified that during the trial, the positioning of the mannequins helped them identify which of the men was dead. [The Carrasco mannequins' shirt had bullet holes and blood stains, while the shirt on the Guerra mannequin did not.] Donna Monroe Jones, a juror during the trial, also testified. She testified that the jurors noticed that the shirt on the Carrasco mannequin was blood-stained and bullet-riddled. Additionally, she testified that the mannequins made the jurors feel uncomfortable and ill at ease.

Given the undisputed facts leading up to and surrounding the lineup, the identification of Guerra at the lineup was predestined. After all, he was present at the time of the shooting. To then use that fact as the sole basis to prosecute him for capital murder, is more than a stretch. Under the "totality of the circumstances," the identification procedures used by the police and the prosecutors were so corrupting that it caused witnesses, who either

knew otherwise, or did not know at all, to testify that Guerra had committed the crime.

It is also relevant that the police officers and the prosecutors did not quiet Galvan and others, as they commented before, during and after the lineup. It is relevant to this inquiry, as well, that the prosecutors misused the identification of Guerra so as to violate his right to a fair trial. So, different from Thigpen and Neil, it is the effects of these draconian procedures and the results attendant to this abuse of power, that are arresting.

The pretrial use of the mannequins in the meeting with witnesses at the prosecutors' office the weekend before trial was certain to reinforce the consensus facts so that there would be complete harmony in the testimony. The unrestricted, incessant presence of the mannequins, one wearing a bullet-riddled, blood-stained shirt that the jurors and witnesses saw daily, violated a constitutional guarantee of a fair trial, by injecting impermissible suggestive factors into the trial process. Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

It was no mystery to the state that their entire case against Guerra rested on the witnesses identifying him. The state had to count on the eyewitnesses excluding from their testimony, facts that clearly pointed to

The physical evidence unequivocally pointed to Carrasco as the shooter.

Carrasco.<sup>7</sup> Therefore, the state, to seal its victory, deliberately chose to taint the identification process by insisting upon perjured testimony. The statements taken before the lineup makes it abundantly clear that the witnesses either identified or described a composite of both men Carrasco as the shooter. It was only after the unexplained misconduct by the police officers, the permitted misconduct on the part of Galvan, and the reinforcement by the prosecutors, that Guerra was chosen as the shooter.

#### IV (c) Conclusion:

The state has the burden of proving, beyond a reasonable doubt, that the intentional act of causing to be admitted tainted, unreliable and perjured testimony, identifying Guerra as the shooter, was harmless. Thigpen, 804 F.2d at 897 (citing Chapman, 386 U.S. at 24.) The state has offered no evidence to contradict this point and has failed to discharge its duty.

#### V.

##### **Failure to Disclose Materially Exculpatory Evidence**

#### V (a) The Legal Standard:

There is long standing authority for the principle 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

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<sup>7</sup> [Richard Bax, one of the prosecutors in the 1982 trial, conceded "the physical evidence ... totally pointed towards Carrasco Flores as being the shooter...."]

to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). In order to establish that evidence falls within the purview of Brady, a petitioner must establish that the evidence was suppressed and that it was material and favorable. Id. Suppressed evidence is "material" if there is 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).

V (b) Discussion:

Before the trial, Guerra's attorneys filed motions requesting production of all material inconsistent with the guilt or lawful arrest of Guerra. They also filed an extensive motions for pretrial discovery and inspection. Obviously, the conduct of the police and prosecutors was unknown to the defense attorneys. Yet, it was the type of conduct that the motions sought and the type that the prosecutors were duty bound to disclose.

In the discussion that follows, the Court analyzes the various witness statements and the police's and prosecutors' conduct surrounding the statements. It is the conduct giving rise to and surrounding the statement that is the focus of the petitioner's charge.

~~Garcia's first statement identified Carrasco as the shooter. She~~

According to Garcia, she told the police on the night of the shooting that the short-haired man was the shooter. The first written statement prepared for her

She was asked to sign this written statement, which omitted her exonerating reference to the fact that the short-haired man was the shooter and that the long-haired man was the man with the empty hands near the front end of the police car at the time Officer Harris was shot.

described the events and actor as follows:

The blond hair (sic) reach into the front of his pants and pull out a pistol and shoot the policeman ... the man with the blonde hair then shot the man in the red (sic) car ... the man that shot the policeman and the man in the red car had blonde hair and was about 5'8" tall .... He was wearing brown pants and a brown shirt....

~~This version was reduced to a written statement and she was asked to sign it.~~

Garcia, who had attended only seven years of school, asked the police officer to read it to her because she could not read well. The police officer refused and told her to "just sign it." According to Garcia, she then signed it because, of the earlier verbal threat that another police officer made concerning revoking her husband's parole for living with her, Garcia, a minor.

After Garcia watched the lineup, she told the police that the man in the number 4 position was not the shooter but, instead, was the man with empty hands near the front of the police car at the time officer Harris was shot. When the second statement was prepared, it omitted the exonerating information provided by Garcia. This second statement was not read to Garcia. insert page 27A

From the Court's perspective, knowledge of this conduct explains the prosecutor's impatience with Garcia during the trial of the case. The

She was asked to sign this second statement. She did so, for the same reason that she had signed the first statement.

At the re-enactment, Garcia told one of the two prosecutors that the short-haired man was the one who appeared to have been the shooter, not the long-haired man. This exculpatory evidence was not recorded and not passed on to the defense.

At the pretrial weekend meeting, Garcia told one of the two prosecutors again that the long-haired man wearing the green shirt was not the man who had shot the police officer. This exculpatory evidence was not recorded and not passed on to the defense.

prosecutor insisted that Garcia had not seen a blond-haired man shoot officer Harris causing her to testify that she had not. The prosecutor then attributed Garcia's reluctance to testify to fear of reprisal from people in the neighborhood.

According to Diaz, she told the police that when officer Harris was shot, the long-haired man was standing on the driver side of the police car near the front end, facing toward the police car with his arms extended out over the police car, feet spread apart, and that the palms of his hands were facing down toward the police car. In addition, his hands were empty and were positioned as if he were about to place his hands on the hood of the car to be searched. **insert page 28A**

After the lineup was conducted, Diaz told the police that the man in the number 4 position was the man who had been on the driver side, near the front, of the police vehicle. In spite of hearing this, an officer prepared another statement omitting the exonerating information provided by her. She signed this statement, as well, without reading it, unaware of its true contents.

At the pretrial weekend meeting, Diaz told one of the two prosecutors that she was at the crime scene at the time of the shooting and that it did not look as though Guerra had a gun, because at the time of the

In spite of hearing this, an officer prepared a statement omitting the exonerating information provided by her and inserting the incorrect information that the long-haired man pointed a gun in the direction of the police car and shot four times at the police car. Tired, she signed this statement without reading it, unaware of its true contents.

shooting Guerra's hands were open with his palms down on the hood of the police car. This exculpatory evidence was not recorded and not passed on to the defense.

During the habeas hearing, Perez testified that he told the police on the night of the shooting that he saw two men running past him that evening after the shooting of officer Harris. The first man ran east on the south side of Walker and turn south onto Lenox. Perez stated that he was too far away to recognize the runner. A second man ran east on the north side of Walker and turned south on Lenox. As the second man ran past Perez, the who looked like Carrasco, man pointed an object at Perez that he was holding in his left hand. As he ran, the object fell from his hand to the street. It made a metallic sound as it hit the pavement and looked like a handgun with a clip. The runner stopped to pick the object up, and continued running south on Lenox toward McKinney.

When Perez's statement was prepared, it omitted the fact that Perez had identified the object as a handgun. The police officer persuaded Perez to have the description in the statement read that the runner had dropped a metallic object. Later, in discussing his testimony with the prosecutor he was informed that he should describe the "object" as an "object"

if he was not "100% certain" that it was a gun.

At the lineup, Perez told the police that he recognized Guerra from having seen him earlier in the hallway, but that Guerra was not the man who had dropped the object as he ran past him earlier that night. He was not invited to the reenactment a week or so after the shooting.

Jose Heredia's testimony in this proceeding and his written statement identifies the passenger as the shooter. He testified that he told the police that when officer Harris was shot, officer Harris was standing just behind his driver's door and that the long-haired man was standing on the, driver's side of the police car near the front end. He further stated that the man was facing the police car with his hands on the hood of the police car, a foot apart, palms down and empty. The short-haired man, approaching a few feet southeast of officer Harris and the long haired man (Guerra), pointed a gun at officer Harris and shot him.

After hearing Heredia's version, a police officer prepared a statement that omitted the exonerating information given concerning Guerra; specifically, that Guerra was against the car and empty handed when Carrasco came up behind Guerra and shot officer Harris. Heredia, like several of the other witnesses, tried to read his statement but could not because he could not

read English. Like others, he was told to "just sign it." He further testified that he was afraid not to sign the statement, having seen his mother (Holguin) arrested and handcuffed at the scene.

After Heredia viewed the lineup, he told a police officer that he recognized Guerra as the driver of the black car and that Guerra was not the man that shot officer Harris. Heredia was not asked to sign another statement.

Holguin, Heredia's mother, testified that she told the police that she had not seen the shooting at all. In spite of this, a statement was prepared that she was told to sign. Holguin testified that she informed the police officer who prepared the statement that she could not speak English. No one translated the statement for her benefit. Although completely unaware of the contents of the statement, Holguin testified that she signed it because she was ordered to do so. Earlier that evening, she had been handcuffed at the scene for several hours before being brought to the police station.

George Brown testified in this proceeding that he told the police that, after hearing shots that were later determined to have killed officer Harris, he ran west on Walker street from Delmar past Lenox to Edgewood. As he passed Lenox he saw someone running south on Lenox that appeared

to be Carrasco. Later, he saw Perez who stated to him that the man who was seen running south on Lenox was carrying a gun and had dropped it. Brown related Perez's statement to the police, that the person handling the weapon had dropped it while running. Brown's written statement omitted the information that he had received from Perez and had related to the police.

V (c) Conclusion:

The Court finds that the testimony of Garcia, Diaz, Holguin, Heredia and Perez is credible. Moreover, it is consistent with the physical evidence that establishes that Guerra did not shoot officer Harris and Mr. Armijo. Specifically, the physical evidence shows that the shooter used a nine-millimeter handgun, to kill both, officer Harris and Mr. Armijo. It further shows that the weapon had marks on it of the nature and type that would exist had the weapon been dropped to the pavement.<sup>8</sup> Important to these findings is the physical description of the shooter given by the scene witnesses in their <sup>interviews</sup> initial ~~statements~~ describing Carrasco, and the omission of material exonerating information from the written statements prepared by the police based on the interview descriptions.

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<sup>8</sup> Floyd E. McDonald, formerly head of the forensic lab for Houston Police Department, the department where Amy P. Heeter worked, testified that the description by Perez of what occurred on that evening concerning the dropping of the weapon, is consistent with the marks that he found on the weapon. Moreover, the positioning of the parties leads to the conclusion that the person whose hands had been placed on the hood of the vehicle was not the shooter. The shooter, because of the location of the bullets found after the shooting, would have stood east of the police officer and the other person. The bullets lodged in the house on the northwest corner of Walker and Edgewood. Officer Harris' vehicle was parallel to this house.

As well, the fact that the weapon was found on the body of Carrasco was ample evidence of an exonerating nature to put the police and the prosecutors on notice that Carrasco was the killer. The prosecutors' theory, that Guerra and Carrasco had mistakenly switched weapons in the car before the shooting and had exchanged them later at the house (4907 Rusk), was sheer speculation and no evidence was ever proffered to support this theory. Moreover, it was not even a reasonable hypothesis based on any inference that could have been drawn from the evidence.

The police officers and prosecutors had a duty to accurately record the statements of the witnesses, to fairly investigate the case, and to disclose all exculpatory evidence. Moreover, they had a duty to not prosecute an innocent man. They failed in these duties. These intentional omissions, during the investigation and prosecution, and the inclusion of poisonous speculations during trial, had the effect of suppressing and destroying favorable testimony that the Court finds was material to Guerra's defense. The information that the police and prosecutors failed to disclose, as well as the manner that the investigation and prosecution were conducted, hardly left a paper trail, and intentionally so. The concept of deceit was planted by the police and nurtured by the prosecutors. This conduct by the police and prosecutors could only

have been deliberate and, so much so, that even the exonerating evidence was used in such a manner as to create a materially misleading impression.

The prosecutors and officer Amy Parker Heeter, the state's expert on trace metal test, also misled the defense attorneys concerning the trace metal detection test results. Specifically, Guerra's attorneys were not shown or told what the true results of the trace metal detection test were. The prosecutors told the defense attorney only that the test had been positive as to Carrasco's handling of officer Harris' weapon and negative for the murder weapon. According to the defense attorneys, this statement led them to, conclude that only one trace metal pattern was found on Carrasco's hands, that of officer Harris' weapon.<sup>9</sup> This was a half-truth.

In fact, the trace metal pattern matching officer Harris' weapon

<sup>9</sup>It should be noted that during the testing of the nine-millimeter pistol Heeter held it in her left hand, as was observed and reported about Carrasco by the witnesses. Yet, she failed to disclose that trace metal was found on Carrasco's left hand.

During the course of the testimony, the prosecutor inserted in his questions inaccurate statements from Diaz's testimony that were prejudicial to Guerra. The question and answer is as follows:

Q. You say you saw this one man and you saw him "pointing."  
Was he pointing toward or in the direction of the police car or the police officer?

A. Uh-huh, the direction of the police car.

On no less than five (5) other occasions, the prosecutor included within the question, an incorrect statement of the witness' prior testimony. He repeatedly used the phrase "pointing at the police officer."

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page 38]

have been deliberate and, so much so, that even the exonerating evidence was used in such a manner as to create a materially misleading impression.

The prosecutors and officer Amy Parker Heeter, the state's expert on trace metal test, also misled the defense attorneys concerning the trace metal detection test results. Specifically, Guerra's attorneys were not shown or told what the true results of the trace metal detection test were. The prosecutors told the defense attorney only that the test had been positive as to Carrasco's handling of officer Harris' weapon and negative for the murder weapon. According to the defense attorneys, this statement led them to conclude that only one trace metal pattern was found on Carrasco's hands, that of officer Harris' weapon.<sup>9</sup> This was a half-truth.

In fact, the trace metal pattern matching officer Harris' weapon

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<sup>9</sup>It should be noted that during the testing of the nine-millimeter pistol Heeter held it in her left hand, as was observed and reported about Carrasco by the witnesses. Yet, she failed to disclose that trace metal was found on Carrasco's left hand.

During the course of the testimony, the prosecutor inserted in his questions inaccurate statements from Diaz's testimony that were prejudicial to Guerra. The question and answer is as follows:

Q. You say you saw this one man and you saw him "pointing."  
Was he pointing toward or in the direction of the police car or the police officer?

A. Uh-huh, the direction of the police car.

On no less than five (5) other occasions, the prosecutor included within the question, an incorrect statement of the witness' prior testimony. He repeatedly used the phrase "pointing at the police officer."

[move to  
Footnote  
9A on  
page 38]

was on Carrasco's right hand. There were also trace metal patterns found on Carrasco's left hand. This revelation could have been utilized by the defense to impeach the expert's testimony and/or impeach the state's theory of the case, that Guerra was the shooter and had, during the course of escaping, returned Carrasco's weapon. More importantly, armed with this knowledge, Guerra's attorneys may have hired their own trace metal expert who could have testified that the trace metal patterns on Carrasco's left hand were consistent with the patterns left by the nine-millimeter weapon found ~~on him~~ under his body after he was shot and killed by the police. ~~at the morgue.~~

The state failed to disclose that there were any trace metal patterns on Carrasco's left hand, even though they knew that they, arguably, matched the nine-millimeter weapon. Although the police were told, repeatedly, that the shooter fired the weapon with his left hand, there is no meaningful record of any efforts to identify the trace metal patterns on Carrasco's left hand. The police and prosecutors had a duty to eliminate Guerra as the shooter, if the evidence supported it.

Floyd McDonald, a ballistics expert, testified at the evidentiary hearing that when held and fired, the murder weapon left a discernible trace metal pattern in less than 60 seconds. He testified that neither sweat nor

normal washing with soap and water would remove the pattern. Rubbing one's hands with sand or dirt, with less than sustained vigor, would not remove such a pattern. Police records reflect that the police believed ~~He opined~~ that the dirt found on Guerra's hands, when he was arrested, came from his having been on the ground <sup>being searched by</sup> ~~hiding from~~ the police ~~after his arrest.~~ Although the ground was damp from a light rain, contact with the ground would not have erased any trace metal on his hands.

McDonald also testified that the two trace metal patterns found on Carrasco's left hand after his death are consistent with both the type of trace metal pattern left by firing the nine-millimeter weapon and Perez's testimony that Carrasco dropped and retrieved a gun as he ran past him. This dropping and retrieving of the weapon accounts for the double trace metal image found on Carrasco's left hand. It is undisputed that Guerra had no trace metal of any sort on either hand or on his body. So the testimony of Heeter, that the metal comprising officer Harris' weapon does not easily leave trace metal patterns, was a "red-herring." It was of no evidentiary value to the trial and was designed merely to confuse the jury.

The state's theory, that both defendants laid their weapons on the front seat in the vehicle and somehow did not realize that they had exchanged weapons until they met later at which time they switched weapons, in the face

of this physical evidence, is beyond belief, particularly when the theory does not rise above the level of speculation.

This evidence, even if it were concealed from the prosecution by the police, is imputed to the state prosecutors because the evidence was material and critical to the case and because an inquiry would have revealed it to them. Williams v. Griswald, 743 F.2d 1553, 1542 (11th Cir. 1984); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979). By dealing in half-truths and innuendo and by suppressing evidence that was favorable and material to Guerra's defense, the prosecutors violated Guerra's right to a fair trial. Brady, 373 U.S. at 87.

The Court concludes that, but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense or the trial would have resulted in an acquittal. Bagley, 473 U.S. at 682.

## VI.

### **Prosecution's Use of Known False Evidence And Known Illegitimate Arguments at Trial**

Next, the petitioner asserts that the prosecutor used known false testimony and illegitimate arguments in the trial and closing arguments. In this regard, the petitioner asserts that: (a) the prosecutors solicited and encouraged

Garcia and Perez to overstate or understate the facts; (b) the prosecutors injected false statements concerning the character of Heredia, the 14 year old, when they accused him of being either drunk or having "smoked something" because he yawned during his testimony; and (c) the prosecutors questioned Heredia about an alleged murder at the cemetery, near the shooting scene knowing that it was a yarn spun by the children.

The Court has previously stated the facts surrounding the testimony of Garcia and Perez and will not restate the fact here. Suffice it to say that the knowing use of false testimony by the prosecutors violates a defendant's "due process" rights under the Fifth and Fourteenth Amendments. See Napue v. Illinois, 360 U.S. 264, 269 (1959). The Court finds that such violations are abundant in the record.

The prosecutors also committed misconduct by deliberately and knowingly putting into the mouths of witnesses words that the witnesses had not said and did not believe to be true. This was accomplished by persistently cross-examining those witnesses on a false basis and by making improper insinuations and assertions calculated to mislead the jury and discredit unfavorable testimony. <sup>9A</sup> The use of this untrue information was material and detrimental to Guerra's defense. United States v. Williams, 112 S. Ct. 1735,

9A] [insert from footnote 9 on page 34]  
See also note 2 at p. 8 <sup>38</sup> supra.

1749 (1992) (quoting Berger v. United States, 295 U.S. 78 (1935)).

Regarding the questions to Heredia about alcohol and drugs, the prosecutor asked him if he was drunk or had smoked anything. These questions were designed to strike down the young boy because he would dare testify contrary to the prosecutor's case theory. In closing argument, the prosecutor argued to the jury that Heredia was under the influence of either alcohol or narcotics. This improper conduct is rank ridicule and intimidation, utilized to its consummate when any witnesses did not testify to this state's liking.

The petitioner also complains about the trial testimony of officer Jerry Robinette. After J. Luna testified that Carrasco had arrived at their home brandishing both the nine-millimeter weapon and officer Harris' weapon, the state called officer Robinette. Officer Robinette testified that J. Luna and Esparza had told him that they were not home in and around the time that the shootings had occurred because they had left earlier and did not return until around 11:30 p.m., when they were questioned. Even if this is true, the testimony is of no value because they were there when Carrasco arrived later.

Officer Robinette's testimony is inconsistent with J. Luna's trial testimony and also with police reports showing that both J. Luna and Esparza

were home when Carrasco and Guerra left as well as when they returned later that night. The police reports<sup>10</sup> show that officer Antonio Palos questioned J. Luna at 4907 Rusk just before Carrasco was killed. In spite of this knowledge, the prosecutor argued that J. Luna and Esparza had lied when they testified that they were at 4907 Rusk when Carrasco returned.

Both prosecutors claimed as fact, in closing argument, that five eyewitnesses, who had not conferred with each other, told the police that Guerra killed officer Harris and Mr. Armijo and had identified Guerra at the lineup. Both prosecutors knew that this was factually incorrect because at least one of the prosecutors was at the scene shortly after the shooting and participated in the gathering and interviewing of witnesses. Moreover, both had participated in the reenactment and the pretrial weekend meeting where the various statements of the witnesses were discussed and conformed.

The petitioner also urges, and legitimately so, that there was no justification for informing four jurors, during voir dire, that he was an "illegal alien" and that this fact was something that the jurors could consider when answering the punishment special issues. According to the prosecutors, this fact could help in a determination of whether Guerra should received a life

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<sup>10</sup> These reports were not produced or made available to the defendant, pretrial, pursuant to the defendant's discovery request.

sentence or the death penalty.

The "offense" of unlawful entry into the United States is irrelevant to the issue of a defendant's propensity for future violent and dangerous criminal behavior. No proof was offered that illegal aliens are more prone than citizens to commit violent crimes. Guerra was entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic. Zant v. Stephens, 462 U.S. 862, 879 (1983).

The prosecutors also appealed to the jury to "let the other residents at 4907 Rusk ... know just exactly what we citizens of Harris County think about this kind of conduct...." This appeal went beyond arguments seeking law enforcement to improperly play to the jury's prejudice by painting all the residents at 4907 Rusk with the broad brush of shared responsibility for the death of officer Harris. Thus, they were in need of being taught a lesson. This "us" against "them" argument is also nothing more than an appeal to ethnic or national origin prejudice which is constitutionally impermissible. McCleskey, 481 U.S. at 309 n.30; see also McFarland v. Smith, 611 F.2d 414, 416-17 (2d Cir. 1979); United States v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990);

see Haynes, 481 F.2d at 157.

The petitioner's claim of denial of "due process" did not end with the police and the prosecutor, it continued into the Court process. It is asserted that the inaccurate translations of the witnesses' testimony from Spanish to English by the court interpreters prevented a fair trial. The first interpreter, Linda Hernandez, was removed after one of the jurors complained that she was interpreting inaccurately. The second court interpreter, Rolf Lentz, acted inappropriately by making jokes and adopting an improper casual manner, while communicating with several defense witnesses in Spanish. Much of this went unchecked by the court.

The petitioner also questions the propriety of an experienced prosecutor questioning a witness about the witness' participation in a crime that the witness was not under investigation for and had not been criminally charged. One of Guerra's roommates, who testified in Guerra's defense, was questioned about his "participation" in a robbery that the prosecutors well knew had not resulted in a charge. Yet, it was done in all likelihood, to affect the judgment of the jury in determining the witnesses' credibility. This knowing false accusation by the prosecutors violated Guerra's "due process" rights because the question was not a proper question, even on character.

This type of deliberate violation of oath as a prosecutor and violation of the rules of evidence is incompatible with the rudimentary demands of justice and fair play. This principle remains true even when the state, though not soliciting false evidence, allows it to go uncorrected. Giglio v. United States, 405 U.S. 150, 154 (1972).

## VII.

### Cumulative Effect of Prosecutorial Error

Finally, the petitioner contends that the cumulative effect of the errors made by the trial court and the prosecutors resulted in an unfair trial. Because the state court, in considering the petitioner's petition for writ of habeas corpus, found no waiver of error, there is no bar to considering the errors found in a cumulative error analysis. Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992) (*en banc*), cert denied, 113 S. Ct. 2928 (1993). When the errors of the state infuses a trial with such prejudice and unfairness as to deny a defendant a fair trial, due process has not been enjoyed. Derden, 978 F.2d at 1458.

Here, the extent of the prosecutorial misconduct is legion. The number of instances of misconduct as well as the type and degree compels the conclusion that the cumulative effect of the prosecutors' misconduct rendered

the trial fundamentally unfair. There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted. Kirkpatrick v. Blackburn, 777 F.2d 272, 278-79 (5th Cir. 1985), cert. denied, 476 U.S. 1178 (1986).

### CONCLUSION.

The police officers' and the prosecutors' actions described in these findings were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. It is these type flag-festooned police and law-and-order prosecutors, who bring cases of this nature giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another "notch in their guns" despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.


The police officers and prosecutors were successful in intimidating and manipulating a number of unsophisticated witnesses, many mere children, into testifying contrary to what the witnesses and prosecutors knew to be the true fact, solely to vindicate the death of officer Harris and for personal

aggrandizement. The cumulative effect of the police officers' and prosecutors' misconduct violated Guerra's federal constitutional right to a fair and impartial process and trial.

Therefore, the petitioner's Writ of Habeas Corpus is GRANTED, the conviction and judgment are set aside.

It is ORDERED that this case is remanded to the 248th Judicial District Court where the court shall, within 30 days, proceed in conformity with this memorandum opinion to retry the petitioner or release him.

Signed this 14th day of November, 1994.

  
\_\_\_\_\_  
KENNETH M. HOYT  
United States District Judge

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

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RICARDO ALDAPE GUERRA,

Petitioner.

v.

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

Respondent.

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Civil Action No. H-93-290

**ORDER**

ON THIS DAY came on to be heard Petitioner's First Amended Motion to Alter or Amend the Judgment, Pursuant to Fed. R. Civ. P. 52(b). After considering said Motion, the Court is of the opinion that the Motion is well-founded and should be in all things GRANTED.

It is, therefore, ORDERED that this Court's Order on Application for Writ of Habeas Corpus signed on November 14, 1994, and entered on November 15, 1994, is hereby amended as provided in Attachment A to Petitioner's First Amended Motion to Alter or Amend the Judgment, Pursuant to Fed. R. Civ. P. 52(b).

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1995.

HONORABLE KENNETH HOYT  
UNITED STATES DISTRICT JUDGE



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

FILED  
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U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

RICARDO ALDAPE GUERRA,

Petitioner.

v.

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

Respondent.

Civil Action No. H-93-290

**FIRST AMENDED CERTIFICATE OF CONFERENCE  
FOR MOTION FOR ATTORNEYS' FEES AND COSTS**

I, Scott J. Atlas, do hereby certify that I conferred by telephone on January 2, 1995, with William C. Zapalac, attorney for Respondent, about the contents of the Motion for Attorneys' Fees and Costs, filed December 28, 1994. He informed me that he neither approves nor opposes the relief requested in that motion because he believes that the matter is solely within the discretion of the Court. We inadvertently mischaracterized his response in our original Certificate of Conference for Motion for Attorneys' Fees and Costs. We have withdrawn our characterization of the motion as "unopposed."

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY:



SCOTT J. ATLAS

Attorney-in-Charge

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FAX: (713) 615-5399

**OF COUNSEL:**

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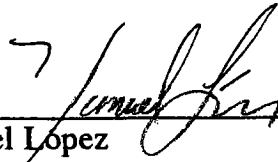
Houston, Texas 77046

(713) 961-5901

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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, on the 11<sup>th</sup> day of January, 1995.

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Manuel Lopez

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JAN 05 1995

MICHAEL N. MILBY Clerk

RECEIVED

JAN 10 1995

cc: Team  
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SJA  
IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Clerk, U.S. District Court  
Southern District of Texas  
FILED

DEC 28 1994

Michael N. Milby, Clerk of Court

*RICARDO ALDAPE GUERRA*

Petitioner

v.

*JAMES A. COLLINS, DIRECTOR  
TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE, INSTITUTIONAL DIVISION,*

Respondent

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Civil Action No. H-93-290

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**ORDER**

Be it remembered that on this \_\_\_\_\_ day of \_\_\_\_\_, 1994, came on to be heard Respondent's Motion to Alter or Amend the Judgment, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that the last paragraph of the Court's Order on Application for Writ of Habeas Corpus is amended to read:

It is ORDERED that the writ of habeas corpus is conditionally granted unless the state begins retrial proceedings by arraigning the petitioner within thirty days from the date this order becomes final. If the state does not complete the arraignment within the allotted time, the petitioner shall be released from custody.

SIGNED on this the 4th day of January, 1994, at Houston, Texas.

  
United States District 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

FILED  
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U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

**CERTIFICATE OF CONFERENCE FOR  
UNOPPOSED MOTION FOR ATTORNEYS' FEES AND COSTS**

I, Scott J. Atlas, do hereby certify that I conferred by telephone on January 2, 1995, with William C. Zapalac, attorney for Respondent, about the contents of the Motion for Attorneys' Fees and Costs, filed December 28, 1994, and he informed me that he does not oppose the relief requested in that motion. Thus that motion is now an unopposed motion. The motion was originally not captioned "unopposed" because the conference had not yet occurred.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas / with permission M  
SCOTT J. ATLAS

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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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, on the 3<sup>rd</sup> day of January, 1995.

  
Manuel López

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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

FILED  
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U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

**CERTIFICATE OF CONFERENCE FOR  
UNOPPOSED MOTION TO FILE BILLING RECORDS UNDER SEAL**

I, Scott J. Atlas, do hereby certify that I conferred by telephone on January 2, 1995, with William C. Zapalac, attorney for Respondent, about the contents of the Motion to File Billing Records Under Seal, filed December 28, 1994, and he informed me that he does not oppose the relief requested in that motion. Thus that motion is now an unopposed motion. The motion was originally not captioned "unopposed" because the conference had not yet occurred.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY:

*Scott J. Atlas / with permission*

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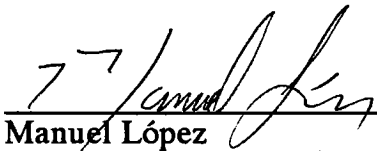
Houston, Texas 77046

(713) 961-5901

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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, on the 3<sup>rd</sup> day of January, 1995.

  
Manuel López

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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*

*TEXAS DEPARTMENT OF CRIMINAL*

*JUSTICE, INSTITUTIONAL DIVISION,*

Respondent

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Civil Action No. H-93-290

**RESPONDENT'S UNOPPOSED MOTION TO ALTER OR AMEND THE  
JUDGMENT, PURSUANT TO FED. R. CIV. P. 59 (e)**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent ("the Director"), by the Attorney General of Texas, and files this Unopposed Motion to Alter or Amend the Judgment, Pursuant to Fed. R. Civ. P. 59(e). The Director would respectfully show the Court as follows:

**I.**

On November 15, 1994, the court issued its order conditionally granting the writ of habeas corpus, directing the state to "within 30 days, proceed in conformity with this memorandum opinion to retry the petitioner or release him." Order on Application for Writ of Habeas Corpus, Doc. 51, at 45. On December 14, 1994, the court entered its final judgment, beginning the time for complying with the order. *See* Fed. R. Civ. P. 54, 58.

