

Aldape: Fed. Habeas Pleadings
(9/95-2/96) (5th Cir.) (v. 12)



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

INDEX VOL. 12

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105.	12/27/95	Brief of Respondent-Appellant	Zapalac
106.	12/27/95	An Extension of Time has been granted to and including 12/27/95 for filing appellant's/petitioner's brief	Court of Appeals
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20443

CC: Aldape
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F- plds

U.S. COURT OF APPEALS
FILED

FEB 14 1996

RICARDO ALDAPE GUERRA

Petitioner - Appellee

CHARLES R. FULBRUGE III
CLERK

v.


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, Houston

O R D E R :

IT IS ORDERED that appellee's motion for an extension
of 12 days, or, to and including March 11, 1996 to file his brief
is GRANTED,


RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-20443

GARY L. JOHNSON, 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 UNOPPOSED
MOTION FOR EXTENSION OF TIME TO FILE BRIEF

Petitioner-Appellee Ricardo Aldape Guerra ("Guerra") files this unopposed motion requesting additional time to file its brief for the following reasons.

1. Due to lead counsel's participation in a complex and lengthy arbitration in which the hearing began on December 4, 1995 and final closing argument was held on January 22, 1996, and because the complexity of the captioned case required that responsibility for each of the major issues be divided among a number of people, on January 8, 1996 Guerra obtained by telephone an unopposed thirty-day extension to file his principal brief. As a result, the due date for the brief

L. Rledge

U.S. COURT OF APPEALS
FILED

FEB 9 1996

CHARLES R. FULBRUGE III
CLERK

was extended from January 29 to February 28, 1996, as shown by the letter attached hereto and marked "Exhibit A." At the time, Guerra anticipated the possibility that the factual complexity of the case and the fact that the State's brief challenged as clearly erroneous each of the lower court's findings of fact, might well cause Guerra to file a motion for leave to file a brief in excess of the fifty-page limit imposed by Rule 28(g) of the Federal Rules of Appellate Procedure. At the time, Local Rule 28.1 required that such a motion be filed at least ten days in advance of the due date of the brief.

2. On January 9, 1996, the Fifth Circuit modified Local Rule 28.1 to require that the motion to file an extra length brief, when filed, must be accompanied by a draft copy of the brief. Guerra learned of this rule change sometime after January 9, 1996. After it became clear that Guerra believed it to be imperative to file a motion for leave to file a brief in excess of Rule 28's page limitation, Guerra realized that under the new rule his brief would need to be completed not by February 28, 1996 as originally contemplated when Guerra requested additional time, but by February 18, 1996.

3. Accordingly, Guerra requests an additional twelve days to file his brief so that it will be due on Monday, March 11, 1996. With a due date of March 11, the motion for leave to file a brief in excess of the fifty-page limitation and the draft copy of the brief will be due ten days earlier, which would mean that the draft brief will be due by March 1, 1996. Guerra cannot yet estimate the number of extra pages he will request for this brief.

4. This is a capital habeas appeal in which the lower court has ruled that based on overwhelming evidence of police and prosecutorial misconduct, especially in light of the strong evidence of Guerra's innocence, that Guerra's request for habeas corpus relief should be granted and Guerra retried or released. Since the State has made the sole basis for its appeal a challenge to each of the lower court's fact findings on the grounds that they were each clearly erroneous,

Guerra's brief must marshal an extensive factual record in support of the lower court's findings and to show the misconduct, the prejudicial impact of the misconduct, and the weakness of the State's proof of guilt. The complexity of this task and the need for thoroughness, as well as a change in the Court's rules after an extension had been granted, mean that an adequate brief simply cannot reasonably be prepared when due.

5. Accordingly, Petition-Appellee Ricardo Aldape Guerra respectfully requests that the Court extend until March 11, 1996 the due date for filing Guerra's principal brief.

Respectfully submitted,

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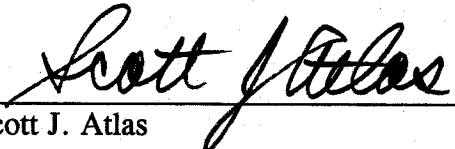
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**ATTORNEYS FOR PETITIONER-
APPELLEE, RICARDO ALDAPE GUERRA**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served via Federal Express on William C. Zapalac, Office of the Attorney General, 209 W. 14th at Lavaca, Austin, Texas 78711 on the 8th day of February, 1996.



Scott J. Atlas

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EXHIBIT A

Vinson & Elkins

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January 9, 1996

Hon. Monica Washington, Deputy Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street, Room 102
New Orleans, LA 70130

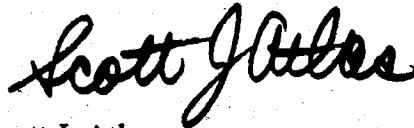
Re: No. 95-20443; *Ricardo Aldape Guerra v. Wayne Scott*

Dear Ms. Washington:

As we discussed in our telephone conversation yesterday, in response to my request for an additional 30 days to file Petitioner-Appellee's brief in the captioned case, a request that is unopposed by lead counsel for Respondent-Appellant, you agreed that the time for filing Petitioner-Appellee's brief will be extended by 30 days from its original due date of January 29, 1996 to February 28, 1996.

I need this additional time for several reasons. First, Respondent-Appellant's brief is very fact intensive, requiring a detailed review of the record. Second, the press of my other work makes it difficult to comply with the original deadline, especially a brief and oral argument due in a pending arbitration. Finally, I have been assisted by several people whose schedule is equally difficult between now and January 29, 1995.

Very truly yours,



Scott J. Atlas

Enclosures

c: William C. Zapalac
Office of the Attorney General
P. O. Box 12548
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EXHIBIT A

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February 8, 1996

VIA FEDERAL EXPRESS

Hon. Monica Washington, Deputy Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street, Room 102
New Orleans, LA 70130

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

Dear Ms. Washington:

Enclosed for filing in the captioned cause are an original and four copies of Petitioner-Appellee's Unopposed Motion for Extension of Time to File Brief.

Please acknowledge receipt of these documents by file-stamping the extra copy and returning same in the enclosed self-addressed, stamped envelope.

Very truly yours,



Scott J. Atlas

Enclosures

cc: (w/enclosure)

William C. Zapalac - **VIA FEDERAL EXPRESS**

Ricardo Aldape Guerra

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Hon. Monica Washington, Deputy Clerk

Page 2

February 8, 1996

bc: (w/enclosure)
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Santiago Roel
Mary Lou Soller
Julia Sullivan
Zona F. Hostetler
Prof. Harold Koh
Carol Wolchok
Team

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-20443

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

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v.

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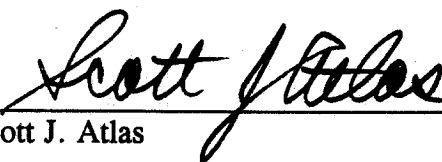
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Texas Bar No.: 01418400
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ATTORNEYS FOR PETITIONER-
APPELLEE, RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

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Scott J. Atlas

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EXHIBIT A

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January 9, 1996

Hon. Monica Washington, Deputy Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street, Room 102
New Orleans, LA 70130

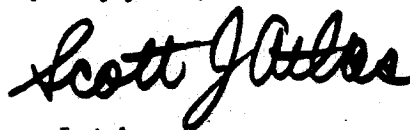
Re: No. 95-20443; *Ricardo Aldape Guerra v. Wayne Scott*

Dear Ms. Washington:

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Very truly yours,



Scott J. Atlas

Enclosures

c: William C. Zapalac
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711

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January 21, 1996

WRITER'S FAX

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Ms. Julia Sullivan
SIDLEY & AUSTIN
1722 I St NW
Washington, DC 20006

Re: No. 95-20443; *Ricardo Aldape Guerra v. James A. Collins*; in the U.S. Court of Appeals for the Fifth Circuit

Dear Ms. Sullivan:

On behalf of Petitioner-Appellee Ricardo Aldape Guerra, I consent to your filing an amicus curae brief on behalf of any or all of the amici on whose behalf you filed a brief in the lower court in the captioned case.

Very truly yours,



Scott J. Atlas

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Enclosures

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cc: William Zapalac

bcc: Vinson & Elkins L.L.P.

Susan Brown
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January 9, 1996

Hon. Monica Washington, Deputy Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street, Room 102
New Orleans, LA 70130

Re: No. 95-20443; *Ricardo Aldape Guerra v. Wayne Scott*

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Scott J. Atlas

Enclosures

c: William C. Zapalac
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711

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② PC - Tyler F
③ F. Aldape
olds
"Aldape's Request
for 30 Day Extension
to 2/28/96"

Hon. Monica Washington, Deputy Clerk

Page 2

January 9, 1996

bc: Ricardo Aldape Guerra

Hon. Monica Washington, Deputy Clerk

Page 3

January 9, 1996

bc: Julia Sullivan
Mary Lou Soller
Zona F. Hostetler
Prof. Harold Koh
Carol Wolchok



Office of the Attorney General
State of Texas

F-Aldape
p/1/96
(dup?)

DAN MORALES
ATTORNEY GENERAL

January 3, 1996

RECEIVED

JAN - 5 1996

SJA

Hon. Monica Washington, Deputy Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: *Ricardo Aldape Guerra v. Wayne Scott*, No. 95-20443

Dear Ms. Washington:

Enclosed for filing with the papers in the above-referenced cause are seven printed and bound copies of the Brief of Respondent-Appellant and four bound copies of the Record Excerpts. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding two copies of said brief to Petitioner-Appellant. Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script, reading "William C. Zapalac".

William C. Zapalac
Assistant Attorney General
(512) 936-1600

WCZ/jgw
Enclosures

c: Mr. Scott Atlas
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2500 First City Tower, 1001 Fannin
Houston, TX 77002-6760

No. 95-20443

No. 95-20443

1/3/96

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

BRIEF OF RESPONDENT-APPELLANT

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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
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ATTORNEYS FOR RESPONDENT-APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a)(3), oral argument should be denied because the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

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No. 95-20443

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On Appeal From the United States District Court
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Houston Division

BRIEF OF RESPONDENT-APPELLANT

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 brief.

STATEMENT OF JURISDICTION

The district court entered an order granting habeas corpus relief on November 15, 1994. 6 R 1369; RE Tab 2.¹ On May 18, 1995, the court granted Guerra's motion to alter or amend its order and issued its amended order, again granting relief. 6 R 1546; RE Tab 4. The Director filed notice of appeal on June 2, 1995. 6 R 1548; RE Tab 5. This court stayed the judgment on June 21, 1995. 6 R 1571. The court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUE

Whether the district court's factual findings that the police and prosecutors engaged in misconduct, depriving Guerra of due process, are clearly erroneous.

STANDARD OF REVIEW

A district court's findings of fact will be set aside if the reviewing court determines that they are clearly erroneous. Fed. R. Civ. P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985). Legal conclusions are reviewed *de novo*. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Guerra is in custody pursuant to a judgment and sentence of the 248th District Court of Harris County, Texas in cause number 359805, styled *The State of Texas v. Ricardo Aldape Guerra*. Guerra was indicted for the murder of police officer J. D. Harris, while Officer Harris was in the lawful discharge of his duties, a capital offense. Guerra pled not guilty and was tried by a jury. On October 12, 1982, the jury found him guilty as charged. After a separate hearing on

¹"R" refers to the record on appeal. "RE" refers to Respondent-Appellant's record excerpts. "SR" refers to the record of Guerra's state trial.

punishment, the jury, on October 14, 1982, returned affirmative answers to the issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. The trial court sentenced Guerra to death by lethal injection, as required by law.

Guerra's case was automatically appealed to the Court of Criminal Appeals of Texas. The court affirmed his conviction and sentence on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim.App. 1988). Guerra's petition for writ of certiorari was denied on July 3, 1989. *Guerra v. Texas*, 492 U.S. 925, 109 S. Ct. 3260 (1989).

On May 8, 1992, Guerra filed an application for writ of habeas corpus in the state convicting court. On July 2, 1992, he withdrew the application and, on September 17, 1992, he filed a second application. The trial court recommended that relief be denied. The Court of Criminal Appeals noted that, by making no findings of fact, the trial court had found, as a matter of law, that there were no controverted, previously unresolved issues of fact material to Guerra's confinement. In reviewing the record and the pleadings, the Court of Criminal Appeals concluded that the trial court's implied finding was fully supported. Accordingly, it denied relief on the same basis as the trial court. *Ex parte Guerra*, Application No. 24.021-01 (Tex.Crim.App. January 13, 1993).

Guerra then filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division. The court conducted an evidentiary hearing on November 15, 16, 18, 19, and 22, 1993. On November 15, 1994, the court entered an order granting habeas corpus relief. 6 R 1369; RE Tab 2. On May 18, 1995, the court amended its order in several respects, and again granted habeas corpus relief. 6 R 1546; RE Tab 4. The state was ordered to release Guerra unless it began a retrial within thirty days. The

Director filed timely notice of appeal, 6 R 1548; RE Tab 5, and on June 21, 1995, this court stayed the district court's judgment. 6 R 1571.

B. Statement of Facts

On July 13, 1982, J. D. Harris, a police officer with the K-9 Division of the Houston Police Department, was on patrol in a Mexican-American neighborhood near downtown Houston, accompanied by his K-9 partner, Texas. XXIII SR 706. At approximately 10:00 p.m., a pedestrian, George Brown, waved down Officer Harris and stated that a black and burgundy Cutlass almost ran over him while he was walking his dog on Walker Street. XXII SR 383. Less than a minute later, Officer Harris approached a vehicle stalled at the intersection of Walker and Edgewood and fitting the description given to him by Brown. XXII SR 388. Apparently, the car was attempting to make a U-turn on a nearby street when it stalled, blocking traffic on that street. XX SR 67; XXI SR 282; XXII SR 388.

At Guerra's trial, two teenage girls, Herlinda Garcia and Vera Flores testified that they were walking to the store about 10:00 p.m., that the same black car had stopped them seconds before, and the driver told them his car needed a boost and asked them if they had some cables. XXII SR 446, 507. Both girls stated that they saw the police officer drive up and park his patrol car behind the black car seconds later. XXII SR 448, 508. According to Garcia, two men exited the black car, walked towards the officer, and put their hands on the police car. XXII SR 448-449, 479. Garcia then saw one of the men, later identified as Ricardo Aldape Guerra, pull what appeared to be a gun from his pants.² XXII SR 449-50. She heard three shots and saw the officer fall to the ground. XXII SR 450-51. Garcia, who ran toward her house holding her seven-month old baby, heard more shots being fired behind her. XXII SR 451. As did Garcia, Vera

² Guerra's companion was later identified as Roberto Carrasco Flores (Carrasco).

Flores testified that she saw two men get out of the black and red car and approach the police car. XXII SR 511. The men seemed to place their hands on the hood of the patrol car while the officer was standing by the open door of his car. XXII SR 510, 527. After Flores saw the driver of the car, whom she identified as Guerra, pull something from in front of him, she heard three shots and then saw the officer lying on the ground. XII SR 512-13, 534, 543. Flores ducked beside a car and saw Guerra running down Walker street towards Lenox. XXII SR 535. Both girls identified Guerra as being the one who shot and killed Officer Harris. XXII SR 452-517).

Another eyewitness, Hilma Galvan, testified that she was walking around her neighborhood that night with two of her neighbor's children, Jose and Armando, when Guerra came speeding around a corner in a black car and almost hit them. XXII SR 550. Galvan was able to identify Guerra as the driver of the car because he was a customer of the convenience store where she worked. XXII SR 561-67, 570, 576. Galvan also saw George Brown talking to an officer in a patrol car. XXII SR 553. While standing on the sidewalk in front of her house at 4925 Walker, the third house east of the intersection of Walker and Edgewood, Galvan observed a patrol car and the same black and red car that almost hit her blocking Walker street. XXII SR 553-54. Galvan also saw Garcia and Flores standing by the front of the black and red car. XXII SR 557-58. Galvan heard the officer twice tell Guerra to "[c]ome here" and then saw Guerra turn and walk towards the officer. XXII SR 557. She next heard the sound of shots being fired and saw a "flash" coming from Guerra's hand and then saw the officer fall to the ground. XXII SR 560.

Galvan testified that she saw Guerra running toward her and the two children with her on the same side of the street firing his gun in the direction of

Garcia and her baby across the street.³ XXII SR 586-87. Galvan ran inside her house and stayed there until Jose Armijo, Jr. came to her house a few moments later screaming that his father had been shot. XXII SR 562-65. Galvan ran to the car that had crashed into a tree in front of her house and saw that a man, later identified as Francisco Jose Armijo, Sr., had been shot; Galvan then helped his two-year old daughter from the back seat of the car. XXII SR 565-66. She identified Guerra as the man whom she saw shoot Officer Harris. XXII SR 561, 567, 570.

Jose Armijo, Jr. testified that on the evening of July 13, 1982, he and his two-year old sister, Lupita, had accompanied their father, Francisco Jose Armijo, Sr., to the store. XXI SR 281. Jose stated that while they were driving west on Walker Street on their way home, he saw a black car and a police car blocking the intersection. XXI SR 281-82. Jose saw the police officer standing behind the open door to his patrol car and observed two people with their hands placed on the hood of the police car. XXI SR 283. Jose's father stopped his car and Jose observed the man with the long hair, later identified as Guerra, "scratch his back" and then take out a gun and shoot the policeman. XXI SR 284. After Jose saw the fire coming from Guerra's gun, the policeman fell to the ground and one of the men grabbed the policeman's gun. XXI SR 285-86.

While Armijo was attempting to move his car, the two men started running down Walker towards Armijo's car. XXI SR 286. The man in the purple shirt ran down Armijo's side of the car, while the man with the green shirt, Guerra, ran on the passenger side of the car and started shooting into the car. XXI SR 286-87. Jose pushed his sister down in the back seat; Armijo was hit by one of the bullets fired from Guerra's gun. XXI SR 287. Jose testified that during a subsequent

³ Galvan lives on the north side of Walker while Herlinda Garcia lives with her family on the south side.

lineup at the police station, he recognized Guerra as the man who shot the police officer and who also shot his father. XXI SR 290. However, Jose told the police officer at the lineup that he was unable to identify anyone because Guerra lived in the same area of town as he did and he was afraid that if he identified him from the lineup, Guerra would "come and get him." XXI SR 290-91.

Patricia Diaz testified that she was driving her car down Walker when she approached a patrol car and a black car with the red top blocking the intersection. XXI SR 310. Because the intersection was blocked, she stopped her car approximately three to four feet from the black car, which was later identified as the car Guerra was driving. XXI SR 311. Diaz stated that her headlights were on and she saw Guerra "pointing" towards the officer right before four shots rang out. XXI SR 312-13, 317, 325. Diaz identified Guerra at the lineup as the man she saw "pointing" towards Officer Harris. XXI SR 317.

When investigating the scene of the murders, law enforcement officials learned from the eyewitnesses that Guerra and Carrasco had fled in an easterly direction down Walker street, with one man on the north side of the street firing his weapon and the other man on the south side of the street firing his weapon. XX SR 104-05. Two nine-millimeter cartridges were found on the north side of the street (on the driveway at 4925 Walker) and two cartridges from a .45 caliber pistol were found on the south side of the street. XX SR 73, 92, 102-03, 143. Immediately after the shooting, law enforcement officials canvassed the neighborhood looking for people with information regarding the shootings. XXI SR 213-14. Acting on a tip that the suspects might be living in the house at 4907 Rusk, on the corner of Rusk and Dumble, Officers Lawrence Trapagnier and Mike Edwards, along with other Houston Police Department officers, proceeded to that location to coordinate a search for the suspects. XXI SR 216; XXIII SR 648, 667. After searches of the two houses at 4907 Rusk and 4911 Rusk by police officers

proved fruitless, Officers Trapagnier and Edwards approached a dark garage behind the house at 4911 Rusk. XXI SR 669-70. As the officers shined their flashlights in the garage, gunfire erupted and Officer Trapagnier was shot numerous times by one of the suspects, later determined to be Carrasco. XXI SR 658, 673-75, 678. Other officers, hearing the shots ran to Trepagnier's aid and shot and killed Carrasco. XX SR 21; XXIII SR 661. A Browning nine millimeter pistol was found under Carrasco's body. XX SR 42. Officer Harris' .357 millimeter ammunition was recovered from the waistband of Carrasco during a search at the Harris County Morgue. XXI SR 202, 209.

Terry Wilson, Chief of the Civil Rights Division of the Harris County District Attorney's Office and a certified peace officer, testified that he responded to the scene at Edgewood and Walker at approximately 11:00 p.m. to investigate the shootings of Officer Harris and Armijo. XX SR 8, 10, 17. At approximately 11:30 p.m., while en route to look for possible suspects, Wilson heard two "volleys" of numerous shots coming from what appeared to be a location northeast from scene of the murder. XX SR 17. Wilson proceeded to that location, 4911 Rusk, observed a police officer and one of the suspects lying on the ground, both with apparent gunshot wounds. XX SR 19-22. In order to protect the physical evidence of the crime scene and restrict access to the house, Wilson began to put up crime scene tape. XX SR 23-24. While trying the tape to a tree, Wilson observed a male, later identified as Guerra, crouched behind a horse trailer at the back of the lot. XX SR 25. At this point, Wilson pulled his weapon, called for assistance, and proceeded to arrest Guerra. XX SR 26. Wilson testified that after he arrested Guerra, he looked under the horse trailer and found a red bandanna with a .45 caliber pistol wrapped inside of it that was located about two feet from where Guerra had been crouched down. XX SR 28. Wilson identified Guerra at

trial as the individual whom he found crouched behind the horse trailer and subsequently placed under arrest. XX SR 27.

Amy Heeter, a chemist with the Houston Police Department, testified that she performed a trace metal detection test on Carrasco to determine whether he had held a particular weapon in the period proceeding his death. XXI SR 160. She stated that many factors affect the presence or lack of a trace metal pattern, such as dirt, blood, water, or sweatiness of the palms. XXI SR 162-63. According to Heeter, it is possible for a person to hold a weapon yet not have trace metal patterns on his hands because of the above variables. XXI SR 163. Heeter found a pattern on Carrasco's right palm similar to the pattern formed on her own hand when she held Officer Harris' .357 revolver. XXI SR 171. When she performed the trace metal detection test on Carrasco's left hand, she determined that, although it was possible that the pattern she detected may have been consistent with holding a pistol, the results were not consistent with handling the nine millimeter Browning. XXI SR 172, 177.

Danita Smith, a chemist with the Houston Police Department, testified in detail concerning the variables that affect the results of a trace metal test, including the fact that it is easier to get a trace metal reading from a deceased person because there is a lack of movement. XXI SR 180-85. Smith performed trace metal tests on Guerra about 4:45 a.m. July 14th, approximately seven hours after the shootings. XXI SR 186. She stated that Guerra's hands were very dirty as if he had rubbed them in dirt or as if he had fallen on the ground. XXI SR 187. When she performed the trace metal test, she was unable to find any type of a pattern on either of hands. XXI SR 188.

C. E. Anderson, a firearms examiner with the Houston Police Department, testified that he recovered two .45 caliber cartridges, seven nine millimeter cartridges, and three nine millimeter bullets in the vicinity of Edgewood and

Walker. XX SR 120-21. At the 4911 Rusk location he recovered six nine millimeter cartridges. XX SR 122. Anderson conducted a test on all of the nine millimeter casings recovered in the vicinity of Edgewood and Walker and determined that they were fired from the nine millimeter gun found underneath Carrasco's body. XX SR 131. Anderson also determined that the nine millimeter cartridges recovered from the Rusk Street shooting were also fired from the nine millimeter. XX SR 138. He determined that the .45 caliber cartridges found at or near the scene of the shooting of the officer were fired from the .45 caliber pistol found in the red bandanna. XX SR 131. Anderson was not able to make a positive identification as to whether the three nine millimeter projectiles found lodged in the house at 4919 Walker street were fired from the particular nine millimeter pistol found under Carrasco. XX SR 133-35. He also determined that it was a nine millimeter bullet that killed Francisco Armijo. XX SR 145. Anderson concluded that, based on his examination of the scene, the location of the projectiles, and his investigation, Officer Harris was killed with a nine millimeter pistol. XX SR 152.

Dr. Aurelio Espinola, Deputy Chief Medical Examiner for Harris County, testified that he performed the autopsy on the body of Officer Harris. XXIII SR 683-84. Based on his examination, there were three gunshot wounds of entrance on the left side of Harris' head and three exit wounds on the right side of his head. XXII SR 685-92. Dr. Espinola also determined that the each of the first two shots sustained by Harris were fatal. XXIII SR 695. He concluded that the cause of Harris' death was three gunshot wounds to the head, face and chin. XXIII SR 696. Dr. Espinola also testified that from his examination of the size of the wounds that a .45 caliber could not have made the wounds, but that a nine millimeter could have made the wounds. XXIII SR 700. Dr. Espinola also performed an autopsy

on Francisco Jose Armijo and determined that his death was caused by a gunshot wound to the head. XXIII SR 697-99.

During the punishment stage of the trial, the State presented evidence, through the testimony of Robert Dawson and Steve Earhardt, that Guerra, Carrasco, and Enrique Torres Luna had committed an aggravated robbery at the Rebel Gun Store on July 8, 1982, in which they took over fifteen thousand dollars worth of guns and ammunition. XXVI SR 64, 71, 76, 77, 116.

ARGUMENT

THE DISTRICT COURT'S FACTUAL FINDINGS, WHICH ARE NECESSARY FOR THE GRANTING OF HABEAS RELIEF, ARE CLEARLY ERRONEOUS.

The district court granted relief based on its review of the pleadings and the testimony of witnesses at the evidentiary hearing. 6 R 1369, 1546; RE Tab 4 at 1. In making its factual findings, the court accepted the testimony of many of the witnesses presented by Guerra. Although there is evidence in the record to support the court's findings, a review of the entire record leads inexorably to the conclusion that the findings are clearly erroneous.

