Aldape: State Trial Court Pleadings (10/96) (v. 15)

TAB	DATE	DESCRIPTION	FILED BY
149.	10/18/96	State's Reply to Defendant's Motion to Suppress Witness Statements and In-Court Identifications	State
150.	10/18/96	State's Reply to Defendant's Motion to Dismiss Indictment with Prejudice	State
151.	10/18/96	Signed Order Taking Judicial Notice of Prior Proceedings in all Pretrial Proceedings	Court
152.	10/18/96	Signed Order Taking Judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Court Evidentiary Hearing in all Pretrial Proceedings	Court

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

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

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141.	10/08/96	Defendant's Motion to Dismiss Indictment with Prejudice and Proposed Order	Atlas
142.	10/08/96	Defendant's Motion for Return of personal Property and Proposed Order	Atlas
143.	10/08/96	Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings and Proposed Order	Atlas
144.	10/08/96	Defendant's Motion to Take judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Trial Court Evidentiary in all Pretrial Proceedings and Proposed Order	Atlas
145.	10/08/96	Petitioner Ricardo Aldape Guerra's Application for Writ of Habeas Corpus	Atlas
146.	10/10/96	A Copy of Form CJA 30 with SJA's Signature (re atty fees)	Atlas
147.	10/11/96	Affidavit of David Michael Gips	Atlas
148.	10/18/96	Transcript of Hearing on Motion to Suppress Evidence; and Exhibits Added at 10/31/96 Hearing	Court

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

ORDER TAKING JUDICIAL NOTICE OF HEARING TRANSCRIPT AND EXHIBITS OF FEDERAL HABEAS COURT EVIDENTIARY HEARING IN ALL PRETRIAL PROCEEDINGS

On this day came on to be heard Defendant's Motion to Take Judicial Notice of Transcript and Exhibits of Habeas Proceedings in All Pretrial Proceedings, and the Court, after reviewing the file and argument of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that in all pretrial proceedings, pursuant to Texas Rule of Criminal Evidence 201, the Court will take judicial notice of the transcript (*i.e.*, the statement of facts) of the November 1993 federal district court's evidentiary hearing on Defendant Ricardo Aldape Guerra' application for writ of habeas corpus and all 48 exhibits admitted into evidence at that hearing in *Guerra v. Collins*., Civil A. No. H-93-290 (S.D. Tex.) (decision reported at 916 F. Supp. 620 (S.D. Tex. 1995)).

Signed this 18th day October, 1996.

PRESIDING JUDGE

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

VEHOU97:24664.1

13 Jm 980 ✓

STATE OF TEXAS
COUNTY OF HARRIS

I, Charles Bacarisse, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this DEC 31 1996.

CHARLES BACARISSE, DISTRICT CLERK
HARRIS COUNTY, TEXAS

By _____ Deputy

Court of Criminal Appeals accepted the recommendation and denied relief. In February 1993 Aldape Guerra filed a habeas corpus petition in federal district court. The federal district court conducted an extensive evidentiary hearing in November 1993; in November 1994 that court entered an order granting relief. The order was amended on May 18, 1995, *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), and the State was ordered to release Aldape Guerra unless the State began retrial proceedings by arraigning him within 30 days. That judgment was stayed by the U.S. Court of Appeals for the Fifth Circuit. On July 30, 1996, the U.S. Court of Appeals for the Fifth Circuit affirmed the federal district court's decision. *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996). The State did not request a rehearing by the Fifth Circuit.

Signed this 8th day October, 1996.

PRESIDING JUDGE

VEHOU97:23149.1

V1973 P0125

STATE OF TEXAS
COUNTY OF HARRIS

I, Charles Bacarisse, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this DEC 31 1996.

CHARLES BACARISSE, DISTRICT CLERK
HARRIS COUNTY, TEXAS

By _____ Deputy

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

ORDER TAKING JUDICIAL NOTICE OF
PRIOR PROCEEDINGS IN ALL PRETRIAL PROCEEDINGS

On this day came on to be heard Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings, and the Court, after reviewing the file and argument of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that in all pretrial proceedings the Court will take judicial notice of the following undisputed facts, pursuant to Rule 201 of the Texas Rules of Criminal Evidence: On July 13, 1982, J.D. Harris, a Houston police officer, was murdered while on patrol in a Hispanic neighborhood in Houston, Texas. Ricardo Aldape Guerra ("Aldape Guerra") was arrested that same night. He was tried for the capital murder of Officer Harris and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. The Texas Court of Criminal Appeals affirmed the conviction on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex. Crim. App. 1988) (en banc). In 1989 the United States Supreme Court denied Aldape Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925 (1989). In May 1992 Aldape Guerra filed for habeas relief in the state trial court. On September 17, 1992, following the appointment of new counsel two months earlier, he filed an amended application for habeas relief. On September 21, 1992, the trial court denied Aldape Guerra's request for an evidentiary hearing and recommended denial of relief, without making findings of fact or conclusions of law. In January 1993 the Texas

13 tm 981 ✓

RECORDER'S MEMORANDUM:
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cc: Team
m (asked w/ 3h)
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NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
RICARDO ALDAPE GUERRA	§	248th JUDICIAL DISTRICT

STATE'S REPLY TO DEFENDANT'S MOTION
TO DISMISS INDICTMENT WITH PREJUDICE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas, by and through the undersigned Assistant District Attorney, and files this response to the Defendant's Motion to Dismiss Indictment with Prejudice, showing unto this Honorable Court the following, to-wit:

1. On May 18, 1995, following an evidentiary hearing, Hoyt, J., a federal judge for the United States District Court for the Southern District of Texas, conditionally granted the application of Ricardo Aldape Guerra, hereinafter called Defendant, for habeas corpus relief and ordered his conviction and sentence for the capital murder of James D. Harris, a Houston police officer, set aside. The State of Texas was ordered to begin retrial of Defendant by arraigning him within thirty (30) days from the date Hoyt's order became final. ***Guerra v. Collins***, 916 F.Supp. 620, 637, 638 (S.D. Tex. 1995). Hoyt's opinion was affirmed in ***Guerra v. Johnson***, 90 F.3d 1075 (5th Cir. 1996).

2. The Defendant has filed a motion to dismiss the indictment herein with prejudice and in support of that motion he relies substantially upon ***State v. Frye***, 897 S.W.2d 324 (Tex. Crim. App. 1995), to assert that since the State of Texas violated his constitutional rights as found by the federal judge in ***Guerra v. Collins, supra***, the dismissal of the instant prosecution is the only remedy that will adequately protect those rights.

3. The premise underlying the Defendant's argument is that the findings of the federal court vis-a-vis the claimed deprivations of the Defendant's constitutional rights are somehow binding upon, and are entitled to the full faith and credit by this Court. Therefore, before responding to the Defendant's claims, the State reurges those arguments set out in its State's Reply to Defendant's Motion to Suppress Witness Statements and In-Court Identifications and incorporates those arguments herein by reference for all purposes as though more fully included herein. Succinctly, it is the State's position that since the federal court failed to permit the State a full, fair, and unbridled opportunity to rebut the testimony of admitted perjurers, this Court is not bound to accept the federal court's findings. Moreover, since the Fifth Circuit Court of Appeals merely found that the lower federal court's findings were not clearly erroneous as to only three witnesses at that hearing (90 F.3d 1078-1080), neither federal court opinion should even be considered as persuasive authority. Thus, the premise underlying the Defendant's effort to secure a dismissal with prejudice is without foundation.

4. Although the State believes that ***State v. Frye, supra,*** was erroneously decided, it is not necessary to revisit the case, since the issues in this case do not involve the alleged violation of one's right to counsel under the 6th Amendment as they did in ***Frye***. The more significant aspect to ***Frye*** vis-a-vis the issue in this case is that the remedy fashioned therein was based upon the decision in ***United States v. Morrison***, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed2d 564. In that case, Justice White, writing for an unanimous court, and addressing whether a 6th Amendment violation resulting from "egregious behavior of Government agents", opined:

> More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of an indictment is plainly inappropriate, even though the violation may have been deliberate. This has been the result reached where a Fifth Amendment violation has occurred, and we have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment. **The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression**. (emphasis added). 449 U.S. at 365, 366.

Thus, the result in ***Frye*** is an aberration, out of harmony with ***Morrison***, and patently not applicable to an alleged violation based upon a denial of due process, and more particularly as to how Defendant's first trial was conducted. The State would respectfully submit, that only after a full and fair evidentiary hearing before this Court on matters of identification, etc., that this Court can fashion the appropriate remedy by denying the State the fruits of its alleged transgressions if the Court finds them to actually exist.

5. Notwithstanding that the presently composed Court of Criminal Appeals seemingly has held that a trial court can dismiss an indictment without the State's consent under the circumstances peculiar in ***Frye***, in violation of TEX. CODE CRIM. PROC., art. 32.02, the State adopts the dissenting opinion of Judge Keller in that case in which she noted that the Court in ***State v. Johnson***, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991), held that there was no general authority, written or unwritten, inherent, or implied which permits this Court to dismiss a case without the consent of the attorney for the state of Texas. Moreover, the Court of Criminal Appeals has expressly held that a trial court may not dismiss a case with prejudice. ***State ex rel. Holmes v. Denson***, 671 S.W.2d 896, 900 (Tex. Crim. App. 1984). Thus, the Defendant's reliance on ***Frye*** is misplaced.

6. The Defendant's claim that the State presented manufactured information to the grand jury in violation of the 5th Amendment Grand Jury Clause is again based upon a faulty premise, that being the validity of the federal court's findings with which the State has previously articulated its disagreement. Moreover, the opinions from the federal district and appellate courts upon which the Defendant relies, as a basis to support dismissal of the indictment, are in no wise binding upon the State of Texas. The Defendant cites no Texas authority to support his argument. It is neither the role of an appellate court nor of this Court to review the sufficiency or validity of the evidence presented to a grand jury to determine if an indictment was justified. ***Dean v. State***, 749 S.W.2d 80, 82 (Tex. Crim. App. 1988). An indictment returned by a legal

and unbiased grand jury, that is valid on its face, mandates that the State be accorded its right to a trial on the merits. ***State v. Brock***, 788 S.W.2d 920, 922 (Tex. App. - Houston [1st Dist.] 1990, pet. ref'd).

7. Moreover, habeas courts are to fashion remedies designed to spur state courts to fulfilling their constitutional obligations to the defendant. Thus, a discharge may be warranted where an alternate remedy would not vitiate the prejudice of the fundamental unfairness or would itself violate a habeas applicant's constitutional rights. ***Simmons v. Beyer,*** 44 F.3d 1160, 1171 (3rd Cir. 1995); ***Capps v. Sullivan***, 13 F.3d 350, 352 (10th Cir. 1993). Federal district courts have the power to dispose of habeas corpus matters as "law and justice require." 28 U.S.C. § 2243. Thus, although the State of Texas vigorously objects to the validity of the federal court's findings, if the facts were as egregious as the Defendant now claims, the federal court arguably would have had the power to bar prosecution. The federal court's failure to have done so is patently prima facie evidence that dismissal of this prosecution was inappropriate, even in the eyes of the federal district judge who only heard some of the evidence. Since this Court has heard none of the evidence in this case, and has only a cold record before it, it therefore would be inappropriate for this Court to dismiss or bar the prosecution herein.

WHEREFORE, PREMISES CONSIDERED, the State of Texas respectfully requests that this Court deny the Defendant's motion to dismiss indictment with prejudice for the reasons discussed herein and also discussed in the State's Reply to

Defendant's motion to suppress witnesses' statements and identification of the Defendant, and that this Court, by not dismissing the indictment with prejudice, conduct a trial on the merits herein consistent with the federal court ordering of same. At that trial, the admissibility of the witness statements and identification of the Defendant can be litigated, both pre-trial by this Court, and the appropriate guilt/innocence factfinder.

RESPECTFULLY SUBMITTED,

CASEY O'BRIEN
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston TX 77002-1901
(713) 755-6173
TBC No. 15165900

Date: October 18, 1996

CERTIFICATE OF SERVICE

This is to certify that a copy of this reply has been delivered to an attorney for the Defendant by hand delivery of a copy of same.[1]

SIGNED this 18TH day of October, 1996.

CASEY O'BRIEN
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, TX 77002-1901
(713) 755-6173
TBC No. 15165900

[1] Although an attorney named S. J. Atlas is denominated as the attorney-in-charge, since approximately one dozen attorneys are named on the Defendant's pleadings, the State was unable to determine which attorney(s) would be present at this Court's hearing. The State will advise the Court of the attorney actually served, although it will attempt to serve Mr. Atlas.

10/18/96

149 148
v.15

CC: Team
From: m 8 ja
O-f- ald
pldge

NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
RICARDO ALDAPE GUERRA	§	248th JUDICIAL DISTRICT

STATE'S REPLY TO DEFENDANT'S MOTION TO SUPRESS WITNESS STATEMENTS AND IN-COURT IDENTIFICATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas, by and through the undersigned Assistant District Attorney, and files this response to the Defendant's Motion to Suppress Witness Statements and In-Court Identifications, showing unto this Honorable Court the following, to-wit:

1. On May 18, 1995, following an evidentiary hearing, Hoyt, J., a federal judge for the United States District Court for the Southern District of Texas, conditionally granted the application of Ricardo Aldape Guerra, hereinafter called Defendant, for habeas corpus relief and ordered his conviction and sentence for the capital murder of James D. Harris, a Houston police officer, set aside. The State of Texas was ordered to begin retrial of Defendant by arraigning him within thirty (30) days from the date Hoyt's order became final. ***Guerra v. Collins***, 916 F. Supp. 620, 637, 638 (S.D. Tex. 1995). Hoyt's opinion was affirmed in ***Guerra v. Johnson***, 90 F.3d 1075 (5th Cir. 1996).

2. In what can only respectfully, yet fairly from the State of Texas' perspective, be characterized as the grandiose musings of a federal court, particularly in light of the record, or more significantly the lack of a record in view of the fact that the State of Texas was denied a full, fair and objective hearing to rebut the accusations of recanting witnesses, that federal court concluded:

> The police officers' and the prosecutors' action described in these findings were intentional, were done in bad faith, and are outrageous. These men and women sworn, to uphold the law, abandoned their charge and became merchants of chaos. It is these type flag-festooned police and law-and-order prosecutors who bring cases of this nature, giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another 'notch in their guns' despite overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.
>
> The police officers and prosecutors were successful in intimidating and manipulating a number of unsophisticated witnesses, many mere children, into testifying contrary to what the witnesses and prosecutors knew to be true fact, solely to vindicate the death of officer Harris and for personal aggrandizement. The cumulative effect of the police officers' and prosecutors' misconduct violated Guerra's federal constitutional right to a fair and impartial process and trial. 916 F. Supp. at 637.

The above conclusions were based upon evidence adduced in a hearing in which the federal court believed every witness who testified in support of the Defendant's claims, and who disbelieved every witness who testified contrary to the Defendant's claims. The federal court even refused to believe the trial testimony of a trace metals expert.

916 F. Supp. at 632. To the federal court, the prosecution of Defendant was perceived as one big conspiracy. To even a neophyte attorney for the State of Texas, however, it should have been patently, as well as painfully obvious, that the result in this case was predestined - a cursory reading of the seemingly less than objective federal court's order of September 29, 1993, ordering the evidentiary hearing, should have been adequate "handwriting on the wall" to the Assistant Attorney General in charge of the federal habeas hearing. **See State's Exhibit A, order of federal district court.**

3. The federal court in its opinion, focused substantially on statements given by numerous witnesses, [for example, Patricia Diaz, Herlinda Garcia, Jose Francisco Armijo, Elvira Medina Flores, Jacinto Vitales Vega, Jose Angel Heredia, Hilma Galvan, and Armando Heredia, Frank Perez] at the crime scene, and later at the police station where in several instances several statements were taken from these witnesses, allegedly in order to "seal the victory" of the prosecution - see, for example discussion 916 F. Supp. at 632, 633.

4. The Fifth Circuit Court of Appeals, in sustaining the order of the federal court reviewed his findings vis-à-vis only three witnesses: Herlinda Garcia, Patricia Diaz, Frank Perez to determine if they were clearly erroneous. 90 F.3d at 1078-1080. Although Garcia's written statements to the police were consistent with her trial testimony identifying the Defendant as murderer of Harris, the district court, however, found that Garcia had been intimidated by the police and that exonerating evidence as to the Defendant had been omitted from her statements (90 F.3d at 1079). Similarly,

Diaz, at the habeas hearing, "recanted" her previous trial testimony, and the district court thereafter found her habeas testimony to be credible when she asserted that there had been material omissions from her statements by the police (90 F.3d 1079). Frank Perez also testified that the police had omitted material information from his statements, and effectively recanted much of his trial testimony (90 F.3d 1079, 1080).

5. On November 19, 1993, in that habeas evidentiary hearing, the federal judge refused to permit the State of Texas' request to amend its subpoena list to add the names of:

> [E]ight additional witnesses, and these are police officers who either took the statements of witnesses or notarized those statements, and these witnesses have come in; and as your Honor is aware from the testimony, have argued that they either did not read the statements or could not read English and they were not read in Spanish to them and that sort of thing. (S.F.IV-5).[1]

After a brief dialogue between the State, counsel for Defendant who basically objected to these additional witnesses since they were not on the State's witness list (S.F.IV-6-8), and Hoyt, J., the court refused to permit the addition of these witnesses critical to the State of Texas' efforts to refute the testimony of the Defendant's recanting witness. The federal court instead directed that the parties submit a stipulation of their proposed testimony, a rather useless exercise in view of the court's comments as to the weight and relevancy that it would accord such a stipulation. Quite unsurprisingly, however,

the parties were never able to enter into that stipulation, and controverting testimony to that of admitted perjurers was precluded from being placed into the habeas record.[2]

6. The State would respectfully submit that the Defendant's Motion to Suppress is meritless, especially in light of the candidly egregious and restrictive manner in which the federal hearing was conducted. Specifically, the district court refused to permit the State of Texas to present the testimony of the police officers who the Defendant's witnesses had accused of numerous instances of flagrant misconduct involving identification and statement-taking procedures, notwithstanding that the central issue in the habeas hearing was the police officers' conduct, i.e., the manner in which witness statements had been taken; the alleged alteration of such statements; and, the alleged omission of material information from such statements. Essentially, the Defendant's witnesses were allowed to accuse the police officers of numerous instances of flagrant misconduct, allegedly designed solely to satisfy what Hoyt, J. later ostensibly perceived to be a "blood lust" on the part of the prosecution, but the State of Texas was not allowed to present the police officers' testimony to rebut the allegations of the Defendant's witnesses, in essence admitted perjurers. Finally, Hoyt, J. found

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[1] Any reference denominated by "S.F." is to the transcription of the habeas hearing conducted by Hoyt, J. in November, 1993. For example S.F.IV-5 refers to volume four, page 5 of that hearing.

[2] Interestingly, counsel for the Defendant had earlier agreed to an amendment of the list to add the names of two witnesses, but now vigorously opposed the addition of witnesses who the State asserted were important to the truth-finding process which lies at the very foundation of 28 U.S.C. § 2254 proceedings. This habeas proceeding, although quasi civil, quasi criminal in nature, should not have been conducted like a civil trial - trial by ambush - where the spoils to the victors are monetary, and in many instances, at least to opposing counsel, of similar vein.

the Defendant's witnesses to be credible without the benefit of a full hearing: a hearing at which the police officers would be allowed to respond to the allegations against them.

7. The Defendant claims that the doctrine of collateral estoppel compels this Court to grant the motion to suppress (Memorandum of Law, page 3). The doctrine of collateral estoppel simply means that once an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in any future lawsuit. The doctrine is not to be applied hypertechnically, but requires the reviewing court to examine the record to determine just what issue has been foreclosed between the parties. ***Ex parte Byrd***, 752 S.W.2d 559, 564 (Tex. Crim. App. 1988); ***Ex parte Tarver***, 725 S.W.2d 195, 198 (Tex. Crim. App. 1986); ***Dedrick v. State,*** 623 S.W.2d 332, 336 (Tex. Crim. App. 1981). Collateral estoppel precludes a subsequent prosecution only if the matter to be relitigated dictated a previous acquittal, and the fact-finder rationally could not have based its verdict on an issue other than that which the defendant now seeks to foreclose. ***Flores v. State***, 906 S.W.2d 133, 141 (Tex. App. - San Antonio 1995, no pet. hist.); see also ***U.S. v. Grosz***, 76 F.3d 1318, 1329 (5TH Cir. 1996)(an exception to law of case doctrine exists if the evidence on a subsequent trial was substantially different).

8. The Defendant fails to cite a single authority, however, that supports his theory that collateral estoppel applies where, after a federal district court in a 28 U.S.C. § 2254 proceeding has found a ultimate fact, that finding has been found

thereafter to be binding on a state court on a subsequent remand. Although the Defendant cites several cases, none of these cases, however, are dispositive of the issue ***sub judice***. To the contrary a case cited by the Defendant, ***U.S. v. Evans***, 655 F. Supp. 243 (E.D. La. 1987) appears to be persuasive authority that the doctrine of collateral estoppel would not apply vis-à-vis the testimony of the witnesses sought to be suppressed under the peculiar facts of this case. In ***U.S. v. Evans***, the Court, in applying the doctrine of collateral estoppel to preclude the Government from relitigating the admissibility of evidence which was previously determined by another federal court opined:

> The government has had a full and unbridled opportunity to litigate the issue involved...and has strenuously done so. The government acknowledged that no new evidence would be presented if this Court held another evidentiary hearing. In addition, the government indicates a willingness to be bound by the prior presentation of evidence on the motion. To suggest that this Court should again consider the matter based upon the same law and the same factual record ... conflicts with notions of judicial economy; all of which the doctrine of issue preclusion is designed to avoid (emphasis added). 655 F. Supp. at 245.

9. It is the State's position, as argued above, that it was denied a full and unbridled opportunity to present evidence at the habeas hearing to rebut the testimony of admitted perjurers by the actions of the federal court, in refusing to permit, upon the Defendant's objection, the State an opportunity to amend its witness list. The State further takes the position that it strenuously objects to the validity of the findings entered by the federal court in light of the limited and restricted record before that

court. Finally, the State asserts that there are police witnesses who can testify at a hearing in state court that the testimony of the witnesses found to be credible by Hoyt, J. is false vis-à-vis the statements of those witnesses. Consequently, the doctrine of collateral estoppel has no application.[3]

10. Moreover, it is beyond peradventure that the doctrine of collateral estoppel is but an aspect of double jeopardy. ***Warren v. State***, 514 S.W.2d 458, 462 (Tex. Crim. App. 1974). As early as the 1949 case of ***Woods v. State***, 220 S.W.2d 644 (Tex. Crim. App. 1949) the Court of Criminal Appeals rejected a double jeopardy claim where Woods had been granted habeas corpus relief by a federal court. The Court of Criminal Appeals found that once the federal court had found Woods' conviction to be void and in violation of Woods' constitutional rights, the case stood in the same posture as if the Court of Criminal Appeals had reversed the case in the first instance. See also, TEX. CODE CRIM. PROC., art. 44.29(a); see and cf. ***U. S. v. Arreola-Ramos,*** 60 F.3d 188, 193 (5TH Cir. 1995)(district court's pre-trial ruling of lack of double jeopardy and the 5TH Circuit's affirmance of that ruling was not binding as *res judicata*, law of the case, collateral estoppel, or any other theoretical to the double jeopardy issue upon remand). It is the State's position, therefore, that this case

[3] In addition to the police officers which the State sought to have testify in order to rebut the allegations of the Defendant's witnesses, three other witnesses critical to the State's case did not testify at that habeas hearing: Jose Armijo, Jr., Elvira Medina Flores, and Hilma Galvan. In its opinion, notwithstanding that the federal court had not heard Galvan's "side of the story", the federal court gratuitously made her a part of the "big conspiracy", allegedly because of her dislike for Mexican Nationals who took jobs from Americans. 916 F.Supp. at 629.

merely stands in the posture as if a new trial had been granted by this Court. Although the Defendant now seeks to "collaterally estopp" the litigation of the admissibility of these statements, as well as identification by witnesses that the Defendant was the murderer of Officer Harris, (see ***infra***), based upon a cold record and a limited evidentiary hearing in federal court, this Court should decline the Defendant's invitation. The Defendant is entitled to an evidentiary hearing on the admissibility of the disputed evidence before trial; he is not entitled to rely upon the federal court's order as a bar to that hearing. On the contrary, the federal court unconditionally instructed that the Defendant be retried. Although the federal court apparently could have done so, no mention of any evidence or testimony being barred from that trial was a component of the remedy fashioned by the Court. At this juncture, the State respectfully requests that this Court comply with that order.

11. Finally, it is the State's position, as articulated above, that the State of Texas was not afforded a full and complete hearing on the matter of the identification procedures utilized by law enforcement. Again, it must be emphasized that the federal court heard only part of the story, that being the part which it ostensibly choose only to hear. The State further takes the position that it strenuously objects to the validity of the findings entered by the federal court in light of the limited and restricted record before that court. Finally, the State asserts that there are police witnesses who can

testify at a hearing in state court that the testimony of the witnesses found to be credible by the federal judge is false vis-à-vis the line-up procedures.[4]

WHEREFORE, PREMISES CONSIDERED, the State of Texas respectfully requests that this Court deny the Defendant's motion to suppress witness statements and in-court identifications for the reasons discussed herein, and that this Court conduct a trial on the merits herein consistent with the federal court ordering of same. At that trial, the admissibility of the witness statements and identification of the Defendant can be litigated, both pre-trial by this Court, and the appropriate guilt/innocence factfinder.

RESPECTFULLY SUBMITTED,

CASEY O'BRIEN
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston TX 77002-1901
(713) 755-6173
TBC No. 15165900

Date: October 18, 1996

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[4] What the State of Texas finds particularly offensive vis-à-vis the federal court's order was its characterization of the two well-respected prosecutors at Defendant's trial, Richard Bax and Robert Moen, now similarly highly respected defense attorneys, as "merchants of chaos" and its conclusion that their conduct was "outrageous". 916 F.Supp. at 637. Equally offensive is the assertion that these individuals deliberately violated their oaths as prosecutors. ***Id.*** Unfortunately, neither of these individuals can or will ever have the opportunity to rebut what the State of Texas believes to be groundless accusations and innuendoes now in the public domain.

CERTIFICATE OF SERVICE

This is to certify that a copy of this reply has been delivered to an attorney for the Defendant by hand delivery of a copy of same.[5]

CASEY O'BRIEN
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston TX 77002-1901
(713) 755-6173
TBC No. 15165900

Date: October 18, 1996

[5] Although an attorney named S. J. Atlas is denominated as the attorney-in-charge, since approximately one dozen attorneys are named on the Defendant's pleadings, the State was unable to determine which attorney(s) would be present at this Court's hearing. The State will advise the Court of the attorney actually served, although it will attempt to serve Mr. Atlas.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

SEP 30 1993

Michael N. Milby, Clerk
By Deputy: B Jarmon

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

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

ORDER

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

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

rec'd 10/6/93

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

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

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

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

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

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

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

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

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

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

It is so ORDERED.

Signed this 29th day of September, 1993.

