

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION

4 RICARDO ALDAPE GUERRA

\* Civil No. H-93-290

5 VERSUS

\* Houston, Texas

\* November 19, 1993

6 JAMES A. COLLINS,  
7 Director, Institutional Division

\* 9:15 a.m.

8 Texas Department of Criminal Justice

\*

9 TRANSCRIPT OF PROCEEDINGS  
10 BEFORE THE HONORABLE KENNETH M. HOYT  
11 UNITED STATES DISTRICT JUDGE  
12 VOLUME IV

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GENERAL ORDER 94-15, UNITED STATES  
DISTRICT COURT, SOUTHERN DISTRICT  
OF TEXAS.

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Appearances - Con't

For the Respondent:

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1 THE COURT: Mr. Atlas, did the marshals and the state  
2 officers get Mr. Matamoros down for you or did you get that  
3 resolved with them?

4 MR. ATLAS: Yes, Your Honor. That's been  
5 satisfactorily resolved. Thank you.

6 THE COURT: Very good. Thank you.

7 I think we are ready then to proceed and pick yp  
8 with your next witness. Who is that?

9 MR. GEE: Your Honor, I think we have a preliminary  
10 matter that Mr. Zapalac wants to take up with the Court.

11 THE COURT: Okay. Mr. Zapalac.

12 MR. ZAPALAC: Your Honor, counsel has indicated that  
13 he anticipates concluding his case maybe by noon today or  
14 shortly into the afternoon, and we have some witnesses we had  
15 not anticipated having to call, based on some of the testimony  
16 that's come out, and would like to amend the witness list, and  
17 would like to take up that issue now so that we know who we  
18 may or may not be able to call and who to have available when  
19 the petitioner rest.

20 THE COURT: Let me just take a look and see. I  
21 believe initially you had Neely, Webber, Brown, and Armijo,  
22 Jr.

23 MR. ZAPALAC: Right. And we amended that, submitted  
24 an amended list, without opposition from the petitioner to  
25 include James Montero and B.E. Frank; and Mr. Atlas indicated

1 he had no opposition to that.

2 We now have eight additional witnesses, and  
3 these are the police officers who either took the statements  
4 of witnesses or notarized those statements, and these  
5 witnesses have come in; and as Your Honor is aware from the  
6 testimony, have argued that they either did not read the  
7 statements or could not read English and they were not read in  
8 Spanish to them and that sort of thing.

9 THE COURT: Well, as to the issue of whether or not  
10 they were notarized, you made that an issue. I don't think  
11 the petitioners made that an issue. I don't really care  
12 whether they have been notarized or not.

13 MR. ZAPALAC: Well, the question that we were going  
14 to direct to the notaries in these cases was whether they  
15 asked the person if this was their statement, if they had read  
16 it and that sort of thing.

17 THE COURT: What difference does it make. They all  
18 admitted it's their signaure. It's like somebody signing a  
19 note.

20 MR. ZAPALAC: The question is whether they had read  
21 the statement or whether it had been read to them.

22 THE COURT: So, no one else -- I guess what you are  
23 saying I guess is that -- what I'm trying to figure out is if  
24 you duplicating witnesses. In other words, it doesn't make  
25 sense to have a police officer come in -- let's assume that's

1 the person that took the statement and typed it out -- there  
2 is no dispute that the statement existed or it exists -- and  
3 have that person come and testify "I took this statement.  
4 Here's what the person told me" that I wrote down. I guess  
5 that may be an issue now, though. I am not sure. Yeah. I  
6 think in a couple instances it is; and then you need another  
7 person to say that statement, that the party acknowledged to  
8 them they had read it and that that was true and accurate  
9 before it was notarized.

10 Is that what you are saying? You need that  
11 linkage?

12 MR. ZAPALAC: Yes, Your Honor. Because those two  
13 aspects of the case have become an issue from the testimony of  
14 the witnesses.

15 MR. GEE: Your Honor, we would like to be heard  
16 before the Court rules.

17 THE COURT: Go ahead.

18 MR. GEE: I take it that what Mr. Zapalac is saying  
19 is that he was surprised by the testimony and he needed these  
20 eight new witnesses to meet the testimony, but we would like  
21 to point out first that we don't like to be unaccommodating.  
22 We think we have been been accommodating. We didn't object to  
23 the two new witnesses who came in a little early. We do  
24 object to these eight new ones who come in now.

25 It is certainly not a new issue as to whether

1 the statements were selectively edited or were faithful to  
2 what the witnesses told the police officers. I am reading  
3 from Page 19 of our original answer. It says: "The applicant  
4 also alleged the state intimidated witnesses and changed their  
5 words around in their statements."

6 And further down on the same page: "The  
7 applicant alleges that the state used improper procedures  
8 during the line-up procedure, such as allowing witnesses to  
9 talk among themselves during the line-up, and allowing  
10 witnesses to identify the applicant in each other's presence."

11 I won't go through all the pleadings, but there  
12 are many instances of this in the pleadings.

13 There is one other example in our answer in this  
14 Court at Page 19. We say: "Guerra specifically contends that  
15 the prosecutors withheld and suppressed material exculpatory  
16 evidence, intimidating witnesses into testify for the state."

17 And over on Page 19: "If they had been  
18 disclosed we say it would have been material. That some  
19 witnesses claim that Guerra had his empty hands on the hood of  
20 the patrol car and that Carrasco was standing east Officer  
21 Harris at the time of the shooting, but this information was  
22 missing from the statements prepared by the police."

23 That some other witnesses who described the same  
24 circumstances were pressured to use words indicating Guerra  
25 did the shooting, or that the witness had nothing beneficial

1 to say.

2 And that one witness described Carrasco running  
3 along the north side of Walker, carrying what looked like a 9  
4 millimeter pistol, but the police omitted this from the signed  
5 statement.

6 Now, these are their pleadings, Your Honor, I am  
7 reading from to the Court; and in our response, to take only  
8 one example, those were admissions from our own pleadings.

9 THE COURT: Of what you were contending?

10 MR. GEE: Yes, sir. This is no surprise.

11 And to take only one instance from our pleading  
12 at Page 14 of our response, we say, we give fair warning:

13 "In addition, Guerra will produce witnesses who  
14 insist that the police selectively edited reports and witness  
15 statements. It would be for the Court at the evidentiary  
16 hearing to decide whom to believe."

17 So we have it out of the State's mouth that they  
18 knew these issues were in the case, and now suddenly we have  
19 eight new witnesses that we haven't heard of before.

20 We object, and we ask the Court not to allow the  
21 amendment.

22 THE COURT: Let me ask this question, Mr. Gee,  
23 regarding -- and also I guess ask it of Mr. Zapalac. Who is  
24 going to be able to say they specifically remember taking  
25 these statements, anyway, and remember exactly what these



1 people said?

2 MR. GEE: It would be a miracle if anyone could, Your  
3 Honor, 12 years later.

4 MR. ZAPALAC: Your Honor, I think that the police  
5 officers would be able to at least speak to their regular  
6 practice in taking witness's statements.

7 THE COURT: That's what I am getting to. That's all  
8 they would really be able to say, that they, in the normal  
9 course of their business, would take down as best they can  
10 what the witness has to say, and would record that and would  
11 then ask the witness to read the statement.

12 And then the court reporter would generally say,  
13 in the usual course of business, I would not acknowledge this  
14 signature without asking a person A, B, C and D, whatever is  
15 stamped, I believe, on the front of the documents or whatever  
16 their usual statement is; that you have read the statement; is  
17 this true and accurate, prior to them signing it and  
18 knowledging it.

19 Isn't that generally what we are going to get,  
20 anyway, from these eight people?

21 MR. ZAPALAC: I believe that may be the case.

22 THE COURT: I mean, nobody -- and I am not suggesting  
23 they won't say it -- but I am asking: Is there anybody going  
24 to come in here and say: Well, I remember taking this  
25 statement, and let me tell you exactly what was said?

1 MS. CORNELIUS: Can I speak to that, Judge?

2 THE COURT: Certainly.

3 MS. CORNELIUS: I have actually spoken with the  
4 officers.

5 It is correct, no one is going, as far as the  
6 officers I have talked to yet, is going to remember that  
7 particular statement --

8 THE COURT: Or the details of the statement.

9 MS. CORNELIUS: -- because each officer gave -- each  
10 officer took two or three statements.

11 What has been indicated to me, though, is that  
12 if an individual had shown some type of inability to read or  
13 whatever that then another paragraph is added: You know, I  
14 can not read English. It has been translated to me in  
15 Spanish.

16 THE COURT: Well, that's what they would normally do.

17 MS. CORNELIUS: The notaries I have talked to have  
18 said that if they had gone in to notarize the statements at  
19 any time, not these particular -- well, these particular  
20 statements, but they don't recall them -- and if the  
21 individual had said: "No. The officer refuses to read it  
22 back to me," then there would be some type of indication, or  
23 that notary would read it back to that individual, or would  
24 take it to the lieutenant, if there was problem; and that that  
25 had not happened; that they would remember that particular

1 incident, and that incident did not occur.

2 THE COURT: But here is the issue. The issue is not  
3 whether or not the police department did -- well, the issue is  
4 not an attack against the policies and practices of the  
5 Houston Police Department --

6 MR. GEE: We will stipulate.

7 THE COURT: -- and what they would normally and  
8 customarily do. What the petitioner is contending here is  
9 that it didn't happen; that the usual practices did not occur.

10 So the real question is who, if anybody, can  
11 speak to that, because you could march eight people in here  
12 and they could say: This is how we generally conduct  
13 business. And I am not even sure that the petitioner would  
14 object to you saying that this is how we conduct business.

15 MR. GEE: We are willing to stipulate to their normal  
16 practice, Your Honor.

17 THE COURT: The question is: What happened on this  
18 occasion?

19 And if anybody can come in and say: I can tell  
20 you what happened because here's a tape recorder of the entire  
21 statements or, I remember specifically what happened and would  
22 then be able to testify surrounding that and give credible  
23 evidence in that regard, incredible evidence, whatever it may  
24 be, the point is, I don't believe the issues are being joined  
25 by you giving the customary practice in this case.

1           I think that the law generally presumes that  
2 things have occurred in the usual manner that they should have  
3 occurred and that the usual and customary practices are in  
4 accordance with the law; and it is only when the party says  
5 "no, this time it didn't happen" that the usual and customary  
6 practices are put in issue and the parties then must come  
7 forward and present evidence that the usual and customary  
8 practices were either -- well, not necessarily usual and  
9 customary. They have got to come forward and present specific  
10 evidence on those specific charges, not what normally happens.

11           MS. CORNELIUS: Your Honor, do you think an officer's  
12 testimony that he has never taken a statement where an  
13 individual couldn't read English -- he has never refused to  
14 read it back translating in Spanish would not speak to that  
15 issue? It may not be specifically --

16           THE COURT: No. Because I am not even sure the issue  
17 in this case is that anybody refused to read anything back.

18           I think one of the issues -- and I am not  
19 particularly talking about any particular witness that has  
20 testified -- I think what we have here is a combination of  
21 several different kinds of things, and I guess I have to go  
22 back to the record and my notes to figure out which this  
23 applies, which witnesses this applies to.

24           First, there are persons whose educational level  
25 is such that they are unable to read.

1                   Secondly, there are those persons who do not  
2 speak English sufficiently, that if you had read it to them in  
3 English, it would not have made a big difference.

4                   And maybe even third, there are those persons  
5 who would not have chosen the words used, because they are of  
6 a much more common understanding of what the world is. It's a  
7 much more simplistic lifestyle than the lifestyle that we, you  
8 and I, or even maybe the police officers, would impose upon  
9 them, because we are now imposing upon people who live in a  
10 very simple way a very complex judicial or law enforcement  
11 process, and we use these "buzz words" that don't make sense.

12                  You know, when you ask, for example, one of the  
13 witnesses: And what did the defense counsel tell you?

14                  And surprised, she says: Now, who in the world  
15 is the defense counsel?

16                  And the problem is that it doesn't make sense  
17 within the question because she doesn't know if defense  
18 counsel means the person who was doing this or the person  
19 doing that, and a it's a lot easier for that to make sense if  
20 you were to have asked her a question in a fashion that she  
21 would have understood what you were talking about.

22                  I am not suggesting how that could have been  
23 done, but I am simply suggesting that we have got basically  
24 three problems. One is education; one has to do with the  
25 language, and one has to do with the manner in which we go

1 about presenting statements and documents to individuals; and  
2 then, too, we may have some genuine misunderstanding going on  
3 here, and I don't mean necessarily just on the part of these  
4 witnesses. It could have been on the part of the police  
5 officers.

6 But the problem is that police officers have not  
7 acknowledged that they misunderstood anybody. In fact, their  
8 position is they put everything down accurately and  
9 appropriately and in accordance with the usual and customary  
10 practices.

11 So that for a person to say that I have never  
12 refused to do something, puts in the issue, well, when were  
13 you asked? And I don't think that's an issue at this point.

14 MS. CORNELIUS: Your Honor, I believe if you look at  
15 the statements, there are paragraphs on certain statements  
16 that say, "I do not read English. This statement was read  
17 back to me by such and so and it is true and correct"; that  
18 these statements themselves acknowledge the particular  
19 problems that the witnesses had.

20 THE COURT: Right. I am not suggesting that  
21 acknowledgment of the language problem has not been made in  
22 one or more of the statements. I have not looked at them in  
23 specific detail to figure out which does that.

24 But again, I don't think that's the issue. I  
25 think the question, I think the matter that is addressed by

1 your pointing that out is what is usually and customarily  
2 done.

3 That's like asking: Do you need a simple  
4 divorce or a complex divorce? And the person says, well, I  
5 just need a plain divorce. I don't have any children; I don't  
6 have this, and so you go and pull your simple divorce out of  
7 the box, and that's the usual and customary kind of divorce  
8 proceeding you file.

9 But your secretary mistakenly pulls out the one  
10 that acknowledges there are children, and she then files one,  
11 and the judge looks at the pleading and says, what in the  
12 world did you file this pleading for and there are no children  
13 involved? All of this is unnecessary.

14 You say, well, Judge, we just did something  
15 different like than what we normally do. This is a mistake.

16 But 20 months down the road or 10 years down the  
17 road, we would all be here trying to figure out why you used  
18 this particular pleading, and you probably wouldn't know  
19 yourself why you used a particular pleading, when it was  
20 totally unnecessary.

21 So, the question -- back to your concern -- of  
22 whether or not a person would say, I didn't do this  
23 intentionally, or I did what I normally do, doesn't resolve  
24 the question in this particular case as of what did happen.  
25 That's the problem.

1           MR. GEE: Well, Your Honor, very simply, we gave them  
2 fair warning of this issue. Their pleadings admit that they  
3 had fair warning, and we don't think that they ought to be  
4 permitted to come in and sandbag us now this late in the day.

5           THE COURT: Well, I think more importantly my  
6 concern, or equally important is my concern that I am not sure  
7 their testimony can add anything to the case, because my  
8 perception of what they would be saying is that they don't  
9 violate the law.

10           The question of whether or not they did  
11 something differently is established by the documents and the  
12 events that occurred at the time and may be is supported by  
13 some of the testimony that's action given here, but nothing  
14 new from an officer is going to -- I don't think there is  
15 anything that can come from the an officer that can change any  
16 of that.

17           So, I will ask counsel if they will stipulate  
18 that if the police officers will testify regarding how they  
19 handled the prisoners -- not the prisoners -- the witnesses  
20 and maybe even the prisoner, I guess, in that sense because  
21 they took the statement from him, as well, the question of how  
22 they would handle the petitioner, let's call it, as well as  
23 the other witnesses that gave statements in this case, whether  
24 or not you would have any doubt that if those parties were to  
25 be called, they would testify that this is the manner in which



1 they conducted their business in the usual and customary  
2 manner, and their procedure would require that they read these  
3 statements to them.

4 I am not sure you want to stipulate to that, but  
5 something to that effect.

6 MR. ATLAS: No, Your Honor. Not quite the way you  
7 presented it.

8 I think we would be prepared to stipulate  
9 or work out a stipulation about what their normal practice is.  
10 I don't think I am prepared to stipulate they necessarily  
11 follow the normal practice.

12 THE COURT: Oh, absolutely. I didn't say that they  
13 did.

14 MR. ATLAS: Well, then, I misunderstood.

15 THE COURT: I'm sorry.

16 No. I meant that's what they would testify to  
17 if they were to testify, not that they did do it.

18 MR. ATLAS: I think we can probably work out a  
19 stipulation about what they would testify about with respect  
20 to what their normal practices are and what their normal  
21 practices were during 1982. That's probably as far as I would  
22 be willing to go on the stipulation, provided we can work out  
23 the wording, and I suspect we can. Why don't we work on that.

24 THE COURT: Then I am going to sustain the  
25 petitioner's objection to the addition of eight witnesses and

1 notary public, who were the officers and notaries relative to  
2 this issue of what the police officers should or may have done  
3 on that occasion.

4 MR. ZAPALAC: Your Honor, subject to --

5 THE COURT: If you want to put their names in the  
6 record, you need to do that because I don't have their names.

7 MR. ZAPALAC: I will do that.

8 Subject to whatever stipulation Mr. Atlas comes  
9 up with, would we be allowed to make an offer of proof as to  
10 what these witnesses would have testified to?

11 THE COURT: Well, I am not sure that you know what  
12 they're going to testify to, but I think, if your  
13 representation to me is what I think it is, then I think it  
14 would be limited to what we have just discussed here. I am  
15 not going to permit you to just say anything you want to in  
16 the record. What I mean by that is something that's  
17 self-serving. Some police officer says: I absolutely did not  
18 say this or didn't do this on that occasion. I am not going  
19 to permit that.

20 MR. ZAPALAC: No. We don't have that sort of thing,  
21 but in connection with their usual practices, like I said, I  
22 don't know what the stipulation is going to say. There may be  
23 some things that we would have asked the witnesses that won't  
24 be covered by the stipulations.

25 THE COURT: That very well may be, and I think I need

1 to hear it. We will certainly take it up.

2 MR. ATLAS: Let me say, Your Honor, since I can't  
3 tell you that I am familiar with what their normal practices  
4 were in 1982, I am looking to the state to provide me with a  
5 proposed stipulation about those practices before I respond.

6 THE COURT: Well, I think that's something you all  
7 can work out; and if you cannot, I will take it up at the  
8 appropriate time.

9 MR. ATLAS: All right, sir.

10 THE COURT: Before we conclude the evidence in the  
11 case.

12 All right. Who is the next witness this  
13 morning?

14 MR. ATLAS: Your Honor, we have a couple of  
15 housekeeping matters we would like to resolve first with  
16 regard to exhibits and related matters, with the Court's  
17 permission.

18 THE COURT: All right.

19 MR. ATLAS: First with respect to be Petitioner's  
20 Exhibit 2, which is the exhibits from the original 1982 trial,  
21 I wanted to state on the record that there are several  
22 exhibits that are not in there, and I wanted to identify them.

23 THE COURT: Those were State Exhibits 1 through 89.

24 MR. ATLAS: Yes, Your Honor.

25 THE COURT: And Defendant's Exhibits A, B, C and D.

1 And the ones that are not in there, obviously, are 19 and 20,  
2 which are the mannequins; but there are pictures of the  
3 weapons in there, which we don't need and then you need to  
4 tell me what other exhibits are not in there.

5 MR. ATLAS: In addition to those, Your Honor, No. 22  
6 is not in there because it was withdrawn in the original  
7 trial.

8 No. 64 and 82 and 83 are guns that didn't seem  
9 pertinent to this matter, so we haven't made a picture of  
10 those guns. I have no objection to including them; but I  
11 didn't incur the expense or the time of making copies of the  
12 pictures, and if the state wishes them, I have no objection to  
13 it, but they're not there now.

14 THE COURT: All right.

15 MR. ATLAS: And 85, which is a diagram of a store  
16 location which related entirely to sentencing and didn't seem  
17 to me to be a part of this hearing, I don't know what happened  
18 to it, but it's not in our copy. If the state can find a copy  
19 of it and wants to put it in, I have no objection; but in any  
20 event, we couldn't find it and didn't deem it relevant.

21 THE COURT: All right.

22 MR. ATLAS: With respect to the mannequins, I thought  
23 the best way to solve that problem was to go to the district  
24 clerk's office and, hopefully, find there a copy of the  
25 picture of each of the two mannequins that supposedly were

1 substituted for the mannequins in the record; and we dutifully  
2 went down to the district clerk's office and found two  
3 pictures, each that had both mannequins in them. In fact,  
4 they look like duplicate pictures.

5 And so, in the interest of completeness, since  
6 we won't have the pictures for State's Exhibits 19 and 20 as  
7 part of Exhibit 2, I propose to tender to the Court and offer  
8 in evidence what has been marked as Petitioner's Exhibit 36,  
9 which is a color copy of one of the two pictures from the  
10 district clerk's office. Since they look like duplicates or  
11 at least pictures taken from almost exactly the same location,  
12 a full frontal view of both of the mannequins standing next to  
13 each other, I saw no reason to have two copies as two  
14 exhibits.

15 THE COURT: Well, is that 36 in conflict with any  
16 other number in the exhibit list of 1 through 89?

17 MR. ATLAS: No, Your Honor. I was actually proposing  
18 this as an independent exhibit called Petitioner's Exhibit 36,  
19 as opposed to making part of the petitioner's exhibit.

20 THE COURT: I see. I misunderstood you there. I'm  
21 sorry.

22 MR. ATLAS: I thought that would be less confusing  
23 than putting in a picture of two mannequins.

24 THE COURT: Any objection to Petitioner's 36?

25 MR. ZAPALAC: No objection, Your Honor.

1 MR. ATLAS: In addition, Your Honor, I have been told  
2 there were four exhibits that I talked about during the course  
3 of questioning witnesses and may inadvertently have forgotten  
4 to offer them into evidence and would like to do so at this  
5 time.

6 The first is Petitioner's Exhibit 15, which is  
7 the statement of Jacinto Vega, that contains F number 183 and  
8 184. This exhibit, as well as the other three I am going to  
9 discuss, are all part of Petitioner's Exhibit 4. So let me  
10 formally offer Petitioner's Exhibit 15 into evidence.

11 MR. ZAPALAC: No objection, Your Honor.

12 THE COURT: What is that? What is 15, now?

13 MR. ATLAS: 15 is the statement of Jacinto Vega, and  
14 it is F183 and 184.

15 THE COURT: Was it ever used in this case?

16 MR. ATLAS: Yes, Your Honor. It was used for the  
17 purpose of questioning the witness about certain things.

18 I take it back. The way it was used, Your  
19 Honor, was to question the expert on the first day about  
20 whether the description that he gave the first night of the  
21 event, before lawyers and others interceded, was consistent  
22 with the physical evidence as the expert found.

23 THE COURT: It's admitted.

24 And the other?

25 MR. ATLAS: Second of the four is Petitioner's

1 Exhibit 17, a statement of Officer G.L. Bratton,  
2 B-r-a-t-t-o-n.

3 MR. ZAPALAC: No objection, Your Honor.

4 MR. ATLAS: The third is Petitioner's Exhibit 23, the  
5 statement of Herlinda Garcia, F10. I would offer that.

6 THE COURT: 23?

7 MR. ATLAS: 23.

8 THE COURT: Any objection?

9 MR. ZAPALAC: No objection, Your Honor.

10 MR. ATLAS: Is that admitted, Your Honor?

11 THE COURT: Yes. It's admitted.

12 MR. ATLAS: The fourth of the four is Petitioner's  
13 Exhibit 25, which is the second statement of Herlinda Garcia,  
14 No. F11. I offer that in evidence.

15 THE COURT: 25. What is her name, now?

16 MR. ATLAS: Herlinda Garcia. She had two statements,  
17 and 23 and 25 are the two statements. I just offered 23 and I  
18 am now offering 25, post line-up statement.

19 MR. ZAPALAC: No objection to that, Your Honor.

20 THE COURT: It's admitted.

21 MR. ATLAS: There may be a fifth, Your Honor.  
22 Petitioner's Exhibit 20, at least according to this list may  
23 not be admitted. That is the stack of photographs of people  
24 that came from the police records. They are numbered F2034  
25 consecutively through 2047.

1 THE COURT: Those were admitted.

2 MR. ATLAS: Your Honor, just as a prophylactic  
3 protection, let me offer -- we believe that we have offered  
4 and that the Court has admitted with every exhibit from 1  
5 through, now, 36, except for Petitioner's Exhibits 6 and 7.  
6 So, in an abundance of caution, unless the Court deems it's  
7 inappropriate --

8 THE COURT: Both 6 and 7 are admitted.

9 MR. ATLAS: Your Honor, I don't believe we offered  
10 those.

11 THE COURT: I guess they were by stipulation.

12 MR. ATLAS: There were certain things that covered  
13 them by stipulation about how if a person who signed the  
14 affidavit in No. 6 had testified, this is what he would say,  
15 and same thing with No. 7. No. 6 is irrelevant, frankly.

16 No. 7 the Court did not admit at that time  
17 because there was relevance objection, and we said we would  
18 offer it at later time. We have not yet tied that up. So we  
19 at least didn't intend to offer it, and I know Mr. Zapalac  
20 didn't intend to agree to it.

21 THE COURT: I noted there was a relevancy objection  
22 to No. 5, and that I did, I believe, rule upon. That was the  
23 videotape.

24 MR. ATLAS: Yes, Your Honor.

25 THE COURT: Is there any objection to 6 and 7?



1 MR. ZAPALAC: Are they being offered at this point?

2 THE COURT: These are the affidavits, I believe.

3 MR. ATLAS: They are, Your Honor, and technically I  
4 am not offering them yet for submission as exhibits. I am  
5 just excluding them from the offer I am about to make.