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. at 573, 105 S. Ct. at 1511. When the district court's findings are not "plausible in light of the record reviewed in its entirety," they are clearly erroneous. *Id.*, at 574, 105 S. Ct. at 1511.

The district court granted relief on the following allegations:

1. The police and prosecutors intimidated witnesses prior to trial to secure favorable testimony against Guerra;

2. The identification procedures were impermissibly suggestive;
 3. The prosecutors suppressed material, exculpatory evidence;
 4. The prosecutors knowing used false evidence and relied on illegitimate arguments at trial; and
 5. The cumulative effect of the above errors resulted in a due process violation.
- A. *The testimony of the witnesses at the evidentiary hearing cannot be true in light of the evidence from their pretrial statements and trial testimony; the testimony that is true does not show a violation of Guerra's constitutional rights.*

The bulk of the court's opinion dealt with Guerra's allegation that the police and prosecutors threatened and intimidated witnesses in order to get them to identify Guerra, rather than Carrasco, as the one who killed Officer Harris. The court reviewed the evidentiary hearing testimony of eight witnesses and concluded that there had been official misconduct that resulted in the witnesses' testifying falsely.

Patricia Diaz

The court below found that Patricia Diaz was threatened by police at the scene of Officer Harris' murder when she stated that she did not see the shooting, that she had gotten only a glimpse of Guerra's profile, and that Guerra's hands appeared to be empty. The court also found that, when Diaz tried to tell the prosecutors that she had not seen Guerra pointing at Officer Harris, they yelled at her, scaring her into testifying the way they wanted her to. 6 R 1540; R.E. Tab 4.

The allegation that Diaz was threatened by the police at the scene of the murder because she would not identify Guerra as the shooter is wholly implausible

in light of the fact that the police had no idea at that time that Guerra was even involved in the crime or that there was any possibility that he was the murderer. What is believable is that the police were intent on finding the person responsible for the crime and perhaps became frustrated at what appeared to be a lack of cooperation on the part of witnesses. Nothing in the record supports a finding that Diaz was threatened by the police because she would not identify Guerra as the murderer and that she agreed to identify him because of the threats.

The court also found that Diaz told the prosecutors that she had not seen Guerra pointing at the victim but that they forced her to testify that she had. 6 R 1540; R.E. Tab 4 at 7. She also testified that much of what was contained in the statement she gave after the shooting was untrue. 12 R 24, 86. This, again, is not believable in light of the entire record. At the evidentiary hearing, Diaz stated that she had not read her statement before signing it because she was tired and just wanted to leave the police station. 12 R 23, 77. However, if the statement were untrue and if she had not read it, she offered no explanation for the fact that her testimony at trial faithfully tracked the statement. *Cf.* Pet. Exhibit 30 *with* XXI SR 309-40. Because Diaz' testimony was consistent with her statement, and because she had not read the statement before testifying, the only explanation is that the statement contained a truthful account of the events as she perceived them on the night of the killing. What cannot be true is what the district court found: that the statement did not reflect what Diaz told the police, that she did not read the statement before testifying, but that her testimony accurately recited the details of the statement. The district court's findings in this regard are clearly erroneous.

Elena Holguin

Elena Holguin testified that she was handcuffed at the scene of Officer Harris' murder and kept handcuffed for a couple of hours, until she was taken to police headquarters. She also testified that police officers threatened her if she

would not cooperate with their investigation. 10 R 141-42. The district court cited this as an instance of witness intimidation. 6 R 1541; R.E. Tab 4 at 8. However, even if the incident occurred, and even if it was unprovoked, the court was unable to cite to any effect that it had on Holguin's testimony. Holguin had not been a witness to the murder of Officer Harris, so her statement did not contain an identification of the shooter. Pet. Ex. 26. Although Holguin claimed that she was not allowed to read the statement or have it read to her before she signed it, 10 R 145, she did not claim that anything in the statement, or in her testimony that was consistent with the statement, was not true. Although the record might support the district court's finding regarding the way that Holguin was treated, it will not support a finding that Holguin was intimidated into giving information or testimony that implicated Guerra and that was untrue.

Frank Perez

The district court found that Frank Perez witnessed a police officer on top of a suspect with her gun drawn and pointed at his face asking, "Why did you kill the cop?" 6 R 1539; *see* 9 R 117. It turned out that the person had no involvement with the case. As was the case with Holguin, however, what is lacking here is any indication that the episode had the effect of intimidating any witness into giving untrue information that inculpated Guerra. Perez testified that the incident occurred some distance away from the scene of the killing. There is no indication that any other witnesses were around to observe. Nothing in the record even suggests that any witnesses changed their testimony or gave false information because of it. Perez himself never testified that he felt intimidated and did anything to implicate Guerra as a result.⁴ The finding does not constitute an

⁴In fact, Perez did not see the killing of Officer Harris, so he was not in a position to identify the murderer. He did see someone running down the street past his house shortly after hearing the shots. The man appeared to point a gun at

example of official action that threatened or coerced witnesses to identify Guerra as the killer of Officer Harris.

In Perez' statement, given shortly after the murder occurred, he related that he had seen a man running past his house shortly after hearing gunfire. Originally, the statement said that Perez saw the man drop a gun; however, the word "gun" was marked through and "object" was substituted. *See* Pet. Ex. 21. Perez testified, and the district court found as true, that the prosecutors told him that unless he was 100% certain that he had seen a gun he should say "object."⁵ The court below cited this as an example of prosecutorial interference with a witness' testimony. 6 R 1538-39; R.E. Tab 4 at 9. The court did not explain how seeking to present accurate information to the jury amounts to prosecutorial misconduct. Moreover, even if the state did impermissibly change the witness' testimony, the defense had a copy of Perez' statement available and could have cross-examined him on the change had it seemed significant. XXII SR 419. Although the state might have encouraged Perez to be precise in his testimony, the court's finding does not show a violation of Guerra's right to due process.

Jose Luis Luna and Roberto Onofre

At the evidentiary hearing, Jose Luis Luna and Roberto Onofre testified that he lived in the same house as Guerra. Sometime between the killing of Officer Harris and the time that Carrasco was shot, the police appeared, with guns drawn. They forced Luna and another person outside, pointed guns at them, screamed at them, and searched the area. 12 R 153-54; 186-87. The district court reported this

Perez, dropped it, then picked it up. Perez described him in a way that was consistent with Carrasco. *See* Pet. Exhibit 21. At trial, he identified a photograph of Carrasco as being the person he had seen. XXII SR 414. He also identified the mannequin of Carrasco as "appear[ing] the same" as the man he had seen. *Id.*

⁵Perez' testimony was that he could not identify what he had seen the man drop because it was very dark and trees blocked the light. XXII SR 412.

as yet another instance of official misconduct that resulted in intimidation of witnesses. The district court ignored several facts, however. For example, Luna was not a witness to the killing of Officer Harris, so the incident clearly had no effect on his identifying the murderer. In addition, Luna, far from being intimidated, testified about the incident at Guerra's trial as a defense witness. XXIV SR 819-20. Finally, Luna also testified that a short while after hearing a series of shots in the direction where Harris was killed, Carrasco came into the house out of breath and said that he had killed a policeman. XXIV SR 814-15. Assuming that the described conduct did take place, it plainly had no effect on the testimony of the witnesses involved.⁶

Herlinda Garcia

The district court credited Herlinda Garcia's testimony that the police threatened to arrest her and her husband after she told them that Carrasco, not Guerra, was the shooter. The court also found that when Garcia tried to tell prosecutors before trial that Guerra was not the one who killed Harris, they told her that she could not change her mind at that point. 6 R 1537; R.E. Tab 4 at 10. As a result, the court determined that Garcia was forced to testify in a way that implicated Guerra, although she knew that he was not the murderer.

As was the case with the findings relating to Patricia Diaz, the court's findings ignore the other evidence in the record, evidence that makes its findings untenable. For example, there has been no showing that at the time Garcia supposedly identified Carrasco as Officer Harris' killer the police knew anything about Guerra's possible involvement. In fact, well after Carrasco was killed, the

⁶The same is true about the testimony that, in the weeks after the murder, police officers appeared at Luna's house in the middle of the night, forced the occupants to lie face down, and proceeded to search and ransack the house. There is no evidence in the record to show that any defense witnesses were deterred from testifying because of this behavior.

police believed that he was Harris' murderer. 9 R 122, 128-29. Thus, there was no basis for the police to make threats to try to persuade witnesses to name Guerra as the murderer. In addition, Garcia's statement, given shortly after midnight on July 14, and supposedly after the police threatened her, described the shooter in a manner that resembled Carrasco rather than Guerra. *See* Pet. Ex. 23. The record contains nothing to show that Garcia identified Guerra in the line-up because of pressure from the police. Finally, as was true of Diaz, Garcia testified at the evidentiary hearing that she did not read her statement before signing it because she did not know how to read, and the police refused to read it to her. 10 R 62-63. She also claimed that some of the statements were not true and were not what she had told the police. 10 R 65-66. Yet her trial testimony was exactly the same as her statement. XXII SR 429-62. On at least two occasions during her trial testimony she was asked about things she had said in her statement and replied appropriately. XXII SR 459-60, 466-67.⁷ Plainly, she had full knowledge of what she had said in her statement. Looking at the entire record, and not simply the testimony from the evidentiary hearing, the district court's findings regarding Garcia's statement and testimony are clearly erroneous.

George Brown

The district court made two findings based on George Brown's evidentiary hearing testimony: that he believed he was segregated from the Hispanic witnesses at the police station because his last name was not Hispanic, and that he could hear the other witnesses discussing the shooting among themselves. Besides being irrelevant because they do not show any police misconduct and do not show that any witnesses changed their stories because of harassment from the authorities,

⁷On the first occasion, the prosecutor asked if she had described the shooter as having blond hair and she said she had. The second time, Guerra's attorney had her read her description of the shooter's clothes, and she did so.

they do not accurately reflect the testimony. Regarding his being separated from the rest of the witnesses, Brown testified as follows:

Q (Mr. Atlas) So let me see if I understand this correctly. From about midnight or so when you were brought into the police station until shortly before the line-up at 6:00 in the morning, you, apparently the only one with an Anglo surname, were separated and kept apart from your Hispanic neighbors the entire time; is that right?

A (Brown) I don't know if they were taken into cubicles also. I have no way of knowing that.

Q All you know is you were segregated into a cubicle and you weren't allowed to mix with them or communicate with them in any way at any time before the line-up began from the time you got in there around midnight the night before; isn't that right?

A Correct. I just did what I was told to.

11 R 81. At no time in the record did Brown even intimate that he felt he was being separated because of his name and presumed different nationality.

Similarly, when asked about what he observed in the hallway while he was waiting for the line-up, Brown described the people who were present. Then he was asked:

Q (Mr. Atlas) Were they talking amongst themselves?

A Yes, they were.

Q Could you hear what they were saying?

A No, I couldn't.

11 R 82-83. To the extent these findings are relevant to any of the issues in this case, they are clearly erroneous.

The court's conclusion that the state, through its police officers and prosecutors, threatened, browbeat, and intimidated witnesses to make sure that they identified Guerra as the killer at trial is based on its findings with respect to the named witnesses. All of those findings are either clearly erroneous, irrelevant, or prove, not intimidation, but a lack of fear on the part of witnesses. Consequently, the conclusion that Guerra was denied due process and a fair trial cannot survive.⁸

B. The identification procedures used in this case were not impermissibly suggestive.

The district court also held that the state denied Guerra due process by resorting to improper identification procedures. According to the court, the state employed techniques that were designed to insure that the witnesses would identify Guerra, whether he was the murderer or not.

In determining whether an identification process constitutes a denial of due process, it first must be determined if the pretrial identification was impermissibly suggestive. If it is, the court then must determine whether the procedures created a substantial likelihood of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967 (1968); *United States v. Merkt*, 794 F.2d 950, 957-58 (1986). The factors to be considered in determining whether an identification is reliable include: 1) the opportunity of the witness to view the defendant; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description; 4) the level of

⁸The district court gratuitously maligns the prosecutors' behavior, condemning particularly "[t]he tone of voice, as well as the artful manner in which the questions were asked" 6 R 1533. Nothing in the record indicates that the court was present at the trial to know the tone of voice the prosecutors used. Further, part of a lawyer's job is to artfully frame questions to present the client's case. Absent using artful questions to present evidence that is untrue, there is nothing improper about being skilled in the use of language.

certainty displayed by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382 (1972).

The district court found fault with four aspects of the identification procedure in this case. It held that the witnesses' identification of Guerra was tainted and unreliable because the witnesses were permitted to see Guerra in handcuffs being taken into and out of the Homicide Division, because the witnesses were allowed to talk among themselves about the identity of the killer before the line-up, because the police staged a "re-enactment" of the murder for the witnesses; and because the state used mannequins made to resemble Guerra and Carrasco as exhibits during the trial.

Viewing of Guerra in handcuffs

The trial court found that the witnesses were seated in the hallway outside the Homicide Division while waiting to give their statements and to view the line-up. During this time, Guerra was led past the witnesses in handcuffs. The court concluded that this tainted the identifications that the witnesses made of Guerra as the one who shot Officer Harris. 6 R. 1523-30; Tab 4 at 20.

The court ignored two facts in making this decision. First, the witnesses for the most part were people who already knew Guerra, which reduced the chances that they identified the wrong person. Second, most of the witnesses gave their statements before Guerra was led through the hallway. Frank Perez testified that Guerra was brought through the first time after he gave his statement. 9 R 180-81. His statement was given at 12:40 am. See Pet. Ex. 21. Seven witnesses gave statements after Perez did: Patricia Diaz (1:40 am), Armando Heredia (4:35 am), Jose Heredia (4:15 am); Elena Holguin (1:30 am); Danny Martinez (1:00 am); Trinidad Medina (1:35 am); and Enrique Luna Torres (3:45 am). Of these, only Diaz and the Heredia brothers were witnesses to the shooting of Officer Harris,

and they are the only ones who described the shooter and who viewed the line-up to identify shooter. Armando Heredia's statement identified the shooter as "Guero," which was Carrasco's nickname, but positively picked Guerra out of the line-up and stated that he knew Guerra as "Guero." He did not testify at the trial. Jose Heredia did not identify anyone in the line-up, and testified at trial for Guerra.

Only Diaz arguably made an identification at odds with the description in her statement. However, at no time has Diaz testified that seeing Guerra being led through the hallway in handcuffs affected her identification of him in the line-up. Indeed, she has not repudiated her identification of Guerra at all.⁹ At the evidentiary hearing, she merely said that she had signed her statement without reading it, and that she did not know that the statement contained the sentence "I saw this man with his hands out-stretched, and I guess he had a gun in his hands." 12 R 29. Nothing in the record supports the district court's finding that Guerra was identified in the line-up because the witnesses had seen him led through the hallway earlier in the evening.¹⁰

⁹ Diaz' identification of Guerra was tentative anyway. At trial, after a vigorous cross-examination about what she had seen, she admitted that "I didn't exactly know who shot who." 12 SR 340.

¹⁰ At the evidentiary hearing, Diaz testified that her trial testimony was not intended to relate what she had seen but to describe what was in her statement. 12 R 24-26. She was referred expressly to portions of her trial testimony where the prosecutor directed her "to look at your statement and tell the jury everything you said in your statement," or to "[t]ell the jury how [you] described the man for the police in your statement on July 14, 1982." 12 R 24. Even if Diaz was intending to relate only what was in the statement on these occasions, that does not explain her testimony on cross-examination that did not refer to what was in the statement but to what she had seen, which was consistent with the statement. XXI SR 323-33.

Discussions among the witnesses

The district court also found that the line-up identifications were tainted because Hilma Galvan insisted to Jose and Armando Heredia and Jose Armijo, Jr., that Guerra was the shooter. 6 R 1524-25; R.E. Tab 4 at 22. With respect to the Heredia's, this finding is clearly erroneous. As noted above, Jose Heredia did not identify Guerra in the line-up as the shooter, so he clearly was not influenced by Galvan's comments. Further, he testified at trial on Guerra's behalf and identified Carrasco as the one who killed Officer Harris. XXIII SR 744. Armando Heredia did identify Guerra in the line-up but did not testify at trial. Thus, even if his identification were tainted, it did not affect the outcome of the trial because the jury never was made aware of it.

As for Jose Armijo, Jr.'s, identification of Guerra, there is no record support for the finding that it was the result of Galvan's prompting. In the first place, Jose, Jr. did not identify Guerra at the line-up. XXI SR 290. It was not until he testified at trial that he described Guerra as the one who had shot Officer Harris. XXI SR 284. Assuming that Galvan did urge Jose, Jr. to identify Guerra as the killer of Officer Harris and of Jose, Jr.'s father, it could not have resulted in a misidentification of Guerra at the line-up. Assuming further that Galvan continued to lobby Jose, Jr. to name Guerra as the killer, that his trial testimony was influenced by that, and the identification was erroneous -- something for which there is absolutely no support in the record -- the state cannot be held responsible. There is no showing that the state encouraged Galvan to try to convince Jose, Jr. to change his story and name Guerra as the one who committed the murders. Even if Galvan took it upon herself to speak to Jose, Jr. and persuade him that Guerra was the murderer, the state is not responsible for the conduct of private citizens when they are outside of official control. In any event, without state action, there can be no constitutional violation. *Cf. Thompson v. Mississippi*, 914 F.2d 736, 739 (5th

Cir. 1990), *cert. denied*, 498 U.S. 1124, 111 S. Ct. 1083 (1991) (state action required for violation of right to counsel at post-indictment confrontation). The record does not support the district court's findings that Galvan's talking to other witnesses resulted in misidentification of Guerra as the killer.

Pretrial re-enactment

The district court further found that the identifications were rendered unreliable because the police and prosecutors staged a re-enactment of the crime a couple of weeks after it occurred. According to the district court, "[t]his procedure permitted the witnesses to overhear each others [*sic*] view and conform their views to develop a consensus view." 6 SR 1527; R.E. Tab 4 at 20.

This finding was made from whole cloth by the district court. There was no testimony from any source at the evidentiary hearing that the re-enactment was conducted in such a way that the witnesses heard and observed the comments of each other. Certainly, there was no evidence that any witness was swayed by anything that any other witness said at the re-enactment, and changed his or her testimony "to develop a consensus view." This is not surprising inasmuch as the witnesses already had given statements and the record shows that the trial testimony of the witnesses was consistent with the statements already on file. As for using the re-enactment to ensure that all the witnesses testified alike, the trial record belies that. Not even all of the eyewitnesses to the killing of Officer Harris were able to identify Guerra as the shooter, and each of the accounts contained each witness' own version of how the incident occurred, where the participants were, and the sequence of events. In short, the trial testimony showed exactly what would have been expected in any trial, *viz.*, that each witness perceived things slightly differently and remembered different details. The one fact that was common to all of those who were able to identify the killer was that it was Guerra. Nothing in the record as a whole supports the district court's finding that the re-

enactment in any manner produced an unreliable identification of Guerra or testimony that was untrue.¹¹

Use of mannequins

At the trial, the prosecution displayed two mannequins which were made to look like Guerra and Carrasco, and which were wearing the clothing each man had on on the night of the murders. The district court found that the use of the mannequins violated Guerra's right to due process because "the positioning of the mannequins helped [witnesses Heredia and Perez] identify which of the men was dead."¹² 6 SR 1523. Even if true, however, this is irrelevant to whether there was a violation of Guerra's right to due process. As noted before, Heredia testified for Guerra and identified Carrasco as the shooter. Perez was not an eyewitness to the killing and did not, because he could not, identify either man as the shooter. Neither Perez nor Heredia testified that their testimony was influenced in any way by the presence of the mannequins in the courtroom. Thus, there is nothing in the record to support the district court's finding that the use of the mannequins, or any of the other procedures, violated Guerra's right to due process.¹³

¹¹ The district court also disparaged the re-enactment because only "chosen" witnesses were invited to attend. 6 R 1527. This is not as sinister as the court makes it appear. The "chosen" witnesses were those who had been eyewitnesses and who, therefore, had information relevant to a re-enactment.

¹² It is puzzling what significance the district court attached to this. There was no dispute that Carrasco was dead and that Guerra was not.

¹³ The district court also noted that one of the jurors testified that the jury was uncomfortable and ill at ease because of the life-like appearance of the mannequins. 6 R 1523. The juror did not testify that the jury's verdict was affected by the presence of the mannequins. Such testimony would not have been admissible in any event. FED. R. EVID. 606(b).

**C. *The record shows no violation of
Brady v. Maryland, 373 U.S. 83,
83 S. Ct. 1194 (1963).***

The district court found that the prosecutors suppressed evidence that was favorable to Guerra, in violation of Guerra's right to due process and the dictates of *Brady v. Maryland*. In particular, the district court found that the witnesses Herlinda Garcia, Patricia Diaz, Frank Perez, Jose Heredia, Elena Holguin, and George Brown gave information to the police that was exculpatory of Guerra but that was not made available to the defense. In addition, the court found that Amy Parker Heeter, the state's expert on trace metal testing, failed to disclose material evidence that was favorable to Guerra and that would have implicated Carrasco.

Under the Due Process Clause as interpreted by *Brady*, the state is required to disclose to the defense any exculpatory evidence that is material to either guilt-innocence or punishment. *East v. Scott*, 55 F.3d 996, 1002 (5th Cir. 1995); *Wilson v. Whitley*, 28 F.3d 433, 435 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 754 (1994). Undisclosed 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, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding *Id.* The district court's findings that led it to conclude that the state violated *Brady* are either clearly erroneous or irrelevant.

Herlinda Garcia

The district court accepted Garcia's testimony at the evidentiary hearing that 1) she told the police that the shooter had short hair, that the long-haired man was near the front of the car when Officer Harris was killed, and that his hands were empty; 2) after the line-up, she told the police that the person in the No. Four position (Guerra) was not the shooter and that his hands had been empty; 3) at the

re-enactment, she told the prosecutors that the short-haired man had done the shooting; and 4) at the meeting with prosecutors the weekend before trial, the long-haired man with the green shirt was not the killer. The court also found that Garcia did not read either the original statement she gave to police or the statement she made after the line-up, neither of which contained the allegedly exculpatory information. 6 SR 1518-20. Because it was uncontested that this information was not given to the defense, the court concluded that *Brady* had been violated.

This finding can be supported only by ignoring the other evidence in the record. Most notably, although Garcia testified that she had not read her statements before testifying and that the statements did not accurately reflect what she had said, neither she nor the court explained how her trial testimony could have been so consistent with them. *See* XXII SR 439-500. It is obvious that if she actually saw something different from what was in the statements and told that to the police, but did not read the statements the police wrote, it is not possible that her testimony would mirror her statements. The only explanation is that both the statements and the subsequent testimony are true.¹⁴ The district court's finding cannot make sense in light of the entire record and, thus, is clearly erroneous. *See Real Asset Management, Inc. v. Lloyd's of London*, 61 F.3d 1223, 1227 (5th Cir. 1995) (factual finding is clearly erroneous when reviewing court is left with firm and definite impression that a mistake has been made).

¹⁴ Also unexplained by Garcia and the court below is the fact that the police included in her statement that the person who did the shooting was wearing a brown shirt and brown pants. Pet. Ex. 23. This was closer to a description of Carrasco than of Guerra. If the police were out to insure that all of the witnesses identified Guerra as the killer, especially witnesses who could not read and would not be able to tell what the police put in their statements, it is unreasonable to believe that they would leave in details that did not match Guerra's appearance and their own ideas of what they wanted the evidence to show happened at the scene.

Patricia Diaz

The district court made the same mistake with respect to Patricia Diaz, finding that her evidentiary hearing testimony was true while ignoring the rest of the record, which demonstrates that the findings cannot possibly be correct. The district court found that the police altered Diaz' statement to omit the information that Guerra was standing with his arms outstretched, palms down, and hands empty at the time Officer Harris was killed. In addition, according to the district court, the police put into the statement that Guerra pointed a gun at Harris and shot him four times. The court also found that the police doctored Diaz' post-line-up statement as well, to omit her information that Guerra had been near the front of the police car when the shots were fired. Further, the court found that the prosecutors failed to notify the defense that Diaz told them prior to the time she testified that she did not think Guerra had a gun because his hands were open, palms down, and on the hood of the police car when Harris was shot. The court finally found that Diaz did not read her statements before signing them because she was tired. 6 R 1517-18; R.E. Tab 4 at 29-30. The court concluded that the state's action with regard to Diaz resulted in suppression of exculpatory evidence.

As was true of Garcia, the district court's findings are not possible in light of the entire record. Specifically, Diaz' trial testimony was consistent with her statement in all significant particulars. *Cf.* Pet. Ex. 30 *with* XXI SR 309-340. It is obvious that if Diaz told the police something different from what was in the statements and did not read the statements before she signed them, it is not possible that her testimony would track her statements so closely. It can only be the case that both the statements and the subsequent trial testimony are true.¹⁵ Once again, the district court's findings are clearly erroneous.

¹⁵ The district court put much emphasis on the fact that at the evidentiary hearing Diaz testified that Guerra's hands were outstretched, palms down, and

Frank Perez, George Brown

Frank Perez testified at the evidentiary hearing that he saw a man running from the direction of the shooting of Officer Harris a short time after he heard the shots. The man dropped something to the ground as he passed Perez' house; when it hit the street, it made a metallic sound, and it looked to Perez like a gun. He described the man as looking like Carrasco. He stated that he told the police this both at the scene and when giving his statement. 9 R 109-11, 114-15. He also stated that the police convinced him to refer to the gun as an "object." The court found that the information about Perez' seeing the man drop a gun was omitted from his statement and was not revealed to the police. 6 R 1516; R.E. Tab 4 at 31. The court also found that George Brown had told the police officer taking his statement that Perez had told him about the man with the gun. That information was not contained in his statement. The court concluded that this was *Brady* material that the state suppressed. 6 R 1513-14; R.E. Tab 4 at 33-34.