KENNETH M. HOYT
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

SEP 30 1993

Michael N. Milby, Clerk
By Deputy: B Jarmon

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

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KENNETH M. HOYT
United States District Judge

Tab 14B

CAUSE NO. 359,805

THE STATE OF TEXAS : IN THE DISTRICT COURT

:

:

VS. : HARRIS COUNTY, TEXAS

:

:

RICARDO ALDAPE GUERRA: 248TH JUDICIAL DISTRICT

248TH DISTRICT COURT

HARRIS COUNTY, TEXAS

Judge W. R. Voigt, Presiding

MOTION TO SUPPRESS

VOLUME 1 OF 1 VOLUMES

October 18, 1996

SHERRI JOHNSON, CSR
Deputy Official Court Reporter
248TH District Court
Harris County, Texas

COPY

CAUSE NO. 359,805

THE STATE OF TEXAS	:	IN THE DISTRICT COURT OF
	:	
VS.	:	HARRIS COUNTY, T E X A S
	:	
RICARDO ALDAPE GUERRA	:	248TH JUDICIAL DISTRICT

APPEARANCES:

FOR THE STATE:

Mr. Casey O'Brian
Assistant District Attorney
Harris County, Texas

FOR THE DEFENDANT:

Mr. Scott Atlas
Mr. Stanley Schneider
Attorneys at Law
Houston, Texas

BE IT REMEMBERED, it came on to be heard on this the 8th day of October, A.D., 1996, before the Honorable W. R. Voigt, Judge Presiding of the 248th District Court of Harris County, Texas; and all preliminary matters having been disposed of, the following proceedings were had, viz:

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October 18, 1996

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P R O C E E D I N G S

October 18, 1996

THE COURT: This is Cause No. 82-359805, the State of Texas versus Ricardo Aldape Guerra. We're here today to hear some motions and an application for writ of habeas corpus. Is the Defense ready?

MR. ATLAS: We are, Your Honor.

THE COURT: State ready?

MR. O'BRIAN: Yes, sir.

THE COURT: Very well. The Defense has filed a series of motions. I believe the first one is the motion to suppress.

MR. ATLAS: Yes, Your Honor.

THE COURT: Defendant's motion to suppress witness statements and in-court identifications.

MR. ATLAS: Yes, Your Honor, although probably as a predicate to that, I would ask -- I would like to ask whether the State has any objection to our motion to take judicial notice. We

have two such motions.

They seem to have implicitly concurred with them in the responses that they filed today but perhaps we can take care of that as a housekeeping matter before we get into the substantive motions.

MR. O'BRIAN: I'm not sure I understand what he's talking about we take judicial notice of, Judge.

THE COURT: Well, let me just ask you one thing, Mr. Casey. I see two motions here filed by the State, State's reply to Defendant's motion to dismiss indictment with prejudice and State's reply to Defendant's motion to suppress witness statements and in-court identifications.

Have you filed any other motions?

MR. O'BRIAN: No. I filed them both this morning and served same on Defense.

THE COURT: Very well. Now, as to the judicial notice, let's talk about that.

MR. ATLAS: Yes, Your Honor. We

have two motions. A motion to take judicial notice of prior proceedings and all pretrial proceedings and a motion to take judicial notice of hearing, transcript and exhibits of Federal habeas trial court evidentiary hearing and all pretrial proceedings.

That would make references that we make with respect to the other motions that we're going to address today much simpler.

THE COURT: Okay.

MR. O'BRIAN: I do not have any objection to doing that, Judge. In fact, I would like to introduce a copy of the -- of the habeas hearing held in Federal Court. I don't know that the Judge has that.

MR. SCHNEIDER: Your Honor, this box contains the five volumes of the statement of facts during the Federal habeas hearing, a copy of all the exhibits that were introduced in that hearing. Do we mark each volume individually or --

THE COURT: Yes, you may mark each one individually. It will make it easier to keep a record of what we're doing.

MR. ATLAS: Your Honor, we had supplied with our two motions to take judicial notice proposed orders that we served on the State at the same time that we filed copies with the Court and I would ask permission to approach the bench and provide the Court with a copy of those orders.

THE COURT: Yes, please do.

(Whereupon, Defendant's Exhibit Nos. 1-A through 1-G were marked for identification.)

MR. O'BRIAN: Judge, the position of the Court in regards to the taking of judicial notice to this, we do not dispute and would agree to permit the Court to take judicial notice that, in fact, these hearings were held; that, in fact, the results were as they were. We do not concede the findings of a Federal

Judge in regards to whether those findings are, in fact, true.

MR. ATLAS: Your Honor --

MR. O'BRIAN: Other than that, we certainly permit the Court and have no objection to your -- to the offer as to those hearings occurred, as to the fact that this testimony was, in fact, elicited, et cetera.

MR. ATLAS: And that's all we're requesting, Your Honor. We're not asking the State to say that they like or concur in the findings.

We merely ask the Court to take judicial notice that the Federal Court made those findings that the testimony was given as it's contained in the transcript. That's it.

MR. O'BRIAN: I have no objection to that.

THE COURT: Very well then. We have an agreement on that and I will take judicial notice.

MR. SCHNEIDER: Your Honor, for purposes of these proceedings, I've

marked the exhibits as Exhibit 1-A through G. Volume 1-A is the proceedings from November 15, 1993, 1-B is November 16,1993, 1-C is November 18, 1993, 1-D is November 19, 1993, 1-E is November 22, 1993. The attachments are the exhibits that were introduced which is 1-F and 1-G is a video that was introduced and we'd offer all of those.

MR. O'BRIAN: No objections.

THE COURT: Are those attachments 1 through 48? Do they have numbers?

MR. ATLAS: Yes, Your Honor. They're all separately numbered. In fact, they are true and correct copies of the exhibits that were actually from the court's records.

THE COURT: All right. Those are admitted.

(Whereupon, Defendant's Exhibit Nos. 1-A through 1-G were admitted into evidence.)

THE COURT: What else?

MR. ATLAS: We will be bringing down copies of some of the pleadings that were a part of the trial -- of the record at the Federal habeas court -- our habeas petition, the State's response and the State's brief on appeal to the Fifth Circuit -- and as soon as they are here in the courtroom, we intend to tender them as well as exhibits. We have not brought them with us and I apologize but we'll have them in a few minutes.

MR. O'BRIAN: And I won't have an objection to supplementing the record with those items.

THE COURT: Very well then. When they get here, you may do that.

Now, next on your motion, you have a motion to suppress witness statements?

MR. ATLAS: Yes, Your Honor.

THE COURT: You want to go forward on that?

MR. ATLAS: Yes, Your Honor.

THE COURT: All right.

MR. ATLAS: Your Honor, I have some -- a factual overview about this

case that really relates to all the substantive motions but it certainly relates to the motion to suppress in particular as well.

THE COURT: Go ahead.

MR. ATLAS: With the Court's permission, I'd like to take about ten minutes to provide the backdrop for the -- both, explaining the Federal District Court's ruling and to give the Court full appreciation about what this case is all about.

THE COURT: Go ahead.

MR. ATLAS: Your Honor, if I may approach, we have a blowup of the neighborhood -- let me turn it a little bit so that Mr. O'Brian can see it as well.

THE COURT: I can't see the bottom part of that.

MR. ATLAS: This is really just the street scene where the crime occurred. These are both actually exhibits in the Court's stack that has now been admitted I believe as 1-G.

MR. O'BRIAN: Judge, can I interrupt here?

THE COURT: Yes.

MR. O'BRIAN: I don't understand whether we're going to relitigate the facts of the case now or not, whether or not we are making a legal argument that, in fact, the Court must adopt some findings.

THE COURT: Let's give Mr. Atlas the opportunity to tell us what he's doing.

MR. O'BRIAN: All right.

MR. ATLAS: Your Honor, I think it will be very clear in just a few minutes that I'm providing a backdrop. These are just demonstrative so that the Court can appreciate and understand the significance of what I'm saying and this exhibit is actually Petitioner's Exhibit 13 in the Court's stack but it is really just to provide an overview of the neighborhood so that my comments make sense in context.

THE COURT: All right.

MR. ATLAS: Your Honor, as the Court

knows from the Federal District Court's opinion that is much in controversy here this morning, the murder for which my client was convicted, it was a murder that occurred in -- one late July evening in 1982 in east Houston, July 13, 1982.

In brief, about 10:00 o'clock in the evening my client, Guerra, who I will refer to as Aldape, was driving a car with a passenger named Roberto Carrasco Flores, who I will refer to as Carrasco. They were apparently speeding, the car stalled at one point at this intersection of Walker and Edgewood in east Houston and a few seconds later a police car from the Houston Police Department drove up with Houston Police Officer James D. Harris driving and he was alone in the car -- actually, I believe there was a dog in the car with him, a K-9 cop. It was unexpected, ordered the two men out of the car, at least one of them went over to the front of the police officer's car, put his hand on the hood and the other apparently circled around at some

point -- there was some dispute in the testimony -- and without provocation, at point-blank range pulled a 9 millimeter pistol and shot Officer Harris three times in the head, death was instantaneous.

The same person with that 9 millimeter pistol after grabbing the police officer's .357 magnum started running down the street and shot another innocent bystander, Mr. Jose Armijo, Sr., who happen to drive up at the wrong time with his ten-year-old son, Jose, Jr., in the car with him and continued running.

The issue for the last 14 years, Your Honor, and the only real issue in the original trial and to this day is which of the two men, Carrasco or Aldape, was the man who shot Officer Harris and then shot Mr. Armijo.

An hour and a half -- the prosecutor from the original trial conceded at the habeas hearing that the man who shot Officer Harris and Mr. Armijo qualified for the death penalty and the other man

had absolutely nothing to do with the shooting. There was no evidence to indicate any involvement whatsoever in the shooting. And so the issue was as plain as could be and that is, who pulled the trigger on the 9 millimeter to shoot Officer Harris and Mr. Armijo.

About an hour and a half later outside a house about a block and a half away, Carrasco came out of a hiding place, a dark garage with his guns blazing shooting at police officers who were closing in on him. He seriously wounded one police officer and in turn was shot by the police.

When they found him lying on the ground, they found that the murder weapon, the 9 millimeter and the dead police officer's gun, the .357, on his body. In fact, he had been shooting the 9 millimeter.

There was no physical evidence then or ever that my client, Mr. Aldape, had touched either weapon and so it appeared as if it were an open and shut case that

Carrasco was the shooter but the Houston police rounded up about 16 neighborhood witnesses who were outside and had seen something that night and took them all down to the police station. Most of them were kids, teenagers, a few adults and after an early -- there was quite a bit of confusion in the early stages about what they saw. They were kept in the police station all night and by 6:00 o'clock the next morning during a lineup, a few of them identified Aldape as the man they thought they had seen shooting Officer Harris.

At the trial a few months later, the State presented testimony from essentially -- in addition to a number of police experts who had been out at the scene -- presented testimony from I believe eight witnesses from the neighborhood and the Defense presented testimony from another three plus Mr. Aldape who testified as well.

At the end of the trial, the jury convicted -- found Mr. Aldape guilty of

capital murder and ultimately sentenced him to die. This was October 1982.

Flash forward now to 1993. Mr. Aldape has exhausted his appeals. With our assistance has exhausted his State Court habeas appeal and a Federal habeas petition has been filed in Federal District Court here in the Southern District in Houston.

The Federal Court has granted an evidentiary hearing on the issue of whether there was police or prosecutorial misconduct in connection with the arrest, investigation and prosecution of my client.

Testimony at the habeas hearing came from the Defense side or the Petitioner's side now, Mr. Aldape. We presented testimony from five of the eight neighborhood witnesses who had testified for the State in the original trial as well as some additional witnesses from the neighborhood as well, including the two of the three who had testified for Aldape in the original trial.

Presumably if the other three had provided useful information for the State, they would have provided them here. We did not. And the witnesses all testified that essentially they had not discussed this case with each other during the last ten years or so since the original trial and here is what the Federal District Court found and what the testimony essentially demonstrated.

As I said, these witnesses were almost entirely teenagers ranging in age literally from the ten year old who had seen his father shot in the car as he watched, Jose Armijo, Jr., a number of teenagers ranging from 14 to 18, 20, 21 and then a couple of adults.

The three from the original trial who did not testify at the habeas hearing were Jose Armijo, Jr., Hilma Galvan, who becomes a significant player later on in the testimony, and a woman named Elvira Flores.

What the Federal District Court found and what seven different witnesses

at the habeas hearing testified to is that the police descended on the scene after hearing that there was an officer down, which is not surprising, and that witnesses were intimidated in one fashion or another by the police who just insisted, whether witnesses said they had seen anything significant or not, that the witnesses identify someone as the shooter of the police officer.

The Federal District Court found and those seven witnesses testified that witnesses were -- that the police handcuffed some witnesses, pointed guns at others, threatened to arrest some, yelled at others, cursed, accused some of lying, threatened to revoke the parole of the spouse of one witness, threatened to take the child of another -- the baby of another, and in one fashion or another thoroughly intimidated these children.

As I said, all the witnesses were taken down to the police department. There were 16 from the neighborhood I believe. Fifteen were Hispanics. One

was an Anglo. The one Anglo who actually was a witness for -- called by the State at the habeas hearing testified that he was actually segregated from the other 15 -- from the 15 Hispanics and put into a private office. He had no understanding whatsoever why he was segregated from the rest and kept in a private office all night while the 15 remaining witnesses, the Hispanic witnesses, were left out in the hallway until it was time for the lineup.

While they were out in the hallway, several witnesses testified and the Court recognized that Ms. Galvan, Ms. Flores and Jose Armijo, Jr., who I call Jose, Jr., the ten year old, were heard saying they hadn't seen who did the shooting.

While they were sitting out there in the hallway, my client, Aldape, was brought out in front of the witnesses out in the hallway two different times wearing handcuffs and paper sacks over his hands presumably to preserve evidence of trace metal and was walked in plain

view passed all of those witnesses, even the police who testified then did not deny that happened. And witnesses -- several witnesses overheard Jose, Jr., say, "That's not him. That's not the one who shot my father." And a number of witnesses testified, in fact, five of them testified that Ms. Galvan said, in essence, "I recognize him. He's a wetback" -- a Mojado in Spanish -- "they only come over here to steal our jobs and commit crimes and we need to say that he's the man who did the shooting."

Even though there were witnesses who testified she wasn't even outside at the time of the shooting, she insisted to Elvira Flores and to Jose, Jr., and to others who were plenty close enough to hear her that they needed to blame Aldape as the man who did the shooting because he was a wetback.

Now, by this time Houston police officers knew that Carrasco was dead and as they testified at the habeas hearing, many of them thought that Aldape was

culpable either because they thought he was the shooter or many of them, it didn't make any difference whether he was the shooter or not, they thought he was equally culpable if he was there and didn't stop it or they somehow thought that there was some conspiracy. They never understood that the prosecutor -- what the prosecutors understood, which was that only the shooter was the guilty one and that the person who didn't pull the trigger wasn't accused of being a party, wasn't accused of a conspiracy or aiding, abetting or anything else but unfortunately, the police never understood this.

According to the Federal District Court and according to testimony from four different witnesses, they told the police -- they were taken into the police office one at a time to give their statements and they told the police essentially in one fashion or another that Carrasco, not Aldape, was the shooter. Some said they saw Carrasco

standing there with his hands pointed and saw a flash coming from the gun. Some said they saw him pointing directly at the police officer. Others actually said they saw him shoot.

All of them said that at the time of the shooting, they saw Aldape standing -- in fact, we have one other display. This is Petitioner's Exhibit 10 from the original habeas hearing. This has the police officer's car, the car that Aldape was driving on the south side of the street. The police car facing south and south is down on this chart.

According to the police evidence, Officer Harris was standing where this blue oval shape is. The blood was found where this red is, standing behind his open police door, as the witnesses testified. The blood was at an angle almost perpendicular to the car and the bullets from the 9 millimeter that killed Officer Harris were found in a house to the west and slightly north of where Officer Harris was standing.

In fact, we presented testimony and the Court found credible from Floyd McDonald who found it -- and then ran the Houston police laboratory for 30 years -- and then found it -- and ran the Pasadena, Texas Police laboratory for another half dozen years -- and he testified that the shooter -- since the -- based on -- entirely on police records and police testimony that if the blood went across the car essentially perpendicular and the bullets ended up over here to the west and slightly north and Officer Harris was standing behind his car door -- to the north of his open car door and according to the police testimony, there were powder burns on his head indicating, as the police testified at the original trial, that the gun had to be within a foot or almost two feet from Officer Harris' head when the shoots -- when the trigger was pulled because of the powder burns, then the shooter had to have been standing very close to and slightly to the east of

Officer Harris.

In fact, once he demonstrated, it was fairly obvious from this chart and yet every witness had Ricardo Aldape standing south on the other side of the police door near the front of Officer Harris' car -- near the south end of Officer Harris' car pointing towards the west. And these witnesses all testified and the Court found them credible that they told the police they saw Ricardo Aldape standing at the south end of Officer Harris' car with his hands out stretched towards the west with his hands open and empty at the time of the shooting. And yet, as the Federal District Court found, based on the testimony of those four witnesses and a review of their witness statements, which are also in evidence for the Court, that the police deliberately failed to include that information in those witness statements. And, in fact, inserted other information that they knew not to be true that implicated Aldape, although,

frankly, the early statements were quite confusing but they failed to include any of the clear exonerating evidence that these witnesses had told the police.

In addition to the four witnesses who testified to that, one other witness testified that he told the police that shortly after the shooting, he saw Carrasco running around the corner holding a gun that looked just like the murder weapon and then he dropped it on the ground. And, in fact, it turned out low and behold that the 9 millimeter had several scratches on it as if it had been dropped in asphalt and the Federal District Court found that witness credible as well.

The Court also found that when these witnesses told the police that Aldape was not the shooter and that Carrasco was or various pieces of exonerating evidence demonstrated clearly that was the case, that the police called one a liar, doctored their statements and forced the witnesses to sign them and not allowing

them to read them, essentially intimidating them and bullying them into signing those statements without having any idea what was in them, including one witness whose statement said that she had two years of school in the United States, even though as she testified, she didn't speak a word of English, had one year of kindergarten in Mexico and nobody translated that statement for her so she had no clue what she was signing.

Then, as the Federal Court found, about 6:00 o'clock in the morning all these witnesses were taken to a lineup at the police station. And in that lineup, according to the testimony and the findings of the Federal District Court which were affirmed by the Fifth Circuit, only one -- only Aldape -- he was the only one in the lineup with shoulder-length hair and a beard who met the description of what the witnesses were saying -- some of the witnesses were saying the shooter looked like.

They were allowed to watch the

lineup in a group and there was really virtually no evidence to contest that. And because they were in a group, a number of -- every witness was allowed to hear all the other witnesses identify Aldape, even though some of them were only saying they had seen him at the scene or they had seen him as the driver but it appeared as if several of them -- a number of them -- more than there were -- were identifying him as the shooter, plus witnesses testified they overheard Jose, Jr., say, "That's not the man who shot my father," but Hilma Galvan was allowed to remain with that child all night after seeing Ricardo walk down the hallway with his hands in handcuffs, demonstrating he was clearly the principle suspect of the police and she was overheard by four or five -- seven different witnesses saying to Jose, Jr., over and over, "That's the wetback. That's the Mojado. That's the man you must say shot your father."

Four different witnesses testified

and the Court found them credible that they told the Houston police after the lineup, "We recognize Aldape" or "We don't but he's not the one we saw shooting. He's the one with his hands open and empty pointing in a different direction at the time of the shooting."

And yet according to the Federal District Court, police who were so anxious to find someone to punish for this shooting and they couldn't punish Carrasco because he was dead, forced one of those witnesses to sign a statement that was false or didn't take statements at all and, as a result, that exonerating evidence also never made its way to the attorneys for the Defense. And several witnesses testified that the police warned the witnesses not to talk to Aldape's attorneys so that they never knew about all of this misconduct at the time of the original trial.

Then a week later because the statements were so confusing and internally inconsistent and not

consistent with the physical evidence or the facts, the District Attorneys and some police brought selected witnesses down to the crime scene to, as the DA admitted when he testified, have an opportunity to re-enact the crime and to make their statements consistent so they could come up with a consistent --

MR. O'BRIAN: Judge, now I object. I really object when he says that these people went out there to make their statements consistent with each other. I object to that. It's materially false and libellous.

THE COURT: Was that found by Judge Hoyt? Is that in the order?

MR. ATLAS: Yes, Your Honor. And, in fact, it was the subject of testimony admitted to by Mr. -- I believe it was Mr. Moen when he testified as a State's witness at that hearing -- at the evidentiary hearing.

THE COURT: All right. Your objection is overruled. If that's a mischaracterization of the testimony, you

can --

MR. O'BRIAN: Well, Judge, you can read it.

THE COURT: As I recall the record of the Federal Court, just about everything that Mr. Atlas has said so for coincides with what I recall being in the record.

Now, this part I don't -- this part I cannot agree with because I don't remember that particular detail but the others appear to be what the Federal Court found at its hearing.

MR. ATLAS: Yes, Your Honor, and I'm attempting to describe as carefully as I can what the Federal Court found and in my opinion without any exaggeration of it. Obviously, what I say is not evidence in this hearing.

In any event, witnesses who could have provided exculpatory evidence were not invited to this re-enactment and, in fact, several witnesses who happened to show up at the re-enactment or see it testified and, as the Court found, even

though they told the District Attorneys who were there that it was not Aldape who was the shooter, they were either argued with or threatened or ignored.

In fact, as the Federal Court found, one was told that she could not change her statement, the one that, as the Court found, she had been bullied into signing the night of the shooting, but Ms. Galvan and Elvira Flores gave statements after the re-enactment that were dramatically different from what they had given the police the night of the shooting once they had had a chance to go through this re-enactment that I've described.

Then as the Federal District Court found, the weekend before the trial, many of the witnesses were gathered together in the District Attorney's office here in downtown Houston and were introduced for the first time to two mannequins that the DA's office had prepared to look like Aldape and Carrasco had looked on the night of the shooting. Obviously, Carrasco was dead but the two mannequins

not only looked just like them, they were quite striking likenesses and we had those at the Federal Court hearing, although they have not worn well over the course of the last ten years.

Carrasco's mannequin was wearing the original shirt that Carrasco had worn the night he died, complete with bullet holes and caked blood, as the Court found, leaving no doubt for any of these witnesses which of the two mannequins represented the man who died that night and which one represented the Defendant who was still alive and in court and, as the Federal Court found, leaving nothing to chance. The District Attorneys actually showed witnesses two different pictures, a picture of Carrasco and a picture of Aldape. They pointed to the picture of Carrasco and said, "This is the man who died that night." And they pointed to Aldape and said, "This is the man who shot the cop." So, they left nothing to chance. And while, as the Court found, several -- four different

witnesses told them again and again, including at that pretrial meeting, it was Carrasco, not Aldape, the DA's either ignored them, yelled at them or threatened them.

Finally, at the trial, as the Federal Court found, and as -- there's really no dispute about, these mannequins were stationed in the courtroom just a few feet from the witnesses making it easy for each witness to tell which one was the dead man and which was -- which one represented the Defendant who was on trial there. And Ms. Galvan, Ms. Flores, and Jose Armijo, Jr., despite having given statements -- well, not Jose, Jr. He hadn't given a statement at all the night of the shooting -- but the other two -- despite having given statements that were quite vague and contradictory, despite having been overheard by witness after witness saying early that night that they had no idea who the shooter was because they hadn't gotten a good look at them, all of a sudden at the time of the

trial, they became dramatically more certain, as the Federal District Court found, Armijo and Galvan and Flores no doubt came to the conclusion that Aldape was the shooter because of the suggestive procedures that the police and the prosecution had used from the very beginning when they got to the crime scene from intimidating witnesses to allowing them to see Aldape with his handcuffs on where Ms. Galvan could pressure the others to pick the wetback, as she put it, to the lineup where she was allowed to do the same to the re-enactment where the prosecutors ignored contrary comments from witnesses and allowed the witnesses to get their stories straight with each other to the pretrial meeting where they showed pictures saying, "This is the guy who shot the cop," and showed them the mannequin making it clear which one was alive and which one was dead.

After all of that, the Court found that's why those witnesses came to the

conclusion that Aldape was the shooter, even though the prosecutors knew it wasn't true and the Court found as three different witnesses testified that the District Attorney pressured them to either perjure themselves on the witness stand or not tell the entire truth when they testified.

And, as the Court found, the District Attorneys repeatedly in the original 1982 trial used false evidence. They mischaracterized the testimony of one witness. They forced another witness to lie on the stand. They accused one witness, with absolutely no proof, of being on drugs or alcohol while he was testifying. They accused two witnesses of having conferred privately with one of the District Attorneys and told him privately information that he alleged contradicted what they testified about.

They inferred that my client had committed a third murder that night out at a cemetery nearby, even though the prosecution knew and had documents in

their file showing that they hadn't produced, as the District Court found, showing that that murder hadn't even happened, that it was an absolute hoax and there had been no such murder.

And finally and in my view of one of the most despicable things that were done at that trial, as the Federal District Court found, was they made a blatant appeal to ethnic prejudice. They told several jurors during jury selection that if they convicted Aldape, then they could take into account the fact that he was an illegal alien, as they put it, in deciding whether to give him a life sentence or the death penalty, even though they had never demonstrated why the fact that he crossed the border without proper documentation had anything to do with whether my client deserved to live or die.

And as the Federal Court found, because they were obligated to determine whether the various forms of misconduct by the State had caused any harm and as a

result had to analyze the weight of the evidence demonstrating Mr. Aldape's guilt, the Court made it very clear -- in fact, explicitly said that but for the misconduct of the police and the prosecutors, Aldape either would not have been tried or would have been acquitted because testimony showed and the Court found that Carrasco had a reputation for being violent, used several alias, came out shooting, had the murder weapon and the dead policeman's gun on him when he was shot and killed and uncontested that he owned the murder weapon. It was his and there was trace metal showing that he had actually held both guns, although there was some dispute about that, but the Court found that trace metal was consistent with him having held both the murder weapon and the policeman's gun, which frankly by that point everybody knew, while Aldape had no prior record, was easygoing, was found cowering behind a trailer unlike Carrasco who came out shooting, had no trace metal on him of

any kind and no physical evidence of any kind that he ever touched either the murder weapon or the dead policeman's gun, plus, as the Court found, Jose, Jr., who was probably the strongest witness for the State at the original trial, had told the police that night, as the Court found, that the shooter had shot with his left hand and yet, as the Court found, Carrasco is the left-handed one, not Aldape, who was right-handed. Carrasco is the one who had trace metal on his left hand that the Court found based on the testimony of Floyd McDonald was consistent with the murder weapon and had, as everybody can see, trace metal on his right hand consistent with having held the dead policeman's gun, which is what you would expect if he shot with his left hand and then he grabbed the policeman's gun with his right.

And as I mentioned, one of the witnesses confirmed that almost immediately after the shooting, he had seen Carrasco coming from where the

shooter had to have been and holding a gun that looked like a 9 millimeter weapon and picked it out from the three guns that were in the court that day.

As a result of all this testimony and these rulings, the Federal District Court found and it was affirmed -- that opinion was affirmed by the Fifth Circuit earlier this year that the police and the prosecution had intimidated witnesses into testifying in ways that they -- that the police and prosecution knew wasn't true, that they had used unnecessarily suggestive identification procedures that were grossly inappropriate and basically put in the mind of every one of those witnesses, particularly Armijo, Jr., Galvan and Flores but every other witness as well the fact that the police viewed Aldape as guilty and wanted them to testify that Aldape was guilty, found that the police and prosecution had violated the Brady rule repeatedly by failing to turn over exculpatory evidence, by failing to include

exculpatory evidence about Aldape's innocence and Carrasco's guilt in the witness statements and failed to reveal the information that witness after witness had told them about Carrasco's guilt and Aldape's innocence and had even put into the witness statements information that was blatantly false that Aldape was clearly innocent and as a result, this was harm to him because, as the Court said, had the police and prosecution not engaged in this misconduct, Aldape would have been acquitted.