6 What I would like to do is just to make sure I  
7 have offered everything and across this board except for those  
8 two, is to formally offer and into evidence, to the extent I  
9 haven't already done that, Petitioner's Exhibits 1 through 36,  
10 excluding Petitioner's Exhibit 6 and 7.

11 THE COURT: If there are no objections, then, that  
12 these either have been admitted or may be admitted.

13 MR. ZAPALAC: Subject only to the objections we have  
14 already made that have been overruled, there is no objection.

15 THE COURT: I understand. All right. They're  
16 admitted, then.

17 MR. ATLAS: The next question, Your Honor, actually  
18 may we approach the bench on this matter?

19 THE COURT: Yes.

20

21 (Conference before the bench)

22

23 MR. ATLAS: Your Honor, Mr. Aldape Guerra has been  
24 wearing the same clothes since he was brought down from  
25 Huntsville to come into Court on Monday. The family brought a

1 change of clothes up to him today. They were not allowed  
2 through the marshal's office to give it to him.

3 THE COURT: They will generally take him.

4 MR. ATLAS: Can we arrange for that at lunch time?

5 THE COURT: Sure. I mean, I think that they should  
6 not have refused the clothes. They may have refused to let  
7 him change at that point.

8 MR. ATLAS: They refused the clothes. I don't know  
9 the story, but all I know is we have still got them. As long  
10 we can change them at lunch, we will live with it for the next  
11 several hours.

12 THE COURT: Okay.

13 MS. CORNELIUS: We are trying to figure out where we  
14 are. Do you still anticipate closing by noon?

15 MR. ATLAS: We think there is a fair chance we will  
16 finish by noon. It will depend a lot on your  
17 cross-examination. We don't think we will have any problem  
18 finishing by noon if everything goes the way we expect.

19 THE COURT: My guess is -- it's almost 10:00 o'clock  
20 now.

21 MR. ATLAS: We have lost 45 minutes, so it's hard to  
22 know, so I think we will be close. Whether we finish right at  
23 noon --

24 THE COURT: We are going to break at 11:40 and then  
25 pick up around 1:30. I have got a phone conference I have got

1 to do with some other lawyers being in trial, and then I am  
2 going directly into this. It has really thrown my scheduling  
3 conferences off. I have to do those by phone and catch  
4 lawyers. So it's very possible we won't be finished until  
5 after 1:30.

6 MR. ATLAS: It is very clear, barrin an unusually  
7 lengthy cross-examination, which is always possible, but I  
8 don't anticipate, based on what the witnesses are expected to  
9 testify about, it is very clear you will have to put on some  
10 witnesses today, if that's the reason for your question.

11 Giving my best estimate to Bill as of this  
12 morning before we started, it hasn't changed in the last hour,  
13 except we are now 45 minutes late.

14 MS. CORNELIUS: We can just put on quick witnesses,  
15 if we only have an hour or so.

16 MR. ATLAS: I can't tell you any more than what I  
17 already have.

18 THE COURT: We will probably know more by noon.

19 MR. ZAPALAC: One other thing. The witness list that  
20 we have submitted begins with, in addition to the witnesses  
21 listed by the petitioner --

22 THE COURT: Yes.

23 MR. ZAPALAC: -- there are some witnesses on there  
24 that I don't know whether they're going to call or not that we  
25 didn't list as our witnesses.

1 THE COURT: On their list?

2 MR. ZAPALAC: Because they were on their list, but we  
3 do anticipate if they don't call them, we will be calling  
4 them.

5 MS. CORNELIUS: Some of them.

6 MR. ZAPALAC: Some of them.

7 THE COURT: I specifically instructed the parties at  
8 the pretrial conference to list anyone you expected to call,  
9 whether it was on your opponent's list or not. It would be  
10 nice to have an indication of who those people are.

11 MR. ZAPALAC: The two I am thinking about are the  
12 prosecutors, Dick Bax and Bob Moen.

13 THE COURT: I will take it up when it happens.

14 MR. ATLAS: Okay.

15 There is one other matter we can deal with back  
16 in our seats.

17 Your Honor, the final matter this morning before  
18 proceeding to the testimony is to ask Your Honor, since we are  
19 at least within relatively near clear sight of the end of the  
20 petitioner's case, and while we can't anticipate the length of  
21 the respondent's case, we expected to be a matter of days  
22 rather than weeks, to ask the Court whether Your Honor would  
23 like the parties to submit proposed findings of fact and/or  
24 proposed conclusions of law at the termination of the hearing.

25 THE COURT: Well, I think that may be something that

1 I would like to consider, although I am not sure it's going to  
2 reduce the amount of work I am going to have to do, because I  
3 have got a -- it's almost as though your findings of fact  
4 would be conclusions at this point, and I think that I have  
5 already mentally, in fact, I think we have already done  
6 probably 40 or 50 pages of writing on this already trying to  
7 put it into some kind of perspective, and that's going to have  
8 to be redone. We did that just to get to the point where I  
9 issued an order.

10 But what I think I am going to have to do is go  
11 back and rethink the way we did that because I have got this  
12 tripod that I am dealing with, and whoever reads this needs to  
13 be able to make sure that they're reading, when they're on the  
14 page, they know they're reading about what it is that was said  
15 on two or three different occasions. So, I have got to figure  
16 out how to organize this.

17 I don't know that I will have any trouble with  
18 that, and that may be helpful to me in some respects to have  
19 your points of view on what you believe the facts are, and  
20 certainly it clarifies, I gather, whether or not there are  
21 disputes as it relates to certain facts.

22 I will say this. I will not require it, but I  
23 will not oppose it, so that I leave it to you to determine;  
24 and if so, I will set some deadlines and cutoff dates so that  
25 I may have some particular work schedule to comply with.

1           MR. ATLAS: Your Honor, and assuming hypothetically  
2 the party chooses to exercise that option, would Your Honor  
3 prefer that be in the form of a series of proposed findings of  
4 fact or a narrative description or rendition of the facts,  
5 obviously citations to an appropriate witness's testimony?

6           THE COURT: I would prefer that it be in -- I would  
7 not prefer that's in narrative form, but I would definitely  
8 want it referencing exhibits and/or places in the state record  
9 that you are relying upon, and particularly also making that  
10 complete by references to exhibits in this case that we  
11 believe support or clarify that position.

12           MR. ATLAS: All right, Your Honor.

13           Your Honor, at this time my colleague, Stan  
14 Schneider will call the next witness.

15           THE COURT: Mr. Schneider.

16           MR. SCHNEIDER: Candy Elizondo, Your Honor.

17           THE COURT: Would you please raise your right hand.

18           Do you solemnly swear or affirm any testimony  
19 you will give in this case will be the truth, the whole truth,  
20 nothing but the truth so help you God?

21           THE WITNESS: I do.

22           THE COURT: Please take the witness stand.

23           Would you hold up just one second, Mr.  
24 Schneider. Thank you for your patience, Mr. Schneider.

25

CANDELARIO ELIZONDO

was called as a witness by the Petitioner and,  
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHNEIDER:

Q Would you state your name, please.

A Candelario Elizondo.

Q How are you employed, sir?

A I am a lawyer.

Q How long have you been a lawyer?

A About 18 years.

Q What kind of practice do you have?

A I specialize in criminal law.

Q Are you board certified?

A I am.

Q How long have you been board certified?

A Since 1980, I believe.

Q You are in private practice now?

A Yes, sir.

Q Before you were in private practice did you work at the  
district attorney's office?

A I did.

Q How long were you an assistant district attorney?

A About five and a half to six years.

Q How many felony trials have you had?

1 THE COURT: Are you talking about through today or  
2 before?

3 BY MR. SCHNEIDER:

4 Q Through today.

5 A I am just guessing, over 150 felony jury trials, maybe  
6 200.

7 Q Including federal felony and state?

8 A Including federal felony trials.

9 Q How many murder cases have you tried?

10 A Many. 20 or 30.

11 Q In investigating murder cases, what's the normal number  
12 of police officers involved in your ordinary murder?

13 A I say about seven to eight. Two or three, maybe four  
14 detectives, two or three blue and whites.

15 Q When you investigate a murder, do you often go to the  
16 scene?

17 A Yes, sir.

18 Q Why do you go to the scene?

19 A To see how it all happened; to look at the light  
20 conditions; to see if there is any possible defense at the  
21 scene.

22 Q Now, you represented Ricardo Aldape Guerra?

23 A I did.

24 Q In front of you is the transcript from the trial,  
25 Petitioner's Exhibit No. 3, and in it is the appointment slip



1 for Joe Hernandez.

2 A That's correct.

3 Q Who is Joe Hernandez?

4 A He was co-counsel in this case.

5 Q Who was lead counsel?

6 A I was.

7 Q Why was that?

8 A Judge Oncken said so. I guess maybe I had more  
9 experience than Joe did.

10 Q When were you appointed?

11 A Joe Hernandez was appointed on July the 15th, so I can  
12 only surmise I was appointed about the same time, also.

13 Q The records show that was first day that Ricardo Aldape  
14 Guerra was in Court. Would that be consistent?

15 A That would be consistent.

16 Q Now, in the course of your investigation of this case,  
17 did you go to the scene of the shooting of Officer Harris?

18 A Yes, sir.

19 Q What did you do at the scene?

20 A Talked to witnesses, or tried to talk to witnesses.

21 Q Did they talk to you?

22 A Some did and some didn't.

23 Q Did you get any information, much information that was  
24 helpful to you in your investigation?

25 A Not really, Mr. Schneider. I was looking for somebody

1 that could identify Carrasco as the shooter at the scene, and  
2 I could not find that person.

3 Q Did you talk to Hilma Galvan?

4 A Yes, sir. Briefly.

5 Q What did she tell you?

6 A Told me to get off her porch.

7 Q How many times did she tell you to get off her porch?

8 A About three times.

9 Q Did you find any eyewitnesses to the shooting that would  
10 talk to you?

11 A No.

12 Q In the course of your investigation, did you ever learn  
13 that potential witnesses were arrested at the scene on the  
14 evening of July 13th, 1982?

15 A Actually arrested? I was not aware of any being actually  
16 arrested.

17 Q Taken in handcuffs to the police station?

18 A I found out later they were taken in handcuffs.

19 Q Let me show you Petitioner's Exhibit 35. I showed you  
20 this exhibit before, haven't you?

21 A Yes, sir.

22 Q Is it legal or proper for police to enter a home of  
23 somebody repeatedly without a search warrant or an arrest  
24 warrant?

25 A It's illegal.

1 Q And in this statement it appears that the officers went  
2 to one home where Ricardo Aldape Guerra lived several times.

3 A That's correct.

4 Q Is it proper procedure for police to take witnesses and  
5 arrest them, and put them on the ground, anyway?

6 A Not in my book.

7 Q What message does that type of tactic send to the people  
8 in the community?

9 A One of intimidation and one of fear.

10 Q Now, did you ever learn that Herlinda Garcia was  
11 threatened with prosecution of her common law husband, Johnny  
12 Matamoros?

13 A No. I did not know of that.

14 Q You knew she was 14 years old?

15 A Correct.

16 Q You knew she was pregnant in July of 1982?

17 A I don't recall that, Mr. Schneider.

18 Q She had one child, though?

19 A I don't recall that.

20 Q And if she was living with Johnny Matamoros, who was over  
21 18 years old, he would be subject to statutory rape charge?

22 A That would be correct.

23 Q Did you ever hear that she was threatened?

24 A No.

25 Q This area where the murder took place that's on this

1 exhibit, are there a lot of undocumented Hispanics in that  
2 area?

3 A Yes, sir.

4 Q What message would this send, of handcuffing witnesses to  
5 take to the police station, repeatedly going into homes,  
6 having witnesses that lie down to the ground outside their  
7 homes, threatening witnesses with prosecution of their  
8 husbands, what message would that send to --

9 MS. SCKERL: I'm sorry. Are you done with the  
10 question?

11 MR. SCHNEIDER: I wasn't quite finished.

12 Q -- to the community?

13 MS. SCKERL: Your Honor, I would object. It calls  
14 for speculation on the part of Mr. Elizondo, unless he was out  
15 there and knows what the witnesses felt at the time.

16 THE COURT: I am not sure it calls for that kind of  
17 knowledge. I think it's a question of common sense. I am  
18 really not sure that the answer isn't obviated by the  
19 question, but I will overrule the objection.

20 A It would send one of fear, intimidation; also send one  
21 that you better cooperate with us or you might get in trouble  
22 yourself.

23 Q Based on your investigation during the summer of 1982,  
24 did you observe any atmosphere or any message being sent by  
25 the police concerning are Ricardo Aldape Guerra?

1 A During the trial?

2 Q During the trial and before the trial during your  
3 investigation?

4 A The message, the aura in the courtroom that I was  
5 perceiving at the time was one of, again, fear; and, I guess,  
6 to put it in another sense, it was kind of like, the  
7 impression I got was: We already killed one. Let's just kill  
8 this other one. That's the impression I got.

9 Q Why?

10 A That was aura in the courtroom. That was aura on the  
11 streets.

12 Q Was that because of a police officer being killed?

13 A Most definitely.

14 Q Have you ever seen an investigation, a police  
15 investigation where there is 43 or 50 some-odd police officers  
16 making the scene of an investigation?

17 A It would have to be a police shooting.

18 Q Why?

19 A Everybody wants to get involved in a police shooting.  
20 Every police officer in town wants to make the scene.

21 Q Is that unusual to have 43 police officers?

22 A In a police shooting, no.

23 Q In a homicide investigation?

24 A That would be unusual.

25 Q If the offense reports in this case list 43 separate

1 police officers involved in the investigation or the events of  
2 July 13th, 1982, would that be unusual?

3 A That would not be unusual at all.

4 Q For a police shooting?

5 A For a police shooting.

6 Q But for an ordinary homicide it would?

7 A It would be highly unusual.

8 Q Now, you got involved on the 15th.

9 I want to show you Petitioner's Exhibit No. 5.

10 MR. SCHNEIDER: Your Honor, may I play a portion of  
11 the tape to Mr. Elizondo?

12 THE COURT: Is that Exhibit No. --

13 MR. SCHNEIDER: 5.

14 MS. SCKERL: May I move around so I can see?

15 THE COURT: Yes.

16 If you could, you may want to just pull that  
17 forward a little bit

18 MR. SCHNEIDER: Mr. Elizondo, can you see that?

19 THE WITNESS: Move it this way.

20

21 (Tape played in open court).

22

23 BY MR. SCHNEIDER:

24 Q Now, Mr. Elizondo, looking at this picture, this drawing,  
25 the person running away, what color shirt did he have on?

1 A It looks purple, but I can't --

2 Q This one here in the back, (indicating)?

3 A Green?

4 Q Okay.

5 A It looks green.

6 Q If the Houston Police Department were the source of the  
7 color of the shirts people involved, in these drawings, and  
8 the shooter has a purple shirt on and person running away has  
9 a green shirt on, did you find any indication in your review  
10 of the files that showed that?

11 A No, sir.

12 Q Did any police officer tell you that the person who ran  
13 away had a green shirt on?

14 A No, sir.

15 Q That the person doing the shooting had a purple shirt on?

16 A No, sir. No, sir.

17 Q Would that information have been beneficial to you?

18 A Of course it would have been.

19 Q Let me show you Petitioner's Exhibit 36, the colored  
20 pictures of the mannequins.

21 A Yes, sir.

22 Q Your client having the green shirt on.

23 A That's correct.

24 Q Carrasco had a purple shirt on.

25 A That's correct.

1 Q Now, on the evening -- you knew there was a line-up?

2 A Correct.

3 Q In the early morning hours of the 14th?

4 A Correct.

5 Q You saw pictures of it?

6 A That's correct.

7 Q Did anyone ever tell you that the police took your client  
8 down the hallway at homicide?

9 A No, sir.

10 Q Well, do you remember homicide?

11 A Yes, sir.

12 Q Were you familiar with the third floor of the jail?

13 A That's correct. I was.

14 Q Could you draw a diagram of the third floor of the jail  
15 for us?

16 A Sure.

17 Q Use this easel here.

18 A Third floor of the jail?

19 Q I mean the police station.

20 A Of the police station.

21 As it existed back then, the third floor of 61  
22 Riesner, homicide was over here, sex crimes was over here,  
23 robbery was over here, and burglary and theft were over here,  
24 (indicating). The chief's office was over here.

25 THE COURT: I'm sorry. But what is over there?



1 THE WITNESS: The chief's office.

2 THE WITNESS: The chief, okay.

3 A There were some stools over here, some benches right here  
4 at homicide. Over here was a line-up room, (indicating).  
5 This right here was prisoner's elevator.

6 Q Where did that go?

7 A To the jail.

8 Q From the third floor up to the jail?

9 A Correct.

10 Here is the stairwell over here.

11 Q What about elevators to the floors?

12 A I don't know exactly where it went. I just assume it  
13 went to the jail because I never was in that elevator, but I  
14 have always used these two elevators over here. These over  
15 here were the elevators.

16 These particular elevators came from the basement all  
17 the way to the jail. They stopped on each floor. Right here  
18 was a soda water machine, the entrance to sex crimes, the  
19 entrance to robbery, and, like I said, a little bench right  
20 here; might have been another bench on the other side, but I  
21 don't recall that. Then you entered homicide, right there,  
22 (indicating).

23 Q Now, to get on the floor, based on your experience as a  
24 prosecutor and a defense attorney, what was the normal  
25 procedure for getting a witness or a prisoner, or where was

1 the prisoner normally brought to to get to that floor?

2 A They would come in through the basement. There is a  
3 little walkway at the very bottom, right there as you drive  
4 into the 61 Riesner through the back that enters through the  
5 basement. The prisoner is brought through the basement and  
6 brought up to a particular, either the jail or the particular  
7 investigating agency.

8 Q Go ahead and have your seat, please.

9 MR. SCHNEIDER: May we have this marked, Your Honor,  
10 Exhibit 37.

11 THE COURT: What happened to 36? That's fine. You  
12 are calling that 37?

13 MR. SCHNEIDER: Yes. Oh, the picture of the  
14 mannequins, Your Honor, is 36.

15 MS. SCKERL: No objection.

16 BY MR. SCHNEIDER:

17 Q Now, the line-up as at 6:00 o'clock in the morning?

18 A That's correct.

19 Q Did you ever know that during the early morning hours of  
20 the 14th, your client, Mr. Guerra, came up the elevators and  
21 was brought down the hallway in front of the witnesses in the  
22 case that were going to appear in the line-up?

23 A I did not know that.

24 Q Did you ever learn that later on that same morning he was  
25 then brought from homicide to the photo lab which is on the

1 4th floor?

2 A Did not know that.

3 Q Is there any way on to get from homicide to the 4th  
4 floor, to your knowledge, without going down the same hallway  
5 where the witnesses were?

6 A To my knowledge there is no other way to get there.

7 Q Is there anything wrong, in your mind, in the police  
8 showing a suspect with handcuffs on and bags on his hands to  
9 prospective witnesses before a line-up?

10 A Of course. It's impermissibly suggestive.

11 Q What do you mean by that?

12 A Well, if you are down there at the homicide office and  
13 you are sitting right there at the benches and you see  
14 somebody come by with handcuffs on and paper bags on his hands  
15 and you see him, then you see him again in the line-up, you  
16 are going to certainly remember him again.

17 Q If at the time the person is being displayed with  
18 handcuffs and bags on his hands, one of the prospective  
19 citizens say, or witnesses say, "He's the one; blame him; he  
20 is the one that killed your father," or "He's the one that did  
21 the shooting of the officer," is pointing you out, the person  
22 out, would that have impact?

23 A If that happened, it certainly would.

24 Q In your investigation, did anyone tell you or did you  
25 ever hear that on the early morning hours of the 14th of July,

1 Ricardo Aldape Guerra was lead down the hallway into homicide  
2 and witnesses were talking and pointing him out, that he is  
3 the one that shot the police officer, the one that looked like  
4 God, picked him, and making statement that like; and after he  
5 gave his statement, was then lead back to the hallway through  
6 the witnesses to the photo lab on the 4th floor?

7 A I was never made aware that.

8 Q Would that have made a difference in your representation?

9 A It would certainly have changed my strategy.

10 Q In what sense?

11 A To attack the line-up.

12 Q Did you ever hear any witnesses describe the line-up to  
13 you prior to the trial?

14 A No, sir.

15 Q Did you ever hear or ever learn that any witnesses were  
16 talking during the line-up?

17 A No, sir.

18 Q Did you ever hear that Ms. Galvan said, "Pick No. 4"?

19 A Never heard that.

20 Q If she had said that, would that have made a difference  
21 in your strategy?

22 A Certainly would have; sure it would have.

23 Q In what sense?

24 A Attack the line-up as being impermissably suggestive.

25 Q Did you ever learn that the prosecutors showed pictures

1 of Carrasco and pictures of your client on the Saturday before  
2 trial and told the witnesses that, "This is the one that's  
3 dead," meaning Carrasco, and "This is the one that's alive.  
4 This is the one that killed the cop"?

5 A Did not know that.

6 Q This is the Saturday before trial.

7 Would it have made any difference to you in your  
8 strategy if you had learned that?

9 A Sure it would.

10 Q In what sense.

11 A Attack the line-up again. In court identification of my  
12 client. Find out what happened at that particular meeting.  
13 See what happened, what the prosecutors did during that  
14 meeting to make somebody identify my client.

15 Q In your process of your investigation did you ever  
16 learn -- let me back up. I am getting a head of myself.

17 In mid August of 1982, you went to the district  
18 attorney's office and saw their file in this case?

19 A That's correct.

20 Q How many different offense reports were there?

21 A I don't know. I don't think I knew then. I now know  
22 there were five.

23 Q What do you mean "five"?

24 A Five offense reports.

25 Q Which ones?

1 A The one on Harris, the one Trepagnier, the one on Armijo,  
2 the one on --

3 Q Were there two other police officers involved in the  
4 shooting?

5 A That's correct. They also made reports.

6 Q Did you see all those reports?

7 A I don't know. I don't remember.

8 Q Were you ever given any audio tapes of witnesses?

9 A I don't remember any audio tapes. I don't remember them.

10 Q Let me show you Petitioner's Exhibit 38. It's an F268 of  
11 the offense report.

12 Do you remember seeing that portion of the offense  
13 report where it lists audio tapes of interviews of witnesses  
14 at the scene?

15 A I don't remember this. I don't remember. I am not  
16 saying it didn't list it, it didn't happen. I don't remember  
17 it.

18 Q Do you remember ever being given any audio tapes,  
19 interview of witnesses?

20 A I don't remember that.

21 Q Is that something you would normally remember?

22 A I would hope so. If I can hear the tapes, maybe I could  
23 refresh my memory.

24 Q If you knew there were tapes -- in your ordinary practice  
25 when you find out there is audio tapes of witnesses, do you

1 get copies of them?

2 A It's a given. It's a must.

3 MR. SCHNEIDER: Your Honor, we would offer  
4 Petitioner's Exhibit 38.

5 MS. SCKERL: No objection, Your Honor.

6 THE COURT: Admitted.

7 BY MR. SCHNEIDER:

8 Q Did you ever see any videotapes?

9 A I don't recall any videotapes. I don't recall. I am not  
10 saying I didn't see them. I just don't recall them.

11 Q Now, there was a discovery hearing?

12 A That's correct.

13 Q And the Court ordered Brady material given to you,  
14 correct?

15 A That's correct.

16 Q And the Court ordered, the state agreed to give you  
17 scientific tests, results of scientific tests?

18 A That's correct.

19 Q And do you remember getting the results of the trace  
20 metal test?

21 A I remember getting the results of the trace metal test.

22 Q What results were you given?

23 A I was given the results over the telephone; and as I  
24 recall, the results, they were negative on Ricardo Aldape  
25 Guerra, positive on Carrasco as to having the dead policeman's

1 pistol, and negative on Carrasco as holding the 9 millimeter.

2 Q Do you remember which hands?

3 A I don't recall ever being told what hand.

4 Q Did the results change?

5 A Not really.

6 Q On the morning of trial were you shown Petitioner's  
7 Exhibit 18 or told of it?

8 A Yes.

9 Q That's the trace metal test on Carrasco's left hand?

10 A Correct.

11 Q How significant was that to you?

12 A Well, it now tells me, that particular thing told me  
13 there was another trace metal, another pattern.

14 Q Another pattern where, on Carrasco?

15 A On the left hand, on Carrasco.

16 Q What would you have done before trial if you had that  
17 test result?

18 A If I had known about this and if I had been able to get  
19 it, I would have gotten an expert to come in and analyze this.

20 Q Would you have compared it to the Browning 9 millimeter?

21 A 9 millimeter, yes, sir.

22 Q The size?

23 A See if it matched that, yes, sir.

24 Q What did the negative tell you on Carrasco's left hand?

25 A Negative to me means there was none. There was no



1 pattern.

2 Q The pattern on the left hand of Carrasco, -- excuse me --  
3 the pattern on the right hand of Carrasco's was consistent  
4 with the handling of the officer's gun?