The court's finding with respect to Perez' statement is clearly erroneous. His statement plainly shows that in three different places the police officer first typed "gun." These were marked out and "object" was written in, with Perez' initials next to the changes. Pet. Ex. 21. The statement was given to the defense at the close of Perez' direct examination. XXII SR 419. Guerra's attorneys had

appeared to be empty, whereas at trial she had testified that Guerra was "pointing" at Officer Harris. At the hearing, Diaz described a gesture by the assistant district attorney with one finger out in the direction of the back door of the courtroom as "pointing," and one of placing both hands on a table palms down as "leaning." 12 R 54. The district court disregarded this. The court also did not mention that at the evidentiary hearing, Diaz said that when she demonstrated at trial how Guerra was pointing, she put her arms in front of her with the palms down. Had this been true, either the prosecutor would have tried to clarify the matter, or defense counsel would have made much about the way Guerra apparently was standing. Neither happened. XXI SR 314.

every opportunity to cross-examine him on the alteration of the statement if they had thought it worth pursuing.

The fact that Brown's statement did not contain the information relayed to him by Perez is of little moment. Brown had no first-hand knowledge of the incident and including it in his statement would have added nothing to the investigation. Because the information was in Perez' statement and the statement was given to the defense, the district court's finding of a *Brady* violation cannot stand.

Jose Heredia

The district court found that Jose Heredia gave a statement to the police in which he stated that the short-haired man shot the police officer and that Guerra was standing with his hands empty and on the police car at the time of the shooting. Further, the court found that Heredia told the police after the line-up that Guerra was not the person who shot Officer Harris. The court found a *Brady* violation from the fact that this information was not included in Heredia's statement. 6 R 1514-15; R.E. Tab 4 at 32.

These findings are legally irrelevant because Heredia testified as a defense witness. It is apparent that Guerra's attorneys contacted him and discussed what he had seen on the night of the murder. Heredia's version of the episode was as available to Guerra as it was to the state. Under these circumstances, there is no obligation under *Brady* to make the information known to the defense. *Blackmon v. Scott*, 22 F.3d 560, 563 (5th Cir. 1995) (if favorable evidence is readily available to the defense, or could be obtained by the exercise of reasonable diligence, state under no obligation to provide it to defense); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990) (same); *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (same).

Elena Holguin

The district court also found a *Brady* violation in the case of Elena Holguin. It is unclear how her case constituted a suppression of favorable evidence and the court did not explain its finding. As the court below noted, Holguin told police that she did not see the shooting. Nonetheless, a statement of what she did have to say was prepared. According to Holguin, although she could not read the statement, she signed it when told to because she was tired, surprised, and nervous. 10 R 143-46.

The district court did not see fit to identify the exculpatory evidence that Holguin had that was not included in her statement or made available to the defense. This is apparently because there was nothing that Holguin knew or told to police that qualified as exculpatory information. *See* Pet. Ex. 26; 10 R 135-55. Because she was not a witness to the killing, there is little that she could say that would have exonerated Guerra and inculpated Carrasco. The district court's finding of a *Brady* violation in the case of Holguin is wholly without support in the record.

Amy Heeter Parker

Amy Parker, a chemist with the Houston Police Department, testified at trial about trace metal tests that she performed on Carrasco's hands. The purpose of the tests was to determine whether Carrasco had handled any metal objects, particularly a gun, in the time before his death and, if so, to see if the pattern resembled any of the weapons known to have been in his and Guerra's possession. She testified that there was a pattern on Carrasco's right hand that was consistent with the one that would be left by Officer Harris' service revolver. XXI SR 171. She also testified that the pattern retrieved from Carrasco's left hand was not consistent with the 9 mm semiautomatic that was the murder weapon. XXI SR 172. Floyd McDonald, who founded the Houston Police Department Crime Lab,

testified at the evidentiary hearing that he believed the patterns on Carrasco's left hand were consistent with the murder weapon, particularly in light of the fact that Carrasco had apparently dropped a gun once and picked it up again. 9 R 75. Guerra's attorneys were told only that the tests were positive for Carrasco's handling of Officer Harris' gun and negative for handling the murder weapon. The district court concluded that the state violated *Brady* by failing to inform the defense that there was a pattern on Carrasco's left hand but that the state chemist did not think it matched the 9 mm. 6 SR 1509-12; R.E. Tab 4 at 36.

In this case, there is no dispute about the court's factual findings. However, those findings do not support the court's conclusion that Guerra was denied due process because the state did not disclose that there were trace metal patterns on Carrasco's left hand. Undisclosed evidence is material only 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, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding *Id.*

In the view of the district court, the information about the pattern on Carrasco's left hand would have allowed Guerra's attorneys to challenge the testimony of the state's expert and to put on their own expert to testify that the pattern showed that Carrasco had indeed handled the murder weapon. 6 SR 1509; R.E. Tab 4 at 36. However, the court places too much importance on this evidence. It was undisputed that Carrasco was using the 9 mm gun during the shoot-out with police that preceded his death. One of the police officers was seriously wounded by shots from Carrasco's weapon, which turned out to be the same one that had been used to kill Officer Harris. Even if the defense had argued that the trace metal patterns on Carrasco's left hand were consistent with the 9 mm

gun, that would have been accounted for by the uncontested fact that Carrasco had used the gun just before he was shot. It did nothing to establish that he was the one who killed Officer Harris and, thus, did not exonerate Guerra in the killing. The evidence does not raise a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, the evidence was not material, and there was no *Brady* violation.

D. There was no prosecutorial misconduct that rendered Guerra's trial fundamentally unfair.

The district court found that the prosecutors engaged in misconduct during the trial and concluded that this behavior resulted in a denial of Guerra's right to due process. The court specifically faulted the prosecutors for "encouraging" Patricia Diaz and Frank Perez to over- or understate the facts; for making false statements about the character of Jose Heredia; for asking questions about an alleged murder in a cemetery near the murder scene; by using testimony of a police officer to rebut the testimony of Jose Luna that he was present when Carrasco returned home with both the 9 mm weapon and Officer Harris' revolver; for arguing to the jury that witnesses who had not conferred with each other had each identified Guerra as the murderer; and for informing several jurors that Guerra was an illegal immigrant and that this could be considered in answering the second punishment issue. In addition, the court found that the trial court also participated in the denial of Guerra's rights by allowing improper conduct by the court interpreter go unchecked. 6 R 1503-08; R.E. Tab 4 at 39-44.

Prosecutorial misconduct does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process

Clause of the Fourteenth Amendment. *Jones v. Butler*, 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied*, 490 U.S. 1076, 109 S. Ct. 2090 (1989). To establish that a prosecutor's conduct rises to such a level, the petitioner must demonstrate that the misconduct is persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper conduct. *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986).

Encouraging misstatements by witnesses

The district court found that the prosecutor overstated Diaz' testimony by having her testify that Guerra was pointing "at the police officer," when that was not what she intended to say. The record reflects that during direct examination of Diaz, the prosecutor asked:

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.

XXI SR 313. Following this, the prosecutor asked several questions that referred to Guerra pointing at the police officer. The district court found that this deliberately misstated Diaz' testimony and constituted prosecutorial misconduct. 6 R 1506-07; R.E. Tab 4 at 40-41.

The court itself ignored the context of the questions. Following the portion quoted above, the prosecutor asked what Diaz observed, and she described hearing shots and later seeing Officer Harris lying on the ground. XXI SR 314. It was logical for the prosecutor to refer to Guerra as pointing "at the officer" in light of the testimony that Guerra was pointing, shots were fired, and the officer was shot. This instance does not show misconduct on the part of the state.

The district court also took issue with the prosecutor's telling Frank Perez that he should say that he saw a man running by his house drop "an object" rather

than "a gun," unless he was 100% sure that it was a gun. However, Perez himself admitted that he was not absolutely sure that what he saw was a gun. Moreover, even if the instruction from the prosecutor amounted to misconduct, Perez' statement did use the word "gun," which Perez marked through and replaced with "object." The defense was not deprived of the opportunity to question Perez about the change and why he had made it. Any misconduct, if there were any, was limited and not of the degree that Guerra was deprived of due process.

Jose Heredia

During cross-examination of Jose Heredia, the prosecutor asked

Q. I am not keeping you awake -- I am not keeping you awake by asking you questions today, are we?

Have you had anything to drink before you came down here to the courtroom today?

A. No, sir.

Q. Have you had anything to smoke before you came down here to the courthouse today?

A. No, sir.

Q. Is there something about this trial that strikes you as being pretty funny?

A. Nothing.

XXXII SR 747-48. To the district court, this amounted to unwarranted ridicule of the witness "because he would dare testify contrary to the prosecutor's case theory." 6 SR 1506; R.E. Tab 4 at 41. In reality, the questions quite obviously were directed at Heredia's behavior on the witness stand, yawning during questioning, then laughing at the prosecutor's questions. Again, even if the

questions were inappropriate, they were limited and were not so pervasive that they resulted in denying Guerra due process.

Extraneous murder

The prosecutor began his questioning of Heredia by asking about his earlier testimony about a murder reported in the area prior to the time that Officer Harris was killed. XXIII SR 746-47. The district court characterized the alleged murder as merely a story made up by children. 6 SR 1508. Whatever the basis for the story, it was clear that it first came out during direct examination. XXIII SR 739. Guerra's attorney also made it clear that there was no allegation that Guerra had been involved in the killing. XXIII SR 739. Guerra can show no prejudice arising from the questioning, assuming that it was improper.

Rebuttal testimony

During the defense case-in-chief, Jose Luna testified that he had been at home when Carrasco came in with both the 9 mm gun and Officer Harris' weapon. XXIV SR 815. In rebuttal, the state called a police officer who testified that he interviewed Luna about 11:30 pm, about the time that Carrasco was shot and killed. Luna told him he had just returned home. XXIV SR 885. The district court found that this was misconduct because the state had a report from another officer who interviewed Luna just before Carrasco was killed. According to the district court, this proved that Luna was home when he claimed Carrasco returned with the guns and said he had killed a policeman. In fact, the two reports were taken within a short time of each other, and the earlier one does not demonstrate that Luna was at home when Carrasco appeared, only that he might have been in the area a few minutes before he was interviewed the second time. This does not show prosecutorial misconduct.

Prosecutorial argument

The district court found further misconduct in the argument of the prosecutor that each of the witnesses had identified Guerra as the shooter and that they had not conferred among themselves in arriving at their identifications. According to the court, the prosecutors were aware that the witnesses "conformed" their statements both at the re-enactment and at the meeting between prosecutors and witnesses the weekend before trial testimony began. However, what the court again overlooked is that the witnesses had given their statements already by the time of the re-enactment and the weekend meeting. There is no evidence that the witnesses collaborated on their stories prior to giving their statements, and their testimony and identifications were consistent with the statements. There was nothing, therefore, that was incorrect, much less improper, about the argument.

The district court found another instance of misconduct in the prosecutors' telling the jury that Guerra was an illegal alien and that the jury could consider that evidence at the punishment phase in determining whether he would continue to commit violent acts that would constitute a threat to society. Although being an illegal alien is not a crime of violence, it does demonstrate a disregard for society's laws and norms. In addition, because an illegal alien can face difficulty in finding work, a jury might consider that a person already inclined to disregard the law might break other laws in order to get money to eat and live on. Further, because an illegal alien faces deportation if discovered, a jury might conclude that such a person would have a reason to resort to violence to avoid apprehension. This could be especially true in Guerra's case, where he had been convicted of a violent crime already. Thus, even though a person's status as an illegal immigrant might not be proper evidence by itself to consider at the punishment phase, the inferences that a jury might be able to draw from that fact could legitimately shed light on whether a death sentence was appropriate. The prosecutors' use of the evidence

did not amount to misconduct, and certainly did not inject any improper considerations into the proceedings.

Actions of the interpreter

Finally, the court below found that the interpreter during the state trial engaged in inappropriate behavior while translating the testimony, and that the trial court did not correct his actions. The court's findings in this regard were based on the testimony of Linda Hernandez, the first interpreter who was replaced because of complaints that she was not translating properly. 10 R 116-32. There were no examples given of any serious mistakes or improper behavior on the interpreter's part, and nothing that showed that Guerra was prejudiced in any way. Moreover, Candelario Elizando, one of Guerra's trial attorneys, who is fluent in Spanish, testified that he had not observed anything that he thought was out of order in the second interpreter's behavior, and stated that he certainly would have objected to anything that he thought was prejudicing his client. 13 R 61-62.

E. Because there were no errors as found by the district court, Guerra is not entitled to relief under the cumulative error doctrine.

Finally, the district court held that, even if no one error that it identified in the trial was serious enough to call for reversal of Guerra's conviction, the cumulative effect of all of them together amounted to a denial of due process.

In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (*en banc*), this court adopted the cumulative error doctrine. Under the court's formulation, relief on the basis of cumulative error can be granted only where (1) the individual errors were constitutional violations and not violations of state law only, (2) the errors were not barred from consideration by a failure to abide by state procedural rules, and

(3) the errors "so infected the entire trial that the resulting conviction violates due process." *Derden*, 978 F.2d at 1454.

As demonstrated in the rest of this brief, the district court's factual findings are either clearly erroneous or legally irrelevant. The result is that they do not show any errors in the proceedings against Guerra. A prerequisite to the granting of relief under the cumulative error doctrine is that there be identifiable errors in the first place. Because there were no errors here, Guerra is not entitled to relief.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the judgment of the court below be reversed.

Respectfully submitted,

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RESPONDENT-APPELLANT

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that two true and correct, printed and bound copies of the above and foregoing Brief of Respondent-Appellant have been served by placing same in Federal Express, postage prepaid, on this the 3rd day of January, 1996, addressed to: Mr. Scott Atlas, Vinson & Elkins, 2500 First City Tower, 1001 Fannin, Houston TX 77002-6760.



WILLIAM C. ZAPALAC

Assistant Attorney General

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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TEL. 504-589-6514
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December 27, 1995

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MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

SJA

No. 95-20443 Guerra v. Scott
USDC No. CA-H-93-290

The following action has been taken:

(X) AN EXTENSION OF TIME has been granted to and including 12/27/95

- (X) for filing appellant's/petitioner's brief.
- () for filing appellee's/respondent's brief.
- () for filing reply brief.
- () for filing petition for rehearing.
- ()

- () Enclosed order has been entered.
- () Motion to consolidate granted.
- () Motion to supplement or correct the record granted.
- () Motion for leave to file supplemental brief granted.
- () Motion for leave to file brief amicus curiae granted.
- ()

() Motion to file bill of costs out of time granted.

() Approved bill of costs enclosed.

() Motion for leave to file Record Excerpts in excess of 40 pages is granted but subject to reconsideration by the merits panel.

() Motion of appellant to reinstate the appeal is granted.

- () Transcript due within fifteen (15) days from this date.
- () Appellant's brief/record excerpts due within forty (40) days from this date.
- ()

() By copy of this letter, the District Court Clerk is requested to return the record and or exhibits.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: *Ouida Tomlinson*
Ouida Tomlinson, Deputy Clerk

Mr William Charles Zapalac
Mr Scott J Atlas

MOT-2

95-20443

Mr Scott J Atlas
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Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 27, 1995

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DEC 28 1995

SJA

Hon. Charles R. Fulbruge, III, Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: *Guerra v. Scott*, No. 95-20443

Dear Sir:

Enclosed for filing with the papers in the above-referenced cause are the original and three typewritten copies of Brief of Respondent-Appellant. The required number of bound briefs and the Record Excerpts will be submitted within seven days.

By copy of this letter, I am forwarding one copy of said document to counsel for Petitioner-Appellant. Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script, reading "William C. Zapalac".

WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 936-1400

WCZ/br
Enclosures

c: Mr. Scott Atlas
Vinson & Elkins
2500 First City Tower
1001 Fannin
Houston TX 77002-6760

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

BRIEF OF RESPONDENT-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a)(3), oral argument should be denied because the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

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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

BRIEF OF RESPONDENT-APPELLANT

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 brief.

STATEMENT OF JURISDICTION

The district court entered an order granting habeas corpus relief on November 15, 1994. 6 R 1369; RE Tab .¹ On May 18, 1995, the court granted Guerra's motion to alter or amend its order and issued its amended order, again granting relief. 6 R 1546; RE Tab . The Director filed notice of appeal on June 2, 1995. 6 R 1548; RE Tab . This court stayed the judgment on June 21, 1995. 6 R 1571. The court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUE

Whether the district court's factual findings that the police and prosecutors engaged in misconduct, depriving Guerra of due process, are clearly erroneous.

STANDARD OF REVIEW

A district court's findings of fact will be set aside if the reviewing court determines that they are clearly erroneous. Fed. R. Civ. P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985). Legal conclusions are reviewed *de novo*. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

Guerra is in custody pursuant to a judgment and sentence of the 248th District Court of Harris County, Texas in cause number 359805, styled *The State of Texas v. Ricardo Aldape Guerra*. Guerra was indicted for the murder of police officer J. D. Harris, while Officer Harris was in the lawful discharge of his duties, a capital offense. Guerra pled not guilty and was tried by a jury. On October 12, 1982, the jury found him guilty as charged. After a separate hearing on

¹"R" refers to the record on appeal. "RE" refers to Respondent-Appellant's record excerpts. "SR" refers to the record of Guerra's state trial.

punishment, the jury, on October 14, 1982, returned affirmative answers to the issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. The trial court sentenced Guerra to death by lethal injection, as required by law.

Guerra's case was automatically appealed to the Court of Criminal Appeals of Texas. The court affirmed his conviction and sentence on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim.App. 1988). Guerra's petition for writ of certiorari was denied on July 3, 1989. *Guerra v. Texas*, 492 U.S. 925, 109 S.Ct. 3260 (1989).

On May 8, 1992, Guerra filed an application for writ of habeas corpus in the state convicting court. On July 2, 1992, he withdrew the application and, on September 17, 1992, he filed a second application. The trial court recommended that relief be denied. The Court of Criminal Appeals noted that, by making no findings of fact, the trial court had found, as a matter of law, that there were no controverted, previously unresolved issues of fact material to Guerra's confinement. In reviewing the record and the pleadings, the Court of Criminal Appeals concluded that the trial court's implied finding was fully supported. Accordingly, it denied relief on the same basis as the trial court. *Ex parte Guerra*, Application No. 24.021-01 (Tex.Crim.App. January 13, 1993).

Guerra then filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division. The court conducted an evidentiary hearing on November 15, 16, 18, 19, and 22, 1993. On November 15, 1994, the court entered an order granting habeas corpus relief. 6 R 1369; RE Tab __. On May 18, 1995, the court amended its order in several respects, and again granted habeas corpus relief. 6 R 1546; RE Tab __. The state was ordered to release Guerra unless it began a retrial within thirty days. The

Director filed timely notice of appeal, 6 R 1548; RE Tab __, and on June 21, 1995, this court stayed the district court's judgment. 6 R 1571.

B. Statement of Facts

On July 13, 1982, J. D. Harris, a police officer with the K-9 Division of the Houston Police Department, was on patrol in a Mexican-American neighborhood near downtown Houston, accompanied by his K-9 partner, Texas. XXIII SR 706. At approximately 10:00 p.m., a pedestrian, George Brown, waved down Officer Harris and stated that a black and burgundy Cutlass almost ran over him while he was walking his dog on Walker Street. XXII SR 383. Less than a minute later, Officer Harris approached a vehicle stalled at the intersection of Walker and Edgewood and fitting the description given to him by Brown. XXII SR 388. Apparently, the car was attempting to make a U-turn on a nearby street when it stalled, blocking traffic on that street. XX SR 67; XXI SR 282; XXII SR 388.

At Guerra's trial, two teenage girls, Herlinda Garcia and Vera Flores testified that they were walking to the store about 10:00 p.m., that the same black car had stopped them seconds before, and the driver told them his car needed a boost and asked them if they had some cables. XXII SR 446, 507. Both girls stated that they saw the police officer drive up and park his patrol car behind the black car seconds later. XXII SR 448, 508. According to Garcia, two men exited the black car, walked towards the officer, and put their hands on the police car. XXII SR 448-449, 479. Garcia then saw one of the men, later identified as Ricardo Aldape Guerra, pull what appeared to be a gun from his pants.² XXII SR 449-50. She heard three shots and saw the officer fall to the ground. XXII SR 450-51. Garcia, who ran toward her house holding her seven-month old baby, heard more shots being fired behind her. XXII SR 451. As did Garcia, Vera

² Guerra's companion was later identified as Roberto Carrasco Flores (Carrasco).

Flores testified that she saw two men get out of the black and red car and approach the police car. XXII SR 511. The men seemed to place their hands on the hood of the patrol car while the officer was standing by the open door of his car. XXII SR 510, 527. After Flores saw the driver of the car, whom she identified as Guerra, pull something from in front of him, she heard three shots and then saw the officer lying on the ground. XII SR 512-13, 534, 543. Flores ducked beside a car and saw Guerra running down Walker street towards Lenox. XXII SR 535. Both girls identified Guerra as being the one who shot and killed Officer Harris. XXII SR 452-517).

Another eyewitness, Hilma Galvan, testified that she was walking around her neighborhood that night with two of her neighbor's children, Jose and Armando, when Guerra came speeding around a corner in a black car and almost hit them. XXII SR 550. Galvan was able to identify Guerra as the driver of the car because he was a customer of the convenience store where she worked. XXII SR 561-67, 570, 576. Galvan also saw George Brown talking to an officer in a patrol car. XXII SR 553. While standing on the sidewalk in front of her house at 4925 Walker, the third house east of the intersection of Walker and Edgewood, Galvan observed a patrol car and the same black and red car that almost hit her blocking Walker street. XXII SR 553-54. Galvan also saw Garcia and Flores standing by the front of the black and red car. XXII SR 557-58. Galvan heard the officer twice tell Guerra to "[c]ome here" and then saw Guerra turn and walk towards the officer. XXII SR 557. She next heard the sound of shots being fired and saw a "flash" coming from Guerra's hand and then saw the officer fall to the ground. XXII SR 560.

Galvan testified that she saw Guerra running toward her and the two children with her on the same side of the street firing his gun in the direction of

Garcia and her baby across the street.³ XXII SR 586-87. Galvan ran inside her house and stayed there until Jose Armijo, Jr. came to her house a few moments later screaming that his father had been shot. XXII SR 562-65. Galvan ran to the car that had crashed into a tree in front of her house and saw that a man, later identified as Francisco Jose Armijo, Sr., had been shot; Galvan then helped his two-year old daughter from the back seat of the car. XXII SR 565-66. She identified Guerra as the man whom she saw shoot Officer Harris. XXII SR 561, 567, 570.

Jose Armijo, Jr. testified that on the evening of July 13, 1982, he and his two-year old sister, Lupita, had accompanied their father, Francisco Jose Armijo, Sr., to the store. XXI SR 281. Jose stated that while they were driving west on Walker Street on their way home, he saw a black car and a police car blocking the intersection. XXI SR 281-82. Jose saw the police officer standing behind the open door to his patrol car and observed two people with their hands placed on the hood of the police car. XXI SR 283. Jose's father stopped his car and Jose observed the man with the long hair, later identified as Guerra, "scratch his back" and then take out a gun and shoot the policeman. XXI SR 284. After Jose saw the fire coming from Guerra's gun, the policeman fell to the ground and one of the men grabbed the policeman's gun. XXI SR 285-86.

While Armijo was attempting to move his car, the two men started running down Walker towards Armijo's car. XXI SR 286. The man in the purple shirt ran down Armijo's side of the car, while the man with the green shirt, Guerra, ran on the passenger side of the car and started shooting into the car. XXI SR 286-87. Jose pushed his sister down in the back seat; Armijo was hit by one of the bullets fired from Guerra's gun. XXI SR 287. Jose testified that during a subsequent

³ Galvan lies on the north side of Walker while Herlinda Garcia lives with her family on the south side.

lineup at the police station, he recognized Guerra as the man who shot the police officer and who also shot his father. XXI SR 290. However, Jose told the police officer at the lineup that he was unable to identify anyone because Guerra lived in the same area of town as he did and he was afraid that if he identified him from the lineup, Guerra would "come and get him." XXI SR 290-91.

Patricia Diaz testified that she was driving her car down Walker when she approached a patrol car and a black car with the red top blocking the intersection. XXI SR 310. Because the intersection was blocked, she stopped her car approximately three to four feet from the black car, which was later identified as the car Guerra was driving. XXI SR 311. Diaz stated that her headlights were on and she saw Guerra "pointing" towards the officer right before four shots rang out. XXI SR 312-13, 317, 325. Diaz identified Guerra at the lineup as the man she saw "pointing" towards Officer Harris. XXI SR 317.

When investigating the scene of the murders, law enforcement officials learned from the eyewitnesses that Guerra and Carrasco had fled in an easterly direction down Walker street, with one man on the north side of the street firing his weapon and the other man on the south side of the street firing his weapon. XX SR 104-05. Two nine-millimeter cartridges were found on the north side of the street (on the driveway at 4925 Walker) and two cartridges from a .45 caliber pistol were found on the south side of the street. XX SR 73, 92, 102-03, 143. Immediately after the shooting, law enforcement officials canvassed the neighborhood looking for people with information regarding the shootings. XXI SR 213-14. Acting on a tip that the suspects might be living in the house at 4907 Rusk, on the corner of Rusk and Dumble, Officers Lawrence Trapagnier and Mike Edwards, along with other Houston Police Department officers, proceeded to that location to coordinate a search for the suspects. XXI SR 216; XXIII SR 648, 667. After searches of the two houses at 4907 Rusk and 4911 Rusk by police officers

proved fruitless, Officers Trapagnier and Edwards approached a dark garage behind the house at 4911 Rusk. XXI SR 669-70. As the officers shined their flashlights in the garage, gunfire erupted and Officer Trapagnier was shot numerous times by one of the suspects, later determined to be Carrasco. XXI SR 658, 673-75, 678. Other officers, hearing the shots ran to Trepagnier's aid and shot and killed Carrasco. XX SR 21; XXIII SR 661. A Browning nine millimeter pistol was found under Carrasco's body. XX SR 42. Officer Harris' .357 millimeter ammunition was recovered from the waistband of Carrasco during a search at the Harris County Morgue. XXI SR 202, 209.