The Court has found that this misconduct was deliberate and that the main witnesses at the habeas hearing were credible.

Now, Your Honor, the bottom line on all of this is that my client has spent the last 14 years in prison for a crime that he did not commit because of deliberate, intentional, flagrant misconduct by the police and the prosecution.

And with respect to the substantive motions that we have filed, the motion to suppress, the motion to dismiss and the application for habeas corpus, we would ask -- and there are mechanical aspects of this that I can discuss in a moment -- the State has argued in its filings today that they did not receive a fair hearing at this Federal evidentiary hearing. After having never raised that issue in the Federal District Court, never having raised that issue in the Court of Appeals, they make an argument about having been denied an opportunity to amend their witness list, even though they knew from the habeas petition the issues that were going to be tried, even though they knew from our witness list what witnesses we were planning to put on and even though they had an opportunity to stipulate and openly never submitted that stipulation, they nonetheless somehow come in here and argue -- and argue to this Court that they didn't have the opportunity for a fair hearing in the

Federal District Court.

We think they've long since waived that argument but, Your Honor, these issues -- these issues depend on a review of the transcript and a review of the pleadings that we have not had an opportunity to respond to.

And for that reason and a number of others that I will explain in a moment, we would ask the Court to do what Judge Onion, Retired Chief Justice of the Court of Criminal Appeals did in the Senator -- Kay Bailey Hutchinson case and that is defer ruling on the principle motions until after we've picked a jury and getting to the point we're about ready to have testimony.

And the reason for that is as follows, Your Honor, as I've said, my client has spent 14 years in prison for a crime he didn't commit. If the Court grants these motions now, we're looking at another two or three years minimum while the State appeals this to the Court of Appeals and the Court of Criminal

Appeals.

During the interim, that means another three years where my client has to remain in prison. It means another two or three years where the State has an opportunity to do what they've been doing for the last few months.

Your Honor, they have been -- the police once again are doing what they attempted to do back in 1982 and did so effectively and that is to intimidate witnesses. Witness after witness has told us that they have been surprised at their home or work by several police officers in uniform, that they have been taped without being asked permission, that the police have refused to leave their home even after they have been repeatedly asked to do so and going so for as actually having one police officer put his foot in the witness' door and not allow her to close the door.

THE COURT: When was that supposed to have happened?

MR. ATLAS: Your Honor, that

happened within the last two months.

MR. O'BRIAN: Most of those are recorded, Judge.

MR. ATLAS: Your Honor, what's recorded is -- they made these witnesses go down to the police station and recorded statements from them but the ones I'm talking about happened at their home before they ever got down to be recorded. And, in fact, some of these witnesses refused to go and that's why the police kept coming back and coming back and why they refused to leave.

They were threatened with subpoena. Witnesses were yelled at. Police said such things as -- shown a copy of their testimony in a habeas hearing and said in a loud voice, "Why did you say the Houston Police Department made you say this?" Accused Aldape of other crimes, threatened that Aldape could kill again if he was released.

THE COURT: Well, so far that hasn't been substantiated in anything that I have. Wouldn't that be something for you

to bring in some testimony on?

MR. ATLAS: Your Honor, I have affidavits about all of this and I intend to introduce that into evidence here today.

MR. O'BRIAN: Well, then I object, Judge. We should bring those witnesses in and they'll be subject to cross-examination.

THE COURT: Well, before we do that, let's hear the rest of your argument.

MR. ATLAS: Yes, Your Honor. The point of all of this and the final point about this is witnesses were -- were told that people had said that they had been -- they accepted money for favorable testimony, which is an absolute untruth and they were specifically and explicitly discouraged from contacting me to let me know about these contacts.

The point of this is that if the prosecution has another two or three years to try to work on these witnesses every passing month and every --

THE COURT: Let me just say

something. This case has gone on already for 14 years.

MR. ATLAS: Yes, sir.

THE COURT: It is not my -- it is not my intention to let it drag on for any longer than is necessary. So, you don't need to address that.

I'm well aware that there could be delays in this case if it's -- if it's not pushed to a conclusion. Now, what else do you have to say?

MR. ATLAS: Yes, Your Honor. So, the final point of that is if we could pick our jury and then have the Court rule, we would be able to expedite this and put this case in a posture where we didn't have a two-or-three-year delay. Because the longer we've waited, the harder it has been to find witnesses and the more opportunity the police have had to engage in the kind of conduct I've just described.

Now -- so, I would ask the Court for an opportunity to respond to the pleadings that have been filed this

morning for -- by the District Attorney and to go forward with picking a jury and then to argue these substantive motions, the motion to dismiss, the motion to suppress and we would entertain, if the Court would agree to this, to withdraw our application for habeas corpus and resubmit it as a plea in bar so that it could be ruled on before the admission of any testimony in the trial.

So, before I continue with my argument, I'd like to at least plead with the Court to have an opportunity to respond and to have these issues be resolved after a jury has been selected as they were in the Senator Hutchinson case before we go forward with the rest of the trial.

If the Court agrees to that, I will defer the arguments on the substantive motions until such time as we've had an opportunity to respond and the jury has been impaneled.

THE COURT: I have your copies of your motions and you had also provided me

with courtesy copies. I see that the two replies filed by the State this morning were filed at 10 minutes after 9:00 and I have not had a chance to see them. I only found them here when I came up on the bench.

At this time what we're going to do is take a 15-minute break. I'll review the State's pleadings and then we will go forward. We'll start again at about 10 after 11:00. Court's in recess until then.

(Short recess.)

THE COURT: Be seated, please. All right. Mr. Atlas, are you finished with your evidence and argument at the moment?

MR. ATLAS: Yes, Your Honor.

THE COURT: Did you have anything else?

MR. ATLAS: Well, I'm finished with the factual background. I'm now prepared to proceed to the argument on the motion

to suppress or handle it any other way the Court prefers.

THE COURT: Let me hear first from the State. I'm not going to hear something I don't think on the motion to suppress at this time.

Mr. O'Brian, do you have anything?

MR. O'BRIAN: I was going to call Shirley Cornelius who was at that hearing.

THE COURT: For what purpose?

MR. O'BRIAN: For the purpose of establishing that, in fact, we did not have a complete hearing. I think that needs to be part of this record. What facts we believe this Judge -- this Federal Judge did not hear that the fact finder would be entitled to hear in deciding whether or not there was police or prosecutorial misconduct.

THE COURT: In what respect?

MR. O'BRIAN: In deciding whether or not there was police or prosecutorial misconduct, that evidence that was not heard.

THE COURT: Well, we've got over 1,000 pages of testimony --

MR. O'BRIAN: I quite understand.

THE COURT: From the hearing of the Federal Court for the Southern District. Do we need more evidence?

MR. O'BRIAN: I believe so, Judge, and I'll tell you why. I have counted up 22 witnesses that did not testify in that hearing that had something to do with either taking witness statements, handling a lineup, talking to witnesses, allegedly intimidating those witnesses, refuting the allegations as to the trace metal test that did not testify, witnesses that actually identified the Defendant then, now and would have at that writ hearing and I think that what we saw here was a one-sided show culminating, in fact, the persecution of two prosecutors by a Federal Judge and I think, Judge, this record needs to be complete as to that. We did not get the hearing we were entitled to.

THE COURT: I understand, Mr. Casey,

but -- and you may have your opinions as to what the Federal Court did and whether it suits you or not but that's your opinion.

When a case comes down, one has to pay attention to it, doesn't one?

MR. O'BRIAN: Judge, I am prepared to put a witness on the stand and make a record of why my opinion is supported this way.

THE COURT: Well, here's what I'm thinking, since you're both asking me for a trial, you and the pleadings that you -- that you have filed this morning are asking for a trial in this matter. Mr. Atlas is asking for a trial. So, I'm going to give you a trial. And if there's anything else you want to put forward, you can do that at the trial.

Will that be a suitable remedy?

MR. O'BRIAN: Yes and no. I'll tell you why. If, in fact, you go along with the Defense's position that they are allowed to have this motion in advance until we select a jury and then have a

plea in bar that would then decide these issues, the State would be foreclosed from calling any witnesses and have no right of appeal. Now, that's exactly what they're trying to do, is to ward off our right of appeal. I don't suggest for a moment, Judge, that you should grant their motion to suppress our witnesses in the first place. Should you do that, though, we would have a right to appeal because we would have no further case. We would have no evidence.

Now, if, in fact, we select a jury, jeopardy attaches and then you then rule that we have no witnesses. We are foreclosed from taking any action that, in fact, would prosecute somebody for the murder of two men and we strenuously object to that procedure.

If, in fact -- if, in fact, there is to be a ruling on this motion, I think it needs to be now or it needs to be in advance of a selection of any jury and that's what we strenuously urge the Court to do.

THE COURT: Here's what I'm going to allow you to do if you want. You can put on Ms. Cornelius and put whatever you want on the record and after I've heard that, then I will tell you what I'm going to do. So, if you want, call Ms. Cornelius.

MR. O'BRIAN: Thank you, Judge. State calls Shirley Cornelius.

(Whereupon, the witness was sworn.)

THE COURT: Go ahead.

SHIRLEY CORNELIUS,

having been called as a witness by the State, and after having been sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY O'BRIAN:

Q Could you state your name, please?

A Shirley Cornelius.

Q Ma'am, how are you employed?

A I'm an Assistant District Attorney here in Harris County.
Q For how long?
A Thirteen years.
Q How are you assigned?
A I'm currently in the post-conviction writ section of the appellate division of the office.
Q All right. Were you so assigned back in November of 1993?
A Yes, I was.
Q Did you have an occasion to participate at first as an observer of a writ of habeas corpus Ricardo Aldape Guerra versus James A. Collins, et al?
A In Federal Court.
Q Yes, ma'am.
A Yes.
Q At some point, ma'am, did you, in fact, actively participate?
A Yes.
Q All right. At the close of the evidence in that case, can you tell us was there anything further the Respondent wanted to put forth before that Judge?

A Well, there were a number of things, specifically we tried to put on witnesses who were either police officers or employees at the Houston Police Department who participated in taking the witness statements from the witnesses who testified at the habeas hearing.

Q And what was the purpose -- what was the rational of you wanting to put those witnesses on?

A I have to explain a little bit. These witnesses at the hearing testified that they had been told to identify Aldape Guerra as the shooter instead of Carrasco. They had been told that either by police officers or by another witness, Hilma Galvan.

They also testified that the night of the shooting when they gave their statements, they were either not allowed to read the statements back to themselves before signing them or because the statements were in English and they only spoke Spanish and they couldn't read them and the police would not read them back in Spanish to them.

In fact, they testified that they had to sign their names to the statements

without having read the statements before. And these witnesses never explained in their testimony at the Federal hearing if they had never read those statements, how their testimony at trial in 1983 (sic) was so close to what the statement said. They were nearly verbatim and we wanted to put the officers on who had witnessed the statements, who had notarized the statements, witnesses and notaries who attended the statements to testify either from their personal recollections concerning the taking of that witness statement or if they didn't have a personal recollection after 10 or 12 years, to testify as to their normal course in conduct in taking statements and what would happen if a deviation occurred and how such deviation would showup on the statement or in the documentation.

Q Were there, in fact, witnesses that testified that something was taken from their statement or something was added to their statement that certainly the testimony of the police officers who took the statements, witnesses' statements, would have been able to clarify?

A Yes.
Q Now, let me ask you this. There was also testimony in the Federal hearing concerning the conduct of a lineup. Do you recall that?
A Yes.
Q And where -- do you recall the testimony of a retired Houston police officer by the name of Montero?
A Yes.
Q In addition to Montero, unlike what is characterized in the testimony, were there other police officers that, in fact, were at that lineup, though you couldn't tell that from the hearings?
A Yes, there were. And it wasn't -- I believe it was -- Sergeant Bloyd was one of them and I can't -- maybe Lieutenant Cain was present. I'm not real sure.
Q Do you remember a Detective Roberts?
A Roberts. It was Roberts.
Q Were there two -- further two police officers that did not testify that worked the back, one being Hispanic?
A Yes, there was, and I can't recall their names right now.

Q Were there, in fact, a number of detectives that worked during the course of the investigation that were Hispanic and spoke Spanish?
A Yes. The Chicano squad was brought out on this case to take statements and to help with the witnesses.
Q As a result of any language barriers that might exist with the witnesses?
A Exactly.
Q Did any of the Chicano squad testify in the Federal hearing?
A I believe Montero was part of the Chicano squad.
Q Okay. Did anybody else testify besides Montero?
A Not that I recall.
Q Do you remember that Montero said he didn't take any of their statements?
A Yes.
Q But there were other Chicano squad members that, in fact, did; is that true?
A Yes.
Q Did any of them testify in this hearing other than Montero who supervised the squad?

A No.
Q Let me ask you this. Did Peggy Howell who notarized the statement of Jose Armijo testify?
A No, she did not.
Q Did Detective Dobianski who took the statement of Jose Armijo testify?
A No.
Q Did Detective Mosqueda who took the statement of Brown testify?
A No.
Q Did Detective Pierce who notarized the statement of Brown testify?
A No.
Q Did Detective Carl Kent testify who took the second statement of Brown after the hearing?
A No.
Q Did Detective Williamson who took the statement of Patricia Diaz testify?
A No, he did not.
Q Did Lieutenant Cain who worked the back of the lineup and notarized the statement of Diaz testify?
A No.
Q Did Detective D. D. Shirley who took the

statement of Elvira Flores testify?
A No.
Q Did Bobby Beck who notarized the statement of Flores testify?
A No.
Q Did Officer P. L. Trumble who took the statement of Hilma Galvan testify?
A No.
Q Did Detective Bruce Frank who notarized that statement testify?
A No, he did not.
Q Did Detective R. D. Anderson who took the statement of Herlinda Garcia testify?
A No.
Q Did Detective Gene Yanchek who took the statement -- I don't remember which one he took. He took another statement. Did he testify?
A No, he did not.
Q Did Detective J. K. Newman who took the statement of Trinadad Medina testify?
A No.
Q Did Detective Roberts who worked the front of the lineup with Jim Montero testify?
A No.

Q Did Detective Bloyd who also worked the front of the lineup with Montero testify?
A No.
Q Did Detective Hernandez who worked the back of the lineup testify?
A U. P. Hernandez, correct?
Q U. P. Hernandez.
A No, he did not.
Q Did Amy Heiter who I think is now Amy Harelson, did she testify?
A No, she did not testify.
Q What's the significance of Amy Harelson or Amy Heiter?
A Her name was Amy Heiter at the time of the trial and I believe also at the hearing in '93.

The significance of that was Floyd McDonald basically called her incompetent on the stand and Floyd McDonald was Amy Heiter's supervisor at the time that Amy Heiter did the testing in 1982 I believe and then testified in 1993.

Q Weren't there, in fact, two witnesses that had something to do with this trace metal test that testified in the trial itself, another

woman -- another chemist or if you don't remember, that's fine?

A I don't really recall. In the trial?

Q Yes.

A I do not recall at the trial.

Q Do you recall a great deal of testimony concerning -- concerning the conduct of Hilma Galvan on the evening of the murder?

A Yes.

Q Did Hilma Galvan call -- did Hilma Galvan testify?

A At the hearing, no.

Q Would she have been able to clarify her conduct?

A Yes.

Q Did Jose Armijo testify?

A No, he did not.

Q He was the ten-year-old boy who was, in fact, with his father when his father was murdered?

A That's correct.

Q Did Elvira Flores testify?

A She did not.

Q Are all three of those persons who positively identified -- positively identified the Defendant as the shooter at the trial?

A Are you asking did they identify --
Q Yes?
A Yes, they did.
Q And did Elvira Flores and Hilma Galvan positively identify the Defendant in a lineup?
A In the showup, yes. And actually Jose Armijo did identify Aldape Guerra in the showup but did not inform the police officers at that time.
Q Were there, in fact, other police officers -- I don't even know their names -- but other police officers that went to the scene on the occasion where Dick Bax and Bob Moen went out to the scene with witnesses?
A The re-enactment a week later?
Q Yes.
A Yes.
Q And even those officers testified as to the conduct of the District Attorneys or the conduct of the police on that occasion in regards to orchestrating what these witnesses would say?
A No.
Q Based upon your 13 years as a prosecutor, is it uncommon to go to the scene of a crime?

A It is not uncommon at all.
Q Is it uncommon to ask witnesses what they saw from the vantage point they saw them?
A Not if you want to keep your job as a prosecutor. You better be prepared.

MR. O'BRIAN: I don't have anything else, Judge. I pass the witness.
THE COURT: Mr. Atlas, cross.
MR. ATLAS: Just a few, Your Honor.

CROSS EXAMINATION

BY MR. ATLAS:

Q Ms. Cornelius, when you say you actually came to a point where you participated some in the habeas hearing, you actually questioned witnesses during the habeas hearing on November 19?
A That's correct, two or three of them.
Q You put some on and you cross examined some others, did you not?
A Yes. I either directed or crossed two or three of them.
Q Okay. And, in fact, both Roe Wilson and

Carolyn Sckerl actually sat in at different times during the habeas hearing and actively participated in the State's trial of the habeas hearing, did they not?

A Ms. Sckerl did but I don't believe Ms. Wilson did. She sat in, yes, but she did not actively participate in the examination of any witnesses, if I'm not mistaken.

Q But she was actually sitting in the courtroom at the counsel table during most, if not all, of the evidentiary hearing, right?

A No. Only for a day or possibly two days.

Q But Ms. Sckerl did actively participate in questioning some witnesses and cross examining the others, did she not?

A Yes, the last -- I believe the last two days.

Q Okay. Now, before the habeas hearing in Federal Court in November 1993, you actually had seen the habeas corpus petition that was filed by the Petitioner in this case in February 1993, correct?

A I had not, no.

Q But was it available to you had you chosen to see it? Nobody kept you from --

A Are you referring to the -- are you referring

to the State writ or the Federal writ?

Q I'm talking about the Federal writ. I'm sorry.

A The Federal writ. I suppose I could have gone to the Federal courthouse and requested a copy of it, yes.

Q Nobody kept you from doing that or from asking for a copy from the Attorney General's office or anybody else, right?

A No.

Q Okay. But whatever is in that Federal writ, you're simply -- at the time of the evidentiary hearing in November 1993, you had not reviewed it before that; is that correct?

A Mr. Atlas, that's correct. Just so the Judge understands, we do not represent the State of Texas in Federal Court.

We actually went to the hearing as page turners. We were going to simply help the -- assist the Attorney General find certain testimony at trial in the record and all of that. We were not -- we were not actually going there to represent the State of Texas as litigants.

Q But during the course of the evidentiary

hearing in Federal Court, you ultimately did become lawyers for the State, did you not?

A Yes, we did.

Q And by the time the evidentiary hearing was over, you and Ms. Sckerl had both actively participated on behalf of the State in presenting the State's side of the Federal evidentiary hearing issues, right?

A Yes, in some measure.

Q Well, by some measure, you put on some witnesses and cross examined others and Ms. Sckerl did the same, right?

A Exactly.

Q Now, did you review the witness list that was submitted by the Petitioner, Ricardo Aldape Guerra, before the evidentiary hearing began in 1993?

A I don't believe so.

Q Was there anything that prevented you from reviewing such a list had you chosen to do so?

A I suppose not.

Q Ms. Cornelius, some time before November 1993 when the Federal evidentiary hearing began, you had reviewed the Petitioner's application for a writ of habeas corpus that was filed in

the State District Court, correct?

A I personally had not before the hearing started. I was loosely familiar with some of the claims but I had not actually reviewed the petition.

Q But someone in the District Attorney's office where you work had a copy of the State -- the application for writ of habeas corpus filed by my client and it was available to you had you chosen to ask for it, right?

A Yes.

Q Okay. And you were generally familiar before the Federal evidentiary hearing began that the application for writ of habeas corpus in the State Court was presumably the one that was filed in Federal Court had alleged that the lineup was conducted improperly. You knew that in advance, didn't you?

A I would not presume that what was filed in Federal Court would track in State Court -- would track what was necessarily filed in State Court, no.

Q But you knew before the Federal evidentiary hearing started that there were allegations made by the Petitioner in Federal Court that

the lineup had been conducted improperly; is that right?

A Mr. Atlas, I really -- I'm not trying to be difficult. I really can't tell you what I knew or presumed before or what I knew or presumed after it had started.

(Whereupon, Defendant's Exhibit Nos. 2 and 3 were marked for identification.)

MR. ATLAS: Your Honor, at this time I'd like to introduce into evidence the writ filed in Federal District Court by Ricardo Aldape Guerra in the Federal District Court proceeding that we've been talking about here today as well as the State's response, which we have marked as Defendant's Exhibits 2 and 3.

MR. O'BRIAN: I have no objection.

THE COURT: Defendant's Exhibits 2 and 3 are admitted without objection.

(Whereupon, Defendant's Exhibit Nos. 2 and 3 were admitted into evidence.)

(Whereupon, Defendant's Exhibit Nos. 4-A and 4-B were marked for identification.)

MR. ATLAS: Your Honor, at the same time I'd like to introduce into evidence the State's brief on appeal to the Fifth Circuit from the Federal District Court ruling of Judge Hoyt that we've been talking about in this case as well as the record excerpts that were filed along with that brief which have been marked as Defendant's Exhibits 4-A and 4-B.

MR. O'BRIAN: I have no objections, Judge.

THE COURT: Defendant's Exhibit 4-A and 4-B are admitted without objections.

(Whereupon, Defendant's Exhibit Nos. 4-A and 4-B were admitted into evidence.)

Q (By Mr. Atlas) Ms. Cornelius, you've been handling habeas matters for the District Attorney's office here in Harris County for a

number of years, have you not?

A Yes, I have.

Q Is it your understanding that under the law issues raised in Federal District Court in a habeas proceeding like the evidentiary hearing involved here have to generally be issues that were raised in the Federal application for writ of habeas corpus filed by the inmate in that same case?

A I think you said it backwards. They have to initially be raised in State Court before they can proceed to Federal Court. Is that what you're saying?

Q Well, let me go ahead and ask it that way then.

A Okay. That is generally correct.

Q It's also true that in general if you're going to put on evidence at an evidentiary hearing in Federal District Court in support of issues that you're making habeas application for, those issues have to have been raised first in the Federal habeas application, right?

A I see. Yes.

Q Okay. Now, have you ever seen before today the State's brief on appeal to the Fifth

Circuit from Judge Hoyt's ruling that is the subject of what we've been talking about today?

A The State's brief? Do you mean from the Attorney General's office?

Q Yes, the Attorney General's brief to the Fifth Circuit challenging -- challenging on appeal Judge Hoyt's ruling granting habeas relief to my client?

A I have seen it. I have not sat down and read through the entire document, no.

Q And do you know or do you recall having seen whether that brief raises the issue of the claim that your office is making today, which is that you didn't get a full and fair opportunity to present your side of the case in the Federal District Court proceeding?

A I don't recall. The brief is in evidence. The Judge can look at it. I truly don't recall.

Q Okay. You have seen, have you not, the order that Judge Hoyt entered I believe in early 1993 ordering an evidentiary hearing and describing the scope of the issues that will be tried at that hearing, correct?

A I read it at the time the order was entered, yes.

Q And do you recall it saying essentially that it would have an evidentiary hearing on the issues of whether the police and prosecutors had engaged in misconduct in connection with the arrest and investigation of the capital murder for which my client was ultimately tried and convicted?

A You know, Mr. Atlas, I've never read an order like that before and, yes, you're right. That is basically what it said.

Q I'm sorry, Ms. Cornelius. I was really just asking a yes or no question.

A Okay.

Q I was not asking you for your characterization of whether you ever seen an order like that before and I apologize if I gave you that impression.

A Okay.

MR. ATLAS: Your Honor, I'll pass the witness. Frankly, at this time I'd like to move to strike the witness' testimony because I don't see the

relevance of it.

MR. O'BRIAN: May I redirect. Judge?

THE COURT: That's denied. Go ahead.

REDIRECT EXAMINATION

BY MR. O'BRIAN:

Q Ms. Cornelius, is it -- whose burden is it to prove the allegations in a petition in a habeas corpus hearing?

A The movant which would be in this case Aldape Guerra.

Q And whose burden would it be to rebut the allegations?

A Well, we don't have a burden to rebut the allegations. If the allegations are proven, then the burden would shift to the State or the Respondent to rebut the proof.

Q Okay. Now, because you have a petition indicating generally allegations of misconduct, would you have any idea what these witnesses are going to say?

A Generally, no.

Q So, you can't gaze into some crystal ball and decide exactly what you're going to have to rebut, what the specifics of the allegations are, what one witness might say a policeman did to them?

A Not with any specificity, no.

Q So, would you be able to tell in advance who it was you would need to rebut a particular specified allegation?

A In some cases, you could. In some cases, you could not. In most cases, you're going to have to hear the witnesses' testimony, especially when -- when the allegations are very broad that "police officers did something," when the individuals are not named.

You have to hear the specifics in their testimony to know how you're going to deal with any rebuttal matters.

Q So, at the time it came to rebut these matters, you were denied the ability to do that?

A Yes, we were.

MR. O'BRIAN: That's all I have,

Judge.

MR. ATLAS: No further questions.

THE COURT: There's something that I'd like to clear up. We've heard today that the witnesses never explained how their testimony was so close to their statements but they were given -- there was cross-examination allowed, wasn't there?

MR. O'BRIAN: I'm sorry, Judge. I'm not following you.

THE COURT: We've heard today that these -- that the movant's witnesses never explained how their testimony at the hearing seemed to be so close to their statements, the statements they had given, correct?

MR. O'BRIAN: Yes, that's what she said.

THE COURT: Well, the State or the Attorney General had the chance to cross examine these people, didn't they?

THE WITNESS: Well, Your Honor, that's correct but I'm not going to make the movant's -- I'm not going to ask a

question of that witness who I think is lying and then have to live with some explanation they made off the top of their head.

It was their responsibility. They had the burden. So, it would have been their burden to explain how the statements could have been so consistent with the testimony. I wouldn't assume that burden for them.

THE COURT: Well, you seem to say -- I took it that you didn't think it was right that they never explained this and when you think that something isn't right, then isn't it incumbent upon you to clear that up?

THE WITNESS: No, sir. It's not an issue of it not being right. I think there was a gap in their burden of proof that they didn't fill with explaining how the statements that they say they never were able to read were so close to the testimony -- they were almost verbatim with the testimony.

There's simply a gap in their proof,

not that it wasn't right that they didn't explain it, just that I felt they hadn't made their burden of proof.

THE COURT: But apparently the Federal Court decided otherwise, as I understand it?

THE WITNESS: Well, that's correct and we disagree.

THE COURT: Yes. Well, I understand that when one litigates a case, there's a winner and a loser.

Now, I also -- we've heard today that, when you were questioned by Mr. Casey, there were many witnesses -- apparently 20 who did not testify. Were these witnesses subpoenaed?

MR. O'BRIAN: I think I can answer that although I wasn't there. We apparently made that attempt at that moment and were frustrated by that. Perhaps I can clarify that.