5 A That's correct.

6 Q And your theory of defense was that Carrasco was the  
7 killer?

8 A That's absolutely correct.

9 Q Where was the Browning found?

10 A Next to Carrasco's left hand.

11 Q Were the 9 millimeter bullets found anywhere around  
12 Carrasco?

13 A In his pocket.

14 Q What would the pattern in the left hand prove in our  
15 mind?

16 A Hopefully it would prove that he had held the killing  
17 pistol.

18 Q The exhibit in front of you, I think it's 18,  
19 Petitioner's Exhibit 18 --

20 A Yes, sir.

21 Q -- was that exculpatory in your mind?

22 A Yes, sir.

23 MS. SCKERL: Your Honor, just for purposes -- I don't  
24 remember what Petitioner's 18 was.

25 MR. SCHNEIDER: Pattern on the Carrasco's left hand.

1 MS. SCKERL: Thank you.

2 BY MR. SCHNEIDER:

3 Q Did the state ever give you that?

4 A No, sir.

5 Q Was it material to your case?

6 A It could have been very material.

7 Q In what sense.

8 A We could have had an expert come in and analyze that  
9 particular trace met metal on his left hand. If we could have  
10 had an expert come in and say that was consistent with the 9  
11 millimeter, that was certainly material to our case.

12 Q Him having fired the 9 millimeter?

13 A Pardon?

14 Q Him being the one that --

15 A Correct. Or that held the 9 millimeter, anyway.

16 Q Now, do you remember the mannequins?

17 A Yes, sir. I sure do.

18 Q What was the first time you saw the mannequins?

19 A First day of trial.

20 Q What was your first reaction, do you remember?

21 A I objected immediately.

22 Q Why?

23 A Because they were -- in my mind they were there to  
24 inflame and prejudice the minds of the jury.

25 Q In what sense?

1 A They were scary looking. They were just intimidating  
2 looking. If you could picture the mannequins with all their  
3 hair, they were really intimidating.

4 Q Petitioner's Exhibit 36 in front of you is a color  
5 picture of them.

6 A That's correct.

7 Q Is that the way they looked in front of the jury?

8 A Facing the jury; that's correct.

9 Q Did they ever move from a position in front of the jury  
10 throughout the trial?

11 A Never.

12 Q Now, Patricia Diaz, do you remember her?

13 A Is that the one that was by Ricardo Aldape Guerra's car?

14 Q Yes. Patricia Diaz was, to refresh your memory, was  
15 driving the car next to --

16 A Yes, sir. I remember her. I remember.

17 Q I have shown you Page 313 of the record.

18 A You have.

19 Q During the trial, was it important -- do you remember if  
20 your strategy was important for you to have Mr. Guerra  
21 pointing, having his body not facing the officer?

22 A Sure.

23 Q Why?

24 A Because that way, if he wasn't facing the officer, he  
25 couldn't be shooting the officer.

1 Q On Page 313, Line 14, does this refresh your memory as to  
2 the question being asked by Mr. Moen?

3 A Yes, sir.

4 Q On Page 316, were you aware that Mr. Moen changed the  
5 direction in which Mr. Guerra was pointing?

6 A No, sir.

7 Q If he continued using the phrase, the man you described  
8 "pointing at the police officer" rather than "pointing at the  
9 car, police car," would that be proper?

10 A No, sir.

11 Q Why?

12 A Because on Page 313 we have Ricardo Aldape Guerra facing  
13 the police car, now then on 316 now we have Ricardo Guerra  
14 facing the police officer.

15 Q Let me show you 314. If the witness demonstrates to the  
16 jury how Mr. Guerra was standing over the car, would this ever  
17 be in evidence?

18 A Should not be, no.

19 Q Is that proper prosecutorial technique to change the  
20 words of witnesses?

21 A It certainly is not.

22 Q Did you ever talk to man named Frank Perez?

23 A I don't recall. I was looking at his statement the other  
24 day and I noticed he went to Steven F. Austin high school. I  
25 recall going to high school to talk to a witnesses. I don't

1 recall.

2 Q Did you ever hear, in your investigation, if Frank Perez  
3 told the police that he was working on his car when he heard  
4 shots, a man came running down the street, and then a second  
5 man ran down the street behind him, and that the second man  
6 pointed an object that he believed was a gun at him. He heard  
7 a click, as if the person was firing, attempting to fire the  
8 gun, then dropped the gun. The man picked it up. Then he  
9 continued running in the direction of the cemetery.

10 A Did I ever hear that?

11 A I know he gave a statement. I am not sure the statement  
12 he gave consisted of all that, so I didn't hear all of that.

13 Q Would have made a difference -- and the gun that he saw  
14 was 9 millimeter in a person's left hand?

15 A If he said that, if he had told me that, it would have  
16 certainly been material.

17 Q And the person that he saw, that he identified was Mr.  
18 Carrasco?

19 A If he identified Mr. Carrasco, that would have been real  
20 material.

21 Q Why?

22 A Because that was our whole defense. Our whole defense  
23 was that Carrasco did the killing, and we were looking for  
24 those particular witnesses to come up to tell us Carrasco did  
25 the killing.

1 Q So if he told the police that he saw the 9 millimeter  
2 gun, the Browning, in Carrasco's left hand shortly after he  
3 heard shots and saw him running from Walker, would that have  
4 been exculpatory in your mind?

5 A Most definitely so.

6 Q Did you ever know that?

7 A Never knew that, no, sir.

8 Q Did you talk to Trinidad Medina? She was riding in the  
9 car with Patricia Diaz.

10 A I think I did. I talked to a bunch of people down there  
11 at the scene. I don't remember their names now, but I  
12 remember a Trinidad.

13 Q Ms. Medina did not testify at the trial?

14 A I don't recall.

15 Q Did you ever hear in your investigation that Ms. Medina  
16 told the police that Carrasco was the one who shot the police  
17 officer?

18 A Never heard that, no, sir.

19 Q Did you ever hear that she saw Mr. Aldape Guerra facing  
20 the police car and Mr. Carrasco Flores coming behind the  
21 police officer and shooting him from within a couple feet?

22 A Feet.

23 A Nerver heard that?

24 Q Were you looking for those type of witnesses?

25 A Yes, sir.

1 Q Why?

2 A Because that was consistent with our defense, that  
3 Carrasco had killed the police officer and that Aldape Guerra  
4 was a passenger in this particular car.

5 Q Did you ever hear that the witnesses that lived out there  
6 on Walker were told not to talk to you?

7 A No, sir. I just kind of surmised it from talking to or  
8 trying to talk to some of them. It's not like they wouldn't  
9 talk to you. They were just being uncooperative. They  
10 weren't telling you everything.

11 Q Did you ever, in the course you have your investigation,  
12 ever hear about a murder at the cemetery being committed on  
13 the evening of July 13th, 1982?

14 A Yes, sir.

15 Q What did you hear about that?

16 A I remember reading about it in the offense report, and I  
17 was talking to the prosecutors; and I said, what is this  
18 about? Is Ricardo Aldape Guerra involved in this? And they  
19 said, no. He is not involved. That has nothing to do with  
20 this case at all.

21 Q Which prosecutor did you talk to?

22 A I don't recall. I want to say it was Dick Bax.

23 Q Did the cemetery murder come out during the trial?

24 A Yes, sir.

25 Q Do you remember where?

1 A I believe it was through Jose Heredia.

2 Q Were you surprised?

3 A Yes. It kind of came out kind of spontaneously from Mr.  
4 Heredia.

5 Q Do you remember Mr. Moen questioning him about it?

6 A Yes, sir.

7 Q Did you ever see any offense reports which contradicted  
8 the questioning by Mr. Moen?

9 A No, sir. Not until recently.

10 Q Let me show you Petitioner's Exhibit 39.

11 A Yes, sir.

12 Q What's the significance of Petitioner's Exhibit 39?

13 A That the lady at the cemetery was not dead or was never  
14 shot at.

15 MR. SCHNEIDER: Your Honor, we offer Petitioner's  
16 Exhibit 39 into evidence?

17 THE COURT: What is that, an offense report?

18 MR. SCHNEIDER: Yes, Your Honor.

19 MR. SCKERL: No objection, Your Honor.

20 MR. SCHNEIDER: F376A is the number of the exhibit.

21 BY MR. SCHNEIDER:

22 Q Mr. Elizondo, is it proper for a prosecutor to insinuate  
23 to a witness that certain facts, or to a jury, that certain  
24 facts are true like Ricardo Aldape Guerra was involved in a  
25 murder at the cemetery earlier in the evening when they had



1 actual knowledge there was no such event?

2 A It's not proper at all.

3 Q Why?

4 A It's just trying to inflame and prejudice the minds of  
5 the Jury again against Ricardo Aldape Guerra.

6 Q That he committed another murder?

7 A Correct.

8 Q If you had had Petitioner's Exhibit 39 in your possession  
9 or were aware of it, would you have been able to use it?

10 A Which is that one?

11 Q This is the exhibit I just showed you.

12 A Yes, sir.

13 Q How would you have used it?

14 A I would have got Jose Heredia back on redirect and said,  
15 that never happened, in fact, it was a hoax, wasn't it? Or  
16 brought a police officer in to testify to that.

17 Q Did that impact the trial?

18 A I think it did.

19 Q In what sense.

20 A Just one more thing against Roberto Aldape Guerra; one  
21 more little insinuation; one more little thing for the jury to  
22 come back and hang their hat on.

23 Q During the trial were there police officers there?

24 A Yes, sir.

25 Q How many?

1 A Depending on what time and when, during the trial of the  
2 case I would say there was about four or five, five or six  
3 police officers during the entire trial in the courtroom.

4 Q What about during final arguments?

5 A I want to say there was 20, 25 police officers in that  
6 particular courtroom.

7 Q What message did that send?

8 A Once again, you know, it was intimidation and fear. The  
9 jury has got to believe us. The jury got to make a finding  
10 that Ricardo Aldape Guerra did the killing.

11 Q Why?

12 A Why what?

13 Q Why do you think that was being done?

14 A Oh, to convict Ricardo Aldape Guerra.

15 Q Now, you have testified that in your mind the information  
16 concerning the line-up, or the one-on-one show of Ricardo  
17 Aldape Guerra and the events of the line-up, if you had known  
18 that, that would have been exculpatory; is that correct?

19 A In my mind, yes, sir.

20 Q And in your mind, did the failure to give you the trace  
21 metal test until the day Amy Etter testified, the trace metal  
22 test of the left hand was exculpatory evidence?

23 A Yes, sir.

24 Q You also testified that you believed that if Frank Perez  
25 and Trinidad Medina told the police what I have expressed to

1 you, that evidence would have been exculpatory?

2 A Yes, sir.

3 Q How would all of that have changed your strategy? If you  
4 had Frank Medina -- excuse me -- Frank Perez, Trinidad Medina,  
5 the trace metal test and the hallway?

6 A For one thing, would have called them as witnesses and  
7 asked them the question: Did you see who did the shooting?

8 Frank Perez would have said Carrasco.

9 Trinidad would have would have said Carrasco.

10 Q Would you have had scientific evidence corroborated by a  
11 witness that had the Browning in Carrasco's left hand  
12 immediately after Officer Harris was shot?

13 A We would have made a request for it.

14 Q Wouldn't you have had it with the trace metal test in the  
15 left hand?

16 A Yes, sir.

17 Q Then with Frank Perez saying he saw the Browning?

18 A Yes, sir. The 9 millimeter.

19 Q Could that have changed the outcome of the trial?

20 A In my opinion, yes.

21 MR. SCHNEIDER: Thank you.

22 No further questions, Your Honor.

23 THE COURT: Cross-examination.

24 MS. SCKERL: Thank you, Your Honor.

25

## CROSS-EXAMINATION

BY MS. SCKERL:

Q Good morning, Mr. Elizondo.

A Good morning.

Q Now, the case of Mr. Aldape Guerra was not the first murder case or capital murder case you had handled, was it?

A That's correct.

Q And Mr. Hernandez was a little bit newer as a lawyer than you were, I believe?

A That would be a correct statement.

Q What is your native language?

A I grew up speaking Spanish.

Q Would you consider yourself proficient in Spanish?

A I do.

Q And were you back in 1982?

A I considered myself proficient, yes, ma'am.

Q What about Mr. Hernandez, do you know what his native language was?

A Spanish.

Q And was he also proficient in speaking Spanish?

A I believe he was.

Q Did you have any difficulty talking with Mr. Aldape Guerra during your preparation for the trial, during trial, anything like that?

A Did not.

1 Q During the trial do you recall there being a change in  
2 interpreters for the witnesses?

3 A Yes, ma'am. I do.

4 Q And who requested that change?

5 A I want to say it was the juror that objected to the  
6 translation; and at that point in time I believe Judge Oncken  
7 replaced the translator and brought another one in, if I  
8 remember correctly.

9 Q But if you had had difficulty with the translator's  
10 translation, you would have objected -- let me rephrase that;  
11 not difficulty.

12 If you had disagreed with the translator's  
13 interpretation of what the witnesses would have said, you  
14 would definitely have objected, wouldn't you?

15 A I think we did, to Judge Oncken. We said -- she was  
16 doing a good job, we thought. I believe she was doing a good  
17 job.

18 Q So you felt that what the witnesses were testifying to  
19 was the same as what the interpreter was telling, saying that  
20 they testified to?

21 MR. SCHNEIDER: I object to the form of the question  
22 as to what he felt and what objections he made.

23 THE COURT: Are you asking him if he recollects  
24 whether or not he agreed at that time or are you asking him  
25 now?

1 MS. SCKERL: I will rephrase it to ask if he  
2 recollects.

3 BY MS. SCKERL:

4 Q Mr. Elizondo, if back in 1982 you had disagreed with the  
5 interpreter's interpretation of what the witnesses were  
6 saying, you would have objected, wouldn't you?

7 A If I would have disagreed, yes, ma'am, I would have.

8 Q So you felt back in 1982 that the jury was receiving an  
9 accurate interpretation of what the witnesses said?

10 A In my mind, I believe that they were.

11 Q With the witnesses who agreed to speak with you back in  
12 '82, you didn't have any difficulty understanding them,  
13 communicating with them?

14 A Not talking -- not communicating with them in Spanish.

15 Q Correct.

16 A Correct.

17 Q Or if they spoke English, communicating with them  
18 English, whichever --

19 A We talked. We did talk, and there was some people that  
20 just really just wouldn't give us any information that -- you  
21 know, they were just kind of being uncooperative. I mean, you  
22 could tell you.

23 Is that what you are getting to?

24 Q No. I am talking about just the language itself.

25 A No problem.

1 Q You had no problem understanding what they were saying?

2 A No problem.

3 Q You are saying they did not cooperate with you?

4 A Best of my knowledge, yes.

5 Q You went out to the scene in the neighborhood out there  
6 on Walker and Rusk and talked to witnesses and tried to find  
7 them and things like that, didn't you?

8 A On various occasions, ma'am.

9 Q More than one time?

10 A Oh, yes, ma'am, many.

11 Q To the best of your knowledge, back in -- let me rephrase  
12 that.

13 Back in 1982, you told Judge Oncken that you had had  
14 full access to the state's file, correct?

15 A That's correct.

16 Q Mr. Elizondo, your theory of the case back in 1982, and I  
17 believe probably up now in 1993, but specifically back in  
18 1982, was that Ricardo Aldape Guerra was at the scene back at  
19 the shooting of Officer Harris, but that he simply was not the  
20 person who shot Officer Harris; is that correct?

21 A That would be a correct statement.

22 Q So there is no doubt in anyone's mind that Ricardo Aldape  
23 Guerra was out there on the night of July 13th, 1982?

24 A That would be a correct statement.

25 Q So then, Mr. Elizondo, wouldn't it also be a correct

1 statement the fact that witnesses saw him handcuffed,  
2 allegedly, being taken to the line-up room or being taken to  
3 the photo lab would not necessarily affect the identification  
4 in court because there is no doubt Mr. Ricardo Aldape Guerra  
5 was out on the scene on July 13th?

6 A That could be a correct statement.

7 Q And you did have an opportunity to cross-examine the  
8 witnesses who testified at trial regarding the line-up  
9 procedure and their identification of the defendant, right --  
10 or excuse me -- of Mr. Guerra?

11 A We were able to cross-examine them.

12 Q Do you recall cross-examining any of them on the line-up?

13 A I don't recall.

14 Q But the record will speak for itself.

15 Now, was it also your understanding back in 1982 that  
16 on the night of July 13th, 1982, when Officer Trepagnier, the  
17 second officer who was shot out there at the different block,  
18 was shot, he was also shot with a 9 millimeter?

19 A I recall that.

20 Q And that there was no doubt that Roberto Carrasco Flores  
21 was the one who shot him with that 9 millimeter because  
22 Roberto was killed that night; and when he was rolled over or  
23 turned or moved or whatever, the 9 millimeter was under his  
24 body or right next to his body, correct?

25 A I want to say it was right next to his hand.



1 Q Okay.

2 A But there is no question that the pistol that Carrasco  
3 had was the same pistol used to shoot Trepagnier.

4 Q So, therefore, the trace metal test that you say you got  
5 during trial that said or -- I can't remember whether you said  
6 you didn't receive it -- that said there was trace metal from  
7 a 9 millimeter wouldn't really have affected the evidence for  
8 the corner of Walker and where Officer Harris was shot because  
9 there is no doubt in anyone's mind that later in the day  
10 Roberto Carrasco Flores had the 9 millimeter?

11 A There was no question that the pistol that was used to  
12 shoot Trepagnier was a 9 millimeter; that's correct.

13 Q And that it was a 9 millimeter that was introduced at  
14 trial; it was a 9 millimeter, the same 9 millimeter used to  
15 shoot Officer Harris, correct?

16 A That's correct.

17 Q So, there is no doubt that after the shooting of Officer  
18 Harris, Roberto Carrasco Flores held the 9 millimeter gun?

19 A That's correct.

20 Q Now, Mr. Schneider asked you a number of questions  
21 regarding proper police procedure, that it's improper to go  
22 into a home without a warrant and to put people down on the  
23 floor while you search for somebody. Do you recall that?

24 A Yes, ma'am.

25 Q The police officers back on July 13th faced with going

1 into a home of a number of Hispanic people, looking for  
2 someone who had just shot -- two people who had just shot a  
3 police officer, when they did not know exactly who they were  
4 looking for, had no names and only had a description of the  
5 clothes and the kind of hair they had.

6           Wouldn't you agree with me, Mr. Elizondo, that, in  
7 fact, it would be bad police procedure not to make the  
8 situation as unviolent and as safe as possible for a brief  
9 moment?

10 A     I would have to disagree with you on the fact they  
11 entered the house without a search warrant, without an arrest  
12 warrant, in that respect.

13 Q     You have absolutely no idea whether or not they were  
14 giving consent to enter that house?

15 A     I don't know. I don't know that.

16 Q     So, let's assume that they were giving consent. It would  
17 not be bad police procedure for them to place the people on  
18 the floor and hold them there while they searched for a murder  
19 suspect.

20           THE COURT: Excuse me. I believe these are two  
21 different scenarios of the facts and the trial, and the facts  
22 that have been brought out here don't indicate that when they  
23 went back to search that anybody was put on the floor. Unless  
24 I am mistaken, I believe that the first circumstance was one  
25 where they went into the house searching on that night, and

1 there were subsequent searches --

2 MS. SCKERL: I'm sorry, Your Honor.

3 THE COURT: -- I believe. And if I am incorrect --

4 MS. SCKERL: I am talking solely about the search on  
5 that night.

6 MR. SCHNEIDER: There is an exhibit introduced, 35,  
7 statement of one of the officers, that indicates on the  
8 evening of the 13th there was repeated searches of 4907 Rusk.

9 THE COURT: I am not sure that there is evidence that  
10 on each of those indications there was anybody put on the  
11 floor.

12 I am trying to make sure you are separating the  
13 tape time, because just to simply make the general  
14 statement --

15 MS. SCKERL: I am simply, Judge, responding to Mr.  
16 Schneider's question --

17 THE COURT: All right. Go ahead.

18 MS. SCKERL: -- that it was improper.

19 THE COURT: Go ahead.

20 BY MR. SCKERL:

21 Q Mr. Elizondo, if police got consent and entered a home  
22 looking for a murder suspect and put the people on the floor  
23 simply to hold the situation so that no one else is put in any  
24 danger, would you continue to say that was improper police  
25 procedure?

1 A If it's done for a brief moment, no. I see that it would  
2 be necessary.

3 Q That it would be necessary.

4 Now, at the time is that the officers were looking  
5 for Ricardo Aldape Guerra and Roberto Carrasco Flores and  
6 witnesses were placed on the floor, nobody knew, or the police  
7 didn't know where Ricardo was and where Roberto was, correct?

8 A I believe that's true.

9 Q And so, if that could be considered intimidation, that  
10 could no way be interpreted to be intimidation to force the  
11 witnesses to identify Ricardo Aldape Guerra, could it?

12 A At that time, no, ma'am.

13 Q You talked on direct examination about the aura on the  
14 streets. Now, was that just the aura of police officers or  
15 was that sort of community uproaring?

16 A I got the feeling it was kind of community -- out of that  
17 particular area, that's the feeling I was getting. I was  
18 talking to people, and they were just -- you know, that's the  
19 impression I was given, from the community and from the  
20 police.

21 Q Are you talking that was the aura out at the scene of the  
22 shooting of Officer Harris?

23 A I definitely got that impression when I talked to Ms.  
24 Galvan.

25 Q What about other people?

1 A Other people, yes, ma'am. They were not being  
2 cooperative.

3 Q You testified also earlier it would be unusual for 43  
4 separate police officers to be involved in a shooting unless  
5 it was police officer shooting; is that correct?

6 A That's true.

7 Q Well, Mr. Elizondo, when you consider the fact that what  
8 you have got out on the night of July 13th, 1982 is a shooting  
9 of a police officer, two armed men running away from that,  
10 shooting an innocent bystander, injuring his child through  
11 the, I believe it was the glass impact, when the glass went  
12 through the windshield; you have got another shooting of a  
13 police officer, who had to be taken to the hospital, the  
14 recovery of another suspect, and you have probably, guessing,  
15 15 witnesses out at the scene, can you think of a way that  
16 could be handled with less than 43 officers involved in the  
17 whole thing?

18 A I would have to get the fact scenario on that.

19 Q But it would not be unusual?

20 A It's not unusual, any time a police officer gets shot, to  
21 have at least 40 or 50 police officers. Let me put it that  
22 way.

23 Q And compounded this time with the fact that two police  
24 officers were shot at two different scenes, two different  
25 investigations, plus an innocent bystander being shot, you

1 would expect that, wouldn't you?

2 A Sure, sure.

3 Q You talked with your client about what happened the night  
4 he was arrested, didn't you?

5 A Yes, ma'am.

6 Q You talked with your client about the line-up procedure?

7 A Yes, ma'am.

8 Q You talked with your client about what happened after he  
9 was arrested and was put in jail?

10 A Yes, ma'am.

11 Q And your client never told you, you know, Mr. Elizondo,  
12 when I was walking down the hall, everybody kept going, "he  
13 did it; he did it; he did it." He never said anything like  
14 that, did he?

15 A I don't recall that.

16 Q Well, okay Mr. Elizondo if he had said that, you  
17 certainly would have investigated, wouldn't you?

18 A Sure.

19 Q Now, Mr. Elizondo, looking back at the trial back in  
20 1982, do you recall Patricia Diaz, and maybe other witnesses,  
21 also, testifying that they saw the defendant at that time,  
22 Ricardo Aldape Guerra, pointing at the police officer,  
23 pointing at the police car? Do you recall?

24 A I recall that just from reading the transcript.

25 Q Okay.

1           Because it was a big issue back in 1982 whether or  
2 not Mr. Guerra was facing the police car or whether he was  
3 facing the officer or what exactly he was doing, if Ms.  
4 Patricia Diaz had testified that what she meant by "pointing"  
5 was to hold your hand flat out like that (indicating), you  
6 certainly would have made a big deal of that, wouldn't you?

7       A     Certainly.

8       Q     Because that would have really helped your case a lot,  
9 wouldn't it?

10      A     Certainly.

11      Q     Now, you said that you objected to the mannequins being  
12 in the courtroom and being introduced into the evidence  
13 because they were scary and you felt they were meant to  
14 inflame the jury; is that correct?

15      A     That's true.

16      Q     But Mr. Elizondo, you didn't object, and I don't think  
17 you said anything now, that they were not appropriate and  
18 proper representations of the people as you knew them to be,  
19 were they?

20      A     I don't recall making that objection.

21      Q     Based on your recollection and looking at the picture of  
22 how the mannequins looked back in 1982, they were proper  
23 representations of what Roberto Carrasco Flores and Ricardo  
24 Aldape Guerra looked like on July 13th, 1982?

25      A     Life-like.

1 Q So they were accurate?

2 A Yes, ma'am.

3 MS. SCKERL: May I have a moment to speak with Mr.  
4 Atlas?

5 THE COURT: Sure.

6

7 (Attorneys confer)

8

9 MS. SCKERL: May I proceed, Your Honor?

10 THE COURT: Just one second. You may proceed.

11 MS. SCKERL: Thank you.

12 BY MS. SCKERL:

13 Q Mr. Elizondo, you testified that you were a prosecutor  
14 for five years; is that right, about?

15 A Five-and-a-half.

16 Q What status were you at the Harris County District  
17 Attorney's office when you left the office?

18 A Chief prosecutor of 230th District Court.

19 Q As a chief prosecutor in any district court, you were  
20 responsible for handling capital murders, murders in very  
21 serious cases, right?

22 A That would be correct.

23 Q In your experience as a prosecutor and as a defense  
24 attorney you've handled all sorts of different cases, haven't  
25 you?



1 A Many.

2 Q In your experience as a prosecutor first, were you  
3 insistent with police officers and people giving statements  
4 that they not put something in a written statement unless they  
5 are absolutely positive about it?

6 A That's true.

7 Q That's because it makes it so easy to cross-examine and  
8 impeach people; is that right?

9 A That's true.

10 Q I would assume, then, that you carried out that procedure  
11 and that philosophy as defense attorney if you take statements  
12 from people other than your client. Would you agree with  
13 that?