Terry Wilson, Chief of the Civil Rights Division of the Harris County District Attorney's Office and a certified peace officer, testified that he responded to the scene at Edgewood and Walker at approximately 11:00 p.m. to investigate the shootings of Officer Harris and Armijo. XX SR 8, 10, 17. At approximately 11:30 p.m., while en route to look for possible suspects, Wilson heard two "volleys" of numerous shots coming from what appeared to be a location northeast from scene of the murder. XX SR 17. Wilson proceeded to that location, 4911 Rusk, observed a police officer and one of the suspects lying on the ground, both with apparent gunshot wounds. XX SR 19-22. In order to protect the physical evidence of the crime scene and restrict access to the house, Wilson began to put up crime scene tape. XX SR 23-24. While trying the tape to a tree, Wilson observed a male, later identified as Guerra, crouched behind a horse trailer at the back of the lot. XX SR 25. At this point, Wilson pulled his weapon, called for assistance, and proceeded to arrest Guerra. XX SR 26. Wilson testified that after he arrested Guerra, he looked under the horse trailer and found a red bandanna with a .45 caliber pistol wrapped inside of it that was located about two feet from where Guerra had been crouched down. XX SR 28. Wilson identified Guerra at

trial as the individual whom he found crouched behind the horse trailer and subsequently placed under arrest. XX SR 27.

Amy Heeter, a chemist with the Houston Police Department, testified that she performed a trace metal detection test on Carrasco to determine whether he had held a particular weapon in the period proceeding his death. XXI SR 160. She stated that many factors affect the presence or lack of a trace metal pattern, such as dirt, blood, water, or sweatiness of the palms. XXI SR 162-63. According to Heeter, it is possible for a person to hold a weapon yet not have trace metal patterns on his hands because of the above variables. XXI SR 163. Heeter found a pattern on Carrasco's right palm similar to the pattern formed on her own hand when she held Officer Harris' .357 revolver. XXI SR 171. When she performed the trace metal detection test on Carrasco's left hand, she determined that, although it was possible that the pattern she detected may have been consistent with holding a pistol, the results were not consistent with handling the nine millimeter Browning. XXI SR 172, 177.

Danita Smith, a chemist with the Houston Police Department, testified in detail concerning the variables that affect the results of a trace metal test, including the fact that it is easier to get a trace metal reading from a deceased person because there is a lack of movement. XXI SR 180-85. Smith performed trace metal tests on Guerra about 4:45 a.m. July 14th, approximately seven hours after the shootings. XXI SR 186. She stated that Guerra's hands were very dirty as if he had rubbed them in dirt or as if he had fallen on the ground. XXI SR 187. When she performed the trace metal test, she was unable to find any type of a pattern on either of hands. XXI SR 188.

C. E. Anderson, a firearms examiner with the Houston Police Department, testified that he recovered two .45 caliber cartridges, seven nine millimeter cartridges, and three nine millimeter bullets in the vicinity of Edgewood and

Walker. XX SR 120-21. At the 4911 Rusk location he recovered six nine millimeter cartridges. XX SR 122. Anderson conducted a test on all of the nine millimeter casings recovered in the vicinity of Edgewood and Walker and determined that they were fired from the nine millimeter gun found underneath Carrasco's body. XX SR 131. Anderson also determined that the nine millimeter cartridges recovered from the Rusk Street shooting were also fired from the nine millimeter. XX SR 138. He determined that the .45 caliber cartridges found at or near the scene of the shooting of the officer were fired from the .45 caliber pistol found in the red bandanna. XX SR 131. Anderson was not able to make a positive identification as to whether the three nine millimeter projectiles found lodged in the house at 4919 Walker street were fired from the particular nine millimeter pistol found under Carrasco. XX SR 133-35. He also determined that it was a nine millimeter bullet that killed Francisco Armijo. XX SR 145. Anderson concluded that, based on his examination of the scene, the location of the projectiles, and his investigation, Officer Harris was killed with a nine millimeter pistol. XX SR 152.

Dr. Aurelio Espinola, Deputy Chief Medical Examiner for Harris County, testified that he performed the autopsy on the body of Officer Harris. XXIII SR 683-84. Based on his examination, there were three gunshot wounds of entrance on the left side of Harris' head and three exit wounds on the right side of his head. XXII SR 685-92. Dr. Espinola also determined that each of the first two shots sustained by Harris were fatal. XXIII SR 695. He concluded that the cause of Harris' death was three gunshot wounds to the head, face and chin. XXIII SR 696. Dr. Espinola also testified that from his examination of the size of the wounds that a .45 caliber could not have made the wounds, but that a nine millimeter could have made the wounds. XXIII SR 700. Dr. Espinola also performed an autopsy

on Francisco Jose Armijo and determined that his death was caused by a gunshot wound to the head. XXIII SR 697-99.

During the punishment stage of the trial, the State presented evidence, through the testimony of Robert Dawson and Steve Earhardt, that Guerra, Carrasco, and Enrique Torres Luna had committed an aggravated robbery at the Rebel Gun Store on July 8, 1982, in which they took over fifteen thousand dollars worth of guns and ammunition. XXVI SR 64, 71, 76, 77, 116.

ARGUMENT

THE DISTRICT COURT'S FACTUAL FINDINGS, WHICH ARE NECESSARY FOR THE GRANTING OF HABEAS RELIEF, ARE CLEARLY ERRONEOUS.

The district court granted relief based on its review of the pleadings and the testimony of witnesses at the evidentiary hearing. 6 R 1369, 1546; RE Tab __. In making its factual findings, the court accepted the testimony of many of the witnesses presented by Guerra. Although there is evidence in the record to support the court's findings, a review of the entire record leads inexorably to the conclusion that the findings are clearly erroneous.

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. at 573, 105 S. Ct. at 1511. When the district court's findings are not "plausible in light of the record reviewed in its entirety," they are clearly erroneous. *Id.*, at 574, 105 S. Ct. at 1115.

The district court granted relief on the following allegations:

1. The police and prosecutors intimidated witnesses prior to trial to secure favorable testimony against Guerra;

2. The identification procedures were impermissibly suggestive;
 3. The prosecutors suppressed material, exculpatory evidence;
 4. The prosecutors knowing used false evidence and relied on illegitimate arguments at trial; and
 5. The cumulative effect of the above errors resulted in a due process violation.
- A. *The testimony of the witnesses at the evidentiary hearing cannot be true in light of the evidence from their pretrial statements and trial testimony; the testimony that is true does not show a violation of Guerra's constitutional rights.*

The bulk of the court's opinion dealt with Guerra's allegation that the police and prosecutors threatened and intimidated witnesses in order to get them to identify Guerra, rather than Carrasco, as the one who killed Officer Harris. The court reviewed the evidentiary hearing testimony of eight witnesses and concluded that there had been official misconduct that resulted in the witnesses' testifying falsely.

Patricia Diaz

The court below found that Patricia Diaz was threatened by police at the scene of Officer Harris' murder when she stated that she did not see the shooting, that she had gotten only a glimpse of Guerra's profile, and that Guerra's hands appeared to be empty. The court also found that, when Diaz tried to tell the prosecutors that she had not seen Guerra pointing at Officer Harris, they yelled at her, scaring her into testifying the way they wanted her to. 6 R 1540.

The allegation that Diaz was threatened by the police at the scene of the murder because she would not identify Guerra as the shooter is wholly implausible

in light of the fact that the police had no idea at that time that Guerra was even involved in the crime or that there was any possibility that he was the murderer. What is believable is that the police were intent on finding the person responsible for the crime and perhaps became frustrated at what appeared to be a lack of cooperation on the part of witnesses. Nothing in the record supports a finding that Diaz was threatened by the police because she would not identify Guerra as the murderer and that she agreed to identify him because of the threats.

The court also found that Diaz told the prosecutors that she had not seen Guerra pointing at the victim but that they forced her to testify that she had. 6 R 1540. She also testified that much of what was contained in the statement she gave after the shooting was untrue. 12 R 24, 86. This, again, is not believable in light of the entire record. At the evidentiary hearing, Diaz stated that she had not read her statement before signing it because she was tired and just wanted to leave the police station. 12 R 23, 77. However, if the statement were untrue and if she had not read it, she offered no explanation for the fact that her testimony at trial faithfully tracked the statement. *Cf.* Pet. Exhibit 30 *with* XXI SR 309-40. Because Diaz' testimony was consistent with her statement, and because she had not read the statement before testifying, the only explanation is that the statement contained a truthful account of the events as she perceived them on the night of the killing. What cannot be true is what the district court found: that the statement did not reflect what Diaz told the police, that she did not read the statement before testifying, but that her testimony accurately recited the details of the statement. The district court's findings in this regard are clearly erroneous.

Elena Holguin

Elena Holguin testified that she was handcuffed at the scene of Officer Harris' murder and kept handcuffed for a couple of hours, until she was taken to police headquarters. She also testified that police officers threatened her if she

would not cooperate with their investigation. 10 R 141-42. The district court cited this as an instance of witness intimidation. 6 R 1541. However, even if the incident occurred, and even if it was unprovoked, the court was unable to cite to any effect that it had on Holguin's testimony. Holguin had not been a witness to the murder of Officer Harris, so her statement did not contain an identification of the shooter. Pet. Ex. 26. Although Holguin claimed that she was not allowed to read the statement or have it read to her before she signed it, 10 R 145, she did not claim that anything in the statement, or in her testimony that was consistent with the statement, was not true. Although the record might support the district court's finding regarding the way that Holguin was treated, it will not support a finding that Holguin was intimidated into giving information or testimony that implicated Guerra and that was untrue.

Frank Perez

The district court found that Frank Perez witnessed a police officer on top of a suspect with her gun drawn and pointed at his face asking, "Why did you kill the cop?" 6 R 1539; *see* 9 R 117. It turned out that the person had no involvement with the case. As was the case with Holguin, however, what is lacking here is any indication that the episode had the effect of intimidating any witness into giving untrue information that inculpated Guerra. Perez testified that the incident occurred some distance away from the scene of the killing. There is no indication that any other witnesses were around to observe. Nothing in the record even suggests that any witnesses changed their testimony or gave false information because of it. Perez himself never testified that he felt intimidated and did anything to implicate Guerra as a result.⁴ The finding does not constitute an

⁴In fact, Perez did not see the killing of Officer Harris, so he was not in a position to identify the murderer. He did see someone running down the street past his house shortly after hearing the shots. The man appeared to point a gun at

example of official action that threatened or coerced witnesses to identify Guerra as the killer of Officer Harris.

In Perez' statement, given shortly after the murder occurred, he related that he had seen a man running past his house shortly after hearing gunfire. Originally, the statement said that Perez saw the man drop a gun; however, the word "gun" was marked through and "object" was substituted. *See* Pet. Ex. 21. Perez testified, and the district court found as true, that the prosecutors told him that unless he was 100% certain that he had seen a gun he should say "object."⁵ The court below cited this as an example of prosecutorial interference with a witness' testimony. 6 R 1538-39. The court did not explain how seeking to present accurate information to the jury amounts to prosecutorial misconduct. Moreover, even if the state did impermissibly change the witness' testimony, the defense had a copy of Perez' statement available and could have cross-examined him on the change had it seemed significant. XXII SR 419. Although the state might have encouraged Perez to be precise in his testimony, the court's finding does not show a violation of Guerra's right to due process.

Jose Luis Luna and Roberto Onofre

At the evidentiary hearing, Jose Luis Luna and Roberto Onofre testified that he lived in the same house as Guerra. Sometime between the killing of Officer Harris and the time that Carrasco was shot, the police appeared, with guns drawn. They forced Luna and another person outside, pointed guns at them, screamed at them, and searched the area. 12 R 153-54; 186-87. The district court reported this

Perez, dropped it, then picked it up. Perez described him in a way that was consistent with Carrasco. *See* Pet. Exhibit 21. At trial, he identified a photograph of Carrasco as being the person he had seen. XXII SR 414. He also identified the mannequin of Carrasco as "appear[ing] the same" as the man he had seen. *Id.*

⁵Perez' testimony was that he could not identify what he had seen the man drop because it was very dark and trees blocked the light. XXII SR 412.

as yet another instance of official misconduct that resulted in intimidation of witnesses. The district court ignored several facts, however. For example, Luna was not a witness to the killing of Officer Harris, so the incident clearly had no effect on his identifying the murderer. In addition, Luna, far from being intimidated, testified about the incident at Guerra's trial as a defense witness. XXIV SR 819-20. Finally, Luna also testified that a short while after hearing a series of shots in the direction where Harris was killed, Carrasco came into the house out of breath and said that he had killed a policeman. XXIV SR 814-15. Assuming that the described conduct did take place, it plainly had no effect on the testimony of the witnesses involved.⁶

Herlinda Garcia

The district court credited Herlinda Garcia's testimony that the police threatened to arrest her and her husband after she told them that Carrasco, not Guerra, was the shooter. The court also found that when Garcia tried to tell prosecutors before trial that Guerra was not the one who killed Harris, they told her that she could not change her mind at that point. 6 R 1537. As a result, the court determined that Garcia was forced to testify in a way that implicated Guerra, although she knew that he was not the murderer.

As was the case with the findings relating to Patricia Diaz, the court's findings ignore the other evidence in the record, evidence that makes its findings untenable. For example, there has been no showing that at the time Garcia supposedly identified Carrasco as Officer Harris' killer the police knew anything about Guerra's possible involvement. In fact, well after Carrasco was killed, the

⁶The same is true about the testimony that, in the weeks after the murder, police officers appeared at Luna's house in the middle of the night, forced the occupants to lie face down, and proceeded to search and ransack the house. There is no evidence in the record to show that any defense witnesses were deterred from testifying because of this behavior.

police believed that he was Harris' murderer. 9 R 122, 128-29. Thus, there was no basis for the police to make threats to try to persuade witnesses to name Guerra as the murderer. In addition, Garcia's statement, given shortly after midnight on July 14, and supposedly after the police threatened her, described the shooter in a manner that resembled Carrasco rather than Guerra. *See* Pet. Ex. 23. The record contains nothing to show that Garcia identified Guerra in the line-up because of pressure from the police. Finally, as was true of Diaz, Garcia testified at the evidentiary hearing that she did not read her statement before signing it because she did not know how to read, and the police refused to read it to her. 10 R 62-63. She also claimed that some of the statements were not true and were not what she had told the police. 10 R 65-66. Yet her trial testimony was exactly the same as her statement. XXII SR 429-62. On at least two occasions during her trial testimony she was asked about things she had said in her statement and replied appropriately. XXII SR 459-60, 466-67.⁷ Plainly, she had full knowledge of what she had said in her statement. Looking at the entire record, and not simply the testimony from the evidentiary hearing, the district court's findings regarding Garcia's statement and testimony are clearly erroneous.

George Brown

The district court made two findings based on George Brown's evidentiary hearing testimony: that he believed he was segregated from the Hispanic witnesses at the police station because his last name was not Hispanic, and that he could hear the other witnesses discussing the shooting among themselves. Besides being irrelevant because they do not show any police misconduct and do not show that any witnesses changed their stories because of harassment from the authorities,

⁷On the first occasion, the prosecutor asked if she had described the shooter as having blond hair and she said she had. The second time, Guerra's attorney had her read her description of the shooter's clothes, and she did so.

they do not accurately reflect the testimony. Regarding his being separated from the rest of the witnesses, Brown testified as follows:

Q (Mr. Atlas) So let me see if I understand this correctly. From about midnight or so when you were brought into the police station until shortly before the line-up at 6:00 in the morning, you, apparently the only one with an Anglo surname, were separated and kept apart from your Hispanic neighbors the entire time; is that right?

A (Brown) I don't know if they were taken into cubicles also. I have no way of knowing that.

Q All you know is you were segregated into a cubicle and you weren't allowed to mix with them or communicate with them in any way at any time before the line-up began from the time you got in there around midnight the night before; isn't that right?

A Correct. I just did what I was told to.

11 R 81. At no time in the record did Brown even intimate that he felt he was being separated because of his name and presumed different nationality.

Similarly, when asked about what he observed in the hallway while he was waiting for the line-up, Brown described the people who were present. Then he was asked:

Q (Mr. Atlas) Were they talking amongst themselves?

A Yes, they were.

Q Could you hear what they were saying?

A No, I couldn't.

11 R 82-83. To the extent these findings are relevant to any of the issues in this case, they are clearly erroneous.

The court's conclusion that the state, through its police officers and prosecutors, threatened, browbeat, and intimidated witnesses to make sure that they identified Guerra as the killer at trial is based on its findings with respect to the named witnesses. All of those findings are either clearly erroneous, irrelevant, or prove, not intimidation, but a lack of fear on the part of witnesses. Consequently, the conclusion that Guerra was denied due process and a fair trial cannot survive.⁸

B. The identification procedures used in this case were not impermissibly suggestive.

The district court also held that the state denied Guerra due process by resorting to improper identification procedures. According to the court, the state employed techniques that were designed to insure that the witnesses would identify Guerra, whether he was the murderer or not.

In determining whether an identification process constitutes a denial of due process, it first must be determined if the pretrial identification was impermissibly suggestive. If it is, the court then must determine whether the procedures created a substantial likelihood of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967 (1968); *United States v. Merkt*, 794 F.2d 950, ___ (1986). The factors to be considered in determining whether an identification is reliable include: 1) the opportunity of the witness to view the defendant; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description; 4) the level of

⁸The district court gratuitously maligns the prosecutors' behavior, condemning particularly "[t]he tone of voice, as well as the artful manner in which the questions were asked" 6 R 1533. Nothing in the record indicates that the court was present at the trial to know the tone of voice the prosecutors used. Further, part of a lawyer's job is to artfully frame questions to present the client's case. Absent using artful questions to present evidence that is untrue, there is nothing improper about being skilled in the use of language.

certainty displayed by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, ___, 93 S. Ct. 375, ___ (1976).

The district court found fault with four aspects of the identification procedure in this case. It held that the witnesses' identification of Guerra was tainted and unreliable because the witnesses were permitted to see Guerra in handcuffs being taken into and out of the Homicide Division, because the witnesses were allowed to talk among themselves about the identity of the killer before the line-up, because the police staged a "re-enactment" of the murder for the witnesses; and because the state used mannequins made to resemble Guerra and Carrasco as exhibits during the trial.

Viewing of Guerra in handcuffs

The trial court found that the witnesses were seated in the hallway outside the Homicide Division while waiting to give their statements and to view the line-up. During this time, Guerra was led past the witnesses in handcuffs. The court concluded that this tainted the identifications that the witnesses made of Guerra as the one who shot Officer Harris. 6 R. 1523-30.

The court ignored two facts in making this decision. First, the witnesses for the most part were people who already knew Guerra, which reduced the chances that they identified the wrong person. Second, most of the witnesses gave their statements before Guerra was led through the hallway. Frank Perez testified that Guerra was brought through the first time after he gave his statement. 9 R 180-81. His statement was given at 12:40 am. See Pet. Ex. 21. Seven witnesses gave statements after Perez did: Patricia Diaz (1:40 am), Armando Heredia (4:35 am), Jose Heredia (4:15 am); Elena Holguin (1:30 am); Danny Martinez (1:00 am); Trinidad Medina (1:35 am); and Enrique Luna Torres (3:45 am). Of these, only Diaz and the Heredia brothers were witnesses to the shooting of Officer Harris,

and they are the only ones who described the shooter and who viewed the line-up to identify shooter. Armando Heredia's statement identified the shooter as "Guero," which was Carrasco's nickname, but positively picked Guerra out of the line-up and stated that he knew Guerra as "Guero." He did not testify at the trial. Jose Heredia did not identify anyone in the line-up, and testified at trial for Guerra.

Only Diaz arguably made an identification at odds with the description in her statement. However, at no time has Diaz testified that seeing Guerra being led through the hallway in handcuffs affected her identification of him in the line-up. Indeed, she has not repudiated her identification of Guerra at all.⁹ At the evidentiary hearing, she merely said that she had signed her statement without reading it, and that she did not know that the statement contained the sentence "I saw this man with his hands out-stretched, and I guess he had a gun in his hands." 12 R 29. Nothing in the record supports the district court's finding that Guerra was identified in the line-up because the witnesses had seen him led through the hallway earlier in the evening.¹⁰

⁹ Diaz' identification of Guerra was tentative anyway. At trial, after a vigorous cross-examination about what she had seen, she admitted that "I didn't exactly know who shot who." 12 SR 340.

¹⁰ At the evidentiary hearing, Diaz testified that her trial testimony was not intended to relate what she had seen but to describe what was in her statement. 12 R 24-26. She was referred expressly to portions of her trial testimony where the prosecutor directed her "to look at your statement and tell the jury everything you said in your statement," or to "[t]ell the jury how [you] described the man for the police in your statement on July 14, 1982." 12 R 24. Even if Diaz was intending to relate only what was in the statement on these occasions, that does not explain her testimony on cross-examination that did not refer to what was in the statement but to what she had seen, which was consistent with the statement. XXI SR 323-33.

Discussions among the witnesses

The district court also found that the line-up identifications were tainted because Hilma Galvan insisted to Jose and Armando Heredia and Jose Armijo, Jr., that Guerra was the shooter. 6 R 1524-25. With respect to the Heredia's, this finding is clearly erroneous. As noted above, Jose Heredia did not identify Guerra in the line-up as the shooter, so he clearly was not influenced by Galvan's comments. Further, he testified at trial on Guerra's behalf and identified Carrasco as the one who killed Officer Harris. XXIII SR 744. Armando Heredia did identify Guerra in the line-up but did not testify at trial. Thus, even if his identification were tainted, it did not affect the outcome of the trial because the jury never was made aware of it.

As for Jose Armijo, Jr.'s, identification of Guerra, there is no record support for the finding that it was the result of Galvan's prompting. In the first place, Jose, Jr. did not identify Guerra at the line-up. XXI SR 290. It was not until he testified at trial that he described Guerra as the one who had shot Officer Harris. XXI SR 284. Assuming that Galvan did urge Jose, Jr. to identify Guerra as the killer of Officer Harris and of Jose, Jr.'s father, it could not have resulted in a misidentification of Guerra at the line-up. Assuming further that Galvan continued to lobby Jose, Jr. to name Guerra as the killer, that his trial testimony was influenced by that, and the identification was erroneous -- something for which there is absolutely no support in the record -- the state cannot be held responsible. There is no showing that the state encouraged Galvan to try to convince Jose, Jr. to change his story and name Guerra as the one who committed the murders. Even if Galvan took it upon herself to speak to Jose, Jr. and persuade him that Guerra was the murderer, the state is not responsible for the conduct of private citizens when they are outside of official control. In any event, without state action, there can be no constitutional violation. *Cf. Thompson v. Mississippi*, 914 F.2d 736, 739 (5th

Cir. 1990), *cert. denied*, 498 U.S. 1124, 111 S. Ct. 1083 (1991) (state action required for violation of right to counsel at post-indictment confrontation). The record does not support the district court's findings that Galvan's talking to other witnesses resulted in misidentification of Guerra as the killer.

Pretrial re-enactment

The district court further found that the identifications were rendered unreliable because the police and prosecutors staged a re-enactment of the crime a couple of weeks after it occurred. According to the district court, "[t]his procedure permitted the witnesses to overhear each others [*sic*] view and conform their views to develop a consensus view." 6 SR 1527.

This finding was made from whole cloth by the district court. There was no testimony from any source at the evidentiary hearing that the re-enactment was conducted in such a way that the witnesses heard and observed the comments of each other. Certainly, there was no evidence that any witness was swayed by anything that any other witness said at the re-enactment, and changed his or her testimony "to develop a consensus view." This is not surprising inasmuch as the witnesses already had given statements and the record shows that the trial testimony of the witnesses was consistent with the statements already on file. As for using the re-enactment to ensure that all the witnesses testified alike, the trial record belies that. Not even all of the eyewitnesses to the killing of Officer Harris were able to identify Guerra as the shooter, and each of the accounts contained each witness' own version of how the incident occurred, where the participants were, and the sequence of events. In short, the trial testimony showed exactly what would have been expected in any trial, *viz.*, that each witness perceived things slightly differently and remembered different details. The one fact that was common to all of those who were able to identify the killer was that it was Guerra. Nothing in the record as a whole supports the district court's finding that the re-

enactment in any manner produced an unreliable identification of Guerra or testimony that was untrue.¹¹

Use of mannequins

At the trial, the prosecution displayed two mannequins which were made to look like Guerra and Carrasco, and which were wearing the clothing each man had on on the night of the murders. The district court found that the use of the mannequins violated Guerra's right to due process because "the positioning of the mannequins helped [witnesses Heredia and Perez] identify which of the men was dead."¹² 6 SR 1523. Even if true, however, this is irrelevant to whether there was a violation of Guerra's right to due process. As noted before, Heredia testified for Guerra and identified Carrasco as the shooter. Perez was not an eyewitness to the killing and did not, because he could not, identify either man as the shooter. Neither Perez nor Heredia testified that their testimony was influenced in any way by the presence of the mannequins in the courtroom. Thus, there is nothing in the record to support the district court's finding that the use of the mannequins, or any of the other procedures, violated Guerra's right to due process.¹³

¹¹ The district court also disparaged the re-enactment because only "chosen" witnesses were invited to attend. 6 R 1527. This is not as sinister as the court makes it appear. The "chosen" witnesses were those who had been eyewitnesses and who, therefore, had information relevant to a re-enactment.

¹² It is puzzling what significance the district court attached to this. There was no dispute that Carrasco was dead and that Guerra was not.

¹³ The district court also noted that one of the jurors testified that the jury was uncomfortable and ill at ease because of the life-like appearance of the mannequins. 6 R 1523. The juror did not testify that the jury's verdict was affected by the presence of the mannequins. Such testimony would not have been admissible in any event. FED. R. EVID. 606(b).