THE COURT: Yes.

REDIRECT EXAMINATION CONTINUED

BY MR. O'BRIAN:

Q Was there an attempt to, in fact, get eight particular witnesses?

A Yes.

Q What attempts were made to do that?

A I do not practice in Federal Court so I'm sure Mr. Atlas will understand this a lot better or Mr. Schneider but the witness list evidently goes through the Judge --

Q Anyway, what did you do --

A Well, we had to turn in the witness list.

Q What did you do on the record in regards to requesting from the Judge that we, in fact, needed to be permitted to bring in these witnesses?

A Mr. Zapalac explained to the Judge that we were submitting an amended witness list for subpoenas with the eight names on it.

Q For the purposes of rebuttal?

A For the purposes of rebuttal.

Q And what did the Judge do?

A Well, the Defense didn't say anything at the time --

MR. ATLAS: Your Honor, forgive me. Although this is not in front of a jury and I'm not clear to what extent it's evidentiary, obviously the best evidence of what happened at the trial is in the transcript itself which is in evidence. So, we would object --

THE COURT: I just have one question here. Normally -- we've all tried cases -- and normally, when you're going to try a case, you issue a subpoena list, don't you? And as Ms. Cornelius said, you have to be prepared. You issue a subpoena list.

Don't you issue a subpoena list with everybody that you think might possibly be necessary so that when the moment comes, you can rely upon that subpoena?

MR. O'BRIAN: That's certainly true if I have the burden and I have to go forward, Judge. That's not necessarily true, as you well know, in regards to the Defense.

THE COURT: But I haven't heard of a party waiting until rebuttal time and

then wanting to issue subpoenas for rebuttal.

Normally, when rebuttal witnesses are called, aren't they called immediately after the case in chief or the hearing, right?

MR. O'BRIAN: Sure, they are.

THE COURT: Well --

MR. O'BRIAN: But the position the Court took -- and it's in the records -- was, "We're not going to listen to these witnesses."

THE COURT: Yes.

MR. O'BRIAN: Regardless of whether they're on some list. "I'm not interested in these witnesses."

THE COURT: Well, you know, I'm not going to pass on what the Federal Court did but I suppose the Federal Court did what was appropriate in that case. I'm certainly not -- I can't look behind that.

MR. O'BRIAN: I'm not about to agree with you, Judge. I don't think he did something appropriate.

MR. ATLAS: Your Honor, may I ask Ms. Cornelius one additional question.

THE COURT: Yes. Go ahead.

RECROSS-EXAMINATION

BY MR. ATLAS:

Q Ms. Cornelius, this issue about not having been given a fair opportunity to present the State's case in the Federal District Court, was that issue ever raised in any way in the Fifth Circuit appeal from the Federal District Court's ruling? It wasn't, was it?

A I don't believe so. We did not handle this on the Federal side. If it's not in the brief, then it wasn't addressed.

MR. ATLAS: Thank you.

THE COURT: All right. Anything further?

MR. O'BRIAN: Other than arguments, Judge.

THE COURT: All right. Then you both rest and close on the hearing here?

MR. O'BRIAN: Yes, sir.

THE COURT: Are you ready for argument?

MR. O'BRIAN: Yes, sir.

THE COURT: All right. How much time do you want?

MR. ATLAS: Your Honor, on the argument on the motion to suppress, I can do in less than five minutes.

THE COURT: Well, it's your motion. You have the right to open and close.

MR. ATLAS: I'll close. Let me reserve --

THE COURT: You may step down. Thank you, Ms. Cornelius. Thanks so much.

MR. ATLAS: I'll be happy to defer to Mr. O'Brian and simply close after his argument.

THE COURT: Very well. Mr. O'Brian.

MR. O'BRIAN: Thank you, Judge. First of all, let me say this, Judge. I urge the Court to rule on this motion now. I do not want to be a party -- this office does not want to be a party to

selecting a jury and having jeopardy attach and then having some plea in bar granted so that we cannot go forward thereby obviating the State's right to appeal should you decide this issue against us.

Now, for these reasons, I think that you should not decide these issues against us. When we appealed to the Fifth Circuit the ruling of Judge Hoyt, we were appealing on technical grounds. Defendant then came in with this collateral estoppel motion in State Court after a Federal Judge and after the Fifth Circuit ordered a new trial. That Fifth Circuit Judge -- that panel -- that Judge over in the US District Court could have granted a plea in bar then but chose not to. I don't know why. He apparently found that there was some gigantic conspiracy involving the Houston Police Department and involving two well-respected prosecutors who are now members of the Defense community in this town but irregardless of that, that Judge

ordered that remedy.

Now, I think they are entitled to another hearing here. I think they are entitled to a hearing that is complete and full in regards to the suggestibility of any lineups, any identifications, any court identifications. We do that on a daily basis in this courthouse and I'll be glad to do that. But when we are litigating issues in Federal Court where there's some gigantic conspiracy to convict the wrong man involving honorable police officers and prosecutors and we are not then permitted to rebut that with the very actions they took in the investigation of this crime where two men's lives were, in fact, taken, I think that's wrong.

The principle of estoppel is this. When there is a fair and complete, exhausted analysis of the issue, then we shouldn't be permitted to relitigate.

We have not had, first of all, a fair or exhausted or complete hearing on the issue of the identifications, hearing

on the issue of the conduct of the police officers, hearing on the issue of the conduct of those prosecutors when they allegedly went out and made these witnesses say something, hearing on whether or not the prosecutors did something wrong when they put mannequins together so that it would better aid a jury's understanding in who did what, a hearing on whether or not the prosecutors made erroneous arguments, a hearing on whether or not the jury decided whatever issue it was they were going to decide based upon the conduct of the -- what happened in that Federal Court -- and I'm going to be frank -- is that these people were assassinated. Their character was assassinated.

I've never seen anything like what happened to Dick Bax in the course of that trial. I've never seen anybody attack somebody personally, impute their reputation, call them -- suborning perjury in my entire life and I know Dick Bax better than that and I know Bob Moen

better than that. It didn't happen.

We are -- we should be permitted to have a hearing on the whole issue of whether or not these witnesses when they came into court and testified that Aldape Guerra is the shooter did that because of something they saw that night and that's always been the standard -- "Did you see something that night and are you testifying today as a result of something you saw that night, not something the police officers did, not something the prosecutors did, not something you saw at the police station?" "Are you testifying truthfully today as a result of what you saw in 1982 when you are telling a jury or a Judge, 'I saw that man shoot a policeman. I saw that man shoot an Hispanic man?" That's what happened in here in the State Court.

I think you ought to rule on it and I think you ought to overrule it and I think you ought to have an intermediary evidentiary hearing on the issue of whether or not there was police

misconduct to the extent that these witnesses cannot testify they saw Aldape Guerra shoot two people to death. The memory of Officer Harris and Jose Armijo demand it. Thank you, Judge.

THE COURT: Thank you, Mr. O'Brian.

MR. ATLAS: Your Honor, in our motion to suppress, we ask the Court to suppress four different kinds of evidence, the testimony from the original trial in 1982 stating or suggesting that my client was either the shooter or a pointer in the direction of Officer Harris or Mr. Armijo. Second, the witnesses' statements that were taken incorrectly and unreliably according to the Federal Court in connection with the investigation of those shooting deaths. Third, testimony at any retrial here to the same effect that my client was either the shooter or the pointer or indicating same. And finally, any testimony at a retrial concerning any prior confrontations such as the lineup or others where they stated or came of the

view that my client was the shooter or the pointer at or in the direction of Mr. Armijo or Officer Harris.

Now, the importance of this evidence is clear and the reason that Mr. O'Brian is pressing it so strongly is clear and that is they concede there is no physical evidence against my client. It is all this eyewitness testimony. And so the identification testimony is crucial to this case. Without that evidence, they have no case.

The findings by the Federal District Court, I've already been through and discussed at some length. I won't repeat those now, Your Honor, except to say that the argument that the Federal Judge ordered a new trial both proves too much and too little. The Federal Judge said, "We'll try him or release him but I found this evidence tainted." And if it was tainted in 1982, it's still tainted in 1996.

So, the notion that the Federal Judge ordered that they have a retrial,

he allowed it but he didn't allow it with the use of the same tainted evidence. And if the same tainted evidence is used again, we'll have the same problem and my client will have to spend another ten years in prison attempting to vindicate his rights and end up ultimately back in Federal Court with the same ruling. That's why the principle of collateral estoppel allows the State or any other party one fair opportunity to prove the issue.

Now, they've raised for the first time today the argument that the Federal Court hearing was somehow unfair. Even though as the habeas petition will demonstrate, we made it abundantly clear that the arguments we were raising were precisely the arguments that the Federal Court found were valid, that the police intimidated witnesses at the scene, that the police allowed my client to be walked through wearing handcuffs and paper sacks and allowed the witnesses in the hallway to see him so that they could focus on

him as the suspect, one witness was intimidated and browbeat others to identify him, that the lineup allowed all the witnesses to identify him together so that each other -- each one could hear the other picking him out of the lineup for whatever purpose and allowed one witness to focus everybody on him, that the re-enactment was held again for the purpose of allowing witnesses to conform their stories, and that the mannequin and the pictures were used to demand that the witnesses select Aldape as the shooter whether they believed it to be true or not and then the prosecution seems to want to overlook the fact that they had our witness list and our witness list identified the witnesses who were going to testify.

Having put the issue of the lineup in question, they then raised in the Federal District Court at the eleventh hour the notion of supplementing their witness list and the Court gave them the opportunity to stipulate.

At the very end of the transcript, as we can point out if the Court wishes in the supplemental filing, the Court asked if the parties had reached a stipulation. We said we had. Yet apparently, it's not in the record and they made no effort to reoffer those witnesses again after that.

They mischaracterized in a number of ways or not fairly characterized in a number of ways Judge Hoyt's actions during that trial. The transcript will speak for itself and I won't waste the Court's time dealing with that now, except to say that not one of those issues about these 22 witnesses -- and they didn't ask for 22. They asked for eight at the habeas hearing -- not one time in their brief to the Fifth Circuit on appeal did they raise the issue of being denied a fair hearing. That was the time to raise that issue. They didn't do it. They waived it. For them to do it now suggests they've really run out of arguments.

The collateral estoppel doctrine allows any party, in this case the State, one fair opportunity to prove or disprove or to rebut when somebody has met their burden. We met that burden.

The reason for their collateral estoppel principle is to deny the State or any party the opportunity for a trial run because if you let them have a trial run in the Federal habeas court, then they can improve their posture and presumably make a better offer or at least try to correct whatever errors or inadequacies they had the first time. They had that one opportunity to do it.

For them to suggest they didn't have a fair opportunity is incorrect. They never raised that issue before. They filed their pleadings. They've had their chance. They waived it. My client's entitled to rely on it. He's proven it and we ask this Court to rule that this evidence ought to be suppressed because they had their chance in court.

They somehow claim that a Federal

Court's ruling in a habeas corpus proceeding is not binding on the State Court, not even persuasive on the State Court.

On that theory, Your Honor, you can take the Federal Court's ruling here that my client was denied a fair trial and he ordered that he ought to be retried or released, then the State could say, "Let's ignore that. We'll just execute." That logic simply makes no sense.

The collateral estoppel requires the same parties, the same issues, at least as tough of burden. We have demonstrated all of that. They had their fair hearing and we'd ask the Court to suppress all of that evidence.

THE COURT: Thank you, Mr. Atlas. The Federal Court having vacated the judgement of conviction, the same being upheld by the Fifth Circuit, both of you asking for trial, although for different rulings on the motions, naturally, I take the motions under advisement. I will not

rule upon them now and I'm setting this case for trial. When can you be ready for trial?

MR. SCHNEIDER: We're set December 2, Your Honor.

THE COURT: December 2?

MR. SCHNEIDER: Yes, sir.

THE COURT: Very well then. December 2 for trial. This hearing is adjourned.

(Whereupon, the following proceedings were concluded.)

THE STATE OF TEXAS :

COUNTY OF HARRIS :

I SHERRI L. JOHNSON, Deputy Official Court Reporter for the 248th District Court of Harris County, Texas, do hereby certify that the foregoing pages of typewritten material contain a true and correct transcript of all evidence adduced and admitted at the hearing in the case shown in the caption hereof; that I was present in open court and reported said testimony in shorthand, and that later I transcribed same into typewriting.

IN TESTIMONY WHEREOF, witness my official signature on this the 22nd day of October, 1996.

SHERRI L. JOHNSON
Deputy Official Court Reporter
248th District Court
Harris County, Texas

Certification No.: 2938
Expiration Date : 12-31-97

CC: Team
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O - F. w/ 10/18/96
Transcript

MEMORANDUM

January 6, 1997

TO: File

FROM: Scott J. Atlas

RE: *Aldape* - Highlights of 10/18/96 Hearing

A. MOTION TO TAKE JUDICIAL NOTICE

1. The D.A. agrees to our proposed Order to take judicial notice of all prior proceedings, hearing transcripts, and exhibits in federal court (5-7). I agree that he is not concurring in the findings, only that the federal court made those findings and that the testimony was given as is contained in the transcript. (6-7). The proceedings and exhibits are marked as Exhibits 1-A through G. (7-8).

B. MOTION TO SUPPRESS

1. I give a factual overview of the findings of the federal habeas trial court. (9-40). I respond to the State's written response to the Motion to Suppress, particularly the argument that they did not receive a full and fair hearing in federal court. (41-42). I then ask that the Court defer ruling on our principal motions until after we have picked a jury. (42-47).

2. The D.A. argues about why the State did not receive a fair hearing in federal court. (50). He then argues against deferring ruling on the motions until after the jury has been selected. (51-52).

3. Shirley Cornelius testifies on direct. (50-64). She describes police officers who had either witnessed or notarized the statements of various witnesses and who could testify either *from personal recollection* or their normal course of conduct about what occurred. (56). There were also police officers who could have testified about the lineup. (57). Certain members of the Chicano squad who spoke Spanish participated in taking the statements. (58). The D.A. then asks her whether each of the people who either notarized statements, witnessed them, or worked during the lineup testified. (59-61). He also asked whether Amy Heeter, Hilma Galvan, Jose Armijo, Jr., and Vera Flores testified. (61-63). There were also police officers present during the reenactment. (63-64). I cross-examined her (64-73), in which she admitted that she and Kari Sckerl questioned witnesses during the habeas hearing (64-65), that she had not seen the habeas petition before the hearing began (65-66), that she and Kari originally were intending to be only page turners but ultimately became lawyers for the State (66-67), and that she had not reviewed the witness lists before the

evidentiary hearing began even though people in the D.A.'s office had a copy of the federal habeas petition beforehand. (67-69). I file Exhibits 2 and 3, which are our federal habeas petition and the State's response (69-70), and Exhibits 4A and 4B, the State's brief on appeal to the Fifth Circuit and the record excerpts filed with that brief. (70). She had seen the State's brief in the Fifth Circuit previously, but had never read it entirely, so she does not know whether it had raised the full and fair opportunity issue previously. (71-72). She confirms having read, before the habeas hearing began, Judge Hoyt's Order describing the scope of the issues to be tried at the hearing, which was whether the police and prosecutors had engaged in misconduct. (72-73). The D.A. then re-directs. (74-76). Judge Voigt asks a number of questions (76-78), confirming that the State had an opportunity to cross-examine the defense witnesses who testified at the habeas hearing. The D.A. asks additional questions (79-82), where she explains how Zapalac asked Judge Hoyt for permission to submit an amended witness list to add eight witnesses for rebuttal. (79). I ask one additional question, where she concedes that as far as she knows, the inability to supplement the witness list was not raised in the federal habeas appeal. (82).

4. The D.A. argues why the Court should not wait to rule on the Motion to Suppress (83-84) and why the Court should deny collateral estoppel effect to Judge Hoyt's ruling for lack of a full and fair opportunity to litigate the issues. (84-87). He requests an evidentiary hearing on whether there was police misconduct. (87-88).

5. I describe the substance of the evidence that we want suppressed and why it is important and should be suppressed. (88-90). I respond to the argument that the State was deprived of a full and fair opportunity in the federal habeas hearing. (90-94).

6. Judge Voigt takes the matter under advisement and sets the case for trial on December 2. (94-95).

SJA

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Ex Parte RICARDO ALDAPE GUERRA, Applicant.	CAUSE NO._____ IN THE 248TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

STATE OF TEXAS v. RICARDO ALDAPE GUERRA	CAUSE NO. 359805 IN THE 248TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, T E X A S

AFFIDAVIT OF DAVID MICHAEL GIPS

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared David Michael Gips, known to me to be the person whose name is subscribed below, who did on oath depose and say:

1. My name is David Michael Gips. I am 18 years of age and am not a party to either of the captioned actions. I have personal knowledge of the facts set forth herein.

2. I am employed as a bicycle messenger by Houston Express, a messenger delivery service. As a part of my job, I routinely make deliveries on behalf of Vinson & Elkins, L.L.P. My employee number is # 263.

3. On Tuesday, October 8, 1996, at approximately 4:55 p.m., I made a rush delivery on behalf of Vinson & Elkins L.L.P. to a Mr. Casey O'Brien at the Harris County District Attorney's office, 7th Floor, 201 Fannin, Houston TX.

4. I was directed to Mr. O'Brien's office upon my arrival at the Harris County District Attorney's office and Mr. O'Brien identified himself to me. Mr. O'Brien is a white male of medium height and weight, and balding. Mr. O'Brien accepted the delivery from me personally, which was contained in a white banker's box which was partially filled. I had received that same box personally from the hand of Mr. Scott Atlas. Because I did not have a work order with me, I did not obtain Mr. O'Brien's signature on any receipt.

5. Further affiant sayeth not.

David Gips

DAVID MICHAEL GIPS

Sworn to before me and subscribed in my presence this 11th day of October, 1996.

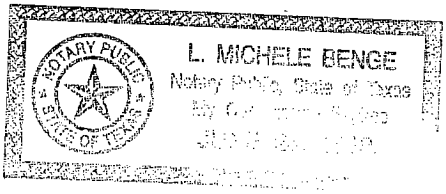
L. Michele Benge

Notary Public - State of Texas

Notary's Name Printed:

L. Michele Benge

My Commission Expires: 6/29/99



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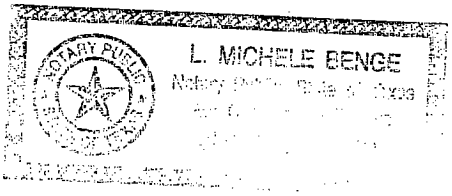

Ex Parte RICARDO ALDAPE GUERRA, Applicant.	CAUSE NO._____ IN THE 248TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS
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2. I am employed as a bicycle messenger by Houston Express, a messenger delivery service. As a part of my job, I routinely make deliveries on behalf of Vinson & Elkins, L.L.P. My employee number is # 263.

3. On Tuesday, October 8, 1996, at approximately 4:55 p.m., I made a rush delivery on behalf of Vinson & Elkins L.L.P. to a Mr. Casey O'Brien at the Harris County District Attorney's office, 7th Floor, 201 Fannin, Houston TX.

4. I was directed to Mr. O'Brien's office upon my arrival at the Harris County District Attorney's office and Mr. O'Brien identified himself to me. Mr. O'Brien is a white male of medium height and weight, and balding. Mr. O'Brien accepted the delivery from me personally, which was contained in a white banker's box which was partially filled. I had received that same box personally from the hand of Mr. Scott Atlas. Because I did not have a work order with me, I did not obtain Mr. O'Brien's signature on any receipt.

5. Further affiant sayeth not.

David Gips

DAVID MICHAEL GIPS

Sworn to before me and subscribed in my presence this 11th day of October, 1996.

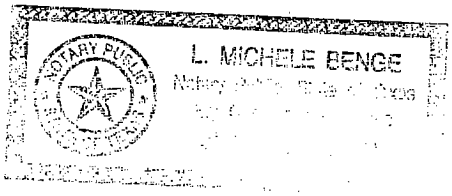
L. Michele Benge

Notary Public - State of Texas

Notary's Name Printed:

L. Michele Benge

My Commission Expires: 6/29/99



F – All
1cy-f-A2b
1cy-f-All pldg (w/ bill)

Vinson & Elkins

ATTORNEYS AT LAW

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WRITER'S FAX
(713) 615-5399

October 10, 1996

Ms. Cherie Palermo
Staff Attorneys Office
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* (*aff'd* July 30, 1996)

Dear Cherie:

Per your request, attached you will find a copy of Form CJA 30 with my original signature. I appreciate your assistance in this matter.

Very truly yours,

Scott

Scott J. Atlas

Enclosure
VEHOU07:25101.1

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—660-.22

DEATH PENALTY PROCEEDINGS: APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

CJA 30 (3/94) D 21990

1 JURISDICTION	2a. DISTRICT COURT DOCKET NO.	2b. COURT OF APPEALS DOCKET NO.	3. FOR (DISTRICT/CIRCUIT)
☐ DISTRICT COURT 2 ☒ COURT OF APPEALS 3	CA 93 290	95-20443	Fifth Circuit

4. LOC. CODE	5. CHARGE/OFFENSE (U.S. or other code citation)	6. CASE CODE
LAUNO	28 USC 2254	☒ D-1 ☐ D-2 ☐ D-3 ☐ D-4

7. IN THE CASE OF: GUERRA vs JOHNSON, Director TDCJ

8. PERSON REPRESENTED (Last Name, First Name, Middle Initial): RICARDO A. GUERRA

9. PERSON REPRESENTED (Status): 1 ☐ DEFENDANT 2 ☐ HABEAS PETITIONER 3 ☐ APPELLANT 4 ☒ APPELLEE 5 ☐ OTHER

10. COURT ORDER

O ☒ Appointing Counsel C ☐ Co-Counsel P ☐ Subs. for Panel Atty. F ☐ Subs. for Federal Public or Community Defender R ☐ Subs for Retained Atty.

Name of Prior Attorney: _____ Appt. Date _____ Voucher No. _____

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case.

b) The attorney named in block 11 is appointed to serve as: ☒ Lead Counsel ☐ Co-Counsel

Name of Co-Counsel: _____

Appointment Date: _____ Voucher No.: _____

c) If you represented the defendant or petitioner in any prior proceeding, attach a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel).

☐ d) Due to the expected length of this case and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, interim payments of compensation are approved pursuant to the attached order.

Sig. of Presiding Judicial Officer or by Order of Court (Clerk/Deputy)

6/12/95
Date of Order

Nunc Pro Tunc Date

11. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS

Scott J. Atlas
1001 Fannin - Ste. 2300
Houston, Texas 77002

12. WORK PHONE: 713 758-2024

13A. Does the attorney have the preexisting agreement (see instructions) with a corporation, including a professional corporation? ☐ Yes ☒ No

13B. SOCIAL SECURITY NO. (Only provide per instructions)

13C. EMPLOYER I.D. NO. (only provide per instructions)

13D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions)

Vinson & Elkins
1001 Fannin, Ste. 2300
Houston, TX 77002

U.S. COURT OF APPEALS
FILED
JUN 12 1995
CHARLES R. FULBRUGE III
CLERK

CLAIM FOR SERVICES OR EXPENSES

14. STAGE OF PROCEEDING

Check the box which corresponds to the stage of the proceeding during which the work claimed at item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. Submit a separate voucher for each stage of the proceeding.

CAPITAL PROSECUTION
a ☐ Pre-Trial
b ☐ Trial
c ☐ Sentencing
d ☐ Other Post Trial
e ☐ Appeal
f ☐ Petition for Supreme Court Writ of Certiorari

HABEAS CORPUS
g ☐ Habeas Petition
h ☐ Evidentiary Hearing
i ☐ Dispositive Motions
j ☒ Appeal
k ☐ Petition for Supreme Court Writ of Certiorari

OTHER PROCEEDINGS
l ☐ Stay of Execution
m ☐ Appeal of Denial of Stay
n ☐ Petition for Writ of Certiorari to Supreme Court Regarding Denial of Stay
o ☐ Other (Please attach description of Proceeding)

15. HOURS, BY CATEGORY

Indicate the number of hours expended for the following categories of work performed during the stage of proceedings at item 14:

On a separate sheet, provide a detailed description of the services performed, including the amounts of time spent and the dates on which the services were performed.

CATEGORIES	HOURS
a. In-Court Hearings	1.00
b. Interviews and Conferences with Client	2.50
c. Witness Interviews	—
d. Consultation with Investigators & Experts	—
e. Obtaining & Reviewing the Court Record	387.75
f. Obtaining and Reviewing Documents and Other Evidence	229.00
g. Consulting with Resource Center	—
h. Legal Research and Writing	578.00
i. Travel	4.25
j. Other (Please Attach Description of Service)	136.50

SUBTOTALS:
In Court (a) 1.00
Out of Court (b thru j) 1338.00
x Hourly Rate/$ 86.93
15A. TOTAL AMOUNT CLAIMED: $ 116,272.00

16. EXPENSES

TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT
transportation (airfare) to New Orleans	$ 171.00	Computer research	2350.90
travel to Huntsville	55.90	photo copy	5563.50
		courrier	21.38
		transcript	52.50
		long distance	350.69
		10% discount	

16A. TOTAL TRAVEL EXP. $ 204.21
16B. TOTAL OTHER EXP. $ 7,709.28
17. GRAND TOTAL CLAIMED $ 124,185.49

18. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD 1/1/95 TO 8/13/96

F ☐ Final Payment I ☒ Interim Payment No. 1
S ☐ Supplemental Payment

If yes, give details on additional sheets. _____

Has compensation and/or reimbursement for work in this case previously been applied for? ☒ YES ☐ NO
Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☒ YES ☐ NO

I swear or affirm the truth or correctness of the above statements ► Scott J. Atlas
SIGNATURE OF ATTORNEY/PAYEE

► 10/10/96
DATE

APPROVED FOR PAYMENT

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ATTORNEYS AT LAW

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WRITER'S TELEPHONE
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FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 6:53
BY DEPUTY

October 8, 1996

VIA MESSENGER
Mr. Charles Bacarisse
Harris County District Clerk
301 San Jacinto
Houston, Texas 77002

Re: Cause No. 35665; *Ex Parte Ricardo Aldape Guerra*; In the 248th District Court of Harris County, Texas

Dear Sir:

Enclosed for filing in the captioned cause is Petitioner Ricardo Aldape Guerra's Application for Writ of Habeas Corpus.

Please stamp the enclosed extra copy of this letter and pleading and return them to the undersigned. By copy of this letter and the enclosed documents, a copy of this filing is being provided to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosure
c: **VIA MESSENGER**
Hon. W. R. Voigt
248th District Court
1302 Preston, 3rd Floor
Houston, Texas 77002

Vinson & Elkins
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October 8, 1996

VIA MESSENGER
Mr. Charles Bacarisse
Harris County District Clerk
301 San Jacinto
Houston, Texas 77002

Re: Cause No. _____; *Ex Parte Ricardo Aldape Guerra*; In the 248th District Court of Harris County, Texas

Dear Sir:

Enclosed for filing in the captioned cause is Petitioner Ricardo Aldape Guerra's Application for Writ of Habeas Corpus.