**II.**

Fed. R. Civ. P. 59(e) states that "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Pursuant to

Fed. R. Civ. P. 6(a), if the time prescribed or allowed by the rules is less than eleven days, intermediate Saturdays, Sundays, and legal holidays are not counted in determining the due date. "Legal holidays" includes any day designated as a holiday in the state in which the district court is located. In this case, the court's final judgment was entered on December 14, 1994. December 17 and 18 and 24 and 25 were intermediate Saturdays and Sundays, and December 26 was both a national and a Texas state holiday. Excluding these days, this motion pursuant to Rule 59(e) is timely if filed by December 29, 1994.\*

### III.

The phrase "proceed . . . to retry the petitioner" is vague and lends itself to a variety of interpretations. For example, the order could be satisfied if the state completes the arraignment of the petitioner on the outstanding indictment within thirty days. The order also could be read to mean that the actual trial must have begun within the allotted time. That, in turn, could mean that jury selection must be under way, or that the actual presentation of evidence must have commenced. The phrase also could mean that the trial must have concluded and that a verdict have been rendered.

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\*Rule 6(a) applies to motions filed under Rule 59(e):

"Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have a few as 5 working days to prepare their motions. This hardship would be especially acute in the case of Rules 50(b) and (c), 52(b), and 59(b), (d), and (e), which may not be enlarged at the discretion of the court."

#### IV.

As a practical matter, in the case of a capital murder trial only the first possibility -- completing the arraignment of the defendant -- is realistic. Trying a capital murder case requires having a judge free up the docket to the extent that several weeks or months can be devoted to the capital case. Alternatively, the county would need to secure the services of a visiting judge, as well as provide a courtroom for the trial. In either case, once physical facilities are available, arrangements must be made for a special venire to be called from which the jury can be chosen. Individual *voir dire* in a capital case easily can take weeks, and the trial itself can be a lengthy affair. Further, where a retrial is involved, the prosecution must locate witnesses and reassemble evidence to be used at trial. From the defense standpoint, adequate time must be allowed for investigation, location of witnesses, and preparation of a defense. It is impossible from a logistical standpoint to accomplish more than the arraignment in a capital murder trial on only thirty days notice. A clarification of the court's order to specify that the state is in compliance if it completes the defendant's arraignment within thirty days will forestall needless collateral litigation over the court's meaning.

In a similar case, United States District Judge William Wayne Justice conditionally granted the writ and directed the state to release the petitioner if it had not "commenced proceedings for another trial" within ninety days from the date of his order. On motion by the Director, the court recognized the ambiguity of the phrase and noted that the logical import of it was that the state should have completed arraignment within the time allowed. Accordingly, it amended the order to require that petitioner be released if the state had not "commenced proceedings for another trial of applicant, by re-arraigning him" within the time specified. See *Bennett v. Collins*, No. 6:89cv703 (ED Tex. 1994), Order dated June 2, 1994, attached as Appendix A. This court likewise should afford the state

a reasonable opportunity to re-try Petitioner and make clear what actions will constitute compliance with its order.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests that the court amend the order of November 15, 1994, made final by the judgment of December 14, 1994, to require that the state arraign Petitioner within thirty days after the judgment is final.


Respectfully submitted,

DAN MORALES  
Attorney General of Texas

JORGE VEGA  
First Assistant Attorney General

DREW T. DURHAM  
Deputy Attorney General for  
Criminal Justice

MARGARET PORTMAN GRIFFEY  
Assistant Attorney General  
Chief, Capital Litigation Division

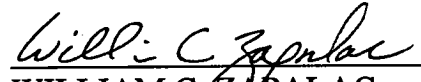
  
\_\_\_\_\_  
WILLIAM C. ZAPALAC  
Assistant Attorney General  
State Bar # 22245480  
Southern District # 8615

P.O. Box 12548, Capitol Station  
Austin, Texas 78711  
(512) 463-2080  
Fax No. (512) 320-8132

ATTORNEYS FOR RESPONDENT


### **CERTIFICATE OF CONFERENCE**

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that I conferred by telephone on December 22, 1994, with Scott Atlas, attorney for Petitioner, about the contents of this motion, and he informed me that he does not oppose it.

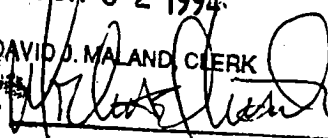
  
WILLIAM C. ZAPALAC  
Assistant Attorney General

### **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 Unopposed Motion to Alter or Amend the Judgment, Pursuant to Fed. R. Civ. P. 59(e) has been served by placing same in the United States Mail, postage prepaid, on this the 27th day of December, 1994, addressed to: Hon. Scott J. Atlas, VINSON & ELKINS, 2300 First City Tower, 1001 Fannin, Houston TX 77002-6760.

  
WILLIAM C. ZAPALAC  
Assistant Attorney General

## **APPENDIX A**

**FILED**  
 U.S. DISTRICT COURT  
 EASTERN DISTRICT OF TEXAS  
 JUN 02 1994  
 DAVID J. MALAND, CLERK  
 BY DEPUTY 

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF TEXAS  
 TYLER DIVISION

BABY RAY BENNETT,  
 Applicant,

V.

JAMES A. COLLINS, DIRECTOR  
 TEXAS DEPARTMENT OF CRIMINAL  
 JUSTICE, INSTITUTIONAL  
 DIVISION,

Respondent.

§  
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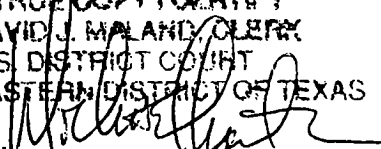
6:89cv703

ORDER

Respondent has filed a motion to alter or amend the writ of habeas corpus issued on May 6, 1994. Respondent contends that the order is unclear because the phrase "commenced proceedings for another trial" is ambiguous. As noted by the respondent, the logical meaning of "commenced proceedings for another trial" is that the state must have re-arraigned applicant no later than ninety days from the date of service of this court's May 6 order. A continuance should be unnecessary for purposes of re-arraigning applicant. Accordingly, it is

**ORDERED** that respondent's motion to amend the writ of habeas corpus shall be, and it is hereby, **GRANTED**. The amended portion of the writ is as follows: it is

**ORDERED** that applicant shall be released, if the State of Texas has not commenced proceedings for another trial of applicant, by re-arraigning him, within ninety days from the date of service

A TRUE COPY I CERTIFY  
 DAVID J. MALAND, CLERK  
 U.S. DISTRICT COURT  
 EASTERN DISTRICT OF TEXAS  
 By: 

74

of this [the May 6, 1994] order.

**SIGNED** this 2<sup>nd</sup> day of June, 1994.



William Wayne Justice  
United States District Judge

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

*RICARDO ALDAPE GUERRA*

Petitioner

v.

*JAMES A. COLLINS, DIRECTOR*  
*TEXAS DEPARTMENT OF CRIMINAL*  
*JUSTICE, INSTITUTIONAL DIVISION,*

Respondent

§  
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Civil Action No. H-93-290

**ORDER**

Be it remembered that on this \_\_\_\_ day of \_\_\_\_\_, 1994, came on to be heard Respondent's Motion to Alter or Amend the Judgment, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that the last paragraph of the Court's Order on Application for Writ of Habeas Corpus is amended to read:

It is ORDERED that the writ of habeas corpus is conditionally granted unless the state begins retrial proceedings by arraigning the petitioner within thirty days from the date this order becomes final. If the state does not complete the arraignment within the allotted time, the petitioner shall be released from custody.

SIGNED on this the \_\_\_\_ day of \_\_\_\_\_, 1994, at Houston, Texas.

\_\_\_\_\_  
United States District 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 TO FILE BILLING RECORDS UNDER SEAL**

TO THE HONORABLE JUDGE HOYT:

Petitioner, Ricardo Aldape Guerra, submits this Motion to File Billing Records Under Seal seeking leave to tender to the court unedited invoices for the court's use in ruling on the petitioner's Motion for Attorneys' Fees and Costs.

Petitioner attached redacted versions of the invoices to the Motion for Attorneys' Fees and Costs. Petitioner felt it necessary to protect attorney confidences and thus removed the descriptions of those attorney activities that petitioner deemed sensitive or privileged. Nevertheless, petitioner recognizes that the court may wish to consider full descriptions of the listed work entries in making its determination on the Motion for Attorneys' Fees and Costs. For that purpose, petitioner requests that the court grant him leave to file the unredacted invoices under seal, not to be made a part of the public record of the case.

FILED  
DEC 28 94  
U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas / with permission ML

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) 615-5399

OF COUNSEL:

STANLEY G. SCHNEIDER

Texas Bar No. 17790500

Schneider & McKinney

11 E. Greenway Plaza

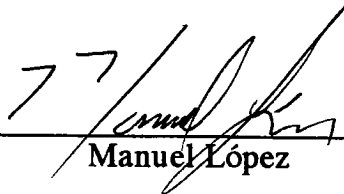
Houston, Texas 77046

(713) 961-5901

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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, on the 28<sup>th</sup> day of December, 1994.

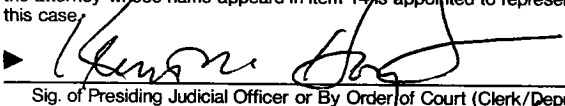
  
\_\_\_\_\_  
Manuel López

f:\ml1154\guerra\seal.mot





## APPOINTMENT AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. JURISDICTION <input type="checkbox"/> MAG. <input type="checkbox"/> DIST. <input type="checkbox"/> OTHER		3. <input type="checkbox"/> APPEALS <input type="checkbox"/> MAG. <input type="checkbox"/> DIST. <input type="checkbox"/> OTHER		2. MAG. DOCKET NO.	3. DIST. CT. DOCKET NO. <b>CA 93-290</b>	VOUCHER NO. <b>0616205</b>	
4. APPEALS DOCKET NO.		5. FOR (DISTRICT/CIRCUIT) <b>District</b>		6. LOC. CODE		7. CHARGE/OFFENSE (U.S. or other code citation)	
8. IN THE CASE OF <b>RICARDO GUERRA</b> vs <b>JAMES COLLINS</b>		9. PERSON REPRESENTED (FULL NAME) <b>RICARDO ALDAPE GUERRA</b>		7A. CASE CODE <b>D-1</b>		9A. NO. REPRESENTED	
10. PERSON REPRESENTED (STATUS) <input type="checkbox"/> DEFENDANT-ADULT <input type="checkbox"/> APPELLANT <input type="checkbox"/> OTHER <input type="checkbox"/> DEFENDANT-JUVENILE <input type="checkbox"/> APPELLEE		11. PROCEEDINGS (Describe briefly) <b>Petition for Writ of Habeas Corpus</b>					
12. PAYMENT CATEGORY A <input type="checkbox"/> FELONY C <input type="checkbox"/> PETTY OFFENSE E <input checked="" type="checkbox"/> OTHER B <input type="checkbox"/> MISDEMEANOR D <input type="checkbox"/> APPEAL		13. COURT ORDER <input checked="" type="checkbox"/> Appointing Counsel F <input type="checkbox"/> Subs. for FD <input type="checkbox"/> Co-Counsel R <input type="checkbox"/> Subs. for Retained Atty. <input type="checkbox"/> Subs. for Panel Atty. _____ Name of prior panel attorney _____ Appt. Date _____ Voucher No. _____					
Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 14 is appointed to represent this person in this case.   Sig. of Presiding Judicial Officer or By Order of Court (Clerk/Deputy)  Date of Order <u>1/15/93</u> Nunc Pro Tunc Date		14. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS <b>Scott J. Atlas Vinson &amp; Elkins 1001 Fannin Suite 2300 Houston, Texas 77002</b>					
		15. WORK PHONE <b>758-2024</b>		16A. Does the attorney have the preexisting agreement (see instructions) with a corporation, including a professional corporation? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
		16B. SOCIAL SECURITY NO. (Only provide per instructions)		16C. EMPLOYER I.D. NO. (Only provide per instructions)			
		16D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions) <b>Vinson &amp; Elkins, L.L.P. 1001 Fannin, #2300 Houston, TX 77002</b>					

## CLAIM FOR SERVICES OR EXPENSES

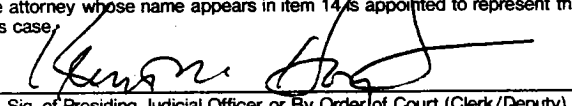
		SERVICE	HOURS	DATES		
IN COURT	17. a.	Arraignment and/or Plea	Please see attached Motion for Attorneys' Fees and Costs and exhibits thereto.		Multiply rate per hour times total hours to obtain "In Court" compensation.  Enter total below. <b>17A. TOTAL IN COURT COMP.</b>	
	b.	Bail and Detention Hearings				
	c.	Motions Hearings				
	d.	Trial				
	e.	Sentence Hearings				
	f.	Revocation Hearings				
	g.	Appeals Court				
	h.	Other (Specify on additional sheets)				
		(Rate per hour = ) TOTAL HOURS =			\$	
OUT OF COURT	18. a.	Interviews and conferences	Please see attached Motion for Attorneys' Fees and Costs and exhibits thereto.		Multiply rate per hour times total hours. Enter total "out of court" compensation below.  <b>18A. TOTAL OUT OF COURT COMP.</b>	
	b.	Obtaining and reviewing records				
	c.	Legal research and brief writing				
	d.	Travel time (Specify on additional sheets)				
	e.	Investigative and other work (Specify on additional sheets)				
		(Rate per hour = ) TOTAL HOURS =			\$	
EXPENSES	19.	TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT	19A. TOTAL TRAVEL EXP.
	Please see attached Motion for Attorneys' Fees and Costs and exhibits thereto.					\$
						19B. TOTAL OTHER EXP.
						\$
						20. GRAND TOTAL CLAIMED
						\$247,295.70

21. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD <u>January 15, 1993</u> to <u>December 22, 1994</u>	
F <input type="checkbox"/> Final Payment <input checked="" type="checkbox"/> Interim Payment No. <u>1</u> Has compensation and/or reimbursement for work in this case previously been applied for? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
If yes, were you paid? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, by whom were you paid? _____ How much? _____ Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
If yes, give details on additional sheets. <u>N/A</u>	
I swear or affirm the truth or correctness of the above statements <u>Scott J. Atlas with permission</u> <u>12/28/94</u>	
SIGNATURE OF ATTORNEY/PAYEE DATE	

APPROVED FOR PAYMENT	22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSE	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED/CERT.
	\$	\$	\$	\$	\$
	27. SIGNATURE OF PRESIDING JUDICIAL OFFICER				27A. JUDGE/MAG. CODE
28. SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE)				29. TOTAL AMT. APPROVED	
				\$	

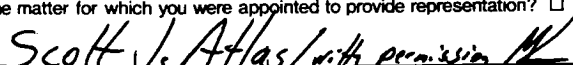
ORIGINAL MAILED TO ADMINISTRATIVE OFFICE AFTER ENTRY OF PAYMENT DATA

## APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. JURISDICTION 1 <input type="checkbox"/> MAG. 2 <input type="checkbox"/> DIST. 3 <input type="checkbox"/> APPEALS 4 <input type="checkbox"/> OTHER		2. MAG. DOCKET NO.		3. DIST. DOCKET NO. CA 93-290		VOUCHER NO. <b>0616205</b>	
4. APPEALS DOCKET NO.		5. FOR (DISTRICT/CIRCUIT) District		6. LOC. CODE		7. CHARGE/OFFENSE (U.S. or other code citation)	
8. IN THE CASE OF RICARDO GUERRA vs JAMES COLLINS				9. PERSON REPRESENTED (FULL NAME) RICARDO ALDAPE GUERRA		7A. CASE CODE D-1	
10. PERSON REPRESENTED (STATUS) 1 <input type="checkbox"/> DEFENDANT-ADULT 3 <input type="checkbox"/> APPELLANT 5 <input checked="" type="checkbox"/> OTHER 2 <input type="checkbox"/> DEFENDANT-JUVENILE 4 <input type="checkbox"/> APPELLEE				11. PROCEEDINGS (Describe briefly) Petition for Writ of Habeas Corpus			
12. PAYMENT CATEGORY A <input type="checkbox"/> FELONY C <input type="checkbox"/> PETTY OFFENSE E <input checked="" type="checkbox"/> OTHER B <input type="checkbox"/> MISDEMEANOR D <input type="checkbox"/> APPEAL							
13. COURT ORDER <input checked="" type="checkbox"/> Appointing Counsel F <input type="checkbox"/> Subs. for FD C <input type="checkbox"/> Co-Counsel R <input type="checkbox"/> Subs. for Retained Atty. P <input type="checkbox"/> Subs. for Panel Atty. _____ Name of prior panel attorney _____ Appt. Date _____ Voucher No. _____				14. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS Scott J. Atlas Vinson & Elkins 1001 Fannin Suite 2300 Houston, Texas 77002			
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				16B. SOCIAL SECURITY NO. (Only provide per instructions)		16C. EMPLOYER I.D. NO. (Only provide per instructions)	
				16D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions) Vinson & Elkins, L.L.P. 1001 Fannin, #2300 Houston, TX 77002			

## CLAIM FOR SERVICES OR EXPENSES

		SERVICE	HOURS	DATES		
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	b.	Bail and Detention Hearings	Attorneys' Fees and Costs and			
	c.	Motions Hearings	exhibits thereto.			
	d.	Trial				
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	f.	Revocation Hearings				
	g.	Appeals Court				
	h.	Other (Specify on additional sheets)				
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	b.	Obtaining and reviewing records	Attorneys' Fees and Costs and			
	c.	Legal research and brief writing	exhibits thereto.			
	d.	Travel time (Specify on additional sheets)				
	e.	Investigative and other work (Specify on additional sheets)				
		(Rate per hour = ) TOTAL HOURS =			\$	
EXPENSES	19.	TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT	19A. TOTAL TRAVEL EXP.
		Please see attached Motion for Attorneys' Fees and Costs and exhibits thereto.				\$
						19B. TOTAL OTHER EXP.
						\$
						20. GRAND TOTAL CLAIMED
					\$247,295.70	

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	\$	\$	\$	\$	\$
	27. SIGNATURE OF PRESIDING JUDICIAL OFFICER				DATE
28. SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE)				DATE	29. TOTAL AMT. APPROVED
					\$

ORIGINAL MAILED TO ADMINISTRATIVE OFFICE AFTER ENTRY OF PAYMENT DATA



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 ATTORNEYS' FEES AND COSTS**

TO THE HONORABLE JUDGE HOYT:

Pursuant to the Criminal Justice Act, the Anti-Drug Abuse Act, and Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure, petitioner Ricardo Aldape Guerra files this Motion for Attorneys' Fees and Costs seeking reimbursement for attorneys' fees and costs in the amount of \$247,295.70 (\$220,859.50 in attorneys' fees and \$26,436.20 in costs), a portion of the amount expended in pursuing this death penalty habeas corpus petition.

The Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), permits a United States District Court to appoint counsel for qualifying indigent defendants petitioning for federal habeas relief under 28 U.S.C. § 2254. By order dated February 22, 1993, this court appointed Scott J. Atlas of the law firm of Vinson & Elkins to represent petitioner. Subsequently, the court set January 15, 1993, *nunc pro tunc*, as the date for the commencement of the representation.

FILED  
DEC 28 94  
U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

The Criminal Justice Act provides for compensation for representation pursuant to this appointment, both for time expended in-court and time expended out-of-court, as well as for expenses reasonably incurred. 28 U.S.C. § 3006A(d)(1). The Anti-Drug Abuse Act has waived the recovery limits established by the Criminal Justice Act for death penalty habeas corpus appointments. 21 U.S.C. § 848(q)(10). The Judicial Conference of the United States has established as a guideline an attorney compensation range of \$75 to \$125 per hour for both in-court and out-of-court time for such death penalty appointments.

The billing invoices attached as Exhibits A through D document the time expended pursuing the federal habeas relief by Scott Atlas and other associates and partners at Vinson & Elkins, the late Thomas Gibbs Gee from Baker & Botts, Stanley G. Schneider from Schneider & McKinney and Richard Alan Morris from Feldman & Associates.<sup>1/</sup> Thomas Gee and Stanley Schneider have been co-counsel on behalf of the petitioner since June 1992, when the matter was strictly a pro bono matter in Texas state court. Richard Morris originally worked on the petitioner's case while at Vinson & Elkins, but has continued working on the matter since joining Feldman & Associates.

The hourly rates on the invoices reflect the normal private billing rates of all of the attorneys and other personnel involved, with those rates higher than \$125 per hour billed at only \$125 per hour. The attorneys' fees requested in this motion for Vinson & Elkins has been reduced by an additional 25%, given the size of the Vinson & Elkins' request, a discount

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<sup>1/</sup>The attached invoices have been redacted to protect attorney privileges including the attorney work product privilege. In conjunction with this motion, however, petitioner is also filing a Motion to File Bill Under Seal, making available to the court unredacted versions of each of the invoices.

substantially greater than the total amount of reimbursement sought by the other three law firms combined. Expenses charged by Vinson & Elkins have been reduced by 10% to ensure that any incidental expenditure for contact with representatives of the media not already removed from this application are excluded from this request for compensation. The amounts billed by Baker & Botts, Schneider & McKinney and Feldman & Associates have not been so reduced. The requested amounts are apportioned as follows: the law firm of Vinson & Elkins requests \$187,758.75 in fees and \$26,412.39 in expenses; the law firm of Baker & Botts requests \$10,507.00 in fees and \$19.50 in expenses; the law firm of Schneider & McKinney requests \$11,875.00 in fees and \$0.00 in expenses, and the law firm of Feldman & Associates requests \$10,718.75 in fees and \$4.31 in expenses.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas / with permission MK

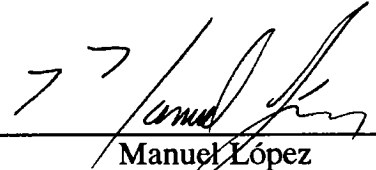
SCOTT J. ATLAS  
Attorney-in-Charge  
Texas Bar No. 01418400  
2500 First City Tower  
1001 Fannin  
Houston, Texas 77002-6760  
(713) 758-2024  
FAX: (713) 615-5399

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

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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, on the 28<sup>th</sup> day of December, 1994.

  
\_\_\_\_\_  
Manuel López

f:\ml1154\guerra\fees.mot

A

## Billing Allocation Report

Room: 2819  
 Scott J. Atlas

Invoice: 1042962  
 December 27, 1994

Billed thru December 22, 1994

Client: PRO127 PRO BONO (CONTINGENT)  
 Matter: 29000 GUERRA, RICARDO ALDAPE

ID #	Timekeeper	Hours	Amount Billed
399	Scott J. Atlas	704.50	88,062.50
716	Theodore Kassinger	44.00	5,500.00
880	Ann E. Webb	63.00	7,875.00
951	J. Cavanaugh O'Leary	40.25	5,031.25
954	Allan R Conge	24.00	3,000.00
981	Phillip N Sanov	16.75	2,093.75
992	Paul A Wehrmann	32.25	4,031.25
999	Frank A. Parigi	6.75	843.75
1015	Anne Bernard Clayton	25.50	3,187.50
1023	Marc D Fisher	105.75	13,218.75
1029	Lisa R Beck	37.25	4,656.25
1031	Timothy K. Borchers	6.75	843.75
1064	Richard A Morris	92.75	11,130.00
1097	Michael J. Mucchetti	234.25	29,281.25
1154	Manuel Lopez	23.25	2,790.00
1157	James R. Markham	89.75	8,990.00
1166	Peter C Ku	91.25	9,125.00
2932	Esmeralda Casillas	4.00	140.00
3817	Jeffrey D Migit	6.50	227.50
3877	Daniel F. Wiersema	2.00	100.00
4747	Edward O Jackson	23.50	470.00
5179	Cara C. Sion	6.50	195.00
5444	Andrew B. Ruthven	.25	11.25
5479	Karen L. Getty	20.25	1,721.25
5539	Beverly L. Palmer	28.50	2,137.50
5810	Ellen W. M. Gray	3.00	270.00
5816	Kim Elliott Neumann	23.50	1,880.00
6233	Gillian Lachaux	2.75	206.25
6400	Melissa Eason	133.00	10,640.00
6503	Susan-Leigh Brown	142.50	10,687.50
6810	Sara Liz Patterson	1.00	75.00
6865	Melody Hughes Harman	1.00	70.00
7077	Carla S. Danbury	9.50	760.00
7085	Barbara H. Woodward	21.25	1,593.75
7347	Shawn R. Knight	5.00	250.00
7430	Cornelia C. Williams	1.00	50.00
7442	Robert Summerlin	231.75	11,600.00
7456	Rebecca E Schweigert	88.50	4,425.00
7489	Brian L Burgess	23.25	1,162.50
7565	Glenn S Greene	40.25	2,012.50
Total		2,456.75	250,345.00

Note: Fee allocation will not be posted until the invoice is confirmed

December 27, 1994

Page:

Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

Fees for services rendered through December 22, 1994

	Init		Hours
1/15/93	JCO	TEAM MEETING; BEGIN REVISING [REDACTED] SECTION OF BRIEF FOR FILING IN FEDERAL COURT.	2.00
	PAW	TELEPHONE CONFERENCE WITH ALDAPE TEAM.	.75
	RAMO	CONFERENCE WITH SCOTT ATLAS REGARDING PREPARING FEDERAL APPLICATION.	.50
	MM	MEET WITH ALDAPE TEAM TO DISCUSS FILING OF FEDERAL WRIT; OBTAIN INFORMATION REGARDING [REDACTED].	2.00
	JRM	TELEPHONE CONFERENCE WITH SCOTT ATLAS AND ALDAPE GUERRA HABEAS PETITION GROUP REGARDING NEXT STEPS.	1.00
	SLBR	ATTEND TEAM MEETING; OFFICE CONFERENCE WITH SCOTT ATLAS REGARDING REVIEW CASE CITES IN BRIEFS; HIGHLIGHT CASES WITH SUBSEQUENT HISTORIES AND TRANSFER INFORMATION TO RELEVANT PAGES IN BRIEFS.	4.00
1/17/93	ACO	REVIEW SECTIONS OF BRIEF.	.75
1/18/93	ACO	REVIEW AND REVISE BRIEF SECTIONS; REVIEW CASE LAW.	1.00
	JABC	REVISE FEDERAL BRIEF.	1.75
	MDFI	REVIEW OF PRIOR DRAFTS OF BRIEF WITH ALTERATIONS FOR FILING IN FEDERAL COURT AND RESEARCH TO UPDATE LAW.	4.00
	LRB	REVISE ALDAPE BRIEF FOR FEDERAL COURT.	1.50
	RAMO	REVISED STATE APPLICATION FOR PURPOSES OF FILING IN FEDERAL COURT.	3.00
	MM	COLLECT FEDERAL HABEAS MATERIALS.	.50
	SLBR	CONTINUE REVISIONS TO SUBSEQUENT CASE HISTORY CITES IN FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS.	1.00
1/19/93	PAW	COMBINATION OF SECTIONS FROM AMENDED APPLICATION AND REPLY BRIEF IN TEXAS COURT OF CRIMINAL APPEALS FOR SUBMISSION IN FEDERAL COURT.	2.50
	LRB	REVISE BRIEF FOR FEDERAL COURT FILING; AUTO CITE CASES.	6.00
	RAMO	EDIT AND REVISE BRIEF IN PREPARATION FOR FILING IN FEDERAL COURT.	.75

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init	Hours
1/19/93	MM RESEARCH EVIDENTIARY HEARING ISSUES.	2.00
	SLBR CONTINUE REVISIONS TO SUBSEQUENT CASE HISTORY CITES IN FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS.	3.00
1/20/93	LRB SHEPARDIZE ALDAPE CASES.	.75
	MM RESEARCH EVIDENTIARY HEARING ISSUES; LOCATE FACTUAL ARGUMENTS FOR HEARING.	3.00
	SLBR CONTINUE REVISIONS TO SUBSEQUENT CASE HISTORY CITES IN FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS AND REPLY TO RESPONDENT'S ORIGINAL ANSWER TO APPLICANT'S FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS.	1.00
1/21/93	MM RESEARCH EVIDENTIARY HEARING ISSUES; LOCATE FACTUAL ARGUMENTS FOR HEARING.	4.00
	JRM WORK ON SECTIONS FOR FEDERAL HABEAS PETITION.	3.75
1/22/93	SJA WORK ON BRIEF.	2.00
	MM RESEARCH EVIDENTIARY HEARING ISSUES; LOCATE FACTUAL ARGUMENTS FOR HEARING.	4.00
	SLBR LIBRARY RESEARCH REGARDING <del>RESEARCH ON EVIDENTIARY</del> <del>RESEARCH</del> REVIEW SAME; TELEPHONE CONFERENCE WITH KIM NEUMAN REGARDING SAME; TELEPHONE CONFERENCE WITH <del>RESEARCH</del> REGARDING SAME.	1.00
1/23/93	MM DRAFT HABEAS SECTION ON EVIDENTIARY HEARING.	4.50
1/24/93	SJA WORK ON FEDERAL COURT HABEAS PETITION.	5.50
1/25/93	SJA WORK ON BRIEF.	11.50
	RAMO REVISE FEDERAL HABEAS APPLICATION; RESEARCH FEDERAL CASE LAW.	11.50
	MM ALDAPE HABEAS SECTION.	2.50
1/26/93	SJA WORK ON BRIEF.	7.00
	SLBR CONFERENCE WITH SCOTT ATLAS REGARDING REVISING TABLE OF AUTHORITIES; CONSOLIDATE CASE CITES FROM BRIEFS AND REVISE TABLE OF AUTHORITIES ACCORDINGLY.	6.00
	RESC CONFERENCE WITH SUSAN BROWN; CONSOLIDATE TABLES OF AUTHORITY FROM BRIEFS "A" AND "B"; BEGIN CITE CHECKING.	4.50

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PRO BONO (CONTINGENT)

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
1/27/93	TWK TELEPHONE CONFERENCES WITH SCOTT ATLAS AND WORK ON FEDERAL APPLICATION.	1.50
	SLBR CONTINUE CONSOLIDATING AND REVISING CASE CITES AND REVISING TABLE OF AUTHORITIES ACCORDINGLY; ORGANIZE STATEMENT OF FACTS.	2.75
	RESC FINISH CONSOLIDATION OF TABLES OF AUTHORITY FROM BRIEFS "A" AND "B"; MANUAL CITE CHECK OF NEW CASES ADDED THUS FAR.	4.50
1/28/93	SJA WORK ON BRIEF.	7.00
	TWK RESEARCH AND REVISE SECTIONS OF FEDERAL APPLICATION.	3.50
	PAW READ SUPREME COURT'S DECISION IN [REDACTED], EDIT BRIEF FOR FEDERAL FILING.	3.00
	LRB REVISE AND REVIEW ALDAPE BRIEF; RESEARCH FEDERAL CASES REGARDING LAW ON [REDACTED]	4.00
	MM EDIT HABEAS.	.50
	RESC COMPARE NEW TABLE OF AUTHORITIES TO NEW BRIEF TO CATCH AND CORRECT ERRORS AND IDENTIFY PROBLEM CITES; COMPARE PRODUCT TO COMPUTER-GENERATED TABLE OF AUTHORITIES.	12.00
1/29/93	TWK RESEARCH AND REVISE SECTIONS OF FEDERAL APPLICATION.	2.00
	JABC REVIEW FEDERAL HABEAS PETITION.	1.25
	BLP CITE CHECK APPEAL BRIEF.	15.00
	EWMG HELP CITE CHECK SCOTT ATLAS' BRIEF.	3.00
	MEAS TRANSLATE AFFIDAVIT FOR CLIENT TO SIGN; CONFERENCE WITH SCOTT ATLAS.	3.50
	SLBR ASSIST WITH PREPARATION OF APPENDIX TO BRIEF TO BE FILED IN FEDERAL COURT.	5.00
	CSDA CITE CHECK BRIEF.	5.00
	BHWO CITE CHECK BRIEF ON ALDAPE MATTER.	3.50
	RESC LEXIS CITE-CHECK OF NEW AND RECENT CASE LAW; MANUAL CITE-CHECK OF CODES AND STATUTES; TROUBLE SHOOT PROBLEM CITES; COMPARE MOST RECENT TABLES OF AUTHORITIES TO MOST RECENT BRIEF TO IDENTIFY ERRORS AND MAKE SHORT CITES WHERE NECESSARY.	16.00