**C. *The record shows no violation of
Brady v. Maryland, 373 U.S. 83,
83 S. Ct. 1194 (1963).***

The district court found that the prosecutors suppressed evidence that was favorable to Guerra, in violation of Guerra's right to due process and the dictates of *Brady v. Maryland*. In particular, the district court found that the witnesses Herlinda Garcia, Patricia Diaz, Frank Perez, Jose Heredia, Elena Holguin, and George Brown gave information to the police that was exculpatory of Guerra but that was not made available to the defense. In addition, the court found that Amy Parker Heeter, the state's expert on trace metal testing, failed to disclose material evidence that was favorable to Guerra and that would have implicated Carrasco.

Under the Due Process Clause as interpreted by *Brady*, the state is required to disclose to the defense any exculpatory evidence that is material to either guilt-innocence or punishment. *East v. Scott*, 55 F.3d 996, 1002 (5th Cir. 1995); *Wilson v. Whitley*, 28 F.3d 433, 435 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 754 (1994). Undisclosed 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, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding *Id.* The district court's findings that led it to conclude that the state violated *Brady* are either clearly erroneous or irrelevant.

Herlinda Garcia

The district court accepted Garcia's testimony at the evidentiary hearing that 1) she told the police that the shooter had short hair, that the long-haired man was near the front of the car when Officer Harris was killed, and that his hands were empty; 2) after the line-up, she told the police that the person in the No. Four position (Guerra) was not the shooter and that his hands had been empty; 3) at the

re-enactment, she told the prosecutors that the short-haired man had done the shooting; and 4) at the meeting with prosecutors the weekend before trial, the long-haired man with the green shirt was not the killer. The court also found that Garcia did not read either the original statement she gave to police or the statement she made after the line-up, neither of which contained the allegedly exculpatory information. 6 SR 1518-20. Because it was uncontested that this information was not given to the defense, the court concluded that *Brady* had been violated.

This finding can be supported only by ignoring the other evidence in the record. Most notably, although Garcia testified that she had not read her statements before testifying and that the statements did not accurately reflect what she had said, neither she nor the court explained how her trial testimony could have been so consistent with them. See XXII SR 439-500. It is obvious that if she actually saw something different from what was in the statements and told that to the police, but did not read the statements the police wrote, it is not possible that her testimony would mirror her statements. The only explanation is that both the statements and the subsequent testimony are true.¹⁴ The district court's finding cannot make sense in light of the entire record and, thus, is clearly erroneous. See *Real Asset Management, Inc. v. Lloyd's of London*, 61 F.3d 1223, 1227 (5th Cir. 1995) (factual finding is clearly erroneous when reviewing court is left with firm and definite impression that a mistake has been made).

¹⁴ Also unexplained by Garcia and the court below is the fact that the police included in her statement that the person who did the shooting was wearing a brown shirt and brown pants. Pet. Ex. 23. This was closer to a description of Carrasco than of Guerra. If the police were out to insure that all of the witnesses identified Guerra as the killer, especially witnesses who could not read and would not be able to tell what the police put in their statements, it is unreasonable to believe that they would leave in details that did not match Guerra's appearance and their own ideas of what they wanted the evidence to show happened at the scene.

Patricia Diaz

The district court made the same mistake with respect to Patricia Diaz. finding that her evidentiary hearing testimony was true while ignoring the rest of the record, which demonstrates that the findings cannot possibly be correct. The district court found that the police altered Diaz' statement to omit the information that Guerra was standing with his arms outstretched, palms down, and hands empty at the time Officer Harris was killed. In addition, according to the district court, the police put into the statement that Guerra pointed a gun at Harris and shot him four times. The court also found that the police doctored Diaz' post-line-up statement as well, to omit her information that Guerra had been near the front of the police car when the shots were fired. Further, the court found that the prosecutors failed to notify the defense that Diaz told them prior to the time she testified that she did not think Guerra had a gun because his hands were open, palms down, and on the hood of the police car when Harris was shot. The court finally found that Diaz did not read her statements before signing them because she was tired. 6 R 1517-18. The court concluded that the state's action with regard to Diaz resulted in suppression of exculpatory evidence.

As was true of Garcia, the district court's findings are not possible in light of the entire record. Specifically, Diaz' trial testimony was consistent with her statement in all significant particulars. *Cf. Pet. Ex. 30 with XXI SR 309-340*. It is obvious that if Diaz told the police something different from what was in the statements and did not read the statements before she signed them, it is not possible that her testimony would track her statements so closely. It can only be the case that both the statements and the subsequent trial testimony are true.¹⁵ Once again, the district court's findings are clearly erroneous.

¹⁵ The district court put much emphasis on the fact that at the evidentiary hearing Diaz testified that Guerra's hands were outstretched, palms down, and

Frank Perez, George Brown

Frank Perez testified at the evidentiary hearing that he saw a man running from the direction of the shooting of Officer Harris a short time after he heard the shots. The man dropped something to the ground as he passed Perez' house; when it hit the street, it made a metallic sound, and it looked to Perez like a gun. He described the man as looking like Carrasco. He stated that he told the police this both at the scene and when giving his statement. 9 R 109-11, 114-15. He also stated that the police convinced him to refer to the gun as an "object." The court found that the information about Perez' seeing the man drop a gun was omitted from his statement and was not revealed to the police. 6 R 1516. The court also found that George Brown had told the police officer taking his statement that Perez had told him about the man with the gun. That information was not contained in his statement. The court concluded that this was *Brady* material that the state suppressed. 6 R 1513-14.

The court's finding with respect to Perez' statement is clearly erroneous. His statement plainly shows that in three different places the police officer first typed "gun." These were marked out and "object" was written in, with Perez' initials next to the changes. Pet. Ex. 21. The statement was given to the defense at the close of Perez' direct examination. XXII SR 419. Guerra's attorneys had

appeared to be empty, whereas at trial she had testified that Guerra was "pointing" at Officer Harris. At the hearing, Diaz described a gesture by the assistant district attorney with one finger out in the direction of the back door of the courtroom as "pointing," and one of placing both hands on a table palms down as "leaning." 12 R 54. The district court disregarded this. The court also did not mention that at the evidentiary hearing, Diaz said that when she demonstrated at trial how Guerra was pointing, she put her arms in front of her with the palms down. Had this been true, either the prosecutor would have tried to clarify the matter, or defense counsel would have made much about the way Guerra apparently was standing. Neither happened. XXI SR 314.

every opportunity to cross-examine him on the alteration of the statement if they had thought it worth pursuing.

The fact that Brown's statement did not contain the information relayed to him by Perez is of little moment. Brown had no first-hand knowledge of the incident and including it in his statement would have added nothing to the investigation. Because the information was in Perez' statement and the statement was given to the defense, the district court's finding of a *Brady* violation cannot stand.

Jose Heredia

The district court found that Jose Heredia gave a statement to the police in which he stated that the short-haired man shot the police officer and that Guerra was standing with his hands empty and on the police car at the time of the shooting. Further, the court found that Heredia told the police after the line-up that Guerra was not the person who shot Officer Harris. The court found a *Brady* violation from the fact that this information was not included in Heredia's statement. 6 R 1514-15.

These findings are legally irrelevant because Heredia testified as a defense witness. It is apparent that Guerra's attorneys contacted him and discussed what he had seen on the night of the murder. Heredia's version of the episode was as available to Guerra as it was to the state. Under these circumstances, there is no obligation under *Brady* to make the information known to the defense. *Blackmon v. Scott*, 22 F.3d 560, 563 (5th Cir. 1995) (if favorable evidence is readily available to the defense, or could be obtained by the exercise of reasonable diligence, state under no obligation to provide it to defense); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990) (same); *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (same).

Elena Holguin

The district court also found a *Brady* violation in the case of Elena Holguin. It is unclear how her case constituted a suppression of favorable evidence and the court did not explain its finding. As the court below noted, Holguin told police that she did not see the shooting. Nonetheless, a statement of what she did have to say was prepared. According to Holguin, although she could not read the statement, she signed it when told to because she was tired, surprised, and nervous. 10 R 143-46.

The district court did not see fit to identify the exculpatory evidence that Holguin had that was not included in her statement or made available to the defense. This is apparently because there was nothing that Holguin knew or told to police that qualified as exculpatory information. *See* Pet. Ex. 26; 10 R 135-55. Because she was not a witness to the killing, there is little that she could say that would have exonerated Guerra and inculpated Carrasco. The district court's finding of a *Brady* violation in the case of Holguin is wholly without support in the record.

Amy Heeter Parker

Amy Parker, a chemist with the Houston Police Department, testified at trial about trace metal tests that she performed on Carrasco's hands. The purpose of the tests was to determine whether Carrasco had handled any metal objects, particularly a gun, in the time before his death and, if so, to see if the pattern resembled any of the weapons known to have been in his and Guerra's possession. She testified that there was a pattern on Carrasco's right hand that was consistent with the one that would be left by Officer Harris' service revolver. XXI SR 171. She also testified that the pattern retrieved from Carrasco's left hand was not consistent with the 9 mm semiautomatic that was the murder weapon. XXI SR 172. Floyd McDonald, who founded the Houston Police Department Crime Lab,

testified at the evidentiary hearing that he believed the patterns on Carrasco's left hand were consistent with the murder weapon, particularly in light of the fact that Carrasco had apparently dropped a gun once and picked it up again. 9 R 75. Guerra's attorneys were told only that the tests were positive for Carrasco's handling of Officer Harris' gun and negative for handling the murder weapon. The district court concluded that the state violated *Brady* by failing to inform the defense that there was a pattern on Carrasco's left hand but that the state chemist did not think it matched the 9 mm. 6 SR 1509-12.

In this case, there is no dispute about the court's factual findings. However, those findings do not support the court's conclusion that Guerra was denied due process because the state did not disclose that there were trace metal patterns on Carrasco's left hand. Undisclosed evidence is material only 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, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding *Id.*

In the view of the district court, the information about the pattern on Carrasco's left hand would have allowed Guerra's attorneys to challenge the testimony of the state's expert and to put on their own expert to testify that the pattern showed that Carrasco had indeed handled the murder weapon. 6 SR 1509. However, the court places too much importance on this evidence. It was undisputed that Carrasco was using the 9 mm gun during the shoot-out with police that preceded his death. One of the police officers was seriously wounded by shots from Carrasco's weapon, which turned out to be the same one that had been used to kill Officer Harris. Even if the defense had argued that the trace metal patterns on Carrasco's left hand were consistent with the 9 mm gun, that would have been

accounted for by the uncontested fact that Carrasco had used the gun just before he was shot. It did nothing to establish that he was the one who killed Officer Harris and, thus, did not exonerate Guerra in the killing. The evidence does not raise a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, the evidence was not material, and there was no *Brady* violation.

D. There was no prosecutorial misconduct that rendered Guerra's trial fundamentally unfair.

The district court found that the prosecutors engaged in misconduct during the trial and concluded that this behavior resulted in a denial of Guerra's right to due process. The court specifically faulted the prosecutors for "encouraging" Patricia Diaz and Frank Perez to over- or understate the facts; for making false statements about the character of Jose Heredia; for asking questions about an alleged murder in a cemetery near the murder scene; by using testimony of a police officer to rebut the testimony of Jose Luna that he was present when Carrasco returned home with both the 9 mm weapon and Officer Harris' revolver; for arguing to the jury that witnesses who had not conferred with each other had each identified Guerra as the murderer; and for informing several jurors that Guerra was an illegal immigrant and that this could be considered in answering the second punishment issue. In addition, the court found that the trial court also participated in the denial of Guerra's rights by allowing improper conduct by the court interpreter go unchecked. 6 R 1503-08.

Prosecutorial misconduct does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process

Clause of the Fourteenth Amendment. *Jones v. Butler*, 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied*, 490 U.S. 1076, 109 S. Ct. 2090 (1989). To establish that a prosecutor's conduct rises to such a level, the petitioner must demonstrate that the misconduct is persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper conduct. *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir.1986).

Encouraging misstatements by witnesses

The district court found that the prosecutor overstated Diaz' testimony by having her testify that Guerra was pointing "at the police officer," when that was not what she intended to say. The record reflects that during direct examination of Diaz, the prosecutor asked:

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.

XXI SR 313. Following this, the prosecutor asked several questions that referred to Guerra pointing at the police officer. The district court found that this deliberately misstated Diaz' testimony and constituted prosecutorial misconduct. 6 R 1506-07.

The court itself ignored the context of the questions. Following the portion quoted above, the prosecutor asked what Diaz observed, and she described hearing shots and later seeing Officer Harris lying on the ground. XXI SR 314. It was logical for the prosecutor to refer to Guerra as pointing "at the officer" in light of the testimony that Guerra was pointing, shots were fired, and the officer was shot. This instance does not show misconduct on the part of the state.

The district court also took issue with the prosecutor's telling Frank Perez that he should say that he saw a man running by his house drop "an object" rather

than "a gun," unless he was 100% sure that it was a gun. However, Perez himself admitted that he was not absolutely sure that what he saw was a gun. Moreover, even if the instruction from the prosecutor amounted to misconduct, Perez' statement did use the word "gun," which Perez marked through and replaced with "object." The defense was not deprived of the opportunity to question Perez about the change and why he had made it. Any misconduct, if there were any, was limited and not of the degree that Guerra was deprived of due process.

Jose Heredia

During cross-examination of Jose Heredia, the prosecutor asked

Q. I am not keeping you awake -- I am not keeping you awake by asking you questions today, are we?

Have you had anything to drink before you came down here to the courtroom today?

A. No, sir.

Q. Have you had anything to smoke before you came down here to the courthouse today?

A. No, sir.

Q. Is there something about this trial that strikes you as being pretty funny?

A. Nothing.

XXXII SR 747-48. To the district court, this amounted to unwarranted ridicule of the witness "because he would dare testify contrary to the prosecutor's case theory." 6 SR 1506. In reality, the questions quite obviously were directed at Heredia's behavior on the witness stand, yawning during questioning, then laughing at the prosecutor's questions. Again, even if the questions were

inappropriate, they were limited and were not so pervasive that they resulted in denying Guerra due process.

Extraneous murder

The prosecutor began his questioning of Heredia by asking about his earlier testimony about a murder reported in the area prior to the time that Officer Harris was killed. XXIII SR 746-47. The district court characterized the alleged murder as merely a story made up by children. 6 SR 1508. Whatever the basis for the story, it was clear that it first came out during direct examination. XXIII SR 739. Guerra's attorney also made it clear that there was no allegation that Guerra had been involved in the killing. XXIII SR 739. Guerra can show no prejudice arising from the questioning, assuming that it was improper.

Rebuttal testimony

During the defense case-in-chief, Jose Luna testified that he had been at home when Carrasco came in with both the 9 mm gun and Officer Harris' weapon. XXIV SR 815. In rebuttal, the state called a police officer who testified that he interviewed Luna about 11:30 pm, about the time that Carrasco was shot and killed. Luna told him he had just returned home. XXIV SR 885. The district court found that this was misconduct because the state had a report from another officer who interviewed Luna just before Carrasco was killed. According to the district court, this proved that Luna was home when he claimed Carrasco returned with the guns and said he had killed a policeman. In fact, the two reports were taken within a short time of each other, and the earlier one does not demonstrate that Luna was at home when Carrasco appeared, only that he might have been in the area a few minutes before he was interviewed the second time. This does not show prosecutorial misconduct.

Prosecutorial argument

The district court found further misconduct in the argument of the prosecutor that each of the witnesses had identified Guerra as the shooter and that they had not conferred among themselves in arriving at their identifications. According to the court, the prosecutors were aware that the witnesses "conformed" their statements both at the re-enactment and at the meeting between prosecutors and witnesses the weekend before trial testimony began. However, what the court again overlooked is that the witnesses had given their statements already by the time of the re-enactment and the weekend meeting. There is no evidence that the witnesses collaborated on their stories prior to giving their statements, and their testimony and identifications were consistent with the statements. There was nothing, therefore, that was incorrect, much less improper, about the argument.

The district court found another instance of misconduct in the prosecutors' telling the jury that Guerra was an illegal alien and that the jury could consider that evidence at the punishment phase in determining whether he would continue to commit violent acts that would constitute a threat to society. Although being an illegal alien is not a crime of violence, it does demonstrate a disregard for society's laws and norms. In addition, because an illegal alien can face difficulty in finding work, a jury might consider that a person already inclined to disregard the law might break other laws in order to get money to eat and live on. Further, because an illegal alien faces deportation if discovered, a jury might conclude that such a person would have a reason to resort to violence to avoid apprehension. This could be especially true in Guerra's case, where he had been convicted of a violent crime already. Thus, even though a person's status as an illegal immigrant might not be proper evidence by itself to consider at the punishment phase, the inferences that a jury might be able to draw from that fact could legitimately shed light on whether a death sentence was appropriate. The prosecutors' use of the evidence

did not amount to misconduct, and certainly did not inject any improper considerations into the proceedings.

Actions of the interpreter

Finally, the court below found that the interpreter during the state trial engaged in inappropriate behavior while translating the testimony, and that the trial court did not correct his actions. The court's findings in this regard were based on the testimony of Linda Hernandez, the first interpreter who was replaced because of complaints that she was not translating properly. 10 R 116-32. There were no examples given of any serious mistakes or improper behavior on the interpreter's part, and nothing that showed that Guerra was prejudiced in any way. Moreover, Candelario Elizando, one of Guerra's trial attorneys, who is fluent in Spanish, testified that he had not observed anything that he thought was out of order in the second interpreter's behavior, and stated that he certainly would have objected to anything that he thought was prejudicing his client. 13 R 61-62.

E. Because there were no errors as found by the district court, Guerra is not entitled to relief under the cumulative error doctrine.

Finally, the district court held that, even if no one error that it identified in the trial was serious enough to call for reversal of Guerra's conviction, the cumulative effect of all of them together amounted to a denial of due process.

In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (*en banc*), this court adopted the cumulative error doctrine. Under the court's formulation, relief on the basis of cumulative error can be granted only where (1) the individual errors were constitutional violations and not violations of state law only, (2) the errors were not barred from consideration by a failure to abide by state procedural rules, and

(3) the errors "so infected the entire trial that the resulting conviction violates due process." *Derden*, 978 F.2d at 1454.

As demonstrated in the rest of this brief, the district court's factual findings are either clearly erroneous or legally irrelevant. The result is that they do not show any errors in the proceedings against Guerra. A prerequisite to the granting of relief under the cumulative error doctrine is that there be identifiable errors in the first place. Because there were no errors here, Guerra is not entitled to relief.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the judgment of the court below be reversed.

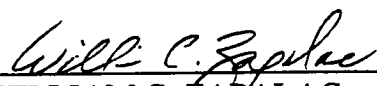
Respectfully submitted,

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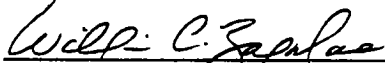
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CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Brief of Respondent-Appellant has been served by placing same in Federal Express, postage prepaid, on this the 27th day of December, 1995, addressed to: Mr. Scott Atlas, Vinson & Elkins, 2500 First City Tower, 1001 Fannin, Houston TX 77002-6760.


WILLIAM C. ZAPALAC
Assistant Attorney General

** TX CONFIRMATION REPORT **

AS OF JAN 31 '97 16:31 PAGE.01

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	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
01	1/31	16:30	6098976067	G3--S	00"48	00	INC

Response:

12/95

F. Old plds

- ① Need summary of trial ev. ^{with} & how weak it was & compared to the
② Need summary of evd. hrs. evd. & misconduct with the refs to why/how the witnesses perceived the mis-
conduct influenced the witnesses trial test. ^{each witness}

No. 95-20443

- ③ Better expl. of stdd of review IN THE
④ Cumulative effect UNITED STATES COURT OF APPEALS
of the series misconduct is FOR THE FIFTH CIRCUIT
important.

- ⑤ Address the themes of RICARDO ALDAPE GUERRA,
State's argmt - ^{summary} of args. ^{adopt} positions for trial Petitioner-Appellee,
① witnesses c/n ~~at~~ testimony if v. not true, since they c/n read stmnt
(et.)
② Brady args WAYNE SCOTT, DIRECTOR,
③ Identfctn pts. TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
④ Prosecutorial Misconduct INSTITUTIONAL DIVISION,
Respondent-Appellant.

- ⑤ Cumulative Error -
→ argue this hard.

Point to specific On Appeal From the United States District Court
combinations of arg/sens For the Southern District of Texas
that meet the stnds. Houston Division

Innocent - 12
ID procedure - 12
Brady - 25
25 Trial
30

BRIEF OF RESPONDENT-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a)(3), oral argument should be denied because the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

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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

BRIEF OF RESPONDENT-APPELLANT

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 brief.

STATEMENT OF JURISDICTION

The district court entered an order granting habeas corpus relief on November 15, 1994. 6 R 1369; RE Tab __.¹ On May 18, 1995, the court granted Guerra's motion to alter or amend its order and issued its amended order, again granting relief. 6 R 1546; RE Tab __. The Director filed notice of appeal on June 2, 1995. 6 R 1548; RE Tab __. This court stayed the judgment on June 21, 1995. 6 R 1571. The court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUE

Whether the district court's factual findings that the police and prosecutors engaged in misconduct, depriving Guerra of due process, are clearly erroneous.

STANDARD OF REVIEW

A district court's findings of fact will be set aside if the reviewing court determines that they are clearly erroneous. Fed. R. Civ. P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985). Legal conclusions are reviewed *de novo*. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Guerra is in custody pursuant to a judgment and sentence of the 248th District Court of Harris County, Texas in cause number 359805, styled *The State of Texas v. Ricardo Aldape Guerra*. Guerra was indicted for the murder of police officer J. D. Harris, while Officer Harris was in the lawful discharge of his duties, a capital offense. Guerra pled not guilty and was tried by a jury. On October 12, 1982, the jury found him guilty as charged. After a separate hearing on

¹"R" refers to the record on appeal. "RE" refers to Respondent-Appellant's record excerpts. "SR" refers to the record of Guerra's state trial.

punishment, the jury, on October 14, 1982, returned affirmative answers to the issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. The trial court sentenced Guerra to death by lethal injection, as required by law.

Guerra's case was automatically appealed to the Court of Criminal Appeals of Texas. The court affirmed his conviction and sentence on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex.Crim.App. 1988). Guerra's petition for writ of certiorari was denied on July 3, 1989. *Guerra v. Texas*, 492 U.S. 925, 109 S.Ct. 3260 (1989).

On May 8, 1992, Guerra filed an application for writ of habeas corpus in the state convicting court. On July 2, 1992, he withdrew the application and, on September 17, 1992, he filed a second application. The trial court recommended that relief be denied. The Court of Criminal Appeals noted that, by making no findings of fact, the trial court had found, as a matter of law, that there were no controverted, previously unresolved issues of fact material to Guerra's confinement. In reviewing the record and the pleadings, the Court of Criminal Appeals concluded that the trial court's implied finding was fully supported. Accordingly, it denied relief on the same basis as the trial court. *Ex parte Guerra*, Application No. 24.021-01 (Tex.Crim.App. January 13, 1993).

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Guerra then filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division. The court conducted an evidentiary hearing on November 15, 16, 18, 19, and 22, 1993. On November 15, 1994, the court entered an order granting habeas corpus relief. 6 R 1369; RE Tab __. On May 18, 1995, the court amended its order in several respects, and again granted habeas corpus relief. 6 R 1546; RE Tab __. The state was ordered to release Guerra unless it began a retrial within thirty days. The

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Director filed timely notice of appeal, 6 R 1548; RE Tab __, and on June 21, 1995, this court stayed the district court's judgment. 6 R 1571.

B. Statement of Facts

On July 13, 1982, J. D. Harris, a police officer with the K-9 Division of the Houston Police Department, was on patrol in a Mexican-American neighborhood near downtown Houston, accompanied by his K-9 partner, Texas. XXIII SR 706. At approximately 10:00 p.m., a pedestrian, George Brown, waved down Officer Harris and stated that a black and burgundy Cutlass almost ran over him while he was walking his dog on Walker Street. XXII SR 383. Less than a minute later, Officer Harris approached a vehicle stalled at the intersection of Walker and Edgewood and fitting the description given to him by Brown. XXII SR 388. Apparently, the car was attempting to make a U-turn on a nearby street when it stalled, blocking traffic on that street. XX SR 67; XXI SR 282; XXII SR 388.

At Guerra's trial, two teenage girls, Herlinda Garcia and Vera Flores testified that they were walking to the store about 10:00 p.m., that the same black car had stopped them seconds before, and the driver told them his car needed a boost and asked them if they had some cables. XXII SR 446, 507. Both girls stated that they saw the police officer drive up and park his patrol car behind the black car seconds later. XXII SR 448, 508. According to Garcia, two men exited the black car, walked towards the officer, and put their hands on the police car. XXII SR 448-449, 479. Garcia then saw one of the men, later identified as Ricardo Aldape Guerra, pull what appeared to be a gun from his pants.² XXII SR 449-50. She heard three shots and saw the officer fall to the ground. XXII SR 450-51. Garcia, who ran toward her house holding her seven-month old baby, heard more shots being fired behind her. XXII SR 451. As did Garcia, Vera

² Guerra's companion was later identified as Roberto Carrasco Flores (Carrasco).