Please stamp the enclosed extra copy of this letter and pleading and return them to the undersigned. By copy of this letter and the enclosed documents, a copy of this filing is being provided to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosure
c: **VIA MESSENGER**
Hon. W. R. Voigt
248th District Court
1302 Preston, 3rd Floor
Houston, Texas 77002

c: **VIA MESSENGER**
Casey O'Brien, Assistant District Attorney
OFFICE OF THE HARRIS COUNTY DISTRICT ATTORNEY
201 Fannin, Suite 200
Houston, Texas 77002

VIA U.S. MAIL
Stanley G. Schneider
SCHNEIDER & MCKINNEY
11 Greenway Plaza, Suite 3112
Houston, Texas 77046

VIA U.S. MAIL
Ricardo Aldape Guerra, #4362
1301 Franklin 6C4
Houston, Texas 77002

VEHOU07:23464.1

145 (5)

IN THE 248TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Ex Parte RICARDO ALDAPE GUERRA, Applicant.	§	CASE NO._____

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 6:53
BY _____ DEPUTY

APPLICATION FOR WRIT OF HABEAS CORPUS

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ATTORNEYS FOR PETITIONER,
RICARDO ALDAPE GUERRA

October 8, 1996

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1. The Double Jeopardy Clause protects defendants from prosecutorial "oppression." 12
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b. *A second prosecution should be barred in this case where prosecutorial misconduct was undertaken to avoid an acquittal that the prosecutor believed was likely to occur in the absence of the misconduct.* 15

4. The extreme prosecutorial misconduct in Aldape Guerra's first trial trampled his constitutional right to seek an acquittal and should bar any subsequent prosecution 20

B. BECAUSE OF THE PROSECUTION'S INTENTIONAL MISCONDUCT, THE STATE IS BARRED FROM RETRYING ALDAPE GUERRA BY THE DOUBLE JEOPARDY CLAUSE AND THE DUE COURSE

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D. BECAUSE THE UNTAINTED EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT, FURTHER PROSECUTION IS BARRED BY THE DOUBLE JEOPARDY PROVISION OF THE TEXAS CONSTITUTION 27

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IN THE 248TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Ex Parte RICARDO ALDAPE GUERRA, Applicant.	§ § § § § § §	CASE NO. 359,805

APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now Ricardo Aldape Guerra ("Aldape Guerra"), applicant herein, and pursuant to TEX. CRIM. PROC. CODE ANN. arts. 11.05, 11.08, and 11.23 (Vernon 1977); TEX. CONST. art. I, §§ 13, 14 and 19; and U.S. CONST. amends. V and XIV, moves this Court to issue a Writ of Habeas Corpus to release him from confinement and bar his re-prosecution in Cause No. 359,805 for the murder of Houston police officer J.D. Harris or any other case for the shooting death of officer Harris or Jose Armijo, Sr., on the grounds that he is being denied his liberty under a capital murder indictment and faces a re-prosecution that will violate his state and federal right to be free from double jeopardy and his right to due process of law and due course of law. In support thereof, Applicant would show the Court as follows:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this writ by virtue of the authority vested to District Courts by the Constitution of the State of Texas and TEX. CRIM. PROC. CODE ANN. arts. 11.05, 11.08, and 11.23 (Vernon 1977) to determine the validity of Applicant's pretrial allegation that further prosecution would violate his rights against double jeopardy. *Ex Parte Robinson*, 641 S.W.2d 552 (Tex. Crim. App. 1982).

II. STATEMENT OF ISSUES

Issue Number One

Whether the prosecution's intentional misconduct bars the State from re-trying Aldape Guerra pursuant to the Double Jeopardy Clause of the United States Constitution.

Issue Number Two

Whether the prosecution's intentional misconduct bars the State from retrying Aldape Guerra pursuant to the Double Jeopardy Clause and the Due Process of Law provisions of the Texas Constitution.

Issue Number Three

Whether the legal insufficiency of the untainted evidence at trial bars further prosecution pursuant to the Double Jeopardy provision of the United States Constitution.

Issue Number Four

Whether the legal insufficiency of the untainted evidence at trial bars further prosecution pursuant to the Double Jeopardy provision of the Texas Constitution.

III. PROCEDURAL HISTORY

The following is set out in Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings (filed Oct. 8, 1996).

The Shooting. The Complainant, Officer J.D. Harris, was killed in the line of duty on July 13, 1982.

The Arrest. The Defendant, Ricardo Aldape Guerra, was arrested on the very same day, July 13, 1982, and indicted in Cause No. 359,805 on July 23, 1982 for the offense of capital murder of a police officer.

The Trial. The defendant was tried in this Court. On October 12, 1982, the jury returned

a verdict of guilty. Two days later, Aldape Guerra was sentenced to death. A motion for new trial was filed that day and denied on October 26, 1982.

The Direct Appeal. The conviction was affirmed by the Texas Court of Criminal Appeals *en banc* on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex. Crim. App. 1988) (en banc). On July 3, 1989, the United States Supreme Court denied certiorari. 492 U.S. 925 (1989).

Collateral Review in State Court. On May 8, 1992, Aldape Guerra filed an Application for Writ of Habeas Corpus in this Court. An amended application was filed by new counsel, with leave of Court, on September 17, 1992. On September 21, 1992, this Court, without entering findings of fact or conclusions of law, refused Aldape Guerra's request for an evidentiary hearing and recommended that Aldape Guerra be denied relief. The application was then automatically forwarded to the Texas Court of Criminal Appeals, which accepted the trial court's recommendation on January 13, 1993 in a one-page, unpublished, *per curium* opinion, with Justices Clinton and Maloney dissenting. *Ex Parte Guerra*, No. 24,021-01 (Tex. Crim. App. Jan. 13, 1993).

Federal Habeas Review. On February 13, 1993, Defendant filed an Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas (hereinafter "federal habeas trial court"). In November 1993, that court conducted a five-day evidentiary hearing. On November 15, 1994, the court entered an order granting relief, which was amended on May 18, 1995 and published at 916 F. Supp. 620. That order was affirmed on July 30, 1996 by the United States Court of Appeals for the Fifth Circuit. 90 F.3d 1075. The State did not request a rehearing by the Fifth Circuit. The State has not filed a petition for writ of certiorari in the United States Supreme Court but has until October 28, 1996 to do so.

IV. STATEMENT OF MATERIAL FACTS

The following is a recitation of the pertinent facts set forth in the opinion of the federal habeas trial court following the five-day evidentiary hearing.

On July 13, 1982, J.D. Harris, a Houston police officer, was on patrol in a Hispanic neighborhood. Around 10:00 p.m., a pedestrian, George Lee Brown ("Brown"), flagged down Officer Harris' car and complained that a black and burgundy Cutlass automobile had almost run him over while he was out walking his dog. A few minutes later, Officer Harris approached a stalled vehicle fitting Brown's description of the recklessly driven car. 916 F. Supp. at 622.

The vehicle was occupied by Aldape Guerra and another man, Roberto Carrasco Flores ("Carrasco"). Both Aldape Guerra and Carrasco were undocumented workers. Aldape Guerra lived in the neighborhood where the car in which they were sitting had stalled. The two men were dressed and appeared completely differently. Aldape Guerra wore blue jeans and a light green shirt. He had long, black, straight, shoulder-length hair, a mustache, and a beard. By contrast, Carrasco wore a maroon shirt and brown pants. He had light skin—so light that his neighborhood alias was "Wero" or "Guero," which means the blond or light-skinned one—and was clean shaven with short hair. *Id.* at 622-23.

Officer Harris ordered the two out of the car. They complied and approached Officer Harris' vehicle. One of the two men pulled a nine-millimeter Browning semi-automatic pistol and shot Officer Harris three times, killing him. This murder weapon belonged to Carrasco. At the time that Officer Harris was shot, the other occupant of the car had placed or was placing his hands on the hood of the police car, as Officer Harris had instructed. As the two fled the scene of the crime following the shooting, the same man who shot Officer Harris fired the same gun that had killed

Officer Harris into an approaching car. The driver of that car, Jose Armijo, Sr. ("Mr. Armijo"), was shot and later died of his wounds. His two children, including Jose Jr., then age 10, were riding in the car with him. *Id.* at 623.

Less than an hour after the shooting, Carrasco was killed in a shoot-out with police. In the course of the shoot-out, he shot and seriously wounded another police officer with the same weapon used to kill both Officer Harris and Mr. Armijo. On Carrasco's dead body were found the murder weapon and a military-style magazine pouch attached to his belt, which contained additional ammunition for the murder weapon. Finally, Officer Harris' service revolver, a .357 Colt Python, was found in Carrasco's waistband. *Id.* at 623.

The other occupant of the car—Ricardo Aldape Guerra—was not involved in the shoot-out and was discovered afterwards cowering beneath a nearby trailer. He was unarmed at the time; a weapon unrelated to the murders was discovered wrapped in a bandana nearby. Aldape Guerra was immediately arrested and taken back to the crime scene during the time that bystander witnesses were being identified and questioned and where additional spectators had gathered. Later he was taken to the police station, where he would encounter most of those bystander witnesses again. *Id.*

Near the intersection at which these events took place were a number of bystanders. Many of them were minors at the time: Patricia Diaz ("Diaz") (then age 17), Frank Perez ("Perez") (17), Herlinda Garcia ("Garcia") (14), Jose Heredia ("J. Heredia") (14), Elvira "Vera" Flores (now known as Elvira Hernandez) ("Flores") (16), Armando Heredia ("A. Heredia") (18), and Jose Armijo, Jr. ("Jose Jr.") (10). In addition to being disadvantaged in communicating with police in these circumstances by their youth, the native language of all but one of these "neighborhood witnesses," as the federal court called them, is Spanish. Moreover, at the time, many of them had no command

of English. *Id.* at 624, 629.

After the bystanders were assembled by police at the crime scene, they were taken to the police station. Two of the women—Elena Holguin ("Holguin"), the mother of the two Heredia boys, and Trinidad Medina ("Medina"), the mother of Flores and Garcia—were handcuffed. *Id.* at 624-25. The bystanders arrived at the police station before 12:00 midnight on the night of the shooting and remained there until about 6:30 a.m. the next morning. *Id.* at 624. They waited as a group in a hallway outside the Homicide Division offices. *Id.* at 629. During this time they were free to talk among themselves about the shooting and did so. In particular, the Court found that one bystander, Hilma Galvan ("Galvan") (age 44), spent most of her time talking to 10-year-old Jose Jr. and 16-year-old Flores. Also during this time, Aldape Guerra, wearing handcuffs and paper bags over his hands, was "walked and shoved" down the hallway past Diaz, Flores, Garcia, Jose Jr., Galvan, J. and A. Heredia, Medina, and Perez. *Id.* The paper bags presumably served to preserve any trace metal evidence remaining on his hands. He was led before them a second time when taken to the photo lab. *Id.* Ignoring a general instruction or warning against talking, Galvan pointed toward Aldape Guerra as he passed and said to Jose Jr., and to J. and A. Heredia, in Spanish, loud enough for all witnesses and the police to hear, that since Carrasco had died, they could blame the "wetback" from Mexico, the man who "looked like God"—a reference to Aldape Guerra's long hair and beard—for the shooting of Officer Harris. *Id.*[1] Although the Court found that Galvan had likely not

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[1]Galvan's comments were described at length by the federal court:

> She continued by stating that Mexicans only come to the United States to commit crimes and take jobs away from United States citizens. She repeatedly referred to Mexican Nationals as "Mojados" or "wetbacks". She was also heard repeatedly telling Jose Jr. that Guerra was the killer. This conduct can be attributed only to her prejudice toward Mexican Nationals who, as Galvan stated, "took the jobs from

seen the shooting, it also found that she "encouraged the minors" to identify Aldape Guerra as the shooter knowing that Aldape Guerra did not fit even her own initial description of the shooter. *Id.* at 629.

The lineup took place at 6 a.m. on July 14. The police took two sets of witness statements from several of these witnesses; one before the lineup and one afterwards. The federal habeas trial court found that none of the pre-lineup statements contained descriptions that pointed unequivocally to Aldape Guerra as the shooter. *Id.* at 627; *see id.* at 630. The court also found that the police deliberately did not transcribe accurate witness statements, specifically by excluding information exonerating Aldape Guerra. *Id.* at 631-32 (Garcia), 632 (Garcia, Diaz, Brown, Perez), 632-33 (J. Heredia, Brown).

At the lineup, Aldape Guerra was the only subject with shoulder-length hair. Garcia told the police that the man in the number 4 position (Aldape Guerra) was not the shooter but, instead, was the man with empty hands near the front of the police car at the time Officer Harris was shot. *Id.* at 631. This information was omitted from both statements prepared for her. Diaz also told the police that the man in the number 4 position was the man who had been on the driver's side, near the front of the police car (in the position that the physical evidence proved to be the position of the non-shooter), with empty hands. *Id.* at 632. As the State put it in its brief on appeal, the federal habeas trial court "found that the police doctored Diaz' post-lineup statement . . . to omit [this information]." State App. Br. at 27. Perez told the police that he recognized Aldape Guerra from

---

> Americans." The Court concludes that these expressions of prejudice against undocumented aliens was, as likely as any, the motivation for the inconsistencies between Galvan's own statement and her testimony.

916 F. Supp. at 629-30.

having seen him in the hallway, but that Aldape Guerra was not the man he had seen dropping the gun as he ran past Perez earlier that night. *Id.* at 632. J. Heredia told the police at the lineup that he recognized Aldape Guerra as the driver of the black car, but that he was not the man who shot Officer Harris. *Id.* at 633. This and other exonerating information, such as the fact that Aldape Guerra was up against the car and empty handed when Carrasco walked behind Aldape Guerra and shot Officer Harris, was omitted from the only statement J. Heredia was asked to sign. Although he tried to read the statement, he could not read English and was told to "just sign it" by the police. *Id.* at 633.

The federal habeas trial court found that this display of Aldape Guerra, combined with Galvan's comments, had an enormous effect on the witnesses. Before the lineup, witnesses either described Officer Harris' shooter in such a way that the description fit only Carrasco, fit a composite of both men, or could fit either man. *Id.* at 627. After the lineup, with knowledge that Carrasco was dead, several witnesses gave another statement declaring, in spite of numerous previous assurances to the contrary, that Aldape Guerra was the shooter. *Id.* at 627, 630-31.

The night of the shooting and lineup was not the last time that the witnesses were assembled by the State. The federal habeas trial court found that less than two weeks after the shooting, the prosecutors conducted a "reenactment" of the shooting at which carefully chosen witnesses participated. *Id.* at 629. The court found that "this procedure permitted the witnesses to overhear each others [*sic*] view and form a consensus view." *Id.* At this "reenactment," Garcia again told the prosecutors that the short-haired man (Carrasco), not the long-haired man (Aldape Guerra), was the one who appeared to her to have been the shooter. *Id.* at 631-32.

The federal habeas trial court also found that on the weekend before Aldape Guerra's 1982

trial, the prosecutors called the witnesses together yet again to review their testimony as a group at the prosecutors' offices. At that meeting, the prosecutors introduced to the witnesses two mannequins that had been created in the likenesses of Aldape Guerra and Carrasco and that were wearing the actual clothes the two men had worn on the night of the murders. Carrasco's shirt was bullet riddled and blood soaked. The Court found that the pretrial use of the mannequins in the meeting was certain to reinforce the "consensus facts" so that there would be "complete harmony" in the testimony. *Id.* at 630; *see id.* at 629. At the meeting, one of the prosecutors pointed to a picture of Carrasco and said that he was the man who died in the shootout with police, then pointed to a picture of Aldape Guerra and said that he was the man who shot and killed Officer Harris and Mr. Armijo. *Id.* at 626. At this meeting, Garcia told one of the two prosecutors for the third time that the long-haired man wearing the green shirt (Aldape Guerra) was not the man who shot the police officer. Diaz told one of the prosecutors that she was at the crime scene at the time of the shooting and that Aldape Guerra did not appear to be holding a gun because, at the time of the shooting, his hands were open and empty with his palms down on the hood of the police car. *Id.* at 632.

The mannequins were present throughout trial "to reinforce and bolster the witnesses' testimonies." *Id.* at 629. During trial, prosecutors placed the mannequins in front of the jury, where they remained during the testimony of every witness. *Id.* at 630. In fact, the positioning of the mannequins helped witnesses identify which of the men was dead. *Id.* (reciting testimony). The federal habeas trial court further found the "unrestricted, incessant presence of the mannequins, one wearing a bullet-riddled, blood-stained shirt . . . that the witnesses saw daily" injected "impermissibly suggestive factors into the trial process." *Id.*

The bystanders' identifications would figure prominently both in Aldape Guerra's original 1982 murder trial and in the evidentiary hearing during the 1993 federal habeas proceeding at which his 1982 conviction was overturned. The prosecution's entire case depended on the testimony of these bystanders. As the prosecutors conceded at the 1993 federal habeas evidentiary hearing, there simply was no physical evidence of any kind that pointed to Aldape Guerra as the shooter. *Id.* at 630 n.7. Thus, the police and prosecutors were under tremendous pressure to create a case against Aldape Guerra out of bystander testimony if a second man was to pay for Officer Harris' death.

The court found that responding to this pressure, the police used the methods described above to conform the bystanders' identifications, statements, and testimony to a version of events that would implicate Aldape Guerra: *namely*, the police preyed on their extreme youth; exploited their lack of formal education and inability to speak or read or write English fluently or at all, *id.* at 624; threatened them or their relatives with unrelated prosecutions and punishments; used improper police methods such as handcuffing witnesses, conducting midnight "searches" of witnesses' homes, and informing witnesses falsely that once they had signed inaccurate statements they could be punished for correcting them, *id.* at 626; paraded a handcuffed Aldape Guerra in front of witnesses twice to make clear that he was the prime suspect and thereby gave Galvan the opportunity to insist that other witnesses identify him as the shooter; and gathered the witnesses together three times—for a joint lineup, a "reenactment" or walk-through of the shooting at the scene, and a pretrial meeting at which testimony and statements could be harmonized, *id.* at 629. The trial itself constituted a fourth event at which the suggestion that Aldape Guerra was the shooter was irretrievably impressed on the witnesses. *Id.* at 630.

This effort at harmonization worked. For example, the federal habeas trial court found that

Jose Jr., the ten-year-old, was overheard in the hallway saying that he had seen neither Carrasco nor Aldape Guerra clearly enough to know which man had fired the shots (indeed he testified that his father had pushed him down below the dashboard to protect him from the shooting that ultimately took his father's life), but that Galvan's influence caused Jose Jr. to be "specific and direct" in implicating Guerra at trial. *Id.* at 630.

Harmonization of this testimony was crucial to the prosecution's success, since the only important issue at Aldape Guerra's trial was identification: what the man who shot Officer Harris looked like, and whether Aldape Guerra fit that physical description. The police and prosecutorial mishandling of what evidence they had ultimately led to a trial that violated Aldape Guerra's constitutional rights and resulted in a conviction both unfairly reached and unjust in result. It would be difficult to overstate the federal habeas trial court's conviction that the evidence Aldape Guerra seeks to suppress in this application should not have been admitted in Aldape Guerra's original 1982 trial. That court concluded its 18-page opinion as follows:

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

Id. at 637. The court had no doubt of Aldape Guerra's innocence: "There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted." *Id.*

V. GROUNDS FOR RELIEF

A.

BECAUSE OF THE PROSECUTION'S INTENTIONAL MISCONDUCT, THE STATE IS BARRED FROM RE-TRYING ALDAPE GUERRA BY THE DOUBLE JEOPARDY CLAUSE OF THE FEDERAL CONSTITUTION

Although the Texas Court of Criminal Appeals has not directly confronted the issue, the Fifth Circuit in dicta—and a majority of federal circuits that have directly addressed the matter—appears sympathetic to the principle that intentional prosecutorial misconduct intended to avoid an acquittal should trigger the protection against double jeopardy in the Fifth Amendment of the United States Constitution and prevent a second prosecution. The reasoning of these federal cases is persuasive and should lead this Court to end the Harris County District Attorney's efforts in this case to re-try Aldape Guerra.

1. The Double Jeopardy Clause protects defendants from prosecutorial "oppression."

In short, if the State needs intentional, bad faith misconduct to obtain a conviction on its first attempt, it is not entitled to a second trial. A retrial of Aldape Guerra would offend the core interests protected by the Double Jeopardy Clause. The Double Jeopardy Clause preserves the evenhandedness of the criminal justice system by not allowing the State to hone its trial strategy through successive prosecutions. As the Supreme Court has recognized, "permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the Government with a potent instrument of oppression." *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 569 (1977); *see also Lockhart v. Nelson,* 488 U.S. 33, 42 (1988) (the purpose of the Double Jeopardy Clause is to prevent government oppression). A second prosecution increases the risk that an

innocent defendant will be unjustly convicted, not only by enabling the State to reshape its arguments and marshall new facts, but also by simply wearing down the defendant. *See United States v. DiFrancesco,* 449 U.S. 117, 128 (1980); *Arizona v. Washington,* 434 U.S. 497, 503-04 (1978); *Green v. United States*, 355 U.S. 184, 187-88 (1957). To minimize these risks, the Texas and federal constitutions allow the State one opportunity to establish a defendant's guilt, and it must be fairly exercised.

2. Although a mistrial or an appellate reversal generally will not stand in the way of a second prosecution, the double jeopardy rule is triggered if a subsequent prosecution threatens particular interests.

Despite the basic rationale of the double jeopardy provisions, a second prosecution is generally permitted if the original trial results in either a mistrial or a conviction that is later overturned on appeal. The traditional rule — commonly referred to as the *Ball* rule [2] — reasons that in these contexts the defendant's interest in avoiding double jeopardy may be overcome by society's interest "in affording the prosecutor one full and fair opportunity to present his evidence to the jury." *Oregon v. Kennedy,* 456 U.S. 667, 682 (1982) (Stevens, J., concurring); *see also Lewis v. State*, 889 S.W.2d 403, 407 (Tex. App.—Austin 1994, pet. ref'd) (the State may retry defendant where the "slate" has been "wiped clean" by defendant's successful appeal).

There are two exceptions to the *Ball* rule. First, a second prosecution is barred when a conviction is overturned based on legal insufficiency. *See Burks v. United States,* 437 U.S. 1 (1978). Second, the defendant is protected from re-prosecution after a mistrial is induced by prosecutorial or judicial misconduct that is intended to avoid an acquittal. *Kennedy,* 456 U.S. at 673.

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[2] *See generally Ball v. United States*, 163 U.S. 662 (1896) (holding that retrial is not barred following appellate reversal of conviction).

3. Through applying the *Ball* rule and its exceptions, this Court should find that re-prosecution of Aldape Guerra would violate his constitutional rights.

The issue here should be decided by applying the rationale underlying the *Ball* rule and its exceptions. In this case, the issue is whether a defendant is constitutionally protected from re-prosecution when his original conviction was overturned on the grounds that it was procured by prosecutorial misconduct and that, absent such misconduct, the defendant ***would have been acquitted at his first trial.*** No direct precedent provides this Court with a controlling answer to this legal question. However, the clear rationale underpinning the *Ball* rule and its exceptions should lead this Court to conclude that re-prosecution is constitutionally unacceptable in these circumstances.

a. *The exceptions to the Ball rule are based on the dichotomy between "mere error" and "errors that implicate the guilt or innocence" of the defendant.*

The two exceptions to the *Ball* rule listed above honor the same principle. In both cases, the defendants likely would have been acquitted but for the fatal error. Accordingly, to make the defendants whole, it was necessary to give them more than just a new trial. In *Kennedy*, for example, the Court acknowledged that prosecutors could not be allowed to provoke a mistrial in order to abort prematurely a trial that was going poorly, only to reload their guns for a second prosecution. While the defendant likely would have been acquitted if the first trial had been carried out fairly, the prosecutors could adapt their strategies for the second trial and increase the likelihood of a conviction. The oppressive potential of this ruse was obvious to the Court, which noted that the defendant's constitutional rights would be a "hollow shell" unless the double jeopardy rule barred a second prosecution in these circumstances. *Kennedy*, 456 U.S. at 673.

Similarly, *Burks* reasoned that an appellate reversal on the basis of factual insufficiency must

prevent a second prosecution. 437 U.S. at 15. The fact of the reversal establishes that the State tried, but failed, to make its case. As a matter of logic, the defendant would have been acquitted but for the trial court's wrongful failure to direct a verdict of acquittal. *See Robinson v. Wade*, 686 F.2d 298, 307 (5th Cir. 1982) (explaining rationale of *Burks*).

In both cases, returning the defendant to a second trial would have been an incomplete remedy since the defendant was entitled to an acquittal in the first trial. In contrast, when mere procedural errors taint a conviction, the double jeopardy rule is not implicated. Mere procedural errors "impl[y] nothing with respect to the guilt or innocence of the defendant." *Burks*, 437 U.S. at 15. In fact, a defendant whose conviction is tainted by procedural error is only seeking to finally have his case tried in a full and fair proceeding. A new trial provides complete relief to such a defendant.

b. ***A second prosecution should be barred in this case where prosecutorial misconduct was undertaken to avoid an acquittal that the prosecutor believed was likely to occur in the absence of the misconduct.***

The application of the double jeopardy rule to Aldape Guerra should likewise depend on whether the prosecution's misconduct implicated Aldape Guerra's guilt or innocence.[3] If the defendant would have been acquitted but for the prosecutors' misconduct, then a second prosecution is constitutionally repugnant.

The *Burks* and *Kennedy* exceptions justify the application of the double jeopardy bar in these

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[3]Certainly, not all misconduct in every case rises to this level. In many cases, the prosecution would have obtained a conviction without the misconduct. The fact that misconduct occurs in such a case and a conviction is overturned would not preclude a second prosecution. Similarly, not all mistrials invoke the double jeopardy rule, because not all mistrials implicate the defendant's guilt or innocence.

circumstances.[4] There is no difference between a prosecutor who dodges an acquittal by aborting a trial and another who avoids it by hiding material exculpatory evidence. *United States v. Wallach* 979 F.2d 912, 916 (2d Cir. 1992) (reasoning that "[t]here is no justification for that distinction"), *cert. denied,* 508 U.S. 939 (1993). It would be manifestly unfair to deprive a defendant of double jeopardy protection simply because he was the victim of hidden oppression rather than public misconduct.[5] *Id.* As one federal district court has explained, "[f]or purposes of double jeopardy analysis, however, I am convinced that reversal of a conviction for deliberately offensive prosecutorial misconduct warrants the same relief as a mistrial granted on that ground." *Petrucelli v. Smith*, 544 F. Supp. 627, 632 (W.D.N.Y. 1982), *vacated on other grounds*, 735 F.2d 684 (2d Cir. 1984). Not only would such a distinction lack a rational foundation, but it would perversely skew the prosecutors' incentives by making it more attractive to hide misconduct.[6]

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[4]While the Texas Court of Criminal Appeals has not directly confronted this issue, it has clearly recognized the *Kennedy* rule that "prosecutorial overreaching may indeed trigger the preclusive effects of the double jeopardy clause." *Zimmerman v. State*, 750 S.W.2d 194, 210 (Tex. Crim. App. 1988). Texas courts have also relied on the Fifth Circuit's interpretations of "prosecutorial overreaching." For instance, Texas courts have relied on the objective definition of "prosecutorial overreaching" set out in *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976), in which the court directed appellate courts to analyze stringently the "totality of the circumstances" surrounding a prosecutor's conduct.

[5]Indeed, when the misconduct designed to avoid acquittal results in a conviction, the State not only denies the defendant a fair trial (as in provoked mistrial cases), but also puts the defendant at risk of imprisonment (or death, as in the instant case) as long as the misconduct remains hidden. Aldape Guerra was sent to death row as a direct result of the State's misconduct. Under such circumstances, the State mocks Aldape Guerra's finality interest in double jeopardy protection by retrying him.