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PRO BONO (CONTINGENT)

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
1/30/93	TWK RESEARCH AND WORK ON FEDERAL HABEAS APPLICATION.	2.50
	RAMO RESEARCH CITES FOR APPLICATION.	3.00
	RESC DO FINAL CITE-CHECKING; SEND FAXES TO JUDGE GEE; COPY BRIEF; PROOFREAD CHANGES TO BRIEF.	4.00
1/31/93	PNS RESEARCH FOR FEDERAL HABEAS CORPUS BRIEF.	3.00
	RAMO PROOF AND REVISE FEDERAL APPLICATION; COMPILED TABLE OF AUTHORITIES; FINALIZE BRIEF FILED WITH THE COURT.	15.00
	MEAS FINISH TRANSLATION OF AFFIDAVIT FOR PERMISSION TO PROCEED IN FORMA PAUPERIS; GO TO OFFICE TO PICK UP DOCUMENTS TO TAKE TO CLIENT MONDAY MORNING.	3.00
	RESC PREPARE TABLE OF AUTHORITIES, PROOF BRIEF, CORRECT SUPRA AND INFRA CITES.	11.00
2/01/93	SJA WORK ON BRIEF.	7.50
	RAMO PROOF AND REVISE FEDERAL APPLICATION; COMPILE TABLE OF AUTHORITIES; FINALIZE BRIEF FILED WITH THE COURT.	14.50
	BLP FINALIZE TABLE OF AUTHORITIES AND PERFORM COPY CHECK ON FINAL VOLUMES OF EXHIBITS AND BRIEFS -- ALDAPE BRIEF.	5.00
	MEAS GO TO TEXAS DEPARTMENT OF CORRECTIONS TO GET AFFIDAVIT FROM CLIENT; TELEPHONE CONFERENCE WITH SCOTT ATLAS.	5.00
	SLBR ATTENTION TO FINALIZING FIRST APPLICATION FOR WRIT OF HABEAS CORPUS.	.50
	BHWO TELEPHONE CONFERENCES WITH REBECCA SCHWEIGERT OF FIRM;. PREPARE TABLE OF AUTHORITIES; COPY CHECK.	5.00
	SRKN ASSIST IN PREPARATION OF MOTION FOR FEDERAL COURT.	5.00
	RESC PROOFREAD TABLE OF CONTENTS AND CHANGES TO BRIEF; DO FINAL CORRECTIONS OF PAGE NUMBERS FOR SUPRA AND INFRA CITES AND FOR TABLE OF AUTHORITIES; COPY CHECK 6 COPIES EACH OF BRIEF AND APPENDIX	17.00
2/02/93	SJA TELEPHONE CONFERENCES REGARDING AMICUS BRIEF.	1.50
	SLBR CONFERENCE WITH KIM NEUMANN REGARDING [REDACTED]	.25

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
2/03/93	MEAS CONFERENCE WITH SCOTT ATLAS REGARDING [REDACTED]; [REDACTED]; REVIEW [REDACTED]; TELEPHONE CONFERENCES WITH [REDACTED], [REDACTED]	5.75
2/04/93	MEAS TELEPHONE CONFERENCES WITH [REDACTED] [REDACTED]	3.75
2/05/93	SJA MISCELLANEOUS TELEPHONE CONFERENCES REGARDING AMICUS, ETC.	1.75
	MEAS TELEPHONE [REDACTED]	1.00
2/07/93	SJA SELECT FACT REFERENCES IN BRIEF.	2.75
	TWK REVIEW FILINGS.	1.00
2/08/93	MM [REDACTED]	5.00
2/09/93	SJA REVIEW BRIEF FOR FACTS.	2.50
	MM RESEARCH [REDACTED] [REDACTED]	13.00
	MEAS TELEPHONE WITNESSES IN MONTERREY.	.75
2/10/93	SJA MISCELLANEOUS TELEPHONE CONFERENCES.	.75
2/11/93	SJA REVIEW FACT PARTS OF BRIEF.	2.00
2/13/93	SJA REVIEW AMICUS BRIEF AND SELECTED CITES.	2.00
2/15/93	MEAS TELEPHONE CONFERENCES WITH TWO WITNESSES IN MONTERREY TO POSTPONE INTERVIEWS.	.50
2/18/93	RAMO DICTATE MEMORANDUM REGARDING WITNESS INTERVIEW; REVIEW SAME.	3.00
2/19/93	RAMO REVISED MEMORANDUM REGARDING WITNESS INTERVIEW.	.50
2/22/93	SJA PREPARE FOR AND ATTEND HEARING.	2.75
	LRB STATUS CONFERENCE IN JUDGE HOYT'S COURT.	2.00
	RAMO ATTEND HEARING.	2.00
2/26/93	SJA MISCELLANEOUS CALLS.	2.50
3/02/93	SLBR RESEARCH [REDACTED]; DRAFT [REDACTED] [REDACTED]	1.00
3/03/93	SJA WORK ON FACT HEARING PREPARATION.	4.25
	SLBR CONTINUE DRAFT OF [REDACTED]; REVISE SAME; OFFICE CONFERENCE WITH SCOTT ATLAS REGARDING COMPARISON OF PLEADINGS IN FEDERAL COURT WITH OUR PLEADINGS.	1.25

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

HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW  
IRS NO 74-1183015

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Re: GUERRA, RICARDO ALDAPE

		Hours
	Init	3.50
3/04/93	SJA PREPARE FOR FACT HEARING.	3.75
3/08/93	SJA PREPARE FOR FACT HEARING; TELEPHONE CONFERENCE WITH MELISSA EASON REGARDING SCHEDULING MONTERREY VISIT.	2.00
	MEAS TELEPHONE CONFERENCE WITH SCOTT ATLAS; PREPARE LIST OF MONTERREY WITNESSES WITH TELEPHONE NUMBERS AND ADDRESSES.	3.00
3/09/93	SJA PREPARE FOR FACT HEARING.	3.25
	MEAS TELEPHONE CONFERENCES WITH WITNESSES IN MONTERREY TO MAKE APPOINTMENTS FOR MARCH 22 AND 23.	5.75
	SLBR RESEARCH HOW TO OBTAIN COPY OF FILE CONTENTS FROM FEDERAL COURT; REVIEW FILE AT FEDERAL COURTHOUSE.	5.75
3/10/93	SJA PREPARE FOR FACT HEARING.	6.25
	MEAS TELEPHONE CONFERENCES WITH WITNESSES IN MONTERREY; MAKE UP SCHEDULE OF INTERVIEWS; TELEPHONE CONFERENCE WITH SCOTT ATLAS.	.25
3/15/93	RAMO TELEPHONE CONFERENCE WITH MELISSA EASON REGARDING [REDACTED].	.25
	PCK DISCUSS GUERRA CASE WITH SCOTT ATLAS.	5.00
	MEAS TELEPHONE CONFERENCES WITH SCOTT ATLAS, NANCY BELOTA; LETTER AND SCHEDULE OF INTERVIEWS FOR SANTIAGO ROEL; MEMO TO SCOTT ATLAS; TELEPHONE CONFERENCES WITH MONTERREY WITNESSES.	3.00
3/16/93	PCK READ STATUTES ON [REDACTED].	1.25
	MEAS REVISE SCHEDULE; ATTEMPT TELEPHONE CALLS TO [REDACTED].	.25
3/17/93	TWK REVIEW RESPONSE BY STATE OF TEXAS.	3.00
	PCK READ SECTIONS OF GUERRA BRIEF; [REDACTED].	.50
3/18/93	RAMO CONFERENCE WITH MICHAEL MUCHETTI REGARDING PREPARING REPLY TO STATE'S RESPONSE OPPOSING EVIDENTIARY HEARING.	2.00
	PCK READ SECTIONS OF THE GUERRA BRIEF.	5.50
	MEAS TELEPHONE CONFERENCES WITH MONTERREY WITNESSES TO MAKE AND CONFIRM APPOINTMENTS; REVISE SCHEDULE;	

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		TELEPHONE CONFERENCES WITH NANCY BELOTA.	
3/18/93	SLBR	TELEPHONE CONFERENCE WITH [REDACTED] REGARDING [REDACTED]	.25
3/19/93	RAMO	DRAFT INITIAL REPLY TO STATE'S RESPONSE TO ALDAPE'S MOTION FOR EVIDENTIARY HEARING.	2.00
	MEAS	TELEPHONE CONFERENCE WITH NANCY BELOTA; EXCHANGE VOICE MAIL MESSAGES WITH SCOTT ATLAS; ORGANIZE [REDACTED] IN PREPARATION FOR TRIP TO MONTERREY; PREPARE PACKAGE OF MATERIALS FOR TRIP.	5.50
3/21/93	SJA	TRAVEL TO MONTERREY TO INTERVIEW WITNESSES.	5.25
	MEAS	TO MONTERREY, MEXICO WITH SCOTT ATLAS.	3.00
3/22/93	SJA	VISIT WITH WITNESSES IN MONTERREY.	11.50
	PCK	READ GUERRA BRIEF SECTION [REDACTED]	6.00
	MEAS	TRANSLATE FOR SCOTT ATLAS IN WITNESS INTERVIEWS IN MONTERREY.	12.50
3/23/93	PCK	CONTINUE READING GUERRA PETITION FOR WRIT OF HABEAS CORPUS.	3.00
3/24/93	SJA	RETURN TO HOUSTON FROM MONTERREY.	4.25
	MEAS	RETURN TRIP FROM MONTERREY, MEXICO.	5.00
3/26/93	RAMO	CONTINUE REVISING REPLY TO STATE'S RESPONSE TO PETITIONER'S MOTION FOR EVIDENTIARY HEARING.	5.75
	SLBR	RECEIVE AND REVIEW CORRESPONDENCE [REDACTED]	.25
		[REDACTED]; ORGANIZE SAME FOR REVIEW BY SCOTT ATLAS.	
3/29/93	RAMO	REVISE REPLY TO STATE'S RESPONSE TO GUERRA'S MOTION FOR A EVIDENTIARY HEARING.	6.50
3/30/93	RAMO	REVIEW LEGAL RESEARCH REGARDING [REDACTED]; REVISE REPLY TO STATE'S RESPONSE TO GUERRA'S REQUEST FOR AN EVIDENTIARY HEARING.	2.50
3/31/93	SJA	REVIEW AND REVISE REPLY ON EVIDENTIARY HEARING; REVIEW CASES REGARDING SAME;	2.50
	RAMO	REVIEW AND REVISE REPLY TO STATE RESPONSE TO GUERRA'S MOTION FOR EVIDENTIARY HEARING.	1.50

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
3/31/93	MEAS TELEPHONE CALLS WITH SCOTT ATLAS TO WITNESSES IN MONTERREY, MEXICO.	1.00
	SLBR REVIEW FILES ON [REDACTED]	2.00
	SLWP CITE CHECK GUERRA PLEADING FOR SCOTT ATLAS	1.00
4/01/93	SJA PREPARE AFFIDAVITS; REVIEW AND REVISE REPLY ON EVIDENTIARY HEARING.	2.50
	RAMO REVIEW AND RESEARCH CASES REGARDING [REDACTED]; TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING SAME.	4.00
4/02/93	RAMO CONTINUE TO RESEARCH REGARDING [REDACTED] -	1.00
	MEAS TELEPHONE CALL TO SCOTT ATLAS, TELEPHONE CALL TO [REDACTED] IN MONTERREY.	.50
	SLBR REVIEW PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR EVIDENTIARY HEARING; CONFERENCE WITH SCOTT ATLAS REGARDING SAME.	.50
4/05/93	MEAS TELEPHONE CONFERENCE WITH SCOTT ATLAS.	.25
4/06/93	MEAS TELEPHONE CALLS TO MONTERREY.	.50
4/15/93	PCK REREAD SECTION OF BRIEF ON [REDACTED]	2.00
	[REDACTED]	
4/17/93	PCK READ LAW REVIEW ARTICLES ON [REDACTED]	2.00
4/18/93	PCK RESEARCH SECTION ON [REDACTED]	6.00
	[REDACTED]	
4/19/93	PCK FIND ADDITIONAL FIFTH CIRCUIT ON [REDACTED]	8.00
	[REDACTED]	
4/20/93	PCK RESEARCH AND COMPLETE MEMORANDUM WITH COMMENTS ON THE GUERRA PETITION FOR WRIT OF HABEAS CORPUS.	5.00
4/21/93	PCK COMPILE CASES CITED IN MEMORANDUM AND RUN AUTO-CITE ON ALL CASES.	2.00
4/23/93	MM REVIEW ALDAPE MEMORANDA.	1.00
4/28/93	SJA WORK ON CASE.	3.00

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
4/28/93	PCK	RESEARCH ISSUE ON [REDACTED]	1.00
4/30/93	PCK	RESEARCH ON [REDACTED]	3.00
5/03/93	PNS	RESEARCH AND DRAFT REPLY PORTION FOR PETITIONER'S BRIEF.	3.00
	PCK	DRAFT MEMORANDUM TO SCOTT ATLAS ON [REDACTED]	1.00
		[REDACTED]	
	BHWO	ORGANIZE FILES FOR LISA BECK OF FIRM.	3.00
5/04/93	PNS	RESEARCH NEW CASE LAW FOR PETITIONER'S REPLY.	3.00
	RAMO	DRAFT AND REVISE MEMORANDUM TO SCOTT ATLAS REGARDING [REDACTED]	.50
	SLBR	CONFERENCE WITH SCOTT ATLAS REGARDING [REDACTED]	.25
		[REDACTED]	
5/05/93	PNS	RECEIVE AND [REDACTED]	2.50
		[REDACTED]	
5/12/93	PNS	REVISE DRAFT OF SECTION FOR BRIEF TO SEND TO SCOTT ATLAS.	3.00
5/14/93	SJA	ATTEND TEAM MEETING.	.75
	TWK	TELEPHONE CONFERENCE REGARDING ALDAPE MATTER.	.50
	LRB	ATTEND TEAM MEETING REGARDING REPLY TO STATE'S RESPONSE.	.75
	RAMO	REVIEW STATE'S ANSWER AND SUMMARY JUDGMENT; TEAM MEETING REGARDING SAME.	1.00
	PCK	ATTEND MEETING TO DISCUSS STATUS OF STATE OF TEXAS' REPLY BRIEF IN THE GUERRA V. COLLINS APPLICATION FOR A WRIT OF HABEAS CORPUS.	2.00
5/15/93	MM	READ STATE'S RESPONSE TO GUERRA HABEAS CORPUS WRIT.	2.00
5/16/93	MM	DRAFT REPLY TO STATE'S RESPONSE TO GUERRA'S HABEAS CORPUS WRIT.	4.00
5/17/93	SJA	REVIEW AND PREPARE SUMMARY OF ALDAPE GUERRA BRIEF	3.50
	LRB	REVIEW STATE'S RESPONSE.	1.25
	RAMO	REVIEW STATE'S COMPLETED ANSWER AND SUMMARY JUDGMENT MOTION.	.75

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
5/18/93	SJA	WORK ON BRIEF; TELEPHONE CONFERENCES WITH TEAM.	3.50
	JCO	BEGIN REVIEW OF RESPONDENT'S ANSWER; TELEPHONE CONFERENCE WITH SCOTT ATLAS.	.75
	PNS	REVIEW LATEST REVISIONS FOR BRIEF; CONFERENCE WITH CAVANAUGH O'LEARY; SEND REVISIONS TO SCOTT ATLAS.	2.00
	LRB	TELEPHONE CONFERENCE WITH SCOTT ATLAS AND PETER KU REGARDING OUR REPLY; REVIEW BRIEFS.	2.00
	MM	DRAFT [REDACTED]	5.50
	PCK	MEET WITH LISA BECK AND RICK MORRIS TO DISCUSS DIVISION OF GUERRA'S REPLY TO THE STATE'S ANSWER.	1.00
	PCK	WORK ON GUERRA'S REPLY TO STATE'S ANSWER. READ [REDACTED]	4.00
5/19/93	SJA	WORK ON BRIEF; MISCELLANEOUS TELEPHONE CONFERENCES REGARDING SAME.	3.00
	JCO	FINISH REVIEW OF STATE'S RESPONSE; RESEARCH; BEGIN PREPARING REPLY TO STATE'S RESPONSE; TELEPHONE CONFERENCE WITH SCOTT ATLAS.	4.00
	LRB	MEET WITH RICHARD MORRIS AND PETER KU REGARDING BRIEF; REVIEW ARGUMENTS.	2.00
	RAMO	REVIEW STATE'S ANSWER.	2.75
	MM	RESEARCH [REDACTED]	2.00
	JRM	RESEARCH AND DRAFT REPLY.	4.00
	PCK	WORK ON GUERRA'S REPLY TO STATE'S ANSWER.	4.00
5/20/93	SJA	WORK ON BRIEF; MISCELLANEOUS TELEPHONE CONFERENCES.	2.75
	AEW	OFFICE CONFERENCE WITH SCOTT ATLAS REGARDING FEDERAL HABEAS PETITION AND NEED TO SURVEY CASE LAW CONSTRUING [REDACTED]; REVIEW RECENT SUPREME COURT DECISION REGARDING SAME.	1.50
	JCO	BEGIN DRAFTING REPLY; TELEPHONE CONFERENCES WITH SCOTT ATLAS; REVIEW APPLICATION FOR WRIT OF HABEAS	5.00

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		CORPUS; TELEPHONE CONFERENCE WITH LISA BECK.	
5/20/93	MM	READ CASES REGARDING [REDACTED].	2.00
	PCK	READ STATE AND FEDERAL CASES ON [REDACTED].	8.00
		[REDACTED] INTEGRATE GUERRA'S STATE PETITION FOR HABEAS CORPUS WITH CURRENT REPLY.	
5/21/93	SJA	WORK ON BRIEF; TELEPHONE CONFERENCES WITH TEAM MEMBERS	7.00
	AEW	REVIEW AND ANALYZE [REDACTED].	7.00
	JCO	RESEARCH; CONTINUE DRAFTING REPLY.	2.00
	PAW	PREPARE REPLY BRIEF.	1.00
	JABC	DRAFT REPLY FOR GUERRA.	6.25
	LRB	RESEARCH AND DRAFT REPLY BRIEF.	5.00
	PCK	DRAFT REPLY BRIEF TO STATE'S ANSWER ON ISSUES OF [REDACTED].	6.00
5/22/93	SJA	WORK ON BRIEF.	8.75
	ACO	WORK ON BRIEF.	4.00
	PCK	EDIT GUERRA REPLY BRIEF AND RESEARCH CASES ON [REDACTED].	6.00
5/23/93	SJA	WORK ON BRIEF.	10.00
	ACO	WORK ON BRIEF.	3.75
5/24/93	SJA	WORK ON BRIEF.	5.50
	AEW	REVIEW FACTUAL SUMMARY OF INCIDENT AND ANALYSIS OF EVIDENCE; ANALYZE [REDACTED]; RESEARCH SUPREME COURT AND COURTS OF APPEALS DECISIONS [REDACTED]; ORGANIZE RESULTS OF ANALYSIS; TELEPHONE CONFERENCE WITH TED KASSINGER REGARDING SURVEY OF [REDACTED] DECISIONS; TELEPHONE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING [REDACTED]; OFFICE CONFERENCE REGARDING ASSISTING WITH ANALYSIS OF [REDACTED].	6.00
	JCO	RESEARCH; CONTINUE DRAFTING REPLY.	5.00

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
5/24/93	ACO WORK ON BRIEF.	2.00
	PNS CONFERENCE TO MICHAEL MUCCHETTI REGARDING CONSTITUTIONAL ISSUES ON [REDACTED]	.25
	PAW PREPARE REPLY BRIEF.	8.00
	LRB DRAFT BRIEF.	6.00
	RAMO DICTATE SECTION TO BE INCORPORATED INTO ALDAPE'S RESPONSE TO STATE'S ANSWER AND SUMMARY JUDGMENT MOTIONS.	4.00
	MM REPLY TO STATE'S RESPONSE.	4.00
	PCK SEARCH FOR [REDACTED]	7.00
	[REDACTED]	
	[REDACTED]	
	GGRE RESEARCH ON [REDACTED]	3.00
5/25/93	SJA WORK ON BRIEF.	6.00
	AEW CONTINUE TO REVIEW AND ANALYZE-[REDACTED]; PREPARE PACKAGE OF INFORMATION FOR ATTORNEYS ASSISTING IN REVIEW OF CIRCUIT COURT DECISIONS [REDACTED]; RESEARCH LAW REVIEW ARTICLES DEALING WITH [REDACTED].	4.50
	JCO FINISH DRAFTING AND REVISING SECTION OF REPLY.	2.00
	JABC REVISE BRIEF.	1.25
	LRB DRAFT BRIEF.	3.00
	RAMO REVISE SECTION TO BE INSERTED IN RESPONSE TO STATE'S ANSWER; RESPOND TO STATE'S ARGUMENT REGARDING [REDACTED].	6.00
	JRM DRAFT ADALPE REPLY BRIEF.	5.00
	PCK MEET WITH LISA BECK AND RICK MORRIS TO DISCUSS DIVISION OF GUERRA'S REPLY TO THE STATE'S ANSWER.	1.00
	GGRE SHEPARDIZE DEATH PENALTY CASES IN WRIT OF HABEAS CORPUS APPLICATION FOR GUERRA.	5.25
5/26/93	SJA WORK ON BRIEF.	6.50
	JCO REVIEW REVISIONS TO SECTION OF REPLY MADE BY SCOTT ATLAS; PROOF AND REVISE SECTION OF REPLY PER SCOTT'S REVISIONS.	1.25

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init	Hours
5/26/93	PAW PREPARE REPLY BRIEF IN FEDERAL DISTRICT COURT.	2.00
	JABC REVISE BRIEF.	1.75
	MM REPLY TO STATE'S RESPONSE.	3.00
	JRM MAKE FINAL REVISION TO REPLY BRIEF.	.25
	SLBR DRAFT FOLLOW-UP LETTER TO [REDACTED]	2.00
	[REDACTED] CONFERENCE WITH SCOTT ATLAS REGARDING SAME; MAKE REVISIONS TO SAME; ORGANIZE [REDACTED] SAME.	
5/27/93	SJA WORK ON BRIEF.	11.00
	FAP RESEARCH [REDACTED]	1.00
	JABC REVISE BRIEF.	4.50
	LRB TELEPHONE CONFERENCE WITH SCOTT ATLAS; REVIEW BRIEF.	.50
	TKB RESEARCH [REDACTED]	2.50
5/28/93	SJA WORK ON BRIEF.	6.00
	FAP REVIEW [REDACTED]	1.75
	JABC REVISE BRIEF FOR ALDAPE.	5.75
5/29/93	SJA WORK ON BRIEF.	3.50
5/30/93	SJA WORK ON BRIEF.	2.00
5/31/93	SJA WORK ON BRIEF.	7.50
6/01/93	SJA WORK ON BRIEF.	10.25
	PAW RESEARCH [REDACTED]	4.00
	[REDACTED]	
	FAP REVIEW [REDACTED]	2.00
	TKB RESEARCH [REDACTED]	1.75
	BLP CITE CHECK BRIEFS.	5.00
	BHWO CITE CHECK BRIEF AS REQUESTED BY SCOTT ATLAS.	6.25
	RESC CITE CHECK FEDERAL REPLY BRIEF.	8.00
6/02/93	SJA WORK ON BRIEF.	4.00
	AEW SEVERAL TELEPHONE CONFERENCES WITH SCOTT ATLAS REGARDING ANALYSIS OF FIFTH CIRCUIT PRECEDENT ON [REDACTED] TELEPHONE CONFERENCE WITH PAUL WEHRMAN REGARDING HIS REVIEW OF FIFTH CIRCUIT CASES; REVIEW AND SUMMARIZE [REDACTED]; REVIEW [REDACTED]	6.00

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		[REDACTED]; REVIEW ANALYSIS OF [REDACTED]	
6/02/93	PAW	READ CASES [REDACTED]	2.00
	FAP	RESEARCH [REDACTED]	2.00
	TKB	CONTINUE RESEARCH REGARDING [REDACTED]	2.50
	BLP	CITE CHECK BRIEF.	3.50
	CSDA	CITE CHECK GUERRA BRIEF	4.50
	RESC	FINISH CITE-CHECKING FEDERAL REPLY BRIEF; PROOFREAD CORRECTIONS.	8.00
6/03/93	AEW	CONTINUE TO REVIEW FIFTH CIRCUIT DECISIONS INTERPRETING [REDACTED] [REDACTED] REVIEW [REDACTED]	6.00
	JCO	REVIEW [REDACTED]	.50
	PAW	READ ALL CASES [REDACTED]	4.00
6/04/93	AEW	CONTINUE TO REVIEW FIFTH CIRCUIT DECISIONS [REDACTED] INCORPORATE ANALYSIS INTO FILE MEMORANDUM; TELEPHONE CONFERENCE WITH PAUL WEHRMANN REGARDING [REDACTED] INCORPORATE SAME INTO MEMORANDUM OF LAW.	8.00
	PAW	READ ALL CASES [REDACTED]	4.00
6/06/93	AEW	REVIEW LAW REVIEW ARTICLES [REDACTED] [REDACTED] INCORPORATE SAME INTO FILE MEMORANDUM.	3.00
6/07/93	AEW	CONTINUE TO REVIEW [REDACTED] REGARDING [REDACTED] LEAVE MESSAGE FOR SCOTT ATLAS AND TED KASSINGER REGARDING STATUS OF RESEARCH.	7.00
	ACO	REVIEW SECTION OF BRIEF.	.75
	LRB	REVIEW AND REVISE BRIEF SECTION.	2.00
6/08/93	AEW	REVIEW AND REVISE FILE MEMORANDUM REGARDING [REDACTED] IN FIFTH CIRCUIT.	4.00

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Of PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init	Hours
6/09/93	SJA WORK ON BRIEF.	3.50
	TWK RESEARCH AND REVISE SECTION OF BRIEF.	1.00
	AEW PREPARE FILE MEMORANDUM IN FINAL FORM.	6.00
6/10/93	SJA REVIEW AND REVISE BRIEF	5.50
	AEW REVIEW AND REVISE FILE MEMORANDUM.	4.00
	RESC PROOFREAD REVISIONS TO THE ALDAPE REPLY BRIEF.	1.00
6/11/93	JDMI PROOF BRIEF CORRECTIONS; CITE CHECKED TABLE OF AUTHORITIES; PROOF TABLE OF CONTENTS.	2.50
	DEWI PREPARE TABLE OF AUTHORITIES FOR ALDAPE BRIEF.	1.00
	RESC BEGIN TABLE OF AUTHORITIES FOR THE ALDAPE REPLY BRIEF.	1.00
6/14/93	SJA WORK ON BRIEF.	4.75
	TWK REVIEW MEMO REGARDING [REDACTED]	.75
	DEWI CITE CHECK REVISIONS TO ALDAPE BRIEF.	1.00
	SLBR RECEIPT AND REVIEW OF CORRESPONDENCE [REDACTED] REGARDING [REDACTED] CONFERENCE WITH SCOTT ATLAS REGARDING SAME.	.50
	RESC PREPARE TABLE OF AUTHORITIES FOR RESPONSE TO THE STATE'S REPLY.	1.50
6/15/93	SJA COMPLETE BRIEF	4.00
	TWK RESEARCH AND REVIEW DRAFT BRIEF.	1.25
6/16/93	SJA REVIEW AND REVISE AFFIDAVITS; PREPARE BRIEF ATTACHMENTS FOR FILING	3.75
	BLBU REVIEW THE DIFFERENCE BETWEEN [REDACTED] [REDACTED].	.50
6/18/93	SJA REVIEW AND REVISE AFFIDAVITS.	2.00
	TWK WORK ON GUERRA BRIEF ISSUE.	.75
	BLBU MEMO REGARDING [REDACTED]	4.00
6/21/93	TWK RESEARCH AND PREPARE MEMORANDA REGARDING [REDACTED] [REDACTED]	1.00
6/22/93	SJA REVIEW AND REVISE AFFIDAVITS.	1.50
	TWK RESEARCH AND REVISE MEMO TO ANN WEBB REGARDING [REDACTED]	1.00
	SLBR TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING [REDACTED]	.25

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
6/23/93	SJA	REVIEW AND REVISE AFFIDAVITS; REVIEW TED KASSINGER MEMO TO ANN WEBB [REDACTED]	1.00
6/24/93	SJA	REVIEW AND REVISE AFFIDAVITS.	1.50
6/28/93	SJA	TELEPHONE CONFERENCE WITH MELISSA EASON; REVIEW FACT INFORMATION FOR HEARING.	1.75
	MEAS	TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING MONTERREY WITNESS AFFIDAVITS.	.50
6/29/93	LRB	REVIEW LAW REVIEW ARTICLES FROM SCOTT ATLAS.	.50
6/30/93	MEAS	TELEPHONE CONFERENCES WITH WITNESSES IN MEXICO; REVIEW AFFIDAVITS.	5.00
7/06/93	PCK	READ [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	2.00
	MEAS	TELEPHONE CALLS WITH SCOTT ATLAS, TELEPHONE CALLS TO MONTERREY WITNESSES, REVISE AFFIDAVITS, CONFERENCE WITH MARISA REUTER REGARDING TRANSLATIONS.	8.00
7/07/93	SJA	REVIEW AND REVISE AFFIDAVITS; OFFICE CONFERENCES WITH MELISSA EASON AND SUSAN BROWN REGARDING SAME.	1.25
	TWK	REVIEW MEMO REGARDING [REDACTED]	.25
	JCO	REVIEW MEMO REGARDING [REDACTED]	.50
	PCK	READ MEMORANDUM [REDACTED] [REDACTED] [REDACTED]	3.00
	MEAS	CONFERENCE WITH SCOTT ATLAS; REVISE AFFIDAVITS OF MONTERREY WITNESSES; TELEPHONE CONFERENCES WITH MARISA REUTER REGARDING TRANSLATIONS AND TRIP TO HUNSTVILLE; TELEPHONE CONFERENCE WITH SCOTT ATLAS; TELEPHONE CALLS TO MONTERREY.	7.50
	SLBR	CONFERENCE WITH SCOTT ATLAS REGARDING VISIT TO RICARDO; OBTAIN COPY OF [REDACTED] AFFIDAVIT FROM MELISSA EASON.	.50