(478)
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police man
(479)
was
near the
trunk (477)

Flores testified that she saw two men get out of the black and red car and approach the police car. XXII SR 511. The men seemed to place their hands on the hood of the patrol car while the officer was standing by the open door of his car. XXII SR 510, 527. After Flores saw the driver of the car, whom she identified as Guerra, pull something from in front of him, she heard three shots and then saw the officer lying on the ground. XII SR 512-13, 534, 543. Flores ducked beside a car and saw Guerra running down Walker street towards Lenox. XXII SR 535. Both girls identified Guerra as being the one who shot and killed Officer Harris. XXII SR 452-517).

asked which one had
hands on hood, she says
she was only paying attention
to one; after the
other got
out of the
car, she
never saw
him again
(527-531)
but saw
4 hands
(532)

Another eyewitness, Hilma Galvan, testified that she was walking around her neighborhood that night with two of her neighbor's children, Jose and Armando, when Guerra came speeding around a corner in a black car and almost hit them. XXII SR 550. Galvan was able to identify Guerra as the driver of the car because he was a customer of the convenience store where she worked. XXII SR 561-67, 570, 576. Galvan also saw George Brown talking to an officer in a patrol car. XXII SR 553. While standing on the sidewalk in front of her house at 4925 Walker, the third house east of the intersection of Walker and Edgewood, Galvan observed a patrol car and the same black and red car that almost hit her blocking Walker street. XXII SR 553-54. Galvan also saw Garcia and Flores standing by the front of the black and red car. XXII SR 557-58. Galvan heard the officer twice tell Guerra to "[c]ome here" and then saw Guerra turn and walk towards the officer. XXII SR 557. She next heard the sound of shots being fired and saw a "flash" coming from Guerra's hand and then saw the officer fall to the ground. XXII SR 560.

where
was
AAG
standing?

Galvan testified that she saw Guerra running toward her and the two children with her on the same side of the street firing his gun in the direction of

Garcia and her baby across the street.³ XXII SR 586-87. Galvan ran inside her house and stayed there until Jose Armijo, Jr. came to her house a few moments later screaming that his father had been shot. XXII SR 562-65. Galvan ran to the car that had crashed into a tree in front of her house and saw that a man, later identified as Francisco Jose Armijo, Sr., had been shot; Galvan then helped his two-year old daughter from the back seat of the car. XXII SR 565-66. She identified Guerra as the man whom she saw shoot Officer Harris. XXII SR 561, 567, 570.

Jose Armijo, Jr. testified that on the evening of July 13, 1982, he and his two-year old sister, Lupita, had accompanied their father, Francisco Jose Armijo, Sr., to the store. XXI SR 281. Jose stated that while they were driving west on Walker Street on their way home, he saw a black car and a police car blocking the intersection. XXI SR 281-82. Jose saw the police officer standing behind the open door to his patrol car and observed two people with their hands placed on the hood of the police car. XXI SR 283. Jose's father stopped his car and Jose observed the man with the long hair, later identified as Guerra, "scratch his back" and then take out a gun and shoot the policeman. XXI SR 284. After Jose saw the fire coming from Guerra's gun, the policeman fell to the ground and one of the men grabbed the policeman's gun. XXI SR 285-86.

While Armijo was attempting to move his car, the two men started running down Walker towards Armijo's car. XXI SR 286. The man in the purple shirt ran down Armijo's side of the car, while the man with the green shirt, Guerra, ran on the passenger side of the car and started shooting into the car. XXI SR 286-87. Jose pushed his sister down in the back seat; Armijo was hit by one of the bullets fired from Guerra's gun. XXI SR 287. Jose testified that during a subsequent

³ Galvan lies on the north side of Walker while Herlinda Garcia lives with her family on the south side.

lineup at the police station, he recognized Guerra as the man who shot the police officer and who also shot his father. XXI SR 290. However, Jose told the police officer at the lineup that he was unable to identify anyone because Guerra lived in the same area of town as he did and he was afraid that if he identified him from the lineup, Guerra would "come and get him." XXI SR 290-91.

he didn't say all this until trial

Patricia Diaz testified that she was driving her car down Walker when she approached a patrol car and a black car with the red top blocking the intersection. XXI SR 310. Because the intersection was blocked, she stopped her car approximately three to four feet from the black car, which was later identified as the car Guerra was driving. XXI SR 311. Diaz stated that her headlights were on and she saw Guerra "pointing" towards the officer right before four shots rang out. XXI SR 312-13, 317, 325. Diaz identified Guerra at the lineup as the man she saw "pointing" towards Officer Harris. XXI SR 317.

pointing not at Harris, but at his car
(312-13)

When investigating the scene of the murders, law enforcement officials learned from the eyewitnesses that Guerra and Carrasco had fled in an easterly direction down Walker street, with one man on the north side of the street firing his weapon and the other man on the south side of the street firing his weapon. XX SR 104-05. Two nine-millimeter cartridges were found on the north side of the street (on the driveway at 4925 Walker) and two cartridges from a .45 caliber pistol were found on the south side of the street. XX SR 73, 92, 102-03, 143.

Immediately after the shooting, law enforcement officials canvassed the neighborhood looking for people with information regarding the shootings. XXI SR 213-14. Acting on a tip that the suspects might be living in the house at 4907 Rusk, on the corner of Rusk and Dumble, Officers Lawrence Trapagnier and Mike Edwards, along with other Houston Police Department officers, proceeded to that location to coordinate a search for the suspects. XXI SR 216; XXIII SR 648, 667. After searches of the two houses at 4907 Rusk and 4911 Rusk by police officers

I thought more 9mm found - see p. 9/10 of infra

proved fruitless, Officers Trapagnier and Edwards approached a dark garage behind the house at 4911 Rusk. XXI SR 669-70. As the officers shined their flashlights in the garage, gunfire erupted and Officer Trapagnier was shot numerous times by one of the suspects, later determined to be Carrasco. XXI SR 658, 673-75, 678. Other officers, hearing the shots ran to Trepagnier's aid and shot and killed Carrasco. XX SR 21; XXIII SR 661. A Browning nine millimeter pistol was found under Carrasco's body. XX SR 42. Officer Harris' .357 millimeter ammunition was recovered from the waistband of Carrasco during a search at the Harris County Morgue. XXI SR 202, 209. *Carrasco had been shooting the 9mm*

Terry Wilson, Chief of the Civil Rights Division of the Harris County District Attorney's Office and a certified peace officer, testified that he responded to the scene at Edgewood and Walker at approximately 11:00 p.m. to investigate the shootings of Officer Harris and Armijo. XX SR 8, 10, 17. At approximately 11:30 p.m., while en route to look for possible suspects, Wilson heard two "volleys" of numerous shots coming from what appeared to be a location northeast from scene of the murder. XX SR 17. Wilson proceeded to that location, 4911 Rusk, observed a police officer and one of the suspects lying on the ground, both with apparent gunshot wounds. XX SR 19-22. In order to protect the physical evidence of the crime scene and restrict access to the house, Wilson began to put up crime scene tape. XX SR 23-24. While trying the tape to a tree, Wilson observed a male, later identified as Guerra, crouched behind a horse trailer at the back of the lot. XX SR 25. At this point, Wilson pulled his weapon, called for assistance, and proceeded to arrest Guerra. XX SR 26. Wilson testified that after he arrested Guerra, he looked under the horse trailer and found a red bandanna with a .45 caliber pistol wrapped inside of it that was located about two feet from where Guerra had been crouched down. XX SR 28. Wilson identified Guerra at

trial as the individual whom he found crouched behind the horse trailer and subsequently placed under arrest. XX SR 27.

Amy Heeter, a chemist with the Houston Police Department, testified that she performed a trace metal detection test on Carrasco to determine whether he had held a particular weapon in the period proceeding his death. XXI SR 160. She stated that many factors affect the presence or lack of a trace metal pattern, such as dirt, blood, water, or sweatiness of the palms. XXI SR 162-63. According to Heeter, it is possible for a person to hold a weapon yet not have trace metal patterns on his hands because of the above variables. XXI SR 163. Heeter found a pattern on Carrasco's right palm similar to the pattern formed on her own hand when she held Officer Harris' .357 revolver. XXI SR 171. When she performed the trace metal detection test on Carrasco's left hand, she determined that, although it was possible that the pattern she detected may have been consistent with holding a pistol, the results were not consistent with handling the nine millimeter Browning. XXI SR 172, 177.

blast
not to
shoot

Danita Smith, a chemist with the Houston Police Department, testified in detail concerning the variables that affect the results of a trace metal test, including the fact that it is easier to get a trace metal reading from a deceased person because there is a lack of movement. XXI SR 180-85. Smith performed trace metal tests on Guerra about 4:45 a.m. July 14th, approximately seven hours after the shootings. XXI SR 186. She stated that Guerra's hands were very dirty as if he had rubbed them in dirt or as if he had fallen on the ground. XXI SR 187. When she performed the trace metal test, she was unable to find any type of a pattern on either of hands. XXI SR 188.

C. E. Anderson, a firearms examiner with the Houston Police Department, testified that he recovered two .45 caliber cartridges, seven nine millimeter cartridges, and three nine millimeter bullets in the vicinity of Edgewood and

*

Walker. XX SR 120-21. At the 4911 Rusk location he recovered six nine millimeter cartridges. XX SR 122. Anderson conducted a test on all of the nine millimeter casings recovered in the vicinity of Edgewood and Walker and determined that they were fired from the nine millimeter gun found underneath Carrasco's body. XX SR 131. Anderson also determined that the nine millimeter cartridges recovered from the Rusk Street shooting were also fired from the nine millimeter. XX SR 138. He determined that the .45 caliber cartridges found at or near the scene of the shooting of the officer were fired from the .45 caliber pistol found in the red bandanna. XX SR 131. Anderson was not able to make a positive identification as to whether the three nine millimeter projectiles found lodged in the house at 4919 Walker street were fired from the particular nine millimeter pistol found under Carrasco. XX SR 133-35. He also determined that it was a nine millimeter bullet that killed Francisco Armijo. XX SR 145. Anderson concluded that, based on his examination of the scene, the location of the projectiles, and his investigation, Officer Harris was killed with a nine millimeter pistol. XX SR 152.

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but they were fired from a Browning automatic (134)

Dr. Aurelio Espinola, Deputy Chief Medical Examiner for Harris County, testified that he performed the autopsy on the body of Officer Harris. XXIII SR 683-84. Based on his examination, there were three gunshot wounds of entrance on the left side of Harris' head and three exit wounds on the right side of his head. XXII SR 685-92. Dr. Espinola also determined that the each of the first two shots sustained by Harris were fatal. XXIII SR 695. He concluded that the cause of Harris' death was three gunshot wounds to the head, face and chin. XXIII SR 696. Dr. Espinola also testified that from his examination of the size of the wounds that a .45 caliber could not have made the wounds, but that a nine millimeter could have made the wounds. XXIII SR 700. Dr. Espinola also performed an autopsy

on Francisco Jose Armijo and determined that his death was caused by a gunshot wound to the head. XXIII SR 697-99.

During the punishment stage of the trial, the State presented evidence, through the testimony of Robert Dawson and Steve Earhardt, that Guerra, Carrasco, and Enrique Torres Luna had committed an aggravated robbery at the Rebel Gun Store on July 8, 1982, in which they took over fifteen thousand dollars worth of guns and ammunition. XXVI SR 64, 71, 76, 77, 116.

ARGUMENT

THE DISTRICT COURT'S FACTUAL FINDINGS, WHICH ARE NECESSARY FOR THE GRANTING OF HABEAS RELIEF, ARE CLEARLY ERRONEOUS.

The district court granted relief based on its review of the pleadings and the testimony of witnesses at the evidentiary hearing. 6 R 1369, 1546; RE Tab . In making its factual findings, the court accepted the testimony of many of the witnesses presented by Guerra. Although there is evidence in the record to support the court's findings, a review of the entire record leads inexorably to the conclusion that the findings are clearly erroneous.

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. at 573, 105 S. Ct. at 1511. When the district court's findings are not "plausible in light of the record reviewed in its entirety," they are clearly erroneous. *Id.*, at 574, 105 S. Ct. at 1115.

The district court granted relief on the following allegations:

1. The police and prosecutors intimidated witnesses prior to trial to secure favorable testimony against Guerra;

2. The identification procedures were impermissibly suggestive;
 3. The prosecutors suppressed material, exculpatory evidence;
 4. The prosecutors knowingly used false evidence and relied on illegitimate arguments at trial; and
 5. The cumulative effect of the above errors resulted in a due process violation.
- A. *The testimony of the witnesses at the evidentiary hearing cannot be true in light of the evidence from their pretrial statements and trial testimony; the testimony that is true does not show a violation of Guerra's constitutional rights.*

The bulk of the court's opinion dealt with Guerra's allegation that the police and prosecutors threatened and intimidated witnesses in order to get them to identify Guerra, rather than Carrasco, as the one who killed Officer Harris. The court reviewed the evidentiary hearing testimony of eight witnesses and concluded that there had been official misconduct that resulted in the witnesses' testifying falsely.

Patricia Diaz

The court below found that Patricia Diaz was threatened by police at the scene of Officer Harris' murder when she stated that she did not see the shooting, that she had gotten only a glimpse of Guerra's profile, and that Guerra's hands appeared to be empty. The court also found that, when Diaz tried to tell the prosecutors that she had not seen Guerra pointing at Officer Harris, they yelled at her, scaring her into testifying the way they wanted her to. 6 R 1540.

The allegation that Diaz was threatened by the police at the scene of the murder because she would not identify Guerra as the shooter is wholly implausible

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in light of the fact that the police had no idea at that time that Guerra was even involved in the crime or that there was any possibility that he was the murderer. What is believable is that the police were intent on finding the person responsible for the crime and perhaps became frustrated at what appeared to be a lack of cooperation on the part of witnesses. Nothing in the record supports a finding that Diaz was threatened by the police because she would not identify Guerra as the murderer and that she agreed to identify him because of the threats.

The court also found that Diaz told the prosecutors that she had not seen Guerra pointing at the victim but that they forced her to testify that she had. 6 R 1540. She also testified that much of what was contained in the statement she gave after the shooting was untrue. 12 R 24, 86. This, again, is not believable in light of the entire record. At the evidentiary hearing, Diaz stated that she had not read her statement before signing it because she was tired and just wanted to leave the police station. 12 R 23, 77. However, if the statement were untrue and if she had not read it, she offered no explanation for the fact that her testimony at trial faithfully tracked the statement. Cf. Pet. Exhibit 30 with XXI SR 309-40. Because Diaz' testimony was consistent with her statement, and because she had not read the statement before testifying, the only explanation is that the statement contained a truthful account of the events as she perceived them on the night of the killing.

What cannot be true is what the district court found: that the statement did not reflect what Diaz told the police, that she did not read the statement before testifying, but that her testimony accurately recited the details of the statement.

The district court's findings in this regard are clearly erroneous.

Elena Holguin

Elena Holguin testified that she was handcuffed at the scene of Officer Harris' murder and kept handcuffed for a couple of hours, until she was taken to police headquarters. She also testified that police officers threatened her if she

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would not cooperate with their investigation. 10 R 141-42. The district court cited this as an instance of witness intimidation. 6 R 1541. However, even if the incident occurred, and even if it was unprovoked, the court was unable to cite to any effect that it had on Holguin's testimony. Holguin had not been a witness to the murder of Officer Harris, so her statement did not contain an identification of the shooter. Pet. Ex. 26. Although Holguin claimed that she was not allowed to read the statement or have it read to her before she signed it, 10 R 145, she did not claim that anything in the statement, or in her testimony that was consistent with the statement, was not true. Although the record might support the district court's finding regarding the way that Holguin was treated, it will not support a finding that Holguin was intimidated into giving information or testimony that implicated Guerra and that was untrue.

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Frank Perez

The district court found that Frank Perez witnessed a police officer on top of a suspect with her gun drawn and pointed at his face asking, "Why did you kill the cop?" 6 R 1539; see 9 R 117. It turned out that the person had no involvement with the case. As was the case with Holguin, however, what is lacking here is any indication that the episode had the effect of intimidating any witness into giving untrue information that inculpated Guerra. Perez testified that the incident occurred some distance away from the scene of the killing. There is no indication that any other witnesses were around to observe. Nothing in the record even suggests that any witnesses changed their testimony or gave false information because of it. Perez himself never testified that he felt intimidated and did anything to implicate Guerra as a result.⁴ The finding does not constitute an

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⁴In fact, Perez did not see the killing of Officer Harris, so he was not in a position to identify the murderer. He did see someone running down the street past his house shortly after hearing the shots. The man appeared to point a gun at

example of official action that threatened or coerced witnesses to identify Guerra as the killer of Officer Harris.

In Perez' statement, given shortly after the murder occurred, he related that he had seen a man running past his house shortly after hearing gunfire. Originally, the statement said that Perez saw the man drop a gun; however, the word "gun" was marked through and "object" was substituted. *See* Pet. Ex. 21. Perez testified, and the district court found as true, that the prosecutors told him that unless he was 100% certain that he had seen a gun he should say "object."⁵ The court below cited this as an example of prosecutorial interference with a witness' testimony. 6 R 1538-39. The court did not explain how seeking to present accurate information to the jury amounts to prosecutorial misconduct. Moreover, even if the state did impermissibly change the witness' testimony, the defense had a copy of Perez' statement available and could have cross-examined him on the change had it seemed significant. XXII SR 419. Although the state might have encouraged Perez to be precise in his testimony, the court's finding does not show a violation of Guerra's right to due process.

Jose Luis Luna and Roberto Onofre

At the evidentiary hearing, Jose Luis Luna and Roberto Onofre testified that he lived in the same house as Guerra. Sometime between the killing of Officer Harris and the time that Carrasco was shot, the police appeared, with guns drawn. They forced Luna and another person outside, pointed guns at them, screamed at them, and searched the area. 12 R 153-54; 186-87. The district court reported this

Perez, dropped it, then picked it up. Perez described him in a way that was consistent with Carrasco. *See* Pet. Exhibit 21. At trial, he identified a photograph of Carrasco as being the person he had seen. XXII SR 414. He also identified the mannequin of Carrasco as "appear[ing] the same" as the man he had seen. *Id.*

⁵Perez' testimony was that he could not identify what he had seen the man drop because it was very dark and trees blocked the light. XXII SR 412.

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as yet another instance of official misconduct that resulted in intimidation of witnesses. The district court ignored several facts, however. For example, Luna was not a witness to the killing of Officer Harris, so the incident clearly had no effect on his identifying the murderer. In addition, Luna, far from being intimidated, testified about the incident at Guerra's trial as a defense witness. XXIV SR 819-20. Finally, Luna also testified that a short while after hearing a series of shots in the direction where Harris was killed, Carrasco came into the house out of breath and said that he had killed a policeman. XXIV SR 814-15. Assuming that the described conduct did take place, it plainly had no effect on the testimony of the witnesses involved.⁶

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Herlinda Garcia

The district court credited Herlinda Garcia's testimony that the police threatened to arrest her and her husband after she told them that Carrasco, not Guerra, was the shooter. The court also found that when Garcia tried to tell prosecutors before trial that Guerra was not the one who killed Harris, they told her that she could not change her mind at that point. 6 R 1537. As a result, the court determined that Garcia was forced to testify in a way that implicated Guerra, although she knew that he was not the murderer.

As was the case with the findings relating to Patricia Diaz, the court's findings ignore the other evidence in the record, evidence that makes its findings untenable. For example, there has been no showing that at the time Garcia supposedly identified Carrasco as Officer Harris' killer the police knew anything about Guerra's possible involvement. In fact, well after Carrasco was killed, the

⁶The same is true about the testimony that, in the weeks after the murder, police officers appeared at Luna's house in the middle of the night, forced the occupants to lie face down, and proceeded to search and ransack the house. There is no evidence in the record to show that any defense witnesses were deterred from testifying because of this behavior.

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police believed that he was Harris' murderer. 9 R 122, 128-29. Thus, there was no basis for the police to make threats to try to persuade witnesses to name Guerra as the murderer. In addition, Garcia's statement, given shortly after midnight on July 14, and supposedly after the police threatened her, described the shooter in a manner that resembled Carrasco rather than Guerra. See Pet. Ex. 23. The record contains nothing to show that Garcia identified Guerra in the line-up because of pressure from the police. Finally, as was true of Diaz, Garcia testified at the evidentiary hearing that she did not read her statement before signing it because she did not know how to read, and the police refused to read it to her. 10 R 62-63. She also claimed that some of the statements were not true and were not what she had told the police. 10 R 65-66. Yet her trial testimony was exactly the same as her statement. XXII SR 429-62. On at least two occasions during her trial testimony she was asked about things she had said in her statement and replied appropriately. XXII SR 459-60, 466-67.⁷ Plainly, she had full knowledge of what she had said in her statement. Looking at the entire record, and not simply the testimony from the evidentiary hearing, the district court's findings regarding Garcia's statement and testimony are clearly erroneous.

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George Brown

The district court made two findings based on George Brown's evidentiary hearing testimony: that he believed he was segregated from the Hispanic witnesses at the police station because his last name was not Hispanic, and that he could hear the other witnesses discussing the shooting among themselves. Besides being irrelevant because they do not show any police misconduct and do not show that any witnesses changed their stories because of harassment from the authorities,

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⁷On the first occasion, the prosecutor asked if she had described the shooter as having blond hair and she said she had. The second time, Guerra's attorney had her read her description of the shooter's clothes, and she did so.

they do not accurately reflect the testimony. Regarding his being separated from the rest of the witnesses, Brown testified as follows:

Q (Mr. Atlas) So let me see if I understand this correctly. From about midnight or so when you were brought into the police station until shortly before the line-up at 6:00 in the morning, you, apparently the only one with an Anglo surname, were separated and kept apart from your Hispanic neighbors the entire time; is that right?

A (Brown) I don't know if they were taken into cubicles also. I have no way of knowing that.

Q All you know is you were segregated into a cubicle and you weren't allowed to mix with them or communicate with them in any way at any time before the line-up began from the time you got in there around midnight the night before; isn't that right?

A Correct. I just did what I was told to.

11 R 81. At no time in the record did Brown even intimate that he felt he was being separated because of his name and presumed different nationality.

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Similarly, when asked about what he observed in the hallway while he was waiting for the line-up, Brown described the people who were present. Then he was asked:

Q (Mr. Atlas) Were they talking amongst themselves?

A Yes, they were.

Q Could you hear what they were saying?

A No, I couldn't.

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11 R 82-83. To the extent these findings are relevant to any of the issues in this case, they are clearly erroneous.

The court's conclusion that the state, through its police officers and prosecutors, threatened, browbeat, and intimidated witnesses to make sure that they identified Guerra as the killer at trial is based on its findings with respect to the named witnesses. All of those findings are either clearly erroneous, irrelevant, or prove, not intimidation, but a lack of fear on the part of witnesses. Consequently, the conclusion that Guerra was denied due process and a fair trial cannot survive.⁸

B. The identification procedures used in this case were not impermissibly suggestive.

The district court also held that the state denied Guerra due process by resorting to improper identification procedures. According to the court, the state employed techniques that were designed to insure that the witnesses would identify Guerra, whether he was the murderer or not.

In determining whether an identification process constitutes a denial of due process, it first must be determined if the pretrial identification was impermissibly suggestive. If it is, the court then must determine whether the procedures created a substantial likelihood of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967 (1968); *United States v. Merkt*, 794 F.2d 950, ___ (1986). The factors to be considered in determining whether an identification is reliable include: 1) the opportunity of the witness to view the defendant; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description; 4) the level of

⁸The district court gratuitously maligns the prosecutors' behavior, condemning particularly "[t]he tone of voice, as well as the artful manner in which the questions were asked" 6 R 1533. Nothing in the record indicates that the court was present at the trial to know the tone of voice the prosecutors used. Further, part of a lawyer's job is to artfully frame questions to present the client's case. Absent using artful questions to present evidence that is untrue, there is nothing improper about being skilled in the use of language.

Diaz described tone

certainty displayed by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, ___, 93 S. Ct. 375, ___ (1976).

The district court found fault with four aspects of the identification procedure in this case. It held that the witnesses' identification of Guerra was tainted and unreliable because the witnesses were permitted to see Guerra in handcuffs being taken into and out of the Homicide Division, because the witnesses were allowed to talk among themselves about the identity of the killer before the line-up, because the police staged a "re-enactment" of the murder for the witnesses; and because the state used mannequins made to resemble Guerra and Carrasco as exhibits during the trial.

Viewing of Guerra in handcuffs

The trial court found that the witnesses were seated in the hallway outside the Homicide Division while waiting to give their statements and to view the line-up. During this time, Guerra was led past the witnesses in handcuffs. The court concluded that this tainted the identifications that the witnesses made of Guerra as the one who shot Officer Harris. 6 R. 1523-30.

The court ignored two facts in making this decision. First, the witnesses for the most part were people who already knew Guerra, which reduced the chances that they identified the wrong person. Second, most of the witnesses gave their statements before Guerra was led through the hallway. Frank Perez testified that Guerra was brought through the first time after he gave his statement. 9 R 180-81. His statement was given at 12:40 am. See Pet. Ex. 21. Seven witnesses gave statements after Perez did: Patricia Diaz (1:40 am), Armando Heredia (4:35 am), Jose Heredia (4:15 am); Elena Holguin (1:30 am); Danny Martinez (1:00 am); Trinidad Medina (1:35 am); and Enrique Luna Torres (3:45 am). Of these, only Diaz and the Heredia brothers were witnesses to the shooting of Officer Harris,

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and they are the only ones who described the shooter and who viewed the line-up to identify shooter. Armando Heredia's statement identified the shooter as "Guero," which was Carrasco's nickname, but positively picked Guerra out of the line-up and stated that he knew Guerra as "Guero." He did not testify at the trial. Jose Heredia did not identify anyone in the line-up, and testified at trial for Guerra.

Only Diaz arguably made an identification at odds with the description in her statement. However, at no time has Diaz testified that seeing Guerra being led through the hallway in handcuffs affected her identification of him in the line-up. Indeed, she has not repudiated her identification of Guerra at all.⁹ At the evidentiary hearing, she merely said that she had signed her statement without reading it, and that she did not know that the statement contained the sentence "I saw this man with his hands out-stretched, and I guess he had a gun in his hands." 12 R 29. Nothing in the record supports the district court's finding that Guerra was identified in the line-up because the witnesses had seen him led through the hallway earlier in the evening.¹⁰

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⁹ Diaz' identification of Guerra was tentative anyway. At trial, after a vigorous cross-examination about what she had seen, she admitted that "I didn't exactly know who shot who." 12 SR 340.