[6]The Supreme Court "repeatedly has eschewed distinctions in the scope of protection afforded by the double jeopardy clause grounded wholly on temporal or technical considerations." *Robinson*, 686 F.2d at 308 n.21.

On the basis of this concern, the Fifth Circuit has long been sympathetic to the analysis that would find an exception to the *Ball* rule when prosecutorial misconduct—undiscovered until after trial—prevents an acquittal. *Robinson,* 686 F.2d at 308 (dicta);[7] *United States v. Opager,* 616 F.2d 231 (5th Cir. 1980) (same). In *Robinson,* the Fifth Circuit expressed this view:

> Whether the tactic condemned [of prosecutorial overreaching] is successful in its objective of securing a mistrial, or unsuccessful, but causes the return of a verdict of conviction, would seem to be of little significance in development of a law of preclusion designed to protect this interest [of protecting the defendant from being unfairly deprived of possible acquittal].

686 F.2d at 308.[8] The *Robinson* court also stated that "[t]he interest in denying the Government 'that forbidden second crack' would seem equally to be infringed by oppressive prosecutorial tactics designed to avoid acquittal as by retrial following acquittal for insufficiency of evidence." *Id.* at 308; *see also Opager*, 616 F.2d at 235.

A clear majority of the federal appeals courts that have addressed the issue have agreed with the Fifth Circuit. *See United States v. Gary*, 74 F.3d 304, 315 (1st Cir.) (approving distinction between "egregious" misconduct and less significant errors), *cert. denied*, 116 S. Ct. 2567 (1996); *Wallach,* 979 F.2d at 916 (2d Cir.); *Evans v. Thompson*, 881 F.2d 117, 123 n.1 (4th Cir. 1989), *cert. denied,* 497 U.S. 1010 (1990) (acknowledging that "deliberate prosecutorial misconduct" would

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[7]Even though *Robinson* was decided over 10 years ago, the Fifth Circuit has not repudiated its analysis. *See, e.g., United States v. Miller*, 952 F.2d 866, 874 n.7 (5th Cir.) (citing *Robinson*, yet rejecting double jeopardy challenge in part because "we find no deliberate prosecutorial overreaching that might bar retrial"), *cert. denied*, 505 U.S. 1220 (1992).

[8]*Robinson* also noted that the Supreme Court's efforts in *Burks* to limit the scope of the double jeopardy rule was to protect the *defendant's* "core" interest—"lying at the core of the Clause's protections"—in not allowing the State to "hon[e] its trial strategies and perfect[ ] its evidence through successive attempts at conviction." 686 F.2d at 308.

uniquely bar retrial where "a verdict has been set aside for trial error"); *United States v. Singer,* 785 F.2d 228, 239 (8th Cir.), *cert. denied,* 479 U.S. 883 (1986) (finding that the "right" to avoid double jeopardy "should not hang on which court correctly determines that misconduct infected the trial"); *United States v. Curtis,* 683 F.2d 769, 774 (3d Cir.), *cert. denied,* 459 U.S. 1018 (1982) (finding "considerable force to th[e] proposition" that the double jeopardy clause should apply with equal weight to mistrials and reversals based on prosecutorial misconduct); *United States v. Rios*, 637 F.2d 728, 729 (10th Cir.1980), *cert. denied,* 452 U.S. 918 (1981) (concluding that double jeopardy provisions "are indeed applicable" in context of appellate reversal); *see also United States v. Quinn,* 901 F.2d 522, 531 (6th Cir. 1990) (recognizing a possible exception to *Ball* rule if there is prosecutorial misconduct); *United States v. Roberts,* 640 F.2d 225, 231 (9th Cir.) (Norris, J., dissenting) (stating that "intentional prosecutorial misconduct" may bar retrial after reversal), *cert. denied*, 452 U.S. 942 (1981).[9]

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[9]Certain dicta within Supreme Court decisions, if read too narrowly, could be interpreted to deny Aldape Guerra's requested relief. In *Burks*, for example, the Court noted that "reversal for trial error, as distinguished from evidentiary insufficiency" does not bar retrial. 437 U.S. at 15. Also, in *United States v. Scott*, 437 U.S. 82 (1978), the Court commented that "[t]he successful appeal of a judgment of conviction, on any ground other than insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge." *Id.* at 90-91 (citation omitted).

For two reasons, this dicta should not be read to shut off the remedy that was supported in *Robinson* and the decisions of the other federal courts of appeals. First, neither *Burks* nor *Scott* involved acts of extreme prosecutorial overreaching that were purposefully undertaken to avoid a probable acquittal. *See Opager*, 616 F.2d at 236. In fact, *Burks* (and, derivatively, *Scott*) based its distinction between trial error and insufficient evidence on the presumption that the former "implies nothing with respect the guilt or innocence of the defendant." This distinction should weigh in on Aldape Guerra's behalf given the facts of this case.

Second, subsequent Supreme Court dicta suggests that a constrictive reading of *Burks* and *Scott* would be erroneous. In *Lockhart* Justice Rehnquist prefaced his double jeopardy decision by pointing out that "[n]othing in the record suggests any ***misconduct*** in the prosecutor's submission

Courts have recognized the need for an articulable standard to govern these cases. A general statement to the effect that any misconduct should trigger the double jeopardy rule goes too far to the extent that it would bar a retrial following "mere procedural errors." *See Wallach*, 979 F.2d at 916. The *Kennedy* Court explained that a broad, rudderless standard would actually work against the interests of defendants, since courts would be less likely to redress legitimate defense complaints if to do so would cause the State to incur a disproportionately severe penalty. 456 U.S. at 676 n.7. Instead, the Court fashioned a rule to ensure that the State's punishment suited its offense. The Court held that double jeopardy would prevent retrial only in "cases in which the conduct giving rise to the successful motion for mistrial was ***intended to provoke*** the defendant into moving for mistrial." 456 U.S. at 679 (emphasis added). The application of the rule depends on whether the prosecutor's misconduct was intended to salvage a case that the prosecutor believed would otherwise have been lost.

Responding to similar concerns, the Second Circuit has adopted a standard that can reasonably be applied in circumstances such as this case. The Second Circuit's standard is based on a direct extension of the rule established in *Kennedy*. In parallel with the *Kennedy* rule, the Second Circuit concluded that retrial should be barred following a reversal based on prosecutorial misconduct "where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Wallach*, 979 F.2d at 916. As the court was careful to note, this

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of the evidence. We conclude that in cases such as this . . . the Double Jeopardy Clause does not preclude retrial." 488 U.S. at 34 (emphasis added). The Court's special effort to distinguish the case of prosecutorial misconduct from an ordinary case, at a minimum, shows that whether the Double Jeopardy Clause will be triggered by intentional overreaching is an open question.

standard embraces no more than the level of egregious misconduct considered to bar retrial in *Kennedy*. *Id.*

4. The extreme prosecutorial misconduct in Aldape Guerra's first trial trampled his constitutional right to seek an acquittal and should bar any subsequent prosecution.

To determine whether misconduct triggers double jeopardy protections, a court must make a finding of fact about the prosecutors' intent based on the objective evidence.[10] In this case, the objective evidence reveals—and the federal habeas trial court found—that the prosecution's misconduct was ***intended*** to prevent Aldape Guerra from receiving a probable acquittal. As that court stated, in the absence of any misconduct, Aldape Guerra either "would not have been charged with this offense or the trial would have resulted in an acquittal." 916 F. Supp. at 635. It is just as clear that the police and prosecution set out to avoid this outcome by intimidating witnesses, suppressing exculpatory evidence, and manufacturing their own "incriminating" evidence.

The prosecution had ample reason to expect that Aldape Guerra would have been acquitted in a fair trial. As one of the original prosecutors admitted at the evidentiary hearing in the federal habeas trial court, "the physical evidence . . . totally pointed towards Carrasco Flores as being the shooter." *Id.* at 630 n.7. Based on its thorough examination of the record, the federal habeas trial court wrote that there was no doubt "that the verdict would have been different had the trial been properly conducted." *Id.* at 637.

The federal habeas trial court recognized that the police and prosecutors nevertheless wanted to punish both Aldape Guerra and Carrasco for the same crime, "even if it was impossible to do so."

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[10]*See Kennedy*, 456 U.S. at 675 ("Inferring the existence or nonexistence of intent from objective facts is a familiar process in our criminal justice system.").

Id. at 626; *see also id.* (finding that "mood and motivation" of the investigating police "was to convict Aldape Guerra for the death of officer Harris even if the facts did not warrant that result"). "These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. . . . Their misconduct was ***designed*** and ***calculated*** to obtain a conviction and another 'notch in their guns' despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra." *Id.* at 637 (emphasis added).

To achieve their conviction in spite of the evidence, the prosecutors ***knowingly*** and ***intentionally*** hid evidence, used false testimony, created false evidence, and used other illegitimate arguments. The federal habeas trial court concluded that "the police officers' and the prosecutors' actions described in these findings were intentional, were done in bad faith, and were outrageous." *Id.* at 637. For example:

- Recognizing that its entire case against Aldape Guerra "rested on the witnesses identifying him, . . . the state, to seal its victory, deliberately chose to taint the identification process by insisting upon perjured testimony." *Id.* at 630.

- The prosecutors purposefully failed to disclose material, exculpatory evidence. "These intentional omissions, during the investigation and prosecution, and the inclusion of poisonous speculations during trial, had the effect of suppressing and destroying favorable testimony that the Court finds was material to Guerra's defense. . . . This conduct by the police and prosecutors ***could only have been deliberate*** and, so much so, that even the exonerating evidence was used in such a manner as to create a materially misleading impression." *Id.* at 634 (emphasis added).

- The district court found "abundant" violations in which the prosecutors made "knowing use of false testimony. . . . The prosecutors also committed misconduct by deliberately and knowingly putting into the mouths of witnesses words that the witnesses had not said and did not believe to be true." *Id.* at 635.

These objective findings of fact make clear that the prosecutors' misconduct was intended to avert Aldape Guerra's probable acquittal. Accordingly, this Court should hold that a second prosecution

is barred under the standard announced in *Wallach.*

The prosecutorial misconduct in the first trial denied Aldape Guerra the acquittal that he deserved. As a matter of federal constitutional law, a second prosecution should not be allowed. The rationale underlying *Ball*, *Burks*, and *Kennedy*, along with the persuasive reasoning of the federal circuit courts in cases like this, should lead this Court to construe the Double Jeopardy Clause of the federal constitution to prohibit any future prosecution of Aldape Guerra for the death of Officer Harris.

B.

BECAUSE OF THE PROSECUTION'S INTENTIONAL MISCONDUCT, THE STATE IS BARRED FROM RETRYING ALDAPE GUERRA BY THE DOUBLE JEOPARDY CLAUSE AND THE DUE COURSE OF LAW PROVISIONS IN ARTICLE I, SECTIONS 13, 14 AND 19, OF THE TEXAS CONSTITUTION

Because of the prosecution's intentional misconduct, any retrial of Aldape Guerra should also be barred by the Double Jeopardy Clause (article I, section 14) and the Due Course of Law provisions (article I, sections 13 and 19) of the Texas Constitution. Although no Texas court has yet made this specific ruling, Texas jurisprudence is trending this way, and this case offers solid footing for such a conclusion.

Texas courts have consistently and clearly condemned misconduct by the State that intentionally provokes a defendant into making a motion for mistrial. This year, the Texas Court of Criminal Appeals expanded the circumstances in which misconduct by the State so denies a defendant his constitutional right to be tried in a single proceeding by the jury first selected that a retrial of the defendant is barred by the Double Jeopardy Clause of the Texas Constitution. In *Bauder v. State*, 921 S.W.2d 696 (Tex. Crim. App. 1996), the Court exceeded the double jeopardy

protections afforded by the United States Constitution and held that "a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only when the objectionable conduct was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id.* at 699.[11]

The sound rationale of *Bauder* logically extends to this case to bar Aldape Guerra's retrial under article I, section 14, of the Texas Constitution. The *Bauder* court was expressly concerned with assuring the "fairness or efficiency in the trial process" and with ensuring that a defendant's decision to have questions of his criminal liability for one offense resolved in more than one trial be the result of his free election. *Id.* at 698. Clearly, in this case the State's pervasive and intentional

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[11]By this holding, the Texas Court of Criminal Appeals implicitly but unmistakably rejected any previous indications that the Texas and federal double jeopardy provisions are "conceptually identical." *Ex parte Davis*, 893 S.W.2d 252, 256 (Tex. App.—Austin 1995, pet. granted). In *Davis*, the appellant filed a pretrial writ of habeas corpus alleging that prosecutorial misconduct that resulted in the reversal of his conviction on appeal barred his retrial under the Double Jeopardy and Due Process Clauses of the United States Constitution and the double jeopardy and due course of law provisions of the Texas Constitution. *Id.* at 253. The court of appeals rejected appellant's arguments and affirmed the denial of the writ. *See id.* at 254.

Events that occurred subsequent to the *Davis* decision eliminate any persuasive force that *Davis* may have in relation to this case. First, the subsequent *Bauder* decision nullifies a central premise of *Davis* that the Texas and federal double jeopardy provisions are conceptually identical and that the Texas double jeopardy guarantee gives no greater protections than its federal counterpart. *See id.* at 255-56. *Bauder* clearly establishes that the Texas double jeopardy provision is neither identical to nor dependent on the federal clause. *See id.* at 697. In fact, *Bauder* reaffirmed that the Texas provision is to be interpreted independently of the federal clause and, in so doing, concluded that the state provision affords greater protection than the federal clause. *See id.* at 697, 699; *Heitman v. State*, 815 S.W.2d 681 (Tex. Cr. App. 1991). Moreover, on September 11, 1996, the Texas Court of Criminal Appeals granted appellant's petition for discretionary review in *Davis,* thereby signaling that the intermediate appellate court's state double jeopardy analysis is likely not the final pronouncement on that issue.

misconduct undermined any fairness or efficiency that should have existed in determining Aldape Guerra's criminal responsibility for the death of Officer Harris.

Moreover, allowing the State to retry Aldape Guerra for the same offense would unfairly and unconstitutionally allow the State two bites at the prosecutorial apple. The State, having committed numerous instances of misconduct intended to prevent an acquittal of Aldape Guerra and resulting in the reversal of his conviction, would then be unfairly allowed to retry Aldape Guerra under more favorable conditions. *Cf. Bauder*, 921 S.W.2d at 698-99. This circumstance grossly offends the interests protected by the Texas Double Jeopardy Clause by improperly ***promoting***, rather than ***restraining***, the government's ability to subject a defendant accused of a crime to the mental, emotional, and financial hardship of repeated trials for the same offense. *See id.* at 698 (emphasis added).

The principles on which *Bauder* was decided naturally encompass the facts of this case and easily support the conclusion that a retrial of Aldape Guerra is jeopardy barred. That *Bauder* involved a defendant's motion for mistrial and not the reversal of a defendant's conviction on appeal does not erode this sound conclusion. *But see Mitchell v. State*, 1996 WL 514266 (Tex. App.--Tyler 1996, no writ).[12] Had Aldape Guerra and the trial court judge been made aware of the State's

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[12]In *Mitchell*, the Tyler court of appeals affirmed the trial court's order denying appellant's pretrial petition for writ of habeas corpus. 1996 WL 514266 at * 11. Appellant argued that his re-prosecution should have been barred under the Double Jeopardy Clause of the Texas Constitution because of the prosecutorial misconduct that appellant discovered well after he was convicted. *Id.* at * 7. The *Mitchell* court rejected appellant's reliance on *Bauder* and reasoned that *Bauder* is specifically limited to prosecutorial misconduct in the mistrial context. *Id.*

On September 12, 1996, the Texas Court of Criminal Appeals stayed *Mitchell* and is now awaiting the filing of appellant's petition for discretionary review. By staying *Mitchell*, the Court of Criminal Appeals indicated that the court of appeals' conclusions regarding the Texas double

pervasive and clandestine misconduct, Aldape Guerra would have been able to successfully move for a mistrial before the case was submitted to the jury. However, the prosecution hid its misconduct from Aldape Guerra and the trial court, so it was not discovered until after trial, thereby depriving Aldape Guerra of a mistrial. To hold Aldape Guerra responsible for the State's success at hiding its improper activities would be manifestly unfair. Further, it would place form over substance to reason that a retrial of Aldape Guerra would be barred if the State's misconduct in this case had goaded him into moving for a mistrial, but would not be barred if the identical (but hidden) misconduct resulted in the reversal of his conviction on appeal.

In fact, although not explored in *Mitchell*, the *Bauder* analysis regarding mistrials actually buttresses the conclusion that a retrial of Aldape Guerra is barred by the Double Jeopardy Clause of the Texas Constitution. In *Bauder*, the court recognized a line between "legitimate adversarial gamesmanship" by the state and "manifestly improper prosecutorial methods." 921 S.W.2d at 700. In particular, the court acknowledged that "tactical decisions to offer prejudicial evidence are a normal and, in most respects, acceptable part of the adversary process." *Id.* at 698. However, the *Bauder* decision hinged on the fact that the prosecution overstepped that boundary and, in so doing, deprived the defendant of the protection of the Double Jeopardy Clause. *See id.* at 700. Likewise, here the State grossly transcended the realm of legitimate advocacy to obtain a conviction.

This Court is well within its authority to hold that a retrial of Aldape Guerra is barred by the Double Jeopardy Clause of the Texas Constitution based on the prosecutorial misconduct that was intended to (and did) prevent his acquittal and that necessitated the reversal of his conviction on

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jeopardy provision are likely to be re-examined in light of *Bauder* and the pending petition for discretionary review in *Davis*.

appeal. Moreover, by so holding, this Court enters well-chartered territory and joins other state courts that have addressed or resolved these issues in the defendant's favor.[13] Therefore, granting the instant motion to prevent Aldape Guerra's retrial because a retrial on these facts is jeopardy barred by the Texas Constitution constitutes a logical and well-grounded application of Texas double jeopardy principles and follows the well-reasoned path marked by other state courts. Accordingly, this Court should grant Aldape Guerra's application for writ of habeas corpus on the ground that the State's attempt to retry him is barred by article I, section 14, of the Texas Constitution.

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[13]*See, e.g., Oregon v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983) (interpreting the Double Jeopardy Clause of the Oregon Constitution to provide greater protection than the federal provision and concluding that "a retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial ***or reversal***") (emphasis added); *Commonwealth of Pennsylvania v. Smith*, 615 A.2d 321 (Pa. 1992) (granting appellant's motion to preclude a retrial based on double jeopardy because of after-discovered evidence of prosecutorial misconduct and holding that "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial").

C.

BECAUSE THE UNTAINTED EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT, FURTHER PROSECUTION IS BARRED BY THE DOUBLE JEOPARDY PROVISION OF THE UNITED STATES CONSTITUTION

D.

BECAUSE THE UNTAINTED EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT, FURTHER PROSECUTION IS BARRED BY THE DOUBLE JEOPARDY PROVISION OF THE TEXAS CONSTITUTION

1. The rule of *Burks* bars retrial where the evidence is legally insufficient.

The Supreme Court in *Burks* confirmed that further prosecution is barred after a reversal of a criminal defendant's conviction on the ground that the evidence at the first trial was legally insufficient.[14] 437 U.S. at 15. This double jeopardy principle independently bars further prosecution of Aldape Guerra. Disregarding all evidence essentially fabricated by police and prosecutors, no evidence remains to support a conviction.

In the usual application of the *Burks* principle, the reviewing court determines that the trial court erred by not directing an acquittal because the prosecution's evidence at trial was legally insufficient. Double jeopardy protections are invoked "because the defendant was entitled to an acquittal at the first trial." *United States v. Kirk*, 70 F.3d 791, 794 (5th Cir. 1995) (citing *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988)). *Burks* does not apply, however, where a conviction is reversed "because of some error in the proceedings leading to the conviction." *Lockhart*, 488 U.S. at 38. The important difference between the two situations is that the *Lockhart* scenario "does not implicate

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[14]Legal sufficiency requires that a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. State*, 833 S.W.2d 118, 122 (Tex. Crim. App. 1992).

issues of guilt or innocence," and double jeopardy principles are therefore not invoked. *See United States v. Goss*, 650 F.2d 1336, 1341 n.2 (5th Cir. 1981).

These two doctrines have overlapped in a number of cases. In these cases, the evidence might have been legally insufficient but for the trial court's error in admitting inadmissible evidence. Though courts have had some trouble reconciling the competing interests, the balance has generally been struck in favor of retrial. *See, e.g.*, *Greene v. Massey*, 437 U.S. 19, 26 & n.9 (1978) (explicitly declining to opine as to the "double jeopardy implications" of a holding that "once the inadmissible hearsay evidence was discounted, there was insufficient evidence to permit the jury to convict"); *United States v. Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir.) (holding that retrial was not barred where the written confession of a coconspirator was improperly admitted, even if the evidence was legally insufficient in the absence of the confession), *cert. denied*, 459 U.S. 834 (1982); *Faulder v. State*, 745 S.W.2d 327, 330 (Tex. Crim. App. 1987) (holding that defendant's improperly admitted confession should be considered in evaluating the legal sufficiency of the evidence in support of conviction).

Lockhart itself presented such a scenario. There, the Supreme Court addressed the issue it had avoided in *Greene* and held that, where "[n]othing in the record suggests any misconduct in the prosecutor's submission of the evidence," that evidence can be considered in evaluating the sufficiency of the evidence, even where an appellate court later determines the trial court should not have admitted the evidence. 488 U.S. at 34, 42. "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed . . . ." *Id.* at 42.

The reason for this result is a good one where the prosecution has acted in good faith: "Because we cannot know what evidence might have been offered if the evidence improperly

admitted had been originally excluded by the trial judge, . . . such situations do not present instances of evidentiary insufficiency." *Sarmiento-Perez*, 667 F.2d at 1240. In other words, in these cases, issues of guilt or innocence are not necessarily implicated. To protect society's interest in prosecuting and convicting a guilty defendant, then, the prosecutor's reliance on the trial judge's ruling must first be protected.

This rationale breaks down completely when the police and prosecutors act intentionally to fabricate incriminating evidence against, and suppress and destroy exonerating evidence in favor of, a defendant whom they know to be innocent and hide this and other serious misconduct from the trial judge. Suddenly, the "governmental oppression" lacking in *Lockhart* appears all too vividly. *Lockhart* and related cases then become significant for their tame facts. In none of these cases was the only evidence standing between the defendant and an acquittal also evidence that was the product of bad faith, intentional prosecutorial misconduct. With Aldape Guerra, this Court confronts an extraordinary case that, even if it does not fall within the typical application of the *Burks* principle, nevertheless implicates precisely the same balance of interests.

2. The rule of *Burks* applies here because of the outrageous, intentional prosecutorial misconduct.

The constitutional protection against double jeopardy bars retrial here because, as the federal habeas trial court found, the evidence adduced at trial, other than testimony that was essentially fabricated by police and prosecutors, was legally insufficient. Although the federal court was not asked to rule on a legal sufficiency challenge based on the untainted evidence, the evidence presented to that court and the court's findings firmly establish the basis for the challenge. This Court, after reviewing the federal court's fact findings, should confirm the legal insufficiency of the

evidence.[15]

Double jeopardy bars further prosecution even more compellingly here than in the typical *Burks* application. All of the incriminating evidence introduced at trial was fabricated by police and prosecutors and was otherwise fatally tainted by ***intentional*** prosecutorial misconduct. Double jeopardy jurisprudence therefore mandates that the fruit of the uniquely oppressive, intentional misconduct of the police and prosecutors not be considered in determining the legal sufficiency of the evidence. Were it otherwise, the government, knowing it had no evidence against a defendant, could simply fabricate evidence to avoid an acquittal in the first trial and wear down the innocent defendant as the state and federal Double Jeopardy Clauses prohibit. Although the egregiousness of the prosecutorial misconduct in this case appears to be unprecedented, Texas double jeopardy decisions do distinguish intentional from unintentional prosecutorial misconduct.[16]

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[15]Double jeopardy should bar retrial no matter which court concludes that the evidence was insufficient. *See Faulder*, 745 S.W.2d at 330 (holding that a criminal defendant is permitted to make "a collateral attack on the sufficiency of the evidence that was adduced at his former trial" where he pleaded former jeopardy). While such a collateral attack is permitted by the Texas Court of Criminal Appeals, it may not be generally permitted by federal courts when the appellate court could have ruled on the challenge. *See Vanderbilt v. Collins*, 994 F.2d 189, 196 (5th Cir. 1993) (concluding, "[a]lbeit with significant reservations," that where the appellate court reverses for mere trial error, double jeopardy does not bar a retrial even if another court later determines that the evidence at trial was legally insufficient to sustain a conviction). Of course, the facts of *Vanderbilt* did not implicate the egregious prosecutorial misconduct found in this case. *Vanderbilt* should not be extended to apply in the face of this misconduct, which was only discovered because of the evidentiary hearing before the federal district court.

[16]*See, e.g.*, *Davis*, 893 S.W.2d at 254 (holding that prosecutorial misconduct, though grounds for a new trial, did not raise a double-jeopardy bar to retrial, emphasizing that the evidence did not establish "that the police or their agents acted in ***bad faith*** regarding the failure to preserve evidence") (emphasis added); *Carter v. State*, 848 S.W.2d 792, 797 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (concluding that, where the defendant did not claim the evidence in the first trial was insufficient, "***unintentional*** suppression of favorable evidence" was not grounds for a double jeopardy bar to retrial) (emphasis added); *Sanders v. State*, 771 S.W.2d 645, 650 (Tex.

Moreover, because the evidence ***not*** attributable to "intentional prosecutorial overreaching" is legally insufficient in this case, double jeopardy bars retrial even more clearly than the circumstances discussed hypothetically by the Fifth Circuit in *Robinson*. The Fifth Circuit there explained that "[t]he extreme tactics which constitute prosecutorial overreaching offend the double jeopardy clause at least in part because they unfairly deprive the defendant of ***possible*** acquittal, by heightening, in a manner condemned by law, the jury's perception of the defendant's guilt." 686 F.2d at 307-08 (emphasis added). The prosecutorial misconduct committed against Aldape Guerra takes the rationale one step further: He was denied not only a possible acquittal, but a certain one, as the federal district court found.[17]

3. The untainted evidence at trial was legally insufficient.

After an extensive evidentiary hearing, the federal district court found the following:

> The police and prosecutors . . . had a duty to not prosecute an innocent man. They failed in [this duty]. . . . The concept of deceit was planted by the police and

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App.—El Paso 1989, pet. ref'd) (rejecting a claim that prosecutorial misconduct barred retrial and noting "there was no finding by the federal judge that the prosecutorial misconduct was ***intentional***") (emphasis added); *Tenery v. State*, 680 S.W.2d 629, 634-35 (Tex. App.—Corpus Christi 1984, pet. ref'd) (reasoning that though "'***unintentional*** improper jury argument'" justified a new trial, "we cannot say on the facts here presented that the misconduct assigned by appellant constituted ***prosecutorial overreaching*** sufficient to bar appellant's retrial") (emphasis added); *Mahavier v. State*, 644 S.W.2d 129, 134 (Tex. App.—San Antonio 1982, no pet.) (finding "no ***intentional*** misconduct" and holding retrial was not barred) (emphasis added); *see also Bauder*, 921 S.W.2d at 699 (holding that further prosecution is barred by the Texas Double Jeopardy Clause where the trial court grants a mistrial for prosecutorial misconduct, whether done ***intentionally*** or ***recklessly***). The Tyler Court of Appeals in *Mitchell* recently assumed intentional prosecutorial conduct without finding it had occurred and allowed retrial. *See supra* note 12.