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
7/07/93	GGRE	READ AND REVIEW TED KASSINGER'S MEMORANDUM DESCRIBING [REDACTED]; BEGIN RESEARCH.	1.00
7/08/93	MEAS	TELEPHONE CALLS TO MONTERREY TO [REDACTED].	1.00
	SLBR	ARRANGE TRIP TO SEE-[REDACTED] WITH MARISA REUTER.	.25
7/09/93	MEAS	TELEPHONE CONFERENCE WITH [REDACTED] IN MONTERREY; REVISE AFFIDAVITS; MEMO TO AND CONFERENCE WITH SCOTT ATLAS.	6.75
7/12/93	SLBR	ATTENTION TO ARRANGEMENTS TO VISIT [REDACTED] CONFERENCE WITH SCOTT ATLAS REGARDING TOPICS TO BE DISCUSSED WITH [REDACTED]	.50
7/13/93	SLBR	TRAVEL TO HUNTSVILLE; VISIT WITH RICARDO REGARDING [REDACTED]; RETURN TO HOUSTON; DRAFT MEMORANDUM TO SCOTT ATLAS REGARDING SAME.	6.00
7/15/93	BLBU	REVIEW CASE LAW REGARDING [REDACTED].	3.00
	BLBU	DRAFT MEMORANDUM REGARDING [REDACTED].	4.00
7/19/93	BLBU	FINISH DRAFT OF MEMORANDUM REGARDING [REDACTED]	5.25
	GGRE	RESEARCH MEMORANDUM ON [REDACTED]	.50
7/22/93	TWK	REVIEW MEMORANDUM REGARDING [REDACTED] MESSAGES TO SCOTT ATLAS.	.50
	BLBU	RESEARCH LATEST CASES [REDACTED]	1.50
7/23/93	BLBU	FINISH MEMORANDUM ON [REDACTED]	5.00
	GGRE	RESEARCH [REDACTED]	1.00
7/26/93	MEAS	REVIEW AFFIDAVITS; ATTEMPTED TELEPHONE CALLS TO MONTERREY WITNESSES.	.50
	GGRE	RESEARCH ON GUERRA MEMO REGARDING [REDACTED]	4.25
7/27/93	GGRE	RESEARCH ON [REDACTED]	8.00
7/28/93	MEAS	TRANSLATE AFFIDAVITS OF [REDACTED]; CONFERENCE WITH SCOTT ATLAS.	9.50
7/29/93	TWK	REVIEW RESEARCH MEMORANDUM; TELEPHONE CONFERENCE WITH SCOTT ATLAS ON SAME.	.50
8/02/93	MEAS	TELEPHONE CALLS TO TWO MONTERREY WITNESSES.	.75
8/03/93	MEAS	TELEPHONE CONFERENCES WITH [REDACTED] IN MONTERREY; TELEPHONE CALLS [REDACTED]	1.00

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		[REDACTED]; ATTEMPTED CALLS TO [REDACTED].	
8/05/93	GGRE	MEMORANDUM [REDACTED].	8.25
8/06/93	GGRE	CONTINUE MEMORANDUM ON [REDACTED].	9.00
8/13/93	JCO	REVIEW AMICUS CURIAE BRIEF FILED ON BEHALF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES.	.50
	PAW	READ THE FEDERAL DISTRICT COURT AMICUS CURIAE.	.50
	PAW	READ THE FEDERAL DISTRICT COURT AMICUS CURIAE.	.50
	MM	READ AMICUS BRIEF OF MEXICAN GOVERNMENT.	.25
8/17/93	TWK	REVIEW RESEARCH MEMORANDA IN ALDAPE CASE.	.75
8/19/93	TWK	READ RECENT DECISIONS AND MEMORANDA REGARDING GUERRA APPEAL.	1.25
	MEAS	CONFERENCE WITH SCOTT ATLAS REGARDING AFFIDAVITS.	.75
8/27/93	MEAS	TRANSLATE [REDACTED] AFFIDAVIT.	5.00
9/12/93	MEAS	FINISH TRANSLATION OF [REDACTED] AFFIDAVIT; TELEPHONE CALL TO [REDACTED].	2.75
9/13/93	MEAS	TELEPHONE CALLS TO [REDACTED].	1.25
9/24/93	SLBR	CONFERENCE WITH SCOTT ATLAS REGARDING TRANSLATION OF AFFIDAVITS OF MONTERREY WITNESSES; OBTAIN [REDACTED].	.75
9/29/93	SLBR	ARRANGE FOR TRANSLATION OF AFFIDAVITS.	.50
9/30/93	KLG	RESEARCH REGARDING AFFIDAVITS.	1.50
	SLBR	CONFERENCE WITH SCOTT ATLAS REGARDING TRANSLATION OF AFFIDAVITS; INTEROFFICE CONFERENCE WITH KAREN GETTY REGARDING TRANSLATOR.	.25
10/01/93	KLG	RESEARCH REGARDING AFFIDAVITS.	1.00
10/05/93	SJA	PREPARE FOR AND ATTEND TEAM MEETING; DETERMINE DOCUMENTS TO DISTRIBUTE.	3.50
	TWK	TELEPHONE CONFERENCE REGARDING ALDAPE HEARING.	1.00
	JCO	TEAM MEETING.	1.25
	ACO	ALDAPE MEETING.	1.25
	MDFI	ATTEND TEAM MEETING [REDACTED].	2.00
	MM	MEETING REGARDING EVIDENTIARY HEARING; PREPARE FOR ALDAPE MEETING, [REDACTED].	3.00

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
10/05/93	SLBR	TELEPHONE CONFERENCES WITH [REDACTED] [REDACTED] REGARDING [REDACTED]; ATTEND TEAM MEETING REGARDING PREPARATION FOR EVIDENTIARY HEARING.	1.75
10/06/93	SJA	MISCELLANEOUS TELEPHONE CONFERENCES AND VOICE MAILS WITH MICHAEL MUCCHETTI AND SUSAN BROWN REGARDING [REDACTED].	1.25
	ACO	REVIEW WITNESS FILES.	.50
	MM	DRAFT HABEAS CORPUS AD TESTIFICANDUM; REVIEW [REDACTED].	4.50
	EVCA	OBTAIN FORM ON HABEAS CORPUS FOR MICHAEL MUCCHETTI.	.50
	SLBR	CONFERENCE WITH KAREN GETTY REGARDING PREPARATION FOR EVIDENTIARY HEARING; TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING SAME; OBTAIN [REDACTED] [REDACTED] FOR [REDACTED]; INTEROFFICE CONFERENCE WITH SCOTT ATLAS REGARDING SAME; ARRANGE FOR MICHAEL MUCCHETTI TO CONTACT [REDACTED] REGARDING SAME; TELEPHONE CONFERENCE WITH WARDEN'S OFFICE REGARDING TRANSPORTATION OF [REDACTED] AND [REDACTED] TO THE EVIDENTIARY HEARING; REVIEW [REDACTED] REGARDING [REDACTED] TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING [REDACTED].	3.00
10/07/93	MM	RESEARCH [REDACTED] [REDACTED] CONFERENCE WITH [REDACTED] REGARDING [REDACTED] [REDACTED] FOR PEOPLE AND THINGS IN [REDACTED]	3.25
	JDMI	REVIEW [REDACTED] [REDACTED]; [REDACTED] [REDACTED] [REDACTED] AND [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].	3.50
	KLG	DRAFT [REDACTED].	1.00
	SLBR	TELEPHONE CONFERENCE WITH [REDACTED] REGARDING [REDACTED]; TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING SAME; CONFERENCE WITH MICHAEL MUCCHETTI REGARDING [REDACTED]; CONFERENCE WITH KAREN GETTY REGARDING [REDACTED]	2.00

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
10/08/93	ACO REVIEW [REDACTED].	1.50
	JDMI PREPARE A MEMO TO SCOTT ATLAS CONCERNING PLEADINGS FILED IN FEDERAL COURT.	.50
	KLG PREPARE [REDACTED].	2.00
10/11/93	MDFI LETTER TO [REDACTED] TRANSMITTING COPY OF ORDER ENTERED BY THE FEDERAL JUDGE GRANTING RICARDO ALDAPE AN EVIDENTIARY HEARING- [REDACTED]	.25
	MDFI REVIEW OF VARIOUS FILE DOCUMENTS REGARDING TESTIMONY AND OUT OF COURT STATEMENTS OF WITNESSES [REDACTED]	7.00
	MM REVIEW [REDACTED]	3.50
	MEAS [REDACTED] AFFIDAVIT TRANSLATION.	2.50
10/12/93	SJA MEET WITH TOM GEE TO [REDACTED]	2.75
	JCO BLGIN REVIEWING [REDACTED]	3.00
	MEAS FINISH TRANSLATION AND REVISIONS TO [REDACTED] MEMORANDUM TO SCOTT ATLAS.	5.50
	SLBR TELEPHONE CONFERENCE WITH RICK MORRIS REGARDING [REDACTED] CONFERENCE WITH MICHAEL MUCCHTTI REGARDING SAME.	.25
10/13/93	KLG CONTINUE TO PREPARE [REDACTED].	.50
10/14/93	JCO CONTINUE REVIEW OF [REDACTED] BEGIN DRAFTING MEMO TO SCOTT ATLAS REGARDING [REDACTED]; TELEPHONE CONFERENCE WITH RICK MORRIS.	4.00
	KLG CONTINUE TO PREPARE [REDACTED].	.50
10/15/93	TWK RESEARCH FILES IN PREPARATION FOR HEARING.	4.00
	JCO DRAFT AND REVISE MEMO TO SCOTT ATLAS REGARDING [REDACTED]	2.00

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
10/16/93	SJA	PREPARE FOR EVIDENTIARY HEARING.	7.25
	TWK	REVIEW TESTIMONY AND REVISE AFFIDAVITS.	3.50
	ACO	REVIEW [REDACTED].	3.00
10/17/93	SJA	PREPARE FOR EVIDENTIARY HEARING.	8.00
	ACO	REVIEW [REDACTED] R	.75
		[REDACTED].	
10/18/93	TWK	RESEARCH, DRAFT, AND REVISE MEMOS AND [REDACTED]	6.00
	JCO	REVISE MEMO TO SCOTT ATLAS REGARDING [REDACTED]	.50
		[REDACTED]; TELEPHONE CONFERENCE WITH	
		SCOTT ATLAS.	
	ACO	DRAFT MEMO DISCUSSING [REDACTED].	1.25
	KLG	PREPARE SUMMARY MEMO OF [REDACTED].	.50
10/19/93	JCO	REVISE MEMOS TO SCOTT ATLAS REGARDING [REDACTED],	1.50
		[REDACTED]	
	MM	UPDATE WITNESS REPORTS FOR [REDACTED]	3.00
		[REDACTED].	
10/20/93	TWK	REVIEW NEW MATERIALS.	.25
	RELS	REVIEW WITNESS STATEMENTS AND POLICE REPORTS AND	3.75
		CREATE A LIST REGARDING THE SAME; MEET WITH SCOTT	
		ATLAS REGARDING AVAILABILITY AND ASSIGNMENTS.	
10/21/93	MM	DISCUSSION WITH COURT CLERK CONCERNING THE USE OF	.50
		INTERPRETERS FOR WITNESSES AND THE ACCUSED IN A	
		FEDERAL EVIDENTIARY HEARING.	
	MM	READ [REDACTED]	.75
		[REDACTED]	
	KLG	CONTINUE TO PREPARE [REDACTED].	1.00
10/22/93	KLG	PREPARE [REDACTED].	2.00
10/24/93	SJA	OFFICE CONFERENCE WITH ROBERT SUMMERLIN REGARDING	.25
		MISCELLANEOUS TASKS.	
	ACO	REVISE [REDACTED]	.75
		[REDACTED]	
10/25/93	SJA	PREPARE FOR HEARING; TELEPHONE CONFERENCES WITH	6.75
		TOM GEE, STAN SCHNEIDER, [REDACTED]	
		[REDACTED], MRS. ALDAPE, TEAM MEMBERS; PREPARE	
		INFORMATION FOR WITNESSES' TESTIMONY.	

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
10/25/93	MDFI FURTHER RESEARCH AND DRAFT MEMO ON [REDACTED] [REDACTED]	3.00
	JRM DRAFT AND REVISE MEMORANDA REGARDING [REDACTED] [REDACTED]	6.25
10/26/93	SJA PREPARE FOR HEARING.	7.00
	TWK WORK ON REVISIONS TO [REDACTED]	.25
	ACO DRAFT MEMO REGARDING [REDACTED]	.75
	JRM REVIEW MATERIALS REGARDING [REDACTED]	.25
	KLK PREPARE [REDACTED]	1.50
10/27/93	SJA PREPARE FOR HEARING; INTERVIEW WITNESSES.	6.00
	JRM REVIEW [REDACTED] [REDACTED]; BEGIN OUTLINE OF MEMO TO SCOTT ATLAS.	3.50
	KLK PREPARE [REDACTED]	1.50
	SLBR CONFERENCE WITH KAREN GETTY REGARDING [REDACTED] [REDACTED]	.25
10/28/93	SJA VISIT WITH WITNESSES; PREPARE FOR HEARING.	5.75
	JRM FURTHER PREPARATION OF MEMORANDUM ON [REDACTED] [REDACTED]	3.00
	KEN INVESTIGATION REGARDING WITNESSES FOR SCOTT ATLAS.	1.50
	RELS ASSEMBLE STATEMENT OF FACTS NOTEBOOK; REVIEW [REDACTED] [REDACTED]; PREPARE PRODUCTION DOCUMENTS TO BE ADDED TO VARIOUS NOTEBOOKS; REVIEW [REDACTED] [REDACTED]; CONFERENCE WITH JERRY SIMANDL REGARDING THE SAME.	6.25
10/29/93	SJA PREPARE FOR TRIAL.	4.00
	JRM DRAFT PORTION OF MEMO ON [REDACTED]	3.75
	KLK PREPARE [REDACTED]	1.00
	RELS CONFERENCE WITH [REDACTED] [REDACTED]; PREPARE PRODUCTION DOCUMENTS TO BE ADDED TO NOTEBOOKS; CONFERENCE WITH HEATHER MATHIS REGARDING [REDACTED] REVIEW [REDACTED]	6.25

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
10/30/93	SJA	PREPARE FOR HEARING; VISIT WITNESS.	7.75
	TWK	RESEARCH AND REVISE [REDACTED] AND PREPARE MEMO TO SCOTT ATLAS.	1.50
	JRM	CONTINUE PREPARING MEMORANDUM.	5.00
10/31/93	SJA	PREPARE FOR HEARING.	9.00
	RELS	ASSEMBLE STATEMENT OF FACT NOTEBOOK; REVISE INDEX THE SAME; PREPARE [REDACTED] TO BE ADDED TO NOTEBOOKS; UPDATE [REDACTED]	6.00
11/01/93	SJA	PREPARE FOR HEARING.	3.50
	JRM	FURTHER DRAFTING OF [REDACTED] MEMORANDUM.	2.00
	RELS	REVIEW [REDACTED] S, [REDACTED] TO PREPARE NOTEBOOKS FOR EVIDENTIARY HEARING; CREATE [REDACTED] NOTEBOOK; COMPILE AND [REDACTED] S- [REDACTED]; PREPARE [REDACTED] S- [REDACTED].	9.25
11/02/93	SJA	PREPARE FOR HEARING; ATTEND STATE'S HEARING.	5.50
	RELS	REVIEW [REDACTED] S, [REDACTED] DOCUMENTS [REDACTED] S; MEET WITH JERRY SIMANDL REGARDING [REDACTED]; REVIEW [REDACTED] E.	10.25
11/03/93	SJA	PREPARE FOR HEARING.	7.50
	MM	REVIEW [REDACTED] S.	.50
	JRM	REVISE MEMORANDA OF [REDACTED] S [REDACTED].	1.25
	KEN	BEGIN RESEARCH OF [REDACTED] S- [REDACTED].	4.50
	SLBR	CONFERENCE WITH SCOTT ATLAS REGARDING [REDACTED] [REDACTED] AND TRIAL EXHIBITS; DRAFT LETTER TO [REDACTED], ARRANGE FOR PREPARATION OF TRIAL EXHIBITS.	2.00

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init	Hours
11/03/93	RELS TELEPHONE CONFERENCE WITH [REDACTED] [REDACTED] REGARDING VIEWING GUERRA [REDACTED] TRAVEL TO [REDACTED] [REDACTED] REGARDING SAME; ASSIST IN THE ISSUANCE OF [REDACTED] COMPILE AND [REDACTED] DOCUMENTS FOR [REDACTED]; PREPARE TO HAVE [REDACTED] DOCUMENTS COPIED.	8.75
11/04/93	SJA PREPARE FOR HEARING.	6.50
	RELS REVIEW [REDACTED], [REDACTED] TO PREPARE NOTEBOOKS FOR EVIDENTIARY HEARING; COMPILE AND VERIFY DOCUMENTS FOR [REDACTED]; PREPARE TO HAVE [REDACTED] DOCUMENTS COPIED AND DISTRIBUTED TO TEAM; ASSIST IN THE ISSUANCE OF [REDACTED], [REDACTED].	10.00
11/05/93	SJA PREPARE FOR HEARING.	7.00
	EOJA PREPARE EXHIBITS; COMPILE AND ASSIMILATE DOCUMENTS TO BE USED IN INTERVIEWS WITH VARIOUS WITNESSES.	4.00
	KEN RESEARCH [REDACTED].	7.50
	SLBR CONFERENCE WITH RICK MORRIS AND SCOTT ATLAS REGARDING SCHEDULE VISIT WITH [REDACTED] TELEPHONE CONFERENCE WITH [REDACTED] REGARDING SAME.	.50
	BHWO PREPARE WITNESS FILES AS REQUESTED BY SCOTT ATLAS.	3.50
	RELS COMPILE AND VERIFY DOCUMENTS FOR [REDACTED] [REDACTED]; DISTRIBUTE THE SAME; REVIEW [REDACTED] [REDACTED] TO PREPARE NOTEBOOKS FOR EVIDENTIARY HEARING; PREPARE TO HAVE [REDACTED] DOCUMENTS COPIED.	6.50
11/06/93	SJA PREPARE FOR HEARING.	8.50
	JABC REVIEW [REDACTED] TESTIMONY.	3.00
11/07/93	SJA PREPARE FOR HEARING	9.50
	RELS CREATE A [REDACTED] NOTEBOOK FOR [REDACTED]; COMPILE AND VERIFY DOCUMENTS FOR [REDACTED] [REDACTED]; DUPLICATE THE SAME; REVIEW [REDACTED] [REDACTED] TO PREPARE NOTEBOOKS; UPDATE [REDACTED]	6.50

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init		Hours
11/08/93	SJA	PREPARE FOR HEARING; MEET WITH WITNESSES.	7.50
	ACO	ATTEND INTERVIEW SESSION WITH [REDACTED]	2.00
	MDFI	RESEARCH ON [REDACTED]	3.00
	MM	RESEARCH [REDACTED]; MEET WITH [REDACTED]	3.00
	JRM	TELEPHONE CONFERENCE WITH SCOTT ATLAS [REDACTED] REGARDING UPCOMING HEARING.	1.50
	KLG	PREPARE [REDACTED]	1.50
	KEN	COMPLETE [REDACTED] AND PREPARE MEMO TO SCOTT ATLAS REGARDING STATUS OF RESEARCH.	7.50
	SLBR	TELECONFERENCES WITH RICK MORRIS REGARDING VISIT WITH [REDACTED]; TELECONFERENCE WITH PRISON REGARDING SAME; PREPARE FOR EVIDENTIARY HEARING.	5.00
	RELS	REVIEW [REDACTED] TO PREPARE NOTEBOOKS FOR EVIDENTIARY HEARING; COMPILE AND [REDACTED] DOCUMENTS FOR [REDACTED] PREPARE TO HAVE [REDACTED] UPDATE [REDACTED]	7.75
11/09/93	SJA	PREPARE FOR HEARING; MEET WITH WITNESSES.	13.00
	TWK	PREPARE FOR AND PARTICIPATE IN TELEPHONE CONFERENCE WITH SCOTT ATLAS AND WITNESS.	.75
	MM	[REDACTED] RESEARCH.	8.00
	KLG	PREPARE [REDACTED]	1.00
	SLBR	PREPARE FOR EVIDENTIARY HEARING.	6.75
	RELS	REVIEW [REDACTED] TO PREPARE NOTEBOOKS FOR EVIDENTIARY HEARING; COMPILE AND VERIFY DOCUMENTS FOR [REDACTED] UPDATE [REDACTED] PREPARE TO HAVE [REDACTED]	9.75
11/10/93	SJA	PREPARE FOR HEARING; INTERVIEW WITNESSES.	9.50
	MDFI	MEET WITH SCOTT ATLAS REGARDING RESEARCH TO BE DONE AND MEET WITH [REDACTED]-THIS EVENING; RESEARCH ON [REDACTED]	6.25

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
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Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		MEET WITH [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	
11/10/93	MM	RESEARCH; MEETING WITH [REDACTED]	7.50
	KLG	PREPARE [REDACTED] AND TRANSLATION.	2.00
	SLBR	PREPARE FOR EVIDENTIARY HEARING.	5.00
	CCWI	REVIEW [REDACTED] SEARCH.	1.00
	RELS	REVIEW [REDACTED] [REDACTED] TO PREPARE NOTEBOOKS FOR RAG EVIDENTIARY HEARING; COMPILE AND VERIFY DOCUMENTS FOR [REDACTED]; DISTRIBUTE THE SAME; PREPARE TO HAVE [REDACTED]	8.25
11/11/93	SJA	PREPARE FOR HEARING; VISIT WITH WITNESSES.	5.00
	TWK	REVIEW WITNESS INTERVIEWS AND TELEPHONE CONFERENCES WITH SCOTT ATLAS.	.25
	JCO	REVIEW MEMOS REGARDING WITNESS INTERVIEWS.	1.00
	MDFI	DRAFT MEMO REGARDING [REDACTED] [REDACTED]	1.00
	MM	PREPARE ALDAPE CASE FOR TRIAL.	5.50
	EVCA	GATHER CASES FOR RESEARCH MEMORANDUM PER MICHAEL MUCCHETTI'S REQUEST.	1.00
	KLG	REVISE [REDACTED]	1.00
	SLBR	PREPARE FOR EVIDENTIARY HEARING.	10.00
	MHHA	REVIEW, EDIT, AND GATHER CASE LAW RELATING TO SCOTT ATLAS' MEMORANDUM.	1.00
	RELS	REVIEW [REDACTED] [REDACTED] TO PREPARE NOTEBOOKS FOR EVIDENTIARY HEARING; COMPILE AND VERIFY DOCUMENTS FOR [REDACTED]; DISTRIBUTE THE SAME; PREPARE TO HAVE [REDACTED] ASSIST IN THE ISSUANCE OF [REDACTED] [REDACTED], CREATE A [REDACTED] NOTEBOOK FOR JUDGE GEE; TELEFAX [REDACTED] TO SCOTT	11.25

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
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Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		ATLAS IN FLORIDA.	
11/12/93	SJA	PREPARE FOR HEARING.	5.00
	MM	PREPARE MATERIALS FOR ALDAPE GUERRA EVIDENTIARY HEARING.	3.00
	EVCA	REVIEW RESEARCH MEMORANDUM AND CHECK CITES FOR ACCURACY.	1.50
	SLBR	PREPARE FOR EVIDENTIARY HEARING.	7.00
	RELS	TELEPHONE CONFERENCE WITH M. BAIRD JUDGE HOYT'S CASE MANAGER REGARDING COURTROOM AVAILABILITY; ARRANGE FOR TRIAL EXHIBITS TO BE COLOR COPIED; OBTAIN A COPY OF THE TRANSCRIPT OF THE DISCOVERY HEARING IN STATE COURT; COMPILE AND VERIFY DOCUMENTS FOR [REDACTED] AND INSERT INTO NOTEBOOKS; REVIEW [REDACTED] [REDACTED] AND OBTAIN ADDITIONAL REFERENCED DOCUMENTS; DISTRIBUTE THE SAME; REVIEW [REDACTED] [REDACTED] TO PREPARE NOTEBOOKS; PREPARE TO HAVE [REDACTED] [REDACTED]	11.75
11/13/93	SJA	PREPARE FOR HEARING; MEETING AND TELEPHONE CONFERENCES WITH WITNESSES	10.00
	TWK	REVIEW NEW MEMORANDA REGARDING HEARING.	.25
	EOJA	ASSIST WITH PREPARATIONS FOR HEARING ON MONDAY; ORGANIZE [REDACTED] AND ASSIST WITH VARIOUS OTHER PROJECTS AS NEEDED.	11.00
	CCSI	ORGANIZE PLEADINGS; REVIEW AND REVISE INDEX TO SAME.	4.00
	SLBR	PREPARE FOR EVIDENTIARY HEARING.	7.50
	RELS	TELEPHONE CONFERENCE WITH [REDACTED] [REDACTED] REGARDING DOCUMENT TRANSFORMATION TO AND FROM THE COURTHOUSE; CREATE [REDACTED] FILE. [REDACTED] NOTEBOOKS; REVIEW PLEADINGS FILE INDEX AND PULL VARIOUS PLEADINGS; CREATE [REDACTED] [REDACTED] NOTEBOOK; REVIEW PROSECUTION DOCUMENTS [REDACTED] FILES, AND POLICE REPORT FILES TO [REDACTED] NOTEBOOKS FOR EVIDENTIARY HEARING; [REDACTED]	12.75

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

HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW  
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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
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Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		<del>REVIEW DOCUMENTS FOR HEARING</del> ; DISTRIBUTE THE SAME; PREPARE TO HAVE <del>DOCUMENTS</del>	
11/14/93	SJA	VISIT WITH CLIENT; PREPARE FOR HEARING.	14.00
	MDFI	REVIEW SUMMARIES OF ALL TESTIMONY; PREPARE DOCUMENTS FOR REFERENCE DURING DIRECT EXAMINATION; PREPARE TESTIMONY EXCERPTS FOR JUDGE AND FOR SCOTT ATLAS; ORGANIZE ALL BOXES OF MATERIALS.	9.25
	EOJA	ASSIST WITH PREPARATIONS FOR HEARING ON MONDAY; ORGANIZE <del>DOCUMENTS</del> AND ASSIST WITH VARIOUS OTHER PROJECTS AS NEEDED.	8.50
	CCSI	REVIEW AND REVISE INDEX TO PLEADINGS.	2.50
	SLBR	PREPARE FOR EVIDENTIARY HEARING.	2.25
	RELS	FINALIZE <del>DOCUMENTS</del> <del>DOCUMENTS</del> TO BE USED AS NOTEBOOKS FOR EVIDENTIARY HEARING; COMPLETE <del>DOCUMENTS</del> <del>DOCUMENTS</del> ; IDENTIFY AND PREPARE PLTITIONER EXHIBITS; ORGANIZE AND INDEX PRODUCTION BOXES; CREATE A MASTER INDEX OF ALL BOXES.	14.00
11/15/93	SJA	PREPARE FOR AND ATTEND EVIDENTIARY HEARING.	10.75
	JCO	ATTEND EVIDENTIARY HEARING; REVIEW SUMMARIES OF WITNESS INTERVIEWS.	3.50
	MDFI	ATTEND HEARING; PREPARE WITNESSES FOR TESTIMONY; VARIOUS RESEARCH IN FILE; MEETING AFTER HEARING TO DISCUSS PREPARATION FOR NEXT DAY.	10.00
	MM	EVIDENTIARY HEARING; PREPARE FOR SAME.	10.00
	KLK	PREPARE <del>DOCUMENTS</del>	.50
	KEN	FOLLOW-UP ON BACKGROUND <del>RESEARCH</del> AND COMPLETED MEMO REGARDING RESEARCH.	2.50
	SLBR	ASSIST AT EVIDENTIARY HEARING.	8.75
	RELS	PREPARE FOR AND ATTEND EVIDENTIARY HEARING; CREATE A PETITIONER EXHIBIT LIST.	11.75
11/16/93	SJA	PREPARE FOR AND ATTEND EVIDENTIARY HEARING	11.00
	MDFI	ATTEND HEARING; PREPARE WITNESSES FOR TESTIMONY; PICK UP AND RETURN WITNESS TO AND FROM COURTHOUSE;	9.00

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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
11/16/93	MM RESEARCH IN FILE.	
	EVIDENTIARY HEARING; PREPARE FOR SAME; VISIT	12.50
	<del>GUERRA, RICARDO ALDAPE</del> ; TRANSPORTATION TO <del>HOUSTON</del>	
	KLG PREPARE <del>GUERRA, RICARDO ALDAPE</del>	.25
	SLBR ASSIST AT EVIDENTIARY HEARING.	8.75
	RELS PREPARE FOR AND ATTEND RAG EVIDENTIARY HEARING;	12.00
	UPDATE PETITIONER EXHIBIT LIST AND DUPLICATE AND	
	DISTRIBUTE THE SAME.	
11/17/93	SJA PREPARE FOR HEARING.	7.00
	MDFI RESEARCH ON <del>GUERRA, RICARDO ALDAPE</del>	4.00
	MM VISIT- <del>GUERRA, RICARDO ALDAPE</del> ; TRANSPORTATION TO	6.25
	<del>HOUSTON</del> ; BRING ORDER TO JUDGE HOYT'S OFFICE AND	
	WAIT FOR SIGNATURE; DRAFT ORDER REGARDING ALDAPE	
	GUERRA VISIT; PREPARE FOR EVIDENTIARY HEARING.	
	MM DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND	1.50
	CLOSING STATEMENT.	
	RELS TELEPHONE CONFERENCE WITH MYRA BAIRD RE: ADMITTED	4.25
	EXHIBITS; REVIEW <del>GUERRA, RICARDO ALDAPE</del>	
	<del>GUERRA, RICARDO ALDAPE</del> ; UPDATE	
	PETITIONER EXHIBIT LIST; DUPLICATE AND DISTRIBUTE	
	THE SAME.	
11/18/93	SJA PREPARE FOR AND ATTEND HEARING.	13.25
	TWK ATTEND ALDAPE HEARING.	3.00
	MDFI ATTEND HEARING; RESEARCH AND <del>REVIEW OF BRIEF</del> TO	10.50
	PREPARE PROPOSED CONCLUSIONS OF LAW.	
	MM EVIDENTIARY HEARING; <del>SUPPLY WITH THE PREPARED</del>	15.00
	<del>GUERRA, RICARDO ALDAPE</del> ; PREPARE FOR	
	HEARING, INCLUDING EDITING FINDINGS OF FACT.	
	SLBR ASSIST AT EVIDENTIARY HEARING.	8.25
	RELS PREPARE FOR AND ATTEND EVIDENTIARY HEARING; UPDATE	12.00
	PETITIONER EXHIBIT LIST AND DISTRIBUTE THE SAME.	
11/19/93	SJA PREPARE FOR AND ATTEND HEARING.	10.50
	MDFI ATTEND HEARING; RESEARCH <del>AND REVIEW OF BRIEF</del> TO	9.00
	PREPARE PROPOSED CONCLUSIONS OF LAW.	