14 A I could agree with that.

15 MS. SCKERL: May I approach the witness, Your Honor?

16 THE COURT: You may.

17 BY MR. SCKERL:

18 Q I would like to show you what has previously been marked  
19 and introduced as Petitioner's Exhibit 21, and that's a copy  
20 of Frank Perez' statement; and would you agree with me that it  
21 looks like it's been reduced from a larger statement because  
22 of the way it's copied?

23 A Yes, ma'am.

24 Q I would like you to look at the fifth line and the  
25 seventh line where Mr. Perez, it looks like, had put down:

1 "The guy dropped a gun," it was crossed out and put "object"  
2 and then initialed, "in front of my house." "He stopped and  
3 picked up the" -- looks like again gun was scratched out --  
4 "object" was put in -- "up, and when he did, he looked  
5 directly at me. After the guy picked up the" -- scratched out  
6 gun, put in "object" -- "he continued to run to McKinney."

7 Would you agree with me that's what that says?

8 A That's true.

9 Q So, Mr. Elizondo, if you had read the statement back --  
10 or when you read the statement back in 1982, whenever that  
11 would be, either before or during trial, you would have seen  
12 that he had crossed out "gun" and put in "object," correct?

13 A Yes, ma'am.

14 Q As a defense attorney, do you know approximately how many  
15 murders or capital murders you have handled?

16 A Handled?

17 Q Yes, sir.

18 A 30.

19 Q And have you also handled other serious cases, aggravated  
20 sexual assaults, aggravated kidnapping, those types of cases?

21 A Yes.

22 Q If you go to trial, especially, you try and interview the  
23 witnesses ahead of time, right?

24 A Yes, ma'am.

25 Q Would you say that often times state's witnesses are not

1 very cooperative with the attorney for the defendant?

2 A On many occasions.

3 Q And probably they're usually, would you agree with me  
4 that they're usually not cooperative?

5 A I would say that's more true of the plaintiffs and their  
6 relatives, et cetera, yes, ma'am.

7 Q But also just of witnesses in general, if they think the  
8 defendant did it, they don't really want to cooperate with the  
9 guy who's "trying to get him off," right?

10 A That would be a true statement.

11 MS. SCKERL: Your Honor may, I have just a moment?

12 THE COURT: Sure.

13 BY MS. SCKERL:

14 Q Mr. Elizondo, you, during the trial of 1982, called some  
15 witnesses to testify on the defendant's behalf, correct?

16 A That's true.

17 Q And where did you get the names of those witnesses?

18 A I don't recall. I believe they were also in the offense  
19 report; but I found them, I think, somewhere else. They lived  
20 in the neighborhood. But through the offense report and/or  
21 through my investigator. I think it was a combination of  
22 both.

23 Q But the people who you did call were listed as witnesses  
24 in the offense report, weren't they?

25 A I believe so, yes, ma'am

1 MS. SCKERL: No further questions, Your Honor.

2 THE COURT: Mr. Schneider.

3 MR. SCHNEIDER: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. SCHNEIDER:

6 Q Mr. Elizondo, I am going to ask you a hypothetical  
7 question based upon Petitioner's Exhibit 18, okay.

8 MS. SCKERL: I'm sorry I couldn't hear.

9 MR. SCHNEIDER: I am going to ask him a hypothetical  
10 question.

11 BY MR. SCHNEIDER:

12 Q If you were defending a case and the facts are that a man  
13 is shot with a Browning 9 millimeter and the second person is  
14 shot with a Browning 9 millimeter and the witness for the  
15 second shooting said the man was holding the gun in his left  
16 hand and shortly after the second shooting a witness says that  
17 a person dropped a 9 millimeter gun and then later on that  
18 same person had the 9 millimeter gun next to his hand and you  
19 had a trace metal test similar or identical to the one on  
20 Petitioner's Exhibit 18, on the left hand of one person, and  
21 an expert says that the trace metal test on 18 indicates that  
22 that person held a gun similar to the Browning twice, or  
23 gripped it twice. Are you following me along?

24 A Yes, sir.

25 Q There is evidence he dropped the 9 millimeter once and

1 picked it up again and gripped it a second time. Would that  
2 have been significant, given those facts?

3 A Yes, sir, sure would have.

4 Q How?

5 A In that there was two different patterns there of the  
6 time he picked up the second time of the 9 millimeter.

7 Q What about the witness that said, in my hypothetical,  
8 that the person that did the second shooting held the gun in  
9 his left hand?

10 A That would be certainly helpful.

11 Q Isn't that what you had in this case?

12 A According to the hypothetical, yes.

13 Q The little boy saw his father being shot by a person  
14 holding a gun in his left hand?

15 A That's correct.

16 Q In Petitioner's Exhibit 21, Frank Perez --

17 A Yes, sir.

18 Q -- you and I talked about this case before?

19 A Yes, sir.

20 Q We he have gone over his testimony and you are  
21 cross-examination.

22 A Yes, sir.

23 Q What were you concerned about in that statement?

24 A In this statement, he seemed to be describing Aldape  
25 Guerra in that he states in his statement here, he had a full

1 beard and a mustache. If I see the guy again, I could  
2 identify him. That's what scared me about Frank Perez.

3 Q Did he describe, in your cross-examination, did he  
4 identify Carrasco and explain his identification of Carrasco;  
5 is that correct?

6 A I don't recall.

7 Q What you cross-examined him about will speak for itself.

8 A Yes, sir.

9 Q Have you ever heard of witnesses complaining that police  
10 told them not to talk to defense attorneys?

11 A I have heard of that.

12 Q Have you ever experienced it in cases you have worked on?

13 A Yes, sir.

14 Q A few times or many times?

15 A A lot of times.

16 Q In this case would it surprise you if witnesses were told  
17 that?

18 MS. SCKERL: Your Honor, I would object.

19 THE COURT: I will sustain it as to whether or not he  
20 would be surprised.

21 BY MR. SCHNEIDER:

22 Q You said there was atmosphere of fear and intimidation in  
23 this case?

24 A Yes, sir.

25 Q Was that coming from the police?

1 A I believe so.

2 Q Did that start the night of the shooting?

3 A I believe so.

4 Q Have you investigated scenes of multiple murders where  
5 there were only a couple of police officers involved in the  
6 investigation?

7 A Yes, sir.

8 Q Is that more normal?

9 A Yes, sir.

10 Q Have you seen scenes of investigations where there is  
11 mutiple murders and multiple witnesses where two detectives  
12 handled the entire interrogation of all the witnesses?

13 A Yes, sir. I just finished one right now.

14 Q Is that the ordinary procedure?

15 A Yes, sir.

16 Q So, two people being killed and a third person shot is  
17 not -- it's unfortunate, but it's not extraordinary  
18 circumstances?

19 A The extraordinary circumstance here was the police  
20 officer got killed.

21 Q And the second one being shoot?

22 A Correct.

23 Q Linda Hernandez, was she doing a good job as being  
24 interpreter?

25 A I thought so.

1 Q Were there problems with certain witnesses after that  
2 that complained about what was being said?

3 A The only thing I recall was a juror complaining about the  
4 interpreter.

5 Q Did you have any problems with her?

6 A None at all.

7 MR. SCHNEIDER: May I have a moment, Your Honor?

8 THE COURT: Yes, sir.

9 BY MR. SCHNEIDER:

10 Q If someone was at the scene of a crime and is not a  
11 participant in a crime, does that make them culpable for the  
12 crime?

13 A No, sir.

14 Q So, just being present does not make you guilty?

15 A That's correct.

16 Q And if there are people -- if someone walks down the  
17 hallway and people are talking and saying, that's the person  
18 that's doing the shooting, is that what the problem is with  
19 that type of show-up?

20 A That would be subjective, yes, sir. As to being the  
21 shooter. Not to just being at the scene, to being the  
22 shooter.

23 Q The two together?

24 A Correct.

25 Q And often times have you seen -- going back to when your



1 client's been arrested -- do they often times appear to hide  
2 their head?

3 A Yes, sir.

4 Q And not want to be seen?

5 A Correct.

6 Q Do they often walk with their head down?

7 A Yes, sir.

8 Q As to not look around at what's going around?

9 A That's correct.

10 MR. SCHNEIDER: Pass the witness, Your Honor.

11 MS. SCKERL: I have nothing further, Your Honor.

12 THE COURT: Let me ask you a question.

13 I believe you testified that you received a  
14 phone call from the district attorney's office regarding the  
15 trace metal test?

16 THE WITNESS: Yes, sir. That's what I recall.

17 THE COURT: And the phone call informed you, I think  
18 I heard you say that, that as far as Flores was concerned,  
19 that is, Carrasco, that the tests were positive as to holding  
20 the weapon of the police officer?

21 THE WITNESS: That's correct.

22 THE COURT: But negative as to the 9 millimeter  
23 weapon?

24 THE WITNESS: That's correct, Judge.

25 THE COURT: Did they give you any test results

1 relating to any test that had been run on Mr. Guerra's hands  
2 at that time?

3 THE WITNESS: No, sir.

4 THE COURT: Did they tell you they had run tests on  
5 his hands, or that they had attempted to?

6 THE WITNESS: They told me it was a negative on  
7 Guerra.

8 THE COURT: Okay.

9 THE WITNESS: That's all they told me, Judge. When I  
10 heard that, I was rather elated, anyway.

11 THE COURT: Yeah. I understand that. But I am just  
12 trying to determine what they told you in the phone call  
13 message to you was consistent or inconsistent with the  
14 testimony of the witnesses at the time of trial; and I gather  
15 from what you have said, your recollection, not specifically  
16 what they said, but your recollection of what they told you on  
17 the phone was basically consistent with what they testified to  
18 at the time of trial, or was it not, as far as you know?

19 THE WITNESS: Judge, it was consistent to a certain  
20 extent.

21 What I didn't know is there was a pattern there  
22 on Carrasco.

23 THE COURT: But it showed itself up in the exhibit  
24 that was admitted into evidence?

25 THE WITNESS: At trial time, yes, sir.

1 THE COURT: But that witness, I believe, testified  
2 that even that pattern didn't establish anything.

3 THE WITNESS: I believe that's correct, Judge.

4 THE COURT: Or it was her opinion it did not?

5 THE WITNESS: Correct.

6 THE COURT: So at least her opinion that was given  
7 was consistent --

8 THE WITNESS: With what they had told me.

9 THE COURT: -- with what you had been told.

10 That's all I have.

11 MR. SCHNEIDER: May I ask a follow-up question on  
12 what you said?

13 THE COURT: Yes.

14 REDIRECT EXAMINATION

15 BY MR. SCHNEIDER:

16 Q Based upon what you were told, did you think that there  
17 was only one pattern on Carrasco?

18 A Yes. Yes, sir.

19 Q Did you have any knowledge or notice that there were two  
20 patterns, a pattern on each hand of Carrasco's?

21 A No, sir.

22 Q Did that ever become clear to you until trial --

23 A Trial time.

24 Q -- that there was two patterns on Carrasco's hands, one  
25 on each hand?

1 A At trial time, when I found out there was two patterns.  
2 One was on the left hand; one was the right hand. And, of  
3 course, the right hand identified the police officer's pistol,  
4 and on the left hand was negative as to anything.

5 Q Exact gun, exact weapon?

6 A Correct.

7 Q The existence of a pattern on both hands, would that have  
8 been important to you, just the existence of a pattern on both  
9 hands?

10 A Yes, sir.

11 MR. SCHNEIDER: I have no further questions, Your  
12 Honor.

13 MS. SCKERL: May I have just one more question?

14 THE COURT: Sure.

15 RECROSS-EXAMINATION

16 BY MS. SCKERL:

17 Q But Mr. Elizondo, you knew Mr. Flores had held two guns,  
18 didn't you, before trial, because Officer Harris' weapon was  
19 found on him and the 9 millimeter; is that correct?

20 A That's true.

21 MS. SCKERL: Nothing further, Your Honor.

22 THE COURT: All right. You may step down.

23 THE WITNESS: Judge, may I be excused?

24 MR. SCHNEIDER: No objection, Your Honor.

25 THE COURT: You may be excused.

1 MS. SCKERL: No objection.

2 THE WITNESS: Thank you, Judge.

3 MR. SCHNEIDER: Your Honor, at this time I offer into  
4 evidence Lynwood Ross's affidavit, Petitioner's Exhibit No. 7.  
5 It pertains to Petitioner's Exhibit 39 in that in the first  
6 batch of materials that were given, this page was omitted from  
7 the police report and they had to go back and find the police  
8 report; and the second time they had looked, it was not in the  
9 original offense report, and this was not seen by Mr. -- it  
10 makes it relevant because Mr. Elizondo did not see it the  
11 first time he saw the offense report, either, and had to go  
12 back into court.

13 We are offering into evidence.

14 THE COURT: When you say they had to go back and look  
15 for it, you mean in this proceeding?

16 MR. SCHNEIDER: In this proceeding before, when we  
17 first got the materials.

18 THE COURT: Is there any dispute this was not a part  
19 of the record? Is that what you are saying? Was not a part  
20 of the record in the state proceedings?

21 MR. SCHNEIDER: No, Your Honor. We are talking about  
22 as a part of the offense report; and when it was first given  
23 to the lawyers for Mr. Guerra, it was not included in the  
24 offense reports being given. It was then requested at a later  
25 time, and they had to go back and find this particular page.

1 THE COURT: You say it was requested at a later time,  
2 you mean by the defense lawyers?

3 MR. SCHNEIDER: Yes, Your Honor.

4 THE COURT: They went back and found this page.

5 MR. SCHNEIDER: Yes.

6 THE COURT: And that was found, I guess, and  
7 presented to them sometime during the trial?

8 MR. SCHNEIDER: No.

9 MR. ATLAS: Your Honor, perhaps I can clarify this,  
10 because it was a young employee working for me at the time.

11 What happened, Your Honor, was this. Mr. Guerra  
12 filed an open records request, or somebody at the lawyers  
13 office, and we got, purported from the DA's office, the entire  
14 investigative file in this case.

15 In the course of reviewing those documents last  
16 summer, we discovered that there were several, many pages of  
17 documents missing, and the affidavit describes that and says  
18 that he then went over to the district attorney's office, to  
19 Ms. Sckerl's office, and through searching was able to find  
20 the several pages that were missing.

21 One of the four pages that was missing that was  
22 not produced, as best we can tell, the first time was this  
23 particular page, which happens to be the page that Mr.  
24 Elizondo just finished testifying he, himself did not see when  
25 he looked through the investigator's files, when he looked

1 through the DA's files in 1982.

2 We are making this offer for circumstantial  
3 evidence purposes only, and that is to provide some link,  
4 however indirect, to buttress the testimony of Mr. Elizondo  
5 that it is entirely possible that page was not in the  
6 investigator's files, or not in the police or DA's file when  
7 they were shown to Mr. Elizondo years before.

8 THE COURT: I understand that what you are saying.

9 MS. SCKERL: May I respond to that, Your Honor?

10 THE COURT: Sure.

11 MS. SCKERL: As Mr. Atlas said, I was the person who,  
12 when they were missing pages from the offense report, who Mr.  
13 Atlas contacted and told me that there were pages missing.

14 I have not personally read the affidavit you are  
15 looking at, but I would like the record to be clear there was  
16 not a single page missing.

17 What happened was in the copying of the offense  
18 report, sometimes two pages were copied at once so they didn't  
19 all go through; but this was not a situation of having to go  
20 and find a page. They could pick it out of the offense report  
21 and copy it again, because it simply hadn't gone through the  
22 system correctly, as opposed to being missing somewhere; that  
23 the pages were always in the offense report. They just didn't  
24 get copied.

25 THE COURT: Well, I think they're being offered, it's

1 being offered -- and you may not agree with what conclusion  
2 they want me to reach.

3 What I am trying to make sure -- there is no  
4 objection to the offering.

5 MS. SCKERL: There is no objection.

6 THE COURT: This would be number what?

7 MS. SCKERL: Your Honor, may I read the affidavit?

8 THE COURT: I have no problem with you reading it,  
9 but why would you not be able to deal with an offer at this  
10 time? All the other parts, I believe, are in. I think this  
11 is the only page missing out of --

12 MR. ZAPALAC: There are others.

13 MR. ATLAS: We are offering the affidavit. That  
14 document is already admitted.

15 THE COURT: This is not the affidavit?

16 MR. ATLAS: The affidavit is here --

17 THE COURT: Let me see it.

18 MR. ZAPALAC: -- which is Petitioner's Exhibit 7.

19 THE COURT: It's no mystery that this document  
20 existed.

21 My concern would be, I would not be interested  
22 in waiting until you read it before you rule upon it, because  
23 this came up three or four days ago, I believe. You were  
24 probably not here during that part, but I believe there was  
25 never any objection voiced as to this being admitted, because



1 it was never really offered; and I believe the stipulation was  
2 that if it were to be admitted, it would say whatever -- there  
3 was some stipulation regarding the --

4 MR. ATLAS: Yes, Your Honor. They just preserved  
5 their relevance objection but made no other objection to it.

6 THE COURT: Right.

7 MR. ZAPALAC: They said, if he were here, that's what  
8 he would testify to.

9 THE COURT: Right. And that's what confused me  
10 because I was thinking then it had been admitted, but that was  
11 simply the stipulation relative to that.

12 MR. ZAPALAC: Yes.

13 THE COURT: I will tell you this. I will go ahead  
14 and admit it and overrule the relevancy objection; but if you  
15 believe there is some material problem, then you may bring  
16 that to my attention at later time before the proceeding is  
17 over.

18 MS. SCKERL: Thank you, Your Honor.

19 THE COURT: 7 is admitted.

20 Gentlemen, I believe, and ladies, I believe I  
21 have a verdict in a case that I tried for about seven or eight  
22 weeks. I had not planned to take it at this point, but I had  
23 planned to take a break in about 10 or 15 minutes from this  
24 case and be back at 1:30. So, let me go ahead and take my  
25 break, go ahead and commence it this point. That will give

1 you a little bit lengthier lunch break than you need,  
2 probably, but I will then be able to go ahead and get my  
3 verdict and get back here in a timely fashion.

4 MR. ATLAS: Your Honor, I don't think there is any  
5 alternative, but what you have suggested, in the interest of  
6 fair advanced warning, our next witness, who I believe will be  
7 our last witness, is an expert from out-of-state who has flown  
8 in and has a 3:15 flight. We will endeavor -- and I think  
9 it's out of Intercontinental -- we will endeavor to put her on  
10 as quickly as we can, but this unexpected turn of events about  
11 the lengthy lunch period has put us in a bit of a bind. We  
12 will have to see what kind of alternative plans we can make  
13 for her.

14 THE COURT: What will that witness be testifying  
15 concerning?

16 MR. ATLAS: She is a psychologist who will testify  
17 about the impact of suggestion on memory after trauma.

18 THE COURT: All right.

19 MR. ATLAS: But I don't see we have any alternative.  
20 We will just do the best we can. Unfortunately, this is  
21 catching us all by surprise.

22 THE COURT: All right. Let's recess then until 1:30.

23  
24 (At this time a recess was taken for lunch)  
25

1 THE COURT: All right. Who are we missing? The  
2 lawyers, huh? I guess they will be down shortly.

3 MR. GEE: Your Honor, our next witness will be  
4 Elizabeth Loftus.

5 THE COURT: Elizabeth Loftus. Are you Ms. Loftus?

6 THE WITNESS: I am.

7 THE COURT: Please come around. Raise your right  
8 hand, please.

9 Do you solemnly swear or affirm any testimony  
10 you give in this case will be the truth, the whole truth and  
11 nothing but the truth so help you God?

12 THE WITNESS: I do.

13 THE COURT: Take the witness stand. If you would  
14 pull the microphone in front of you, and spell your last name,  
15 please, ma'am.

16 THE WITNESS: My last name is Loftus. It's  
17 L-o-f-t-u-s.

18 THE COURT: Thank you.  
19  
20  
21  
22  
23  
24  
25

1 ELIZABETH LOFTUS

2 was called as a witness by the Petitioner and,  
3 having been first duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. GEE

6 Q Just for the record, would you state your name, please  
7 ma'am.

8 A Yes. My name is Elizabeth Loftus.

9 Q Dr. Loftus, my name is Tom Gee, and I am one of the  
10 lawyers representing the petitioner in this case.

11 Q Where do you live, Doctor?

12 A I live in Seattle, Washington.

13 Q I think I will let you get put together there.

14 A I live in Seattle, Washington.

15 Q Very good.

16 How are you currently employed?

17 A I'm currently professor of psychology at the University  
18 of Washington, which is in Seattle.

19 Q Tell us your educational background, please, ma'am.

20 A Well, just beginning at college, I went to UCLA. I  
21 graduated in 1966 with a bachelor's degree in mathematics and  
22 also in psychology.

23 From there I went to Stanford University, and I  
24 received my masters degree in psychology in 1967, and then my  
25 Ph.D. in psychology in 1970, also from Stanford.

1 Q Thank you, Doctor.

2 Do you hold any memberships or fellowships in  
3 professional organizations?

4 A I do, yes.

5 Q Give us a few examples, if you would.

6 A I am a member, for example, of the Western Psychological  
7 Association, which is an organization of psychologists that  
8 covers the western region in the United States, California;  
9 Oregon; Washington; Alaska and so on, and I was president of  
10 that organization in 1984.

11 I am also a member of the American Psychological  
12 Association, which is the largest organization of  
13 psychologists in this country. There are well over a hundred  
14 thousand members. I was president of the Lowan Psychology  
15 Division of that organization in 1985, and then I was  
16 president of the Experimental Psychology Division in 1988.

17 I'm a member of the American Psychological Society,  
18 which is an organization of about 15,000 research  
19 psychologists, and I am on the board of directors of that  
20 organization; and then I am also member of the psychonomics  
21 society, which is a smaller organization of experimental  
22 psychologists. I am on the governing board of that  
23 organization. Those are the major organizations with which I  
24 am affiliated.

25 Q Thank you, Doctor.

1 Do you have a particular area of research specialty?

2 A I do, yes. My area most broadly is experimental  
3 psychology, cognitive psychology, and I specialize within that  
4 area in subject of human memory.

5 Q Have you done any study in the area of the nature and the  
6 malleability of memory?

7 A I have done many many studies on the malleability of  
8 memory. Just as an estimate, probably, at least 200 studies  
9 involving over 20,000 individuals.

10 Q You have published roughly how many books or articles in  
11 this area?

12 A Oh, I have published at least 16 books and over 200  
13 scientific articles, and the majority of my writing is in the  
14 area of memory and human information processing.

15 Q Is that a copy of your curriculum vitae that I put on the  
16 witness stand with you?

17 A Well, it's a portion of my vitae. The first 22 pages of  
18 it, anyhow.

19 Q Would you glance through it and verify that it is  
20 accurate or as far as it goes.

21 A Yes. This looks accurate and reasonably recent, except  
22 it does appear as if three or four pages of it are missing;  
23 but those are just the last six years of speeches that I have  
24 given, so it's not missing that much.

25 MR. GEE: This is Petitioner's Exhibit 40, Your

1 Honor. We offer it in evidence.

2 THE COURT: Any objection.

3 MR. ZAPALAC: No objection, Your Honor.

4 THE COURT: It's admitted.

5 BY MR. GEE:

6 Q Now, Doctor, why is memory a subject of interest to  
7 psychologists?

8 A Well, memory is probably one of the most important  
9 psychological functions that we as human beings engage in; and  
10 I suppose one of the reasons it's of interests to  
11 psychologists is because, for one reason, is that lay people  
12 often have beliefs and opinions about the workings of memory  
13 that are contradicted by the findings of psychological  
14 scientists.

15 Q Well, that's interesting.

16 Has the psychological profession at this point done  
17 enough research and study in this area that one could say that  
18 the subject matter can be addressed in terms of scientific  
19 research as well as common sense and common knowledge?

20 A Oh, well, absolutely in terms of scientific research.  
21 The study of memory is approximately a hundred years old. We  
22 can date it back at least to 1885 with the work of Evinghouse,  
23 the first experimental work on the subject of human memory.  
24 So we have about a century of scientific literature on the  
25 workings of human memory.

1 Q Could you give us a brief description of the kind of  
2 research you have done in this area?

3 A My own work is on trends to concentrate on the  
4 malleability of memory.

5 THE WITNESS: And, Your Honor, if I could illustrate  
6 this using a piece of paper, it might make it a little easier.

7 THE COURT: Go ahead.

8 BY MR. GEE:

9 Q Please do.

10 A You asked about my own work. It follows a very simple  
11 and straightforward paradigm. What I tend to do is to show  
12 people some sort of an event, like a simulated crime or a  
13 simulated accident, and then I question people to test their  
14 recollections about the event at some later time.

15 And during the course of this interval of time  
16 between the events and my test of someone's recollection, I  
17 expose some of my witnesses to misleading or suggestive  
18 information. So, we'll call it post-event information.

19 Some of the witnesses will get post-event  
20 information; other witnesses will get no post-event  
21 information, even though they've seen the identical event and  
22 they're going to be tested in the identical way.

23 We can then look at the extent to which this  
24 post-event information, particularly when it's misleading or  
25 suggestive, interferes with their ability to remember what



1 they saw.

2 So, just to give you a couple of quick examples. In  
3 some of my studies, for example, we have shown people a  
4 simulated accident. That's the actual event. Maybe a car  
5 went through an intersection with a yield sign. We might  
6 suggest to some of our witnesses that actually there was a  
7 stop sign at the intersection, not a yield sign. We do this  
8 with a suggestive question.