[17]Even where only a reasonable likelihood exists that the verdict might have been different but for knowing use of perjured testimony, for example, the lesser remedy of a new trial is appropriate. *See, e.g., United States v. Washington*, 44 F.3d 1271, 1281 (5th Cir.), *cert. denied*, 115 S. Ct. 2011 (1995); *Ex Parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989).

> nurtured by the prosecutors. This conduct by the police and prosecutors could only have been deliberate . . . .
>
> . . . .
>
> The Court concludes that, but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense or the trial would have resulted in an acquittal.

916 F. Supp. at 633-35 (citation omitted).

To convict Aldape Guerra, the police and prosecutors knew they must fabricate incriminating evidence and suppress and essentially destroy exculpatory evidence. Examples of their success at fabrication and destruction of evidence are legion. *See id.* at 634 (finding that the police officers' and prosecutors' conduct "had the effect of suppressing ***and destroying*** favorable testimony that the Court finds was material to Guerra's defense") (emphasis added); *id.* at 635 ("[T]he ***knowing*** use of false testimony by the prosecutors violates a defendant's 'due process' rights . . . . The Court finds that such violations are abundant in the record.") (emphasis added); *id.* at 637 ("The police officers and prosecutors were successful in ***intimidating and manipulating*** a number of unsophisticated witnesses, many mere children, into testifying contrary to what the witnesses and prosecutors ***knew*** to be the true fact . . . .") (emphasis added); *see also id.* ("The police officers' and the prosecutors' actions described in these findings were ***intentional***, were done in ***bad faith***, and are ***outrageous***.") (emphasis added). By fabricating and destroying evidence, the state rendered unconstitutional any further prosecution of Aldape Guerra.[18] Indeed, destruction of evidence, alone,

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[18]The prosecutors' argument at trial only exacerbated their intentional misconduct. *See, e.g.*, 916 F. Supp. at 636 ("Both prosecutors claimed as fact, in closing argument, that five eyewitnesses, ***who had not conferred with each other***, told the police that Aldape Guerra killed officer Harris and Mr. Armijo and had identified Aldape Guerra at the lineup. Both prosecutors knew that this was factually incorrect because at least one of the prosecutors was at the scene shortly after the shooting

can justify dismissal of a case. *See, e.g., United States v. Cooper*, 983 F.2d 928, 933 (9th Cir. 1993) (holding that, because "government agents . . . , in bad faith, allowed its proof, or its disproof, to be [destroyed]," the indictment related to this proof was appropriately dismissed); *see also United States v. Rolande-Gabriel*, 938 F.2d 1231, 1238 (11th Cir. 1991) ("Absent some proof that the destroyed evidence was exculpatory or that the evidence was destroyed in bad faith, the case should not be dismissed.").

After discarding the evidence that was fabricated by police and prosecutors or otherwise the product of outrageous, intentional misconduct, the remaining evidence of Aldape Guerra's guilt not only fell far short of legal sufficiency, but was simply nonexistent.[19] The prosecution would be left

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and participated in the gathering and interviewing of witnesses. Moreover, both had participated in the reenactment and the pretrial weekend meeting where the various statements of the witnesses were discussed and conformed.") (emphasis in original).

[19]On direct appeal, the Texas Court of Criminal Appeals, which did not hold an evidentiary hearing, cited the incriminating evidence from trial. *See* 771 S.W.2d 453, 458-59. The only witnesses the court cited as supposedly having seen Aldape Guerra commit murder were 10-year-old Jose Armijo, Jr., and 14-year-old Herlinda Garcia. When the truth finally emerged in the evidentiary hearing before the federal district court, the court found that Garcia had been intimidated and harassed by police and prosecutors. *See* 916 F. Supp. at 625; 90 F.3d at 1079. Indeed, at a pretrial meeting she told prosecutors that Aldape Guerra was ***not*** the man who shot officer Harris. 916 F. Supp. at 625. As to young Jose, Jr., on the night of the tragedy he stated, "The man shot the gun with his left hand . . . . I didn't see the men that shot the policeman too good and I don't remember what they looked like or what they were wearing . . . ." *Id.* at 628. Of course, after the highly suggestive identification procedures and intimidation of witnesses by the police and prosecutors, this young boy, too, testified just as the prosecutors desired. *See id.* at 624-31 (describing the highly improper procedures and intimidation).

The significance of Jose Jr.'s statement that the gunman shot with his left hand was also lost because of the state's misconduct. The state could find no trace metal pattern of Officer Harris's gun or the murder weapon on Aldape Guerra's hands. It did find traces of Officer Harris's gun on Carrasco's right hand and traces consistent with the murder weapon having been fired from Carrasco's left hand. It suppressed the evidence of Carrasco's left hand, however; the defense never

only with its speculation, which flies in the face of the physical evidence:

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

916 F. Supp. at 635.

Ultimately, this Court must decide whether Aldape Guerra's circumstances fall within the rule of *Lockhart*, where the trial court mistakenly admits hearsay or other improper evidence, or the rule of *Burks*, where the prosecution fails to prove its case. The incriminating evidence at trial was solely the product of proven, intentional prosecutorial misconduct. Additionally, substantial exculpatory evidence was intentionally destroyed. Because this misconduct relates so fundamentally to guilt and innocence issues, *Burks* demands that further prosecution be barred.

Bauder states that the Texas Constitution should provide greater double jeopardy protection than the analogous provision of the United States Constitution. 921 S.W.2d at 699; *id.* at 700 (Clinton, J., concurring); *id.* at 701 (Baird, J., concurring): *id.* at 702-03 (Maloney, J., concurring); *accord, Ex parte Davis*, 893 S.W. 2d 252, 256 (Tex. App.—Austin 1995, pet. granted) . Therefore, the Double Jeopardy Clause of the Texas Constitution should mandate the same result.

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knew about it until too late. *See id.* at 634 ("The state failed to disclose that there were any trace metal patterns on Carrasco's left hand, even though they knew that they, arguably, matched the [murder] weapon. Although the police were told, repeatedly, that the shooter fired the weapon with his left hand, there is no meaningful record of any efforts to identify the trace metal pattern on Carrasco's left hand.").

There remains, then, no untainted evidence pointing to Aldape Guerra.

E.

CONCLUSION

The prosecution's intentional misconduct in this case, which was calculated to—and did—deprive Aldape Guerra of the acquittal he deserved, is well-established and cannot seriously be disputed. Indeed, under firmly-rooted principles and quickly-evolving federal and state jurisprudence, the state's re-prosecution of Aldape Guerra would violate the Double Jeopardy Clauses of the United States and Texas Constitutions and the Due Process of Law Clause of the Texas Constitution. This Court should extend the federal and state double jeopardy principles to protect Aldape Guerra's constitutional right against twice being tried for Officer Harris' death. Moreover, the evidence adduced at trial, other than the testimony that the State essentially fabricated to convict Aldape Guerra, was legally insufficient to support Aldape Guerra's conviction. Under the rule and rationale of *Burks,* the constitutional protection against double jeopardy bars the retrial of Aldape Guerra in this additional circumstance.

The State had its chance to fairly convict Aldape Guerra, grossly abused that opportunity, and ultimately failed to establish Aldape Guerra's actual involvement in the crime, much less his guilt. Under the facts of this case, allowing the State another chance to deprive Guerra of his liberty would violate the Double Jeopardy Clauses of the United States and Texas Constitutions and the Due Course of Law provisions of the Texas Constitution. Accordingly, this Court should dismiss the prosecution of Aldape Guerra in Cause No. 359,805 and issue a Writ of Habeas Corpus to release Aldape Guerra from his wrongful confinement and to bar his re-prosecution for the murder of Houston police officer J.D. Harris.

Respectfully submitted,

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STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT OF VERIFICATION

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

Scott J. Atlas

Subscribed and sworn to before me this 8th day of October, 1996.

Notary Public

My commission expires:

6/23/99

L. MICHELE BENGE
Notary Public, State of Texas
My Commission Expires
JUNE 23, 1999.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 8th day of October, 1996.

SCOTT J. ATLAS

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FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 01:10
BY DEPUTY

October 8, 1996

VIA MESSENGER

Mr. Charles Bacarisse
Harris County District Clerk
301 San Jacinto
Houston, Texas 77002

Re: Cause No. 359805; *The State of Texas v. Ricardo Aldape Guerra*; In the 248th District Court of Harris County, Texas

Dear Sir:

Enclosed for filing in the captioned cause are the following:

1. Defendant's Motion to Suppress Witness Statements and In-Court Identifications, a Memorandum in Support, and a proposed Order;

2. Defendant's Motion to Dismiss Indictment with Prejudice and proposed Order;

3. Defendant's Motion for Return of Personal Property and proposed Order;

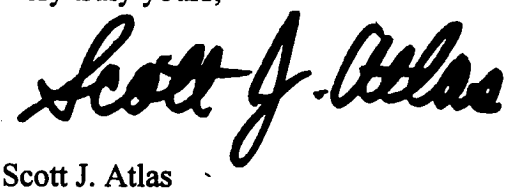
4. Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings and proposed Order; and

5. Defendant's Motion to Take Judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Trial Court Evidentiary in all Pretrial Proceedings and proposed Order.

Please stamp the enclosed extra copy of this letter and pleadings and return them to the undersigned. By copy of this letter and the enclosed documents, a copy of this filing is being

provided to opposing counsel.

Very truly yours,



Scott J. Atlas

Enclosures

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144 (2)

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

FILED
HARRIS DISTRICT CLERK'S OFFICE
1996 OCT -8 PM 3:9
BY DEPUTY

DEFENDANT'S MOTION TO TAKE JUDICIAL NOTICE OF HEARING TRANSCRIPT AND EXHIBITS OF FEDERAL HABEAS TRIAL COURT EVIDENTIARY HEARING IN ALL PRETRIAL PROCEEDINGS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Ricardo Aldape Guerra ("Aldape Guerra"), Defendant in the captioned cause, and files this Motion to Take Judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Trial Court Evidentiary Hearing in All Pretrial Proceedings as follows:

1. On July 13, 1982, J.D. Harris, a Houston police officer, was murdered while on patrol in a Hispanic neighborhood in Houston, Texas. Aldape Guerra was arrested that same night. He was tried for the capital murder of Officer Harris and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. In February 1993, after his appeals had been exhausted and he had been denied habeas relief by the state courts, Aldape Guerra filed an application for a writ of habeas corpus in federal district court. The federal district court conducted an extensive evidentiary hearing on his application in November 1993.

2. Pursuant to Texas Rule of Criminal Evidence 201, Aldape Guerra requests that this Court take judicial notice of the transcript (*i.e.*, the statement of facts) of the November 1993 federal district court's evidentiary hearing on Aldape Guerra's Application for Writ of Habeas Corpus and the exhibits admitted into evidence at that evidentiary hearing. The decision by that court, based on the evidence presented at the November 1993 evidentiary hearing, is reported at 916 F. Supp. 620.

The transcript, consisting of five volumes, is attached hereto as Attachment 1. The 48 exhibits introduced at the habeas hearing are attached hereto as Attachment 2, excluding Petitioner's Exhibit Nos. 1, 2, and 3, which are the 27-volume Statement of Facts from the 1982 trial (Petitioner's Exhibit No. 1), the exhibits from the 1982 trial (Petitioner's Exhibit No. 2), and the Transcript from the 1982 trial (Petitioner's Exhibit No. 3), respectively, from the 1982 state court capital murder trial. These three exhibits are being withheld because they are voluminous, are in this Court's files, and are in the Harris County District Attorney's files.

WHEREFORE, PREMISES CONSIDERED, Defendant Ricardo Aldape Guerra requests that in all pretrial proceedings, the Court take judicial notice of the transcript of the federal district court's November 1993 evidentiary hearing on Aldape Guerra's application for writ of habeas corpus and all 48 exhibits admitted into evidence at that hearing.

Respectfully submitted,

VINSON & ELKINS L.L.P.

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ATTORNEYS DEFENDANT
RICARDO ALDAPE GUERRA

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 8th day of October, 1996.

Scott J. Atlas
SCOTT J. ATLAS

VEHOU07:24664.1

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

CHARLES BACARISSE
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1998 OCT -8 PM 5:57

ORDER TAKING JUDICIAL NOTICE OF HEARING TRANSCRIPT AND EXHIBITS OF FEDERAL HABEAS COURT EVIDENTIARY HEARING IN ALL PRETRIAL PROCEEDINGS

On this day came on to be heard Defendant's Motion to Take Judicial Notice of Transcript and Exhibits of Habeas Proceedings in All Pretrial Proceedings, and the Court, after reviewing the file and argument of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that in all pretrial proceedings, pursuant to Texas Rule of Criminal Evidence 201, the Court will take judicial notice of the transcript (*i.e.*, the statement of facts) of the November 1993 federal district court's evidentiary hearing on Defendant Ricardo Aldape Guerra' application for writ of habeas corpus and all 48 exhibits admitted into evidence at that hearing in *Guerra v. Collins.*, Civil A. No. H-93-290 (S.D. Tex.) (decision reported at 916 F. Supp. 620 (S.D. Tex. 1995)).

Signed this ____ day _____, 199___.

_____
PRESIDING JUDGE

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FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 03
BY DEPUTY

October 8, 1996

VIA MESSENGER

Mr. Charles Bacarisse
Harris County District Clerk
301 San Jacinto
Houston, Texas 77002

Re: Cause No. 359805; *The State of Texas v. Ricardo Aldape Guerra*; In the 248th District Court of Harris County, Texas

Dear Sir:

Enclosed for filing in the captioned cause are the following:

1. Defendant's Motion to Suppress Witness Statements and In-Court Identifications, a Memorandum in Support, and a proposed Order;

2. Defendant's Motion to Dismiss Indictment with Prejudice and proposed Order;

3. Defendant's Motion for Return of Personal Property and proposed Order;

4. Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings and proposed Order; and

5. Defendant's Motion to Take Judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Trial Court Evidentiary in all Pretrial Proceedings and proposed Order.

Please stamp the enclosed extra copy of this letter and pleadings and return them to the undersigned. By copy of this letter and the enclosed documents, a copy of this filing is being

provided to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

c: **VIA MESSENGER**
Hon. W. R. Voigt
248th District Court
1302 Preston, 3rd Floor
Houston, Texas 77002

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VEHOU07:24698.1

143 (1)

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 5:58
BY DEPUTY

DEFENDANT'S MOTION TO TAKE
JUDICIAL NOTICE OF PRIOR PROCEEDINGS IN ALL PRETRIAL PROCEEDINGS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Ricardo Aldape Guerra ("Aldape Guerra"), Defendant in the captioned cause, and files this Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings as follows:

1. On July 13, 1982, J.D. Harris, a Houston police officer, was murdered while on patrol in a Hispanic neighborhood in Houston, Texas. Aldape Guerra was arrested that same night. He was tried for the capital murder of Officer Harris and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. The Texas Court of Criminal Appeals affirmed the conviction on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex. Crim. App. 1988) (en banc). In 1989 the United States Supreme Court denied Aldape Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925, 109 S. Ct. 3260 (1989).

2. In May 1992 Aldape Guerra filed for habeas relief in the state trial court. On September 17, 1992, following the appointment of new counsel two months earlier, he filed an amended application for habeas relief. On September 21, 1992, the trial court denied Aldape Guerra's request for an evidentiary hearing and recommended denial of relief, without making findings of fact or conclusions of law. In January 1993 the Texas Court of Criminal Appeals

accepted the recommendation and denied relief. In February 1993 Aldape Guerra filed a habeas corpus petition in federal district court. The federal district court conducted an extensive evidentiary hearing in November 1993; in November 1994 that court entered an order granting relief. The order was amended on May 18, 1995, *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), and the State was ordered to release Aldape Guerra unless the State began retrial proceedings by arraigning him within 30 days. That judgment was stayed by the U.S. Court of Appeals for the Fifth Circuit. On July 30, 1996, the U.S. Court of Appeals for the Fifth Circuit affirmed the federal district court's decision. *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996). The State did not request a rehearing by the Fifth Circuit.

3. Every fact described in the preceding two paragraphs is set forth in the opinion of either the federal district court, 916 F. Supp. at 622-23, 637-38, or the Fifth Circuit, 90 F.2d at 1076, 1080, or both. Pursuant to TEX. R. CRIM. EVID. 201, Aldape Guerra requests that this Court take judicial notice of the occurrence of these prior proceedings as the Court rules on any motions currently or subsequently filed and in any other decisions made by the Court. A certified copy of the federal district court's decision of May 1995 is attached hereto marked "Attachment 1" and incorporated herein for all purposes.

WHEREFORE, PREMISES CONSIDERED, Defendant Ricardo Aldape Guerra requests that in all pretrial proceedings the Court take judicial notice of the occurrence of all prior proceedings in state and federal court, both the substantive criminal proceedings, subsequent appeals, and all habeas proceedings and appeals, all as described in paragraphs 1 and 2 above.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: Scott J. Atlas

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified, mail return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 8th day of October, 1996.

Scott J. Atlas
SCOTT J. ATLAS

VEHOU07:23149.1

ATTACHMENT 1

United States District Court
Southern District of Texas
FILED

MAY 1995

Michael N. Milby, Clerk

65

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAY 19 1995

Michael N. Milby, Clerk

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

AMENDED ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

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

TRUE COPY I CERTIFY
ATTEST: 9/10/96
MICHAEL N. MILBY, Clerk
By _____ Deputy Clerk

I.

Factual and Procedural History

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

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

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

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

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

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[1] These characteristics and features are important because the identity of the "shooter" was in dispute.

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

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

II.

Petitioner's Contention:

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

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

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

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procedure leading up to trial.

III.

Pretrial Intimidation of Witnesses:

III (a) The Petitioner's Contentions:

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

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

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

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

III (b) Federal Habeas Testimony:

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

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

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[2] During Diaz' testimony the prosecutor, on several occasions, altered the testimony by question and reaffirmed it again and again. For example:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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shooter, not only of officer Harris but also Mr. Armijo.[3]

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

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

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[3] The statement referred to by the prosecutor states in relevant:

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

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

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

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

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

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

III (c) Discussion and Conclusion:

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

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

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

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

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

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

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

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IV.

Improper Identification Procedures

IV (a) The Legal Standard:

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

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

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

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

IV (b) Discussion:

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

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

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

> ... "I know the one that shot the officer by sight...." The shooter "was wearing dark brown pants and a dark brown or black shirt. He (sic) tall and thin and has shoulder length straight blond hair." (Hilma G. Galvan at 12:05 a.m., July 14, 1982).
>
> * * *
>
> ... "I saw the guy with the blond hair reach into ... his pants and pull out a pistol and shoot the policeman.... He was wearing brown pants and a brown shirt that was open all the way down." (Herlinda Medina Garcia, at 12:12 a.m., July 14, 1992).

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* * *

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

* * *

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

* * *

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

* * *

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

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

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

* * *

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

* * *

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

* * *

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV (c) Conclusion:

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

V.

Failure to Disclose Materially Exculpatory Evidence

V (a) The Legal Standard:

There is long standing authority for the principle that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). In order to establish that

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evidence falls within the purview of Brady, a petitioner must establish that the evidence was suppressed and that it was material and favorable. Id. Suppressed evidence is "material" if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985).

V (b) Discussion:

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

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

She described the events and actor as follows:

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

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

According to Garcia, she told the police on the night of the shooting that the short-haired man was the shooter. The first written statement prepared her. She was asked to sign this written statement, which omitted her exonerating reference to the fact that the short-haired man was the shooter and that the long-haired man was the man with the empty hands near the front end of the police car at the time Officer Harris was shot. Garcia, who had attended only seven years of school, asked the police officer to read it to her because she could not read well. The police officer refused and told her to "just sign it." According to Garcia, she then signed it because of the earlier verbal threat that another police officer made concerning revoking her husband's parole for living with her, Garcia, a minor.

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

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same reason that she had signed the first statement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V (c) Conclusion:

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

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

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

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

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

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

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

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

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

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body after he was short and killed by the police.

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

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

McDonald also testified that the two trace metal patterns found on

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

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

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

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

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

VI.

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

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

The Court has previously stated the facts surrounding the

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

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

> **Q.** You say you saw this one man and your saw him "pointing." Was he pointing toward or in the direction of the police car or the police officer?
> **A.** Uh-huh, the direction of the police car.

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

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

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

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

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[10] See also note 2 at p. 8 supra.

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

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

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

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

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[11] These reports were not produced or made available to the defendant, pretrial, pursuant to the defendant's discovery request.

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

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

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

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

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

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

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

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

VII.

Cumulative Effect of Prosecutorial Error

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

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at 1458.

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

CONCLUSION

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

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

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

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

Signed this 18th day of May, 1995.

KENNETH M. HOYT
United States District Judge

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CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

FILED
1998 OCT -8 PM 6:55
CHRIS DANIEL
DISTRICT CLERK
HARRIS COUNTY, TEXAS
BY DEPUTY

ORDER TAKING JUDICIAL NOTICE OF
PRIOR PROCEEDINGS IN ALL PRETRIAL PROCEEDINGS

On this day came on to be heard Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings, and the Court, after reviewing the file and argument of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that in all pretrial proceedings the Court will take judicial notice of the following undisputed facts, pursuant to Rule 201 of the Texas Rules of Criminal Evidence: On July 13, 1982, J.D. Harris, a Houston police officer, was murdered while on patrol in a Hispanic neighborhood in Houston, Texas. Ricardo Aldape Guerra ("Aldape Guerra") was arrested that same night. He was tried for the capital murder of Officer Harris and was convicted on October 12, 1982. On October 14, 1982, he was sentenced to death by lethal injection. The Texas Court of Criminal Appeals affirmed the conviction on May 4, 1988. *Guerra v. State*, 771 S.W.2d 453 (Tex. Crim. App. 1988) (en banc). In 1989 the United States Supreme Court denied Aldape Guerra's petition for a writ of certiorari. *Guerra v. Texas*, 492 U.S. 925 (1989). In May 1992 Aldape Guerra filed for habeas relief in the state trial court. On September 17, 1992, following the appointment of new counsel two months earlier, he filed an amended application for habeas relief. On September 21, 1992, the trial court denied Aldape Guerra's request for an evidentiary hearing and recommended denial of relief, without making findings of fact or conclusions of law. In January 1993 the Texas

Court of Criminal Appeals accepted the recommendation and denied relief. In February 1993 Aldape Guerra filed a habeas corpus petition in federal district court. The federal district court conducted an extensive evidentiary hearing in November 1993; in November 1994 that court entered an order granting relief. The order was amended on May 18, 1995, *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), and the State was ordered to release Aldape Guerra unless the State began retrial proceedings by arraigning him within 30 days. That judgment was stayed by the U.S. Court of Appeals for the Fifth Circuit. On July 30, 1996, the U.S. Court of Appeals for the Fifth Circuit affirmed the federal district court's decision. *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996). The State did not request a rehearing by the Fifth Circuit.

Signed this ____ day _____, 1996.

_____
PRESIDING JUDGE

VEHOU07:23149.1

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FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 03:40
BY DEPUTY

October 8, 1996

VIA MESSENGER

Mr. Charles Bacarisse
Harris County District Clerk
301 San Jacinto
Houston, Texas 77002

Re: Cause No. 359805; *The State of Texas v. Ricardo Aldape Guerra*; In the 248th District Court of Harris County, Texas

Dear Sir:

Enclosed for filing in the captioned cause are the following:

1. Defendant's Motion to Suppress Witness Statements and In-Court Identifications, a Memorandum in Support, and a proposed Order;

2. Defendant's Motion to Dismiss Indictment with Prejudice and proposed Order;

3. Defendant's Motion for Return of Personal Property and proposed Order;

4. Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings and proposed Order; and

5. Defendant's Motion to Take Judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Trial Court Evidentiary in all Pretrial Proceedings and proposed Order.

Please stamp the enclosed extra copy of this letter and pleadings and return them to the undersigned. By copy of this letter and the enclosed documents, a copy of this filing is being

provided to opposing counsel.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

c: **VIA MESSENGER**
Hon. W. R. Voigt
248th District Court
1302 Preston, 3rd Floor
Houston, Texas 77002

VIA MESSENGER
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Ricardo Aldape Guerra, #4362
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(13)

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

FILED
CHARLES BARKER
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 4:57
BY DEPUTY

DEFENDANT'S MOTION FOR RETURN OF PERSONAL PROPERTY

Now comes Defendant, Ricardo Aldape Guerra ("Guerra"), and files this Motion for Return of Personal Property, and as cause therefor would show this Court the following:

1. In October 1982, Guerra was found guilty in this Court of the capital murder of a Houston police officer and sentenced to death. His petition for a writ of habeas corpus was granted, and his conviction was set aside. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996).

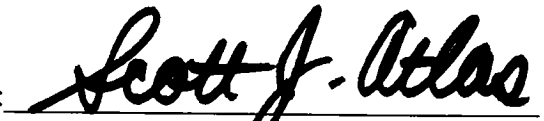
2. On the night of his arrest (late evening on July 13, 1982 or early morning on July 14, 1982), Houston police officers confiscated from Guerra $15.59 in cash and a $300.00 money order made out to his mother. A copy of the record from official police files reflecting the confiscation of this cash and money order (F333, F677) is attached hereto, marked "Attachment 1," and incorporated herein for all purposes. Guerra wishes to obtain the return of said cash and money order.

3. Neither the cash nor the money order has ever been used as evidence in any proceeding, and neither has evidentiary significance. In any event, Guerra is prepared to stipulate at any retrial to the fact that he had the cash and money order in his possession at the time of his arrest and that the last page of Attachment 1 is a true and correct copy of the money order.

Accordingly, Defendant Ricardo Aldape Guerra respectfully requests the return of the $15.59 in cash and $300.00 money order that were in his possession and were confiscated by Houston police officers in the late evening of July 13, 1982 or the early morning of July 14, 1982.

Respectfully submitted,

VINSON & ELKINS L.L.P.

By: 

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RICARDO ALDAPE GUERRA

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Houston, Texas 77046
(713) 960-6019

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 8th day of October, 1996.

Scott J. Atlas

Scott J. Atlas

VEHOU07:21518.1

ATTACHMENT 1

HIS PISTOL TO SHOOT, WEDO HAD ALREADY SHOT SEVERAL TIMES AT THE CAR.

WHEN THEY GOT TO THE HOUSE ON RUSK, WEDO SHOWED HIM THE OFFICERS PISTOL. HE STATES THAT HE GOT SCARED AND DECIDED TO LEAVE THE HOUSE AND AS HE WALKED OUT THE BACK DOOR HE DECIDED TO HIDE BEHIND A HORSE TRAILER THAT WAS IN THE BACK YARD. HE STATES THAT HE SAW WEDO GO INTO THE GARAGE AND HE FIGURED THAT HE WAS GOING TO HIDE IN THERE. HE CLAIMS TO HAVE SEEN SOMEONE SHINE A LIGHT INSIDE THE GARAGE AND HE FIGURED THAT IT WAS A POLICE OFFICER.