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HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW  
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Re: GUERRA, RICARDO ALDAPE

	Init	Hours
11/19/93	MM EVIDENTIARY HEARING; EDIT FINDINGS OF FACT.	11.00
	SLBR ASSIST AT EVIDENTIARY HEARING.	8.25
	RELS PREPARE FOR AND ATTEND EVIDENTIARY HEARING; UPDATE PETITIONER EXHIBIT LIST AND DISTRIBUTE THE SAME; ASSIST IN THE ISSUANCE OF [REDACTED] SUBPOENA.	14.25
11/20/93	SJA PREPARE FOR HEARING.	10.00
	RELS COMPILE A [REDACTED] COPY OF THE [REDACTED] UPDATE NOTEBOOKS; REVISE PETITIONER EXHIBIT LIST.	8.25
11/21/93	SJA PREPARE FOR HEARING.	6.00
	MM EDIT FINDINGS OF FACT.	1.00
	RELS CREATE A PETITIONER EXHIBIT NOTEBOOK; TRAVEL TO [REDACTED] REGARDING [REDACTED].	3.25
11/22/93	MDFI ATTEND HEARING; RESEARCH AND [REDACTED] TO PREPARE PROPOSED CONCLUSIONS OF LAW.	8.50
	MM EVIDENTIARY HEARING; PREPARE FOR HEARING; EDIT FINDINGS OF FACT.	10.00
	EVCA TO AND FROM FEDERAL COURTHOUSE FOR DELIVERY OF BRIEF TO MICHAEL MUCCHETTI.	1.00
	SLBR ASSIST AT EVIDENTIARY HEARING.	8.00
	RELS PREPARE FOR AND ATTEND EVIDENTIARY HEARING; UPDATE PETITIONER EXHIBIT LIST.	9.75
11/23/93	MM DRAFT FINDINGS OF FACT.	1.50
	RELS UPDATE PETITIONER EXHIBIT NOTEBOOK; FINALIZE PETITIONER EXHIBIT LIST; DUPLICATE AND DISTRIBUTE THE SAME; REORGANIZE FILES.	4.75
11/24/93	MM EDIT FINDINGS OF FACT.	1.00
11/29/93	JRM TELEPHONE CONFERENCE WITH SCOTT ATLAS AND FOLLOW-UP MEETING WITH TED KASSINGER REGARDING NEW PROJECT; LEGAL RESEARCH REGARDING [REDACTED].	.75
11/30/93	MM EDIT FINDINGS OF FACT.	2.25
12/01/93	TWK REVIEW NEW MATERIALS REGARDING GUERRA CASE.	.25
	MM DRAFT FINDINGS OF FACT.	3.00
12/02/93	MM FINDINGS OF FACT.	3.50

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
12/03/93	MM	FINDINGS OF FACT.	5.00
12/04/93	MM	FINDINGS OF FACT.	1.00
12/06/93	JRM	RESEARCH [REDACTED]	3.00
12/08/93	MDFI	REVIEW OF PROPOSED FINDINGS OF FACT AND WORK ON DRAFTING PROPOSED CONCLUSIONS OF LAW.	5.00
	MM	EDIT FINDINGS OF FACT.	4.00
	JRM	RESEARCH REGARDING [REDACTED]	6.00
12/09/93	JRM	RESEARCH REGARDING [REDACTED]	6.50
12/10/93	SJA	REVIEW AND REVISE FINDINGS OF FACT.	5.00
	MDFI	DRAFT PROPOSED CONCLUSIONS OF LAW.	6.00
	MM	EDIT FINDINGS OF FACT.	2.00
	JRM	FURTHER RESEARCH ON [REDACTED] TELEPHONE CONFERENCE WITH SCOTT ATLAS REGARDING SAME.	5.00
12/13/93	MDFI	DRAFT PROPOSED CONCLUSIONS OF LAW.	2.00
12/14/93	MDFI	TELEPHONE CONFERENCE WITH STAN SCHNEIDER REGARDING CONCLUSIONS OF LAW.	.50
	JRM	RESEARCH ON [REDACTED]	6.00
12/15/93	JRM	FURTHER RESEARCH AND DRAFT MEMORANDUM ON [REDACTED]	4.50
12/17/93	SJA	REVISE PROPOSED FINDINGS.	2.75
12/18/93	SJA	WORK ON FINDINGS.	7.50
12/19/93	SJA	WORK ON FINDINGS.	12.25
	JRM	FURTHER RESEARCH AND DRAFTING OF MEMORANDUM REGARDING [REDACTED]	4.00
12/20/93	SJA	WORK ON PROPOSAL FINDINGS.	6.25
	JRM	RESEARCH REGARDING [REDACTED]	4.00
12/21/93	SJA	REVIEW AND REVISE PROPOSED FINDINGS.	6.00
	MDFI	DRAFT PROPOSED CONCLUSIONS OF LAW.	2.50
	JRM	RESEARCH REGARDING [REDACTED]	3.50
12/22/93	SJA	REVIEW AND REVISE PROPOSED FINDINGS.	10.00

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	Init	Hours
12/22/93	MDFI DRAFT PROPOSED CONCLUSIONS OF LAW.	3.00
	JRM RESEARCH REGARDING [REDACTED]	2.00
12/23/93	SJA WORK ON PROPOSED FINDINGS.	16.25
	JRM FINISHED MEMORANDUM ON [REDACTED]	3.50
12/26/93	SJA REVIEW AND REVISE PROPOSED FINDINGS.	8.00
12/27/93	SJA REVIEW AND REVISE PROPOSED FINDINGS.	3.50
12/28/93	SJA REVIEW AND REVISE PROPOSED FINDINGS; MISCELLANEOUS TELEPHONE CALLS REGARDING SAME.	4.75
12/29/93	SJA REVIEW AND REVISE PROPOSED FINDINGS; REVIEW LENGTHY VOICE MAIL MESSAGES REGARDING SAME; TELEPHONE CONFERENCES WITH STAN SCHNEIDER AND TOM GEE REGARDING SAME.	3.50
	TWK REVIEW JIM MARKHAM MEMORANDUM AND DRAFT BRIEF.	1.00
	GLAC CITE CHECK STATEMENT OF FACTS BRIEF.	2.75
12/30/93	SJA FINAL REVIEW AND REVISION OF PROPOSED FINDINGS.	2.75
	TWK RESEARCH, REVIEW, AND REVISE DRAFT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; TELEPHONE CONFERENCE WITH SCOTT ATLAS ON SAME.	.75
1/13/94	TWK REVIEW STATE'S PROPOSED FINDINGS OF FACT AND LAW.	.25
1/14/94	JRM FIND AND BEGIN TO REVIEW [REDACTED] [REDACTED]	.50
1/15/94	SJA TEAM MEETING TO PLAN FEDERAL HABEAS; NUMEROUS TELEPHONE CONFERENCES WITH TEAMS.	3.00
1/26/94	MM CONVERSATIONS WITH COURT REPORTER, COURT SECRETARY, COURT CLERK, AND SCOTT ATLAS.	1.00
1/27/94	MM DRAFT MOTION, ORDER, AND ATTORNEY AFFIDVIT.	1.00
2/16/94	SJA MISCELLANEOUS TELEPHONE CONFERENCES.	.75
2/17/94	SJA REVISE SUMMARY.	.75
3/23/94	SJA TRANSLATE FOR SCOTT ATLAS IN WITNESS INTERVIEWS.	8.00
5/13/94	SJA ARRANGE FOR [REDACTED]	.25
10/07/94	SJA REVIEW MISCELLANEOUS MATERIALS; RESEARCH [REDACTED]	6.75
10/26/94	SJA TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER REGARDING STATUS OF THE CASE.	.25
11/08/94	SJA REORGANIZE FILES.	2.25

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Account Number PRO127 29000  
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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
11/11/94	SJA	REVIEW NEW MATERIALS.	4.00
11/14/94	SJA	REVIEW NEW MATERIALS.	6.00
11/15/94	SJA	OBTAIN COURT OPINION; REVIEW SAME.	1.00
	MM	READ ORDER.	1.00
11/20/94	SJA	REVIEW CORRESPONDENCE; REVIEW AND REVISE [REDACTED] [REDACTED] WORK ON LETTER TO ATTORNEY GENERAL; REVIEW RECORD REGARDING OPINION.	4.00
11/21/94	MM	WRITE MEMO REGARDING [REDACTED]	6.00
11/22/94	SJA	TELEPHONE CONFERENCES WITH STAN SCHNEIDER, WILLIAM ZAPALAC; WORK ON RESPONSE TO DISTRICT ATTORNEY LETTER TO ATTORNEY GENERAL; REVIEW AND REVISE [REDACTED]	2.50
	MM	PREPARE MEMO REGARDING [REDACTED]	4.00
11/23/94	SJA	MISCELLANEOUS TELEPHONE CONVERSATIONS; COMPARE [REDACTED]	6.00
	MM	RESEARCH [REDACTED]	2.00
11/28/94	SJA	MISCELLANEOUS TELEPHONE CONFERENCES WITH AMICUS COUNSEL AND CO-COUNSEL; COMPARE [REDACTED] [REDACTED]; BEGIN DRAFT OF REPLY.	6.25
	MM	RESEARCH [REDACTED]	3.50
11/29/94	SJA	REVIEW [REDACTED]	6.75
	MM	RESEARCH [REDACTED]	3.00
11/30/94	SJA	REVIEW OPINION TO IDENTIFY LEGAL ISSUES; TELEPHONE CONFERENCE WITH MANUEL LOPEZ REGARDING ISSUES TO RESEARCH; TELEPHONE CONFERENCES WITH STANLEY SCHNEIDER REGARDING ISSUES TO RESEARCH.	5.25
	MM	[REDACTED]	1.00
	ML	CONFERENCE WITH SCOTT ATLAS REGARDING RESEARCH ON [REDACTED] RESEARCH [REDACTED] [REDACTED]	3.00
12/01/94	SJA	TELEPHONE CONFERENCE WITH STANLEY SCHNEIDER REGARDING [REDACTED]; TELEPHONE CONFERENCE WITH MANUEL LOPEZ REGARDING RESEARCH [REDACTED] [REDACTED] REVIEW VOICE MAIL FROM MANUEL LOPEZ REGARDING RESEARCH [REDACTED], RESEARCH ISSUE OF	6.75

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
		REVIEW OPINION FOR [REDACTED]	
		PREPARE FOR APPEAL.	
12/01/94	ML	SEND OCTEL TO SCOTT ATLAS REGARDING [REDACTED] [REDACTED]; RESEARCH [REDACTED]	7.50
12/02/94	SJA	OFFICE CONFERENCE AND TELEPHONE CONFERENCE WITH MANUEL LOPEZ REGARDING [REDACTED] [REDACTED] REVIEW; REVIEW AND REVISE MICHAEL MUCCHETTI'S MEMO REGARDING [REDACTED] [REDACTED] AND REVIEW MISCELLANEOUS CASES; REVIEW AND REVISE MANUEL LOPEZ' MEMO REGARDING [REDACTED]; WORK ON MOTION TO AMEND.	6.75
	MM	RESEARCH [REDACTED]	4.00
	ML	RESEARCH [REDACTED] [REDACTED]; TELEPHONE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING RESEARCH [REDACTED] [REDACTED]; READ MEMORANDUM FROM MICHAEL MUCCHETTI ON [REDACTED]; LISTEN TO OCTEL FROM SCOTT ATLAS REGARDING [REDACTED] [REDACTED]; RESEARCH [REDACTED] [REDACTED] TELEPHONE CONFERENCE WITH SHARON TRIGG IN DISTRICT CLERK'S OFFICE REGARDING C.J.A.FORM FOR RECOVERY OF ATTORNEYS' FEES.	2.25
12/05/94	SJA	COMPARE [REDACTED]; PREPARE FOR APPEAL.	6.25
	ML	RESEARCH [REDACTED]	.50
	ABRU	LOCATE [REDACTED]	.25
12/06/94	SJA	COMPARE [REDACTED] PREPARE FOR APPEAL.	5.00
	MM	RESEARCH [REDACTED]	1.50

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Re: GUERRA, RICARDO ALDAPE

	Init		Hours
12/07/94	SJA	COMPARE [REDACTED]; PREPARE FILES FOR APPEAL.	7.00
	MM	[REDACTED]	4.00
12/08/94	SJA	COMPARE [REDACTED]; PREPARE FILE FOR APPEAL.	8.00
	ML	LISTEN TO OCTEL FROM MICHAEL MUCCHETTI REGARDING [REDACTED]; TELEPHONE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING [REDACTED].	.50
12/09/94	SJA	COMPARE [REDACTED]; PREPARE FOR APPEAL.	8.50
	MM	EDIT MEMORANDUM REGARDING [REDACTED]	1.00
	ML	CONFERENCES WITH SCOTT ATLAS AND ROBERT SUMMERLIN REGARDING [REDACTED]; TELEPHONE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING [REDACTED].	1.00
12/12/94	SJA	COMPARE [REDACTED]; BEGIN PREPARATION OF MEMO REGARDING SAME; BEGIN PREPARING FOR APPEAL.	7.75
	ML	TELEPHONE CONFERENCE WITH MICHAEL MUCCHETTI REGARDING [REDACTED].	.25
12/13/94	SJA	PREPARE MEMO ANALYZING [REDACTED]; PREPARE FOR APPEAL.	4.25
12/14/94	SJA	PREPARE FOR APPEAL; PREPARE MEMO ANALYZING [REDACTED]	1.50
12/15/94	SJA	REVIEW AND REVISE DRAFT MEMO ANALYZING [REDACTED]	.50
12/18/94	ML	EDIT [REDACTED]	1.50
12/19/94	ML	EDIT [REDACTED]	6.25

VINSON & ELKINS  
L.L.P.

ATTORNEYS AT LAW

HOUSTON

DALLAS

AUSTIN

WASHINGTON

LONDON

MOSCOW

IRS NO 74-1183015

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Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

	Init		Hours
12/20/94	TWK	REVIEW SCOTT ATLAS MEMORANDA AND CONFERENCES WITH SCOTT ATLAS REGARDING [REDACTED]	.75
	ML	RESEARCH [REDACTED] [REDACTED] EDIT [REDACTED] [REDACTED]	.50
12/21/94	RELS	NUMEROUS CONFERENCES WITH MANUEL LOPEZ REGARDING [REDACTED] REVIEW AND REVISE [REDACTED]	2.50

Current fees, total \$250,345.00

Disbursements and other charges through December 22, 1994

## COMPUTER RESEARCH

12/08/92	JRM	WESTLAW	204.72
12/10/92	JRM	LEXIS	166.16
12/10/92	JRM	WESTLAW	126.54
12/22/92	MDFI	LEXIS	16.61
12/22/92	MDFI	WESTLAW	4.37
12/29/92	LRV	WESTLAW	113.86
10/06/93	MM	WESTLAW	193.86
10/21/93	MM	WESTLAW	31.11
11/08/93	KTG	LEXIS	22.66
11/08/93	MM	WESTLAW	548.27
11/08/93	JRM	LEXIS	59.55
11/10/93	MDFI	LEXIS	13.99
11/10/93	MDFI	WESTLAW	55.65
11/11/93	JLG	WESTLAW	290.42
11/16/93	CHM	WESTLAW	45.79
12/19/93	JRM	LEXIS	13.03
12/21/93	JRM	LEXIS	113.60
1/14/94	JRM	LEXIS	33.30

COMPUTER RESEARCH \$2,053.49

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

PHOTOCOPY

1/19/93	MKS	UNIT-50	TM-10:47	1.00
1/19/93	ACO	UNIT-66	TM-10:04	3.10
5/06/93	RGAR	UNIT-30	TM-10:19	60.50
7/30/93	SJA	UNIT-48	TM-14:25	4.00
8/05/93	SJA	UNIT-28	TM-11:16	6.80
8/10/93	SJA	UNIT-28	TM-09:23	1.10
8/12/93	SJA	UNIT-25	TM-16:46	38.50
8/12/93	SJA	UNIT-31	TM-15:33	11.30
8/16/93	SJA	UNIT-28	TM-16:29	6.90
9/14/93	SJA	UNIT-28	TM-16:08	1.50
9/22/93	SJA	UNIT-28	TM-17:01	9.50
9/30/93	SJA	UNIT-28	TM-16:20	16.40
9/30/93	SJA	UNIT-31	TM-16:04	28.80
9/30/93	SJA	UNIT-48	TM-16:28	2.50
9/30/93	MALA	UNIT-48	TM-16:52	8.50
10/01/93	MALA	UNIT-28	TM-10:05	36.80
10/04/93	SJA	UNIT-29	TM-12:11	1.00
10/06/93	SJA	UNIT-20	TM-10:36	88.20
10/06/93	SJA	UNIT-21	TM-12:25	24.10
10/06/93	SJA	UNIT-22	TM-10:16	63.00
10/06/93	SJA	UNIT-28	TM-16:10	20.10
10/06/93	MALA	UNIT-28	TM-09:49	28.10
10/06/93	MALA	UNIT-48	TM-11:33	22.40
10/07/93	SJA	UNIT-17	TM-13:48	18.00
10/07/93	SJA	UNIT-28	TM-16:19	15.00
10/07/93	MALA	UNIT-28	TM-15:34	16.30
10/07/93	MALA	UNIT-45	TM-14:33	64.40
10/11/93	SJA	UNIT-17	TM-13:13	16.70
10/11/93	SJA	UNIT-20	TM-13:23	6.30
10/11/93	SJA	UNIT-22	TM-13:24	4.70
10/11/93	SJA	UNIT-28	TM-15:51	14.70
10/12/93	SJA	UNIT-28	TM-15:36	30.30
10/15/93	SJA	UNIT-18	TM-15:32	55.80
10/15/93	SJA	UNIT-20	TM-16:12	3.80
10/15/93	SJA	UNIT-21	TM-15:54	15.60

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

HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW  
I.R.S. NO 74-1183015

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Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

10/15/93	SJA UNIT-28 TM-16:40	5.00
10/15/93	MALA UNIT-48 TM-14:57	4.20
10/15/93	SJA UNIT-98 TM-23:44 BINDING & CHRGS	6.00
10/18/93	SJA UNIT-28 TM-16:53	34.50
10/19/93	MALA UNIT-28 TM-16:17	1.00
10/19/93	MALA UNIT-48 TM-16:25	6.40
10/21/93	SJA UNIT-21 TM-14:56	81.90
10/21/93	SJA UNIT-22 TM-15:48	40.30
10/21/93	MALA UNIT-28 TM-10:39	4.00
10/22/93	MM UNIT-32 TM-12:05	1.70
10/26/93	SJA UNIT-28 TM-10:14	10.00
10/26/93	SJA UNIT-29 TM-13:37	32.10
10/27/93	SJA UNIT-28 TM-18:11	3.60
10/28/93	SJA UNIT-18 TM-13:50	98.90
10/28/93	MALA UNIT-28 TM-11:24	2.80
10/28/93	MALA UNIT-48 TM-15:32	23.00
10/28/93	RELS UNIT-17 TM-14:22	13.10
10/28/93	RELS UNIT-22 TM-19:34	32.10
10/28/93	RELS UNIT-28 TM-18:03	1.40
10/28/93	RELS UNIT-48 TM-17:04	21.10
10/28/93	RLLS UNIT-73 TM-13:48	4.40
10/29/93	MALA UNIT-48 TM-12:09	4.80
10/29/93	RELS UNIT-20 TM-11:21	13.60
10/29/93	RELS UNIT-28 TM-17:38	6.40
10/30/93	SJA UNIT-28 TM-15:18	7.10
10/31/93	RELS UNIT-28 TM-14:17	5.70
11/01/93	SJA UNIT-28 TM-17:00	2.50
11/01/93	RELS UNIT-18 TM-11:01	28.50
11/01/93	RELS UNIT-28 TM-15:38	16.60
11/01/93	RELS UNIT-48 TM-15:06	10.70
11/02/93	SJA UNIT-28 TM-17:25	26.10
11/02/93	MALA UNIT-28 TM-15:43	5.10
11/02/93	RELS UNIT-27 TM-14:39	1.30
11/02/93	RELS UNIT-28 TM-17:50	12.90
11/02/93	SJA UNIT-98 TM-10:33 COLOR COPYING	2.00
11/02/93	SJA UNIT-98 TM-10:33 COLOR COPYING	12.00
11/03/93	SJA UNIT-28 TM-17:00	17.30

VINSON & ELKINS  
L.L.P.

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HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW  
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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/03/93	MALA UNIT-48	TM-10:46		1.10
11/03/93	RELS UNIT-21	TM-19:34		2.70
11/03/93	RELS UNIT-28	TM-17:54		15.80
11/03/93	RELS UNIT-48	TM-17:21		2.30
11/03/93	RELS UNIT-98	TM-23:43	COLOR COPYING	8.00
11/04/93	SJA UNIT-28	TM-11:52		2.50
11/04/93	MALA UNIT-28	TM-14:10		26.20
11/04/93	RELS UNIT-20	TM-15:04		36.80
11/04/93	RELS UNIT-28	TM-21:17		47.60
11/05/93	SJA UNIT-28	TM-14:13		21.20
11/05/93	EOJA UNIT-26	TM-15:08		11.20
11/05/93	EOJA UNIT-28	TM-17:54		1.70
11/05/93	RELS UNIT-20	TM-17:46		473.20
11/05/93	RELS UNIT-28	TM-15:23		34.10
11/05/93	RELS UNIT-98	TM-18:27	COLOR COPYING	36.00
11/05/93	RELS UNIT-98	TM-18:28	COLOR COPYING	64.00
11/06/93	SJA UNIT-28	TM-16:52		11.30
11/07/93	SJA UNIT-28	TM-19:35		3.20
11/07/93	RELS UNIT-28	TM-21:27		48.10
11/08/93	SJA UNIT-28	TM-17:05		8.50
11/08/93	MALA UNIT-28	TM-10:52		15.00
11/08/93	RELS UNIT-28	TM-20:20		58.60
11/08/93	RELS UNIT-29	TM-13:38		6.70
11/08/93	RELS UNIT-98	TM-07:41	COLOR COPYING	50.00
11/08/93	RELS UNIT-98	TM-22:14	COLOR COPYING	2.00
11/09/93	SJA UNIT-28	TM-20:37		36.60
11/09/93	SJA UNIT-29	TM-15:02		5.80
11/09/93	MALA UNIT-28	TM-16:06		6.00
11/09/93	SLBR UNIT-20	TM-11:20		11.90
11/09/93	SLBR UNIT-23	TM-14:08		19.70
11/09/93	SLBR UNIT-28	TM-13:43		7.10
11/09/93	RELS UNIT-23	TM-12:49		55.60
11/09/93	RELS UNIT-28	TM-17:05		24.40
11/09/93	RELS UNIT-48	TM-14:36		2.70
11/09/93	SJA UNIT-98	TM-08:27	COLOR COPYING	40.00
11/09/93	RELS UNIT-98	TM-08:17	COLOR COPYING	96.00
11/09/93	RELS UNIT-98	TM-08:18	COLOR COPYING	112.00

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HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW  
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Account Number PRO127 29000  
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Re: GUERRA, RICARDO ALDAPE

11/10/93	SJA	UNIT-28	TM-17:15	94.70
11/10/93	SLBR	UNIT-29	TM-15:19	1.00
11/10/93	RELS	UNIT-28	TM-16:12	5.80
11/11/93	SJA	UNIT-28	TM-18:03	130.20
11/11/93	SJA	UNIT-34	TM-15:51	12.80
11/11/93	MM	UNIT-37	TM-11:25	3.20
11/11/93	SLBR	UNIT-28	TM-11:24	4.40
11/11/93	RELS	UNIT-21	TM-13:49	46.80
11/11/93	RELS	UNIT-23	TM-20:02	4.20
11/11/93	RELS	UNIT-28	TM-19:05	6.20
11/11/93	RELS	UNIT-48	TM-13:58	5.20
11/11/93	SLBR	UNIT-98	TM-15:44 COLOR COPYING	2.00
11/11/93	SLBR	UNIT-98	TM-15:47 COLOR COPYING	32.00
11/11/93	RELS	UNIT-98	TM-22:55 COLOR COPYING	8.00
11/11/93	RELS	UNIT-98	TM-22:58 COLOR COPYING	4.00
11/11/93	RELS	UNIT-98	TM-22:58 COLOR COPYING	30.00
11/11/93	RELS	UNIT-98	TM-22:59 COLOR COPYING	118.00
11/12/93	SJA	UNIT-18	TM-17:01	6.50
11/12/93	SJA	UNIT-23	TM-12:51	6.20
11/12/93	SJA	UNIT-28	TM-17:11	7.20
11/12/93	MM	UNIT-32	TM-11:25	5.90
11/12/93	SLBR	UNIT-21	TM-17:13	1.40
11/12/93	SLBR	UNIT-28	TM-16:13	5.00
11/12/93	RELS	UNIT-17	TM-13:44	311.00
11/12/93	RELS	UNIT-20	TM-12:59	202.20
11/12/93	RELS	UNIT-21	TM-09:48	24.40
11/12/93	RELS	UNIT-23	TM-20:12	43.70
11/12/93	RELS	UNIT-28	TM-20:28	79.00
11/12/93	RELS	UNIT-29	TM-14:07	2.70
11/12/93	RELS	UNIT-30	TM-14:21	18.80
11/12/93	RELS	UNIT-98	TM-23:19 BINDING & CHRGS	108.08
11/12/93	RELS	UNIT-98	TM-23:22	1.60
11/12/93	RELS	UNIT-98	TM-23:23	26.70
11/12/93	RELS	UNIT-98	TM-23:23 BINDING & CHRGS	2.00
11/13/93	SJA	UNIT-28	TM-18:00	32.00
11/13/93	EOJA	UNIT-28	TM-19:50	88.20
11/13/93	MALA	UNIT-28	TM-13:39	10.10

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Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/13/93	RELS UNIT-28 TM-18:14	34.10
11/13/93	RELS UNIT-48 TM-19:23	7.40
11/14/93	SJA UNIT-28 TM-23:22	97.00
11/14/93	MDFI UNIT-28 TM-20:54	2.80
11/14/93	EOJA UNIT-28 TM-22:06	106.20
11/14/93	MALA UNIT-28 TM-17:08	5.10
11/14/93	CCSI UNIT-28 TM-14:54	1.40
11/14/93	RELS UNIT-28 TM-23:10	231.30
11/14/93	RELS UNIT-48 TM-23:28	13.40
11/15/93	MALA UNIT-28 TM-14:34	5.00
11/15/93	MALA UNIT-48 TM-11:04	1.20
11/15/93	RELS UNIT-98 TM-07:54 BINDING & CHRGS	2.00
11/15/93	RELS UNIT-98 TM-08:32 BINDING & CHRGS	8.00
11/15/93	SJA COPIES BY NIGHTRIDER IN COURTHOUSE	2.70
11/16/93	MALA UNIT-28 TM-12:31	16.50
11/16/93	RELS UNIT-28 TM-07:56	1.00
11/17/93	SJA UNIT-28 TM-13:34	1.30
11/18/93	SJA UNIT-28 TM-15:03	17.60
11/18/93	RELS UNIT-28 TM-17:51	49.40
11/19/93	MALA UNIT-48 TM-16:10	1.00
11/19/93	RELS UNIT-28 TM-12:55	3.40
11/19/93	SJA COPIES BY NIGHTRIDER IN COURTHOUSE	.40
11/20/93	SJA UNIT-28 TM-16:49	5.30
11/20/93	RELS UNIT-28 TM-18:59	32.40
11/21/93	SJA UNIT-28 TM-15:33	13.50
11/21/93	RELS UNIT-28 TM-14:38	1.90
11/22/93	SLBR DISCOVERY DOCUMENT SERVICES-COPIES	38.00
11/22/93	SJA UNIT-28 TM-08:25	3.00
11/22/93	MM UNIT-32 TM-11:23	1.50
11/22/93	MM UNIT-52 TM-14:21	2.50
11/22/93	MALA UNIT-48 TM-08:43	1.90
11/22/93	RELS UNIT-28 TM-12:57	2.40
11/22/93	RELS UNIT-48 TM-18:25	8.40
11/23/93	RELS UNIT-28 TM-10:53	4.30
11/23/93	RELS UNIT-48 TM-14:58	1.00
11/23/93	SJA UNIT-98 TM-14:05 COLOR COPYING	2.00
11/24/93	SJA DISCOVERY DOCUMENT SERVICES-COPIES	62.70

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Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/24/93	SLBR DISCOVERY DOCUMENT SERVICES-COPIES	42.22
11/24/93	SJA UNIT-28 TM-15:20	1.70
11/24/93	SJA UNIT-37 TM-11:06	5.30
11/24/93	MALA UNIT-28 TM-12:59	1.20
11/24/93	MALA UNIT-48 TM-14:54	1.20
11/29/93	SJA UNIT-28 TM-10:25	32.10
11/30/93	SJA UNIT-28 TM-17:02	13.30
11/30/93	SJA UNIT-98 TM-07:33 BINDING & CHRGS	2.00
12/01/93	SJA UNIT-28 TM-15:43	34.20
12/03/93	SJA UNIT-28 TM-16:13	4.90
12/03/93	MALA UNIT-28 TM-09:28	1.30
12/04/93	MM UNIT-32 TM-14:22	2.10
12/06/93	SJA UNIT-28 TM-15:55	1.00
12/09/93	RELS UNIT-28 TM-10:42	2.90
12/09/93	JRM UNIT-87 TM-18:33	5.00
12/10/93	MM UNIT-32 TM-09:28	10.00
12/10/93	JRM UNIT-87 TM-18:11	2.40
12/10/93	JRM UNIT-89 TM-16:37	1.70
12/14/93	JRM UNIT-87 TM-16:31	4.20
12/15/93	SJA A-1 BLUE PRINT-COPIES	87.68
12/15/93	SJA A-1 BLUE PRINT-COPIES	43.84
12/15/93	SLBR A-1 BLUE PRINT-COPIES	54.02
12/15/93	RELS A-1 BLUE PRINT-COPIES	41.89
12/15/93	RELS A-1 BLUE PRINT-COPIES	48.71
12/15/93	RELS A-1 BLUE PRINT-COPIES	22.57
12/15/93	RELS A-1 BLUE PRINT-COPIES	43.84
12/24/93	SJA UNIT-28 TM-00:59	5.90
12/26/93	SJA UNIT-28 TM-18:36	1.80
12/27/93	SJA UNIT-22 TM-10:26	155.40
12/27/93	SJA UNIT-28 TM-09:32	10.00
12/27/93	MALA UNIT-22 TM-11:08	85.80
12/27/93	MALA UNIT-28 TM-09:11	15.60
12/27/93	MALA UNIT-48 TM-14:33	7.20
12/30/93	SJA UNIT-28 TM-15:38	149.90
12/30/93	SJA UNIT-48 TM-08:08	1.50
12/30/93	MALA UNIT-28 TM-16:38	10.10
1/03/94	SJA UNIT-18 TM-12:41	139.80

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Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