¹⁰ At the evidentiary hearing, Diaz testified that her trial testimony was not intended to relate what she had seen but to describe what was in her statement. 12 R 24-26. She was referred expressly to portions of her trial testimony where the prosecutor directed her "to look at your statement and tell the jury everything you said in your statement," or to "[t]ell the jury how [you] described the man for the police in your statement on July 14, 1982." 12 R 24. Even if Diaz was intending to relate only what was in the statement on these occasions, that does not explain her testimony on cross-examination that did not refer to what was in the statement but to what she had seen, which was consistent with the statement. XXI SR 323-33.

Discussions among the witnesses

The district court also found that the line-up identifications were tainted because Hilma Galvan insisted to Jose and Armando Heredia and Jose Armijo, Jr., that Guerra was the shooter. 6 R 1524-25. With respect to the Heredia's, this finding is clearly erroneous. As noted above, Jose Heredia did not identify Guerra in the line-up as the shooter, so he clearly was not influenced by Galvan's comments. Further, he testified at trial on Guerra's behalf and identified Carrasco as the one who killed Officer Harris. XXIII SR 744. Armando Heredia did identify Guerra in the line-up but did not testify at trial. Thus, even if his identification were tainted, it did not affect the outcome of the trial because the jury never was made aware of it.

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As for Jose Armijo, Jr.'s, identification of Guerra, there is no record support for the finding that it was the result of Galvan's prompting. In the first place, Jose, Jr. did not identify Guerra at the line-up. XXI SR 290. It was not until he testified at trial that he described Guerra as the one who had shot Officer Harris. XXI SR 284. Assuming that Galvan did urge Jose, Jr. to identify Guerra as the killer of Officer Harris and of Jose, Jr.'s father, it could not have resulted in a misidentification of Guerra at the line-up. Assuming further that Galvan continued to lobby Jose, Jr. to name Guerra as the killer, that his trial testimony was influenced by that, and the identification was erroneous -- something for which there is absolutely no support in the record -- the state cannot be held responsible. There is no showing that the state encouraged Galvan to try to convince Jose, Jr. to change his story and name Guerra as the one who committed the murders. Even if Galvan took it upon herself to speak to Jose, Jr. and persuade him that Guerra was the murderer, the state is not responsible for the conduct of private citizens when they are outside of official control. In any event, without state action, there can be no constitutional violation. Cf. *Thompson v. Mississippi*, 914 F.2d 736, 739 (5th

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Cir. 1990), *cert. denied*, 498 U.S. 1124, 111 S. Ct. 1083 (1991) (state action required for violation of right to counsel at post-indictment confrontation). The record does not support the district court's findings that Galvan's talking to other witnesses resulted in misidentification of Guerra as the killer.

Pretrial re-enactment

The district court further found that the identifications were rendered unreliable because the police and prosecutors staged a re-enactment of the crime a couple of weeks after it occurred. According to the district court, "[t]his procedure permitted the witnesses to overhear each others [*sic*] view and conform their views to develop a consensus view." 6 SR 1527.

This finding was made from whole cloth by the district court. There was no testimony from any source at the evidentiary hearing that the re-enactment was conducted in such a way that the witnesses heard and observed the comments of each other. Certainly, there was no evidence that any witness was swayed by anything that any other witness said at the re-enactment, and changed his or her testimony "to develop a consensus view." This is not surprising inasmuch as the witnesses already had given statements and the record shows that the trial testimony of the witnesses was consistent with the statements already on file. As for using the re-enactment to ensure that all the witnesses testified alike, the trial record belies that. Not even all of the eyewitnesses to the killing of Officer Harris were able to identify Guerra as the shooter, and each of the accounts contained each witness' own version of how the incident occurred, where the participants were, and the sequence of events. In short, the trial testimony showed exactly what would have been expected in any trial, *viz.*, that each witness perceived things slightly differently and remembered different details. The one fact that was common to all of those who were able to identify the killer was that it was Guerra. Nothing in the record as a whole supports the district court's finding that the re-

enactment in any manner produced an unreliable identification of Guerra or testimony that was untrue.¹¹

Use of mannequins

At the trial, the prosecution displayed two mannequins which were made to look like Guerra and Carrasco, and which were wearing the clothing each man had on on the night of the murders. The district court found that the use of the mannequins violated Guerra's right to due process because "the positioning of the mannequins helped [witnesses Heredia and Perez] identify which of the men was dead."¹² 6 SR 1523. Even if true, however, this is irrelevant to whether there was a violation of Guerra's right to due process. As noted before, Heredia testified for Guerra and identified Carrasco as the shooter. Perez was not an eyewitness to the killing and did not, because he could not, identify either man as the shooter. Neither Perez nor Heredia testified that their testimony was influenced in any way by the presence of the mannequins in the courtroom. Thus, there is nothing in the record to support the district court's finding that the use of the mannequins, or any of the other procedures, violated Guerra's right to due process.¹³

¹¹ The district court also disparaged the re-enactment because only "chosen" witnesses were invited to attend. 6 R 1527. This is not as sinister as the court makes it appear. The "chosen" witnesses were those who had been eyewitnesses and who, therefore, had information relevant to a re-enactment.

¹² It is puzzling what significance the district court attached to this. There was no dispute that Carrasco was dead and that Guerra was not.

¹³ The district court also noted that one of the jurors testified that the jury was uncomfortable and ill at ease because of the life-like appearance of the mannequins. 6 R 1523. The juror did not testify that the jury's verdict was affected by the presence of the mannequins. Such testimony would not have been admissible in any event. FED. R. EVID. 606(b).

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**C. *The record shows no violation of
Brady v. Maryland, 373 U.S. 83,
83 S. Ct. 1194 (1963).***

The district court found that the prosecutors suppressed evidence that was favorable to Guerra, in violation of Guerra's right to due process and the dictates of *Brady v. Maryland*. In particular, the district court found that the witnesses Herlinda Garcia, Patricia Diaz, Frank Perez, Jose Heredia, Elena Holguin, and George Brown gave information to the police that was exculpatory of Guerra but that was not made available to the defense. In addition, the court found that Amy Parker Heeter, the state's expert on trace metal testing, failed to disclose material evidence that was favorable to Guerra and that would have implicated Carrasco.

Under the Due Process Clause as interpreted by *Brady*, the state is required to disclose to the defense any exculpatory evidence that is material to either guilt-innocence or punishment. *East v. Scott*, 55 F.3d 996, 1002 (5th Cir. 1995); *Wilson v. Whitley*, 28 F.3d 433, 435 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 754 (1994). Undisclosed 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, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding *Id.* The district court's findings that led it to conclude that the state violated *Brady* are either clearly erroneous or irrelevant.

Herlinda Garcia

The district court accepted Garcia's testimony at the evidentiary hearing that 1) she told the police that the shooter had short hair, that the long-haired man was near the front of the car when Officer Harris was killed, and that his hands were empty; 2) after the line-up, she told the police that the person in the No. Four position (Guerra) was not the shooter and that his hands had been empty; 3) at the

re-enactment, she told the prosecutors that the short-haired man had done the shooting; and 4) at the meeting with prosecutors the weekend before trial, the long-haired man with the green shirt was not the killer. The court also found that Garcia did not read either the original statement she gave to police or the statement she made after the line-up, neither of which contained the allegedly exculpatory information. 6 SR 1518-20. Because it was uncontested that this information was not given to the defense, the court concluded that *Brady* had been violated.

This finding can be supported only by ignoring the other evidence in the record. Most notably, although Garcia testified that she had not read her statements before testifying and that the statements did not accurately reflect what she had said, neither she nor the court explained how her trial testimony could have been so consistent with them. See XXII SR 439-500. It is obvious that if she actually saw something different from what was in the statements and told that to the police, but did not read the statements the police wrote, it is not possible that her testimony would mirror her statements. The only explanation is that both the statements and the subsequent testimony are true.¹⁴ The district court's finding cannot make sense in light of the entire record and, thus, is clearly erroneous. See *Real Asset Management, Inc. v. Lloyd's of London*, 61 F.3d 1223, 1227 (5th Cir. 1995) (factual finding is clearly erroneous when reviewing court is left with firm and definite impression that a mistake has been made).

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¹⁴ Also unexplained by Garcia and the court below is the fact that the police included in her statement that the person who did the shooting was wearing a brown shirt and brown pants. Pet. Ex. 23. This was closer to a description of Carrasco than of Guerra. If the police were out to insure that all of the witnesses identified Guerra as the killer, especially witnesses who could not read and would not be able to tell what the police put in their statements, it is unreasonable to believe that they would leave in details that did not match Guerra's appearance and their own ideas of what they wanted the evidence to show happened at the scene.

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Patricia Diaz

The district court made the same mistake with respect to Patricia Diaz, finding that her evidentiary hearing testimony was true while ignoring the rest of the record, which demonstrates that the findings cannot possibly be correct. The district court found that the police altered Diaz' statement to omit the information that Guerra was standing with his arms outstretched, palms down, and hands empty at the time Officer Harris was killed. In addition, according to the district court, the police put into the statement that Guerra pointed a gun at Harris and shot him four times. The court also found that the police doctored Diaz' post-line-up statement as well, to omit her information that Guerra had been near the front of the police car when the shots were fired. Further, the court found that the prosecutors failed to notify the defense that Diaz told them prior to the time she testified that she did not think Guerra had a gun because his hands were open, palms down, and on the hood of the police car when Harris was shot. The court finally found that Diaz did not read her statements before signing them because she was tired. 6 R 1517-18. The court concluded that the state's action with regard to Diaz resulted in suppression of exculpatory evidence.

As was true of Garcia, the district court's findings are not possible in light of the entire record. Specifically, Diaz' trial testimony was consistent with her statement in all significant particulars. Cf. Pet. Ex. 30 with XXI SR 309-340. It is obvious that if Diaz told the police something different from what was in the statements and did not read the statements before she signed them, it is not possible that her testimony would track her statements so closely. It can only be the case that both the statements and the subsequent trial testimony are true.¹⁵ Once again, the district court's findings are clearly erroneous.

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¹⁵ The district court put much emphasis on the fact that at the evidentiary hearing Diaz testified that Guerra's hands were outstretched, palms down, and

Frank Perez, George Brown

Frank Perez testified at the evidentiary hearing that he saw a man running from the direction of the shooting of Officer Harris a short time after he heard the shots. The man dropped something to the ground as he passed Perez' house; when it hit the street, it made a metallic sound, and it looked to Perez like a gun. He described the man as looking like Carrasco. He stated that he told the police this both at the scene and when giving his statement. 9 R 109-11, 114-15. He also stated that the police convinced him to refer to the gun as an "object." The court found that the information about Perez' seeing the man drop a gun was omitted from his statement and was not revealed to the police. 6 R 1516. The court also found that George Brown had told the police officer taking his statement that Perez had told him about the man with the gun. That information was not contained in his statement. The court concluded that this was *Brady* material that the state suppressed. 6 R 1513-14. → the df.

The court's finding with respect to Perez' statement is clearly erroneous. His statement plainly shows that in three different places the police officer first typed "gun." These were marked out and "object" was written in, with Perez' initials next to the changes. Pet. Ex. 21. The statement was given to the defense at the close of Perez' direct examination. XXII SR 419. Guerra's attorneys had

appeared to be empty, whereas at trial she had testified that Guerra was "pointing" at Officer Harris. At the hearing, Diaz described a gesture by the assistant district attorney with one finger out in the direction of the back door of the courtroom as "pointing," and one of placing both hands on a table palms down as "leaning." 12 R 54. The district court disregarded this. The court also did not mention that at the evidentiary hearing, Diaz said that when she demonstrated at trial how Guerra was pointing, she put her arms in front of her with the palms down. Had this been true, either the prosecutor would have tried to clarify the matter, or defense counsel would have made much about the way Guerra apparently was standing. Neither happened. XXI SR 314. } no, at the car

every opportunity to cross-examine him on the alteration of the statement if they had thought it worth pursuing.

The fact that Brown's statement did not contain the information relayed to him by Perez is of little moment. Brown had no first-hand knowledge of the incident and including it in his statement would have added nothing to the investigation. Because the information was in Perez's statement and the statement was given to the defense, the district court's finding of a *Brady* violation cannot stand.

Jose Heredia

The district court found that Jose Heredia gave a statement to the police in which he stated that the short-haired man shot the police officer and that Guerra was standing with his hands empty and on the police car at the time of the shooting. Further, the court found that Heredia told the police after the line-up that Guerra was not the person who shot Officer Harris. The court found a *Brady* violation from the fact that this information was not included in Heredia's statement. 6 R 1514-15.

These findings are legally irrelevant because Heredia testified as a defense witness. It is apparent that Guerra's attorneys contacted him and discussed what he had seen on the night of the murder. Heredia's version of the episode was as available to Guerra as it was to the state. Under these circumstances, there is no obligation under *Brady* to make the information known to the defense. *Blackmon v. Scott*, 22 F.3d 560, 563 (5th Cir. 1995) (if favorable evidence is readily available to the defense, or could be obtained by the exercise of reasonable diligence, state under no obligation to provide it to defense); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990) (same); *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (same).

no, b/c used to distrust him
but Heredia couldn't read & didn't know what it said

Elena Holguin

The district court also found a *Brady* violation in the case of Elena Holguin. It is unclear how her case constituted a suppression of favorable evidence and the court did not explain its finding. As the court below noted, Holguin told police that she did not see the shooting. Nonetheless, a statement of what she did have to say was prepared. According to Holguin, although she could not read the statement, she signed it when told to because she was tired, surprised, and nervous. 10 R 143-46.

The district court did not see fit to identify the exculpatory evidence that Holguin had that was not included in her statement or made available to the defense. This is apparently because there was nothing that Holguin knew or told to police that qualified as exculpatory information. See Pet. Ex. 26; 10 R 135-55. Because she was not a witness to the killing, there is little that she could say that would have exonerated Guerra and inculpated Carrasco. The district court's finding of a *Brady* violation in the case of Holguin is wholly without support in the record.

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Amy Heeter Parker

Amy Parker, a chemist with the Houston Police Department, testified at trial about trace metal tests that she performed on Carrasco's hands. The purpose of the tests was to determine whether Carrasco had handled any metal objects, particularly a gun, in the time before his death and, if so, to see if the pattern resembled any of the weapons known to have been in his and Guerra's possession. She testified that there was a pattern on Carrasco's right hand that was consistent with the one that would be left by Officer Harris' service revolver. XXI SR 171. She also testified that the pattern retrieved from Carrasco's left hand was not consistent with the 9 mm semiautomatic that was the murder weapon. XXI SR 172. Floyd McDonald, who founded the Houston Police Department Crime Lab,

testified at the evidentiary hearing that he believed the patterns on Carrasco's left hand were consistent with the murder weapon, particularly in light of the fact that Carrasco had apparently dropped a gun once and picked it up again. 9 R 75. Guerra's attorneys were told only that the tests were positive for Carrasco's handling of Officer Harris' gun and negative for handling the murder weapon. The district court concluded that the state violated *Brady* by failing to inform the defense that there was a pattern on Carrasco's left hand but that the state chemist did not think it matched the 9 mm. 6 SR 1509-12.

In this case, there is no dispute about the court's factual findings. However, those findings do not support the court's conclusion that Guerra was denied due process because the state did not disclose that there were trace metal patterns on Carrasco's left hand. Undisclosed evidence is material only 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, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding *Id.*

In the view of the district court, the information about the pattern on Carrasco's left hand would have allowed Guerra's attorneys to challenge the testimony of the state's expert and to put on their own expert to testify that the pattern showed that Carrasco had indeed handled the murder weapon. 6 SR 1509. However, the court places too much importance on this evidence. It was undisputed that Carrasco was using the 9 mm gun during the shoot-out with police that preceded his death. One of the police officers was seriously wounded by shots from Carrasco's weapon, which turned out to be the same one that had been used to kill Officer Harris. Even if the defense had argued that the trace metal patterns on Carrasco's left hand were consistent with the 9 mm gun, that would have been

accounted for by the uncontested fact that Carrasco had used the gun just before he was shot. It did nothing to establish that he was the one who killed Officer Harris and, thus, did not exonerate Guerra in the killing. The evidence does not raise a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, the evidence was not material, and there was no *Brady* violation.

D. There was no prosecutorial misconduct that rendered Guerra's trial fundamentally unfair.

The district court found that the prosecutors engaged in misconduct during the trial and concluded that this behavior resulted in a denial of Guerra's right to due process. The court specifically faulted the prosecutors for "encouraging" Patricia Diaz and Frank Perez to over- or understate the facts; for making false statements about the character of Jose Heredia; for asking questions about an alleged murder in a cemetery near the murder scene; by using testimony of a police officer to rebut the testimony of Jose Luna that he was present when Carrasco returned home with both the 9 mm weapon and Officer Harris' revolver; for arguing to the jury that witnesses who had not conferred with each other had each identified Guerra as the murderer; and for informing several jurors that Guerra was an illegal immigrant and that this could be considered in answering the second punishment issue. In addition, the court found that the trial court also participated in the denial of Guerra's rights by allowing improper conduct by the court interpreter go unchecked. 6 R 1503-08.

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also refers to witnesses' testimony of Harris not pointing to the car.

Prosecutorial misconduct does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process

Clause of the Fourteenth Amendment. *Jones v. Butler*, 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied*, 490 U.S. 1076, 109 S. Ct. 2090 (1989). To establish that a prosecutor's conduct rises to such a level, the petitioner must demonstrate that the misconduct is persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper conduct. *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir.1986).

Encouraging misstatements by witnesses

The district court found that the prosecutor overstated Diaz' testimony by having her testify that Guerra was pointing "at the police officer," when that was not what she intended to say. The record reflects that during direct examination of Diaz, the prosecutor asked:

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.

XXI SR 313. Following this, the prosecutor asked several questions that referred to Guerra pointing at the police officer. The district court found that this deliberately misstated Diaz' testimony and constituted prosecutorial misconduct. 6 R 1506-07.

The court itself ignored the context of the questions. Following the portion quoted above, the prosecutor asked what Diaz observed, and she described hearing shots and later seeing Officer Harris lying on the ground. XXI SR 314. It was logical for the prosecutor to refer to Guerra as pointing "at the officer" in light of the testimony that Guerra was pointing, shots were fired, and the officer was shot. This instance does not show misconduct on the part of the state. } ? * !

The district court also took issue with the prosecutor's telling Frank Perez that he should say that he saw a man running by his house drop "an object" rather

than "a gun," unless he was 100% sure that it was a gun. However, Perez himself admitted that he was not absolutely sure that what he saw was a gun. Moreover, even if the instruction from the prosecutor amounted to misconduct, Perez' statement did use the word "gun," which Perez marked through and replaced with "object." The defense was not deprived of the opportunity to question Perez about the change and why he had made it. Any misconduct, if there were any, was limited and not of the degree that Guerra was deprived of due process.

Jose Heredia

During cross-examination of Jose Heredia, the prosecutor asked

Q. I am not keeping you awake -- I am not keeping you awake by asking you questions today, are we?

Have you had anything to drink before you came down here to the courtroom today?

A. No, sir.

Q. Have you had anything to smoke before you came down here to the courthouse today?

A. No, sir.

Q. Is there something about this trial that strikes you as being pretty funny?

A. Nothing.

XXXII SR 747-48. To the district court, this amounted to unwarranted ridicule of the witness "because he would dare testify contrary to the prosecutor's case theory." 6 SR 1506. In reality, the questions quite obviously were directed at Heredia's behavior on the witness stand, yawning during questioning, then laughing at the prosecutor's questions. Again, even if the questions were

But see closing argument

inappropriate, they were limited and were not so pervasive that they resulted in denying Guerra due process.

Extraneous murder

The prosecutor began his questioning of Heredia by asking about his earlier testimony about a murder reported in the area prior to the time that Officer Harris was killed. XXIII SR 746-47. The district court characterized the alleged murder as merely a story made up by children. 6 SR 1508. Whatever the basis for the story, it was clear that it first came out during direct examination. XXIII SR 739. Guerra's attorney also made it clear that there was no allegation that Guerra had been involved in the killing. XXIII SR 739. Guerra can show no prejudice arising from the questioning, assuming that it was improper.

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Rebuttal testimony

During the defense case-in-chief, Jose Luna testified that he had been at home when Carrasco came in with both the 9 mm gun and Officer Harris' weapon. XXIV SR 815. In rebuttal, the state called a police officer who testified that he interviewed Luna about 11:30 pm, about the time that Carrasco was shot and killed. Luna told him he had just returned home. XXIV SR 885. The district court found that this was misconduct because the state had a report from another officer who interviewed Luna just before Carrasco was killed. According to the district court, this proved that Luna was home when he claimed Carrasco returned with the guns and said he had killed a policeman. In fact, the two reports were taken within a short time of each other, and the earlier one does not demonstrate that Luna was at home when Carrasco appeared, only that he might have been in the area a few minutes before he was interviewed the second time. This does not show prosecutorial misconduct.

7

Prosecutorial argument

The district court found further misconduct in the argument of the prosecutor that each of the witnesses had identified Guerra as the shooter and that they had not conferred among themselves in arriving at their identifications. According to the court, the prosecutors were aware that the witnesses "conformed" their statements both at the re-enactment and at the meeting between prosecutors and witnesses the weekend before trial testimony began. However, what the court again overlooked is that the witnesses had given their statements already by the time of the re-enactment and the weekend meeting. There is no evidence that the witnesses collaborated on their stories prior to giving their statements, and their testimony and identifications were consistent with the statements. There was nothing, therefore, that was incorrect, much less improper, about the argument.

But I changes in the witness testimony?

The district court found another instance of misconduct in the prosecutors' telling the jury that Guerra was an illegal alien and that the jury could consider that evidence at the punishment phase in determining whether he would continue to commit violent acts that would constitute a threat to society. Although being an illegal alien is not a crime of violence, it does demonstrate a disregard for society's laws and norms. In addition, because an illegal alien can face difficulty in finding work, a jury might consider that a person already inclined to disregard the law might break other laws in order to get money to eat and live on. Further, because an illegal alien faces deportation if discovered, a jury might conclude that such a person would have a reason to resort to violence to avoid apprehension. This could be especially true in Guerra's case, where he had been convicted of a violent crime already. Thus, even though a person's status as an illegal immigrant might not be proper evidence by itself to consider at the punishment phase, the inferences that a jury might be able to draw from that fact could legitimately shed light on whether a death sentence was appropriate. The prosecutors' use of the evidence

Is this permissible arg. or mere speculation?

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did not amount to misconduct, and certainly did not inject any improper considerations into the proceedings.

Actions of the interpreter

Finally, the court below found that the interpreter during the state trial engaged in inappropriate behavior while translating the testimony, and that the trial court did not correct his actions. The court's findings in this regard were based on the testimony of Linda Hernandez, the first interpreter who was replaced because of complaints that she was not translating properly. 10 R 116-32. There were no examples given of any serious mistakes or improper behavior on the interpreter's part, and nothing that showed that Guerra was prejudiced in any way. Moreover, Candelario Elizando, one of Guerra's trial attorneys, who is fluent in Spanish, testified that he had not observed anything that he thought was out of order in the second interpreter's behavior, and stated that he certainly would have objected to anything that he thought was prejudicing his client. 13 R 61-62.

E. Because there were no errors as found by the district court, Guerra is not entitled to relief under the cumulative error doctrine.

Finally, the district court held that, even if no one error that it identified in the trial was serious enough to call for reversal of Guerra's conviction, the cumulative effect of all of them together amounted to a denial of due process.

In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (*en banc*), this court adopted the cumulative error doctrine. Under the court's formulation, relief on the basis of cumulative error can be granted only where (1) the individual errors were constitutional violations and not violations of state law only, (2) the errors were not barred from consideration by a failure to abide by state procedural rules, and

(3) the errors "so infected the entire trial that the resulting conviction violates due process." *Derden*, 978 F.2d at 1454.

As demonstrated in the rest of this brief, the district court's factual findings are either clearly erroneous or legally irrelevant. The result is that they do not show any errors in the proceedings against Guerra. A prerequisite to the granting of relief under the cumulative error doctrine is that there be identifiable errors in the first place. Because there were no errors here, Guerra is not entitled to relief.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the judgment of the court below be reversed.

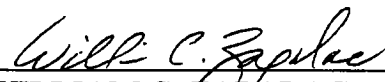
Respectfully submitted,

DAN MORALES
Attorney General of Texas

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Deputy Attorney General for
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MARGARET PORTMAN GRIFFEY
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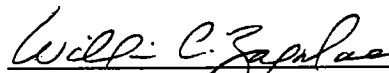

WILLIAM C. ZAPALAC
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ATTORNEYS FOR RESPONDENT

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 Brief of Respondent-Appellant has been served by placing same in Federal Express, postage prepaid, on this the 27th day of December, 1995, addressed to: Mr. Scott Atlas, Vinson & Elkins, 2500 First City Tower, 1001 Fannin, Houston TX 77002-6760.


WILLIAM C. ZAPALAC
Assistant Attorney General



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

CC: Team
(in &
out) #
D-F. always
play

December 22, 1995

Hon. Charles R. Fulbruge, III, Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: *Guerra v. Scott*, No. 95-20443

Dear Sir:

Enclosed for filing with the papers in the above-referenced cause are the original and one copy of Respondent-Appellant's Second Motion for Extension of Time.

By copy of this letter, I am forwarding one copy of said document to counsel for Petitioner-Appellee. Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "William C. Zapalac".

WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 936-1400

WCZ/br
Enclosures

c: Mr. Scott J. Atlas
VINSON & ELKINS
2500 First City Tower
1001 Fannin
Houston TX 77006

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 SECOND MOTION
FOR EXTENSION OF TIME**

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 Second Motion for Extension of Time.

I.

The original due date for filing the Director's brief in this cause has been extended once from November 27, 1995, to December 22, 1995. For the reasons set out below, an additional five days is needed to complete and file the brief.