9 And then we test people later on and ask them what  
10 kind of a traffic sign did you see, in many instances, in  
11 fact, under some conditions over 80 percent of our witnesses  
12 will choose the stop sign because they've succumbed to this  
13 suggestive information.

14 So, using this basic procedure, we have gotten people  
15 to tell us they saw stop signs when they were yield signs, or  
16 they saw a person who actually had straight hair, we can lead  
17 them into believing it was curly hair. We have people that  
18 see barns that didn't exist or broken glass that wasn't there,  
19 and most recently have even gotten people to remember  
20 childhood events that never actually happened to them. That's  
21 the basic kinds of work.

22 Q Thank you, Doctor.

23 Have you appeared as a witness on more than one  
24 occasion?

25 A Yes. I have testified in Court approximately 200 times

1 since June 3rd, 1975.

2 Q Have you ever testified on behalf of an inmate or  
3 criminal defendant?

4 A Well, usually -- yes. Two thirds of those 200 cases or  
5 so approximately are criminal cases, and the other one-third  
6 of the cases are civil cases of one type or another.

7 Q Have you ever been retained to appear on behalf of the  
8 prosecution?

9 A I have actually been retained by the prosecution four  
10 times. In the end, the testimony wasn't actually needed, so I  
11 never have actually testified on behalf of the prosecution;  
12 but that was just an accident of those four cases.

13 Q Doctor, is there a generally accepted theory in the  
14 psychology profession of how memory works?

15 A There is a generally accepted theory that memory does not  
16 work like a videotape recorder. You don't just play, record  
17 the event and play it back later. The process is much more  
18 complex than that; and I think, by looking at the illustration  
19 from my own experiments, you can see that it involves a number  
20 of stages and many factors come in to play in each of those  
21 stages. So, there are factors that are important at the time  
22 of the events itself; there are factors that are important at  
23 the time you are testing someone for the accuracy of their  
24 memory, and then factors that are important in between.

25 One of the things we know about memory is that if

1 during that period of time before somebody is tested you  
2 expose people to suggestive information, it can contaminate or  
3 distort or transform their memory.

4 Q Are there stages in memory?

5 A Well, these would be the stages. The event is an  
6 acquisition stage where some information is laid down in  
7 memory. Next is the retention stage where some time is  
8 passing and maybe other things are happening to a witness, and  
9 then finally there is a retrieval stage. That's when you test  
10 someone for their memory.

11 Q Well, let's talk a minute about the acquisition stage.

12 What kind of factors can have a significant effect on  
13 subsequent memory?

14 THE WITNESS: Well, Your Honor, if I could use this  
15 paper again.

16 THE COURT: Help yourself.

17 THE WITNESS: It helps me.

18 THE COURT: Apparently you have been a teacher  
19 before.

20 THE WITNESS: Thank you.

21 A The acquisition stage is when the event itself happens;  
22 and, of course, there is some factors that are interest  
23 something of a matter of common sense, such as how good the  
24 lighting is and how far away the people are from what they're  
25 going to be remembering.

1 But then also factors that are not so much a matter  
2 of common sense, such as how stressful or frightened are the  
3 witnesses, how much violence are they experiencing, because  
4 that plays an important role.

5 Is anybody under the influence of alcohol? Because  
6 there is a literature shows alcohol has an affect on the  
7 acquisition of the information.

8 And so these are some factors that are important at  
9 the time of acquisition of the event itself.

10 Q About about suddenness?

11 A Well, you know, I am not sure if something is sudden that  
12 I can actually find a study in the literature that looked at  
13 suddenness as a variable.

14 Q It plays into stress?

15 A People have looked at violence, which suddenly erupts in  
16 the middle of an event that's being watched.

17 Q How about a power imbalance, that is, a weak person who  
18 is surrounded by more powerful factors. Does that figure in,  
19 or just as a part of stress?

20 A I don't know of any particular study that has looked at  
21 that kind of and issue at the time of acquisition.

22 The way that this would come in would be later on,  
23 because people with authority or with power can influence you  
24 during the retention stage after the events is over, and  
25 that's been documented in the literature.

1 Q Well, let's talk about the retention stage. What's  
2 important at this stage.

3 A So, after the event is completely over, then we enter  
4 this new stage that's the retention stage, and now a new set  
5 of factors come into play; and one obvious one that I think is  
6 something of a matter of common sense is how long is this  
7 retention period? How much time passes between the event and  
8 the attempt to recall that event.

9 If I were to illustrate that with a graph and so I  
10 were to plot time passing, how much time has passed, memory on  
11 this axis, you would expect to see a forgetting curve that  
12 might look something like this, (indicating). Now, that's  
13 something of a matter of common sense. The more time passes,  
14 the more the memory is going to fade.

15 What's not so much a matter of common sense about  
16 this theory, however, is that as time is passing and the  
17 memory is weakening, it's becoming increasingly vulnerable to  
18 post-event suggestion.

19 This curve also tells you, of course, soon after the  
20 event, the memory is more likely to be accurate.

21 Q Does post-event suggestion mean just what it sounds like  
22 it means?

23 A Yes. Well, post-event information is the general term.  
24 Any time a person gets new information from talking to other  
25 witnesses, from overhearing other witnesses, from being

1       interrogated in a suggestive or leading fashion, from looking  
2       at media coverage, all of these are examples of post-event  
3       information that have the potential to supplement, contaminate  
4       or distort somebody's recollection.

5       Q     Have psychologists studies post-event suggestion and its  
6       effects?

7       A     Yes. Many psychologists have studied it, including my  
8       own laboratory work that I have been doing.

9       Q     What have they found?

10      A     Well, I and others have found that when you expose people  
11      to suggestive or misleading post-event, it creates errors in  
12      people's recollection; that it can lead to the development of  
13      false memories; it can lead to false identifications of  
14      people; it can lead to other kinds of false memories for what  
15      happened in the past. And once these memories are created,  
16      they can be as real and vivid to a person as if they actually  
17      were experienced. They can be detail; they can be confident,  
18      even though they're false.

19      Q     Is there any necessary relation between the confidence  
20      with which a memory is held and its accuracy?

21      A     Well, actually, now you are moving into this last phase.

22      Q     Let's talk about the last phase, the retrieval.

23      A     That's the retrieval phase. This is when you are testing  
24      someone's recollection; and, of course, now a new set of  
25      factors come into play. How the questions are worded, how a

1 witness is interviewed or approached, all of these can affect  
2 the accuracy of the information that you get.

3 But one of the most interesting things that we have  
4 seen about the retrieval phase has to do with a concept that  
5 you just mentioned in your question, the concept of  
6 confidence. Because what the work of psychologists has shown  
7 is that contrary to a common belief that confidence is a very  
8 good predictor of whether a person is accurate, in fact, there  
9 is actually a relatively weak relationship between confidence  
10 and accuracy. That means that often we see people who are  
11 very confident and wrong, as well as at other times seeing  
12 people who are very confident and right; and the bottom line  
13 message is that confidence is not a very good predictor of  
14 accuracy, particularly if there has been some post-event  
15 suggestion.

16 Q All right, Doctor. If you will resume the stand.

17 Let me see if I can recap what we have covered so  
18 far. That memory is malleable; it is easily added to,  
19 transformed or contaminated. Am I right so far?

20 A Yes.

21 Q That false memory get created when you have post-event  
22 suggestions?

23 A Yes.

24 Q And that a person can be very detailed and confident  
25 about memory, but that that confidence does not necessarily

1 reflect that they are accurate memories?

2 A That's correct. All of those are well supported by  
3 psychological research.

4 Q Well, let's turn to the case.

5 Did we contact you, ma'am, to provide us with expert  
6 assistance in the area of the nature and malleability of  
7 memory?

8 A Yes. You did.

9 Q I would like to ask you what sort of materials you have  
10 reviewed in order to prepare for your testimony.

11 Have you looked over some of the testimony of the  
12 witnesses?

13 A Yes. I have looked at, well, both witness statements and  
14 also court testimony, trial testimony.

15 Q Have you looked at police reports?

16 A Yes.

17 Q Have you looked at instances of media coverage, newspaper  
18 accounts and so forth?

19 A Yes. I did watch some of the actual coverage, both in  
20 July of 1982, also in October of 1982, actual television  
21 coverage; and then I read transcripts of some television  
22 coverage that I wasn't able to get actual videotapes of.

23 Q Have you reviewed both of those, including line-up  
24 photos?

25 A Yes. I have looked at the line-up photo and also other



1 media coverage.

2 Q Do you feel that you have seen enough information to have  
3 a reasonably accurate view of the facts leading up to this  
4 case?

5 A Well, I don't think I know as much as you know or the  
6 Judge knows, but I think I know a fair amount about what this  
7 case is about.

8 Q Has Mr. Atlas kept you advised of proceedings in court  
9 here?

10 A Yes.

11 Q All right.

12 How would we apply your test of the accuracy of  
13 retrieval to this case then, Doctor?

14 A Well, if I could use the piece of paper.

15 Q Yes, ma'am. Please do.

16 A Now, I can either do this by memory or rely on a few  
17 notes.

18 Q Well, I think you can use your notes.

19 A Thank you.

20 In my opinion, the psychological factors that I have  
21 been talking about that we've looked at in the research and  
22 the potential for post-event suggestion applies very well to  
23 the particular situation here. There is an event. It took  
24 place on July 13th, 1982. There are recollections that were  
25 given in court, and I'll just call these, well, call them

1 trial recollections, in October of 1982; and there are many  
2 things that happened in between those two points in time that  
3 are potential sources of post-event information or actual  
4 sources of post-event information that could have and looked  
5 like they actually may have influenced some of the witnesses  
6 in this case.

7 So, I did mention earlier that media coverage is  
8 something that we have studied, and its ability to supplement  
9 or contaminate a witness's recollection; and there was media  
10 coverage throughout July soon after the event itself. There  
11 was more media coverage around October, 1982 at the time of  
12 the trial. And that media coverage was highly subjective of  
13 the idea that the defendant in this case, who I call Ricardo.

14 Q Call him Ricardo.

15 THE WITNESS: If that's all right with you, Your  
16 Honor.

17 A So, for example, just a few times items I pulled out of  
18 my review of the media coverage.

19 As early as July 14th, Channel 11 aired the idea that  
20 the police believed that Ricardo was the one who shot the  
21 officer.

22 On 7-15 the Houston Post was saying that Ricardo did  
23 the shooting.

24 On 7-16, the Houston Chronicle displayed a photograph  
25 of Ricardo as the suspect in this case.

1           So, there is a suggestion not only that it's Ricardo  
2 and his photograph, but also that he is the one who did the  
3 shooting, and that occurred very, very early on in the scheme  
4 of things.

5       Q     Well, then Channel 13, on the 14th of July, had little  
6 Jose on saying: He shot the police. Then he got the police  
7 gun and shot my father.

8           Do you remember that?

9       A     Yes. Now, of course, when Jose -- I do remember that,  
10 but that comment was not specifically directed towards  
11 Ricardo. He was talking about the men shot the police.

12       Q     Whoever it might be.

13       A     Whoever it might be. That's the only reason I did not  
14 mention that particular one in this brief list. There is much  
15 more media coverage we could point to.

16           There were more instances of post-event suggestion  
17 that went on on 7-14.

18           THE WITNESS: I hope this isn't too messy for you,  
19 Your Honor.

20           MR. GEE: Can you see, Your Honor?

21           THE COURT: Absolutely. Go ahead. I mean, not  
22 absolutely too messy, but I can see it.

23       A     On the 13th there were activities that went on at the  
24 police station that were highly suggestive, in my review of  
25 the material.

1 Q You are referring to the parading of the prisoner before  
2 the witnesses, for example?

3 A Well, of course, to have Ricardo being brought in and  
4 seen in the hallway in handcuffs is a very, very suggestive  
5 thing to do. So we have the defendant in handcuffs; we have  
6 the witnesses talking with one another and not separated, but  
7 they're contaminating one another; pretty strong evidence of  
8 lots of discussion and, in particular, pressured comments  
9 coming from at least one of those witnesses.

10 Q The irrepressible Ms. Galvan?

11 A Well, I was not going to call her that, but that's who I  
12 was thinking of.

13 And then, of course, in the viewing of the line-up,  
14 many of the witnesses now see Ricardo, whether they selected  
15 him or not. So, the viewing of the defendant in the line-up  
16 now constitutes post-event information that may be responsible  
17 for explaining why some of these witnesses changed their  
18 testimony from one point in time to another.

19 Shall I go on?

20 Q Yes, please.

21 A Then about seven or eight days later, we're approximately  
22 7-21 or 7-22 -- I have different notations on that -- there is  
23 a restaging of this.

24 Q Out on the original grounds, right?

25 A Yes. Of this event.

1           That kind of activity, of course, brings witnesses  
2 together, allows them to be mutually contaminating one another  
3 and would probably have the tendency to make their  
4 recollections more consistent with one another, consistent  
5 with that restaging, and a number of the witnesses were  
6 present at that restaging.

7           Then just buyer to the trial, I believe it was  
8 October 1st, there is a weekend preparation meeting where lots  
9 of witnesses come together. I will call it the Saturday prep  
10 meeting. And among other things at this Saturday prep  
11 meeting, where many witnesses are attending, the mannequins  
12 are displayed, some photographs, apparently, including  
13 Ricardo's photograph, displayed, new information supplied to  
14 the witnesses. Those mannequins are important for reasons  
15 I'll mention later. I forget how you spell "mannequin."

16           And then finally we have the activities that went on  
17 at the trial itself, in particular of the display of these  
18 mannequins and other kinds of things. So you can see here  
19 ample, ample opportunity in the form of media coverage,  
20 activity for the police station, interactions, lots of  
21 interactions that we know about and, presumably, many we don't  
22 know about between and among these various witnesses that  
23 occurred at several opportunities, and these are some of the  
24 examples of post-event suggestion that I see in my review of  
25 the materials in this case.

1 Q Now, let's supply these items of contamination or  
2 post-event suggestion to the witnesses. I am particularly  
3 interested in Jose, Jr., the little boy.

4 Do you remember how Jose's recollection started out?

5 A Yes. I do. I do believe that some of these items of  
6 suggestion and information might be responsible, might help us  
7 understand why Jose, Jr.'s recollections changed so  
8 dramatically from the time of the event in July to the time he  
9 testified in trial, and I'll just point out a few of the  
10 things that he was subjected to.

11 Q Before that, though, let's start with what he thought he  
12 saw to begin with.

13 A Okay. From my review of the material, soon after the  
14 event, Jose, Jr., 10 years old, said something like he did he  
15 did not remember what the men looked like or what they were  
16 wearing, and all he really remembered as far as the appearance  
17 of the person, was something about the shooter being  
18 left-handed.

19 Q All right.

20 A So, there is no apparent memory of the suspect's  
21 appearance except his left-handed comment.

22 Q Now, along come the post-event suggestions.

23 A Well, of course, there is media coverage both in the  
24 television, newspapers and so on that is in the environment of  
25 on Jose, Jr. Of course, we don't know exactly what he was

1 exposed to know in particular, but we know that there was  
2 suggestion in the community about Ricardo, what he looked  
3 like, that he was supposedly the shooter.

4 Jose did go to the police station. He apparently saw  
5 the defendant, was in the hallway when the defendant came in  
6 handcuffs. He was exposed to comments, and particularly the  
7 comments and discussions, and there is some evidence that I  
8 reviewed suggesting Galvan's more than subtle pressure,  
9 communicating to him that Ricardo was the shooter.

10 He did view the line-up; and interestingly, despite  
11 all this suggestion, he still made no identification.

12 Q All right. Let's go on.

13 A But he then takes part in that Saturday preparation  
14 meeting involving the mannequins and now the exposure of  
15 Ricardo, and it's around this time, just before the trial,  
16 that he begins to apparently remember that Ricardo was the one  
17 he saw and Ricardo was the one who did the shooting.

18 He testifies to that effect in the trial while the  
19 mannequins are present. And there is something very  
20 interesting that he does in that trial that I think really  
21 illustrates the power of those mannequins as a form of  
22 post-event information. At trial he talks about the man with  
23 the green shirt who had long hair on his face and a long  
24 beard. So he's got a whole description of the person who did  
25 the shooting now.

1           We can't know for sure it was because of the  
2 mannequin in front him, but he can get this information from  
3 the mannequin, and yet he had no memory of the appearance of  
4 the suspect three months earlier.

5           So, we have again sources of post-event suggestion  
6 that we can identify in the case of Jose that could be  
7 responsible for changing his memory from no memory to now  
8 identifying Ricardo as the person he saw.

9       Q     And that is your professional opinion?

10      A     Well, it's my professional opinion. Of course, I can't  
11 say, nor could anyone, that Joe's memory is true or false. I  
12 can only offer this as a reasonable interpretation of why the  
13 dramatic change. It's perfectly consistent with the idea that  
14 post-event suggestion is responsible for those changes, even  
15 though this then-10 year-old, now older person may have been  
16 trying to be as accurate as possible.

17      Q     All right. So much for Jose.

18           Let's talk about Vira Flores, another of the  
19 witnesses who identified Ricardo as the shooter.

20      A     Well, Ms. Flores, who was, apparently, about 16 years old  
21 at the time, from my review of the material and my  
22 understanding of what was introduced in this particular  
23 hearing, first of all, at the time of the event itself, she  
24 was strongly under the influence of alcohol; and we know from  
25 the scientific literature that even as few as two or three



1 drinks is enough to affect the formation of new memories, is  
2 enough to affect the quality of the information that gets into  
3 long-term memory.

4 Q Do you know what barrachio means?

5 A I'm sorry. I don't, no.

6 Q All right.

7 A Theis is a joke that most of this room will know except  
8 somebody from Seattle. I think I can figure it out from the  
9 context.

10           Anyhow, although she does describe a blond Latin  
11 male, she goes to the line-up, the police station. She's part  
12 of this suggestive environment where the defendant is brought  
13 in in handcuffs. There are lots of comments and communication  
14 among the witnesses. There is supposedly the remarks of  
15 Galvan, which are remembered by many others.

16           She viewed the defendant in the line-up. She did not  
17 make an identification, despite the presence of this  
18 suggestive information; but a little over a week later, after  
19 restaging where witnesses are now brought together, there has  
20 now been lots and lots of opportunity for media coverage, she  
21 begins to now report that she saw the shooting and it was  
22 Ricardo who was the shooter. So, she is exposed to whatever  
23 went on at that restaging; and, of course, the record on this  
24 is a little sketchy, but we know that many people were brought  
25 together for purposes of this restaging.

1           This witness also was a part of the Saturday  
2 preparation meeting and, therefore, exposed to the mannequins  
3 and other information that was available to witnesses at that  
4 time.

5           She testifies at trial in the presence of the  
6 mannequins; and again, there is another interesting example of  
7 the hindsight bias and the potential power of these  
8 mannequins, if that's the key to this, because at the trial  
9 this witness now says that the shirt was green, and she says  
10 that this was in her earlier sworn statement to the police.

11 Q     But it's not, is it?

12 A     Well, in no statement that I reviewed of this witness,  
13 Flores, was there any mention of any green shirt that she is  
14 now sure of and thinks that she also mentioned earlier in  
15 sworn testimony.

16 Q     So this is an example of what you call false memory?

17 A     Well, as far as her recollection of it being in a sworn  
18 statement, that is a false memory.

19 Q     That's what I mean.

20 A     The entire phenomenon is something we call "the hindsight  
21 bias," where we find something out, namely, a shirt is green  
22 that a person was wearing, and may have a tendency to think we  
23 would have known it all along. So, it's something that  
24 happens to people who aren't attempting to be deceptive, who  
25 are trying to tell the truth, but it's a natural by-product of

1 the malleable memory.

2 MR. GEE: Your Honor, may I have a moment?

3 THE COURT: You may.

4 MR. GEE: Pass the witness.

5 THE COURT: Cross-examination

6 CROSS-EXAMINATION

7 BY MS. SCKERL:

8 Q You said your name was Dr. Loftus?

9 A That's my name, yes.

10 Q I just wasn't paying much attention to it when you said  
11 it. I apologize.

12 A Well, that's one of the factors that affects memory, too.

13 Q I set myself up for that one.

14 My name is Cary Sckerl. I'm an Assistant D.A. in  
15 Harris County.

16 Have we talked ever before, that you know, about this  
17 case?

18 A I don't believe so, no.

19 Q Have you talked with anybody who represented the state  
20 back in 1982 or who are representing the State of Texas now  
21 regarding this case?

22 A I don't think so, no.

23 Q So all of the information that you have received and that  
24 you are making your conclusion based on is that information  
25 presented to you by people associated with Mr. Aldape Guerra;

1 is that correct?

2 A Well, they're the ones who supplied me with the police  
3 reports and the newspaper articles and the television  
4 coverage.

5 Q And you talked with them about the facts of the case and  
6 some of the things that happened?

7 A Right.

8 Q You described, I believe, in the beginning of your  
9 testimony the fact that you see an event and then later if  
10 you're tested on an event and there is a time in between where  
11 some people were given suggestions and other people weren't,  
12 you saw a difference; is that correct?

13 A Right.

14 Q How much time elapsed in between the event and the  
15 testing?

16 A In most of my studies those retention intervals are on  
17 the order of less than a week or so.

18 Q Would you agree with me, Dr. Loftus, it is very difficult  
19 to mold someone and change someone's memory in a matter of two  
20 to three hours?

21 A No. I would not agree with that.

22 Q Why not?

23 A Well, first of all, because I have seen in my own  
24 experiments that we can mold someone's memory in as short a  
25 time as one hour if the conditions are right.

1 Q What would those right conditions be?

2 A Well, for example, in the experiments we will show  
3 somebody a simulated accident, and we might try to suggest  
4 that they saw a different traffic sign or that the appearance  
5 of someone was different. If our suggestion comes an hour  
6 later, we can influence a significant number of people.

7 Q And how do you go about suggesting the change?

8 A In these experimental studies it's done in a number of  
9 ways. We either ask a suggestive and leading question. We  
10 might ask a question like: Did another car pass the red  
11 Datsun while it was at the intersection with the stop sign  
12 there? And that's a very subjective question which suggests  
13 to the witness in a relative clause it was a stop sign when  
14 perhaps it wasn't.

15 We might allow a witness to overhear another  
16 witness's version. We have even done a couple of experiments  
17 where we have created simulated media coverage about an event.  
18 In fact, it happened to be a shooting, and we created some  
19 simulated media coverage and contaminated people's memories  
20 that way.

21 So, it is possible that you can influence people's  
22 memories even in a short period of time as, oh, less than an  
23 hour.

24 Q Then assume with me that their memory was, in fact,  
25 influenced that way, okay; that an event happened that they

1 were presented with outside stimuli, suggestibilities over a  
2 period of time. Would, 10 years later, their memory revert to  
3 what their memory was before the introduction of stimuli?

4 A Not necessarily.

5 Q And, in fact, probably not?

6 A Well, it depends on lots of things, such as whether they  
7 were rehearsing the false recollection or rehearsing a true  
8 recollection.

9 Q I'm sorry. I don't understand your answer.

10 A I am not sure I understood your question.

11 Q Okay.

12 If someone viewed an event, then experienced a number  
13 of outside influences, as you talked about, and then gave the  
14 feedback, as you talked about in your test, as to what they  
15 recalled it to be, okay, fair, including the outside stimuli,  
16 say five years later if they were questioned about that event,  
17 they would recall -- what would they recall?

18 A Well, I mean, in these studies, if you came back to them  
19 later, they might recall nothing; they might stick with the  
20 suggested information, the false information; that might  
21 happen with a number of them, or they might even refer revert  
22 back to what they would have said before. It's hard to know.

23 Q If someone was seeing an event -- excuse me. That was  
24 very bad grammar.

25 If someone saw an event, was influenced by outside

1 stimuli, talked about the event, 10 years later were then  
2 re-exposed and went through a lot of media coverage again,  
3 went through a lot of questioning again, went through a lot of  
4 leading questions again, except in a different manner, going  
5 the opposite, say your stop sign -- let me put this in a  
6 hypothetical.

7 A person saw the accident and you saw a yield sign.  
8 Through the outside stimuli, you said it was a stop sign.  
9 They responded in your test that it was a stop sign. If they  
10 were questioned about that same event 10 years later and they  
11 were told, no, it wasn't a stop sign or a yield sign, it was a  
12 railroad sign and were subjected to media coverage that it was  
13 a railroad sign, were subjected to leading questions that it  
14 was a railroad sign, isn't it true that they, in fact, could  
15 then remember that it was a railroad sign and neither the  
16 yield or stop sign?

17 A Yes.

18 Q So, all of the witnesses who you examined their  
19 statements, their trial testimony, the media coverage, if they  
20 were 10 years later confronted with all of those things again,  
21 but pointing to a different answer, they could, in fact, be  
22 lead 10 years later, too, couldn't they?

23 A Yes.

24 Q And you didn't talk with any of the actual witnesses?

25 A No.

1 Q So, you're just making your observations based on the  
2 written material you were given; is that correct, and the  
3 media coverage.

4 A Right.

5 Q You don't know if any of the witnesses saw any of the  
6 media coverage, do you?

7 A I don't know that for a fact. I just know that it was --  
8 there was ample coverage; and you don't even need necessarily  
9 a specific witness to see the media coverage in order to be  
10 influenced by it, that is, one person can see the television  
11 coverage. If that can become the material for conversations  
12 among witnesses, then that way the media effects seep down  
13 into the consciousness of other people who haven't even  
14 actually been the ones watching the television.

15 Q You talked about dealing with Jose Armijo, Jr., the young  
16 boy 10 years old. Do you deal with children often in your  
17 work?