1/03/94	SJA	UNIT-28	TM-13:55		11.10
1/04/94	SJA	UNIT-28	TM-16:25		60.50
1/07/94	SJA	UNIT-28	TM-15:47		13.20
1/12/94	SJA	UNIT-28	TM-13:18		2.10
1/13/94	SJA	UNIT-36	TM-14:04		11.60
1/19/94	MDFI	UNIT-98	TM-10:24	COPIES	.90
4/26/94	SJA	UNIT-50	TM-13:43		2.10
11/15/94	SJA	UNIT-20	TM-16:25		230.00
11/15/94	SJA	UNIT-28	TM-17:08		28.60
11/16/94	SJA	UNIT-28	TM-10:09		69.60
11/16/94	SJA	UNIT-60	TM-14:54		68.50
11/17/94	SJA	UNIT-28	TM-14:47		93.60
11/17/94	SJA	UNIT-48	TM-13:36		3.00
11/18/94	SJA	UNIT-20	TM-15:08		14.70
11/21/94	SJA	UNIT-28	TM-09:32		7.00
11/21/94	MM	UNIT-51	TM-12:08		3.50
11/22/94	SJA	UNIT-28	TM-15:39		14.10
11/23/94	SJA	UNIT-20	TM-15:25		38.70
11/23/94	SJA	UNIT-28	TM-15:48		12.90
11/23/94	MM	UNIT-52	TM-10:28		3.80
11/28/94	SJA	UNIT-28	TM-16:38		8.50
11/29/94	SJA	UNIT-28	TM-20:07		7.30
11/29/94	SJA	UNIT-29	TM-15:07		56.50
11/30/94	SJA	UNIT-28	TM-16:27		9.40
12/01/94	SJA	UNIT-28	TM-14:14		3.50
12/01/94	MM	UNIT-50	TM-13:24		7.40
12/01/94	ML	UNIT-40	TM-11:38		1.90
12/02/94	MM	UNIT-32	TM-09:39		7.10
12/05/94	SJA	UNIT-28	TM-16:20		3.40
12/05/94	MM	UNIT-50	TM-14:32		7.20
12/06/94	SJA	UNIT-28	TM-13:57		14.60
12/07/94	SJA	UNIT-28	TM-16:03		7.70
12/07/94	MM	UNIT-50	TM-18:37		2.00
12/08/94	SJA	UNIT-28	TM-16:43		9.60
12/08/94	MM	UNIT-50	TM-09:56		3.00
12/08/94	MM	UNIT-52	TM-09:59		6.70
12/12/94	SJA	UNIT-29	TM-14:48		11.60

V I N S O N & E L K I N S  
L.L.P.  
ATTORNEYS AT LAW

HOUSTON DALLAS AUSTIN WASHINGTON LONDON MOSCOW

I.R.S. NO. 74-1183015

December 27, 1994

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Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

12/12/94	SJA	UNIT-60 TM-11:25	10.30
12/12/94	ML	UNIT-29 TM-16:40	6.60
12/14/94	SJA	UNIT-24 TM-14:39	55.90
12/15/94	SJA	UNIT-28 TM-15:01	7.30
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			PHOTOCOPY \$7,113.06

COURIER SERVICES

8/05/93	SJA	FEDERAL EXPRESS 01836285491	22.50
9/30/93	SJA	09/30/93 HE#0930151 BILL PACK	2.50
9/30/93	SJA	09/30/93 HE#0930154 U.S. DISTRICT COURT	2.50
10/06/93	SJA	HOUSTON TO WASHINGTON COURIER PAK	8.50
10/06/93	SJA	HOUSTON TO WASHINGTON COURIER PAK	8.50
10/15/93	SJA	FEDERAL EXPRESS 01836337431	49.25
10/18/93	SJA	COURT MESSENGER SERVICE	5.00
10/21/93	SJA	FEDERAL EXPRESS 01836341001	56.75
10/21/93	SJA	FEDERAL EXPRESS 01836341096	29.00
10/25/93	SJA	10/25/93 HE#1025108 FELDMAN & ASSOCIATES	13.25
10/29/93	SJA	FEDERAL EXPRESS 01836348315	15.00
11/10/93	SJA	COURT MESSENGER SERVICE	5.00
11/11/93	SJA	AUS COURIER: ATTORNEY GENERAL'S OFFICE	16.25
11/12/93	SJA	11/12/93 HE#1112003 SCHNEIDER & MCKINNEY	11.00
11/12/93	SJA	11/12/93 HE#1112092 FELDMAN AND ASSOCIATES	11.00
11/17/93	SJA	11/17/93 HE#1117093 MEXICAN CONSULATE OFFICE	11.00
12/10/93	SJA	TRANSPORTING DOCS & EXHIBITS TO & FROM CTHOUS	556.50
12/10/93	MM	12/10/93 HE#1210033 FELDMAN & ASSOCIATES	7.13
12/27/93	SJA	FEDERAL EXPRESS 01836386027	22.50
12/27/93	SJA	12/27/93 HE#1227095 FELDMAN & ASSOCIATES	7.13
12/30/93	SJA	12/30/93 HE#1230142 STANLEY SCHNEIDER	7.13
1/03/94		HOUSTON TO WASHINGTON COURIER	8.50
1/03/94		HOUSTON TO WASHINGTON COURIER	8.50
1/03/94	SJA	COURT MESSENGER SERVICE	5.00
2/02/94	SJA	01/13/94 FEDERAL EXPRESS	33.00
10/04/94	SJA	HOUSTON TO WASHINGTON COURIER	8.50
11/15/94		FEDERAL EXPRESS 03635890221	15.50
11/15/94	SJA	FEDERAL EXPRESS 03635890316	15.50
11/15/94	SJA	FEDERAL EXPRESS 03635890413	15.50

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PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/15/94	SJA	FEDERAL EXPRESS	03635890422	22.50
11/15/94	SJA	11/15/94 HE#1115170 STANLEY SCHNEIDER		7.13
11/16/94		FEDERAL EXPRESS	03635890912	15.50
11/16/94	SJA	FEDERAL EXPRESS	03635891086	15.50
11/23/94	SJA	FEDERAL EXPRESS	03635896004	47.50
11/30/94	SJA	FEDERAL EXPRESS	03635899172	15.50
11/30/94	SJA	FEDERAL EXPRESS	03635899181	22.50
12/20/94	SJA	FEDERAL EXPRESS	03635915202	15.50

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COURIER SERVICES \$1,139.02

## TELEFAX

8/26/93	SJA	TELEFAX		2.00
9/30/93	SJA	TELEFAX		75.00
10/15/93	RGAR	UNIT-30 TM-13:21	918173227463	2.00
10/25/93	SJA	UNIT-28 TM-15:51	99606025	4.00
10/25/93	SJA	UNIT-28 TM-15:54	99606025	2.00
10/25/93	SJA	UNIT-28 TM-15:56	96689054	5.00
10/26/93	SJA	TELEFAX		13.00
10/27/93	MALA	UNIT-28 TM-10:52	90115252803669	3.00
10/28/93	SJA	UNIT-28 TM-13:55	99606025	2.00
10/28/93	SJA	UNIT-28 TM-13:57	92291522	4.00
10/28/93	SJA	UNIT-28 TM-14:51	98612562	5.00
10/30/93	SJA	TELEFAX		9.00
10/30/93	SJA	TELEFAX		12.00
11/01/93	SJA	UNIT-28 TM-16:02	99606025	4.00
11/01/93	SJA	UNIT-28 TM-16:42	98626237	2.00
11/02/93	MALA	UNIT-28 TM-14:29	912034320136	5.00
11/02/93	MALA	UNIT-28 TM-16:08	912034320136	5.00
11/03/93	SJA	UNIT-28 TM-09:50	912024348008	4.00
11/03/93	SJA	UNIT-28 TM-16:05	912066853157	5.00
11/04/93	SJA	TELEFAX		21.00
11/05/93	SJA	TELEFAX		3.00
11/08/93	SJA	UNIT-28 TM-16:50	915124632084	4.00
11/09/93	MALA	UNIT-28 TM-11:25	915124772153	10.00
11/09/93	MALA	UNIT-28 TM-11:33	92291522	10.00
11/09/93	MALA	UNIT-28 TM-11:43	92291522	1.00

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Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/10/93	SJA	UNIT-28	TM-09:10	99615954	17.00
11/10/93	SJA	UNIT-28	TM-17:36	915124632084	10.00
11/10/93	SJA	TELEFAX			8.00
11/10/93	SJA	TELEFAX			13.00
11/10/93	SJA	TELEFAX			9.00
11/10/93	SJA	TELEFAX			10.00
11/11/93	SJA	UNIT-28	TM-12:24	99606025	13.00
11/11/93	RELS	UNIT-28	TM-19:06	918132873664	10.00
11/11/93	SJA	TELEFAX			3.00
11/12/93	SJA	UNIT-28	TM-17:20	97555809	9.00
11/12/93	SJA	TELEFAX			2.00
11/12/93	SJA	TELEFAX			2.00
11/12/93	SJA	TELEFAX			2.00
11/12/93	SJA	TELEFAX			10.00
11/12/93	SJA	TELEFAX			2.00
11/13/93	SJA	UNIT-28	TM-11:45	92291522	18.00
11/13/93	SJA	UNIT-28	TM-13:04	99615954	3.00
11/13/93	SJA	UNIT-28	TM-13:50	99615954	8.00
11/13/93	SJA	UNIT-28	TM-13:55	99615954	3.00
11/13/93	SJA	UNIT-28	TM-13:59	92291522	2.00
11/13/93	SJA	UNIT-28	TM-14:11	99615954	2.00
11/13/93	SJA	UNIT-28	TM-14:27	915124772153	11.00
11/13/93	SJA	UNIT-28	TM-16:46	99615954	6.00
11/13/93	SJA	UNIT-28	TM-17:54	99615954	29.00
11/13/93	SJA	UNIT-28	TM-18:08	2346	1.00
11/13/93	SJA	UNIT-28	TM-18:20	99615954	4.00
11/13/93	SJA	UNIT-28	TM-18:22	99615954	3.00
11/13/93	SJA	UNIT-28	TM-18:25	92291522	37.00
11/13/93	SJA	UNIT-28	TM-18:42	92291522	6.00
11/13/93	SJA	UNIT-28	TM-18:46	92291522	6.00
11/13/93	SJA	UNIT-28	TM-18:51	915124772153	2.00
11/13/93	SJA	UNIT-28	TM-18:53	915124632084	2.00
11/13/93	MALA	UNIT-28	TM-10:18	915124632084	2.00
11/13/93	MALA	UNIT-28	TM-12:06	99615954	17.00
11/14/93	SJA	UNIT-28	TM-10:54	99615954	12.00
11/14/93	MALA	UNIT-28	TM-14:38	92291522	4.00
11/14/93	MALA	UNIT-28	TM-14:41	99615954	4.00

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Re: GUERRA, RICARDO ALDAPE

11/14/93	MALA UNIT-28 TM-14:52 99615954	8.00
11/14/93	MALA UNIT-28 TM-16:32 92291522	3.00
11/14/93	MALA UNIT-28 TM-16:36 915124772153	3.00
11/14/93	MALA UNIT-28 TM-16:39 99615954	3.00
11/15/93	SJA TELEFAX	48.00
11/18/93	SJA TELEFAX	11.00
11/18/93	SJA TELEFAX	11.00
11/18/93	SJA TELEFAX	11.00
11/18/93	SJA TELEFAX	11.00
11/22/93	SJA UNIT-28 TM-10:46 912022931827	11.00
11/22/93	SJA TELEFAX	11.00
11/23/93	SJA TELEFAX	2.00
11/24/93	SJA TELEFAX	3.00
11/24/93	SJA TELEFAX	11.00
11/24/93	SJA TELEFAX	4.00
12/13/93	MDFI TELEFAX	9.00
12/13/93	MDFI TELEFAX	9.00
12/16/93	SJA TELEFAX	4.00
12/21/93	JRM TELEFAX	6.00
12/29/93	TWK TELEFAX	5.00
4/07/94	SJA TELEFAX	1.00
10/21/94	SJA TELEFAX	7.00
11/15/94	SJA TELEFAX	28.00
11/15/94	SJA TELEFAX	28.00
11/15/94	SJA TELEFAX	28.00
11/15/94	SJA TELEFAX	28.00
11/16/94	SJA TELEFAX	46.00
11/16/94	SJA TELEFAX	47.00
11/18/94	SJA TELEFAX	4.00

TELEFAX ----- \$915.00

OVERTIME

9/30/93	SJA WORK ON CASE (ALDAPE)	12.50
11/06/93	SJA REVISE [REDACTED]	112.50
11/07/93	SJA TYPE & REVISE [REDACTED]	187.50
11/08/93	SJA ALDAPE-PREPARATION OF DOCS	31.25

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Account Number PRO127 29000  
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Re: GUERRA, RICARDO ALDAPE

11/09/93	SJA	WORK THOROUGH ON DOCUMENTS	25.00
11/09/93	SJA	PREPARE FOR TRIAL	25.00
11/10/93	SJA	WORK THOROUGH ON DOCUMENTS	25.00
11/10/93	SJA	PREPARE FOR TRIAL	25.00
11/11/93	SJA	WORK THOROUGH ON DOCUMENTS	25.00
11/11/93	SJA	WORK ON DOCUMENTS	62.50
11/11/93	SJA	PREPARE FOR TRIAL	12.50
11/12/93	SJA	DOCUMENT PREPARATION	25.00
11/12/93	SJA	PREPARE FOR TRIAL	25.00
11/13/93	SJA	ASSIST W/TRIAL PREPARATIONS	275.00
11/13/93	SJA	PREPARATION FOR HEARING	187.50
11/13/93	SJA	PREPARE FOR TRIAL	162.50
11/14/93	SJA	ASSIST W/TRIAL PREPARATIONS	187.50
11/14/93	SJA	TYPED AND REVISED [REDACTED]	187.50
11/14/93	SJA	PREPAREING FOR ALDOPE HEARING	137.50
11/15/93	SJA	TYPED AND REVISED [REDACTED]	25.00
11/15/93	SJA	PREPARATION OF DOCS FOR HEARING	25.00
11/15/93	SJA	MISC FOR HEARING	25.00
11/15/93	SJA	MISC. FOR COURT NEXT DAY	50.00
11/16/93	SJA	TYPED AND REVISED [REDACTED]	62.50
11/16/93	SJA	PREPARATION FOR HEARING	18.75
11/16/93	SJA	MISC FOR HEARING	25.00
11/18/93	SJA	PREPARATION OF DOCS FOR HEARING	6.25
11/18/93	SJA	MISC FOR HEARING	25.00
11/19/93	SJA	PREPARATION OF DOCS FOR HEARING	6.25
11/19/93	SJA	MISC FOR HEARING	25.00
11/20/93	SJA	REVISE [REDACTED]	181.25
11/21/93	SJA	REVISE AND FINALIZE [REDACTED]	162.50
11/22/93	SJA	MISC FOCS FOR HEARING	25.00
12/23/93	SJA	ALDAPE DOCUMENTS	360.00
12/24/93	SJA	ALDAPE DOCUMENTS	90.00
12/26/93	SJA	ALDAPE DOCUMENTS	137.50
12/28/93	SJA	FINDINGS OF FACT	25.00
12/30/93	SJA	FINDINGS OF FACT	25.00
12/30/93	SJA	SEND OUT FINDINGS OF FACT	18.75

OVERTIME ----- \$3,050.00

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Account Number PRO127 29000  
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Re: GUERRA, RICARDO ALDAPE

POSTAGE

11/02/93	SJA	POSTAGE	5.59
1/08/94	SJA	POSTAGE	11.55
11/15/94	SJA	POSTAGE	54.93
			-----
			POSTAGE \$72.07

OUTSIDE PROF. SVCS.

10/26/93	SJA	[REDACTED]	162.38
11/17/93	SJA	SERVICES RENDERED-RICARDO ALDAPE GUERRA	906.75
11/19/93	SJA	[REDACTED]	297.69
11/23/93	SJA	CONSULTATION, REVIEW RECORDS, EXPERT WITNESS	1,400.00
11/23/93	SJA	[REDACTED]	405.94
11/23/93	SJA	[REDACTED]	405.94
11/23/93	SJA	[REDACTED]	405.94
11/23/93	SJA	[REDACTED]	368.27
12/13/93	SJA	EXPERT WITNESS-ELIZABETH LOFTUS, PHD	7,060.50
			-----
			OUTSIDE PROF. SVCS. \$11,413.41

TELEPHONE

7/29/93	SJA	WASHINGTONDC MARY LOU SOLLER	3.28
7/30/93	SJA	WASHINGTONDC MARY LOU SOLLER	.82
8/03/93	MEAS	MEXICO	4.84
8/05/93		WASHINGTONDC MARY LOU SOLLER	4.10
8/05/93	SJA	WASHINGTONDC MARY LOU SOLLAR	9.02
8/05/93	SJA	MEXICO	1.27
8/06/93		MEXICO	1.27
8/17/93	SJA	HUNTSVILLETX	.82
8/18/93	SJA	WASHINGTONDC JULIA SULLIVAN	3.28
9/12/93		MEXICO	5.86
9/12/93		MEXICO	1.78
9/13/93	MEAS	MEXICO	1.27
9/13/93	MEAS	MEXICO	21.16
9/13/93	SJA	HUNTSVILLETX	.82
9/13/93	SJA	MEXICO ALICIA BURPSA	4.33

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Re: GUERRA, RICARDO ALDAPE

9/20/93	MEAS	LONG DISTANCE TELEPHONE CALLS-- 8/2/93 MONTER	5.53
9/24/93	SJA	AUSTIN TX BARBARA HINES	5.33
9/30/93		AUSTIN TX	1.23
9/30/93	SJA	HUNTSVILLE TX PRISON WARDEN	.82
9/30/93	SJA	MEXICO ALDAPE'S FAMILY	2.29
10/01/93		WPALMBEACH FL	.82
10/01/93		WASHINGTON DC	.82
10/01/93		MEXICO	1.78
10/01/93	SJA	MEXICO	2.80
10/01/93	SJA	WASHINGTON DC TED KASSINGER	.82
10/05/93			2.46
10/05/93		WASHINGTON DC SCOTT ATLAS	16.40
10/05/93		WASHINGTON DC SCOTT ATLAS	6.97
10/05/93	SJA	WASHINGTON DC JULIA SULLIVAN	2.46
10/05/93		DALLAS TX PAUL WEHRMAN	.82
10/06/93	MM	AUSTIN TX	2.46
10/06/93	MM	AUSTIN TX	7.79
10/07/93	SJA	BETHESDA MD SUSAN BAUSTEIN	1.64
10/07/93	SJA	AUSTIN TX	.82
10/07/93		AUSTIN TX	1.23
10/07/93	MM	AUSTIN TX	2.87
10/12/93	SJA	NEW HAVEN CT ANDY MC STAY	1.64
10/15/93		SEATTLE WA ELIZABETH LOFTUS	.82
10/15/93	SJA	SEATTLE WA ELIZABETH LOFTIS	7.38
10/18/93		AUSTIN TX WILLIAM ZAPALAC	1.23
10/18/93		AUSTIN TX WILLIAM ZAPALAC	.82
10/18/93		AUSTIN TX WILLIAM ZAPALAC	.82
10/20/93		WASHINGTON DC MARY LOU SOLLER	1.64
10/20/93		WASHINGTON DC JULIA SULLIVAN	1.23
10/20/93		WASHINGTON DC MARY LOU SOLLER	1.23
10/20/93		WASHINGTON DC MARRIOTT	.82
10/25/93		MEXICO	3.31
10/25/93		MEXICO	15.04
10/26/93		HUNTSVILLE TX PRISON	2.09
10/26/93		WILLIS TX PRISON	6.97
10/26/93	SJA	HUNTSVILLE TX PRISON	1.23
10/26/93	SJA	NEW HAVEN CT LENWOOD ROSS	3.28

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Re: GUERRA, RICARDO ALDAPE

10/26/93	SJA	NEW HAVEN CT	LENWOOD ROSS	3.28
10/26/93	SJA	HUNTSVILLE TX		2.46
10/26/93	SJA	HUNTSVILLE TX		.82
10/26/93	SJA	HUNTSVILLE TX	PRISON	1.20
10/26/93	SJA	MEXICO		1.78
10/27/93	SJA	AUSTIN TX		.82
10/28/93	SJA	SEATTLE WA	ELIZABETH LOFTUS	1.64
10/29/93		HUNTSVILLE TX	PRISON	1.20
10/31/93	SJA	SEATTLE WA	ELIZABETH LOFTUS	13.27
11/02/93	SJA	NEW HAVEN CT	LENWOOD ROSS	.82
11/02/93		WASHINGTON DC	JIM MARKHAM	.82
11/03/93		WASHINGTON DC	JIM MARKHAM	1.20
11/03/93		DALLAS TX	DAVID GODBY	3.28
11/04/93		HUNTSVILLE TX	PRISON	1.20
11/04/93	SJA	HOUSTON TX		8.50
11/08/93	SLBR	HUNTSVILLE TX		.82
11/09/93		HUNTSVILLE TX	PRISON	.82
11/09/93	SJA	HOUSTON TX		4.80
11/10/93	SLBR	HUNTSVILLE TX		.82
11/10/93	SJA	MEXICO		3.82
11/10/93	SJA	AUSTIN TX	BILL ZAPALAC	5.33
11/11/93	RELS	ARLINGTON TX		3.28
11/11/93	SJA	SEATTLE WA	ELIZABETH LOFTUS	2.05
11/11/93	SJA	AUSTIN TX		7.38
11/11/93	SLBR	TELEPHONE CALLS.		3.00
11/12/93	SLBR	WILLIS TX		2.46
11/12/93	SJA	AUSTIN TX	BILL ZAPALAC	.82
11/14/93	RELS	WILLIS TX	LEGAL ENTERPRISE	1.20
11/14/93	RELS	ARLINGTON TX		4.50
11/15/93	RELS	DALLAS TX		1.20
11/15/93	RELS	ARLINGTON TX		1.20
11/15/93	SJA	MEXICO		1.78
11/15/93	SJA	HUNTSVILLE TX	PRISON	.82
11/15/93	SJA	HUNTSVILLE TX	PRISON	.82
11/15/93	SJA	HUNTSVILLE TX	PRISON	1.20
11/16/93	MSBR	MEXICO		1.78
11/16/93	MSBR	MEXICO		3.82

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Account Number PRO127 29000  
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Re: GUERRA, RICARDO ALDAPE

11/17/93	SJA	CASH ADVANCE FOR QUARTERS FOR PHONE CALLS, CO	5.00
11/17/93		SEATTLE WA ELIZABETH LOFTUS	3.28
11/17/93	SJA	HUNTSVILLETX TDC WARDEN'S OFC.	2.05
11/23/93	SJA	WASHINGTONDC JULIA SULLIVAN	1.64
11/24/93	SJA	WASHINGTONDC	1.23
11/29/93	SJA	WASHINGTONDC TED KASSINGER	4.10
12/08/93	SJA	DALLAS TX PAUL WEHRMANN	2.05
12/20/93		NEW YORK NY	1.23
12/27/93	SJA	BREWSTER MA	1.64
12/28/93		NEW YORK NY SCOTT ATLAS	3.28
1/05/94	SJA	MEXICO	5.35
1/07/94		AUSTIN TX	1.23
1/13/94	SJA	RAMON RODRIQUEZ	1.64
2/04/94		SEATTLE WA DR. LOFTUS	.82
2/10/94	SJA	RAMON RODRIQUEZ	5.33
2/17/94	SJA	MEXICO	4.84
2/23/94		HUNTSVILLETX	1.23
3/01/94	SJA	HUNTSVILLETX RECORDS ALDAPE UERRA	1.23
3/17/94	SJA	RICHMOND VA MARGARET EDDIS	2.46
4/07/94	SJA	MEXICO	1.27
4/26/94	SJA	HUNTSVILLETX RICARDO ALDAPE GUERRA	.82
4/26/94	SJA	HUNTSVILLETX RICARDO ALDAPE GUERRA	.82
5/06/94		AUSTIN TX	9.02
5/06/94		AUSTIN TX	9.02
5/20/94		HUNTSVILLETX	.82
6/07/94	MEAS	MEXICO PRO BONO - ALDAPE	4.84
7/01/94	SJA	MEXICO	4.33
7/07/94	SJA	WESLACO TX	1.23
9/06/94	SJA	HUNTSVILLETX ALDAPE	.82
9/14/94	SJA	WASHINGTONDC	2.87
10/21/94		MEXICO	2.29

TELEPHONE \$365.66

MISCELLANEOUS

10/28/93	MM	COPY OF ORDER.	1.00
11/01/93	SJA	JW MARRIOTT/ALDAPE/3	38.63

December 27, 1994

Page: 5

Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/07/93	RELS ADALPE TRIAL-MEALS	6.48
11/07/93	RELS ADALPE TRIAL-MEALS	3.35
11/07/93	RELS ADALPE TRIAL-MEALS	8.60
11/07/93	RELS ADALPE TRIAL-MEALS	3.56
11/07/93	RELS ADALPE TRIAL-MEALS	6.48
11/07/93	RELS ADALPE TRIAL-MEALS	6.48
11/17/93	RELS COPYING CHARGE	3.00
11/18/93	SJA GAS FOR DRIVER TO PICK UP WITNESSES	10.00
11/23/93	SJA LAMADELEINE-11/11/93 D732761 MEALS	86.20
11/23/93	SJA LAMADELEINE-11/16/93 D733861 MEALS	96.40
11/23/93	SJA PJ'S-11/9/93 2601 MEALS	60.89
11/23/93	SJA PJ'S-11/13/93 2516 MEALS	42.31
11/23/93	SJA BASILS-11/10/93 MEALS	56.98
11/23/93	SJA DRIVER OF WITNESSES DURING HEARING	364.00
11/30/93	KLAU HOUSTON AUDIO-VIDEO-26" COLOR MONITOR RENTAL	637.05
12/07/93	SJA PARKING AT FEDERAL COURTHOUSE	20.00
12/08/93	SJA BASILS-11/22/93 MEALS	29.99
12/08/93	SJA BASILS-11/22/93 MEALS	58.77
12/13/93	SJA HOTEL ROOM-THE LANCASTER-LOFTUS	183.32
12/14/93	NACA WILSON BUS PROD-OFFICE SUPPLIES 11/93	230.71
12/27/93	SJA 4 VHS COPIES - ALDAPE GUERRA	80.00
12/27/93	SLBR 3 VHS COPIES - ALDAPE GUERRA NEWSCASTS	60.00
12/27/93	SJA 1 VHS COPY - ALDAPE GUERRA	20.00
12/27/93	SJA 5-VHS COPIES OF 2 NEWSCASTS	100.00
12/28/93	SJA ALONTI-11/8/93 MEALS	63.33
12/28/93	SJA ALONTI-11/15/93 MEALS	94.99
12/28/93	SJA ALONTI-11/18/93 MEALS	94.99
12/28/93	SJA ALONTI-11/19/93 MEALS	24.36
12/28/93	SJA ALONTI-11/22/93 MEALS	24.36
1/14/94	SJA NINFA'S-11/19/93 MEALS	99.30
2/10/94	SJA LANCASTER-LODGING FOR DR ELIZABETH LOFTUS-EXP	183.32
		-----
	MISCELLANEOUS	\$2,798.85

## TRAVEL

10/19/93	SJA	PRKG/BAKER & BOTTS-ALDAPE MEETING	10.00
11/02/93	SJA	PARKING-COURTHOUSE/STATUS CONFERENCE	6.00

December 27, 1994

Page: 5

Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

11/07/93	RELS ADALPE TRIAL	12.50
11/10/93	SJA PARKING AT FEDERAL COURTHOUSE	40.00
11/11/93	SLBR PASADENA COURT HOUSE	36.37
11/11/93	SLBR PASADENA COURT HOUSE-MEALS	1.72
11/15/93	SJA PARKING-FEDERAL COURT HOUSE	38.00
11/15/93	SJA COURTHOUSE	17.00
11/16/93	MDFI PARKING/FEDERAL COURTHOUSE	8.00
11/17/93	MM TAXI/PARKING FOR EVIDENTIARY HEARING	12.00
11/18/93	MM PARKING CITY OF HOUSTON	6.00
11/18/93	SJA TAXI/CRIMINAL COURTHOUSE, COPY CENTER, FEDERAL	10.50
11/19/93	SJA PARKING/FEDERAL COURTHOUSE	12.00
11/19/93	MSBR PARKING & TOLL ROAD FEES	12.00
11/22/93	SJA TAXI	4.00
11/21/94	SJA MONTERREY, MEXICO	200.46
		-----
	TRAVEL	\$426.55
	Total disbursements and	-----
	other charges	\$29,347.11
		-----
	Invoice total	\$279,692.11

TOTAL AMOUNT (PAYABLE IN U.S. DOLLARS) DUE WITHIN 30 DAYS OF RECEIPT

Please reference account and  
invoice numbers when remitting.PLEASE REMIT TO: 1001 FANNIN, SUITE 2500  
HOUSTON, TEXAS 77002-6760

December 27, 1994

Page: 5

Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

## Summary of services on this invoice

Name	Hours	Amount
SJA Scott J. Atlas	704.50	\$88,062.50
LRB Lisa R Beck	37.25	\$4,656.25
TKB Timothy K. Borchers	6.75	\$843.75
SLBR Susan Leigh Brown	142.50	\$10,687.50
BLBU Brian L Burgess	23.25	\$1,162.50
EVCA Esmeralda Casillas	4.00	\$140.00
JABC Anne Bernard Clayton	25.50	\$3,187.50
ACO Allan R Conge	24.00	\$3,000.00
CSDA Carla S. Danbury	9.50	\$760.00
MEAS Melissa Eason	133.00	\$10,640.00
MDFI Marc D Fisher	105.75	\$13,218.75
KLG Karen L. Getty	20.25	\$1,721.25
EWMG Ellen W. M. Gray	3.00	\$270.00
GGRE Glenn S Greene	40.25	\$2,012.50
MHHA Melody Hughes Harman	1.00	\$70.00
EOJA Edward O Jackson	23.50	\$470.00
TWK Theodore Kassinger	44.00	\$5,500.00
SRKN Shawn R. Knight	5.00	\$250.00
PCK Peter C. Ku	91.25	\$9,125.00
GLAC Gillian Lachaux	2.75	\$206.25
ML Manuel Lopez	23.25	\$2,790.00
JRM James R. Markham	89.75	\$8,990.00
JDMI Jeffrey D Migit	6.50	\$227.50
RAMO Richard A Morris	92.75	\$11,130.00
MM Michael J. Mucchetti	234.25	\$29,281.25
KEN Kim Elliott Neumann	23.50	\$1,880.00
JCO J. Cavanaugh O'Leary	40.25	\$5,031.25
BLP Beverly L. Palmer	28.50	\$2,137.50
FAP Frank A. Parigi	6.75	\$843.75
SLWP Sara Liz Patterson	1.00	\$75.00
ABRU Andrew B. Ruthven	.25	\$11.25
PNS Phillip N Sanov	16.75	\$2,093.75

December 27, 1994

Page: 5

Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

Name	Hours	Amount
RESC Rebecca E Schweigert	88.50	\$4,425.00
CCSI Cara C. Sion	6.50	\$195.00
RELS Robert Summerlin	231.75	\$11,600.00
AEW Ann E. Webb	63.00	\$7,875.00
PAW Paul A Wehrmann	32.25	\$4,031.25
DFWI Daniel F. Wiersema	2.00	\$100.00
CCWI Cornelia C. Williams	1.00	\$50.00
BHWO Barbara H. Woodward	21.25	\$1,593.75
	2,456.75	\$250,345.00

December 27, 1994

Account  
Of

PRO BONO (CONTINGENT)

Account Number PRO127 29000  
Billing Attorney Scott J. Atlas  
Invoice Number 1042962

Re: GUERRA, RICARDO ALDAPE

-> Remittance Copy <-

-----

Fees for services rendered through December 22, 1994	\$250,345.00
Disbursements and other charges through December 22, 1994	\$29,347.11
Invoice total	----- \$279,692.11

-> Please return this page with your payment <-

TOTAL AMOUNT (PAYABLE IN U.S. DOLLARS) DUE WITHIN 30 DAYS OF RECEIPT

Please reference account and  
invoice numbers when remitting.