II.

Preparation for and attendance at the evidentiary hearing in *McBride v. Scott*, No. 5:95-CV-024, on December 12 required more time than expected because of the number of witnesses involved and their scattered locations. As a result there was less time than anticipated to devote to completion of the brief in this cause.

III.

In addition, a computer malfunction in the office of the undersigned on December 22 further shortened the time available to prepare the brief. Because the air conditioning in the building will be turned off over the holidays, it is necessary to shut down the computer system from 6 pm December 22 until the evening of December 26, further preventing the brief's completion. An extension of time until December 27 will be sufficient to complete and file the brief.

IV.

Scott J. Atlas, counsel for appellee, has informed the undersigned that he does not oppose the granting of this motion.

WHEREFORE, PREMISES CONSIDERED, the director respectfully requests an extension of time until December 27, 1995, to file his brief in this cause.

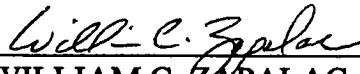
Respectfully submitted,

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Attorney General of Texas

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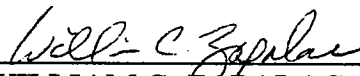

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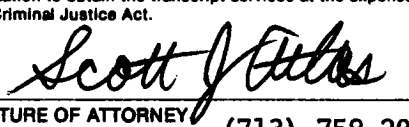
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent-Appellant's Second Motion for Extension of Time has been served by placing same in the United States Mail, postage prepaid, on this the 22^d day of December, 1995, addressed to: Mr. Scott J. Atlas, VINSON & ELKINS, 2500 First City Tower, 1001 Fannin, Houston 77002-6760.


WILLIAM C. ZAPALAC
Assistant Attorney General

F. Aldape plds Mailed 11/28/95. (UA)

CJA 24 (REV. 10/89)						AUTHORIZATION AND VOUCHER FOR PAYMENT OF TRANSCRIPT "		VOUCHER NO.	
1. JURISDICTION		1 <input type="checkbox"/> MAGISTRATE 3 <input type="checkbox"/> APPEALS		2 <input checked="" type="checkbox"/> DISTRICT 4 <input type="checkbox"/> OTHER		2. MAG. DOCKET NO.		PAID BY	
3. DISTRICT DOCKETING NO. Civ. Action H-93-290		4. APPEALS DOCKET NO.		5. FOR (DISTRICT/CIRCUIT) S.D. of Tex Houston Division				ACCTG. CLASS. NOS.	
6. IN THE CASE OF Ricardo Aldape Guerra						VS. James A. Collins			
7. PERSON REPRESENTED Ricardo Aldape Guerra				8. LOCATION/ORGANIZATION CODE		DATE PAID			
9. PROCEEDINGS IN WHICH TRANSCRIPT IS TO BE USED (DESCRIBE BRIEFLY)									
Appeal (We need a copy of the transcript only)									
10. PROCEEDINGS TO BE TRANSCRIBED (DESCRIBE SPECIFICALLY) NOTE: Trial transcripts are not to include prosecution opening statement, defense opening statement, prosecution argument, defense argument, prosecution rebuttal, voir dire or jury instructions, unless specifically authorized by the Court (see Box 13C).									
11/15/93 to 11/16/93 and 11/22/93									
11. ATTORNEY'S STATEMENT As the attorney for the person represented who is named above, I hereby affirm that the transcript requested is necessary for adequate representation. I therefore request authorization to obtain the transcript services at the expense of the United States pursuant to the Criminal Justice Act. <div style="display: flex; justify-content: space-between;"> <div>  SIGNATURE OF ATTORNEY (713) 758-2024 ATTORNEY'S TELEPHONE NO. </div> <div> 11/27/95 DATE </div> </div>					12. COURT ORDER Financial inability of the person represented having been established to the Court's satisfaction, the authorization requested in Item 11 is hereby granted. <div style="display: flex; justify-content: space-between;"> <div> SIGNATURE OF JUDGE OR MAGISTRATE DATE </div> </div>				
13. SPECIAL AUTHORIZATIONS								14. JUDGE'S INITIALS	
A. Apportion % of transcript with								14. A.	
B. <input type="checkbox"/> Expedited <input type="checkbox"/> Daily <input type="checkbox"/> Hourly Transcript								14. B.	
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D. <input type="checkbox"/> In this multi-defendant case, commercial duplication of transcripts will impede the delivery of accelerated transcript services to persons proceeding under the Criminal Justice Act.								14. D.	
CLAIM FOR SERVICES									
15. COURT REPORTER/TRANSCRIBER STATUS <input type="checkbox"/> Official <input type="checkbox"/> Contract <input type="checkbox"/> Transcriber <input type="checkbox"/> Other					18. PAYEE'S ADDRESS (INCLUDE CITY, STATE AND ZIP CODE)				
16. FULL NAME OF PAYEE									
17. SOCIAL SECURITY OR EMPLOYER ID. NO. OF PAYEE					19. TELEPHONE NO. AREA CODE () NUMBER				
20. TRANSCRIPT	INCLUDE PG. NOS.	NO. OF PAGES	RATE PER PAGE	SUB-TOTAL	DED. AMT. APPORTIONED	TOTAL			
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B. Copy			\$	\$	\$	\$			
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21. CLAIMANT'S CERTIFICATION I hereby certify that the above claim is correct and that I have not claimed or received payment from any other source for the services rendered and claimed on this voucher. <div style="display: flex; justify-content: space-between;"> <div>CLAIMANT'S CERTIFICATION</div> <div>DATE</div> </div>					22. CERTIFICATION OF ATTORNEY OR CLERK I hereby certify that the transcript was received. <div style="display: flex; justify-content: space-between;"> <div>SIGNATURE OF ATTORNEY/CLERK OF COURT</div> <div>DATE</div> </div>			23. TOTAL CLAIMED \$	
24. APPROVED FOR PAYMENT <div style="display: flex; justify-content: space-between;"> <div>SIGNATURE OF PRESIDING JUDICIAL OFFICER</div> <div>DATE</div> </div>						25. AMT. APPROVED \$			

INSTRUCTIONS FOR CJA FORM 4 AUTHORIZATION AND VOUCHER FOR PAYMENT OF TRANSCRIPT

READ THESE INSTRUCTIONS CAREFULLY BEFORE COMPLETING THE FORM. ACCURACY AND THOROUGHNESS WILL AID IN THE PROMPT PAYMENT OF THE CLAIM.

USE A TYPEWRITER IF POSSIBLE. OTHERWISE WRITE LEGIBLY WITH BALLPOINT PEN AND BE SURE THAT WRITING GOES THROUGH TO THE LAST COPY.

IF ADDITIONAL SPACE IS NEEDED TO COMPLETE ANY ITEM ON THE FORM, ATTACH CONTINUATION SHEETS.

ITEM 1: JURISDICTION—Check the box that categorizes the type of court in which the transcript request is made. If you check the box "Other", be sure to specify the forum in the space provided.

ITEM 2-4: DOCKET NUMBERS—Self-explanatory.

ITEM 5: FOR (DISTRICT/CIRCUIT)—Enter the name of the district or circuit in which the transcript request is made.

ITEM 6: IN THE CASE OF—In criminal cases, enter U.S. vs. the defendant's name. If there is more than one defendant, enter only the name of the defendant who is the person represented (the person for whom the transcript services are requested). If the person represented is not a defendant (e.g., a material witness), enter the first named defendant in the court's recording of the case. If this is a civil case (e.g., habeas corpus, NARA), enter the name of the petitioner vs. the name of the respondent and include the respondent's title.

ITEM 7: PERSON REPRESENTED—Enter the full name of the person for whom representation is being provided (the person for whom the transcript services are requested). Only one "person represented" should be entered on each voucher.

ITEM 8: LOCATION/ORGANIZATION CODE—Obtain this number from the clerk of court.

ITEM 9: PROCEEDINGS IN WHICH TRANSCRIPT IS TO BE USED—Describe briefly the nature of the proceeding or other purpose for which the transcript is required (e.g., motion hearing, trial preparation, trial, appeal).

ITEM 10: PROCEEDINGS TO BE TRANSCRIBED—State specifically the type of proceedings to be transcribed (e.g., preliminary hearing, arraignment, plea, sentencing, trial, motions, parole or probation revocation proceedings, state court proceedings, deposition). Note the restriction on trial transcripts (see Item 13C).

ITEM 11: ATTORNEY'S STATEMENT—This must be signed and dated by counsel for the person represented (or by a person proceeding *pro se* under the CJA). Check the appropriate box to designate your status as an attorney from a Federal Public Defender Organization (FPD), a Community Defender Organization (CDO), a CJA panel attorney, a retained attorney whose client is unable to afford the cost of the transcript service, or a person who qualifies for representation under the CJA but who has chosen to proceed *pro se*.

ITEM 12: COURT ORDER—This must be signed and dated by the presiding judicial officer. No additional court order is necessary.

ITEM 13: SPECIAL AUTHORIZATIONS—These services may be provided only if specially authorized:

A. *Apportionment of Transcript Costs*—The Judicial Conference has stated that the total cost of *accelerated* transcript services should not be *routinely* apportioned among the parties.

B. *Types of Transcripts*—

- (1) Ordinary—to be delivered within 30 calendar days after receipt of an order.
- (2) Expedited—to be delivered within 7 calendar days after receipt of an order.
- (3) Daily—to be delivered following adjournment and prior to the normal opening hour of the court on the following morning, whether or not it actually is a court day.
- (4) Hourly—ordered under unusual circumstances to be delivered within 2 hours.

Note: All but *ordinary* transcript services require special prior judicial authorization.

C. *Trial Transcripts*—In the absence of special prior authorization, trial transcripts shall exclude the prosecution opening statement, the defense opening statement, the prosecution argument, the defense argument, the prosecution rebuttal, the voir dire and jury instructions.

D. *Multi-defendant Cases*—According to Judicial Conference policy, no more than one transcript should be purchased from the court reporter on behalf of CJA defendants in multi-defendant cases. Arrangements should be made for the duplication, at commercially competitive rates, of enough copies of the transcript for each of the CJA defendants for whom a transcript has been approved. The cost will be paid from CJA funds. This policy does not preclude the furnishing of duplication services by the court reporter at the commercially competitive rate. In addition, the court may grant an exception to this policy based upon a finding that application of the policy will unreasonably impede the delivery of accelerated transcripts to persons proceeding under the CJA. See paragraph 3.12C of the *Guidelines for the Administration of the Criminal Justice Act*, Volume VII, *Guide to Judiciary Policies and Procedures*.

ITEM 14: JUDGE'S INITIALS—If any of the special authorizations noted in Item 14 are granted, the presiding judicial officer must initial in the space provided.

ITEMS 15-19: Self-explanatory.

ITEM 20: TRANSCRIPT COSTS—Cost per page of transcripts claimed by official court reporters, contract court reporters, and transcribers of taped proceedings may not exceed those rates in effect at the time authorization was made. A page of transcript shall consist of 25 lines typed on paper 8-1/2 x 11 inches in size, prepared for binding on the left side, with a 1-3/4 inch margin on the left side and a 3/8 inch margin on the right side. Typing shall be 10 letters to the inch. Generally, persons proceeding under the Criminal Justice Act may receive only the original or a copy of the transcript. Two lines for transcript costs have been provided to reflect that the page rate will vary depending upon whether the party received the original or a copy, and that certain portions may be provided at a higher rate for accelerated service. (If more lines are needed to reflect these factors, attach an additional sheet and record the information in the same format as on the form). Be sure to enter the page numbers for each segment of the transcript.

Note: Reimbursement of expenses may be claimed *only* for the following expenses:

- (1) Travel and subsistence of assistants who aid in preparation of daily or hourly transcript, if authorized in advance by the presiding judicial officer, and
- (2) Extraordinary delivery costs, such as courier services or express mail (regular postage is not reimbursable). Expenses claimed should be set forth specifically and receipts attached.

ITEM 21: CLAIMANT'S CERTIFICATION—Generally, the person providing the transcript services will sign here. However, if the attorney has already paid for the transcript, reimbursement may be sought on this form by signing the claimant's certification. In that event, the attorney also must be listed as payee at Item 17, and the information required at Items 17-19 should relate to the attorney.

ITEM 22: CERTIFICATION OF ATTORNEY OR CLERK—The purpose of this item is to obtain the attorney's verification of receipt of the transcript. Clerks of court may verify receipt on behalf of *pro se* persons, and on behalf of all Criminal Justice Act parties in districts where they are authorized to do so by local court rule.

ITEM 23: Self-explanatory.

ITEMS 24-25: APPROVED FOR PAYMENT—After reviewing for reasonableness and compliance with the CJA and CJA *Guidelines*, the presiding judicial officer must enter the amount approved in Item 25 and sign and date Item 24.

THE BOX IN THE UPPER RIGHT-HAND CORNER OF THE FORM SET OFF IN BOLD LINES IS FOR THE USE OF THE DISBURSING OFFICER.

AFTER THE TRANSCRIPT SERVICES HAVE BEEN RENDERED AND THE VOUCHER APPROVED, THE FORMS ARE TO BE DISPOSED OF AS FOLLOWS:

ORIGINAL—MAILED TO ADMINISTRATIVE OFFICE AFTER DISBURSEMENT.
COPY 1—RETAINED BY DISBURSING OFFICER.
COPY 2—RETAINED IN COURT'S FILES
COPY 3—RETAINED BY PAYEE

INSTRUCTION TEAR SHEET—Remove before typing form

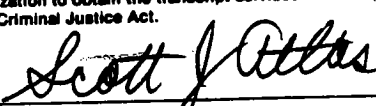

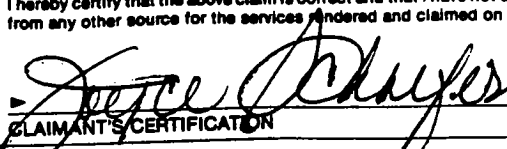
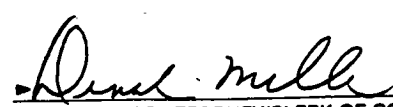
Michelle —
Attached is a CJA form to
fill out (#1-11)
Please have Scott Allen
sign & date.

The original CJA 24
has been misplaced.

Thanks
Dina Miller

95-61

Sample

CJA 24 (REV. 10/89)						AUTHORIZATION AND VOUCHER FOR PAYMENT OF TRANSCRIPT		VOUCHER NO.					
1. JURISDICTION 1 <input type="checkbox"/> MAGISTRATE 2 <input checked="" type="checkbox"/> DISTRICT 3 <input type="checkbox"/> APPEALS 4 <input type="checkbox"/> OTHER _____			2. MAG. DOCKET NO.			PAID BY		ACCTG. CLASS. NOS.					
3. DISTRICT DOCKETING NO. Civ. Action H-93-290			4. APPEALS DOCKET NO.			5. FOR (DISTRICT/CIRCUIT) S.D. of Tex. Houston Division							
6. IN THE CASE OF Ricardo Aldape Guerra			VS. James A. Collins			8. LOCATION/ORGANIZATION CODE							
7. PERSON REPRESENTED Ricardo Aldape Guerra			9. PROCEEDINGS IN WHICH TRANSCRIPT IS TO BE USED (DESCRIBE BRIEFLY) Appeal (We need a copy of the transcript only)			DATE PAID							
10. PROCEEDINGS TO BE TRANSCRIBED (DESCRIBE SPECIFICALLY) NOTE: Trial transcripts are not to include prosecution opening statement, defense opening statement, prosecution argument, defense argument, prosecution rebuttal, voir dire or jury instructions, unless specifically authorized by the Court (see Box 13C). 11/15/93 to 11/16/93 \$112243.8													
11. ATTORNEY'S STATEMENT As the attorney for the person represented who is named above, I hereby affirm that the transcript requested is necessary for adequate representation. I therefore request authorization to obtain the transcript services at the expense of the United States pursuant to the Criminal Justice Act.  7/11/95 SIGNATURE OF ATTORNEY DATE ATTORNEY'S TELEPHONE NO. (713) 758-2024 1 <input type="checkbox"/> FPD 2 <input type="checkbox"/> CDO 3 <input checked="" type="checkbox"/> PANEL ATTORNEY 4 <input type="checkbox"/> RETAINED ATTORNEY 5 <input type="checkbox"/> PRO SE					12. COURT ORDER Financial inability of the person represented having been established to the Court's satisfaction, the authorization requested in Item 11 is hereby granted.  SIGNATURE OF JUDGE OR MAGISTRATE 95 092300 CJATRA DO5TXSH 2532 7/13/95 DATE								
13. SPECIAL AUTHORIZATIONS								14. JUDGE'S INITIALS					
A. Apportion % of transcript with								14. A.					
B. <input type="checkbox"/> Expedited <input type="checkbox"/> Daily <input type="checkbox"/> Hourly Transcript								14. B.					
C. <input type="checkbox"/> Prosecution Opening Statement <input type="checkbox"/> Prosecution Argument <input type="checkbox"/> Prosecution Rebuttal <input type="checkbox"/> Defense Opening Statement <input type="checkbox"/> Defense Argument <input type="checkbox"/> Voir Dire <input type="checkbox"/> Jury Instructions								14. C.					
D. <input type="checkbox"/> In this multi-defendant case, commercial duplication of transcripts will impede the delivery of accelerated transcript services to persons proceeding under the Criminal Justice Act.								14. D.					
CLAIM FOR SERVICES													
15. COURT REPORTER/TRANSCRIBER STATUS <input checked="" type="checkbox"/> Official <input type="checkbox"/> Contract <input type="checkbox"/> Transcriber <input type="checkbox"/> Other					18. PAYEE'S ADDRESS (INCLUDE CITY, STATE AND ZIP CODE) 515 Rusk, Room 8016 Houston, Texas 77002								
16. FULL NAME OF PAYEE Joyce Schaefer					19. TELEPHONE NO. AREA CODE (713) NUMBER 250-5585								
17. SOCIAL SECURITY OR EMPLOYER ID. NO. OF PAYEE 415-66-7401													
C. TRANSCRIPT		INCLUDE PG. NOS.		NO. OF PAGES		RATE PER PAGE		SUB-TOTAL		DED. AMT. APPORTIONED		TOTAL	
A. Original						\$		\$		\$		\$	
B. Copy		I - 1-183 II - 1-209 III - 1-269		661		\$.75		\$ 495.75		\$		\$ 495.75	
C. Expenses (itemize):												\$	
21. CLAIMANT'S CERTIFICATION I hereby certify that the above claim is correct and that I have not claimed or received payment from any other source for the services rendered and claimed on this voucher.  7/20/95 CLAIMANT'S CERTIFICATION DATE					22. CERTIFICATION OF ATTORNEY OR CLERK I hereby certify that the transcript was received.  7/20/95 SIGNATURE OF ATTORNEY/CLERK OF COURT DATE					23. TOTAL CLAIMED \$495.75			
24. APPROVED FOR PAYMENT										25. AMT. APPROVED \$			

SJA

Vinson & Elkins

ATTORNEYS AT LAW

VINSON & ELKINS LLP

2300 FIRST CITY TOWER

1001 FANNIN STREET

HOUSTON, TEXAS 77002-6760

HON. MICHAEL N. MILBY, CLERK
UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
515 RUSK
HOUSTON, TEXAS 77002

ATTENTION: MS. DINAH MILLER



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

CC: Team
Cin & out
J. Sullivan
M.L. Solb
o-f-Aldape pldge
RECEIVED
NOV 22 1995

November 20, 1995

SJA
"Agreed Extension
of Time to 12/20/95
to File A.G.'s
Brief"

Ms. Monica Washington, Deputy Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: *Guerra v. Scott*, No. 95-20443

Dear Ms. Washington:

This letter is written to confirm our telephone conversation today in which you granted Appellant an extension of time from November 27 until December 22, 1995, to file his brief in this cause. I have spoken with Scott Atlas, attorney for Appellee, and he is not opposed to the extension of time being granted.

An extension of time is necessary because of other responsibilities I have had since receiving the record on appeal in this case. These include attending an out-of-town discovery conference in *McBride v. Scott*, No. 5:9CV24, on October 19; filing a brief in opposition to a petition for writ of certiorari in the Supreme Court in *Sterling v. Scott*, No. 95-5645, on October 20; filing an answer in *Clayton v. Scott*, No. 1:94CV037-C, on October 23; filing an amended answer in *McBride v. Scott* on October 30, and attending an out-of-town deposition in the same case on November 10; filing a response to a 250-page habeas petition in *Hafdahl v. Scott*, No. 2:95CV100, on November 17; filing a brief in opposition in the Supreme Court in *Vuong v. Scott*, No. 95-6643, and responsibility for the execution in that case scheduled for December 7; and an out-of-town hearing in *McBride v. Scott*, on December 12-13. The extension of time will permit me adequate opportunity to prepare Appellant's brief in this case.

By copy of this letter, I am informing counsel for Appellee of this action.

Ms. Monica Washington

November 20, 1995

Page 2

Thank you for your kind assistance in this matter.

Sincerely,



WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 936-1400

WCZ/br

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

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

CC: Ricardo
Team
+8
o-f. pidge
TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

October 16, 1995

RECEIVED

OCT 20 1995

SJA

Mr William Charles Zapalac
Office of the Attorney General
for the State of Texas
209 West 14th Street
6th Floor Price Daniel Sr Building
Austin, TX 78701

No. 95-20443 Guerra v. Scott
USDC No. CA-H-93-290

This case has been docketed. Please use the case number above for future inquiry. A briefing checklist will be sent upon request.

Briefing Notice. Pursuant to FRAP 12 you are advised the record on appeal has been filed. Appellant's brief and record excerpts are due within forty (40) days of this date.

- i.e., 11/25/95

Policy on Extensions. The Court considers cases on the merits promptly after briefs are filed. However, the Court will not know if the case requires oral argument until all briefs are filed. So, a delay in briefing is a delay in calendaring. The Court has instructed us to grant extensions sparingly and only for good cause. As such, the ordinary busyness of counsel will not be considered grounds for an extension. Opposing counsel must also be contacted to determine opposition to an extension.

Reply Brief. Cases cannot be forwarded to the Court until all briefs are filed, except in criminal appeals. Therefore, reply briefs must be filed within the fourteen (14) day period fixed by FRAP 31(a).

Dismissal of Appeals. Local Rule 42.3 allows the Clerk to dismiss appeals without notice if the brief is not timely filed.

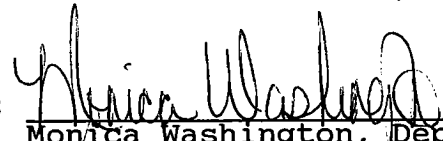
Appearance Form. If an appearance form has not been filed one must be returned, naming each party you represent, within fifteen (15) days from this date as required by FRAP 12(b) and Local Rule 46.

Record on Appeal. The original (X) record () pleadings only, for use in preparing your brief and excerpts are enclosed (the record/transcript may be requested by pro se litigants, or by attorneys/parties if voluminous) if you have filed your appearance form, or will be available once you file that form. Instructions are attached to the record defining your responsibilities for handling and return of the record.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By:


Monica Washington, Deputy Clerk
(504) 589-4123

Enclosure

cc: Mr Scott J Atlas

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

RECEIVED

OCT 09 1995

SJA

F. Aldape plalgs cc: Team
Stan Schneider
Julia Sullivan
Lila Beck
Rick Morris
Mannick Lag

**MICHAEL N. MILBY
CLERK**

**P.O. BOX 61010
HOUSTON, TX 77208**

October 6, 1995

Mr. Charles R. Fulbruge III, Clerk
U.S. Court of Appeals, Fifth Circuit
600 Camp Street, Room 102
New Orleans, LA 70130

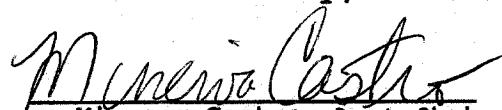
IN RE: USDC NO. CA-H-93-0290
GUERRA VS. COLLINS
USCA NO. 95-20443

Dear Mr. Fulbruge:

In connection with this appeal, the following is transmitted.
Please acknowledge receipt on the enclosed copy of this letter.

Record on appeal consisting of:
6 Volumes of pleadings;
7 Volumes of transcripts;
15 Expandable folders of exhibits;
8 Expandable folders of State Court Records;
2 SEALED envelopes.

Very Truly Yours,
Michael N. Milby, Clerk


Minerva Castro, Deputy Clerk

cc: Mary Lou Soller
Bob Walt
Scott J. Atlas
William C. Zapalac

F - a l d a n e
p l a y

YOU COULD HAVE RECEIVED THIS NOTICE YESTERDAY BY FAX.

Just complete and return the authorization below and you will receive notice of orders and judgments within hours of their entry. It's FREE and it's FAST!

Scott J Atlas
Vinson & Elkins
1001 Fannin St
Ste 2300
Houston, TX 77002

RECEIVED
SEP 12 1995

SJA

4:94-cv-00081 #82
27 page(s).
09/11/95

AUTHORIZATION TO SEND ORDERS AND
JUDGMENTS BY FACSIMILE TRANSMISSION

The Clerk of Court for the Southern District of Texas is authorized to transmit notice of entry of judgment or orders under Fed.R.Civ.P. 77, Fed.R.Crim.P. 49, and Fed.R.Bankr.P. 9022, 9036 by facsimile transmission of judgments, orders or notices in any case in which this capability exists*, and the undersigned appears as attorney in charge. I understand that this electronic notice will be in lieu of notice by mail. The following telephone number is dedicated for facsimile transmission.

FAX Phone No: 713/615-5399

Signature: Scott J. Atlas Address: 1001 Fannin, Ste. 2300
Attorney Name: Scott J. Atlas Houston, TX 77002
State Bar No: 01418400 Phone No: 713/758-2024

Mail to: Clerk, Southern District of Texas
P. O. Box 61010
Houston, TX 77208

* Available only in civil and bankruptcy cases pending in the Houston Division, but eventually this capability will be expanded to other divisions.