18 A Well, the bulk of my experiments are with adult  
19 witnesses. I have probably done five or six studies involving  
20 children witnesses, but there are others who have been greater  
21 expertise in the area of child testimony.

22 Q And isn't it true, Dr. Loftus, that a child who  
23 experiences something traumatic is often at first very  
24 unwilling to communicate with anyone about what has happened?

25 A That may be true about some children, but I would not say



1 that that's true about Jose, as evidenced by his appearance on  
2 television.

3 Q You would agree with me, I assume, that people can  
4 remember more as times on?

5 A That can happen.

6 Q So the fact that Jose Armijo talked on television about  
7 someone shooting his dad and he didn't remember all of the  
8 details certainly doesn't mean that he would not at a later  
9 time accurately remember details?

10 A No. It's conceivable that some new and accurate detail  
11 could become available later that wasn't available earlier.

12 Q Did you review the testimony of Marie Armijo?

13 A I have read her testimony at some point in time.

14 Q Do you recall that they said that when they went home  
15 after the line-up, her son told her, you know I saw the guy  
16 who shot my dad, but I was scared to identify him?

17 A I do recall something like that testimony or something  
18 like that recollection, anyhow, according to the mother.

19 Q And those are not her exact words, I am sure.

20 So, in fact, if she testified that did happen, that  
21 would take out any influence of the media coverage through the  
22 14th or 15th -- and I don't remember what other dates -- the  
23 16th, you said, the reenactment that Jose was not at on the  
24 22nd, or the pretrial preparation, wouldn't it?

25 A Well, the problem I keep having with this example is that

1 the mother didn't come forward for months, and so there is a  
2 retrospective problem with her recollection as to exactly what  
3 happened back in July.

4 Q Whether or not Mrs. Armijo came forward and told the  
5 police is rather irrelevant since the man had already been  
6 charged with killing her husband.

7 I guess what you are saying is you don't believe what  
8 Ms. Armijo is saying, what she testified to?

9 A No, no. I am just assuming if she comes forward with her  
10 recollections of what Jose, Jr. did or said back in July when  
11 he came back from the line-up that this is a recollection. I  
12 mean, she is recalling something that would have happened  
13 three months earlier, so it, too, should be subjected to the  
14 same scrutiny as other kinds of recollections.

15 Q But you are not saying that it didn't happen that way?

16 A I don't know if it happened or not.

17 Q Isn't it difficult for anybody to go back and look at  
18 what happened to other people, especially without talking to  
19 those other people, and make a determination how they were  
20 influenced by any certain stimuli?

21 A Well, it is possible to identify sources of post-event  
22 information by reviewing the record.

23 Q Right.

24 A It's not possible to say whether this particular source  
25 did influence this particular person and made them have a

1 false memory.

2 Q So you cannot say that the witnesses who testified in the  
3 Ricardo Aldape Guerra case back in 1982 were affected at all  
4 by the outside stimuli, can you?

5 A Right. It's only a reasonable explanation for why their  
6 testimony may have changed so dramatically.

7 Q And are you talking about dramatically from now?

8 A No. I was talking about from July 13th until early  
9 October when they testified in trial.

10 Q What about the people whose testimony did not change, as  
11 you say, dramatically, who were exposed to the same  
12 information?

13 A Well, that just shows you that not everybody is  
14 susceptible to post-event suggestion every time they are  
15 exposed to it.

16 MS. SCKERL: I have no further questions, Your Honor.

17 THE COURT: Redirect.

18 MR. GEE: Thank you, Doctor.

19 THE COURT: You may step down. Thank you very much.

20 MR. GEE: May she be excused, Your Honor?

21 THE COURT: Any objection?

22 MS. SCKERL: No objection, Your Honor.

23 THE COURT: You may be excused.

24 THE WITNESS: Thank you.

25 MR. ATLAS: Your Honor if we may confer a moment,

1 please.

2 THE COURT: Sure.

3 MR. ATLAS: Your Honor, at this time the petitioner  
4 rests.

5 THE COURT: All right. Mr. Zapalac.

6 MS. CORNELIUS: Your Honor, at this time the state  
7 would call Sergeant Webber.

8 THE COURT: Would you have him come in, please. I  
9 don't think he has been sworn in.

10 MS. CORNELIUS: I don't believe any of our witnesses  
11 have been sworn, Your Honor.

12 THE COURT: Ms. Cornelius, will you be taking this  
13 witness?

14 MS. CORNELIUS: Yes, Your Honor.

15 THE COURT: Raise your right hand, please, sir.

16 Do you solemnly swear or affirm any testimony  
17 you will give in this case will be the truth, the whole truth,  
18 nothing but the truth so help you God?

19 THE WITNESS: I do.

20 THE COURT: Please take the witness stand. If you  
21 will adjust the microphone there, pull it around in front of  
22 you so may speak directly into it.

23 MS. CORNELIUS: May I proceed, Your Honor?

24 THE COURT: You may. Hold on one second. There may  
25 be some documents need to be retrieved.

1

LARRY WEBBER

2

was called as a witness by the Respondent and,

3

having been first duly sworn, testified as follows:

4

DIRECT EXAMINATION

5

BY MS. CORNELIUS:

6

Q Would you state your name for the record.

7

A My name is Larry Webber.

8

Q Mr. Webber, how are you employed?

9

A City of Houston Police Department.

10

Q What position do you hold there?

11

A I'm a sergeant, police.

12

Q Where are you currently assigned?

13

A Homicide Division.

14

Q How long have you had that assignment?

15

A For 15 years.

16

Q So, obviously, you were there in July of 1982; is that correct?

17

18

A That's correct.

19

Q Do you recall being called to a shooting scene on July 13th, 1982 wherein an Officer J.D. Harris was shot?

20

21

A Yes, ma'am. I do.

22

Q Just for purposes of placing this, that location was in Southeast Houston on, I believe -- was it Walker Street?

23

24

A That's correct.

25

Q When you arrived at the scene, what was your assignment?

1 A My assignment was to interview witnesses there at the  
2 scene.

3 Q Let me back up just a second.

4 Not only were you assigned to homicide in 1982,  
5 wasn't there a particular assignment within the homicide group  
6 that you were assigned to?

7 A Yes.

8 Q What is that?

9 A That was the officer shooting team.

10 Q What was the purpose for that?

11 A The purpose was to investigate shootings that involved  
12 police officers, either officer shooting someone or someone  
13 shooting an officer.

14 Q Were other members of the officers shooting team then  
15 dispatched to that location?

16 A Yes, ma'am.

17 Q And jumping forward a little bit again, when you reached  
18 there you were assigned to interview witnesses, did you say?

19 A That's correct.

20 Q How is a crime scene like that divided among the  
21 detectives?

22 A Any kind of homicidal scene is divided generally into two  
23 parts. You have certain officers would take care of what we  
24 call the actual scene investigation, that's the documentation  
25 of the scene itself, to collection of evidence, and the other

1 officers would interview, would locate and interview  
2 witnesses.

3 Q Something else I just thought to clear up. I believe  
4 throughout the reports made in 1982 you and other persons are  
5 referred to as "detectives"?

6 A Yeah. Back then we were detectives.

7 Q You all are now referred to as sergeants; is that  
8 correct?

9 A That's correct.

10 Q But it is the same rank; is that correct?

11 A That's correct.

12 Q So if I use the terms interchangeably, everyone knows  
13 what we are talking about, okay.

14 When you arrived at the scene, what did you do?

15 A After arriving at the scene, I made contact with the  
16 lieutenant from our division who was there at the scene, and  
17 at that time he assigned me to locate and interview witnesses.

18 Q Do you recall who was with you during the interview of  
19 these witnesses?

20 A Yes. At that time it was Sergeant Yanacek, Sergeant  
21 Hermann and an Assistant DA.

22 Q And later was a group within the homicide department  
23 called the Chicano Squad called out?

24 A Yes.

25 Q Why was that?

1 A Since most of the witnesses involved Hispanic citizens,  
2 the Chicano Squad, they were called out to assist doing the  
3 interviews.

4 Q Did you actually interview witnesses at the scene that  
5 night?

6 A Yes. I did.

7 Q While you were interviewing witnesses, did you ever hear  
8 any, any witness trying to him properly influence another  
9 witness concerning the events that had transpired?

10 A No, ma'am.

11 Q While you were interviewing these witnesses, I understand  
12 that we didn't have identifications of people, but were you  
13 given physical descriptions of the individual who they thought  
14 was the shooter?

15 A Yes. We were given descriptions.

16 Q I know you were given description of both persons  
17 involved, but were you ever given descriptions of the  
18 individual that anyone identified as the shooter?

19 A By name or just physical description?

20 Q Physical description?

21 A Yes, ma'am.

22 Q Do you recall with any specificity any particular witness  
23 who described Mr. Ricardo Aldape Guerra as the shooter?

24 A I recall one witness in particular, a female witness.

25 Q Do you recall her name?



1 A Elvira Flores.

2 Q And approximately how long after you arrived at the scene  
3 would this have been?

4 A I'd say within 15 or 20 minutes after arriving at the  
5 scene.

6 Q The shooting occurred sometime, I believe, right before  
7 10:00 o'clock; is that correct?

8 A That's correct.

9 Q About what time would you have arrived at the scene?

10 A I was notified at home about 10:18, and I arrived at the  
11 scene sometime like 10:45.

12 Q So, approximately 45 minutes after the first shooting,  
13 you arrived at the scene, correct?

14 A That's correct.

15 Q I believe the second shooting occurred around 11:30; is  
16 that correct?

17 A That's correct.

18 Q So you were there on the scene about 45 minutes before  
19 the second shooting occurred?

20 A That's correct.

21 Q When you arrived there at the scene, had anyone already  
22 sort of shepherded the witnesses together for you?

23 A Yes. Some of the first officers on the scene, uniformed  
24 officers on the scene, had, once I arrived there, they told us  
25 they had several citizens who had given them information about

1 seeing the actual shooting.

2 Q You referred to Vira Flores. Do you recall what  
3 description Elvira Flores gave you of the person she said was  
4 the shooter?

5 A Yes.

6 Q What was that description?

7 A She described the shooter as a Hispanic male, about  
8 five-six to five-eight, 160 pounds, was wearing a green  
9 jacket, long brown hair, and a moustache and beard.

10 Q Do you recall if anyone else at the scene that you  
11 interviewed also described the person whom we later learned to  
12 be Ricardo Aldape Guerra as the shooter?

13 A Offhand, I don't recall anyone else giving a description  
14 of the shooter.

15 Q Were they just describing them, the two individuals they  
16 saw? Would that be a fair statement?

17 A Yes. I know several of the citizens did give  
18 descriptions, but I can't recall their names right now.

19 Q But I guess what I am trying to say is, you may have  
20 gotten other description. It's just no one was making the  
21 distinction as to which was the shooter and which was the  
22 other person? Is that a fair statement?

23 A Vira is the only one that actually gave a statement or  
24 description of the guy she said she saw do the shooting.

25 Q While you were there at the scene talking to,

1 interviewing these witnesses, did you ever leave that scene?

2 A Yes, ma'am I did.

3 Q Where did you go?

4 A I went to 4911 Rusk Street.

5 Q Why did you go there?

6 A While at the scene of Walker Street, we had received  
7 information from a citizen concerning the whereabouts of  
8 possible suspects, and we were advised about two houses  
9 located on Rusk, so we walked around to that location.

10 Q What did you do when you got to 4911 Rusk.

11 A When I first got there, there was about 12 uniformed  
12 officers standing out in the middle of the street, and we told  
13 the officers, myself and members of the Chicano Squad, told  
14 them we were there to interview citizens at 4911 and, I  
15 believe, 4907 Rusk; and we asked for their assistance to go to  
16 those houses to interview those people.

17 Q Which house did you go to first?

18 A We went to a single-story house at 4911 Rusk first.

19 Q What did you do?

20 A Well, we knocked on the door. A Hispanic male came to  
21 the door. One of the uniformed officers who was Spanish  
22 speaking spoke to the guy who answered the door in Spanish and  
23 asked for his consent that we come in and search the house.

24 Q Did you all get that individual's consent?

25 A Yes. He granted us consent to come in.

1 Q Would you describe this encounter as an intimidating  
2 encounter to that individual?

3 A No. It was not.

4 Q Were their weapons drawn?

5 A No. We had no weapons drawn.

6 Q And this is at 4911 Rusk.

7 Did you search the house then?

8 A Yes. We did.

9 Q What did you do after leaving 4911 Rusk?

10 A After not finding anything there, we walked next door to  
11 a two-story house, and there was some Hispanic citizens  
12 sitting outside on the front porch, and we went through the  
13 same routine with them. Hispanic officer, Officer Palos asked  
14 them about granting us consent to search their house, and they  
15 gave us that consent.

16 Q Do you recall who else was present then?

17 A Repeat your question.

18 Q Do you recall who else was present with you?

19 A I know Sergeant Yanacek, Officer Ibarra, Sergeant  
20 Gatewood, and at least three to four uniformed officers there.

21 Q There has been prior testimony that -- or it had been  
22 established earlier, I should say -- this incident at 4907  
23 Rusk was the second time the house had been searched that  
24 evening. Were you aware at that time that officers had  
25 previously gone through the house at 4907 Rusk?

1 A No, ma'am. No one had told me that someone had already  
2 searched the house.

3 Q When you all got there, were your weapons drawn?

4 A No, ma'am. They were not.

5 Q Did you place anyone on the floor and, I guess, secure  
6 the situation by placing these individuals on the floor with  
7 guns pointed to their heads?

8 A No.

9 Q That type of scenario, would you consider that a consent  
10 to search?

11 A Yes.

12 Q No, no. Excuse me.

13 The scenario, if you placed them on the floor, put  
14 guns on their heads, would you consider that that they were  
15 voluntarily consenting to the search of the house?

16 A No. If we had to go through that procedure, that's not  
17 voluntary.

18 Q Okay.

19 So when you say they consented to the search to the  
20 house, you are not taking into account -- you are not saying  
21 that you put them on the floor and put guns on their heads and  
22 said, "and then they consented to the search to the house."  
23 Is that correct?

24 A That's correct.

25 Q The placing them on the floor with guns to their heads

1 did not occur?

2 A It did not occur.

3 Q Did you search the house?

4 A Yes. We did.

5 Q What did you do then?

6 A Well, after not finding anyone there, we exited the  
7 house, and I know myself and Sergeant Gatewood and Sergeant  
8 Yanacek stood outside and discussed if we should take some of  
9 the citizens who were there in the house downtown. I think  
10 one or two of them had given some information about possibly  
11 knowing someone that matched the description of the guy we  
12 were looking for; and I guess within 45 seconds, that's when  
13 another shooting occurred.

14 Q What happened when the second shooting occurred?

15 A Well, I was standing outside of the two-story house.  
16 Myself and Sergeant Yanacek had discussed amongst ourselves  
17 about walking to the rear of the single-story house to check  
18 and see what was back there; and I know there was two  
19 officers, uniform officers standing in front of us, and I  
20 don't know if they heard what we were saying or not, but I  
21 know they walked off, and in about, I know about 45 seconds to  
22 a minute after they walked off, we heard a lot of gun shots  
23 coming from the rear of the house.

24 Q What did you do?

25 A Well, myself, at that time we all drew weapons because we

1 didn't know what was going on, and I know we heard the shoots.  
2 Someone hollered out: There is an officer shot in the back of  
3 the house.

4 I ran to the back of the house. As I ran to the back  
5 of the house, I saw there was a uniformed officer had been  
6 shot. He was lying on the ground. Then I heard some other  
7 shots coming from the side of the single-story house; and once  
8 all that shooting was over with, then we all ran to that side  
9 of the house and saw that there was another man who had been  
10 shot and killed.

11 Q Were you present when a few moments later Mr. Aldape  
12 Guerra was arrested?

13 A Yes. I was.

14 Q From the time Mr. Aldape Guerra was arrested until the  
15 time he was placed in the patrol vehicle, approximately how  
16 long a time elapse?

17 A I would say, after the shooting on Walker Street was over  
18 with, I would say about five or ten minutes after the shooting  
19 was over, I know I was standing by the body of Mr. Flores, who  
20 was shot and killed; and one of the assistant DA's, Terry  
21 Wilson, who was also at that time seen, we heard a loud holler  
22 come from him and said, I got someone inside this trailer, and  
23 several officers went to his assistance; and when they opened  
24 the trailer, that's when they found the defendant hiding  
25 inside the trailer.

1 Q What happened to the defendant at that time?

2 A He was taken out of the trailer, he was handcuffed, and  
3 we had a crime scene unit at the scene, and we went ahead and  
4 had the crime scene officers to bag his hands.

5 Q Where was he taken?

6 A From there he was taken downtown to the City of Houston  
7 Police Department Homicide Division.

8 Q Was he taken from the scene immediately?

9 A Yes. He was.

10 Q What did you do then?

11 A Well, after the scene on Walker Street, two other  
12 homicide detectives decided that they would take over the  
13 investigation of that scene on Walker. I left that scene and  
14 went back to Rusk to continue with that investigation where  
15 it, the original shooting had occurred.

16 Q You were going to go back to your witnesses on Rusk; is  
17 that correct?

18 A That's correct.

19 Q As you left to return to Rusk, did you notice anything  
20 unusual about your witnesses?

21 A Yeah. Well, as I was leaving the Walker Street location,  
22 well, as I came from the rear of the house from where Mr.  
23 Flores had -- where he had fallen, then I noticed that several  
24 of the witnesses were standing out there in the middle of the  
25 street on Walker Street.



1 Q When you say "several of the witnesses," do you mean  
2 several of the witnesses that you had been speaking to earlier  
3 in the evening?

4 A That's correct.

5 Q So they had followed the sound of the gun shots to this  
6 location, correct?

7 A That's correct.

8 Q Did those witnesses see, or was there an opportunity for  
9 those witnesses to see Mr. Aldape Guerra being placed under  
10 arrest?

11 A They did.

12 Q Did they see him taken to the patrol vehicle?

13 A Yes. They did.

14 Q Was anything said at the scene at that time then by any  
15 of the witnesses?

16 A Well, I approached the witnesses, and I told them I  
17 needed them back over on Walker Street and asked them to  
18 follow me there; and at that time I know Vira, for one, at  
19 that time identified the defendant as the one she saw shoot  
20 the officer.

21 Q Who did she identify the defendant to, to you or to other  
22 witnesses?

23 A She identified him to me.

24 Q During that time, other than Vira Flores, do you recall  
25 any other female identifying the defendant as the shooter and

1 perhaps trying to pressure other people into identifying the  
2 defendant as the shooter?

3 A I don't recall any other females at the scene identifying  
4 a defendant or trying to pressure anyone else into  
5 identifying.

6 Q Had that happened, what would you have done?

7 A We generally tell the witnesses not to talk amongst  
8 themselves or discuss any identification of suspects at  
9 scenes.

10 Q That raises an interesting point. You said that normally  
11 you tell witnesses not to talk among themselves?

12 A That's correct.

13 Q What is the purpose of that?

14 A We don't want anybody to influence their identification  
15 of anybody.

16 Q Were you later in the evening, or I guess the early  
17 morning hours now of July 14th, in the homicide office?

18 A Yes. I was.

19 Q That would be at 61 Riesner; is that correct?

20 A That's correct.

21 Q What were you doing in the homicide office?

22 A Well, after I had cleared the scene off of Rusk, I went  
23 back to my office to prepare what we call a Chief's synopsis  
24 or a noteworthy so the Chief would be aware of what happened  
25 that night. In the situation where an officer is shot or an

1 officers shoots someone, we have to make a synopsis so the  
2 Chief will have it first thing in the morning once he arrives  
3 at work.

4 Q During the preparation of this Chief's synopsis, were you  
5 milling in and out of the homicide area on the 3rd floor at 61  
6 Riesner?

7 A Yes. I was.

8 Q What was the purpose?

9 A Well, I was going to various sergeants and officers who  
10 were taking statements from the witnesses. Each officer or a  
11 sergeant had been assigned one of the witnesses from the scene  
12 to take a statement from that particular person; and I was  
13 going to each one of them, you know, getting information from  
14 that officer about what the witness had stated in his or her  
15 statement.

16 Q In all of this movements -- well, I guess I am assuming  
17 something -- approximately how long were you in the homicide  
18 area, then, once you returned to 61 Riesner? Just a guess.  
19 Was it 45 minutes or several hours?

20 A Several hours, 'cause it was about noontime before I  
21 left.

22 Q It was several hours.

23 During this time you were present, then, when the  
24 witnesses were there in the homicide offices, correct?

25 A That's correct.

1 Q Were you ever in the hallway there out in front of  
2 homicide?

3 A That's correct.

4 Q During that time, did you ever see or hear any witnesses,  
5 particularly, I guess, an older -- older in relation to the  
6 other witnesses, Hispanic female attempting to influence or  
7 pressure the younger witnesses into identifying the  
8 defendants?

9 A No, ma'am.

10 Q Were you present at the line-up?

11 A No, ma'am.

12 Q Did you later look at the line-up sheet to see or to get  
13 any information off the line-up sheet for your reports?

14 A Yes. I did.

15 Q Was there anything on the line-up sheets that surprised  
16 you?

17 A Yes. There was.

18 Q What was that?

19 A When checking the line-up sheet I saw that Vira Flores  
20 had made a negative identification on the defendant.

21 Q And why did that surprise you?

22 A Well, because I knew at the scene she had identified the  
23 defendant as the one that she had seen shoot the officer.

24 Q Now, just so this is very clear, she identified the  
25 actual defendant as shooting the officer, correct?

1 A That's correct.

2 Q When the defendant had been arrested and was brought out  
3 in handcuffs, correct?

4 A That's correct.

5 Q Prior to that time, she had also given you a physical  
6 description of the defendant and his clothing -- of the  
7 shooter and his clothing, correct?

8 A That's correct.

9 Q Did the physical description of the shooter and his  
10 clothing match the defendant as you later found him 45 minutes  
11 later?

12 A Yes, ma'am. It did.

13 Q Did you ever talk to Vira Flores about this?

14 A Yes. I later drove out to her house and talked with her  
15 about her making a negative identification.

16 Q Would this have been at the reenactment you all did a  
17 week-and-a-half later?

18 A No. It was the same day.

19 Q I see.

20 You questioned her about her negative identification,  
21 correct?

22 A That's correct.

23 Q And what did Ms. Flores tell you?

24 A Well, she told me at the time that although she had  
25 identified the defendant, she felt that enough people had

1 already identified him as the person who shot the officer, so  
2 she didn't think it was necessary that she make a positive  
3 identification.

4 Q So, in other words, she didn't want to get involved  
5 unless necessary?

6 A That was correct.

7 Q What did you do then?

8 A Well, at that time I told her that since she had already  
9 identified the defendant to me that I needed her to go back  
10 downtown with me to give a statement to the point that she did  
11 recognize the defendant during the line-up, but she failed to  
12 mention that to the officers who was doing the line-up.

13 MS. CORNELIUS: Thank you, Your Honor. I have no  
14 further questions.

15 CROSS-EXAMINATION

16 BY MR. SCHNEIDER:

17 Q Sergeant Webber, did you prepare any reports concerning  
18 your conversation with Vira Flores and what she told you on  
19 the night of July 13th, 1982?

20 A I am sure I wrote it in there somewhere. Well, I say I  
21 am sure. I know something had to be documented about it.

22 Q Did you read it today?

23 A No.

24 Q Well, let me show you your portion of your report. It's  
25 F321. That's a portion of your report where you give a

1 summary of all of the witnesses, what they have said.

2 A Uh-huh.

3 Q All the civilian statements.

4 Do you recognize your report? Is this you?

5 A That's me.

6 Q Is there anything on page 32 of F321 from your report  
7 that has a description of Ricardo Aldape Guerra wearing a  
8 green shirt or her identification of Ricardo Aldape Guerra?

9 A No. Not on this particular page, no.

10 MS. CORNELIUS: Your Honor, excuse me. We don't have  
11 the same numbers that Mr. Schneider has. If you could tell me  
12 what page of the supplement it is.

13 MR. SCHNEIDER: 29. 2.029.

14 BY MR. SCHNEIDER:

15 Q Is that the only explanation or only description of  
16 Elvira Flores, the only thing she ever said, anything you ever  
17 written down?

18 A Is that the only thing?

19 Q Yes.

20 A I am sure there are some other information that she gave.

21 Q Are you sure?

22 A Well, I have not read the report.

23 Q You have not read the report. So this is all from memory  
24 from 11 years ago?

25 A That's correct.

1 Q Did you prepare a report concerning what Vira told you?

2 A Concerning -- I know I prepare, made a report.

3 Q Did you prepare a report concerning what Vira Flores told  
4 you on July 13th, 1982?

5 A I know I made a report, but I haven't had time to review  
6 the report.

7 MR. SCHNEIDER: Your Honor, can we take a break and  
8 let the witness review his report?

9 THE COURT: Let's establish a couple things before we  
10 take a break.

11 First of all, is there any dispute about the  
12 extent of the report between the lawyers? In other words,  
13 what you've shown the witness and what I believe you have  
14 shown to me is numbered page 321, I think also has a number 29  
15 on it. Is there any dispute that is the entire report  
16 prepared by this officer concerning this event?

17 MR. SCHNEIDER: Oh, no, Your Honor. This, what I  
18 have in my hands, are all the documents I have.

19 THE COURT: No. I don't mean on all the officers.

20 MR. SCHNEIDER: Of this officer.

21 MS. CORNELIUS: Your Honor, this detective made  
22 several supplements.

23 THE COURT: So, all of those would be contained in  
24 this particular volume?

25 MS. CORNELIUS: I have no idea. That's something --



1 MR. SCHNEIDER: This is something we have prepared of  
2 all the documents that have Officer Webber's -- Sergeant  
3 Webber's name on it, and we went through and pulled all the  
4 pages and separated them.