PLEASE REMIT TO: 1001 FANNIN, SUITE 1000  
HOUSTON, TEXAS 77006

## INVOICE CONFIRMATION ACKN LEDGEMENT

To: Billing Dept  
Room: 3672

Invoice: 1042962  
December 27, 1994

Invoice is: \_\_\_\_\_ \* Confirmed  
\_\_\_\_\_ Voided

--> Note: If a typed invoice is sent to the client please attach a copy !

---

Billed thru December 22, 1994

Type of Billing: Fee/Disbursements and other charges

Billing Attorney: Scott J. Atlas Room: 2819

Client: PRO127 PRO BONO (CONTINGENT)

Matter: 29000 GUERRA, RICARDO ALDAPE

---

For services rendered through December 22, 1994 \$250,345.00

Disbursements and other charges  
through December 22, 1994 \$29,347.11

-----  
Invoice total \$279,692.11

\* Confirmation acknowledges that the billing system  
generated invoice or the attached invoice was sent to the  
client.

Signature: \_\_\_\_\_



**B**

B- Manuel Lopez  
lcy-m

BAKER & BOTTS

L.L.P.

ONE SHELL PLAZA

910 LOUISIANA

HOUSTON, TEXAS 77002-4995

AUSTIN  
DALLAS  
MOSCOW  
NEW YORK  
WASHINGTON, D.C.

TELEPHONE: (713) 229-1234  
FACSIMILE: (713) 229-1522  
TELEX: 76-2779

PB-565

December 6, 1994

RECEIVED

DEC - 7 1994

S.J.A

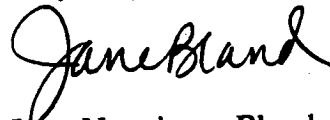
Mr. Scott J. Atlas  
Vinson & Elkins  
Suite 2500  
1001 Fannin  
Houston, Texas 77002-6760

RE: *Ricardo Aldape Guerra*

Dear Scott:

Enclosed please find a detailed account of Judge Gee's time and expense records for the above-referenced matter. If you need any further information for the fee application, please do not hesitate to call me at 229-1891.

Very truly yours,



Jane Nenner Bland

JNB:1279  
Enclosure

HOU02:144527

DEC 7 1994

December 6, 1994

Re: *Ricardo Aldape Guerra*

For services rendered and expenses incurred from January 15, 1993 through December 30, 1993 in the above-referenced matter:

Total Fees 83.9 @ \$125 per hour:	\$10,487.50
Total Expenses	<u>19.50</u>
<b>TOTAL FEE AND EXPENSES</b>	<b><u>\$10,507.00</u></b>

**Expenses:**

**Duplicating service:**

**\$19.50**

**\$19.50**

DATE ----	HOURS -----	CLIENT MATTER	NON-CHARGEABLE GUERRA, RICARDO ALDAPE	DESCRIPTION -----
01/15/93 GEE, T. G.	.4			TELEPHONE CONFERENCES WITH SCOTT ATLAS
01/28/93 GEE, T. G.	1.0			WORK ON PRO BONO HABEAS.
01/29/93 GEE, T. G.	4.4			REVIEW AND EDIT FEDERAL HABEAS PETITION.
01/30/93 GEE, T. G.	4.2			REVIEW AND EDIT FEDERAL HABEAS PETITION.
01/31/93 GEE, T. G.	4.0			REVIEW AND EDIT FEDERAL HABEAS PETITION.
02/02/93 GEE, T. G.	1.0			REVIEW BRIEFS.
02/03/93 GEE, T. G.	.8			FURTHER STUDY OF BRIEFS
02/19/93 GEE, T. G.	.8			REVIEW BRIEFS
02/20/93 GEE, T. G.	2.8			STUDY BRIEFS AND DRAFT LETTER OPINION
02/22/93 GEE, T. G.	1.2			GET PANEL, FINISH AND SEND LETTER
06/03/93 GEE, T. G.	2.2			REVIEW AND EDIT DRAFT BRIEF
10/01/93 GEE, T. G.	.8			WORK ON HABEAS CORPUS
10/12/93 GEE, T. G.	2.0			(HABEAS CORPUS) OFFICE CONFERENCE WITH SCOTT ATLAS REGARDING FORTHCOMING ORAL HEARING
11/08/93 GEE, T. G.	1.0			HABEAS CORPUS; STUDYING MATERIALS FURNISHED FOR CROSS EXAMINATION OF WITNESSES MOEN AND BAX
11/09/93 GEE, T. G.	1.6			STUDYING AFFIDAVITS AND WITNESS STATEMENTS
11/11/93 GEE, T. G.	4.2			CONFER WITH SCOTT ATLAS AND OTHERS REGARDING CONDUCT OF HEARING NEXT WEEK
11/12/93 GEE, T. G.	3.2			CONTINUED PREPARING FOR HEARING NEXT WEEK
11/15/93 GEE, T. G.	9.2			IN TRIAL OF CASE
11/16/93 GEE, T. G.	8.2			IN TRIAL OF CASE
11/17/93 GEE, T. G.	1.4			PREPARATION FOR CONTINUATION OF TRIAL TOMORROW
11/18/93 GEE, T. G.	8.7			TRIAL OF CASE IN COURT
11/19/93 GEE, T. G.	9.0			TRIAL OF CASE IN COURT

NON-CHARGEABLE  
GUERRA, RICARDO ALDAPE

CLIENT  
MATTER

DATE	HOURS	DESCRIPTION
11/22/93 GEE, T. G.	8.4	TRIAL OF CASE IN COURT
12/27/93 GEE, T. G.	2.4	EDITING DRAFT, FINDINGS OF FACTS AND CONCLUSIONS OF LAW
12/30/93 GEE, T. G.	1.0	READ AND EDIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

83.9  
=====

TOTAL  
HOURS

INDIVIDUAL

TOTAL  
HOURS

INDIVIDUAL

83.9

GEE, T. G.

c

**SCHNEIDER & MCKINNEY, P.C.**

ATTORNEYS AT LAW  
Eleven Greenway Plaza, Suite 3112  
Houston, Texas 77046  
(713) 961-5901  
Fax (713) 961-5954

Stanley G. Schneider, P.C.  
W. Troy McKinney  
Thomas D. Moran

December 28, 1994

Ricardo Aldape Guerra  
c/o Scott Atlas

Invoice #39

	<u>Hrs/Rate</u>	<u>Amount</u>
Professional services		
01/18/93 SGS Conversation with Bill Zapalac regarding execution date; conversation with Scott Atlas.	1.00 125.00/hr	125.00
01/30/93 SGS Reviewed draft of motion for evidentiary hearing and writ of habeas corpus.	2.00 125.00/hr	250.00
03/17/93 SGS Reviewed state's response to motion for evidentiary hearing; conversation with Scott Atlas.	1.00 125.00/hr	125.00
05/20/93 SGS Reviewed state's response to writ of habeas corpus.	2.00 125.00/hr	250.00
10/01/93 SGS Conversation with Scott Atlas regarding 9/30/93 order.	0.50 125.00/hr	62.50
10/25/93 SGS Conversation with Scott Atlas regarding writ of habeas corpus and testificandum.	0.25 125.00/hr	31.25
11/01/93 SGS Pre-trial conference.	0.50 125.00/hr	62.50

Ricardo Aldape Guerra

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
11/01/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/02/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/03/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/04/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/05/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/06/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/07/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/08/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/09/93 SGS Prepare for hearing; meet with witnesses.	6.00 125.00/hr	750.00
11/14/93 SGS Prepare for hearing.	2.00 125.00/hr	250.00
11/15/93 SGS Prepare for and attend evidentiary hearing.	3.00 125.00/hr	375.00
11/16/93 SGS Prepare for and attend evidentiary hearing.	11.00 125.00/hr	1,375.00
11/18/93 SGS Prepare for and attend hearing.	11.00 125.00/hr	1,375.00
11/19/93 SGS Prepare for and attend hearing.	10.50 125.00/hr	1,312.50
11/20/93 SGS Prepare for hearing.	3.00 125.00/hr	375.00
11/21/93 SGS Prepare for hearing.	1.00	125.00

Ricardo Aldape Guerra

Page 3

	<u>Hrs/Rate</u>	<u>Amount</u>
	125.00/hr	
11/22/93 SGS Prepare for and attend hearing.	10.50 125.00/hr	1,312.50
11/23/93 SGS Conversation with Scott Atlas regarding findings of fact.	0.50 125.00/hr	62.50
12/27/93 SGS Reviewed memo regarding prosecutorial misconduct.	0.50 125.00/hr	62.50
12/29/93 SGS Conversation with Scott Atlas regarding proposed findings of fact.	1.00 125.00/hr	125.00
12/30/93 SGS Final review and revise of proposed findings of fact.	2.75 125.00/hr	343.75
12/31/93 SGS Reviewed state's proposed findings of fact.	1.00 125.00/hr	125.00
For professional services rendered	95.00	\$11,875.00
Balance due		\$11,875.00



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This facsimile contains CONFIDENTIAL INFORMATION which may also be LEGALLY PRIVILEGED and which is intended only for the use of the addressee. If you are not the intended recipient of this facsimile, or agent responsible for delivering it to the recipient, you are hereby notified that any dissemination or copying of this facsimile may be strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone and return the original facsimile to us at the above address via the postal service.

FEELDMAN & ASSOCIATES  
Twelve Greenway Plaza  
Suite 1202  
Houston TX 77046  
(713) 960-6000

December 27, 1994

PRO02/001  
Vinson & Elkins L.L.P.  
1001 Fannin  
Houston TX 77002  
Attn: Scott Atlas

Invoice #12111

In reference to: Guerra, Ricardo Aldape  
Pro Bono

For services rendered through October 31, 1994:

		Hrs/Rate
07/17/93	RM Prepare witness list.	0.50 125.00/hr
10/06/93	RM Conversation with Susan Brown regarding preparation for evidentiary hearing and contacting potential witness; review memo re: [REDACTED]	0.25 125.00/hr
10/07/93	RM Conversation with Susan Brown regarding location of potential witness.	0.50 125.00/hr
10/27/93	RM Locate and interview witnesses; prepare for hearing.	3.00 125.00/hr
10/28/93	RM Visit with witnesses; prepare for hearing.	4.00 125.00/hr
10/30/93	RM Visit with witnesses; prepare for hearing.	6.00 125.00/hr
11/01/93	RM Review [REDACTED] [REDACTED]	4.00 125.00/hr

			Hrs/Rate	
			-----	
11/02/93	RM	Draft and revise memo regarding <del>_____</del> <del>_____</del> ; attend hearing.	7.00 125.00/hr	
11/03/93	RM	Locate and interview witnesses.	3.00 125.00/hr	
11/05/93	RM	Prepare for evidentiary hearing.	4.00 125.00/hr	
11/06/93	RM	Prepare for evidentiary hearing.	6.00 125.00/hr	
11/07/93	RM	Prepare for evidentiary hearing.	7.00 125.00/hr	
11/08/93	RM	Conversation with Susan Brown regarding <del>_____</del> <del>_____</del> .	0.25 125.00/hr	
11/09/93	RM	Prepare for evidentiary hearing; meet witness.	5.00 125.00/hr	
11/15/93	RM	Prepare for and attend evidentiary hearing.	10.00 125.00/hr	
11/16/93	RM	Prepare for and attend evidentiary hearing; interview witnesses.	8.00 125.00/hr	
11/19/93	RM	Prepare for and attend evidentiary hearing; interview witnesses.	9.00 125.00/hr	
11/22/93	RM	Prepare for and attend evidentiary hearing; interview witnesses.	8.25 125.00/hr	
				Amount
			-----	-----
		Total fees	85.75	\$10,718.75

PRO02/001

Page 3

Amount

Costs:

Photocopy

0.50

Long Dist.

3.81

Total costs

-----  
\$4.31

Total amount of this bill

-----  
\$10,723.06

Balance Due

-----  
\$10,723.06  
-----

1. the law firm of Vinson & Elkins shall recover \_\_\_\_\_ in attorneys' fees and \_\_\_\_\_ in expenses;
2. the law firm of Baker & Botts shall recover \_\_\_\_\_ in attorneys' fees and \_\_\_\_\_ in expenses;
3. the law firm of Schneider & McKinney shall recover \_\_\_\_\_ in attorneys' fees and \_\_\_\_\_ in expenses; and
4. the law firm of Feldman & Associates shall recover \_\_\_\_\_ in attorneys' fees and \_\_\_\_\_ in expenses.

U.S. COURTS  
SOUTHERN DISTRICT  
OF TEXAS

DEC 28 94

FILED

DATED this \_\_\_\_ day of \_\_\_\_\_, 199\_\_.

---

HONORABLE KENNETH HOYT  
UNITED STATES DISTRICT JUDGE

f:\ml1154\guerra\fee.ord



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

**TO THE HONORABLE JUDGE HOYT:**

Petitioner attached redacted versions of the invoices to the Motion for Attorneys' Fees and Costs. Petitioner felt it necessary to protect attorney confidences and thus removed the descriptions of those attorney activities that petitioner deemed sensitive or privileged. Nevertheless, petitioner recognizes that the court may wish to consider full descriptions of the listed work entries in making its determination on the Motion for Attorneys' Fees and Costs. For that purpose, petitioner requests that the court grant him leave to file the unredacted invoices under seal, not to be made a part of the public record of the case.

Respectfully submitted,

VINSON & ELKINS L.L.P.

BY: Scott J. Atlas / with permission ML  
SCOTT J. ATLAS

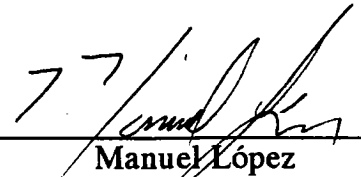
Attorney-in-Charge  
Texas Bar No. 01418400  
2500 First City Tower  
1001 Fannin  
Houston, Texas 77002-6760  
(713) 758-2024  
FAX: (713) 615-5399

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

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; 300 West 15th Street; Austin, Texas 78711, and to William C. Zapalac, Enforcement Division; Office of the Attorney General; P.O. Box 12548, Capitol Station; Austin, Texas 78711, on the 28<sup>th</sup> day of December, 1994.

77 /   
\_\_\_\_\_  
Manuel López

f:\ml1154\guerra\seal.mot

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

On this day came on to be considered Petitioner's Motion to File Billing Records Under Seal. After considering said motion, the Court is of the opinion that the Motion is well-founded and should in all things be GRANTED.

**DATED** this \_\_\_\_ day of \_\_\_\_\_, 199\_\_.

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DEC 18 1964

S.:

=====

**Michael N. Milby, Clerk**

**KENNETH M. HOYT**  
**UNITED STATES DISTRICT JUDGE**

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2

2



#51

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

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
ENTERED

RICARDO ALDAPE GUERRA,

Petitioner,

VS.

JAMES A. COLLINS, DIRECTOR  
TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. H-93-290

NOV 15 1994

Michael N. Milby, Clerk

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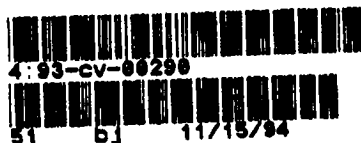
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**ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS**

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This case is before the Court pursuant to the application for a writ of habeas corpus filed by the petitioner, Ricardo Aldape Guerra. This Court granted the petitioner's motion for an evidentiary hearing and pursuant thereto, received documentary and testimonial evidence. Having reviewed the writ application, the response, the state trial record, the exhibits introduced into evidence and the testimony presented at the evidentiary hearing, the Court is of the opinion that the writ shall be granted.



## **I.**

### **Factual and Procedural History**

On July 13, 1982, J. D. Harris, a Houston police officer, was on a patrol in a Hispanic neighborhood. Around 10:00 p.m. a pedestrian, later determined to be George Lee Brown, waved down officer Harris complaining that a black and burgundy Cutlass automobile had almost run him over while he was walking his dog. Within minutes, officer Harris approached a stalled vehicle fitting the description given to him by the pedestrian.

The vehicle was occupied by Ricardo Aldape Guerra and Roberto Carrasco Flores, undocumented workers, who lived in the neighborhood. Pursuant to officer Harris' command, the occupants approached officer Harris' vehicle. The second occupant pulled a nine-millimeter Browning semi-automatic pistol and shot officer Harris three times. It is undisputed that the weapon was owned by Carrasco. At the time of the shooting, the first occupant had placed or was placing his hands on the hood of officer Harris' vehicle in obedience to officer Harris' command. As the individuals fled the scene of the crime, the second occupant fired a nine-millimeter pistol into an approaching vehicle shooting Jose Armijo, Sr., in the presence of his two children.

It is undisputed that Carrasco wore a maroon shirt and brown pants and that Guerra wore a light green shirt and blue jeans. Carrasco was also known in the neighborhood as "Guero" or "Wero" because of his light-skin, and light-colored blond-like hair. As well, he was clean-shaven and had short hair; Guerra, on the other hand, had black, straight, shoulder-length hair, a mustache, and a beard.<sup>1</sup>

Within an hour of the shooting, Carrasco was killed in a shootout with police, but not before he shot and seriously wounded another police officer with the same weapon used to kill officer Harris and Mr. Armijo. Officer Harris' weapon, a .357 Colt Python, was found in Carrasco's waistband when his body was searched or examined at the morgue. Also discovered was an additional "ammo" magazine for the nine-millimeter pistol in a "military-type" magazine pouch attached to Carrasco's belt.

Guerra was arrested shortly after Carrasco was killed, while hiding beneath a horse trailer. He was unarmed at the time, although a .45-caliber Detonics pistol was found lying under the trailer, wrapped in a bandanna. After he was arrested, he was taken to the crime scene where spectators had gathered and witnesses were being identified and questioned. Later, he was

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<sup>1</sup> These characteristics and features are important because the identity of the "shooter" was in dispute.

taken to the police station.

Guerra was tried for the offense of capital murder and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. His conviction was affirmed on May 4, 1988, by the Texas Court of Criminal Appeals in Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988) (*en banc*), cert. denied, 492 U.S. 925 (1989).

On September 21, 1992, the state trial court denied Guerra's application for writ of habeas corpus, as well his request for an evidentiary hearing and failed to enter findings of fact. Guerra's case was automatically forwarded to the Texas Court of Criminal Appeals, which adopted the trial court's recommendation in an unpublished, per curiam, order. Guerra then filed this application for a federal writ of habeas corpus.

## II.

### **Petitioner's Contention:**

In his several arguments, Guerra contends that he was denied a fair and impartial trial because of: (a) pretrial intimidation of witnesses; (b) an improper identification procedure; (c) the prosecutors' failure to disclose materially exculpatory evidence; (d) the prosecutors' use of known false evidence and known illegitimate arguments to the jury; and, (e) the cumulative

effect of the prosecutorial error.

Each of these contentions and the relevant evidence will be addressed in turn. To assist the reader in following this discussion, it should be noted that the evidence consists of (a) the statements of witnesses taken on the morning following the shooting; (b) the trial testimony in the underlying conviction; and (c) the testimony taken in this proceeding.

Restated, Guerra complains that he was brought to the crime scene and location of the witnesses in handcuffs; at the police station, he was twice escorted past the witnesses with handcuffs and bags over his hands; at the lineup, he was the sole Hispanic on exhibition with long-hair; before, during, and after the lineup, the witnesses were permitted to communicate amongst themselves, with one particular witness urging the others to identify Guerra as the shooter; at a reenactment of the crime and at a pretrial weekend meeting of the witnesses, the prosecutor told the witnesses that Carrasco was dead and that Guerra was the shooter; at the trial, two life-size mannequins were stationed in front of the jury from the beginning to the end of the trial. Finally, Guerra argues that the prosecution failed to disclose materially exculpatory evidence and used evidence known to be false, or half truths, to convict him. The cumulative effect of all of these actions resulted in a

violation of his "due process" rights and the fundamental right to a fair procedure leading up to trial.

### **III.**

#### **Pretrial Intimidation of Witnesses:**

##### **III (a) The Petitioner's Contentions:**

The petitioner contends that several, if not all, of the witnesses were intimidated by the police and the prosecutors, the result of which was that the witnesses either gave contradictory testimony, or their testimony was presented in a manner that shaded the truth. On the question of intimidation, the petitioner called several witnesses who were under the age of 18 at the time: Patricia Diaz (age 17); Elena Holguin; Frank Perez (age 17); Herlinda Garcia (age 14); Jose Heredia (age 14); Armando Heredia (age 16); and Elvira Flores (age 16).

The evidence is undisputed that the witnesses were brought to the police station before midnight on July 13, 1992. They remained until about 6:30 a.m. the next morning. The petitioner asserts that in addition to lack of sleep, the ability to coerce and intimidate the witnesses was made easy by three other factors common to most of the key witnesses, i.e., their inability to speak fluent English, their lack of education, and their youth.

The native language of all but one of the neighborhood witnesses is Spanish and, at the time, many of the witnesses had little or no command of the English language. These facts, coupled with the lack of formal education, according to the petitioner, created a situation where the witnesses' statements as taken lent themselves to selective interpretations. These circumstances, according to the petitioner, set the tone for how the witnesses were handled.

### III (b) Federal Habeas Testimony:

During the federal evidentiary hearing, Patricia Diaz, a minor in 1982, testified that she told police officers at the crime scene that she did not see the shooting, but only got a glimpse of Guerra's profile after she heard the shots. She told them that Guerra's hands looked empty. One of the police officers, using vulgar language, insisted that Diaz had seen more and threatened to take away her infant daughter unless she cooperated. While still at the crime scene, Diaz saw another officer yelling at, handcuffing, and placing her aunt, Trinidad Medina, into a police car.

Diaz also testified that at the pretrial weekend meeting, held shortly before trial, the prosecutors also yelled at her, insisting that she change her testimony in some respects. She also told the prosecutor that she never

saw Guerra pointing at officer Harris.<sup>2</sup>

Elena Holguin also testified at the trial and this proceeding. She stated that she was in her home at the time of the shooting. After she told police officers that she had not seen officer Harris get shot, one of the police officers became angry and told her that she had a duty to help them. Because of her alleged uncooperativeness, she was handcuffed, without provocation or justification, and placed into a police car. She was taken to the police station barefoot because the police would not permit her to get her shoes. She further testified that, in total, she was kept in handcuffs for more than two hours and they were not removed until she reached the police station.

Frank Perez testified that shortly after Harris was shot, a police officer pointed a gun at an unidentified Hispanic male, told him to lie down on the ground and yelled: "Why did you kill the cop?" The man on the ground was neither Carrasco nor Guerra. He also testified that at the pretrial

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<sup>2</sup> During Diaz' testimony the prosecutor, on several occasions, altered the testimony by question and reaffirmed it again and again. For example:

Q. "Could you see or make out, Patricia, what type of object, if anything, this man had in his hand?" (p. 314, L. 6)

Q. "Could you see which way this man went after he pointed at the police officer like you have shown the jury....?" (p. 315, L. 2)

Q. "Now, could you describe this man you saw pointing at the police officer...?" (p. 316, L. 12)

Q. "Does that look a lot better, like the way he looked that night he was pointing at the police officer?" (p. 318, L. 4).

The record shows that Diaz never saw either man pointing at the police officer, only at the car. Further, she never saw any object.

weekend meeting, he told the prosecutors that, shortly after officer Harris was shot, a man who looked like Carrasco had run past him and pointed an object at him that appeared to be a nine-millimeter gun. In response, the prosecutor insisted that if Perez was less than "100%" certain that the object was a gun, he should not testify that the object pointed at him was a "gun," just an "object."

Jose Luis Luna was called to testify, as well. He testified that after officer Harris had been shot, but shortly before Carrasco was killed, police officers came to his home at 4907 Rusk, with guns drawn. The police officers ordered J. Luna and Jose Manual Esparza outside, forced them face down on the front porch, pointed guns at their heads, put a foot on them and cursed and screamed at them, while they searched the area.

Roberto Onofre testified that he witnessed this event between the police, J. Luna and Esparza as he was returning to the house that he shared with them. Onofre also testified that after Carrasco was killed, two police officers returned and questioned himself, Jose Luna, Jose Esparza and Enrique Torres Luna. During this exchange, the officers screamed, cursed, and threatened to arrest them if they did not tell what they knew. Several police officers then entered the house and searched it.

Onofre and J. Luna both testified that several times during July, after Carrasco's death and the after the arrest of Guerra, police officers came to their home after midnight while they were asleep, entered the house, conducted themselves violently and used abusive language. They would order the residents to sit in the living room while they searched the house, kicking items out of the way and tearing up any newspaper clipping about Guerra. Although Onofre signed a consent to search at the time, he testified that he did so only because of the police officers' conduct, their actions toward the residents, and their mannerisms.

Herlinda Garcia, 14 years old at the time, testified that she told the police that Carrasco was the shooter. At that time, several police officers told her she would be arrested and jailed unless she cooperated. An unidentified police officer stated to her "that she just did not know what all could happen to her and her husband." At the time, Garcia's husband was over 18 years and on parole. She testified that she took these comments as a threat to reincarcerate her husband on rape charges if she did not say what was expected of her.

At the pretrial weekend meeting, after Garcia told one of the prosecutors that Guerra was not the man who had shot officer Harris, the

prosecutor told her that she was confused and that she could not now change her mind because she had already made a statement identifying Guerra as the shooter, not only of officer Harris but also Mr. Armijo.<sup>3</sup>

George Brown testified that after Mr. Armijo was shot, he was left in his car, without medical attention, for over an hour. However, officer Harris was immediately taken to the hospital within a few minutes after the ambulance arrived.<sup>4</sup> For the four to six hours leading up to the lineup at 6:00 a.m., Brown was kept separate from the other Hispanic witnesses, they were seated on a bench in a hallway outside the Homicide Division office. He attributes this segregation to the fact that his last name is of European origin.

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<sup>3</sup> The statement referred to by the prosecutor states in relevant:

"This evening sometime after 10:00 p.m. my sister and me (sic) were going to the store .... My sister and I was (sic) walking down the sidewalk when I remembered that I had left my money .... I ran home to get my money .... When I got back to my sister we saw this black car turn off of Walker on to Lenox street rear (sic) fast .... As the car was getting ready to back up a police car ... pulled in behind it."

"...[H]e told the men in the black car to get out of the car.... Both men came out of the car on the driver's side .... [H]e told them to put their hands on the hood...."

"Before I got a chance to move I saw this guy with the blond hair reach into the front of his pants and pull out a pistol and shoot the policeman.... The man with blond hair came after me shooting at me.... [H]e then shot the man in the read (sic) car." [Mr. Armijo]

"... I did not get to see the other man and I do not know what happened to him ... the man that shot the policeman ... was wearing brown pants and a brown shirt that was open all the way down."

<sup>4</sup> Mr. Armijo was still alive during this time and was kept at the scene, according to police, because they thought that he had shot officer Harris. This delay by police quite possibly resulted in the death of a key witness.

He could, nevertheless, overhear them talking among themselves about the shooting.

Garcia also testified that while at the police station she overheard police officers tell several of the Hispanic witnesses not to discuss the case with anyone, except the police and the prosecutors, and especially warned them not to talk to Guerra's lawyers or "they [the witness] could get in trouble." In addition, Garcia and several of the other witnesses testified that at the pretrial weekend meeting one of the prosecutors pointed to a picture of Carrasco and stated to the witnesses that the man in the picture was the man who died in the shootout with police. They then pointed to a picture of Guerra and said that he was the man who shot and killed officer Harris and Mr. Armijo.

### III (c) Discussion and Conclusion:

Intimidation by the police or prosecution to dissuade a witness from testifying or to persuade a witness to change his testimony, when combined with a showing of prejudice to the defendant, violates a defendant's "due process" rights. See United States v. Heller, 830 F.2d 150, 152-53 (11th Cir. 1987). This was the case in United States v. Smith, 577 F. Supp. 1232, 1236-38 (S.D. Ohio 1983) where the Court found that threats by government agent caused a witness to give false, damaging testimony. See also Webb v.

Texas, 409 U.S. 95 (1972). Thus, the government does not have the unfettered right to interference with any witness, particularly, in making the choice to testify or not. United States v. Hammond, 598 F.2d 1008, 1012-13 (5th Cir. 1979). Where interference occurs by the police, police actions that intimidate witnesses may be imputed to the state in its prosecution. Cf., Fulford v. Maggio, 692 F.2d 354, 358 (5th Cir. 1982), rev'd on other grounds, 462 U.S. 111 (1983). Equally so, the state has a duty to disclose such conduct. This duty is imposed not only upon its prosecutor, but upon on the state as a whole, including its investigative agencies. Therefore, if a confession is in the possession of a police officer, constructively, the state's attorney has both access to and control over the document. *Id.*

It is clear to this Court that the mood and motivation underlying the police officers' conduct arising out of this case was to convict Guerra for the death of officer Harris even if the facts did not warrant that result. The Court finds and holds that the police officers and the prosecutors intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense. Specifically, the written statements that were taken after the line-up are in many respects in significant contrast to those taken before the line-up. The Court attributes this to the fact that Carrasco had been killed and the

strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so.

In addition to the scurrilous conduct exhibited by the police, the Court is confounded by the fact that the police would handcuff two innocent women, threaten to revoke the parole of another's common-law husband, and repeatedly, day after day in the early morning hours, search the residence of innocent people. This conduct alone speaks volumes about the intimidation suffered by these children who were caught up in the police net and the circumstance.

The prosecutors' conduct was equally rank. Before and during the trial, questions to the witnesses were stated in such a manner that the questions stated or implied complicity by Guerra, irrespective of the fact that the answers did not conform. The tone of voice, as well as the artful manner in which the questions were asked, left little room for truthful answers or explanation. When the answers were not to their liking, they resorted to ridicule. Such conduct severely prejudiced Guerra's right to a fair trial and, therefore, violated his right to "due process" of law. See Heller, 830 F.2d at 152-53; Smith, 577 F. Supp. at 1236-38; see generally Webb, 409 U.S. 95 (1972) *cf.*, Hammond, 598 F.2d at 1012-13.

The Court concludes that the pretrial intimidation of the witnesses, most of whom were children, resulted in violating Guerra's right to fundamental "due process" and a fair trial.

#### IV.

#### **Improper Identification Procedures**

##### IV (a) The Legal Standard:

The Supreme Court has adopted a "totality of the circumstances test" to be utilized in the analysis of identification testimony. Identification testimony is admissible if it appears "reliable," even if it is flawed by improper police behavior. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). Thus, an unnecessarily suggestive identification is not subject to a "per se" exclusion. Id. The Court must determine whether an identification procedure constitutes a denial of "due process." In doing so it must first be determined whether the pretrial identification was unnecessarily suggestive. Assuming that it was, the Court must then determine whether the identification was so unreliable that the defendant's "due process" right to a fair trial would be precluded if the identifications were permitted. Id.