HE STATES THAT HE HEARD SEVERAL SHOTS AND THAT IT APPEARED TO COME FROM TWO DIFFERENT WEAPONS, BECAUSE ALL OF THE SHOTS DIDN'T SOUND THE SAME. AFTER THE SHOOTING HE CLAIMS TO HAVE STAYED QUITE BUT ONE OF THE OFFICERS PUT HIS LIGHT ON HIM AND HE WAS ARRESTED. FOR DETAILS SEE ATTACHED STATEMENT...

THE SUSP WAS THEN ASKED TO REMOVE HIS CLOTHES SO THAT THEY COULD BE TAGGED IN THE CRIME LAB. A TRUSTEE'S UNIFORM WAS GIVEN TO HIM. DET WEBBER SUBMITTED THE SUSP'S CLOTHING. THE SUSP WAS THEN PLACED IN THE CUSTODY OF DET WEBBER.

SUPPLEMENT ENTERED BY = 68769
REPORT REVIEWED BY-DSF EMPLOYEE NUMBER-057123
COPIES ALSO SENT TO- RPI/ / / / ACTION DUE DATE- / /
DATE CLEARED- C7/13/82

NO-CCC6

OFFENSE- CAPITAL MURDER OF A POLICE OFFICER aa

STREET LOCATION INFORMATION

NUMBER- 4900 NAME-WALKER TYPE- SUFFIX-
APT NO-C NAME- TYPE- SUFFIX-
DATE OF OFFENSE-07/13/82 DATE OF SUPPLEMENT-07/18/82
COMPL(S) LAST-HARRIS FIRST-JAMES MIDDLE-D
LAST- FIRST- MIDDLE-

RECOVERED STOLEN VEHICLES INFORMATION

NONE

OFFICER1-L.E. WEBBER EMP#-C43133 SHIFT-1 DIV/STATION-HOMICIDE

SUPPLEMENT NARRATIVE

THE BELOW ARRESTED SUSP WAS TURNED OVER TO DET'S WEBBER AND BOSTOCK AFTER DET GATEWOOD HAD COMPLETED HIS INTERVIEW OF THE SUSP. DET WEBBER TOOK THE SUSP TO THE PHOTO LAB WHERE PHOTO'S WERE TAKEN OF THE SUSP IN FULL LENGTH VERSION SHOWING THE CLOTHING OF THE SUSP AND HIS OVERALL HEIGHT. THE SUSP WAS LATER BROUGHT BACK TO THE HOMICIDE OFFICE WHERE THE SUSP WAS ASKED TO STRIP OUT OF HIS CLOTHING AND TO DRESS IN A JAIL WHITE JUMPSUIT.

THE SUSP'S CLOTHING WAS RETAINED BY THIS DET AND WAS SUBMITTED TO THE HPD CRIME LAB. THE CRIME LAB NUMBER IS L82-5806. DET REQUESTED THAT THE CLOTHING BE EXAMINED FOR BLOOD AND OTHER FOREIGN EVIDENCE RELEVENT TO THIS CASE AND INCIDENT #42667382.

EVIDENCE SUBMITTED:

1. A GREEN MILITARY FATIGUE LONG SLEEVE JACKET. THE RIGHT FRONT BREAST POCKET CONTAINED $.21 IN CHANGE, A BIC TYPE CIGARETTE LIGHTER THAT IS COVERED WITH A SILVER METAL CASE WITH AN EAGLE ATTACHED, AND FOURTEEN DOLLARS IN CURRENCY ($14.00) TWO FIVE DOLLAR BILLS AND FOUR ONE DOLLAR BILLS.

2. PAIR OF SEMI-FADED LEVI BLUE JEANS WITH ONE DOLLAR AND THIRTY-EIGHT CENTS IN COINS IN THE RIGHT FRONT POCKET ($1.38).

3. PAIR OF WHITE HIGH-TOP TENNIS SHOES, ALL STAR BRAND.

4. A PAIR OF WHITE UNDER BRIEFS.

5. A PAIR OF WHITE CREW SOCKS WITH GREEN STRIPPINGS AT THE TOP.

6. DETECTIVE ALSO COLLECTED HAIR SAMPLES FROM THE SUSP.

THE SUSPECT WAS LATER PLACED IN THE CITY JAIL AT 8:00AM. DET'S WEBBER AND BOSTOCK SPOKE WITH SGT. WEAVER OF THE JAIL DIVISION AND REQUESTED THAT THE SUSP BE KEPT SEPARATE FROM ALL OTHER PRISONERS.

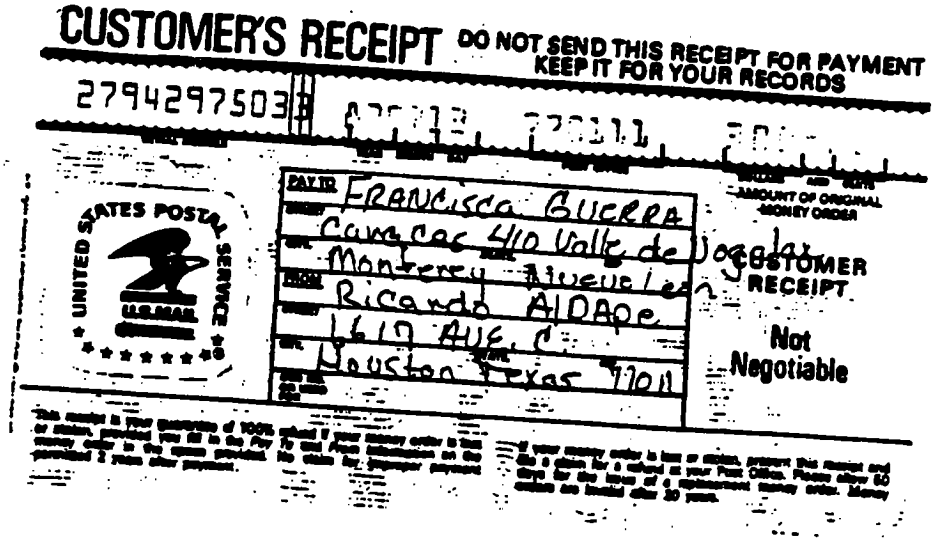
ARRESTED AND NOT YET CHARGED: RICARDO ALDAPE GUERRA LAM/20
4911 RUSK, DOB 4-3-62

HOLD CARD SHOWS DET GATEWOOD AND OFFICER YBARBO AS THE ARRESTING OFFICERS.

NOTE: RICARDO ALSO HAD IN HIS RIGHT BREAST POCKET OF THE SHIRT HE WAS WEARING A UNITED STATES POSTAL SERVICE MONEY ORDER MADE OUT TO A FRANCISCA ALDAPE IN MONTERREY, MEXICO. MONEY ORDER #27942975033 FOR THE AMOUNT OF $300.00. DATED 7-13-82 POST OFFICE #770111, MAIL TO FRANCISCA GUERRA, CARACAS 410 VALLE DE VOGALAR. SUSPECT LIST AN ADDRESS IN HOUSTON AS 6617 AVE C.

SUPPLEMENT ENTERED BY = 43133
REPORT REVIEWED BY-OSF EMPLOYEE NUMBER-057123
COPIES ALSO SENT TO- RP1/ / / / / ACTION DUE DATE- / /
DATE CLEARED- 07/13/82

F 000333



CUSTOMER'S RECEIPT DO NOT SEND THIS RECEIPT FOR PAYMENT
KEEP IT FOR YOUR RECORDS

2794297503

AMOUNT OF ORIGINAL MONEY ORDER

UNITED STATES POSTAL SERVICE
U.S. MAIL

PAY TO: FRANCISCA GUERRA
Caracas 410 Valle de Vogelar
Monterey Nuevo Leon
FROM: Ricardo ALDAPE
1617 AVE. C
Houston Texas 77011

CUSTOMER RECEIPT

Not Negotiable

This receipt is your guarantee of 100% refund if your money order is lost or stolen, provided you fill in the Pay To and From information on the money order in the space provided. No claim for improper payment permitted 2 years after payment.

If your money order is lost or stolen, present this receipt and file a claim for a refund at your Post Office. Please allow 60 days for the issue of a replacement money order. Money orders are invalid after 30 years.

F 000677

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 5:57

ORDER GRANTING DEFENDANT'S MOTION
FOR RETURN OF PERSONAL PROPERTY

On this day came on to be heard Defendant's Motion for Return of Personal Property and the Court, after reviewing the file and the arguing of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that the $15.59 in cash and the $300 money order that were in the possession of Defendant Ricardo Aldape Guerra and were confiscated by police officers in the late evening of July 13, 1982 or early morning of July 14, 1982, shall be returned to Ricardo Aldape Guerra's lead counsel in the captioned case by no later than _____, 1996.

Signed this _____ day of _____, 1996.

_____
PRESIDING JUDGE

VEHOU07:21518.1

Vinson & Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P
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WRITER'S FAX
(713) 615-5399

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
1996 OCT -8 PM 4:10
BY DEPUTY

October 8, 1996

VIA MESSENGER

Mr. Charles Bacarisse
Harris County District Clerk
301 San Jacinto
Houston, Texas 77002

Re: Cause No. 359805; *The State of Texas v. Ricardo Aldape Guerra*; In the 248th District Court of Harris County, Texas

Dear Sir:

Enclosed for filing in the captioned cause are the following:

1. Defendant's Motion to Suppress Witness Statements and In-Court Identifications, a Memorandum in Support, and a proposed Order;

2. Defendant's Motion to Dismiss Indictment with Prejudice and proposed Order;

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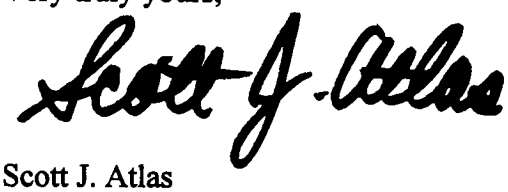
4. Defendant's Motion to Take Judicial Notice of Prior Proceedings in All Pretrial Proceedings and proposed Order; and

5. Defendant's Motion to Take Judicial Notice of Hearing Transcript and Exhibits of Federal Habeas Trial Court Evidentiary in all Pretrial Proceedings and proposed Order.

Please stamp the enclosed extra copy of this letter and pleadings and return them to the undersigned. By copy of this letter and the enclosed documents, a copy of this filing is being

provided to opposing counsel.

Very truly yours,



Scott J. Atlas

Enclosures

c: **VIA MESSENGER**
Hon. W. R. Voigt
248th District Court
1302 Preston, 3rd Floor
Houston, Texas 77002

VIA MESSENGER
Casey O'Brien, Assistant District Attorney
OFFICE OF THE HARRIS COUNTY DISTRICT ATTORNEY
201 Fannin, Suite 200
Houston, Texas 77002

VIA U.S. MAIL
Stanley G. Schneider
SCHNEIDER & MCKINNEY
11 Greenway Plaza, Suite 3112
Houston, Texas 77046

VIA U.S. MAIL
Ricardo Aldape Guerra, #4362
1301 Franklin 6C4
Houston, Texas 77002

(4)

141 Vol. 15

CAUSE NO. 359805

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

FILED
1998 OCT -9 PM 6:57
BY DEPUTY

DEFENDANT'S MOTION TO DISMISS INDICTMENT WITH PREJUDICE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Ricardo Aldape Guerra ("Aldape Guerra") and files this Motion to Dismiss Indictment with Prejudice, and in support thereof would show the Court the following:

ARGUMENT AND AUTHORITIES

Aldape Guerra believes that the indictment should be dismissed with prejudice for two reasons. First, under *State v. Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995), and under article I, sections 10 and 19, of the Texas Constitution, the State violated Aldape Guerra's constitutional rights, and dismissal is the only remedy that will adequately protect those rights. Second, under the Grand Jury Clause of the Fifth Amendment of the United States Constitution and article I, section 10, of the Texas Constitution, the State violated Aldape Guerra's constitutional rights, and dismissal is the only remedy that will adequately protect those rights.

A. The *Frye* Analysis

1. Under *Frye*, a Court Should Dismiss an Indictment when It Cannot Eliminate the Taint of a Constitutional Violation.

In *Frye* the Texas Court of Criminal Appeals ruled that a trial court has the power to dismiss an indictment, even without the prosecutor's permission, when necessary to remove the taint of a constitutional violation from the trial or retrial of a case. *Id.* at 330.

In *Frye* the prosecution violated the defendant's Sixth Amendment right to counsel by twice enticing him to converse with District Attorney employees outside the presence of his attorney, and

secretly recording these conversations. *Id.* at 325-26. The Court of Criminal Appeals made a broad holding about the power of trial courts to dismiss an indictment when dismissal "may be the *only* means for adequately protecting an individual's Sixth Amendment rights." *Id.* at 330. The Supreme Court has acknowledged that this power extends to Fifth Amendment due process violations:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

United States v. Russell, 411 U.S. 423, 431-32 (1973) (dicta).[1]

The *Frye* Court listed the two factors that determine when the trial court should invoke its power to dismiss an indictment to remedy a Sixth Amendment violation, which Aldape Guerra maintains are sufficient to justify dismissing an indictment to remedy a Fifth Amendment violation as well: (1) if the defendant has suffered harm from a constitutional violation and (2) dismissal is the only remedy that will adequately protect the infringed rights. 897 S.W.2d at 331. Significantly, the Court held that both issues were questions of fact and refused to substitute its judgment for the trial court on either question. *Id.* Aldape Guerra believes that the same test should be applied to justify dismissing an indictment under article I, sections 10 and 19, of the Texas Constitution.

The opinion of the intermediate appellate court in *Frye* described the second of these requirements in greater detail. 846 S.W.2d 443 (Tex. App.—Houston [14th Dist.] 1992). The State had argued that the appropriate remedy was to bar the State from using the tainted evidence. *Id.* at 451. The Court of Appeals rejected that claim because the trial court had found that the specific violation at issue could not be cured in that manner:

---

[1]As an example of this type of situation, the Supreme Court cited *Rochin v. California*, 342 U.S. 165 (1952), a case where outrageous due process violations by the police permitted them to locate the only incriminating evidence against the defendant.

> The trial court specifically found that the tainted information was *inextricably intertwined* with the untainted information and that a meaningful segregation was unworkable, and that dismissal was the only possible remedy.

Id. at 452 (emphasis added).

Aldape Guerra can demonstrate that both the harm and the adequate protection elements are satisfied in his case. First, this Court has the power to dismiss the indictment because Aldape Guerra's constitutional rights are at stake. Second, dismissal is needed here because both elements that the Court of Criminal Appeals outlined are present: the constitutional violations harmed Aldape Guerra, and dismissal of the indictment is the only remedy that will adequately protect his constitutional rights.

2. Constitutional Violations Harmed Aldape Guerra.

The United States District Court for the Southern District of Texas found both violations of Aldape Guerra's constitutional rights and resulting harm. The constitutional violations included intimidation of witnesses, use of impermissibly suggestive identification procedures, and withholding of exonerating evidence. *Guerra v. Collins*, 916 F. Supp. 620, 626, 630-31 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996). The harm to Aldape Guerra was severe.

In describing the effect of the misconduct, the *Guerra* court found that the police and prosecutors intentionally and knowingly created incriminating evidence, suborned perjured testimony that Aldape Guerra was the murderer, and destroyed exonerating evidence and that in a fair trial Guerra would have been acquitted:

> ***[T]he identification procedures*** used by the police and the prosecutors were so corrupting that it ***caused witnesses***, who either knew otherwise, or did not know at all, ***to testify that Guerra had committed the crime.***

Id. at 630 (emphasis added).

> The state has the burden of proving . . . that ***the intentional act of causing to be admitted tainted, unreliable and perjured testimony, identifying Guerra as the shooter***, was harmless . . . . The state has offered no evidence to contradict this point and has failed to discharge its duty.

Id. at 631 (emphasis added).

> [T]hey had a duty to not prosecute an innocent man. They failed in these duties. ***These intentional omissions . . . had the effect of suppressing and destroying favorable testimony*** . . . . The information that the police and prosecutors failed to disclose . . . hardly left a paper trail, and intentionally so. . . . ***This conduct*** by the police and prosecutors ***could only have been deliberate*** . . . .

Id. at 634 (emphasis added).

> The Court concludes that, ***but for the conduct of the police officers and the prosecutors, either Guerra would not have been charged with this offense or the trial would have resulted in an acquittal.***

Id. at 635 (emphasis added).

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

Id. at 637 (emphasis added).

The District Court used equally strong language in describing the collective harm of all of the constitutional violations: "There is no doubt in this Court's mind that the verdict would have been different had the trial been properly conducted." *Guerra*, 916 F. Supp. at 637.

3. Because the Tainted Testimony Is Inextricably Intertwined with Evidence that Both the State and Aldape Guerra Wish to Use, This Court Should Dismiss the Indictment.

The State's violations permanently destroyed evidence in this case in at least two ways.[2]

First, the State's illegal conduct permanently damaged the testimony because it created false memories in several key witnesses by, *inter alia*, parading Aldape Guerra, in handcuffs, in front of witnesses before the lineup so that witnesses knew he was the authorities' prime suspect, allowing witnesses to hear others identify Aldape Guerra during the lineup, showing witnesses mannequins that looked like Aldape Guerra and Carrasco, with Carrasco's likeness dressed in the bullet-riddled, blood-drenched shirt worn by Carrasco when he was killed, and insisting that Aldape Guerra, not Carrasco, was the murderer. The District court explicitly recognized this by finding that the State's actions were to blame for the inconsistencies in the testimony of numerous witnesses. 916 F. Supp. at 629-30. As a result, for example, Hilma Galvan, who originally gave the police a statement in large part exonerating Aldape Guerra, *id.* at 628, later insisted that Aldape Guerra was the shooter. *Id.* at 629. Similarly, young Jose Armijo, Jr. (age 10 at the time of the shooting), after telling police immediately after the incident that he had not seen Aldape Guerra or Carrasco clearly enough to identify the shooter, testified at trial that he saw Aldape Guerra shoot Officer Harris. *Id.* at 630. It is impossible for the State to now eliminate the damaging effects of its actions on the current memories of either Ms. Galvan or Jose, Jr.

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[2]In addition, Aldape Guerra has suffered harm resulting from the delay caused by the State's misconduct. A crucial witness from the first trial, Jose Esparza, died after the trial. He testified that shortly after the shooting Carrasco had confessed to shooting officer Harris. *Guerra*, 916 F. Supp. at 636. Mr. Esparza's death prevents him from repeating that testimony to a new jury.

In the first trial, the State suggested that Esparza was not present when Carrasco supposedly confessed to being the shooter. The federal habeas court found that this effort by the State to impeach Esparza was based on knowingly false evidence. 916 F. Supp. at 636. Thus, Esparza's testimony, without the unfair attempt to impeach him, would have been even more useful in a retrial.

Second, the State's conduct permanently damaged the testimony by forcing witnesses to sign deliberately false statements and give false testimony at the 1982 trial. The police intimidated witnesses and forced them to sign statements that excluded exonerating information, mainly that Carrasco, not Aldape Guerra, had been the killer. *Id.* at 633. The federal habeas trial court found that the State failed to record exonerating statements made immediately after the incident. For example, Herlinda Garcia told the police soon after the shooting that the man with short hair (Carrasco) was the shooter. The police excluded this reference from her statement, which she could not read but signed in response to police threats. *Id.* at 631. At a meeting just before trial, she told one of the prosecutors that Aldape Guerra was not the shooter, but he told her she could not change her mind since she had signed a statement identifying Aldape Guerra as the shooter. *Id.* at 625. Similarly, Patricia Diaz initially told police that when officer Harris was shot, Aldape Guerra's hands were empty. *Id.* at 632. The police excluded this information from her statement, which she signed without reading it, unaware of its content. *Id.* As the federal habeas trial court described it, by failing to accurately record witness statements and to disclose all exculpatory evidence, "[T]hese intentional omissions . . . had the effect of suppressing and destroying favorable testimony that the Court finds was material to Guerra's defense." *Id.* at 634. This destruction of evidence irreparably injured Aldape Guerra in two ways: (1) Aldape Guerra cannot refresh the witnesses' recollection with accurate, contemporaneously recorded statements and testimony; and (2) if the State tries to impeach any of these witnesses (by asking, for example, if they told police that Aldape Guerra was the killer), Aldape Guerra cannot show the jury prior consistent statements contained in the original witness statements and in the 1982 testimony. Nothing can protect Aldape Guerra from such harm.

Additionally, Aldape Guerra will face the obstacle of knowing that witnesses can be impeached by the unconstitutionally tainted statements and testimony, thus forcing them, on direct

or re-direct examination, to explain why their accounts of the incident changed so dramatically. Unlike the first two concerns, however, this problem can be cured by suppression of the witness statements and 1982 trial testimony, which is requested in Defendant's Motion to Suppress Witness Statements and In-Court Identifications (filed Oct. 8, 1996).

Eyewitness testimony will be crucial in the re-trial here because, as the federal habeas trial court found, the physical evidence "establishes" that Aldape Guerra did not shoot officer Harris. 916 F. Supp. at 633. The State's entire case depends on eyewitness testimony. Because the State's conduct—intimidation of witnesses, use of impermissibly suggestive identification procedures, and suppression of exonerating evidence—damaged beyond repair the memories and prior statements and testimony of most eyewitnesses, there is no means of removing the taint of the constitutional violations from a retrial. The only means of protecting Aldape Guerra's rights is to dismiss the indictment.

B. Fifth Amendment Grand Jury Clause

The Grand Jury Clause of the Fifth Amendment gives citizens accused of capital crimes the right to an "independent and informed grand jury." *See Wood v. Georgia*, 370 U.S. 375, 390 (1962); *United States v. Sitton*, 968 F.2d 947, 953 (9th Cir. 1992) (noting the existence of a "Fifth Amendment right to the judgment of an independent and informed grand jury."), *cert. denied*, 507 U.S. 929 (1992). So does article I, section 10, of the Texas Constitution. The Supreme Court has described the reason for this constitutional right:

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty . . . and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood, 370 U.S. at 390. In theory, then, the grand jury will protect innocent citizens from the unfounded accusations of overzealous prosecutors.

The protection provided by the grand jury process, however, depends entirely on the supply of accurate information. In this case, the State deprived Aldape Guerra of the protection of the grand jury process by presenting manufactured information to the grand jury. As the prosecutors conceded at the 1993 federal habeas hearing, there simply was no physical evidence of any kind that pointed to Aldape Guerra as the shooter. 916 F. Supp. at 630 n.7. The State relied entirely on eyewitness testimony to accuse Aldape Guerra. Through its intimidation of witnesses, use of improperly suggestive identification procedures, and exclusion of exonerating information from the witness statements, the State corrupted all of its evidence against Aldape Guerra. Thus, the grand jury was wholly unable to perform its protective function because it was thoroughly misinformed. In this manner, the State deprived Aldape Guerra of the protection of his constitutional right to an informed grand jury in the state court proceedings.

Federal courts have found violations of the Fifth Amendment on facts involving less egregious prosecutorial misconduct. *See United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974) (holding that a prosecutor, who failed to disclose to the grand jury the existence of certain perjured testimony, violated the defendants' Fifth Amendment rights); *United States v. Lawson*, 502 F. Supp. 158, 172 (D. Md. 1980) (concluding that a prosecutor who, *inter alia*, asked misleading questions denied defendants "their constitutional right to an 'unbiased' grand jury"). Thus, both the purpose of the Grand Jury Clause and existing Fifth Amendment case law direct the Court to conclude that the conduct of Aldape Guerra's prosecutors violated his Fifth Amendment right to an independent and informed grand jury.

To remedy constitutional violations under the Grand Jury Clause,[3] courts have observed that dismissal of the indictment is an appropriate remedy. *See Sitton*, 968 F.2d at 953 (noting that federal courts will dismiss indictments if prosecutorial misconduct "rises to the level of a violation of the Fifth Amendment right to the judgment of an independent and informed grand jury."); *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 (9th Cir. 1983) ("Dismissal of an indictment is therefore warranted on constitutional grounds if prosecutorial misconduct has undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it."), *cert. denied*, 465 U.S. 1079 (1984). In cases involving conduct much ***less*** corrupting of the grand jury decision-making process than that of Aldape Guerra's accusers, federal courts have dismissed indictments. *See United States v. Hogan*, 712 F.2d 757, 761-62 (2d Cir. 1983) (dismissing an indictment, based on supervisory power, because prosecutors had, among other things, referred to the defendant as a hoodlum and presented—possibly inadvertently—misleading statements).

The Third Circuit explained the rationale for dismissing indictments based on prosecutorial misconduct:

> We recognize that dismissal of an indictment may impose important costs upon the prosecution and the public. . . . But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury, where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. . . . [T]he handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the

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[3]Many of the federal cases on dismissal of indictments for prosecutorial misconduct involve federal courts exercising their supervisory powers, not federal courts protecting constitutional rights. *See, e.g., United States v. Hogan*, 712 F.2d 757, 761-62 (2d Cir. 1983). The issue whether a federal court should dismiss an indictment to enforce a constitutional right is distinct from the issue whether a federal court should dismiss an indictment pursuant to its supervisory powers.

> judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979). This rationale explains why dismissal is necessary when prosecutorial misconduct constitutes a ***constitutional*** violation. Under existing case law and under the rationale of the Third Circuit in *Serubo*, the Court should use dismissal of the indictment as the remedy for protecting the Grand Jury Clause rights of Aldape Guerra.

The federal courts do not require the existence of a constitutional violation to justify dismissal of an indictment. The First Circuit has observed: "Generally, a court, under its supervisory powers, will dismiss an indictment if there has been prosecutorial misconduct that actually biases the grand jury in performing its fact-finding function." *United States v. Maceo*, 873 F.2d 1, 3 (1st Cir. 1989), *cert. denied*, 493 U.S. 840 (1989). Aldape Guerra maintains that article V, sections 8 and 12, of the Texas Constitution gives state courts such supervisory powers.

To leave standing the indictment of Aldape Guerra would seriously abrogate the protection afforded Texas citizens by the Grand Jury Clause. As occurred here, police and prosecutors could manufacture cases for presentation to the grand jury who, unaware that the information had been fabricated, would return indictments against whomever the State chose to accuse. Prosecutors would possess a virtually limitless power of accusation. Many citizens, however innocent, would be at the prosecutors' mercy because of the anguish, harm to reputation, and enormous potential expense caused by an indictment. *See Serubo*, 604 F.2d at 817. To avoid this result and to protect Aldape Guerra's constitutional rights, the Court should dismiss the indictment with prejudice.

CONCLUSION

For all of the foregoing reasons, Aldape Guerra respectfully requests that this Court dismiss the indictment pending against him with prejudice and grant him any other relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Harris County District Attorney's Office by hand delivering a copy to the assistant district attorney handling the case or by sending a copy certified mail, return receipt requested, to 201 Fannin, Suite 200, Houston, Texas 77002, on this 8th day of October, 1996.

Scott J. Atlas

SCOTT J. ATLAS

VEHOU07:24582.1

CAUSE NO. 359805

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
RICARDO ALDAPE GUERRA	§	248TH JUDICIAL DISTRICT

FILED
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DEPUTY

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS INDICTMENT

On this day came on to be heard Defendant's Motion to Dismiss Indictment, and the Court, after reviewing the file and argument of counsel, is of the opinion that this Motion should be in all things GRANTED.

It is, therefore, ORDERED that the indictment of Ricardo Aldape Guerra for the capital murder of Houston police officer James Harris is hereby dismissed.

Signed this _____ day of _____, 1996.

_____
PRESIDING JUDGE

VEHOU07:24629.1