5 THE COURT: All right. All right.

6 What I don't want to do is, I don't want to  
7 spend a lot of time arguing about whether this is complete and  
8 all of it; and if that can be done, I would appreciate that.  
9 Otherwise, yes. I will give you time.

10 Why don't we take about a 30-minute break and  
11 give him an opportunity to review the reports, and maybe he  
12 can verify that himself. Take 30 minutes.

13  
14 (At this time a recess was taken)

15  
16 THE COURT: Good afternoon. Please be seated.

17 I owe you an apology. I got a verdict in the  
18 case at noon, so that took my lunch hour, whole hour. Then  
19 there was a bond question I tried to care of on my break, and  
20 obviously I couldn't take care of it, so now you know the  
21 whole story.

22 MR. SCHNEIDER: Your Honor, can we approach the  
23 bench?

24  
25 (Conference before the bench)

1 MS. SCKERL: It's more scheduling. Detective Webber  
2 will take a while for cross.

3 THE COURT: Rest of the day, I guess.

4 MR. SCHNEIDER: I say 15 to 20 minutes to a half  
5 hour.

6 MS. CORNELIUS: We have got two witnesses here today?  
7 One of them is supposed to be in uniform at Humble PD at 4:45,  
8 supposed to be officiating a high school football game at  
9 4:45.

10 THE COURT: The other stripes. Instead of on the  
11 shoulder, they're on the back.

12 MS. CORNELIUS: Another witness needs to be out of  
13 here by 5:00. Is it okay if we make this our last witness of  
14 the day, put them on Monday?

15 THE COURT: Well, I don't have any problem about  
16 that. I am not sure we are going to get any more. I don't  
17 want to split a witness's testimony between Friday and Monday.  
18 I don't like doing that.

19 We will complete the witnesses, unless you have  
20 got someone who is going to take 10 or 15 minutes. Then we  
21 are not going to waste our time, come back Monday and restate  
22 it.

23 It's 4:00 o'clock. We can probably get somebody  
24 out of here by 5:00 with this witness.

25 MS. CORNELIUS: Thank you.

1 THE COURT: You may proceed.

2 BY MR. SCHNEIDER:

3 Q Sergeant Webber, on the break, you and I went through  
4 portions of the offense report; is that correct?

5 A That's correct.

6 Q In particular we went to page F326, and it's also 2.024.  
7 In the center of the page you said that you noted a statement  
8 that you wrote?

9 A That's correct.

10 Q And in that statement you say that witnesses told you  
11 that the person who shot Harris was wearing a green army  
12 fatigue jacket, had long hair and a beard?

13 A That's correct.

14 Q Who told you that?

15 A Well, I know one of the witnesses was Vira Flores.

16 Q Who else?

17 A I can't recall right now who else said it.

18 Q Where is it noted anywhere in your report who those  
19 witnesses are? Did you ever find it any other place?

20 A Well, there are not identified by name. There is no one  
21 identified by name that told me this. I wrote here,  
22 "witnesses at the scene."

23 Q So, the only person you have a recollection of is Vira  
24 Flores; is that correct?

25 A That's correct.

1 Q Now, let me show you Petitioner's Exhibit 41 and 42. Do  
2 you recognize these what they are?

3 A There is a statement by Elvira Flores and another  
4 statement by Mrs. Flores.

5 Q Petitioner's 41 is dated July 14th of '82?

6 A That's correct.

7 Q And the other one is dated July 22nd of '82?

8 A That's correct.

9 MR. SCHNEIDER: Honor we offer Petitioner's Exhibit  
10 41 and 42.

11 THE COURT: Any objection?

12 MS. CORNELIUS: No objection, Your Honor.

13 THE COURT: They're admitted.

14 BY MR. SCHNEIDER:

15 Q Now, Petitioner's Exhibit 41 was taken at 12:40 a.m.?

16 A That's correct.

17 Q Does it contain any mention or any description -- why  
18 don't we go back to Page 326 one second.

19 You mentioned the size of this person. You said that  
20 the Vira Flores told you that he was five-six to five-eight,  
21 and has a weight?

22 A Yes.

23 Q Was it there?

24 A It's not mentioned there.

25 Q It's not mentioned there. So you didn't write that down?

1 A No. I did not.

2 Q In Petitioner's Exhibit 41, is there any mention of a  
3 description of the person or what Vira Flores seen -- the  
4 person Vira saw or allegedly saw?

5 A This statement was given by her to another detective at  
6 the time, and I don't see anything in here other than a hair  
7 description.

8 Q A hair description. What did she say?

9 A She says here: I only noticed that the driver of the  
10 black vehicle had blond-colored hair and that he was a Latin  
11 American male in his 20s.

12 Q Nothing about clothing, height, or weight?

13 A Nothing in there.

14 Q Or beard?

15 A No.

16 Q Then you testified that the next day you went out to Vira  
17 Flores' house, talked to her and brought her back down?

18 A That's correct.

19 Q Now, I show you Petitioner's Exhibit 42. Does that  
20 refresh your recollection you went out there and that was when  
21 the restaging took place and you talked to her again?

22 A Yes, sir. The reenactment.

23 Q That was some week later, on the 22nd, that you talked to  
24 her?

25 A Yes.

1 Q The statement starts off by stating: "I want to give  
2 this second statement because I would like to" -- it says: "I  
3 would like to up some events I did not mention."

4 Is that correct?

5 A Well, it says here: On July, I was brought to the  
6 Homicide Division where I gave a statement to a detective  
7 concerning the shooting of a police officer.

8 Q Then the next line. I want to give the second statement  
9 because I would like to up some events I did not mention.

10 A That's correct.

11 Q Now, in this statement does it say anything -- you took  
12 the statement?

13 A That's correct.

14 Q Does it say anywhere in the statement first that there  
15 was a green jacket on him?

16 A Not in this particular statement, no.

17 Q Is the person's height?

18 A No. It's not mentioned.

19 Q Weight?

20 A No.

21 Q Beard?

22 A No.

23 Q Moustache?

24 A No.

25 Q In fact, just as she points out, the No. 4 was the person

1 that she recognized?

2 A Our concern was to make sure she had that information  
3 concerning the line-up in it.

4 Q You didn't think it was important to get her original  
5 description down, what she originally told you?

6 A Well, like I said, in this particular statement here, our  
7 concern at that time was to get the information concerning the  
8 line-up that she had viewed and had made identification on the  
9 suspect, on the defendant.

10 Q But nowhere in your report did you say, this witness told  
11 me or gave me this description, a particular description?

12 MS. CORNELIUS: Your Honor, I object. This has been  
13 asked and answered.

14 THE COURT: Well, let me start this off this way,  
15 because I think we will get through this if the witness  
16 answers the questions that is asked and then we move on to the  
17 next question, because we don't need to ask a question and get  
18 some answer and then we go to another question to get back to  
19 the question that was asked.

20 The question asked, officer, was this: Did you  
21 think it was important to get the original description from  
22 Ms. Flores at the time this first statement or second  
23 statement was made?

24 THE WITNESS: At the second statement, no, sir, I  
25 didn't think it was important.

1 THE COURT: At the first statement?

2 THE WITNESS: Orally she gave --

3 THE COURT: Excuse me. Excuse me.

4 Either you thought it was important or you  
5 didn't.

6 THE WITNESS: Well, sir, I didn't take the first  
7 statement.

8 THE COURT: Well, either you thought it was important  
9 or you didn't. But she did talk to you?

10 THE WITNESS: That's correct.

11 THE COURT: She told you who did this?

12 THE WITNESS: That's correct.

13 THE COURT: Either you felt that was important to  
14 incorporate in your report or you did not.

15 THE WITNESS: Well, at the time --

16 THE COURT: Excuse me.

17 Either you felt it was important or you did not.  
18 Was it an important thing?

19 THE WITNESS: Yes, sir. It was important.

20 THE COURT: All right.

21 Next question. Let's proceed.

22 MR. SCHNEIDER: I will move on.

23 BY MR. SCHNEIDER:

24 Q You indicated that you went to 4907 Rusk.

25 You remember on Page 326, same page as before, you



1 indicated earlier that to your knowledge no one had searched  
2 that house before when you went in to search the house. If  
3 you look at the paragraph just above the one with the  
4 description, didn't Officer Palos tell you that the house had  
5 ,previously been searched?

6 A Yes. He did.

7 Q So, you went in again to search it?

8 A Yes. I did.

9 Q Is that normal procedure?

10 A Yes, sir.

11 Q How many police officers were in front of that house when  
12 you first got there?

13 A Well, I estimate there was at least 10 to 12 police  
14 officers there. They were not in front of that house. They  
15 were standing in the middle of the street.

16 Q In the middle of the street?

17 A Yes.

18 Q What was the mood of the officers? Were they upset?

19 A No. The officers were very relaxed.

20 Q Were they very calm?

21 A Yes. They were.

22 Q Were they calm over on Walker Street?

23 A Yes. They were.

24 Q Was there any officer that you saw on Walker that was  
25 excited because one of their own was killed?

1 A I don't recall seeing any officer being excited.

2 Q Did you hear any officers yelling?

3 A No, sir.

4 Q Did you hear any officers cursing?

5 A No, sir.

6 Q Did you see any officers with guns to the back of  
7 people's heads on the ground?

8 A No, sir.

9 Q You then heard more shooting from behind 4907.

10 A 4911.

11 Q 4911.

12 And so you went to 4911. Another officer was shot?

13 A That's correct.

14 Q And other officers killed a person there?

15 A That's correct.

16 Q Isn't it true that Terry Wilson found Mr. Guerra  
17 underneath the trailer?

18 A Well, from what I know is that he found him inside the  
19 trailer.

20 Q After the second officer was shot, were the officers  
21 still calm?

22 A Well, everybody was excited because there had been some  
23 shooting, so everybody's nerves were on edge. I know my  
24 nerves were.

25 Q Were nerves on edge before that?

1 A No. They were not.

2 Q How many officers do you think participated in this  
3 investigation that night?

4 A As far as homicide, I know we had two lieutenants at the  
5 scene; we had other detectives at the hospital, myself,  
6 sergeants Yanacek, members of the Chicano Squad. I think  
7 there was three or four members of the Chicano Squad out there  
8 and at that time, Sergeant Neely, Sergeant Holland. I say  
9 there were at least 10 detectives from homicide there, along  
10 with two supervisors, along with about four officers from the  
11 Chicano Squad.

12 Q 14, 16 officers?

13 A Uh-huh.

14 Q How many officers in uniform were there?

15 A I have no idea. There was very few officers at the  
16 actual scene because the scene had been secured for us to do  
17 our investigation, and I knew there were some uniformed  
18 officers at the perimeter at the scene; but at the actual  
19 scene where the shooting occurred, I don't recall seeing any  
20 uniformed officers in that immediate area.

21 Q Over on Walker when you were first there, how long did  
22 you spend time at Walker?

23 A I say I was there at least 45 minutes.

24 Q Did you see uniformed officers there, different officers?

25 A I don't recall seeing any uniformed officers in that

1 immediate area of the scene where the Officer Havers was shot.  
2 Like I stated, most of them were in the perimeter of the  
3 scene.

4 Q In your report, starting on Page 316, you give summaries  
5 of written statements. That's 316; is that correct?

6 A I have it. Yes. This is where I started giving  
7 summaries of statements, yes.

8 Q Is there any summary of any oral statements identifiable  
9 to witnesses that you have been able to find?

10 A The summation of these statements are based on written  
11 statements.

12 Q All right.

13 My question is, is there any summary of oral  
14 statements that you have?

15 A No.

16 Q I want to move on, sir.

17 Mr. Guerra was taken to homicide; is that correct?

18 A That's correct.

19 Q J.R. Roberts was one of the officers that took him  
20 downtown; is that correct?

21 A If you say so.

22 Q Then Gatewood was questioning him.

23 A That's correct.

24 Q All of these civilian witnesses, where were they when you  
25 got downtown?

1 A When I got to the Homicide Division, they were sitting  
2 outside in the hall way on the benches, sir.

3 Q You drew for us a diagram of the third floor of police  
4 station; is that correct?

5 A That's correct.

6 Q And I have it marked as Petitioner's Exhibit 43; is that  
7 correct?

8 A That's correct.

9 MR. SCHNEIDER: Your Honor, I offer Petitioner's 43.

10 THE COURT: Any objection?

11 MS. CORNELIUS: No objection, Your Honor.

12 THE COURT: It's admitted.

13 BY MR. SCHNEIDER:

14 Q Now, you have identified the elevators where the red dot  
15 is; is that correct?

16 A That's correct.

17 Q The show-up room, burglary and theft?

18 A Yes.

19 Q Down at the end of the hallway the homicide squad?

20 A Right.

21 Q Homicide information officers and the robbery division?

22 A That's correct.

23 Q And the benches were along the wall next to the robbery  
24 division?

25 A That's correct.

1 Q Along these benches, is that where you saw the civilian  
2 witnesses sitting?

3 A Let me retract that. I didn't see all of them sitting  
4 there, because when I got there some of the witnesses were  
5 being interviewed by officers.

6 Q Some of the witnesses were there?

7 A That's correct.

8 Q There are two ways to get to homicide from the first  
9 floor; is that correct?

10 A Well, three ways.

11 Q Three ways.

12 There is a staircase here next to the homicide squad  
13 room?

14 A That's correct.

15 Q According to your diagram?

16 A That's correct.

17 Q The elevators.

18 A That's correct.

19 Q And then another staircase back down the hallway?

20 A That's correct.

21 Q This staircase down in the lower part goes to the first  
22 floor only?

23 A Goes to the basement.

24 Q Goes to the basement?

25 A Uh-huh.

1 Q If the officers were taking the prisoner, arresting a  
2 prisoner, arrested prisoner into the police station and were  
3 entering from the basement then they would have two choices  
4 then on how to get to the third floor?

5 A They would have, yes, two choices.

6 Q If they took the elevator up to the third floor, the  
7 prisoner would then be brought down this hallway to homicide  
8 division?

9 A Yes. If he used the elevators.

10 Q Where was Mr. Guerra the first time you saw him that  
11 evening in homicide?

12 A He was sitting in one of the offices there within the  
13 homicide division.

14 Q In the squad room down here?

15 A Yes.

16 Q Then you took him to the photo lab?

17 A That's correct.

18 Q At that time it was on the 4th floor; isn't that correct?

19 A That's correct.

20 Q Did you take him up this hallway to the elevators and up  
21 to the 4th floor?

22 A That's correct.

23 Q Was he handcuffed?

24 A Yes. He was.

25 Q Is it normal procedure to transport a prisoner in custody

1 in handcuffs within the police station?

2 A Yes. It is.

3 Q This is about 4:00 o'clock in the morning?

4 A No.

5 Q What time?

6 A I would say it was about sometime like between 7:30 and  
7 8:00 a.m.

8 MR. SCHNEIDER: May I have one moment, Your Honor?

9 THE COURT: Yes.

10 BY MR. SCHNEIDER:

11 Q Let me show you 332, F332. Does that refresh your memory  
12 that it was about 3:00 o'clock in the morning?

13 THE COURT: Excuse me just one second.

14 MS. CORNELIUS: Could you refer to the --

15 MR. SCHNEIDER: 2.040.

16 A I don't see anything in reference to time in here.

17 BY MR. SCHNEIDER:

18 Q All right.

19 If the statements, last statement by Mr. Guerra was  
20 around 3:00 o'clock in the morning and you took custody of him  
21 after the last statement, would that be just about the time  
22 you took him into custody?

23 A Well, he was in custody at the scene.

24 Q Or took him to the photo lab?

25 A No.



1 Q If you took possession of him after the interview by  
2 Gatewood, would you have taken him -- in that last statement  
3 was at 3:00 in the morning, you took him to photo lab at that  
4 time?

5 A No. We did not.

6 Q You did not take him?

7 A We didn't take him at 3:00 o'clock in the morning. The  
8 time is documented in there, but it's not 3:00 o'clock in the  
9 morning.

10 Q Okay.

11 Would you have taken his close from him before the  
12 line-up?

13 A No. We took his clothes after the line-up.

14 Q So, was he in his regular clothes in the line-up?

15 A I would say so.

16 Q Let me show you Petitioner's Exhibit 24. Is he in a jail  
17 uniform in Petitioner's Exhibit 24?

18 A Yes. He is in a jail uniform.

19 Q And page F332 indicates that his clothes were taken and  
20 he was placed in a jail white jump suit?

21 A That's correct.

22 Q He was in a jail white jump suit at the time of the  
23 line-up?

24 A Yes. According to the photograph here, yes.

25 Q If he was placed in a jail white jump suit before the

1 line-up, he would have been taken to the photo lab and his  
2 clothes taken from him before the line-up; is that correct?

3 A Now, repeat your question again.

4 Q If he is placed in jail white jump suit at the time he  
5 went to photo lab, all right -- that's what it says, right?

6 A I am reading something else.

7 Well, he was taken to the photo lab where he was  
8 taking photographs in his clothes that he was arrested in, and  
9 then later he was placed in the jump suit.

10 Q That was before the line-up?

11 A Well, yes. If he was -- yes. It had to be before the  
12 line-up.

13 Q This indicates that he is returned to the photo lab, from  
14 the photo lab to Homicide Division; is that correct?

15 A That's correct.

16 Q Would you have then brought him back down the elevators  
17 back down the hallway to the homicide squad?

18 A Let me read over that, because I'm getting confused on  
19 this. I just looked at it for the first time since '82,  
20 'cause it's noted in here the time we took him to the photo  
21 lab.

22 (Witness reviews document).

23 Q So, my question is, when you took him from the photo lab  
24 back to homicide, you had taken him back down this hallway in  
25 front of where the witnesses were sitting?

1 A I don't know if the witness were sitting there or not.

2 Q Would you have taken him back down this hallway?

3 A Yes.

4 Q And so you would have transported him at least twice down  
5 this hall yourself?

6 A I don't recall -- yes, twice.

7 Q Before the line-up?

8 A Like I said, a time is not documented, so I cannot say,  
9 'cause I know the line-up started at 6:00 a.m., and I don't  
10 recall the time that we took him up to the photo lab to have  
11 him photographed.

12 Q You know you took his clothes from him before the  
13 line-up.

14 A That's correct.

15 Q So you would have brought him back to the homicide  
16 division before the line-up?

17 A Yes.

18 Q If the witnesses were on the bench over here, you would  
19 have walked in by the witnesses at least two times --

20 A No.

21 Q -- in handcuffs?

22 A No.

23 Q That wouldn't have happened?

24 A No.

25 Q Why?

1 A Because we do not parade suspects in front of witnesses  
2 in order to have a line-up.

3 Q All right.

4 So, the witnesses that were being interviewed were  
5 not sitting on the benches here?

6 A Well, I say when I got to the homicide office, there was  
7 some witnesses there, and some of them inside being  
8 interviewed for statements.

9 Q Where were the witnesses after they gave the statements  
10 and before the line-up?

11 A Well, if we were going to have a line-up, we generally  
12 have all the witnesses go down to the showing room, we place  
13 them in the showing room so we clear the hallway out.

14 Q If the last statement was at 1:00 o'clock, would you have  
15 all the witnesses sitting in the show-up room from 1:00  
16 o'clock in the morning 'til 6:00 o'clock in the morning?

17 A I don't know if they were sitting in there or not.

18 MR. SCHNEIDER: Pass the witness, Your Honor.

19 MS. CORNELIUS: Redirect examination, Your Honor.

20 THE COURT: Yes, ma'am.

21 REDIRECT EXAMINATION

22 BY MS. CORNELIUS:

23 Q Sergeant Webber, I would like to just clear up a few  
24 things.

25 First of all, you and I have not had an opportunity

1 to really sit down and discuss the entire events of that  
2 evening; is that correct?

3 A That's correct.

4 Q As a matter of fact, prior to your testifying today, you  
5 have not really had an opportunity to fully review the offense  
6 reports in connection with this case; is that correct?

7 A That is correct.

8 Q And as these events occurred 11 years ago, I am just  
9 trying to establish, you are trying to recall them as best you  
10 can; is that correct?

11 A That's correct.

12 Q You're not intentionally trying to mislead this Court  
13 about times or anything like that; is that correct?

14 A That's correct.

15 Q I believe you stated that sometime prior to the show-up  
16 or the line-up at 6:00 a.m. you took the defendant to the  
17 photo lab. Now, that would have been sometime between the  
18 taking of his statement, which he didn't sign, but the  
19 interview with the statement, which I believe ended around  
20 4:30 and 6:00 o'clock; is that correct?

21 A Yes, ma'am.

22 Q Now, you don't really know what happened with the  
23 defendant prior to that, correct?

24 A That's correct.

25 Q You know. But as far as the transporting of the

1 defendant, correct?

2 A That's correct.

3 Q So, is it -- I am just trying to clear this up. Is it  
4 your testimony that when you took the defendant through the  
5 hallway to the photo lab, you made sure that at that time  
6 there were no witnesses there?

7 A That's correct.

8 Q But you can't speak to what happened before that 4:30; is  
9 that correct?

10 A That's correct.

11 Q Now, if the witnesses completed their statements around  
12 1:00 o'clock, and were waiting to be called for a line-up, is  
13 there any facility where they can go and perhaps get coffee or  
14 just sit and wait?

15 A Well, the cafeteria in the basement of the building, and  
16 I don't recall if any of them went down there or not to get  
17 coffee or anything.

18 Q But you do know that when you moved this defendant there  
19 was no one present, no witnesses present in the hallway?

20 A There were no witnesses in the hallway.

21 Q You did not participate participate in the line-up; is  
22 that correct?

23 A That's correct.

24 Q Now, actually, Sergeant Webber, I thought -- and I know  
25 you are going to correct me if I am wrong -- I thought there

1 was a second elevator there on the second floor, interior  
2 elevator that goes to the jail?

3 A Yes. There is a third elevator, but it's inside the  
4 show-up room.

5 Q It's inside the show-up room, right?

6 A That is correct.

7 Q So, when you're taking an -- where all does that elevator  
8 go?

9 A That elevator goes from the sixth floor womens jail and  
10 the fifth floor mens jail down to the third floor show-up  
11 room.

12 Q What's on the 4th floor?

13 A At that time, juvenile division, forgery, and  
14 identification division.

15 Q Does it go any farther down than the third floor to the  
16 show-up room.

17 A I think it goes all the way to the basement because it's  
18 part of the jail, and our booking area to the jail is in the  
19 basement, so I do believe it goes to the basement.

20 MS. CORNELIUS: Your Honor, may I approach the  
21 exhibit? I can't see that far.

22 THE COURT: Certainly.

23 Can you see the exhibit, sergeant?

24 THE WITNESS: Yes, sir.

25

1 BY MS. CORNELIUS:

2 Q So the other elevators would be in the actual show-up  
3 room or right off the show-up room?

4 A Yeah. There is an interior elevator within the show-up  
5 room.

6 Q You don't have any personal knowledge as to whether or  
7 not any of the officers ever used that elevator in  
8 transporting this defendant at any time; is that correct?

9 A No, ma'am.

10 Q Mr. Schneider asked you if at the scene if you observed  
11 any officers to be excited. Would it be a fair  
12 characterization to say that perhaps everyone was excited in  
13 that there had been several shootings in the course of an hour  
14 and a half, but that you observed officers conducting  
15 themselves professionally?

16 A That's correct. No officers were out of control at the  
17 scene out there.

18 Q Did you ever observe any officers yelling at any of the  
19 witnesses?

20 A No, ma'am.

21 Q Now, you also said, you went through a list of the  
22 sergeants that you recall being present at the scene and other  
23 people. I believe that we could add to that list, you said  
24 there were about 10 uniformed officers standing out in the  
25 street in front of 4907 and 4911 Rusk, correct?



1 A That's correct.

2 Q There, of course, were crime scene units, police  
3 officers, correct?

4 A That's correct.

5 Q As a matter of fact, didn't you all have three separate  
6 crime scenes to process that night?

7 A That's correct.

8 Q So, with three different crime scenes come a greater  
9 number of persons to process the crime scenes, correct?

10 A That's correct.

11 Q And secure those crime scenes?

12 A That's correct.

13 Q But the fact does remain, I think it's fair to say that  
14 when there has been an officer shooting, there are more  
15 officers involved; is that correct?

16 A That's correct.

17 Q As a matter of fact, the police shooting team comes out?

18 A That's correct.

19 Q In preparing your offense report, when you make an  
20 offense report, is the purpose of the offense report to put  
21 down everything you know or you've learned at the scene or is  
22 it something to basically give an overall view of what was  
23 happening, to refresh your memory later should you be  
24 testifying?

25 A Well, it's basically to give an overall view of

1 everything that took place there at the scene.

2 Q Now, when you arrived at the scene, I believe you  
3 testified that several police officers had already talked to  
4 witnesses and gave you the descriptions that they had elicited  
5 from those witnesses, correct?

6 A That's correct.

7 Q Now, did you, in turn, at any time give those  
8 descriptions to other sergeants at the scene?

9 A Yes. I did.

10 Q So, if an individual identified or described a suspect  
11 height, weight and all, height, weight, facial features, hair  
12 clothing, just because it's not reflected in your particular  
13 offense report does not mean that it was not used by other  
14 officers; is that correct?

15 A That is correct.

16 Q In fact, I believe that, without going through the entire  
17 offense report, this defendant was listed as Suspect No. 2,  
18 and the physical description of the Suspect 2 was given at  
19 that point, correct?