The factors to be considered in evaluating the reliability of an identification are: (i) the witnesses' opportunity to view the accused at the

time of the crime; (ii) the witnesses' degree of attention; (iii) the accuracy of the witnesses' prior description; (iv) the level of certainty demonstrated at the confrontation; and (v) the time between the crime and the confrontation. Id. (citing Neil v. Biggers, 409 U.S. 188 (1972)).

Where the state's use of pretrial identification procedures posed a substantial likelihood of tainting the state witnesses' identifications of the defendant and both, their out-of-court and in-court, identifications are not shown to be independently reliable, the Court must determine if admission of the identifications into evidence is harmless error. See Young v. Herring, 917 F.2d 858, 864 (5th Cir. 1990), cert. denied, 112 S. Ct. 1485 (1992) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). When the state is the beneficiary of any error, the burden of proving that the error was harmless, beyond a reasonable doubt, rest at the state's door. Thigpen v. Cory, 804 F.2d 893, 897 (6th Cir. 1986), cert. denied, 482 U.S. 918 (1987) (citing Chapman, 386 U.S. at 24).

#### IV (b) Discussion:

The facts of this case present a situation that is somewhat peculiar to the Brathwaite case. Here, the facts show that the petitioner was known in and around the neighborhood, therefore, it was logical that the witnesses could

identify the petitioner as being at the scene when officer Harris was shot. Moreover, Guerra's presence at the scene is not in dispute. Guerra gave a statement to that effect on the evening of the shootings. What is confounding is that the police took statements shortly after the shooting that were essentially exculpatory of Guerra. After learning of Carrasco's death and after the lineup, the police took additional statements that contradicted or impeached the prior statements in some subtle and other not so subtle ways.

In this regard, the record shows that there were at least six witnesses who claim to have seen officer Harris shot: Hilma G. Galvan, Herlinda Medina Garcia, Jose Francisco Armijo, Jr., Elvira Medina Flores, Patricia Ann Flores Diaz and Armando Heredia. When these persons gave their first written statements, between 12:00 a.m. and 1:00 a.m., they stated in relevant part the following:

... "I know the one that shot the officer by sight...."  
The shooter "was wearing dark brown pants and a dark brown or black shirt. He (sic) tall and thin and has shoulder length straight blond hair." (Hilma G. Galvan at 12:05 a.m., July 14, 1982).

\* \* \*

... "I saw the guy with the blond hair reach into ... his pants and pull out a pistol and shoot the policeman.... He was wearing brown pants and a brown shirt that was open all the way down." (Herlinda Medina

Garcia, at 12:12 a.m., July 14, 1992).

\* \* \*

... "The man shot the gun with his left hand.... I didn't see the men that shot the policeman too good and I don't remember what they looked like or what they were wearing...." (Jose Francisco Armijo at 12:15 a.m., July 14, 1982).

\* \* \*

... "Both the driver with blond hair and the passenger ... put their hands on the police car.... At this time the blond-haired driver pulled a pistol ... and started shooting at the police officer .... I don't think I can identify the two persons I saw...." (Elvira Medina Flores at 12:40 a.m., July 14, 1982).

\* \* \*

... "I told the detective that the man that was standing fourth from the \_\_\_\_\_ was the same man that I had seen on Walker.... I guess he had a gun in his hand." (Patricia Ann Flores Diaz, second statement, at 6:20 a.m. July 14, 1982).<sup>5</sup>

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.... "The man that shot the police officer I know him as Wedo (sic). I have known him about a month. As soon as he got out of the car I recognized him. He was also the man that ... shot the policeman."

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<sup>5</sup> Diaz's first statement, given at 1:40 a.m., described the shooter as a Hispanic male with "collar length black hair and was wearing a long sleeve, dark colored shirt." By the time Diaz gave her second statement she was unsure which of the men had shot the officer. For sure she did not know whether Guerra even had a weapon.

(Armando Heredia at 4:35 a.m. July 14, 1982).

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Two others gave relevant statements that bear upon the identification issue because of their proximity in time and circumstances to the events. John Reyes Matamoros and George Lee Brown gave statements before the lineup. In relevant part they state:

"I was able to see one of the men that had gotten arrested [after Carrasco was killed] and he was the man that was sitting in the front passenger seat [between 9:45 p.m. to 10:00 p.m.]....." (George Lee Brown at 12:40 a.m., July 14, 1982).

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"The man I saw running with the gun was a mexican american (sic) about 20 or 21 years old. He had shoulder length hair that was not as dark as mine and it looked more like hair that a white person would have. He was wearing a button up shirt and brown pants....." (John Reyes Matamoros at 12:10 p.m., July 14, 1982).

Several of the witnesses knew Guerra from the neighborhood. For the police to utilize this familiarity in the reckless manner that it did, is troubling. In fact, the state used a host of improper identification procedures in an effort to manipulate the witnesses' statements and testimony. Notably suggestive were (i) permitting the witnesses to see the petitioner in handcuffs

on several occasions while the witnesses were waiting to view the lineup, and (ii) permitting the witnesses to talk about and discuss identification before, during and after the lineup.

The prosecutors joined the hunt by conducting a reenactment of the shooting shortly after the incident with various chosen witnesses participating. This procedure permitted the witnesses to overhear each others view and conform their views to develop a consensus view. At the pretrial weekend conference, the prosecutors presented the two mannequins intended for use during trial. These life-size mannequins, created in the images of Guerra and Carrasco, were utilized then and throughout the trial to reinforce and bolster the witnesses' testimonies. The effect of these impermissible suggested procedures also resulted in a denial of "due process", as evidenced by the witnesses' federal habeas testimony.

The habeas testimony reveals that Guerra, handcuffed and with paper bags over his hands, was walked and shoved down the hallway outside the Homicide Division offices past the witnesses. He was then taken from the Homicide Division offices to the photo lab, where his clothes were taken from him. On both occasions, he was escorted along the hall before Diaz, Flores, Garcia, Jose, Jr., Galvan, Medina and Perez.

Before the lineup, Galvan, Garcia, Flores and Vega described the shooter in such a way that the description fit only Carrasco, i.e., he had blond-like hair and wore brown pants and a brown/maroon shirt. Jose, Jr., who was 10 years old at the time, could only identify the shooter as being left-handed. This description was critical because Carrasco was left-handed. After the lineup and, with the knowledge that Carrasco was dead, the witnesses gave a series of second statements declaring, in spite of numerous previous assurances to the contrary, that Guerra was the shooter.

The various testimonies also show that Galvan spent most of her time in the hallway talking to Jose, Jr., and Flores. Although a general instruction or warning against talking was given, Galvan continued. She pointed toward Guerra and said to Jose, Jr. and Armando Heredia, in Spanish, loud enough for all the witnesses and the officers in the room to hear, that since Carrasco had died, they could blame the man who "looked like God" or the "wetback" from Mexico for the shooting of officer Harris. Based on her various accounts, Galvan's statement, that she actually witnessed the shooting, is suspect. Nevertheless, she encouraged the minors to identify Guerra as the shooter knowing that Guerra did not fit even her own description of the shooter.

She continued by stating that, Mexicans only come to the United States to commit crimes and take jobs away from United States citizens. She repeatedly referred to Mexican Nationals as "Mojados" or "wetbacks". She was also heard repeatedly telling Jose, Jr., that Guerra was the killer. This conduct can be attributed only to her prejudice toward Mexican Nationals who, as Galvan stated, "took the jobs from Americans." The Court concludes that these expressions of prejudice against undocumented aliens was, as likely as any, the motivation for the inconsistencies between Galvan's own statement and her testimony.

Galvan's influence also explains how José, Jr.'s testimony was so specific and direct when he was overheard in the hallway at the police station admitting that he had not seen Guerra or Carrasco clearly enough to know which had fired the shots. In fact, Jose, Jr. admitted in his statement that he had not seen who shot his father because his father had pushed him below the dashboard as the shooting commenced. He repeated his inability to identify the shooter while he was sitting in the hallway outside the Homicide Division upon seeing Guerra during the lineup.<sup>6</sup> It is more likely so than not, that

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<sup>6</sup> It was argued by the state that Jose, Jr. became fearful when he saw Guerra and did not want to tell all that he knew. It was later, when he had gathered himself that he had the courage to come forward. However, the court had the benefit of a news clip in which Jose, Jr. was featured and related the incidents to the news media the day after the shooting.

Jose, Jr.'s belief that Guerra was the shooter was a result of seeing Guerra in handcuffs at the police station and hearing Galvan, repeatedly, insist that Guerra was the shooter.

During the trial, the prosecutors placed the mannequins in front of the jury and they remained there during the testimony of the witness. Heredia and Perez testified that during the trial, the positioning of the mannequins helped them identify which of the men was dead. [The Carrasco mannequins' shirt had bullet holes and blood stains, while the shirt on the Guerra mannequin did not.] Donna Monroe Jones, a juror during the trial, also testified. She testified that the jurors noticed that the shirt on the Carrasco mannequin was blood-stained and bullet-riddled. Additionally, she testified that the mannequins made the jurors feel uncomfortable and ill at ease.

Given the undisputed facts leading up to and surrounding the lineup, the identification of Guerra at the lineup was predestined. After all, he was present at the time of the shooting. To then use that fact as the sole basis to prosecute him for capital murder, is more than a stretch. Under the "totality of the circumstances," the identification procedures used by the police and the prosecutors were so corrupting that it caused witnesses, who either

knew otherwise, or did not know at all, to testify that Guerra had committed the crime.

It is also relevant that the police officers and the prosecutors did not quiet Galvan and others, as they commented before, during and after the lineup. It is relevant to this inquiry, as well, that the prosecutors misused the identification of Guerra so as to violate his right to a fair trial. So, different from Thigpen and Neil, it is the effects of these draconian procedures and the results attendant to this abuse of power, that are arresting.

The pretrial use of the mannequins in the meeting with witnesses at the prosecutors' office the weekend before trial was certain to reinforce the consensus facts so that there would be complete harmony in the testimony. The unrestricted, incessant presence of the mannequins, one wearing a bullet-riddled, blood-stained shirt that the jurors and witnesses saw daily, violated a constitutional guarantee of a fair trial, by injecting impermissible suggestive factors into the trial process. Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

It was no mystery to the state that their entire case against Guerra rested on the witnesses identifying him. The state had to count on the eyewitnesses excluding from their testimony, facts that clearly pointed to

Carrasco.<sup>7</sup> Therefore, the state, to seal its victory, deliberately chose to taint the identification process by insisting upon perjured testimony. The statements taken before the lineup makes it abundantly clear that the witnesses identified Carrasco as the shooter. It was only after the unexplained misconduct by the police officers, the permitted misconduct on the part of Galvan, and the reinforcement by the prosecutors, that Guerra was chosen as the shooter.

#### IV (c) Conclusion:

The state has the burden of proving, beyond a reasonable doubt, that the intentional act of causing to be admitted tainted, unreliable and perjured testimony, identifying Guerra as the shooter, was harmless. Thigpen, 804 F.2d at 897 (citing Chapman, 386 U.S. at 24.) The state has offered no evidence to contradict this point and has failed to discharge its duty.

#### V.

#### **Failure to Disclose Materially Exculpatory Evidence**

##### V (a) The Legal Standard:

There is long standing authority for the principle 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

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<sup>7</sup> [Richard Bax, one of the prosecutors in the 1982 trial, conceded "the physical evidence ... totally pointed towards Carrasco Flores as being the shooter...."]

to punishment, irrespective of the good faith or bad faith of the prosecution."

Brady v. Maryland, 373 U.S. 83, 87 (1963). In order to establish that evidence falls within the purview of Brady, a petitioner must establish that the evidence was suppressed and that it was material and favorable. Id. Suppressed evidence is "material" if there is 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).

V (b) Discussion:

Before the trial, Guerra's attorneys filed motions requesting production of all material inconsistent with the guilt or lawful arrest of Guerra. They also filed an extensive motions for pretrial discovery and inspection. Obviously, the conduct of the police and prosecutors was unknown to the defense attorneys. Yet, it was the type of conduct that the motions sought and the type that the prosecutors were duty bound to disclose.

In the discussion that follows, the Court analyzes the various witness statements and the police's and prosecutors' conduct surrounding the statements. It is the conduct giving rise to and surrounding the statement that is the focus of the petitioner's charge.

Garcia's first statement identified Carrasco as the shooter. She

described the events and actor as follows:

The blond hair (sic) reach into the front of his pants and pull out a pistol and shoot the policeman ... the man with the blonde hair then shot the man in the read (sic) car ... the man that shot the policeman and the man in the red car had blonde hair and was about 5'8" tall .... He was wearing brown pants and a brown shirt....

This version was reduced to a written statement and she was asked to sign it. Garcia, who had attended only seven years of school, asked the police officer to read it to her because she could not read well. The police officer refused and told her to "just sign it." According to Garcia, she then signed it because of the earlier verbal threat that another police officer made concerning revoking her husband's parole for living with her, Garcia, a minor.

After Garcia watched the lineup, she told the police that the man in the number 4 position was not the shooter but, instead, was the man with empty hands near the front of the police car at the time officer Harris was shot. When the second statement was prepared, it omitted the exonerating information provided by Garcia. This second statement was not read to Garcia.

From the Court's perspective, knowledge of this conduct explains the prosecutor's impatience with Garcia during the trial of the case. The

prosecutor insisted that Garcia had not seen a blond-haired man shoot officer Harris causing her to testify that she had not. The prosecutor then attributed Garcia's reluctance to testify to fear of reprisal from people in the neighborhood.

According to Diaz, she told the police that when officer Harris was shot, the long-haired man was standing on the driver side of the police car near the front end, facing toward the police car with his arms extended out over the police car, feet spread apart, and that the palms of his hands were facing down toward the police car. In addition, his hands were empty and were positioned as if he were about to place his hands on the hood of the car to be searched.

After the lineup was conducted, Diaz told the police that the man in the number 4 position was the man who had been on the driver side, near the front, of the police vehicle. In spite of hearing this, an officer prepared another statement omitting the exonerating information provided by her. She signed this statement, as well, without reading it, unaware of its true contents.

At the pretrial weekend meeting, Diaz told one of the two prosecutors that she was at the crime scene at the time of the shooting and that it did not look as though Guerra had a gun, because at the time of the

shooting Guerra's hands were open with his palms down on the hood of the police car. This exculpatory evidence was not recorded and not passed on to the defense.

During the habeas hearing, Perez testified that he told the police on the night of the shooting that he saw two men running past him that evening after the shooting of officer Harris. The first man ran east on the south side of Walker and turn south onto Lenox. Perez stated that he was too far away to recognize the runner. A second man ran east on the north side of Walker and turned south on Lenox. As the second man ran past Perez, the man pointed an object at Perez that he was holding in his left hand. As he ran, the object fell from his hand to the street. It made a metallic sound as it hit the pavement and looked like a handgun with a clip. The runner stopped to pick the object up, and continued running south on Lenox toward McKinney.

When Perez's statement was prepared, it omitted the fact that Perez had identified the object as a handgun. The police officer persuaded Perez to have the description in the statement read that the runner had dropped a metallic object. Later, in discussing his testimony with the prosecutor he was informed that he should describe the "object" as an "object"

if he was not "100% certain" that it was a gun.

At the lineup, Perez told the police that he recognized Guerra from having seen him earlier in the hallway, but that Guerra was not the man who had dropped the object as he ran past him earlier that night. He was not invited to the reenactment a week or so after the shooting.

Jose Heredia's testimony in this proceeding and his written statement identifies the passenger as the shooter. He testified that he told the police that when officer Harris was shot, officer Harris was standing just behind his driver's door and that the long-haired man was standing on the driver's side of the police car near the front end. He further stated that the man was facing the police car with his hands on the hood of the police car, a foot apart, palms down and empty. The short-haired man, approaching a few feet southeast of officer Harris and the long haired man (Guerra), pointed a gun at officer Harris and shot him.

After hearing Heredia's version, a police officer prepared a statement that omitted the exonerating information given concerning Guerra; specifically, that Guerra was against the car and empty handed when Carrasco came up behind Guerra and shot officer Harris. Heredia, like several of the other witnesses, tried to read his statement but could not because he could not

read English. Like others, he was told to "just sign it." He further testified that he was afraid not to sign the statement, having seen his mother (Holguin) arrested and handcuffed at the scene.

After Heredia viewed the lineup, he told a police officer that he recognized Guerra as the driver of the black car and that Guerra was not the man that shot officer Harris. Heredia was not asked to sign another statement.

Holguin, Heredia's mother, testified that she told the police that she had not seen the shooting at all. In spite of this, a statement was prepared that she was told to sign. Holguin testified that she informed the police officer who prepared the statement that she could not speak English. No one translated the statement for her benefit. Although completely unaware of the contents of the statement, Holguin testified that she signed it because she was ordered to do so. Earlier that evening, she had been handcuffed at the scene for several hours before being brought to the police station.

George Brown testified in this proceeding that he told the police that, after hearing shots that were later determined to have killed officer Harris, he ran west on Walker street from Delmar past Lenox to Edgewood. As he passed Lenox he saw someone running south on Lenox that appeared

to be Carrasco. Later, he saw Perez who stated to him that the man who was seen running south on Lenox was carrying a gun and had dropped it. Brown related Perez's statement to the police, that the person handling the weapon had dropped it while running. Brown's written statement omitted the information that he had received from Perez and had related to the police.

V (c) Conclusion:

The Court finds that the testimony of Garcia, Diaz, Holguin, Heredia and Perez is credible. Moreover, it is consistent with the physical evidence that establishes that Guerra did not shoot officer Harris and Mr. Armijo. Specifically, the physical evidence shows that the shooter used a nine-millimeter handgun, to kill both, officer Harris and Mr. Armijo. It further shows that the weapon had marks on it of the nature and type that would exist had the weapon been dropped to the pavement.<sup>8</sup> Important to these findings is the physical description of the shooter given by the scene witnesses in their initial statements describing Carrasco.

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<sup>8</sup> Floyd E. McDonald, formerly head of the forensic lab for Houston Police Department, the department where Amy P. Heeter worked, testified that the description by Perez of what occurred on that evening concerning the dropping of the weapon, is consistent with the marks that he found on the weapon. Moreover, the positioning of the parties leads to the conclusion that the person whose hands had been placed on the hood of the vehicle was not the shooter. The shooter, because of the location of the bullets found after the shooting, would have stood east of the police officer and the other person. The bullets lodged in the house on the northwest corner of Walker and Edgewood. Officer Harris' vehicle was parallel to this house.

As well, the fact that the weapon was found on the body of Carrasco was ample evidence of an exonerating nature to put the police and the prosecutors on notice that Carrasco was the killer. The prosecutors' theory, that Guerra and Carrasco had mistakenly switched weapons in the car before the shooting and had exchanged them later at the house (4907 Rusk), was sheer speculation and no evidence was ever proffered to support this theory. Moreover, it was not even a reasonable hypothesis based on any inference that could have been drawn from the evidence.

The police officers and prosecutors had a duty to accurately record the statements of the witnesses, to fairly investigate the case, and to disclose all exculpatory evidence. Moreover, they had a duty to not prosecute an innocent man. They failed in these duties. These intentional omissions, during the investigation and prosecution, and the inclusion of poisonous speculations during trial, had the effect of suppressing and destroying favorable testimony that the Court finds was material to Guerra's defense. The information that the police and prosecutors failed to disclose, as well as the manner that the investigation and prosecution were conducted, hardly left a paper trail, and intentionally so. The concept of deceit was planted by the police and nurtured by the prosecutors. This conduct by the police and prosecutors could only

have been deliberate and, so much so, that even the exonerating evidence was used in such a manner as to create a materially misleading impression.

The prosecutors and officer Amy Parker Heeter, the state's expert on trace metal test, also misled the defense attorneys concerning the trace metal detection test results. Specifically, Guerra's attorneys were not shown or told what the true results of the trace metal detection test were. The prosecutors told the defense attorney only that the test had been positive as to Carrasco's handling of officer Harris' weapon and negative for the murder weapon. According to the defense attorneys, this statement led them to conclude that only one trace metal pattern was found on Carrasco's hands, that of officer Harris' weapon.<sup>9</sup> This was a half-truth.

In fact, the trace metal pattern matching officer Harris' weapon

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<sup>9</sup>It should be noted that during the testing of the nine-millimeter pistol Heeter held it in her left hand, as was observed and reported about Carrasco by the witnesses. Yet, she failed to disclose that trace metal was found on Carrasco's left hand.

During the course of the testimony, the prosecutor inserted in his questions inaccurate statements from Diaz's testimony that were prejudicial to Guerra. The question and answer is as follows:

**Q.** You say you saw this one man and you saw him "pointing."  
Was he pointing toward or in the direction of the police car or the police officer?

**A.** Uh-huh, the direction of the police car.

On no less than five (5) other occasions, the prosecutor included within the question, an incorrect statement of the witness' prior testimony. He repeatedly used the phrase "pointing at the police officer."

was on Carrasco's right hand. There were also trace metal patterns found on Carrasco's left hand. This revelation could have been utilized by the defense to impeach the expert's testimony and/or impeach the state's theory of the case, that Guerra was the shooter and had, during the course of escaping, returned Carrasco's weapon. More importantly, armed with this knowledge, Guerra's attorneys may have hired their own trace metal expert who could have testified that the trace metal patterns on Carrasco's left hand were consistent with the patterns left by the nine-millimeter weapon found on him at the morgue.

The state failed to disclose that there were any trace metal patterns on Carrasco's left hand, even though they knew that they, arguably, matched the nine-millimeter weapon. Although the police were told, repeatedly, that the shooter fired the weapon with his left hand, there is no meaningful record of any efforts to identify the trace metal patterns on Carrasco's left hand. The police and prosecutors had a duty to eliminate Guerra as the shooter, if the evidence supported it.

Floyd McDonald, a ballistics expert, testified at the evidentiary hearing that when held and fired, the murder weapon left a discernible trace metal pattern in less than 60 seconds. He testified that neither sweat nor

normal washing with soap and water would remove the pattern. Rubbing one's hands with sand or dirt, with less than sustained vigor, would not remove such a pattern. He opined that the dirt found on Guerra's hands, when he was arrested, came from his having been on the ground hiding from the police. Although the ground was damp from a light rain, contact with the ground would not have erased any trace metal on his hands.

McDonald also testified that the two trace metal patterns found on Carrasco's left hand after his death are consistent with both the type of trace metal pattern left by firing the nine-millimeter weapon and Perez's testimony that Carrasco dropped and retrieved a gun as he ran past him. This dropping and retrieving of the weapon accounts for the double trace metal image found on Carrasco's left hand. It is undisputed that Guerra had no trace metal of any sort on either hand or on his body. So the testimony of Heeter, that the metal comprising officer Harris' weapon does not easily leave trace metal patterns, was a "red-herring." It was of no evidentiary value to the trial and was designed merely to confuse the jury.

The state's theory, that both defendants laid their weapons on the front seat in the vehicle and somehow did not realize that they had exchanged weapons until they met later at which time they switched weapons, in the face

of this physical evidence, is beyond belief, particularly when the theory does not rise above the level of speculation.

This evidence, even if it were concealed from the prosecution by the police, is imputed to the state prosecutors because the evidence was material and critical to the case and because an inquiry would have revealed it to them. Williams v. Griswald, 743 F.2d 1553, 1542 (11th Cir. 1984); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979). By dealing in half-truths and innuendo and by suppressing evidence that was favorable and material to Guerra's defense, the prosecutors violated Guerra's right to a fair trial. Brady, 373 U.S. at 87.

The Court concludes that, but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense or the trial would have resulted in an acquittal. Bagley, 473 U.S. at 682.

## VI.

### **Prosecution's Use of Known False Evidence And Known Illegitimate Arguments at Trial**

Next, the petitioner asserts that the prosecutor used known false testimony and illegitimate arguments in the trial and closing arguments. In this regard, the petitioner asserts that: (a) the prosecutors solicited and encouraged

Garcia and Perez to overstate or understate the facts; (b) the prosecutors injected false statements concerning the character of Heredia, the 14 year old, when they accused him of being either drunk or having "smoked something" because he yawned during his testimony; and (c) the prosecutors questioned Heredia about an alleged murder at the cemetery, near the shooting scene knowing that it was a yarn spun by the children.

The Court has previously stated the facts surrounding the testimony of Garcia and Perez and will not restate the fact here. Suffice it to say that the knowing use of false testimony by the prosecutors violates a defendant's "due process" rights under the Fifth and Fourteenth Amendments. See Napue v. Illinois, 360 U.S. 264, 269 (1959). The Court finds that such violations are abundant in the record.

The prosecutors also committed misconduct by deliberately and knowingly putting into the mouths of witnesses words that the witnesses had not said and did not believe to be true. This was accomplished by persistently cross-examining those witnesses on a false basis and by making improper insinuations and assertions calculated to mislead the jury and discredit unfavorable testimony. The use of this untrue information was material and detrimental to Guerra's defense. United States v. Williams, 112 S. Ct. 1735,

1749 (1992) (quoting Berger v. United States, 295 U.S. 78 (1935)).

Regarding the questions to Heredia about alcohol and drugs, the prosecutor asked him if he was drunk or had smoked anything. These questions were designed to strike down the young boy because he would dare testify contrary to the prosecutor's case theory. In closing argument, the prosecutor argued to the jury that Heredia was under the influence of either alcohol or narcotics. This improper conduct is rank ridicule and intimidation utilized to its consummate when any witnesses did not testify to this state's liking.

The petitioner also complains about the trial testimony of officer Jerry Robinette. After J. Luna testified that Carrasco had arrived at their home brandishing both the nine-millimeter weapon and officer Harris' weapon, the state called officer Robinette. Officer Robinette testified that J. Luna and Esparza had told him that they were not home in and around the time that the shootings had occurred because they had left earlier and did not return until around 11:30 p.m., when they were questioned. Even if this is true, the testimony is of no value because they were there when Carrasco arrived later.

Officer Robinette's testimony is inconsistent with J. Luna's trial testimony and also with police reports showing that both J. Luna and Esparza

were home when Carrasco and Guerra left as well as when they returned later that night. The police reports<sup>10</sup> show that officer Antonio Palos questioned J. Luna at 4907 Rusk just before Carrasco was killed. In spite of this knowledge, the prosecutor argued that J. Luna and Esparza had lied when they testified that they were at 4907 Rusk when Carrasco returned.

Both prosecutors claimed as fact, in closing argument, that five eyewitnesses, who had not conferred with each other, told the police that Guerra killed officer Harris and Mr. Armijo and had identified Guerra at the lineup. Both prosecutors knew that this was factually incorrect because at least one of the prosecutors was at the scene shortly after the shooting and participated in the gathering and interviewing of witnesses. Moreover, both had participated in the reenactment and the pretrial weekend meeting where the various statements of the witnesses were discussed and conformed.

The petitioner also urges, and legitimately so, that there was no justification for informing four jurors, during voir dire, that he was an "illegal alien" and that this fact was something that the jurors could consider when answering the punishment special issues. According to the prosecutors, this fact could help in a determination of whether Guerra should received a life

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<sup>10</sup> These reports were not produced or made available to the defendant, pretrial, pursuant to the defendant's discovery request.

sentence or the death penalty.

The "offense" of unlawful entry into the United States is irrelevant to the issue of a defendant's propensity for future violent and dangerous criminal behavior. No proof was offered that illegal aliens are more prone than citizens to commit violent crimes. Guerra was entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic. Zant v. Stephens, 462 U.S. 862, 879 (1983).

The prosecutors also appealed to the jury to "let the other residents at 4907 Rusk ... know just exactly what we citizens of Harris County think about this kind of conduct...." This appeal went beyond arguments seeking law enforcement to improperly play to the jury's prejudice by painting all the residents at 4907 Rusk with the broad brush of shared responsibility for the death of officer Harris. Thus, they were in need of being taught a lesson. This "us" against "them" argument is also nothing more than an appeal to ethnic or national origin prejudice which is constitutionally impermissible. McCleskey, 481 U.S. at 309 n.30; see also McFarland v. Smith, 611 F.2d 414, 416-17 (2d Cir. 1979); United States v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990);

see Haynes, 481 F.2d at 157.

The petitioner's claim of denial of "due process" did not end with the police and the prosecutor, it continued into the Court process. It is asserted that the inaccurate translations of the witnesses' testimony from Spanish to English by the court interpreters prevented a fair trial. The first interpreter, Linda Hernandez, was removed after one of the jurors complained that she was interpreting inaccurately. The second court interpreter, Rolf Lentz, acted inappropriately by making jokes and adopting an improper casual manner, while communicating with several defense witnesses in Spanish. Much of this went unchecked by the court.

The petitioner also questions the propriety of an experienced prosecutor questioning a witness about the witness' participation in a crime that the witness was not under investigation for and had not been criminally charged. One of Guerra's roommates, who testified in Guerra's defense, was questioned about his "participation" in a robbery that the prosecutors well knew had not resulted in a charge. Yet, it was done in all likelihood, to affect the judgment of the jury in determining the witnesses' credibility. This knowing false accusation by the prosecutors violated Guerra's "due process" rights because the question was not a proper question, even on character.

This type of deliberate violation of oath as a prosecutor and violation of the rules of evidence is incompatible with the rudimentary demands of justice and fair play. This principle remains true even when the state, though not soliciting false evidence, allows it to go uncorrected. Giglio v. United States, 405 U.S. 150, 154 (1972).

VII.

### Cumulative Effect of Prosecutorial Error

Finally, the petitioner contends that the cumulative effect of the errors made by the trial court and the prosecutors resulted in an unfair trial. Because the state court, in considering the petitioner's petition for writ of habeas corpus, found no waiver of error, there is no bar to considering the errors found in a cumulative error analysis. Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992) (*en banc*), cert denied, 113 S. Ct. 2928 (1993). When the errors of the state infuses a trial with such prejudice and unfairness as to deny a defendant a fair trial, due process has not been enjoyed. Derden, 978 F.2d at 1458.

Here, the extent of the prosecutorial misconduct is legion. The number of instances of misconduct as well as the type and degree compels the conclusion that the cumulative effect of the prosecutors' misconduct rendered

the trial fundamentally unfair. There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted. Kirkpatrick v. Blackburn, 777 F.2d 272, 278-79 (5th Cir. 1985), cert. denied, 476 U.S. 1178 (1986).

### CONCLUSION..

The police officers' and the prosecutors' actions described in these findings were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. It is these type flag-festooned police and law-and-order prosecutors, who bring cases of this nature giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another "notch in their guns" despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.

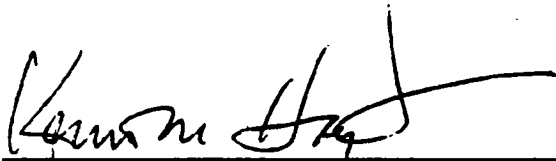
The police officers and prosecutors were successful in intimidating and manipulating a number of unsophisticated witnesses, many mere children, into testifying contrary to what the witnesses and prosecutors knew to be the true fact, solely to vindicate the death of officer Harris and for personal

aggrandizement. The cumulative effect of the police officers' and prosecutors' misconduct violated Guerra's federal constitutional right to a fair and impartial process and trial.

Therefore, the petitioner's Writ of Habeas Corpus is GRANTED, the conviction and judgment are set aside.

It is ORDERED that this case is remanded to the 248th Judicial District Court where the court shall, within 30 days, proceed in conformity with this memorandum opinion to retry the petitioner or release him.

Signed this 14th day of November, 1994.

  
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KENNETH M. HOYT  
United States District Judge