20 A That's correct.

21 Q And that would contain the height and weight that the  
22 scene officers and then you and other police officers  
23 gathered, correct?

24 A That's correct.

25 MS. CORNELIUS: I have no other questions, Your

1 Honor.

2 THE COURT: Anything else.

3 MR. SCHNEIDER: Just a couple of questions.

4 RECROSS-EXAMINATION

5 BY MR. SCHNEIDER:

6 Q How many officers were in and around this area taking  
7 statements?

8 A How many officers were there taking statements?

9 Q Yes.

10 A I don't know. Just enough officers to make sure all the  
11 statements were taken.

12 Q Were there 15, 20 civilian witnesses?

13 A I don't recall offhand how many witnesses we had that  
14 night, but I know there was enough officers there to take  
15 their statements.

16 Q You were taking officer's statements that made the scene?

17 A That's correct.

18 Q There was media outside here in the hall or around the  
19 building?

20 A I know there was media somewhere there in the building.  
21 Exactly where I don't recall.

22 Q People were kind of running around trying to get  
23 everything done?

24 A Yes. Within the squad room area, yes.

25 Q Kind of frantic running, getting things done, getting

1 reports done, make sure all the witnesses were talked to?

2 A Well, I know we was concerned about getting all the  
3 witnesses' statements together and those of the officers  
4 there.

5 Q Your normal proceed is not to take a person in handcuffs  
6 in front of witnesses?

7 A No. We do not parade a suspect before witnesses prior to  
8 a line-up.

9 Q Were you aware of where people were when you took Mr.  
10 Guerra down this hallway, an independent recollection?

11 A Well, I know there was no witnesses on the benches when I  
12 took them up to the photo lab.

13 Q You remember that distinctly?

14 A Yes. Had there been people there, I wouldn't have taken  
15 him down the hallway.

16 Q Do you know where they were?

17 A I have no idea. I know they were not in the hallway  
18 there.

19 Q And there were none coming back, when you came back?

20 A No. I saw no witnesses in the area at all.

21 Q Were you familiar with who all the witnesses were in the  
22 case?

23 A Yes. At one time or another I had seen all the  
24 witnesses, yes.

25 Q That night?

1 A That's correct.

2 Q Did you see them all at the reenactment?

3 A No. We didn't have all the witnesses there for the  
4 reenactment.

5 MR. SCHNEIDER: Pass the witness.

6 THE COURT: Anything else?

7 MS. CORNELIUS: No, sir.

8 THE COURT: I have couple of questions before you  
9 step down, Sergeant Webber.

10 My concern goes partly to your trial testimony.  
11 I believe you testified in this case, did you not?

12 THE WITNESS: Yes. I did.

13 THE COURT: I believe your testimony, part of  
14 transcript volumes are 21, and it starts on page, around 210,  
15 I guess. It starts on 211.

16 What I am going to do is ask my clerk to pass to  
17 you, if we have that -- let me just hand you my copy, and I  
18 will ask the questions that I need to ask you; and I'm  
19 referring, if you need to follow, I am referring to Page 221,  
20 if you want to follow that.

21 Before I ask you questions regarding Page 221,  
22 let me ask you this question. I believe you testified that  
23 there is no specific reference in any of the notes -- in any  
24 of your reports that you prepared regarding the specific  
25 person, that is, Ms. Flores, who gave this statement to you at

1 the scene.

2           You don't specifically reference her as that  
3 witness, do you?

4           THE WITNESS: No, sir I do not.

5           THE COURT: I believe you said that she gave you this  
6 statement, not at the time you came to the scene, but this was  
7 after the second shooting, or at least after the third  
8 shooting -- well, this would really be the fourth shooting  
9 that involved Mr. Flores himself. It was after all of that  
10 had occurred that you actually got -- that she actually came  
11 up to you at some point and told you, when you returned to the  
12 crime scene, the original crime scene, it was at that second  
13 returning that she gave you this statement; is that correct,  
14 or did I misunderstand you?

15           THE WITNESS: No, sir. She gave me the description  
16 before the second shooting.

17           THE COURT: So, when you arrived, somewhere before  
18 you left that location and went to start searching the house,  
19 she had given you this description?

20           THE WITNESS: That's correct.

21           THE COURT: Let me ask you this. Were the other  
22 sergeants at that location before you got there?

23           THE WITNESS: When I got there, I know Sergeant  
24 Yanacek and Sergeant Hermann, they were already there at the  
25 scene, and two lieutenants and several other sergeants because

1 they were on duty at the time.

2 THE COURT: When did Gatewood join the group, because  
3 he was with you when you went down to the house, wasn't he?

4 THE WITNESS: Yes, sir. He arrived on the scene  
5 shortly after I did.

6 THE COURT: There was a couple of other officers, I  
7 believe, that you named that were there.

8 When did they arrive in relationship to this  
9 statement, if you can tell me?

10 THE WITNESS: I would have to say sometime after I  
11 arrived on the scene.

12 THE COURT: All right.

13 So, you received this statement at a time when  
14 you were pretty much, I gather, in charge of that particular  
15 crime scene; it was pretty much your scene at that point. The  
16 jurist investigator did come to you at some point later on.

17 THE WITNESS: Well, I was in charge of it as far as  
18 putting the case together.

19 THE COURT: Right. That's what I mean.

20 THE WITNESS: Yes.

21 THE COURT: It was your case, and you knew that  
22 sometime shortly after you arrived, that you were the person  
23 assigned to deal with that scene?

24 THE WITNESS: Yes, sir.

25 THE COURT: All right.

1           THE COURT: When you arrived at the scene, did anyone  
2 tell you or were the police officers trying to determine  
3 whether or not Mr. Armijo, the gentleman who had been shot,  
4 were you trying to determine whether or not he was, in fact,  
5 the shooter? Were you a part of any of those discussions?

6           THE WITNESS: No, sir. To my knowledge, that never  
7 came up.

8           THE COURT: He was shot, too, wasn't he?

9           THE WITNESS: Yes. He was shoot, too.

10          THE COURT: Had he been removed from the scene by the  
11 time you arrived or was he still in his car?

12          THE WITNESS: He was still there in his car when I  
13 arrived at the scene.

14          THE COURT: If you will look at your testimony, it  
15 indicates in that testimony that you arrived -- now, this is  
16 somewhere over, and I am not sure you need to look at it --  
17 but your testimony states you believed you arrived there about  
18 11:30.

19                 Now, your testimony today is you thought maybe  
20 10:30. But do you think your testimony at that time was a  
21 little bit more accurate as to the time that you may have  
22 arrived in terms of when you may have arrived at the scene?

23          THE WITNESS: No, sir. Because my report reflected  
24 the shooting on Rusk Street occurred at 11:30, sometime around  
25 11:30, and I know I was there when the shooting on Rusk Street



1 occurred.

2 THE COURT: Okay. So, your testimony at trial may be  
3 innacurate or they may have just taken it down inaccurately.

4 Can you, if you would, I believe it's going to  
5 be around Page 212, 212 or 213, where you will see an 11:30, I  
6 believe, there.

7 MS. CORNELIUS: Your Honor, I believe that's when  
8 they transferred the witnesses.

9 THE COURT: Okay. That may be. I may be confused.

10 MS. CORNELIUS: It's on Page 215.

11 Would you like our copy, Judge?

12 THE COURT: I don't think I really need it. I want  
13 to make sure he can verify what I am asking.

14 THE WITNESS: On 215, Page 215, I see here --

15 THE COURT: What was the question that was asked?

16 THE WITNESS: The question is: "At about what time  
17 was it that these witnesses that they are talking about were  
18 transported downtown?"

19 And my response was: "Well, I would say it was  
20 sometime between 12:30, I mean, 11:30 and 12:30 that night."

21 THE COURT: I don't think that's what I am referring  
22 to.

23 MR. SCHNEIDER: Your Honor, I believe it's 216, when  
24 he arrived on Rusk Street.

25 THE COURT: Would you turn to Page 216.

1                   What was the question regarding the time there?

2                   THE WITNESS: "Can you give us an approximate time  
3 you arrived there at the Rusk Street address?"

4                   And my response was: "It was approximately  
5 11:30."

6                   THE COURT: Okay. So, you are talking about the  
7 house where you were about to search?

8                   THE WITNESS: That's correct.

9                   THE COURT: As opposed to the time you arrived at the  
10 scene?

11                  THE WITNESS: That's correct.

12                  THE COURT: So at the time you arrived at the Rusk  
13 Street address, you had been more or less on the scene for  
14 about an hour?

15                  THE WITNESS: At least 45 minutes to an hour.

16                  THE COURT: What time was Mr. Armijo transported from  
17 that scene? Had he been transported by the time you got back  
18 after these later shootings? That would have been, I guess,  
19 around 11:30 or so, 45 minutes to an hour after you had  
20 arrived.

21                  THE WITNESS: If I recall correctly, I think his body  
22 had been removed from the scene.

23                  THE COURT: He wasn't dead at that point, was he?

24                  THE WITNESS: No. He had been transported to Ben  
25 Taub. He didn't expire until the following day.

1 THE COURT: Right.

2 And my question is: When was he removed from  
3 the scene? Had he been removed when you came back to that  
4 location or not, your best recollection?

5 THE WITNESS: To say now, I would have to say that he  
6 had been removed from the scene prior to my arrival.

7 THE COURT: Prior to your arrival?

8 THE WITNESS: At the scene on Walker Street, the  
9 original scene, because he had been transported to Ben Taub  
10 Hospital. So I would say have to say he was already --

11 THE COURT: So, it's your belief, based upon -- what  
12 are you basing it upon?

13 THE WITNESS: Well, because he died the following day  
14 at Ben Taub Hospital, and I have to say -- I got the to call  
15 at home at 10:18, and I got there about 10:45, so I know  
16 between the time the shooting went down they had to transport  
17 him to the hospital.

18 THE COURT: Well, I don't know whether or not they  
19 had to do it or not, but I am trying to figure out is if you  
20 know what you are talking about or are you kind of speculating  
21 based upon the exigency of the situation, the fact that this  
22 man had been shot that needs to go to the hospital?

23 THE WITNESS: That's what I am basing it on.

24 THE COURT: How long did Officer Harris remain on the  
25 scene, do you know? Was he still there when you arrived?

1 THE WITNESS: No, sir. He was not.

2 THE COURT: His body had been transported, also?

3 THE WITNESS: Yes, sir. Not to the hospital. They  
4 had taken his body by ambulance to a K-Mart store parking lot.  
5 It was waiting for a Life Flight ambulance, and he died there  
6 in the ambulance on the parking lot.

7 THE COURT: So, whatever time you arrived, somewhere  
8 after 10:30 or thereabouts, as best you can determine, both  
9 Harris and Mr. Armijo, Sr. had been removed, as far as you  
10 know?

11 THE WITNESS: Yes, sir.

12 THE COURT: Now, if you turn back to page, I believe  
13 it's Page 21 or 22 that I turned down.

14 THE WITNESS: 21.

15 THE COURT: All right. At the bottom of the page,  
16 the question is asked of you by the district attorney's  
17 office; and before I ask you this question, let me ask you,  
18 did you ever tell District Attorney Wilson that Ms. Flores had  
19 made this statement to you? Did you go up to him at that time  
20 during the scene of the investigation and say, Ms. Flores just  
21 told me this information that you related here in court today?

22 THE WITNESS: About a description of the suspect?

23 THE COURT: Yes.

24 THE WITNESS: I don't recall if I told him there at  
25 the scene or not.

1 THE COURT: Did you ever tell District Attorney Moen  
2 that this specific statement, that Ms. Flores on that occasion  
3 specifically identified Guerra as the shooter, did you tell  
4 him that?

5 THE WITNESS: I don't recall. I don't even recall  
6 Mr. Moen being at the scene.

7 THE COURT: No. I don't think he was. But, I mean,  
8 he and Mr. Bax, I believe, were the prosecutors at the time of  
9 trial; and I believe Mr. Moen was the gentleman that was  
10 questioning you on that occasion.

11 What I am trying to find out is, when you had  
12 your discussions, if you had any at all with them -- you may  
13 not have even talked with them before you testified -- but  
14 when you had your discussions with them, that is, from that  
15 night to October of 1982 when the trial occurred, did you ever  
16 tell anyone of the district attorneys what you have told me or  
17 said here in court today about Ms. Flores being an eyewitness  
18 to the shooting?

19 THE WITNESS: I don't recall ever telling any of the  
20 prosecutors.

21 THE COURT: Or having any discussion with them about  
22 it?

23 THE WITNESS: I don't recall, sir.

24 THE COURT: On Page 21, there is, I believe near the  
25 bottom of the page, there is a question asked of you and you

1 are discussing with the prosecutor where this gun came from.  
2 Do you recall that?

3 THE WITNESS: Yes, sir.

4 THE COURT: And that was probably the focus more of  
5 your testimony than anything else, where this gun came from.

6 And the prosecutor asked you a question, and  
7 what was his question?

8 THE WITNESS: "The suspect here, Flores" --

9 THE COURT: That's your answer, I believe.

10 THE WITNESS: Oh, okay.

11 The question was: "How was that determined?"

12 THE COURT: And he is talking about how did you  
13 determine who the owner of this 9 millimeter pistol was,  
14 right?

15 THE WITNESS: That's correct.

16 THE COURT: Was there any doubt in your mind at that  
17 time that the 9 millimeter pistol was the weapon that killed  
18 Officer Harris?

19 THE WITNESS: No. There was no doubt in my mind  
20 about that.

21 THE COURT: Was there any doubt in your mind at that  
22 time that Flores was in possession of that weapon at the time  
23 when you went up to his body, and I believe you say you turned  
24 him over, or someone turned him over, the weapon was located  
25 at the time, wasn't it?

1 THE WITNESS: Not the 9 millimeter.

2 THE COURT: The 9 millimeter was not found at that  
3 time, as far as you know?

4 THE WITNESS: If I recall correctly, when the body of  
5 Mr. Flores was turned over, there was a different weapon.

6 THE COURT: What weapon do you think was found when  
7 he was turned over?

8 THE WITNESS: D Type .45 caliber handgun.

9 THE COURT: The .45 caliber handgun, was that kind of  
10 a silver-plate weapon? Is that the one you think was there?

11 THE WITNESS: Yes, sir.

12 THE COURT: Let's assume, just for my questions, for  
13 purposes of this proceeding, that you are mistaken and that it  
14 was, in fact, the 9 millimeter weapon that was found there. I  
15 am not saying it was, but let's assume for these questions.

16 If, in fact, the weapon that was found there  
17 with Mr. Flores at the death scene, at the point in which his  
18 body was removed, was, in fact, the 9 millimeter weapon and,  
19 in fact, it was no dispute that the 9 millimeter weapon was  
20 the one that that had killed the officer, then was there any  
21 question in your mind -- and I guess it was not, because you  
22 felt that the officer had been shot by this, shot and killed  
23 with a weapon that this person didn't have?

24 THE WITNESS: That's correct.

25 THE COURT: Did anyone ever tell you anything

1 different than that?

2 THE WITNESS: I don't recall anyone saying anything.

3 THE COURT: I mean, to this good day, has anybody  
4 ever told you that the weapon that Flores had on that occasion  
5 was not a -- what is it -- .45 caliber, or whatever it was  
6 that you thought that was located?

7 THE WITNESS: Let's see if I can understand your  
8 question.

9 THE COURT: Let me restate it because I may have  
10 confused you.

11 Has anyone in this courtroom or any police  
12 officer or any district attorney told you differently, that,  
13 in fact, the weapon that was recovered at the scene was a 9  
14 millimeter weapon, 9 millimeter pistol as opposed to any other  
15 caliber pistol?

16 THE WITNESS: No, sir.

17 THE COURT: So, to this day it's your belief and your  
18 understanding that the weapon that he was recovered from Mr.  
19 Flores was, in fact, a -- what did you call it -- .45  
20 caliber --

21 THE WITNESS: Yes, sir.

22 THE COURT: -- revolver type?

23 THE WITNESS: Semiautomatic.

24 THE COURT: Semiautomatic.

25 Do you know where you arrived or how you arrived



1 at that understanding?

2 THE WITNESS: That he was not, that Mr. Flores was  
3 not in possession of the 9 millimeter?

4 THE COURT: Right.

5 THE WITNESS: Well, I know for a fact that the 9  
6 millimeter was found at the scene of the second shooting  
7 beneath the trailer where the defendant was arrested.

8 THE COURT: Okay.

9 And you were present when it was found --

10 THE WITNESS: Yes, sir.

11 THE COURT: -- or where you told it was found?

12 THE WITNESS: I was there on the scene when it was  
13 found.

14 THE COURT: Now, when you made your answer -- read  
15 your answer to that question, then, please, on Page 21. I  
16 believe it starts on Page 21.

17 THE WITNESS: Okay.

18 "How is that done?"

19 "The citizen that had purchased the gun had  
20 purchased the gun for the suspect up here at the Carter's  
21 Country gun store out in Pasadena, Texas."

22 "How was that determined?"

23 "The suspect here, Flores, had approached a  
24 citizen in the store and had offered him" --

25 THE COURT: Let me stop you there.

1                   You said, "the suspect here, Flores." Who are  
2 you talking about?

3                   THE WITNESS: Roberto Carrasco Flores.

4                   THE COURT: But you said "here," and Carrasco Flores  
5 was not there, was he?

6                   THE WITNESS: No, sir. He was not there.

7                   THE COURT: Okay. You were not confusing him with  
8 Mr. Guerra at that time, were you?

9                   THE WITNESS: No.

10                  THE COURT: That's just a manner of speaking?

11                  THE WITNESS: Yes, sir. And I'm thinking back that  
12 the prosecutor had showed me a photograph or someone like  
13 that, an an exhibit or something, and I was referring to  
14 "here."

15                  THE COURT: All right. But your testimony -- if you  
16 go ahead and finish reading that.

17                  THE WITNESS: "The suspect here, Flores, had  
18 approached a citizen in the store and had offered him \$500 to  
19 buy the gun, and I gave him \$500, and he purchased a gun and  
20 two boxes of ammo for the 9 millimeter."

21                  THE COURT: So, you knew, based on your own  
22 investigation, that this weapon belonged to Carrasco Flores,  
23 didn't you?

24                  THE WITNESS: That's right.

25                  THE COURT: Or at least he had approached the Carter

1 Country folk, gotten someone there to purchase the weapon and  
2 delivered it to him for some money?

3 THE WITNESS: That's correct.

4 THE COURT: But your understanding relative to what  
5 had actually happened on this night, that is, the night of the  
6 killing, was that Carrasco Flores did not have that weapon in  
7 his possession on that occasion?

8 THE WITNESS: That's correct.

9 THE COURT: And you have never heard anyone explain  
10 or talk about how that weapon got into the hands of anyone  
11 else?

12 THE WITNESS: No, sir.

13 THE COURT: All right. That's all I have.

14 MR. SCHNEIDER: May I ask one question, Your Honor?

15 THE COURT: Sure.

16 RECROSS-EXAMINATION

17 BY MR. SCHNEIDER:

18 Q Sergeant, would you look at Page F327, 2.035. Do you  
19 have it there?

20 A Yes. I have it here.

21 Q Does this page of the report indicate that you found a  
22 9 millimeter Browning under Roberto Carrasco Flores, and had  
23 his hands bagged, lying on the ground next to the dead  
24 suspect?

25 A Where are you reading it here?

1 THE COURT: Give him a page and line number. You got  
2 a line number? Just give him a line number?

3 MR. SCHNEIDER: There is no line number.

4 THE COURT: Oh, it's not a line number?

5 BY MR. SCHNEIDER:

6 Q The underlined part.

7 A Okay. What was the question?

8 Q You found next to the dead suspect a Browning 9  
9 millimeter gun; is that correct?

10 A The detective had the suspect's hands bagged and  
11 handcuffed. Detectives also noticed that there was a gun  
12 lying on the ground next to the dead suspect. The gun  
13 appeared to be a Browning 9 millimeter.

14 MR. SCHNEIDER: No further questions, Your Honor.

15 THE COURT: Anything else?

16 MS. CORNELIUS: No, Your Honor.

17 THE COURT: You may step down, sir. Thank you very  
18 much.

19 MS. CORNELIUS: May this witness be excused?

20 THE COURT: Any objection to this witness being  
21 excused?

22 MR. SCHNEIDER: No, Your Honor.

23 THE COURT: You may be excused, sir. Thank you very  
24 much.

25 We are going to recess this case until Monday

1 morning. Your worst fears are right. It did carry over.  
2 Monday morning, and it will be 9:30.

3 Let me speak with the lawyers, and then I think  
4 I need to speak with one of the state officers or one of the  
5 prison officers before you leave.

6 Would you, please, approach the bench just a  
7 second, please.

8  
9 (Conference before the bench)

10  
11 THE COURT: Do you know if your clients are staying  
12 in town over the weekend?

13 MR. ATLAS: I do not know the answer to that.

14 THE COURT: The reason I ask, I want to make sure  
15 before he leaves here that you don't call me this weekend and  
16 say, Judge, they took my client back to Huntsville or  
17 wherever.

18 MR. ZAPALAC: I think he will remain here until the  
19 conclusion.

20 THE COURT: I wanted to make sure there was an  
21 understanding that he would, and that's why I want to speak  
22 with you all first, then with the officers, so that we don't  
23 have a problem with him being transported, in the event you  
24 need him, go over to the jail and find out he is not there.

25 MR. ATLAS: I was going to ask you the same thing.

1 THE COURT: I am asking the right person. I am the  
2 wrong person to ask if other question had to do with his  
3 clothing. I suspect that he did change clothes.

4 MR. ATLAS: I think he. That worked out fine. His  
5 family was here early. They got here late from the jail, and  
6 by the time they got to him --

7 THE COURT: Too late.

8 MR. ATLAS: Perfectly understandable problem.

9 THE COURT: I wanted to make sure that had been  
10 cleared up, but also make sure that if he had any problem with  
11 clothing, he is obviously not going to remain in these  
12 clothes. I am sure they have their prison garb they want him  
13 to wear at the conclusion of the trial. I wanted to make sure  
14 that at the conclusion of the hearing, make sure that there  
15 isn't anything that gets lost or thrown away or destroyed.  
16 You made need your three-piece suit one day.

17 MR. ATLAS: He has got my shoes. I would like to get  
18 them back.

19 THE COURT: Those could get lost if they go back to  
20 prison. I don't know if he wears those kind of shoes on a  
21 daily basis.

22 MR. ATLAS: One mechanical question. Mr. Zapalac  
23 indicated there is a fair chance he will finish by about noon,  
24 maybe early afternoon on Monday.

25 MR. ZAPALAC: I would think early, sometime Monday.

1 THE COURT: We finished this witness, but whoever  
2 that's important.

3 MR. ZAPALAC: The two prosecutors may be longer, so  
4 there is possibility of it going to another day. I don't  
5 think beyond the end of the day on Monday.

6 THE COURT: I have scheduled all day Monday, anyway.

7 MR. ATLAS: Would Your Honor like to have closing  
8 argument?

9 THE COURT: No. I don't really care to have closing  
10 argument in this case. I rely upon, not your briefs, but I  
11 don't want any briefs. I already have your briefs, but I rely  
12 upon, not rely, but I expect you would file findings of fact  
13 in such cases, and I would prefer that you copy them, attach  
14 them to your findings of fact rather than write me a  
15 memorandum about what the law is, give me the cases or cites  
16 or whatever.

17 MR. ATLAS: While we have you here, would Your Honor  
18 give us deadlines?

19 THE COURT: I want to make sure to talk to the guard.

20 My order, I believe, requires Mr. Guerra to be  
21 in Harris County from day-to-day until we conclude these  
22 proceeding. I want to make sure there is no misunderstanding;  
23 that he needs to be available for them this weekend in Harris  
24 County.

25 GUARD: We will have him here.

1 THE COURT: I wanted to make sure of that.

2 You guys may want to go home.

3 GUARD: We will leave him right here.

4 THE COURT: Thank you, gentlemen and lady.

5 MS. CORNELIUS: Deadlines.

6 THE COURT: On the findings, I don't think they  
7 are -- I don't think the deadline has anything to do with any  
8 one of you seeing what the other has done. I don't believe in  
9 that business.

10 I think you know what you believe the findings  
11 are. That's what you should deal with. So I would think that  
12 I would need those on or before the end of the year. I will  
13 give you about 30 days. This is a holiday weekend. So, by  
14 the time get geared up next week in your trial or whatever, so  
15 you may need that time just to do some editing, by the end of  
16 the year so that I can have a chance to enjoy my holiday.

17 MS. CORNELIUS: How long will it take the court  
18 reporter to get a statement of facts?

19 THE COURT: Probably just like that if the money is  
20 right, snap, crackle and pop.

21 I would not want him to do this on an expedited  
22 basis, and what I mean, I would not want you to ask it be done  
23 on an expedited basis. Because you are the State of Texas,  
24 you are going to be paying him directly, and you can request  
25 anything you want. I am saying that mainly for the benefit of



1 Mr. Atlas here, that I would not want to approve an expedited  
2 preparation cost for the United States.

3 MS. CORNELIUS: I didn't know if he could plug into  
4 the computer and spit it out overnight.

5 THE COURT: Anything else before we go away?

6 We will be back here and continue at 9:30.

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9 (Conclusion of proceedings for November 19, 1993)  
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CERTIFICATION

I, FRED WARNER, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 through 193 are a true and correct transcript of the proceedings had in the above-styled and numbered cause before the Honorable KENNETH M. HOYT, United States District Judge, on the 19th day of November, 1993.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 19th day of August, A.D., 1995.



Fred Warner, CSR  
Official Court Reporter